Observations and Reflections on Evidence Discovery in China
--Based on Pilot Activities in some Local Courts and Procuratorates
对中国“证据开示”试点的观察与思考

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1. Introduction

- 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. Among them, two models are more representative:

- Haidian District Procuratorate of Beijing worked with Beijing Lawyers’ Association to develop the Rules of Evidence Discovery in July 2003 (hereinafter called “Haidian Mode”).

- 随着最近两次的刑事诉讼法修改，中国各地出现了不少刑事“证据开示”试点。其中典型的有：

- 2003年北京市海淀区检察院制定的《证据开示规则》（“海检模式”）
2004年底由人大陈卫东教授负责指导，寿光市委政法委组织协调，法院牵头，与寿光市检察院、司法局以及当地一部分律师事务所一起制定的《刑事案件证据开示操作规程》。以法官助理主持下的证据开示试点叫“寿光模式”。

Renmin University of China and Shouguang Political-legal Committee of Shandong Province took the initiative and worked with 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* ("Shouguang Mode").
II. Analysis (I): Positive aspects

对试点的分析：积极意义

- 客观而言，规范而严谨的庭前“证据开示”的确具有可取之处，而最主要的优点：
- 1. 能够保障犯罪嫌疑人、被告人对指控证据等信息的知情权，而知情权的实现又为其在庭审中有效地行使质证权和辩护权提供了有利条件。
- 2. “证据开示”客观上有可能提高庭审的效率、节约司法资源。

- Objectively speaking, standardized and rigorous pretrial evidence discovery does have its merits.
- 1. The right to information will secure the defense' effective exercise the right to cross-examine and defense in the trial.
- 2. It helps to save the effectiveness of the trial and judicial resources.
3. 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 provide 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.
Analysis (II): Defects of the evidence discovery pilots

- 1. Rules in every pilot vary and stark contrast of the quality may cause miscarriage of justice in judicial practice.
- 2. Pretrial evidence discovery greatly reduces the openness of the trial since only the parties and witnesses will attend such discovery process.

- 1. 各地试点规则各异，质量良莠不齐易导致司法不公。
- 2. “证据开示”使庭审的公开性大为降低，甚至有可能使法机关借此回避社会公众对敏感案件的关注。
3. 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.

4. The main function or 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.
Comments based on personal experience
基于个人辩护经验的评论

- 在笔者担任辩护的一些案件中，法院存在的误区之一就是以审前“证据开示”代替或省略了庭审中的证据出示、辨认、质证和调查等环节。
- 这样的做法实际上是违法的。因为中国的刑事诉讼法要求，只有经过法庭质证并且合法的证据才能作为判案根据。
- One misunderstanding is that the judge often replaced or omitted the steps of evidence production, cross-examination and even debate on the legality and relevance of the evidence.
- Illegal, as 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.
• Four values of the evidence: (1) Procedural fairness; (2) truth finding; (3) protection of human rights; and (4) efficiency.
• But in practice, the pilot court often reduced or even omitted 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.

• Evidence has four values: procedural fairness, discovery of truth, protection of human rights, and efficiency.
• However, in practice, these pilot courts often reduced or even omitted some proceedings, especially evidence production and cross-examination at the investigation stage.
• Such practices may help improve the efficiency of the criminal procedure, but they may also risk endangering the defence's right to defence and thus the fairness of the trial.
结语 Conclusions

- 刑事诉讼的举证责任分配赋予了控方证明被告人有罪的义务。
- 这同时也决定了控辩双方权利与义务的不对等。
- 根据本文的分析，我认为中国应该对证据开示试点持慎重的态度。

- The theory of burden of proof in the criminal procedure imposes the prosecution the obligation of proving guilt of the accused, which determines non-symmetry of the rights and obligations on the burden of proof.
- Based on the analysis above, the pilots on evidence discovery should be treated cautiously.
• We should follow the procedural requirements by law to secure the defendant/defence lawyer’s right to defence and cross-examine and safeguard human right of the accused in the criminal trial.

• Essence is more important than the formality.

• 无论采取那一种证据展示形式，其核心要求在于严格执行法律规定，保证辩方的辩护权、质证权，从而更好地保护被告人和犯罪嫌疑人的权利。

• 从这一点讲，实质要胜于形式。
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