

# WHY CHINESE WITNESSES DO NOT TESTIFY AT TRIAL IN CRIMINAL PROCEEDINGS

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## ABSTRACT

*Having witnesses testifying at trial is a fundamental component of any modern judicatory system. In criminal litigations, generally speaking, testifying and being cross-examined at courtroom as a witness are one's civil duty and being considered as one of the most effective ways to determine case facts. Even though Chinese laws and regulations, in particular the China Criminal Procedural Law, stipulate witnesses' general responsibility to testify at trial and corresponding supporting measures, in reality, the appearance rate of witnesses testifying at criminal trials in China has been consistently extremely low for a long time. On the other hand, it is quite common in China that witnesses make written testimony at police stations or to procurators during pre-trial stages. Thus, often the evidence Chinese judges heavily rely upon in adjudicating criminal cases is some written-formed witness testimony made before trial. Such approach not only causes detriment to procedural due process of criminal trials, but also puts China's ongoing judicial reform into jeopardy. In particular, whether witnesses testify at trial as norm is critical to the enduring campaign of China trial mode transforming from a typical inquisitorial system into a more adversarial system. Based on field studies conducted in ten pilot courts across the country underneath an on-going national research project led a vice chief Justice of the Supreme People's Court of China, the author in this paper presents eight major causes for Chinese witnesses not showing up to testify before the judge in criminal trials.*

## INTRODUCTION

Having witnesses testifying in courtroom, a leading feature of the adversarial system, an effective tool for determining case facts and a demand for procedural due process, is the hallmark of modern criminal procedure. Renowned U.S. legal scholar Professor John Henry Wigmore, whose early twenty-century treatises on the law of evidence still remain unequalled, deemed cross-examination “beyond any doubt the

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greatest legal engine ever invented for the discovery of truth”.<sup>1</sup> And no doubt having witnesses testifying at trial is a prerequisite for conducting cross-examinations. China’s judicial system, on the other hand, due to its inquisitorial tradition, used to heavily rely on material evidence and documentary evidence in adjudication while paying much less attention on live, in-court testimony of witnesses.<sup>2</sup> For a long period of time in the past, the overall appearance rate of Chinese witnesses testifying at trials had been constantly lower than 10% among all levels of jurisdictions across the country, with situation worse in criminal cases than civil cases.<sup>3</sup> However, in very recent years, particularly since the Year of 2012 when both of *China Civil Procedural Law* and *China Criminal Procedural Law* were massively amended, China has pledged to change such norm, showing the world a determination to transform the country’s trial mode from a typical inquisitorial system into a more adversarial one. New laws have been established addressing witnesses’ general responsibility to testify and to be examined at trial, as well as on safety and financial safeguards for witnesses testifying at trial.<sup>4</sup> Moreover, on October 23, 2014, three weeks after the Sixty-fifth Anniversary of the founding of the People’s Republic of China, the Fourth Plenary Session of the Eighteenth Central Committee of the Communist Party of China unprecedentedly launched a vital statecraft on rule of law – CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing

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<sup>1</sup> 5 Wigmore, *Evidence* (3<sup>rd</sup> rev. ed. 1940), sec. 1367, p. 32.

<sup>2</sup> See Hu Yunteng (胡云腾), *Zhengren Chuting Zuozheng Nan jiqi Jiejue Silu* (证人出庭作证难及其解决思路) [*Difficulties in Witnesses Testifying at Trial and Corresponding Solutions*], HUANQIU FALV PINGLUN (环球法律评论) [GLOBAL LAW REVIEW], no.5, 2006 (China); Chen Weidong (陈卫东), *Rang Zhengren Zouxian Fating* (让证人走向法庭) [*Let Witnesses Present in the Courtroom*], SHANDONG JINGCHA XUEYUAN XUEBAO (山东警察学院学报) [JOURNAL OF SHANDONG POLICE COLLEGE], no.2, 2007, at 40, 40-45 (China); Chen Ruihua (陈瑞华), *Lun Zhengren Zhengyan Guize* (论证人证言规则) [*Discussion on Witness Testimony Rules*], SUZHOU DAXUE XUEBAO (苏州大学学报) [JOURNAL OF SOOCHOW UNIVERSITY], no.2, 2012 (China).

<sup>3</sup> Chen Weidong (陈卫东), *supra* note 2, at 40.

<sup>4</sup> Xingshi Susong Fa (刑事诉讼法) [China Criminal Procedure Law] (promulgated by the Nat’l People’s Cong., Mar. 14, 2012, effective Jan. 1, 2013), art. 62-63, 187-188, *available at* [http://www.gov.cn/jfjg/2012-03/17/content\\_2094354.htm](http://www.gov.cn/jfjg/2012-03/17/content_2094354.htm) (last visited Nov. 12, 2014).

the Country According to the Law Forward (hereinafter short for “*the 18<sup>th</sup> Central Committee of CPC Decision*”)<sup>5</sup> – a blueprint for China’s judicial reform in the twenty-first century. One of highlights in the Decision is a commitment that China will focus on reforms of legal proceedings to establish a criminal procedure centered on the trial stage, with case adjudications strictly based on facts and in accordance with laws.<sup>6</sup> Major legal authorities in China, including Professor Guangzhong Chen from China University of Political Science and Law, interpret *the 18<sup>th</sup> Central Committee of CPC Decision* in a narrow sense as another round of top-down state approach to urge Chinese witnesses testifying at trial.<sup>7</sup>

Even though legislative and political pressing on witnesses testifying at trial have reached a historical peak in China, in reality the appearance rate of witnesses testifying at trial has no substantive change before and after.<sup>8</sup> No matter from latest nationwide statistics released by the judicial authority or from field studies on pilot courts conducted by scholars across the country, feedbacks all pointed towards a cold, hard fact that the appearance rate of Chinese witnesses testifying at trials all over the country today remains extremely low, with no sign of any improvement since the 2012 legislation amendments. In the author’s opinion, such dilemma not only is a

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<sup>5</sup> Zhonggongzhongyang Guanyu Quanmian Tuijin Yifazhiguo Ruogan Zhongda Wenti de Jueding (中共中央关于全面推进依法治国若干重大问题的决定) [CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward] (promulgated by the Fourth Plenary Session of the Eighteenth Central Committee of the Communist Party of China, Oct. 23, 2014), available at <https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/> (last visited Feb. 16, 2015).

<sup>6</sup> *Id.*

<sup>7</sup> Shenpan Zhongxin Yu Zhijie Yanci Yuanze Yantaohui (审判中心与直接言词原则研讨会) [Symposium on Trial Centralism and Principles on Direct and Oral Trial] (organized by Professor Guangzhong Chen from China University of Political Science and Law, Dec. 23, 2014), news report available at <http://www.cicjc.com.cn/zh/node/1320> (last visited Feb. 16, 2015).

<sup>8</sup> See Long Zongzhi (龙宗智), *Xin Xingshi Susongfa Shishi Bannian Chupan* (新刑事诉讼法实施: 半年初判) [Preliminary Comments on the Lately Amended China Criminal Procedure Law after Half a Year Implementation], QINGHUA FAXUE (清华法学) [TSINGHUA LAW JOURNAL], no.5, 2013, at 136, 127-142 (China).

repeated reminder of the distinction between the law on the books and the law in action, but more importantly concludes *the 2012 Amendments to China's Procedural Laws* as a failure in promoting witnesses testifying at trial while puts implementation of *the 18<sup>th</sup> Central Committee of CPC Decision* in peril.

People cannot help wondering why such massive legislative and political stimulus did not work. In order to probe into material causes that stop Chinese witnesses testifying in criminal trials, the Research Office of the Supreme People's Court of China which is under the leadership of the Vice Chief Justice Deyong Shen delegated the Institute of Evidence Law and Forensic Science at China University of Political Science and Law (hereinafter short of "CUPL Evidence Institute") to do researches in ten pilot courts across the country.<sup>9</sup> Since September 2013, the CUPL Evidence Institute, divided into ten research teams, conducted a four-month field studies and surveys in the ten pilot courts (hereinafter short of "the 2013 Field Studies").<sup>10</sup> Besides discussions and interviews with all sorts of law practitioners, attending trials and collecting data and materials directly from the pilot courts, the research teams

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<sup>9</sup> This field studies conducted by the CUPL Evidence Institute (the 2013 Field Studies) is part of a National Social Science Foundation Key Project in China – *Studies on People's Courts Provisions of Evidence in Litigation* (Project No.11&ZD175), led by Shen Deyong (沈德咏), Vice Chief Justice of the China Supreme People's Court. The ten pilot courts are Shanghai No.1 Intermediate People's Court (上海市第一中级人民法院), Changzhou Intermediate People's Court in Jiangsu Province (江苏省常州市中级人民法院), Baotou Kundulun District People's Court in Inner Mongolia (内蒙古包头市昆都仑区法院), Wuhan Intermediate People's Court in Hubei Province (湖北省武汉市中级人民法院), Wenzhou Intermediate People's Court in Zhejiang Province (浙江省温州市中级人民法院), Ma'anshan Intermediate People's Court in Anhui Province (安徽省马鞍山市中级人民法院), Beijing Dongcheng District People's Court (北京市东城区人民法院), Chongqing Fuling District People's Court (重庆市涪陵区人民法院), Shenzhen Bao'an District People's Court in Guangdong Province (广东省深圳市宝安区人民法院) and Weihai Huancui District People's Court in Shandong Province (山东省威海市环翠区人民法院).

<sup>10</sup> See Zhang Zhong (张中), *Practical Basis of Evidence Legislation in China*, conference paper submitted to *The Foundations of the Law of Evidence and Their Implications for Developing Countries*, organized by Professor Ronald Jay Allen from Northwestern University School of Law, Nov. 21, 2014, at 1, available at <https://northwestern.app.box.com/s/mcr948plvv8p63n4215a/1/2619259267/22867273807/1> (last visited Feb. 16, 2015).

also distributed 800 questionnaires, of which 750 were returned and processed.<sup>11</sup> From the perspective of research methodology, Phase One was to gather together all raw data of witnesses testifying in criminal trials in all ten pilot courts during one designated month, from which statistics like the actual appearance rate of witnesses testifying at criminal trials in all ten pilot courts during that month was obtained. Phase Two was to look into every criminal case adjudicated in the ten pilot courts during that designated month. By taking into account of a set of various considerations such as the accused' confessions and guilty pleas as well as the materiality of a witness testimony and its controversial level between the litigating parties, each research team, led by a faculty member of the CUPL Evidence Institute and guided by the Research Office of the Supreme People's Court of China, projected a should-be appearance rate of witnesses testifying at criminal trials of the assigned pilot court during the designated month. Phase Three was to conduct a parallel study between the actual witness appearance rate and the should-be witness appearance rate, and made a thorough analysis (including all sorts of experiment conducted on consideration testing) on the fundamental causes for affecting the appearance rate of Chinese witnesses testifying at criminal trials.

As a faculty member of the CUPL Evidence Institute, the author participated in this national research project by the end of 2012. Primarily based upon the 2013 Field Studies, the author makes an effort in this paper to diagnose various fundamental causes for Chinese witnesses not testifying at trial in criminal proceedings. Part I briefly lays out an overall three-petal theoretical basis for having witnesses testifying at trial. Part II provides sampling statistics released by subdivisions of the Supreme People's Court of China as well as data generated from latest field studies by the

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<sup>11</sup> *Id.*

research teams of the CUPL Evidence Institute in the ten pilot courts, to show that over the past thirty years the appearance rate of witnesses testifying at criminal trials in China has been constantly low and *the 2012 Amended China Criminal Procedure Law* has not substantively affected the established practice of witness testimony in China. Part III, by summarizing eight fundamental problems for the extremely low witness appearance rate, looks into the major causes for preventing Chinese witnesses testifying at criminal trials. Part IV concludes that the challenge is an enormously complicated, multiple-layer, systematic issue, mixed with legal, culture, social, political and historical elements. There is no way to resolve such dilemma by changing or fixing any single variable, layer or element.

#### I. THEORETICAL BASIS FOR HAVING WITNESSES TESTIFYING AT TRIAL

The importance of having witnesses testifying at trial in both civil and criminal proceedings has been highly valued in many countries. In Common Law countries, having witness testifying in courtroom is a prerequisite for cross-examinations between the parties, a characteristic feature of the adversary system. For example, according to the Hearsay Rule of *the United States Federal Rules of Evidence*, if a witness does not testify at trial, his or her testimony is inadmissible by the court.<sup>12</sup> On the other hand, in Continental Law countries, the Principle of Direct and Oral Trial has a similar effect for having witnesses testifying at trial.<sup>13</sup> Such a universal rule has some deeply rooted theoretical basis of which below is an overview of three fundamental aspects. All three merits apply in both civil and criminal proceedings.

##### ***A. A Powerful Tool For Evaluating Witness Testimony and For Determining Case Facts***

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<sup>12</sup> FED. R. EVID. 802.

<sup>13</sup> Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, Salvatore Zappalà (ed.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Mar. 21, 2013, at 1076.

As an essential type of evidence, witness testimony, generally defined as statement of a witness made to the adjudicator during the proceeding process with regard to what he or she perceived about the case fact, is a fundamental basis for fact-finders to determine case facts under dispute.<sup>14</sup> Comparing to other types of evidence, such as documentary evidence, material evidence and audio-visual material, a featured characteristic of witness testimony is its dependence on human's subjectivity.<sup>15</sup> On one hand, witnesses' perception, memory or narration may make mistakes from time to time. On the other hand, there is legitimate risk that a witness may simply lie when making testimony. Thus, how to best determine when a witness stated truth and when did not is a challenge that every trial judge in every country faces. Featured characteristics of passivity and neutrality in judiciary have stopped judges going out of the courtroom to investigate and find out the true facts of cases by themselves. However, by sitting in the courtroom and just reading case files and documentary evidence, judges cannot feel witnesses' real motivations and further can hardly make a fair determination on authenticity of any witness testimony. Thus, a better solution is to have witnesses testify at trial, letting them be questioned and examined by both litigating parties. If a witness made a contradictive testimony in the courtroom, the trial judge may immediately ask such witness to explain. If two witnesses' live testimonies are conflicting with each other, the trial judge may instantly order them up to the stand together, questioning each other. After thousands of years of development in litigation proceedings, having witnesses testifying at trial is still the best way that human beings created to examine and evaluate witness testimony.

***B. An Essential Component of Judicial Proceeding Etiquette***

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<sup>14</sup> Chen Weidong (陈卫东), *supra* note 2, at 40.

<sup>15</sup> *Id.*

Judicial proceeding is an ancient, civilized activity of dispute resolution, which, comparing to other political or social events, has a deeper stress on procedure and formalization. For hundreds of thousands of years, case trials in all countries have been conducted in certain fixed, recurring rituals and procedures, which in return formed certain etiquette unique for judicial proceedings. For example, in many western countries, the design and decoration of a courtroom, settings of judges' bench, dressings of a trial judge, the specific way a judge walking into the courtroom to open a trial, specific swearing procedure for witnesses making statements, as well as the stereotyped way for litigating parties and their counsels to communicate with the trial judge, all reflect a strict pattern of judicial proceeding etiquette, indicating from the beginning till the end a high level of civilization and sanctity in adjudication.<sup>16</sup> One reason for such judicial proceeding etiquette is because judiciary power is sacrosanct, functioning as final words for dispute resolution. Having witnesses testifying at trial is an essential part of such judicial proceeding etiquette requirement. Speaking from a strict sense, absence of witness presenting in courtroom would make a trial incomplete in formality whereas trial judges making final judgment merely based on pieces of documentary evidence would be a violation against dignity of adjudication.<sup>17</sup> On the other hand, when someone gets up to the witness stand at trial, surrounding by solemn courtroom settings and facing judges with full of majesty, he or she would naturally generate a feeling of respect and more likely speak the truth.<sup>18</sup> Especially in those religious countries, when a witness holds a bible and swears to the

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<sup>16</sup> See Zhao Feng (赵丰), *Tan Guifan Sifa Liyi yu Shuli Sifa Quanwei (谈规范司法礼仪与树立司法权威)* [Discussions on the Relationship between Judicial Proceeding Etiquette and Judicial Authoritativeness], FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND SOCIETY], no.8, 2010 (China).

<sup>17</sup> *Id.*

<sup>18</sup> Chen Weidong (陈卫东), *supra* note 2, at 41.

God in front of judges, it is the best chance for him or her to make statements in honesty.

***C. An Inherent Demand by the Parties to Cross-Examine Hostile Witnesses At Trial***

Examination of evidence is an indispensable step in judicial proceedings as well as a procedural right that belongs to both sides of the dispute parties. In order to narrow down resource gap between the procurator and the accused, the accused's right to examine adverse evidence has gained increasing attention all over the world. For example, such right has been written into a series of international treaties of United Nations. Article 14 (3)(e) of the *International Covenant on Civil and Political Rights* (hereinafter short for "ICCPR") puts the parties' right to examine hostile witnesses as a significant element of fair trial, stipulating that "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".<sup>19</sup> Thus, no matter a country belonging to the Common Law system or to the Continental Law system, as long as it executed ICCPR, the country has legal obligation to make sure such right of the dispute parties to examine hostile witnesses being realized within its jurisdiction. And the most practical way to realize such disputing parties' right is to have witnesses testify at trial. Under cross-examinations, the ones with mistaken or fraud testimonies may easily be uncovered. By doing so, trial judges could also take a close observation on both parties' as well as their witnesses' testimonies, demeanor, body language, facial expression as well as other subtle manifestations, which in turn would be very helpful for trial judges to evaluate the reliability level of witness testimony and to determine case facts in a rational and reasonable way.

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<sup>19</sup> I.C.C.P.R. Article 14 (3)(e), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited Feb. 16, 2015).

## II. A COLD, HARD FACT – THE EXTREMELY LOW APPEARANCE RATE OF CHINESE WITNESSES TESTIFYING AT TRIAL IN CRIMINAL CASES

In judicial practice of Mainland China, the appearance rate of witnesses testifying at trial in criminal cases had been constantly low all over the country for a long time. According to sampling authoritative statistics released by the China Institute of Applied Jurisprudence at the Supreme People's Court of China, between January and April 1997, only about 30% criminal cases adjudicated in Wuhan Intermediate People's Court in Hubei Province had witnesses testifying at trial.<sup>20</sup> Such numbers were even lower in most other provinces of China. For example, there were less than 25% witnesses testifying at trial in criminal cases of Fujian province during the year of 1997, and particularly in bribery cases no single witness presented in courtroom.<sup>21</sup> More than a decade later, such a dilemma remained unsolved in Chinese judicial system, with no sign of moving into a positive direction.<sup>22</sup> For example, according to authoritative statistics provided by the Research Office of the Supreme People's Court of China, the appearance rate of witnesses testifying at trial in criminal cases of Huangpu District People's Court of Shanghai Municipality was about 5% in 2007.<sup>23</sup> Data also showed that the Third Intermediate People's Court of Chongqing Municipality adjudicated a total of 2796 criminal cases, among which only 12 cases

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<sup>20</sup> See *Zuigao Renmin Fayuan Guanyu Yinfa <Renmin Fayuan Disange Wunian Gaige Gangyao (2009-2013)>de Tongzhi* (最高人民法院关于印发《人民法院第三个五年改革纲要（2009—2013）》的通知) [*The Notification of the Supreme People's Court about Print and Distribute <Third Five-Year Reform Program of The People's Court(2009~2013)>*], available at <http://baike.baidu.com/view/3143231.htm> (last visited Feb. 16, 2015).

<sup>21</sup> *Id.*

<sup>22</sup> See Long Zongzhi (龙宗智), *supra* note 8, at 136.

<sup>23</sup> *Renmin Fayuan Disange Wunian Gaige Gangyao (2009-2013)* (最高人民法院关于印发《人民法院第三个五年改革纲要（2009—2013）》的通知), *supra* note 20. Also see Zhang Weiwei (张玮玮), *Woguo Xingshi Zhengren Chuting Zuozheng Kunjing Fenxi (我国刑事证人出庭作证困境分析)* [*Analysis on the Dilemma of Chinese Witnesses Not Testifying at Trial in Criminal Cases*], FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND SOCIETY], no.6, 2007, at 521, 521-522 (China).

had a total of 13 witnesses testifying at trial, with an appearance rate of 0.32%.<sup>24</sup> To get a better sense of the deadlock situation over the years, below also provides a sampling statistics table of Hebei District People’s Court of Tianjin Municipality released by the Research Office of the Supreme People’s Court of China, indicating that between 2006 and 2011 only about 1% - 2% witnesses testified in criminal proceedings of its jurisdiction.<sup>25</sup>

Year	2006	2007	2008	2009	2010	2011
Number of criminal cases adjudicated	308	419	455	447	446	352
Number of witnesses subpoenaed	29	31	27	15	9	11
Number of witnesses actually testifying at trial	6	5	9	7	5	4
Percentage of witnesses who were subpoenaed while actually testified at trial	20.6%	16.1%	33.3%	20%	22.2%	18.2%
Percentage of criminal cases with witnesses testifying at trial in all cases adjudicated	1.9%	1.2%	2%	1.6%	1.1%	1.1%

Such extremely low participation rate of witnesses’ testifying in courtroom has caused a series of serious negative impacts in Chinese judicial practice, including but not limited to the following: documentary evidence dominated in fact-findings,<sup>26</sup> to some extent, the trial process was symbolic,<sup>27</sup> the accused had no way to examine witnesses at trial, meaning losing his or her right to confrontation,<sup>28</sup> and false or deceptive testimonies of witnesses were difficult to be exposed at trial, which in

<sup>24</sup> See *Chongqing Disan Zhongji Renmin Fayuan Qunian Zhenrgen Chutinglv Jinwei 0.32%* (重庆第三中级人民法院去年证人出庭率仅为 0.32%) [*The Rate of Witness Appearing in Court Was Only 0.32% in Chongqing Third Intermediate People’s Court Last Year*], FAZHI RIBAO (法制日报) [LEGAL DAILY], June 14, 2011 (China).

<sup>25</sup> *Renmin Fayuan Disange Wunian Gaige Gangyao (2009-2013)* (最高人民法院关于印发《人民法院第三个五年改革纲要（2009—2013）》的通知), *supra* note 20.

<sup>26</sup> Long Zongzhi (龙宗智), *supra* note 8, at 136.

<sup>27</sup> Fan Chongyi (樊崇义), *Xingshi Susong Shishi Wenti yu Duice Yanjiu (刑事诉讼实施问题与对策研究)* [*Problems in Implementations of Criminal Procedural Law and Studies on Solutions*], ZHONGGUO RENMIN GONGAN DAXUE CHUBANSHE (中国人民公安大学出版社) [CHINESE PEOPLE’S PUBLIC SECURITY UNIVERSITY PRESS], 2001 edition, Page 453 (China).

<sup>28</sup> Chen Weidong (陈卫东), *supra* note 2, at 41.

return increased the chance of wrongful convictions.<sup>29</sup> Focused on addressing such problems along with other legislative defects, the 2012 Amendments to *China Criminal Procedural Law* and follow-up judicial interpretations issued by the Supreme People's Court of China made significant amendments over rules regarding witnesses testifying in courtroom, such as Article 187 – specifying conditions for witnesses appearing at courtroom to testify and Article 188 – laying out rules of compelling witnesses to show up in courtroom, as well as added a series of corresponding support measures, such as Article 62 – particular protections on witnesses, and Article 63 – financial reimbursement for witnesses presenting in courtroom.<sup>30</sup> However, reality does not accord with anticipations. The appearance rate of witnesses testifying in criminal trials still has not been notably picked up since 2012 in China.<sup>31</sup> Surveys conducted in the 2013 Field Studies show that 26.4% of the 750 questionnaire respondents (judges) reported that for criminal cases they heard in the past three years, the appearance rate of witnesses was below 5%, while 24.4% of the respondents indicated that the witness appearance rate ranged from 5% to 20%.<sup>32</sup> Till now, it is almost certain to say that Chinese legislators' intent embedded in the 2012 Amendments to *China Criminal Procedural Law* regarding promoting witnesses testifying at trial more or less has failed.

### III. EIGHT MAJOR CAUSES FOR THE EXTREMELY LOW APPEARANCE RATE OF WITNESSES TESTIFYING IN CHINESE COURTROOM OF CRIMINAL CASES

Such extremely low appearance rate of witnesses testifying at trial in Chinese criminal proceedings happens with reasons. Primarily based on the 2013 Field Studies while influenced by a number of latest articles published on leading Chinese law

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<sup>29</sup> *Id.* at 40.

<sup>30</sup> Xingshi Susong Fa (刑事诉讼法) [China Criminal Procedure Law], *supra* note 4.

<sup>31</sup> See Long Zongzhi (龙宗智), *supra* note 8, at 136.

<sup>32</sup> Zhang Zhong (张中), *supra* note 10, at 5.

journals, the author in this paper summarizes and presents below with eight problems as the major causes for Chinese witnesses not showing up to testify before the judge in criminal trials.

**A. Constitutional Problem – Deficient Authoritativeness of Judiciary Under China’s Overall Political Structure**

In United States, constitutional principles of “Separation of Power” and “Check and Balance” win the hearts of all. The three power bodies – legislative, administrative and judicial branches – are independent from each other and exercise their own authorities separately, within which the judicial branch, in a narrow sense, particularly refers to the federal and state court systems while does not include prosecutions and police stations. In contrast, the political system in China is named “Centralization with Top-down Supervisions”.<sup>33</sup> Furthermore, the Chinese Constitution defines the political system of China as “One Government with Two Judicial Wings – the People’s Court and the People’s Procuratorate under the leadership of the People’s Congress”.<sup>34</sup> The National People’s Congress is both an organ of the State Power and the State Legislative Body. The Chinese Government, the People’s Court and the People’s Procuratorate exercise their own authorities under laws and regulations enacted by the National People’s Congress as well as are supervised by it. Thus, the political powers in China are not distributed separately and equally, rather belong to a system of “leadership – being led” and “supervising – being supervised”.

Differences in political systems result in disparities in judicial authorities. In United States, because of the constitutional principles of “Separation of Powers” and

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<sup>33</sup> Zuo Weimin (左卫民) & Ma Jinghua (马静华), *Xingshi Zhengren Chutinglv: Yizhong Jiyu Shizheng Yanjiu de Lilun Chanshu (刑事证人出庭率: 一种基于实证研究的理论阐述) [Appearance Rate of Witnesses Testifying at Trial in Criminal Proceedings: Theoretical Analysis Based upon Empirical Research Studies]*, ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE], no.6, 2005 at 171, 164-176 (China).

<sup>34</sup> *Id.*

“Check and Balance”, the judicial branch – U.S. federal and state court systems – has an equally vital political status along with its legislative branch and executive branch. Thus, to certain extent, the superior authoritativeness of U.S. court system comes from its prestigious political status and a clear empowerment by the U.S. Constitution. In contrast, in China, under the principle of “Centralization with Top-down Supervisions”, not only different State organs have strict differences in political hierarchies, but different governmental employees within the same State organ have strict differences in political titles. In daily working relationships, Chinese State organs, including courts, are very sensitive on each other’s political hierarchy, and Chinese governmental officials, including judges, pay lots of attention on each other’s administrative titles and treat each other differently in accordance with their administrative levels. Chinese officials, including judges on all levels, calculate all the time on whether they should treat other peer governmental officials with equally or higher or lower political respect. A well-known hidden political rule in China is that lower-level governmental agencies or officials should pay abundant respect and honor to any higher-level governmental agencies or officials. Under such a political structure, Chinese courts are actually under leadership of the Chinese Communist Party while supervised by the People’s Congress, and on the same political status level with numerous administrative organs, police stations and procuratorates.<sup>35</sup> Any Chinese judge, no matter from local district court or from the Supreme People’s Court of China, is an ordinary governmental employee within a massive, hierarchical state bureaucracy system. Thus, from the perspective of China’s overall political structure, the judicial authoritativeness of Chinese courts is congenitally deficient.

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<sup>35</sup> *Id.*

The relative low authoritativeness of judiciary in China has a profound negative impact on witness testifying at trial, which is highlighted in the case of governmental official witnesses.<sup>36</sup> By taking into account of political need for honor and respect, Chinese trial judges would always hesitate when there is need to call for a governmental official witness who is in higher political hierarchy to testify at trial.<sup>37</sup> Apparently, according to the traditional logics of Chinese politics, there is risk of irritating political leaders in such a situation. As a general practice, if any trial judge does so, general public in China may see such action as recklessness without political common sense. In criminal proceedings, such governmental official witnesses often would be police officers. In western countries, police officers frequently testify at trial as eye-witnesses. However, in China police officer-witnesses presented in courtroom in very rare cases.<sup>38</sup> There are various reasons behind this awkward phenomenon, within which one of the most obvious reasons is the political hierarchy problem addressed here.

Maybe some one would say governmental official witnesses testifying in courtroom only represent a relatively small portion of witnesses and the analysis from the perspective of political hierarchy does not have universal significance. However, it is fair to say the impact of Chinese governmental official witnesses not testifying in courtroom cannot be overlooked. Although governmental official witnesses only represent a small portion of witnesses in general, their appearance rate in courtroom does relate to an immense issue on whether laws and regulations can be implemented uniformly. Rule of law, in other words, means ruling by laws and regulations that apply to all citizens within the jurisdiction equally and fairly. Just as everyone learned

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<sup>36</sup> Long Zongzhi (龙宗智), *supra* note 8, at 3.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

in the primary school, everyone is equal before the law. In a legal society, there is no room for any sort of superior privileges above the law. If governmental officials could easily avoid testifying at trial, they may have a chance to become bad role models for the general public to follow.

***B. Institutional Problem – Criminal Proceeding in China Like a “Relay Race” or “Assembly Line” Among Police Department, Procuratorate and the Court***

In China, the police department, the procuratorate and the court are included in the same overall governmental system, with an equal level of administrative hierarchy. Each one of the three has an independent, equal autonomy on judicial powers and responsibilities, while all together constitute the judicial system of China in a broad sense.<sup>39</sup> The designers of China’s judicial system originally expected these three state departments working together while restricting each other’s power.<sup>40</sup> Thus, there was no concept of “trial centrality” or “judge dominance” in China’s criminal proceedings. It is clear that no Chinese court has power to control pre-trial stages because pre-trial stages are the autonomous zones of the police department and the procuratorate.<sup>41</sup> Either the police or the procuratorate has an independent power to “search and seizure” without any approval or warrant issued by a court. Criminal proceeding in China is like a “relay race” or “assembly line” among police department, procuratorate and the court, with a clear division of labor among these three internally. Thus, for purpose of avoiding conflicts with the police and the procuratorate, the court seldom rejects or reverses evidence prepared by the police or the procuratorate in criminal proceedings (i.e. pre-trial written testimony of witnesses).<sup>42</sup> Evidence prepared by the police or by the procuratorate, once submitted to the court, has certain

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<sup>39</sup> Lv Erqi (陆而启), *Yegong Haolong – Xingshi Zhengren Chuting de yi ge Yuyan (叶公好龙: 刑事证人出庭的一个寓言) [A Fable of Double Faces on Witness Presence in Criminal Court]*, ZHENGJU KEXUE (证据科学) [EVIDENCE SCIENCE], no. 1, 2008 at 40-43, 37-48 (China).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

congenital authoritativeness and effectiveness in China, and trial judges may experience significant pressure if they want to challenge such written/documentary evidence.<sup>43</sup> For a long period of time, trial process of criminal proceedings in China was like a confirmation procedure (with seldom rejections) for pre-trial documentary evidence or written testimony provided by the procuratorate while the ideal, substantive trial function of fact-findings has been constantly down-played.<sup>44</sup> Thus, correspondingly, having witnesses testify at trial in criminal proceedings often sounded like an unnecessary action in criminal cases in China.

### ***C. Cognitive Problem – Long-time Ignorance of Accused’s Confrontation Right in China***

It is commonly believed by trial judges in China, just as the 2013 Field Studies indicated, that as long as facts of a case turn out being clear to judges on the bench through reviewing documentary evidence submitted by the parties, then calling for witnesses to present at trial to testify on the same matter is considered as redundant, which in the mind of most Chinese judges would only add extra but recurring adjudicating work while delay the trial process.<sup>45</sup> It even has been written into Article 187 of the *China Criminal Procedural Law* that there are three conditions for witnesses testifying at trial, one of which is trial judges shall believe it is necessary for a witness to testify at trial,<sup>46</sup> and the standard for judges to determine “necessity” here is whether or not the witness may add new facts or may help trial judges better

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<sup>43</sup> Long Zongzhi (龙宗智), *supra* note 8 at 1-2; Lu Erqi (陆而启), *supra* note 39, at 40-42.

<sup>44</sup> *Id.*

<sup>45</sup> See Lin Lin (林林), *Zhengren Zuozheng yu Zhengren Zhengyan Zhidu de Leng Sikao (证人作证与证人证言制度的冷思考)* [Thoughts on Witness Testifying and the Witness Testimony Rules], XUESHU JIAOLIU (学术交流) [ACADEMIC EXCHANGE], no. 1, 2004, at 43, 42-47 (China); Gao Jie (高婕), *Xin Xingsufa Shiye xia de Zhengren Chuting Zuozheng Xianzhuang ji Duice (新刑事诉讼法视野下的证人出庭作证现状及对策)* [The Reality of Low Appearance Rate of Witnesses Testifying at Trial and Corresponding Solutions from the Perspective of the Lately Amended Criminal Procedural Law], DI JIU JIE GUOJIA GAOJI JIANCHAGUAN LUNTAN LUNWENJI (第九届国家高级检察官论坛论文集) [THE 9<sup>TH</sup> NATIONAL SENIOR PROCURATOR FORUM PROCEEDINGS], Aug. 21, 2013 (China).

<sup>46</sup> China Criminal Procedure Law, article 187.

determining case facts.<sup>47</sup> What is missed or ignored here is the accused's right to confront a witness whose testimony is against the accused's interest.<sup>48</sup>

Even though respecting and protecting citizens' human rights has been written into China's Constitution since the beginning, and although it is widely recognized in China that the two fundamental goals for the judiciary in criminal adjudications are cracking down on crimes and protecting human rights, the 2013 CUPL Field Studies as well as numerous academic works published on leading Chinese law journals indicate that in practice, Chinese judges are way more obsessed on fighting against crimes but seem not paying enough attention on the other equally important responsibility – to protect fundamental human rights of both parties in litigation, including the accused's.<sup>49</sup> Surveys indicate that a significant number of Chinese judicial officers even did not realize that the accused has such inherent right of face-to-face confrontation and believe granting the accused a chance at trial to examine written testimony of an adversary witness but without the presence of the adversary witness in the courtroom would be good enough to protect the accused's basic human rights.<sup>50</sup>

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<sup>47</sup> Wan Yi (万毅), *Xin Xingsu Fa Zhengren Chuting Zhidu de Ruogan Fajieshi Wenti (新刑事诉讼法证人出庭制度的若干法解释问题)* [Interpretation Problems regarding Rules of the Witnesses Testifying at Trial within the Lately Amended China Criminal Procedure Law], GANSU ZHENGFA XUEYUAN XUEBAO (甘肃政法学院学报) [JOURNAL OF GANSU INSTITUTE OF POLITICAL SCIENCE AND LAW], Nov., 2013, at 2, 3, 1-6 (China).

<sup>48</sup> Yang Xiong (杨雄), *Zhengren Chuting Zuozheng Zhidu de Lifa Fazhan yu Kunjing (证人出庭作证制度的立法发展与困境)* [Legislative Developments and Dilemmas in the System of Witnesses Testifying at Trial], HENAN SHIFAN DAXUE XUEBAO (河南师范大学学报) [JOURNAL OF HENAN NORMAL UNIVERSITY], no. 5, 2012 at 95, 96, 95-99 (China); also see Gao Jie (高婕), *supra* note 45.

<sup>49</sup> See Long Zongzhi (龙宗智), *Woguo Xingshi Zuozheng Zhidu zhi Sanda Guaizhuang Pingxi (我国刑事作证制度之三大怪状评析)* [Analysis on the Three Major Strange Phenomenon in the System of Witness Testifying in Chinese Criminal Proceedings], RENMIN FAYUAN BAO (人民法院报) [PEOPLE'S COURT DAILY], June 1, 2001 (China).

<sup>50</sup> Wang Zhuhao (汪诸豪) & Shen Peng (沈鹏), *Renmin Fayuan Susong Zhengju Guiding Shiyongqingkuang de Diaoyan Baogao (人民法院诉讼证据规定适用情况的调研报告——与马鞍山市两级法院法官座谈)* [Field Study Report on Implementation of the People's Courts Provisions of Evidence in Litigation] 12 (Dec. 16, 2013) (an interim research product for the 2013 Field Studies) (unpublished product on file with the CUPL Evidence Institute) (China) [hereinafter short for "CUPL Field Study Report"]; also see Long Zongzhi (龙宗智), *supra* note 8.

***D. Cultural Problem – Invisible Influence by Chinese Traditional Culture and Social Environment of “Not to Involve Oneself into a Dispute” and “Taking No side In Any Conflict”***

Affected by theories of the Confucianism and thousands of years' traditional Chinese cultures, most Chinese people deeply believe in ancient Chinese proverbs of “harmony is most precious” (和为贵), “not to involve oneself into a dispute and take no side in any conflict” (明哲保身), “maximize what is good and minimize what is bad” (趋利避害) and “avoid trouble whenever possible” (多一事不如少一事).<sup>51</sup> Such ancient customs significantly affects daily life of Chinese people as well as the modern Chinese society as a whole. When taking actions or making decisions in daily life, many Chinese do not even need to remind themselves about such ancient proverbs but their conduct simply would follow. Keeping high sensibility in relationships, paying significant attention on “face-saving” (面子), no offense to others, and harmony in work and in life are the most important guidance for conduct in daily life of most Chinese.<sup>52</sup> As a result, within a very long period of time in the past, most people in China traditionally treated litigation or lawsuit as a really “awful thing” simply since certain features of litigation are incompatible with such ancient Chinese customs.<sup>53</sup> For example, confliction with the opposing party is unavoidable in litigations, and lawsuit would lead to “face-losing” of someone, causing tensions

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<sup>51</sup> See Chen Weidong (陈卫东), *supra* note 2, at 41; Zhang Liming (章礼明), *Zhengren Chuting Nan de Wenhua Leixingxue Jieshi* (证人出庭“难”的文化类型学解释) [*Cultural Typology Explanation on the Rare Appearance of Witness in Court*], HEBEI FAXUE (河北法学) [HEBEI LAW SCIENCE], no.10, 2012, at 68, 68-74 (China); Zhang Xu (张旭) & Yi Jisong (易继松), *Guanyu Zhengren Buchuting Zuozheng de Falv Sikao* (关于证人不出庭作证的法律思考) [*Thoughts on Witnesses Refusing to Testify at Trial*], XIANDAI FAXUE (现代法学) [MODERN LAW SCIENCE], no.4, 2002, at 82, 82-85 (China).

<sup>52</sup> Li Shouwei (李寿伟), *Zhengren Chuting Zuozheng: Jiejue Laowenti de Xinfangan* (证人出庭作证: 解决老问题的新方案) [*Witnesses Testifying at Trial: New Approaches to Solve Old Problems*], ZHONGGUO SHEHUI KEXUE BAO (中国社会科学报) [CHINA SOCIAL SCIENCE WEEKLY], April 30, 2014 (China), at 1.

<sup>53</sup> *Id.*

between litigating parties, or making some one experiencing trouble or conflicts.<sup>54</sup> Thus, in reality, nowadays when facing criminal litigations, many Chinese witnesses deeply influenced by such customs, hesitate or even reject to appear in courtroom. It is common to see Chinese, when being noticed by the court to show up at trial as witnesses, do not cooperate.<sup>55</sup> In many cases, they may find some excuse to evade, or simply disappear before the hearing date without notifying the court or either side of the litigating parties.<sup>56</sup>

### ***E. Legislative Problem – Severe Defects in Chinese Legislations Regarding Witnesses Testifying at Trial***

Defects in legislation are a key reason for Chinese witnesses not showing up in courtroom. As a summary, based on the 2013 Field Studies as well as the latest publications of leading legal academics in China, there are at least three major aspects of legislative defects in China regarding witness testifying at trial.

First is the Problem of Severe Legislation Incompleteness that led to a systematic failure of witness testifying at trial in China.<sup>57</sup> For example, under the *China Criminal Procedural Law* or any other legislation in China, there is no specific rule addressing direct and cross examinations or the accused's right to confrontation.<sup>58</sup> Only Article 59 of the *China Criminal Procedure Law* briefly mentioned witness testimony shall be examined by all parties at trial before being admitted as the basis for adjudication, but it is too general.<sup>59</sup> Also, neither witness impeachment rule nor rehabilitation rule exist in Chinese procedural laws. Without such specific regulations, there would have

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<sup>54</sup> *Id.*

<sup>55</sup> Chen Weidong (陈卫东), *supra* note 2, at 41.

<sup>56</sup> Wang Zhuhao (汪诸豪) & Shen Peng (沈鹏), *Xingshi Zhengju Guize zai Sifa Shijian zhong de Shiyongxing (刑事证据规则在司法实践中的适用性——基于马鞍山市两级法院的调研)* [*Applicability of the Criminal Evidentiary Rules in Judicial Practice – Based on Field Studies conducted in Ma'anshan Intermediate People's Court in Anhui Province*], RENMIN LUNTAN (人民论坛) [PEOPLE'S TRIBUNE], no.17, 2014, at 117, 117-119 (China).

<sup>57</sup> Chen Weidong (陈卫东), *supra* note 2, at 41-42.

<sup>58</sup> Lv Erqi (陆而启), *supra* note 39, at 46; Zhang Weiwei (张玮玮), *supra* note 23, at 522.

<sup>59</sup> China Criminal Procedural Law, article 59.

no clear guidance on how to challenge a witness testifying at trial, especially from standpoint of the opposing party, which is a direct cause for low effectiveness of witnesses presenting at trial in China.<sup>60</sup> Furthermore, there is no hearsay rule or hearsay exception/exemption rule in China, which means there is no clear and specific regulation in China addressing out-of-court statement evidence.<sup>61</sup>

Not only does China lack substantive trial procedural rules regulating examinations over witnesses, but practical procedural rules addressing subpoena of witnesses are neither in place.<sup>62</sup> Chinese laws just stipulate that the judge shall subpoena witnesses to testify at trial whenever three conditions under Article 187 of the *China Criminal Procedural Law* are satisfied.<sup>63</sup> However, how to initiate and conduct the process of “subpoena of witness” is a question with no clear answers. Corresponding step-by-step approaches could be found in Chinese laws and regulations.<sup>64</sup> In practice, as reflected in the 2013 Field Studies, a significant percentage<sup>65</sup> of judges in the pilot courts believe that as long as court summons ordering a witness to testify at trial, then it is the procuratorate’s responsibility to make sure such witness showing up in the courtroom on time.<sup>66</sup> However, on the other hand, almost all Chinese procuratorates believe that since summons of witness were issued by the court, it is the court’s responsibility to have the witness present at

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<sup>60</sup> Yang Xiong (杨雄), *supra* note 48, at 96.

<sup>61</sup> Xu Juanjuan (许娟娟), *Xingshi Zhengren Bu Chuting Zuozheng de Yuanyin Tanjiu (刑事证人不出庭作证的原因探究) [Explorations on Why Witnesses not Testifying at Trial in Criminal Proceedings]*, FAZHI YU SHEHUI (法制与社会) [LEGAL SYSTEM AND SOCIETY], no. 12, 2007 at 525, 525-526 (China); Wan Yi (万毅), *supra* note 47.

<sup>62</sup> *Id.*, at 526; Zhang Weiwei (张玮玮), *supra* note 23 at 522.

<sup>63</sup> China Criminal Procedure Law, article 187.

<sup>64</sup> Wan Yi (万毅), *supra* note 47.

<sup>65</sup> The CUPL Field Studies indicated that 78% trial judges from the ten pilot courts believed as long as court summons ordering a witness to testify at trial, then it is the procuratorate’s responsibility to make sure such witness showing up in the courtroom on time.

<sup>66</sup> See Wang Zhuhao (汪诸豪) & Shen Peng (沈鹏), *supra* note 56, at 10; Zhang Weiwei (张玮玮), *supra* note 23, at 522.

trial on time.<sup>67</sup> Such buck-passing dilemma in China was ultimately due to a lack of specified procedural regulations addressing subpoena of witnesses.<sup>68</sup>

In addition, there is no specific procedural law in China regulating admissibility or probative weight priorities between pre-trial written testimony and at-trial live testimony.<sup>69</sup> A related but different problem here is that no specific rule in the Chinese procedural law essentially limits the use of written testimony, except for one single rule regulating appraisal opinion letters of forensic scientists under Article 187 of the *China Criminal Procedure Law*.<sup>70</sup>

The second major aspect of legislative defects in China regarding witness testifying at trial is the Problem of Flaws, Loopholes and Contradictions in the Current-Existing Laws. For example, Article 187 of the *China Criminal Procedural Law* provides that as long as one of the three conditions – 1) witness testimony in dispute, 2) with significant impact to adjudication of the case, and 3) trial judge’s belief that it is necessary for a witness to present at trial – cannot be satisfied, such witness has no responsibility to testify at trial.<sup>71</sup> However, as addressed in Section C aforementioned, such a regulation misses the point of the accused’s right of face-to-face confrontations over a hostile witness whose testimony is against the accused’s

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Xu Juanjuan (许娟娟), *supra* note 61 at 525; Wang Li (王力), *Xingsu Fa Xiugai Hou Zhengren Chuting Zuozhenglv Rengdi de Yuanyin* (刑事诉讼法修改后证人出庭作证率仍低的原因) [*Reasons for Appearance Rate of Witnesses Testifying at Trial still Low after the Lately Amended Criminal Procedure Law*], DAQING SHEHUI KEXUE (大庆社会科学) [DAQING SOCIAL SCIENCES], no. 4, 2013 at 119, 525-526 (China); Feng Xinghua (冯杏华), *Xiugai hou Xingshi Susongfa Zhengren Chuting Zuozheng Zhidu Pingxi* (修改后刑事诉讼法证人出庭作证制度评析) [*Comments on the Rules of Witnesses Testifying at Trial After the Criminal Procedure Law Amended*], FAZHI LUNTAN (法治论坛) [NOMOCRACY FORUM], no. 1, 2013 at 360, 356-361 (China).

<sup>70</sup> Article 187 of the *China Criminal Procedure Law* stipulates that when all three conditions of Article 187 are satisfied, forensic scientists shall present at trial to testify. If, after being notified by the court, some forensic scientist refuses to show up in the courtroom, then his or her written appraisal opinion letter is inadmissible; *also see* Long Zongzhi (龙宗智), *supra* note 49, at 137; Wan Yi (万毅), *supra* note 47, at 5-6.

<sup>71</sup> China Criminal Procedure Law, article 187.

interest.<sup>72</sup> Instead, Article 187 of the *China Criminal Procedural Law* sets up a legal basis for a witness not testifying at trial, as long as the witness can prove his or her testimony is not material to adjudication of the case or if he or she can convince the trial judge that there is no necessity for him or her to testify at trial.<sup>73</sup>

Even if Article 187 requires a witness to testify at trial, Article 190 of the *China Criminal Procedure Law*, among other laws and regulations in China, stipulates that for those witnesses who do not present at trial, their pre-trial written testimonies shall be read in front of the judge at trial by the procurator (or by the defender if such witnesses are for the accused).<sup>74</sup> So, on one hand, the law requires certain types of witnesses to testify at trial while on the other hand, the law permits pre-trial written testimonies being read at trial.<sup>75</sup> Thus, the law has a problem of self-contradiction here.

The third major aspect of legislative defects in China regarding witness testifying at trial is the Problem of Imprecisions and Ambiguities in Regulations, related to the second major aspect of legislative defects above-mentioned. For example, the *China Criminal Procedural Law* does have general rules on safety protection of witness testifying at trial, such as Article 61 and 62.<sup>76</sup> However, a survey on the general public (part of the 2013 Field Studies) indicates that, by being asked “why you would not be willing to testify at trial”, 79% respondents who were randomly selected in public chose the option of “being afraid of retaliation by the opposing party in

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<sup>72</sup> Yang Xiong (杨雄), *supra* note 48 at 95, 96; Zhang Weiwei (张玮玮), *supra* note 23, at 521.

<sup>73</sup> Wang Li (王力), *supra* note 69, at 118.

<sup>74</sup> China Criminal Procedure Law, article 190; *also see* Provisions of the Supreme People’s Court, the Supreme People’s Procuratorates, the Ministry of Public Security, the Ministry of State Security and the Ministry of Justice concerning the Examination and Judgment of Evidence in Death Sentence Cases and Provisions on the Exclusion of Illegal Obtained Evidence in Criminal Cases, article 1 (1).

<sup>75</sup> Luo Qian (罗倩), *zai Gongzheng yu Xiaolv Zhijian –Zhengren Chuting Zuozheng Zhidu de Kunjing he Chulu* (在公正与效率之间：证人出庭作证制度的困境和出路) [*Between Justice and Efficiency – Dilemmas and Solutions of Rules regarding Witnesses Testifying at Trial*], *ZHONGGUO SHIYOU DAXUE XUEBAO* (中国石油大学学报) [JOURNAL OF CHINA UNIVERSITY OF PETROLEUM], no. 1, 2014 at 56, 55-59 (China).

<sup>76</sup> China Criminal Procedure Law, article 61, 62.

litigation”. So, even though legislation lays out a general rule over witness protection, in reality, Chinese witnesses still have a strong feeling of insecurity when considering testifying at trial. Besides the Cultural Problem as addressed in Section D aforementioned, the missing part here, includes but not being limited to, specified stipulations on the scope of protection target(s), specific type(s) of case(s) that would trigger witness protection, a detailed roadmap on how to apply for such witness protection, a reviewing standard for such witness-protection applications, a reconsideration mechanism in case such witness protection application did not pass through the reviewing process, specific time lines before and after trial for starting such witness protections, specific, practical measures to protect witnesses, specified organizations that are assigned to conduct such witness safety protection and how they cooperate with each other on the safety-protection assignment, etc.<sup>77</sup>

Similar problem of imprecision and ambiguity exists in regulations of witness compensation. The *China Criminal Procedural Law* does have general rule on witness compensation, such as Article 63.<sup>78</sup> However, the law does not specify the scope of compensation, the compensation standards, where funding comes from, as well as which governmental organization(s) is or are in charge of such witness compensation, etc.<sup>79</sup>

***F. Motivational Problem – Chinese Judges Preferring Documentary/Written Evidence To At-Trial Witness Testimonies While Chinese Procurators Reluctant to Have Their Witnesses Testify At Trial***

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<sup>77</sup> Feng Xinghua (冯杏华), *supra* note 69, at 360; Luo Qian (罗倩), *supra* note 75, at 56; Shi Yihua (史轶华), *Xingshi Anjian Zhengren Jujue Chuting Zuozheng zhi Yuanyin yu Duice Tanxi (刑事案件证人拒绝出庭作证之原因与对策分析) [Reasons and Solution on Witnesses Rejecting to Testify at Trial in Criminal Proceedings]*, FAZHI BOLAN (法制博览) [LEGALITY VISION], Nov. (middle), 2014 at 242, 242-243 (China).

<sup>78</sup> China Criminal Procedure Law, article 63.

<sup>79</sup> Zhao Fei (赵飞), *Lun Woguo Xingshi Zhengren Chuting Zuozheng Zhidu (论我国刑事证人出庭作证制度) [Discussion on the System of Witnesses Testifying at Trial in China]*, SHANDONG QINGNIAN ZHENGZHI XUEYUAN XUEBAO (山东青年政治学院学报) [JOURNAL OF SHANDONG YOUTH UNIVERSITY OF POLITICAL SCIENCE], no.5, 2012 at 98, 95-99 (China).

For a long period of time in the past, Chinese judges largely relied upon written documents or documentary evidence in determining case facts at criminal trials – what is widely known as “proceedings conducted in writings” or “file-transcript centrism”.<sup>80</sup> Based upon the 2013 Field Studies, it indicated that in recent years, even though continuous legislation amendments and judicial reforms have brought more features of the adversary system into China’s criminal proceedings, judges still heavily rely upon written or documentary evidence, habitually or not. To a large extent, written evidence replaced the role of witness live testimony at trial in China’s judicial practice.<sup>81</sup> In other words, in China, written testimony is the mainstream channel for witnesses expressing their messages to the court while testifying in courtroom is an exceptional situation.<sup>82</sup> It is normal in China’s criminal proceedings that, even if witnesses showed up in courtroom, procurators still chose to have their witnesses read prior prepared written testimony or simply submitted the written testimony to the trial judge for review with no objection by the accused, nor would be denied by the trial judge.<sup>83</sup> After reviewing such written testimony, trial judges in China usually would consider it is no longer necessary for the same witness at trial to testify on the same issue or the witness would be granted very short period of time to do so.<sup>84</sup>

Based upon feedbacks from the 2013 Field Studies, there is strong impression that Chinese judges and procurators generally believe written testimony is more accurate and reliable than witness live testimony at trial. As a summary, their typical rationale

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<sup>80</sup> Zuo Weimin (左卫民) & Ma Jinghua (马静华), *supra* note 33, at 171.

<sup>81</sup> See Deng Shengtao (邓胜涛), Huang Jinbo (黄金波) & Wu Ruyu (吴如玉), *Xingshi Anjian Zhengren Bu Chuting Zuozheng de Yuanyin yu Duice* (刑事案件证人不出庭作证的原因与对策) [*Reasons and Resolution on Witnesses Not Presenting in Courtroom to Testify in Criminal Proceedings*], RENMIN SIFA (人民司法) [PEOPLE’S JUDICATURE], no.11, 2001 at 32, 32-34 (China).

<sup>82</sup> *Id.*

<sup>83</sup> Long Zongzhi (龙宗智), *supra* note 49, at 137.

<sup>84</sup> *Id.*

is when the witness made such written testimony to the police at the investigation stage, their perception and memory were fresh, comprehensive and clear to the most extent, and at that moment which would be immediately after the crime occurred, the witness would encounter the least outside interferences and least self-concerns when making written testimony to the police.<sup>85</sup> When criminal proceeding continues, on one hand, social impact on the witness would grow, especially from the side of victim and from the accused, as well as self-concerns of the witness would rise up, such as fear of reprisal or litigation burnout; on the other hand, memory of the witness on facts of the crime would naturally be getting vague with the passage of time.<sup>86</sup> Thus, based on such recognitions, the reliability of witness live testimony at trial, in the mind of Chinese judges and procurators, is generally not as strong as written testimony made to the police or procurator before trial.<sup>87</sup>

In addition, certain adjudicating mechanisms in China's criminal proceedings help elevate written or documentary evidence to an even higher level of importance. When talking about judicial independence in China, it means trial court shall have independent adjudicating power in each specific case.<sup>88</sup> Here, "trial court" means trial court as a whole, rather than the individual trial judges.<sup>89</sup> According to the *China Criminal Procedural Law*, a typical trial shall be adjudicated by a panel of judges.<sup>90</sup> However, in reality, within each Chinese court, there is an adjudicatory committee composed by senior-level judges that do not sit on the bench at trials but actually have the power of final words on determination of difficult, complex or important cases of

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<sup>85</sup> Also see Zuo Weimin (左卫民) & Ma Jinghua (马静华), *supra* note 33, at 173.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Wang Li (王力), *supra* note 69, at 117.

<sup>89</sup> *Id.*

<sup>90</sup> China Criminal Procedure Law, article 178.

its own jurisdiction.<sup>91</sup> According to Article 15 of *Notice of the Supreme People's Court on Issuing the Implementation Opinions on Reforming and Improving the Adjudicatory Committee System of the People's Court*, the adjudicatory committee shall discuss and determine a case according to a procedure of listening to reports from the panel of trial judges, inquiry, comment and finally vote for the result.<sup>92</sup> Throughout such process, the only way for the adjudicatory committee to determine facts of the case is through listening to case report from the panel of trial judges or reviewing case files by its own and the adjudicatory committee would not be in contact at all with the litigating parties or any witness at any time.<sup>93</sup>

On the other hand, from the perspective of procurators, due to a robust system of documentary evidence, usually when Chinese procurators present their side of case at trial, they already have witness testimonies needed in written form at hand, and more often than not believe nothing else their witnesses may add for their argument by testifying at trial in person.<sup>94</sup> In addition, it is commonly believed by Chinese procurators that if having their witness testify at trial, there is risk that such witness may retract his or her previous pre-trial testimony by saying something different in the courtroom.<sup>95</sup> Written testimony or documentary evidence would not change content by presenting at trial, but when witnesses are testifying at trial, due to various reasons, such as anxiety, nervousness or lack of basic public speaking skill, more often than not unintentionally they may say something inconsistent with prior statements of their own.<sup>96</sup> And once the procurator's witness says something

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<sup>91</sup> China Criminal Procedure Law, article 180; *also see* Wang Li (王力), *supra* note 69, at 117.

<sup>92</sup> *Id.*

<sup>93</sup> *See* Chen Ruihua (陈瑞华), *Anjuan Yisong Zhidu de Yanbian yu Fansi (案卷移送制度的演变与反思) [Evolution in Case File Transfer System and Reflections]*, ZHENGFA LUNTAN (政法论坛) [TRIBUNE OF POLITICAL SCIENCE AND LAW], no.5, 2012 (China).

<sup>94</sup> Zuo Weimin (左卫民) & Ma Jinghua (马静华), *supra* note 33, at 170.

<sup>95</sup> *Id.*; *also see* Li Shouwei (李寿伟), *supra* note 52.

<sup>96</sup> Lu Erqi (陆而启), *supra* note 39, at 42-43.

inconsistent with prior statements of his or her own in front of a judge at trial, the trial judge usually would order the procurator to redo a whole process of investigation, verification and/or appraisal, in order to determine which version of the witness' statements is accurate.<sup>97</sup> Such repeating procedure is extremely time-consuming to the procurators and there is risk that by the end of the repeated investigation, it turns out that such witness testimony is actually adverse to the procurator's case.<sup>98</sup> Thus, in order to avoid all troubles above-mentioned, in practice, Chinese procurators usually are very reluctant (or to say lack of incentive) to have their witnesses testify at trial.<sup>99</sup>

There is another potential issue here, which especially in the past caused a few of Chinese procurators reluctant to have their witnesses testify at trial. In a small number of Chinese criminal cases in the past, written testimonies of witnesses for the procurator side were obtained through illegal manners at pre-trial investigation stage.<sup>100</sup> Such witnesses, if presenting at trial, would be almost certain to say something different or even opposite from their pre-trial written testimonies. Thus, apparently procurators do not want to present such witnesses at trial. Nonetheless, in recent years, due to a persistently increasing nation-wide attention on illegal obtained evidence and through high-technical solutions such as compulsory whole process videotaping of witness inquiry at investigation stage, such illegally obtaining written testimony occurrences have significantly decreased in Chinese procurators' practice.<sup>101</sup>

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> See Chen Weidong (陈卫东), *supra* note 2, at 42.

<sup>100</sup> See Wang Jiancheng (汪建成), *Zhongguo Xuyao Shenmeyang de Feifa Zhengju Paichu Guize (中国需要什么样的非法证据排除规则) [What kind of Illegal Obtained Evidence Exclusionary Rule is needed in China]*, HUANQIU FALV PINGLUN (环球法律评论) [GLOBAL LAW REVIEW], no.5, 2006 (China); Chen Ruihua (陈瑞华), *Feifa Zhengju Paichu Guize de Zhongguo Moshi (非法证据排除的中国模式) [China Model on Exclusion of Illegal Obtained Evidence]*, ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE], no.6, 2010 (China).

<sup>101</sup> *Id.*

***G. Performance Problem – Ineffective Performance by Witnesses and by the Witness Examiners in Courtroom***

Even in the very few cases that witnesses did testify at trial, what most Chinese witnesses did in the courtroom was simply repeating or reading their written testimony made before trial which had already been reviewed by judges before trial started.<sup>102</sup> In addition, a significant number of Chinese witnesses testifying at trial lacked basic skills of public speaking, or were not well coached by counsel before trial or even the litigating party for whom the witnesses testified for simply did not have a lawyer to defend his or her case.<sup>103</sup> Thus, it is common to see in China that, even though witnesses did present at trial and testify, the message they conveyed was the same as or even more limited than their written testimony that had already been submitted to the court before trial. More importantly, due to absence of legislations on direct/cross examinations as well as witness impeachment in China, even if witnesses show up in the courtroom to testify, the opposing party seldom would be able to do an effective examination over the adversary witness, not even to mention impeaching witnesses for lack of credibility.

***H. Enforcement Problem – Dilemmas in Law Implementation and Witness Incompliance***

Chinese judicial system has a serious problem of enforcement that has been widely aware of in the nation for a long period of time but never being effectively solved. There are at least three aspects of such enforcement dilemma.

Firstly, briefly speaking, in the past for a long period of time, it was quite common among judgment enforcement departments (a subdivision of a Chinese court) all over the country, for their law enforcement officers subjectively either simply not

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<sup>102</sup> See Lu Erqi (陆而启), *supra* note 39, at 46.

<sup>103</sup> *Id.*

following laws and regulations, or performing strictly according to the laws. In some extreme cases, certain judgment enforcement officers even broke the law.<sup>104</sup>

Furthermore, there is a serious “Enforcement of Law” Problem. Due to numerous legislative defects above-mentioned in Section E, confusions, misinterpretations and infeasibility, among other problems, emerge all the time throughout law implementation process in China. The four most fatal problems that impede implementing rules and regulations on witnesses testifying at trials are 1) logical imprecisions and loose wordings, 2) ambiguities in regulations, 3) room for nonfeasance, and 4) lack of operability. An example for illustrating Problem No.1) and Problem No.2) is that Article 187 and 188 of the *China Criminal Procedural Law* together empower the court to determine and notify witnesses to testify at trial, stipulating that if after being notified, witnesses refuse to present in courtroom, the court may enforce them showing up.<sup>105</sup> However, the law has not specified what counts as “being notified”, nor clarified the specific method(s) of enforcement over the witnesses to have them testify in courtroom.<sup>106</sup> Also, for instance, multiple rules in the *China Criminal Procedural Law* generally address the issue of witness safety protection.<sup>107</sup> However, the law has not specified what entity or entities is/are responsible to protect witnesses’ safety, nor defined the scope of witness protection.<sup>108</sup> The law neither has clarified whether it is a pre-trial protection for those witnesses who plan to testify in courtroom or after-trial protection only.<sup>109</sup> With respect to Problem No.3), for example, the *Judicial Interpretation issued by the*

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<sup>104</sup> See Zhang Weiwei (张玮玮), *supra* note 23, at 522; Long Zongzhi (龙宗智), *supra* note 49, at 136.

<sup>105</sup> China Criminal Procedure Law, article 187-188.

<sup>106</sup> Wang Zhuhao (汪诸豪) & Shen Peng (沈鹏), *supra* note 56, at 117.

<sup>107</sup> China Criminal Procedure Law, article 60, 61.

<sup>108</sup> Liang Chengwen (梁成文) & Zhang tian Yuxiao (张天羽啸), *Woguo Xingshi Susongfa zhong Zhengren Chuting Zuozheng Nan de Yuanyin (我国刑事诉讼中证人出庭作证难的原因)* [Analysis for the Reasons Why Witnesses in Criminal Proceedings are Not Willing to Testify at Trial], ZHENGZHI FALV (政治法律) [TRIBUNE OF SOCIAL SCIENCES IN XINJIANG], no.4, 2011, at 56, 46-56 (China)

<sup>109</sup> *Id.*

*Supreme People's Court on Article 188 of the Criminal Procedural Law* regulates that for those witnesses who received court notice or subpoena to testify at trial but reject doing so, the court shall first give them admonition; if they still do not show up in the courtroom, after permission from chief judge of the court, such witnesses shall be put in judicial custody.<sup>110</sup> Such judicial interpretation seems very specific at first glance. However, in fact, there is plenty of room for nonfeasance. In particular, the conditional term “permission from chief judge of the court” means a series of internal application and approval procedures within the court, which could be complicated in procedure and time-consuming.<sup>111</sup> Furthermore, if after being under custody the witnesses still do not comply with the court, what else can the trial court do in order for witness compliance? At least no rule in current Chinese legislations gives trial judges guidance on this. Last but not least, regarding to Problem No.4), for example, Article 187 of the *China Criminal Procedural Law* stipulates that, only when all three conditions – disputes between the litigating parties, significant impact on adjudication of the case and necessity in the mind of trial judges – are satisfied, witnesses then shall present in the courtroom.<sup>112</sup> However, as indicated in the 2013 Field Studies, in practice, such legislation gives the trial judges overwhelming discretions in determining what counts as “significant” impact on adjudication of the case and what counts as “necessity” to present in courtroom. Judges may easily find an “excuse” in accordance with such legislation for not allowing witnesses testifying at trial and thus judicial abuse may easily occur here.

Last but not least, unfortunately, incompliance is quite common among Chinese witnesses. For example, as above-mentioned, after receiving court

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<sup>110</sup> China Criminal Procedure Law, article 188.

<sup>111</sup> Wang Li (王力), *supra* note 69, at 119, 120.

<sup>112</sup> China Criminal Procedure Law, article 187.

writ/subpoena/notice for serving witness duty at trial, instead of presenting in the courtroom in set time, some Chinese citizens rather chose to “disappear”, like traveling abroad to escape such testifying responsibility.<sup>113</sup> Other witnesses may still appear in the courtroom physically but do not cooperate mentally by claiming they do not know or do not remember anything related to the case at trial but actually they do know something about facts in dispute.<sup>114</sup>

#### IV. CONCLUSION

The *2012 Amended China Criminal Procedural Law* as well as *the 18<sup>th</sup> Central Committee of CPC Decision* has intended China’s trial mode of criminal procedures moving towards a more adversarial system and enacted a series of rules encouraging witnesses to testify at trial. However, in practice, the appearance rate of Chinese witnesses testifying in criminal courtroom is still extremely low, which has become a bottleneck-restriction in China’s trial mode transformation and in the long run imperils the national blueprint for rule of law laid out in *the 18<sup>th</sup> Central Committee of CPC Decision*. Thus, re-design or changing the current-existing system of witness testifying at trial is now both of an urgent and inevitable challenging to law reformers in China. By analyzing the above eight major causes for the extremely low witness appearance rate, it is clear that such challenge is an enormously complicated, multiple-layer, systematic issue, mixed with legal, culture, social, political and historical elements. There is no way to resolve this dilemma by changing or fixing any single variable, layer or element. What needed here are massive, systematic reforms. Alternatively, if witnesses testifying in courtroom on a regular basis is too difficult to come true in China, then it may be wise for law reformers in China to shift

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<sup>113</sup> Wang Zhuhao (汪诸豪) & Shen Peng (沈鹏), *supra* note 56, at 117.

<sup>114</sup> *Id.*

focus onto creating the second best or alternative solutions on this, for example like video-taping a witness' testimony out of courtroom with the presence of counsel for the opposing party who could conduct real-time cross examination over such witness and later broadcasting such video file at trial before the judge, or having a witness testify at some out-of-court location designated by the trial judge with the presence of clerk for the trial judge as well as counsel for the opposing party who could conduct real-time cross examinations over such witness.