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# Cross-Examination of Witnesses in Chinese Criminal Courts: Theoretical Debates, Practical Barriers, and Potential Solutions

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ABSTRACT

*Questioning witnesses is essential for both fact-finding and ensuring the defendant's right to confrontation in criminal trials. Part I introduces the recently released judicial interpretation on the Application of Criminal Procedure Law by China's Supreme Court as a background for discussion of this Article. In Part II, the author sets the stage by arguing that resolution of questions concerning examination and cross-examination of witnesses is essential to the effective achievement of China's trial-centered criminal procedure law reform. In Part III, a historical review is given of the academic debate on the questioning of witnesses in Chinese criminal courts. Part IV examines and evaluates China's current legislation on cross-examination of witnesses. By comparing the Chinese legal provisions with the Anglo-American cross-examination rules, the author argues that China has not formally established cross-examination rules, but that there are some existing provisions that nevertheless regulate or guide cross-examination. In Part V, the author discusses her empirical findings about the questioning of witnesses in Chinese criminal courts. Features will be summarized, and problems identified. In Part VI, some proposals are put forward to create a set of cross-examination rules suited to the Chinese situation. Part VII concludes this Article by reiterating the author's key arguments.*

TABLE OF CONTENTS



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## I. INTRODUCTION

On January 26, 2021, a long-awaited judicial interpretation was released by the Supreme People's Court (SPC) of the People's Republic of China and aroused tremendous attention among the Chinese legal community.[1] This judicial interpretation concerns the implementation of the Criminal Procedure Law (CPL),[2] which was amended in October 2018. The new SPC judicial interpretation contains 655 articles and became the most voluminous judicial interpretation on criminal procedure law so far. Judicial interpretation has become a special addition to the Criminal Procedure Code of China since 1996, when the

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1. Zuigao Renmin Fayuan Guanyu Shiyong, Zhonghua Renmin Gongheguo Xingshi Susong Fa De Jieshi, Fa Shi [2021] Yi Hao (最高人民法院关于适用《中华人民共和国刑事诉讼法》的解释，法释〔2021〕1号) [Interpretation of the Supreme People's Court on the Application of Criminal Procedure Law of the People's Republic of China, Judicial Interpretation No. 1 [2021]] (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 7, 2020, effective Mar. 1, 2021) Sup. People's Ct. Gaz., Jan. 26, 2021, http://www.court.gov.cn/fabu-xiangqing-286491.html [https://perma.cc/XDZ7-8Q5X] (archived Jan. 16, 2022) [hereinafter 2021 SPC Interpretation].

2. Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, rev'd Oct. 26, 2018, effective Oct. 26, 2018), https://www.pkulaw.com/en_law/6e173190d824228dbdfb.html [https://perma.cc/ZQH7-LNJL] (archived Jan. 16, 2022) [hereinafter 2018 CPL]).

Chinese CPL was amended for the first time.[3] From then on, it has become the custom for the SPC and the Supreme People's Procuratorate (SPP)[4] to issue judicial interpretations to flesh out or supplement the CPL, making it more operational and applicable.[5] The

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3. The People's Republic of China enacted its first Criminal Procedure Law in 1979, (Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法)) [Criminal Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective Jan. 1, 1980) https://www.pkulaw.com/en_law/6e173190d824228dbdfb.html [https://perma.cc/5PQU-9U2D] (archived Jan. 16, 2022) [hereinafter 1979 CPL]), then amended in 1996 (Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, rev'd Mar. 17, 1996, effective Jan. 1, 1997) https://www.pkulaw.com/en_law/2eca790ee72fb2c8bdfb.html [https://perma.cc/2FDU-M6EW] (archived Jan. 16, 2022) [hereinafter 1996 CPL]), 2012 (Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, rev'd Mar. 14, 2012, effective Jan. 1, 2013) https://www.pkulaw.com/en_law/6d5f42efc8724124bdfb.html [https://perma.cc/7XZ2-5M3D] (archived Jan. 16, 2022) [hereinafter 2012 CPL]), and 2018, *see* 2018 CPL, *supra* note 2, respectively.

4. Because procuratorates are also judicial organs in China, the SPP has the same authority with the SPC to issue judicial interpretations, see Zhōnghuá rénmín gònghéguó rénmín jiǎncháyuàn zǔzhī fǎ (中華人民共和國人民檢察院組織法) [Organic Law of the People's Procuratorates of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 26, 2018, effective Jan. 1, 2019) art. 23 (China).

5. Before the 1996 CPL was enacted, the SPC released a judicial interpretation for trial implementation on December 20, 1996, effective from January 1, 1997. Zuigao Renmin Fayuan Yinfa Guanyu Zhixing Zhonghua Renmin Gongheguo Xingshi Susong Fa Ruogan Wenti De Jieshi Shixing De Tongzhi (最高人民法院印发《关于执行<中华人民共和国刑事诉讼法>若干问题的解释(试行)》的通知 (1996) 号) [Notice of the Supreme People's Court on the Interpretation (Trial) on Several Issues Concerning the Implementation of the Criminal Procedure Law of the People's Republic of China, Judicial Interpretation No. 33 [1996]] (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 20, 1996, effective Jan. 1, 1997) SUP. PEOPLE'S CT. GAZ., https://www.pkulaw.com/CLI.3.18614 [https://perma.cc/ED2A-8WMM] (archived Jan. 16, 2022). Then the SPC released a formal judicial interpretation on September 2, 1998, effective from September 8, 1998. Zuigao Renmin Fayuan Guanyu Zhixing Zhonghua Renmin Gongheguo Xingshi Susong Fa Ruogan Wenti De Jieshi, Fa Shi [1998] Ershisan (最高人民法院关于执行《中华人民共和国刑事诉讼法》若干问题的解释, 法释 (1998) 23 号) [Interpretation of Supreme People's Court on Several Issues Concerning Implementation of Criminal Procedure Law of People's Republic of China, Judicial Interpretation No. 23 [1998]] (promulgated by the Judicial Comm. Sup. People's Ct., June 29, 1998) SUP. PEOPLE'S CT. GAZ., Apr. 27, 2010, http://www.court.gov.cn/zixun-xiangqing-824.html [https://perma.cc/9NUG-7U79] (archived Jan. 16, 2022). After the 2012 CPL was promulgated, SPC released a formal interpretation on implementing the CPL on December 20, 2012, and this interpretation took effect on January 1, 2013, together with the 2012 CPL. Zuigao Renmin Fayuan Guanyu Shiyong Zhonghua Renmin Gongheguo Xingshi Susong Fa De Jieshi, Fa Shi [2012] Ershiyi (最高人民法院关于适用中华人民共和国刑事诉讼法 的解释, 法释 (2012) 21 号) [Interpretation of Supreme People's Court on Application of Criminal Procedure Law of People's Republic of China, Judicial Interpretation No. 21 [2012]] (promulgated by the Judicial Comm. Sup. People's Ct., Nov.

5., 2012, effective Jan. 1, 2013) SUP. PEOPLE'S CT. GAZ., Dec. 28, 2012, http://www.court.gov.cn/fabu-xiangqing-4937.html [https://perma.cc/QD32-VDEV] (archived Jan. 16, 2022). The SPP interpretation follows a similar timeline: a judicial interpretation for trial implementation was issued in January 1997. Zuigao Renmin Jiancha Yuan Guanyu Yinfa Renmin Jiancha Yuan Shishi Zhonghua Renmin Gonghe Guo Xingshi Susong Fa Guize Shixing De Tongzhi (最高人民检察院关于印发《人民检察院实施中华人民共和国刑事诉讼法 规则(试行)》的通知 (1997) 1 号) [Notice of the Supreme People's Procuratorate on Printing and Distributing the Rules for the Implementation of the Criminal Procedure Law of the People's Republic of China by the People's Procuratorate (Trial), Judicial Interpretation No. 1 [1997]] (promulgated by the Sup. People's Proc., Jan. 20, 1997, effective date) SUP. PEOPLE'S PROC. GAZ. https://www.pkulaw.com/CLI.3.18605 [https://perma.cc/9QD8-96RF] (archived Jan. 16, 2022). Then a revised edition was issued in 1999. Renmin Jiancha Yuan Xingshi Susong Guize (人民检察院刑事诉讼规则) [Rules of Criminal Procedure of the People's Procuratorate, Judicial Interpretation No. 1 [1999]] (promulgated by the Sup. People's Proc., Dec. 18, 1998, effective Jan. 18, 1999) SUP. PEOPLE'S PROC. GAZ., https://www.pkulaw.com/CLI.3.22101 [https://perma.cc/58C7-382Y] (archived Jan. 16, 2022)). An interpretation was then issued in 2012 after the 2012 CPL amendment. Renmin Jianchayuan Xingshi Susong Guize (Shixing) (人民检察院刑事诉讼规则(试行) [Criminal Procedure Rules of the People's Procuratorate (for Trial Implementation)] (promulgated by Sup. People's Proc., Jan. 15, 1997, revised Oct. 16, 2012) SUP. PEOPLE'S PROC. GAZ., Feb. 17, 2015, https://www.spp.gov.cn/sscx/201502/t20150217_91463.shtml [https://perma.cc/YA57-MJ2Q] (archived Jan. 16, 2022)). And a further interpretation was released in 2019. (Renmin Jianchayuan Xingshi Susong Guize (人民检察院刑事诉讼规则) [Criminal Procedure Rules of People's Procuratorate] (promulgated by Sup. People's Proc., Dec. 2, 2019, effective Dec. 30, 2019) SUP. PEOPLE'S PROC. GAZ., Dec. 30, 2019, https://www.spp.gov.cn/spp/xwfbh/wsfbh/201912/t20191230_451490.shtml#1 [https://perma.cc/4PFK-4SYE] (archived Jan. 16, 2022)) after the 2018 CPL amendment. In addition to the SPC interpretation and the SPP interpretation, the Ministry of Public Security (China's highest police agency) also enacts their interpretations, which cover mainly the investigation. Since there are always conflicts or inconsistencies among interpretations issued by different agencies, these agencies also jointly issue comprehensive interpretations to solve contradictions or inconsistent provisions among their respective interpretations. *See* Zuigao Renmin Fayuan Zuigao Renmin Jiancha Yuan Gong'an Bu Guojia Anquan Bu Sifa Bu Quanguo Renda Changwu Weiyuan Hui Fazhi Gongzuo Weiyuan Hui Guanyu Shishi Xingshi Susong Fa Ruogan Wenti De Guiding (最高人民法院、最高人民检察院、公安部、国家安全部、司法部、全国人大常委会法制工作委员会关于实施刑事诉讼法若干问题的规定) [Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice, and the Legislative Affairs Commission of the Standing Committee of the National People's Congress on Several Issues concerning the Implementation of the Criminal Procedure Law, Judicial Interpretation [1998]] (promulgated by the Sup. People's Proc Dec. 26, 2012, effective Jan. 1, 2013) https://www.pkulaw.com/en_law/1511e42366e814dbbdfb.html [https://perma.cc/7KEZ-NGD9] (archived Jan. 16, 2022); Zuigao Renmin Fayuan Zuigao Renmin Jiancha Yuan Gong'an Bu Deng Guanyu Shishi Xingshi Susong Fa Ruogan Wenti De Guiding (最高人民法院、最高人民检察院、公安部等关于实施刑事诉讼法若干问题的规定) [Provisions of the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice, and the Legislative Affairs Commission of the Standing Committee of the National People's Congress on Several Issues concerning the Implementation of the Criminal Procedure Law, Judicial Interpretation (promulgated by the Sup. People's Proc, Dec. 26, 2012, effective Jan. 1, 2013) https://www.pkulaw.com/CLI.3.191815 [https://perma.cc/VX79-3TAX] (archived

recently released SPC judicial interpretations caused so much attention for two reasons. In the first place, it took over two years to be issued, which is unusual, as the previous judicial interpretations were enacted in the same year in which the CPL amendments were promulgated.[6] Second, the additional increase of the judicial interpretations from 548 to 655 articles appears incommensurate with the minor revision enacted in the 2018 CPL amendment.[7] As a matter of fact, the 2021 SPC interpretations incorporated many previous judicial reform outcomes and will take several papers to elaborate on them. This Article focuses only upon one of the many revisions: changes to the examination and cross-examination of witnesses in criminal trials.[8]

"Witness testimony" has a narrower meaning in China than in many common law jurisdictions. Chinese law defines witnesses as participants in criminal proceedings, other than the defendants or victims, who possesses direct knowledge of case facts and share such knowledge with the case-handling authorities.[9] In Chinese criminal procedure, witness testimony is considered separately from evidence offered by others at court, such as victim statements, defendant confessions and statements, and expert opinions. Although China defines more narrowly persons who are classified as "witnesses," there is a trend of applying the same rules to all oral (testimonial) evidence.[10]

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Jan. 16, 2022). A new joint interpretation is underway to coordinate the new interpretations issued after the 2018 CPL amendment.

6. *See supra*, note 5.

7. The 2018 CPL amendment only involved 26 articles, much less than each of the 1996 and the 2012 amendments. *See* 2018 CPL, *supra* note 2.

8. It has become a custom that rules of examination and cross-examination are included in the SPC interpretations instead of criminal procedure code since the 1996 CPL. That is why the SPC interpretations are the official legislation on witness questioning. Of course, other legal documents also touch on this topic.

9. *See* CRIMINAL PROCEDURE LAW 85 (Chen Guangzhong ed., 7th ed.).

10. The Chinese CPL lists eight categories of legal evidence, including: (1) physical evidence; (2) documentary evidence; (3) witness statement; (4) victim statement; (5) confession and defense of a criminal suspect or defendant; (6) expert opinion; (7) transcripts of crime scene investigation, examination, identification, and investigative reenactment; and (8) audio-visual recordings and electronic data. Chinese evidence law research divided all legal evidence into two categories: oral evidence and tangible evidence. Of the eight types of legal evidence prescribed by the CPL, witness statement, victim statement, confession, and expert opinion fall under oral evidence, and the rest fall under the tangible evidence. *See* 2018 CPL, *supra* note 2. Article 261 of the SPC interpretation of the 2018 CPL provides, "The following rules shall be complied with when examining a witness ...The interrogation and examination of the defendant, victim, civil parties, forensic analyst and person with special knowledge, investigation personnel and other witnesses, aforementioned rules apply. " Clearly the rules of questioning witnesses cover not only the witness, but also defendant, victim, civil parties, expert witness, and investigation personnel. *See* 2021 SPC Interpretation, *supra* note 1, at § 261.

Therefore, this Article uses the term "witness" in its broader meaning. However, as there are some special requirements for questioning defendants and victims in court because they are the parties to the proceeding, this Article only explores the questioning of nonparty witnesses, which include lay witnesses, expert witnesses, and investigation personnel.[11] "Witnesses" in this Article refers to nonparty witnesses unless pointed out otherwise.

Witness testimony in Chinese criminal trials also includes both oral testimony and written statements due to the absence of a hearsay rule. Chinese criminal courts admit both witness testimonies presented by witnesses at court and out-of-court witness statements made to police or prosecutors at pretrial stages.

This Article is based upon a literature review, a normative analysis, a comparative study, and upon empirical research. First, the literature review[12] demonstrates how this subject is now understood in the Chinese legal community and the extent to which there is consensus. Second, the normative analysis shows that China has accumulated some piecemeal legal provisions on the questioning of witnesses, and these are considered by asking whether, having regard to Anglo-American cross-examination rules, these rules need a more systematic evaluation.

Third, as the law on paper is often quite different than the law in action, it is also essential to ascertain whether examination and cross-examination of witnesses takes place in trial practice. The author was

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11. Police didn't testify in Chinese court until the 2010 exclusionary rule required them to do so. Since then, the investigation personnel are encouraged to take the stand as regular witnesses. Since the 2012 CPL was promulgated, efforts are made to push three groups of witnesses to testify in court, and they are lay witnesses, expert witnesses and investigation personnel. Zhengren Chuting Lv Quanguo Diyi Wenzhou Tansuo Shang Zuigao Fa Gongzuo Baogao (证人出庭率全国第一 "温州探索" 上最高法工作报告)(Witness appearance rate ranked No.1 across the country, the Wenzhou Exploration was included into the SPC work report) http://news.66wz.com/system/2017/03/13/104972636.shtml [https://perma.cc/Q4HE-YJXH] (archived Mar. 28, 2022). Article 12 in the "Opinions on Advancing the Reform of the Trial-Centered Criminal Procedure System" urges the improvement of the rules for the cross-examination of witnesses and identification or evaluation experts in court. The system for witnesses, identification or evaluation experts and investigators to appear in court and testify shall be implemented, and the rates of appearance in court to testify shall be raised. Yinfa Guanyu Tuijin Yi Shenpan Wei Zhongxin De Xingshi Susong Zhidu Gaige De Yijian De Tongzhi Fafa 2016, No.18 (印发《关于推进以审判为中心的刑事诉讼制度改革的意见》的通知法发 (2016) 18 号) [Notice on Issuing Opinions on Promoting the Reform of the Trial-centered Criminal Procedure System, Judicial Interpretation No. 18 [2016]] (promulgated by the Sup. People's Proc., July 20, 2016, effective on July 20, 2016) SUP. PEOPLE'S PROC. GAZ., http://gongbao.court.gov.cn/Details/cb3da84936ee3616a2a0c15cc152d4.html [https://perma.cc/T84M-JR8U] (archived Jan. 16, 2022) [hereinafter the 2016 Opinions].

12. The literature reviewed for this Article are provided in an appendix at the end of the piece. *See infra* Appendix at the end of the paper.

involved in two empirical survey projects on live witnesses and cross-examinations from 2014 to 2019. The first survey (2014–2015) covered Beijing, Zhejiang, Guangxi, and Heilongjiang, including in-depth interviews with around 120 prosecutors, criminal judges, and defense lawyers, a dozen symposiums or focus groups, and four hundred questionnaire surveys.[13] The second survey (2019) covered seven cities in four provinces,[14] including in-depth interviews with sixty-two prosecutors, thirty-five criminal judges, and forty-six defense lawyers, and collected nine example cases through workshop discussions, observations of trial videos, and reviews of trial records. The 2014–2015 survey identified the lack of cross-examination rules as one of the reasons why the courts hesitate to call witnesses to testify. The 2019 survey explored cross-examination practice in China. The author has published an article based on the 2014–2015 survey with the focus on live witnesses.[15] The 2019 survey has not been previously published.

This Article tries to answer the following questions: Is examination and cross-examination of witnesses in criminal courts critical for China's justice system? To what level has the study of cross-examination rules in China reached? What cross-examination rules exist in Chinese legislation? How is the questioning of witnesses conducted in practice, if at all? What practical barriers confront China in developing effective cross-examination rules? Can these barriers be overcome if China needs to improve cross-examination rules?

In Part II, the author sets the stage by arguing that resolution of these questions is essential to the effective achievement of China's trial-centered criminal procedure law reform. This reform will be first discussed as the backdrop to the discussion of cross-examination that follows. In Part III, a historical review is given of the academic debate on the questioning of witnesses in Chinese criminal courts. Part IV examines and evaluates China's current legislation. By comparing this legislation with Anglo-American cross-examination rules, the author argues that although China has not formally established cross-examination rules, there are a number of existing provisions that

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13. Focus groups involved prosecutors, criminal judges, and defense lawyers. Questionnaire survey was merely used as a supplementary method to interviews and symposiums. Questionnaires were distributed in four survey cites, targeting prosecutors, criminal judges, and defense lawyers. Since all the questionnaires were distributed by our partner organizations, we were able to get 100 percent response. Questionnaire questions were quite simple and just to confirm some hypothetical causes for lack of live witnesses, and the results were consistent with those obtained from symposiums or interviews. For detailed discussions, see Zhiyuan Guo, *Live Witnesses in Chinese Criminal Courts: Obstacles and Reforms*, 62 INT'L J. L., CRIME AND JUST. 1, 6 (2020).

14. Shanghai, three cities in Guangdong province (Zhuhai, Foshan, Zhongshan), one city in Hebei province (Qinhuangdao), two cities in Fujian province (Fuzhou and Xiamen). *See id.*

15. *See id.* at 1.

nevertheless regulate or guide cross-examination. In Part V, the author discusses her empirical findings about the questioning of witnesses in Chinese criminal courts. Features will be summarized, and problems identified. In Part VI, some proposals are put forward to create a set of cross-examination rules suited to the Chinese situation. Part VII concludes.

## II. WHY HAVE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES BECOME CRITICAL FOR CHINA?

On October 23, 2014, the Fourth Plenary Session of the 18th Chinese Communist Party (CCP) Central Committee released its "Decision of Some Critical Issues on Fully Advancing the Rule of Law." Among others, the "trial-centered" reform was raised as the blueprint for future criminal procedure law reforms.[16] Making the trial center stage has become the theme of criminal procedure law reforms since then; almost all the reforms must serve the ultimate goal of a "trial-centered" criminal process. Although Chinese scholars hold different understandings of "trial-centered" reform, the official definition is "ensuring that evidence in litigation is produced in court, the facts of the case are ascertained in court, the prosecution and defense opinions are offered in court, and the judgment results are formed in court."[17] To implement this shift in policy offered by the Fourth Plenary Session, the SPC, the SPP, and the Ministry of Public Security issued in 2016 their "Opinions on Advancing the Reform of the Trial-Centered Criminal Procedure System" (the 2016 Opinions), and in 2017 the SPC issued its "Implementation Opinions on Comprehensively Promoting the Reform of the Trial-Centered Criminal Procedure System" (the 2017 Implementation Opinions).[18] These two documents provided more specific requirements for the "trial-centered" criminal procedure reforms. As a systematic project, this reform initiative takes the substantial trial as the core reform and gives priority to strengthening the appearance in court of witnesses, experts, and investigation personnel to testify. It also requires "[i]mproving the rules for the cross-examination of witnesses and identification or evaluation experts in court."[19] Thereby, testimony by witnesses in court becomes an

16. It's said to be the first time that the "trial-centered" reform was mentioned. *See Decision of Central Committee of Communist Party of China on Several Major Issues Concerning Comprehensively Promoting Rule of Law*, BEIJING NEWS § III: Advancing Strict Administration of Justice, § IV: Guarantee A Fair Administration of Justice, Promote Public Confidence on Justice System (Oct. 28, 2014, 7:00PM), http://www.bjnews.com.cn/news/2014/10/28/339131.html [https://perma.cc/785H-FYG5] (archived Jan. 16, 2022).

17. *See* the 2016 Opinions, *supra* note 11.

18. *See id.*

19. *See id.* at Art. 12.

important step towards a substantial trial in a "trial-centered" criminal procedure system.

Chinese jurists began to address the problems with witness testimony in court when the CPL was amended for the first time in 1996. The 1996 CPL amendment intended to transform China's then super-inquisitorial model of criminal process into a more adversarial model, with the mode of questioning witnesses changed accordingly—that is, with witnesses being questioned by the parties rather than only by the trial judge.[20] This would have been a significant move towards a more confrontational trial, but the change was made only on paper, not in practice, because too few witnesses take the stand to begin with. As a result, most witness testimony remains presented in written form. The problem with written testimony is that it removes the opportunity for cross-examination. To remedy this situation, the 2012 CPL amendment sought to adopt a series of reforms to ensure the appearance of witnesses in court. These reforms include singling out "material witnesses"[21] from witnesses in general and requiring the "material witnesses" to testify; imposing penalties on those witnesses who are subpoenaed by the court but fail to appear or refuse to give testimony; providing protection and compensation to those who do testify in court, etc.[22] However, despite these reforms, local statistics indicate that witness attendance rates have not improved.[23]

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20. Article 114 of the 1979 CPL, *supra* note 5, provides: After the public prosecutor has read out the bill of prosecution in the courtroom, the adjudication personnel shall begin to question the defendant. The public prosecutor may interrogate the defendant with the permission of the presiding judge. After the adjudication personnel have questioned the defendant, the victim, the plaintiff in a supplementary civil action and the defender may put questions to the defendant with the permission of the presiding judge. Article 155 of the 1996 CPL, *supra* note 3, provides: After the public prosecutor reads out the bill of prosecution in the court, the defendant and victim may make their respective statements on the crimes charged against in the bill of prosecution, and the public prosecutor may interrogate and question the defendant. The victim, and plaintiff and defender in an incidental civil action, as well as agents ad litem may, with permission of the presiding judge, put questions to the defendant. Judicial personnel also may interrogate and question the defendant.

21. Material witness has to meet three criteria, 1) the prosecution or the defense hold different opinions on the witness testimony; 2) the testimony of the witness is of material impact to the case verdict or sentencing; and 3) the people's court finds it is necessary to summon the witness to appear before the court. *See* 2018 CPL, *supra* note 2, at art. 192 ("Where the public prosecutor or a party or the defender or litigation representative thereof raises any objection to a witness statement which has a material effect on the conviction and sentencing of a case, the witness shall testify before court if the people's court deems it necessary.").

22. For more details, see Guo, *supra* note 13.

23. The Second Intermediate People's Court in Shanghai published a White Paper on Live Witness Testimony in Criminal Trials (2016–2018). According to those statistics, out of the 4049 criminal cases (300 first-instance cases and 3749 second-instance cases) heard by the Second Intermediate People's Court in China from 2016 to the first half of 2018, witnesses testified before the court in only 45 cases (22 first-

To find out what are the barriers that prevent witnesses from testifying, the author conducted two empirical surveys.[24] These surveys reveal that neither the deterrence mechanism nor the encouragement mechanism introduced by the 2012 CPL amendment are strictly implemented, so it is not known whether these mechanisms are effective or not. However, the surveys found some new problems created by the 2012 live witness reform.

First, the prosecution lacks incentives to call their own witnesses to testify. On the one hand, they have no obligation to do so because China has not adopted hearsay rules yet. On the other hand, they are unwilling to have witnesses testify in court because it is obviously much easier to rely on stable written testimony in a prepared statement than to take the unnecessary risk of bringing live witnesses to court to testify, who might be shown to be unpredictable and even capricious under cross-examination.

Second, defense attorneys want witnesses to testify in court, but they almost always fail to obtain approval from the court[25] because the latter has the final say on whether a live witness is necessary.[26] The 2012 CPL amendment took a major step in adding a special obligation requiring material witnesses to appear in court, but the material witness institution is defective in that it left the decision at the discretion of the court, and the courts tend to exercise their power to avoid live witnesses for fear of longer and perhaps more complicated trials as a result of inconsistencies between in-court testimony and out-of-court statements.

Third, when witnesses do take the stand, there is usually no witness preparation or coaching prior to trial. The prosecutors usually think it unnecessary to rehearse witnesses because questioning

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instance cases, and 23 second-instance cases). The attendance rate was merely 1.1 percent. *See* Yi Hao 2016–2018 Nian Xingshi Anjian Zhengren Chuting Zuozheng Shenpan Baipishu (2016–2018 年刑事案件证人出庭作证审判白皮书) [2016–2018 White Paper on Witness Testimony in Criminal Cases] SHANGHAI INTERM. PEOPLE'S CT., http://www.shezfy.com/book/bps/2018/p02.html [https://perma.cc/KF35-5DYJ] (archived Jan. 16, 2022).

24. *See generally* Guo, *supra* note 13 (providing a detailed discussion of the first survey).

25. There are two situations in which the defense lawyer may request for live witnesses, defense witness or prosecution witness. If the defense lawyer requests to call a defense witness to testify in court, the court may approve or disapprove, but the written statement of defense witness is still admissible if there is any. If the defense lawyer requests to call a prosecution witness to take the stand for cross-examination, which often occurs, the court usually disapproves such a request. When the defense lawyer knows that the prosecution witness would recant his testimony if he were given a chance to speak in court, the court's disapproval is especially frustrating. Because having a defense witness is rare, most of the defense lawyers' requests go to the prosecution witness. In the majority of cases, the defense lawyer's request for live witness is turned down (on file with author).

26. Opinions obtained from the mentioned surveys (on file with author).

witnesses in Chinese courts requires that the witnesses repeat their prior out-of-court statements. Only in major criminal trials would prosecutors go over the proceedings and questions with their witnesses. Defense lawyers want to prepare their witnesses, but they hesitate to do so for fear of the risk of facing criminal charges of lawyer-assisted perjury.[27]

Fourth, defense lawyers often ask the courts to call prosecution witnesses to testify in court. If approval is given, the prosecution witnesses sometimes change their pretrial statements and make different, often favorable to the defense, statements in the courtroom.[28] But when witnesses do change their stories in court, neither prosecutors nor defense lawyers have the skills to cross-examine them, nor are judges experienced in moderating a trial conducted through live witness testimony. As a consequence, the resulting trial may be regarded as less effective than if written testimony had been simply relied upon.

Undoubtedly the most important problem is the absence of a hearsay rule, which not only leads to the prosecution's preference for written statements over live witness testimony, but also creates an inconsistency issue when witnesses change their testimonies in court. The defect in China's 2012 live witness reform was that it focused upon the appearance of witnesses before the court but not upon the cross-examination of those live witnesses who did appear in court. Simply having live witness testimony was not in itself the goal of the 2012 CPL reforms. The purpose of calling witnesses to testify in court is to get to the truth objectively by examining and cross-examining their testimonies. Getting witnesses to appear is just the first step.[29] But the live witness reforms contained in the 2012 CPL amendment aimed exclusively at encouraging or forcing witnesses to take the stand and did not create any procedural rules for cross-examination. As a result, neither prosecutors nor judges said that they actively seek to call witnesses to the courtroom. And when witnesses do appear, there are no clear legal rules to follow; neither the court nor the parties know how to conduct examinations and cross-examinations. After working

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27. *See* Zhonghua Renmin Gonghe Guo Xingfa (中华人民共和国刑法), Criminal Law of the People's Republic of China (promulgated by the Nat'l People's Cong., July 1, 1979, rev'd Mar. 14, 1997), art. 306, 1979 P.R.C. Laws https://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm [https://perma.cc/AB84-S3QS] (archived Dec. 29, 2021).

28. Although some defense lawyers request for prosecution witnesses to take the stand merely to attack the credibility of prosecution witness through cross-examination, most defense lawyers know by pretrial contact that the prosecution witness will recant his pre-trial statement and give favorable testimony to the defendant (on file with author).

29. This was verified by interviews with judges, prosecutors, and defense lawyers (on file with author).

so hard to have witnesses appear before the court, nobody knows how to extract their value. Therefore, the crux for further reforms on live witness testimony is to improve examination and cross-examination rules and develop corresponding skills in lawyers and judges.

Examination and cross-examination rules provide the basis for the careful scrutiny in court of witness testimony in common law jurisdictions. They are a feature of the adversarial court process, which is oral and essentially controlled by the parties. By contrast, trial process in China is still quite inquisitorial and, to a great extent, relies on case files and written statements, despite several rounds of CPL reforms attempting to transform the Chinese criminal process from an inquisitorial model to a more adversarial model.[30] But while the development of live witness testimony and cross-examination in Chinese courts necessarily has impacts upon other aspects of the court process, both before and during trial, the goal of these reforms is not to totally adopt the adversarial system but to improve the fact-finding function of Chinese trial process.[31] Examination of witnesses is vital to a system of justice seeking to base its decisions on an accurate assessment of the facts of the case. In court processes developed from both common law and civil law traditions, witnesses may be examined and cross-examined in court. Civil law countries, such as France and Germany, use more written statements and give courts more control than in common law-based jurisdictions, but they also allow the parties to examine witnesses where required to accurately determine facts in dispute.[32] One does not have to commit to an Anglo-American process to introduce party examination in China, but one does need rules that give an opportunity to the parties to dispute evidence given against them. The challenge is to develop rules that achieve this goal without being seen as challenging the whole trial system.

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30. *See* Zhiyuan Guo, *Research on the Development of Chinese Criminal Procedure Law in the Past Four Decades*, 9 CHINA LEGAL SCI. 3, 29 (2021).

31. This is the impression the author obtained from and verified in empirical surveys (on file with author).

32. These are common knowledge among academics. *See, e.g.*, Strafprozessordnung [STPO] [Criminal Code], § 239, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.) [https://perma.cc/BRD8-DDN7] (archived Dec. 29, 2021). This description was verified by the author's interviews with German scholars she visited in Germany, or she met in the international conference held in China or elsewhere. For example, interview with Prof. Bernd Schünemann at University of München in June 2019.

## III. AN OVERVIEW OF STUDIES ON CROSS-EXAMINATION RULES IN CHINA[33]

The questioning of witnesses in modern trials usually falls into one of two modes: examination by judges or examination by parties. The Chinese criminal trial used to let judges question witnesses due to its long-standing tradition of inquisitorial criminal process.[34] This practice remained unchanged until the first round of CPL amendments. The CPL was enacted in 1979 and was amended in 1996, 2012, and 2018. There were three waves of study on cross-examination rules in China, each coinciding with the reforms of the original CPL.[35] Cross-examination of witnesses did not enter the domain of Chinese scholars' research until the 1996 CPL amendment made dramatic changes to trial procedure. In transforming the criminal process from the inquisitorial model towards the adversarial model, a "refined" adversarial model[36] replaced the old "super-inquisitorial" model, an inquisitorial trial gave way to a confrontational trial, and the power of investigating evidence that was once monopolized by judges was finally shifted back to the parties. This transformation reflected the importance of party examination and particularly cross-examination, described by the great American scholar Henry John Wigmore as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."[37] The 1996 CPL amendments introduced adversarial factors into the Chinese criminal trial by allowing parties to question witnesses,[38] and the SPC judicial interpretations included some rules on how to question live witnesses.[39] Some Chinese scholars

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33. Because the 1996 CPL reform did not complete the transformation, some scholars call the Chinese model of criminal process a "refined" adversarial model, which means it is a mixed model with some features of inquisitorial criminal process. *See, e.g.*, Long Zongzhi, *Between Tradition and Modernization—On the Re-amendment of Criminal Procedure Law of China*, 22 ZHENGFA LUNTAN 80, 84 (2004).

34. Article 115 of the 1979 CPL, *supra* note 5, provided, "when questioning a witness, ... Parties and defenders may request the presiding judge to put questions to witnesses or expert witnesses or may request permission from the presiding judge to put their questions directly. When the presiding judge considers that the content of the questioning bears no relation to the case, he shall put a stop to it."

35. This is based on an overall review of the literature, which can be found in the appendix.

36. Because the 1996 CPL reform did not complete the transformation, some scholars call the Chinese model of criminal process a "refined" adversarial model, which means it is a mixed model with some features of inquisitorial criminal process. *See, e.g.*, Long Zongzhi, *Between Tradition and Modernization—On the Re-amendment of Criminal Procedure Law of China*, 22 ZHENGFA LUNTAN 80, 84 (2004).

37. 5 JOHN H. WIGMORE, EVIDENCE § 1367, p. 32 (J. Chadbourn rev. 1974).

38. *See* 1996 CPL, *supra* note 3, at art. 156 ("The public prosecutor, the parties and the defenders and agent's ad litem, with permission of the presiding judge, may put questions to the witnesses or expert witnesses.").

39. *See* 1998 SPC interpretation, *supra* note 5, at arts. 143, 146, & 147.

regarded this as establishing cross-examination rules and this aroused great interest in the Chinese legal community. With the exception of a very few,[40] the majority of Chinese legal scholars thought China had through the 1996 amendment introduced cross-examination rules into criminal trials.[41] Nevertheless, they also admitted that there was still a great gap between the Chinese cross-examination rules and the common law cross-examination rules. Some put forward proposals to improve China's rules. Professor Long Zongzhi, in an article published in 2000, analyzed some of the limiting features of China's rules, such as the lack of confrontation, the emphasis on questioning skills instead of the right to cross-examine, the continuing absence of sufficient cross-examination skills, and so forth.[42] The researchers at this period also realized the significance of the absence of supporting institutions for the implementation of effective cross-examination—the lack of pretrial discovery, the failure to have a hearsay rule, the absence of a jury trial, impassive judges, the discouragement of involvement by defense lawyers, etc. This being the situation, it seemed to the researchers that effective cross-examination of witnesses was just wishful thinking, impossible to achieve in practice. Due to insufficient understanding of cross-examination rules, Chinese researchers confused permitting questioning of witnesses by parties with requiring detailed rules governing examination and cross-examination.

When the second round of CPL reform was brought onto the agenda, Chinese scholars stirred up another wave of study on cross-examination rules. After years of implementation of the 1996 CPL amendment, researchers had a more complete and deeper understanding of the requirements for effective cross-examination and were able to evaluate China's model for witness questioning more rigorously. The majority view was that China's model, whether on paper or in action, was far away from producing effective examination and cross-examination, despite allowing the prosecution and defense to take turns in questioning witnesses and there being some provisions representing the technical features of examination and cross-examination. Researchers concluded that cross-examination of witnesses in Chinese criminal courts resembled effective cross-examination only superficially, lacking effect due to insufficient confrontation and supporting rules.

Professor Long Zongzhi adjusted his previous point by calling Chinese witness questioning "examination by prosecution and defense"

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40. *See* Jin Chun & Yang Guihong, *Opinions on Constructing Cross-Examination Rules in Judicial Practice of China*, 5 L. SCI. MAG. 42, 43 (2001).

41. *See* Fan Chongyi & Luo Guoliang, *Changes and Developments of Evidential System after Revisions*, 4 CHINESE J. CRIM. L. (1999), at p.45; Long Zongzhi, On Cross-examination System in Chinese Criminal Trials, 4 CHINA LEGAL SCI. (2000), at p.86.

42. Long, *supra* note 41, at 86–87.

rather than cross-examination.[43] Because the researchers realized that China had not established an effective and complete system of cross-examination rules, they expected an opportunity to further revise the 1996 CPL to complete the legal transplantation of such rules from the adversarial system in common law jurisdictions. The study at this period focused upon the Anglo-American cross-examination rules in proposing how to formulate Chinese cross-examination rules.[44] Unfortunately, the 2012 CPL amendment put the emphasis on mechanisms encouraging or forcing witnesses to take the stand instead of adopting further cross-examinations rules in court. Examination and cross-examination of witnesses thus remained a reform initiative, not a reality.

The third wave of study on cross-examination rules has come with the latest "trial-centered" reform. As aforementioned, as soon as the Fourth Plenary Session of the 18th CCP Central Committee raised the idea of a "trial-centered" procedural system, "substantial trial" reform was put on the agenda.[45] Since the principle of immediacy and orality is the only way to fully realize a trial-centered process, cross-examination rules again became a heated topic for research. Although the 2012 CPL amendment did not reconstruct or improve the witness questioning rules, its reforms on live witnesses, establishment of pretrial discovery,[46] and strengthening of the role of defense lawyers all paved the way for improving cross-examination rules. Thus, research during this period usually put the cross-examination rules in the context of this "trial-centered" reform and explored the

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43. Long Zongzhi, *Several Issues on Testimonial Evidence Examination in Chinese Criminal Trials: Centered on Cross-Examination*, 25 TRIB. POL. SCI. & L. 25 (2008).

44. *See* Chen Weidong & Wang Jing, *Reconstructing Cross-Examination Rules in Chinese Criminal Trials*, 22 PEOPLE'S PROCURATORIAL SEMIMONTHLY (2007); Long, *supra* note 43, at 27–30; Chen Jianmin, *Rules and Skills of Cross-Examination in American Criminal Proceedings*, 4 L. SCI. (2004).

45. *See, e.g.*, the 2016 Opinions, *supra* note 11. The 2016 Opinions explicitly provided in Article 11, Regulating the procedure of court investigation, and ensuring that evidence in litigation is produced in court and the facts of the case are ascertained in court. ("Evidence proving that the defendant is guilty or innocent, or falls under mitigating circumstances or aggravating circumstances shall be produced in court to protect, in accordance with the law, the rights of cross-examination of both the prosecution and defense.").

46. China's pretrial discovery is different from that in common law jurisdictions. *See* 2018 CPL, *supra* note 2, arts. 40, 42 (granting the defense a right to consult, extract and duplicate case materials which is interpreted as the prosecution's discovery to the defense and also imposing an obligation on the defense to disclose certain evidence including alibi evidence, underage evidence, and insanity evidence).

institutional value of cross-examination rules from this different perspective.[47] This wave of study is still ongoing as of 2022.

All in all, the study on cross-examination rules in China has the following features. First, the research has turned from speculative studies to a serious discussion of the reforms required. Second, comparative study on cross-examination rules pays attention not only to statutory rules on trial procedure, but also to judicial practice and academic debates. Third, theoretical research on cross-examination rules is more in depth. Researchers do not merely study the cross-examination rules themselves, but also explore the relationships between cross-examination rules and other procedural rules and processes. Cross-examination is not studied in isolation but within the larger context of reform of criminal process models. This can be compared with studies of cross-examination rules in Western countries, which focus on the need for confrontation if rectitude is to be achieved, the need for trial advocacy skills, and the limits of what can be achieved through cross-examination. China's study on cross-examination is still in its infancy.

## IV. DO CROSS-EXAMINATION RULES EXIST IN CHINA? A NORMATIVE ANALYSIS

### A. *Current Legislation on Questioning of Witnesses*

Examination and cross-examination stand for a process that is regarded as the most rigorous way of achieving truth in a criminal trial. It requires legal rules embodying the process in trial together with lawyers who have the skills to cross-examine effectively but without distorting the truth. This Part explores the extent to which cross-examination rules are part of Chinese law. From the aforesaid overview of cross-examination rules study, researchers are divided on whether cross-examination rules have been established in China. While most thought cross-examination rules had been adopted in China after the 1996 CPL reform, the majority of researchers now think that since the 2012 CPL reforms, there are no cross-examination rules in China.[48] Chinese jurists thought cross-examination rules existed in China because there are some provisions resembling the

47. *See, e.g.*, Xiaona Wei (魏晓娜), Yi shenpan wei zhongxin de xingshi susong zhidu gaige [以审判为中心的刑事诉讼制度改革] [Trial-Centered Criminal Procedure Law Reforms], Faxue yanjiu (法学研究) [Chinese J. L.], vol. 4, 2015, at 104.

48. *See, e.g.*, Long Zongzhi (龙宗智), xingshi tingshen renzheng diaocha guize de wanshan (刑事庭审人证调查规则的完善) [Improving the Examination Rules of Testimonial Evidence in Criminal Trial], Xiandai Faxue (现代法学) [Modern L.], vol. 1, at 4, (2018), http://cacpl.chinalaw.org.cn/portal/article/index/id/4028/cid/18.html [https://perma.cc/HL88-2XZK] (archived Jan. 3, 2022).

cross-examination rules in common law jurisdictions, but all these provisions lack detailed guidance. A comprehensive review of current legislation helps to draw an objective conclusion.

Before the legislation is closely explored, a comparison between the Chinese trial process with the Anglo-American trial process is necessary, because the trial process sets the scene for the questioning of witnesses in court. As most English-speaking lawyers know, the parties control the case in common law trials. Having made an opening statement explaining its case, the prosecution calls its own witnesses and examines them in chief (no leading questions or questions seeking to establish credit) and then the opponent cross-examines (through leading questions and questions seeking to discredit). When the prosecution has finished calling all its witnesses and tendering all evidence supporting its case, the defense then calls its evidence, primarily witnesses to counter the prosecution's case and these witnesses are examined in chief (again, no leading or credit-seeking questions), with the prosecutor then having the right to cross-examine (again, by leading questions and questions seeking to discredit). Then parties sum up in turn and the court (or jury) decides.

While in China, the court calls witnesses (no matter whether they are prosecution witnesses or defense witnesses) and lets the witnesses give an uninterrupted account of their evidence. Then, with the permission of the court, the parties can put questions to the witnesses. The party who has requested the court to call the witness usually has the right to question the witness first, then the opponent can pose questions. The court has the authority to pose supplementary questions to the witness if the court determines there is a need. Victims, civil parties, and their legal representatives also have rights to pose questions to the witnesses with the permission of the court. When all questioning is concluded, the parties sum up and the court decides. Keeping in mind the differences between the Chinese and common-law trial processes, attention should now be paid to the existing Chinese legislation on examination and cross-examination.

Article 194 of the current CPL (the 2018 CPL) is commonly regarded as the legal source of cross-examination rules in China.[49] It provides:

> Before a witness gives testimony, the judges shall instruct and explain to him the legal responsibility that shall be incurred for intentionally giving false testimony or concealing criminal evidence. The public prosecutor, the parties, the defenders and litigation representatives, with the permission of the presiding judge, may question the witnesses and expert witnesses. Where the presiding

49. This provision has never been changed since the 1996 CPL. *See* 1996 CPL, *supra* note 3, at art. 156; 2012 CPL, *supra* note 3, at art. 189; 2018 CPL, supra note 2, at art. 194.

judge considers any questioning irrelevant to the case, he/she shall put a stop to it. The judges may question the witnesses and expert witnesses.[50]

However, this provision merely indicates that witnesses may be questioned by the parties and perhaps suggests that judges only have the authority to pose supplementary questions. Nor does it draw a distinction between direct examination and cross-examination. What is known is that the parties may take turns posing questions to witnesses.

As is well known, the common law cross-examination rules consist of rules on the order of examination and cross-examination, the scope of examination and cross-examination, the place of leading questions, the right of opponents to object to improper questions and inadmissible testimony, the procedure where a witness is hostile, etc. To conduct a thorough evaluation, it must be determined whether similar such rules can be found in current Chinese legislation. To determine this, in addition to examining the code of criminal procedure, other legal sources also need to be examined, including the SPC judicial interpretations, the SPP judicial interpretations, the SPC Rules for Court Investigation under First-Instance Regular Procedures in the Handling of Criminal Cases by People's Courts (for Trial Implementation) (hereinafter the Court Investigation Rules) and the SPP Guidelines for the Production of Evidence and Cross-Examination in Court by Public Prosecutors of the People's Procuratorates.[51]

Because the SPC interpretations provide detailed guidance for trial procedure, its provisions deserve close examination. Three articles are most relevant. Article 259 of the SPC judicial interpretations (revised in 2021) contains an incomplete provision on the order of questioning witnesses. It states:

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50. 2018 CPL, *supra* note 2, at art. 194.

51. *See generally* Renmin Fayuan Banli Xingshi Anjian Diyi Shen Putong Chengxu Fating Diaocha Guicheng Shixing (人民法院办理刑事案件第一审普通程序法庭调查规程（试行)) [The Supreme People's Court Rules for Court Investigation in First-Instance Ordinary Procedures in the Handling of Criminal Cases by People's Courts (for Trial Implementation] (promulgated by the Judicial Comm. Sup. People's Ct., Jun. 6, 2017), https://www.pkulaw.com/en_law/34ac4bbf37780055bdfb.html [hereinafter the Court Investigation Rules]; Zuigao Renmin Jiancha Yuan Guanyu Yinfa Renmin Jiancha Yuan Gongsu Ren Chuting Juzheng Zhizheng Gongzuo Zhiyin De Tongzhi (最高人民检察院关于印发《人民检察院公诉人出庭举证质证工作指引》的通知) [Notice of the Supreme People's Procuratorate on Issuing the Guidelines for the Production of Evidence and Cross-Examination in Court by Public Prosecutors of the People's Procuratorates] (promulgated by the Sup. People's Proc., Jul. 3, 2018), https://www.pkulaw.com/CLI.3.317674(EN) [https://perma.cc/9YBL-RKJX] (archived Jan. 4, 2022) (hereinafter SPP Guidelines for the Production of Evidence and Cross-Examination in Court by Public Prosecutors of the People's Procuratorates).

> When witnesses take the stand, they shall give their testimonies to the court first, then they shall be examined by the party who requested for their appearance, which may be followed by the examination of the opposing party, upon approval by the presiding judge. When the court takes the initiative to subpoena a witness, the order of questioning such witness is determined by the court according to the circumstances of the case.[52]

Article 261 provides for the rules of questioning witnesses: "The following rules shall be complied with when examining a witness: (1) the content of the question shall be relevant to the fact of the case; (2) leading questions are prohibited; (3) threating a witness is prohibited; (4) humiliating a witness is prohibited." [53] Article 262 provides for a general rule of objection:

> When the question addressed in witness examination is inappropriate or bears no relevance to the case, the opposing party can object and request the chief judge to interrupt the examining party. The chief judge shall make judgment and sustain or overrule the objection. The chief judge can also interrupt and stop the examination on his own initiative according to the circumstances.[54]

The SPC interpretations touch on the order of examination and cross-examination, some general rules of questioning witnesses, breach of which may lead to objection by the opposing party, and a quite simple objection rule. Although these articles touch upon some cross-examination rules, the SPC interpretations barely constitute a complete code because they are too vague and lack detail. However, it is still too early to draw any conclusion on whether Chinese legislation contains rules of witness examination and cross-examination because further and more complete provisions in other legal documents can be identified. The following are some examples of such provisions. The analysis focuses on four main issues: the order of questioning witnesses, the scope of examination and cross-examination, the rules of objection, and the rules about leading questions.

### 1. The Order of Questioning Witnesses

The legal provisions of China on the order of questioning witnesses are inconsistent as between the different documents and sometimes as used in the same document. For example, the 2012 SPC judicial interpretations let the party who requested the live witness to examine first, then permit the opposing party to examine.[55] However,

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52. *Id.* at art. 262.
53. *Id.* at art. 262.
54. *Id.* at art. 262.
55. Article 212 of the 2012 SPC Interpretation, *supra* note 5, provides, "Witnesses and forensic analysts shall be examined first by the party who requested for

the Court Investigation Rules[56] offer a questioning process resembling more closely the common law position, stating:

> After a witness appears in court, the prosecution or the defense in favor of the claim shall raise questions first, after which, with approval by the presiding judge, the opposing party may also raise questions. After the prosecution or the defense raises questions, the opinions of the party's witness testimony may be summarized, and the prosecution or the defense with new questions may, with permission of the presiding judge, raise questions anew. The judge may question a witness as he or she deems it necessary. With the permission of the presiding judge, the defendant may question the witness.[57]

This article does not merely provide for the order of examination, cross-examination, re-examination, and re-cross-examination, but also permits judges to make supplementary inquiries. This is the provision most resembling the Anglo-American cross-examination process. Unfortunately, the Court Investigation Rules are just administrative directions for trial implementation and do not have the binding force of judicial interpretations. These rules are not strictly followed in practice and it is unfortunate that the recently issued SPC judicial interpretations do not incorporate the same process. Instead, these SPC interpretations contain a new provision,[58] simply requiring witnesses to give their testimonies to the court first, then allowing witnesses to be examined and cross-examined. This is a signal that China is not yet on track to adopt the Anglo-American cross-examination rules completely. In terms of the order of questioning, the 2021 SPC interpretations established a hybrid process in which witnesses tell their stories to the court, followed by examination and cross-examination.[59]

### 2. The Scope of Examination and Cross-Examination: Relevance Rule

The scope of questioning is an important subject of Anglo-American rules about direct and cross-examination. Take the United States' Federal Rules of Evidence (FRE) as an example. FRE 611 states: "Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility.

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the appearance, which may be followed by the examination of the opposing party, upon approval by the chief judge."

56. It was issued by the Supreme People's Court on November 27, 2017, with two sets of other rules, rules on pre-trial conference, and rules on excluding illegally obtained evidence. These three sets of rules are called "Three regulations," and they are aimed at improving the substantial trial. *See* Court Investigation Rules, *supra* note 51.

57. *Id.* at art. 262.

58. *See* 2021 SPC Interpretation, *supra* note 1, at art. 259.

59. *See id.*

The court may allow inquiry into additional matters as if on direct examination." [60] The overall criterion is relevance, but another important limit relates to the scope of direct examination, where the examiner is prohibited from asking questions relevant only to the witness's credit, whereas in cross-examination, questions relevant only to discrediting the witness are one of the principal reasons for allowing cross-examination in the first place. Cross-examination should be confined, at least presumptively, to what has been revealed in direct examination. This limit is presumably imposed for reasons of efficiency.

The Chinese scope of cross-examination is simply defined. Relevance is the only criterion. Regardless if the examination is direct or on cross, the content sought by the question shall be relevant to the fact of the case.[61] Compared to the FRE, the threshold for questions to be presented on cross-examination is relatively low. But in all common law jurisdictions, the scope of direct examination and cross-examination is defined by relevance to the issue or, where allowed, to credibility Therefore, the Chinese position is basically consistent with common law jurisdictions.

### 3. Objection Rule[62]

When the questioning of a witness violates particular rules or is otherwise inappropriately conducted, parties may object to the question and ask the court to rule upon the objection. In American trials, common grounds for objections to questions include relevance, questions beyond the scope of direct examination, hearsay, questions already asked and answered, argumentative questions, leading questions, compound questions, questions that assume a fact not in evidence, and so forth.

The SPC interpretations list just two general grounds for an objection: that the question is inappropriate or that the question bears no relevance to the case.[63] However, other legal documents further define what kinds of questions are considered "inappropriate" by listing more concrete grounds for an objection. For example, Article 21 of the Court Investigation Rules provides: "Where the prosecution or the defense raises a question in an inappropriate manner, or irrelevant to the case facts, *in violation of the relevant rules of questioning*, the

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60. FED. R. EVID. 611.

61. "The content of the question shall be relevant to the fact of the case" is emphasized in SPC interpretations and other legal documents. *See* 2021 SPC Interpretation, *supra* note 1; 1996 SPC Interpretation, *supra* note 5; 1998 SPC Interpretation, *supra* note 5; 2012 SPC Interpretation, *supra* note 5.

62. FED. R. EVID. 611.

63. *See* 2021 SPC Interpretation, *supra* note 1, at art. 262.

opposing party may raise an objection." [64] Thus, in addition to "inappropriate" and irrelevant questioning, violating the rules of questioning is also a ground for objections. Article 20 of the Court Investigation Rules lists the rules of questioning:

> A witness shall be questioned under the following principles: (1) The content of the questioning shall be relevant to the case facts. (2) No question may be raised in an inducing manner. (3) The witness shall not be threatened or misled. (4) The witness shall not be degraded. (5) The personal privacy of the witness shall not be disclosed.[65]

The SPP Guidelines for the Production of Evidence and Cross-Examination in Court by Public Prosecutors of the People's Procuratorates contain a more comprehensive list of grounds for objections:

> (1) raising questions in a leading manner; (2) threatening or misleading a witness; (3) causing a victim or witness make statement or testimony with speculative, critical, and inferential opinions; (4) raising questions irrelevant to the facts of the case; (5) raising insulting questions to a victim or witness; and (6) other circumstances that violate the provisions of the law.[66]

Based on current legislation, common grounds for objections to witness testimony in Chinese courts include irrelevant questions, leading questions, threatening questions, misleading questions, insulting questions, questions causing speculation, critical and inferential opinions, questions endangering the privacy of witnesses, and so on.

The Chinese objection rules also provide how an objection shall be handled. Article 21 of the Court Investigation Rules continues to provide:

> If the opposing party raises an objection in court, the questioning party shall explain the reason for the questioning, and the presiding judge shall sustain or overrule the objection as he or she sees fit; and if the opposing party does not raise an objection in court, the presiding judge may also stop the questioning based on the circumstances.[67]

The distinction between the Chinese rule and common law rules is that judges can take the initiative to stop the questioning without objections

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64. Court Investigation Rules, *supra* note 51, at art. 21 (emphasis added).

65. Court Investigation Rules, *supra* note 51, at art. 20.

66. SPP Guidelines for the Production of Evidence and Cross-Examination in Court by Public Prosecutors of the People's Procuratorates, *supra* note 51, at art. 48. They were issued on July 3, 2018, aiming to guide the prosecution producing evidence at trial.

67. Court Investigation Rules, *supra* note 51, at art. 21.

from the opposing party. This is a clear illustration of the residual inquisitorial nature of the Chinese criminal trial.

4. Leading Question Rule

A leading question is one that suggests to the witness how it is to be answered or puts words into the mouth of the witness to be merely agreed or denied in his or her response.

Under the American FRE 611(c), leading questions are prohibited on direct examination except as necessary to develop the witness's testimony.[68] However, when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, leading questions can be employed during the direct examination of such a witness. On the other hand, in cross-examination, leading questions are permissible and regarded as of fundamental importance in testing a witness's credibility.[69]

Chinese rules forbid the use of any leading question altogether. "[L]eading questioning is prohibited" has been included in the SPC interpretations since the 1998 version. It can also be found in other legal documents. But the blanket prohibition limits the function of cross-examination in finding the truth through testing the credibility of witnesses.

A provision recognizing that leading questions may be required in the objective search for truth is Article 402 of SPP interpretation,[70] which provides:

> While interrogating defendants and questioning witnesses, prosecutors shall not pose any leading or inappropriate questions that may affect the objectivity of statements or testimony. If a defender employs leading or other inappropriate questions with the defendant or witness that may affect the objectivity of statements or testimony, the public prosecutor may request that the presiding judge stop or not admit the concerned statements or testimony.[71]

Although this provision still forbids the use of leading questions, it seeks to draw a line between leading questions that may affect the

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68. Court Investigation Rules, *supra* note 51, at art. 21.

69. "There are times when a cross-examiner would pose open-ended questions. Suppose that the cross-examiner wants to argue that the witness is lying and is simply repeating a memorized story—a "script." If the witness uses exactly the same wording over and over again, that can impeach the witness. Ordinarily, when a person gives multiple accounts of the same event, there will be some minor differences between the accounts. It is suspicious if the accounts are absolutely identical." Excerpt from communication from Prof. Edward J. Imwinkelried to Prof. Zhiyuan Guo on June 15, 2021 (on file with author).

70. 2019 SPP Interpretation, *supra* note 5. The People's Procuratorate Criminal Procedural Regulation was issued and took effective on December 30, 2019.

71. *Id.* at art. 402.

objectivity of testimony and those that may not. This loosens the prohibition against leading questions and could be seen as a starting point to consider introducing a place for leading questions as in Anglo-American and other common law jurisdictions—an approach that generally prohibits leading questions in direct examination but allowing them to test credibility in cross-examination.

### B. *Features of China's Witness Questioning Legislation*

Even though it may not be the intention of the Chinese legislature, after years of development, the cross-examination rules have permeated into Chinese legislation piece by piece. Of course, this legal transplantation is an ongoing process. Compared to cross-examination rules in common law jurisdictions, some important matters are missing from China's legislation, such as rules on the order of examination and cross-examination, a reasonable rule about leading questions, rules of impeachment, and rules on inconsistent testimony.

To summarize the situation, China's legislation on the questioning of witnesses currently carries the following features. First, multiple participants may now be permitted to put questions to witnesses in court.[72] In common law jurisdictions, the prosecuting lawyer and defense lawyer are the key players in the courtroom, and they examine and cross-examine witnesses. Meanwhile, in Chinese criminal courts, victims, civil parties, and their legal representatives may be permitted to question witnesses—in addition to the prosecutor, the defense lawyer, and the judge. This makes the questioning of witnesses in Chinese criminal courts more like a collective investigation rather than a confrontational battle. However, this Article focuses only upon witness questioning by prosecutors and defense lawyers. Questioning of witnesses by other participants is beyond the purpose of this Article.

Second, witness questioning in Chinese criminal courts does not follow the order of examination, cross-examination, reexamination, and re-cross-examination. In a common law court, witnesses have always been interviewed by one or other of the parties before trial and generally line up as being either prosecution or defense witnesses and are called and examined accordingly. In Chinese courts, however, all witnesses are regarded as assisting the court in finding the truth; thus, as witnesses to assist the court, all the witnesses are called by the court.[73] In a common law court, all witnesses called by a party must be directly examined using non-leading questions and opponents may then cross-examine, using leading questions as they wish. However,

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72. 1996 CPL, *supra* note 3, at art. 155.

73. Chinese courts can call witnesses ex officio or call witnesses at the request of the parties. 2021 SPC Interpretation, *supra* note 1, at art. 259.

the order of witness questioning in a Chinese criminal court is not only confusing but also capricious. As aforementioned, the 2012 SPC interpretations permitted the party who requested the live witness to question first, then permitted the opposing party to question. Suppose it was the defense lawyer who requested the prosecution witness to testify in court, then the defense lawyer could question the prosecution witness first. Should the questioning by the defense lawyer follow the rules of direct examination or cross-examination? According to common law rules, the first questioning is direct examination, followed by cross-examination by the opponent lawyer. But in the aforesaid scenario, the defense lawyer must conduct direct examination of a prosecution witness without the use of leading questions, despite an intention in most cases to challenge the witness's testimony. The absurdity of such provisions is manifest.

Although the 2017 Court Investigation Rules brought the questioning order back on track, providing that "the prosecution or the defense in favor of the claim shall raise questions first,"[74] which resembles direct examination, the recently revised SPC interpretation made another gesture by providing,

> [a]fter witnesses appear in court, they shall generally first provide testimony to the court; and then, with the permission of the presiding judge, the party applying for subpoenaing witnesses to testify in court shall question them, and after the conclusion of the questioning, the opposite party may also question them.[75]

This move is regarded by some Chinese scholars (including the author) as a setback and suggests the hesitation of China's highest court in completely adopting cross-examination rules.

Third, direct examination in Chinese court is not conducted in a question-and-answer format. In common law trials, when a witness is called to the stand, the party who calls him or her to court conducts the direct examination; witnesses answer the non-leading questions raised by direct examiners. Direct examination of witnesses is conducted in a question-and-answer format. In Chinese court, however, under the SPC judicial interpretations, witnesses report what happened to the court before the parties are given the opportunity to examine directly or through cross-examination, depending upon which party has asked the witnesses to be called.[76] Compared to direct examination in common law trials, direct examination of witnesses in Chinese court is conducted in two steps: witnesses provide an uninterrupted account of their testimony at first, then the court may allow the party who

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74. Court Investigation Rules, *supra* note 51, at art. 19.
75. 2021 SPC Interpretation, *supra* note 1, at art. 259.
76. *Id.*

requested their appearance to pose questions. Unlike the question-and-answer format in common law trials, direct examination in Chinese court is a combination of a self-narrating session and a question-and-answer session. Both common law-style direct examination and the Chinese-style two-session direct examination have advantages and disadvantages in the pursuit of truth. It is hard to say which style is better than the other. Permitting witnesses to give their testimony to the court first can avoid the influence of direct examiners through the way they phrase the questions. But the witnesses' narratives may go unconstrained without the confinement of questions. In contrast, the question-and-answer format in common law trials can make sure the witness gives testimony as the direct examiner wanted; however, this format is often criticized for its potential interference with witness testimony.

Fourth, there is a blanket prohibition against leading questions in any questioning of witnesses. It's acceptable that the party calling the witness may only ask open-ended questions on direct examination, but it's unreasonable that the opposing party is forbidden to ask leading questions on cross-examination. In common law jurisdictions, leading questions are regarded as the most effective technique to test fully the accuracy and veracity of a witness. Since the version given by the witness in direct examination may conflict with the version that has been given to the opposing attorney, full leeway must be given to put questions before the witness. Common law rules of evidence also permit the cross-examination of a witness called by a party using leading questions where that witness is deemed "hostile" to that party. It's hard to imagine how a lawyer conducting cross-examination can challenge a witness merely by asking open-ended questions. Cross-examination cannot function without leading questions. Therefore, any blanket prohibition against leading questions undermines the very purpose of cross-examination.

Fifth, in China, trial judges continue to play important roles in questioning witnesses. The residual inquisitorial nature can be found in many provisions. For example, all the participants need the permission of the presiding judge to pose questions to witnesses. Judges may question witnesses if they think it necessary. Judges may take the initiative and interrupt questioning if they think the questioning is inappropriate or violates the rules of questioning, even without objection from the opposing party.. All these provisions grant the judges authority to control the witness questioning or even the whole trial process.

In conclusion, the questioning of witnesses in Chinese criminal court is more alternate examination than cross-examination.[77] As Dr. Wang Guozhong has pointed out, if cross-examination is an Oregon-style debate, alternate examination is a university seminar.[78] There are three reasons why China's legislation on witness questioning is alternate examination instead of cross-examination. First, it is impossible to develop advanced witness-questioning methods and skills because the appearance of witnesses has been rare in criminal courts over the past few years. Second, the criminal trial in China is based on preprepared prosecutorial case dossiers, not in-court, first-hand examination of evidence—the questioning of a witness is simply to verify his or her written statement contained in the case dossier. A very simple questioning rule can meet this goal. Third, in America at least, one rationale for cross-examination is to fulfill a constitutional right to confront unfavorable witnesses. But while the questioning of witnesses in Chinese criminal courts, and many other common law courts, seeks justification only in its ability to achieve truth, this very strong justification itself provides justification for more permissive rules on the questioning of witnesses.

As a consequence, China has not fully and systematically adopted a process demanding that opponents have the opportunity to cross-examine witnesses who testify against them.

## V. QUESTIONING WITNESSES IN CHINESE CRIMINAL COURT: AN EMPIRICAL EXPLORATION

Because there is always disparity between statutes and practice, it is important to explore the same legal institution from both normative and empirical perspectives. Given the sophistication of the subject and the regional variations in China, it is difficult to give a complete picture of witness questioning in Chinese criminal courts. However, the two surveys upon which this Part is based covered a dozen provinces, which account for one third of China's jurisdictions, and can provide a convincing representative account of how witnesses are questioned in criminal trials across the country.

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77. *See* Long, *supra* note 43. *See generally* 2021 SPC Interpretation, *supra* note 1, at art. 259.

78. *See generally* WANG GUOZHONG (王国忠), XINGSHI SUSONG JIAOCHAXUNWEN ZHI YANJIU (刑事诉讼交叉询问之研究) [A STUDY OF CROSS-EXAMINATION IN CRIMINAL PROCEEDINGS] (2007); What is Oxford Oregon Debate Format?, ASKINGALOT https://askinglot.com/what-is-oxford-oregon-debate-format (last visited Jan. 6, 2022) [https://perma.cc/3NVU-J93Y] (archived Jan. 6, 2022) (Oregon-style debate, "more popularly known as Oxford-Oregon Debate or Forensic Debate, is the traditional debate format used in elementary, high schools, and colleges all over the country. There are two sides in this format: the Affirmative and the Negative.").

First, a disappointing finding of the surveys the author conducted confirms the low witness attendance rate even after the 2012 CPL reform. As a prosecutor interviewee in Fuzhou[79] disclosed, of his sixteen years working as a public prosecutor, there were only three cases where witnesses testified in court, and two of them were demonstration trials.[80] Despite the low witness attendance rate, the survey attempted to discover in what kind of cases witnesses do take the stand. It appears that only in contested cases where defendants refuse to confess are witnesses required to testify, principally to force the defendants into admitting their guilt. Another situation where the prosecution often requests witnesses to testify is when live witnesses can produce a more persuasive trial effect. This may depend on the strength of the prosecution's overall case. If the prosecution has adequate evidence, prosecutors would rather rely on written statements. If the prosecution's case is weak, prosecutors would then call key witnesses to confront the defendant and again seek to force the latter to confess. The interviewees also disclosed that when the defense successfully has its witnesses come to court, the prosecution will request the prosecution witnesses also to appear before the court in order to confront the defense witnesses when called to testify.[81]

In addition to the reasons analyzed in Part II, the surveys the author conducted found that courts tend to question witnesses out of court rather than at trial.[82] According to some judges who were interviewed, they would rather not approve the request for live witnesses to testify at trial because "when witnesses testify in court, their live testimonies often expose problems with the investigation; these procedural defects can only embarrass the investigators and have little substantial impact on fact-finding."[83] Therefore, most judges prefer verifying witnesses' testimony through informal out-of-court interviews. In many cases where the court has turned down the defense's request for live witnesses for fear that their testimony will prompt chaotic trial proceedings, the presiding judge has called the requested witnesses to his office and conducted an in-person interview, or at least conducted an interview over the phone. This tendency indicates Chinese courts prefer to seek truth informally and avoid confrontation in court with the defendant and his or her lawyer, the defendant having no right to confrontation.

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79. Fuzhou is the capitol city of Fujian province, an economically advanced province on the southeast coast of China.

80. Demonstration trials are usually conducted for special purposes, such as propaganda or experiment, which means they are not representative. Interview F0819 (on file with author).

81. Interview Q0819 (on file with author).

82. Interview Z0619 (on file with author).

83. Interview Z0619, interview F0619, and interview Q0819 (on file with author).

Second, at a trial with live witnesses, one very important reason for poor trial performance is lack of witness preparation. Neither prosecutors nor defense lawyers are sure of whether it is ethical to prepare witnesses prior to trial. Neither of them knows how to prepare witnesses nor what the boundaries are. Not to mention that the defense lawyers have the additional concern of getting involved in instigating witness perjury.[84] As a result, a trial with unprepared live witnesses is usually disorganized, if not a disaster. Witnesses often give inconsistent testimonies in court, sometimes due to the blur of memory, sometimes due to the influence of the parties and their families.[85] Prosecutors feel awkward when their witnesses recant testimonies in court, and the trial effect is embarrassing. When being asked why prosecutors do not impeach witnesses who recant their testimony, prosecutor interviewees disclosed that they lack impeachment skills on the one hand, and on the other they are afraid that the pretrial statement will be totally overturned if they push a witness into a corner, resulting in an even worse impact on their case.[86] According to the prosecutors interviewed, the trial effect is extremely important to them because of the "internal case review mechanism"[87] and the "performance evaluation mechanism,"[88] both of which regard the trial effect as a crucial evaluation factor for prosecutors. These evaluations provide a strong incentive for prosecutors to avoid calling live witnesses to testify in court as much as possible.

Third, when witnesses appear in court, the practice of questioning them varies from place to place due to the absence of detailed cross-examination rules and advocacy skills training. As aforementioned, although the cross-examination rule-like provisions are growing gradually in Chinese legislation, they at most provide a general framework for examination and cross-examination of witnesses in criminal courts. Trial advocacy is not a regular course offered at most

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84. Article 306 of China's Criminal Law provides for a crime of defense lawyer perjury, which makes a lot of defense lawyers hesitate to contact witness prior to trial. Some defense lawyers even avoid independent investigation for fear of the potential trouble.) Zhonghua Renmin Gonghe Guo Xingfa 中华人民共和国刑法 [Criminal Law of the People's Republic of China] (promulgated by the Second Session of the Fifth Nat. People's Cong., July 1, 1979, amended Mar. 14, 1997), art. 306.

85. China is a society of acquaintance, and witnesses are acquainted with defendants, victims, and their families in many cases. When a witness is notified to testify in court, the parties and their families often approach the witness and tried to affect his or her testimony by bribing or threatening.

86. Interview, S0619 (on file with author).

87. The case registration section within the prosecutor's office has the authority to evaluate prosecutor's performance by watching recorded trials at random. If the trial effect is poor, the involved prosecutor would be negatively evaluated, and the evaluation will affect his salary raise and promotion.

88. Both the trial effect and whether the court confirms the prosecution's charges are important in the performance evaluation mechanism.

Chinese law schools. There have been some training programs on examination and cross-examination, but they . were either an introduction to American advocacy or forums for successful lawyers to share their personal experiences, and neither were regarded as assisting prosecutors and defense lawyers to improve their direct examination and cross-examination skills. The empirical surveys the author conducted found that many prosecutors and defense lawyers question witnesses according to their understanding of the existing laws or their own litigation experience, or merely by following a lawyer's instinct. Some interviewed had never heard of such rules. Some prosecutors or defense lawyers had such a superficial understanding of such rules that they could not distinguish between leading questions and non-leading questions. Judges are in no better position in terms of familiarity with cross-examination rules. Many judges confront similar difficulties and have no idea how to effectively guide and control the questioning of witnesses in court. By observing recorded trials, it is found that presiding judges often responded to an opposing party's objection by an ambiguous warning to the questioning party to "mind the way you raise questions." However, the presiding judges were unable to explain what specific problems there were with the party's questioning methods or upon what grounds the opposing party's objection was sustained.

Despite there being multiple legal grounds for objections, they are rarely raised in China's trial practice. According to the trial observation and interview results, prosecutors raise objections more often than defense lawyers, primarily on the ground of irrelevancy. Prosecutors also object on the ground of leading questions, but because legal professionals do not share a common understanding about what a leading question is, judges face difficulty in ruling on objections made on such ground. Some judges interviewed said their rulings over objections depends primarily on whether the disputed questioning is conducive to finding the truth of the case. If the questions in dispute help to clarify the facts of the case, presiding judges tend to allow such questions; if the questions in dispute do not help ascertain the facts, presiding judges tend to forbid such questions. Due to presiding judges' diverse personal backgrounds, different experiences on the bench, and disparity in their capacities to control hearings, it is often difficult to predict how a judge will rule on an objection. It seems judges sustain more objections raised by the prosecutors and overrule more objections raised by defense lawyers. This is not surprising considering the close relationship between courts and procuratorates in China. All in all, due to the scarcity of trial advocacy training, even defense lawyers themselves admit their questioning of witnesses is not as good as it could be. The poor performance in questioning witnesses enhances the difficulty of courts requesting live witnesses. It is a vicious circle.

Fourth, judges remain active players in the questioning of witnesses at trial. Although it remains customary for a trial judge to put questions to witnesses in all jurisdictions, Chinese judges clearly employ this power much more frequently than their counterparts in common law jurisdictions. It is not rare to see the presiding judges questioning witnesses along with prosecutors and defense lawyers at Chinese criminal trials. In addition to turning the supplementary questioning into regular questioning, Chinese judges often interrupt defense lawyers' inappropriate questioning without waiting for an objection by prosecutors. A defense lawyer interviewee told the author, when questioning witnesses in court, he was objected to more often by the presiding judge than by prosecutors.[89] In a recorded hearing, when the defense lawyer tried to impeach a witness by pointing out the inconsistency between the witness's pretrial statement and in-court testimony and intended to read aloud the pretrial statement, the presiding judge interrupted and warned the defense lawyer, "Don't ask repeat questions, the prosecutor has already read aloud the pretrial witness statement."[90] In another case where the prosecution witness recanted his pretrial statement and testified in favor of the defendant, the prosecutor's impeachment accomplished nothing and the questioning reached a deadlock, then the presiding judge asked the witness: "Did you tell the truth when you testified in the police station? Is the pretrial statement your voluntary statement?" Facing the questioning by the judge, the witness stopped arguing his pretrial statement was given under police pressure and said "yes." One can only speculate whether this answer was given under pressure from the presiding judge and whether it was appropriate for the judge to join the prosecutor to resist impeaching the witness, especially a witness who appeared to be hostile.

Last but not least, a series of problems arise when a witness recants his pretrial testimony in court. Witnesses confront multiple interferences when they are subpoenaed to testify in court. In addition to improper influence from the parties and their families, a unique problem in China is the interference from the police or the prosecution. The surveys the author conducted indicate that when defense lawyers requested live testimony from a witness, more often than not, they requested certain prosecution witnesses to testify in court. Defense lawyers did so either because they were sure the prosecution witness had a different story to tell, or they wanted a chance to cross-examine the key prosecution witnesses. When a defense lawyer was eager to have a prosecution witness take the stand, the court would anticipate that witness recanting pretrial testimony, and because of the close

89. Interview X0819 (on file with author).
90. Recorded Hearing, F0619 (on file with author).

relationship between courts and their local prosecutor's offices, they would usually inform the prosecution. Prosecutors then in many cases "talked" to the witnesses in question to make sure he or she adhered to the pretrial statements. Another less regular practice is the similar involvement of police when they know a prosecution witness is going to change his or her testimony in court. Furthermore, in some cases, the survey shows that where a witness has recanted his or her testimony in court, the police confronted the witness again, resulting in some witnesses rejecting their in-court testimony and returning to their pretrial statements. Occasionally, if the witness refused to obey the police and insisted on the in-court testimony, he or she was simply arrested after testifying in court.[91] Of course, this practice is exceptional, but it still suggests that the problem of police tampering with witnesses is present.

When a witness recants his pretrial testimony, the questioning usually focuses on why the witness has changed his testimony. The court is under tremendous pressure to rule as to which testimony is reliable—pretrial testimony or in-court testimony—especially when there is no physical evidence to corroborate this witness testimony. In a bribery case heard in 2014, one witness—the employee of the defendant—was called to testify on one count of accepting a bribe and his testimony was critical to establishing the prosecution's case. Since this prosecution witness was requested to testify in court by the defense lawyer, the prosecutor moved for a recess to talk to the witness when the witness had decided to recant his pretrial testimony. After the recess, the witness recanted his pretrial testimony in court, explaining that his memory was blurred due to the elapsed time when speaking to the police. However, the court did not accept the in-court testimony because it held that the witness had not provided a reasonable explanation for recanting his pretrial testimony, given that the pretrial testimony was corroborated by other evidence.[92] This practice is consistent with the legal provision in SPC judicial interpretations:

> When the testimony of a witness in court contradicts his or her pretrial testimony, if the witness can provide a reasonable explanation in court for recanting his or her [earlier] testimony and there is other evidence to corroborate it, [the court] should accept the testimony given in court. *If the witness cannot provide a reasonable explanation in court for recanting his or her [earlier] testimony and there is no other evidence to corroborate his or her pretrial testimony, [the court] should accept the pre-trial testimony.*[93]

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91. Interview, Q0819 (on file with author).

92. Interview, Z0619 (on file with author).

93. 2021 SPC Interpretation, *supra* note 1, at art. 91 (emphasis added). The earliest provision about inconsistent testimony was contained in Zuigao Renmin Fayuan

This provision sets two tests for inconsistent testimony: one is a reasonable explanation for recanting pretrial testimony and the other is the availability of corroboration. The problem is that in a majority of cases, as a result of the prosecutor's preparation of the case for trial, the pretrial testimony will almost always be corroborated by other extrinsic evidence rather than in-court testimony, so this test favors pretrial testimony. If a system of justice is to be trial centered, it can be strongly argued that pretrial statements of witnesses should not be read aloud when witnesses testify in court. Rather, pretrial statements should be produced only where required to refresh the witness's memory during direct examination or when used in cross-examination to impeach the witness's testimony in court. Article 25 of the Court Investigation Rules already provides:

> Where a witness testifies in court, his or her pretrial testimony shall generally no longer be produced or read, except under the following circumstances: (1) A witness forgets or omits the key part of the pretrial testimony when testifying in court, and necessary reminders need to be offered to the witness. (2) The witness testimony in court contradicts his or her pretrial testimonies, and a reasonable explanation from the witness is required. In order to verify the source of evidence, the authenticity of evidence, and other issues, or evoke the witness's memory, the prosecution or the defense may, with the permission of the presiding judge, present evidence such as physical evidence and documentary evidence to the witness when questioning the witness.[94]

Unfortunately, this provision has not obtained the attention it deserves and is not implemented in practice.

In common law trials, when a witness recants pretrial testimony, impeachment is a powerful tool to find out which story is true. As described by Professor Edward J. Imwinkelried,

> When a cross-examiner wants the trier of fact to attach significant weight to the pretrial statement, he or she attempts to "accredit" the statement. The cross-examiner tries to elicit facts indicating that the pretrial statement is more likely to be reliable, e.g. the witness's memory was fresher at the time or after the event

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Guanyu Shiyong Zhonghua Renmin Gonghe Guo Xingshi Susong Fa De Jieshi (最高人民法院关于适用《中华人民共和国刑事诉讼法》的解释) [Rules Concerning Questions about Examining and Judging Evidence in Death Penalty Cases] (2010), http://www.court.gov.cn/fabu-xiangqing-286491.html [https://perma.cc/Z72U-VWT6] (archived Jan. 7, 2021). Section 2 of art. 15 provides, "When the testimony of a witness in court contradicts his or her pretrial testimony, if the witness can provide a reasonable explanation in court for recanting his or her [earlier] testimony and there is related evidence to corroborate it, [the court] should accept the testimony given in court." The 2010 Rules clearly put the emphasis on accepting the in-court testimony. But the 2021 SPC interpretation seems to offset the preference for in-court testimony and put the pretrial testimony at an equal status with the in-court testimony. I think this provision is a setback.

94. Court Investigation Rules, *supra* note 51, at art. 21.

> the witness has had extensive, potentially biasing contact with the side that calls him or her to the stand.[95]

However, because cross-examination skills are lacking, most Chinese lawyers cannot use impeachment to deal with this kind of situation and merely leave it with the court to choose between pretrial testimony and in-court testimony. During the empirical surveys, the researchers ran into a successful example of impeachment by the prosecution. In a corruption case, the defense lawyer requested two key prosecution witnesses to testify in court. These two witnesses were both relatives and employees of defendant. They testified against the defendant to the police and prosecutors, but they both recanted their pretrial testimonies on the pretext of police threatening and inducement when they came to court. To counter their allegations, the prosecution called two police officers to testify on the legality of the interrogation process. Below is an excerpt from the trial records. W stands for witness, and P stands for the prosecutor.[96]

> W: I didn't make the statement as shown in the written testimony.
>
> P: How can you explain that there are six of your fingerprints on merely three lines of testimony?
>
> W: (pause) I didn't review and verify the content of that written statement.
>
> P: How can you explain that there are revision marks on all three of pretrial statements?
>
> W: I did review, but I did not have time to verify the content.
>
> P: How long did you spend on reviewing these statements?
>
> W: 10 minutes or so.
>
> P: What is your education background? Do you have a college degree?
>
> W: Yes, I have a bachelor's degree.
>
> P: Couldn't you finish reviewing 6 pages of statements in 10 minutes?
>
> W: Well, the police officer kept talking to me when I was reviewing the written statements, so I couldn't concentrate on the content.

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95. Communication from Prof. Edward J. Imwinkelried to author on June 15, 2021 (on file with author).

96. Court Investigation Rules, *supra* note 51, at art. 21.

P: You did request some minor revisions to the three written statements, didn't you? Your fingerprints can be found on them.

W: Yes, I did.

P: Do you think it reasonable that you missed the substance of the statement but noticed minor errors and asked for correction of these minor details?

W: (long silence)

The witness gave up his effort of recanting pretrial testimonies at last. This is the best example of effective impeachment the researchers have found during the empirical surveys. However, cross-examination of this level is exceedingly rare in Chinese criminal courts.

## VI. STRENGTHENING CROSS-EXAMINATION RULES IN CHINA—SOME PROPOSALS

Examining and cross-examining witnesses in open court remains essential even where the accused have admitted their guilt and accepted punishment, as is shown in a growing number of cases in recent years.[97] According to published empirical research[98] based on one hundred randomly selected cases from sixteen provinces through an online database,[99] 80 percent of the prosecutors and defense lawyers' efforts were put into challenging testimonial evidence, including in 39.53 percent of cases for ordinary witnesses, 21.86 percent for defendants' confessions, 15.35 percent for victim statements, and 5.12 percent for expert opinions.[100] This indicates that testimonial evidence remains the focus of court investigation in contested cases as the parties—prosecution and defense—have different views on the credibility and effect of testimonial evidence.

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97. According to the recently released 2021 SPP working report, in over 85% of criminal cases, the accused admitted guilt and accepted punishment. ZHANG JUN, WORK REPORT OF THE SUPREME PEOPLE'S PROCURATORATE (Mar. 8, 2021), https://www.spp.gov.cn/spp/gzbg/202103/t20210315_512731.shtml [https://perma.cc/2ZDU-ZDA5] (archived Jan. 7, 2022).

98. Han Xu (韩旭) & Wang Jianbo (王剑波), Xingshi tingshen zhizheng yunxing zhuangkuang shizheng yanjiu: yi 100 ge tingshen anli wei yangben (刑事庭审质证运行状况实证研究——以 100 个庭审案例为样本) [An Empirical Study on the Operation of Cross-examination in Criminal Trials: Taking 100 Trial Cases as Samples], Rule of Law Studies (法治研究), vol.6, 2016, at 46 http://cacpl.chinalaw.org.cn/portal/article/index/id/4119/cid/18.html [https://perma.cc/DC5G-7WB4] (archived Jan. 7, 2022).

99. *See* China Court Trial Online (中国庭审公开网), http://tingshen.court.gov.cn/ [https://perma.cc/RYP2-5WLN] (archived Jan. 7, 2022).

100. *See id.*

Therefore, in addition to further solving the problem of witness attendance,[101] it remains necessary to build up a set of detailed rules on how to present and challenge witness testimony in court. Accomplishing the first goal is the precondition of conducting the latter reform. Without live witnesses, cross-examination of witness testimony cannot take place. But without effective rules for examination and cross-examination, the oral testimony of witnesses cannot be properly tested, and it becomes meaningless to bring witnesses to court. These two lines of reform should be pursued simultaneously.

This Article focuses on the development of cross-examination rules, so this Part merely puts forward some reform proposals for building up the cross-examination rules in China. Based on the preceding comparative study and empirical surveys, the author suggests the following reforms.

First, questioning witnesses should follow the order of direct examination, cross-examination, followed by re-direct examination and re-cross-examination if required. As discussed in Part IV, the Chinese legal provisions on the order of questioning witnesses have continued to change. Practitioners have found it difficult to implement these provisions and sometimes are confused by them.[102] It is absurd to have the defense lawyer question the prosecution witness first even if the witness has been requested by the defense, because cross-examination should follow a direct examination by the prosecutor revealing how the witness's testimony supports the prosecution's case. However, if the prosecution witness recants his or her testimony in court, the defense lawyer should then directly examine the witness first to show how the evidence does not support the prosecutor, with the prosecutor then having the opportunity to cross-examine.

The SPC interpretations do not adopt the reasonable provision from the Court Investigation Rules; rather, they create another mode of witness questioning. The witness is expected to give a complete narrative to the court when he or she takes the stand. Following the

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101. A short-term solution is to shift the control of witness appearance from the court to the parties. The Court Investigation Rules tried to curtail the court's power in determining whether it's necessary to call a witness to testify in court. Unlike the final provision in the CPL, art. 13 of the Court Investigation Rules merely grant the court an authority to verify if the two other criteria have been met, downplaying the role of court in deciding who should come to court and testify. Meanwhile, the last section of art. 13 also imposes on the prosecutors and the defense lawyers an obligation to assist the court in calling the witnesses, indicating that witnesses are the parties' witnesses, not the court's witnesses. *See* Court Investigation Rules, *supra* note 51, at art. 13.

102. Our empirical survey revealed that sometimes, no matter who the witness is called by, the prosecutor always examines the witness first, even if the witness is called by the defense. This is an example of how the rules confuse practitioners (2019 interviews, on file with author).

witness's account, the party who requested this witness can question first, then the opposing party can put questions to the same witness. Although some scholars proposed this mixed-witness questioning mode—a witness's uninterrupted narration followed by cross-examinations by both parties[103]—this proposal distracts from the importance of cross-examination as a technique to be used to fully test the testimony of an opposing witness. Therefore, it is hoped that the SPC interpretations can bring its provision on the order of questioning witnesses in line with the relevant provisions in the Court Investigation Rules. That is, when a witness takes the stand, the party favored by that witness's testimony shall perform a direct examination followed by a cross-examination by the opposing party.

In Chinese criminal courts, when a witness takes the stand, direct examination does not take the form of question and answer. Instead, the court first permits the witness to give a complete narrative, then allows the prosecutor to ask open-ended questions to highlight some points, followed by questioning from the defense lawyer. Judges are also permitted to ask supplementary questions. While China may keep this form of witness examination to clarify what support the witness is giving to the prosecution's case, cross-examination must then be available to test through question and answer whether and to what extent the witness's testimony is to be accepted.

Second, China must loosen the prohibition against leading questions. The criticism that China should not completely ban leading questions for all witness questioning has been made ever since the 1996 CPL reform.[104] However, the blanket ban remains after a number of opportunities to correct it. Leading questions are a powerful tool, without which the cross-examination loses its force of confronting rival accounts and cannot effectively test the credibility and veracity of a witness's testimony. Therefore, the blanket prohibition against leading questions should be lifted and a reasonable leading question rule created. Leading questions should only be restricted in direct examination. In cross-examination, and when questioning hostile witnesses or expert witnesses, leading questions should be permitted or even encouraged.

It is merely the first step to permit leading questions on cross-examination. There will be a long way to go for Chinese legal professionals to understand and identify leading questions and reach consensus on that identification. Common law jurisdictions have accumulated a lot of experience and skills for the identification of

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103. *See generally* Long, *supra* note 43.

104. Jianwei Zhang, Some Thoughts on Asking Leading Questions in Criminal Trials and the Probative Value of Evidence, Faxue (法学), Vol. 11, 1999, at 33.

leading questions.[105] Direct examiners are advised to begin as many questions as possible with natural interrogatory words such as what, which, when, where, how, why, and who. According to some American textbooks on evidence, there are three degrees of leading questions:[106] (1) *Mildly* leading. These questions usually begin with words such as is, are, do, did, was, and were. The question refers to a fact or event, and any reference of that nature carries a mild suggestion that the event occurred or that the fact is true. (2) *Fairly* leading. These questions ordinarily begin with words such as isn't, aren't, don't, didn't, wasn't, or weren't. The negative phrasing sends a clearer signal to the witness. (3) *Brutally* leading. You can make a question brutally leading in one of two ways. First, the sentence can start with a "windup," such as "isn't it true," "isn't it a fact," or "won't you admit." Second, when the witness is very compliant—which occasionally happens with very honest witnesses—an assertion can be made, followed by a question such as "Right?" or "Correct?" (e.g., "The traffic light was red. Correct?") The latter style of questioning is sometimes called "conversational cross-examination."[107] Although the Chinese language is different from English, lessons can still be learned from the Anglo-American practice of identifying leading questions.

Third, the process and grounds for objection should be improved to solve practical problems. Since the judicial interpretations have contained not only the grounds for objections, but also the procedure to raise and rule on objections in court, the first step in improving the objection rule is for lawyers to use it. Training on raising objections should be conducted among prosecutors, defense lawyers, and judges to make clear that there are grounds—apart from irrelevance and leading questions—to raise objections when an opposing party's witness is being questioned. Trial advocacy courses should be developed and offered for law students so that all legal professionals share the same understanding of the grounds for objections, such as knowing what a leading question is. In Chinese criminal courts, the presiding judge can take the initiative and interrupt one party's questioning;[108] however, in practice, judges almost always interrupt

105. JUN, *supra* note 97.

106. *See generally* RONALD L. CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE (6th ed. 2020).

107. *See id.*

108. Article 21 of the Court Investigation Rules provides, "Where the prosecution or the defense asks a question in an inappropriate manner, or irrelevant to the facts of the case, in violation of the relevant rules of questioning, the opposing party may raise an objection. If the opposing party raises an objection in court, the questioning party shall explain the reason for the questioning, and the presiding judge shall sustain or overrule the objection as he or she sees fit; and if the opposing party does not raise an objection in court, the presiding judge may also stop the questioning based on the circumstances." Court Investigation Rules, *supra* note 51, at art. 21.

the defense lawyer. This is a remaining inquisitorial aspect of the Chinese criminal trial that intends to assist truth-finding, but it also may cause conflict between the court and the defense, enlarging further the disparity between the prosecution and the defense by treating the two parties differently. The presiding judge should take care to treat the parties equally and refrain from interfering in the questioning of witnesses.

In addition to the above-mentioned rules for examination and cross-examination of witnesses, there are further controversial issues that deserve consideration. First, is witness preparation necessary? Although many people are concerned about the temptation to interfere with the testimony of witnesses before trial,[109] witness preparation is certainly necessary to ensure the effective direct examination of a witness called by a party to testify. As a general proposition, cross-examiners do not want to ask a question unless they can be relatively confident of the probable answer. Cross-examiners can have that confidence if (1) they have had personal, pretrial contact with the witness or (2) they otherwise have had adequate discovery about the witness. Therefore, unless pretrial discovery is adequate, the cross-examiner must rely upon preparing the witness prior to trial. Without preparation, witnesses will have a frustrating experience testifying in court and be unwilling to testify again. The inability of the parties to prepare prior to coming to court would also reduce the effectiveness of questioning and in turn discourage the court and the parties from calling live witnesses. Preparing the witness prior to trial is an important prerequisite for successful direct examination. Preparation for cross-examination demands that an opponent's lawyer be properly instructed by the defendant, so prosecution witnesses have alternative explanations put to them. However, witness preparation needs the development of supportive institutions, such as more detailed legal ethics rules and corresponding trial advocacy training. It's essential to not cross the line when rehearsing witnesses. This is especially critical in the opinion of the Chinese defense bar because they take the risk of indictment for perjury if they cross the line seriously.[110]

Second, China needs to develop a more protective environment in court for the witness who is testifying. Witnesses should enjoy protection against interference from anyone, including the defendant, victims and their family members, and more importantly, police and prosecutors. After a witness has made a statement and is subpoenaed, no one should be able to approach the witness prior to trial, except for

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109. Most defense lawyers expressed this concern (2019 interviews, on file with author).

110. Yang Yuguan, Legal Restriction on Perjury Issues in Criminal Proceedings, TSINGHUA UNIV. L.J., Vol.14, No.6, 2020, at 126–27.

attorneys to prepare the witness for trial. And if the witness recants his or her testimony in court, the police and prosecutors should not be entitled to approach the witness after trial either.

Third, impeachment rules should be established step by step. There are three basic goals of cross-examination: adopting true facts, narrowing false facts, and fully testing the veracity of the testimony of a witness. Witness testimony may be impeached in cross-examination by showing bias, lack of ability to observe or know, prior inconsistent testimonies, prior act of dishonesty, etc. In the empirical surveys the author conducted, most interviewees did not think it a good idea to impeach a witness by his or her prior acts of dishonesty because they were worried that such impeachment would discourage potential witnesses from taking the stand and have a negative influence on the already low witness attendance rate. For the same reason, perjury is rarely charged against witnesses who unsuccessfully recant pretrial testimony in court.[111]

Fourth, Chinese courts still face a unique challenge in choosing between in-court testimony and pretrial written statements after several rounds of amendment to the Chinese CPL. Even if witnesses show up and testify in court, their pretrial statements are still admissible. Prosecutors are still free to read aloud the pretrial statements in court and ask the court to choose between the pretrial statements and in-court testimony. This is regarded as one of the limitations of China's live-witness reforms.[112] Courts make decisions on this question by applying two tests: if the live witness can give a reasonable explanation for the change of testimony and if the testimony is consistent with other evidence for the case. Because the first test is just a subjective judgment of the court, and the second test is always favorable to pretrial testimony, the ideal solution would be, as at common law, simply to adopt the hearsay rule and exclude all the pretrial statements and test the credibility and reliability of in-court testimony by cross-examination, with inconsistent pretrial statements only permitted to impeach.

Lastly, some insightful scholars have already realized the necessity for creating special rules for questioning vulnerable

111. *See* Interview Z0619 (June, 2019) (on file with author); Interview X0819 (Aug., 2019) (on file with author).

112. Chen Ruihua (陈瑞华), Xin Jianjie shenli zhuyi: tingshen zhongxin zhuyi gaige de zhuyao zhangai (新间接审理主义："庭审中心主义"改革的主要障碍) [New Doctrine of Indirect Trial: The Main Obstacles of Court Hearing-Centered Procedural Reform], PEKING UNIV. L.J. (中外法学), vol. 28, no.4, 2016, at 850.

witnesses, such as children[113] and victims of sexual assault.[114] Some survey interviewees the author talked to also pointed out the need for special rules and training in examining and cross-examining vulnerable witnesses. In a sexual assault case, the defense lawyer requested the victim and a key witness to testify in court. Both the victim and witness were minors, and the court turned down the request, finding that both the defense attorneys and prosecutors lacked special questioning skills needed to mitigate the risk of causing repeat harm to the minors.[115] The recently released SPC interpretations announced a principle that, generally, juvenile victims and witnesses should not testify in court and that special protections should be adopted if live testimony is necessary.[116] This provision recognizes the special category of cases involving juveniles, but excluding all juvenile witness testimony from open court should not be a permanent solution to this issue. Special rules should be developed to examine and cross-examine juvenile witnesses in criminal courts when necessary to promote a full accounting of the truth.

## VII. CONCLUSIONS

Compared with the common law cross-examination rules, China's legislation on the questioning of witnesses has the following features. First, multiple participants may be permitted to put questions to witnesses in court. Second, witness questioning in Chinese criminal courts does not follow the order of examination, cross-examination, re-examination, and re-cross-examination. Third, unlike the question-and-answer format in common law trials, the direct examination in Chinese court is a combination of a self-narrating session and a question-and-answer session. To be specific, direct examination of witnesses in Chinese court is conducted in two steps: witnesses provide

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113. *See* Wang Xiaohua (王晓华) & Zhou Zixing (周子星), Lun ertong zhengyan de zhengmingli ji ertong zhengren de chuting (论儿童证言的证明力及儿童证人的出庭) [On the Probative Power of Child Testimony and the Appearance of Child Witnesses in Court], JUV. DELINQ. ISSUES (青少年犯罪问题), vol. 4, 2017, https://www.pkulaw.com/qikan/e84a078fc7aaed11690aa7a57c9eff6bbdfb.html [https://perma.cc/KN28-46KL] (archived Jan. 7, 2022).

114. *See* Xiang Yan (向燕), Lun xingqin ertong anjian de jingmi ban'an moshi (论性侵儿童案件的精密办案模式) [On the Precise Case Handling Mode of Child Sexual Abuse Cases], CHINA J. CRIM. L. (中国刑事法杂志), vol. 2, 2020, http://law.law-star.com/txtcac/lwk/097/lwk097s141.txt.htm [https://perma.cc/57DA-V5RB] (archived Jan. 7, 2022).

115. *See* Interview FZ0819 (Aug., 2019) (on file with author).

116. Article 558 provides, "When a juvenile case is on trial, juvenile victims and witnesses do not testify in court in most cases. Where there is a real need to notify juvenile victims or witnesses to appear in court and testify, technical means shall be employed to guarantee the juvenile's privacy and protective measures such as psychological intervention shall be adopted." 2021 SPC Interpretation, *supra* note 1, at art. 558.

an uninterrupted account of their testimony at first, and then the court may allow the party who requested their appearance to pose questions. Fourth, there is a blanket prohibition against leading questions in any questioning of witnesses, which undermines the very purpose of cross-examination. Fifth, trial judges in China continue to play important roles in questioning witnesses. All the participants need permission from the presiding judge to pose questions to witnesses. Judges may question witnesses if they think it necessary. Judges may take the initiative and interrupt questioning if they think the questioning is inappropriate or violates the rules of questioning, even without objection from the opposing party. In conclusion, the questioning of witnesses in Chinese criminal court is more alternate examination than cross-examination.

There are three reasons for this. First, it is impossible to develop advanced witness questioning methods and skills because the appearance of witnesses has been rare in criminal courts over the past few years. Second, the criminal trial in China is based on preprepared prosecutorial case dossiers, not in-court, first-hand examination of evidence—the questioning of a witness is simply to verify his or her written statement contained in the case dossier. A very simple questioning rule can meet this goal. Third, in the United States at least, one rationale for cross-examination is to fulfill a constitutional right to confront unfavorable witnesses. But while the questioning of witnesses in Chinese criminal courts and many other common law courts seeks justification only in its ability to achieve truth, this very strong justification itself provides a rationale for more permissive rules on the questioning of witnesses.

As a consequence, China has not fully and systematically adopted a process demanding that parties have the opportunity to cross-examine witnesses who testify against them.

The empirical surveys the author conducted revealed some interesting findings. First, Chinese courts prefer to seek truth informally and avoid confrontation in court with the defendant and his or her lawyer, with the defendant having no right to confrontation. Second, at a trial with live witnesses, one very important reason for poor trial performance is lack of witness preparation. Third, according to trial observations and interview results, prosecutors raise objections more often than defense lawyers, primarily on the ground of irrelevancy. Fourth, in addition to turning the supplementary questioning into regular questioning, Chinese judges often interrupt defense lawyers' inappropriate questioning without waiting for objection by prosecutors.

Therefore, in addition to further solving the problem of witness attendance, it is necessary to build up a set of detailed rules on how to present and challenge witness testimony in court. Based on the

comparative study and empirical surveys, the author suggests the following reforms.

First, questioning witnesses should follow the order of direct examination followed by cross-examination, then re-direct examination and re-cross-examination if required. When a witness takes the stand, the prosecution or the defense favored by that witness's testimony shall perform a direct examination, followed by cross-examination by the opposing party.

Second, China must loosen the prohibition against leading questions. Leading questions should only be restricted in direct examination. In cross-examination and when questioning hostile witnesses or expert witnesses, leading questions should be permitted or even encouraged.

Third, the process and grounds for objection should be improved to solve practical problems. The presiding judge should take care to treat the parties equally or refrain from interfering in the questioning of witnesses.

There are some controversial issues that deserve consideration, such as whether witness preparation is necessary in China. A more tolerant environment should be developed for witnesses testifying in court. Impeachment rules should be established step by step. Chinese courts still face a unique challenge in choosing between in-court testimony and pretrial written statements. It is also necessary to create special rules for questioning vulnerable witnesses, such as children and victims of sexual assault.

## VIII. APPENDIX

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