Article

THE INTERNATIONAL JOURNAL of EVIDENCE & PROOF

Is an oral-evidence based criminal trial possible in China?

The International Journal of Evidence & Proof
2017, Vol. 21(1-2) 52–68

DOI: 10.1177/1365712716674800
journals.sagepub.com/home/epj
SAGE

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Abstract

Witness testimony is a fundamental component of any modern, adversarial judicial system. The criminal trial is particularly reliant on the testimony and cross-examination of witnesses to furnish to the judge and/or jury the relevant facts of the case. Chinese law and regulation, in particular the Chinese Criminal Procedural Law of 2012, stipulates that witnesses have a general responsibility to testify and establishes a series of supporting measures to facilitate witnesses testifying at trial. However, the appearance rate of witnesses to orally testify at criminal trials in China is and has long been extremely low. In keeping with common and civil law pre-trial preparation, it is common in China for witnesses to provide written statements at police stations or to procurators prior to trial. The difference is that these written statements often form the principal, and sole, evidence of the prosecution case at trial without appearance, examination or contradiction of the source witness. Chinese judges decide guilt on the written witness statements which are made pre-trial and at varying times prior to the trial. We briefly examine the detriments of this non-oral scrutiny of evidence. We examine the Chinese cultural adherence to a written criminal trial, despite provisions for an oral examination in the Chinese Criminal Procedural Law, and explain nine reasons why witnesses do not appear at trial. Our reasons are based on empirical study conducted in ten pilot programmes across District or Intermediate Courts in mainland China. We argue that our review of the need for an oral-based scrutiny of procurator-led evidence in criminal trials in China is indicative and instructive of the need for China to continue its current focus on considering and adapting common and civil law-based methods of judicial scrutiny and oversight into its criminal justice system.

Keywords

low attendance of witnesses, written evidence, Chinese culture, judicial reform

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Introduction

Witness testimony and cross-examination are fundamental to modern adversarial criminal procedure. Witness testimony in a courtroom provides the fact-finder with the opportunity to assess the witness based on their mannerisms, posture, gestures and appearance in order to gauge their temperament, motivations and truthfulness. Modern approaches to vulnerable witnesses (including children, the physically and mentally impaired, or complainants of sexual or domestic-based crimes) require a nuanced approach to the treatment and examination of certain witnesses if the fact-finder is to have reciprocal appreciation of the significance of the witness's perceived conduct.[1] This nuance derives from an interdisciplinary approach, for example, including the expertise of pathologists and psychologists regarding the needs of witnesses if they are to be psychologically positioned to answer questions in a manner that reveals rather than obscures their reliability and credibility. But this modern approach is founded on the need, based on the advantage it offers to the fact-finder's deliberations, for witnesses to give oral evidence and be tested on it. The Wigmorean position that cross-examination, rather than jury trial, is the great and permanent contribution to the Anglo-American system of law to improve methods of trial procedure remains the touchstone of reforms in modern litigation systems designed to ensure correct decision-making (Wigmore, 1940: 32, sec. 1367).

Cross-examination, from the narrow perspective of the trial, permits assessment of the accuracy and credibility of a lay witness's memory and observations. However, for nations in which it is not a sacrosanct and protected feature of court proceedings, there is a more ready and real appreciation of the wider role that a system informed by cross-examination has in preventing the manipulation of criminal trials through the introduction of written testimonies corrupted by concoction, falsehood and alteration, which lead to fallacious arguments and improperly informed judicial decisions. Cross-examination is not limited to an engine within a courtroom, but is a larger machine on which a populace can rely to combat unscrutinised and incomplete adjudication so as to engender public confidence in the wider system of law and court governance and as an ideology in general, beyond its impact on individual cases.

This article reviews the literature within China regarding why witnesses do not appear to give oral evidence in mainland courts, in the light of legal provision now explicitly permitting this to be done. This review is contextualised within empirical evidence garnered from pilot programmes aimed at exploring the reasons for the non-attendance of witnesses in criminal proceedings. The programmes were conducted in ten District or Intermediate Courts in the mainland provinces of Anhui, Guangdong, Hubei, Inner Mongolia, Jiangsu, Shandong and Zhejiang, as well as the municipalities of Beijing, Shanghai and Chongqing. On the basis of this review of internal literature to China and empirical study, we arrive at nine reasons why witnesses do not appear to give oral evidence in contested criminal trials. We submit that the relevant officials are, as usual, key to meaningful reform and we highlight the political, social, cultural and legal rationales which should induce continued and further action by them to ensure that it is the norm for contested criminal trials to be informed by oral evidence which is elicited and tested.

The first part of this article analyses the genesis of the 2012 reforms and their purpose and the next part outlines the continuing low attendance of witnesses in trial proceedings throughout China. Based on these foundations, the next part develops nine reasons for why the 2012 and associated reforms have, to date, had little success in promoting a system of oral evidence in Chinese criminal proceedings. We then we pause to consolidate the platform for the utility of an oral system of evidence, following which we explain the reasons and rationales as to why China should continue to place emphasis on reforms and practicalities in those reforms to embed an oral system of evidence. Our reasoning in the final part is a reflective complement to the reasons we discern for witnesses remaining unwilling to testify. Our thesis

1. See article by J Wheatcroft in this Special Edition. See also Caruso and Cross (2012). See further Wheatcroft et al. (2015).

in this article concerns the likelihood and future of an oral evidence trial system meaningfully developing in Chinese mainland courts.

The 2012 reforms

Chinese witnesses were traditionally reduced to paper statements in a system that preferred a paper criminal trial to an oral trial. This is sometimes connected, within China, to China's legal system deriving more heavily from inquisitorial methods than adversarial (Chen, 2007: 40, 2012; Hu, 2006). As we will discuss in below, this proposition is erroneous, as it suggests that there is an absence of oral evidence in inquisitorial courts and also ignores the issues of court manipulation that can take place in the absence of witnesses being available to recount and stand by their testimony, to be tested and challenged.

Witnesses generally appear to testify in approximately 10 per cent of 'contested' cases across mainland China (Chen, 2007: 40). In 2012, however, both the China Civil Procedural Law and China Criminal Procedural Law were significantly amended. The amendments were largely based on seeking to align civil and criminal procedure in China with processes prevailing in common law courts of Anglo-American indoctrinated countries.[2]

Article 60 together with Articles 59, 187 and 188 provide for a general duty on behalf of any witness to testify and be subjected to examination at trial. Articles 62 and 63 are ancillary measures introduced to encourage witnesses to adhere to the duty to appear in court by providing, *inter alia*, safeguards and compensation for witnesses who appear to give evidence at trial. Article 62 provides the following safeguards:

(1) keeping confidential the real names, addresses, employers and other personal information of the aforesaid persons;
(2) adopting measures to avoid the actual appearance or true voice of those who appear in courtrooms for testimony;
(3) prohibiting certain persons from having contact with the witnesses, experts, victims and their close relatives;
(4) adopting special measures to protect the personal and residential security of the aforesaid persons; and/or
(5) other necessary protective measures.

The other measures referred to in Article 62(5) include monetary compensation for witnesses testifying at trial. The legislation implicitly suggests that financial loss (loss of time from work and family) is a motivation for Chinese witnesses not appearing in trial proceedings, as distinct from an insinuation (to use that more nefarious word for a moment) that such witnesses may be unaided, discouraged or prevented from appearing at trial.

More recently, on 23 October 2014, the 4th Plenary Session of the 18th Central Committee of the Communist Party of China launched a policy, literally translated as the 'CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward'. In Chinese it is written: 中共中央关于全面推进依法治国若干重大问题的决定. We shall refer to it as the '18th Central Committee of CPC Decision'.[3] It is a blueprint for the Chinese Central Government's reform of its court and judicial system in the 21st century.

2. 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/flfg/2012-03/17/content_2094354.htm (accessed 12 September 2016).
3. 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

A key element of the 18th Central Committee of CPC Decision is a commitment that China will focus on criminal law reform with a particular emphasis on reform of criminal procedure that is central to the process and expectation for criminal trials.[4]

The announcement has, unsurprisingly, been met with scepticism. Scepticism with respect to such an announcement, which requires resource-intensive investment in criminal justice is, we hasten to add, not because it has been made in China—there would be healthy scepticism about any similar government announcement in a developed or emerging legal system. Internal Chinese academics interpret the 18th Central Committee of CPC Decision as a top-down approach to urge Chinese witnesses to testify at trial, rather than a more holistic initiative to reform the judiciary and its methodology.[5] But, for present purposes, their interpretation is not contrary to the reform's determination to develop a culture of witness attendance. Putting aside 'chicken and egg' concerns about whether the attendance of such witnesses can be productive without associated reforms to the judiciary and court system that they will be subject to and by which they will be scrutinised, clearly there is a basic impetus and ambition to have witnesses at trial.

Since 2012 there has been very little change, despite this expectation and legal framework to bring witnesses to court having been implemented for just under five years. Even acknowledging the size of the population required to adopt, adapt to and embrace the laws, it nonetheless remains of concern that the reforms have not seen any marked shift (see Long, 2013: 136). The failure to increase the appearance rate of witnesses in any discernible way caused some commentators to note that the 2012 Amendments merely added red tape and procedural 'fluff' to an already deficient and inefficient trial process (see Zhao, 2015: 72).

In order to determine why the frequency with which Chinese witnesses testify at criminal trials has remained unchanged and low, despite the legislative and policy reforms, the Research Office of the Supreme People's Court of China, led by Vice Chief Justice Deyong Shen, delegated the task of researching that issue to the Institute of Evidence Law and Forensic Science at China University of Political Science and Law.[6]

Since September 2013, the CUPL Institute has administered ten research teams as they conducted four-month long field studies and surveys across each of ten pilot courts on mainland China. We refer to these collectively as the 2013 Pilot Studies (see Zhang, 2014: at 1). These empirical studies reveal various causes for Chinese witnesses not testifying at trial in criminal proceedings, which we now explain and examine.

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, 23 October 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/ (accessed 16 February 2015).

4. Ibid.

5. 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] (organised by Professor Guangzhong Chen from China University of Political Science and Law, 23 December 2014), news report. Available at: www.cicjc.com.cn/zh/node/1320 (accessed February 2015).

6. This field study 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 10 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).

The low appearance rate of Chinese witnesses in criminal trials

In mainland China, the appearance rate of witnesses testifying in criminal trials has long been consistently low. Over the last two decades, the highest rates of appearance in contested trials have been between 20 and 30 per cent. Statistics released by the Chinese Institute of Applied Jurisprudence at the Supreme People's Court of China reveal that, between January and April 1997, approximately 30 per cent of criminal cases adjudicated in the Wuhan Intermediate People's Court in Hubei Province had witnesses testify at trial. Numbers were usually lower in most other provinces of China. Less than 25 per cent of witnesses testified at criminal trials in Fujian Province during 1997—bribery and corruption-related cases are particularly noteworthy in this data, with none of these cases involving any witnesses appearing in court to testify (see Zhang, 2014: at 1).

In the first decade of this century, the status quo persisted, with no sign of progress and, indeed, a decline (see Long, 2013: 136). The appearance rate of witnesses testifying at criminal trials in the Huangpu District People's Court of Shanghai Municipality was approximately 5 per cent in 2007.[7] In that year, the Third Intermediate People's Court of Chongqing Municipality adjudicated a total of 2,796 criminal cases, of which only 12 cases had a total of 13 witnesses testifying at trial, with an appearance rate of less than one third of 1 per cent (see *Legal Daily*, 2011).

These low witness participation rates have had a series of serious, negative impacts on Chinese judicial practice. These include, but are not limited to, documentary evidence being the predominant source of evidence to support case facts (Long, 2013: 136), making the trial process symbolic rather than robust (Fan, 2001: 453), reducing the capacity to scrutinise evidence and disabling the accused from examining witnesses at trial or contesting prosecution positions (Chen, 2007: 41). This latter issue especially increases the chance of wrongful conviction by making false or deceptive testimonies difficult to expose to the trier of fact (Chen, 2007: 40; see also, Caruso, 2012). With a focus on addressing such problems along with other legislative defects, the 2012 Amendments to the China Criminal Procedural Law and consequential judicial interpretations issued by the Supreme People's Court of China made significant amendments to rules regarding witnesses testifying in courtroom. We set out the (translated) pertinent articles below.

Article 60 states that anyone who has information about a case shall have the duty to testify. Article 60 provides:

> All those who have information about a case shall have the duty to testify.
>
> Physically or mentally handicapped persons or minors who cannot distinguish right from wrong or cannot properly express themselves shall not be qualified as witnesses.

Article 187 makes clear three conditions for witnesses to testify at trial and provides as follows:

> A witness shall appear before a people's court to give testimony where the public prosecutor, the party concerned or the defender or agent ad litem has objections to the testimony of a witness, and the testimony of the witness has material impact on case conviction and sentencing, and the people's court deems it necessary to ask the witness to appear before the court.
>
> Where a member of the people's police appears before a court as a witness to give testimony of a crime witnessed when performing official duties, the preceding paragraph shall apply.
>
> Where the public procurator, the party concerned or the defender or agent ad litem has objections to the appraisal results, and the people's court deems it necessary for the expert concerned to appear before the court, the expert shall appear before the court to give testimony. Where the expert refuses to appear before

7. Liberation Daily (2008) Buzu 5% Xingshi Zhengren Yuan Chuting Zuozheng (不足5%刑事证人愿出庭作证) [Less Than 5% Witnesses Willing to Testify at Criminal Trials]. Jiefang Ribao (解放日报) [Liberation Daily] 8 September.

> the court to give testimony upon receipt of the notice of the people's court, the appraisal results shall not be taken as the basis for deciding the case.

Article 188 establishes rules compelling witnesses to appear. It provides:

> Where a witness, without good reasons, fails to appear before a people's court to give testimony upon receipt of the notice of the people's court, the people's court may compel the witness to appear, unless the witness is the spouse, parent or child of the defendant.
>
> Where a witness, without justifiable reasons, refuses to appear before the people's court or refuses to testify when in court, the witness shall be admonished, and in the case of grave circumstances, the witness may be detained for not more than ten days with the approval of the president of the people's court. The punished person may apply to the people's court at the next higher level for reconsideration if he/she has objections to the detention decision. Detention shall not be suspended during the reconsideration period.

In addition, the amendments add a series of corresponding support measures, such as Article 62, which, as indicated earlier, provides particular protections for witnesses in particular criminal cases, and Article 63, which provides for the financial reimbursement of witnesses testifying in court.[8]

Each of these ancillary measures is designed to facilitate witness attendance and even induce witnesses to seek to attend at court to testify, in anticipation of the Article 188 'directives' not being sufficient to compel them to a civic duty. These measures have, however, failed to substantially affect the appearance rates of witness in criminal trials (Long, 2013: 136).

The 2013 Pilot Studies included detailed questionnaire surveys issued to judges of the criminal jurisdictions of the subject pilot courts. The surveys showed that 26.4 per cent of the 750 questionnaire judicial respondents reported that, for criminal cases they had sat on in the past three years, the appearance rate of witnesses was below five per cent. A further 24.4 per cent of the respondents indicated that the witness appearance rate in their cases ranged from five to 20 per cent (Zhang, 2014: 5).

Nine causes of the low appearance rate of Chinese witnesses in criminal trials

The low rate of witnesses testifying at trial can be explained by a number of social, political and administrative factors that, in concert, operate to discourage and prevent the successful introduction of in-court testimony.

In this section, we examine nine principal causes for Chinese witnesses not appearing at trial, as revealed by empirical analysis of the 2013 Pilot Studies.

The constitutional reason: The deficient power of the judiciary

The first issue is: *who* are the witnesses that are not appearing in contested criminal trials? To answer this, a grass roots review of the political landscape of China is needed.

Most common law jurisdictions with an Anglo-American colonial history have traditions of a constitutionally ingrained separation of power. The three branches of government, legislative, and administrative/executive and judicial are necessarily independent from each other. The judicial branch includes

8. Art. 63 provides: 'A witness shall be entitled to allowance for his/her performance of the obligation of giving testimony in terms of transportation, accommodation and catering expenses incurred thereby. The allowance granted to witnesses for giving testimony shall be included into the business expenses of judicial organs and be guaranteed by the public finance of people's governments at the same level. Where the witness is an employee of an entity, the entity shall not deduct his/her salary, bonus and other benefits directly or in a disguised form.' See also Xingshi Susong Fa (刑事诉讼法) [China Criminal Procedure Law], n. 4.

judicial officers but does not include prosecutors, police or law enforcement, which belong to the executive.

In contrast, the political system in China has been described as 'centralization with top-down supervision' (Zuo and Ma, 2005: 171). The Chinese Constitution defines the central state organs in power as 'One Government with Two Judicial Wings—the People's Court and the People's Procuratorate—created by, responsible to and under the supervision of the People's Congress'.[9] Under this political structure, Chinese courts fall under the leadership of the Chinese Communist Party and are supervised by the People's Congress. The People's Court and the People's Procuratorate exercise their own authority under laws and regulations enacted by the National People's Congress, as well as being supervised by the Congress. The result is that the judicial arm of government in China is not independent, nor is it isolated from the influence of the Congress and the supervision of the Party.

In constitutional democracies with a common law origin, the separation of powers derives from constitutional recognition and associated isolation of the judicial branch as an arm of government. In China, pursuant to the view of 'centralization with top-down supervision', different state organs have different government hierarchies, with the position of the judiciary varying from state to state. Concomitant with this are the reporting obligations of government officials/employees within the state organ structure. Officials, who it will have been noted, are also employees, include judicial officers. Chinese state organs, including courts, are both aware and sensitive to the seniority and political influence of each other. Chinese governmental officials, including judges, attend to and emphasise the political status of each other's administrative titles. One's treatment corresponds to one's level of authority, political seniority and esteem. A well-known unspoken political rule in China is that lower-level governmental agencies or officials are expected to revere and manifestly show a great deal of respect to their political superiors, regardless of the nature of the person's role or their agency (Zuo and Ma: 171).

Any Chinese judge, whether they are from the local district court or from the Supreme People's Court of China, is an ordinary governmental employee within a massive, hierarchical bureaucracy. They can and do reside on the same, or lesser, political status level as numerous administrative officials, police agencies and procuratorates. Judges may therefore be subject to expectations concerning how they treat prosecutors or police presenting evidence at trial where those individuals are of superior political seniority, which may colour their decision-making and taint the impartiality of the judicial process. This problem is highlighted in cases where potential witnesses are government officials (Long, 2013: 3). Taking into account the political expectation not to breach the norm of respect and subservience within the political structure, procuratorates would usually hesitate to call such witnesses to testify and rather be bound by any pre-arranged and supplied written statement. This subservience to influence is borne and accepted by trial judges, not through the adversarial principle of party responsibility for witnesses, but for the same reason of acceptance of statements based on political position (Long, 2013).

In criminal proceedings, the potential witnesses, being the governmental officials to which we refer, are the very police officers who investigated the subject charges. This is a significant group of witnesses who are not appearing, or being called to appear by prosecution, and whose non-appearance is not being queried by courts. In every developed criminal justice system, investigating police officers are the essential witnesses in contested criminal trials. However, in China, police officers rarely, although slightly increasingly in recent years, appear in court (Long, 2013). A prominent cause of this is the disparity in political seniority between police, procuratorate and judges in China and the lack of independence and reverence assigned to courts, unlike the status and power assigned to law enforcement agencies and officers.

The non-attendance (and the absence of compulsion or questioning arising from this non-attendance) of government officials, particularly police, constitutes a critical group of key witnesses unaffected by

9. See arts 62, 63, 67, 128 and 133 of the Constitution of the People's Republic of China, available at: http://en.people.cn/constitution/constitution.html (accessed 25 August 2016).

the 2012 Amendments because those amendments were not aimed at them. Yet their non-attendance is indicative of the fundamental structural issues within the Chinese criminal justice system. The rule of law requires that laws and regulations apply to all citizens within the jurisdiction equally and fairly. In a legal system that is operating fairly and efficiently, there is no room for privileges elevating those of superior political standing to be above the law—or more accurately, unquestioned by the law. The absence and failure of government officials to testify in criminal cases, to the extent reported and known in China, results in the public not having confidence in the power or purpose of courts to adjudicate criminal trials. This, of course, discourages lay witnesses from expending the time and personal input of involvement in the full trial process by giving evidence.

The institutional reason: Criminal proceedings are a 'relay race' or 'assembly line' between police, procuratorate and the court

The Chinese criminal justice system was for a long period of time predicated on three central state departments, police, procuratorate and court, working cohesively in criminal prosecution. There is not the Anglo-American structure of a court- or trial-centric approach to the administration of criminal justice through investigation, presentation and adjudication, with the court as final arbiter of the investigation and prosecution presentation (Long, 2013).

The 2013 Pilot Studies confirm the internal critique of criminal proceedings by researchers in China that label the proceedings as akin to a 'relay race' or 'assembly line' between the police department, procuratorate and court. The terms are used to reflect that, rather than each successive body checking and scrutinising the work of the previous on a criminal charge, the 'labour' in finalising a conviction is divided amongst them. The Pilot Studies demonstrated that the court seldom rejected or questioned evidence prepared by the police or the procuratorate in criminal proceedings (Long, 2013).

The emphasis placed on pre-trial witness statements compiled by the police and procuratorate, the significance of the trial's fact-finding function, has long been diminished to being a procedural 'rubber stamping' in China.[10] The acceptance of officials, in the absence of their attendance, compounds the constitutional issue we raised with the institutional issue. They combine to dissuade the public and any lay witnesses that there is any point in their seeking to appear at a trial.

The cognition reason: Face-value acceptance

The 2013 Pilot Study survey data demonstrates that trial judges in China commonly hold the view that, provided facts are clear to the judge through reviewing documentary evidence submitted by the parties, the presence of witnesses in court is otiose. By 'clear' we mean that the judge considers the written material to be internally consistent on its face. In the minds of a significant number of judges surveyed, calling for witnesses would only add extra, unnecessary adjudication work that would delay the trial process, and this view is reflected in a previous study and inquiry into perceptions of the Chinese judiciary (see Gao, 2013; Lin, 2004: 43).

This may be seen as an extension of the constitutional and institutional reasons. It may also be regarded as a judicial apathy towards the assistance that a trier of fact is given by the presence of a witness for examination and query (Gao, 2013; Yang, 2012: 95, 96). Such a view is quite reasonable and legitimate, but the 2012 Amendments aimed to empower the judge if they scrutinised the material supplied to them and had cause to seek further information. In this sense, the constitutional and institutional reasons were sought to be addressed by permitting a judge to call for additional detail,

10. See Cheng (2014: 3). Note: the judicial reformers in China in recent years have gradually realised harmfulness of such procedural 'rubber stamping'. 'Take the trial as the center' has been hotly discussed in the judicial reform after the 2014 '18th Central Committee of CPC Decision'. However, so far little substantial progress has been achieved. See Zhang (2015).

rather than being seen to directly question or criticise material supplied to them or the official form in which it was received.

Article 187 of the China Criminal Procedural Law prescribes that there are three conditions required to be satisfied to justify witnesses testifying at trial, one of which is the trial judge being satisfied that it is necessary for the witness to testify. The test for judges to determine 'necessity' is whether or not the witness may *add new facts* or may help the trial judge better determine case facts in a way that the documentary statement cannot (Wan, 2013: 2, 3). Despite the express provision of this power, and the political sensitivity in its terms and interpretation, the mindset and culture of judges remains almost unaltered across the Pilot Study data.

The cultural reason: The influence of Chinese traditional culture

Confucianism and related teachings engender in many Chinese people an acceptance of the ancient Chinese proverbs '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) (see Chen, 2007: 41; Zhang, 2012: 68; Zhang and Yi, 2002: 82).

There is merit in such lessons and their principles are not limited to the culture and mindset of Chinese citizens. Interim data collated following the 2012 Amendments indicates that potential lay Chinese witnesses pay significant attention to 'face-saving' (面子), preventing offence to others and preserving harmony in relationships in their daily conduct (Li, 2014: 1). As a result, Chinese people regard and treat litigation as a particularly undesirable experience, regardless of any wrong occasioned to them or any possible reward, simply because the adversarial procedure is incompatible with such ancient Chinese customs (Li, 2014). Despite the—effective—incentive regime built into the 2012 Amendments for protection and compensation of lay witnesses, the traditional culture and teachings of China are incompatible with the 2012 reforms. The reforms do not ameliorate these teachings and it remains common for Chinese people, even if given notice to appear at trial as a witness, not to cooperate with authorities (Chen, 2007: 41). In many cases, the subject witness will find an excuse to not appear or simply not attend at the hearing date without notifying the court or the parties (Wang and Shen, 2014: 117). The consequence is reversion to the 'efficiency' that stems from the first three reasons discussed and the proceedings are not adjourned, nor is the non-attending witness pursued.

The methodology reason: How do witnesses testify at trial?

The 2012 Amendments legislate to provide a power to the judiciary to have witnesses appear at trial and an ancillary structure to facilitate and incentivise attendance. However, the law is silent as to the process and rules to be applied to the treatment and examination of any witness who appears to testify (Chen, 2007: 41–42).

Neither the Chinese Criminal Procedural Law, nor any other regulation or rule in China, provides for process or evidential rules addressing in-chief/direct and cross-examination or re-examination of a witness (Zhang, 2007: 522). Article 59 of the Chinese Criminal Procedure Law briefly mentions that witness testimony shall be examined by all parties at trial before being admitted as the basis for adjudication, but there is no mandated procedure specified for doing so.[11] Moreover, it has been interpreted as a review of the supplied written material, rather than an invitation or provision for the admission of oral testimony. The long reliance on written statements also means that the Chinese criminal justice system does not apply related evidential safeguards, such as the hearsay rule, from

11. China Criminal Procedural Law, art. 59.

which a procedure and set of rules for witness examination necessarily derives (Wan, 2013: 47; Xu, 2007: 525).

Not only does China lack substantive trial procedures for the examination of witnesses, but there is also a dearth of rules addressing the subpoena of witnesses (Xu, 2007: 526; Zhang, 2013: 522). Article 188 provides a compulsive power to the court, however, no specific rules of 'action' are provided by the Supreme People's Court or other authority for the initiation and conduct of summoning or otherwise compelling attendance in the event that the court exercises an Article 188 power.

The 2013 Pilot Studies survey data indicated that 78 per cent of trial judges considered that, were a judge to exercise the Article 188 power, it would be for the Office of the Procuratorate to ensure that the witness attended court at the requisite time (see Wang and Shen, 2014: 10; Zhang, 2014: 522). Interviews and surveys of the Procuratorates indicated that the responsibility rests with the court to achieve its own orders for witness attendance (Wang and Shen, 2014; Zhang, 2014). The law is not clear how the court does that, which bodies they could possibly compel to complete the task or the specific method(s) of enforcement that may be undertaken (Wang and Shen, 2014: 117). The institutional reason also facilitates such a discourse between where responsibility vests in a system where there is an equality of criminal justice institutions rather than a trial-centric model—a problem compounded by the silence of the 2012 Amendments and associated regulation since that time with regard to the underpinning methods required to give the witness attendance powers force (Wang and Shen, 2014).

The resource reason: Is the witness actually protected or compensated?

This is an extension of the methodology reason, in that the problem lies in the broad statement encompassed by the 2012 Amendments not having implementation underpinning or legitimacy. Chinese people remain uncertain about appearing in court proceedings largely due to concerns of security and personal welfare. In 2006, a general online survey of the public asked: 'Why would you not be willing to testify at trial?' Almost 3,000 people answered the survey. Seventy-nine per cent of respondents cited fear of retaliation by the party to which their evidence would be adverse as the basis for them declining to appear.[12] Whilst Articles 61 and 62 of the Chinese Criminal Procedural Law now provide for the safety and security of witness testifying at trial,[13] the law again lacks specificity, meaning that witnesses cannot be informed about how they will be treated by the system nor what they can expect. This is reflected in the discordant views of courts and procuratorates as to roles and responsibilities discussed as part of the methodology reason.

The 2012 Amendments do not provide any detail or certainty concerning the criteria for eligibility for witness protection, how to apply for witness protection, how witness-protection applications would be reviewed, specific timelines on joining exiting witness protection programmes and practical measures to protect witnesses (Luo, 2014: 56; Shi, 2014: 242). No such detail has been provided by courts neither consequent to the Amendments. In the absence of regulatory or directive certainty, together with public misgivings about the machinations of the Chinese bureaucratic engine, there is a lack of properly administered witness protection programmes.

12. This online survey was conducted by one of the largest gateway websites in China—sina.com. The online survey asked a series of questions regarding testifying in courtroom. First it asked 'Would you like to testify at trial?' and then 'Why would you not be willing to testify at trial (multi-select)?' A total of 2,923 website users anonymously participated in the online survey. Forty-five per cent clicked 'Yes, I would like to testify at trial'. Thirty-five per cent indicated 'not sure' and 20 per cent simply said 'no'. For the second question, 79 per cent indicated 'fear of retaliation by the opposing party is the main reason'. The second highest ranked answer (with only 30 per cent support) was 'unwillingness to be involved in a lawsuit'. Report on this online survey: http://news.sina.com.cn/c/2006-04-12/00079591933.shtml (accessed 25 August, 2016). A recent online article from Shenzhen Luohu District People's Court regarding witness unwilling to testify at trial mentioned this online survey again: http://mt.sohu.com/20160816/n464391800.shtml (accessed 25 August 2016).
13. China Criminal Procedure Law, arts 61, 62.

Similar shortcomings and uncertainties pervade public opinion concerning witness compensation. Despite the relevant edict in Article 63 of the Chinese Criminal Procedural Law for general compensation,[14] the law does not specify the scope of compensation, the compensation standards, where funding comes from or the responsible executive body for administering the distribution of witness compensation (Zhao, 2012: 98). The executive should be responsible for resourcing this enactment but there appears to be little will or enthusiasm and certainly little expenditure on establishing and maintaining a fund for this purpose.

The rights reason: Limited participation of the accused

Article 187 of the Chinese Criminal Procedural Law provides that as long as the testimony of the witness is not in dispute, the evidence does not present a significant influence on the adjudication of the case and the trial judge is not satisfied that it is necessary for the witness to present at trial, then the witness has no responsibility or compunction to testify at trial.[15] Article 187 permits the compulsory attendance of the witness solely based on a unilateral assessment by the trial judge as long as the first two conditions (testimony in dispute and significant influence on the adjudication, also assessed by the trial judge) are satisfied. It provides no regime for the consideration, let alone submission, of the accused as to whether the attendance of witnesses would assist in the ascertainment of facts relevant to guilt. The gravity of the reform written by Article 187 to Chinese courts should not be undervalued—it is a significant step to so empower courts by written instrument, as is evident from our discussion of the position and role of Chinese courts under the constitutional and institutional reasons. Article 187, however, confirms that even the progressive reforms China is now reducing to written word give limited attention or consideration to the position and rights of the accused in the contested trial to cross-examine and test the evidence of witnesses for the prosecution (Yang, 2012: 95, 96; Zhang, 2014: 521).

Motivational problem: Chinese judges prefer written evidence

In the past, Chinese judges have always largely relied upon documentary evidence in determining case facts at criminal trials—what is widely known as 'proceedings conducted in writing' or 'file-transcript centrism' (Zuo and Ma, 2005: 171). In recent years, even though continuous legislative amendments and judicial reforms have brought more features of the adversary adjudication system into China's criminal proceedings, judges still heavily rely upon written or documentary evidence.

Despite Articles 60, 187 and 188, this judicial conservatism is facilitated by Article 190 of the Chinese Criminal Procedure Law. Article 190 stipulates that a witness's pre-trial written testimony shall be read in front of the judge at trial by the procurator or by the defendant if they do not present at trial.[16] Articles of this type can co-exist in developed criminal justice systems which have a tradition of oral advocacy, however, the written tradition in China has the precise opposite effect, with the presumptive position of receiving written evidence being facilitated to perpetuate by Article 190 (Luo, 2014: 56).

We pause for a brief reflection as to whether the oral tradition should indeed be preferred to the written in the criminal contest. Written evidence plays the role in Chinese judicial practice that testimony *viva voce* plays in common law courts (see Deng et al., 2001: 32). It is normal in Chinese criminal proceedings that, even where witnesses do appear in court, procurators still choose to have their

14. China Criminal Procedure Law, art. 63.
15. China Criminal Procedure Law, art. 187.
16. China Criminal Procedure Law, art. 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, art. 1(1).

witnesses read previously prepared written statements. These practices are normally approved (sometimes proactively) by the trial judge (Long, 2013: 137).

There is a strong impression that Chinese judges and procurators generally consider that written testimony is more accurate and reliable than in court witness testimony. Their typical rationale is that when the witness made such written testimony to the police at the investigation stage, their perception and memory were fresh, comprehensive and clear. Furthermore, immediately after the crime, the witness would encounter the least external interference and have the least opportunity for reflection, concoction and self-preservation (also see Zuo and Ma, 2005: 173). Opportunities for interference with the witness, corruption of their testimony or memory loss increase with every moment after the events (Zuo and Ma, 2005). Thus, generally, Chinese judges strongly prefer written testimony made to the police or procurator before trial (Zuo and Ma, 2005).

That position has merit but fails to guard against systemic and otherwise difficult to disrupt practices which may pervert the system, such as police corruption and how soon after the events the testimony was written. In a small number of criminal cases in China, written testimonies of witnesses for the procurator have been found to have been obtained through illegal or improper means (see Chen, 2010; Wang, 2006). These illegal and improper means have been disclosed by the procurator, rather than ruled by any contested application on the evidence before the court. As a result, the procurator has withdrawn. Due to persistently increasing Chinese nationwide attention on illegally obtained evidence, together with improved and increased preventative measures such as compulsory videotaping of witness inquiries and interviews, the occurrence of such illegality and impropriety in the gathering of evidence has significantly decreased (Zhang, 2014). This is a positive advance for Chinese law enforcement but, as is evident, the procurator has been left to self-assess the viability of its evidence. The significance of such admissions of defective criminal investigation and recording, even in only a small number of cases, given the discussion in this section with respect to the political and institutional relationships, is significant, but it seems equally fair to reserve judgment about the extent of shortcomings in the supplied prosecution evidence were that evidence the subject of open contest and challenge rather than individual, unilateral appraisal. Therein lies the deficiency of the paper-based criminal trial; as Wigmore would agree, it is not engineered for the most robust scrutiny of reliable and credible evidence.

The performance reason: Witnesses and counsel

Take the archetypal scenario: the witness has been brought to court at the volition of the procurator or with their assistance following an Article 187 or 188 order; the court and procurator have agreed to elicit testimony from the witness rather than have the witness read out a pre-prepared written statement; the court has outlined a process for each party to examine, cross-examine and re-examine and, stretching the model beyond the 2012 Amendments, the defence has been heard on these issues, and thus the voice of the accused. All is in order, but it is everyone's—judge, procurator, defence lawyer and witness—first time.

Advocates in Chinese courts are not trained or experienced in eliciting or testing evidence by oral examination: it is not their system and therefore it is not their training. Judges are unaccustomed to and untrained in supervising orally-led evidence. Most importantly, witnesses are entirely unprepared for the process because they have had no assistance or support from law enforcement agents or procuratorate officers with respect to preparing for the environment of the courtroom or the process and psychology of questioning. In cases where witnesses do appear, the absence of any prosecution service or capacity or interest to prepare witnesses for their appearance is stark, given the utter inability of witnesses and counsel to engage—and thus there is a reversion to the written (Wang, 2006).

Accordingly, even in the few cases where witnesses do testify at trial, witnesses not only read their pre-trial written testimony because it is culturally ingrained as efficient, they also do so because the system is ill-equipped and uninformed of how to do other than that (see Lu, 2008: 46).

Even with resources and methodology that we noted were absent earlier, the generational shift required to overcome the cultural and motivation reasons manifests most plainly in the need for base-level education in the skills and services required to implement an oral advocacy method.

Why witnesses should testify at trial

The systemic and generational issues that require attention for the 2012 Amendments to be realised are a long-term, resource-intensive mission for China, as it would be for any legal system. Chinese literature and scholarship are attuned to the importance of an oral advocacy system, through witness participation in court, as fundamental to a long-term vision for the Chinese legal system to achieve not only domestic but international confidence. The importance of having witnesses testifying at trial in criminal proceedings is now recognised by China as fundamental to the judicial arm of government in common law and civil systems. As an example, Chinese scholarship refers to the Hearsay Rule, as provided for in Rule 802 of the United States Federal Rules of Evidence, to note that if a witness does not testify at trial, his or her testimony is inadmissible. Emphasis being drawn from the need to present a witness at trial for scrutiny of fact-finding. In civil continental law countries, insistence on witnesses testifying at trial as a means to confine the trial process to a transparent, in-court process is noted as a means to achieve public confidence in the administration of criminal justice (Sluiter et al., 2013: 1076).

The importance of oral testimony to a robust and rectitude-based system of laws is well covered in the literature of Anglo-American criminal administration, but is developing and emerging in China. The thinking of scholars and the ideology developing in respect of the oral system in China is therefore worth reviewing here, not for the purposes of instruction on the principles but also for the purpose of appreciating the stage of deliberations and debate informing Chinese proponents of institutional change.

Chinese literature focuses on two fundamental goals to be achieved by a criminal contest of guilt informed by oral testimony. First, in-court testimony facilitates the fullest evaluation of case facts based on the witness's recount of those facts. Second, it supports a sense of procedural fairness by enabling the parties to test, question, bring into doubt and potentially undermine the testimony of opposing witnesses, which is especially important where that testimony lacks credibility or certainty. We elaborate on each point below.

The first reason for reform: A tool for evaluating testimony and determining facts

Witness testimony, generally defined as statement of a witness made to the adjudicator during judicial proceedings concerning what he or she perceived, is a fundamental basis for fact-finders to determine disputed case facts (Chen, 2007: 40). Compared to other types of evidence, such as material evidence and audio-visual material, a fundamental characteristic of witness testimony is its dependence on human subjectivity (Chen, 2007). Witness testimony carries the risks of intentional statements of untruths to mislead or deceive the trier of fact being admitted into evidence (Wang, 2015: 94–103). There is also the risk of accidentally misleading the trier of fact owing to human error, such as a witness's failing memory, mistaken perception or poorly structured narration (Wang, 2015). This is detrimental to the integrity of the outcome of the case, as the evidence may have polluted the trier of fact's judgement, to a degree which will be determined by the weight accorded to the evidence. Focusing on reading case files and reviewing documentary evidence does not allow the trier of fact to adequately judge and assess a witness's credibility, manner and motivations. Triers of fact without access to witnesses cannot make a fair determination on the authenticity of witness testimony (Shen, 2015: 14).

On the basis of this assessment of Chinese criminal practice, scholars note that having witnesses testify at trial and facilitating a process that enables the parties to examine and cross-examine each witness mitigates this problem and provides a greater level of value and reliance that can be placed on witness testimony (Shen, 2015). If a witness gave contradictory testimony in the courtroom, the trial judge could immediately ask the witness to explain. If two witnesses provide testimony in court that

conflicts, the conflict may be identified and queried and, perhaps, resolved. It is processes such as these that leave no doubt that in-court testimonies achieve the most reliable outcomes by enabling the trier of fact to gather both oral and observed information and to evaluate witness testimony both for content and reliability (Shen, 2015: 13).

The second reason for reform: Fair process, fair contest, fair result through oppositional scrutiny

Chinese scholarship has noted that the accused's right to examine adverse evidence presented on their indictment is a means by which the accused may intellectually challenge the resources of the state to amass the case against him or her (Shen, 2015: 15–16).

The importance of this right in Chinese literature is drawn directly from Article 14(3)(e) of the International Covenant on Civil and Political Rights. The well-known Article provides for examination of opposing witnesses as a right belonging to a party and therefore a necessary element of fair trial. ICCPR parties, whether adhering to common law or civil law systems, have an obligation to institute a judicial and procedural system that ensures that both parties to a dispute have the right to examine witnesses. The most practical way to realise this right is to have witnesses testify at trial and be subject to cross-examination. This may expose trial judges to more thorough and impartially presented testimonies due to the influence of both parties' counsel's questions and scrutiny over the accounts of the opposing party's witnesses. Cross-examination enables counsel to test and scrutinise the content of a witness's testimony as well as to exert pressure that may reveal something of the credibility of a witness manifested through their demeanour, body language or facial expressions.

Chinese exploration of the oral advocacy systems now reflects well-established Anglo-American views supporting the oral tradition. The conceptual foundation is sound. The inertia it provides will only translate to output if the impediments we identify in this section are directly addressed.

Conclusion

The 2012 Amendments together with the 18th Central Committee of CPC Decision intended China to adopt a trial mode of criminal procedures that would see its system evolve into a more adversarial contest by enacting a series of rules encouraging witnesses to testify at trial. The policy and objective is rational but there are a number of fundamental and facilitative matters that need to be addressed if this is to occur. We have outlined those matters as nine reasons for the present failings of the intended reforms. Some of those reasons relate to the superstructure of Chinese governance and relationships. Some concern the education and training of criminal justice *dramatis personae*. Others relate to the resourcing and structures for realisation and implementation of the legislated intention. All are broad, systemic issues affecting the criminal justice system in China, as in all countries. They require patience but not exasperation at the size of the reform. If the national blueprint set out by the 18th Central Committee of CPC Decision is to be realised, we argue for patient but proactive and direct attention to the critical reasons for its current problems.

Acknowledgement

The authors are grateful to Mr Jordan Phoustanis, an associate of the CAPJC and Litigation Law Unit, for his research assistance.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) disclosed receipt of the following financial support for the research, authorship, and/or publication of this article: This article was a joint research project of the CAPJC and based on research for the Year 2016 Project of Humanities and Social Sciences of China University of Political Science and Law (Young Scholar Project 'Use of Cross-examination at Trials') (本文系中国政法大学2016年校级人文社会科学研究项目-青年项目 "交叉询问在法庭审判中的运用" 阶段性研究成果).

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