THE EMPIRICAL RESEARCH ON WITNESS APPEARANCE IN COURT IN CHINA'S CRIMINAL PROCEDURE

Zhong Zhang^{*}

The witness appearance system has made great achievements in China after the past thirty years developed. However, there are serious challenges in implementing the system, the problem of non-appearance of witness has not been solved, notifying the police officer appearance in court is more difficult, which result in pretrial testimonial transcripts are used widely. Even if the witness comes in court, his/her testimony is lack of effective guarantee for the authenticity. The main reasons for the witness not to testify in court are the flaws in the witness protection system and the lack of financial compensation. In addition, a witness privilege system needs to be established.

INTRODUCTION.....	841
I. UNRESOLVED PROBLEM OF NON-APPEARANCE OF THE WITNESS	844
II. DIFFICULTIES IN POLICE OFFICER'S APPEARANCE.....	845
III. WIDELY USED PRETRIAL TESTIMONIAL TRANSCRIPTS.....	847
IV. THE LACK OF EFFECTIVE GUARANTEES FOR THE AUTHENTICITY OF THE WITNESS TESTIMONY	848
V. FLAWS IN THE WITNESS PROTECTION SYSTEM.....	849
VI. THE LACK OF FINANCIAL COMPENSATION FOR WITNESS'S APPEARANCE	851
VII. AN URGENT NEED TO ESTABLISH A WITNESS PRIVILEGE SYSTEM	852
CONCLUSION.....	854

INTRODUCTION

Witness appearance is great significance for investigation, evidence verification and fact-finding decisions. However, because our traditional culture does not recognize the importance of witness appearance, and also

^{*} Zhong Zhang, associate professor of law, research fellow of the Center of Cooperative Innovation for Judicial Civilization, associate dean of the Institute of Evidence Law and Forensic Science. Research fields: criminal procedure and evidence law.

because judicial officers' lack sufficient understanding of the importance of witness appearance,¹ the witness appearance rate has long been low. The low rate of witness appearance was once regarded as one of the three abnormalities in the testimony system in China.² Therefore, solving the problem of witness's non-appearance has become an important task in China's judicial reform. The *Third Five-Year Reform Program of the People's Court (2009-2013)* promulgated in 2009 provided that, "There shall be established a system that will promote the witness and expert taking the witness stand, provide protection to witness and expert who take the witness stand, and provide proper procedures to define the scopes of which the police investigators should take the witness stand." The revised 2012 *Criminal Procedure Law* and the Judicial Interpretations provide important guarantee in establishing the witness appearance system.

Firstly, the law requires the police officer to testify as a witness at the trial. The *Criminal Procedure Law* prescribes two situations that require the police officer's appearance. In one case, the police officer who saw the crime when he performed official duties shall take the witness stand. In the other case, when there is a dispute between the prosecutor and the defendant on the legitimacy of a piece of evidence obtained in the interrogation, and if such evidence is considered to be a confession extorted "by torture", the police investigator shall testify at the trial upon the court's notification. Such provisions play an important role in finding the case facts, safeguarding the defendant's confrontation right, and preventing extortion of confession by torture.

Secondly, the law promotes the establishment of a compulsory witness appearance system. To solve the problem of non-appearance of witness, the *Criminal Procedure Law* reiterates witness' obligation to testify in court and formally establishes a compulsory witness appearance system in Section 188—"If the witness, who has received the subpoena issued by the court, refuses to testify in court with no justified excuses, the court can force him/her to appear in court, except that, he/she is the defendant's spouse, parents or children." In the case, where the witness refuses to testify in court, this provision provides the corresponding sanctions—"If the witness refuses to appear in court or refuses to answer questions in court without any justified excuse, he/she shall be reprimanded; in serious cases, he/she shall be sentenced to ten days in detention upon approval of the chief judge."

¹ Fan Chongyi, *Problems in Implementation of Criminal Procedure Law and Countermeasures*, 267 (Chinese People's Public Security University Publishing House 2001).

² Long Zongzhi, *Three Abnormalities in China's Testimony System*, THEORY AND PRACTICE OF PROCEDURE LAW 378 (Chen Guangzhong ed., People's Court Press 2001).

Thirdly, the law provides improved protections to witnesses. The *Criminal Procedure Law* endeavors to promote witness protections. On the one hand, it is prescribed in the law that, public security authorities and judicial authorities shall bear the responsibility to protect the witness's personal safety and his/her close relatives' safety; on the other hand, the law provides special safety protection measures that should be taken before the witness taking the stand. This provision has been a significant improvement of the old practice, which merely provided ex post sanctions. In other words, when a witness testifies at the trial which involves the criminal charge of endangering national security, terrorist attack, organized crime or drug offense, the judicial authorities shall take protection measures, such as securing the witness's private information, including name, address and place of work, veiling his/her look, altering his/her voice, prohibiting special persons from making contact with him/her and his/her close relatives, and specially protecting him/her and his/her house. If these measures can be implemented in practice, the risk of retaliation against the witness will be greatly reduced, and a witness will feel less worried to appear in court.

Fourthly, the law promotes a witness appearance compensation system. To avoid a witness's additional financial loss caused by the appearance in court, Section 63 of the *Criminal Procedure Law* provides a witness appearance compensation system. On the one hand, it prescribes the scope of compensation for costs resulting from the witness's appearance, including the witness's expense in transportation, accommodation and meals, and the work time loss caused by his/her fulfillment of the obligation to appear in court; on the other hand, it prescribes the source of the compensation fund. The subsidy for the witness's appearance is sponsored by the judicial authority's operational funds. The distribution of the subsidy is ensured by the government of the same level. In addition, to eliminate the witness's financial loss concerns, in light of this section, the witness's employer is prohibited to deduct or deduct in disguise the witness's salaries, bonuses or other benefits for the reason of the witness's off work.

To gain an understanding of implementation of these measures, the study on *China Development Index of Evidence Rules* carried out in 2013 took witness appearance as a primary index. In this study, a survey on the implementation of the witness appearance was conducted among 10 courts.³

³ In September, 2013, the Institute of Evidence Law and Forensic Science, China University of Political Science and Law and the Supreme People's Court Research Office stroke cooperation on the National Social Science Fund's research project *People's Court Litigation Evidence Rules*, making a survey on the application of evidence rules among more than 800 judges from five appellate courts and five trial courts across China, and entrusting Beijing Horizon Research Consultancy Group to make survey data analysis.

In the 2014 research on *China Justice Index*, a survey on witness appearance was conducted again.⁴ The two surveys gained an intuitive understanding of the implementation of the witness appearance system and a better understanding of flaws and problems of the witness appearance system.

I. UNRESOLVED PROBLEM OF NON-APPEARANCE OF THE WITNESS

The biggest problem which the court has long been faced with during the implementation of the *Criminal Procedure Law* is the witness's non-appearance.⁵ There are data indicating that, prior to 2000, witness appearance rate was generally no more than 5% and even lower in some regions. For example, of the 185 criminal cases filed by Erdao District Procuratorate in Changchun, Jilin in 1997, only in 8 cases the witness testified in court. The rate of witness appearance was only 4.3%.⁶ From January, 1997 to June, 1999, in the 297 criminal cases tried by the Nanguan District, the People's Court in Kaifeng, Henan, of the 1,397 witnesses who are required to appear in court, only 5 of them did take the witness stand.⁷ If the witness does not appear in court, cross-examination, "the greatest legal engine that reveals the truth" cannot be conducted.⁸ A direct consequence resulting from non-appearance of the witness is the distortion of the witness testimony, which will affect the accuracy of the fact-finding.

Based on the awareness of the negative impact of non-appearance of the witness, in some regions, the courts' are required to take stronger' obligation to notify the witness taking the stand, and also the judicial officers are required to undertake more obligations to persuade and educate the witness to take the stand in court. In some regions, the compensation system is established to encourage the appearance of the key witness. Through years of efforts, the problem of the witness's non-appearance has been slightly, but not fundamentally, solved. In the end of 2009, in all the criminal cases across the country, witness appearance rate in trial courts was

⁴ China Justice Index is a quantitative assessment measurement that shows the degree of the judicial civilization in a jurisdiction. This Index was developed by the research team of National "2011 Program" Judicial Civilization Collaborative Innovation Center. In 2014, the research team randomly interviewed 7200 respondents among the non-judicial practitioners and judicial practitioners in nine provinces/municipalities across China. This survey aims to gain a dynamic understanding of how the current judicial civilization affects everyone's daily life.

⁵ Chen Weidong, *Research Report on Implementation of Criminal Procedure Law*, 125 (China Fangzheng Press 2001).

⁶ Sun Fei & Liu Ying, *What Are the Difficulties in Witness Appearance?*, THE PROCURATORATE DAILY, Aug. 22, 1999.

⁷ Wang Laichao, *It's Hard to See Witness in Court*, 2 CHINA BUSINESS LAW (2000).

⁸ RONALD J. ALLEN, RICHARD B. KUHN, ELEANOR SWIFT & DAVID S. SCHWARTZ, EVIDENCE: TEXT, PROBLEMS, AND CASES 205 (co-translated by Zhang Baosheng, Higher Education Press 2006).

no more than 10%, and less than 5% in appellate courts.⁹ In some regions, the situation was even worse than that before 2000. For example, in 2010, there were 2,796 criminal cases tried in the Third Intermediate People's Court of Chongqing. In these cases, of the 4,048 witnesses, who should testify at the trial in the trial courts and the appellate courts, only 13 of the witnesses in 12 cases actually took the stand. The witness appearance rate was only 0.32%.¹⁰

To impel witness appearance, the *Criminal Procedure Law* strengthens the witness's obligation to testify in court, and prescribes the compulsory witness appearance and relevant sanctions for non-appearance witness. But the problem of non-appearance of the witness has still not been fundamentally solved. In a survey on judges conducted in 2013, 26.4% of the 750 respondents believed witness appearance rate was below 5% in the cases they tried in the past three years, and 24.4% believed witness appearance rate was 5%-20%. In the study of China Justice Index conducted in 2014, 33.6% of the respondents believed that, witness appearance rate was below 5% in criminal cases, and 32.5% believed witness appearance rate was 6%-30%. It is worth noting that, 43.1% of the respondents who had been involved in legal career for more than 20 years believed witness appearance rate was 5%.¹¹

II. DIFFICULTIES IN POLICE OFFICER'S APPEARANCE

There are two instances that a police officer is required to testify at trial. In one instance, the police officer is required to testify in court as an eyewitness. And in the other case, the police officer is required to testify in court on the issue of asserted illegal evidence collection. Since the implementation of the revised *Criminal Procedure Law*, police officer's appearance has been seen in various regions. For example, in a mobile phone theft case tried by the Haizhu District People's Court in Guangzhou, Zhejiang, on January 24, 2013, of the two in court testifying witnesses, who are the members of the anti-theft team of Guangzhou Municipal Public Security Bureau, one is a police officer. This officer's testimony provided strong weight in determination the case facts.¹² But on the whole, very few

⁹ Long Pingchuan, *Key Witness Can Receive Economic Compensation for Appearance in Court*, THE PROCURATORATE DAILY, Dec. 11, 2009.

¹⁰ Xu Wei, *Witness Appearance Rate was Only 0.32% under Administration of Third Intermediate People's Court of Chongqing in 2010*, LEGAL DAILY, Jun. 14, 2011.

¹¹ Zhang Baosheng, Zhang Zhong & Wu Hongqi, *Report on China Justice Index 2014*, 167 (China University of Political Science and Law Press 2015).

¹² Liu Yingtuan, *Sometimes Police Officer is Called Witness*, PEOPLE'S COURT DAILY, Jan. 30, 2013.

police officers take the stand in court. In many regions, to require the police officer's appearance is very difficult. The higher authority's involvement in persuading and educating the police officer to take stand is often needed. Even when a police officer appears in court, the testifying effect is not that good.

Appearance of the police officer is not different from appearance of an ordinary witness even the police officer only testifies in court about what he/she witnessed when he/she performed his/her duties. But it is difficult for a police officer to accept that, he/she should be subject to the court's investigation just as an ordinary witness.¹³ Some police investigators believe that, appearance in court degrades them. Taking the witness stand is psychologically unacceptable for a police investigator, for he/she might think how an administrator of the state should present him/her in court as a witness to answer the lawyer's question.¹⁴ Survey data indicate that, only 34.5% of the respondents believe a police officer is "very likely" to appear in court providing testimony on what he/she witnessed when he/she performed his/her duties. In fact, in many cases, the police officer does not think he/she should or need to appear in court, for what he/she witnessed on his/her duties have been documented and submitted to the court. Although there are objections against the non-appearance of the police officer, the investigation authority keeps issuing "Investigation Notes" which are used to certify non-existence of illegal evidence collection and are used to substitute the appearance of the police officer. Such approach is widely criticized for it bears many risks and flaws.¹⁵

Police officer's appearance is related with the accuracy of fact finding. Police officer's appearance plays an important role in safeguarding the defendant's confrontation right and curbing extortion of confession by torture.¹⁶ In practice, a police officer is notified in advance of testifying in court about the issue of asserted illegal evidence collection. In other words, the defendant asserts in court that his/her pretrial confession is extorted by the police officer by torture, and thus requires the police officer to testify in court. To prove the legitimacy of the extortion of the confession, the court would notify the police officer who made the interrogation to appear in

¹³ LI YUHUA, ZHOU JUN & QIAN ZHIJIAN, POLICE OFFICER APPEARANCE GUID 12-14 (Publishing House of Chinese People's Public Security University 2014).

¹⁴ FAN CHONGYI, CRIMINAL EVIDENCE SYSTEM DEVELOPMENT AND APPLICATION 266 (The People's Court Press 2012).

¹⁵ Chen Ruihua, *Investigators' Witness Status*, 1 JOURNAL OF JINAN UNIVERSITY (PHILOSOPHY AND SOCIAL SCIENCES) (2012).

¹⁶ Zhang Zhong, *Revision of Criminal Procedure Law and Improvement of Evidence System*, NEW DEVELOPMENTS IN CRIMINAL EVIDENCE LAW 30 (Wang Jinxi ed., Law Press China 2013).

court. Survey result shows that, in such case, it is very hard to enforce the appearance of the police officer. Only 31.2% of the respondents believe the police officer is “very likely” to appear in court, while 29.6% believe that, the police officer is “unlikely” or “impossible” to do that.

III. WIDELY USED PRETRIAL TESTIMONIAL TRANSCRIPTS

Statements made by a witness outside the courtroom are hearsay. According to the hearsay rule, hearsay shall not be adopted except in special cases. But China’s evidence law does not incorporate the hearsay rule. A pretrial testimonial transcript can be admitted as evidence as long as it has been verified. The *Criminal Procedure Law* Section 59 prescribes that, “The witness’s pretrial out-of-court testimonial transcript, expert opinion, crime scene investigation transcript and any evidentiary document shall be read out in the court.” This provision in fact endorses the admissibility of the pretrial testimonial transcripts. The admission of probative value of testimonial transcripts has resulted in numerous abnormalities in criminal trials in China, such as witness’s non-appearance in court and the admission of the pretrial testimonial transcripts as evidence.¹⁷

In practice, as a witness usually does not appear in court, the defendant is unable to confront with the witnesses who offer testimonial evidence against him/her in the form of cross-examination during a trial, but only confront with a pile of paper, which are pretrial out-of-court testimonial transcripts. Such practice is absurd. However, the judge survey shows that, only 10.3% of the respondents believe that, the pretrial testimonial transcripts are inadmissible.

According to the interviewees’ response to one of the judge survey questions, which is to test how likely the pretrial testimonial transcripts would be admitted at trial, given the presumption that the witness, with full awareness of that pretrial testimonial transcripts can substitute his/her appearance in court, evades court appearance by giving pretrial testimonial transcripts only, 62.1% of the judges believe the court is likely to directly use the pretrial testimonial transcripts, while only 8.1% believe it is disallowed for the court to directly use the pretrial testimonial transcripts.

According to the interviewees’ response to another judge survey question, which is to test how likely the judge would allow the admission of the pretrial testimonial transcripts, given that the judge finds that there are too many witnesses in the case, and thus uses the pretrial testimonial transcripts to avoid troubles, 44.9% of the judges believe the court is likely

¹⁷ Long Zongzhi, *Written Testimony and Its Application*, 4 CHINA LEGAL SCIENCE (2008).

or very likely to directly use the pretrial testimonial transcripts, while only 11.6% believe it is disallowed for the court to directly use the pretrial testimonial transcripts. The right to be confronted with the witness who accuses against the witness is considered to be a fundamental human right of the defendant.¹⁸ Admission of pretrial testimonial transcripts means deprivation of the defendant's right of confrontation.

IV. THE LACK OF EFFECTIVE GUARANTEES FOR THE AUTHENTICITY OF THE WITNESS TESTIMONY

A witness bears the obligation not only to testify but also to provide authentic testimony. Section 189 of the *Criminal Procedure Law* provides that, "When a witness gives testimony, the judge shall instruct him/her to give authentic testimony and of the sanctions if he/she intentionally gives false testimony or conceals evidence." But in practice, for some reasons, the testimony given by the witness can rarely reflect the case facts accurately. Besides the witness intentionally gives false testimony or conceals evidence, factors that can affect testimony authenticity also include the witness' cognition, memory and expression. In other words, a witness may provide false testimony even if he/she does not intend to provide false testimony.¹⁹

Witness testimony, specifically the eyewitness testimony, has high probative value. But such testimony may have a substantial impact on the accuracy of fact-finding if any deviation or error occurs.²⁰ In practice, some witnesses provide false testimony in order to frame up others. Survey data show that, up to 47.4% of the respondents believe this possibility exists. 6.9% of the respondents believe this possibility is "very likely" to exist.

If the witness intentionally gives false testimony, he/she can be charged with the crime of perjury. Some witnesses give testimony passively. For example, if a witness appears in court upon the court's subpoena, but is reluctant to testify, he/she often testifies in court by stating "I did not see it" or "I did not catch it". Some witnesses demonstrate extreme unserious attitude when testifying at the trial. They make nonsense statements in court. The result of the judge survey shows that, 40.8% of the respondents believe such unserious in-court testimony given by a witness may exist during the trial.

¹⁸ CHEN GUANGZHONG, EXPERT PROPOSAL OF CRIMINAL EVIDENCE LAW OF THE PEOPLE'S REPUBLIC OF CHINA (ARTICLES, INTERPRETATION AND ARGUMENTATION) 480 (China Legal Publishing House 2004).

¹⁹ LIU JINYOU, SCIENCE OF EVIDENCE LAW (NEW ED.) 115 (China University of Political Science and Law Press 2003).

²⁰ ZHANG JUN, UNDERSTANDING AND APPLICATION OF RULES ON CRIMINAL EVIDENCE, 128 (Law Press China 2010).

In addition, some witnesses are reluctant to give testimony. For example, in some cases, the witness gives testimony in the court while he/she was not on the crime scene at the moment. The result of the judge survey shows that, 67.2% of the respondents believe this possibility exists.

Some people think that, a witness should sign a sworn declaration before giving testimony in the court in order to provide guarantees to the testimony's authenticity. In some regions, the witness is even required to take oath in the court with one hand touching the Constitution.²¹ But the result of the judge survey shows that, 90.1% of the respondents believe that, safeguarding the witness's own interest is the most effective means to ensure the authenticity of the witness's testimony; 86.9% believe that, severe punitive measures should be taken against perjury; and 82.7% suggest that, witness protection should be strengthened. In that sense, the law should clearly prescribe the judicial authority's responsibility in protecting the safety of the witnesses and their close relatives, and the law should define and implement specific protection measures.

V. FLAWS IN THE WITNESS PROTECTION SYSTEM

The guarantee of the witness's safety is an important factor in encouraging the witness's appearance and the authenticity of the witness's testimony. If the safety of a witness and his/her close relatives cannot be guaranteed, the witness will lose the motive to give in court testimony. The great British judge Lord Denning said, if the witness would be retaliated by those who do not like his/her testimony when the case is over, how can we expect the witness to freely and frankly give testimony they should give?²² Therefore, witness protection is not simply a state wide responsibility. It is also a prerequisite for having the potential witness willingly appear in court to give testimony.

However, for a long time, there are serious flaws in China's witness protection system. Besides the excessive abstractness of the legislation and the lack of specific protection measures, the flaws also include the incompetent witness protection measures provided by the *Criminal Procedure Law*. The law only provides that, penal sanctions, an ex post remedy, be enforced to any retaliating conduct against witness.²³ However,

²¹ Zheng Jinxiong & Wang Xu, *Xiamen Siming District Court Tries Witness Oath System*, LEGAL DAILY, Dec. 5, 2001.

²² LORD DENNING, *THE DUE PROCESS OF LAW* 25 (co-translated by Li Keqiang, Law Press China 1999).

²³ WANG JINXI, *CRIMINAL WITNESS TESTIMONY* 226-227 (Publishing House of Chinese People's Public Security University 2002).

in a witness protection system equipped with no specific measures, the so-called “protecting the safety of the witnesses and their close relatives” is nothing but a slogan.²⁴

In awareness of the importance of witness protection and the lack of witness protection measures, five ministries and commissions led by the Supreme People’s Court promulgated the *Regulations on Several Issues Concerning Evidence Review and Determination in Handling of Death Penalty Cases* in 2010. This judicial interpretation, aiming to change the current situation of low-rate witness appearance, clearly provides witness protection measures, such as “limiting publicity of the witness’ information”, “limiting inquiry into the witness”, “veiling the witness’ look” and “changing the witness’ sound”. The 2012 *Criminal Procedure Law* incorporates these provisions and also provides more witness protection measures, including securing the witness’ personal information such as name, address and place of work, veiling his/her look, altering his/her voice, prohibiting special persons from making contact with him/her and his/her close relatives, and specially protecting him/her and his/her house.

However, in practice, these protection measures are not applied very well. Survey data show that, the measure of securing the witness’ personal information such as name, address and place of work is taken in 31.9% of the cases; the measure of veiling the witness’ look or altering his/her voice is taken only in 19.9% of the cases; the measure of prohibiting special persons from making contact with the witness and his/her close relatives is taken only in 19.9% of the cases; and the measure of specially protecting the witness and his/her house is taken only in 14.5% of the cases. Only 18.1% of the witnesses, who filed request for safety protection to the people’s court, people’s procuratorate or public security bureau, are protected.

It should be specially noted that, the witness protection measures prescribed in Section 62 of the *Criminal Procedure Law* are limited to “ex ante protections”. This provision does not deal with witness protections after testimony is given. However, what the witness mostly worries is retaliation. Therefore, the legislators should strengthen the protection measures for witnesses after they give testimony. Such measures might include changing the witness’s identity, assisting the witness moving to another area, or changing the witness’s outlook.

²⁴ FAN CHONGYI, SPECIAL REPORT ON REVISION OF CRIMINAL PROCEDURE LAW 483 (Publishing House of Chinese People’s Public Security University 2004).

VI. THE LACK OF FINANCIAL COMPENSATION FOR WITNESS'S APPEARANCE

Appearance in court is a witness's legal obligation, but the appearance may cost the witness certain expenses or have him/her lose potential income. If the potential cost is over the potential gaining, the witness's refusal to appear in court is considered to be a "rational" request. To change the witness's unwillingness of appearing in court, interest factors that motivate the witness's behavior must be controlled. Therefore, a financial subsidy in compensating the witness of his/her appearance in court is considered not only to be necessary to compensate the economic losses caused by the witness's appearance in court, but also a solid guarantee for the witness's willing fulfillment of the in court appearance obligation.²⁵

However, in China's criminal procedure system, there has long been lack of financial compensation measures in compensating the witness. To solve the difficulties in encouraging the witness's appearance, some local courts have experimentally begun to set up the witness compensation system. For example, Section 112 of *Regulations on Issues Concerning Evidence in Handling of Various Cases (Trial)* promulgated by the Beijing High People's Court in 2001 prescribes that, "The cost resulting from the witness's appearance in court, such as the loss of working time, transportation cost, accommodation cost, and other necessary cost, should be compensated to the witness, given the witness files request for compensation. The amount of the compensation should be inspected and decided by the court. The party who has the witness take stand in the party's favor should pay in advance the witness compensation along with other necessary litigation fees. The accurate allocation of the witness compensation should be decided by the court according to the court decisions of the parties' contributory liabilities." In 2003, the Chan Cheng District People's Court in Foshan, Guangdong, promulgated the *Regulations on the Witness's Appearance and Compensation in Criminal Cases*. This judicial interpretation prescribes that, the court shall pay the witness the compensation, including the loss of working time, transportation cost, accommodation cost, meal cost and other reasonable expenses, after the witness fulfills the obligation to appear in court. But these compensation measures are not well implemented in practice. For example, in Beijing, the first witness compensation was issued in December, 2009 by Xicheng District People's Procuratorate. In this case, the witness was only paid by

²⁵ Yao Li & Wu Danhong, *Research on Witness Economic Compensation System*, 3 JOURNAL OF ZHONGNAN UNIVERSITY OF ECONOMICS AND LAW (2004).

100 RMB for compensation.²⁶ This compensation case is both Beijing's and the country's first case of compensating a key witness who testifies in court in light of the procuratorial authority's institutionalized regulations.²⁷

To eliminate the witnesses' financial loss concerns and to encourage the witnesses' willingness in fulfilling the obligation to appear in court in order to assist the judicial authorities to find the truth of facts, Section 63 of the revised *Criminal Procedure Law* prescribes that, a witness shall be given a subsidy for his/her appearance in court. The witness's employer shall not withhold his/her salaries or bonuses for his/her off work caused by his/her appearance in court. This section prescribes the scope and funding sources of the subsidy paid to the witness in compensation of his/her appearance in court. But it does not prescribe a clear standard for calculating the subsidy. The calculation standard provided by the Xicheng District People's Procuratorate, which states 200 RMB per day for accommodation and meals, 20 RMB per meal, and 10 RMB (urban residents) and 30 RMB (suburban residents) for transportation, will hardly encourage the witnesses to fulfill the obligation to appear in court.

Normal expenses resulting from appearance in court including transportation, accommodation, meal and communication fees and loss of working time cannot be compensated adequately. Survey data show that, transportation expense (78.8%) is the most likely to be compensated, followed with accommodation expense (70.3%) and loss of working time (64.3%). The respondents believe communication expense (46.8%) is the least likely to be compensated.

VII. AN URGENT NEED TO ESTABLISH A WITNESS PRIVILEGE SYSTEM

The criminal procedure is not only a process aiming to make fact-findings but also a process implementing the value choice. Protecting the privilege of the witness is actually the result of value choice.²⁸ The main purpose of protecting the witness's privilege is to protect the witness's outside court's interests and relationships, whose importance is considered to be sufficiently overweighs the cost of losing useful evidence in the judicial process.²⁹ However, the privilege of witness is apparently contrary

²⁶ Gao Jian, *First Financial Compensation for Key Witness*, BEIJING DAILY, Dec. 11, 2009.

²⁷ Long Pingchuan, *Key Witness Can Receive Economic Compensation for Appearance in Court*, THE PROCURATORATE DAILY, Dec. 11, 2009.

²⁸ WANG JINXI, CRIMINAL WITNESS TESTIMONY 84 (Publishing House of Chinese People's Public Security University 2002).

²⁹ RONALD J. ALLEN, RICHARD B. KUHN, ELEANOR SWIFT & DAVID S. SCHWARTZ, EVIDENCE: TEXT, PROBLEMS, AND CASES 905 (co-translated by Zhang Baosheng, Higher Education Press 2006).

to the goal of promoting the accuracy of fact-finding.³⁰ Numerous countries have provided clear scope of the witness privilege, although the scope described in different countries might be slightly different in specific cases.³¹

In China, the majority of the judges consider it necessary to establish the witness privilege system. The result of the judge survey shows that, 79.7% of the respondents support specific relatives be given the privilege of not testifying in court; 87.2% support the privilege be provided to protect the communications between lawyer and client; and 82.9% advocate the privilege be provided to protect the communications between the psychiatrist or psychotherapy practitioners and the patient.

Section 188 of the *Criminal Procedure Law* basically reflects the idea of protecting the witness's privilege, by prescribing exceptions to the mandatory witness appearance requirement. This provision states that, "If, the witness, who has received the subpoena issued by the court, refuses to testify in court with no justified excuses, the court can force him/her to appear in court, except that he/she is the defendant's spouse, parent or child." In fact, after the promulgation of the *Draft Amendment to Criminal Procedure Law*, some scholars pointed out that, this section means that, the defendant's close relatives can refuse to appear in court to testify against the defendant.³² This section in fact provides protections to the "privilege of witness".³³ However, the author does not believe that, this section establishes the privilege of witness. This section, only prescribing that, the defendant's spouse, parents and children shall not be forced to appear in court, does not relieve the defendant's spouse, parents and children from the obligation to appear in court.

It should be noted that, the Section 188 of the *Criminal Procedure Law* providing "the defendant's specific relatives shall not be forced to appear in court" does not mean to destruct the value of "placing righteousness above family loyalty". Noted by some scholars, the revised *Criminal Procedure Law* will not "interfere the current judicial regulations, which is based on the value of 'placing righteousness above family loyalty'".³⁴ In general,

³⁰ ZHANG BAOSHENG, EVIDENCE LAW 254 (China University of Political Science and Law Press 2009).

³¹ FAN CHONGYI, SPECIAL REPORT ON REVISION OF CRIMINAL PROCEDURE LAW 487-488 (Publishing House of Chinese People's Public Security University 2004).

³² Li Xianzhao, Ding Yapeng & Jiang Tingyu, *Criminal Procedure Law Alters Righteousness above Family Loyalty*, XINHUA DAILY, Aug. 28, 2011.

³³ Wang Hong, *Police Officers Need to Appear in Court for Clarification*, LEGAL EVENING NEWS, Aug. 24, 2011.

³⁴ Li Xianzhao, Ding Yapeng & Jiang Tingyu, *Criminal Procedure Law Deletes Righteousness above Family Loyalty*, XINHUA DAILY, Aug. 28, 2011.

establishment of the privilege for relatives is primarily aiming to protect family relationships and ethics and mutual trust. If a person, who holds the privilege, for example, the defendant's spouse, parent or child, does not claim or waive the privilege, he/she can appear in court.³⁵

CONCLUSION

Building the evidence system is a long-term and arduous task, and also a complex social systematical program. Through the past thirty years' development, the status of the law of evidence has been for the first time identified in China's legal system.³⁶ Particularly, since the beginning of the 21st century, China has entered a stage of rapid development of evidence law. The two "criminal evidence rules" jointly promulgated by five ministries and commissions led by the Supreme People's Court in 2010 as a symbol has set a new milestone in China in establishing the evidence law. The promulgation of the 2012 revised *Criminal Procedure Law* and the relevant judicial interpretations, which aim to promote the establishment of the witness appearance system has pushed the development of the evidence law to a new level.

However, the key to rule of law is the implementation of the law. Section 14 of the *Opinions on Comprehensive Intensification of Reform of People's Court* promulgated by the Supreme People's Court in 2015 stresses that, China shall "strictly implement the witness appearance system". It can be seen from the survey result that, there are serious challenges in implementing the witness appearance system. We should rethink the reasonableness of establishment of the evidence system while strive to overcome the practical obstacles. The enforcement of the witness appearance system shall take into considerations of other countries' experience as well as China's legal traditions, basis of the China's society's evolvement of civilization, and the awareness and China's citizens' awareness and tolerance of rule of law.

³⁵ Yin Hong & Wang Yiyin, *Seven Highlights in Revision of Criminal Procedure Law*, GUANGMING DAILY, Aug. 25, 2011.

³⁶ ZHANG BAOSHENG & CHANG LIN, CHINA EVIDENCE LEGISLATION DEVELOPMENT REPORT (1978-2008) 1 (China University of Political Science and Law Press 2011).