

**The Underlying Reasons of the Low Rate of Criminal Witness Testifying in  
China**

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## The Underlying Reasons of the Low Rate of Criminal Witness Testifying in China

**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. Theoretical circles generally believe that a perfect witness testifying system can help witnesses to testify in court. China's witnesses testifying system has made remarkable progress from the legal text in 2012. However, judging from the judicial practice in recent years, the proportion of criminal witnesses appearing in court has not been significantly improved. The underlying cause of the unexpected situation is not the various defects of witness testifying system in China itself, but the operating environment of witness testifying system. Further speaking, whether high or low, the proportion of criminal witnesses appearing in court has no substantive impact on the criminal trial. Especially in cases where criminal trial become formalistic, many people's courts do not need witnesses to testify in court.

**Key Words:** New criminal procedure law; witness testifying system; the low rate of criminal witness testifying.

## 1. 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.

Although the theoretical community always thinks that the cross-examination between the prosecution and the defense help both to maintain procedural justice and to find out the truth, and has given high expectations to the witness testifying system since criminal trial mode reform in the mid-1990s, it is very disappointing for them that witnesses generally did not testify in court in the process of implementing the revised Criminal Procedure Law (CPL) of 1996. 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. Some media report that the rate of witness testimony in court is only from 1% to 5%

in China. Under such circumstances, the witness testifying system became a hot topic in the theoretical field. Theoretical circles universally attributed the too low rate of witness testimony in court 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. Under this background, China began to create a large-scale reform for the criminal witness testifying system. Obviously, since the 5th Session of the Eleventh NPC adopted the Decision on Amending the 1996 CPL (P. R. C) on March 14, 2012, China's witnesses testifying system has changed enormously and made remarkable progress from the legal text. To go further, the 2012 CPL (P. R. C) not only improved the witness protection system and added several protective measures, but also for the first time at the legal level stipulated the witness compensation system, the compulsory testifying system for a witness, and the sanction system for a witness who refuses to testify in court. 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).

Although all sectors of society have expressed praise for China's criminal witness testifying system reform, judging from the implementing of the amended 2012 CPL (P. R. C), the proportion of criminal witnesses appearing in court has not been significantly improved. In the process of criminal trial, both the prosecution and the defense still adduce and cross-examine the written witness testimony records made by the investigating authorities in court as usual. Why do witnesses still generally not testify in court in the case that China's witness testifying system has been continuously improved?

In my opinion, the underlying cause of the unexpected situation is not the various defects of witness testifying system in China itself, but the operating environment of witness testifying system. Further speaking, although the perfect witness testifying system helps to promote witnesses to testify in court, the low rate of criminal witness testifying is only a superficial phenomenon, and the imperfection of the witness testifying system is not a fundamental reason for witnesses not to testify in court. Actually, the underlying reason of this phenomenon that witnesses do usually not testify in court is whether high or low, the proportion of criminal witnesses appearing in court has no substantive impact on the criminal trial. Especially in cases where criminal trial become formalistic, many people's courts do not need witnesses to testify in court, and even artificially prevent witnesses from appearing in court to testify. In this circumstance, if we did not study the deep-seated problems behind, but simply attribute the low rate of criminal witness testifying to the imperfection of the witness testifying system, and hope to increase the proportion of witnesses appearing in court to testify by improving the witness testifying system, this would definitely become a wishful thinking. In view of this, this paper no longer intends to analyze how to modify China's criminal witness testifying system, but to discuss its four deep-level dilemmas in judicial practice.

## **2. Mutual Coordination among Investigative organs, Procuratorates and Courts**

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. 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. In point of a witness testifying in court, if nothing 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.

### **3. The Distortion 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. 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.

#### **4. Formalistic Trial**

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-examination and debate between prosecution and defense in court.

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 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.

### **5. The Misunderstanding of Finding Truth**

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. Only just from this perspective, the witness testifying system can have sufficient living space.

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. 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.

**REFERENCES**

- [1] Bian Jianlin & Chen Weidong (ed.), *Research on the Implementation of the New Criminal Procedure Law*. [M]. Beijing: China Legal Publishing House, 2017.
- [2] Wang feng, *The Implementation of the New Criminal Procedure Law in First Year*. [N], 21st Century Business Herald, March 17, 2014.
- [3]Mao Lijun, *What Is the Reason of the Low Rate of witness testimony in Court*. [N]. People's Political Consultative Daily, July 31, 2007.
- [4] Zhou jing & Wang chao, *Retrospect and Rethinking on the Law of Criminal Evidence with Some Considerations on the Transformation of Its Research Method*. [J]. PEKING UNIVERSITY LAW JOURNAL, 2004, (3):360-382.
- [5]Wang chao, *Rethinking of the Principles of Division of Labor with Individual Responsibility, Mutually Cooperation and Mutually Condition: from the Angle of Procedural Justice*, STUDIES IN LAW AND BUSINESS, Vol.2005, No.2, pp.19-25.
- [6] Chen Ruihua, *Between Problems and Doctrine: Research on the Fundamental Problems in Criminal Procedure*. [M]. Beijing: China Renmin University Press, 2003.
- [7]Jerry L. Mashaw. *Due Process in the Administrative State* (first edition), Yale University Press, 1985, pp.158-170.
- [8] Liu Guangsan (ed.), *Criminal Evidence Law*. [M]. Beijing: China Renmin University Press, 2015.
- [9]Zuo Weimin & Ma Jinghua, *The Rate of Witness Testimony in Court: Empirical Studies Based on Theoretical Explanations*. China Legal Science, No.6, 2005 (Serial No.127),

pp.164-176.

[10]Song Yinghui (Ed.), Detailed Interpretation on the Criminal Procedure Law of the People's Republic of China, Beijing: China University of Political Science and Law Press, 2012.

[11]Long Zongzhi (Ed.), Research on the China' s Criminal Evidence Rules, Beijing: Zhong Guo Jian Cha Press, 2011.

[12]ZHANG Jun (Ed.), Understanding and Application for Criminal Evidence Rules, Beijing: Law Press, 2010.

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