A False Promise of Fair Trials: A Case Study of China’s Malleable Criminal Procedure Law

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[Abstract] China revised its Criminal Procedure Law in 1996, adopted an adversarial-style trial model, and granted remarkable procedural safeguards to the accused. Many have been tempted to conclude that this new law is capable of ensuring fair trials for criminal defendants and thus could improve China’s record of human rights protection.

In this article, I argue that despite some progresses in formality, the new law is poorly implemented in practice and fails to fulfill its promise of fair trials. I examine two high-profile cases in detail to demonstrate how procedural safeguards prescribed by the new law are frequently manipulated by judges, either to pursue efficiency and convenience, or to accommodate outside influences, such as political concerns, public outrage, personal friendship, or even bribes. Through these manipulations, the essence of fair trials is largely missing, while wrongful verdicts, including false conviction or acquittal, and disproportionate sentences, are likely to be produced at the interferer’s will.

I do not deny the reality that many of these problems are caused by institutional flaws in China’s criminal justice system, particularly the absence of a responsible judiciary. However, instead of pinning hopes on an unrealistic constitutional reform, I propose a technical approach, which focuses on restructuring the new law to make criminal trials less vulnerable against manipulations and interferences. This technical solution, in routine cases at least, would ensure a fair trial relying on the procedure itself, rather than on unreliable judges.

Introduction

In 1979, the People’s Republic of China promulgated its first Criminal Procedure Law (CPL-1979), which was heralded as “an efficient instrument of crime control for the (China Communist) Party (CCP)”.

Following the Soviet model, CPL-1979 generally treated criminal defendants as objects for investigation and punishment rather than as subjects who are entitled a fair trial. Under this law, defense lawyers could only participate in the trial stage, and had limited power to conduct independent investigations. Judges had full access to the prosecution file before trial, and were responsible for questioning the witnesses and presenting other evidence to the defendant at trial. Thus, they acted more like prosecutors than neutral and impartial adjudicators. Some observers described the criminal process as an assembly line, or a relay race, with the police “cooking rice”, the prosecutors “serving rice”, and finally the judges “eating rice”.

Defendants

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3 Modern China’s first Criminal Procedure Law, which was modeled after German and Japanese criminal procedures, dates back to 1910. The Nationalists who ruled China from 1911 adopted this code and made some revisions. It is still used now in Taiwan. After the Communist Party established the PRC in the mainland in 1949, almost all the “old” laws were replaced by a Socialism legal system introduced from the Soviet Union.

4 CPL-1979, article 26, 29.

and their lawyers “were marginalized within the criminal justice system.” Chinese legal scholars characterized this system, which mainly relied on judges’ initiative and emphasized crime control, as a “super-inquisitorial model.”

China experiences a tremendous economic boom and social transition after 1979. As a result of this, and probably under international pressure for human rights protection in addition, the National People’s Congress (NPC), the highest legislature, approved a drastic amendment of CPL-1979 in 1996 (CPL-1996). Compared with the prior version, CPL-1996 adopts an adversarial-style trial model, and purports to grant more procedural safeguards to the accused. For example, CPL-1996 provides that all evidence should be introduced and presented to the court by the two parties, rather than by the judges who hear the case. In addition, the parties, not the judges, have the first chance to examine witnesses (including the defendants, who have no privilege against self-incrimination). Furthermore, before trial, judges have access only to the prosecution’s “major evidence”, not the full files. Finally, defense lawyers are allowed to participate in the investigation and prosecution phases of the case, although without full access to their clients or police files. Defense lawyers can conduct an independent investigation, but interviews with prosecution witnesses still need approval from judges or prosecutors. The prior law made free counsel available only to juvenile, mute, or deaf defendants, but the amended law extended that right to all indigent defendants charged with capital crimes as well.

Based on these revisions, many scholars, domestic or international, cheered the CPL-1996 as a significant transition from the inquisitorial model to the adversarial one. From its formality, CPL-1996 indeed enhances the participation of defense lawyers and prosecutors, and transforms judges from aggressive investigators to neutral adjudicators. The resulting structure of criminal trials looks like an isosceles triangle. Judges occupy the vertex, while prosecutors and lawyers are positioned at the two corners of the base, equidistant from the judges. As some have noted that, if CPL-1979 resembled a relay race, CPL-1996 looks more similar to an obstacle course. Many observers are tempted to conclude that CPL-1996 establishes a fairer trial framework for the

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7 Generally, legal scholars categorize criminal procedures as either Adversarial or Inquisitorial. The common law system is usually considered as Adversarial, while the civil law system is regarded as Inquisitorial. Some Chinese scholars regard Chinese and European criminal justice systems as similar, but they acknowledge that those accused in China do not receive similar protection as those in Europe. Therefore, they refer to the China’s system as a Super-Inquisitorial Model. See Wang Haian, Xingshi Susong Moshi de Yanjin (The Evolution of Criminal Procedure Models), Zhongguo Renmin Gongan Daxue Chubanshe (China Police Academy Press), 2004, chapter 10 and 11; Zhang Bin, Lun Woguo Xingshi Shenpan zhong de Chao Zhiquaun Zhusi Yinsi (Super-Inquisitorial Factors in China's Criminal Trials), Zhongguo Renmin Gongan Daxue Xuebao (Journal of China Police Academy), 2006, 4.
8 See e.g. Lawyers Committee for Human Rights, Opening to Reform? An Analysis of China’s Revised Criminal Procedure Law (1996); Amnesty International, China, No One Is Safe.
10 CPL-1996, article 155, 156.
11 CPL-1996, article 150.
12 CPL-1996, article 33, 34, 36, 37, 96.
13 Long Zongzhi, Shixi Woguo Xingshi Shenpan Fangshi Gaige de Mubiao yu Lujing (On the Objectives and Approaches of China’s Criminal Trial Reform), Shehui Kexue Yanjiu (Social Science Research), 2005, 1. This comparison apparently comes from Herbert Paker, Two Models of the Criminal Process, 113 U. Pa L. Rev. 1 (1964).
16 Long Zongzhi, Xingshi Sifa de Liyi Jizhi ya Xingshi Sifa Moshi (The Interest System and Models of Criminal Justice), Shehui Kexue Yanjiu (Social Science Research), 1991, 1.
accused and could improve China’s record of human rights protection.\textsuperscript{17}

However, a deeper examination reveals that despite the move towards a more adversarial model, CPL-1996 shares some common flaws with its predecessor, CPL-1979. Both laws take as their fundamental premise the idea that the prime mission of criminal procedure is to combat crimes.\textsuperscript{18} Factual truth and substantive correctness are specifically emphasized, while procedural fairness, one of the core values in any genuine adversarial system, is notable in its absence. In addition, CPL-1996 retains a heavily criticized “collaboration” provision, which requires courts, procuratorates and Public Security Bureaus (PSB, China’s police agency) to collaborate with each other in practice.\textsuperscript{19} Although another article of CPL-1996 reiterates the independence of the courts in their entirety (but not necessarily that of individual judges) “against interference from any administrative organs, social organizations and persons;”\textsuperscript{20} it seems quite difficult to draw a clear line between collaboration and independence, and it is not obvious how an adversarial-style trial could function upon these conflicting principles. Furthermore, although never indicated in either CPL-1979 or CPL-1996, the CCP, as the supreme authority of all local and national affairs, never gives up or even eases its ultimate control over judicial processes. Judges, directly or indirectly, are all subordinated to the CCP and its local leaders, instead of the people, whom the judges claim to serve. With such an authoritarian power positioned above the judiciary and acting as “judges’ judge,” it remains unclear whether the drastic revision of CPL could make significant differences in practice and produce a genuine adversarial trial model.

Even absent those concerns, many have questioned whether CPL-1996 is capable of being effectively implemented. With such a sweeping departure from ingrained practice, it would be unrealistic to expect a smooth transition. Research has demonstrated that, despite CCP’s enormous capability of social mobilization, realizing the promise of modernized national laws still presents tremendous challenges at the local level. Ideological clashes with long-standing tradition, lack of material resources and personnel training, and intentional resistance by interest groups all contribute to frustrating the ambition of the central government.\textsuperscript{21} Particularly in the criminal justice system, where crime control still occupies a prominent position on the agenda of the government, major protections for defendants’ rights are likely to be resisted. In fact, right after CPL-1996 took effect on January 1, 1997, scholars expressed considerable doubts about its implementation, particularly in the early years.\textsuperscript{22} As the law entered the new century, some

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\textsuperscript{17} Lawyers Committee for Human Rights, \textit{supra} note 8.

\textsuperscript{18} CPL-1979, CPL-1996, both at article 2.


observers even declared it “a total failure.”23 However, some scholars also observed positive changes in criminal justice practice and a general trend of conforming to international standards of fair trials.24

It is quite understandable that both pessimistic and optimistic conclusions have been drawn in assessing the impact of CPL-1996. As Stanley Lubman noted in his review of American literature on Chinese law, studying Chinese law is like exploring an uncharted forest.25 Several obstacles complicate such an adventure. First, trees (legal institutions) in the forest used to be wound around by thick vines (CCP), and had only become more visible and viable by the end of 1990s.26 Second, given the tremendous economic and legal transition of the past three decades, the law in action may differ greatly from the law in the books. A textual survey may uncover progressive modernization and westernization, while an empirical study could uncover more inconsistencies and irrationalities. Third, due to the lack of data and other methodological limitations, much scholarship on Chinese legal institutions is quite preliminary. Some are mere interpretations of existing statutes, and some simply “assesses the applicability of Western concepts and theories to the Chinese context.”27 Those who study China’s criminal justice from a historical perspective may find the recent developments quite exciting, but those who study it from an international perspective may draw more negative conclusions.

Full-scale empirical assessment of the implementation of CPL-1996 seems impractical. National data provided by Chinese government agencies is too general, limited in scope, contradictory and unreliable.28 Although a few Chinese scholars have devoted significant efforts to field work, their research samples are too narrow to reach a representative conclusion.29 Some foreign scholars have also interviewed quite a few judges and lawyers in China.30 However, due to their identity as foreigners, as well as the limitation of fragmented interviews, it has been very difficult for them to obtain a realistic and comprehensive view of China’s criminal justice system.31

Nonetheless, empirical studies are still possible. In particular, the Internet has significantly enlarged our access to information about criminal justice in China.32 Especially in high-profile

24 Chu, supra note 1.
26 Id. at 25.
29 For instance, sponsored by Ford Foundation, Zuo Weimin and his colleagues, including the author of this article, conducted an intensive empirical research in the western province of Sichuan. Three courts, four procuratorates, and three PSBs were selected as research samples. It was one of the most ambitious field work ever conducted in China on criminal justice, but it was limited to only one of China’s 31 provincial jurisdictions. See Zuo Weimin et al., Zhongguo Xingshi Sausong Yunxing Jizhi Shizheng Yanjiu（Empirical Research on the Operation of the Mechanism of China Criminal Procedure）, Beijing: Falv Chubanshe（Law Press）, 2008. See also Chen Ruihua ed. Zhongguo Xingshi Bianhua Shizheng Kaocha（Empirical Survey of China’s Criminal Defense）, Beijing: Beijing Daxue Chubanshe（Peking University Press）, 2005 (research samples were all located in Beijing).
30 See Susan Trevaskes, Courts and Criminal Justice in Contemporary China, Lanham: Lexington Books, 2007; Chu, supra note 1, at 159; Smith & Gompers, supra note 22, at 110.
32 By the end of 2008, there were approximately 300 billion Internet users in China, constituting of the largest online population in the word. However, this only amounts to 23 percent of China’s entire population. See Andrew
cases involving notorious judicial misconduct, widespread public attention usually leads to extensive press coverage and individual reports. Not only are the trial proceedings covered in detail, but also behind-the-scenes stories are disclosed to the public. As a result, a much more detailed picture of a particular case is available than what would be found in the text of the law and the court opinion. The Internet coverage provides a new and more illuminating window on China’s judicial practice, and may significantly help to diagnose underlying problems in the criminal justice system.

This paper relies on the extraordinary amount of press coverage in two high-profile cases to assess the impact of CPL-1996. These cases have attracted national and international attention, and they have resulted in heated debate among the masses and the academics. In addition, this article uses data from prior empirical research conducted by the author and other scholars, as well as the author’s experience as a practicing lawyer and legal aid volunteer in Western China. The article makes two major points. First, it shows that even though CPL-1996 provides significant procedural safeguards that theoretically could ensure a fair trial for criminal defendants, it fails to establish an effective mechanism for systematically and coherently implementing those protections. Judges, who are supposed to adhere to the fundamental principle of fair trials, are not always committed to pursuing procedural fairness. As a result, provisions in CPL-1996 are widely manipulated in practice. Almost all the safeguards are applied superficially, but the essence of a fair trial is lacking. The trial procedure becomes vulnerable to outside influences, as well as to judges’ pursuit of personal interests. Second, as manipulated by judges, criminal trials generally do not even purport to provide the defendant a fair trial, but only to obtain a substantively correct verdict. To dispose of cases efficiently and conveniently, judges, at least in ordinary cases, manipulate the trial procedure into a proceeding that simply confirms the charges and conforms to the judges’ pretrial assessment of the prosecution files. Moreover, in sensitive cases involving political concerns or public outrage, or in cases where outsiders try to influence judges through personal relationships or bribes, the trial procedure can be manipulated to accommodate those outside influences.

Part I of this article lays out the general context of China’s criminal justice system, a system in which substantive correctness overrides procedural fairness in most cases, and violations of defendant’ rights are tolerated as long as a correct verdict is reached. Part II analyzes the multiple-murder case of Yang Jia, which may have produced a correct and legal conviction, but engendered enormous controversy concerning the balance between substantive correctness and procedural fairness. The case also shows how judges manipulated the trial procedure to ensure efficiency and convenience and eventually turned the trial into a mere formality. Part III discusses the false conviction of an alleged wife-murderer, in which an innocent man was put into prison for more than 11 years. Only after his missing wife happened to come back to see her daughter did the court retry the case and acquit the husband. This case demonstrates how trial procedure can be manipulated in response to outside influences, and how this manipulation can lead to wrongful verdicts and corruption. The article concludes that under such an authoritarian regime where the political system is not able to guarantee the integrity of the judiciary, individual procedural safeguards alone cannot stand against formidable challenges, nor can they ensure a fair trial or even a correct verdict for the accused. Thus, in addition to the rights now contained in CPL-1996 regarding the participation in the trial, serious thought must be given to address the vulnerability of the judiciary to outside pressures. A strong, coherent, and integrated framework with intersupportive individual rules that can resist intentional manipulation and powerful interference is essential. In other words, if we cannot count on judges to act responsibly and resist external pressure and cultural norms, then we must rely on procedures that strictly channel judicial conduct to enhance the fairness as well as the accuracy of trials.

Jacobs, *Internet Usage Rises in China*, N. Y. Times, Jan. 14, 2009; Yang Zheng, *Woguo Xianyou Wangmin Renshu Jiejin Sanyi* (The Number of Internet Users is Close to 300 Million in China), Shenzhen Tiequ Bao (Shenzhen Special Zone News), 2009. 1. 14. The Internet does not only provide a more convenient and faster channel for information transference and exchange, but also provides a generally public forum for free speech, which is not available through traditional public media like newspaper and TV, which are still under the tight control of the authoritarian Chinese regime.
I. Correctness v. Fairness: General Context

On the morning of November 26, 2008, Yang Jia, a 28-year-old man convicted of killing six police officers and injuring another four, was executed by lethal injection in Shanghai, China’s largest city. There was no doubt that he actually committed the brutal crime, nor any doubt that he could legally avoid the death penalty. However, Yang’s trial and appeal resulted in enormous controversy. Journalists and bloggers who dug into Yang’s personal background and his year-long combat with the Shanghai police over alleged torture he had previously suffered at their hands, claimed that Yang was just taking revenge after exhausting all available legal means. Public media and lay individuals as well as legal professionals scrutinized Yang’s trial and appeal. Most concluded that, although Yang may have deserved a death penalty, he was nonetheless convicted and executed unfairly.

The surprising sympathy over Yang’s murder and death is a symbol of how ordinary Chinese citizens are angry over police misconduct, particularly torture and brutality in criminal investigations. It also shows that the masses may prefer a fair trial procedure over a correct and legal verdict. The latter message may seem unusual to the legal profession, which used to believe that the masses lack consciousness of the importance of fair trials and due process. Indeed, when a mafia mastermind named Liu Yong was sentenced to death in 2003, fourteen of China’s elite legal scholars who argued to exclude the coerced pre-trial confession and vacate the capital sentence were criticized by the masses as “enemies of the people.” Millions of web users denounced those scholars, mainly professors at China’s most prestigious law schools, for rashly distorting Chinese reality with unpractical western legal norms of due process. Given this painful lesson, many scholars believe that it will take a long time for the Chinese public to gain much appreciation of due process. The conventional view is that the masses only demand substantively correct verdicts, which means investigations that uncover the factual truth and trials that convict the real criminals and acquit innocent persons.

This view is consistent with the historical and cultural role Chinese judges have played,

33 In October of 2007, Yang was traveling in the downtown of Shanghai by a rented but unregistered bike. He was stopped by a patrol officer, who suspected that Yang had stolen the bike. After a quarrel with the officer, Yang was taken to a local police station, where he was held for several hours before the police cleared his suspicion and let him go. Yang alleged that six or seven police officers beat him up in the police station. Chenzhongxiaolu, Yang Jia An Shimo (The Full Story of Yangjia’s Case), Caijing (Finance & Economy), 2008. 10. 27.

34 In the context of Western civilization, it would be unchallengeable that public confidence in the criminal justice system is grounded upon both convicting real criminals and providing a fair trial for those accused. See Irvin v. Dowd, 366 U.S. 717, 728 (1961) (concurring opinion of Justice Frankfurter stating that “One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure.”); Thomas DiBiagio, Judicial Corruption, the Right to a Fair Trial, and the Application of Plain Error Review: Requiring Clear and Convincing Evidence of Prejudice or Should We Settle for Justice in the Dark? 25 Am. J. Crim. L. 595, 596 (1998). However, generally and historically speaking, Chinese people are inclined to tolerate most unfair practice (in terms of Western standards of fairness) in order to convict and punish a true criminal.

35 Liu Yong, a Shenyang businessperson, was charged of premeditated assault, robbery, blackmail, organizing a mafia organization and other crimes in 2001. Liu was convicted in the trial court and sentenced to death, although his lawyers presented evidence showing that the police obtained Liu’s pre-trial confession of being a mastermind of two premeditated assaults by brutal torture. On appeal to Liaoning Province High Court, Liu’s lawyer released an experts’ opinion signed by 14 distinguished legal scholars, including the chair and vice chairs of the Chinese Society of Procedure Law, stating that based on the defense evidence, Liu’s inculpatory confession was illegally obtained and thus should be excluded. On August 11, 2002, the appellate court affirmed Liu’s conviction, but commuted the sentence to death probation, meaning that if Liu would not commit any premeditated crimes in the next two years, his death penalty will be automatically replaced with a sentence of life imprisonment. The court reasoned that it could not “fundamentally exclude (the possibility) that the police have tortured Liu.” This opinion triggered an enormous public uproar, which partly pushed the SPC to exercise its rarely used power to review and retry a case directly and thereby to affirm the trial court’s capital sentence. Liu was executed on December 22, 2003. Although almost all of the signing experts insisted on their position, many commentators concluded that because China’s best legal scholars betrayed the public, they were abandoned and conquered by the people. Lin Chufang, Shenyang Liuyong An Gaipan Diaocha (Probing on Liuyong’s Commutation), Nanfang Zhoumo (Southern Weekend), 2003. 8. 28; SPC opinion, 2003 xìng tí zi di 5 hào (2003 No. 5 Criminal Review); Whitfort, supra note 14, at 143.
where they have been required to ascertain truth and render a correct verdict, rather than to produce a just outcome through fair procedures. One of the CCP’s philosophical principles is *shi shi qiu shi*, which means seeking truth from facts. This principle also rooted in the material epistemology of Marxism, which claims all truth and knowledge can be acquired through human practice. Given this ideology, it is understandable why the CCP is inclined to deny that sometimes truth cannot be ascertained in criminal trials. Consequently, CPL-1996 proclaims in writing that courts, procuratorates, and police must ground their actions on facts (shishi) and laws (falv). In particular, all convictions must be based on “clear facts and sufficient evidence.” Errors or ambiguity in fact finding will result in reverse and retrial or adjudication review, which means that even a closed case can be re-opened.

As a result of growing corruption of judges, prosecutors and police officers, there had been a tremendous loss of public confidence in the judiciary in recent years. As part of its effort to rebuild public confidence, the CCP tends to strictly emphasize finding factual truth, and employs various means of fact-finding, regardless whether they are procedurally fair. For instance, criminal suspects are not entitled to keep silent; confessions are encouraged and can lead to a lesser sentence. Police officers can interrogate a suspect outside the presence of his lawyer. Judges are provided with prosecution files (at least material evidence) ahead of trial and are required to familiarize themselves with the file in order to better discover the facts. Judges are empowered to initiate independent investigations outside of the courtroom, and they can question the defendant and witnesses at trial. In addition, primary decisions of many trial judges are strictly reviewed by supervising judges, and may only be released after approval at higher levels. Collective decision-making is widely employed to enhance the quality of court judgments. These practices indicate that Chinese leaders believe that through intensive investigation and tight internal supervision, factual truth in most criminal cases can be ascertained, leading to substantively correct verdicts.

China’s endeavors to pursue substantive correctness in criminal trials are sometimes in tension with the Western perception of a fair trial. As generally recognized in the West, procedural fairness, along with substantive correctness, is a core value in criminal trials. The right to a fair trial is a fundamental human right, adopted in various domestic and internationals laws. In contrast, substantive correctness, in many cases, might be too elusive and sometimes impossible to obtain. If the trial procedure is fair, the outcome is accepted as proper even when it might not be substantively correct. For example, although most people believed that O.J. Simpson had murdered his ex-wife and her friend as charged, there was no doubt that he was tried and acquitted in a fair manner and the jury verdict was correct and final. Such acceptance calls to mind Justice Jackson’s observation about the Supreme Court: “We are not final because we are infallible, but we are infallible only because we are final.” In other words, the completion of procedure will surely end any controversy over substantive matters.

Basically, a fair trial is both a fact-finding instrument and a legitimacy-making incubator. First, a fair trial could provide an adequate opportunity for each party, particularly for the defense, to present its case and challenge the opposing side, with special procedural safeguards to maintain equity. Factual evidence and legal arguments of the case are supposed to be thoroughly elicited through this contest. Second, a fair trial confines the judge into a legal space where his decision can only be based “on objective arguments and evidence presented … without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.” As such, the defendant can effectively participate in the process of

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37 CPL-1996, article 162.
38 CPL-1996, article 189.
39 CPL-1996, article 204.
40 International Covenant on Civil and Political Rights, article 14; African Charter on Human and Peoples’ Rights, article 7 and 26; Inter-American Convention on Human Rights, article 8; and [European] Convention for the Protection of Human Rights and Fundamental Freedoms, article 6.
shaping the judge’s mind, and therefore is responsible for and bound by the subsequent outcome. This is how the court decision attains its legitimacy.\(^4\) These two parts, coherently and integrally combined, constitute the fundamental framework of a fair trial. Breaking either one, even in part, could result in the failure of fact-finding or the presumption of legitimacy.

However, since there is little likelihood that the CCP and its leaders are yet ready to embrace a truly independent and impartial judiciary, it seems impossible to establish an integrated framework that could universally ensure a fair trial in China’s criminal justice system. Whatever the framework is, the CCP’s position is that it must reserve a leeway for the CCP to take control if it deems necessary, at least in politically sensitive cases. As the first priority in the CCP’s agenda, political needs override legal logic when the two conflict. This makes judges mainly responsible to the Party’s needs, rather than those of the people or the case itself. Without significant political reforms, it is unlikely that a genuine and coherent system for fair trials can be achieved.\(^4\)

Although some individual procedural safeguards, such as expansion of defense lawyers’ role in CPL-1996, are possible, the trial framework is still so segmented and fragile that the essence of fair trials might be easily compromised.

The CCP is quite aware of this fundamental inconsistency between party dominance and fair trials. However, the CCP also believes that once a substantively correct verdict is reached, people will not demand procedural fairness. In other words, as long as an unfair criminal trial apparently produces a correct verdict, the lack of fairness may not pose a serious challenge to the party’s political legitimacy. This is why CPL-1996 privileges substantive correctness over procedural fairness, particularly as applied in practice. As a matter of fact, some procedural rights, which are deemed to be crucial in the West, are generally seen in China as potential obstacles to the state’s efforts to ascertain truth and correctness.\(^4\) For example, granting defendants the right to keep silent may frustrate a police investigation;\(^4\) providing lawyers to defendants may lead to lies to authorities or messages among conspirators; a lawyer’s presence at an interrogation may defeat police tactics or tricks; skilled lawyers may mislead judges by focusing on trivia and obscuring critical issues; defendants granted bail and not in custody may intimidate witnesses or destroy evidence; full discovery in advance of trial may help a defendant make up stories to cover his crime. Thus, when scholars and lawyers proposed these procedural safeguards in an amendment of CPL-1996, the Ministry of Public Security and local PSBs fiercely attacked them.\(^4\) Some other proposals with potential negative impact on the prosecutor’s mission to successfully convict defendants were also suspended or postponed.

Moreover, the procedural safeguards of CPL-1996 may conveniently be violated to achieve substantive correctness. For example, most judges still carefully read the prosecution’s file and therefore enter the courtroom with biased minds; defendants’ requests to summon witnesses are more likely to be denied; a court-appointed lawyer may be designated only three days before trial; judges may criticize or even threaten defendants who refuse to confess; observers’ access to public hearings may be illegally restricted; etc. Undertaken in the name of guaranteeing correctness, these actions are readily tolerated by supervising judges and other authorities.

China’s growing crime rate during the past three decades also contributes to the tolerance of judges’ violation of defendants’ procedural rights. Concomitant with China’s amazing

\(^4\) For a broader argument on this matter, see Lubman, supra note 25, at 27, 34.
\(^4\) See Whitfort, supra note 14.
\(^4\) This is one of the main reasons why China is among the a few countries in which criminal defendants are not entitled to keep silent, and refusal of confess usually will be considered as an aggravating factor in sentencing.
\(^4\) See Fu, supra note 6, at 41; Chu, supra note 1, at 170.
\(^4\) For instance, CPL-1996 and corresponding judicial interpretations limit defense lawyer’s access to his client and prosecution files and give leeway to almost every witness not to testify at trial. Following practice repeatedly proved these flaws of CPL-1996, and scholars have been calling on a new amendment since later 1990s. The 10th NPC put into its agenda a proposal to amend CPL-1996 before the expiration of its term in 2008. However, because consensus over critical issues could not be reached among courts, procuratorates, PSBs and the All China Lawyers Association, the amendment was postponed to the 11th NPC. Chen Guangzhong, Xingsufa Fengyu Xiugai Lu (The Tortuous Path for Amending CPL-1996), Caijing (Finance & Economy), 2008, 23.
urbanization, modernization and industrialization, crimes have become a pressing social problem all over the country. The public has been urging the government to take more effective and aggressive approaches, particularly toward violent crimes and corruption. “Being tough on crimes is a winning issue for politicians, especially when crime is rising.”\textsuperscript{49} As a result, not only harmless violations of defendants’ rights in the trial stage, but also a broad range of police misconduct, such as deception, entrapment, “soft torture,”\textsuperscript{50} and even brutal and obvious torture are generally tolerated.

Given such frequent violations of defendants’ procedural rights, effective remedies must be adopted to ensure that they do not jeopardize factual truth and substantive correctness. As mentioned above, aggressive investigation by police and judges, as well as strict supervision over judges’ opinions and behaviors, are widely employed in practice. China also relies on its particular evidence rule of mutual corroboration to ensure substantive correctness of criminal verdicts. Mutual corroboration means incriminating confessions, even voluntary guilty pleas in front of judges, are not sufficient for conviction. Judges are required to find corroborative evidence, such as witness testimony or tangible evidence, to confirm the truthfulness of the defendant’s confession, even though they are convinced that no reasonable doubt still exists; otherwise, they have to acquit the defendant on ground of insufficient prosecution evidence.\textsuperscript{51} Compared with most western countries, in which a voluntary, knowing and intelligent guilty plea could more likely lead to a conviction, China’s mutual corroboration rule sets up a higher standard of proof for the prosecution. This may be an indication of how Chinese prefer substantive correctness over procedural fairness, and it also shows the legislature’s efforts to compensate for flaws resulting from various violations of defendants’ procedural rights.

One more point should be addressed. Public revelation that an innocent person was wrongfully convicted because of violations of his/her procedural safeguards would tremendously damage the government’s reputation and legitimacy. That incidents of this kind were rarely recognized in the 1980s and 1990s does not mean there were no wrong convictions in those years. It merely means that the masses did not have the open forum of the Internet to spread information. The government could handle any erroneous conviction secretly, without inviting public attention and damaging its image. However, the Internet has reversed this balance, putting the government under comprehensive supervision and scrutiny by the masses. A high-profile case, like Yang’s trial, may be brought to the attention of millions of people in a single day by a single blogger. However, it seems that many Chinese judges, prosecutors, and police have not become accustomed to this historic transition, and they still act in a traditional manner, sometimes provoking an enormous public uproar. It will take some time for the government to acknowledge the power of Internet and adjust its behavior.

In summary, China’s criminal trials are not balanced contests purporting to grant defendants fair trials. Rather, they are state-dominated bureaucratic inquisitorial processes designed to ascertain substantive correctness. On the one hand, to uncover factual truth, prosecutors and judges are generously empowered to employ all necessary investigation methods, even including violations of defendants’ procedural rights, with only a few impediments imposed by the defense. The trial framework is therefore structurally unfair. On the other hand, to maintain political legitimacy, strict internal supervision and an evidence rule of mutual corroboration have been established, but can be easily overwhelmed by an unfair trial and result in false convictions.

\textbf{II. Unfair Trial: How Judges Manipulate Trial Procedure to Pursue Efficiency and Convenience}


\textsuperscript{50} As commonly used in China’s criminal investigation, soft torture means illegal but non-violent treatments that can impose coercive physical impact upon the suspects, such as sleep deprivation and starvation

\textsuperscript{51} For instance, in Sichuan Province, a retired purchaser of a state-owned enterprise turned himself in to local police and confessed that he had taken some bribes more than 10 years ago. The police then questioned the alleged bribers, but none of them admitted the bribe. Without any corroborative evidence to confirm the suspect’s absolutely voluntary confession, the police had to dismiss the case.
Given Yang’s odd behavior and the real possibility that mitigating factors might surface and explain such behavior, Yang’s trial should have been a complicated process, requiring considerable time and caution from the judges. Yang’s motive to kill should have been carefully investigated, and his background intensively explored. Particularly, Yang’s prior encounter with Shanghai police in 2007, which allegedly involved police torture and brutality, and his yearlong petition and negotiation with Shanghai police and higher authorities, should have been examined in detail. Furthermore, Yang’s unusual behaviors before or during the murder, such as being single and unemployed ever since graduation, and his incredible calmness and efficiency in the execution of his crime, might indicate that he was suffering from a mental disability. Any of these factors could have a significant impact on his conviction and sentence. To carefully present and examine all this information at the trial would take considerable time. Although it might be understandable that the government would be harsh to the defendant, there was no need to convict and execute Yang in a rush. Considering the exceptional severity of Yang’s crime, a careful and cautious trial would never acquit him, but could only reinforce the dignity of the defendant and the integrity of the criminal judicial system. A hurried conviction, however, would inevitably induce public suspicion and criticism.

In many ways, the trial of Yang Jia was one of the most important in China. First, the death penalty, which was all but inevitable, would end the life of a 28-year-old young and unmarried man, the single child of an old and divorced lady living on a small pension. Second, the victims were nine police officers and one security guard. Six of them were brutally stabbed to death, and the other four were seriously wounded, leaving their family and colleagues in extreme grief and anger. Third, the case had drawn national and international attention, with hundreds of journalists gathering outside the courthouse and trying to uncover every detail of the case. Thousands of bloggers posted their opinions and predictions, and newspapers and magazines put Yang’s case in the headlines. Finally and most significantly, this case became a historic symbol of how a regular citizen (over) reacts to governmental misconduct and how the government reinstates its legitimacy and reputation through its response to this (over) reaction. People were watching how the court handled this case, with the expectation of justice, fairness and transparency, mixed with suspicion of revenge and opaqueness. As such, Yang’s trial had become not only a major criminal case, but also a political issue. It would be an exceptional and valuable opportunity for the government to rebuild its reputation and retain public confidence, but it also could become a nightmare for the government that would worsen the existing tension and cause it to lose more support.

However, the government did not proceed with grave deliberation and great caution to grant the murderer a fair trial and restore public confidence. Instead, the government seemed to take the case personally and emotionally. Because the government did not seem to approach the matter as a criminal case to be tried in a legal manner with fairness and transparency, the public became extraordinarily angry and fiercely criticized the government after Yang was convicted and executed.

1) Conviction and execution in a rush

Given the procedural protections contained in PCL-1996, one would expect a trial of this magnitude to take considerable time, regardless of the government’s position. However, despite the facial similarities based on the rules on the books, trials in China look very little like trials in most Western countries. Yang’s first instance trial opened at 10 A.M., August 26, 2008. It closed for deliberation only one hour later. No official court transcript was available for this trial, nor was any transcript made by anyone who observed the trial. Although we do not know what exactly happened in the trial, its speed clearly indicates that it was far from the cautiously and carefully handled trial one might expect under the circumstances. CPL-1996 specifies that in every trial proceeding, the court must first confirm the identity and status of the defendant, as well as those of the defense lawyers, and identify the judges sitting on the bench and the prosecutors. It requires

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CPL-1996 provides two trials for all criminal defendants, including a first instance trial and an (optional) appellate trial. The latter one does not only review the legality of the lower court’s decision, but also comprehensively reviews all the facts already examined in the lower court. Evidence will be presented again in the appellate court, and both parties can bring in new evidence. If new facts are proved, the appellate court can either render a new decision based upon the new facts, or just reverse the case and require a retrial in the lower court.
the court to clearly inform the defendant of his rights, including the right to counsel, the right to present evidence and call witnesses, and the right to recuse a judge, court reporter, or prosecutor. In practice, these proceedings may last 5 to 10 minutes, and are followed by interrogating the defendant, examining witnesses, presenting other evidence, and arguing over legal issues. The last part, usually referred to as legal argument, may take 10 minutes or more, depending on the complexity of legal issues and the lawyers’ habits. If these procedures were followed, then Yang had only 40 to 45 minutes to present his case and to challenge the prosecution’s case. This is doubtlessly unreasonable for a case involving death penalty and complicated facts.

The official judgment, rendered on the morning of September 1, 2009, six days after the one-hour trial, underscores the conclusion that Yang had little opportunity to defend himself. The 16,000-word opinion of the three judges who officiated is 25 pages long. This opinion shows that the prosecutors presented more than 30 items of evidence, including the live testimony of two police officers. Written statements or interview transcripts of another 23 witnesses were read into record, with no convincing reason given for their absence. Forensic reports on Yang’s mental capacity, inspection reports of the crime scene, autopsy reports on the murdered victims, and medical reports on the injured victims were also introduced. The court decision only cited a small portion of each witness’s testimony or report, or just summarized its content; yet, this description still took more than 16 pages. It usually takes a legal professional at least 20 minutes to read through this opinion. A layman like Yang would need longer. In a single hour, it would be impossible for the prosecutors, defense lawyers and judges to introduce and examine all this evidence adequately. Most of prosecution evidence must have been only mentioned or listed by title at the trial, and not read and examined in detail until later.

This is a rather routine practice in China’s criminal trials. Empirical research conducted in 2005 at a busy district court located in a huge city of western China showed that the average duration of criminal trials is 29 minutes. Even at a court of a rural county, the average trial time is 40 minutes. Particularly, for minor cases eligible for summary procedure, 10 minutes would be enough to convict a defendant. At one trial I observed, the entire proceeding lasted only 8

53 Criminal defendants are permitted to hire their own lawyers if they choose to. For those unable to afford a lawyer and charged with capital crimes, or under age of 18, or blind, deaf and mute, the court shall appoint lawyers at the expense of the government. For other indigent defendants, the court can make either choice at its discretion. CPL-1996, chapter 4.

54 CPL-1996, article 154.

55 The legal argument phase in China’s criminal trials is similar to a closing statement in the common law system. Each of the parties, usually beginning with the prosecution, has an interruption-free chance to summarize evidence and facts, analyze major issues, and conclude his case. Legal argument can last more than one round, subject to the presiding judge’s discretion.

56 First instance criminal trial could either adopt regular procedure (tried by a collegial panel) or summary procedure (tried by a single judge), depending on the severity of the crime and the potential sentence. However, capital cases initially tried in an intermediate court, like Yang’s case, must be heard by a collegial panel, which generally consists of 3 judges and could be more, including laymen as possible jurors (assessors). CPL-1996, article 147.

57 A critical flaw of CPL-1996 is that witnesses are not required to appear at trial and testify under oath or swear. As an alternative, most investigating police officers only interview witnesses outside of the courtroom, have the witnesses sign the interview transcripts, and then submit to the court. The transcripts, usually referred as witnesses’ testimony (Zhengren Zhengyan), will be read into record at the trial, and the defense is permitted to examine the contents of the transcripts, which is considered equivalent to cross-examining a live witness testifying at trial. CPL-1996, article 157.

58 CPL-1996 and corresponding judicial interpretations provide a simplified procedure for minor cases without factual disputes. Only defendants who have pled guilty before trial are eligible for summary trials. Compared with regular procedure, the prosecutor does not have to personally appear at trial, but only delivers his dossier to the judge. When the prosecutor chooses to confront the defendant at trial, he may summarize his evidence and arguments, rather than present his case in detail. As an award for guilty plea and consent of summary procedure, the defendant may receive a lenient sentence. See CPL-1996, article 174-179; Guanyu Shiyou Pu tong Chengxu Shenli "Bieguoren Renzui Anjian” de Ruogan Yijian (Shixing) (Several Opinions on Trying Guilty-Plea Cases with Regular Procedure) (Provisional); Guanyu Shiyou Jiangxi Chengxu Shenli Gongsu Anjian de Ruogan Yijian (Several Opinions on Trying Public-Prosecution Cases with Summary Procedure).

59 See Lan Rongjie, Susong Guize Difanghua Shizheng Yanjiu: Yi Caipingqian Peizhi Wei Shijiao (Empirical
minutes, with the defendant saying no more than 10 words. The judge rendered his decision immediately at the trial, convicted the defendant of robbery, and sentenced him to 2 years in prison. In such trials, hardly any witnesses are summoned, evidence is summarized and read into the record, and defendants are rarely given enough time to talk. Most trials are handled in a rush, with judges hurrying to close their cases.

The 10-minute trial might be the defendant’s only chance to stand in front of the judge and present his case. It is not a preliminary hearing or a sentencing hearing. CPL-1996 does not provide separate proceedings for evidentiary and sentencing hearings. They are all included in a single trial at which all factual and legal issues are argued, considered and decided. In most cases, defendants are detained in a police facility before trial and are transferred to a detention center or jail right after conviction. Within the term of the sentence set by the trial court, most defendants will have no further chance to see any judge, including appellate court judges. For defendants who do not have a lawyer, either hired or appointed, the brief trial may also be the only time when they are informed of the evidence against them. Detained defendants have no pretrial access to prosecution file; the first time they get to know who is accusing them is at the trial. However, if a prosecutor chooses to provide a summary, the defendant may hear nothing more than the witnesses’ names at his trial. In other words, a convicted defendant may never learn of the prosecution’s full case. By Western standards, this procedure could never produce a fair trial.

Trial judges cannot rely on such a short trial to ascertain the facts and make a reliable decision. There is even not enough time for the prosecutor to go through with his evidence, nor for the defendant to examine the evidence carefully. In fact, most judges do not consider the trial as a fact-finding process, but only an instrument to verify their pre-trial findings. In other words, judges’ decisions come from reading prosecution dossier before trial, and are later verified and confirmed at the trial by the defendants’ verbal admission of the accusations against them. Since a conclusion has already been reached ahead of trial, it reflects well on judges to finish trials as quickly as possible. As a matter of efficiency and convenience, no judge wants to try a case twice. So long as they can convince themselves that their pre-trial conclusion is correct, they rarely hesitate to close quickly. Apparently, judges by and large only care about the correctness of their decision, instead of the fairness of the trial. In practice, this approach works almost perfectly in terms of correctness. Statistics of empirical research show that at a court where the average time of all criminal trials is only 29 minutes, less than 10 percent cases were appealed in the year of 2005.

As prescribed by CPL-1996, China’s criminal trials begin with the prosecutor reading the indictment to the court, followed by the defendant’s response of admission or denial. The defendant then is required to describe his crime in details, and can be questioned by the prosecutor, the defense lawyer, and finally the judges. After both sides present all evidence, a separate session is opened for verbal arguments over legal issues, followed by the defendant’s final statement. The judges render their decisions after a collective deliberation (although in practice, judges may not deliberate over simple cases). Generally, the judges can verify their pre-judgment with the defendant’s admission of accusation. CPL-1996, article 155, 160, 162.


Most appellate trials in China are finished without a formal hearing. Judges only read the dossier, court records of the trial and the trial court opinion, and then render their final decision after deliberation. Only in cases involving serious crimes, such as capital cases, or in cases where some substantial disputes have been raised on appeal, would a hearing be opened and the defendant be granted a second chance to see a judge.

See, W. Liu, Y. Situ, supra note 22; Chu, supra note 1, at 162.

Compared with CPL-1979, CPL-1996 tries to cut off judges’ pretrial access to prosecution file, requiring only a copy of major evidence be transferred to the court before trial (regular procedure only, not including summary procedure). The remaining evidence is submitted at trial. However, not all jurisdictions implement this provision strictly, due to various reasons, such as economic concerns brought in by huge amount of xeroxing. Moreover, even by reading that major evidence, most judges could also reach a quite clear conclusion. They still regard the trial as a confirmatory process. The only change results from this revision of CPL-1996 may be that judges spend more time in reading dossiers after trial, rather than before trial. Some observers also found that reading only major evidence before trial is more likely to reach a conclusion of guilty, and may also run risk of obtaining a distorted pre-judgment. See Long Zongzhi, Xingshi Tingshen Zhidu Yanjiu (Research on Criminal Trial System), Beijing: Zhongguo Zhengfa Daxue Chubanshe (China University of Political Science and Law Press), 2001, p151.

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among which 85.2% were affirmed by the appellate court.  

In Yang’s case, although his first trial only lasted one hour, it generated a written opinion of 25 pages 6 days later, with 16 pages summarizing facts and evidence introduced into the record. Despite Yang’s appeal and complaint of unfair trial, the appellate court affirmed his conviction and death penalty. Neither the trial court nor the appellate court considered it as an unfair or illegal trial, because they have become accustomed to this type of “speedy trial”. What was surprising was the uproar among the public, who apparently demanded more than a legally correct verdict and were disappointed by the rush conviction and execution of Yang.

2) Tried by biased judges?

Yang was tried in Shanghai No. 2 Intermediate Court, which is located in the same city where the crime was committed. It is generally believed in China that courts are partially dependent on or even subordinated to the government of the same level that the court therefore can not be impartial in cases involving the government as a party. Concerned by the fact that Yang seemed to attack Shanghai government or Shanghai PSB, rather than the 10 victims he picked out at random, many commentators argued that the case should be relocated to another court outside of Shanghai territory. It was argued that the judges might encounter unjust pressure or interference from Shanghai government. However, neither the court nor Shanghai government ever responded to this widespread petition.

Yang’s target, Shanghai PSB, is not only one major department of Shanghai Municipal Government, which finances the Shanghai court system, but also a key player among the local Communist Party Political-Legal Committee (CPPLC), which coordinates the work of police, procuratorates, and courts. The head of Shanghai PSB is also the Secretary General of Shanghai CPPLC, while the chief judge of Shanghai People’s High Court and the chief procurator of Shanghai People’s Procuratorate are both vice secretaries. In other words, among the hierarchy of Shanghai Communist Party, the highest judge of all Shanghai courts is a subordinate to the director of Shanghai PSB, and must act at the command of the latter. This was why many people argued for a change of venue in Yang’s trial, claiming all courts within Shanghai territory, regardless trial court or appellate court, should be recused from trying Yang.

CPL-1996 is quite ambiguous about relocating a case only based on hierarchical concerns. There is no per se requirement that judges must recuse themselves when trying cases involving a superior or the government. Instead, CPL-1996 relies on the discretion of a higher court. Practically, if a case is to be moved beyond provincial boundary, the decision must come from the Supreme People’s Court of China (SPC), which rarely does so unless the case involves a top-ranking governmental official. For a regular governmental employee or a civilian, though, even if conflicts of interest have been reasonably proved, most courts will not bother to change a venue. In extreme cases of multiple-murder, gang-rape or organized violent crimes, although

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64 Lan Rongjie, doctorate dissertation, supra note 59. Another explanation for such a high ratio of affirmation is that appellate judges rely on the same dossier upon which trial judges base their decision.

65 Scholars and observers call this phenomenon “judicial localization”, which does not only undermine the independence and impartiality of the courts, but also results in local protectionism, another prominent problem in China. See Margaret Woo, Law and Discretion in the Contemporary Chinese Courts, 8 Pac. Rim L. & Pol’y J. 581, 592 (1999). As for local protectionism in civil procedure, see also, Jerome Cohen, Reforming China’s Civil Procedure, 45 Am. J. Comp. L. 793-804 (1997); Donald Clarke, Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments, 10 Colum. J. Asian L. 1, 41-49 (1996).


67 For example, four months before Yang was tried, the former Party Secretary of Shanghai Communist Party, also a member of the politburo of CCP, the highest decision-making body of China, was convicted of corruption by Tianjin No. 2 Intermediate Court, a court 1,000 kilometers away from Shanghai. Apparently, this was assigned by the SPC, who assumed that all courts in Shanghai had conflicting interest in trying the former big boss. See Tian Yu, Wu Jing, Shanghai Yuan Shiwei Shiji Chen Liangyu Yishen Beipan 18 Nian (The Former Shanghai Party Secretary Chen Liangyu Got 18 Years in First Trial), Xinhua News, 2008.4.1.

68 For instance, in 2000, a judge of Xiaan Intermediate Court, Yang Qingxiu, was charged of attempting to murder the chief judge of his court, and was tried in the same court by his former colleagues, with the alleged victim sitting as the chief judge and maintaining considerable administrative and adjudicative power over all other judges. Yang Qingxiu asked the entire court to be recused, and his trial to be relocated, but the court rejected his
public outrage and political pressure present possible threats to the impartiality of judges, courts rarely decide to relocate a case.\(^69\) It seems China’s court leaders are only concerned by cases in which a defendant may benefit from being tried by a closely connected court,\(^70\) but care little about whether a defendant might be prejudiced by a specific court. Change of venue is mainly considered as a manner to avoid improper leniency resulting from personal relationship between the judges and the defendant, rather than to protect the defendant from being harmed by biased judges.

Probably this was why Shanghai court refused to relocate Yang’s trial, even though the totality of circumstances indicated that all courts in Shanghai could possibly be biased. From the perspective of politics, though, it was understandable. After all, changing venue of Yang’s case could be easily interpreted as an official acknowledgment that the court is actually dependent on and subordinated to the government (particularly the PSB), which could not be acknowledged for the sake of political legitimacy. Interestingly, a reputable law professor who was later heavily criticized by commentators as taking the side of the government said to a national official news agency that legally speaking, Shanghai court is independent and neutral to local government, thereby obviating the need to worry about that Yang’s fair treatment.\(^71\) Under the laws as written, he was correct. CPL-1996 states that “people’s courts execute the judicial power in compliance of the law… free of interference from all administrative organs, social organizations and individuals”.\(^72\) However, the reality with respect to the independence and impartiality of China’s courts has made such an argument no more than mere propaganda or even an ironic lie.

Concerns of corruption were rarely raised in the heated debate over Yang’s trial. It seemed to most observers that neither Yang nor the victims or their families would try to bribe a judge. Moreover, tremendous media coverage and political pressure also combined to assure that no judge would dare to seek a bribe. It was conceivable, though, that the trial judges and court leaders were personally acquainted with the victims or their families, but this alone would not make significant differences to Yang’s conviction and sentencing.

However, as a society mainly based on personalized social nexus,\(^73\) corruption is a common concern in many other criminal trials. Some defendants, usually through their lawyers, may provide bribes in exchange of acquittal or leniency. Victims may also occasionally bribe judges. Chinese judges are generally deeply rooted in local communities, particularly in rural areas where migration is slower and smaller. Daily life and legal practice will acquaint a trial judge with many individuals.

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\(^70\) Being harsh to former government officials is quite common in China, maybe as of the government’s effort to rebuild public confidence. Empirical research has discovered that being a former government official in a criminal trial is more likely to receive a harsher punishment. \(\text{See }\) Liu, Jianhong, Zhou, Dengke, Liska, Allen E., Messner, Steven F., Krohn, Marvin D., Zhang, Lening and Lu, Zhou, Status, Power, and Sentencing in China, 15 Justice Quarterly 289, 297 (1998).

\(^71\) Yang Weihan, Xingshifa Xuejie Sanwei Xuezhe Pouxi Yangjia Xijing Sharen An Shenpan Guocheng (Three Criminal Law Scholars Analyze the Trial Procedure of Yangjia’s Murder Case), Fazhi Ribao (Legal Daily), 2008.10.24.

\(^72\) CPL-1996. article 5.

\(^73\) In observance and analysis of China’s judicial practice, guanxi (literally "relationship/connections") is a factor that should never be ignored. As Yan Yunxiang defines, guanxi is a “uniquely Chinese normative social order which is based on the particularistic structure of relationship as characterized in Confucian ethics”. Based on primary relations, such as familial, kinship, and communal, or on constructed “new short-term and instrumental connections outside the framework of primary relations for mutually beneficial purposes”, guanxi provides one “with a social space and at once incorporates economic, political, social and recreational activities”. \(\text{See }\) Yan Yunxiang, The Culture of Guanxi in a North Chinese Village, 35 The China Journal, 1-25 (1996). \(\text{See also }\) Kamal Sheel, Understanding Human Relationship in China, in Tan Chung ed. Across the Himalayan Gap: An Indian Quest for Understanding China, New Delhi: Gyan Publishing House, 1998.
courts, I asked all the judges the same question during one-on-one anonymous interviews, “by and large, in what percentage of cases you have encountered illegal outside influences, regardless of whether it involved a bribe?” Almost all judges replied with an estimation of 20 percent. Although inappropriate phone calls do not necessarily mean corruption or prejudice, they still show how vulnerable a judge’s position could be, and how difficult it is for a local judge to remain neutral and impartial. Change of venue, under this circumstance, seems to be a feasible cure, but will inevitably bring in other concerns such as inefficiency and inconvenience. Furthermore, given that personalized interactions are so widely and deeply embedded into China’s culture and judicial practice, it is unrealistic to think that change of venue alone can easily solve these problems. In the end, court leaders choose to relocate only those cases involving high-ranking officials, while leave almost all other cases to local judges, whether they are biased or not. This was exactly what happened to Yang Jia.

3) Represented by victim’s counsel?

The most-frequently-attacked flaw of Yang’s trial was that his defense lawyer, Xie Youming, appointed by the court, was also a long-term contracted counsel of Shanghai Zhabei District Government, the 10 victims’ ultimate employer.74 Before Yang’s trial, lawyer Xie admitted in an interview with a journalist that Yang would inevitably be sentenced to death, which caused public outrage condemning his conflict of interest and generated calls for his recusal. Xie never responded nor recused himself.75 Yang’s father, who had been separated form Yang and his mother for more than 15 years, hired two Beijing lawyers to defend Yang.76 However, these two lawyers never got permission to meet with Yang, who was detained in a police facility and had no access to his father or any lawyer other than Xie. Although neither the police nor the prosecutors, according to the law, have authority to prevent those Beijing lawyers from interviewing Yang, Shanghai procuratorate presented an interview transcript and said that Yang had rejected any lawyer hired by his father. Surprisingly, although lawyer Xie claimed that Yang has personally signed an authorization document to confirm his representation status, the Shanghai Lawyers Association stated in a press release that Xie was actually hired by Yang’s mother, who had been missing since the same day of the crime.77 These suspicious facts suggest that the Shanghai government tried to control Yang’s trial by appointing a government-sided lawyer to help him and excluding all other lawyers who were committed to his best interests. They might also indicate that the Shanghai government was actually trying to hide information about what might have motivated Yang from the eyes of the public.

Compared with other cases, the heated debates over Yang’s representation seemed more dramatic. It is not unusual, though, that the government tries to constrain defense counsel’s action, whether it involves hired counsel or appointed counsel. In sensitive cases, the prosecutor, sometimes through the Bureau of Justice, the government agency regulating lawyers and law firms, will meet with defense counsel in advance and coach counsel to act in a particular manner. For example, questions on sensitive topics may be prohibited from being raised at trial, and a defense claim of innocence may be precluded in favor of a plea for leniency. Lawyers who refuse those instructions and defend a sensitive case too vigorously might be disciplined or even suspended from practice. Obviously, trying and convicting a sensitive defendant are not the only government objectives. It also wants to convict the defendant in a desired manner, without being

74 Yang stabbed the victims in the headquarter building of Shanghai Zhabei District Public Security Sub-Bureau, which is both a department of Shanghai Zhabei District Government and a branch of Shanghai PSB. This dual system is designed to ensure that police can respond to local needs directly, while still under a centralized command system and thus could be mobilized by the higher government very quickly.
75 See Luo Jieqi, 16 Lvshi Yaoqiu Chachu Yangjia Lvshi (16 lawyers request to discipline Yangjia’s lawyer), Xinkuaibao (Fresh & Swift News), 2008.8.1, A31.
76 Hiring a defense lawyer by relatives is a routine practice in China, because most suspects are held in police custody and cut off contact with the outside, including any lawyer. In addition, at the investigation stage, the PSB is not obliged to provide a lawyer to any defendant, including those facing capital charges.
77 See Chen Yu, Shi Feike, Tang Qiang, Yangjia Anzhong De Lvshi Qunxiang (lawyer’s images in Yangjia’s case), Nandu Zhoukan (Southern Weekly), 2008.11.17.
challenged, embarrassed or jeopardized by an uncooperative defense lawyer.\textsuperscript{78}

In non-sensitive cases, which are the majority of all criminal trials, concerns center around the ineffectiveness of court-appointed counsel. Judges are inclined to appoint cooperative lawyers, who never make trouble but act perfunctorily to finish the job and facilitate closing the case smoothly and efficiently. Particularly in county courts, in which cases less likely involve significant factual disputes, and only juvenile, deaf, mute and blind defendants are entitled free lawyers,\textsuperscript{79} a court-appointed counsel is little more than a bystander. Some lawyers never even meet with their clients ahead of trial, nor do they examine the prosecution files in advance. I once observed a juvenile trial in a county court. The public defender appointed to represent the defendant spoke no more than ten words all through the trial, which lasted approximately forty minutes. I was also told that in a district court of a huge city, most unassisted juvenile defendants are referred to a single young lawyer, who is well acquainted with the judges and mainly relies on the skimpy allowance paid for by the court to make his living.\textsuperscript{80} Representing almost 200 juveniles a year, on top of a few cases from other sources, this young lawyer is in no position to provide effective representation. He may not be considered as a victim’s counsel sitting at the defense table, such as lawyer Xie, but he may not be regarded as a defense lawyer, either. However, what really matters to the court is that, by providing the defendants such a lawyer, judges manage to finish their cases efficiently, conveniently and lawfully. A legally correct conviction is obtained, whether there is fair procedure or not.

4) Denied the opportunity to confront witnesses

With respect to the right of confrontation, Yang received a better treatment than most other criminal defendants in China did. Two witnesses were called to testify at his trial, which is very unusual in China’s criminal justice system. However, a distorted confrontation may function worse than non-confrontation. If only inculpatory witnesses are summoned to accuse the defendant at trial and identify the perpetrator in the courtroom, while all potential exculpatory witnesses are out of the defendant’s reach, it is harder to expect a just outcome. In Yang’s first instance trial, he requested to summon five police officers who allegedly had illegally stopped, interrogated, and tortured Yang in his previous encounter with Shanghai police. Yang might attempt to justify his murders by eliciting evidence about the torture and seek empathy and leniency from the judges. However, the court simply denied Yang’s request. The prosecutors then introduced those officers’ written statements, which were very similar to each other, and argued that they acted lawfully and did not torture Yang at all. In addition, two officers were called in by the prosecution. One actually had arrested Yang at the murder scene and taken off his mask. The other testified how stubborn and demanding Yang had been during his petition and negotiation with Shanghai PSB over the alleged torture. Apparently, Yang was infuriated and frustrated by this testimony. As the court opinion wrote, “as a response to the court’s denial to summon witnesses Xue Yao, Chen Yinqiao and Wu Yuhua, Yang refused to answer any questions addressed to him at trial, refused to examine any evidence introduced by lawyers of both sides, and declined to present his own defense. He claimed the trial procedure was unfair.”\textsuperscript{81}

\textsuperscript{78} Stanley Lubman observed that in sensitive cases involving dissidents and others condemned for “endangering the security of the state”, the administration of criminal process is totally politicized, not only in unconformity of the Western standard of human rights or international human rights conventions already signed by China, but also a violation of China’s own domestic law. See Stanley Lubman, \textit{Bird in a Cage: Chinese Law Reform after Twenty Years}, 20 Nw. J. Int’l L. & Bus. 383, 394 (2000).

\textsuperscript{79} CPL-1996 requires all cases involving potential death penalty be initially tried in an intermediate court or even a High People’s Court of the provincial level. This provision indicates the legislature’s carefulness in serious cases and death penalty, but also implies that judges of the county/district level may not be capable or qualified to try those cases.

\textsuperscript{80} Private lawyers appointed to represent criminal defendants are provided with a meager allowance, aiming to cover their transportation and printing. The actual amount varies from 50 to 1,000 China Yuan, depending on the economy of a particular jurisdiction. In the city of this young lawyer, a standard allowance for each case is 200 China Yuan. With almost 200 cases referred to him every year, this lawyer is able to make an acceptable living, although lower than the average income of private lawyers.

The court did not explain why it denied Yang’s request to summon witnesses. After Yang’s conviction was affirmed on appeal, one of the prosecutors in his trial addressed this question in a speech to a Shanghai law school. He admitted that the prosecution filed a motion to quash Yang’s request, by presenting a videotape of the investigation in dispute, which only showed part of the investigation and contained nothing illegal. The court, however, did not address this issue in its opinion, but only orally denied Yang’s request. It is doubtful that the court was convinced that Shanghai police had not tortured Yang. On the contrary, the totality of circumstances and professional experiences all suggest that Yang was telling the truth. In this regard, denial of Yang’s confrontation request should be considered as a political tactic, rather than a legal decision, since it would be politically unacceptable to disclose Shanghai police’s misconduct in an attempt to justify Yang’s revenge. Moreover, even if Yang successfully proved the alleged torture, it would not have saved his life. Under no circumstance would torture which happened one year earlier legally justify a premeditated multiple murder against randomly selected law enforcement officers. Therefore, when facing a dilemma between procedural fairness and political correctness, it was predictable and understandable that Shanghai court would not hesitate to choose the latter course.

As a routine practice, even if a case involves no political sensitivity, China’s courts rarely summon witnesses. Empirical research in all 19 courts of a metropolitan area in west China reveals that during the whole year of 2004, only 68 witnesses were summoned in total. This barely amounted to 0.38 percent of all the 6,810 criminal cases. 9 of the 19 courts did not call in any witness.\(^{82}\) In most cases, several reasons prevent both the prosecution and the defense from obtaining witnesses. First, since criminal defendants are not entitled an absolute right to confront accusers, witnesses are consequently not required to appear in court. Second, without a plea bargaining system, almost all cases go to trial, including those many involving few factual disputes. Third, judges and prosecutors are widely concerned with inefficiency and cost. Fourth, witnesses may also worry about time and safety. Finally, as mentioned above, China’s mutual corroboration evidence rule enables judges in most cases to find out the correct facts through prosecution files, even without questioning a single witness at trial.\(^{83}\)

As a result of the absence of witnesses, a trial can be finished quite efficiently and smoothly. Written statements will be read into record, either word-by-word or summarily. Defense lawyers, if there are any, will meaninglessly examine the statements and try to challenge the witnesses who never show up. Judges may not concentrate on what is going on at trial, since they have read all or most of the statements before trial and have already formed a conclusion. Often this conclusion is then confirmed by the defendant’s verbal acknowledgement at the beginning of the trial. In this regard, by depriving the defendants of the confrontation right, judges manage to dispose of most cases not only efficiently and conveniently, but also correctly and lawfully.

5) Deprived of a public trial

As prescribed by CPL-1996, only cases involving state secrets, personal privacy and juvenile defendants, can be closed to the public. All other trials must be open. However, CPL-1996 does not provide details on how to implement this provision. Judges can and do manipulate the process to deprive a defendant of the right to public trial. In Yang’s trial on August 26, 2008, which should have been open to the interested public and press, all civilians and journalists who arrived at the courthouse very early in the morning were told that an observer permit was required to enter the building, but all permits had been reserved by other observers. Not surprisingly, only those selected by the court in advance, which did not include Yang’s father and aunt, were permitted to observe the trial. Unconfirmed rumors said most observers were police officers and relatives of the victims, arriving and leaving the courthouse in governmental vehicles.\(^{84}\) It could be imagined how

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\(^{82}\) Zuo Weimin, Ma Jianghua, Xingshi Zhengren Chuting Lv: Yizhong Jiyu Shizheng Yanjju de Lilun Chanshu (Rate of witness testifying at criminal trials: a theoretical analysis based on empirical research), Zhongguo Faxue (China Law), 2005.6.

\(^{83}\) For discussion on reasons of why witnesses rarely testify at trial, see Long Zongzhi, Zhongguo Zaozheng Zhidu zhi Sanda Guaxianzhuang Pingxi (Analysis on Three Strange Phenomenon of China’s Witness System), Zhongguo Lvshi (China Lawyer), 2001, 1.

\(^{84}\) See Shao Jian, Yangjia An Gongkai Shenli Yinggai Mingjuqishi (The public trial of Yang Jia should have been true), Yanzhao Wanbao (Hebei Evening News), 2008.8.31.
much public outrage was provoked by this brazen manipulation.

However, depriving a defendant of a public trial is not as common as other manipulations. Indeed, more concerns are raised from inappropriate publicity of criminal trials. For example, a corrupt official may be tried in an auditorium with the presence of hundreds of governmental officials; a notorious criminal may be tried in a municipal public square where thousands of people can observe; a young adult defendant who is charged of robbing students could be tried in a high school lecture hall. Under all these circumstances, a trial is much more than a legal proceeding, but actually a class, a propaganda event, and a political campaign. The court does not only aim at convicting the defendant, but it also purports to educate the audience with the dramatic trial show.\(^85\) Moreover, to send a politically correct message to the audience, the trial must be carefully prepared to the point that they are sometimes rehearsed in advance. The defendant must admit his guilt and express his remorse at the trial, and the defense lawyer must never raise serious doubts that could embarrass the prosecutor or the judge.

6) Conclusion

In all jurisdictions, a criminal trial is designed to find out the facts and apply the law accordingly. What vary are the methods to achieve this objective. Common law countries believe that a contest between opposing parties is the best way to ascertain truth, while civil law countries prefer an active judge. However, no matter who dominates the trial, the courtroom is generally supposed to be a forum for producing verdicts, where raw materials, such as evidence, are brought in and then processed by judges, lawyers and other participants involved in the trial mechanism. The immediate goal of a trial is to shape the judges’ minds and form a judicial opinion, including a factual finding and a legal conclusion. A trial is not only a contest and a dialogue between the prosecution and the defense, but also a dynamic between the judges and the parties, through which the judges perceive the facts and analyze the law. Judges’ perception of facts should only be acquired from the trial, not any other sources. It is the trial proceeding, particularly the hearing, rather than the pre-trial or post-trial procedures, that presents evidence to the judges and consequently produces a final verdict. The trial is the core and climax of a criminal procedure, while investigation and prosecution stages function as preparatory proceedings. In other words, a trial, and only the trial, is the incubator of the final verdict. A trial is where judges actually try a case, rather than only announce a decision.

It is not clear what kind of trial that CPL-1996 intends to produce. In some criminal cases, productive contests and dynamics are really brought in, and judges actually rely on the hearings to form their opinions. But in other cases, such as what happened to Yang, a trial may only mean a simple verification process to confirm what the judges have already found out before trial. Such a trial, rather than actually trying a case and producing a verdict, is little more than a rubber stamp to publicly authorize a pre-trial conclusion. The actual fact-finding process is conducted and finished before trial by reading prosecution files, without the presence of both parties. The live presence of parties in front of the judges contributes little in shaping the judges’ minds.

But why does CPL-1996, which had been expected to bring in an adversarial-style trial framework, end up with such a distorted trial model? Most scholars argue that the judges are to blame. Trial judges care much more about their own convenience and efficiency than the fairness of the trial or the procedural rights of the defendants. They perceive themselves as blue-collar workers on the criminal justice assembly line, rather than the decent and noble guardians of justice. To many of them, trying cases and convicting criminals means little more than a regular office job, and what they think they are supposed to do is to finish the case and take their paycheck. So long as they can correctly dispose of all cases assigned to them, the objective is to make their daily work more comfortable and less stressful, while doing no damage to their salaries or positions. Understandably, judges would prefer reading dossiers in their private offices with a cup of tea, rather than sitting on the bench under strict scrutiny of lawyers and the public. Once they have formed a general conclusion by reading dossiers, few of them would tolerate a lengthy

trial that could consume considerable time and resources but eventually would result in an identical conclusion. Instead, they always tend to push both parties to move on at their highest speeds, go straight through all required legal proceedings without addressing any superfluous point not mandated by existing laws, and then close the trial.

Could there be any quality control for judges’ work and production, they are those explicit requirements in statutes, such as appointing a free counsel to a juvenile defendant, informing the defendants of their rights, and holding an open hearing so that the defendant can stand right in front of the judges, regardless how much chance he can actually receive to present his defense. However, the statutes, particularly the explicit rules, are only the bottom line for a judicial proceeding, and can only ensure the very basic outward legality of the procedure. Without adhering to the fundamental principles of justice, such as fairness and transparency, explicit rules can be easily manipulated and distorted, and eventually deviate from those principles. For instance, seating a sleeping counsel at the defense table might make a trial look legal, but it would still not be substantively fair. If a system does not take these manipulations and distortions seriously, overlooks or even encourages actions as such, it will result in legal but unfair verdicts.

As demonstrated by Yang’s trial, a case of so much importance and complication, China’s criminal trial could be easily manipulated and converted into a confirmation process. Judges read prosecution dossiers ahead of trial, form a general conclusion, and enter into the courtroom with predetermined outcome in mind. Once the defendant verbally acknowledges the accusation at the beginning of the trial, judges routinely urge lawyers to summarize evidence and accelerate arguments. Absent witnesses and cooperative defense lawyers also contribute to efficiency and convenience of the judges’ work, while the mutual corroborative evidence rule and strict internal supervision help to enhance correctness of the judges’ fact-findings. As such, judges care less and less about the fairness of trials, but mainly focus on how to correctly and legally finish cases with most efficiency and convenience.

Wrongful Verdicts: How Manipulation of Trial Procedures Causes False Convictions or Acquittals

In addition to efficiency and convenience, if manipulation of trial procedure could also guarantee substantive correctness of a verdict, there would be much less academic criticism and public outrage. However, the problem is that twisted trials frequently cause incorrect verdicts, by convicting innocent people, acquitting guilty ones, or imposing excessive punishment or disproportionate leniency on criminal defendants. Occasionally, innocent persons have been sentenced to death and executed. Manipulation of trial procedure, although not the only cause of these wrongful verdicts, is more likely to affirm and validate errors made by police and prosecutors. Thus, criminal defendants are deprived of their last chance to be protected against false prosecution.

Theoretically, well-designed trial procedure could protect judges from unwanted external influences or interferences, and consequently enhance judges’ impartiality and independence. Immediate release of verdict after trial, for example, may defeat an outsider who wants to taint a judge’s opinion by winning and dining the judge after the trial, as many defense lawyers or defendants’ relatives have done in China. However, it may also discourage judges from thoughtful consideration and eventually lead to a careless verdict. A balance must be drawn between judges’ diligence and independence, or in other words, between factual truth and procedural fairness.

\[86\] For instance, in 1994, a 21-year-old man named Nie Shubin was convicted of raping and murdering Kang, a female factory worker, and was executed in 1995. 10 years later, one habitual rapist and murderer, Wang Shujin, was arrested and confessed that he actually raped and murdered Kang in 1994. Wang was then brought to the crime scene, where he clearly identified the exact location and described many details that could only be known by the actual perpetrator. Wang did not know Nie, nor was he aware of Nie’s trial and execution. He was later sentenced to death, but only on his other crimes, not on the one involving Kang and Nie. Both Nie’s dossier and Wang’s death penalty were submitted to the SPC for a final review. However, more than three years have since past and no final answer has yet been released. See Zhao Ling, Nie Shubin Yuansha An Xuanerweijue, Fang Goudui Gongzhong Ya Yidi Diaocha (Nie Shubin’s False Execution Still Pending, Public Call for Relocation of Venue to Avoid Corruption), Nanfang Zhoumo (Southern Weekly), 2005. 3. 24.
Considering that China’s judiciary is struggling to retain public confidence, which has declined drastically due to judicial corruption, procedural fairness appears more desirable than factual truth. Particularly in ordinary cases, there is a very small possibility of critical factual error, but outside influences still impose substantial threats to judges’ integrity. Under these circumstances, an interference-free verdict released right after the trial, rather than a careful but time-consuming consideration, may be preferable.

In the West, the United States as an example, elaborate precautions are taken to shield the fact finder, such as a jury, from suspicious taint by extraneous influences. To ensure the integrity of judicial decision and guarantee a fair trial by an impartial jury, jurors are permitted to consider only admitted evidence, arguments and instructions. Prospective jurors who are aware of the case in question or who have formed pre-conceived judgments about it are excused in *voir dire*. Improper contact with jurors during the trial may result in replacement of the affected juror or even a mistrial, and jurors’ use of wireless communication devices is banned during deliberation. With respect to bench trials, procedural restrictions upon judges are not as tight, although the United States Supreme Court has stated that “in every state, including Louisiana, the structure and style of the criminal process – the supporting framework and the subsidiary procedures – are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial.” Professional judges are presumed to be capable of resisting outside influences. Inadmissible evidence, which would otherwise be kept away from a jury, will inevitably be exposed to the judge. However, judges are expected to be able to disregard evidence which is inadmissible. Fact-findings are not required to be rendered without delay after the trial. Instead, judges are free to ponder on the case as long as they deem necessary, even with new trials going on at the same time. Bench trials rely more on judges’ professional ethics and personal consciences, instead of sophisticated procedural fences, to resist outside influences. In fact, most Western countries need not to worry about judges’ vulnerability against interferences in ordinary cases. The constitutional framework, with judicial independence, checks and balance, aggressive press, freedom of speech, etc., establishes a highly integrated judiciary. However, no such a well-balanced constitutional framework is yet available with respect to China’s criminal justice system, but CPL-1996 still counts on judges’ personal ethics and consciences to resist outside influences. As a result, when a judge chooses to cater to an interferer, he may find few institutional barriers to his misconduct.

Yang Jia’s trial reveals that in ordinary criminal cases, Chinese judges are inclined to manipulate procedural safeguards to ensure efficiency and convenience. Nevertheless, it is generally tolerated by both the court and the public, because in most cases, despite the manipulated procedure, judges can still reach substantively correct and superficially legal verdicts. However, if a malleable trial encounters an outside interferer, the proceeding might be manipulated to further interest of the interferer, rather than to merely pursue efficiency and convenience. False verdicts as a result of this manipulation are quite likely to be produced at the interferers’ wills, such as happened in the following case.

1) Public outrage: a conspirator of irresponsible judges?

Mr. She Xianglin, a 29-year-old security guard of Jinshan County, Hubei Province, discovered that his wife, Zhang Zaiyu, was missing on the night of January 20, 1994. Zhang’s family suspected that She Xianglin somehow contributed to Zhang’s disappearance, since he was said to have had an affair with another woman. Three months later, a body of a woman was found floating in a nearby reservoir. The face of the dead woman had deteriorated too much to be identified. Zhang’s brother was summoned to check the body, which happened to have similar

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88 U.S. v. Freeman, 634 F.2d 1267 (10th Cir. 1980) (defendant’s conviction was reversed because a government investigator entered into the jury room during its deliberation without notice to defense lawyer.) Owen v. Duckworth, 727 F.2d 643 (7th Cir. 1984) (threatening phone call made to one juror and then communicated by the juror to other members of the jury deprived the petitioner’s constitutional right of a fair trial.)
height, weight and hairstyle as his missing sister. He then identified the body as Zhang Zaiyu. Mr. She became a prime suspect and was arrested on a murder charge. After 11 days of continuous interrogation with brutal torture and deprivation of sleep, She Xianglin finally confessed to the alleged crime, although his confession contained a number of inconsistencies. With respect to how he murdered his wife, he mentioned four different schemes at different times, including conspiring with a friend, who later presented a successful alibi. No murder weapon was ever discovered, nor was there any eyewitness. In addition to She’s confession, the prosecution could only provide three circumstantial witnesses to prove that She had an affair with another woman. Despite those unresolved doubts and the lack of direct evidence, prosecutors decided to press on with the case.91

When Jingshan County PSB proposed an official indictment for the first time, the procuratorate turned it back and instructed the PSB to collect more supporting evidence to clarify those doubts; otherwise it would not proceed to indict She. Three months later, without any new evidence, the PSB sent the case to Jingshan Procuratorate again, stating that all other evidence had disappeared due to time lapse. In the mean time, the alleged victim’s grieving family, joined by hundreds of angry townspeople, protested at Jingshan County government, demanding harsh punishment for She. They even accused local officials of taking a bribe from She to send his case back and forth. Under this enormous public pressure, a consensus was finally reached in Jingshan Procuratorate. According to a file disclosed to investigators and journalists 11 years later, the majority of procuratorate officials agreed that because of the severity and extreme nature of She’s crime, particularly the pressing public outrage, “under no circumstance should it be dismissed”.92

She Xianglin was first tried in Jingzhou Intermediate Court on October 13, 1994. The whole city was stirred. The grieving family of Zhang, with angry masses, crowded into the courthouse and demanded a “quick conviction and swift execution”93 of the defendant. Although the defense lawyer pointed out various flaws in the prosecution’s case, the court did not disappoint the audience. Twelve days later, Mr. She was convicted of premeditated murder of his wife, and was sentenced to death.

She Xianglin appealed to Hubei Province High Court, which was located in the provincial capital city of Wuhan, more than 100 miles away from the public outrage in Jingshan County.94 The appellate court, without a hearing, immediately found reasonable doubts about the conviction. It did not, though, acquit She directly on appeal, although it was empowered to do so.95 Instead, the High Court reversed the conviction and remanded the case for a retrial, with an instruction to the trial court to resolve those doubts.

Unable to get more evidence from either side, Jingzhou Intermediate Court returned the case to the prosecution, on the ground of “unclear facts and insufficient evidence”.96 Jingzhou

93 Wang Gang, id
94 Actually, Zhang’s family also petitioned to various provincial government agencies, including the High Court, accusing local officials’ failure to “execute She swiftly”. However, because of the geographical distance and limited transportation, except presenting a petition letter signed by more than 220 townspeople, Zhang’s family was not able to mobilize a visible mass protest. See Zhang Li, Yurenji Zhetian Ta Wuzui Chuyu: Yige Canku de Falv Wanxiao: Hanyuan I Innian She Xianglin Jiaporenwang (Acquitted on April Fool’s Day: a Crucial Legal Joke: She Xiangling Being Wronged for 11 Years and Lost His Family), Nanfang Zhumo (Southern Weekend), 2005. 4. 7.
95 Article 136, CPL-1979.
96 Under article 123 of CPL-1979, returning case to prosecution was legal. However, CPL-1996 requires the court to find the defendant not guilty if prosecution evidence is not sufficient to prove its case. CPL-1996, article 162. Nevertheless, in practice, if a court concludes that an acquittal should be rendered based upon insufficient evidence, most judges are inclined to suggest the prosecutor withdraw the indictment, which could avoid a public declaration of not guilty. Most likely, the prosecutor will follow this suggestion and return the case back to the
Jintao, aiming to ease the tension between the government and the public, and to tackle various disputes and conflicts among the society. The judicial system is regarded as a vital instrument to fulfill this objective. Reform Judicial Institutional Reform by Addressing the Masses’ Judicial Needs

98 100 101 Dushi Bao (Southern Daily), 2008. 4. 11.

returning a case may practically mean acquitting the defendant, but also avoids embarrassing the prosecutor or the compensation, to which he would be entitled if he had been formally found not guilty by a court. In other words, guilty or not. Most defendants, under this circumstance, will be happy to just go away and never ask for state considerations, including the law, the social order situation, and the people’s feelings.

It is not unusual in China that PSBs, procuratorates, and courts are driven by public opinion and thus compromise the integrity of criminal justice. One of CPL-1996’s fundamental principles, as stated in article 6, is “relying on the masses” (Yikao Qunzhong). In 2008, the Central CPPLC promulgated a new set of guidelines for judicial reform, adopting “mass line” (qunzhong luxian) as one basic policy, an obvious departure from the professionalism approach, which had been emphasized during the past decade under the leadership of the former Chief Justice, Xiao Yang. “Mass line”, a political slogan popularly used in China’s revolutionary era, half a century ago, requires the judiciary to address the masses’ needs by carrying out justice with participation of the masses. The new president of the SPC, Chief Justice Wang Shengjun, particularly defined “mass line” with respect to death penalty, arguing that death sentence should be grounded upon three considerations, including the law, the social order situation, and the people’s feelings.

It is politically understandable that the government and the court take the masses’ opinion, particularly public outrage, very seriously, even at the cost of compromising rule of law. As a regime not established on genuine democracy, CCP needs public confidence to maintain its legitimacy, power and governance. Addressing the public’s needs and responding to public outrage are important means to establish public confidence. However, without a democratic representative system, judges and governmental officials are all embedded in bureaucratic institutions. They are most sensitive to and responsible to the needs of their respective superiors, rather than to those of the public or the voters. In fact, as in Yang’s trial, judges frequently override the public’s needs with their own pursuit of efficiency and convenience. Only when significant public outrage emerges and triggers threats to social stability, or stubborn individuals keep petitioning higher authorities and disgrace local agencies, are responses initiated to address the demands of the angry public or grieving individuals. The past decade, in particular, has seen growing economic disparity and governmental corruption, which has caused great tension between the government and the public. A single case could easily break this tension and trigger serious social instability or violent riots. The government has therefore become more and more sensitive to public outrage and pledged continuous efforts to establish a harmonious society.

police, who will set the defendant on bail and release him, without clearly giving an answer as to whether he is guilty or not. Most defendants, under this circumstance, will be happy to just go away and never ask for state compensation, to which he would be entitled if he had been formally found not guilty by a court. In other words, returning a case may practically mean acquitting the defendant, but also avoids embarrassing the prosecutor or the police.


98 Wang Qijing, Xin Yilun Tizi Gaige Zhixiang (The Direction of the New Round of Judicial Institutional Reform), Liaowang (Outlook Weekly), 2009. 1. The author is the Vice Secretary of the Central CCPLC.


100 Wu Bo, Biена Zhixinghe Laobaixingshuoshi (Don’t Mention Enforcement Rate to the People), Nanfang Dushi Bao (Southern Daily), 2008. 4. 11.

101 See Randall Peerenboom, supra note 49, at 1050.

102 Harmonious society (Hexie Shehui) is the ideological/political slogan initiated by the current President Hu Jintao, aiming to ease the tension between the government and the public, and to tackle various disputes and conflicts among the society. The judicial system is regarded as a vital instrument to fulfill this objective.
“Stability overrides everything else”, a political slogan proposed by the current President of China, has hence been promoted to be the number one political principle. In any case where judicial integrity conflicts with social stability, the former is usually compromised.

In Mr. She’s case, when the family of the murdered wife, backed up by hundreds of angry townspeople, protested at the county town, it immediately became a pressing political issue to the local government, much more than a mere criminal case. Alarms of social instability rang. Authorities approached the situation with maximum caution, since one more inappropriate action might agitate the furious public. Particularly for local police officers, who formerly worked with She when he was a security guard, any leniency shown to She would have invited immediate suspicion of corruption.\textsuperscript{103} Therefore no one in the PSB dared to take the risk and let She walk away, although some of them might have been fully aware of the flaws in the case. Due to the massive public outcry, Mr. She was indeed presumed guilty, and could not be released unless convincing exculpatory evidence had been discovered. No prosecutor, for the same reason, would cross the line and dismiss the case, either. All pressure was eventually directed at the judges, who were empowered to render a definitive decision whether She was guilty. However, the judges had their own leeway to dodge this dilemma. The trial judges, who did not have final say over She’s conviction and execution, chose to cater to the public pressure and shift the tough job to the appellate court. The appellate judges, though, found another shelter. They simply reversed the conviction and remanded for a new trial. Obviously, no one in the judicial system, including the police, prosecutors or judges, dared to release She, although many of them probably believed him innocent. They were all afraid of the public outrage and their potential personal responsibility. Everyone tried to shift the blame to another agency. Finally, Jingmen CPPLC had to step in and call an end to this ugly game, but they dared not acquit the sensitive defendant either. On the one hand, they decided to convict She of murder to accommodate the public outrage; but, on the other hand, they only sentenced She to 15-year imprisonment to preserve the possibility for further correction. Those reasonable doubts did not necessarily grant She an acquittal, but only a compromised leniency. This approach is called “yizui congqing (leniency for suspected crimes)” by Chinese scholars, contrary to “yizui congqiu (acquittal for suspected crimes)” as prescribed by CPL-1996.\textsuperscript{104} As a judge of the Jingmen Intermediate Court recalled 9 years later, the CPPLC were clearly aware of the ambiguity of She’s case, but they also knew that they needed to give the outraged public a conviction or risk serious social unrest.\textsuperscript{105}

\subsection*{2) Bureaucratic interference: who actually makes the decision?}

She Xianglin was initially indicted in September 1994. His final conviction came four years later, in September 1998. This unusual delay\textsuperscript{106} was all about an ugly game of passing the buck.\textsuperscript{107}

\textsuperscript{103} Such suspicion could trigger uncontrollable mass incidents. For example, in January, 2007, a waitress of a luxury hotel in Dazhu County, Sichuan Province, died after intoxication and rape. Since no suspect had been apprehended for days, and the behind-scenes owner of the hotel was a local police, numerous rumors about corruption and murder circulated in the county town. A mass protest emerged and finally erupted into riots, with furious masses burning down the hotel. See Jia Yanyong, Sichuan Dazhu Qunti Shijian Zhuiji: Chuanyan Wei Cengqing Gongzhong Zouxiang Shikong (Sichuan Dazhu Mass Incident Report: Unclarified Rumors Cause Uncontrollable Public), Nanfang Dushibao (Southern Daily), 2007. 2. 4. However, somehow ironically, Mr. She’s work experience with local police never benefited him, rather, partially justified the torture he suffered from his former colleagues. As Jingshan PSB claimed in a statement responding to inquiries of why She made inconsistent confessions, Mr. She was considered to be more capable of resisting investigation and interrogation, because he used to work as a security guard. Liu Binglu, supra note 91.

\textsuperscript{104} See Liu Xianquan, She Xianglin Shaqi An Yinfa de Xueli Sikao: Chuantong Xingshi Sifa Linian de Fansi (Jurisprudential Thoughts Triggered by She Xianglin’s Wife-Murder Case: Rethink the Traditional Ideology of Criminal Justice), Faxue (Jurisprudence), 2005. 5; Li Jianming, Sixing Anjian Cuowu Caiyun Wenti Yanjiu: yi Sharen Anjian wei Shijiao de Fenxi (Research on Wrongful Death Penalty Case: from the Perspective of Homicide Cases), Fashang Yanjiu (Law & Commerce Research), 2005. 1.

\textsuperscript{105} Sun Chunlong, supra note 93.

\textsuperscript{106} CPL-1996 article 168 imposes a 45-day time limitation upon first instance trials, with a 30-day optional extension for 4 types of exceptional cases such as gang crime, extremely serious and complicated crime, continuous crimes in multiple jurisdictions, and major crimes in remote area where transportation is inconvenient. As for appellate trial, article 196 has a similar provision. Additionally, another 10-day period is provided for filing an appeal. In this regard, no defendant would expect to wait 4 years for his final conviction.
Having witnessed this embarrassing battle for years, Jingmen CPPLC\textsuperscript{108} eventually called an end. A coordinative meeting was scheduled on October 8, 1997, with participation of officials from courts, procuratorates and PSBs of both county (basic) level and municipality (intermediate) level. A compromise, with a conviction of She and a downgraded sentence, was reached among the several institutions. Mr. She’s life was saved, not only to avoid a nonreversible execution, but also to make sure his case would be kept under local control and not subject to another review by the skeptical Hubei Province High Court.\textsuperscript{109}

At this point, Mr. She’s remanded trial had not been scheduled, but every player in the system had known the final answer, since they were all bound by the CPPLC’s decision, even though the decision-makers were not only judges, but also Party officials, prosecutors and police officers. What left then was only to perform a trial show and sentence She to jail for 15 years, which would cloak the CPPLC’s decision with apparent legality, irrespective of how many reasonable doubts still existed. Once the CPPLC made its decision, the case was finished.

Finally, the criminal justice system found its direction and was ready to move forward. On March 31, 1998, She Xianglin was indicted again, but this time by Jingshan County Procuratorate, an institution not authorized to handle premeditated murder cases. 75 days later, on the last day of the time limitation set by CPL-1996, Jingshan County Court rendered its decision, convicting She of murder and sentencing him to 15-year imprisonment, the maximum sentence a county court could ever impose. One episode worth mentioning: as indicated in the dossier, two judges went to interrogate She in the detention center before the trial.\textsuperscript{110} She Xianglin contended that the interrogation transcript did not accurately reflect his statements and refused to sign it. One judge responded: “it does not matter whether you sign it or not. Those above us have reached a consensus (to convict you).”\textsuperscript{111} On his appeal to the intermediate court, Mr. She pressed his innocence again, but obviously no one cared about what he said. On September 22, 1998, after four and half years in custody, She’s conviction was finally affirmed. He was subsequently transferred to a prison to serve his remaining term of sentence, until his wife, the alleged murdered victim, suddenly came back 6 years later, on March 28, 2004.\textsuperscript{112} The entire town was shocked. After another 4 days, on April 1, the Fool’s Day, Mr. She was released from the prison. He might have believed his sudden freedom as a big joke. In fact, it was, only it lasted over 10 years.

However, not everyone was convinced by the CPPLC’s decision. The corresponding appellate judge\textsuperscript{113} responsible for drafting the court opinion became very skeptical after reading the dossier, and proposed to return the case to the trial court. He was not authorized, though, to make this decision. For such an important case with such significant sensitivity, no individual

\textsuperscript{107} Wang Gang, supra note 92.

\textsuperscript{108} In 1996, Jingzhou City was divided into two municipalities, with a new city called Jingmen established to administer several counties including Jingshan County, where She resided. As a result of this rezoning, after Hubei Province High Court remanded She’s conviction, he was later tried in Jingmen Intermediate Court.

\textsuperscript{109} Chapter 2 of CPL-1996 establishes a two-tier trial system in China. A county court is authorized to try a case if the potential sentence is below life sentence. If the defendant then appeals, the conviction could be finally affirmed by the intermediate court. There will be no appeals, even optional ones, to a higher court. As such, once She was firstly convicted in a county court, the Hubei Province High Court would not have a chance to review his conviction.

\textsuperscript{110} Under article 45 and 158 of CPL-1996, judges are empowered to interview the defendant in the detention center or other places, even without presence of either the prosecutor or the defense lawyer. In practice, though, only a few judges, and only in controversial cases, exercise this power. Criminal defendants are presumed more likely to tell the truth when confronted only with judges, free of intimidation from police or prosecutors.

\textsuperscript{111} Liu Binglu, supra note 91.

\textsuperscript{112} As Zhang Zaiyu recalled, in January, 1994, she ran away after a quarrel with She Xianglin, her husband, and finally went to Shandong Province, somewhere more than 500 miles away from Jingshan County. Zhang married a farmer there and had another child with the man. Zhang had no idea about what happened in Jingshan, but because she missed her daughter, whom she had with She Xianglin and left in Jingshan, Zhang finally decided to come back to see them. See Zhang Li, supra note 94.

\textsuperscript{113} All appellate courts hear cases in a panel of at least three judges, with one judge responsible for regular correspondences between the court and the parties. Generally, the corresponding judge also drafts the court opinion and reports the case to the Adjudicative Committee if necessary.
judge, except for the CPPLC or the Adjudicative Committee, was empowered to make the final decision. The Adjudicative Committee is comprised of court leaders, including the president, vice presidents, division chief judges, and some other senior judges, and is empowered to decide all important cases by a simple majority vote. The three judges sitting on the bench at trials are usually not members of the Committee and have no vote in determining the case. The Adjudicative Committee members rarely attend any trial or read any dossier. They simply listen to the report of the corresponding judge, discuss it with each other and take a vote.

For other less politically sensitive cases, the judges hearing the trial may have exclusive power to make the final decisions. It varies in different jurisdictions with respect to who has the final say in an individual case. The single judge or the panel sitting at the trial, in general, can decide ordinary cases, although some jurisdictions require these opinions be approved by the division chief judge before release. Those cases with sentences of suspension, fine, or other non-imprisonment punishment may be sent to a vice president for approval. All acquittal cases, death penalty convictions, and other sensitive or controversial cases must be reported to the Adjudicative Committee, the highest decision-making body within the court. In some jurisdictions, the Criminal Division General Meeting, or the presiding judge of a panel, may also be considered as separate decision-makers and empowered to decide certain cases. In a county court I observed in western China, no individual judge could decide a single case; all criminal cases must be collectively determined by the Criminal Division General Meeting or the Adjudicative Committee. In comparison, 89 percent of criminal cases of another court only 150 miles away and in the same province, are resolved by the judges who heard the trial, leaving only 3 percent to the Adjudicative Committee.

Strictly speaking, CPL-1996 only authorizes the Adjudicative Committee and collegial panel (or the single judge in a summary trial) to render a court opinion. There is no legal basis for local CPPLC, court (vice) president, criminal division chief judge, Criminal Division General Meeting, or the presiding judge of a panel to decide any case. However, no jurisdiction seems to take this prohibition seriously, nor does any judge or litigator challenge those decision-makers’ legal status in practice. The court system assumes that hierarchical review and bureaucratic supervision by court leaders, either individually or collectively, are of essential importance to guarantee adjudication quality and political correctness. Court leaders are presumed more competent, more experienced, more politically reliable, and less corruptible than lower judges, and thus are empowered to supervise lower judges, review their decisions, and evaluate their performance,

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114 In general, China’s courts consist of several divisions, including registration, criminal, civil, administrative and enforcement divisions, plus an administrative office, a policy & research office, and a political office.

115 Absence from trial may also make a supervisor render a false decision. Those behind-the-scenes decision-makers may never have met the defendant face-to-face before convicting him or even sentencing him to death. As for a defendant like Mr. She, who was indeed brutally tortured to confess, the decision-makers would not see the physical and mental damages resulting from the torture, which could likely trigger reasonable doubts for an eyewitness observer. Could there have been any witness testified at She’ trial or appeal, they wouldn’t see him, either. All they could see was a report written by a lower judge, who might unintentionally or deliberately distort the facts to suit his conclusion. All these factors, combined together, significantly increased the possibility of false verdicts.

116 This rule could be construed as an indicator that China’s courts do not trust their judges, thus impose strict scrutiny upon those lenient sentences, which are more likely to be traded for bribes. By contrast, except for maximum sentences such as death penalty in an intermediate court, or 15-year imprisonment in a basic court, court leaders usually do not review convictions with normal term of imprisonment. It seems that courts are more suspicious about lesser sentences, rather than harsh ones.

117 However, as demonstrated by She’s case, the local CPPLC is superior to a court in the hierarchical structure of the Party.

118 Similar to the Adjudicative Committee, the Criminal Division General Meeting is presided over by the division chief judge, attended by all judges of the criminal division. Each judge has one equal vote. Its decision is binding to all criminal judges, but in some cases subject to the Adjudicative Committee’s review.

119 For empirical data, see Lan Rongjie, supra note 59. For general description of the hierarchy of decision-making, see also Lubman, supra note 77, at 397.

120 Lan Rongjie, id.

121 See Margaret Woo, supra note 64, at 582.
although they are not authorized by existing laws to do so. Judges are not equal to each other. Court leaders with considerable influence upon lower judges’ evaluation and promotion do not have to cite a legal foundation if they want to interfere into a case.

As mentioned above, China lacks an effective constitutional mechanism to keep its court system accountable, which makes it easier for China’s judges to find loopholes and trade their cases for personal interest. There is little doubt, though, that China’s leaders are aware of this fundamental defect, but without appealing to institutional reforms like judicial independence or freedom of speech, the only conceivable solution left for the leaders is bureaucratic supervision, a double-edged-sword. Judges are closely monitored, and their decisions are carefully scrutinized. Severe punishment might be imposed upon violators. Collective decision-making, such as review by Adjudicative Committee and Criminal Division General Meeting, is widely adopted to prevent individual corruption. However, bureaucratic supervision also makes possible for inappropriate intrusion from the supervisors, who themselves may not be effectively supervised, and thus may become as unaccountable as those they are supposed to regulate. Corruption, irrationality, bias, and irresponsibility may all find a way into the final verdict through the so-called supervision process.

As in She’s trial, although the corresponding judge was quite skeptical about the prosecution’s case, he could not overturn or set aside She’s conviction. He was little more than a puppet staged by local CPPLC to go through a show trial. What he found out and what he thought about were not important because the CPPLC had already made a final decision. What really mattered then was to stage a trial that looked lawful and thus could superficially legalize the CPPLC’s decision. However, because the CPPLC itself was biased by public outrage and pressured by political concerns, the false conviction was affirmed. The bureaucratic supervision system, which was designed to enhance adjudication quality, ended up making a huge mistake, and this mistake was imposed, top-down, onto those individual judges who initially proposed a correct solution.

3) Invisible outside influences: the man behind the curtain

Although bureaucratic interference may be technically illegal, it is widely accepted as necessary and realistic. Various local regulations have been adopted to legalize, formalize and regulate bureaucratic interference. Nevertheless, there are also outside influences that are less visible, illegal and unethical, and may affect a court decision, or corrupt a judge as well. These influences come from various sources, including friends, family, acquaintances, former classmates, neighbors, superior judges, lawyers, or others who have contact with the judge and can exert influence. Most of this interference is carried out secretly, invisible to the public and especially to the opposing party. After all, it is relatively easy to hide a secret transaction behind normal social activity. A mere phone call, for instance, could lead to a deal with the judge, leaving little risk of being overheard or caught.

Compared with bureaucratic interference, invisible outside influences from individuals with direct contacts with the judges are more wide spread. As mentioned above, bureaucratic interference usually exists in sensitive or controversial cases, where court leaders, who are presumed more competent and more reliable than lower judges, are assigned to resolve sensitive issues and complicated problems. For those ordinary cases involving neither sensitivity nor complexity, lower judges may be empowered to make a final decision without being thoroughly

122 During the past decade, in his annual reports to the National Congress General Conference, the president of the SPC, also the Chief Justice of China, consistently acknowledged the widespread existence of judicial corruption. See individual reports at: http://www.court.gov.cn/work/.
123 This is one of the main reasons why the adjudicative committee system was not abolished in CPL-1996, despite under fierce attack for decades. As some defenders argued, collective decision-making process could prevent individual judges from abusing judicial power, protect individual judges from outside influences and, bring in more intelligence and experience into court opinions. See Zhu Suli, Jiceng Fayuan Shenpan Weiyuanhuai Zhidu de Kaocha yu Sikao (Observation and Analysis of Adjudicative Committee System of Basic Courts), 2 Beida Falv Pinglun (Peking Law Journal), 343 (1999).
124 For a better understanding of China’s judicial corruption, see Zou Keyuan, Judicial Reform in China: Recent Developments and Future Prospects, 36 Int'l Law. 1039; see also Lubman, supra note 78, at 396.
slogan for China’s criminal justice system is authorities are generally granted comparatively lighter sentences in practice. A long-standing and well-known order to encourage confession, cooperation, and self-correction, defendants who voluntarily confess to the

According to China Criminal Law, remorse is not necessarily a mitigating factor in sentencing. However, in order to encourage confession, cooperation, and self-correction, defendants who voluntarily confess to the authorities are generally granted comparatively lighter sentences in practice. A long-standing and well-known slogan for China’s criminal justice system is tanbai congkaan, kangju congyan, which means confession results in leniency, while resistance leads to harshness. Due to the ambiguity in defining remorse, as well as the lack of clear guidance, this rule is frequently used by judges to justify leniency, which has invited widespread criticism. Empirical research conducted in a prison in north China uncovered that defendants having friends in high places were likely to get a sentence reduction of 16.7 months, a huge advantage compared with their fellow criminals. Although this research did not present any actual evidence of outside influences upon the sentencing process, its implications are strong.

It is true that not every defendant happens to know someone personally connected with the judge, particularly in urban areas, where huge population and growing migration significantly reduce judges’ connections with local community. However, a bribe can function better than, or at least as well as, a friend of the judge. China has been struggling to tackle corruption ever since it adopted a market economy in late 1970s. Millions of businesses prosper every year, but the government retains the most valuable resources and almost unlimited power in regulating the market. Without an effective anti-corruption mechanism, there are always plenty of incentives and opportunities to bribe a governmental official to further one’s interests. More temptation goes to the judges, who have the final say and broad discretion over various lucrative commercial disputes, as well as deprivation of liberty or life of a criminal defendant. China’s Chief Justice has frankly acknowledged in his report to the NPC that some judges trade judicial power for personal interest. In 2003, a total number of 468 judges were removed for violation of judicial ethics, even though the judicial discipline system has always been criticized as inefficient and ineffective.

As mentioned before, I interviewed quite a few criminal judges in several basic courts of western China, and asked how many cases involved illegal outside influences. Almost all judges replied, in anonymity, with an estimate of 20 percent. I did not move further to ask in how many cases they did cater to the interferers, as it would be offensive and might destroy my interview.

125 China Criminal Law, article 263.
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128 Liu, Jainhong, supra note 70, at 297.
129 Tian Yu, Chen Fei, Yang Weihan, Zuigao Fayuan Huiying Sida Mingen Huati (The Supreme Court Responds to Four Sensitive Topics), Xinhua Net, http://news.xinhuanet.com/misc/2008-03/03/content_7757158.htm.
130 Chen Fei, Zhang Jingyong, Fayuan Weifa Wei ji Rensha Zhunian Xiajiang (The Number of Judges Violating Law or Ethical Rule Decreased by Year), Xinhua Net, http://news.xinhuanet.com/misc/2008-03/10/content_7758918.htm.
131 Li Lijing, Henan: Jinnian Siyue Yilai 400 ming Wei ja Fayuan Shou Chufen (Henan: 400 Judges Were...
president of the SPC, have been removed from bench within the past few years.\textsuperscript{132} It has become a common perception that many judges are corrupt, although only a few have actually been investigated and convicted. “All crows under the sun are black” is how people depict the judicial system.

However, just like in Yang Jia’s case, the judges who tried She Xianglin were not likely to have taken bribes from either the defendant or the victim’s family. It was a murder case in the poor countryside, involving no monetary disputes. Tremendous grievance and anger was triggered, drawing great attention of local community and government leaders to the court. It was collectively decided by the CPPLC instead of any individual judge. As a result, it was almost impossible for the trial judges to seek a bribe. However, because Mr. She had worked closely with local police, the public suspected that some officers might have taken bribes from She to deadlock the prosecution and keep him alive. On the one hand, this suspicion pushed the victim’s family to protest at the county government and even petition to the provincial capital; on the other hand, it forced local police and prosecutors to treat She harshly to avoid being suspected of corruption, although they were not convinced of his guilt.\textsuperscript{133} Being tough against a notorious defendant, in this regard, is not only a political strategy to win public confidence, but also a personal tactic for judicial officers to protect themselves from accusations of corruption.

Mutual protection is also frequently discovered among judicial officers, sometimes at the cost of defendants’ rights. Under China’s State Compensation Law, once a criminal prosecution is dismissed, or ends up with an acquittal, the detained defendant is entitled compensation for his loss of liberty and damage of property.\textsuperscript{134} Although the state will initially pay the compensation, those police officers, prosecutors, and judges who made decisions to detain the defendant\textsuperscript{135} will also be found personally responsible, and could be disciplined or even prosecuted.\textsuperscript{136} This provision, at first glance, seems aiming to protect criminal defendants from arbitrary prosecutions, but it actually discourages prosecutors and judges from releasing a possibly innocent defendant, since a fellow judicial officer would likely be penalized. Particularly in a rural jurisdiction, officers are generally well connected and frequently socialize with each other.\textsuperscript{137} Personnel exchange between the PSB, procuratorate, and court is also quite common.\textsuperscript{138} As such, it is not surprising that judges and prosecutors try to protect their fellow judicial officers by avoiding an acquittal or dismissal, even though they have reasonable doubts. They would rather pass the buck as they did in She’s case, than let the defendant walk away. It seemed clear that no one in the system wanted to jeopardize a fellow judicial officer’s career by acquiting an innocent man.

\textsuperscript{132} Tian Fengqi, president of Liaoning Province High Court, was sentenced to life imprisonment in 2003. In the same year, Mai Chongkai, president of Guangdong Province High Court, got a 15-year sentence. Three years later, Wu Zhenhan, president of Hunan Province High Court, was sentenced to death probation. In 2008, Huang Songyou, vice president of the SPC, was removed from bench on multiple corruption charges. Xu Yandong, president of Heilongjiang Province High Court, was expelled from all public employment and the CCP in 2005, but was not officially charged or convicted, only because he did not take any bribe rather than bribing a provincial leader to further his promotion.

\textsuperscript{133} See Wang Gang, supra note 92.

\textsuperscript{134} \textit{Guojia Peichang Fa (State Compensation Law)}, article 15.

\textsuperscript{135} Under CPL-1996, a suspect is usually detained by the police at first, which may last no more than 37 days. Subsequently, the procuratorate may issue an official arrest warrant and detain the suspect for another 3 months. If a case is dismissed before indictment, or results in an acquittal at the first instance trial, the procuratorate will be responsible to compensate the detainee. If the defendant is acquitted on appeal, both the procuratorate and the trial court will be responsible. If the conviction is affirmed by appellate court but later vacated by a retrial, only the appellate court will take the responsibility.

\textsuperscript{136} \textit{Guojia Peichang Fa (State Compensation Law)}, article 24.

\textsuperscript{137} In She’s case, some judicial officers acknowledged to a reporter that PSB, procuratorate and court are “too close to each other”. Sun Chunlong, supra note 93.

\textsuperscript{138} For instance, when Mr. She was finally acquitted in 2005, one of the chief police officers of Jingshan PSB, who took charge of investigating She’s alleged crime in 1994, had become the vice president of Jingshan County Court.
especially when there was also a high level of public outrage and bureaucratic interference.\textsuperscript{139}

\textbf{4) Malleable procedure: how outside influences affect judges}

She Xianglin’s trial demonstrated, in a dramatic way, how various outsiders could affect a judge’s opinion. Public outrage, which triggers threats to social stability, can force judges to presume a notorious defendant guilty. Bureaucratic supervisors, with or without legal authority over certain cases, can set aside the trial judge’s opinion and make a final decision. Invisible outsiders, through either personal connections or bribes, can effectively change the judge’s mind. Under those formidable pressures, although some judges found reasonable doubts in She’s case, they sent him to jail anyway. Nevertheless, She’s trial still looked legal, if we examine it in accordance with the bare text of CPC-1996. From beginning to end, procedural safeguards adopted by CPL-1996 were all applied, but also manipulated in a sophisticated way to accommodate outside influences. It was those procedural defects that created a loophole for outsiders to affect the judges, and convict the innocent husband and imprisoned him for 11 years, even though his allegedly murdered wife was still alive.

A. Forum shopping: manipulate jurisdiction to avoid or choose a specific court. Charged with a capital crime, She Xianglin was supposed to be tried by an intermediate court, and, if he chose to, appeal to a provincial high court. However, his conviction was actually affirmed by Jingmen Intermediate Court, an agency that normally has no final say over murder cases. The only reason to change jurisdiction, as stated by the actual decision-making-body, Jingmen CPPLC, was to avoid appellate review by Hubei Province High Court, which had once refused to approve She’s conviction because of unresolved reasonable doubts. As a result of this manipulation, local authorities in Jingmen were able to completely control the trial and its outcome, without being interrupted or second-guessed by higher courts. A side effect, though, was that She would not be sentenced to death, because the longest sentence permitted to be affirmed by an intermediate court is 15 years.

Similar manipulations of jurisdiction are not rare in China. Upgrading or downgrading hierarchical jurisdiction, such as the Jingmen CPPLC did, is usually employed to avoid a specific court. Particularly for serious crimes in which potential death penalty or life sentence are involved, moving the first instance trial from an intermediate court to a basic court means an immediate reduction of penalty. Relocating geographical jurisdiction, or change of venue, is also effective in pursuing desired verdicts. For instance, in the western province of Sichuan, a rich and well-connected businessman charged with fraud managed to relocate his trial to a desired basic court,\textsuperscript{140} where he bribed the vice president and consequently received a very light sentence. This illegal leniency enabled him to flee abroad immediately after the trial,\textsuperscript{141} leaving almost 10 high-ranking local officials involved in this scheme to be arrested later.\textsuperscript{142}

Chapter 2 of CPL-1996 states that jurisdictional adjustment is permissible, but must be decided by a higher court. No further guidance, though, is provided by CPL-1996, thus leaves a loophole for illegal manipulation. In practice, jurisdictional change is more likely to be adopted officially, particularly in anti-corruption cases where the defendant is a former official of a specific

\textsuperscript{139} See Sun Chunlong, supra note 93.

\textsuperscript{140} The excuse used to change the venue in this case was quite strange and thought provoking. The procuratorate argued that because the defendant was an important investor in the district where the crime occurred, trying him locally would damage the investment environment and hurt local economy. See Ren Ke, Shui Ba Tamen Laxia Ma? (Who Stroke Them Down?), Nanfang (South), 2005. 8. 9. However, this was not an obvious nonsense, and it was really appreciated by local authorities. It indicted how economic development has become the priority among all local affairs, and how judicial institutions must compromise independence to accommodate local economy.

\textsuperscript{141} The defendant was convicted, but only sentenced to 16 months imprisonment, which was exactly how long he had been kept in custody before trial. Since pre-trial detention must be deducted from imprisonment, he was released immediately after trial and fled abroad. Similar arrangements are usually adopted to equivalently acquit a defendant by corrupt judges, or to release a defendant in a case where reasonable doubts could not be convincingly excluded. It probably means the same as an acquittal to the detained defendant, but to the judge, it would avoid review and approval by the adjudicative committee, which is inevitably necessary for an acquittal and may discover hidden corruption schemes.

\textsuperscript{142} Ren Ke, supra note 140.
jurisdiction and has potential influence upon local judges. Moreover, it usually requires cooperation between the procuratorate and the court, which makes it more difficult to be the subject of a bribe. But once sold for personal interest, it usually involves corruption of multiple policemen, prosecutors and judges.

B. Manipulate case assignment process to choose a desired judge. CPL-1996 is silent on how cases are to be assigned to individual judges. In practice, ordinary cases are assigned to judges in sequence of registration number, a mechanism similar to random assignment. For sensitive cases, though, court leaders usually reserve discretion to pick out desired judges. For example, when She Xianglin was retried in 2005 after his wife came back alive, the collegial panel was presided over by the chief judge of the criminal division of Jingshan County Court, who rarely tries case personally. It might be a signal that the court took this trial seriously and wanted to put the most reliable judge in charge, but it was also conceivable that when court leaders picked out a particular judge, they might also convey specific instructions and demand a certain outcome from the case.

Another major concern is corruption. Once the case assignment process is adjustable, it might be manipulated by corrupt judges to facilitate illegal interest. Some courts have attempted to avoid this by establishing a computer-based case assignment system. However, as long as court leaders, sometimes forced by local government or Party leaders, still reserve the privilege of assigning desired judges to sensitive cases, illegal interferers, most times through corrupt judges, can also find a way to hijack this proceeding and obtain a favorable verdict.

C. Manipulate dossier transfer proceeding to cripple the defense. No formal pretrial discovery is required by CPL-1996. Instead, article 150 demands that a copy of the prosecution’s dossier be transferred to the court along with the indictment. Article 36 authorizes defense lawyers’ access to this transferred file, which could be construed as discovery and enables defense lawyers to prepare for the trial. However, probably in fear of judges’ pre-judgment, CPL-1996 only requires a partial transfer, at least in ordinary cases, which means only evidence selected by the prosecutor, not all, can reach the judges before trial. As a result, the defense lawyer only has partial access to the prosecution’s evidence, which may significantly jeopardize his efforts to defend his client effectively. The recently revised Lawyer’s Law takes a more progressive approach, requiring the prosecution disclose its dossier directly to defense lawyers, not through the court. However, since CPL-1996 has not been revised accordingly, some local procuratorates still refuse full disclosure to defense counsel.

143 See discussion above on arguments over whether Yang Jia’s should be tried in Shanghai.
144 Similar to the hierarchical structure of the court system, China has four levels of procuratorates. The basic level is responsible for prosecuting ordinary cases, while the intermediate level prosecutes most serious crimes. Each procuratorate, hierarchically and geographically, corresponds to a particular court. As a result, jurisdictional change in the court system also means similar change at the prosecution side.
145 Each case is given a serial number when registered into the court docket, so does each judge of the criminal division. Judges take cases in turn, with the exception of the division chief judge, who usually skips several rounds before taking a second case, or just does not try cases unless designated by the court president.
146 Liu Binglu, supra note 91.
147 As a routine practice, the division chief judge seldom tries cases. Instead, he supervises the entire division, presides over general division meetings to discuss difficult cases, and takes care of administrative affairs. But most importantly, he reviews and approves opinions written by other judges, which inevitably impairs the independence of lower judges, and in turn strengthens the bureaucratic hierarchy of the court system.
148 For instance, at a report to Hunan Province People’s Congress in 2009, the president of Hunan Province High Court introduced a computer system to assign cases randomly, which could, as he stated, prevent judges from picking out favorable cases, as well as prevent disputants from picking out preferable judges. Kang Weimin, Hunan Sheng Gaoji Renmin Fayuan Gongzuo Baogao (Work Report of Hunan Province High Court), 2009. 1. 15. http://www.hunan.gov.cn/tmzf/xxlb/ttxw/200901/c20090130_151328.htm
149 See Lawyer’s Law (revised in October 2007; taking effect on June 1, 2008), article 34.
150 As a national basic law promulgated by the NPC, CPL-1996 is constitutionally higher than the Lawyer’s law, which was ratified by the Standing Committee of NPC. When the revised Lawyer’s law conflicts with CPL-1996 and troubles some prosecutors, this issue is frequently brought out as an excuse to reject defense lawyer’s request
CPL-1996 does not clearly circumscribe how much evidence the prosecution should transfer to the court, leaving broad discretion to the prosecutors over this matter. Although in ordinary cases, defense counsel has little problem obtaining material evidence of significant importance for defense, prosecutors may, in controversial cases, choose to carefully restrict what they transfer to the court, and hold back some critical evidence. As a result, defense counsel cannot be well prepared, and may be disrupted and frustrated when the prosecutor suddenly presents unheard evidence at trial.

Manipulating lawyer’s access to prosecution file, by and large, exists only in sensitive cases, where the government, including both the court and the procuratorate, hesitates to disclose sensitive information to the defense, or tries to avoid a vigorous counsel who may make it more difficult to convict the defendant. The government might not exclude the defense counsel, which is obviously in violation of the law, but by manipulating the discovery process, it can effectively cripple his defense.

D. Manipulate publicity to humiliate defendants or hide injustice. When She Xianglin was initially convicted in 1994, his trial was not open to the public, including his parents. Under both CPL-1979 and CPL-1996, only cases involving state secrets, personal privacy or juvenile defendants could be tried in a closed-door courtroom. Mr. She’s murder trial, similar to Yang’s trial, which we discussed earlier, did not meet either of these requirements. A reasonable explanation for this secret justice, believed by many observers, was to protect the court’s reputation. The court clearly knew that too many doubts remained unresolved and would be presented at trial, but it had to convict Mr. She anyway. A closed-door trial, under this circumstance, could more or less protect the court from public criticism and save its reputation. Such a secret trial could also avoid public outrage, which might disturb the order of the courtroom.

Technically, though, neither She nor Yang was deprived of the right of public hearing. The court would argue that due to the limited capacity of the courtroom, only certain number of observers could be accommodated; therefore, a permit was required to enter the courthouse. However, the court did not explain how, and to whom, those permits were distributed. In this regard, it would be reasonable to speculate that, in practice, only those obedient to the court’s instruction could get the permits. Through this manipulation, judges are able to assemble supporters, instead of neutral observers or even aggressive supervisors. If in any case the judges are affected by illegal interferences and render a suspicious verdict, either a conviction or an acquittal, they can hide it from public scrutiny, too. “Sunshine is the best disinfectant,” as Chinese court leaders always claim. When the door of a courtroom is closed to the public, corruption, abuse of discretion and outside influence could all find a chance, and a false verdict is more likely to be produced.

E. Manipulate evidence rules to validate unreasonable discretion. Few judges would doubt that She Xianglin was tortured to confess. Multiple unreasonable inconsistencies existed among his several confessions, and he fiercely retracted all confessions at trial, probably with proof of physical injury resulting from brutal torture. Nevertheless, no single judge dared to exclude his confessions, although some judges doubted the truthfulness of those confessions and requested corroborative evidence. In the end, the court simply picked out one of She’s four confessions, the one could best support a conviction of murder. No explanation was given, either orally or in writing, to illustrate why this particular confession was more reliable, and why She’s torture for disclosure. Since the proposed CPL-1996 amendment is still deadlocked in the NPC, the Sub-committee for Legal Affairs of NPC Standing Committee, which is not authorized to interpret any law, had to step in and call for appliance of the new Lawyer’s Law. See Sun Jibin, Xin Lvshifa yu Xingsufa Chongtu, Renda: An Xuading hou Lvshifa Zhixing (New Lawyer’s Law conflicts with CPL, Congress: Apply Revised Lawyer’s Law), Fazhi Ribao (Legal Daily), 2008. 8. 17.

151 When She Xianglin was retried in 2005, the court initially refused lawyers’ request for access to the dossier of She’s 1994 trial, stating it was “useless in the new trial”. Mr. She’s lawyers suspected “something is hidden in the dossier”. See Sun Chunlong, supra note 93.

152 See Sun Chunlong, id.
defense was not accepted. Moreover, even if She’s confessions were admissible, the prosecution still needed more evidence to secure a conviction. Reasonable doubts, such as the identity of the body, the missing murder weapon, or She’s motive, if considered impartially and strictly in compliance with the law, could have all negated the conviction. Nevertheless, pressed by public outrage and bureaucratic interferences, probably also with concerns of mutual-protection, the court convicted She anyway, allegedly, on the ground of “clear facts and sufficient evidence”. 153

With little guidance on admissibility of evidence or standard of proof, CPL-1996 grants judges broad discretion over evidentiary issues. When outside influences intervene, those evidence rules, which are already too weak, will more likely be manipulated to accommodate illegal interferers. Conflicting evidence, such as She’s multiple confessions, would be carefully selected to suit a desired outcome, with little legal ground being laid out to justify the arbitrary selection. Standard of proof, which is theoretically very high but practically too ambiguous, might also be compromised, although usually in the name of reasonable discretion.

F. Ignore torture defense to suit biased conclusions. At all of his four trials, She Xianglin clearly stated that he had been tortured to confess untruthfully. Without any corroborative evidence, however, none of the four courts supported his torture defense, although some judges did suspect the truthfulness of his confessions. 154 This is not only She’s tragedy. Despite explicitly outlawed by CPL-1996, 155 torture is still frequently witnessed in the criminal justice system of contemporary China. The SPC, moving further than the NPC and its Standing Committee, has pledged to exclude all tortured confessions, 156 but in practice, its promise has rarely been fulfilled, if not ridiculed, by lower courts. Most trial judges, when confronted with request to suppress a coerced confession, will ask the defendant to provide sufficient evidence, such as physical injury or witness testimony, to prove the existence of torture or other police misconduct, otherwise the confession will still be taken into consideration. 157 Most tortured defendants, however, are in police custody and have no means, either to produce or to preserve, any evidence related to police torture. In this regard, the SPC directive, which once won national applause when released, means little more than a rubber check.

It does not mean, though, that Chinese judges are blind to the reality, nor does it indicate that they intentionally, or at least recklessly, incline to convict innocent people. As my interviews with over 50 trial judges revealed, on the one hand, most judges are personally aware of that many confessions are inappropriately, sometimes illegally, obtained through torture or other police misconduct; on the other hand, they also believe that most confessions are nonetheless truthful and the defendants are indeed guilty. Some judges even indicated in off-record conversations that they are somehow convinced that torture might be a better mean to extract truthful confessions. To certain degree, they do not feel uncomfortable using coerced confessions to convict a defendant, since they are quite confident that, substantively, the verdict is correct.

The judges’ confidence, in part based upon their seasoned experiences, is also deeply rooted

153 This is the official conclusion of almost all court opinions in convicting a defendant. The exact words are excerpted from article 162 of CPL-1996.
154 See Wang Gang, supra note 92.
155 CPL-1996, article 43.
156 Ganyu Zhixing Xingshi Sausong Fa Ruogan Wenti de Jieshi (Interpretations on Various Issues of Implementing Criminal Procedure Law), article 61.
157 In Liu Yong’s case, which we discussed above, the defense lawyer presented testimony of Liu’s jailors, who witnessed that Liu was tortured. The Liaoning Province High Court acknowledged this evidence and euphemistically concluded that it could not “fundamentally exclude (the possibility) that the police had tortured Liu”. Lin Chufang, supra note 35. In fact, this might be the first time in China’s criminal justice history that a court vacated a death penalty by excluding the defendant’s coerced confession. Many scholars thus applauded this uneasy move at the beginning. Unfortunately, Liu happened to be a rich and notorious mafia mastermind, and his escape from death penalty in the Liaoning Province High Court triggered unprecedented public outrage. Many people argued: we do not object due process, but why begins with Liu Yong? It was this public pressure lead to a retrial by the SPC and Liu’s final execution. See Suli, Mianxiang Zhongguo de Faxue (The Legal Research That Faces China), http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=25267
in China’s engrained tolerance of police torture and the mutual corroboration evidence rule. For more than 3,000 years, confession has always been the king of evidence in China’s criminal justice system. Confession seems indispensable in a criminal case, not only for a successful investigation, but also for a proper indictment and a correct conviction. The right to keep silent, although globally accepted, is not recognized in CPL-1996, which, on the contrary, demands all criminal suspects and defendants to confess to authorities.158 Especially at the stage of police investigation, overwhelmed by ever-growing crimes and personnel shortage,159 most PSBs, those rural branches in particular, rely heavily on confessions to extract tangible evidence and witness testimony.160 Empirical research shows that in more than 98 percent of all criminal cases, defendants make at least one confession during police investigation, regardless whether it is truthful or not.161 Without a confession from the suspect, most police officers may not be able to collect sufficient evidence to establish a case, or may have to exhaust more resources and energy, which most PSBs do not have. What matters to the police, in practice, is not whether the confession is coerced or truthful, but whether it can lead to other useful evidence and eventually secure a conviction.

To the judges, though, the truthfulness of a confession seems more important. All judges know that coercion or torture could result in a false confession, but they are also clearly aware of the reality that most confessions are extremely indispensable to police investigation. Automatic exclusion of all coerced confessions, as required by the SPC directive, sounds theoretically attractive, but it will inevitably impair the police’s ability and efficiency to combat crimes, which may eventually lead to loss of public confidence, a cost the government cannot bear. A compromise, as formulated by CPL-1996, is to first verify these confessions with corroborative evidence and then admit them. A voluntary confession alone, without supporting evidence, is not deemed sufficient to secure a conviction;162 but once confirmed by a chain of evidence, even a coerced confession can be taken into judges’ consideration.163 It may look unfair to the defendant to admit a coerced confession, but once corroborated, it is usually truthful in substance, and bares little risk of producing a false verdict. Given the reality that confessions are indispensable to police investigation, this rule of mutual corroboration may more or less enhance the reliability of those confessions, and protect the defendant from being arbitrarily convicted upon insufficient evidence. It is a compromise of “something is better than nothing”.

However, it also creates a loophole to validate otherwise inadmissible confessions, and indeed contributes to the widespread existence of police misconduct. Once a judge has corroborated a confession, he may not really care whether it was legally obtained, but simply overturn the defense’ request for suppression. In particular, if the defendant has no convincing

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158 CPL-1996, article 93, 139, and 155.
159 By the end of 2004, there are only 12 police per 10,000 people in China. Working overtime is just routine practice. In December of 2004, only in Chongqing City, 3 police officers died of diseases resulting from overworking, another one committed suicide because of overwhelming stress. See Wu Hongying, Chongqing Jingcha Kuobian Beihou: Yinghan Jingcha Neihuan Chongchong (The Story behind Chongqing Police Recruiting: Various Problems of Tough Police), 21 Shiji Jingji Baodao (21 Century Economic Report), 2005. 2. 5.
160 Without sufficient professional training or technical support, criminal investigation, particularly in rural areas, is quite primitive. DNA test, fingerprints, wire-tapping, Internet and other modernized techniques and skills are only recently adopted but without full coverage over the vast under-developed areas. Obtaining the suspect’s confession, in most cases, is the breakthrough of police investigation, from which police can find clues leading to tangible evidence and witnesses, and consequently can prove a case. See Liu Fangquan, Renzhen Duidai Zhencha Xunwen: Jiyu Shizheng de Kaocha (Take Investigatory Interrogation Seriously: An Empirical Study), 5 Zhongguo Xingshifa Zazhi (China Criminal Science) 96 (2007).
161 These statistics were based upon court dossiers. However, it needs to be noted that not all the statements made by the suspects are actually transcribed and delivered to the court. In practice, investigating police officers only make records after the suspect has confessed, or after they have concluded there won’t be a confession. As a result, although police interrogation usually lasts several hours or even longer, most transcripts are less than 10 pages, and generally only contains statements considered as relevant and important. In extreme cases, police officers may intentionally ignore exculpatory statements made by the suspects. See Zuo Weimin, supra note 29.
162 CPL-1996, article 46.
163 Strictly, besides requiring all confessions be corroborated, CPL-1996 does not mention whether a coerced but corroborated confession could be admissible. Only the SPC directive says no, but is rarely implemented.
evidence to prove the alleged torture, which happens in most cases, the judge may feel quite comfortable to accept the known-to-be-tortured confession. Some extreme cases have seen that even when the defense manages to provide sufficient evidence, the judge may nonetheless turn it down and admit the coerced confession. In some other cases, the evidence used to corroborate a confession, like She Xianglin’s motive to kill his wife, could also be untruthful or ambiguous, and may eventually result in a false conviction.

G. Selectively respond to critical issues to secure an approval or hide injustice. To be persuasive, court opinions must be responsive, soundly addressing all critical issues with evidence, rationality and legal authorities. Selective response, which intentionally leaves some major issues unaddressed, may turn out to be a handsome literature, but surely not an appropriate judicial opinion. To a trial judge, when reporting to a supervisor, a tailored opinion selectively responding to preferable issues may look more appealing than an opinion that raises and squarely deals with all issues, as it stands more chance to be approved by the supervising judge, who has no first-hand knowledge of the facts and arguments. Such an opinion, doubtlessly, has difficulty persuading the defendant, but the trial judge may not care, since what really matters to him is just to get an approval.

CPL-1996 does not specifically address this problem. Some court rules require opinions to respond to all critical issues, but no procedural safeguard is established to enforce this requirement. In practice, as Jerome Cohen has observed, “Chinese judges often do not address or respond in a reasoned manner to many of the factual and legal arguments presented by defense counsel”. For instance, besides simply denying the murder accusation, She Xinglin and his parents actually provided several exculatory witnesses at his trial. Three farmers in a nearby county testified, in written statements, that they had seen a mentally retarded woman, who looked like She’s missing wife, the alleged victim, wandering alone two months after her disappearance. Two bus drivers, who were on duty in the night when She’s wife went missing, testified that Mr. She had taken their buses on the way looking for his wife, sometime between 2:30 AM and 6 AM. This testimony, if considered by a truly neutral tribunal, most likely would have negated She’s conviction, but they were even not mentioned in either the trial court’s or the appellate court’s opinions. All the judges, ordered by local CPPLC to convict Mr. She, could do

164 As Long Zongzhi pointed out, the mutual corroboration rule pays more attention to the outward features of evidence, instead of its substance. In evaluating evidence and making fact-finding, what matters to the judges is not whether they are, personally and impartially, convinced by the evidence, but whether, based upon prescribed rules, they are able to secure a factual conclusion which could be repeated by others, particularly the supervising judges. Conceivably, in some cases, judges have to make a fact-finding inconsistent with what they actually believe. See Long Zongzhi, Yinzheng yu Ziyou Xinzheng: Woguo Xingshi Susong Zhengming Moshi (Corroboration and Free Evaluation of Evidence: China’s Criminal Evidence Model), 2 Faxue Yanjiu (Jurisprudence Research), 107 (2004).

165 In Yunnan province, a police officer named Du Peiwu was charged of murdering his wife and her ex-marital lover in 1999. At his trial, Du presented a bloody shirt to prove that he had been crucially tortured by the police and thus his pre-trial confession should be excluded. The trial judges denied his request, and did not even mention this evidence in its opinion. The appellate judges, noticing too many reasonable doubts, only sentenced Du to death probation, which was obviously inconsistent with the law and practically indicated that the judges were not convinced by the prosecution evidence. Only after the real murderer was accidentally arrested and confessed, Du’s conviction was vacated. Guo Guosong, Zeng Min, Xinxing Bigong Niang Yuanan, Siqiu Du Peiwu Yishu de Xuelei Kongsu (Torture Caused False Conviction: Death Roll Criminal Du Peiwei’s Bloody Denouncement), Nanfang Zhumo (Southern Weekend), 2001. 8. 24.

166 Jerome Cohen, supra note 66, at 242.

167 These three villagers were later harassed, threatened, and even detained by Jingshan PSB, on accusation of taking bribes from She’s parents and providing false testimony. They then conceded. There was no evidence, though, that the courts knew this episode. See Liu Binglu, supra note 91. Jia Yunyong, Hubei Jingshan Shaqi An: Bei Yuan’an Gaibian Mingyun de Yuqun Ren (The Wife-Murder Case of Hubei Jingshan: the People Whose Lives Were Changed by the False Conviction), Nanfang Dushi Bao (Southern Daily), 2005. 5. 4.

168 Although not mentioned in the official court opinions, these statements were still put into the dossier and later sent to the court archive, and only became known to the public after She’s wife suddenly came back alive. In fact, many materials, including yet-confirmed inadmissible evidence, are all allowed to be put into the dossier and expose to judges, who will then carefully read the dossier and make a decision. In this regard, although
little more than turning a blind eye to this exculpatory evidence.

Once judges are allowed to tailor an opinion to suit their conclusion, more loopholes are created for corruption and outside influences. Behind those literally correct opinions, corrupt judges could find one more shelter when producing false verdicts. Observers, like the media, who have no access to the entire dossier, are not able to discover this trick, and may believe that the defendant received a correct verdict. In this way, a tailored opinion, selectively responding to certain issues, can dress injustice in a beautiful vein.

H. Consult higher judges before trial to reduce reverse rate and shift hard work. In sensitive cases with enormous public attention, in addition to reading the dossier carefully before trial, trial judges may consult court leaders or even appellate judges and government leaders as well. A final conclusion, instead of a tentative one, has yet been reached before the hearing. This practice is popularly referred to as “decision first, trial later” (xianding houshen). Like what happened in She Xianglin’s case, the CPPLC held a coordinative meeting for local PSBs, procuratorates and courts, in which an agreement was reached to convict She and sentence him to 15-year imprisonment. Half a year later, Mr. She was formally tried in an open court. Although the defense lawyer vigorously challenged the prosecution’s case, this trial was little more than a show, since a final verdict, including both the conviction and the sentence, had been determined long time before.

To ensure political correctness, such pretrial consultations often occur in sensitive cases, and are sometimes actually mandated. Even in non-sensitive cases, some controversial legal issues may also be submitted for pretrial consultation, as higher court judges are deemed more competent to handle difficult legal problems. An instruction from a higher court, clarifying disputed issues, may become a binding legal authority within its jurisdiction, through which the legal process could maintain uniformity and consistency. To the lower court judges, such an instruction will not only reduce the reversal rate on appeal, but it also shifts the hard work to other judges. Therefore, they always have strong incentives to consult a higher court in advance. In terms of procedural fairness, pretrial consultation has always been under academic attack, since it undermines judicial independence, deprives defendant’s right of effective appeal, and creates loopholes for outside influences. As a response to those criticism, various courts, including the SPC, have promulgated multiple rules to regulate and to limit such consultation, but many local judges still find it quite tempting, especially in sensitive cases.

I. Report to higher judges after trial to ensure correctness. In every Chinese court, there is a hierarchy of decision-making bodies, including, from the bottom up, the corresponding judge, collegial panel, division chief judge, general meeting of criminal division, court president, and adjudicative committee. In many cases, sensitive or complicated cases in particular, the single

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169 The academic journal of SPC, Application of Law (falv shiyong), published a special volume on this matter in 2007. See Jiang Huiling, Falv Tongyi Shiyong Jizhi Zai Renshi (Rethink the Uniformizing Mechanism of Application of Law); Hu Shuguang, Yang Yisheng, Guanyu Goujian Shangxiaji Fayuan Shenpan Yewu Xietiaojizhi de Ruogan Sikao (Some thoughts on Establishing a Coordination Mechanism between Higher and Lower Courts), Application of Law (falv shiyong), 2007. 3.

170 Understandably, appellate judges are not likely to reverse a case if they have given instructions to the trial judges on how to decide the case. In this regard, the right to appeal, even exercised by the defendant, means little in practice. See Wan Yi, Lishi yu Xinshi Jiaokun zhong de Anjian Qingshi Zhi du (Between Tradition and Reality: Case Consultation System), Faxue (Jurisprudence), 2005. 2. Like regular governmental employees, Chinese judges are subjected to performance evaluation by their supervisors, which could significantly affect their bonus and promotion, and could sometimes result in a removal. In addition, the criminal division and the entire court, each as an individual entity, are also regularly evaluated by higher courts, and the results could affect the promotion of the division chief judge and the court president. For these evaluations, appeal rate and reversal rate are always major criteria. See Huang Weizhi, Yewu Kaoping Zhidu yu Xingshi Fazhi (Performance Evaluation and Rule of Law of Criminal Justice), 2 Shehui Kexue Yanjiu (Social Science Research) 85, (2006).

171 See Lawyers Committee for Human Rights, supra note 8; Donald Clarke, supra note 31, at 178; Wan Yi, id.

172 For example, in 1986 and 1995, SPC issued two directives for consultation, regulating the scope and steps of seeking consultation with SPC.
judge or the collegial panel sitting at a trial is not authorized to make a final decision. A hierarchical review, either by an individual court leader or by a collective decision-making body, sometimes by both, is mandated to guarantee the quality of judicial decision. As reviewers seldom attend trials, few decisions can be rendered right at the end of a trial. Most trial hearings conclude without a verdict, while the single judge, or the corresponding judge of a collegial panel, has to draft a proposal opinion and reports to one or more reviewers, who will then take up to several months to release the final decision.

In theory, the accused is entitled to appear in front of the real decision-maker. With a behind-the-scene reviewer, defendants are deprived of this right. Moreover, the independence of the trial judges is impaired, while more loopholes are introduced for outside influences. In practice, many corruption deals are reached after the trial and before the release of final decision, when all the evidence has been presented and the defendant realizes that the only way to get leniency is to bribe the judges.

J. It must be noted that the manipulations listed above are not exclusive. A practicing lawyer in China would agree that so many loopholes exist in CPL-1996 that a judge, if he chooses to, could easily find some space to act for his own convenience or for an interferer’s interest. From the very beginning of case registration, to the end of sentence execution, various procedural safeguards can be manipulated, while all the tricks may still be dressed in conformity with CPL-1996’s explicit requirements. Indeed, when interviewed by a journalist after She Xinglin was finally acquitted, the vice president of Jingshan County Procuratorate said that “almost all episodes in She’ case were legal and reasonable”. However, he should have put one more word before “legal and reasonable”, which is “superficially”, as many of She’s procedural rights were actually violated in substance.

An ideal trial framework, consisting of various procedural safeguards, should be designed to cage the decision-maker into a pure legal space, where a court decision can be solely based upon facts and arguments presented by the parties at trial. Under such a framework, both the defendant and the judge can be protected from illegal outside influences, and the outcome is deemed not only legal and correct, but also legitimate. China’s criminal trial, though, as demonstrated in She’s case, is too vulnerable to stand rigidly against interferers, therefore could easily be captured and manipulated. False verdicts, although usually dressed in a legal formality, are more likely to be manufactured through the twisted process. The procedural safeguards provided by CPL-1996, which are supposed to ensure a fair and correct trial, may turn out to become instruments in judges’ hands to produce wrongful verdicts. This is where the fundamental flaw exists.

Conclusion

In term of crime and sentence, both Yang’s and She’s cases are indeed exceptional in China’s criminal justice system. With respect to how the judges handle the trials, though, they are both quite ordinary. Through the details depicted above, a full view of the daily practice of China’s criminal trials could be obtained. Largely, procedural safeguards prescribed by CPL-1996 are superficially implemented, therefore most trials can be deemed outwardly legal. However, those safeguards are widely manipulated by judges, either to ensure efficiency and convenience, or to accommodate outside influences, such as political concerns, public outrage, personal friendship, or even bribes. As a result, the essence of fair trials, which is to produce a reliable and legitimate

173 In fact, even empowered to make a final decision, few judges are willing to render their opinion right after the trial. First, most trials are too brief and unsubstantial to produce a reliable finding. Second, judges find more comfortable to make up their minds by reading the dossier before or/and after trial, rather than by hearing the trial. In recent years, directed by the SPC, some courts require judges to close a case immediately after the trial, obviously purporting to promote efficiency and defeat external influences. However, it turns out that many judges just read the entire dossier before trial, form a final conclusion, and then open a trial show to release the opinion. See Lan Rongjie, Zhiyu Sheji yu Zhiyu Shijian Zhijian: Xingshi Dangting Xuanpan Zhiyu Shecheng Yanjiu (Between the Design and Practice of Regulations: Empirical Research on Immediate Rendering of Court Opinion in Criminal Cases), 5 Zhongguo Xingshifa Zazhi (China Criminal Science) 93, (2008).

174 Wang Gang, supra note 92.
verdict through a well-designed contest and adjudication, is largely missing, while wrongful verdicts, including false conviction or acquittal, and disproportionate sentences, are likely to be produced if interferers step in.

It would be unfair, though, to say that when drafting CPL-1996, the legislature actually predicted and expected these manipulations. By contrast, as drafted by a team led by liberal scholars, CPL-1996 unequivocally aimed to promote procedural fairness and human rights protection, therefore has been criticized as too radical and westernized. Why, and how, could such an ambition end up in widespread manipulations? Two fundamental flaws, including an institutional defect and a technical failure, might be the answer. First, in general and in practice, Chinese judges are less responsible to the law or the people, than to the CCP and their supervisors. As soon as political needs are accommodated, or supervising judges are satisfied, it matters little whether the law is implemented superficially or given full effect. Moreover, since the public barely have any influence upon judges’ selection, retention, promotion or removal, it makes little difference whether the trial or the verdict could actually convince the accused, the lawyers or other observers. As a result, when driven by personal interest or outside influences, judges find no institutional barrier to sacrificing procedural fairness. Second, given the absence of a responsible judiciary, CPL-1996 fails to take precaution and create a self-protective procedure system, which could, not institutionally but technically, resist intentional manipulations by judges. Provisions of CPL-1996 are therefore so malleable and vulnerable that judges could always find loopholes to manipulate a trial. As what we observed in Yang’s and She’s trials, although it was obvious that the essence of fair trials was violated, both trials were also considered legal, and the defense found no legal channel to seek remedy.

It is always easier to diagnose problems than to articulate a solution. The institutional defect, which actually seems obvious to most legislators and scholars, is not easy to tackle. In fact, without a constitutional reform, no responsible judiciary could be established in current China. A fallback solution, not perfect but practical, is to try a technical approach and create a self-protective trial mechanism that could, at least in non-sensitive cases, limit the opportunities for judges to manipulate the process and its results. Such an approach, acknowledging the reality of institutional flaws but addressing them seriously through sophisticatedly restructured procedural safeguards, would make criminal trials less vulnerable against manipulations. Judges’ discretion over procedural issues would be subjected to more restrictions, which in turn could also shelter judges from unwanted interferers. Individual safeguards would be clearly defined, leaving little space for tampering. Violations of any safeguards, even superficially in conformity with the text of the law but essentially in contrast with the principle of fair trials, should not be tolerated, and a procedural remedy should be granted to the defendant. In summary, a technical solution would focus on offsetting institutional flaws by well-designed procedure, which could, to certain degree, ensure a fair trial relying on the procedure itself, rather than on unreliable judges.

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175 As a significant departure from legislative tradition, the original draft of CPL-1996 was articulated by a research team led by Professor Chen Guangzhong, then President of China University of Politics and Law. Their proposal, based upon national field work and a trip to Europe, including the Great Britain, was largely adopted by the NPC. See Chen Guangzhong, supra note 48.

176 The Judge’s Law of China, like other directives or regulations, explicitly requires all judges loyally enforce the Constitution and state laws, and serve the people wholeheartedly. Judge’s Law, article 3.