

LEGISLATIVE PROGRESS AND LAW ENFORCEMENT DILEMMAS OF CRIMINAL WITNESSES TESTIFYING SYSTEM IN CHINA

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ABSTRACT

To ensure that witnesses testify in court, the National People's Congress (NPC) created large-scale modifications in witnesses testifying system when amending the Criminal Procedure Law (CPL) of the People's Republic of China (P.R.C) (1996 Revision) in 2012. Although China's witnesses testifying system has made remarkable progress from the legal text, it will be confronted with both some technical problems and many insurmountable dilemmas. If these problems and dilemmas can't be changed, witnesses testifying system provided by the new CPL would neither be thoroughly executed nor really solve the problem of the low rate of witness testimony in court that has plagued China's criminal judicial practice.

Keywords: New criminal procedure law; witnesses testifying system; legislative progress; law enforcement dilemmas

INTRODUCTION

In modern criminal procedure, a witness testifying in court is an important guarantee to a fair trial. On the one hand, a witness testifying in court is helpful for a judge to make more an accurate judgment on the basis of finding out the truth. On the other hand, a defendant and his or her defense counsels can cross-examine a witness face to face when the witness testifies in court. If a witness refuses to testify before court, it not only may cause a judge to make an error judgment but also directly deprives a defendant's right to cross-examine a witness face to face. The defendant will have a strong sense of injustice because his or her right has been violated. Moreover, this may affect the acceptability of criminal jurisdiction. With respect to China's criminal procedure, a witness testifying in court is both an important measure to realize a fair trial and a key factor whether China's adversary system reform succeeds.

* After all, only when a witness testifies in court to personally accept two parties' examination or cross-examination, full cross-examination and equal confrontation between prosecution and defense really do.

* Before the NPC amended the 1979 CPL, because trial judges made a substantive review for a case fact and evidence before a court session is opened, and they performed two functions of prosecution and trial, the courtroom often made a preliminary conclusion before holding a court session to hear a case. But under this circumstance of "judgment before trial", it was unnecessary for a witness to testify in court. Since the mid-1990s, to strengthen the function and neutrality of criminal trial and change the highly formalistic court trial, China has made criminal trial mode reform that is aimed at strengthening equal confrontation between prosecution and defense and promoting a fair trial. Because of cross-examination regarded as the core mechanism of the adversarial system, China's scholars widely regard a witness testifying as important guarantee of the reform.

Although a witness testifying in court is so important, witnesses rarely testify before court in practice. According to data obtained from the Supreme People's Court, the rate of criminal witness testimony in court does not exceed 10% in first instance criminal cases, and this rate does not exceed 5% in second instance criminal cases.¹ Some media report that the rate of witness testimony in court is only from 1% to 5% in China.

²In some courts, the rate even less than 1%.³ Theoretical circles universally attribute the infrequency of witness testimony to the institutional level, such as the imperfect witness protection system, the lack of compensation or sanction system for a witness and the hearsay rule.⁴ Therefore, how to ensure that witnesses testify in court and improve witnesses testifying system is both important research topics in theoretical circles and the focus of attention in legislative and judicial sectors. May it's comforting that the reform proposals about a witness testifying system from theoretical circles have been partly reflected in the Decision on Amending the CPL adopted by the 5th Session of the Eleventh NPC on March 14, 2012, such as the witness protection system of the 2012 CPL (P. R. C) art.61 and art.62, the witness compensation system of the 2012 CPL (P. R. C) art.63, and the sanction system or the compulsory testifying system for a witness who refuses to testify in court on the basis of the 2012 CPL (P. R. C) art.188.

Media reports speak highly of the 2012 amendment of the 1996 CPL (P. R. C). Although all sectors of society have expressed praise for the newly amended CPL, this does not mean that the problem of the infrequency of witness testimony that has plagued China's criminal judicial practice will simply be solved. Because a witness testifying contains a series of value conflict and choices, in order to realize maintaining a fair trial, finding out the truth and other functions of the witness testifying system, it need not only the perfect witness testifying system but also a good environment to perform.

If we are only concerned with technical rules of the witness testifying system and were unable to provide an adequate environment in which they can operate, even though China's legislature could provide the best witness testifying system, the new CPL would still fail to fundamentally resolve the low rate of witness testimony in court. In view of this, I do not intend to sing the praises of the new CPL like most other scholars again, and the paper will rethink some technical problems and deep dilemmas about a witness testifying in court on the basis of analyzing the legislative progress of the witness testifying system in China.

1 Mao li jun [毛立军], zheng ren chu ting lv di zheng jie he zai [What Is the Reason of the Low Rate of witness testimony in Court ? 证人出庭率低症结何在?], Ren min zheng xie bao [People's Political Consultative Daily 《人民政协报》], July 31, 2007.

2 Ma shou min [马守敏] and Zou shou hong [邹守宏], san da su song fa da xiu, jian zhi jiao dian he nan dian [Large-scale Modifications for Three Procedure Law And Targeting Focuses And Difficulties 三大诉讼法大修, 剑直焦点和难点], Ren min fa yuan bao [People's Courts Daily 《人民法院报》], June 25, 2011.

3 For example, according to data obtained from Chongqing No.3 Intermediate People's Court, the rate of a witness appearing before court in criminal cases is only 0.32% within the districts of the court in 2010. See Xu wei [徐伟], chong qing san zhong yuan qu nian xing an zheng ren chu ting lv jin 0.32% [The Rate of A Witness Appearing before Court in Criminal Cases Is Only 0.32% in Chongqing No.3 Intermediate People's Court Last Year 重庆三中院去年刑案证人出庭率仅0.32%], Fa zhi ri bao [Legal Daily 《法制日报》], June 14, 2011.

4 See Zhou jing [周菁] & Wang chao [王超], xing shi zheng ju fa xue yan jiu de hui su yu fan si: jian lun yan jiu fang fa de zhuan xing [Retrospect and Rethinking on the Law of Criminal Evidence with Some Considerations on the Transformation of Its Research Method 刑事证据法学的回溯与反思: 兼论研究方法的转型], 2004: 3 Zhong wai fa xue [PEKING UNIVERSITY LAW JOURNAL 《中外法学》]

LEGISLATIVE PROGRESS OF THE CRIMINAL WITNESS TESTIFYING SYSTEM

Although the NPC does not form a uniform evidence code or a separate criminal evidence code, it is undeniable that the revised witness testifying system is an immense improvement at the legal level. On the one hand, the 2012 CPL (P. R. C) enriches the contents of the witness testifying system. On the other hand, the revised witness testifying system is more reasonable insofar as legal principles are concerned and will be more effective in judicial practice. For these reasons, all sectors of society regard the amendment of the witness testifying system as one of the highlights of the amended 2012 CPL (P. R. C).¹ Concretely speaking, the legislative progress of China's witness testifying system lies primarily in the following two aspects.

The Improvement of the Functionality of a Witness Testifying System

Good criminal evidence system should be reasonable in legal principle and applicable without any reservations in judicial practice. If it is difficult to implement criminal evidence system, it will be a mere statement to people without playing its normative roles in criminal procedure. Since the founding of the new China, the NPC has been required to adopt the guiding ideology of the "general rather than detailed" because of deficiencies in legislative techniques and theoretical research. Because of this reasoning, there are few criminal evidence rules in the 1979 CPL (P. R. C).² Although these deficient criminal evidence rules failed to meet the need of judicial practice, in the course of amending the CPL in 1996, the NPC scarcely revised the criminal evidence rules, and only focused on solving urgent problems at that time, such as detention for interrogation, exemption from prosecution, jurisdiction of investigation, and symbolic criminal trials. The old criminal evidence rules were not practical, which is a significant cause of the low rate of witness testimony and repeated coercion. In view of the above lessons, the NPC obviously improved the functionality of a witness testifying system during amending the 1996 CPL (P. R. C).

First of all, the new CPL not only emphasizes that a witness should testify in court but also adds a series of protective measures for a witness to testify in court. The 2012 CPL (P. R. C) not only demands a witness to testify in court³ but also provides that a witness statement may be used as a basis for deciding a case only after it has been examined and cross-examined by both parties⁴ For the purpose of moving a witness to testify in court and increasing the rate of witness testimony in court, the new CPL not only improves the witness protection system but also adds several protective measures for it as following: (1) Article 63 of the 2012 CPL (P. R. C) provides the witness compensation system to prevent a witness from unnecessary losses

1 Song wei[宋伟], Zhao e nuo[赵婀娜], Ding ting[丁汀], Liu wei tao[刘维涛], Zhang yang[张洋], xing su fa da xiu, shi liang dian zhu mu [The Major Amendment of the Criminal Procedure Law, Ten Remarkable Highlights 刑事诉讼法“大修”, 十亮点瞩目], Ren min ri bao [People's Daily 人民日报], March 9, 2012; Song wei[宋伟], zheng ju zhi du chong xiu: liang dian duo, zheng yi da [The Rebuilding of Evidence System: Many Highlights And Much Controversy 证据制度重修: 亮点多, 争议大], Ren min ri bao [People's Daily 人民日报], September 14, 2011.

2 It is generally known that the 1979 CPL (P. R. C) was the first criminal procedure code created soon after the Cultural Revolution. Under the circumstances, the NPC adopted the "general rather than detailed" guiding ideology when making criminal procedure law to urgently change the situation of lawlessness.

3 According to Article 59 of the 2012 CPL (P. R. C), a witness statement may be used as a basis for deciding a case only after it has been cross-examined in court by both sides, the public prosecutor and victim as one side and the defendant and defense counsel as the other side, and verified.

4 According to Article 60 of the 2012 CPL (P. R. C), any person who has information regarding a case shall have the obligation to testify. A physically or mentally handicapped person or a minor who cannot distinguish between right and wrong or cannot correctly express themselves shall not serve as a witness.

for testifying¹; (2) Article 188,§1 of the 2012 CPL (P. R. C) provides the compulsory testifying system for a witness to prevent a witness from evading the obligation to testify²; and (3) Article 188,§2 of the 2012 CPL (P. R. C) provides the sanction system for a witness who refuses to testify in court to prevent a witness from arbitrarily refusing to testify³. From judicial experiences of Western countries, China has established relatively complete systems of witness testifying at least at the legal level.

Moreover, the new CPL makes a preliminary provision for legal consequences when a witness fails to testify in court. The functionality of law must be based on the integrity of legal norms. The entire structure of legal norms includes three constitutive elements, i.e., presumptive conditions, behavioral patterns, and legal consequences. In recent years, an important reason why witnesses don't generally testify in court in China is the 1996 CPL only provides that a witness has the obligation to testify and fails to provide corresponding legal consequences when a witness violates his or her obligation. Past judicial practice has shown that a People's Procuratorate has neither necessary nor impetus to call witnesses to testify because it can optionally use a record of testimony of a witness which belongs to hearsay evidence. In view of this, Article 187,§3 of the 2012 CPL (P. R. C) clearly provides, "If the identification or evaluation expert refuses to do so after being notified by the people's court, the expert opinion may not be used as a basis for deciding the case." Although the new criminal procedure law does not provide the corresponding legal consequences when a witness refuses to testify in court, Article 76 of Interpretation on the Application of the Criminal Procedure Law (issued by the Supreme People's Court, December 20, 2012) provides, if a witness fails to testify in court, the witness's written testimony out of court that has not been verified and confirmed by the witness can not be used as a basis for deciding a case.

Finally, the new criminal procedure law makes more clear provisions for the witness testifying system. The clarity of legal norms is another important factor of law enforcement because law enforcement officers will be at a loss as to what to do if the legal norms are ambiguous and lack specific meaning. Under the influence of the "general rather than detailed" concept, the witness testifying system provided by the 1996 CPL (P. R. C) has almost never been enforced because of the lack of clarity in judicial practice. For example, Although Article 49 of the 1996 CPL (P. R. C) provides "a People's Court, a People's Procuratorate and a public security organ shall insure the safety of witnesses and their near relatives", it does not enumerate concrete protective measures. Theoretical circles generally believe that this is an important reason why witnesses do not generally testify in court.⁴ To

1 The 2012 CPL (P. R. C) art.63 provides, "Subsidization shall be provided for the travel, board and lodging, and other expenses of a witness for performing the obligation to testify. Such subsidization shall be recorded under the operating expenditures of judicial authorities and ensured by the treasury of the government at the same level. When a working witness testifies, his or her employer may not directly or indirectly deduct his or her salary, bonus, welfare, and other remuneration."

2 Article 188,§1of the 2012 CPL (P. R. C) provides, "Where, after being notified by a people's court, a witness refuses to testify before court without justifiable reasons, the people's court may force the witness to appear before court, unless the witness is the spouse, a parent, or a child of the defendant."

3 Article 188,§2of the 2012 CPL (P. R. C) provides, "A witness who refuses to appear before court or refuses to testify after appearing before court without justifiable reasons shall be admonished; And if the circumstances are serious, with the approval of the president of the people's court, the witness may be detained for not more than 10 days. Against the detention decision, the detainee may apply to the people's court at the next higher level for reconsideration. Execution of the detention decision shall not be suspended pending reconsideration."

4 See Zhou jing[周菁] & Wang chao[王超], xing shi zheng ju fa xue yan jiu de hui su yu fan si: jian lun yan jiu fang fa de zhuan xing [Retrospect and Rethinking on the Law of Criminal Evidence with Some Considerations on the Transformation

strengthen the functionality of the witness protection system, the 2012 CPL (P. R. C) not only stresses that People's Courts, People's Procuratorates, and public security authorities have obligations to protect the safety of witnesses¹ but also provides the scope of application, concrete measures, and proceedings of the witness protection in great detail.² For another example, in order to prevent People's Procuratorates from optionally replacing a witness testifying in court by reading out a record of testimony of a witness in court, the new CPL clearly provides specific conditions that a witness must testify in court.³

Paying More Attention to Protecting Human Rights and Procedural Justice

Procedural justice is the soul of modern criminal procedure law. Although not all crimes can be punished accurately and effectively in accordance with procedural justice, and sometimes criminals may even escape punishment, when the state punishes crimes under due legal process, it is acceptable and convincing, whatever the outcome is. Conversely, if the state does not show consideration for the legitimacy of criminal procedures to punish crimes, citizens will not be convinced of its legitimacy or genuinely accept it, even if all criminals are punished. Because of the unique status of procedural justice, modern criminal procedure law has delimited an impassable boundary line for punishing crimes through due legal process. Without due legal process, criminal procedure law may lose its foundation and national prosecutions may lose their legitimacy and be understood as naked repression devoid of justice. On the other hand, when the state is powerful and citizens are weak, and when a criminal prosecution is a mandatory and aggressive state power in and of itself, the lawful rights of a suspect or defendant may be infringed by the state power at many points in the investigative or judicial process. Therefore, if national prosecutions are not appropriately restricted, an investigative or procuratorial organization may act recklessly, depending upon the strength of the governmental power and violate the lawful rights and interests of citizens. In this sense, the protection of human rights has become one of most important values in modern criminal procedure law.

However, the influence of Marxist legal theory (and particularly the theory of the dictatorship of the proletariat⁴) coupled with the influence of a traditional culture that emphasized penalties in the judicial process for thousands of years, China's traditional legal theories

of Its Research Method 刑事证据法学研究的回溯与反思：兼论研究方法的转型], 2004: 3 Zhong wai fa xue [PEKING UNIVERSITY LAW JOURNAL 《中外法学》].

1 In the light of Article 62, §1 of the 2012 CPL (P. R. C), People's Courts, People's Procuratorates, and public security authorities shall ensure the safety of witnesses and their close relatives.

2 Article 62 of the 2012 CPL (P. R. C) provides, when a witness, identification or evaluation expert, or victim testifies about a crime involving national security, terrorist activities, organized crime of a gangland nature, or a drug crime that endangers the personal safety of the witness, identification or evaluation expert, victim or close relatives of the victim, the People's Court, People's Procuratorate, and public security authority shall take one or more of the following protective measures: (1) it shall not disclose his or her true personal information, such as name, residence, and employer; (2) it shall not expose his or her image, true voice, etc., when he or she takes the stand; (3) it shall prohibit particular persons from contacting the witness, identification or evaluation expert, the victim and the victim's close relatives; (4) it shall provide special protection for such witness's body and residence; and (5) it shall provide other necessary protective measures. When a witness, identification or evaluation expert, or victim believes that his or her personal safety or that of his or her close relatives is endangered by his or her testimony in criminal procedures, he or she may request protection from the People's Court, People's Procuratorate, and public security authority. The relevant entities and individuals shall cooperate with the People's Court, People's Procuratorate, or public security authority in taking protective measures in accordance with law.

3 In the light of Article 187, §1 of the 2012 CPL (P. R. C), where the public prosecutor or a party concerned or the defender or agent ad litem thereof raises any objection to a witness statement which has a material effect on the conviction and sentencing of a case, the witness shall testify before court if the people's court deems it necessary.

4 See Wu lei[吴磊](ed.), Zhong guo si fa zhi du (di er ban) [China's Judicial System (the Second Edition) 《中国司法制度》 (第二版)] 49 (Zhong guo ren min da xue chu ban she, 1997)

always focus on the function of punishment in criminal procedure. The law of criminal procedure is defined as a powerful means of striking the enemy, consolidating the people's democratic dictatorship, and guaranteeing socialist modernization,¹ and criminal procedure is regarded as part of the function and activity of prosecuting and punishing crimes.² In this context, it is without question that the criminal evidence rules in the original CPL stressed punishment and had serious shortcomings in the protection of human rights. On the one hand, the 1979 and 1996 CPL (P. R. C) art.2 regards the punishment of criminals as the primary task of criminal procedure law.³ On the other hand, in the 1979 and 1996 CPL (P. R. C), many criminal evidence rules that protect human rights are not provided, such as the principle of the presumption of innocence⁴, the principle against self-incrimination, the exclusionary rule, and the hearsay rule. However, under the influence of ideas of punishment, China pays more attention to the needs of punishment and neglects the value aims of a witness testifying in court at procedural justice, when drafting the witness testifying system. Even some persons deem that the main purpose of a witness testifying in court is to find out the truth of a case fact rather than to meet a defendant's right to cross-examine a witness and promote a fair trial. In this case, a People's Procuratorate often has an option about whether a witness testifies in court. Furthermore, so long as a public prosecutor deems that a record of testimony of a witness made by an investigative organization is true, it can directly read out the record in court, and need not may request the People's Court to notify a witness to appear before court. However, when a witness fails to testify in court, the defense party has no right to request the court to prevent a public prosecutor from reading out the record of testimony of a witness in court.

Fortunately, during amending the 1996 CPL (P. R. C), all sectors of society widely advocate that equal importance should attach to both punishing crimes and protecting human rights and between procedural justice and substantive justice, and then punishing crimes and substantive justice should not be overemphasized as it was in the past.⁵ Consequently, the 2012 CPL (P. R. C) not only explicitly regards "respecting and protecting human rights" as the task of criminal law for the first time but also amends and adds a series of criminal procedure rules that are helpful in improving procedural justice. In point of the amendment of a witness testifying system, the 2012 CPL (P. R. C) has at least two factors to promote protecting human rights and procedural justice. On the one hand, to make a witness testify in court and to promote fair trials, the 2012 CPL (P. R. C) not only improves the witness protection

1 Fa xue jiao cai bian ji bu [法学教材编辑部] (ed.), fa xue gai lun [An Introduction to Science of Law 《法学概论》] 119 (Fa lv chu ban she, 1983)

2 Chen guang zhong [陈光中] (ed.), xing shi su song fa xue (xin bian) [Criminal Procedure Law (New Version) 《刑事诉讼法学》(新编)] 35 (Zhong guo zheng fa da xue chu ban she, 1996)

3 The earlier authoritative doctrines also deemed that the primary task of judicial organizations was to punish counterrevolutionaries and other major criminals in criminal procedure. See Zhang zi pei [张子培], Chen guang zhong [陈光中], Zhang ling yuan [张玲元], Wu yan ping [武延平], and Yan duan [严端], xing shi zheng ju li lun [The theory of Criminal Evidence 《刑事证据理论》] 83 (Qun zhong chu ban she, 1982)

4 Notably, Article 12 of the 1996 CPL (P. R. C) provides, "No person shall be found guilty without being judged as such by a People's Court according to law". Theoretical circles universally believe that, although the clause embodied the basic spirit of the presumption of innocence, China's criminal law as a whole remained defective compared with the principle of the presumption of innocence.

5 The editorial of Legal Daily deemed that the most prominent feature of this amendment of criminal law was to closely reflect the principle of attaching equal importance to both punishing crimes and protecting human rights. See Fa zhi ri bao she lun [the Legal Daily editorial 《法制日报》社论], xing su fa xiu gai, cheng fa fan zui yu bao zhang ren quan bing zhong [Amending Criminal Procedure Law And Equally Attaching Importance to Both Punishing Crimes And Protecting Human Rights 刑法修改, 惩罚犯罪与保障人权并重], Fa zhi ri bao [Legal Daily 《法制日报》], March 8, 2012.

system, but also adds three evidence rules, i.e., the witness compensation rule, the compulsory testifying rule for a witness, and the witness sanction rule. On the other hand, the new CPL is more helpful in realizing defense party's right to apply to a People's Court to summon a witness to testify in court.¹ In the light of Article 187,§1 of the 2012 CPL (P. R. C), a defendant and his or her defense counsels have a right to raise any objection to records of testimony of witnesses made by investigative organizations in court. Where the public prosecutor or a party concerned the record which has a material effect on the conviction and sentencing of a case, the witness shall testify before court if the People's Court deems it necessary. On the basis of Article 78,§3 of Interpretation on the Application of the Criminal Procedure Law, where, after being notified by a People's Court, a witness refuses to testify before court without justifiable reasons, and the People's Court cannot identify the authenticity of his or her testimony, the record of testimony of a witness may not be used as a basis for deciding the case. Similarly, in the light of Article 187,§3 of the 2012 CPL (P. R. C), where a defendant and his or her defense counsels raise any objection to an expert opinion, the identification or evaluation expert shall testify before court if the people's court deems it necessary. If the identification or evaluation expert refuses to do so after being notified by the people's court, the expert opinion may not be used as a basis for deciding the case.

THE TECHNICAL PROBLEMS OF CRIMINAL WITNESSES TESTIFYING

With the accelerated process governed by law, the constitutionalization of human rights protection², and the evolution of criminal trial mode reform, all sectors of society have profoundly understood the damages of the low rate of witness testimony in court and the importance of witnesses testifying. For this reason, a strong atmosphere of greatly increasing the rate of witness testimony in court has been developed in China. Although many scholars are in the full conviction that witnesses testifying system can effectively raise the rate of witness testimony in court, and indeed China has made the perfect witness testifying system that keeps pace with the western witness testifying system at least in the legal text, the witness testifying still has a very long way to go in China. In my opinion, if the following some technical problems were not remedied in time, the witness testifying system with high expectations of the whole society would still fail to take effect as in the past.

The Lack of the Hearsay Rule

From judicial practice of the common law, the hearsay rule is an important theoretical basis of a witness testifying system. According to the basic requirements of the hearsay rule, except for some special circumstances, any person who has information regarding a case shall have the obligation to testify in court, and a variety of written materials outside the courtroom fail to take the place of a witness testifying in court. Moreover, any other persons cannot report a case fact that they know from a witness in court. If the witness testimony adduced by a party belongs to hearsay evidence, the opposing party may raise an objection and request the court to exclude this inadmissible testimony. Although China's criminal procedure law does not provide hearsay, it is undeniable that the witness testifying system provided by the 2012 CPL (P. R. C) reflects the inner spirit of the hearsay rule. On the one hand, Article 59, 60 and 187

1 According to Article 37 and 159 of the 1996 CPL (P. R. C), a defendant and his or her defense counsels has a right to request a People's Court to summon a witness to testify in court. However, the defense party's right scarcely came true because of the lack of corresponding protective measures. In judicial practice, the People's Court almost never summon a witness to testify in court only according to defendant's application.

2 The second Session of the Tenth National People's Congress amended the constitution on March 14, 2004. Xian fa [Constitution] art. 33,§1 (2004) (P. R. C) provides, "The State respects and guarantees human rights."

of the 2012 CPL (P. R. C) take a positive attitude to a witness testifying in court. On the other hand, Article 187 and 188 of the 2012 CPL (P. R. C) make a preliminary provision for the legal consequences when a witness fails to testify in court. Particularly, the 2012 CPL (P. R. C) provides a series of safeguards for a witness testifying by improving the witness protection system and adding the witness compensation system, and the compulsory testifying system or the sanction system for a witness.

Although the new criminal procedure law reflects the basic spirit of the hearsay rule, China fails to really establish the hearsay rule like the common law. Firstly, although the 2012 CPL (P. R. C) substantively amended the criminal evidence rules, it still follows the concept of “the basis for deciding a case”¹ from the former criminal procedure and does not provide separately for the matter of admissibility the competency of evidence. However, the basis for deciding a case and the admissibility or competency of evidence are two different matters because the above-mentioned provisions indicate that the only requirement for evidence to be used as a basis for deciding a case is that it must have been adduced and cross-examined in court. Thus, there is no determination made with respect to the question of what evidence can be admitted to the session of adducing evidence and cross-examination. In other words, during the criminal trial, if evidence presented by both parties accords with the statutory forms provided by the CPL (P. R. C)², it will be directly admitted to the court and become the object of examination, cross-examination and debate, regardless of its admissibility or competency. Secondly, the 2012 CPL (P. R. C) does not discriminate between hearsay evidence and non-hearsay evidence. In this case, both the records of testimony of witnesses made by an investigative organization during interviewing witnesses and a testimony of a witness in court are statutory evidence forms that a People’s Procuratorate may optionally use before court. Finally, because the new CPL does not provide the admissibility of evidence and discriminate between hearsay evidence and non-hearsay evidence, once written materials produced by investigative authorities belong to the categories of evidence in Article 48 of the 2012 CPL (P. R. C), they may appear in court without any barriers. For example, according to Article 190 of the 2012 CPL (P. R. C), so long as a public prosecutor deems necessary, without the prior permission of a judge, he or she may directly read out a statement of a witness who is not in court, an expert opinion of an identification or evaluation expert who is not in court, transcripts of crime scene investigation, and other documentation serving as evidence, and need not summon a witness or an identification or evaluation expert to testify in court.

Obviously, due to without the restrict of the hearsay rule, even though the 2012 CPL (P. R. C) makes large-scale modifications for a witness testifying system, it is difficult to substantially increase the rate of witness testimony in court. For one thing, due to the lack of the hearsay rule, a People's Procuratorate not only may apply to a People’s Court to summon a witness to testify in court but also read out the record of testimony of a witness in court during testimony of a witness being adduced and cross-examined. Which form to choose depends on the motivation of a People's Procuratorate, with no consideration for a fair trial or a defendant's right to cross-examine. But speaking from experience, it is obvious that reading

1 For example, Article 48,§3 of the 2012 CPL (P. R. C) provides that evidence must be verified before being used as the basis for deciding a case. Article 59 of the 2012 CPL (P. R. C) also provides, “A witness statement may be used as a basis for deciding a case only after it has been cross-examined in court by both sides, the public prosecutor and victim as one side and the defendant and defense counsel as the other side, and verified.”

2 In the light of Article 48 of the 2012 CPL (P. R. C), evidence includes the following 8 statutory forms: (1) physical evidence; (2) documentary evidence; (3) witness statement; (4) victim statement; (5) confession and defense of a criminal suspect or defendant; (6) expert opinion; (7) transcripts of crime scene investigation, examination, identification, and investigative reenactment; and (8) audio-visual recordings and electronic data.

out the record of testimony of a witness is more convenient than summoning a witness to testify in court. Therefore, when the CPL fails to forbid a People's Procuratorate to use hearsay evidence, and when the People's Procuratorate need not bear adverse legal consequences for itself because of using hearsay evidence, on the basis of the natural tendency to avoid disadvantages, it is clear that the People's Procuratorate prefers to regard inadmissible records of testimony of witnesses as a basis of a criminal prosecution in court, and has no motivation and necessary to summon witnesses to testify in court.

On the other hand, due to the lack of the hearsay rule, the key whether the courtroom uses testimony of witnesses as a basis for deciding a case is not whether the testimony adduced by the People's Procuratorate is admissible, but whether the testimony is helpful in proving a case fact, i.e., whether the testimony may be verified or corroborated by other evidence.¹ In other words, if testimony of witnesses adduced by the People's Procuratorate can be verified, or it can be corroborated by other evidence, even though it is not admissible due to hearsay rule in theory, the courtroom may use it as a basis for deciding a case. Clearly, because records of testimony of witnesses is very easy to be used as a basis for deciding a case, whether the new CPL provides perfect witness testifying system or not, the People's Procuratorate is unwilling to summon a witness to testify in court. In particular, if the courtroom too simply emphasizes mutual corroboration between a record of testimony of a witness and other evidence, it brings a judge the risk of erroneous judgement. The reason is that mutual corroboration between a record of testimony of a witness and other evidence only proves their consistency. But it does not mean that the record of testimony of a witness is certainly true. Especially, where it is unable to verify to the authenticity of other evidence, if the courtroom still adopts the record of testimony of a witness which is corroborated by other evidence, wrongs may arise at any time. Past judicial practice has shown that the main reason why the courtroom dare adopt confessions or records of testimony of witnesses outside the court and refuse to accept statements of defendants or witnesses before court in many wrongs is that records of testimony of witnesses can be corroborated by confessions outside the courtroom. However, the reason why they can be corroborated each other often results from illegal investigative behaviors rather than their authenticity.

The Hidden Worries of Discretionary Power Abused by Judges

The correct utilization of discretion is a puzzle in criminal procedure. On the one hand, the generality, abstractness, and ambiguity of legal provisions inevitably offer the judiciary certain discretion. On the other hand, the discretionary power tends to be abused by the judiciary because of the lack of effective oversight. Before the amendment of the CPL (P. R. C) in 2012, the judiciary had almost absolute discretion with respect to evidence rules

¹ In point of the hearsay rule, testimony of a witness who is in court is admissible, and the record of testimony of a witness which is made by investigative organizations belongs to inadmissible hearsay evidence. However, according to Article 78 of Interpretation on the Application of the Criminal Procedure Law, testimony of a witness who is in court may be used as a basis for deciding a case only after it has been cross-examined in court by both parties and verified by the courtroom. When testimony of a witness who is in court is in conflict with his or her testimony outside the courtroom, if the witness can make a reasonable explanation and his or her testimony can be corroborated by other evidence, the courtroom shall adopt testimony of a witness who is in court. However, if the witness fails to make a reasonable explanation and his or her testimony outside the courtroom can be corroborated by other evidence, the courtroom may adopt a witness's testimony outside the courtroom. When a witness refuses to testify before court without justifiable reasons, or the witness refuses to testify after appearing before court without justifiable reasons, whether the courtroom uses a record of testimony of a witness as a basis for deciding a case depends on whether the authenticity of testimony of a witness can be verified rather than the hearsay rule. In other words, if the courtroom can verify the authenticity of testimony of a witness, whether it is hearsay evidence or not, the courtroom can use it as a basis for deciding a case. In contrast, if it is unable to verify the authenticity of testimony of a witness, the courtroom shall not use the record of testimony of a witness as a basis for deciding a case.

because they were crude and simple,¹, and it is usually not favorable for suspects and defendants when the judiciary is wielding its discretionary power in a judicial environment that stresses punishment. This may be one of the reasons why witnesses generally do not testify in court.

A judge's discretionary power has certainly been weakened with the large-scale modifications of the criminal evidence rules in 2012, but it remains difficult for the new witness testifying system to effectively control judicial discretion because of legislative drafting and traditional judicial concepts, among other reasons. For example, in light of Article 187,§1 of the 2012 CPL (P. R. C), the premise of the compulsory obligation to testify is to meet the following three requirements simultaneously: (1) Each party may raise any objection to a witness statement; (2) a witness statement has a material effect on the conviction and sentencing of a case; and (3) a People's Court deems it is necessary for a witness to testify in court. This means that whether a witness testifies depends almost entirely on the judge's discretion and has no material connection with whether a defendant's right to cross-examine or a fair trial is infringed because a judge can refuse to notify a witness to testify in court as long as he or she deems that a witness's testimony has no significant influence over conviction and sentencing or it is otherwise not necessary. For another example, according to Article 187,§3 of the 2012 CPL (P. R. C), whether an identification or evaluation expert testifies depends on whether a judge deems it necessary, with no consideration for a fair trial or a defendant's right to cross-examine. Because a judge has arbitrary discretionary power to determine whether a witness or an expert testifies, absurd results may follow. For example, although the defense party has persuaded a witness to testify in court, a judge may show impatience because he or she is afraid that allowing the testimony may result in the decline of judicial efficiency, and not allow the testimony².

The Witness Testifying System That Could Backfire

Undeniably, it is indispensable for prompting a witness to testify in court to establish perfect a witness protection system, a witness compensation system, a compulsory testifying system and a sanction system for a witness who refuses to testify in court. But this does not mean that China can completely resolve the problem of the low rate of witness testimony in court only by means of these systems. The reason is that these systems may fail to promote a witness to testify in court in current judicial environment.

Firstly, the witness protection system is not as effective as we thought. In theory, the perfect witness protection system can exert a substantial influence on witness testifying in court. After all, protective measures for a witness contribute to dispelling his or her concerns about retaliation because of testifying in court. However, the system of witness protection is very costly. Where the judicial budget is very tight, it is not insignificant whether judicial authorities can afford the expensive cost of the witness protection. More importantly, the current witness protection system aims at how to prevent the masses from retaliating against a witness, and it fails to take into account the threat of investigative authorities or People's Procuratorates for a witness. But in China's judicial practice, investigative authorities or People's Procuratorates often warn a witness who proves a defendant's guilty in the investigation stage not to overthrow his or her testimony during the court trial. Otherwise,

1 See Wang chao[王超], jing cha zuo zheng zhi du yan jiu [Research on the System of Police Testifying 《警察作证制度研究》] 271-272 (Zhong guo ren min gong an da xue chu ban she, 2006).

2 Liu guang san [刘广三] (ed.), xing shi zheng ju fa xue [Criminal Evidence Law 《刑事证据法学》] 158 (Zhong guo ren min da xue chu ban she, 2007)

investigative authorities or People's Procuratorates may prosecute the witness in the name of perjury.¹ From the perjury crime cases reported by the media, it has become a repeated phenomenon that investigative authorities or People's Procuratorates randomly prosecute a witness who overthrows his or her testimony outside the courtroom.² Clearly, if a witness may be prosecuted only because he or she changes his or her testimony of the investigation stage in court, no witnesses will be willing or dare testify in court. Similarly, to prevent investigative authorities or People's Procuratorates from prosecuting a witness's perjury responsibility, the witness may repeat his or her testimony that he or she says in the investigation stage during testifying in court. The value and necessary of a witness testifying in court will fall off remarkably in this case.

Secondly, it is difficult to implement the compulsory testifying system for a witness and the sanction system for a witness due to the lack of corresponding measures. Admittedly, there will be an immediate impact for increasing the rate of a witness testifying in court through punishing the witness who refuses to testify in court or forcing the witness to appear before court. However, the basic premise of using strong-arm tactics against a witness is to establish a perfect witness protection system. If the state fails to provide a witness who testifies in court corresponding security protection, the witness will be in a very dangerous situation. From this perspective, when China's witness protection system has some fatal flaws, it may be unrealistic to increase the rate of witness testimony in court by means of the compulsory testifying system and the sanction system for a witness. Furthermore, if the court forces a witness to appear before court, or takes corresponding sanction measures because he or she fails to testify in court, but the court fails to take some measures to protect him or her, no witnesses are willing to testify in court. In this case, in order to avoid sanctions or retaliation, it may be a best choice for the witness to be unwilling to admit that he or she is a witness. The witness may also skillfully escape from testifying on the pretext of knowing nothing or remembering nothing. When the court faces this kind of situation, even if the witness can testify in court, he or she fails to provide valuable testimony being used to prove a case fact.

Finally, the witness compensation system fails to encourage a witness to testify in court. In theory, if a witness fails to get compensation from his or her economic losses due to testifying in court, it will not only be unfair to the witness but also make him or her have no initiative to testify in court. However, the rationality of compensation for a witness who testifies in court does not mean that the witness compensation system can encourage the witness to testify before court. Furthermore, the main purpose of establishing the witness compensation system is to make criminal procedure activities have the lowest legitimacy rather than to promote a witness to testify in court. Actually, the purpose of those witnesses who really want to testify in court is to fulfill their legal obligations rather than to get a limited economic compensation. Out of question, it is exceedingly rare phenomenon that a witness testifies in court merely to get a limited economic compensation. In other words, even though the state can offer a large number of economic compensation to those witnesses who are unwilling to testify in court, they do not necessarily appear before court for it. However, even if those witnesses who really want to testify in court fail to get a corresponding economic compensation, they readily appear before court on the basis of their

1 Chen rui hua [陈瑞华], fa zhi shi ye xia de zheng ren bao hu [The witness protection from the perspective of the rule of law 法治视野下的证人保护], 2000: 3 Fa xue [Law].

2 See Qiu zi [秋子], shui lai bao hu zheng ren [Who protects a witness 谁来保护证人], Fa zhi ri bao [Legal Daily 《法制日报》], January 9, 2001.

sense of justice and legal obligations. Besides, compared with possible retaliation, the limited economic compensation a witness gets because of testifying in court is negligible.

DEEP DILEMMAS OF CRIMINAL WITNESS TESTIFYING

A slight change in the witness testifying system may affect the entire criminal process. To give full play to the function of the witness testifying system in maintaining a fair trial, there should be a receptive and properly structured environment in which to perform with corresponding supporting measures from the court, and the system should have no obvious flaws. Since the NPC has implemented such large-scale modifications of the criminal procedure law, the environment in which the witness testifying system operates has evidently been objectively improved. However, because of legislative drafting, traditional ideas and other factors, the implementation of the witness testifying system is faced with not only many above-described technical problems but also a series of deep dilemmas which are difficult to overcome. If there is no further criminal justice reform to solve these deep dilemmas, the revised witness testifying system may not be fully implemented in the criminal justice system and fails to promote a large number of witnesses to appear before court.

The Common Interest Community of Punishing Crimes

In modern criminal procedure, the interrelationship among investigators, procuratorates and courts affects not only the impartiality of the process of criminal procedure but also the final outcome of criminal procedure. After all, the criminal procedure is a prosecution activity provoked to citizens by the country in the name of the overall interests of society. Meanwhile, criminal investigative authorities, procuratorial organizations and adjudication organizations are representatives of the State to exercise the corresponding state power. In criminal procedural activities, if the relationship among the above organizations cannot be rationalized, legitimate rights and interests of a defendant may be violated at any time, and the defendant will become a tool used to punish crimes.

Since the founding of New China, the principle of “separation of functions, mutual coordination, and mutual checks” has always been regarded as the basic norm of mutual relations among a public security authority, a People's Procuratorate and a People's Court in China. According to traditional theory, this principle as the basic norm of constitution and the basic principle of CPL in China is not only the result of summing up judicial experience with Chinese characteristics but also the creation of following the guidance of Marxism-Leninism and Mao Zedong Thought.¹ On the basis of this principle, although a public security authority, a People's Procuratorate and a People's Court respectively stand for three different functions, namely, criminal investigations, prosecution and criminal trial, they are all politico-legal organizations and criminal judicial authorities on behalf of the State to exercise judicial power, and they commonly shoulder the task of punishing crimes. Admittedly, this arrangement is rational when the legal and judicial systems were not yet fully built in the early period of New China. However, with the continuous progress of the socialist legal system and the boom in human rights protection and procedural justice, the principle has been exposed to more and more problems.² In point of a witness testifying in court, if nothing

1 See Wang chao[王超], jing cha zuo zheng zhi du yan jiu [Research on the System of Police Testifying 《警察作证制度研究》] 274-282 (Zhong guo ren min gong an da xue chu ban she, 2006).

2 Wang chao[王超], Fen gong fu ze hu xiang pei he hu xiang zhi yue yuan ze zhi fan si: yi cheng xu zheng yi wei shi jiao [Rethinking of the Principles of Division of Labor with Individual Responsibility, Mutually Cooperation and Mutually Condition: from the Angle of Procedural Justice 分工负责、互相配合、互相制约原则之反思:以程序正义为视角], 2005: 2 Fa shang yan jiu [STUDIES IN LAW AND BUSINESS 《法商研究》] 19-25.

has been done to the above principle, it is difficult for a People's Court to exclude the testimony stated by a witness in the investigative stage and firmly request the witness to testify in court. This is because under the influence of the above principle, in order to successfully complete shared responsibility of punishing crimes, a public security authority, a People's Procuratorate and a People's Court often form a common interest community of punishing crimes in criminal procedural activities. Because the common interest community aims at punishing crimes, the necessary of a witness testifying in court falls off remarkably.

First, in order to successfully achieve the common purpose of punishing crimes, the above three criminal judicial authorities often take how to accurately identify criminal facts as the primary issue in criminal procedural activities rather than whether the evidence is obtained or adopted by justified means. In this case, as long as they can accurately identify criminal facts and make sure that there is no obvious error in the final outcome of criminal procedure in judicial practice, it can be tolerated and given a reasonable explanation for a public prosecutor to read out the records of testimony of witnesses made by investigative authorities in court. Under the underlying rule of "so long as a punishment is correct, it can be negligible whether the procedure is legitimate or not", the legal supervision of a People's Procuratorate and the criminal trial of a People's Court usually give way to the need of punishing crimes. In this case, a People's Court often turns a blind eye to the adducing pattern of a People's Procuratorate and still uses the records of testimony of witnesses adduced by the People's Procuratorate and which belongs to hearsay evidence as a basis of criminal judgment, and loses interest in summoning a witness to testify in court. Particularly, to prevent a witness from bringing some troubles of overthrowing his or her testimony when appearing before court, the court does not want him or her to testify, and even deliberately keeps a witness from testifying in court.

Secondly, in the common interest community of punishing crimes, a People's Court not only need hear and decide criminal cases, but also shall coordinate with a People's Procuratorate and a criminal investigative authority in order to complete their common task of punishing crimes, which makes a People's Court often deviate from the neutral status and show a certain desire to prosecute in judicial practice. A People's Court has actually evolved into a third prosecutor following a criminal investigative authority and a People's Procuratorate in this case. In other words, a People's Court should be the last bastion of social justice, but it usually stands together with an investigative authority and a People's Procuratorate and becomes the last defense line of criminal judicial authorities punishing crimes. Accordingly, it is unlikely that the People's Court can exclude a witness's testimony obtained by investigative authorities and which is very helpful to prove criminal facts without any pressure, and force a witness to testify in court. Especially when the People's Court reposes too much confidence in the records of testimony of witnesses in response to the pressures from the People's Procuratorate and the public security organ, even though a witness can testify in court, the People's Court is unwilling to adopt a statement of a witness who is in court. In this case, a witness testifying in court will lose its due role in protecting a fair trial because of its formalism.

Finally, from fair trial perspective, a People's Court shall review the admissibility of a witness's testimony submitted by a People's Procuratorate, and exclude the inadmissible witness's testimony. However, since the above three criminal judicial authorities have formed a common interest community of punishing crimes, it is also difficult to imagine that the People's Court can be freed from the yoke of how to accurately identify criminal facts and correctly make a judgment or from the chain of punishing crimes together in order to provide necessary space for the application of hearsay rule or a witness testifying system.

The Shifted forward Centre Gravity of Criminal Procedure Structure

In modern criminal procedure, though a judicial process seems the same from criminal investigation to prosecution and from prosecution to trial, the scientific structure of criminal procedure should center on the criminal trial procedure. On the one hand, based on the presumption of innocence and the function of dispute resolution, the criminal trial is the final and most important procedure in determining the fate of the accused. On the other hand, a criminal court is a “sound proof room” free from invasion by a variety of external factors. Moreover, it adopts the means that conform to procedural justice, such as the fair play between the prosecution and the defense, the common participation of the main parties and public hearing. Hence, compared to the unilateral prosecution of prosecution authorities for a suspect or a defendant, the results of criminal trial are more authoritative and acceptable without doubt. In the criminal procedure structure centered on the criminal trial procedure, although prosecution authorities have enough judicial resources, strong national backing and people’s moral support, the legality and legitimacy of their prosecution activities must be subject to judicial review and control of the court. In contrast with strong prosecution authorities, the accused are in a very weak position, but they enjoy a series litigation rights and constitutional rights to prevent the abuse of prosecution organs. Once these rights are subject to illegal invasion of prosecution organs, the accused may seek corresponding judicial remedies to courts. Moreover, through the mechanism of judicial review, the court can take appropriate procedural sanctions for the improper prosecution activities of prosecution organs and deprive the improper interests obtained by prosecution organs through the improper prosecution activities.

It is obvious that the criminal procedure structure centered on the criminal trial procedure is the important foundation of application of the hearsay rule and a witness testifying system. The reason is that it will be possible to form a virtuous cycle movement among a prosecution party, a defense party and a judge. To ensure the success of prosecution, the prosecution organs must try to prosecute through legal or justified means. Even if the legitimate rights and interests of a defense are violated by the prosecution organs, he or she can obtain corresponding judicial remedies through the channels within the judicial system. A court dares to exclude inadmissible evidence which objectively plays an important role to prove criminal facts by virtue of its authoritative status, and this will contribute to the cyclical running of prosecution activities on the legal track.

However, under the influence of the principle of “separation of functions, mutual coordination, and mutual checks”, it does not produce a positive interactive relationship between the above three criminal judicial authorities, but forms the criminal procedure structure centered on the pretrial procedure through a flow process in China. On the one hand, a public security authority, a People’s Procuratorate and a People’s Court are independently and respectively engaged in judicial actions in the criminal investigation and the criminal trial. Because these three stages balance each other in criminal procedure, it is difficult for the criminal trial to become the center of criminal procedure. In this case, it is hard for a People’s Court to implement a truly effective judicial control and judicial review to the investigative and prosecution activities of a public security authority and a People’s Procuratorate. On the other hand, based on the common aim and relay relationship between the above three criminal judicial authorities, case file materials have a decisive impact on a criminal judgment. A criminal judgment to a certain extent has been reduced to the direct

confirmation of a prosecution decision in this case.¹ Obviously, it is difficult to implement the hearsay rule or the witness testifying system in this structure.

On the one hand, in the criminal procedure structure centered on the pretrial procedure, a People's Court is only the last operator of an assembly line with a public security authority, a People's Procuratorate and a People's Court punishing crimes hand in hand. Concretely speaking, the People's Court is not engaged in independent review and judgment to a criminal prosecution standing in a neutral stance, but fills the role of locating and making up the deficiencies in the issue of punishing crimes and hypocritically makes the final and authoritative determination to the criminal prosecution through the formal criminal trial, and then finishes the last step of criminal sanction under the legal procedures. In this case, it is unlikely for a People's Court to turn a blind eye to evidence submitted by a public security authority and a People's Procuratorate. Certainly, the court also will not exclude the records of testimony of witnesses that belong to hearsay evidence and can take an important role in proving criminal facts at the risk of offending the public security authority and the People's Procuratorate. After all, if the public security authority and the People's Procuratorate have strong evidence to prove criminal facts and the People's Court is able to determine that the criminal prosecution is correct, it will be not of great significance whether the court excludes the inadmissible records of testimony of witnesses.

On the other hand, in the criminal procedure structure centered on the pretrial procedure, a defendant's fate is not determined by a People's Court's criminal trial activities but by prosecution authorities. When a prosecution decision and materials submitted by a People's Procuratorate actually have a pre-determined effect on the judgment of a People's Court, the court will let the procuratorial organs to read out the records of testimony of witnesses in court in place of a witness testifying. In other words, the court would rather trust the authenticity of the records of testimony of witnesses submitted by the prosecution authorities than thoroughly review the exclusionary application of the defense party and then summon a witness to testify in court.

The Phase Separation between Hearing and Adjudication

From a legal principle, because a judge experiences the whole process of adducing evidence, cross examination and debate between prosecution and defense, and a criminal court is a "sound proof room" free from invasion of a variety of "external noises", he or she can calmly deliberate all evidence and make a more comprehensive and objective evaluation about the opinions of both parties, and thus make a more reasonable and accurate judgment on the case. Moreover, as previously noted, fair trial can make court judgments more acceptable by both parties. Perhaps because of that, China regarded criminal trial mode reform as a breakthrough point of criminal justice reform in the mid-1990s.

With the continuous progress of the adversary system trial mode reform in China, the past bad situations, such as "judgment before trial" and the limited distinction between prosecution and trial, have improved a lot, but the weakened trial function, the formalistic court trial and other chronic illness still have not been completely eradicated, and China still has not formed a court culture that a judge makes a decision merely according to the cross-

¹ Chen rui hua [陈瑞华], *xing shi su song de qian yan wen ti (di er ban)* [Forward Position Problems of Criminal Procedure (the Second Edition) 《刑事诉讼的前沿问题》(第二版)] 333-341 (Zhong guo ren min da xue chu ban she, 2005); Wang chao, *supra* note 28, at 23.

examination and debate between prosecution and defense in court¹. Firstly, as mentioned earlier as in the assembly-line style of the criminal procedure structure, the court trial to a certain extent has been degraded to a confirmation process of a prosecution decision. Since the results of criminal procedure has been defined in advance, a People's Court would rather make a decision according to a prosecution decision or case file materials provided by a People's Procuratorate than get engaged in tedious trial. Secondly, due to the lack of the hearsay evidence rule and the prevalence of transferring case file materials, the link between the prosecution case files and the court has not been completely cut off, which leads to the following undesirable effects: (1) the evidence adduced by both parties and their opinions in the court debate cannot exert considerable influence on the judgment conclusion; (2) the formation of criminal adjudication is not usually based on the impression made by a judge according to the evidence adduced by both parties and their opinions in the court debate, but on the fruit of going over files outside the courtroom. Finally, from the surface, a criminal courtroom is always engaged in hearing, and a written sentence is also made by a collegial panel or a sole-judge bench. However, because of the judicial committee, the examination and approval of cases, the requesting instructions of cases and other judicial systems, a collegial panel or a sole-judge bench often cannot exercise a real adjudication authority in their own cases. This is the phenomenon of "real hearers without adjudicating and real adjudicators without hearing" in China's criminal trial. When hearing judges fail to directly make corresponding judgments on basis of the contents of hearing, it is unlikely for them to have enough impetus to prevent a People's Procuratorate from adducing the record of testimony of a witness made by the investigative organs and directly summon a witness to appear before court.

On the one hand, if an adjudication conclusion is derived from outside the courtroom, the contents and process of criminal trial will be of little significance. In that case, a judge will have no interest in carefully considering whether a criminal trial process is in full compliance with the standards of procedural justice. From a trial judge's point of view, since he or she cannot decide the final result of a case anyway, he or she would rather perfunctorily deal with cases rather than thanklessly or hypocritically conducts tedious court trial in accordance with the standards of procedural justice. Under the influence of this mindset, the trial judge is more willing to quickly and conveniently finish criminal trial and regards a witness testifying that may cause delays in trial as an encumbrance. Thus, the trial judge lets a prosecutor read out the record of testimony of a witness in court, and rarely summon a witness to appear before court in accordance with the defense party's request in judicial practice. Even if a witness can occasionally appear before court, the courtroom would rather be convinced of the legitimacy, authenticity and reliability of the record of testimony unilaterally made by the investigative organs than adopt the statement of a witness who is in court. Particularly, the courtroom will not adopt a witness's testimony in court which is in contradiction with the record of testimony of the witness.

On the other hand, when the judgment conclusion is finally decided by a superior court, the judicial committee, the president of the Court, and other external authoritative force of the courtroom, it is unlikely for the trial judge to challenge their conclusion. However, those out-of-courtroom judges who do not experience the trial process clearly more concern about the correctness of the final results of criminal procedure, and do not care too much about the legitimacy of criminal trial process. Therefore, so long as the crime facts can be verified, the

1 Chen rui hua [陈瑞华], wen ti yu zhu yi zhi jian: xing shi su song ji ben wen ti yan jiu [Between Problems and Doctrine: Research on the Fundamental Problems in Criminal Procedure 《问题与主义之间：刑事诉讼基本问题研究》] 421 (Zhong guo ren min da xue chu ban she, 2003).

courtroom will use a record of testimony of a witness adduced by the People's Procuratorate as a basis for deciding a case, and does not care whether a witness testifies in court.

Excessive Emphasis on the Truth of a Case Fact

To correctly solve the issue of conviction and sentencing, a judge must regard the ascertained truth in criminal cases as the basis for judgment; otherwise the judge may make an erroneous judgment and harm judicial credibility and violate the lawful rights and interests of people. In view of this, Article 51 of the 2012 CPL (P. R. C) provides that a sentence of the People's Court must be consistent with the truth, and when truth is withheld intentionally, liability shall be investigated. However, under the influence of the ideology of seeking truth from facts and the epistemology of dialectical materialism, as found in the former criminal procedure law, the criminal trial procedure in the 2012 CPL (P. R. C) also puts an excessive emphasis on discovering the truth in a case. For example, to ascertain the truth, Article 50 of the 2012 CPL (P. R. C) provides that judges, prosecutors, and criminal investigators must, under legal procedures, gather various types of evidence that can prove the guilt or innocence of a criminal suspect or defendant and the gravity of the crime. According to Article 186 and 189 of the 2012 CPL (P. R. C), judges may forwardly question a defendant, a witness, or expert during the trial. Article 191 of the 2012 CPL (P. R. C) provides that a People's Court may investigate and verify evidence by crime scene investigation, examination, seizure, impoundment, forensic identification or evaluation, property inquiry, freezing of property, and other measures, if a collegial panel has any doubt about evidence during a court session. In light of Article 243 of the 2012 CPL (P. R. C), when a People's Court discovers that there are any definite errors in findings of fact or application of law in an effective sentence or ruling of the court, the People's Court may conduct the trial supervision procedures on its own and retry the original case.

Objectively, the preference for truth-seeking does not mean that it is not good for China's judges. After all, the clearer the facts of a case are means the less likely there is an error in the criminal judgment, and the impartiality and authority of the criminal trial will be fully guaranteed. It is unfortunate that the court must be subject to legal restraints when ascertaining criminal facts. Within a specified time and space, the court is not likely to completely ascertain the truth in a case, which means that the facts used as a basis of judgment are only the facts admitted at the legal level and do not necessarily equal the original appearance of criminal facts. Because the court cannot necessarily fully find out the original appearance of criminal facts, why should the judgment of the court be accepted and complied with? Obviously, to make the facts used as a basis of judgment acceptable, the criminal trial must abide by rules that manifest justice. Furthermore, although the court cannot necessarily find out the truth in a case in light of the standards of a fair trial (and sometimes the fair trial even hinders the finding out of the truth), the facts that a court determines in a fair trial are acceptable facts, and judgments based on a fair trial are acceptable and convincing. Conversely, if the court ignores the legitimacy of trial procedure to find out the truth, even if the court can discover the complete truth and make an absolutely correct judgment, the legitimacy and acceptability of the judgment will be damaged.¹ Only just from this perspective, the witness testifying system can have sufficient living space.

¹ According to the American scholar Mashaw's "Dignitary Theory"¹, the main reason why a huge gap exists here is that the former are able to ensure that those people whose interests may be subject to the direct impact of the results of the criminal procedure have the opportunity of meaningfully participating in the whole criminal procedure, therefore they can exert a positive impact on the outcome of criminal procedure, which makes their dignities and litigation status in criminal procedure be respected. It means that the top concern is not whether the criminal facts can be found out, but whether the means of fact-finding are acceptable and convincing. See Jerry L. Mashaw, *Due Process in the Administrative State* 158-170 (first edition,

Consequently, the preference for an excessive emphasis on the truth will inevitably exert an adverse influence on the implementation of the witness testifying system in China's criminal courts. If a court excessively emphasizes the truth, it is not necessary, to a certain extent, for the court to summon a witness to testify in court. For example, in the case of the authenticity of a witness's testimony, it is difficult to convey that the witness's statement in court is necessarily more reliable than the witness's statement in the transcript of questioning undertaken by an investigative authority. The reason a modern state ruled by law stresses that a witness must testify in court is that the primary value of a witness testifying is not about how to find out the truth but about how to protect the defendant's right to cross-examine and, thus, to a fair trial in modern criminal procedure. Although a witness testifying in court objectively contributes to finding out the truth, this is only the incidental function of maintaining a fair trial. We cannot negate the value of witness testimony in maintaining a fair trial because of the reliability of the transcript of questioning. Otherwise, we will be putting the proverbial cart before the horse. Furthermore, the foundation will be laid for a witness testifying in court only when judges are convinced of the value of a witness testifying to protect the fairness of a trial. If judges consider that the only value of a witness testifying is to find out the truth, the necessity of summoning a witness to testify will decline significantly. However, in judicial practice, many judges are accustomed to treating the issue of witness testimony only from the angle of finding out the truth. They deem that a witness testifying is only a legal form as opposed to the authenticity of a witness's testimony, and the final purpose of the witness testifying is to ensure the authenticity of a witness's testimony, otherwise it is not necessary to emphasize the legal form.¹ In other words, if the authenticity of the record of testimony of a witness can be validated, it is not necessary for the court to summon a witness to testify in court. Therefore, during a court trial, many judges would rather make a public prosecutor read out the record of testimony of a witness than summon witnesses to accept the questioning of both parties in court.

The Influence of the Transferring-Files Doctrine

In theory, after both parties adduce evidence, cross-examine and debate, judges make a decisions about whether to convict and how to sentence based on hearings in court. However, because the link between prosecution file materials and the court has not been severed for a long time, many judges are neither willing nor accustomed to make adjudicate in a public hearing, and they often prefer to make decisions by reviewing the prosecution file materials in writing outside of court. The link between the prosecution file materials and the court is difficult to sever because China has a long judicial tradition with transferring files between the prosecution and the court.

In the inquisitorial system provided in the 1979 CPL (P. R. C), a People's Court substantively reviewed all materials in the case transferred by a People's Procuratorate before opening a court session; this led to the stereotypes of "judgment before trial" and "a highly formalistic court trial". With the advance of trial reform, Article 150 of the 1996 CPL (P. R. C) provides, "a People's Procuratorate can only transfer the bill of prosecution containing clear facts of the crime accused and, a list of evidence and a list of witnesses and duplicates or photos of major

Yale University Press, 1985); Chen rui hua [陈瑞华], cheng xu zheng yi de li lun ji chu: ping ma xiu de zun yan jia zhi li lun [Theoretical Principle of Procedural Justice: Discussing Mashaw's "Dignitary Theory" 程序正义的理论基础: 评马修的"尊严价值理论"], 2000 : 3 Zhong guo fa xue [《CHINESE LEGAL SCIENCE 中国法学》].

1 Chen rui hua [陈瑞华], wen ti yu zhu yi zhi jian: xing shi su song ji ben wen ti yan jiu [Between Problems and Doctrine: Research on the Fundamental Problems in Criminal Procedure 《问题与主义之间: 刑事诉讼基本问题研究》] 426 (Zhong guo ren min da xue chu ban she, 2003) .

evidence attached to it.” This meant that the People's Procuratorate did not transfer all materials in the case after 1996. This incomplete pretrial procedure reform still cannot eradicate the phenomenon of “judgment before trial” although it may help decrease a judge’s prejudgment to an extent. After all, the People’s Court still can arrive at a preliminary conclusion under these procedures. More significantly, it has gradually become the norm that the People's Procuratorate initially transfers all materials in the case before the trial because of the costs of copying¹. Moreover, Article 365 of the Criminal Procedure Rules for People's Procuratorates provides, “A People's Court shall transfer evidence materials adduced, read out and played in court; and if the People's Procuratorate cannot transfer these materials in court, it shall transfer them within three days after the court announce an adjournment.” Obviously, whether reviewing case files before trial or after trial, judges will lose their motivation or interests in hearing evidence at trial when they can access the prosecution file materials at any time. Unfortunately, when amending the CPL (P. R. C) in 2012, the 5th Session of the Eleventh NPC did not take measures to change the judicial tradition of the transferring-files doctrine; instead, it strengthened that tradition. Specifically, Article 172 of the 2012 CPL (P. R. C) provides that a People's Procuratorate shall transfer the case file and evidence to the People's Court when initiating a public prosecution.

Although the file transfer from a People's Procuratorate to a People’s Court is helpful for the defense party to know prosecution evidence to prepare for his or her defense, it may greatly weaken the necessity of a witness testifying in court. This is because if the People's Procuratorate transfers the case files to the People’s Court, not a judge’s direct impression on the adducing evidence, cross-examination, and debate, but his or her written review of the case files will likely have substantial influence upon the decision. However, if the adducing evidence, cross-examination, and debate between both parties fail to exert a substantial influence on the judgment conclusion, the hearing judges will only care about the correctness of the judgment conclusion and will be unlikely to mind whether a witness testifies in court. Without doubt, the hearing judges will care nothing about whether witnesses can testify in court. Thus, if the hearing judges deem that they can preliminarily make the correct judgment conclusion simply by reviewing the case files, it will be immaterial for them to decide whether to summon witnesses to testify. Only when the hearing judges are still unable to make an affirmative judgment conclusion through reviewing the case files will they really consider whether it is necessary for them to summon witnesses to testify. Past judicial practice has shown that many judges are generally uninterested in summoning witnesses to testify under the influence of the transferring-files doctrine.

Low Representation Rate in Criminal Cases

It is beyond doubt that a criminal defense is a highly specialized activity. To obtain good defense, a defendant and his or her defense counsels need experience, skills and legal savvy. Particularly as law is becoming more and more complicated and increasingly difficult to understand, there are increasingly high requirements for criminal defense lawyers for the knowledge of law and legal skills. In modern criminal procedure, although a defendant has the right to defend himself or herself, it is difficult for his or her defense to counter with the prosecution of a powerful procuratorial organization because the vast majority of defendants do not have knowledge of law and defense skills. To fully protect a defendant’s right of defense, a modern state ruled by law provides a defense system and gives the defendant the

1 See Chen wei dong [陈卫东](ed.), xing shi su song fa shi shi wen ti dian yan bao gao [The Investigation Report about the Implementation of Criminal Procedure Law 《刑事诉讼法实施问题调研报告》] 133 (Zhong guo fang zheng chu ban she, 2001)

right to retain a defense lawyer. Judicial practice has shown that the right to an attorney contributes to protecting the defendant's lawful interests, realizing procedural justice, and prompting judicial authorities to correctly handle a legal case under the law.

To protect a defendant's right of defense, China's legislature not only provides the defense system in the CPL (P. R. C) but also specifically promulgated the Lawyers Law of the P. R. C (2007 Revision), which provides practices, rights, obligations, legal liabilities, and other characteristics of lawyers. In particular, the 2012 CPL obviously enhances the protection of a suspect or defendant's defense right by amending the defense system. For example, Article 33 of the 2012 CPL (P. R. C) provides that a criminal suspect shall have the right to retain a defense counsel from the day when the criminal suspect is interrogated by a criminal investigation authority for the first time or from the day when a compulsory measure is taken against the criminal suspect. According to Article 47 of the 2012 CPL (P. R. C), if a defense counsel believes that a public security authority, a People's Procuratorate, a People's Court or any staff member thereof has impeded his or her exercise of procedural rights, he or she will have the right to file a petition or accusation with the People's Procuratorate at the same level or at the next higher level. The People's Procuratorate shall examine the petition or accusation in a timely manner and, if it is true, notify the authority involved to correct its behaviors. Although China's criminal defense system has seen an immense improvement, the proportion of lawyers being engaged in criminal defense is low because of occupational risk, difficulties in defense, low fees and other reasons¹. Especially where defense lawyers often are subjected to prosecute because of their investigative activities², many lawyers not only willingly gives up investigation and gathering evidence but also dare not be engaged in a criminal defense business because of worrying about the perjury provided by Article 306 of the Criminal Law (P. R. C). When interviewed by a Legal Daily reporter, Han jia yi [韩嘉毅], the Secretary-General of the Professional Committee of the National Bar Association Criminal once said, "At present, various statistics indicate that the representation rate in criminal cases does not exceed 30%."³ Another report indicates that the representation rate in criminal cases declined from approximately 30 percent to approximately 10 percent with the continuous increase of criminal case in China.⁴ In Beijing, where lawyers' practices are the most developed in all of China, the representation rate in criminal cases is even lower than 10 percent.⁵

1 See Zhang you yi [张有义], xing shi bian hu lv shi zhi ye mian lin liu da nan ti [Criminal Defense Lawyers' Practice Is Facing Six Serious Problems 刑事辩护律师执业面临六大难题], Fa zhi ri bao [Legal Daily 《法制日报》], January 6, 2008.

2 In judicial practice, it has become a repeated phenomenon that judicial authorities arrest, prosecute and try a defense lawyer in the name of perjury for his or her investigation and gathering evidence. According to statistics, from 1997 to 2007, there were 108 lawyers prosecuted for the perjury in Article 306 of the Criminal Law (P. R. C) across the country, and finally only 32 lawyers were found guilty. See Chen shi xing [陈世幸], lv shi wei zheng zui de cun zai shi xing shi bian hu liu yu xing shi [The Perjury for Lawyers Makes Criminal Defense Become A Formality 律师伪证罪的存在使刑事辩护流于形式], Nan fang ri bao [Nan Fang Daily 《南方日报》], July 29, 2011.

3 See Li na [李娜], bian hu ren fang hai zuo zheng zui shu fu xing bian lv shi shou jiao [Defense Counsels Impairing Testification Bounding the Hands and Feet of Criminal Defense Lawyers 辩护人妨害作证罪束缚刑辩律师手脚], Fa zhi ri bao [Legal Daily 《法制日报》], August 8, 2011.

4 See Li wei wei [李玮玮] & Qiu yuan yuan [丘源源], xing shi bian hu jin liang cheng ren qing lv shi [Only 20 Percent of Defendants Retained Criminal Defense Lawyers 刑事辩护仅两成人请律师], Fa zhi ri bao [Legal Daily 《法制日报》], October 20, 2005.

5 See Huang xiu li [黄秀丽], xing shi an jian lv shi bian hu lv bu zu yi cheng [the Representation Rate in Criminal Cases Is Lower Than 10% 刑事案件律师辩护率不足一成], Bei jing ri bao [Beijing Daily 《北京日报》], August 29, 2005.

Apparently, with the lack of lawyers' participation in most criminal cases, even if the witness testifying system in the 2012 CPL (P. R. C) has observed great progress at the legislative level, it is difficult to implement in judicial practice. On the one hand, although defendants urgently want a witness to testify in court, it is difficult for them to make the court support their request for a witness to testify in court. On the other hand, because the records of testimony of witnesses have legitimate appearance, whether a witness testifies in court or not, it is difficult for a defendant who often lacks legal knowledge and advocacy skills to strongly challenge testimony of a witness adduced by a People's Procuratorates. For a long time, because the process of interviewing witnesses lacks an external supervision, criminal investigators almost completely unilaterally and secretly make interviewing transcripts. In judicial practice, whether criminal investigators collect evidence through torture and other illegal means or not, an interviewing record often has a witness's autograph and the following words admitted by him: "I have read the interviewing record, and the contents are real and same as what I have said." This means that the interviewing transcript has the legitimate appearance that may be indisputable. Although many unjust, framed-up and wrong cases have already repeatedly proved that the interviewing transcripts with legitimate appearance do not mean the legality of interviewing process and the reliability of testimony, the records of testimony of witnesses have natural or automatic admissibility because China has no hearsay rule. And under this circumstance, interviewing records unexamined in the admissibility of evidence are directly allowed to enter the courtroom and become the object of cross-examining between prosecution and defense. However, it is very difficult for the defendants to make effective cross-examination and debate for the legitimacy of interviewing process and the authenticity or reliability of the records of testimony of witnesses.

CONCLUSION

To resolve the problem of the low rate of witness testimony in court, the NPC created large-scale modifications in witnesses testifying system when amending the 1996 CPL. Undeniably, the revised witness testifying system has made significant progress in the text and the contents of the legislation. However, the witness testifying is confronted with both technical problems and deep dilemmas. If there is no further justice reform to create a receptive and properly structured environment in which to perform for the witness testifying, it is difficult to implement the witness testifying system with high expectations of all sectors of society, and it still fails to really solve the intractable issue of the low rate of witnesses testimony in court.