# Does China Need Witnesses to Appear in Court? — Courtroom Discourse in China's Criminal

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**Abstract:** China set up a trial system with adversarial elements after the reform of the Criminal Procedure Law (CPL) in 1996. Under such a trial process, witnesses appear in court to testify and receive cross-examination of the prosecution and the defence is of great importance to secure the defendant's procedural rights. Moreover, the amendment in 2012 further improved relevant supporting measures to safeguard defendant's rights, especially right to confront with the witnesses against him. However, the Chinese literatures showed that the rate of witnesses' court appearance is still quite low. Thus several questions may come up: Does the defence have a chance to cross-examine the prosecution witnesses and produce its own witnesses in court? Does China really need the witnesses appear in court? What can be done from the perspective of protecting human rights of the accused in the court trial regarding their right to cross-examine the witnesses?
In this paper, the author reviews the Chinese literatures as well as introduces his empirical observations in some Chinese courts regarding witnesses' appearance in court. He also analyzes the problems of the witness system in the criminal trial and identifies in-depth reasons for few witnesses to testify in court. In his view, the witness' giving testimony in court involves a number of complicated issues in China, as it does not only relate to the defects on the legislation and law enforcement, but also the ideology of state actors in the courtroom, in particular prosecutors and judges, and traditional culture of harmony. Based on these findings, the author raises a number of recommendations for the improvement in securing witnesses' appearance in court, which aims at putting the reforms introduced by the Criminal Procedure Law into effect in China and thus strengthening the protection of the defendant's human rights from procedural perspective.



**Keywords:** Witness; Criminal Procedure; Criminal Trial; Recommendations; China.

## 1. Introduction

In December 2016, the Supreme People's Court quashed the conviction of Nie Shubin's murder case1 because of insufficient evidence and unclear evidence admitted during the trial in mid 1990s, which caused a lot of discussions on how to prevent from the miscarriages of justice in China. When talking about the reasons of wrongful convictions including those representatives ones previously

[1] For detailed case information, see e.g., K. Hunt, S. Wang and S. Jiang, *'My son is innocent': Chinese man exonerated 21 years after execution*, in *CNN News*, 2 December 2016, available at edition. cnn. com/ 2016/ 12/ 01/ asia/ china- executed- man- found- innocent- nie-shubin/ index.html (Last visit: 9 May 2017); I. Leonard, *Mum who saw son executed 20 years ago on 'brink of proving his innocence'*, in *The Mirror*, 28 March 2015, available at www.mirror. co.uk/news/world-news/mum-who-saw-son-executed-5413373 (Last visit: 9 May 2017).

reported such as She Xianglin's Case and Zhao Zuohai's Case, some people cannot help arguing the extortion of confession at first and attributing it to the state actors' strong traditional ideology of confession being "the evidence of the King". But on the other hand, it is clear that prevention of wrong convictions will involve various aspects of the criminal justice system as well. For example, why does the court fail to be the last straw for the defendant when facing powerful state actors in the criminal proceedings? Is it more important than the topic of securing the lawyers' rights in the criminal defence and restricting the illegal investigation acts, even torture in China?

In fact, research in China has shown that witness statement is another important reasons leading to wrongful convictions, apart from extorting confessions by torture. For example, the research findings of Jiahong He et al through questionnaires survey in 2007, 38% of the respondents[2] argued that witness statement is more likely to cause wrong convictions in criminal cases, ranking no. 1 out of the seven types of evidence.[3] In addition, according to his analysis of 50 wrongful convictions, 20% involved false witnesses statement.[4] To this issue, the people, especially foreigners, may also wonder why the state actors and the defence cannot discover the doubt in the courtroom since witnesses are required to give testimony and receive cross-examination of the parties according to the Criminal Procedure Law. Regretfully, Chinese literatures reported that few witnesses appear in court and normally it is the prosecution who read out the witnesses' statement replacing their physical appearance. Then why do witnesses disappear in court? Are there any specific safeguard measures for the witnesses? Can the judges apply compulsory measures to summon witnesses through compulsory measures?



In this paper, the author will review the criminal procedure reforms introduced in 1996 and 2012 respectively, introduces the relevant Chinese literatures as well as his empirical observations (such as courtroom observations, reading of case files and interviews with judges, prosecutors and lawyers) in some Chinese courts regarding witnesses' appearance in court during 2002-2006 and 2015-2017 for comparison purpose. He also analyzes the problems of the witness system in the criminal trial and identifies in-depth reasons for few witnesses to testify in court.

[2] The respondents covered 140 judges, prosecutors, police and lawyers involving in the criminal investigation, prosecution, defence and trial from 5 provinces (autonomous regions or municipalities directly under the Central Government). See J. He and R. He, *The Problems of Evidence in Wrongful Convictions*, in 2 *Tribune of Political Science and Law (Zhengfa Luntan)* 3 (2008). For details, see also L. Zhang, *Wrong Convictions and Seven Types of Evidence (Xingshi Cuoan Yu Qizhong Zhengju)*, Beijing, 2009.

[3] In addition, 37%, 18%, 11%, 5%, 4% and 0% of the respondents attributed to the defendant's oral confessions, conclusion of expert evaluation, victims' statements, audio-visual materials, material evidence and written record of inquests and examination respectively. As far as the witness statement is concerned, most respondents (63%, especially those judge and prosecutors) argued that witnesses made perjury intentionally. J. He and R. He, *The Problems of Evidence in Wrongful Convictions*, in 2 *Tribune of Political Science and Law (Zhengfa Luntan)* 3 (2008).

[4] *Ibid.*

## 2. Reforms of the criminal procedure and witness court appearance since 1996

Generally speaking, China set up a trial system with adversarial elements after the reform of the Criminal Procedure Law (CPL) in 1996. Under such a trial process, witnesses appear in court to testify and receive cross-examination of the prosecution and the defence is of great importance to secure the defendant's procedural rights. To a certain extent, the protection of human rights has been improved in China, and thus the reform won some applause from the international communities.[5] In summary, there have been five important changes. First, the compulsory measure of shelter and investigation was abolished; second, lawyers could become involved at an earlier stage in criminal cases; third, the law generally established the principle of presumption of innocence; fourth, the court would undertake a procedural review before the trial and the procuratorate was not required to transfer all the case files and evidence, but the Bill of Prosecution, a list of evidence, the names of witnesses and copies or photos of major evidence; fifth, during the trial, the prosecution and the defense are responsible for court investigation, production and cross-examination of evidence and debate, and thus the judge's role would tend to be more neutral. Moreover, China revised the Law of the People's Republic of China on Lawyers in 2007 on the part of lawyers' rights in meeting with the clients, reading the prosecution files and collecting evidence and conducting investigation.

Compared with the former inquisitorial system featured in the Criminal Procedure Law (1979) in China, the role of witnesses is vitally significant in the adversarial trial, because the principle of orality requires that "evidence on disputed questions of fact be given by witnesses called before the court to give oral testimony on matters within their own knowledge".[6] Without the witness' cooperation, the whole criminal justice system would cease to function.[7] Henceforth, the judges in China are expected to be more neutral in the criminal trial than before, since the new law provides the prosecution and the defence will be responsible for questioning the defendant, for production and cross-examination of evidence and for court debate. Consequently, according to the system design of the law, the witness is required to appear in court for cross-examination, and sometimes, to answers the judge's inquiries in relation to the witness' competence. That's to say, only when the witness appears in court can the examination and cross-examination of disputed evidence be carried out in



[5] For discussion of the Criminal Procedure Law, for example, see P. Liu and Y. Situ, *Mixing Inquisitorial and Adversarial Models: Changes in Criminal Procedure in a Changing China*, in J. Liu, L. Zhang and S. F. Messner (eds.), *Crime and Social Control in a Changing China*, Greenwood Press, 2001; E. Fairchild and H. Dammer, *Comparative Criminal Justice Systems*, Belmont, 2002, 144; H. Lu and T. D. Miethe, *Legal Representation and Criminal Processing in China*, in 42 *British Journal of Criminology* 267 (2002).

[6] L. Ellison, *The Adversarial Process and the Vulnerable Witness*, Oxford, 2001, 11.

[7] R. J. Harris, *Whither the Witness? The Federal Government's Special Duty of Protection in Criminal Proceedings after Piechowicz v. United States*, in 76 *Cornell Law Review* 1285 (1991), cited in N. R. Fyfe, *Protecting Intimidated Witnesses*, London, 2001, 1.

court. If this can be true, it will help the judge better understand the case through the cross-examination of witnesses,[8] reduce the state actors' heavy reliance on the defendant's oral confession, and thus contribute to reduce wrongful convictions and possibly the torture.

In 2012, the Chinese authority made further amendment of the CPL (1996) in order to solve the problems discovered in the judicial practice. Among the other things, there are some major improvements in the criminal procedure, many of which involved rights protection of the defendant or criminal suspect. For example, the accused is entitled to hire a defender at the criminal investigation stage; enjoys the privilege not to incriminate himself/herself. The law also expanded the applicable scope of legal aid services for the accused, which means all the defendants who might be sentenced to death penalty or life imprisonment but have not retained a lawyer now can have a pro bono lawyer for their cases. Moreover, the law provided more detailed provisions on the exclusion of illegal evidence, especially the measure to secure witness appearance in court, such as compulsory measures against and adequate financial compensation for the witnesses, apart from some protective countermeasures for the witnesses and their relatives. Furthermore, the defenders can read, digest or copy the materials relating to case facts even at the review and prosecution and trial stages; they can meet the clients with the required documents without the need of prior approval from the police with some exceptions. In addition, the law strengthened legal supervision of the procuratorate over application of investigation measures for the purpose of protecting citizens' lawful rights and interests. The law further readjusted the applicable scope of summary procedure improved the case remand system and law enforcement of the penalty in particular the implementation of non-custodial punishment and procuratorial supervision over the probation, parole and penalty outside the prison.



Despite of these measures and positive comments and given that there is always a gap between the law in "books' and the law in action, people have reason to ask: Does the defence have a chance to cross-examine the prosecution witnesses and produce its own witnesses in court? Does China really need the witnesses appear in court? In the next section, I will introduce the practical situation on the witness court appearance in criminal cases in China.

## 3. Current situation of the witness appearance in court

There are no official statistics on the rate of witness appearance before the court in China, because the courts are not required to count and report such a rate to the Supreme People's Court at the end of each year. Furthermore, most Chinese scholars have been focusing on the reform of criminal trial mode, re-trial

[8] Research shows that case files can not reflect all of the statements of what defendant, witnesses, and victims actually said in the police investigation. In most cases, particularly in China, police interrogation and interviews with the witnesses in a closed environment, the reliability of the record can be challenged, given that lawyer's involvement is very limited at the investigation stage. They are not allowed to show up in the process of police interrogation as the western counterparts can do.

procedure and the protection of defendant's human rights. As a result, in the criminal justice research, the witness was somewhat a "forgotten man" of the criminal process.[9]

In judicial practice, witness appearance in the criminal court is said to be rather low before the 2012 CPL reform. The rate of witness appearance was estimated to be less than 10%.[10] Notwithstanding, some scholars in China argued that such a rate may be overestimated.[11] While some data showed that there were witnesses in more than 80% of cases prosecuted by the People's Procuratorates in China, some found that few witnesses appeared in court.[12] This has been regarded as "a problem gives judges a headache in China's court trial".[13] For example, witnesses appeared in approximately 5% of cases tried in the First Criminal Court of Haidian District Court of Beijing.[14] A survey conducted in East China revealed that the rate of witness' court appearance in Gulou District Court of Nanjing, Jiangsu Province was 6.2% on average between 1999 and 2001.[15] In 1998, only 1.5% of witnesses appeared in criminal cases in Shanghai First Intermediate People's Court.[16] In Southeast China, it was reported that the witness rate in Shenzhen Intermediate Court ranged between 2 and 5 percent since 1997.[17] In the People's Court of Yongchun, Fujian Province, no one gave testimony in cases concerning bribery or corruption, although witnesses appeared in 25% of other types of criminal cases in 1997.[18] In North China, witnesses appeared before the Yantai Intermediate People's Court of Shandong Province in less than 1% of criminal cases on average. In Northeast China, Erdao District Procuratorate in Changchun, Jilin Province prosecuted 185 criminal cases in 1997 and witnesses only gave testimony in court in 8 cases (4.3%); of the 197 cases prosecuted in 1998, witnesses appeared in 11 cases (5.6%).[19] Likewise, the survey of Weimin Zuo *et al* reported that the average rate of witnesses' court appearance in court of C City of Sichuan Province was 0.38% in 2004.[20] In



[9] L. Ellison, *The Adversarial Process and the Vulnerable Witness*, Oxford.
[10] J. Wang, *On the Testimonies of Witness in Criminal Cases (Xingshi Zhengren Zhengyan Lun)*, Beijing, 2002.
[11] D. Cheng, *Problems on the Witness Appearance and its Solutions*, in *Collection of Academic Papers of 2003 Annual Conference of Procedure Law*, Beijing, 2003.
[12] C. Zhang, *The Reasons for Low Appearance Rate of Witness in Court*, in *Enlightenment Daily (Guangming Ribao)*, 26 December 2000.
[13] Z. Long and J. He, *Walking out the Misunderstanding on the Witness Giving Testimony*, in J. He (ed.), *Forum on Evidence (Zhengjuxue Luntan)*, Vol. 2, Beijing, 2001.
[14] J. He (ed.), *A Study of the Witness System*, Beijing, 2004.
[15] D. Cheng, *Problems on the Witness Appearance and its Solutions*, in *Collection of Academic Papers of 2003 Annual Conference of Procedure Law*, Beijing, 2003.
[16] J. He (ed.), *A Study of the Witness System*, Beijing, 2004.
[17] Z. Zhang, *An Analysis of Present Situation on the Witness Court Appearance in China and Discussion of Countermeasures*, in J. He (ed.), *Forum on Evidence (Zhengjuxue Luntan)*, Vol. 2, Beijing, 2001.
[18] D. Wu, *What are Good Measures to Solve the Witness' Refusal to give Testimony—A Study of Improving the System of Protecting Witness' Rights in China*, in 3 *People's Procuratorial Bimonthly (Renmin Jiancha)* 6 (1999).
[19] Procuratorial Daily, *The Difficulties in Witness' Court Appearance and the Possible Reasons*, in *Procuratorial Daily (Jiancha Ribao)*, 22 August 1999.
[20] W. Zuo, J. Ma and J. Hu, *Chapter Thirteen: Survey Report on the Pilot of Witnesses Court Appearance and Giving Testimony in Criminal Cases*, in W. Zuo *et al*, *Zhongguo Xingshi Susong*

Central China, the Nanguan District People's Court of Kaifeng City, Henan Province heard 728 criminal cases from January 1997 to October 2003, and the rate of witness presence was around 1%.[21].

Based on the literature available, we may notice that there was very few information on the rate of witness appearance in mid and western China, but scholars argued that they had reason to believe that the rate was similar to the situation in the Eastern area, or even lower.[22] Is this true or not? In order to find answers to this question, I would like to introduce relevant findings of an empirical research on Chinese criminal procedure during my doctoral study, for which I spent around one year and a half in the fields during 2003-2004 with structured research tools.[23] Three courts I visited included one intermediate court of a capital-city in northwest (Site A), one intermediate court at a non-capital city (Site B) in mid China and one basic court at the district level in southwest (Site C), and. Among the other things, the case files[24] (for a total of 235) I accessed found that in *No* case did any prosecution witness appear in courts of the three sites—When the prosecutor presented the testimony of witnesses, he or she just read out the record of the witnesses' statements.[25] On the other hand, the criminal defence is not a popular sector for lawyers in China mostly because of personal safety concerns, e.g., they may face a risk of being charged with the perjury, persuading witnesses to change the testimony. Given this unique situation, it is not a surprise to see that very few lawyers presented defence witness in China.[26] To this end, my research findings in a certain degree echoed the previous literatures as well as Mike McConville's findings on the courts of 13 sites across China where few witnesses can give testimony in court. According to McConville *et al* (2011),[27]



*Yunxing Jizhi Shizheng Yanjiu (Empirical Study on the Operation Mechanism of Criminal Procedure in China)*, Beijing, 2007, 338.

[21] J. He (ed.), *A Study of the Witness System*, Beijing, 2004.

[22] See e.g., D. Cheng, *Problems on the Witness Appearance and its Solutions*, in *Collection of Academic Papers of 2003 Annual Conference of Procedure Law*, Beijing, 2003.

[23] The research tools were jointly developed by a research team led by Professor Mike McConville in early 2003. For details, see Appendix of the book by M. McConville, et al, *Criminal Justice in China: An Empirical Enquiry*, Cheltenham, 2011.

[24] The case files were that of "dead or recently completed" cases that at that time. I read the files according to the reverse chronological order of the case heard. In general, the number of case files I read (n=100, 70 and 65) in the three site is roughly round 1/5 and 1/7 of all the cases heard each year, the data is trustworthy from the qualitative and quantitative perspectives.

[25] This does not mean that the absence of witnesses would prevent some challenges being made to the witnesses' testimony. For example, there were challenges in 37 cases in Site 1 (38%), 4 cases in Site 2 (10%) and 15 cases (24%) in Site 3, which were raised mainly by the defence. See X. Fu, *Empirical Study of Criminal Procedure in China*, Ph.D. thesis, City University of Hong Kong (2005), Chapter Nine.

[26] X. Fu, *On the fairness and communications in the trial of criminal cases in China—An empirical analysis from the perspective of criminal defence*, in 6(2) *International Journal of Law, Language and Discourse* 36-50 (2016); X. Fu, *Public prosecutors in the Chinese criminal trial—Courtroom discourse from the prosecution perspective*, in 1(2) *International Journal of Legal Discourse*, 401-420 (2016).

[27] M. McConville, et al, *Criminal Justice in China: An Empirical Enquiry*, Cheltenham, 2011.

> One of the most striking features of criminal trials in China is the absence of witnesses. With very few exceptions, we found that witness testimony took the form of witness statements read out to the court, predominantly by prosecutors - on our analysis, the defence produced witness statements in only sixteen cases (10 in the Basic Court and 6 in the Intermediate Court). Witnesses were physically produced to give testimony in only 19 trials, involving a total of 31 defendants (24 in the Basic Court and 7 in the Intermediate Court). This means that out of the 1,109 defendants whose cases proceeded to trial, witnesses provided live testimony of some kind in only 2.8 per cent of cases. In all but one of these 19 trials only one witness was produced, and in 12 of these trials that sole witness was the victim.

The low rate of witness appearance in court becomes more problematic in China, sometimes even caused public outrage[28] and criticism from the international communities.[29] It is particular a headache to judges in cases where the two parties produce two different versions of written testimony from the same witness. As part of the efforts to address these problems, the CPL (2012) made dramatic revisions concerning securing witness appearance in court. For example, the law further clarified and improved the conditions of witnesses' appearance in court, such as the system of witness compensation, protection, forced court appearance, etc.[30] But some Chinese literature still showed that few witnesses would come to the court to give testimony for various reasons.[31] For instance, the statistics provided by the two levels of courts in Wuhu City of Anhui Province ranged between 0% and 5% during 2012 and 2014 (n=777).[32] According to the official statistics of the intermediate and grassroots courts in Huzhou City of Zhejiang Province, only 88 witnesses (7 upon the summons at



[28] A farmer in Henan was charged with the office of escape to pay toll fee for more than 3.68 million RMB within 8 month, while his illegal act only earned a profit of 0.2 million RMB. He was sentenced to life imprisonment which resulted in hot discussion in China. As a result, the presiding judge was dismissed because of procedural and factual defects. See Y. Wang, *3.68 Million RMB of Toll Gate Fee, the Charge Standard for a Truck is For a Plane*, in *Yangtzi Evening Newspaper (Yangzi Wanbao)*, 13 January 2011. In this case, there was no witness to appear in court. If the witness could appear to testify, such a ridiculous judgment might be avoided. Of course, this case did not only involve witness appearance in court, but also more with the court system (judge has no individual independence).

[29] For example, in the trial of the 'Rio Tinto' case in April 2010 [E. M. Lynch, *A Response to Rio Tinto—A Different Opinion from Australia*, 20 April 2010, available at chinalawandpolicy.com/tag/stern-hu/ (Last visit: 15 April 2017)], the principal evidence of corrupt payments against Stern Hu and three others was made in a written statement by a witness called Du Shuanghua. Requests that Du be produced as a witness were unavailing.

[30] For details, see Articles 187-189 of the *Criminal Procedure Law of the People's Republic of China* (2012).

[31] Most witnesses appeared in job-related cases (48.65%), while very few occurred in murder cases. Among 88 witnesses, 59% had some kind of relationship with the defendant. Of the 88, 26 withdrew the statements given to the investigation organs. See Y. Wu *et al*, *Improvement of institutional application of the system and earnest update of the effectiveness and quality of the trial—Survey report of Huzhou People's Intermediate Court of Zhejiang Province on witness appearance in court*, in *People's Court Daily [Renmin Fayuanbao]*, 17 September 2015, available at rmfyb.chinacourt.org/paper/images/ 2015-09/17/08/2015091708_pdf.pdf (Last visit: 12 March 2016).

[32] Y. Zhou, *On the improvement of the system of witness court appearance in China—Take the courts in Wuhu for example*, in 16(2) *Journal of Jixi University (Jixi Daxue Xuebao)*, 278-281 (2016).

the court initiative and 81 at the request of the defence) appeared in 37 out of the 24,491 criminal cases during January 2008 and August 2015 (1.5%). Similarly, the research by Boqing Huang and Tianyi Wu indicated the rates of witness disappearance in three grassroots courts of S City varied between 0.8 and 9.7% during 2012 and 2015 despite of the difference between those non-disputed and disputed cases.[33] Likewise, the rate of court appearance in a grassroots court of S Province was 1.12% and 1.16% in 2012 and 2013 respectively, while the pilot data in a court of H City showed that there was no dramatic increase in 2014 (7.2%).[34] In judicial practice, few police officers responsible for the criminal investigation would explain and testify in the court trial as well, letting alone the expert witnesses.[35]

On my part, I also updated my research data in Site A during 2015 and 2017, where I read more than 40 cases files, observed 3 trials and interviewed three judges and prosecutors. My recent courtroom observation of the three cases involving job-related crimes further confirmed this situation—none of the witnesses came to the court in Site A, although the parties had different opinions on whether the defendant had the circumstance of voluntary surrender in a high profile case (e.g. CTO A-26 offence of embezzlement). What the lawyers questioned and debated was based on the written record of the witnesses (mostly the persons who provided the money for seeking for personal gain).[36] Likewise, very few experts attended the trial. In all cases I observed, it was the prosecutor who briefly summarized the experts' conclusions. In no case did the prosecutor explain the absence of experts in court and in no case did the judges ask for an explanation of the absence and in no case, presumably, did the defence request this or insist upon it.



If the judges cannot decide which parties' testimony is reliable without the examination and cross-examination of witnesses in court, they have to review the written testimonies after the trial on the basis of their working experience. This means that there is no substantive and practical change despite of the reform. It would make the adversarial trial process a formality, so that the court in fact had retreated to its former inquisitorial system so far as the production and cross-examination of evidence is concerned. Therefore, the low rate of witness appearance in court might directly influence on the adversarial quality of the criminal trial and menace the success of the reform of the criminal trial. If we

[33] B. Huang and T. Wu, *Reform of the 'demand side: Empirical analysis of witness court appearance in criminal cases*, in 3 *Journal of Law Application (Falv Shiyong)* 7-12 (2017).

[34] Y. Ye, *Study of the system of witness appearance in court from the court-centred perspective*, in 48(2) *Journal of Nanchang University (Human and Social Science Edition)[Nanchang Daxue Xuebao (Renwen Shehui Kexueban)]* 84-90 (2017).

[35] X. Wu and X. Zhou, *The Chinese path of establishing the system of police giving testimonies in court*, in 2 *Journal of People's Public Security University of China (Social Sciences Edition)[Zhongguo Renmin Gongan Daxue Xuebao (Shehui Kexueban)]* 79-84 (2015).

[36] I had a chance to talk with the judge in charge of this case. According to him, since neither the defence nor the prosecution requested any witness to testify in court, there was no need for them to do so. Even if the court summoned those important witnesses, few of them would come as they may feel uncomfortable to face the defendant. In order to clarify the details on the disputed items or matters, the judges sometimes had to pay a visit to those key witnesses.

look at the international perspective, the defendant is endowed with the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".[37] As a result, the witness' absence in court may detract from the defendant's right to a fair trial. In this respect, the witness' appearance in court is essential to the protection of the defendant's human rights—from both substantive and procedure perspectives—and requirement of the due process as required by the international community. In other words, the radical institutional reform on the trial in the criminal justice is reliant on the enforcement of law in China. Without the implementation of the law, the reform can be only a formality without substantive institutional change.

## 4. Analysis of the current witness system in China

There may be various reasons for witnesses' unwillingness to appear in court. In general, it will involve issues from the perspectives of legislative defects and the state actors' ideology and law enforcement, apart from the impact of Chinese traditional culture.

### 4.1 Legislative perspective

The most important reason for low witness appearance in court is closely related to the defects in the present witness system. Among the other things, witness protection was viewed as the biggest problem for witnesses' absence of court trial in China before the reform of CPL (2012), as numerous sources revealed that fear of revenge and retaliation was the biggest concern for witnesses giving testimony in court.[38] In the research by Guoan Le *et al*., for example, the safety concern is the most important reason for the witness to refuse to give testimony in court. The witness who appears in the trial would have to face the defendant in their daily life; no matter it is a criminal or civil case. In China, since most accused will not be sentenced to the death penalty with immediate execution in criminal cases, the criminal may return home after a period of imprisonment. Thus the witness had to encounter the possibility of revenge. There were some reports on such retaliation in the media coverage in China.[39] This is also the views of lawyers and judges I interviewed in 2016 in Site A.



[37] Article 14(3)(5) of *International Covenant on Civil and Political Rights*.
[38] W. Zuo, J. Ma and J. Hu, *Chapter Thirteen: Survey Report on the Pilot of Witnesses Court Appearance and Giving Testimony in Criminal Cases*, in W. Zuo *et al*, *Zhongguo Xingshi Susong Yunxing Jizhi Shizheng Yanjiu (Empirical Study on the Operation Mechanism of Criminal Procedure in China)*, Beijing, 2007, 338.
[39] Apart from the Xiao Jingming's Case mentioned, some witnesses even were killed: News reported that one witness in Shandong Province went to court to give evidence against the defendant in a rape case in 1995. The defendant was convicted and after he was released in 1997, he threatened to take revenge against that witness. The witness and her husband reported it to the security director and party secretary of the village, but no protective measures were adopted to protect the witness and her family. One year later, the former convicted defendant in killed the witness and her son. Then, when the police looked for

This view was supported by a research in Renmin University of China School of Law in 2003: According to the response from 160 judges and another 804 participants, more than 88% of interviewees thought that the most important reason for a witness' refusal to give testimony was the fear of suffering retaliation.[40] Similarly, in another survey, the fear of revenge was found to be the most important of ten reasons for their refusal to appear in court.[41] McConville's book (2011) has similar findings regarding this issue.[42] Therefore, if there is a lack of sufficient protective measures put in place for the witness, how can he/she be expected to appear in court willingly?

In the CPL (1996), there were three major provisions in the Chinese Laws governing the protection of witnesses. First, Article 41(2) of the Constitutional Law of the People's Republic of China provides that "The state organ concerned must deal with complaints, charges or exposures made by citizens in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures or retaliate against the citizens making them. Citizens who have suffered losses as a result of infringement of their civic rights by any state organ or functionary have the right to compensation in accordance with the law." Article 49 of the CPL (1996) also stipulated that "the People's Courts, the People's Procuratorates and the public security organs shall ensure the safety of witnesses and their near relatives; anyone who intimidates, humiliates, beats or retaliates against a witness or his near relatives, if his act constitutes a crime, shall be investigated for criminal responsibility according to law; if the case is not serious enough for criminal punishment, he shall be punished for violation of public security in accordance with law". Similarly, the Criminal Law provides protection for witnesses.[43]



witnesses to the murder case, no one dared to give testimony because of the fear of retaliation. Some citizens (witnesses) even pushed the police out their homes and said: "Even if I have seen the murder, I will not tell you. If he (the murderer) cannot be sentenced to death, I will have to die." This illustrates the inadequate protection of witnesses in practice and the negative effect of giving testimony in court. One or two such examples would magnify the "chilling effect" and produce sufficient deterrent but demonstrations to those who may want to show up in court. See Q. Zhang and X. Yang, *One Murder Case Brought One Burdensome Judicial Topic—How the Law Protects the Witness*, in *City of Goat Evening Newspaper*, 29 October 1998.

[40] L. Liu, Lixia, and D. Wu, *An Empirical Analysis of the Witness System*, in He Jiahong (ed.), *Forum on Evidence (Zhengjuxue Luntan)*, Vol. 7, Beijing, 2004.

[41] The ten items of reasons to refuse the testimony include the sense of fear, selfishness, the revenge, the heart of sheltering or harboring (the suspect or defendant), repayment of the obligation to the person, inimical feeling, revenge, shame, sympathy and the face. See D. Wu, *An Analysis and Discuss of Reasons on the Witness Refusal to Give Testimony*, in J. He (ed.), *Forum on Evidence (Zhengjuxue Luntan)*, Vol. 3, Beijing, 2001, 448.

[42] In particular, Chapter Nine.

[43] Articles 307 and 308 of the *Criminal Law of the People's Republic of China* (1997). Article 307 provides that anyone who stops with violence, threat, bribe, and other methods a witness to testify or instigates others to make false testimony is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the circumstances are severe, to not less than three years but not more than seven years of fixed-term imprisonment. Moreover, the law emphasizes the severely punishment for any judicial personnel committing the crimes as stated in the first two paragraphs of Article 307. In addition, if anyone resorts to persecution and retaliation against a witness, he is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention;

Although the CPL (1996) provided protections for the witness, it is not sufficient and consistently coordinated in practice. First, the provision in the Criminal Procedure Law is a general provision, which lacks of specific protective measure. For example, there is no provision on how the judicial organs protect the safety of the witness and his near relatives, nor measures available for the court to protect the witness. In other words, such legal provisions are too general to be enforced in practice. Second, the object of protection in the procedure law is the witness and his near relatives; while the object of protection in the Criminal Law is the witness only, which is not enough to secure the witness' court appearance because of the fear of revenge against his/her near relatives. Third, the protections in the substantive and procedural law are remedies afterwards, failing to cover the whole process, which lacks of preventive measures for the protection of witness. If the law has sufficiently deterrent effect by threatening punishment against the crime, such a protection afterwards might be helpful to some extent. The point is that, the deterrence of the Criminal Law is not enough to safeguard the safety of witnesses and their relatives. There is evidence that some witnesses were retaliated or revenged as a result of giving the testimony.

The reforms of the CPL (2012) made some positive improvements. For example, where the public prosecutor, the parties or the defender, or agent ad litem has disagreement with the witnesses' testimonies, which may have substantive impact on the conviction and sentencing, the witnesses (including the expert witnesses) should testify *if the court thinks it necessary*. From the legislative perspective, the provisions provided the judge with the discretionary power on if the witnesses could come to testify. In addition, Article 190 allows (the prosecution) to read out testimonies of witness in court to be justified. Moreover, the police can be required to testify and explain on the information regarding the crime at the time of the investigation, who may not receive cross-examination of the defence. Furthermore, Article 192(2) of the CPL (2012) added that, "public prosecutor, the parties and the defender or the agent ad litem may apply to the court to notify the person with professional expertise and knowledge to express personal opinions on expert opinions." This contributes to the review and application of the expert opinions in determining the case in practice, making the scientific evidence clearer and convincing to the parties.[44] In addition, where the witnesses fail to appear and testify in court proceedings after the court's notification, the judge may force the witnesses concerned to testify in court; where the expert witnesses refuse to testify, their expert opinions will not be used as the basis of determining the case.



and when the circumstances are severe, to not less than three years and not more than seven years of fixed-term imprisonment. *Ibid*, Article 308.

[44] There are some positive examples on the values of the experts with special knowledge in avoiding miscarriage of justice in criminal trial in China. For example, see discussion of Nian Bin's case, in Y. Gu, *A study of the protruding problems in the criminal defence in the trial-centred context*', in 2 *China Law Science (Zhongguo Faxue)* 65-85 (2016); Q. Xiong, *Promoting the reform of trial-centred procedural system through Nian Bin's case as a sample*, in 1 *China Law Review (Zhongguo Falv Pinglun)* 31-37 (2015).

*4.1.1 Witness rights*

There are some basic provisions on witness rights in the CPL (1996), but they are scattered throughout the Code. In summary, a witness can enjoy the following rights: the right to ask the judicial organs to safeguard the personal safety and that of their near relatives, use native spoken or written language in giving testimony, request the investigators to present official certificates or identities; receive notice of the court session three days beforehand; verify the testimony in the record of court hearing after the trial; and file charges against any unlawful act by judicial staff. [45] However, these provisions are not complete, and some important rights were missing. For example, there was no provision relating to the reimbursement of costs to witnesses arising from their appearance in court. When a witness appears in court, he/she has to pay the cost incurred. Even if the judicial organs agree to compensate the witness relevant costs, given the shortage of budget for dealing with cases, the police, the procuratorate or the court may shift their responsibility for compensating the witness and ultimately the witness will not be reimbursed. This in fact discourages others from giving testimony actively. Moreover, no one enjoys witness privilege by law in China, so everyone has the duty to give testimony without exception. Thus, in China, for instance, when a husband commits a crime and the wife knows about the crime, if she refuses to give testimony to the police or the procurators, her refusal may constitute an offence. On the other hand, if the wife gives the testimony, it may destroy the harmonious relationship between the couple. These competing considerations may increase the unpredictable nature of witness appearance in court where spouses are concerned, and moreover, where any family members and friends are involved.



In order to protect those who appeared or are to be appeared in court, the CPL 2012 also provided that, where the witnesses testify in cases of endangering national security, terrorism and drug-related crimes, the witnesses themselves and their near relatives may request the judicial organs to protect them if facing personal safety troubles arising from testifying in court. Articles 212-214 of the Interpretation on CPL 2012 established detailed rules on cross-examination of witnesses (including expert witnesses and experts) in court. However, this is not enough to make an overall protection for those witnesses in China, given that it may involve various parties especially the police, notably it lacks beforehand protection for the witnesses. Moreover, it is very likely that the three organs (police, prosecutors and judges) to kick off a "ball game" in protecting witnesses in reality. In addition, the scope of application is not clear, and it seems to cover all types of criminal cases, in fact no/few witnesses appear in court in reality.

*4.1.2 The witness' duty to testify in court*

It is generally accepted by scholars that a witness' duty includes the duty to appear and testify before a court, to make an oath or affirmation and to give

[45] See Articles 9, 14, 49, 97, 151 and 167 of the *Criminal Procedure Law of the People's Republic of China*.

testimony.[46] The CPL (1996) set out the witness' duty to testify expressly:[47] all the citizens who have information about a case shall have a duty to testify, so long as they have the intellectual competence, can distinguish right from wrong or can properly express themselves. Unless there is opposing evidence to prove that a witness is physically or mentally handicapped person or a minor who cannot distinguish right from wrong or cannot properly express himself/herself, he/she shall qualify as a witness. However, the law also stated that the public prosecutor and the defenders could show material evidence to the court for the parties to identify; the records of testimony of witnesses who were not present in court, the conclusions of expert witness who were not present in court, the records of inquests and other documents serving as evidence shall be read out in court; the judge should listen to the opinions of the prosecutor, the defence and the agents ad litem.[48]

However, the Judicial Interpretation of the Supreme People's Court on CPL (1996) (hereinafter called the *Interpretation* [1996]), the witness is permitted not to appear in court after the permission of the People's Court if he/she could meet the required conditions.[49] Such practice in reality, "a small loophole on a big cap", a serious "small loophole"[50] made the exceptions as furnishings, because any witness could make use of it as the justified reason to refuse court appearance.

The CPL (2012) made some improvement in this regard. It states that, where the witnesses fail to appear and testify in court proceedings after the court's notification, the judge may force the witnesses concerned to testify in court; where the expert witnesses refuse to testify, their expert opinions will not be used as the basis of determining the case. However, such provisions are almost in paper which not only involves the legislative issue but also the law enforcement. In judicial reality, witnesses particularly the investigators seldom come to court to testify. A good illustration of this is that, in the first half of 2013, only 0.6% of investigators appeared in court in criminal cases heard in courts of Beijing.[51]



[46] D. Zhao and X. Fu, "A Discussion on the Improvement of Witness System in China", in *Collection of Academic Papers of 2004 Annual Conference of Procedure Law* (Vol. 1), *China Law Society*, 371 (2004).

[47] See Article 48, Criminal Procedure Law of the People's Republic of China. In addition, Article 141(1) of the Interpretation of the Supreme People's Court on the Issues in the Execution of the Criminal Procedure Law of the People's Republic of China (hereinafter called the Interpretation) says: "The witness should appear and give testifying in court."

[48] Article 157, Criminal Procedure Law of the People's Republic of China (1996).

[49] For example, the witness is a minor; the witness is suffering from a serious disease or has difficulty in getting about in the term of court session; the witness' testimony does not play a decisive role in the trial of case; and the witness has other reasonable grounds. See Article 141(2), the Interpretation on CPL (1996).

[50] G. Chen (ed.), *Research on the Issues in Implementation of the Criminal Procedure Law (Xingshi Susoingfa Shishi Wenti Yanjiu)*, China Legal System Publishing House, 2000, 212; Z. Long and J. He, *Walking out the Misunderstanding on the Witness Giving Testimony*, in J. He (ed.), *Forum on Evidence (Zhengjuxue Luntan)*, Vol. 2, China Procuratorial Press, 2001, 165.

[51] For detailed discussion, see K. Dong, *A study of the issue on investigators' testifying in court—from the perspective of Article 57(2) of the criminal procedure law*, in 3 *Law Science (Faxue)* 173-182 (2017).

*4.1.3 Ineffective use of the compulsory measures in practice*

What if the witnesses refuse to testify in court? There is no provision in relation to the CPL (1996) on the consequences of witness refusal to appear in court.[52] If the Court could not compel the witness to appear in court, what can the defenders and the prosecutors do to ensure the witness' court appearance? Unfortunately, where a witness does not attend the court trial, "the judiciary can do nothing but sigh".[53] In Lawyer Li Zhuang's case, the defendant was charged with newly discovered crime of hindering witnesses to testify in court, when he represented another case in July 2008 in Shanghai. According to the media report, the defence applied the witnesses to testify in court, but in fact no witness appeared in court in the trial on April 19, 2011. The court explained that because of special reasons, notice was not served to a few witnesses, and the remaining witnesses are unwilling to testify in court, except one was detained who was unable to show up.[54] In this case, since the charge involved the act of hindering the witnesses to testify, how can the court find out the truth without any witnesses? Therefore, there is a gap between the witness' refusal to testify and the availability of punitive measures. The witness' unwillingness to offend others and the imperfect witness protection scheme cannot explain all the absences of witnesses in court.

The CPL (2012) made some improvements on securing witness appearance in court in some degree. For example, Article 188 states that Except the defendant's spouse, parents and children, where the witnesses fail to appear and testify in court proceedings after the court's notification without justification, the judge may force the witnesses concerned to testify in court; where the expert witnesses refuse to testify, their expert opinions will not be used as the basis of determining the case. When the degree of such refusal is serious, the witnesses can be detained for 10 days. According to Article 208, the Interpretation on CPL (2012), it is the presiding who shall sign and issue the writ to force witnesses to appear in court, which means a lot of administrative formalities to the case-responsible judges, possibly causing delay in trial process and exceeding the time limit for completing the case handling. Furthermore, witnesses' families may make troubles if the court detains or penalize those who refuse to testify in the trial, which can be seen as contrary to the macroscopic atmosphere of developing a harmonious society in China. This situation might be worse given that the defence is in a disadvantageous position in evidence collection because of structural arrangement.



[52] The only provision related to the witness refusal to appear before the court was Article 119(2) of the *Interpretation on CPL* (1996) which stated: "If the witness provided by the public prosecution authority or defender indicates refusing to appear in court as a witness or the notice cannot be served to the witness even if served to the provided correspondence address of the witness, the People's Court shall inform the issue to the public prosecution authority or defender in time".

[53] D. Zhao and X. Fu, *A Discussion on the Improvement of Witness System in China*, in *Collection of Academic Papers of 2004 Annual Conference of Procedure Law* (Vol. 1), Beijing, 371 (2004).

[54] Hualong Net, *The Court Said that Many Witnesses Are Unwilling to Testify in Li Zhang's Case on Newly Discovered Crime of Hindering Witnesses to Testify in Court*, 19 April 2011, available at news.sina.com.cn/c/2011-04-19/160722320562.shtml (Last visit: 19 April 2017).

*4.1.4 Compensation issue.*

Lack of economic profit was regarded as external inducement of witnesses' refusal to give testimony in the context of the CPL (1996). China has been shifting from the planned economy to a market economy. From the economic perspective, each person in fact would care more about their personal interests, as they are more inclined to be the egoists. If they choose to appear and give testimony in court, their expected costs include personal safety problems such as potential risk of being retaliated, direct economic loss and possible destruction of originally good relationship with the accused. Their expected benefit is that they may feel psychological reassurance because of helping promote social justice. If a witness chooses not to give testimony in court, they may have a morally guilty conscience as a potential criminal may not be convicted due to insufficient evidence. By contrast, their refusal to testify may avoid being retaliated or threatened by the accused, maintain their good relationship and not have economic loss. Against such a situation, the costs of giving testimony are higher than that of refusing to testify in court. Consequently, most witnesses would choose not to appear in court.

The CPL (2012) made changes accordingly in this matter. For instance, Article 63 of the CPL (2012) provides that "witnesses should be provided with such subsidies for their transportation, lodging and meals arising from testifying in court, and such costs should be added into the business expenditures of judicial organs, which should be guaranteed by the budget of people's government at the corresponding level. But the problem is that there is a gap/disparity between different regions/provinces in China, apart from there is no fixed standard for such subsidy and fact that such budget has not been fixed in their case-handling budget in judicial practice.[55]



## 4.2 Traditional and cultural influences

China is a state with long history. People are deeply influenced by the Confucius thought, such as the preference of non-litigation, golden mean (the course between extremes), compromise and concession, in order to realize a harmonious and peaceful society, which contrasts with the modern practice of fulfilling social justice and fairness by the litigation. According to the Confucius thought, the moral and ethical requirement of peaceful interrelationship seeks for the peace by making concession to avoid troubles. A man would be regarded as having a bad morality if he was involved in a lawsuit, as people looked down upon and felt shameful on the involvement of the litigation. Thus, "when ancient people talked about the participant of a lawsuit, they often add suffix or prefix words having obviously derogatory sense to show their disdain, for example, 'shyster', and

[55] For detailed discussion in this aspect, see e.g., Y. Ye, *Study of the system of witness appearance in court from the court-centred perspective*, in 48(2) *Journal of Nanchang University (Human and Social Science Edition)[Nanchang Daxue Xuebao (Renwen Shehui Kexueban)]* 84-90 (2017).

'litigation trickster' and "causing troublesome litigation"'.[56] Such traditional thought of slighting litigation has been exerting a subtle influence on the behavior of modern people in China. Some witnesses would think that the appearance in court is a trial against them, which make them shameful. In some cases involving bribery or embezzlement, witnesses in most cases had economical or business contact with the accused. After appearing in court, their figure and reputation might be lowered by their colleagues, which will bring some inconvenience in their business in future. Consequently, in the criminal proceeding, witnesses would often refuse to give testimony in order not to offender others, to be worldly wise and to make themselves safe.[57]

Furthermore, the practice of state judiciary interrogating witnesses by torture in the past still makes witnesses very concerned to be involved in the litigation. Moreover, despite of the development, the interrelationship is still very important in China. Everyone has its own network of human relationships and people are unwilling to destroy their relationship. Sometimes, for instance, "even when a witness knew someone, their country fellow, who stole the electrical wire, they would be reluctant to give testimony in court as a way of supporting procuratorial prosecution, if 'the villain doesn't harm his neighbors.'"[58] Against such background, witnesses are strongly affected by the negative ideology of showing the litigation.



### 4.3 Law enforcement

Apart from the reasons mentioned above, another important one involves judicial staff's attitude toward witnesses' appearance in court, although such a practice is not very common. In judicial practice, when the fact is clear and the evidence is sufficient or the defendant admitted the crime in most cases, it seems that the witnesses' attendance in court is unnecessary. As a result, at least some judges have formed the ideology that there is need to have witnesses appeared in court, even when there is disputed evidence between the defence and the prosecution (or the plaintiff). For instance, in the trial of Case *Zhang Desheng vs. CCTV* on 11 September 2001, the lawyer of the plaintiff reported to the presiding judge twice that there were 4 witnesses waiting outside the court when the two parties had dispute on the authentication of some testimonies. The lawyer requested if the witnesses could be summoned to give testimony in court. However, the presiding did not agree with such request. As a result, the lawyer had to read out another two testimonies again. Within the three hours before the adjournment, none of the witnesses were summoned to court (*Legal Daily* 2001).

Research showed that witness court appearance may take longer time to complete a court session, For example, Zuo weimin revealed that the time of testimony given by each witness occupied 27.7% of court session on average

[56] B. L. Liebman, *Legal Aid and Public Interest Law in China*, in 34 *Texas International Law Journal* 121 (1999).
[57] J. He (ed.), *A Study of the Witness System*, Beijing, 2004, 94.
[58] L. Su, *The Rule of Law in the Process of Modernization of China*, in *Xuewen Zhongguo*, Nanchang, 1998, 198-199.

ranging from 3 to 47 minutes.[59] Given the current situation of crime control, judges have to hear more and more cases, which will mean their workload is much heavier than before. If witnesses are summoned to court, judges will not be happy to do so, as they think that it will in fact take more time, energy and resources for the cross-examination of witnesses in court. Thus it is the judge who is not active or unwilling to summon the witness to the court instead of the witnesses' unwillingness to testify. In my field observation, there are some cases that the request of defendants or defence lawyers was refused by the court. For example, in a case heard in Site 3 [No: S3-CO-01, robbery] in 2004, among the other things, the following dialogue happened at the investigation stage:

> ……
> *Prosecutor: The second group of evidence includes 9 copies of witnesses' testimonies. The testimony……..*
> ……
> *Presiding Judge: Defendant, Do you have any disagreement with the testimonies of the witnesses?*
> *Defendant: Yes, I have the disagreement with YYJ's testimony, because I left there at last.*
>
> *Presiding Judge: How about the other testimonies?*
> *Defendant: They are true.*
> ……
> *Presiding judge: Defendant, do you have any evidence to present in court?*
> *Defendant: No. But I request for the appearance of YYJ in court.*
>
> *Presiding Judge: It does not matter if YYJ appears in court. Do you have any evidence to present in court?*
> *Defendant: No.*
> ……..

Here, we can find that to the judge, since the defendant has already admitted the crime, although reluctantly, it will not affect the conviction the case, summoning the witnesses YYJ has no practical value to the trial except adding the length of the court trial. In fact, the defendant disagreed with the witness' statement and the cross-examination may affect the final outcome of the sentencing.

Furthermore, the prosecution is also unwilling to arrange its witnesses to appear in court. This is extremely true if a witness had the tendency to change his/her testimony after having given his/ her written testimony in the public security organ or in the Procuratorate. The Procuratorate would hinder such a witness from giving testimony in court with various reasons because the change of the testimony in the trial will make the prosecution embarrassed and be disadvantageous to charge against the defendant. Moreover, if the testimonies



[59] W. Zuo, J. Ma and J. Hu, *Chapter Thirteen: Survey Report on the Pilot of Witnesses Court Appearance and Giving Testimony in Criminal Cases*, in W. Zuo *et al*, *Zhongguo Xingshi Susong Yunxing Jizhi Shizheng Yanjiu (Empirical Study on the Operation Mechanism of Criminal Procedure in China)*, Beijing, 2007, 338.

are obtained by illegal means, some prosecutors would concern that witnesses' appearance in court is quite likely to disclose illegal aspect of the evidence and thus lead to unsuccessful prosecution.[60] In addition, if the witness appeared in court, he/she may change his/her testimony in court after being cross-examined. As a result, the prosecution will try to hinder witnesses from attending in court trial by various means. For example, in order to prevent witnesses appearing in court, the prosecution in some cases even contacted and coordinated with the court before the trial and sought for the court's help to issue a decision not to summon witnesses; some even warned the witness directly of the criminal responsibility of perjury or send the police to wait outside the court to prepare for the arrest if the testimony is to be changed.[61]

After the reform in 2012, "the judges shall, before a witness gives testimony, instruct him to give testimony truthfully and explain to him the legal responsibility that shall be incurred for intentionally giving false testimony or concealing criminal evidence. The public prosecutor, the party, the defender and agent ad litem, with the permission of the presiding judge, may question the witnesses and expert witnesses. If the presiding judge considers any question irrelevant to the case, he shall put a stop to it. The judges may question the witnesses and expert witnesses (Article 189). But this situation did not change much in judicial practice. As far as the reason is concerned, the prosecution will transfer all the case files (original copy) to the court before trial under the CPL (2012), which can avoid the practice of first impression being the strongest. The judges may feel it unnecessary to have witnesses testify in court. In the cases with witnesses' testifying in the trial, the judges would seldom admit such oral statement in the judgment by arguing that there are contradictions between the oral and written statements, or the oral statement is of weak persuasiveness or cannot collaborate with other evidences; saying nothing about in the judgment on the witnesses' testimonies given in court. The evidence is that there were 6 out of 56 sample cases in Mao and Yuan's case.[62]



On the prosecution side, public prosecutors represent the state to prosecute a criminal suspect, aiming to punish the crime in China (and elsewhere too). In the context that the practice of successful prosecution, conviction and case conclusion rates is not clearly abolished (although there are some changes in some areas of China), prosecution witnesses testifying in court may bring the risk of failing to convict the defendant after the trial, in case of changing the statement after cross-examination and it is more safe to read out the witnesses' testimonies.[63] They were said to seldom request witnesses' court appearance: For

[60] W. Zhu and N. Zhang, *On the System of Witnesses' Appearance and Testimony in Court in the Criminal Procedure*, in 1(iii) *Fazhi Yu Shehui (Legal System and Society)* 42 (2010).
[61] G. Ma, *A Theory about the Justice of Criminal Judicial Process (Xingshi Sifa Chengxu Zhengyi Lun)*, Beijing, 2002, 207.
[62] Y. Mao and J. Yuan, *Observation of the real effectiveness of witness court appearance in the perspective of the new criminal procedure law—Taking some courts in Z Province as the sample*, in 1 *Journal of Jiangxi Police Institute (Jiangxi Jingcha Xueyuan Xuebao)* 107-111 (2015).
[63] Y. Ye, *Study of the system of witness appearance in court from the court-centred perspective*, in 48(2) *Journal of Nanchang University (Human and Social Science Edition)[Nanchang Daxue Xuebao (Renwen Shehui Kexueban)]* 84-90 (2017); Y. Mao and J. Yuan, *Observation of the real*

example, Yixiao Mao and Jihong Yuan examined 56 criminal cases in the courts of five cities of Z Province in 2013 and 2014 and found that the rates were only 12.8% and 8.7% and in H Court and L Court, which contrasted with the defence initiative (74.4% and 91.3%).[64] In addition, my observation in three cases in Site A found similar practice in China.

### 5. Some thoughts on reforming the current witness system

Based on the intention of the reforms introduced in 1996 and 2012, China attempted to move toward to secure more procedural rights for the accused. Such official documents such as the Opinion of promoting the trial-centred reforms on the criminal procedure system (hereinafter the "opinion") in October 2016 further strengthened the importance of improving the system of witness court appearance, which specifies that witnesses should appear to testify in court if the judge thinks the testimonies would have great impact on the conviction and/or sentencing. But the reality showed that China does not really need witnesses in the courtroom in most criminal cases.

Here, I want to emphasize that I agree with the view that not all the witnesses in a criminal case should come to court if considering the national tradition, cost-effectiveness and practical need of prosecution in China. In fact this is also the general practice of international community. Cross-examination should be applied in those cases that the defendants refuse to accept the charge in China, which is estimated to be 10-15% of the total prosecuted cases. In this way, it would not bring too much burden to the court and the parties to affect the procedural efficiency, but still can satisfy the urgent need of maintaining judicial fairness.



For this purpose, some thoughts as recommendations will be suggested for the purpose of reforming the system in this section. Besides the need of disclosure of evidence before trial and safeguard of key witnesses appear in court, China needs to strengthen the protection system, in particular to change the mindset of the criminal justice actors.

From the range of statutory punishment provided in Chinese laws mentioned above,[65] there is a correlation between the need to punish those criminals who retaliate against the witness or hinder the witness from giving testimony before the court and the need to protect the witness.

If looking at the foreign jurisdictions, there are a number of good practices concerning the protection of witnesses in other jurisdictions, which may serve as an example for China. For example, in the United States, the Federal Witness

*effectiveness of witness court appearance in the perspective of the new criminal procedure law—Taking some courts in Z Province as the sample*, in 1 *Journal of Jiangxi Police Institute (Jiangxi Jingcha Xueyuan Xuebao)* 107-111 (2015).

[64] Y. Mao and J. Yuan, *Observation of the real effectiveness of witness court appearance in the perspective of the new criminal procedure law—Taking some courts in Z Province as the sample*, in 1 *Journal of Jiangxi Police Institute (Jiangxi Jingcha Xueyuan Xuebao)* 107-111 (2015).

[65] The range is within 7 years' imprisonment. See also Article 308 of the *Criminal Law of the People's Republic of China.*

Security Program (WITSEC) and the 1982 Victim and Witness Protection Act are designed for the government to take initiative steps against serious crimes and to promote the protection of witnesses and victims. The programme provides witness protection in the form of "the secret and permanent relocation of witness and their families to places of safety; and if necessary, a change of identification." Apart from the programme mentioned above, several states also established their own shorter-term witness protection scheme.[66] In Hong Kong, the Witness Protection Ordinance, which was enacted in 2002 and amended in 2004, was formulated with the aim of establishing a "Witness protection programme" for the protection of certain witnesses and those persons associated with the witness.[67] This ordinance covers the establishment of a witness protection programme, selection for inclusion in the witness protection programme, the requirement that witness discloses necessary information before being included in the programme, a memorandum of understanding, action where a witness is included in a witness protection programme, the condition of establishing a new identity for participants in the programme, dealing with the rights and obligations of participants, non-disclosure of original identity of participants, termination of protection, restoration of original identity, request for review and the offences. According to the Ordinance, the witness can be effectively protected either before, or during or after the trial.

In China, as far as the problems of witness protection are concerned, it is necessary to strengthen the witness protection from the following aspects. First, the scope of protection should be enlarged rather than focusing on the four types of cases only. In addition, it needs provide whole-way protection rather during or after the trial. Only when the witness is convinced that there is effective protection for his/her near relatives will he/she be able fear of retaliation and give testimony before the court.



Second, it should have some interim protective measures in the Criminal Procedure Law. These measures will reduce witnesses' potential risks of being retaliated by the defendant or his relatives, because witnesses' name and address are not revealed in court and specific measures may be provided after witnesses give testimony in cases of encountering potential risks. They may include: (1) when the procuratorate prosecutes a case and transfers the witness evidence to the court, it should conceal the domicile address and working unit of the witness. (2) When the witness testifies before the court, some appropriate measures can be adopted to separate the witness and the audience. (3) If the judge thinks that the witness who is to testify before the court may encounter some potential risk, he may issue an order to forbid the mass media to videotape or to reveal the witness' name and address. (4) The public security organs should provide specific measures for the witness' personal and housing safety. If it is necessary, such protection should also cover the witness' near relatives. One successful but rare example of witness protection happened in November 1998 when the Guangzhou Intermediate People's Court heard a case relating to the possession

[66] N. R. Fyfe, *Protecting Intimidated Witnesses*, Ashgate, 2001, 16-27.
[67] Available at www.legislation.gov.hk/eng/home.htm.

by positional advantage.[68] In this case, one key witness was a Hong Kong resident, who requested to strengthen protection of his safety when he agreed to be present in court. The local Procuratorate set up a witness protection group, which was responsible for providing security guards for the witness after his entry into Shenzhen and until his return to Hong Kong. This practice had a satisfactory effect in the delivery of the witness' testimony. Though this process was not publicized by the judicial organs, it is worthy of being noted for reference for future in legislation. The media reported that the "first" attempt at witness protection in China occurred in cases investigated by the Baoan District Procuratorate of Shenzhen City since August 2004.[69] One striking feature of the rules on protecting witnesses in cases handled by the district procuratorate is that, considerate protection can be available to those witnesses who will face or have already faced the risk of being threatened with violence.

Third, the witness should be allowed to give testifying anonymously. For example, the Criminal Procedure Law could provide that, in the trial of important cases or cases on organized crimes, the witness is allowed to give testifying before the court without telling others his/her name, address and real identity.[70] However, such information should be revealed in the case files. In the Xiao's case, if the judge did not insist on putting Xiao's name into the judgment with the justification of judicial justice, he may avoid the embarrassed situation.

Fourth, there should be an alternative way of giving testimony before the court. There are similar provisions in the laws of foreign countries. For example, according to the *Criminal Justice Act 1988*, a witness in the United Kingdom must give evidence from the witness box. Under certain specified circumstances, however, the use of a live television link with the court is permissible.[71] This can be an example for China so that witnesses can choose not to appear in court but to give testimony in important and far-reaching cases in a special room out of the court. Although the witness is not present in court, he/she will still be cross-examined by the two parties in the trial. On the one side, this measure can protect the witness; and on the other hand, it helps the judges to distinguish if the witness' testimony is reliable by hearing and seeing the witnesses under cross-examination. Meanwhile, there should be some restrictions on this alternative way in order to prevent abuse of this alternative



[68] D. Wu, *What are Good Measures to Solve the Witness' Refusal to give Testimony—A Study of Improving the System of Protecting Witness' Rights in China*, in 3 *People's Procuratorial Bimonthly (Renmin Jiancha)* 6 (1999).

[69] Southern Daily, *First Practice on the Protection of Witness in Shenzhen and the Costs of Witness Appearance in Court can be Compensated*, in *Southern Daily (Nanfang Ribao)*, 24 January 2005. In fact, this was the second attempt but not the first one in China on the protection of witnesses.

[70] In China, when before the cross-examination, the presiding judge will ask the witness' name, age, address, occupation before the oath. This will give the audience and the parties in court a chance to learn witnesses' basic information. Once witnesses' address and name are revealed, they may face the risk of being retaliated by the defendant or the defendant's family members in future.

[71] The *Criminal Justice Act* 1988, s. 32(1), (1A) and (2). For details, see Inns of Court School of Law, *Evidence*, London, 1996, 57.

way and to save limited judicial resources in terms of financial and temporal costs.

Fifth, after their appearance in court, the witness should be able to obtain some help from the government.[72] If necessary, for example, when the witness' life is in danger, he/she should be relocated to a place of safety or a change of the identity. This requires the formulation of specific rules. In particular, the police should take the lead with active participation and coordination of the prosecution and the court.

Sixth, the law should clearly provide that where the witnesses (in particular the expert witnesses) refuse to testify in court without justifications, their testimonies should not be allowed to read out in court nor used as the basis of determining the case with restricted circumstances as exceptions, just as some Chinese scholars argued.[73] Moreover, given that the investigators mostly the police got involved in a case, their appearance in court giving testimony would be influential in determining the defendant's guilt or innocence, especially when the defendant has disagreement with their confessions and statements. The law should abolish the practice of providing the Explanation on the Case (*Qingkuang Shuoming*) by the police that could be admitted by the court.

Seventh, as for the refusal to appear before the court after summons, I think it is worthwhile to decentralize the power of issuing the writ of forcing the witnesses to testify in court rather than the presiding judge. Moreover, it would be of practical effect to impose the witnesses the fines for refusal to testify in China. The law in many countries provides various punitive measures. For example, the Criminal Procedure Code of Germany provides the consequences of the witness' non-appearance as follows: (1) A witness who fails to appear although he was properly summoned, shall be charged with the costs attributable to his failure to appear. At the same time, a coercive fine shall be imposed on him and if the coercive fine cannot be collected, coercive detention shall be ordered. A witness may also be brought before the court by force. In the case of repeated non-appearance the coercive measure may be imposed a second time. (2) Costs shall not be charged and a coercive measure shall not be imposed if the witness provides a sufficient and timely excuse for his non-appearance. If such excuse is not made in time pursuant to the first sentence, the charging of the costs and the imposition of a coercive measure shall be dispensed with only if it is demonstrated that the delayed excuse is not the witness' fault. (3) Authority to order such measures shall also be vested in the judge in the preliminary proceedings as well as in a commissioned and a requested judge.[74] Furthermore, the law also stipulates the punitive measures for the witness' refusal without reason to testify or take the oath: (1) A witness who without a legal reason,



[72] To this point, some scholars argued that a uniform witness protection agency, under the Ministry of Justice with various levels, should be established to facilitate the witnesses in need. See X. Zhu, *Current Situation of Witness Protection and Improvement in China*, 27 March 2010, available at www.110.com/ziliao/article-162546.html (Last visit: 15 April 2011).
[73] Y. Gu, *A study of the protruding problems in the criminal defence in the trial-centred context*, in 2 *China Law Science (Zhongguo Faxue)* 65-85(2016).
[74] Article 51 of the *Criminal Procedure Code of Germany*.

refuses to testify, or to take an oath, shall be charged with the costs caused by this refusal. At the same time a coercive fine shall be imposed on him and if the fine cannot be collected, coercive detention shall be ordered. (2) Detention may also be ordered to force a witness to testify; however, such detention shall not be extended beyond the termination of those particular proceedings, or beyond a period of six months.[75]

In Japan, a state with a mixture of common law and civil law systems, the law states that a witness who does not appear in court without a legal reason after the summons, shall be detained or pay a fine of not more than 100,000 Japanese Yen. The witness who does not accept the summons shall be summoned again or compelled to appear in court by issuing a warrant.[76] Likewise, in the common law system, such as in the United Kingdom, any person who disobeys a witness summons requiring him/her to attend any court, without just excuse, shall be guilty of contempt of that court and may be punished summarily by that court as if his contempt had been committed in the face of the court.[77] More recently, one witness in Hong Kong refused to testify in court because he did not want to testify against his friends. He was detained into court to give testimony and was sentenced to jail for 21 days for his contempt.[78] These can be served as references in China as well.

Last but not the least, China needs continue the judicial reform and change the ideology of justice personnel. As we discussed in the previous section, not only judges but also prosecutors pay less attention to or even dislike witnesses to appear in court for various reason. They should be exposed to best practices in this area to better understand the important role of witnesses' court appearance in reducing wrong convictions and safeguard the defendant's human rights. Moreover, China should also emphasize that witness statements cannot be used as evidence for conviction if they are not cross-examined with a few exceptions. In this way, with the support of the prosecution and the defence, the judges should be responsible for calling the witnesses to the court.



## 6. Conclusion

Based on the discussions above, we can find that the witness' appearance in court is of still problematic in China. As far as the reasons are concerned, it does not only result from defects from legal perspective, but also law enforcement and strong impact of the traditional culture. It is obviously that success of the new trial mode in China depends heavily upon witnesses' appearance in court. The evidence available tells us that, China does not need witness appearance in the criminal trial, as there is no difference if the witness gives testimony in court—

[75] Ibid, Article 70.
[76] Articles 151 and 152 of the *Criminal Procedure Law of Japan* (Chinese version).
[77] *Criminal Procedure (Attendance of Witness) Act 1965*, cited in R. Munday, *Evidence* (4th Edition), Butterworths, 2000, 53.
[78] Hong Kong Economic Daily, *Refusal to Testify against a Friend, a Witness was Sentenced to Jail for 21 Days*, in *Hong Kong Economic Daily (Xianggang Jingji Ribao)*, 5 March 2005.

In most cases, once the accused is prosecuted, the convictions can be determined by the judge after trial, anyway.

In the broader context of limited lawyers' role in the criminal procedure and fighting against the crime,[79] China needs more institutional reforms to achieve its goals of making a balance between the crime control and the protection of human rights. Based on this assumption, several ways to improve the witness system in China can be recommended. For example, the protection mechanism for witnesses should be improved; compulsory measures to secure the witness' appearance in court, the system of compensating for the witness, change of the traditional ideology and stricter and more transparent law enforcement in China. In my view, China needs solve the witness problem in order to put the reformed criminal procedure law into full effect. To do so will ensure the smooth functioning of the adversarial trial process, thus better protect the defendant's rights and interests and help to find out the truth, which will in turn reduce wrongful convictions in China.



[79] Just as some scholars argued, the work of Chinese defense lawyers is grossly undervalued by the "iron triangle", because they have concurred readily with the "iron triangle" that the effectiveness of their legal representation is questionable and that their work bears little substantive impact on the final outcomes of the criminal trials. Therefore, it is also important to improve lawyers' legal status and practice functions in the criminal defence, among the other things, the right to cross-examine key witnesses on disputable facts in the trial. See B. Liang, N. P. He and H. Lu, *The deep divide in China's criminal justice system: Contrasting perceptions of lawyers and the iron triangle*, in 62(5) *Crime, Law and Social Change*, 585-601 (2014).