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Observations and Reflections on the Pre-trial Evidence Discovery in China——Based on the Pilot Activities in Some Local Courts and Procuratorates

Abstract: Along with the two recent amendments of the Criminal Procedure Law in China (1996 and 2012), there are some pilots on evidence discovery in some Chinese courts and procuratorates. However, some statutory proceedings, such as the evidence discovery, identification, cross-examination and investigation in the courtroom have been replaced or reduced by the piloted [pretrial] evidence discovery due to lack and misinterpretations of specific legal basis. This resulted in dramatic decrease of openness of the trial, and thus the challenge on the judicial fairness. In fact, access and consultation to the case files by the defence lawyers in the civil law system has no essential difference from the evidence discovery in the common law system considering the in representative functions and objectives. The fact that neither of the systems work well in China indicates that any law, regardless of its quality, will become fertile without a healthy environment of implementation. In the author's view, pretrial evidence discovery should be conducted cautiously without sufficient empirical or theoretical research in order to fully secure the fairness of the trial and protection of human rights of the accused.

Keywords: evidence discovery, pilot; observation, reflection

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1 Introduction

Since the reform of criminal procedure law in 1996 and various follow-up judicial interpretations and rules developed by the Supreme People's Court (hereinafter called "SPC"), the Supreme People's Procuratorate (hereinafter called "SPP") and the Ministry of Public Security (hereinafter called "MPS"), some of the procuratorates, public security departments and courts started to draft specific rules and conduct experiments on criminal proceedings, particularly on the rules of evidence discovery, which attracted lots of public attention (e.g. Xu and Wang 2013:89-94, Song and Wang 2012).

For example, Haidian District Procuratorate of Beijing worked with Beijing Lawyers' Association to develop the *Rules of Evidence Discovery* in July 2003 (hereinafter called the "Haidian Mode")(Shanghai Lawyers Association 2002). In this mode, the procurator initiates the evidentiary discovery process before the court trial that both parties provide their evidence available to the other side, but mostly the prosecution shall allow the defence lawyers to access to all the case files no later than 15 days before initiating public prosecution. All the evidences

without the discovery process in general shall not be presented in the court (Jiang 2002). Comparing with the *Criminal Procedure Law of the People's Republic of China* (hereinafter called "CPL 2012"), there are several different provisions between the pilots rules and the CPL. First, the time of access to all the case files in the Haidian Mode was at the review and prosecution stage instead of the date of accepting the case by the court. Such a practice in fact contributed to the strengthening of the defence in criminal cases. Second, the scope of cases available to defence lawyers in the Haidian mode is expanded to all the case files. Given that lawyers' evidence collection is quite limited in judicial practice, such a pilot will help the defence to understand and grasp more information which contributes to the effective defence in court. Third, Exclusion of undiscovered evidence before the trial was the first time in China that the judicial organs voluntarily avoid the practice of "sudden attack" of the evidence in the trial. In practice, some prosecutors failed to transfer all the evidences or those collected after the prosecution, which resulted in unexpected adjournment once the defence lawyer objected such evidence on the ground of prosecution abuse of the litigation power. The Haidian mode means the improvement in this regard, which benefits the defence side reflecting specifically the presumption of innocence.

Another important pilot was initiated by Professor Chen Weidong of China Renmin University cooperated with Shouguang Political-legal Committee of Shandong Province as well as local municipal court, procuratorate, justice bureau and several law offices to draft the *Operational Rules on the Procedures of Evidence Discovery in Criminal Cases* in late 2004 (hereinafter called "Shouguang Mode") The time of evidence discovery in this mode occurs during the period after the formal prosecution and before the formal trial procedure, and the prosecution and the defence may negotiate such discovery even at the review and prosecution stage. Unlike the Haidian mode, it is the assistant judge or a court clerk other than the presiding judge of the case who shall be responsible for presiding or organizing such discovery process.[here it may arise several questions: What if the defendant has no legal representation? Will the presiding judge be allowed to participate in this discovery process before the trial?] Furthermore, the function of evidence discovery is mainly to sort out the disputes on the evidence between the prosecution and the defence so that the court may focus on those disputed items of evidence in the trial and improve the working efficiency accordingly. In addition, it is the court to decide whether or not there is an evidence discovery, and if yes, the venue of such discovery, and the discovery is conducted either by allowing the lawyer to read case files or provide duplicated copies of case files (Chen 2005).

In this paper, the author will discuss the practice and problems of evidence discovery in criminal cases based on her personal experience and through an empirical perspective. In the meanwhile, she also makes a comparison between the pilots and pretrial conference as provided in the 2012 criminal procedure. The purpose of the research is to attract attention of the judiciary and academic circle in China, as the evidence discovery will affect the fairness of the trial and proper safeguard of the communications in a fair legal setting and thus the protection of human rights of the defendant.

2 Overview of the evidence discovery pilots in some locations

Although there are various experiments on evidence discovery, in the author's view, they can be generally categorized into the following modes:

2.1 Old-fashioned mode in lawyer's access to case files

As we know, criminal suspects and defendants shall have the right to defence, and most of such right is focus on the trial, while the prerequisite to full and effective exercise of the right to defence is adequate knowledge of the prosecution files, especially the allegations and criminal evidence. In order to plan the best defence, the defence may need to know certain information in the hands of the government. In general, there are two ways of access to case files: Defence lawyers' access and consultation to the case file in the civil law system and evidence discovery in the common law system. In the first mode, the suspect, defendant and defence lawyers enjoy the right to consult the prosecution case file. In the second mode, the suspect, defendant and the attorney have the right to request the prosecution to disclose all the case information including the evidence. The two modes on the defence side's access to case files in essence are the same, that is, the defence can obtain case information in order to make effective defence, but they are different in terms of legal concept and evidentiary rules of criminal procedure.

In China, along with the two recent amendments to the criminal procedure law, the trial mode is gradually turned from the inquisitorial system into an adversary one. In judicial practice, there are some experiments on the evidence discovery in some places; however, has no common mode or rules on such pilots. For example, in a case the author acted as defence lawyer,[34] despite of some pretrial evidence discovery initiated by the court and the procuratorate concerned, the traditional mode of civil law system on accessing to the case file was still used although we the defence side had already known most of the prosecution evidence. This resulted in a strange phenomenon of parallel of both "wearing a new pair of new shoes and walking on the old way" and "wearing a new pair of old shoes and walking on the old way".

2.2 Evidence discovery in show or exhibition

Evidence discovery is a concept in the common law system, and the *Black's Law Dictionary* defines it as "knowledge of previously unknown information, disclosure and exposure of the information that is intentionally hidden". In such countries as the United Kingdoms and the United States, evidence discovery is mainly conducted before trial, so it is often called the pretrial disclosure.[35] The subject of the obligation in evidence discovery is the prosecution side

[34] This case was Liu XX's case of frauds on loans, financial certificates and documents and deception happened in Shandong Province in 2012. There were 1883 volumes of investigation files and auditing reports on the accounting affairs in this case. It lasted for 8 days for evidence production before the trial. During the process of evidence production by the prosecution, the defence was only allowed to say "yes" or "no" to the evidence. If we had disagreement on the specific item of evidence, we were requested to express the opinion during the court trial. The court session was opened on 10 May 2013 in a prison hospital, and the whole trial only lasted for less than two hours. All the cross-examination procedure was omitted, making the defence no opportunity to challenge and debate the evidence in question. In this case, the pretrial evidence discovery completely replaced the evidence production and cross-examination in the trial, another legal aid lawyer appointed by court cooperated with the court to finish all the proceedings, making the trial a formality, which indicated presumption of guilt or conviction before the trial.

[35] This concept is used as the meaning of pretrial evidence discovery in the whole text unless otherwise specified.

with few exceptions in certain circumstances.[36] The rules on evidence discovery is determined by law, including the subject, scope and exceptions, methods, and procedures of the discovery, dispute resolution and remedies during the discovery process. According a famous American Justice, William J. Brennan, United States Supreme Court Justice says, the basic purpose for allowing the defendant to understand the prosecution case, is to facilitate the process of finding out the facts and thus reducing the danger of wrongful conviction of the innocent (Brennan 1990).

Thus, if there are no special rules or regulations on the communications between the litigation participants, especially on the obligation, scope, method and procedure of evidence discovery in a country, people may have reason to challenge if such evidence discovery system can be established in a really sense. As a basic requirement of procedural justice, evidence discovery should follow certain rules, and be conducted in a proper manner, so that it can be put on the right track, and consequently secure effective defence and protection of the defendant's right (Ma 2009).

To illustrate this with the author's personal defence experience in a criminal case, she read the prosecution files with the conventional manner in the procuratorate during the procuratorial review at first. When the case was prosecuted, the case-handling judge convened a pretrial conference with the two parties' participation, in which the prosecution and the defence exchanged to presence their evidence available in an audio-visual show and reading manner respectively. But there was neither cross-examination nor debate on the legality or relevance of the evidence discovered. It is clear that this so-called "evidence discovery" was just a simple show or exhibition of the evidence materials.

It is neither a factual judgment on the evidence, nor a value judgment on the admissibility of the evidence. Suppose the amount of evidence materials is over one hundred or even one thousand volumes, this cursory manner of discovery disables the suspect or the defendant to effectively identify such huge amount of evidence, and the suspect or defendant cannot make any judgment due to the vague or disappeared memory over time and recognition of the exhibited materials. However, those unrecognized evidence by the suspect cannot be excluded in the criminal proceedings. This kind of evidence discovery is neither the civil law mode, nor the common law mode, but something close to a show or exhibition of the evidence.

2.3 Jerry-built court trial

As for the tasks during the procedure of first instance in the criminal litigation, there are specific provisions in the *Criminal Procedure Law of the People's Republic of China*. For example, Article 48(2) of the CPL provides that, "evidence must be verified before being used as a basis for deciding a case." Article 190 stipulates that, "the public prosecutor and a defender shall adduce physical evidence before court for the parties concerned to identify, and a statement of a witness who is not in court, an expert opinion of an identification or evaluation expert who is not in court, transcripts of crime scene investigation, and other documentation serving as evidence shall be read out in court. A judge shall hear the opinions of the public prosecutor, parties

[36] For instance, in the USA, the defence is obliged to present the evidence before trial to prove the accused's innocence.

concerned, defenders, and ad litem agents." Furthermore, Article 193 states that, "in a court session, any fact or evidence related to conviction or sentencing shall be investigated and debated. With the permission of the presiding judge, the public prosecutor or a party concerned or the defender or agent ad litem thereof may present opinions on the evidence and merits of a case and debate with opposing parties." Article 59 stipulates that, "A witness statement may be used as a basis for deciding a case only after it has been cross-examined in court by both sides, the public prosecutor and victim as one side and the defendant and defender as the other side, and verified." The provisions mentioned above show that, the production, identification and cross-examination, investigation of and debate on the evidence are essential procedures of court trial. Otherwise, the evidence cannot be served as the basis of the judgment. Therefore, even there is formal evidence discovery before the trial, the court shall not omit such steps as the production, identification, cross-examination, investigation and debate on the evidence.

However, in a criminal case represented by the author,[37] the court did not ask the prosecution and the defence to present, and cross-examine the evidence and debate after a pretrial "evidence discovery", but went directly to the court debate. If we compare this situation with the case without pretrial evidence discovery, we will find that such important steps as the cross-examination of and debate on the evidence are missing. If the on-show evidence discovery before the trial aims to help the suspect or defendant to get familiarized with the evidence, the judicial practice of omitting such important links will definitely bring harm to the defendant's procedural right.

3. Merits of the "evidence discovery" pilots in China

In the criminal proceedings, the suspect and defendant shall enjoy a series of procedural rights such as the right to information, right to defence, presumption of innocence, right to challenge or withdrawal, thus constituting a system of the suspect and defendant's procedural rights (R. Chen 2005:20). Among these rights, the right to information is the basis for the suspect and defendant to fully exercise their right to defence and other procedural rights (Qian 2007). The prosecution has also the obligation of presenting all the case evidence before the trial (Kurcias 2000). In fact, the right to information is also a procedural right provided by the constitutional law, which is an important prerequisite to achieve litigation democracy, procedural rule of law and protection of the basic human rights (Cai 2008).

From the global perspective, there are various international conventions emphasizing protection of the accused especially the right to information. For instance, Article 6 of the European Convention on Human Rights provides that "…..3.Everyone charged with a criminal offence has the following minimum rights:(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;(b) to have adequate time and the facilities for the preparation of his defence;(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;……" Likewise, Article 19(2) of the *International Covenant on Civil and Political Rights* (1966) provides that "everyone shall

[37] See also the example in *Supra note* 1.

have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." China signed the Covenant in late 1998. Therefore it incorporated some of these rules into its criminal procedure, including right to information at various stages. For example, Article 36 of the CPL says, "during the criminal investigation, a defence lawyer may provide legal assistance for a criminal suspect, file petitions and accusations on behalf of a criminal suspect, apply for modifying a compulsory measure, learn the charges against a criminal suspect and relevant case information from the criminal investigation authority, and offer opinions." Likewise, Article 37 stipulates that, "defense lawyer may meet and communicate with a criminal suspect or defendant in custody. At a meeting with a criminal suspect or defendant in custody, a defence lawyer may learn relevant case information and provide legal advice and other services, and from the day when the case is transferred for examination and prosecution, may verify relevant evidence with the criminal suspect or defendant. A meeting between a defence lawyer and a criminal suspect or defendant shall not be monitored." Furthermore, Article 38 states that, "a defence lawyer may, from the day when the people's procuratorate examines a case for prosecution, consult, extract, and duplicate case materials. As permitted by the people's court or people's procuratorate, a defender other than a defence lawyer may also consult, extract, and duplicate such materials." Article 39 provides that "Where a defender believes that any evidence gathered by the public security authority or people's procuratorate during the period of criminal investigation or examination and prosecution regarding the innocence of a criminal suspect or defendant or the pettiness of crime has not been submitted, the defender shall have the right to apply to the people's procuratorate or people's court for submission of such evidence." These provisions emphasize the right to information of the suspect and defendant on the criminal charge against him or her.

Based on the statements above, objectively speaking, standardized and rigorous pretrial evidence discovery does have its merits, in particular, the right to information will secure the defence' effective exercise the right to cross-examine and defence in the trial, apart from saving the effectiveness of the trial and judicial resources.[38] In the meanwhile, since there are no specific regulations regarding the manner and scope of information exchange between the suspect, the defendant and the defence lawyers, evidence discovery will provides a comparably transparent and safe environment for the purpose of exchanging evidence and other information. For the defence attorneys who are under the current legal environment, evidence discovery can be an effective way to avoid the risk of perjury.

4. Defects of the "evidence discovery" pilots

4.1 Lack of the legal basis

[38] This is why in the USA some organizations even further promote evidence discovery rules in practice. See, .e.g. National Commission on Forensic Science (2014). Scholars also argued to develop more concrete procedures on the discovery of special evidence. See Sharpe, Kirsch and Packer (2010). See also Mike Klinkosum (2013).

First, there is no legal basis for the formulation of rules on evidence discovery in China. According to such laws as the *Constitutional Law of the People's Republic of China* and *Legislation Law of the People's Republic of China*, local people's courts, procuratorates, or public security organs do not have the powers of both legislation and judicial interpretation. In addition, the CPL provides the system of lawyers' access to case files, and the rules on "evidence discovery" seem unnecessary but just a repetition. Moreover, the evidence discovery pilot in judicial practice lacks the support of procedural law as well. CPL provides procedures for lawyers to access to case files, but did not mention the rules or procedures for evidence discovery. The pilots in essence are a revision of the CPL in practice.

4.2 Limitations of the "evidence discovery" pilots

First, rules in every pilot vary and stark contrast of the quality may cause miscarriage of justice in judicial practice. As we know, China adopts a unitary legislative system, inconsistency in the application of these rules, especially omission or reduction of those statutory steps after the pretrial evidence discovery will seriously bring damages to or even deprive the suspects or defendants of the procedural rights, such as the right to cross-examination and right to defence.

Second, the pretrial evidence discovery greatly reduces the openness of the trial since only the parties and witnesses will attend such discovery process. It may even allow the judiciary to avoid public attention to the sensitive cases. Litigation is a judicial activity heavily relied on the evidence. However, during the trial, since part of the evidence shown before the trial will not be produced, identified or cross-examined, the essential and brilliant part of the proceedings during the trial is omitted or even deleted, and the public observed the trial can barely understand the entire process of the litigation, bewildered by sudden court debate, and unable to make their own judgment regarding the case. What's more serious, the public may not be able supervise the trial and become thus unable to assure the fairness of the litigation.

Third, the evidence discovery pilots factually reduces or omits some of the court proceedings, so it is most likely that the outcomes of same type of cases differ or even contradict to one and another. Such negative consequences will severely damage the unification, authority and fairness of the law, and deteriorate the current judicial environment in China, which is already criticized by the general public.

At last, the basic function or main purpose of evidence discovery is designed to safeguard the right to information of the suspect and defendant regarding the evidence and other information in order to enable them to effectively and thoroughly exercise their procedural rights such as the right to cross-examine evidence and right to defence. If the pretrial discovery replaces such steps as the production, identification, cross-examination, investigation of and the debate on evidence in the trial, it is no doubt extremely unworthy in the respect of fairness and communication.

In the author's opinion, various procedural rules and the evidence discovery pilots are in fact inertial reactions of entrenched vices of utmost contempt to legal procedures.

5 Misunderstandings or misuse of the rules in the "evidence discovery" pilots

5.1 Replacement of the evidence investigation and cross-examination in the trial with pretrial evidence discovery

Lawyers' access to case files is the evidence discovery rule in the inquisitorial mode of the civil law system, while evidence discovery is the one under the common law system. Despite of the radical change to the adversarial trial mode from the traditional inquisitorial one, China is substantially categorized as a civil law system. Based on the author's personal experiences in the criminal defence, one misunderstanding is that the judge often replace or omit the steps of evidence production, cross-examination and even debate on the legality and relevance of the evidence. The CPL requires the parties to present, cross-examine and debate the evidence as an essential part of the court trial, while pretrial evidence disclosure is just an exhibition or show of the evidence, which lacked of legal effect for conforming the legality and relevance of the evidence. Therefore, pretrial evidence discovery cannot replace the court investigation stage in the trial. This is why a famous Chinese professor argues that, "it is not lawful and reasonable to reply with the pretrial discovery process with the courtroom investigation and cross-examination, similarly, we cannot omit the investigation stage in the trial if both parties showed no disagreement in the pretrial discovery. Emphasis of procedural justice requires the proper implementation of the law, the evidence without production, identification and cross-examination in court can be used as the basis for making a judgment.[39]

We have reason to argue that, even when the criminal suspect and the defendant and his or her defenders did not show expressed doubts about the evidence in the discovery process, it does not necessarily mean that, the defence would have no doubt on the evidence during the trial, as in the pretrial discovery, the accused sometimes may not show his or her disagreement with the evidence due to some concerns. Research also shows that pretrial discovery will somewhat affect the final outcome of the punishment in the criminal cases (Turkay 2011). The court should strictly follow the provisions of the criminal proceedings, even the evidence has been exchanged before the trial. In this way, we can secure the defendant's right to cross-examination and debate on the evidence in the trial.

5.2 Evidence discovery as the valuable requirement of improving trial efficiency and saving the resources

In both the adversarial and inquisitorial trial modes, the prosecution have a significant preponderance in the case, because it masters unlimited litigation resources, not only having the support of police specifically engaged in the investigation, but also being able to confine the crime suspect and limit his or her liberty apart from such compulsory measures as search, seizure, and electronic monitoring, who are able to first arrive the crime scene for evidence collection, and to obtain witnesses' cooperation. By contrast, most of the suspects and defendants are low in education level, who do not understand the law and most of them are poor. In another word, there is a strong imbalance between the defendant and the prosecution. In order to reduce such serious disparity, the evidence discovery system is designed to compensate for or balancing the defence side in case information. As a result, the main purpose of evidence

[39] Quoted from the speech given by Professor Fan Chongyi in China University of Political Science and Law on 23 October 2002.

discovery is to meet the demand of the criminal suspect and defendant on the right to information—evidence of the prosecution case—and thus facilitate the defendant and the lawyers to make an effective defence during the trial (Gu and Yuan 2012).

A Chinese scholar summarized four values of the evidence: (1) Procedural fairness; (2) truth finding; (3) protection of human rights; and (4) efficiency (Ma 2009). Although he did not further elaborate the degree of importance and order of the values, the author argues that, the value of protecting human rights undoubtedly should be in the first place, which is one of the goals of the whole criminal procedure, while the procedural fairness and truth-finding are the means or conditions of achieving the goal of protecting human rights, while the efficiency should be placed in the last. We should put the four values in equal importance, and therefore, the pretrial evidence discovery should not be used as the way of only pursuing the efficiency.

If we look at the pilots nationwide, it is not a rare practice for the court to reduce or even omit some of the proceedings, especially evidence production and cross-examination at the investigation stage. Such practice may help improve the efficiency of the criminal procedure, but it may at the risk of endangering the defence side to exercise their right to defence and thus the fairness of the trial. We should not promote the efficiency at the risk of judicial fairness and protection of human rights.

6. Update and codification of the pilots of the pretrial evidence discovery——Pretrial conference in the CPL 2012

As we discussed above, the pilot on the pretrial evidence discovery played a positive role in the protection of lawyers' rights to information in the criminal defence, summary of the disputes of the parties on the evidence and improving trial efficiency in China. In the meanwhile, because the pilots have their geographical limitations, China incorporated the positive aspects of pretrial evidence discovery into the amendment to the CPL in 2012 in a form of the pre-trial conference.[40] Based on the literature review, this measure is welcomed by the courts and the procuratorates as well as the defence lawyers mostly from the perspective of improving the trial efficiency (Tang, Wang and Chen 2012). But on the other hand, some research reported that this practice was not so popular in the courts at the grassroots level.[41] In this section, the author will compare the pilots with the provisions of the CPL regarding the pretrial evidence discovery, and analyze the problems and prospect of the pretrial conference in China.

6.1 Comparison between the pilots of pretrial evidence discovery and the system of pretrial conference in the CPL 2012

First of all, there are some similarities between the pilots of pretrial evidence discovery and the system of pretrial conference. They both serve the function of evidence discovery and clarify the disputes of the parties in evidence before the trial. The pretrial conference procedure does not

[40] Article 182 of the CPL (2012) provided that, "Before a court session is opened, the judges may call together the public prosecutor, parties concerned, defenders, and agents ad litem to gather information and hear opinions on trial-related issues, such as disqualification, a list of witnesses to testify in court, and exclusion of illegally obtained evidence."

[41] For example, one survey showed that 5 out of the 13 grassroots people's courts did not launch the pretrial conference system by November 2013 after the CPL became effective on 1 January 2013. See Xi (2013).

involve substantive hearing of the evidence, but the parties can disclose their evidence. When the two parties have basic information of the evidence listed in the case, it will avoid court interruption because of the "sudden attack" of undisclosed evidence by one party; while on the other hand, it will improve the trial efficiency as the parties will focus more on the disputed evidence and facts of the case during the trial, avoiding spending too much time in those facts and evidences without disputes.

In the past judicial practice, the court had to announce adjournment in the trial when one party requested for the withdrawal of the panel or other interested parties, for a new judicial appraisal, for notification of new witnesses, investigators, and expert witnesses to testify, or for collection of new evidence (Tang, Wang and Chen 2012). As the defenders' right to access to case files is expanded, it is very often that they may raise such request after the discovery process no matter in the form as practiced in the pilots mode or the pretrial conference provided by the CPL 2012. The court will deal with those requests or challenges before the trial so as to avoid unnecessary delay or interruptions of the court trial.

On the other hand, the differences between them are mainly reflected in the scope of items to be addressed and the participants. Comparatively speaking, the range of the pre-trial conference procedure is broader than that of the pretrial evidence discovery pilots. For example, in the light of Article 184 of the *Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China* (hereinafter the "Judicial interpretation"), the judges can ask the following information and solicit the views of the parties on the following matters during the pretrial conference: (a) If the parties have objections on the jurisdiction of the case; (b) if they apply for the withdrawal of the personnel avoided; (c) if they apply for the evidence or materials can provide innocence or leniency of the accused that were collected by the public security organ or people's procuratorate but were not transferred to the court with other case files; (d) if they would like to provide new evidence; (e) if they have objections on the name list of the witnesses, appraisers and the person with special knowledge who present in court; (f) if they will apply for excluding illegally obtained evidence; (g) if they will apply for close trial; and (if) other problems related to the trial. By contrast, in the Haidian pilot mode, it was mainly the procuratorial initiative; while in the Shouguang mode, the content of the disclosure was limited and subject to the court's discretion in some sense.

Moreover, as far as the personnel moderating the discovery are concerned, the moderator was either the procurator (in the Haidian mode) or an assistant judge (in the Shouguang mode) in the pilot projects, in which the case-handling judge were excluded from such procedure in order to prevent from forming the first impression being the strongest. In contrast, it is the case-handling judge who moderates and asks questions and hears the views on the parties' request on the withdrawal, name list of witnesses, expert witnesses and exclusion of illegal evidence.

6.2 Institutional dilemma of the system of pretrial conference in China

Judging from the legislative purpose, the pre-trial conference is a procedure for the court to prepare for the formal court sessions and address the procedural problems that may cause the court interruptions, which focuses on ensuring the trial process in a smooth and centralized manner, improving the trial quality and efficiency and guaranteeing exercise of the rights of the

parties. However, it is a regret that the CPL failed to provide specific guidance as to the degree of simplification of the evidence in the trial that the parties have no dispute and to the applicable scope of the pretrial conference, which may cause confusions and puzzles in judicial practice (Zhang and Guo 2015).

First, scope of the pretrial conference. The CPL 2012 only states that the court "can" convene a pretrial conference. In the light of Article 183 of the SPC's *Judicial Interpretation*, the court can convene a pretrial conference if there is one of the following circumstances in the case: (a) the parties and the defenders, the ad litem agent apply for the exclusion of illegal evidence; (b) if the volume of evidence materials is big, and the case is complicated and knotty; (c) if the case is of great social impact; (d) other circumstances that need a pretrial conference. If we judge from the last item, it seems that almost all the cases require a pre-trial conference. In judicial practice, the pretrial conference may become a small trial session in order to simplify the proceedings.

Second, degree of the simplification of the evidence production and cross-examination of the evidence without the objection at the pretrial conference. In accordance with Article 184(2) of the *Judicial Interpretation*, the panel may inquire the parties if they have objections on the evidence. It shall spend more time in investigating the disputed evidence and simplify the process of evidence production and cross-examination. The law requires the parties to present and examine and cross-examine the evidence in the court, which means understanding the evidences of the other party in the pretrial conference is to improve the trial efficiency with the focal points rather than expressing views on the evidence. Such provisions with the possibility of allowing the court to make a decision on the views of the parties regarding admissibility of the evidence in the pretrial conference will in fact conflict with the essence of legal principle that all the evidences can serve as the basis of judgment only after the production and cross-examination in the court. What's more important is that, how do we understand the meaning of "simplification"? The law and the interpretation have not provided us a clear answer in this regard.

Third, effect of the pretrial conference. Currently, the CPL 2012 only treats the pretrial conference as a consultation mechanism (Li 2014), which does not have any compulsory force. Again, the law and the interpretation are not clear on whether or not the items confirmed in the pretrial conference can be further referred to in the trial. This may result in the fact that any decisions made in the pretrial conference can be of no confirmed effect which can be overruled in the trial. Without adequate supervision, the court concerned may apply the pretrial conference at will. In another word, the conference becomes a meaningless procedure and will lose its vitality and original aims in the criminal proceedings gradually.

6.3 Prospect of the pretrial conference procedure in China

Based on the discussions above, it is necessary to make further improvement of the pretrial conference system. For example, given that the pretrial conference requires cooperation between the prosecution and the defence,[42] the scope of application can be limited to the cases with the

[42] The defendant is always low in educational level (McConville 2011) who may not fully understand the procedure and substantive consequence of having no objection to the evidence disclosed in the pretrial

involvement of defence lawyers to be heard in the ordinary procedure. However, if the defendant without legal representation applied for the pretrial conference, the court should allow his/her direct participation in such conference. As for the summary procedure, there is no much need to convene the pretrial conference in view that the fact is clear and evidence is sufficient and reliable in the case.

As for the content of the review in the pre-trial conference of cases involving major disputes or knotty elements, generally speaking, the judge should focus on the following aspects: (a) Evidence discovery by the parties in turn. After sorting out the views of the two parties, the court shall produce a list of evidence and fact without contest or dispute. During the trial, the prosecution and the defence can only mention name of those uncontested evidences and materials, while focus on the disputed ones. (b) Exclusion of illegal evidence. Once the defence challenges the legality of the evidence in question, it is the prosecution's duty to prove its legality. Failure to prove the evidence will result in the inadmissibility in the court trial. (c) Request of the withdrawal, new judicial appraisal, notification of the new witnesses to appear in court, or collection of new evidence. Only when the result of these justified requests is in place, the court can start to open the session in order to save the time and improve the trial efficiency.

To sum up, the pre-trial conference in China's criminal case is still at its infant stage, which requires further test and improvement in practice. But no matter how the future of this system is, we should always adhere to the pursuit of fundamental justice values.

7. Conclusion

The theory of burden of proof in the criminal procedure imposes the prosecution the obligation of proving guilt of the accused, which determines the prosecution's role in the proceedings and non-symmetry of the rights and obligations on the burden of proof. So, the system of defence lawyers' access to and consulting case files in the civil law system reflects the right to information of the defence in the criminal procedure, and correspondingly the prosecution's burden of proof.

Although the legislation in other jurisdictions may require the defence to provide the evidence before the trial on proving defendant's innocence, such as the practice in the United States, it only limits to such evidence as that the defendant and suspect was not in the crime scene, did not has time of committing the crime, have not reached the age or had the capacity for criminal liability (Gu and Yuan 2012). In the author's opinion, provision of such evidence by the defence provided is not because of the obligation to prove the defendant's innocence, but instead exercise of the right to defence for proving his innocence or leniency of the crime. The defence may choose to or not to exercise such right to provide the evidence. No matter it is in the civil law or common law system, evidence discovery or similar practice, they all serve for achieving the values and goals of procedural justice and human rights.

Based on the analysis above, the question that the author would like to ask is: What are the necessities of borrowing the evidence discovery system from the common law system to a country with a different tradition—civil law system? What are the differences on the legal and social effects of evidence discovery in the two different legal systems? What are the benefits of

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conference.

the pilots if comparing with the past practice in China? Before we are convinced with the positive effects and results, the author argues that China should hold a cautious attitude toward the pilots. But in any case, we should follow the procedural requirements by law to secure the defence right to cross-examine and safeguard human right of the accused in the criminal trial. In the author's view, the essence is more important than the formality. The current system of pretrial conference provided in the CPL 2012 has its positive value but needs further improvement in reality and only in this way can China balance the trial efficiency and rights protection with the support of effective communications.

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