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Fairness and Communication in Legal Settings (II)

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Shu Zhao and Yanan Guo

On Ethnic Minority Language Interpretation System and Practice in Court in China

Abstract: The right of language is a fundamental human right. *The Constitution of China* stipulates that the minority litigant's rights in taking proceedings in his native language should be safeguarded. As a crucial approach to ensuring procedural justice, the principle is significant in guaranteeing the trail fairness, keeping harmonious relationship between all nationalities and respecting ethnic minorities' language. However, in legislative and judicial levels, due to the lack of bilingual practical regulations, many problems related to the issue exist, such as oversimplified principles leading to various practices. The author, based on surveys, statistics and a historical review on China's ancient interpreting systems and a comparative study on the counterpart of Hong Kong, analyzed those reasons and put forward proposals.

Keywords: Minority litigant; Ethnic Minority Language; Legal Interpretation

1 Introduction

In *Constitution of the People's Republic of China*, it is clearly stated in Article 4 that "All nationalities have the freedom to use and develop their own spoken and written languages and to preserve or reform their own folkways and customs." In actual judicial practices, some measures have been adopted to protect the nationalities' right of language, but due to its lack of practicality, some laws could not be effectively enforced. The study is significant to further China's judiciary reform, to construct a harmonious society, to protect the language right of ethnic minority litigants', and to defend their rights and interests of property, freedom even life.

Procedural justice is very significant to guarantee the entity notarization. One aspect of procedural justice is to fully safeguard the right of action of litigant participants, which agrees with the idea of crime control and human rights assurance. Only when the litigant participants' right could be fully guaranteed, could the case facts be ascertained. But if the accused could not understand the language and words during litigation, it will be hard for them to exert their litigious right. Accordingly, it is also one of basic requirements to realize fair justice that participants can use their native languages to institute proceedings. Recently, the increase in criminal cases involved with minorities and language barriers concerned have caused plenty of inconveniences to court trials, which makes the role of interpreters prominent. In criminal proceedings, interpreters are more than litigant participants, but they are pusher to make communication between parts of all kinds possible to drive the procedure. Especially when minority defendants are unable to understand Chinese Putonghua, the interpreters, as the assistant to court, will play a part from the beginning of the procedure to announce the judgment. Just as some experts compare them as "transparent", interpreters play an important role which seems to be inconspicuous. In recent decade, educational circles or practical circles have paid a lot attention to protecting rights concerned with all suspects and defendants as a whole, but some special minorityies have not been attached enough importance to. In criminal cases involved minority nationalities happened in provinces rather than regions inhabited by minority nationalities, those defendants, who compared with others, know little common language, are more isolated and helpless. Thus, it is necessary for the whole society to consider the role of interpreters of minority languages in court trail. The right of

all nationalities to have the freedom to use and develop their own spoken and written languages is one aspect of language right and one of many rights China has empowered ethnic nationalities as well.

In terms of theoretical studies, China's scholars, as far as the author can see, till now, have discussed the language rights of ethnic minorities concerning human rights (Hou etc. 1994; Zhou 2002), ethnic policies (Wang 2005; Liu 2010), litigation principles (Dou etc. 2006; Xue 2007), and the right of litigants (Wang 2014). In terms of legal translation, some legal linguists such as Gonzalez (1991), Benmaman (1999), Framer (2000), Laster (2011) and Taylor (2005), Michael Howie (2007), Jan Battles (2007), Morris (2014), have done research on court translation from the angle of linguistics. In Hong Kong, China, a bilingual legal system has been established and it has become the only area with legislation in both Chinese and English, so the legal translation system is relatively mature. Specific institutions for translation are set up in the Department of Justice and courts of all levels in Hong Kong, and many scholars have conducted studies such as Wu Weiping (2002). However, the studies above are more concerned with translating techniques rather than institutional construction. Zhu Yingping (2001) from Mainland China and some other scholars have mentioned this marginal issue but fewer have paid enough attention to the practical situation of the enforcement of language rights of ethnic minorities, thus the study on the issue is very significant.

2 Problem Introductions

2.1 The Particularity of Ethnic Minorities

It is generally believed that there are two levels concerning international protection of human rights of ethnic minorities. One is on the basis of principles of equality and nondiscrimination, ethnic minorities enjoy all human rights as their counterparts. The other is, according to special principle of protection, ethnic minorities enjoy special rights to protect and develop their own distinctive characteristics (Yang etc. 1994). However, it is considered that the special protection should be more than the fair equality of opportunity in form or privileges endowed, but the protection should, according to the particularity of ethnic minorities, meet different demands in order to provide distinctive treatment including preferential policies and measures, with the genuine equality principle as the basic standing point. China's ethnic minorities are characterized by :(1) the total population of ethnic minorities is small. According to 2010's national census, the whole population was 1,332.8 million, including Han nationality 1,225.9 million, accounting to 91.51%, while ethnic minorities of all 113.79 million, only accounting to 8.49%, which shows that Han nationality is preponderant; (2) ethnic minorities share a common low cultural quality with a high rate of illiteracy which accounted to 33% of the whole ethnic minorities, even as high as 50%-80% in some regions concentrated occupied by minorities; (3) the economic situation and development in ethnic minority areas was backward and unbalanced, compared with other regions of China (Zhou 2002). Due to these characteristics, a special attention should be paid to the protection of rights and interests of ethnic minorities and the protection should also be based on the particularities.

2.2 Problems in Legislative level

In addition to China's Constitution, the protection of language rights is mainly mentioned in *Law of People's*

Republic of China on Regional National Autonomy, and *Law of the People's Republic of China on the Standard Spoken and Written Chinese Language*. China's Constitution is the root, from which lower-level laws of regulations, provincial standards, disciplines grow.

The following articles are directly concerned about language rights:

Table 1 Articles Concerning Language Rights in *Constitution of the People's Republic of China*

All the national autonomous areas are inalienable parts of the People's Republic of China. The people of all nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs.	Article 4
The state promotes the nationwide use of Putonghua (common speech based on Beijing pronunciation).	Article 19
In performing their functions, the organs of self-government of the national autonomous areas, in accordance with the autonomy regulations of the respective areas, employ the spoken and written language or languages in common use in the locality.	Article 121
Citizens of all nationalities have the right to use the spoken and written languages of their own nationalities in court proceedings. The people's courts and people's procuratorates should provide translation for any party to the court proceedings who is not familiar with the spoken or written languages in common use in the locality. In an area where people of a minority nationality live in a compact community or where a number of nationalities live together, hearings should be conducted in the language or languages in common use in the locality; indictments, judgments, notices and other documents should be written, according to actual needs, in the language or languages in common use in the locality.	Article 134

Table 2 Articles Concerning Language Right in Law of People's Republic of China on Regional National Autonomy

The organs of self-government of national autonomous areas shall guarantee the freedom of the nationalities in these areas to use and develop their own spoken and written languages and their freedom to preserve or reform their own folkways and customs.	Article 10
While performing its functions，the organ of self-government of a national autonomous area shall，in accordance with the regulations on the exercise of autonomy of the area，use one or several languages commonly used in the locality; where several commonly used languages are used for the performance of such functions，the language of the nationality exercising regional autonomy may be used as the main language.	Article 21
In accordance with the guidelines of the state on education and with the relevant stipulations of the law，the organs of self-government of national autonomous areas shall decide on plans for the development of education in these areas，on the establishment of various kinds of schools at different levels，and on their educational system，forms，curricula，the language used in instruction and enrollment procedures.	Article 36
The organs of self-government of national autonomous areas shall independently develop education for the nationalities by eliminating illiteracy，setting up various kinds of schools，spreading compulsory primary education，developing secondary education and establishing specialized schools for the nationalities，such as teachers' schools，secondary technical schools，vocational schools and institutes of nationalities to train specialized personnel from among the minority nationalities.	Article 37

In the prosecutions and trial of cases，the people's courts and people's procuratorates of national autonomous areas shall use the language commonly used in the locality. They shall guarantee that citizens of the various nationalities enjoy the right to use the spoken and written languages of their own nationalities in court proceedings. The people's courts and people's procuratorates should provide translation for any party to the court proceedings who is not familiar with the spoken or written languages commonly used in the locality. Legal documents should be written，according to actual needs，in the language or languages commonly used in the locality.	Article 47
The organ of self-government of a national autonomous area shall persuade and encourage cadres of the various nationalities to learn each other's spoken and written languages of the local minority nationalities. While learning and suing the spoken and written languages of their own nationalities，cadres of minority nationalities should also learn Putonghua and the written Chinese（Han）language commonly used throughout the country.	Article 49

In addition to article of language rights, many other regulations, which are considered as essential parts of the constitution, also contain the similar principle and spirit, for example article 47 of *the Law on Regional National Autonomy*, article 6 of the *Organic Law of the People's Courts*, article 9 of the *Criminal Procedural Law*, article 11 of the *Civil Procedure Law*, and article 8 of the *Administrative Procedure Law*.

The regulations and laws mentioned above require that ethnic peoples, when taking part in proceedings, have their right to use their own spoken or written language to sue, respond to lawsuits, submit a complaint, answer, provide with evidence or bill of action. By doing so, the minority party's litigious right and fulfillment of their obligations would not be affected due to the language barriers**.** In areas where people of minority nationalities live in a concentrated community, the judicial offices of all levels should employ the language or languages commonly used in the locality to write indictments, judgments, notices and other documents. To guarantee minorities' equal right to exercise their litigation rights properly to safeguard their legitimate rights and interests, judicial offices should provide the minority party, ethnic litigant participants with interpreters, if they cannot understand or speak the language used in court, so as to eliminate the language barriers.

The language right is the symbol of the idea "every nationality is equal". We can see there are three points worthy of attention: first, to use their native spoken and written languages in court proceedings is the crucial right of the party and litigant participants, and it is a right that is not permitted to be deprived or restricted. Second, to safeguard the language right of the party and litigant participants is the obligation fulfilled by the related organs. Third, while performing its functions, the organ of self-government of a national autonomous area shall, in accordance with the regulations on the exercise of autonomy of the area, use one or several languages commonly used in the locality; where several commonly used languages are used for the performance of such functions， the language of the nationality exercising regional autonomy may be used as the main language.

The constitution and other regulations mentioned above guarantee the realization of the language right of minority peoples to some extent. In most autonomous regions, the right has been implemented and protected well. In these areas, minority judges familiar with both Mandarin and native language are equipped and the whole trial and also the final judgment are done in the native language of the defendants. And when defendants cannot understand Chinese or fail to express in Chinese, courts will hunt for interpreters for the defendants actively and pay for it, in order to protect the language right of the defendants. Take the procuratorial organs in Xilingol League of Inner

Mongolia Autonomous Region for instance. Every year, more than 1,000 cases will be handled, among which more than 50% is bilingual cases with both Mandarin Chinese and Mongolian Language involved. Many problems exist that Parties involved randomly select their languages, charging documents are written in both Mongolian and Mandarin, and languages of proceeding fail to consist with written documents. To solve the problems, Xilingol Procuratorate has formulated and implemented an Interim Provisions on Standardizing Bilingual Trial, to standardize judges and procurators right of judicial and enforcement power, so that the language rights of parties related could be guaranteed and their legitimate rights and interests could be protected. In Urumuchi, Xinjing province, since 2004, a similar interim provision with 18 articles has been carried out. It stipulates under what circumstance native language or Chinese Putonghua should be employed by both parties and all trail personnel during the trail, in paper document writing, and interpreting service should be provided in detail.

However, apart from those interim provisions applied in some autonomous regions, generally speaking, when it comes to specific ways such as when to, how to and who to be chosen as the interpreter, and what an interpreter should be qualified with and how to work, there's no regulations yet in this aspect, which is a judicial blank. What's more, there is also no definite regulation on whether the bilingual defendants are eligible to choose the language on court. For instance, in 2014, a case concerned a Mongolian defendant who is able to speak both in native language and Chinese, but during the trail, he suddenly asked to use his native language rather than Chinese to continue the trial. And the whole trail had to start over, which is a waste of time and energy. Whatever the reason for the defendant to change his language, there's no specific regulation concerned which should be noticed.

The principle of legality is supposed to be comprehensive and stable, and thus it is always in guiding and general words, so is the principle of ethnical languages, but the regulations are also oversimplified, and hard to operate and with many deficiencies, which have caused many judicial practice in a mess.

2.3 Problems in Judicial Practice Level

In the stage of investigation and prosecution, there widely exists a phenomenon of ignoring languages of ethnic minorities in both before trial and on court.

A common practice is, if the party is unfamiliar with Mandarin, a staff that is competent with mandarin and the native language will be equipped for investigation and prosecution. However, the disadvantage is also apparent. Firstly, if other personnel handling the case are unable to understand the native language, the cooperation and supervision will fade as the client who speaks the native language takes all parts actually. Secondly, even all personnel equipped are able to understand the language involved, which language is supposed to be employed to take the record remains the problem. If the native language of the minority is used, all personnel in the following trail are supposed to understand the minority language, which is almost impractical. However, if Mandarin is employed to take record, which is the common routine, the interests and rights of the migrant litigant's may be affected due to the difference between various languages, especially as to some core detail and key statement, defense etc.. For example, an interviewee from a procuratorate (female, 43 years old, Mongolian) presented a representative example in this regard. In one case involving intentional injury leading to the death of the victim in 2013, the defendant collided with the victim and further fought and hurt the victim. The original confession in Mongolian was "I cut him in his neck, and his head hung down immediately". But the translated recoded wrote as "I cut him in his neck, and his head dropped immediately", which aggravated punishment. There is another case

involved a juvenile accused. The judge asked in Mongolian language: "Before going into the store, what did the other accused say to you?" The young man answered in Mongolian: "He asked me to stay outside." Then the judge asked: "What did you do outside." The juvenile answered: "Nothing but looking." In Mongolian language, to look can mean to check out, to hang around, and to be on the lookout as well. Even the bilingual judge would have to be cautious about the key meaning of the word to choose, which would certainly influence the sentence made.

As a commonly employed form of evidence, verbal evidence plays an important part in juridical practice, verbal evidence involved languages of ethnic minority groups is not only widely applied in litigious activities, but with unique probative effect as well. However, for a long time, in actual case handling process, the personnel usually ignore the use of ethnic minority languages and have formed a common procedure of "inquiring-interrogating-translating &recording" at the same time of obtaining evidence, that is, the personnel handling cases may inquire and interrogate in ethnic minority languages but record the translation of the verbal evidence in Chinese while translating the recorded testimony back to the individuals involved to confirm the evidence in ethnic minority languages. Such practices may cause hidden danger for the later prosecution and trial.

Ignoring the use of ethnic minority languages first affects the stability of the evidence. The common practice of "inquiring-interrogating-translating while recording" directly causes the instability of the evidence and becomes the excuses for the witness to change their testimony. Since the initial written testimony which reflected the witness statement in his native language has never been recorded, the written proof on court is nothing but translated words by personnel handling cases, once the witness changed the testimony by the excuse of improper translation, the public prosecutor will always be unable to refute and thus the accuser may fall into a passive situation. Secondly, it hinders the judicial fairness to obtain evidence in languages of minorities. "To base itself on facts and take the law as the criterion" is regarded as the basic principle of law enforcement, and the case facts are identified with evidence with authenticity, consistence and validity. Witness testimony which is supposed to prove the authenticity of the case, should be characterized with the three features mentioned above to safeguard the fairness. However, the authenticity of verbal evidence translated by the personnel handling the cases is liable to be questioned. In actual practice, some investigators may defy the facts that the informant could not speak or understand Chinese very well, and do not remind or stress the principle that he or she is endowed the right to speak in his or her mother tongue, but let them go on with poor Chinese Mandarin. In other cases, the investigator may record in Chinese while the informants are stating in Mongolian language, and then translate the written Chinese back to Mongolian to confirm with the informants. The investigator plays double roles of recording and translating. The spoken language may be in consistent but the accuracy may be lost. The authenticity and validity of the practice is questionable. The effect of evidence obtained like this may be affected due to improper translation and the judicial fairness may be hindered. Thirdly, ignoring the language of minority interferes with maintaining the seriousness of the law. The practice that the personnel handling cases recorded the translated Chinese testimony is regarded as "quick and effective way" but is harmful to the seriousness of the law. It may cause that testimony fails to verify the obtained physical evidence due to wrong translation. Furthermore, it is utterly baseless to accept the translated verbal evidence to decide on a verdict. The record of inquiry or interrogation should preserve the original form of the statement of the informant. The translation without recorded statement in original languages, undoubtedly, failed the expectation in this sense.

In the stage of civil procedure and criminal procedure, in autonomous regions, all trail personnel could be all bilingual ones, but a lot of defenders do not know native languages at all, and then the court language will switch to Chinese, but the native defendant knows nothing about the whole defense. As the judicial subject, court may meet the similar dilemma. If the minority parties are involved, it becomes an issue whether all documents related should

be in the native language of the minority parties. In actual practice, it is hard to realize. In my survey, only a very small portion of court could realize all document concerned are written in native language. If not, as for those who are not familiar with Mandarin, when they get the written judgment, they may just focus on the result of the trail, but neglect the important middle part of explanation and fail to understand, which leads to higher rate of appeal, and is bad for the final solution of the case. Furthermore, in cases involved with minority parties, court will be responsible for hiring the interpreters, and there are usually kinds of connections between the interpreters and court, which must hinder the neutrality of the interpreters and the defendants may misunderstand, which thus affects the final judgment.

In judicial practices, due to a lack of minority interpreting staff, judges, procurators, or lawyers will take the role of interpreter. And to save time and effort, the judicial staff oneself will be recorder, interpreter and judicial party at the same time, and in the circumstance when the minority defendant takes the interpreter as saver, they seldom ask them to challenge. When the questioning is done by native language but recorded in Chinese without any evidence of translation, as long as the defendants lodge an appeal, the record fails to be valid evidence.

2.4 Interpreting service

According to our survey, there are no full-time legal interpreters/ translators as well as specific legal translation institutions. And the interpreters employed are at varying levels. Sometimes, the interpreter fails to translate accurately. What's more, there is a lack of comprehensive examination on interpreters. Due to the shortage of interpreters of ethnic minority languages, the Court usually pays more attention to the result of the translation than the comprehensive examination of the legal experience, the interpreters' professional morality and other aspects related. Besides, there is a lack of supervision system on interpreters. In some cases, the same interpreter will do the translation for public security organs, procuratorial organs and people's courts at the same time, and no one can supervise the accuracy of the translation, which may cause the loss of fairness in trail.

Legal interpreters have at least four aspects of values in procedural law: foreigners take proceedings in China; ethnic minority people take proceedings in areas of Mandarin or Han litigant in minority areas; parties with local accent and parties speaking Mandarin Chinese; deaf or mute participant in proceedings (the author will not discuss this issue due to the limited space). In practice, the right to have interpretation service is facing the following difficulties.

First, the ignorance of translation of local accent and pasimology is against the basic principle of equal justice under law. Second, since interpretation plays an important role in bilingual litigation, the standard for legal interpreters is higher. Legal interpreters should not only be good interpreters who are well trained with language skill, but equipped with considerable law knowledge, so that they could manage to convey accurate information with satisfactory quality, and thus the parties' rights could be protected. However, according to the current law in China, there have not been any specific and clear feasible rules to define issues on interpretation such as the source or qualifications needed of interpreters. In juridical practice, the selection and appointment of interpreters are not standardized, and thus the quality cannot be guaranteed as well. According to our survey, in Xilingol League, those local bilingual judges, more or less, have the experiences to serve as interpreter in court trials. In this way, the neutrality in trial must have been affected to some extent, let alone the interpretation quality. Third, lack of qualified interpreters is another contributor to the fact that the litigious language right of the ethnic nationalities cannot be implemented effectively. The investigation shows: without qualified legal interpreters, it will take great efforts to

find one when the ethnic party didn't understand mandarin in court. In 2005 in Wuhan, in a criminal case with a Mongolian as the defendant, due to the fact that the Mongolian did not understand Chinese, it took the court for almost a month to select an interpreter with basic legal knowledge, which to a large extent, impacted the judicial efficiency and neutrality and fairness of the trial.

Due to the problems mentioned, as for minority litigants, minority living in scattered group and ethnic migrant population in particular, their rights to use their own language in taking proceedings cannot be safeguarded and improved. Take Hohhot, the capital city of Inner Mongolian Autonomous Region as an example. As a city with scattered minorities, the population of Hohhot city, according to 2010's national census, was 286.86million with ethnic minority of 0.27million, accounting to 10.29%. With the economic development of the city, there has been a steady increase in ethnic minority moving to Hohhot city to work, visit, or study, and the peak amounted to 48.6% of the total population. Compared with city residents, the interests and rights of those minorities living in scattered group and floating population are more liable to be infringed. And once the infringement happened, due to the lack of storage of interpreters of minority languages, their interests and rights could not be protected promptly as the result.

3 Interpretation in ancient China and modern Hong Kong

China, since long ago, has been a nation mixed with nationalities speaking in various accent and languages. There has been elementary interpreting system established in different dynasties. To study these historic stages will surely be significant reference to the construction of modern legal interpreting system. In Hong Kong, a bilingual legal system has been established and it has become the only area with legislation in both Chinese and English, so the legal translation system is relatively mature, which can also be examples.

3.1 Regulations concerning interpretations in ancient China law suit

The recorded document literature says that "Since the Western Zhou Dynasty (c.11th century -771 B.C.), there have been organs for foreign affairs and translation as well as interpretations in government.[1]" And "Since Han Dynasty (202B.C.-220 B.C), an interpretation institution during law suits between different nationalities has been stipulated and written as law to trace interpreter's responsibility with errors occurring or other actions to bend the law for personal gain. The institution achieved its peak in Tang Dynasty (618-907) after its development in the Northern and Southern Dynasties (420-589) and extended in to Ming and Qing Dynasty. This legal institution solved the problems in litigations caused by language barriers, whose targets include both foreigners and minority nationalities. At the same time of safeguards litigants legal rights in proceedings, it is beneficial to promote international communication and grand domestic national fusion.[2] "

Table 3 Historical Development of Interpretation Institution in Ancient China

Dynasty	Address Term	Interpretation Institution	Responsibility	Responsibility of the Interpreters	comments

[1] Ma Zuyi: *Chinese Translation History*,1999,9,p2
[2] Zheng Xianwen: Interpreters in Lawsuit in Tang Dynasty, 2007.

The Western Zhou Dynasty	*Sheren* (Tongue Men)	*XiangXu*	Foreign Affairs		
Qin		*Dianke*	Minority Nationalities		
Han	*Yiren/Yiguan*	*Dianke/* *Daxingling* *Dahonglu*		If the anyone cheated interpreters, the one concerned will be published with face thrust.	Minority kingdoms around Han also established similar institutions and interpreters
Beiwei	*Yiyu ren*				
Tang	*Yiyu ren* *Yishi*	*Honglu Si (*mainly for interpretations) *Zhongshu Sheng* (mainly for translations and Interpretations)	Foreign Affairs	The interpreters and translators must sign on the documents to assure the accuracy. Certain regulations and punishment stipulated for false interpretations	
Song	*Yiren/ Tongshi*			If interpretations are provided on purpose, the interpreter will be punished equally as the criminals involved in the case.	
Yuan	*Sheren*	*Huitong Guan*	Foreign Affairs	If false interpretations are made on purpose, the interpreters will be fired and the one who find out the mistake will be promoted	
Ming	*Yizi Sheng/ Tongshi*	*Siyi Guan*	Domestic and Foreign affairs	If interpretations are provided on	*Siyi Guan* is also the first school

				purpose, the interpreter will be punished equally as the criminals involved in the case.	to train interpreters and translators in China
Qing	*Tongshi*	*Yixun Chu*	Foreign Affairs	If interpretations are provided on purpose, the interpreter will be punished equally as the criminals involved in the case.	

From what the table shows, we can see that to provide interpreting service for litigants has always been one of the functions of diplomatic establishments in ancient China. Although in different address terms, "Sheren, Yiren, Yiyuren etc." all refer to interpreters or translators. They were not only responsible for dealing with foreign affairs, but also managing minority nationalities. Yet, the interpreters were not only specifically set for judicial activities, but for administrative activities. They were diplomats as well as legal interpreters when legal dispute occurred.

As for the responsibilities of the interpreters and translators, we can see since Tang, the interpreters had been supposed to be punished if they did false interpretation on purpose for personal interests. Because Yuan Dynasty was established by Mongolian nationality, the interpreters and translators played important role in the society as a whole, and consequently, the punishment was strict and the one who make mistakes would be fired but the one who recognized the error would be awarded, which was the first time in China's history that the award would be given. In Ming Dynasty, the first school to educate and train interpreters and translators were founded named as "Siyi Guan".

The advancement of the ancient interpretation institution in China is embodied in: first, in over 2,000 years of history from the Western Zhou to Qing Dynasty, the regulation concerning interpreters and translators were recorded in laws, which showed the long tradition of promoting litigants taking proceedings with their own languages; second, duty and responsibility of interpreters and translators were stipulated by asking them to sign on paper documents and pledge to provide truthful interpretation, otherwise they would take the legal liability of breach of duty; third, special judicial organs for both foreigners and minority nationalities were set up to maintain the sovereignty but also safeguard litigants' right.

3.2 Interpreting System in Hong Kong

Hong Kong is an international metropolis where people speaking various languages live together. In order to protect the legitimate rights enjoys by parties to the case, the court interpreting system has been established for a long time in Hong Kong. Having evolved over years, this system has grown mature. By looks into the court interpreting

system in Hong Kong in the aspects of court interpreters, qualification, training and supervision, we can promote the interpreting system construction in mainland China.

The court interpreting in Hong Kong could be traced back to 1841 when Qing Dynasty ceded Hong Kong to the U.K. And from then on, the English language has become the official language. Before 1997 when Hong Kong came back to China, the official language employed in HK court was English. After 1997, the judge can make decision to choose either Chinese or English to carry on a court trial, which means Chinese and English are equal. However, due to the fact that the law system in HK belongs to British American Case Law, laws are written in bilingual Chinese and English, most references are in English though. Moreover, some judges and lawyers in HK are foreigners who need court interpreting service during court trail with defendants or witnesses who do not understand English. In response to the huge demand, HK government set specific organization to deal with the matter. The Court Chinese Office attached to judicial organization is responsible for assigning interpreters and translators to levels of courts in HK. Besides English to Chinese, court interpreting also includes Tai, India, Malay, Cantonese and Chinese local accents.

There are full-time and part-time court interpreters. In 2014, there were 187 full-time interpreters who enjoyed welfare as civil servants. If the demand is beyond the capability, registered part-time interpreters will be invited and paid by hours.

In terms of qualification to be an interpreter, HK judicial organs have different standards: for full-time interpreters, they have to possess bachelor degree and have 2nd above grade in Common Recruitment Examination and also pass the related translation and interpretation tests and interviews. Different from the full-time interpreters, court, when in demand of legal service, will recruit part-time interpreters and provide with related tests.

HK court lays emphasis on training of interpreters. All full-time should take part in a one-month training to learn about procedures and grasp basic law knowledge and court terms, to be familiar with common cases, vocabulary and basic interpreting skills such as simultaneous and interactive interpretation.

As for supervision, since court interpreters are the bridge between parties, the quality of interpretations are closely related with interests of the pasties. A regular appraisal will be carried out by a senior official to junior counterparts, and feedback will be sent to staffs concerned and instruction will be given as well. Part-time interpreter will be evaluated by full-time ones. In HK, almost all courts are equipped with recoding system, and every trail will be recorded, thus the record could be used for supervision. in addition to supervisors, a complain scheme is established. If parties in court trial including judges, clerks or public are not satisfied with the performance of the interpreter, they can complain to the relevant departments. And the interpreters concerned may be punished even deleted from the registration.

What can we learn from the past and HK? First, a specific organization responsible for interpreting languages of minority nationality in China’s judicial system should be established as in ancient China and HK. Second, a strict supervision and accountability mechanism should be set up to safeguard the quality of interpretation and thus protect the legitimate rights. Third, a stable training like HK or specific school for judicial interpretation should be provided to ensure the interpreting talents.

4 The reason why China has not yet established the court interpreting system

On the one hand, although entity notarization and procedural justice are connotation of fairness, in China, entity notarization is valued more than procedural justice. Once the two is contradictory, entity notarization is preferred in most cases to procedural justice. In fact, to realize the judicial fairness, the two should be stressed and in a dynamic balance.

On the other hand, generally speaking, in five regions where minority nationalities concentratedly live, the court interpretation system has been developed based on bilingual judges and judicial stuff. However, in other parts of China, or out of the region of the major minority lives, the situation is rather serious. There are some institutional causes, and the crucial is that court construction failed to keep pace with the rapid migration of population with the reform and opening up policy, and the sharp difference in language pattern. In the past, minority nationalities usually inhabit a region as an ethic group, but with economic development and to meet the demand in job market, more and more minority nationalities started leaving their hometown to work in center cities far away. And thus accordingly court interpreting has met huge challenges from two aspects: on the one hand, thanks to the promotion in economic, social and educational status of minorities, the industries engaged in by minorities have expanded from industries with national features, the low end to various jobs, and so crimes involved with minorities also have extended from criminal field to economic and other cases. More opportunities to communicate with major cultures have brought more cultural clashes, and as a result, more contradictions occurred. The local courts have to deal with cases in various fields, which is a challenge for the professional skills of legal professionals, especially in language competence. On the other hand, more and more courts in mainland China, developed inland cities have to deal with cases involved with minority nationalities speaking different languages, which put more pressure on the court capability, interpreting system in particular.

5 Proposals

To solve the problem, in the long run, the government would go on promoting the use of standard mandarin Chinese among ethnic minorities, which is a systematic construction and will take a long time and involve efforts of the whole society. But many other approaches could be taken in different respects.

5.1 To establish a legal interpreting system

The existing problems discussed above indicate that current legal translation in China is extremely imperfect and needs further institutionalized and professional legislation construction. The nature and status of legal translation decides that the legal interpreters should only be qualified if they manage to master language competence, translation skills and legal knowledge at the same time. The ones who should not only have strong capacities to understand and analyze cases, apply legal ideas and knowledge, but also have the certain ability to organize languages and express ideas. What's more, they should have wide scope of knowledge, strong cognitive competence of social reality and cultural background, sound observing ability, strong sense of social responsibility and commonweal consciousness. Besides, they should be self-confident and equipped with the spirit of lifelong learning and the perseverance of promoting individual professional levels constantly. Only the ones who have all

these qualities can burden such heavy and strict legal translation tasks. Therefore, it's necessary for us to use the experience of the US and HongKong for reference, setting up qualification examination for legal translation, issuing legal translation certification, increasing the thresholds to legal translation, in order to guarantee the legal interpreters' quality. In the meantime, the professional self-disciplinary organization of legal translators, similar to lawyers association, should be established, by which the code of professional ethics and practicing rules will be formulated, the examination, registration, assessment will be managed, the learning, training and experience exchanging will be organized, and rewards and punishments will be applied to the legal translators and their legal translation.

First, to establish a certification system. Taking practicing lawyer regulation as reference, a certificate could be issued to a legal interpreter or translator if he/she can pass the tests organized by authorities. Second, to establish a register system. A particular department in judicial organ takes register of all interpreters and translators according to their languages, educational level, age and working areas. Third, to carry on a regular training. Departments concerned should provide trainings including vocational moral, court procedures, duty and responsibility as well as interpreting and translating skills and all registered interpreters and translators must attend certain hours of training to be qualified. Forth, to build a transferring system to form an exchange interpreters and shared resources, in order to promote efficiency and proficiency of interpreters. Fifth, to set up a payment standard. The service fee should be included into law aid system, and the local court even litigates do not have to pay for the interpreting service. Legal translation system, including translation of the ethnic nationalities' languages, dialects, sign languages as well as the translations concerning foreign affairs, should be established and improved in the flowing aspects of building basic principles and rules, basic requirements for translators, identifying source of translators/interpreters, funding sources and payment, management of legal translation, right and obligation of translators, negligence liability of translation.

5.2 Judicial level

First, to establish an avoidance system. Conditions when interpreters are to be avoided should be clarified according to their interests with defendants. Second, to set a time limitation for paper document translation. A time limitation should be stipulated for written translations of paper documents in proceedings and also the legal consequence if the translations is failed to complete within the time should also be set. If the translation has to be done out of court, the original should be kept in court and the translator could only take the copy. Third, to clarify the conditions under which translations or interpretations are invalid. If the translators or interpreters have colluded with defendants or languages of minority nationalities are not employed when questioning, the judge must make decision on accepting or rejecting the interpretation or translations and explain. If in judicial proceedings, there exists questioning without employing languages of minorities nationalities, the procedural action will be invalid and the case will be remanded for retail.

5.3 Supervision

First to establish a supervision system: double interpreters. A system of double interpreters could realize a consecutive interpretation, which will realize mutual supervision as well as best state of interpreters to increase the accuracy. The most important is when litigants are from areas with different local accents, two interpreters from accordingly various areas could reduce the interference from accents to increase the quality. Second, supervision afterwards. A synchronous audio and video recordings for the whole process should be provided so as to check the

interpretation on the one hand, and on the other hand it is helpful to urge interpreters to carry out their duty correctly and prevent them from colluding with defendants.

Second to establish an accountability system: (1) to set a specific crime. In China's Criminal law, article 305 says: " if, in the course of criminal procedures, any witness, expert witness, recorder or interpreter intentionally gives false evidence or make a false expert evaluation, record or translation concerning circumstances that bear an importance relation to a case, in order to frame another person or conceal criminal evidence, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention. If the circumstances are serious, the offender shall be sentenced to fixed-term imprisonment of not less than three years and not more than seven years. It is suggested a "false interpreting crime" should be divided as a single crime, and "involuntary interpreting crime" should be set. The "involuntary interpreting crime" refers to "errors" made by interpreters including "mistranslation" and "miss of translation" due to the interpreter's carelessness, which could have been avoided, and have caused negative impact on court judgment. The difference between the two crimes mentioned above is that the former is intentional, for instance the interpreter has colluded with the defendants for personal interests, and the latter is errors caused by skill inadequacy. (2) To set up different ways to call to account. If the interpreters have broken the law via intentional false interpretation or involuntary interpretation, judicial organs will take the charge, and cancel their licenses as legal interpreters. But if they have not yet been serious to break the law, authorities concerned could talk to, warn, fine or cancel their licenses according to gravity of circumstances.

5.4 Court responsibility

The court should take the responsibility to examine the qualification of interpreters, and to provide interpreting service according to situations. When minority nationality parties are involved, the court should ask if they need interpreting service promptly. Third, avoid judicial staff to act as interpreters to protect the neutrality of interpreters.

5.5 Legal interpreters' talent bank

To cultivate and train bilingual judges and procurators. Bilingual judges and procurators are more capable to dealing with cases involved with minority defendants. If the judge is unable to understand native language, customs or religions, he/she may miss the opportunity of meditation. And when interpreter is the only source of information, once there's mistake in interpretation intentionally, a false judgment may be resulted. In consideration of lack of bilingual judges, the government could set special policies to enroll more bilingual talents into judicial professions and provide them better promotion. By then end of 2012, in Inner Mongolia, 345 bilingual procurators and judges had graduated from the bilingual training program.

Perfecting and implementing the litigious rights of the ethnic nationalities to use their own ethnic languages is not only required by international agreements and international conventions, and the obligations of legislative, judicial and administrative departments, but also one of the most cogent services that the non-official aid agencies can provide for the ethnic nationalities with legal aids to protect their rights and interests. At present, various governmental or non- official legal aid institutions offer legal aid to ethnic minorities mainly via providing legal consulting or serving as an agent, and on account of kinds of reasons, legal translation has not been included yet.

However, as a comprehensive social governance system, ruling by law should be penetrated in every aspect of social activities. In terms of the purposes and objectives of the establishment of legal aid system, legal aid such as

reducing and remitting fees should be offered for the vulnerable groups who are situated in poverty or the disadvantaged position due to many factors in every link or every level in the legal system operation. Vulnerable groups may need professional aids when they are in difficulty in every aspect of law ruling, so the service offered only by lawyers cannot meet the demands which may cover all contents of legal aid which may fail to realize the true values of legal aid. According to "the Survey of Chinese Language Situation" published by Ministry of Education and the Language Commission in December, 2004, mandarin (Putonghua) was only spoken by 53.06% of the population throughout the whole country; 66.03% in town and 45.06% in countryside. As to mastering and applying mandarin, there has been a great difference between town and countryside, Middle West regions and Eastern regions. In particular, among those 47% who cannot communicate in mandarin, most are farmers. As a result, it's necessary and urgent to protect the 46.94% of the population's language right in litigation via legal aid. We think in order to provide professional legal translation service, we could build a translation talent bank for ethnic minority and other minorities, based on bilingual talents with both language competence and legal knowledge in national higher education institutions.

6 Conclusions

All people are equal before the law, including equal in status in litigation, while language is the prerequisite to realize equal litigation. If the litigants, judge, public prosecutor, and lawyers can not communicate, or faced with accusation, the defendants are unable to defend themselves, the trial is far from being regarded as fair and just. Court interpreting is a tool to ensure the litigants' equality in status of litigation. But the current situation in China is very worrying: there is no clear law or regulation to guide court interpreting, no specific department to supervise and manage qualifications, language competence, and quality of interpreters, no related training and testing mechanism for legal translation, so much so that it has been out of control that whether the quality is guaranteed, the interpreter is neutral or whether the moral standard of the interpreter could meet the demand. Some experts point out the legal interpreting asks most but it has not been valued enough. What we should do is to take proper measures to regulate legal interpreting and make the legal service the strong arm to protect minority nationality's right to realize a true judicial fare and justice (Zhu 2014; Weng 2011; Lan 2009; Dou 2006). In judicial proceedings, the language right of the litigants should be safeguarded. In practice, when the impairment of the language right happens, a system of investigating and fixing the liability should be set up to find out who should be held accountable.

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Bionotes

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Translation between Mongolian and Chinese Languages in the Criminal Proceedings —From the Perspective of Protecting Procedural Rights of Mongolian Defendants in China

Abstract: There are five minorities' autonomous regions in China, including the Inner Mongolia Autonomous Region in Northeast area. In judicial practice, Chinese is the main language in the trials of the Region, while the judiciary shall be liable for providing free translation service if the defendant is a Mongolian who does not understand Chinese. This is a constitutional right for citizens in China, but this requirement had encountered many challenges in reality. For example, the Mongolian is a language for the nomadic nationalities which is closely related to their life. As many legal terms in Chinese are far away from their life, it is sometimes difficult for them to find an equivalent word in Mongolian. Furthermore, the traditional life and customary law of the Mongolian Nationalities is far away from the modern life and law of the Han Nationalities, and therefore, it is quite difficult for them to understand the legal theory applied nowadays in China. Moreover, China lacks those intellectuals knowing both Mongolian and Chinese languages. Apart from that, the problems of language barrier between the Mongolian and Chinese in the criminal trial have not be adequately addressed because the government has not fully realized the importance of language right for the minorities and thus it failed to provide sufficient financial and human resources. The translation problem in the trials involving Mongolian people will affect the judicial fairness and justice, which in turn will have impact on the solidarity and social stability of the borderland in China. As a result, the author argues to make further reforms in this respect, such as the government's more attention and increased investment of financial and human resources, conduct in-depth investigation on the language issues and find out the Mongolian languages that can match the meaning in Chinese. In this way can China improve its protection of the defendants and ensure the fairness and equity of the criminal trial.

Keywords: Translation; Mongolian and Chinese Languages; Criminal Trial; Procedural Rights; Fairness

1 Introduction

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According to the jurisprudential theory, the language of the main nationality is generally the official language of a country with multi-nationalities, while the language right of those ethnic minorities is fragile and liable to the infringement, which need urgent protection in practice (Guo 2010:122-123).

There is no exception in China in respect of protecting the ethnic nationalities' language right, which is a country with various nationalities but the Han Nationality is the biggest one in population and thus the Mandarin is the official language (Zhou et al. 2003:87). For example, the Constitutional Law of the People's Republic of China as well as the Civil and Criminal Procedure Law and the Administrative Litigation Law have provided that the parties shall have the right to use their own languages in the proceedings.[3] That is to say, the Chinese government has been sticking to the equality between different nationalities in China, including the equality in language, developing the rights of ethnic minorities in judicial proceedings and daily work and life in using their own native language through legislations at various levels. Therefore, China has factually operated a bi-lingual judicial system in some localities (Zhang 2007:177). Given the requirement of equality among the nationalities and against the background of judicial fairness, it is of great theoretical and practical significance to improve the matching mechanism and regulate the bilingual judicial system in the autonomous regions of China. In another word, for instance, citizens of all ethnic nationalities, no matter whether they are the parties or defenders, witnesses and expert appraisers, shall have the right to use their native language in the criminal proceedings, such as making a statement and debate or writing a proceeding document; and in the areas inhabited by the minorities or ethnic groups, the public security organ, procuratorate and court shall use the locally popular language in the criminal investigation, prosecution and trial respectively, and announce the judgment, public notice and other documents; they should provide translation for the litigation participants if the latter are not familiar with the locally popular language.

Nationalities are equal in political and legal status, they all shall have the right to use and develop their own language and texts. Implementation of the principle of securing the application of the nationalities' languages will achieve the goal of equality and consolidation of nationalities' unity. Furthermore, implementation of the principle will also contribute to help the parties and litigation participants to protect their procedural rights in China. During this process, it would be also advantageous for the public to understand case information, improve their legal awareness and strengthen their supervision over the judiciary's power. Therefore, it is of great theoretical and practical significance in improving the supportive mechanism for the bilingual judicial system, regulating the bilingual judiciary activities and safeguarding the ethnic minorities to fairly and efficiently exercise their right to justice in using their own language in

[3] Section 1 of Article 134 of the *Constitutional Law of the People's Republic of China* provides that citizens of all ethnic groups shall have the right to use their own national language in the proceedings. The people's court and procuratorate shall provide translation for those participants in the proceedings who are not familiar with the local popular language. Section 2 further states that, in the areas inhabited by the minorities or ethnic groups, the trial of cases shall be conducted in the local popular language. Indictments, judgments, notices and other instruments should be written in one or more of the languages commonly used in the locality based on the actual need. Likewise, Article 9 of the *Criminal Procedure Law of the People's Republic China* stipulates that: "Citizens of all ethnic nationalities shall have the right to use their own national language in the proceedings. Where the litigation participants are not familiar with the locally popular language, the people's court and procuratorate shall provide translation for them. In the areas inhabited by the minorities or ethnic groups, information on the case trial and announcement of judgment, public notice and other documents shall be in the locally popular language.

China.

Generally speaking, this paper consists of three parts, most of which is based on the author's surveys in three grassroots and one intermediary court in the Inner Mongolia Autonomous Region of China during early 2015.

2 Operation of Bilingual Judicial System Requires the State's Intellectual Support

As we know, local legislations and judicial activities in the ethnic minorities' autonomous regions exercise the bilingual system, that is, each minority shall enjoy the right to use their own language in the judiciary activities. On the other hand, China is a unitary state, and the only one national language commonly used is the regulated Chinese Mandarin and characters—All the national legislations are enacted in Chinese. Consequently, there is an asymmetric characteristic between the Chinese and minorities' languages. To solve such an asymmetry, it is the state's responsibility to provide a concise and correct legal text of the legislations in the minorities' language in the minorities' autonomous regions so as to ensure consistent application of the national laws within the nation. At present, the texts of such basic laws as the constitutional, criminal, civil and criminal procedure laws are available in the minorities' language in the five autonomous regions in China. But the problem is that, the number of articles of judicial interpretation of those basic laws is even more than that of the original texts, while there are no corresponding texts for those minorities in their own language, which brought some challenges especially at the grassroots level in the translation and drafting of the legal documents in judicial practice.

Take Inner Mongolia Autonomous Region for example. In my survey, I found that the courts generally were lacking of legal texts of the important laws in Mongolian. As a result, the bilingual judges grasping Mongolian and Chinese languages can only translate the applicable national law in the judicial process by themselves. But in reality, a lot of Chinese legal concepts and terms are strangely new in the Mongolian language, as the Mongolian is a kind of ancient language, which is closely linked with Mongolians' traditional nomadic life. Given that most of the modern legal terms are the products of modern economic life and social relations, although many are borrowed terms, it is not difficult to understand the connotation and extension of the concept in the Chinese language. By contrast, the Mongolians with the tradition of nomadic life do not have such contexts in its own language. A typical example is that traditional Mongolian economic life is through goods exchange, while the terms or equivalent words such as the financial fraud and destruction of financial management order in the criminal law existed in modern economic life cannot be found in Mongolian. In my interview with a Mongolian judge in a grassroots court, for instance, she (33 years old, LLM degree) said:

> …..Currently our country has not up to date released any authoritative legal texts or judicial interpretation in Mongolian except the basic law. When I draft a judgment in Mongolian for a case involving the Mongolians, I can only consult a legal text translated by a lawyer from a law firm or from a university professor that is available online, which is often out of date and fragmented in nature. This is particularly true that China modified many laws and we judges dealing with Mongolian parties' case are in urgent need of authoritative and standardized legal texts in Mongolian which can be used in the trial. Obviously, this work cannot be done only relying on a law firm or certain bilingual law professors or judges….

Therefore, how to keep up with the pace of national legislation in translating legal texts of the Chinese Mandarin version promptly into minority languages, and deliver these free of charge and in full quantity to the areas in need is one of the realistic problem that needs to be resolved urgently in the practice of bilingual judicature in national autonomous areas to achieve the legalization and normalization of Mongolian legal norms in China. To this end, I think only the People's Congress at the national or provincial (or equivalent) level is able to organize those high-level bilingual (Chinese Mandarin and Mongolian) talents to complete this translation task in an efficient manner.

3 The Operation of the Bilingual Judicial System Requires the Material Support from the State

During my survey, the Supreme People's Court of China ("SPC") formally issued the *Interim Measures of Online-Accessible Judicial Judgments* in July 2013, according to which all its judicial documents such as the judgments, rulings or decisions shall be published on the internet with some limited exceptional circumstances.[4] Moreover, in the light of the SPC's *Rules on the People's Courts Publishing Online Judicial Rulings*, formally being implemented on 1 January 2014, the SPC will set up a website for publishing the judgments or rulings in effect of the courts at all levels, while the schedule for this work in the grassroots courts of mid or west China shall be decided by the Higher People's Court at the provincial level, reporting to the SPC for record.

Inner Mongolia Autonomous Region is located in the western area of China, which is part of the underdeveloped areas in China, but the vast majority of the grassroots courts have the economic and technical conditions of uploading to the verdicts to the website set up by the SPC. However, the implementation of the SPC's rules is not so satisfactory in the Inner Mongolia, as the SPC website does not support the Mongolian language.[5] In fact, there is a sound system to deal with the computer information processing in Mongolian which has been developed for many years.[6] Thus we have reason to argue that this language application problem apparently did not get adequate attention of the authorities, which resulted in the negative effect on the right of ethnic minorities in using their native language.

Moreover, according to another Mongolian judge (male, 42 years old; LLM) in a grassroots court, as the software price in Mongolian language is not cheap, his court did not equip all the judges dealing with cases involving Mongolian parties with the authentic software. But due to work need, some of them would download the pirate software, which is not functioning quite well and thus affecting the working efficiency. According to the judges interviewed, they expressed the hope that the state can finance such costs for the installation of software in

[4] See http://www.court.gov.cn (accessed 13 July 2015).

[5] My interview with a Mongolian judge in my survey. The SPC asked the Inner Mongolia Higher People's Court to contact the technical supporter Tsinghua Unigroup directly but the latter said no way to solve this problem. See also Higher Intermediate People's Court of Inner Mongolia Autonomous Region, *Survey Report on the Bilingual Trial (Shuangyu Shenpan Diaoyan Baogao) (2014)*, available at http://nmgfy.chinacourt.org (accessed 28 July 2015) confirmed this point.

[6] The work of information processing in Mongolian language started from early 1980s. After 30 years' development, such technology has been extensively applied in office automation work, e-governance, press and publication, picture/graphic editing, voice identification, machine translation and trilingual teaching (Bai, 2012: 3).

Mongolian.

Furthermore, Article 18 of the *Regulations of Inner Mongolia Autonomous Region on the Work of Implementation of the Mongolian Language and Texts* (effective in 2005) provided that staff at all levels of state organs, people's organizations and institutions involving in the translation of Mongolian texts should enjoy special post allowance. However, according to my survey, the Mongolian judges undertook heavy burden in this regard as they had to produce all the judicial documents in bilingual (Mongolian and Chinese mandarin) format, in cases involving Mongolian parties, but none of the judges receive any job allowances for the translation work. Therefore, I think it is quite important to put into full effect the job allowance for the text interpreters between Chinese mandarin and Mongolian or other minorities' languages.

4 Bilingual (Mongolian and Chinese Mandarin) Litigation Requires the Legal Procedural Safeguards for the Parties

The *Regulations of Inner Mongolia Autonomous Region on the Work of Implementation of the Mongolian Language and Texts* (2005) provides that the Mongolian language is the common language used in the Inner Mongolia Autonomous Region, which is an important tool to exercise the autonomy in the Region; all levels of state organs, people's organizations and institutions shall strengthen the translation work of the Mongolian language, the interpreter concerned shall enjoy the post allowance of the Mongolian language translation. It is the first time that a regulation has defined the legal status of Mongolian language as commonly used language in the Inner Mongolia Autonomous Region, which also provided legal basis for the people's courts and procuratorates to apply local common language in the prosecution and case trial in the Region. That is the common/official languages in the Inner Mongolia Autonomous Region is Chinese Mandarin and Mongolian. Second, it provided safeguard through local regulations for the implementation of minor nationalities' national language in the proceedings. The parties may choose Mongolian in the judicial activities in the Inner Mongolia Autonomous Region. Third, the judicial organs in Inner Mongolia shall be the main body of the obligation in ensuring the Mongolian nationalities to use Mongolian in their litigations, while the main body of undertaking the obligation shall safeguard such language right of the ethnic nationality through procedural safeguard.

The procedural safeguard, in a broad sense, means various kinds of procedural requirements and standards set for the purpose of fair trial. In a narrow sense, it refers to the procedural requirement of ensuring the parties' equal procedural opportunities in the proceedings, that is, the principle of due process (Fan 2005:45). While in modern jurisprudence, procedural safeguard has been raised to a high level of fundamental, constitutional and internationally-recognized rights.[7]

In my research, I conducted surveys in three courts in the west and east part of Inner Mongolia Autonomous Region in early 2015—including 3 grassroots courts (Courts A, B and C) and 1 intermediate court (Court D), mostly to collect the statistics during 2012 and 2014 (hereinafter called the three years) on the cases involving use of the Mongolian language in the

[7] See also Article 3 of the *International Covenant on Civil and Political Rights*.

litigation. Although the field sites may not be so representative in reflecting all the pictures, they can in some degree present us some features of bilingual application in the grassroots of Inner Mongolia Autonomous Region. A summary of the research data can be shown in the figures below.

Figure 1

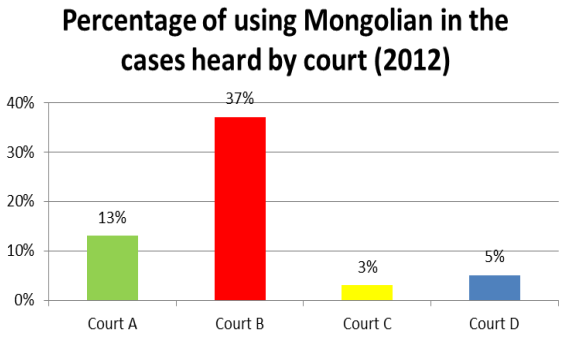


Figure 2

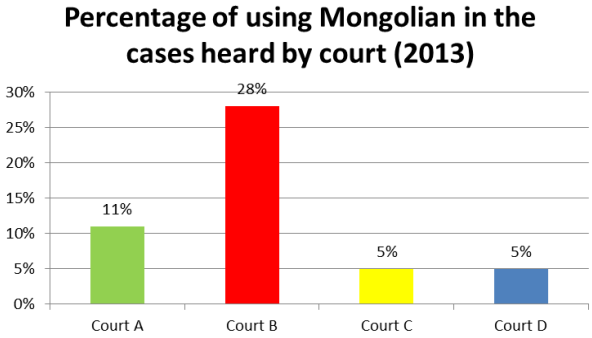


Figure 3

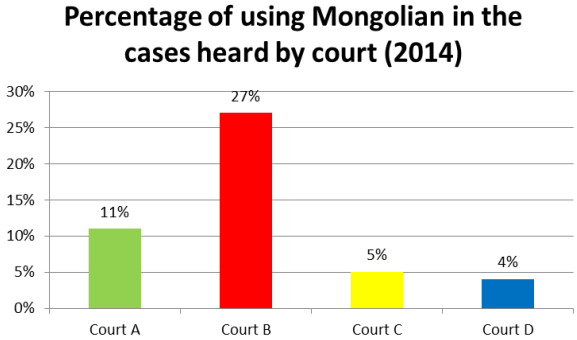


Figure 4

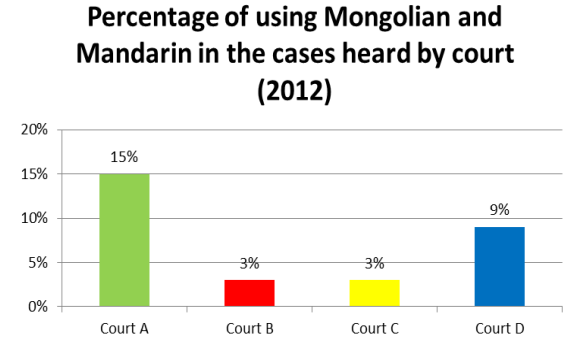
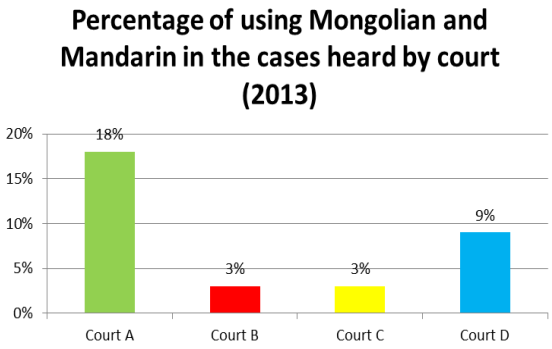


Figure 5

Figure 6



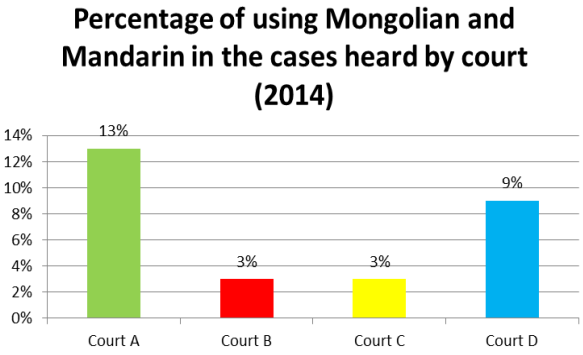
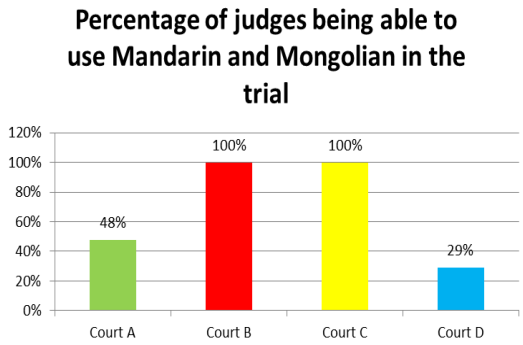


Figure 7



In the sample courts, the bilingual trial mode is based on the parties' autonomy of choosing the language they are willing to use or able to understand, and accordingly the court will arrange its panel and court clerk. Specifically speaking, there are four circumstances in this regard.

(1) Case hearing in Mongolian. If both parties understand and are willing to use Mongolian to conduct proceedings, the court will arrange the judge(s) who can use such language to form a collegial panel to hear the case and draft the judgment in Mongolia.

(2) Case hearing in Mandarin. If both parties are willing to or if one party opposed to use Mongolian to conduct proceedings, the court will arrange the judge(s) to form a collegial panel to hear the case and draft the judgment in Mandarin.

(3) Case hearing in mixed mode. If one party doesn't understand the other party's language in the proceedings, the court will arrange the judges who know both Mandarin and Mongolian to form a collegial panel to hear the case. Another judge rather than the presiding or case-handling judge, or the court clerk or ad litem agent or defender will help translate for the parties in the trial. Judgments and other procedural documents will also be prepared in Mongolian and Mandarin.

(4) Special circumstances. In the western part of Inner Mongolia, the habitants has the tradition of using a mixture of Mongolian and Mandarin languages for a long time, which also influenced the language used in the trial. The parties may speak with some Mandarin words or expression when speaking Mongolian in the trial, especially when they express their own views, conduct defense, bear the burden of proof with the professional legal term. [8]

In this situation, it is the judges who were born locally and can speak the bilingual language, as they have become accustomed to such kind of language expression. When the parties have difficulties in the communication, the trial judge(s) will often act as temporary court interpreters, the parties may understand the other side, apart from the help of one party and their lawyers. This is why one judge (Court President, male, 47 years old, LLB) interviewed said that there are only two lawyers in the whole flag (county) which made it difficult the court to organize a panel

[8] For example, an interviewee from a procuratorate (female, 43 years old, LLB) in my research presented me a representative example in this regard. In one case involving international injury leading to the death of the victim that the interviewee heard in 2009, the defendant collided with the victim in a wedding ceremony and further fought and hurt the victim. Later, the victim was dead shortly as the consequence of the fight. During that collision, the defendant shouted "Kill you", which caused disagreement between the defence and the prosecution. As we know, the word "Kill you" is a popular term cursing somebody, just like shit or son-of-bitch. The interview considered overall circumstances and relationship between the parties, and finally prosecuted the defendant with the charge of intentional injury, which was supported by the court. If the prosecutor or judge does not understand the culture or tradition of Mongolian, this case might be prosecuted with the charge of intentional murder, which will definitely hurt the defendant's rights.

for the trial in need.

In general, we can draw the following conclusions from the field data: First, in the Mongolian and Chinese bilingual litigation, the court will respect the parties' language option, basically guarantee the parties and other participants' right to use their native language, form some dynamic procedures and normative safeguard in this respect, with a certain degree of procedural judicial organization guarantee. For instance, the data of the four sample courts showed that there are a certain number of bilingual judges which can form a trial organization (panel) to meet the need of bilingual proceedings. Second, the trial model can adapt to bilingual litigation in Inner Mongolia Autonomous Region, namely, trial models in Mongolian and a mixture of Mongolian and Mandarin in addition to the one using Chinese Mandarin. This indicated that such practice had its legal and constitutional basis as far as the parties' right to use their native language in the litigation.

In the meanwhile, however, there are several obvious problems in this aspect: The parties and litigation participants' legal right to use their own language in the proceedings is of inadequate stability and lacking of protection of relevant system. Specifically speaking, the following four problems are worthy of our attention.

4.1 There is a lack of normative and uniform standard on the requirement of language used in the court trial when the parties are involved in a bilingual litigation.

For instance, how does the court perform the obligation of conducting the trial with local commonly used language? What are the specific requirements and procedures in this regard? If the court concerned failed to perform the obligation of bilingual perspective, which channels can one of the parties resort to securing his or her rights of using native language? If the court concerned rejected to perform such obligation, what can the parties do for the remedies? All these require an official normative document to illustrate such issues in order to put into practical effect the parties and other participants' rights of languages in the litigation.

Based on the information collected during the survey, there is no other normative requirement of the bilingual litigation acts in Inner Mongolia Autonomous Region except the civil and criminal procedural laws and administrative litigation law at the national level as mentioned above. As a result, the grassroots courts in Inner Mongolia may apply the requirement of securing the ethnic nationalities to use their native language in the litigation in a dynamic manner, that is to say, the application is characterized with more flexibility than routine nature in the judicial practice. This may lead to inadequate expectation of the parties and participants in enjoying their right to use native language in the litigation. In the meanwhile, the public has no objective evaluation on if the court and the judge' acts are fair, which is not conducive for the general public to supervise judicial activities.

4.2 It is a common phenomenon that there is no full-time interpreter in the courts, especially at the grassroots level.

According to my survey, there is no full-time interpreter in any of the four sample courts, it is the bilingual judges, court clerk and even defence lawyers to act as the interpreter for the cases involving the Mongolian parties. In the light of the judges interviewed, there is no normative

document or specific mandatory provisions in a normative document on requiring the courts to equip with full-time interpreters. This is why judges, defence lawyers, court clerk or ad litem agents could act as part-time dual-status interpreter in judicial practice in Inner Mongolia Autonomous Region. This might mean saving the costs and litigation resources on the part of the court, but the legitimacy of such practice is questionable, which is particularly true if the part-time judge is the one responsible for handling the case because of the neutrality requirement in a fair trial. When the parties challenge the translated content by the judge in court, the credit of the judgment will be reduced greatly. The interpreter's duties and responsibilities are mainly delivering truthfully translation and interpretation in court, which requires the status of neutrality (Liu 1999:349). The duties of interpreters/interpreters in the proceedings have decided that its status shall not overlap with the function of other actors in the courtroom, including the judge in the case.

Therefore, the Chinese authority should produce the law or normative documents to provide how the people's court fulfills its obligations of providing translation service for the parties who have the barrier of understanding and using commonly used local language in the litigation, how the court provide professional interpreters, and how provide remedies if the court concerned has restricted or deprived the parties of the right to use their native language? When the court failed to provide translation service, how can the parties safeguard their language right in the litigation? In another word, there is a lack of appropriate procedural safeguards in the national and regional legislations as well as of punitive provisions on the violation of the procedural safeguard in the litigation.

4.3 It is problematic on how to protect the procedure of setting up the trial judicial organization in the bilingual litigation.

The guarantee of a legitimate trial organization (panel) is the precondition of doing well all the judicial works. When the parties get involved in the litigation, they will have to contact with the court and judges directly. Thus it becomes one of the major elements for them to evaluate whether the court and the judge is fair in the trial. On the other hand, the trial organization is an essential matter on the court and judges' involvement and fairness in the litigation (Taniguchi 2002). In order to safeguard judicial justice, another procedural requirement would in general cover the trial organization in the bilingual litigation, in addition to the implementation of judicial independence, withdrawal and collegial deliberation system. That is, in Inner Mongolia, the bilingual judges shall form a collegial panel or serve as the sole judge in the trial. This should be an essential part of the procedural safeguard on the trial organization in the Mongolian and Mandarin bilingual litigation.

China is a country with many ethnic nationalities, and the minorities' regional autonomy system is its basic political system. The situations in the five major autonomous regions regarding major ethnic nationalities are very different and complex in China.[9] Therefore, it is

[9] First, the minorities in each autonomous region have different religious belief, like the Muslins in Ningxia and Uyghurs in Xinjiang worship Islamism, while Mongolians in Inner Mongolia and Tibetans in Tibet believe in Tibetan Buddhism. Second, the economic development is different in the five regions. An illustration of this background is that the GDP per capita in Inner Mongolia ranked top 10 out of the 31 provinces (or equivalence) in China, while Guangxi listed in the least developed province.

difficult to realize the right to use the native language at the national level within a short period. But Article 6 of the *Law of the People's Republic of China on Regional Autonomy of Ethnic Nationalities* prescribes at follows: the people's congress of the areas of national autonomy can formulate adaptive or supplementary provisions according to the principles provided by the Constitutional Law and the Law and in combination with the specific circumstances of the local nationalities. The specific circumstances of the local nationalities is the bilingual or multilingual nature of the litigation in the autonomous regions of ethnic nationalities, which requires to formulate adaptive or supplementary provisions to form practical policies and measures to safeguard the ethnic nationalities' right to use native language in the trial. On the other hand, standardization and institutionalization are important features of the legal behavior that is different from others. Therefore, based on the judicial experience in practice in the Mongolian and Mandarin bilingual litigations, China may consider the following aspects in the standardization and institutionalization of the bilingual judicial behavior:

First, it should further develop institutionalization and standardization of the bilingual litigation according to the successful experience of the Mongolian and Chinese bilingual court and judges models in current judicial practice. The court concerned should inform the parties and participants from the ethnic nationalities area of the right to use native language and have an interpreter in the litigation. At the same time, in light of jurisprudential principle, once the parties or participants of ethnic nationalities are deprived of the right to use their native language in the proceedings, they shall have the rights to appeal or request for a retrial.

Second, the Chinese authority shall provide the parties and other participants with the right to choose the language in the proceedings within the statutory scope, to facilitate them to use the language they are familiar with in the proceedings. In China, the ethnic minorities stay with the Han nationalities in the ethnic area, so it is a relatively common phenomenon for the language interaction. Therefore, the parties and participants should be allowed to use more skilled and convenient language in the proceedings. Except the special situation and requirement (such as using foreign language in a litigation), citizens should have the opportunity to dispose their individual basic rights. They should be allowed to challenge the trial by using the language or translated language so as to secure fair solution of the disputes.

Third, the judiciary at the municipal and county level of the autonomous regions shall equip certain amount of judicial staff that received systematically legal education and can use local popular ethnic language proficiently according to the population of ethnic nationalities within the jurisdiction. The quality of judicial personnel will directly affect the degree of realizing the procedural right of the parties. In the ethnic autonomous areas, judicial personnel judicial staff that received systematically legal education and can use local popular ethnic language proficiently is a precondition for protecting the ethnic nationalities of the ethnic autonomous regions in using the ethnic language in the litigation. Consequently, courts in the autonomous area, especially the grassroots courts, should equip a certain number of judges who have the knowledge of local ethnic language.

Fourth, as for the equipment of interpreters in the proceedings, I think, they should be different from those in other occasions. There are a number of reasons to support this argument: (1) The interpreter/interpreter is one of the main bodies in the proceedings, who shall enjoy the corresponding procedural rights and bear the corresponding legal obligations. (2) Interpreters are also different from the judges of collegial panel. The judicial personnel shall exercise the power

of hearing cases on behalf of the court, who shall have the right to make a decision on the dispute. By contrast, interpreters convey the language service just from an objective point of view, helping the parties to understand the trial related information in a language the parties understood. (3) The translation service will involve many legal professional knowledge and professional terminology in the litigation. Therefore, the Chinese authority shall set up professional agencies to review the qualification of interpreters used for the court trial. In this way can China address the problem of judges acting as the temporary or part-time interpreter in the trial, as this will contribute to the improvement of being fair and neutral in the judicial proceedings.

5 There is an urgent need of regulation the act of bilingual interpretation and translation service involved in the criminal litigation.

A lot of translation/interpretation work will be involved in the criminal trial of those pastoral areas, which is closely related to the rights of the accused. Any interpretation mistakes may affect the trial outcome. In judicial practice, some miscarriages of justice in Inner Mongolia have aroused widespread concern of the public regarding the right to fair trial. The interpreter shall not only help the judiciary to find out and check the fact of crimes, but also protect legitimate rights of the accused in the trial. For example, the defendant Mr. B in a case of contractual fraud that we collected in Site C was an illiterate Mongolian farmer who leased one plot of land to two persons in turn in November 2009 and January 2010, went out with the rent for work and was caught in June 2010. When the prosecutor reviewed the case and interrogated Mr. B and found that he was not fluent in Chinese Mandarin at all. For the sake of ascertaining the case, the procuratorate hired a Mongolian interpreter and finally understood the whole story: There were some overlaps of the contracted land between the two leases and Mr. B was freed from the charge as it was only a contractual dispute.[10]

5.1 There are controversies regarding the accuracy of the content interpreted in criminal proceedings in China.

As we know, most of the interpreters are not systematically trained in the theories of law, and have not got involved in the criminal procedure, and therefore, they may not accurately understand the meaning of legal terms. This may result in the inadequate quality of interpretation. But the accuracy of the interpretation will decide, or at least have direct connections with, final result of the case. Because of this, it is recommended that the interpreter in the criminal proceeding should have received legal education in a systematically manner and understood both Chinese mandarin and Mongolian. Moreover, the interpreters should be able to access to case files before the trial, who should be able to consult and duplicate the case files for the purpose of guaranteeing the accuracy and truthfulness of the interpretation.

5.2 China lacks necessary supervisions over the interpreter's act involved in the criminal

[10] According to the authors' interview in Site C, the Procuratorate reviewed 325 criminal cases and applied Mongolian language in 200 cases since 2009. According the interviewed prosecutors, interpreters contributed to effective avoidance of improper prosecution arising from language barriers.

proceedings.

As we know, most the interpreters are temporarily employed, such as a university or school teacher who majors in Mongolian, the trust of the judiciary on the interpretation is only based on their long-term cooperation. In case that there is a collusion between the interpreter and the parties, it is difficult to control the possible situation that the interpreter conceal or falsify the facts of the case or intentionally interpret in a wrong manner in some key plots. This is also why Articles 149-152 of the *Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* (*commonly known as* "Istanbul Protocol") released by the United Nations specify in detail the interpreter's obligations, such as the obligation of confidentiality, regulation on the possible mistakes, the active role of the investigators, selection and withdrawal of courtroom interpreters (Yang & Yang 2003:279-281).

5.3. The interpreter is not subject to the court proceedings.

Due to lack of the rules in hiring interpreters, the same interpreters may be very likely to provide the translation service for the same case during the whole criminal procedure covering the investigation, prosecution and trial stages in judicial practice. However, if the case involves a joint crime, the same interpreter will provide the service for all the criminal suspects, which may depart from the requirement of the basic principles of criminal procedure and cannot guarantee the objectivity and fairness of the trial. We also have reason to argue that the same interpreter who provides the service at the previous stage may have form subjective presumption of the case when continuing the interpretation for the same case at the next stage. Therefore, the interpreter should also apply the withdrawal rules, at least if he or she has provided the service in a case involving several offenders in a joint crime.

5.4 The suspects have no right to hire interpreters at their own initiative in practice.

On one side, the law emphasizes the neutrality of interpreters in criminal proceedings; while on the other hand, it is the autonomy of the judicial organ to hire and pay the interpreter according to the law. People may double the impartiality of the interpreters as it is very likely for the interpreter to have the tendency to support the task of the judicial organs in performing the punishment functions. Based on my survey, the payment will be made by the public security, procuratorate and court respectively depending on the stages of the proceedings. Accordingly, in our opinion, the rules on hiring judicial interpreters should be established as soon as possible in China in order to redress and change the shortcomings and disadvantages in current judicial practice. Only in this way can the interpretation play a more impartial and objective role in securing fair trial from the technical perspective.

First of all, China should formulate relevant management rules on hiring the interpreters in the criminal procedure, in particular the qualifications and special circumstances of interpreters and responsibility of the interpretation in the criminal proceedings. It should forbid those who have not received professional training or qualifications to engage in the interpretation service in the criminal procedure so as to ensure the solemnity of law enforcement. Furthermore, China

should develop a special normative document on interpreters' involvement in the criminal proceedings, in which it clearly provides the channel and procedure of hiring the interpreters and their legal status, procedural rights and obligations so as to be conductive to the management and regulation of the interpretation. Finally, China should set up a video and audio recording system of the interpretation during the whole criminal procedure. Language communication and meaning of gestures and actions during the interpretation process is of the characteristics of immediacy, while the video and audio recording system will make up the deficiency of written records and consolidate truthfully what happened in the court trial, which can facilitate the consequent checking of the interpretation quality and correct some key omissions, and ensure the objectivity and fairness of the case (Taguchi 2000:205). Another important aspect is the payment institution and payment method. China should authorize an independent agency for paying the interpretation fee and implement a uniform standard of the charge. In our view, the interpreter's costs should be included in the legal aid budget rather than in the budget of judicial organs in order to avoid the partiality of the interpretation. In this regard, we think it may work like this: The interpreter presents a note or ticket or relevant certificates issued by the judiciary to the legal aid institution and obtain the remuneration after the service. Where the interpreter is hired from other place, their travel costs shall be reimbursed together with the travel expenses (Anisha 2009).

6 Provision of legal aid lawyer with the capacity of Mongolian and Chinese languages is the State's responsibility in the criminal proceeding.

Legal aid is a pro bono legal service provided by the government of a State for the citizens or parties in certain types of cases who have the economic difficulties in order to safeguard human rights of the disadvantaged. In fact, the earliest legal aid record appeared in the mid of 15th Century in Scotland where the poor were entitled to free legal consultation (Zhang 1997:4). But such practice had certain limitation because of the individual public interests provided by the practitioners from the professional considerations. It was until early 20 century that the spread of the bourgeois concept of human rights helped the government to understand such assistance as a duty and obligation for the disadvantaged.

According to Articles 34 and 266 of the Criminal Procedure Law (2012), there are two methods for the defendant to acquire legal aid service: Application of the legal aid by the accused in case of having difficult economic situation or other reasons, or appointment by the judicial organs under the statutory conditions.[11] The ethnic minorities are disadvantaged groups in China, and such basic fact decides their right to receive legal aid. Their disadvantages mainly reflect in three aspects: first, the minority population is in a small number comparing with the Han Nationality (Zhang and Zhou 2008). Currently, there are 56 ethnic minorities in China with a total population of nearly 0.12 billion, only accounting for 8.49 per cent of the national population, and 19 ethnic minorities' population is even less than 100,000 people (National

[11] Where the crime suspects/defendant has not retained a defender, the Court, Procuratorate, and the police shall notify the legal assistance institution to assign a lawyer for criminal defence: (1) If the crime suspect/defendant is blind, deaf, or dumb, or is psychiatric who have not completely lost identification or control of his capacity; (2) If the criminal suspect/defendant is a minor; (3) If the criminal suspect/defendant may be sentenced to life imprisonment, and death penalty, who belongs to the vulnerable groups of the society.

Statistics Bureau 2011). The low population number will inevitably lead to their vulnerable position from the psychological aspect and who are very easily marginalized in the real life. Second, the ethnic minority population is generally low in the cultural quality, and one outstanding indicator is the high rate of illiteracy. Except the Mongolian and Manchu minorities, the illiteracy rate of other minorities is higher than the national average. Take Yunnan for example. The illiterate in the population of ethnic minorities occupied 38% of the total minorities in the Province, and some ethnic minorities even amount to 60%-80% (Yunnan Statistics Bureau 2011). Among the other thing, low awareness of the ethnic minorities is a reflection of low cultural quality. Third, the ethnic minorities are economically poor. By the end of 2014, the ethnical minorities still occupied more 30% of the total national rural poverty population in China although such rate is slightly reduced, the absolute number of poor people is still striking (State Ethnic Affairs Commission 2015). The people with economically disadvantaged position will directly led to their difficulty in access to better legal services. In another word, the population number, and culture quality and economic development situation of the ethnic minorities led to their disadvantaged position which has been extended to the litigation field. Due to lack of materials, and financial resources, some parties of the minority groups even have difficulties in paying the litigation costs. Litigation right as the last resort for the justice, the state ought to bear up the corresponding responsibility in this regard. The economic development and social stability of a state depends on the disadvantaged groups. If the society has been neglecting the needs of such groups, it can eventually lead to the collapse of their psychological defense line, causing resentment and despair for the surrounding environment, and the revenge as the worst. Such social instability will not be so conducive to social development in China (Liu 2004). As a result, it is important to implement the legal aid system in full effect for the ethnic minorities so as to smooth their channel of claims and rights protection.

In our survey, we found that no matter it is the urban residents or pastoral herdsmen in the Inner Mongolia Autonomous Region, they have few knowledge of law, and many Mongolian over 60 years old cannot speak proficient Chinese, letting alone the degree of their understanding and using Chinese Mandarin. Considering their proficiency in language and the capacity of legal knowledge, the ethnic minorities may face the structural disadvantage in the criminal litigation without the assistance of legal aid which is not good to secure the right to a fair trial and effective defence. Moreover, the religious beliefs and traditions are also something that the legislators must pay attention to in the criminal procedure. For example, the Mongolians mostly believe in the Tibetan Buddhism in Inner Mongolia, and the belief "compassion being good, and willingness to donate to the poor" play a dominant role in their life. However, such situation may also have its negative impact, that is, the legal awareness of those minorities is poor, making themselves as a vulnerable group in legal protection. This is a realistic and objective situation, but it is also a real and long-term social phenomenon. Accordingly, only the lawmakers provide special protection for those disadvantaged in the legislation can they enjoy the same or similar rights and resources as the ordinary people. It is regrettable that, under the current *Regulations on the Legal Aid*, the eligibility conditions for the legal aid are citizens' economic difficulties and other statutory legal representation or defence matters. Moreover, there is not compulsory criminal defence system in China's criminal procedure law, while the

definition of the standard of economic difficulties and the representation is left to the power of the provincial government.

At present, the provincial government often determines the standard of economic difficulties based on the local minimum living standard. If we look at the application standard, we will find it difficult for the ethnic minorities to apply for the legal aid as they are not included into the scope of application.[12] The standard in the Inner Mongolia is slightly relaxed, which provides 1.5 times of the minimum living standard for urban residents and farmers and herdsmen as the standard of economic difficulties. However, the rule makers did not envision legal services as a non-essential consumption item, as the individuals whose income is above the minimum living wage may not be so willing to pay for the costs of such services. The division line in such a manner will shut those in urgent legal aid need outside the door.

Take D County of the Inner Mongolia in our survey for example again. The local authority provides the standard of economic difficulties as less than twice of the minimum living standard for urban residents and farmers, while the recommended subsistence allowances for residents of rural and pastoral areas in Inner Mongolia is RMB 700-1,000 (Inner Mongolia Gazette 2009). That is to say, the eligible minority herdsmen in pastoral areas should have an annual income of less than RMB 1,500 in order to have access to the legal aid service, while the income per capita in the Region is RMB 7,851 in 2010 (Hu 2011). At the same time, we noted that the annual income in the pastoral area is not as high as we expected because the income is mainly based on their selling of herds. If they encountered bad weather, they may suffer from economic loss. Therefore, they formed a habit of saving the money in case of the bad year, and are not so willing to spend money on legal service in criminal proceedings. On the other hand, the ethnic minorities groups may also encounter the situation of few legal talents available, especially in the remote area. What contrasts the reality is that many paralegals are actively providing legal service. If the government can consider conduct uniform training on legal aid, this group will play an important supplementary role in legal aid in the ethnic minority areas.

7 Conclusions

In the modern world, one principle that many countries deal with various challenges is to construct harmonious ethnic relationship on the basis of equal recognition and appreciation of cultural value diversity (Wang 2006:1-11). China's bilingual judiciary system in ethnic nationalities' autonomous regions embodies the essence of providing equality and tolerance of different culture, and establishing a harmonious ethnic relationship, and has achieved long-term and positive social effect in judicial practice. Finally, I think it will reflect China's efforts in the protection of ethnic nationalities' human rights, showing to the international community, if China pays more attention to the problem of bilingual proceedings in judicial practice.

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[12] This is the standard applied in Ningxia and Guangxi. See State Ethnic Affairs Commission, "The Monitoring Result of Rural Poverty Situation in the Ethnic Minorities Areas in 2011", 28 November 2012, available at http://www.gov.cn/gzdt/2012-11/28/content_2277545.htm (Last visit: 30 November 2015).

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Bionotes

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On the Fairness and Communications in the Trial of Criminal Cases in China - An Empirical Analysis from the Perspective of Criminal Defence

Abstract: It is generally accepted that the rights of suspects and defendants shall be properly protected in a criminal trial. The principle of "equality of arms" demands the accused to get access to legal counsel in a timely and adequate manner irrespective of their economic status. In China, the 1996 and 2012 versions of *Criminal Procedure Law* made some reforms from the perspective of human rights protection. People may wonder, how do the lawyers communicate and cooperate with their clients and witnesses and collect evidence? In this paper, the author will discuss these issues based on his legal-sociological observations in the courtrooms, interview with lawyers, judges and prosecutors, and analysis of dead case files kept in the justice institutions in three locations, apart from the most update literatures. According to his findings, lawyers play a relative passive role in the criminal defence. They have routine but few communications with their clients and witnesses, and what they can argue in the debate is mostly routine strategies for leniency argument. At the end of the paper, the author will also discuss the possibility of improving the effectiveness of criminal defence in China, especially the communications.

Keywords: right to the fair trial, communications, courtroom, criminal defence, empirical study, China

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1 Introduction

It is generally accepted that the right to counsel must be provided in order to place more emphasis on personal freedom and human rights of the accused persons. Among the other things in the various standards of domestic and international documents, the principle of "equality of arms" demands the accused to get access to legal counsel in a timely and adequate manner irrespective of their economic status. For example, *International Covenant on Civil and Political Rights* states that, in the determination of any criminal charge against the accused, everyone shall be entitled to some minimum guarantees, such as to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed of this right if he does not have legal assistance; and to have free legal

assistance.[13] Similarly, apart from the provision that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings, *Basic Principles on the Role of Lawyers* stipulates special safeguards for the accused in criminal matters in order to ensure that legal assistance of lawyers can be obtained timely by the accused.[14] The assignment of legal counsel to all criminal defendants is supposed to ensure the protection of individual rights and adequate scrutiny of police evidence against a criminal defendant (McConville & Baldwin 1981:597). In the process of arrest and charge (and trial), the power of the government is so strong and the defendant is in such a weak position that some protective measures are required to protect the accused from mistakes and from wrongdoing. The defence lawyers thus become involved in the criminal case from the beginning—to provide legal advice for the suspect and inform him of the possible legal consequences of answering the police questions, to help release the suspect's psychological pressures in such a confined and isolated world, to prevent the police from intrusive powers during the investigation, and to try to make sure that the police interrogation is conducted by respecting lawful rights of the suspect (McConville & Baldwin 1981).

In China, the 1996 and 2012 versions of the Criminal Procedure Law made some reforms from the perspective of human rights protection, for example, lawyers can meet their clients, access to the case files and conduct evidence collection at an earlier stage of the proceedings and make sufficient preparation before trial. Since the judge's active role is substantively reduced and the defence can be more convincing than before, indicating some elements of departing from the inquisitorial mode to the adversarial mode in the trial, what is the real situation in the practice? People may wonder, how do the lawyers communicate with their clients? How do they interact with the witnesses and collect evidence? How do they plan their defence strategies before trial? What kind of cooperation do they have with their clients, how do they present their evidence and challenge the prosecution evidence? How do they organize their words at the court debate stage? What kind of role they can generally play in the courtroom? In this paper, the author will discuss these issues based on his legal-sociological observations in the courtrooms, supplemented with the data from the interview with lawyers, judges and prosecutors, and analysis of dead case files kept in the justice institutions in three locations in mainland China, apart from the most update literatures.[15]

2 Overview of the legal provisions on criminal defence

[13] Article 14 of the *International Covenant on Civil and Political Rights*.

[14] Articles 5, 6, 7 and 8 of the *Basic Principles on the Role of Lawyers*.

[15] The criminal procedure that the author relied on for his data collection was the 1996 Criminal Procedure Law. Despite of the possible challenges by readers regarding the effectiveness of the old data, the author has reason to argue that such practice is still working given that there are no substantive changes in the court trials in the 2012 reform. Moreover, the author's research findings are also confirmed by the limited research data available by other researchers on the similar topic after 2013 when the 2012 CPL was formally implemented. In his research, there were 56 sample cases observed in the three sites, a vast majority of defendants were male, and involved with one charge. In Sites A and C, most cases were related to violent crimes such as the offence of intentional homicide or injury in Site A (65%) and in Site C (89%). By contrast, in Site B, the offence on the violation of property (66%), such as the theft, was the most common type of crime. Furthermore, although the defendants' educational level was different in the three sites, they generally lacked adequate education. As far as the defendants' age is concerned, given that the cases involving 16-18 year-old defendants were closed trials, the age group may not be so representative in each site, but generally speaking, the 18-25 years old group occupied a large portion, which varied between 34% and 44% in the three sites.

In China, it is not an exclusive right of lawyers to make criminal defence. Persons recommended by a public organization or the unit to which the criminal suspect or the defendant belongs; and guardians or relatives and friends of the suspect or the defendant are also eligible to be defenders.[16] In the light of the 1979 Criminal Procedure Law, the defenders could get involved in the criminal case only at the trial stage, 7 days prior to the trial proceedings, which was not sufficient to prepare for the defence. In some cases, it was said that 30% of cases were already at trial when the lawyers received the notice for the defence (Fu 1997). As there was no compulsory requirement for the cross-examination and witness court appearance as it is the judges' discretionary power, the defenders' role in the trial was quite limited.

After the reform in 1996, access to defense counsel is directly and closely tied to the movement away from an inquisitorial system, the establishment of the judge as an adjudicative figure and increases in the defendants' rights to cross-examine witnesses. Now, the defence lawyers' rights have been expanded. They can get involved at the early stage of criminal procedure, namely, after the first interrogation or suspect has been subjected to compulsory measures at the investigation stage; they can provide legal advice, help the suspect to file petitions and complaints and apply for bail pending trial.[17] Moreover, from the date on which the procuratorate begins to examine the case for prosecution, defence lawyers may consult, extract and duplicate the judicial documents pertaining to current case and technical materials on appraisal, conduct investigation and collect evidence, and meet and correspond with the defendant in custody.[18] At the trial stage, the defence lawyers can consult, extract and duplicate the material of the facts of the crime accused in the case, which refers to the Bill of Prosecution and attached list of evidence and witnesses and copies of major evidence transferred by the procuratorate, and may meet and correspond with the defendant in custody.[19] During the trial, since "cross-examination in court is allowed, the prosecution-dominated trial is replaced by a more balanced representation of both parties" (Fu 1997:82), and thus defence lawyers are expected to be more active. They can put questions to the defendant, cross-examine the prosecution evidence and witnesses, produce their evidence and witnesses, and make argument with the prosecution in court.

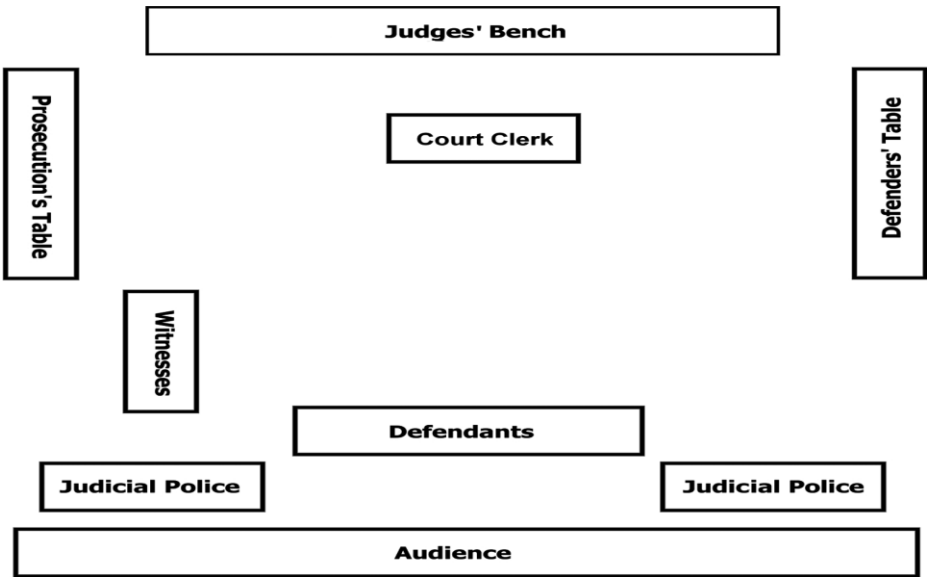
The 2012 CPL reform further expanded lawyers' right to defence in criminal cases. They can not only get involved at the investigation, review and prosecution stage, but also express their view orally or in writing on the cases to the investigators and prosecutors. Moreover, defence lawyers are entitled to attend the pre-trial conferences organized by the court and to express their views on the request of withdrawal of the interested persons from the panel or prosecution side, witness appearance in court and exclusion of illegally obtained evidence, and to persuade judge to make a decision favoring for his client (the defendant). Furthermore, the defence lawyers can meet their client without prior approval with the exception of some special cases. At the prosecution and review stage, they read, duplicate and digest all the case files. More importantly, the reform of the review procedure of death penalty also provided a good chance for lawyers to perform their defence functions.[20]

[16] Article 32 of the Criminal Procedure Law of the People's Republic of China (2012).
[17] Article 36, Criminal Procedure Law of the People's Republic of China.
[18] Article 38 of the Criminal Procedure Law of the People's Republic of China.
[19] Ibid.
[20] For detailed discussion of the reform in this regard, see Chen, *et al* (2012) and McConville and Fu (2014).

3 Criminal defence in action

This part is mainly based on the author's courtroom observation of 56 criminal cases in the three sites in mid and west China;[21] however, the rate of legal representation is now much higher, and even higher than the findings of the case file analysis in my research. Defenders appeared in more than three quarters of cases observed on average, most being privately retained lawyers. Generally speaking, the rate of legal representation is closely connected with the seriousness of crime and economic development of the areas. For instance, the rate of legal representation in Sites A and C (intermediate court) is 80% and 100% respectively, while only half of the defendants in Site B (district court) had a defender. Most of the defenders were privately detained, although there were some pro bono lawyers. Sometimes, the arrangement of pro bono lawyers served for special purpose.[22]

The picture below, the courtroom layout,[23] despite of some pilot reforms on defendant's seating, showed that defence lawyers are away from the defendant's seat, they had no chance for communication, especially temporary exchange, in the courtroom. Such a physical arrangement of the defendant under surveillance of the judicial police in the courtroom makes it unable for him/her to communicate and discuss the case with his/her lawyer during the trial, which contrasted the sitting arrangement of parties in the civil actions in China.



[21] The first site the author chose was a capital city in the northwest of China, which is an important military and economic centre in China. The population in the city was around 6-7 million, where people are very kind, frank, warm-hearted and honest, and cherish more personal relationships. The second site for the author's fieldwork (Site B) was a capital city in the southwest area of China, where there was a total population of 3-4 million and the weather in that place is very pleasant during the whole year. However, the security of social order was not very good in some districts. His fieldwork in Site C is an intermediate city in central China, with a population of around 1.5-2 million, which is located in a neighbouring province of Site A. These three sites represented judicial justice in different areas of western and central area of China.

[22] For example, a pro bono lawyer appeared in the trial of CTO B-7 (offence of theft), which was conducted in a police college as an exemplary court. Later, the author was told that the defender was the friend of one court clerk. Similarly, when Professor Mike McConville attended a court hearing in a district court during his visit in Site A in 2003, there was a pro bono lawyer for the defendant. The leader of the court explained the purpose of appointing a lawyer in the trial was to show the guests a typical setting of criminal trial after the reform of Criminal Procedure Law in 1996.

[23] Cited from Mike McConville *et al*, *Criminal Justice in China: An Empirical Inquiry*, (2011) Cheltenham, UK: Edward Elgar, p. 191.

Given that the defence lawyers have few opportunities to obtain witnesses' cooperation and collect other evidence and conduct only 1-2 pre-trial meetings with their clients, most of them are not sufficiently prepared for the defence (McConville *et al.* 2011).[24] The defence functions of the lawyers cannot be adequately performed without sufficient communications between them and clients before the trial. Where there is any conflicting opinion between the defence lawyer and the defendant during the trial, the collegial panel will generally provide a special opportunity for them to coordinate the viewpoints privately through a short court adjournment. Such conflicting opinions will not affect the judge in a persuasive manner (Chen 2014a:101).

In the following part, the author will discuss the performance of defence lawyers in the courtroom based on the data extracted through his personal observation.

3.1 Defenders at the court investigation stage

Despite the importance and the assumption of lawyers being professionals in the best interests of their clients, many studies in the west show that the benefit to the defendant from a defender is less than expected. For example, the finding of some British scholars argued that there was "a perceived decline in the quality and standards of criminal defence work under the pressure of rising case numbers and falling rates of legal aid payment" (McConville *et al*. 1994:46). In fact, they found that only a small amount of suspects can be provided with legal advice during interrogation and most suspects do not benefit from legal advice during their custody; and "the interests (of the clients) are usually best served by routine processing through guilty pleas since for the most part, have no legal or factual arguments to set against an overwhelming body of prosecution evidence" (McConville *et al*. 1994:74-129).

These findings are replicated in China. Given the structure of the criminal process in China, the trial in essence is a process to confirm the prosecution case; the defence lawyers did not examine and cross-examine the evidence but rather affirmed it in court. Since the defendant in most cases had already confessed his crime, the defence has no legal or factual arguments to set against an overwhelming body of the prosecution evidence in most cases. In the absence of challenging the evidence, the defender could do nothing but focus on the suggestion of lenient punishment, which can benefit the defendant in essence, because the court has such discretionary power by law. Therefore, the defender was limited to asking questions on the details which were advantageous to his client.[25] According to my observation, most defenders in the three sites (86%, 63% and 94%) asked the defendant questions related to the details of the defendant's guilt and the circumstances which might attract lenient punishment. Take CTO B-1 (offence of intentional injury) for example. Here is the dialogue between the defender and the defendant:

> Defender: How's your relationship with the victim?
> Defendant: We are friends.

[24] Despite of the improvement in the 2012 CPL reform, Chinese scholars are still very concerned with the lawyers' meeting with clients in a sufficient and timely manner. See for example, Han (2014).

[25] Some did not even ask the defendant any questions at all, because they thought this was of no value or that it risked antagonizing the judge.

Defender: How did the knife appear with which you stabbed the victim in the crime scene?
Defendant: On that night, my friends called me to go out and I gave the knife to the victim. Later, the victim brought it back to me.

Defender: What did you see after you returned to your room?
Defendant: I saw that he (the victim) was mad from being drunk and was ready to attack others.

Defender: Did you quarrel and clash with him?
Defendant: Yes. He attacked me with a chair.

From the above dialogue, one can see the purpose of the defence lawyer's questions. First, the defendant thought his relationship with the victim was good, so there was no question of this being a revenge attack. Second, the victim was angry from drink. Third, the defendant tried to stop the victim acting violently. Fourth, the knife belonged to the defendant but the victim borrowed it and later returned it to the defendant, which proved that the defendant had no intention to use a knife to hurt the victim. Fifth, it was the victim who attacked the defendant with a chair first. As a result, the victim bore primary responsibility for the occurrence of the incident leading to the defendant's prosecution.

Later, when the presiding judge asked the defender if he had evidence to present, the defender said "no" but requested to be allowed to ask the defendant questions again.

Defender: What did the victim intend to do when he borrowed your knife?
Defendant: He planned to use it when he fought with country fellows on that day.

Defender: Then, who sent the victim to the hospital?
Defendant: It's me and other two people. I signed my name on the operation notice. I also looked for the victim's parents and teachers with a view to solving the problem.

Defender: Did your parents negotiate with the victim's parents on civil compensation?
Defendant: Yes.

Presiding judge: Defender, your question has nothing to do with the case.
Defender: All right.

In the second dialogue, the defender tried to show the victim's intention in borrowing the defendant's knife. Then, he tried to prove that the defendant showed a positive attitude to the crime by sending the victim to the hospital and looking for the victim's parents to discuss compensation. By asking the defendant questions twice, the defender had already expressed his opinions on the case indirectly. When it came to the debate stage, the defender would repeat his opinions in order to impress the judges and suggest lenient punishment. These questions were not pro-forma but intended to be of assistance to the particular defendant. However, the role of the lawyers in practice was still quite limited and they had to be careful not to offend the prosecutors and the judges in court.

At this stage, after questioning the defendant, the defence will have a chance to cross-examine the prosecution evidence and present their evidence. As to the prosecution's evidence, few defenders challenged it, except to contest or put into question to the testimony of some witnesses. For example, defenders in 30% of cases challenged the testimony of selected witnesses. However, the result of the challenge was often unsuccessful, since they had no evidence to contradict the prosecution's evidence. In CTO A-21 (offence of intentional injury), the defender of the second defendant challenged one copy of testimony provided by the witness DQX after the prosecutor presented copies of the testimony of nine witnesses. The prosecutor responded that he had nothing more to say and if the defender thought that testimony was not true. In the prosecutor's view, it was the defender's burden to present evidence to contradict the challenged testimony. However, because there were no witnesses appearing in court, the challenge was doomed to failure. After the 2012 reform, the CPL still requires the consent of the witnesses and victim or his or her relatives if the defence lawyer wants to collect evidence from them. At the same time, evidence collection at the lawyer's initiative before the trial may also bring the risk of being charged with perjury or falsifying the evidence if the defence version is different from the prosecution one collected from the same witness.[26]

Unlike the practice in western countries where the prosecution and the defence had equal chance to collect their own evidence, the police (and the prosecutors) in China monopolize the collection and production of evidence in criminal cases. After the report of the crime, the police were seen to be responsible for collecting the evidence. Thus the production of evidence is in the hands of the police/prosecution. If the defence lawyers want to collect evidence and conduct investigation, there would be obstacles for them. For example, according to the law, defence lawyers may collect information pertaining to the current cases with the prior consent of the witnesses or other units and individuals concerned.[27] However, on most occasions, few witnesses were willing to cooperate with the defence lawyers, because they thought that the police, the prosecutors or the judges should be exclusively responsible for collecting the evidence. The defender had to spend lots of time in explaining the law and persuading a witness to give evidence. Furthermore, the defence collection of evidence from the victim, victim's near relatives or witnesses provided by the victim is subject to the consent of not only the parties concerned but also of the procuratorate or the court,[28] which makes the defence investigation and evidence collection more difficult. Moreover, there was a risk for the defender in collecting the evidence. If the content of the testimony given by a witness to the defence lawyer was present in court, but was contradictory to that collected by the prosecution, then the defender would have more trouble awaiting him, for instance, the possibility of being investigated for perjury (Zhang 2014). Therefore, most defenders were unwilling to conduct investigation and collect evidence. Given the limited time to prepare for the criminal defence and the difficulties and the potential risks, few defenders are able to collect evidence. As a result, they relied heavily on the prosecution evidence. During the court investigation, very few witnesses will present in court to testify and thus give the defence opportunities for cross-examination, even in some socially important cases (West China Daily 2009; Chen 2014b).[29]

[26] Some Chinese scholars suggested a third evidence collection model: Writ of evidence collection issued the court in jurisdiction. But the effect of such practice needs further observation in China in the criminal trial. See Chen 2014b.

[27] Article 37, *Criminal Procedure Law of the People's Republic of China*.

[28] Ibid.

[29] The CPL 2012 provided situations of compulsory measures for bringing witnesses, mostly key witnesses, to court; however,

On rare occasions, defenders produced some evidence concerning the defendant's involvement in crime which might be relevant to mitigation of punishment (rather than to guilt or innocence). In the three sites, defenders in less than 30% of cases on average presented the so-called evidence or material in court, such as the defendant's case history issued by a hospital, the material to prove the defendant having no criminal record or the circumstances of voluntary surrender, evidence to prove that the defendant's family having returned part of the illicit money or the agreement of compensation between the defendant and the victim's family and testimonials proving the defendant's good daily performance and meritorious performance. For example, the defender in CTO C-3 (offence of intentional injury) presented the receipt of compensation and the testimonial provided by the detention house on the defendant's act of disclosing other criminals' undiscovered fact of crime.

3.2 Defender at the court debate stage

Comparatively speaking, the defender was very active and energetic at the courtroom debate stage. They could express their opinion on the case and, in some cases, argue with the prosecutor for further discussion. For example, 40% of defenders in Sites A and B and 19% in Site C had further debate with the prosecutors, since they had disagreement on the argument such as if the defendant had the intention of fraud, if the defendant was guilty, if the evidence was sufficient and the charge was correct, if there was a voluntary surrender, if the victim has fault, if the defendant had a legitimate defence, if the defendant had a good attitude toward his crime and if the suspended penalty was applicable.

But, given the defendant's confession before the trial, few defenders can argue for the innocence of the defendant. In the 56 cases observed, defenders in only two cases (3.58%) argued for the defendant's innocence because of illegal evidence or insufficient evidence in Site A. For instance, in case CTO A-8 (Offences of robbery and theft), the defender of the first defendant makes a speech to argue for the innocence given that the prosecution lost the original copy of key evidences:

> Dear Presiding judge, our opinion has essential differences from the prosecutor's. First, this case gives us a good lesion. I supplement the article of the criminal procedure law—"The oral confession alone, without other evidence, cannot establish the defendant's guilt."
>
> Second, the charge of theft against the first defendant is not tenable. The 1979 criminal law should be applicable since the case happened before the enforcement of 1997 criminal law. What's more, the evaluation of the stolen tricycle will affect the nature of charge in that theft case, since there is something wrong with the invoice of purchasing the vehicle, the charge is not tenable.
>
> Third, I cannot understand the following three problems—the offence of robbery in its subjective should have the intention to illegally possess others' property, which is a prerequisite. But in this case, the defendant denied this intention not only in his eight

such decision power is at the hand of the judges. Against the background of emphasizing the efficiency and heavy workload of judges, very few judges like to have witnesses testifying in court, as this would delay the whole trial process.

confessions but also in today's court hearing. How can we make a judgment? The criminal procedure law says that only after the court hearing can we make clear the issue.

Another problem is the collection of evidence breaks the basic rules of criminal procedure law. For the important and grave case, if the defendant was detained beyond the prescribed time limit, there should be a report on prolonged detention. The defendant in this case was detained for more than 8 years, but there was no such report. The criminal procedure law states that illegal evidence is not admissible. In my opinion, I think the police engaged in some illegal acts to collect evidence. The police missed the testimonies, photos on the site and post mortem, woolen coat and the knife (lethal weapons). The blood left in the site and lethal weapons are very important. The police can explain that this a mistake in their work, but from the legal perspective, these evidence don't exist any longer. The police made a lot of forged document, for example, they changed the material of reporting the case and asked someone else to sign the name on behalf of the witness. How can we adopt those evidences? I suggest the court to make an innocent verdict because the fact of crime is not clear and the evidences insufficient.

This daring defence opinion led to another round of debate between him and the prosecutor, when the presiding judge asked the prosecutor if he wanted to respond to the defenders:

Yes, Presiding Judge. We think the fact is clear and the evidence is sufficient in principle. The first defendant made a confession in the Public Bureau of XX District, Beijing. According to the invoice, the tricycle was bought on February 16 and lost on February 20, which has the value of 4000 Yuan. The present price should be price of actual value. Second, the defender challenges the evidence because of the signature. This is the defender's personal deduction. The key point is the fact of homicide. The plaintiff witnessed the defendants' whole process of murder. The material of reporting the case proves the existence of the robbery and murder. It is natural that the police' different questioning style causing slight differences. Third, the knife, not one but two knifes, mentioned by the defendants did exist in fact. Fourth, who killed the victim is not the focus of this case, because we charge two defendants with the offence of robbery but not homicide. The two defendants try to avoid the responsibility in the court hearing, but one thing is clear—when one defendant committed a crime, another one gave his helping hand, so they should bear joint responsibility for the victim's death. Fifth, the police losing evidence wouldn't mean the non-existence of these items of evidence, because the two defendants had confessions to give us detailed description on the whole process of the case. Sixth, the defendant s' statement on torture is not correct. He confessed his act of theft in Beijing first and then his crime of murder in this city. The police in Beijing contacted us to confirm the fact of crime here. The defendant's transfer went through three police organs, he made a guilty statement. When the police here asked the first defendant key questions, he didn't answer them but lowered his head. If the police made use of torture, he could not keep silent. Although we cannot clarify who stabbed the victim, the fact does exist.

The defender definitely disagreed with the prosecutor:

> The problem is that it is not reasonable to use Mr. A's invoice but not the owner Mr. B's. You said that it was reasonable that different police interrogated the same defendant may cause slight difference in signature, but if the same police interrogated the same defendant, how can you explain it? We suggest the panel to make a new expertise on the signature. If there is any trace of man-made change in the document, there is no need to open court hearing today. In addition, there is a lack of witness testimony. There's a contradiction in the only one testimony. We should treat the case with our utmost care since it involves human lives. We should be responsible for both the defendant and the law. Third, according to the international convention that China joined in, no one is compelled to self-crimination. Therefore, the people's procuratorate should bear the responsibility to make clear fact and the evidence should be sufficient, instead of basically being sufficient. Otherwise, it would trample on the law. The case involved illegal evidence will make a laughingstock of itself before experts.

The Presiding Judge did not say anything on the brilliant debates and the defence opinions but just go ahead with the proceedings. However, according to the judgement, the outcome of the case seemed to be certain when the case is prosecuted. The court finally held that:

> The charge of robbery is established, but the offence of theft, the second charge against the first defendant is not tenable. After the panel's investigation, the opinions of the first defender are partly acceptable. The makeup of material of reporting the case cannot be used as the evidence in this case, but other documents such as written record of site reconnaissance, since they are originated from the copy of authentic one in the past, and the content is true, so these evidences are acceptable. The defender's opinion on the first defendant's innocence is not admissible. The main facts and evidence can prove the defendants' crime, so the court supports the procuratorate's charge. The two defendants' circumstances of crime is grave, they should be punished severely.

On the contrary, most defenders often argued for leniency because the victim had fault, the defendant played a minor role in the crime, or the defendant had a good attitude towards his crime. For example, here's the defender's opinion in CTO A-25 (offence of intentional injury) in summary:

> First, on behalf of the defendant, I apologize to the victim's family. Second, I agree with the nature of charge, the fact and the evidence. Third, the victim had certain fault. Fourth, the defendant has the circumstance of voluntary surrender. Fifth, the defendant has a good attitude towards his crime and the performance of contrition. Sixth, the defendant's family actively compensated the victim's family for the damage of near 60 thousand Yuan. So we suggest the panel reduce the defendant's punishment or impose him a lenient punishment.

3.3 Defender's professional quality

The effectiveness of criminal defence will affect the final outcome of a criminal case to a certain degree. Researches in the UK demonstrated that the quality of defence lawyers and other paralegals varies considerably. For instance, McConville et al (1994) found that in the criminal defence with notable exceptions, the paralegals, clerks and personal assistants employed are unqualified and unskilled persons with limited amount of experience. Therefore, in the absence of professional training and quality, defence lawyers would be concerned with "legal guilt and influenced by more popular conceptions of factual guilt and criminal responsibility" (McConville *et al*. 1994:12). Moreover, many defendants complained that defence counsel spent insufficient time with them prior to the court hearing, was ill-prepared to put in an adequate plea in mitigation (Baldwin & McConville 1977:92). Furthermore, there is a system of effective defence in the criminal cases developed through case law in such countries as the USA in order to fully protect the rights of the accused (Peng 2015).[30]

In the author's research, defenders' professional ability was different in the three sites. Some were high, while some performed poorly in the trial. Some of the defence lawyers were not competent in criminal defence at all, because they did not have detailed knowledge of the case, or lacked sufficient preparation or were inadequately trained.[31] For example, the defender in CTO C-10 (offence of intentional injury) did nothing in the investigation stage but simply asked the defendant one question on how the defendant was caught and got the answer that the defendant was caught by the police when he was irrigating the field. Then, at the debate stage, he stated that he had no disagreement with the charge, but there was a special reason for the occurrence of the case since the victim had obvious fault; although the defendant did not tell the court clearly, he had the circumstance of voluntary surrender; moreover, the defendant had no criminal record and had a good attitude toward his crime; as a result, the defender suggested the judges impose the defendant a lenient punishment. The prosecutor replied that there was no evidence to prove that the defendant had the circumstance of voluntary surrender, since he had been caught by the police. In this case, it was obvious that the defender did not understand the case information in detail and mistook voluntary surrender of the defendant's brother as the defendant's act, although the defendant's answer at the investigation stage indicated his arrest by the police.

In addition, the privately retained lawyers and the court appointed lawyers had a different attitude. They might hold different opinions, even based on the same facts and charge**.** Take CTO A-8 for example. The defender of the first defendant, who was employed by the defendant's family, asked the first defendant a total of 19 questions before the presiding judge stopped him. Then he asked the second defendant four questions to inquire when the second defendant knew the victim was dead, who actively invited the other defendant to the victim's home and if they had discussed the plan beforehand and the reason why the second defendant fled. When the judge in charge of the case asked the defender of the first defendant if he had any challenge, the defender raised four doubts on the evidence:

> First, the material on reporting the crime has been made up a long time after the case; second, the written record on the site reconnaissance could not prove anything, apart

[30] See e.g. also *Powell v. Alabama*, 287 U.S. 45 (1932); *Brooks v. Tennessee*, 406 U.S. 605; *Geders v. United States,* 425 U.S. 80 (1976) and *Wiggins v. Smith*, 539 U.S. 510 (2003), regarding the effective of the criminal defence in the USA.

[31] This was also provided another similar grand research project in China. See McConville *et al*. (2011):293-314.

from having manmade changes inside; third, the document on the post mortem has also been changed by the police; and fourth, there was no test of blood type of the victim. During the oral debate, the defender of the first defendant argued that the charge of the offence of theft was not admissible. Then, he pointed out that the charge of robbery was not reasonable since the two defendants stole nothing and refused to admit the crime. Furthermore, the defender attacked the police's illegal possession of evidence and extended detention of eight years. Finally, he argued that the first defendant was innocent because of unclear facts and insufficient evidence. In his view, the police losing the evidence in case meant that there was no evidence from the perspective of law. These led to further debate between the defender of the first defendant and the prosecutor.

By contrast, the defender of the second defendant, who was appointed by the court via the local legal aid centre, asked the first defendant five questions and the second defendant three questions respectively on the detailed facts of crime. Then, she stated that she held similar opinions as the defender of the first defendant when cross-examining the prosecution evidence. At the debate stage, the defender of the second defendant agreed with the prosecutor's charge in principle, but asked for a lenient punishment by insisting that the second defendant had a good attitude towards his crime and was willing to undertake civil liability although his ideology of law was poor. It was obvious that the second defendant and his defender shared quite different opinions.

The defender's opinion was not really held, as she just fulfilled her routine duty to be the defender in order to satisfy the legal requirement in this case. She did not provide any substantive help to the defendant, because she spent less time and was insufficiently prepared for the defence. Her attitude was not positive and her behaviour in court was poor. Since the defendant refused to admit his crime, how could she insistently state that the second defendant had a good attitude toward his crime? Indeed, the defender of the second defendant at the debate stage tried to impress upon the panel that the second defendant admitted the crime and accepted the punishment of law, because this was quite likely to be adopted by the judge and finally may bring factual virtues for the second defendant—the possibility of lenient sentencing. These lawyers, professional experts in criminal defence, knew that in most judges' mind, the defendant's attitude towards the crime—the confession of the crime or resistance to admit his crime, to a certain extent, can reflect his subjective evilness, personal danger and difficulties or ease in ideological reform capacity to endanger the society in future (Fan 2003). As a result, it was not surprising to see two lawyers have different opinions in one case. In other words, from this case, people can understand that the legal aid lawyers were not very responsible for the defence. This proved that the appearance of legal aid lawyers in criminal cases was on a routine basis, and the issue of money was also one of the major concerns of the legal profession. In fact, according a Chinese scholar's view, most lawyers are not so willing to engage in legal aid services in criminal cases, because the remuneration arising from such representation is very few (Lin & Liu 2014:72; Chen 2014a:103) and factually most lawyers engaged in the pro bono defence are lack of practicing skills or experiences (Chen 2014a:103). Likewise, some researches in the UK found similar problems in legal defence (McConville *et al*. 1994:46). Moreover, some Chinese researchers still criticized lawyers' professional ethics and

responsibility in the criminal defence even after the CPL reform (Gao 2012:56).[32]

4 Conclusion

As discussed above, although the rights of defenders, especially the defence lawyers, have been improved in the criminal defence in China, there is no balanced contest in the trial. The defender's role is still very limited and passive due to structural disadvantages, the difficulties in meeting the suspect, reading case files, conducting investigation and collecting evidence at the pretrial stage and the potential risks in dealing with criminal cases,[33] which hindered the criminal defence in China. Therefore, "the notion of emphasis on striking against the crime and substantive law and insufficient attention to the protection of human rights and procedural requirement and too many restrictions against lawyers practice in judicial interpretation, especially those discriminatory clauses, have seriously encumbered the enforcement of criminal defence" (Fan 2001). After the 2012 CPL reform, the pretrial evidence discovery initiated by the court or procuratorate in some places aimed to improve the trial efficiency; however, there is a risk of going through the formalities: No substantive exchange of the views on the evidence discovered at the pretrial stage or in the courtroom (Liang 2015). This may weaken the role of criminal defence in the trial.

When the defence lawyers present in the courtroom, they are seated away with the defendant, so there are no or at least very few effective, communications between the lawyers and the defendant in the court. They have routine but few communications with their clients, what they can communicate with is the incomplete case files provided by the prosecution. And what they can argue in the debate is the routine strategies for leniency argument. This kind of defence and communication before, during and after the trial cannot safeguard effective exercise of defence for the accused.

In order to improve the effectiveness of criminal defence in China, especially the communications, it is necessary for China to conduct further reforms. For instance, it should delete Articles 306 and 307 of the Criminal Law in order to remove potential professional risks for defence lawyers, increase of pretrial evidence discovery to facilitate the defence side to sufficiently obtain the case information and defence preparation. Moreover, it is important to secure effective communication between the defence lawyers and the clients before the trial. And if possible, the communication between them in the court trial should also be safeguarded, such as the sitting arrangement. In this way, the author thinks China can better protect rights of the accused in the long run.

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[32] There are various reasons for this situation in China. Apart from lack of the immunity from professional risk, low allowance for legal aid lawyers which cannot cover their real costs and insufficient staff are another two important aspects causing such a routine but ineffective practice in China. See detailed discussions in Zheng (2015).

[33] Some lawyers might be sued because of the falsification of evidence (Congressional-Executive Commission on China 2003). For detailed discussions on this, See Pils (2013:411-438); and Lan (2013:304-322). See also Guo (2013:411-448) and Li (2010).

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Yali Liang*

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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On the Legal Protection of the Urban Ethnic Minority Migrant Population as a Vulnerable Group-- Hohhot

Abstract: The ethnic minority migrant population is not only the reflection of urban and rural floating, but also the reflection of the cross-ethnic interaction. After coming to cities, many an ethnic minority migrant cannot adjust themselves in several aspects, like knowledge and skills, values, life styles, national psychology, and national customs. Moreover, they are separated from the others by the unseen frontier and estrangement. Finally, most of them couldn't get rid of poverty, and even get involved in it, turning into the social vulnerable group in cities for their missing of political and legal rights, their lacking of material and economic basis. However, protecting and relieving the social vulnerable groups is meaningful to promote the healthy development of cities and maintain the steady society as well as the essential requirements for realizing the social justice and the legal substantive justice. The author takes the ethnic minority migrant population in Hohhot, the capital city of Inner Mongolia of China as her study object, analyses them from different aspects and attempts to study the legal protection of the specific vulnerable group-the ethnic minority migrant population. The last but not the least, she offers some proposals on how to strengthen the legal protection of the ethnic minority migrant population in cities. For example, establish more specific and comprehensive legislation; abolish systematic barriers and establish social security system; improve the legal aid system and the judicial remedy procedure; strengthen humanistic concern and finally achieve educational equality.

Keywords: ethnic minority, migrant population, vulnerable groups, legal protection

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1 Introduction

According to the latest issued statistics of "Report on China's Migrant Population 2014" by China's National Population and Family Planning Commission, the current urban population proportion of China was over 50%. The migrant population size hit a new high, amounting to 245 million, in excess of 1/6 of the whole (*Report on China's Migrant Population Development* 2014). Comparing with the Han migrant population, the ethnic minority migrant population

group cannot be neglected in the huge migrant population. They dreamed to achieve prosperity when coming to cities, however, they couldn't improve their life and condition, turning into the social vulnerable group in cities for their missing of political and legal rights, their lacking of material and economic basis. The author attempts to analyze the issue on legal protection of the ethnic minority migrant population, one of the vulnerable groups, because it is not only the requirement for realizing social justice and legal substantive justice, but also the vital task to promote economy, maintain national unity and build a harmonious society.

In general, this paper consists of four parts, most of which is based on the author's studies and analysis of the urban ethnic minority migrant population mainly according to the statistics and data of Report on China's Migrant Population Development 2014 and "the Migrant Population Dynamic Monitoring Data of Hohhot (2014)" offered by Hohhot Population and Family Planning Commission. Moreover, she attempts to study the legal protection of the specific vulnerable group--the ethnic minority migrant population. Finally, she offers some proposals on how to strengthen the legal protection of the ethnic minorities migrant population in cities.

2 The Definition of the Vulnerable Groups

As WHO defines, vulnerability is the degree to which a population, individual or organization is unable to anticipate, cope with, resist and recover from the impacts of disasters. Children, pregnant women, elderly people, malnourished people, and people who are ill or immunocompromised, are particularly vulnerable when a disaster strikes, and take a relatively high share of the disease burden associated with emergencies. Poverty- and its common consequences such as malnutrition, homelessness, poor housing and destitution- is a major contributor to vulnerability. Vulnerable groups refer to those who get involved in unfavorable and difficult situation in the aspects of social status, economic income, competitive power, rights and interests maintenance, needing support and help from the state and the society (Wang 2012). The author thinks vulnerable groups refer to those who are restricted by kinds of objective conditions, missing social resources occupancy, lacking competitive ability for existence, unable to gain favorable job opportunity, thus they have low income, unable to get rid of poverty and meanwhile lack of the ability to resist the impacts of disasters, impossible to improve their living conditions by themselves, and situated in the disadvantaged situation in economy, politics, culture and psychology.

There should be some reference objects as standards to define "vulnerable groups", because "they are dynamic groups whose concept and scope will be varied by kinds of different objective conditions"(Sha 2013). As for the transforming period of society in China, the vulnerable groups show the following features when comparing with the common groups:

(1) They are pressed for money and living in poverty. The vulnerable groups are the economically low-income ones whose income is much lower than the social per-capita income. They even live under the poverty line. Poverty is the most fundamental contributor to the common features of the vulnerable groups in living quality and bearing capacity (Adili·Maimaiti, Wushouer·Maimaiti 2010).

(2) They are powerless in political influence and social competition. "The economic base determines the superstructure." Therefore, poor in economy makes the vulnerable groups in the

bottom of social stratification system, having little opportunity to participate politics, even unable to lay down public policies in favor of their own interests. In other word, the vulnerable groups can hardly get rid of poverty and shift for themselves only by their own strength (Li 2013).

(3) Their basic rights are commonly overlooked and they have little consciousness and ability to protect their own rights. Since the existing legal system is lagging behind, and the vulnerable groups have little knowledge and social resources, they should have enjoyed the rights of equality, liberty, political rights, educational rights and the other basic rights as the equal member of the Chinese society. However, their basic rights are not guaranteed but even deprived. What's worse, with little right-protection awareness and ability to safeguard the legal rights and interests of their own, most of the vulnerable groups have to suffer helplessly, resist silently under most circumstances of infringement or accident. Even though some of them will safeguard their legal rights by legal means, it's difficult and bumpy, so much so that in China, the vulnerable groups are commonly situated in "Six Problems"(Liu 2012) at present--employment problem, living problem, housing problem, health care problem, educational problem and legal assistance problem. "Once they encounter serious diseases or other disasters, hardly can they anticipate, cope with, resist or recover from the impacts of the disasters"(Liu 2012).

3 The Research and Analysis on the Investigation from Hohhot Population and Family Planning Commission

3.1 The Investigation and the Questionnaires

The author learned from Hohhot Population and Family Planning Commission that by the end of 2014, 100 dynamic sample points of migrant population had been built in Hohhot which had been included into the 106 monitored cities in China, and the migrant population of Hohhot was amount to 634,000.43 With great efforts, the staff members of Hohhot Population and Family Planning Commission sent out 2000 questionnaires in 2014 with the error rate only 2.8%.44

Generally speaking, the investigation was about the basic information, employment, income and expenditure, health care, and marital status in order to learn the existing and developing status of migrant population in Hohhot by the end of 2014, so that the government will establish related policies and improve their work continuously to offer better service for the migrant population.

The author will attach her importance particularly to the ethnic minority migrant population among the whole migrant population in Hohhot. According to the data displayed in the surveys for the reference year of 2014, 418 of the 2000 respondents were the ethnic minority migrants, accounted for 20.9%, including Mongolian (303, 72.5%), Manchu (45, 10.8%), Hui nationality (39, 9.3%), Daur (3, 0.7%), Ewenki (2, 0.5%), Oroqen(1,0.2%) and uygur (25, 6%).45 Among the ethnic minority migrant population in Hohhot, 102 of them moved from the

[43] See the news of "the Information about the establishment of the migrant population dynamic monitoring points"available at http://www.saibeinews.com. (Last visit at 26 July, 2015).

[44] My research of the surveys is based on the statistics and results of the questionnaires and investigations of the "Migrant Population Dynamic Monitoring Administrative System" available at http://www.ldrk.net.cn. (Last visit at 29 July, 2015).

[45] See the data available at http://www.ldrk.net.cn. (Last visit at 29 July, 2015).

other provinces or autonomous regions, the others moved within Inner Mongolia Autonomous Region. Because Hohhot is the capital city of Inner Mongolia Autonomous Region-- the ethnic area, the percentage of the ethnic minority migrant population was much higher than the average figure 4.6% of the whole nation (*Report on China's Migrant Population Development* 2014).

According to the statistics for the reference year of 2014, the average age of the working-age population (16-59 years old) of the 418 ethnic minority migrants was 34.6 years old; the male ones (217) accounted for 51.9%, and the female ones (201) accounted for 48.1%. 15 ethnic minority migrants (3.6%) received college or higher education; 86 of them (20.6%) received high school's (including vocational high school's or technical secondary school's) education; 162 of them (38.8%) received junior middle school's education; 133 of them (31.8%) received primary school's education; 22 of them (5.3%) were illiterates; and the average years of receiving education were 9.5 years.46

3.2 The Ethnic Minority Migrant Population in Hohhot from Different Aspects

3.2.1 Employment, Income and Expenditure

Firstly, the employment rate of the ethnic minority migrant population was 89.8%, unemployment rate was 1.6%, and household working rate was 8.6%; male employment rate was 97.2%, and female employment rate was 80.8% in 2014. Comparing with the Han migrant population who concentrated in manufacturing industry, wholesale and retail industry, lodging and catering industry, social service industry and construction industry, the ethnic minority migrant population has its own employment features. According to the surveys in 2014, apart from the traditional industries, most of the respondents were occupied in ethnic catering services (26%), ethnic foods businesses (16%), and ethnic small commodities businesses (12%).47

Secondly, as far as economic income is concerned, the average monthly income of the ethnic minority migrant population in Hohhot was 2619 yuan/month in 2014, lower than the notional average by about 20%, which was 3287 yuan/month. Actually, half of the population's average monthly income was lower than 2000 yuan.48 In general terms, the average income of the ethnic minority population was much lower than the permanent urban residents in Hohhot, whose average income was 4499 yuan/month in 2014.49

Thirdly, as to expenditure, the consumption pattern of the ethnic minorities migrant population was quite different from the citizens. As the surveys display, their consumer orientation in 2014 was: purchasing necessities (48%), building houses in hometown (12%), affording to pay school fees (12%), getting married (10%), purchasing agricultural tools (8%), etc.50

3.2.2 Living Mode and Social Insurance

Among the ethnic minority migrant population in Hohhot, 65.1% of them were renting privately, 23.2% of them built or purchased their own houses, 10.7% of them were living in the dormitories or apartments offered by the employers, and 1% of them were living in their

[46] See the data available at http://www.ldrk.net.cn. (Last visit at 29 July, 2015).
[47] See the data available at http://www.ldrk.net.cn. (Last visit at 29 July, 2015).
[48] See the data available at http://www.ldrk.net.cn. (Last visit at 29 July, 2015).
[49] See the news of "the average monthly income in the main cities of China 2014" available at http://www.sina.com.cn (Last visit at 29 July, 2015).
[50] See the data available at http://www.ldrk.net.cn. (Last visit at 29 July, 2015).

working places or other informal residence buildings in 2014.51 What's more, most of them lived in semi-urban areas or county-suburban villages practically without separate bathing facilities, kitchen facilities or separate tap-water vessels.

With respect to social insurance, in 2014, more than half of the ethnic minority migrant population had no access to social insurance coverage, accounted for 56.2%, and the others (43.8%) attended at least one of the social insurances (including endowment insurance, medical insurance, industrial injury insurance, unemployment insurance and maternity insurance).52

4 Causes of Ethnic Minority Migrant Population to Fall into One of the Vulnerable Groups

Migrant population in China refers to the ones who leave their constant registered permanent places without changing their residency status in a given period (usually one year) and live in another administrative region temporarily (Liu 2012).

The ethnic minority migrant population refers to the ethnic minority members who are engaged in economic and professional activities spontaneously in order to make a living in cities and become the temporary resident population. In other word, they are the ethnic minorities who are engaged in various kinds of economic, cultural activities without urban registered permanent residence (Chen 1991). From the surveys displayed above, we can see clearly that when most of the ethnic minority migrant population came from their own minority regions to cities, with little knowledge and few skills, they could only work on some fields of high labor intensity, low income, such as physical laboring, catering service and small commodities businesses. They live in poverty, and their legal rights cannot be guaranteed. What's worse, under the kinds of social exclusion from state system and cities, they have gradually become the "urban marginal man". The ethnic minority migrant population has all the above features and plights of the vulnerable groups (Du 2011).

Besides, comparing with the permanent resident population and the Han migrant population, the ethnic minority migrant population is quite different and deficient in culture, education, language communication, custom, and the like when coming to cities according to the above analysis of the investigation. In contrast to cities, most of the places of their previous residence, with low social level of development, have harsh natural conditions. The ethnic minority migrant population, with distinct living orders and habits, is difficult to adapt itself to the new environment. Moreover, in many places of China, the unique ethnic religious beliefs and customs of the ethnic minorities are hardly known or acknowledged to most people who even misunderstand, despise and repel them, which makes it more difficult for the ethnic minority migrant population to be approved and get involved in cities.

"The imbalance resulted in the forming and existing of the vulnerable groups during the period of social transition, but if there have been vulnerable groups with deep gap for a long time, it's very easy to induce various kinds of social problems which will cause serious social crisis, and what's worse, it will severely decrease the sustainable power of the social economic development and greatly increase the development cost of the social reform"(Shen 2002). Due to the above factors, the urban ethnic minority migrant population belongs to category of the

[51] See the data available at http://www.ldrk.net.cn. (Last visit at 29 July, 2015).
[52] See the data available at http://www.ldrk.net.cn. (Last visit at 29 July, 2015).

vulnerable groups during the transforming of society in China, and it will directly impact on the national unity, social solidarity and prosperity among all the nationalities in China with large population and many nationalities. Hence, it's necessary to protect the legal rights of the ethnic minority migrant population effectively.

5 Strengthening Legal Protection of the Urban Ethnic Minority Migrant Population as a Vulnerable Group

5.1 More Specific and Comprehensive Legislation

5.1.1 Legal Practice on Protecting Vulnerable Groups in Foreign Countries

It has been one of the most important principle in legislation to protect the rights of the vulnerable groups in many countries. At present, most countries have formed their own legal system to protect the rights of the vulnerable groups, which is based on the constitution, mainly depending on the specialized laws and aided by civil law, criminal law and other related laws.

There are special regulations of protecting the rights of the vulnerable groups in the constitutions and constitutional documents of almost all the countries. The constitution of a country is the fundamental law which has the supreme legal authority; however, the concrete implement should be relied on the detailed regulations in some specialized laws. Therefore, various of laws on protecting the rights of the vulnerable groups were established in many countries.

From the achievements in legislation of the foreign countries, we can learn at least three revelations for the protecting of the vulnerable groups in China. First of all, comprehensive laws should be established, including the articles in the fundamental laws and also the specialized laws. Second, the regulations should be specific and operable. Third, there should be regulations about remedy by someone-self which is of great importance in legal practice.

5.1.2 Legislative Situation in China

In China, there are three specialized laws based on the Constitution to protect the rights of the vulnerable groups, which have played very important part in Chinese legal system. However, they cannot adapt to the new situations as time goes by. Though Law on the Protection of the Handicapped of People's Republic of China, Law on the Protection of the Juveniles of People's Republic of China, Law on the Protection of Women's Rights and Interests of People's Republic of China have played a vital role in protecting the equal rights, legal rights and special rights for the three specific vulnerable groups, the regulations of these three specialized laws have lagged behind the objective needs of the vulnerable groups.

In addition, vulnerable groups are not only in existence objectively, they are becoming more and more, so that the shortage in legal system and the difficulties in carrying out laws are always the most serious problems in protecting the rights and interests of the vulnerable groups. As is mentioned above, the disabled, the elderly, children, women are the acknowledged vulnerable groups. But in fact, in the modern Chinese society, the numerous peasants, the poor unemployed urban citizens, the migrant workers from the rural areas and occupied in dangerous positions, the impoverished college students and also the urban ethnic minority migrant population mentioned here should be classified into the vulnerable groups whose legal rights and interests ought to be guaranteed by laws.

When it comes to the urban ethnic minority migrant population, it should be known that Chinese ethnic group affairs are always one of the most important affairs and are paid great attentions by the Party and the government, which will affect the whole nation's development and stability, so no matter in the Constitution of the People's Republic of China, or in the Civil Procedure Law of the People's Republic of China, or in the Criminal Procedure Law of the People's Republic of China, Law the People's Republic of China on Regional National Autonomy, etc, their are special rules to protect the rights and interests of the ethnic minorities. For example, "The organs of self-government of national autonomous areas shall guarantee the freedom of the nationalities in these areas to use and develop their own spoken and written languages and their freedom to preserve or reform their own folkways and customs.""The organs of self-government of national autonomous areas shall guarantee the freedom of religious belief to citizens of the various nationalities." However, when viewing the special law Regulations on Legal Aid of PRC, we find that legal aid for the ethnic minorities hasn't mentioned at all. Indeed, it's impossible to stipulate the ethnic group affairs in any rules and regulations;but there should be some articles in the Regulations on Legal Aid at least. Because the aim of legal aid is to offer free legal service for the vulnerable groups, balance both sides in the lawsuit, safeguard fairness and justice. And ethnic minorities, part of the vulnerable groups, are not mentioned, let alone the urban ethnic minority migrants.

In Inner Mongolia Autonomous Region of PRC, the legislation about the vulnerable groups is lagging behind, the laws are not comprehensive, making it difficult for the government to solve the problems with effective legal support to protect the legal rights and interests of the vulnerable groups. For example, Social Insurance Law of PRC was issued in 2011, which is the milestone in the legal history of social insurance in China. Then the government of Inner Mongolia Autonomous Region drafted and issued some supporting policies, which offered legal basis for the social security work. Yet, there are still many other aspects without specific laws. So much so that, without effective legal force, numerous social security work can be carried out only by political and administrative ways, weakening the government power to protect the rights and interests of the vulnerable groups. And being encountered such cased, they are not likely to solve the problems by the legal way for its high cost, forming a vicious circle. Therefore, only by more specific and comprehensive legislation, the specific problems of the vulnerable groups can be solved and the problems of urban ethnic minority migrant can be settled effectively.

5.2 Legislative Suggestion

As far as protecting the rights and interests of vulnerable groups is concerned, the Chinese government has relied heavily on some policies and administrative rules and regulations issued by some national relevant leading departments, relatively ignoring the strict scientific legislation,which goes against the national legal construction on the long run and also against the legal obligation. Since the Chinese reform and opening-up policy, labor and social security and other public social policies which have been proved by practice should be upgraded and turned into national laws.

On the basis of sufficient feasibility studies, establishing uniform code on the protecting of the vulnerable groups will be the legislation core on the long run. By doing so, all the details and systems of protecting the rights and interests of the vulnerable groups will be included.

Additionally, it is also effective to improve the current laws and issue new specialized laws from the perspective of practical needs,legislative conditions and implementable conditions.

Firstly, the proved effective way, special legislation can be adopted, such as Law on the Protection of the Handicapped of People's Republic of China, Law on the Protection of the Juveniles of People's Republic of China, Law on the Protection of Women's Rights and Interests of People's Republic of China. Secondly, attached legislation can also be used. For example, some chapters and articles can be regulated in the Enterprise Law to protect the rights of the poor workers and the like. Thirdly, improve the current specialized laws, making them meeting the current needs.

In conclusion, although there has been a great number of laws and regulations to protect the interests of the vulnerable groups whether from central government or to local governments in China, there are still some legislative issues to be discussed because the legislative techniques and laws are lagging behind. For instance, the scope of the applicable objects in legal provisions cannot entirely accord with the reality during the transforming period of society in China, the enormous new born migrant workers, laid-off workers, the unemployed and migrant people are not included into the scope; the relevant rules and regulations about the protection of the vulnerable people in laws are rather indistinct and abstract; and what's more, the articles about the legal liability to infringe the rights and interests of the vulnerable groups and its investigation system are really not enough, so much so that it's very difficult for the vulnerable groups to protect their rights and interests by the legal way for the lacking of relevant laws, non-strict investigation.

According to the above analysis, the author thinks that the first thing to do to protect the rights and interests of the vulnerable people is improving the relevant regulations in law. By means of legislation, it's necessary to further improve the social security system, judicial remedy procedure, legal aid system; and moreover, to enact specialized laws for different vulnerable groups pointedly; and finally, to resolve the problems of household registration system, political participation, social security, labor employment, income distribution and some other living problems which are closely bound up to the vulnerable groups rationally and effectively. In addition, it's essential to specify the regulations legally in the confirmation and investigation of legal liability when dealing with the encroaching on the rights and interests of the vulnerable groups in the judicial practice in order that the laws will be more operable and practical and it's possible to protect the legal rights and interests of the vulnerable groups from both in entity and procedure totally. It's also necessary to add some more specific and egocentric rights to the ethnic minority migrants according to their regional features and ethnic customs, making their rational religious beliefs, national customs guaranteed via legislation. Only in this way will the rejection and discrimination from the public be gradually eliminated, and the implicit legal justice be shown, and consequently, their basic legal rights and interests will be truly realized.

5.2 Systematic Barriers and Social Security System

5.2.1 The Necessity to Abolish Systematic Barriers

In China, influenced by the traditional feudal conception and national customs, and besides, restricted by the current dualistic urban and rural residence registration system, there has been kinds of discrimination and inequality in e.g. identity, ownership, and census registration for a

long time. When the ethnic minority migrant population coming to cities, the adult laborers will be limited by various kinds of restrictions on account of the household registration system. As a result, they cannot access the main labor market in cities, and it's impossible for them to gain equal employment opportunity. On the other hand, as to the juvenile, it's difficult for them to receive compulsory education from the urban public school due to the same reason. Without permanent urban residence certificate, they are unable to enjoy other social security and public welfare. In order to safeguard the vulnerable groups like the urban ethnic minorities migrant population, it's essential to abolish the restrictions of the administrative laws and regulations, remove the urban and rural barriers, making them enjoy the equal citizen treatment as the others.

5.2.2 The Necessity to Establish Social Security System

The basic solution to realizing social substantial fairness and justice and protecting the vulnerable groups is to establish a sound comprehensive social security system. In these years, the Party and the government have paid great attention to it, and the basic framework of the social security system has been established, covering increasing number of population. In terms of the vulnerable groups represented by the urban ethnic minority migrant population, the social security system should be further improved as follows:

1 Enlarge the application scope of the social security system, and establish favorable policies for the vulnerable groups like the ethnic minority migrant population.

2 Increase social assistance, providing the urban ethnic minority migrant population with the basic cost of living allowances, low-cost housing, low-price health care and the like, so as to offer the social assistance all around.

3 Improve the social insurance legal system, especially the basic endowment insurance, medical insurance, industrial injury insurance, unemployment insurance and maternity insurance, and establish the multi-layered social insurance system.53

5.2.3 Concrete Suggestion

1. Promote the legalization of the right to social security of the urban ethnic minority migrant population by legislation. At present, the protection of the right to social security of the urban ethnic minority migrant population is always political regulation without operability and the issued Social Security Law is directed at the urban residents. In some ways, there has been no legislation of the right to social security of the urban ethnic minority population in China. The legislative gap will cause great harm to their legal rights and interests. Therefore, we should make every effort to put the policies into practice to protect the rights of the urban ethnic minority migrant population effectively. In terms of specific operation, we should combine the features of the urban ethnic minority migrant population with some other factors to improve the quality of legislation. For instance, the jobs engaged by the urban ethnic minority migrant population are always the flexible ones with unstable incomes, so it should be considered when setting the social security fees. Such legislation combining with the real life of the urban ethnic minority migrant population will make the right to social security turning from idealistic right to actual right.

2. Weaken the effect of the household registration system on the social security system of the urban ethnic minority migrant population. The most outstanding feature of Chinese household registration system is to divide the census registration into two strata, urban and rural

[53] Adili • Maimaiti, Wushouer • Maimaiti, *The Exploration and Analysis on the Legal Protection of the Vulnerable Population During the Transforming Period of Society*, *Exploration and Contending*, December 2010, p. 23.

according to living basis and family member relationship. The Chinese social security system is also taking on the feature of urban and rural separation affected by the household registration system, seriously preventing the urban ethnic minority migrant population from the rural areas against realizing their right to social security. Therefore, we should weaken the effect of the household registration system on the social security system of the urban ethnic minority migrant population, bringing them into the urban social security system together with the urban residents. Meanwhile, we should balance the unfair distribution of social security fund caused by the household registration system in order to make sure the urban ethnic minority migrant population enjoy equal social security with the urban residents.

3. Establish the inter-provincial system of social security for the urban ethnic minority population. Because of the high population mobility of the urban ethnic minority migrant population, we should establish inter-provincial system of social security to guarantee the the relation metastasis of social security can be transferred when they go to the working places or come back to their hometown. Only in this way can the urban ethnic minority migrant population realize their right to social security at any time and under any circumstance.

4. Classify the urban ethnic minority migrant population when managing the right to social security. One the one hand, for the ones who have got stable work and lived in the cities for at least one year, we should incorporate them into the urban social security system and offer them equal treatment with the urban residents; at the same time, we should also make sure that their social security relations can be transferred in the national wide. On the other hand, for the ones who haven't got stable work, we should establish the social security accounts for them according to their identity, and make sure the accounts can be circulated in the national wide.

5.3 Sound Judicial Remedy Procedure and Perfect Legal Aid System

5.3.1 Present Situation and Difficulties

We should advance the actual level of the law enforcement effectively in order to help the vulnerable groups obtain corresponding remedy and help when their rights and interests are encroached. In particular, it's difficult for the urban ethnic minority migrant population to safeguard their legal rights due to their low degree of education, low level of ideology and tight budget. Furthermore, they are also restricted by the other factors like language difficulties or different religious beliefs. All these reasons made the safeguarding of their legal rights deprived or encroached again. Despite of the rules and regulations about protecting the rights and interests of the vulnerable groups in judicial practice, they are general and they don't have the nature of operation in practice, so much so that the weak cannot receive true legal remedy when their rights are encroached.

According to the author's investigation of the urban ethnic minority migrant population in Hohhot, most of them have little legal knowledge, and what's worse, some of them cannot speak Mandarin fluently, which make it difficult for them to understand and apply laws. In other words, lacking of legal knowledge means their lacking of ability when they participate in litigation. If this defect cannot be made up by legislation correspondingly, especially the legislation on legal aid, it is impossible for the urban ethnic minority migrant to achieve effective legal aid in practice. Hence, under the circumstances of considering the Chinese ethnic minorities sufficiently, the rational choice in legislation on legal aid is to incorporate them into the

covering of the legal aid object. Besides, the legislator should view religious beliefs and customs as the practical conditions in minority areas. In Inner Mongolia Automonous Region of PRC, most of the mongolians and other ethnic minorities believe Tibetan Buddhism or Shamanism which religious doctrines have been blended in their culture and life. Profoundly influenced by these religions, they act in accordance with the true, the good and the beautiful. However, this influence has its negative aspect: they view religious rules, etiquette patterns as their acting standard, ignoring laws instead. To great extent, with dim legal awareness, little legal knowledge, the ethnic minorities have belonged the vulnerable groups in the legal level. This objective case has existed and will exist for a long time. Correspondingly, it is the legislator that will offer some help both in legislation and litigation, making them enjoy similar rights and resources as the normal people in society and safeguard their own rights by means of laws.

5.3.2 Some Solutions to the Problems

According to the above, the legal aid system should be improved and perfected based on the Regulations of Legal Aid, and the legal aid resources should be developed widely. Additionally, we should give more humanistic concern to the urban ethnic minority migrant population as well as offer them language translation, popular legal culture and other legal aids in order to safeguard the rights and interests of the vulnerable groups. Besides, the related institutions and organizations should strengthen the judicial oversight, supervise if the basic human rights of the vulnerable groups like the urban ethnic minority migrant population are guaranteed by all means, and make great efforts to strengthen legal publicity in order that the public will pay close attention to the basic human rights of the vulnerable groups, and the ideas of equality and justice will take deep roots in the public's minds.

To be in details, firstly, we should improve the operability of laws and legal awareness of the vulnerable groups. It is not only the government implement but also the participating willing of vulnerable groups that make laws practicable. So it is vital for the vulnerable groups to improve their legal awareness in order that they can safeguard their own legal rights and interests by means of laws. The government should make use of newspaper, television and internet to spread legal knowledge, and make efforts to answer the legal questions from the assisted people-the disabled, the aged, the households enjoying the five guarantees, the low-income group, migrant workers-on Legal Publicity Day.

We should adjust the working conditions according to the changes of laws as soon as possible. Through the detailed rules and rugulations, matched enforcement regulations, we should improve the social security system of vulnerable groups, applying the social security more operable.

Secondly, we should strengthen the enforcement of legal aid. Legal aid has become a very important means to popularize legal knowledge in China. The legal aid organization guided by government offers legal service to the vulnerable groups freely and at the same time improves their legal awareness. It's true that legal aid organizations are guided by government and offer free legal service to vulnerable groups, however, in minority areas the covering of legal aid is not wide, and the force is not intense. Hence, the legal culture of "disgust to litigation"is very prevailing among vulnerable groups in minority areas. When their rights and interests are encroached, they won't choose the legal way to solve the problems. For these reasons, the government should enlarge the force of legal aid and increase the financial investment to make sure the legal aid work can be carried out smoothly. With professional and theoretical training,

the personnl's quality of legal aid will be improved, the new wording methods will be created, the quality and level of legal aid will be improved. The government should take on its due responsibilities to realize the judicial justice and equality of the vulnerable groups.

5.4 Humanistic Concern, and Pushing the Publicity and Leading Work Forward

5.4.1 Strengthening Humanistic Concern

The state and government, especially the related urban functional department should attach more macro control and administration from the angle of humanistic concern to the urban ethnic minority migrant population. They should make efforts to eliminate prejudice and discrimination, comprehend and respect their ethnic religious beliefs and customs, and bring them into the urban fundamental management and service system, making them fully enjoy the citizen treatment but not marginalized. They should also make every effort to offer them more employment training, work on their skill training, and improve their employment competitiveness. In the meantime, urge the employers within the administrative areas to create more occupations for the ethnic minority migrant population, and what's more, facilitate them to find employment depending on their own ethnic culture and ethnic identity.

In addition, the government and the related urban functional department should do better publicity and leading work to promote the inter-communication between the urban residents and the ethnic minority migrant population, in order that the public will realize that the Chinese culture contains the ethnic cultures which are all excellent and glorious. Besides, they have got the same legal rights and interests as the common urban residents. We should seek common points while reserving difference, respect one another, bridge the gap, eliminate discrimination, and admit them into cities as far as possible. Only in this way can the ethnic minority migrant population have the sense of belonging and the sense of approval, making the traditional ethnic cultures brought by them and the modern urban civilization develop harmoniously; intensify the positive effect they brought to cities, making them blend in the urban life as quickly as possible, which will safeguard their legal rights and interests better (Li 2010).

5.4.2 Some Concrete Solutions

Firstly, reinforce the publicity of the rules and regulations of the social security system to the urban ethnic minority migrant population, helping them build up correct law conception of social security. We should spread the knowledge of social security laws to the urban ethnic minority migrant population working in big cities and make them know they have enjoyed the help offered by government with the urban residents equally. What's more, they should know under what circumstances they can enjoy the corresponding social security and in what way they can enjoy the rights practically. Meanwhile, under the leading of the equality conception of social security, the urban ethnic minority migrant population will improve their right-protection awareness actively, and participate in social security positively.

Secondly, right to social security is a right a equality in the modern society. The urban ethnic minority migrant population as one member of the modern society should equally enjoy this right and cannot be treated differently due to their own nationalities, religious beliefs, census registration and so on. Therefore, in real life, we should eliminate discrimination to the urban ethic minority migrant population and improve their unequal situation caused by their nationalities and census registration. We should grant equal civil treatment to the urban ethnic

minority migrant population according to the right to social security endowed by the Constitution, and rescue them from the awkward identity caused by the political census registration.

Thirdly, we should establish correct equal conception of social security because it is the basic responsibility for both the nation and the society to realize the right to social security of the urban ethnic minority migrant population. It is a symbol for an individual in a modern civilized society to have the right to social security; moreover, it is a basic responsibility for people in modern civilized society to make a living with dignity. The urban ethnic minority migrant population as citizen in Chinese society should have the same rights to perform the same responsibility as the urban residents. The government, the performer should perform their responsibility to help the ethnic minority migrant population realize their right to social security no matter whether they have made the pledge to do so or not. In the process of concrete operation, the relevant departments in governments shouldn't shirk their responsibility for they haven't made a pledge; instead, they should help solve the problems about the right to social security of the ethnic minority migrant population, and help them realize the right to social security equally.

5.5 Educational Equality, and Improving the Cultural Quality and Professional Skills

As previously mentioned, the ethnic minority migrant population coming from the ethnic minority areas are unable to obtain preferable employment opportunities when coming to cities due to lacking of educational resources, cultural knowledge and professional skills. Living in the bottom of the urban society is one of the most important reasons that they belong to the category of the vulnerable groups. Thus, enhancing the scientific and cultural level and living skills of the ethnic minority migrant population and improving their qualities all around are the foundation for them to get rid of poverty and change their weak position thoroughly. In consequence, we should strive to develop the cultural and educational programs and improve their qualities in the ethnic minority areas which are output areas of the ethnic minority migrant population (Tang 2009). Meanwhile, we should also carry out all kinds of adult vocational education and training, improve their professional skills and advance their capacity and strength in urban employment according to local conditions.

5.5.1 The Present Situation of Human Capital

When coming to big cities, the urban ethnic minority migrant population has limitations of human capital. Human capital is really a necessary factor for an individual to adapt to the transition of the economic society, and the quality of the human capital will have direct impacts on whether the urban ethnic minority migrant can adapt themselves to big cities and how they can adapt to the new situation. In the aspect of the channel of employment, there have been invisibility and uncertainty of information in market economy. If the ethnic minority migrant population has high educational level, rich working experience, better network awareness and sound information technology, they can be employed very well by means of modern media, save much information expense, expand acquisition space and capacity of employment information and shorten the employment period. With low quality of human capital, the ethnic minority migrant population will be less competitive even in the vulnerable groups. It's difficult for them to compete with the urban residents with high quality of human capital, and what's worse, it's

even difficult for them to compete with the urban laid-off workers. Therefore, the majority of them choose to work in the labor concentrated industries. In the aspect of safeguarding their rights, if the ethnic minority migrants have high quality of human capital, they will have strong legal awareness to safeguard their rights. They can reach relevant employment agreement or contact, or safeguard their own rights by means of legal operable ways. In the aspect of their lifestyle, the ethnic minority migrant population with high quality of human capital will adapt themselves very quickly and finally blend in the urban life.

Because the fiscal expenditure of education is limited in China, and the investment channel of educational fund is simple, the investment in educational training in the underdevelopment ethnic minority areas is much lower than the national and eastern coastal areas. There has been a culture consciousness of taking no count of cultural education for a long time. They can make a living by small businesses without too much education. There has been a "culture discomfort"in school education: the traditional education mode is lacking of national characteristics both in the contents of courses and curriculum provision, which makes it difficult to be jointed with the ethnic minority education. The children of the ethnic minority migrants are not interested in school education and escape school or even drop off school. All of these made the urban ethnic minority migrant population invest in the quality of human capital less and less and finally form a vicious circle.

5.5.2 Some Concrete Measures

There are some concrete measures to improve the quality of the human capital for the urban ethnic minority migrant population. First, we should focus on advance their productive skills. In detail, we should positively develop the rural professional education and adult education in the ethnic minority areas, and strengthen the on-the-job training, vocational training and career training. Besides, we should combine the unused educational resources with the accumulation work of human capital in the ethnic minority countrysides and pasturing areas. Second, we should also carry forward the spirit of advocating knowledge in the traditional culture and religious belief of the ethnic minorities. Thirdly, we should reform school education in the aspects of curriculum and contents of courses, establishing distinct education mode for the ethnic minorities. The last but not the least, we should improve their mental adaptive ability and gradually change their modes of living, producing and existing, and finally blend in the urban life.

6 Conclusions

Although the existing of vulnerable groups are the universal phenomenon in any society or in any age, the urban ethnic minority migrant population as a particular one of the vulnerable groups is deeply ironed by the era of the transformation period of society in China. The realization of their legal rights and interests is not only the important components in building a harmonious socialist society but also the essential realistic problems in maintaining the development and stabilization of the modern cities of our society, and even has great impact on the peace and prosperity as well as the ethnic unity. We certainly have reasons to believe that with the strengthening and perfecting of Chinese legal system, with the further reforms and with the sustained and stable economic development, various methods of protecting the rights and interests of the urban ethnic minority migrant population will be more institutionalized and

normalized. And finally, the difficulties and problems of the vulnerable groups will be solved and the social development achievement will be equally shared by all citizens.

The Chinese government always attaches great importance to the ethnic minority issues, and the urban ethnic minority migrant population as one of the vulnerable groups should be specially protected by laws. However, in legal practice, it's quite difficult for them to seek legal aid by means of law. Not only in legislation but also in litigation, they are not likely to protect their legal rights and interests. To solve all these problems, there is a long way to go for the Chinese legal scholars, lawyers as well as Chinese government to help them realize their legal rights and achieve real justice.

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