

# **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 adopting an adversarial-style trial model and granting 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.*

*This article will argue that, despite some progresses in formality, the new law has been poorly implemented and has failed to fulfill its promise of fair trials. This article will 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. These manipulations have caused the essence of fair trials intended to be created by the 1996 law to be largely nonexistent in modern proceedings, while at the same time allowing interferers to freely produce wrongful verdicts and disproportionate sentences.*

*The reality is 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 for reform on unrealistic constitutional changes, this article proposes a technical approach that focuses on restructuring the 1996 law to make criminal trials less vulnerable to manipulation and interference. This technical solution would help to ensure fair*

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*trials by relying on the procedure itself, rather than on unreliable judges.*

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## 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 (Chinese Communist) Party ("CCP")."<sup>1</sup> Following the model developed in the USSR,<sup>2</sup> CPL-1979 generally treated criminal defendants as objects for investigation and punishment rather than individuals entitled to a fair trial. Defense lawyers could only participate in the trial stage and had limited power to conduct independent investigations.<sup>3</sup> 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.<sup>4</sup> Some observers described the criminal process as an assembly line with the police cooking the rice, the prosecutors serving the rice, and finally the judges eating the rice<sup>5</sup> with defendants and their lawyers being "marginalized within the criminal justice system."<sup>6</sup> Chinese legal scholars characterized this system as a "super-inquisitorial model."<sup>7</sup>

The economic growth and social changes China experienced after 1979 combined with greater international pressure for

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1. Mike Chu, *Criminal Procedure Reform in the People's Republic of China: the Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L.J. 157, 158 (2001).

2. 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.

3. Zhonguo Renmin Gongheguo Xinshi Susong Fa [Criminal Procedure Laws], 1979 ZHONGUO RENMIN GONGHEGUO FAGUI HUIBIAN, arts.26, 29 [hereinafter CPL-1979].

4. CPL-1979, arts.108, 114, 115, 116.

5. Zuo Weimin & Zhou Changjun, XINGSHI SUSONG DE LINIAN [PRINCIPLES OF CRIMINAL PROCEDURE], Falv Chubanshe [Law Press] (1999).

6. H. L. Fu, *Criminal Defense in China: The Possible Impact of the 1996 Criminal Procedure Law Reform*, 153 CHINA Q. 31, 47 (1998).

7. Generally, legal scholars categorize criminal procedures as either adversarial or inquisitorial. The common law system is usually considered 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 Haiyan, XINGSHI SUSONG MOSHI DE YANJIN [THE EVOLUTION OF CRIMINAL PROCEDURE MODELS], (Zhonguo Renmin Gong'an Daxue Chubanshe [China Police Academy Press]), ch. 10-11 (2004); Zhang Bin, *Lun Woguo Xingshi Shenpan zhong de Chao Zhiquan Zhuyi Yinsu* [Super-Inquisitorial Factors in China's Criminal Trials], ZHONGGUO RENMIN GONGAN DAXUE XUEBAO [J. CHINA POLICE ACAD.] 4 (2006).

human rights protection<sup>8</sup> helped force the National People's Congress ("NPC") to approve a drastic amendment to CPL-1979 in 1996 ("CPL-1996"). Compared to the prior version, CPL-1996 adopted a more adversarial-style of trial, and purported to grant more procedural safeguards for defendants. For example, CPL-1996 provides that all evidence should be introduced and presented to the court by the parties rather than the judges.<sup>9</sup> In addition, instead of the judge, the parties have the first chance to examine witnesses (including defendants, who have no privilege against self-incrimination).<sup>10</sup> Furthermore, judges have access only to the prosecution's "major evidence" before trial and not the full files.<sup>11</sup> Defense lawyers are allowed to participate in the investigation and prosecution phases of the case, although without full access to their clients<sup>12</sup> or police files. Defense lawyers can conduct an independent investigation but interviews with prosecution witnesses still need to be approved by judges or prosecutors.<sup>13</sup> CPL-1979 made free counsel available only to juvenile, mute, or deaf defendants, but CPL-1996 extended that right to all indigent defendants charged with capital crimes.

Based on these revisions, many domestic or international scholars cheered the CPL-1996 as a significant transition from the inquisitorial model to the adversarial one.<sup>14</sup> Based on its plain language, CPL-1996 did in fact enhance the participation of defense lawyers and prosecutors and transform judges from aggressive investigators to neutral adjudicators.<sup>15</sup>

The resulting structure of criminal trials looks like an isosceles triangle. Judges occupy the vertex, while prosecutors and defense lawyers are positioned at the two corners of the base,

8. See e.g. Jonathan Hecht, *OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW (1996)*; Amnesty International, *CHINA, NO ONE IS SAFE* (1996).

9. Zhonguo Renmin Gongheguo Xinshi Susong Fa [Criminal Procedure Laws] 1996 ZHONGUO RENMIN GONGHEGUO FAGUI HUIBIAN, art.157 [hereinafter CPL-1996].

10. CPL-1996, arts.155, 156.

11. CPL-1996, art.150.

12. Although Article 36 and 96 of CPL-1996 grant suspects and defendants the right to be interviewed by their lawyers while in police custody, requests for interview are frequently denied by authorities in practice. See Fang Baoguo, *Dangqian lvshi huijiannan de xianzhuang fenxi* [Analysis of Lawyers' Difficulty in Interview], 3 ZHONGUO XINGSHI RA ZAZHI [CHINA CRIM. SCI.] 67 (2004).

13. CPL-1996, arts.33, 34, 36, 37, 96.

14. 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 [SOC. SCI. RES.] 80 (2005). This comparison is drawn from Herbert Paker, *Two Models of the Criminal Process*, 113 U. PA L. REV. 1 (1964).

15. See Chu, *supra* note 1, at 158; Fu, *supra* note 6; Amanda Whitfort, *The Right to a Fair Trial in China: The Criminal Procedure Law of 1996*, 2 CHINESE L. & POL'Y REV. 141 (2007).

equidistant from the judges.<sup>16</sup> As some have noted that, if CPL-1979 resembled an assembly line, CPL-1996 looks more similar to an obstacle course.<sup>17</sup> Many observers concluded that CPL-1996 established a fairer trial framework for the accused and improved China's record on human rights protection.<sup>18</sup>

However, a deeper examination of CPL-1996 reveals that despite its move toward a more adversarial model CPL-1996 shares some common flaws with its predecessor, CPL-1979. The idea that the prime mission of criminal procedure is to combat crimes is the central premise of both laws.<sup>19</sup> Factual truth and substantive correctness are specifically emphasized, yet procedural fairness, one of the core values in any genuine adversarial system is notably absent. 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 fulfilling their duties.<sup>20</sup> Although another article of CPL-1996 reiterates the protection of the courts (but not necessarily individual judges) "against interference from any administrative organs, social organizations and persons,"<sup>21</sup> it is difficult to draw a clear line between collaboration and independence and demonstrate 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 on all local and national affairs, retained ultimate control over the judicial process. Judges, directly or indirectly, are all subordinated to the CCP and its local leaders instead of the people. With an authori-

16. Long Zongzhi, *Fanhui xingshi susong lilun yanjiu de shidian: Xingshi suong liangchong jiegou chongshu* [Return to the Origin of Criminal Procedure Research: Restatement of the Bi-structure of Criminal Procedure], XING SHI FA PING LUN [CRIM. L. REV.] 387 (1998).

17. Long Zongzhi, *Xingshi sifa de liyi jizhi yu xingshi sifa moshi* [The Interest System and Models of Criminal Justice], SHEHUI KEXUE YANJIU [SOC. SCI. RES.] 54 (1991).

18. Amnesty International, *supra* note 8.

19. CPL-1979, art.2; CPL-1996, art.2.

20. CPL-1996, art.7. For criticism from scholars, see Long Zongzhi, *Lun Peihe Zhiyue Yuanze de Mouxie Fuxiaoying Jiqi Fangzhi* [The Negative Effects and Precaution of the Principle of Collaboration and Checking], ZHONGWAI FAXUE [PEKING U. L. REV.] 3 (1991); Jin Xueren, *Gongjianfa Jiguan Zhijian Huxiang Peihe: Yige Chenzhong er Chenjiu de Xingshi Susongfa Yuanze* [Collaboration Principle of PSBs, Procuratorates and Courts: A Heavy and Outdated Principle of Criminal Procedure], HUAQIAO DAXUE XUEBAO [J. OF HUAQIAO U.] (2002).

21. CPL-1996, art.5. For additional information regarding the independence of courts and individual judges, see Wang Xian-rong, *Faguan duli: Sifa gongzheng zhi genben qianti he sifa duli yingyouzhiyi* [Judge's Independence: Fundamental Premise for Judicial Justice and Inherent Meaning for Judicial Independence], 24 HEBEI FA XUE (HEBEI L. SCI.) 121 (2006).

tarian power positioned above the judiciary acting as the “judges’ judge,” it remains unclear whether any revision of CPL could produce a genuine adversarial trial model.

Additionally, many questioned whether CPL-1996 was capable of being effectively implemented past those basic concerns. With such a sweeping departure from ingrained practice, the transition was sure to be difficult. Research has demonstrated that, despite the CCP’s enormous ability to implement social reforms, realizing the promise of modernized national laws still presents tremendous challenges at the local level where ideological clashes with long-standing traditions, a lack of material resources and personnel training, and intentional resistance by interest groups all contribute to frustrating the central government’s goals.<sup>22</sup>

This frustration is especially evident in the criminal justice system where major protections for defendants’ rights are likely to be resisted by locals and have resulted in mixed reviews for the new laws. In fact, right after CPL-1996 took effect on January 1, 1997, scholars expressed considerable doubts about its ability to be implemented, particularly in the early years.<sup>23</sup> As the law entered the new century, some observers even declared it “a total failure.”<sup>24</sup> However, other scholars have observed positive changes in criminal justice practice and a general trend of conforming to international standards of fair trials.<sup>25</sup>

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

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22. See Su Li, *Dangdai zhongguo falv zhong de xiguan: Yige zhidingfa de toushi* [Customs in Laws of Contemporary China: A Statutory Perspective], FA XUE PING LUN [L. REV.] 19 (2001); Su Li, *Guanyu kangbianzhi gaige* [On Reform of Adversarial System], FA XUE YAN JIU [CHINESE J. OF L.] 77 (1995); Su Li, *Falv guibi yu falv duoyuan* [The Phenomenon of Legal Evasion and Legal Pluralism], ZHONG WAI FA XUE [PEKING U. L.J.] 14 (1993); Su Li, *Zailun falv guibi* [Reconsidering Legal Evasion], ZHONG WAI FA XUE [PEKING U. L.J.] 12 (1996); Jiang Shigong, “Falv buru bumaozhidi” de tiaojie: Yiqi “yifa shoudai” an de zai fenxi [Civil Mediation in the Area “Beyond the Reach of Law”], BIJIAOFA YANJIU [J. OF COMP. L.] 269 (1998); Tian Chengyou, XIANGTU SHEHUI ZHONG DE MINJIANFA [Local Law in Rural China] (Law Press 2005).

23. Fu, *supra* note 6, at 32, 48; Weizheng Liu & Yingyi Situ, *Criminal Courts in China’s Transition: Inquisitorial Procedure to Adversarial Procedure?*, 15 CRIME & JUST. INT’L, Feb. 1999, at 15-21; Amnesty International, *supra* note 8. See also Jennifer Smith & Michael Gompers, *Realizing Justice: The Development of Fair Trial Rights in China*, 2 CHINESE L. & POL’Y REV. 108 (2007); Whitfort, *supra* note 15.

24. See Chen Ruihua, XING SHI SU SONG DE QIAN YAN WEN TI [THE FOREFRONT OF CRIMINAL PROCEDURE] 338-403 (Zhongguo ren min da xue chu ban she [China Renmin Univ. Press] 2000).

25. Chu, *supra* note 1.

uncharted forest.<sup>26</sup> Several obstacles complicate such an adventure. First, the transparency of Chinese legal institutions has traditionally been obscured by the CCP and has only become clearer in the late 1990s.<sup>27</sup> Second, given the tremendous economic and legal transitions of the past three decades, the law in action may differ greatly from the law in the books. While a textual survey of the laws may imply progressive modernization and westernization, an empirical study of their application may indicate a great number of inconsistencies and irrationalities. Third, due to the lack of data and other methodological limitations, much of the 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.”<sup>28</sup> While China’s legal reforms appear to show an improvement from a domestic historical perspective, from an international perspective the situation is less positive.

Full-scale empirical assessment of the implementation of CPL-1996 is impractical. National data provided by Chinese government agencies is too general, limited in scope, contradictory and unreliable.<sup>29</sup> Although a few Chinese scholars have devoted significant efforts to field work, their research samples are too narrow to reach a representative conclusion.<sup>30</sup> While some foreign scholars have attempted to interview judges and lawyers in

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26. Stanley Lubman, *The Study of Chinese Law in the United States: Reflections on the Past and Concerns about the Future*, 2 WASH. U. GLOBAL STUD. L. REV. 1, 3 (2003).

27. *Id.* at 25.

28. Lening Zhang, Steven F. Messner & Jianhong Liu, *A Critical Review of Recent Literature on Crime and Criminal Justice in China: Research Findings, Challenges, and Prospects (Introduction)*, 50 CRIM. L. SOC. CHANGE 125, 130 (2008).

29. For instance, according to the National Bureau of Statistics, 40,004 criminal defendants were represented by court-appointed counsels in 2006. 2006 Nian zhongguo shehui tongji shuju [China Social Statistics of 2006], <http://www.stats.gov.cn/tjsj/shehui/2006/2006shehui.htm>. However, in the same year, the Supreme People’s Court of China reported a number of 17,221. Xiao Yang, *Zuigao fayuan gongzuo baogao* [Supreme People’s Court Work Report], <http://www.fmprc.gov.cn/ce/ceuk/chn/xw/t305262.htm>.

30. For instance, Zuo Weimin and his colleagues, including the author of this article, conducted intensive empirical research sponsored by the Ford Foundation 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 works on criminal justice ever conducted in China, but it was limited to only one of China’s 31 provincial jurisdictions. See Zuo Weimin et al., *ZHONGGUO XING SHI SU SONG YUN XING JI ZHI SHI ZHENG YAN JIU* [EMPIRICAL STUDY ON THE OPERATION MECHANISM OF CRIMINAL PROCEDURE IN CHINA] (Fa lu chu ban she [Law Press] 2009); see also Chen Ruihua, *XING SHI BIAN HU ZHI DU DE SHI ZHENG KAO CHA* [EMPIRICAL SURVEY OF CHINA’S CRIMINAL DEFENSE] (Beijing da xue chu ban she [Peking Univ. Press] 2005) (research samples were located in Beijing).

China,<sup>31</sup> due to their identity as foreigners, as well as the inherent limitations in individual interviews, it has been difficult for them to obtain a realistic and comprehensive view of China's criminal justice system.<sup>32</sup>

Despite these difficulties, empirical studies have been made easier by modern developments in communication. In particular, the Internet has significantly enlarged access to information about criminal justice in China.<sup>33</sup> High-profile cases involving notorious judicial misconduct have garnered widespread public attention through extensive press coverage and individual reports. Not only are the trial proceedings covered in detail, but behind-the-scenes stories are also disclosed to the public. As a result, a much more detailed picture of a particular case is now available than what is simply found in the text of the law and the court opinion. Expanded Internet and press coverage provides a new and more illuminating window on China's judicial practice and may aid in the diagnosis of the underlying problems plaguing the criminal justice system.

This paper relies on an 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, even though CPL-1996 provides significant procedural safeguards that theoretically ensure a fair trial for criminal defendants, it fails to establish an effective mechanism for systematically and coherently

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31. See SUSAN TREVASKES, COURTS AND CRIMINAL JUSTICE IN CONTEMPORARY CHINA, at xi (Lexington Books 2007); Chu, *supra* note 1, at 159; Smith & Gompers, *supra* note 23, at 110.

32. For a detailed discussion of empirical research on China's judicial system, see Donald Clarke, *Empirical Research into the Chinese Judicial System*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 164, 164-192 (Erik Gensen & Thomas Heller, eds., Stanford Univ. Press 2003).

33. By the end of 2008, there were approximately 300 million Internet users in China, constituting the largest online population in the world. However, this total only amounts to 23 percent of China's entire population. Andrew Jacobs, *Internet Usage Rises in China*, N.Y. TIMES, Jan. 14, 2009, <http://www.nytimes.com/2009/01/15/world/asia/15beijing.html>; see 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], Jan. 14, 2009. The Internet not only provides a more convenient channel for expedited information transference and exchange, but it also provides a public forum for free speech, which is not available in traditional public media like newspapers and television where information is controlled by the authoritarian Chinese regime.

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 only superficially, and the essence of a fair trial is lacking.

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 often overrides procedural fairness and violations of defendants' rights are tolerated as long as a correct verdict is reached. Part II analyzes the multiple-murder case of Yang Jia which, while it may have produced a correct and legal conviction, engendered enormous controversy concerning the balance between substantive correctness and procedural fairness. The case also shows how judges can manipulate the trial procedure to ensure efficiency and convenience and turn 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 eleven 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 the 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 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. Thus, in addition to the rights contained in CPL-1996 regarding the parties' rights to participate in the trial, serious thought must be given to address the vulnerability of the judiciary to outside pressures. A strong, coherent, and integrated framework of inter-supportive 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.

## I. CORRECTNESS V. FAIRNESS: GENERAL CONTEXT

On the morning of November 26, 2008, Yang Jia, a twenty-eight-year-old man convicted of killing six police officers and injuring another four, was executed by lethal injection. There was no doubt that he actually committed the brutal crimes, nor any doubt that he could legally avoid the death penalty. However, Yang's trial and appeal still resulted in enormous controversy. Journalists and bloggers who dug into Yang's personal background and his year-long combat with the Shanghai police over torture he had allegedly previously suffered at their hands,<sup>34</sup> claimed that Yang was just taking revenge after exhausting all available legal means. The media and the public, along with legal professionals, scrutinized Yang's trial and appeal. Most concluded that although Yang may have deserved the death penalty, he was nonetheless convicted and executed unfairly.

The surprising sympathy over Yang's murder and death is a symbol of the depth and strength of the anger ordinary Chinese citizens have about police misconduct, particularly torture and brutality in criminal investigations. It also indicated the public preference for a fair trial procedure over a correct and legal verdict;<sup>35</sup> perhaps unexpectedly so, as previous events had seen members of the public placing a low value on fair trials and due process. 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 public as "ene-

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34. In October 2007, Yang was traveling in downtown Shanghai with a rented, unregistered bike. He was stopped by a patrol officer, who suspected that Yang had stolen the bike. After quarreling with the officer, Yang was taken to a local police station, where he was held for several hours before being released for lack of suspicion. Subsequently, Yang alleged that six or seven police officers beat him in the police station. Chen Zhongxiaolu, *Yang jia an shimo* [*The Full Story of Yang Jia's Case*], CAIJING [FIN. & ECON.], Oct. 27, 2008, at 139.

35. 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 to those accused. See *Irvin v. Dowd*, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring) (stating "[o]ne 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 M. DiBiagio, *Judicial Corruption, The Right to a Fair Trial, and the Application of Plain Error Review: Requiring Clear and Convincing Evidence of Actual 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 practices (in terms of Western standards of fairness) in order to convict and punish a true criminal.

mies of the people.”<sup>36</sup> Millions of web users denounced those scholars, most of who were 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 believed that it would take years for the Chinese public to gain much appreciation of the importance of due process. The conventional view was that the public only demanded investigations that uncovered the factual truth and trials that convicted the real criminals and acquitted innocent persons. According to the view, as far as the public was concerned, the ends were all-important, and the means, superficial.

This view is consistent with the historical and cultural role Chinese judges have played. The traditional role of judges was to ascertain the truth and render a correct verdict, rather than 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 is 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 that courts, procuratorates, and police must ground their actions on facts (*shishi*) and laws (*falu*).<sup>37</sup> In particular, all convictions must be based on “clear

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36. 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 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 did not commit any premeditated crimes in the next two years, his death penalty would 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. It affirmed the trial court’s capital sentence and Liu was executed on December 22, 2003. Many commentators concluded that China’s best signing legal scholars were abandoned by the people because they betrayed the public by insisting on their position. Lin Chufang, *Shenyang liuyong an giapian diaocha* [Probing on Liuyong’s Commutation], NAN FANG ZHOU MO [S. WKND.], Aug. 28, 2003; Zuigao renmin fayuan zaishen liu yong an xingshi panjue shu (2003) xing ti zi di 5 hao [Sup. People’s Ct. Decision in the Retrial of the Liu Yong Criminal Case (2003) Criminal Retrial No. 5] Zhongguo fayuan wang [China Court Web], available at <http://www.chinacourt.org/public/detail.php?id=96393>. See generally Whitfort, *supra* note 15, at 143.

37. CPL-1996, art.6.

facts and sufficient evidence.”<sup>38</sup> Errors or ambiguity in fact finding will result in reverse and retrial<sup>39</sup> or adjudication review,<sup>40</sup> which means that even a closed case can be re-opened.

The CCP has tended to strictly emphasize the discovery of factual truths, regardless of the fairness of the procedure, as part of its effort to rebuild flagging public confidence in the criminal system due to corruption amongst judges, police and prosecutors. Under this policy, 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 (or 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.

As a safeguard, the primary decisions of trial judges are strictly reviewed by supervising judges, although these reviews of trial court decisions are only 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 criminal cases is ascertainable, leading to correct verdicts.

China’s endeavors to pursue substantive correctness in criminal trials are often in tension with the Western perception of a fair trial. The Western perception holds procedural fairness above substantive correctness in its core values of criminal trials. The right to a fair trial is a fundamental human right, adopted in various domestic and international laws.<sup>41</sup> In contrast, substantive correctness 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 many people in the United States 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 as a consequence the jury verdict was respected.

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38. CPL-1996, art.162.

39. CPL-1996, art.189.

40. CPL-1996, art.204.

41. International Covenant on Civil and Political Rights art.14, Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171; African Charter on Human and Peoples’ Rights arts.7 & 26, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights: “Pact of San Jose, Costa Rica” art.8, Nov. 22, 1969, 1144 U.N.T.S. 123; Convention for the Protection of Human Rights and Fundamental Freedoms art.6, Nov. 4, 1950, 213 U.N.T.S. 221.

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."<sup>42</sup> The completed execution of correct procedures ends controversy over substantive matters.

As such, the Western viewpoint is that a fair trial serves as both a fact-finding instrument and the basis for the legitimacy of the verdict. First, a fair trial should provide an adequate opportunity for each party to present its case and challenge the opposing side, with procedural safeguards designed to maintain equity. This process theoretically thoroughly elicits all the available factual evidence and legal arguments of the case. Second, a fair trial should place the judge in an impartial legal role where his decisions will 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."<sup>43</sup> In such a trial the defendant can effectively participate in the process of shaping the judge's mind, increasing the fairness and legitimacy of the subsequent outcome.<sup>44</sup> These two parts, coherently and integrally combined, constitute the fundamental framework of a fair trial. The absence of either one, even in part, could result in a failure of fact-finding or the legitimacy of the verdict.

Due to the CCP's control and beliefs it remains unlikely that an integrated framework that could universally ensure a fair trial can be implemented within China's criminal justice system. Whatever the framework is, the CCP's position is that it must reserve the prerogative 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 responsive to the Party's needs rather than those of the people or the case itself. Without significant political reform, it is unlikely that a genuine and coherent system for fair trials can be achieved.<sup>45</sup> Although some individual procedural safeguards, such as expansion of defense lawyers' role in CPL-1996, are possible, the trial framework is still so segmented

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42. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).

43. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *The Administration of Justice and the Human Rights of Detainees*, at 68, U.N. Doc. E/CN.4/Sub.2/1994/24 (June 3, 1994) (prepared by Stanislav Chernichenko & William Treat).

44. Ji Weidong, *Falv chengxu de yiyi* [*The Meaning of Legal Procedure*], *ZHONGGUO SHEHUI KEXUE* [SOC. SCI. IN CHINA] 83 (1993).

45. For a broader argument on this matter, see Lubman, *supra* note 26, at 27, 34.

and fragile that the essence of fair trials can easily be compromised.

The CCP is quite aware of the fundamental inconsistency between party dominance and fair trials, but believes that substantively correct verdicts cure the people's demand for procedural fairness. As long as an unfair criminal trial apparently produces a correct verdict, the lack of fairness in the process does 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. Some procedural rights, which are deemed to be crucial in the West, are seen in China as potential obstacles to the state's efforts to ascertain truth and correctness.<sup>46</sup> The fear is that when the process is adjusted to be fairer for defendants, those defendants will exploit the system to escape punishment and the number of successful convictions will plummet. Thus, when scholars and lawyers proposed basic procedural safeguards in an amendment to CPL-1996, the Ministry of Public Security and local PSBs fiercely attacked them.<sup>47</sup> Some other proposals with potential negative impact on the prosecutor's mission to successfully convict defendants were also suspended or postponed.<sup>48</sup>

The focus on substantive correctness also causes frequent violations of the procedural safeguards of CPL-1996.<sup>49</sup> Undertaken in the name of guaranteeing correct verdicts, these violations are readily tolerated by supervising judges and other

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46. See Whitfort, *supra* note 15. For example, granting defendants the right to keep silent would frustrate police investigation; providing lawyers to defendants would lead to lies to authorities and messages being spread amongst conspirators; a lawyer's presence at an interrogation would defeat valuable police tactics or tricks in eliciting a confession; skilled lawyers would mislead judges by focusing on trivial facts and obscuring critical issues; defendants granted bail would intimidate witnesses and destroy evidence; and full discovery in advance of the trial would help the defendant make up false alibis.

47. See Fu, *supra* note 6, at 41; Chu, *supra* note 1, at 170.

48. For instance, CPL-1996 and corresponding judicial interpretations limit a defense lawyer's access to his client and the prosecution's files. They also give leeway to nearly every witness not to testify at trial. Arguing that such provisions are flawed, scholars have been calling for a new amendment since the late 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* (FIN. & ECON.), Nov. 10, 2008, at 160-161.

49. For example, as most judges carefully read the prosecution's file, they enter the courtroom with biased minds; defendants' requests to summon witnesses are more likely to be denied; a court-appointed lawyer for the defendant 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.

authorities. China's growing crime rate during the past three decades also contributes to such tolerance. Concomitant with China's amazing urbanization, modernization and industrialization, crimes have become a pressing social problem all over the country. The public has urged the government to take more effective and aggressive approaches, particularly toward violent crimes and corruption; and when crime rates are increasing, politicians sensitive to public relations will become tougher on crime.<sup>50</sup> As a result, violations of defendants' rights in the trial stage and a broad range of police misconduct, such as deception, entrapment, "soft torture,"<sup>51</sup> and even brutal and obvious torture are often tolerated. Effective remedies must be adopted to ensure that such violations do not jeopardize factual truth and substantive correctness.

China also relies on its particular evidence rule of mutual corroboration to ensure substantive correctness of criminal verdicts. Under the rule, 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.<sup>52</sup> Compared with most Western countries, in which a voluntary, knowing and intelligent guilty plea would 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.

A revelation that an innocent person was wrongfully convicted because of violations of the trial's 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 few wrong convic-

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50. Randall Peerenboom, *Out of the Pan and into the Fire: Well-Intentioned but Misguided Recommendations to Eliminate All Forms of Administrative Detention in China*, 98 Nw. U. L. REV. 991, 1052 (2004).

51. 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

52. 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.

tions in those years. Rather, it is reflective of the fact that the public did not have the open forum of the Internet and mass media to adequately 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 scrutiny by the public. A high-profile case, like Yang Jia's, 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 modern communication device as they have failed to fully alter their behavior and actions, sometimes provoking an enormous public uproar. A full adjustment in the behavior of government officials appears to still require more time.

In summary, China's criminal trials are not balanced contests purporting to grant defendants fair trials. The primary focus on achieving substantive correctness in verdicts has conflicted with and too often overwhelmed any fairness in the trial process created by CPL-1996. On the one hand, to uncover factual truth, prosecutors and judges are generously empowered to employ all necessary investigation methods, even violating the defendants' procedural rights, with only a few impediments imposed by the law. The trial framework is thus structurally unfair. On the other hand, to maintain political legitimacy, strict internal supervision and the evidence rule of mutual corroboration have been established. Unfortunately both can still easily be overwhelmed and result in false convictions. For the defendant, the trial itself is still too frequently little more than a formality.

## II. AN UNFAIR TRIAL: HOW JUDGES MANIPULATE TRIAL PROCEDURE TO PURSUE EFFICIENCY AND CONVENIENCE

In many ways, the trial of Yang Jia was one of the most politically charged in China's history. First, the death penalty was all but inevitable upon conviction. 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.

Yang's trial should have been a complicated process, requiring considerable time and caution from the judges. Yang's mo-

tive 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 history before the murders, such as being single and unemployed ever since graduation, or during the act, such as 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 had a significant impact on his conviction and sentence. Although it may be understandable that the government would not show leniency to Yang, it was unnecessary to convict and execute him in a rushed manner. Considering the exceptional severity of Yang's crime, a careful and cautious trial was necessary to reinforce integrity of the criminal judicial system. A hurried conviction, however, could inevitably induce public suspicion and criticism.

The case became a historic symbol of how a regular citizen may overreact to governmental misconduct and how the government reinstates its legitimacy and reputation through its response to this reaction. People were watching how the judge handled the case, with expectations of justice, fairness and transparency, but mixed with suspicions of vengefulness and opaqueness. As such, Yang's trial became an exceptional and valuable opportunity for the government to rebuild its reputation and public confidence in the criminal system, if handled well, and a possible nightmare for the government that would worsen existing tensions, if handled poorly. However, the government seemed to take the case personally and emotionally. The resulting fallout from Yang's conviction and execution was a fierce and vocal public outcry against the government and its tactics.

#### A) RUSHED CONVICTIONS AND SENTENCES

Given the procedural trial protections in PCL-1996, one would expect a trial of this magnitude to take considerable time, regardless of the government's position. However, despite facial similarities in the law, trials in China look very little like trials in most Western countries. Yang's first instance trial<sup>53</sup> opened at 10

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53. 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.

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 what exactly happened in the trial is unknown, its speed clearly indicates that it was far from being as cautiously and carefully handled as one might expect under the circumstances.

CPL-1996 specifies that in every trial proceeding, courts must first confirm the identity and status of the defendant, as well as those of the defense lawyers, and identify the judges and prosecutors. It requires courts to clearly inform the defendant of his rights, including the right to counsel,<sup>54</sup> the right to present evidence and call witnesses, and the right to recuse a judge, court reporter, or prosecutor.<sup>55</sup> In practice, these proceedings may last five to ten 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,<sup>56</sup> may take ten minutes or more, depending on the complexity of legal issues and the lawyers' habits. If these procedures were followed, then Yang had only forty to forty-five minutes to present his case and to challenge the prosecution's case. This is doubtlessly unreasonable for a case involving the 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<sup>57</sup> is twenty-five pages long. This opinion shows that the prosecutors presented more than thirty items of evidence, including the live testimony of two police officers. Written statements or interview transcripts of another twenty-three witnesses were read into the record with no convincing reason given for the witnesses' ab-

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54. 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 or disabled defendants, publicly-funded counsel is appointed at the court's discretion. CPL-1996, ch. 4.

55. CPL-1996, art.154.

56. 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 a interruption-free chance to summarize evidence and facts, analyze major issues, and conclude his case. Legal argument can last more than one round, subjected to the presiding judge's discretion.

57. First instance criminal trials 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, art.147.

sences.<sup>58</sup> 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's decision only cited a small portion of each witness's testimony or report, or just summarized its contents yet this description still took more than sixteen pages. It takes a legal professional at least twenty minutes to even read through this opinion summarizing the evidence. In a single hour, it would be impossible for the prosecutors, defense lawyers and judges to introduce and examine all this evidence adequately. The logical conclusion is that most of the prosecution evidence was only mentioned or listed by title at the trial and not read and examined in detail by the judges until later.

This is a fairly routine practice in China's criminal trials. Empirical research conducted in 2005 at a busy city district court in western China showed that the average duration of criminal trials is twenty nine minutes. Even in the court of a rural county, the average trial time is only forty minutes. Particularly, for minor cases eligible for summary procedure,<sup>59</sup> ten minutes would be enough to convict a defendant.<sup>60</sup> At one trial this writer personally observed, the entire proceeding lasted only eight minutes, with the defendant saying no more than ten words. The judge

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58. A critical flaw of CPL-1996 is that witnesses are not required to appear at trial and testify under oath or swear. Consequently, most investigating police officers only interview witnesses outside of the courtroom, at which time they have witnesses sign interview transcripts which are then submitted to the court. The transcripts, usually referred to as "witnesses' testimony" (Zhengren Zhengyan), are 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, art.157.

59. 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. In contrast with regular procedure, the prosecutor does not have to personally appear at trial, but only delivers his dossier to the judge. Further, if the prosecutor chooses to confront the defendant at trial, he may summarize his evidence and arguments, rather than present his case in detail. In return for pleading guilty and consenting to such summary procedure, the defendant may receive a lenient sentence. See CPL-1996, art.174-179; GANYU SHIYONG PUTONG CHENGXU SHENLI "BIEGAOREN RENZUI ANJIAN" DE RUOGAN YIJIAN (SHIXING) [SEVERAL OPINIONS ON TRYING GUILTY-PLEA CASES WITH REGULAR PROCEDURE (PROVISIONAL)]; GUANYU SHIYONG JIANYI CHENGXU SHENLI GONGSU ANJIAN DE RUOGAN YIJIAN [SEVERAL OPINIONS ON TRYING PUBLIC-PROSECUTION CASES WITH SUMMARY PROCEDURE].

60. See Lan Rongjie, *Susong guize difanghua shizheng yanjiu: Yi caipanquan peizhi wei shijiao* [Empirical Research on Indigenized Procedural Rules: From the Point of Decision-Making Power Distribution], *Fazhi yu shehui fazhan* [Law & Soc. Dev.] 3 (2008); Lan Rongjie, *ZHONGGUO JICENG FAYUAN XINGSHI SHENPAN DE SANGZHONG MOSHI* [THREE MODELS OF CRIMINAL TRIAL IN CHINA'S BASIC COURTS: EMPIRICAL RESEARCH OF THREE SAMPLE COURTS] (2008) (doctoral dissertation, Sichuan University).

rendered his decision immediately at the trial, convicted the defendant of robbery, and sentenced him to two 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.

Sadly, a ten-minute trial is often the defendant's only chance to stand in front of the judge and present his case. CPL-1996 does not provide for separate proceedings for evidentiary and sentencing hearings. They are all included in a single trial in which all factual and legal issues are argued, considered and decided. Furthermore, defendants are detained in a police facility before trial and are transferred to a detention center or jail right after conviction. While serving their sentence, most defendants will have no further chance to see any judges, including appellate court judges.<sup>61</sup> For defendants without a lawyer 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. A defendant can be convicted never having learned of the prosecution's full case. By Western standards, this defect would never produce a fair trial.

Trial judges cannot make reliable decisions based on such a short trial to ascertain the facts. There is not enough time for the prosecutor to go through all of his evidence or 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<sup>62</sup> as judges' decisions come from reading the prosecution dossier before trial,<sup>63</sup> and are later veri-

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61. 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.

62. See Liu & Situ, *supra* note 23, at 13, 15; Chu, *supra* note 1, at 162.

63. 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 duplicating documents. 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 resulting 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 the risk of obtaining

fied and confirmed at the trial by the defendants' verbal admission of the accusations against them.<sup>64</sup> 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.

In most cases, this approach works quite well in terms of correctness. Statistics show that in a court where the average time of all criminal trials is only twenty nine minutes, less than ten percent of cases were appealed in the year of 2005, among which 85.2% were affirmed by the appellate court.<sup>65</sup>

In Yang's case, although his first trial only lasted one hour, it generated a written opinion of twenty-five pages six days later, with sixteen pages summarizing facts and evidence introduced into the record. Despite Yang's appeal and complaint of an unfair trial, the appellate court affirmed his conviction and death penalty. Neither the trial court nor the appellate court considered it an unfair or illegal trial, as they are accustomed to this type of "speedy trial." What was surprising was the uproar among the public, who apparently demanded more than a correct verdict and were disappointed by the rushed conviction and execution of Yang.

## B) THE BIAS OF THE JUDGE

It is generally believed in China that courts are partially dependent on or even subordinate to the government to a degree that the court cannot be impartial in cases where the personal

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a distorted pre-judgment. See Long Zongzhi, *Xingshi tingshen zhidu yanjiu [Research on Criminal Trial System]*, ZHONGGUO ZHENGFA DAXUE CHUBANSHE [CHINA U. POL. SCI. & L. PRESS] 151 (2001).

64. 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 detail, and he 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, arts.155, 160, 162.

65. See Lan Rongjie, *supra* note 60. Lodging an appeal in China is fairly simple and requires no lawyers or fee. The law also prohibits the appellate court from imposing harsher sentence on the appellant. As such, defendants who are wronged by the trial court will most likely lodge an appeal. 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.

interests of government officials are involved.<sup>66</sup> Concerned by the fact that Yang seemed to purposely attack the Shanghai government or Shanghai PSB, rather than 10 victims 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 the Shanghai government. However, neither the court nor the Shanghai government ever responded to this widespread sentiment.

Yang's target, the Shanghai PSB, is not only a major department of the 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 the police, procuratorates, and courts.<sup>67</sup> The head of the Shanghai PSB is also the Secretary General of Shanghai CPPLC, while the chief judge of the Shanghai People's High Court and the chief procurator of the Shanghai People's Procuratorate are both vice secretaries of the Shanghai CPPLC. Within the hierarchy of the Shanghai Communist Party, the highest judge of all Shanghai courts is a subordinate to the director of the Shanghai PSB, and must follow the command of the latter. This was why many argued for a change of venue in Yang's trial, claiming all courts within Shanghai territory, regardless of whether they were trial courts or appellate courts, should be recused from trying Yang.

CPL-1996 is quite erratic 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. 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.<sup>68</sup> For a regular

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66. Scholars and observers call this phenomenon "judicial localization," which not only undermines 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. See Jerome Cohen, *The Plight of China's Criminal Defense Lawyers*, 33 HONG KONG L.J. 231, 233 (2003).

68. 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 inter-

governmental employee or a civilian, even if conflicts of interest have been reasonably proved, most courts will not bother to change the venue.<sup>69</sup> Even in extreme cases such as multiple-murder, gang rape or organized crime, although public outrage and political pressure present possible threats to the impartiality of judges, courts rarely decide to relocate a case.<sup>70</sup> It seems the real concern in deciding whether to change venues is whether the defendant may benefit from being tried by the original court,<sup>71</sup> with possible prejudice against a defendant rarely factoring into the equation.

Perhaps this was why the Shanghai court refused to relocate Yang's trial, even though the circumstances indicated that the courts in Shanghai were likely to be biased. From the perspective of politics, it was understandable; after all, changing the venue of Yang's case could be easily interpreted as an official acknowledgment that the Shanghai court system is actually dependent on and subordinate to the government (particularly the PSB).

One 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 the Shanghai court system is legally independent and neutral from the local government, thereby obviating the need to worry about Yang's fair treatment.<sup>72</sup> Under the laws as written, he was correct. CPL-1996 states that the "people's courts execute the judicial power in compliance of the law. . . free of interference from all administra-

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est in trying the former big boss. See Tian Yu, Wu Jing, *Shanghai yuan shiwei shuji chen liangyu yishen beipan 18 nian* [*The Former Shanghai Party Secretary Chen Liangyu Got 18 Years in First Trial*], XINHUA NEWS, Apr. 1, 2008.

69. For instance, in 2000, a judge of Xian 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 request, convicted him of murder, and sentenced him to 15-year imprisonment, which was much higher than the average sentence for attempted murder. See Chen Hai, Liu Xianghui, Jin Lingyun, *Faguan mousha yuanzhang an diaocha* [*Investigation on a Judge Murdering His Chief Judge*], NANFANG ZHOUMO [S. WKND.], Sept. 1, 2003.

70. This is one of the major reasons why She Xianglin was convicted of murdering his still-alive wife. This case will be discussed later in this article.

71. 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. 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 JUST. Q. 289, 297 (1998).

72. Yang Weihang, *Xingshifa Xuejie Sanwei Xuezheng Pouxi Yangjia Xijing Sharen An Shenpan Guocheng* [*Three Criminal Law Scholars Analyze the Trial Procedure of Yang Jia's Murder Case*], FAZHIBAO [LEGAL DAILY], Oct. 24, 2008.

tive organs, social organizations and individuals.”<sup>73</sup> However, the reality of the independence and impartiality of China’s courts belies such claims.

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 that the trial judges and court leaders were personally acquainted with the victims or their families, but this alone posed no significant dangers to Yang’s trial.

As Chinese society places a very strong emphasis on personal relationships,<sup>74</sup> corruption is a common concern in many criminal trials. 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 people in his jurisdiction, and once a case enters his docket, he may receive various phone calls from friends, relatives, schoolmates, or neighbors. Defendants, usually through their lawyers or family, may offer bribes in exchange for acquittal or leniency, while victims also occasionally bribe judges to ensure a conviction or harsher punishment. In my empirical research at several trial courts, I asked judges during one-on-one anonymous interviews what percentage of cases involved illegal outside influences. Almost all judges replied with an estimate of twenty percent.<sup>75</sup>

Although receiving inappropriate phone calls does not necessarily lead to corruption or prejudice on the part of a judge, such calls underline how difficult it may be for a local judge to remain neutral and impartial. While changes of venue seem appropriate when the local judges may be prejudiced by members of the community, the ease of a change of venue may be complicated due to concerns such as inefficiency and inconvenience.

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73. CPL-1996, art.5.

74. In observance and analysis of China’s judicial practice, *guanxi* (literally “relationship/connections”) is a factor that should never be ignored. As defined by Yan Yunxiang, *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”. See Yan Yunxiang, *The Culture of Guanxi in a North Chinese Village*, 35 CHINA J. 1, 1-25 (1996). See also Kamal Sheel, *Understanding Human Relationship in China, in ACROSS THE HIMALAYAN GAP: AN INDIAN QUEST FOR UNDERSTANDING CHINA* (Tan Chung ed., Gyan Publishing House) (1998).

75. See Lan Rongjie, *supra* note 60.

Furthermore, given that personal relationships are so vital to 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 leaving almost every other case to the local judge regardless of that judge's possible bias. This was exactly what happened in the trial of Yang Jia.

### C) A LACK OF INDEPENDENT COUNSEL

The most frequently attacked flaw of Yang's trial was that his court-appointed defense lawyer, Xie Youming, was a long-term contracted counsel of the Shanghai Zhabei District Government, the 10 victims' ultimate employer.<sup>76</sup> Before Yang's trial, Xie admitted in an interview that Yang would inevitably be sentenced to death. That statement caused public condemnation of his conflict of interest and generated calls for his recusal. Xie never responded to the outcry nor did he recuse himself.<sup>77</sup>

Yang's father had hired two lawyers to defend Yang.<sup>78</sup> However, these lawyers were never allowed to meet with Yang, who was detained in a police facility and had no access to any lawyer other than Xie. Neither the police nor the prosecutors had authority to prevent the lawyers from interviewing Yang; however, the Shanghai procuratorate presented an interview transcript that said Yang had rejected any lawyer hired by his father. Although Xie claimed that Yang personally signed a document confirming Xie's status as his legal representative, the Shanghai Lawyers Association stated in a press release that Xie was actually hired by Yang's mother, who had been missing since the day of the crime.<sup>79</sup> These suspicious facts suggest that the Shanghai government tried to control Yang's trial by appointing a government-friendly lawyer and excluding all other lawyers. They also

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76. 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.

77. See Luo Jieqi, *16 Lvshi yaoqiu chachu yangjia lvshi [16 Lawyers Request to Discipline Yang Jia's Lawyer]*, XINKUAIBAO [FRESH & SWIFT NEWS], Aug. 1, 2008, at A31.

78. 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.

79. See Chen Yu, Shi Feike, Tang Qiang, *Yangjia Anzhong De Lvshi Qunxiang [Lawyer's Images in Yang Jia's Case]*, Nandu Zhoukan [S. Wkly.], Nov. 17, 2008.

indicate a strong possibility that the Shanghai government was actively trying to hide key information from the public.

The Chinese government is concerned not only with achieving a conviction in sensitive cases but doing so without being challenged or embarrassed by an uncooperative defense lawyer.<sup>80</sup> It is not unusual for the government to attempt to constrain defense lawyers, whether they are hired or appointed. In sensitive cases, the prosecutor will sometimes 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 an assertion of innocence may be precluded in favor of a plea for leniency. Lawyers who refuse these instructions and defend a sensitive case too vigorously might be disciplined or even suspended from practice.<sup>81</sup>

In non-sensitive cases judges are inclined to appoint cooperative lawyers who act perfunctorily to finish the job and facilitate closing the case smoothly and efficiently. Particularly in county courts, in which cases are less likely to involve significant factual disputes, and only juvenile, deaf, mute and blind defendants are entitled free lawyers,<sup>82</sup> 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.

This writer once observed a juvenile trial in a county court in which the public defender spoke no more than ten words during the trial, which lasted approximately forty minutes. In a district court in western China most unassisted juvenile defendants are referred to a single young lawyer.<sup>83</sup> Representing almost 200

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80. 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, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 Nw. J. INT'L L. & BUS. 383, 394 (2000).

81. Such occurrences may not be found in the statutes, but are frequently carried out in practice. China's Minister of Justice has explicitly demanded lawyers take politics seriously when handling sensitive cases. See Cui Qingxin, *Sifabu: Lvshi Daili Mingan Anjian he Quntixing Anjian Xu Gudaju* [Ministry of Justice: Lawyers Representing Sensitive or Mass Cases must Look at Big Pictures], XINHUA NET, [http://www.china.com.cn/policy/txt/2009-08/07/content\\_18293276.htm](http://www.china.com.cn/policy/txt/2009-08/07/content_18293276.htm).

82. 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.

83. 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

juveniles a year, on top of a few cases from other sources, this lawyer is in no position to provide effective representation for all of his clients. The court's real concern is not the effectiveness of the representation, but rather that judges manage to finish their cases efficiently, conveniently and lawfully. If a correct conviction is obtained, any questions on whether there is fair procedure or not are disregarded.

#### D) NO RIGHT TO CONFRONT WITNESSES

Two witnesses were called to testify at Yang's 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 had allegedly illegally stopped, interrogated, and tortured Yang in a previous encounter with the Shanghai police. The evidence could have served to elicit leniency from the judges. The court denied Yang's requests.

However, the prosecutors introduced written statements submitted by these officers, and argued that they acted lawfully and did not torture Yang. In addition, the prosecution called two other officers to give live testimony at the trial. One of the officers 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 the Shanghai PSB about his 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."<sup>84</sup>

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 finally addressed this question. He admitted that the prosecution filed a motion to

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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.

84. Shanghai Municipality No. 2 Intermediate Court, XINGSHI PANJUESHU [CRIMINAL JUDGMENT]; (2008) HU 2 XING ZHONG CHU ZI DI 99 HAO [NO. 99 FIRST INSTANCE CRIMINAL JUDGMENT OF 2008].

quash Yang's request by presenting a videotape of the investigation in dispute that showed only part of the investigation but contained nothing illegal. The court, however, did not address this issue in its opinion, and simply orally denied Yang's request. It is doubtful that the court was convinced that the Shanghai police had not tortured Yang. On the contrary, the totality of circumstances suggests that Yang was telling the truth.

In this regard, denial of Yang's confrontation request may be construed as a political tactic, rather than a legal decision, since it would be politically unacceptable to disclose police 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. When facing a conflict between procedural fairness and political correctness, it was predictable and understandable that the court would not hesitate to choose the latter course.

As a routine practice Chinese courts rarely summon witnesses. Empirical research in all nineteen courts of Chengdu municipality of west China reveals that during 2004, out of 6,810 criminal cases, only 0.38 percent summoned witnesses, and only sixty-eight witnesses were summoned. Nine of the nineteen courts did not call any witnesses during that year.<sup>85</sup>

In most cases, several reasons prevent both the prosecution and the defense from calling witnesses. First, since criminal defendants are not entitled an absolute right to confront accusers, witnesses are not legally required to appear in court. Second, without a plea bargaining system, almost all cases go to trial, including those involving few factual disputes. Third, since judges and prosecutors are widely concerned with inefficiency and cost, witnesses are strictly limited as they prolong the proceedings. Fourth, witnesses may also worry about their own time and safety, and may be unwilling to testify. Finally, as mentioned above, China's evidence rule of mutual corroboration enables judges to ascertain the facts through the prosecution's files, rendering witnesses unnecessary.<sup>86</sup>

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85. Zuo Weimin, Ma Jianghua, *Xingshi zhengren chuting lv: Yizhong jiyu shizheng yanjiu de lilun chanshu* [Rate of Witness Testifying at Criminal Trials: A Theoretical Analysis Based on Empirical Research], ZHONGGUO FAXUE [CHINA L.], June 2005.

86. For discussion on reasons of why witnesses rarely testify at trial, see Long Zongzhi, *Zhongguo zuozheng zhidu zhi sanda guaixianzhuang pingxi* [Analysis on Three Strange Phenomenon of China's Witness System], ZHONGGUO LVSHI [CHINA L.], 2001 at 1.

Without witnesses, written statements are read into the record, either word-by-word or summarily. Defense lawyers, if there are any, are limited to examining the statements and attempting to challenge witnesses who are not present. Judges may not concentrate on what is going on at trial, since they have read all or most of the statements and have already formed a conclusion, which is often confirmed by the defendant's own statements at the trial's outset. By depriving the defendants of the right to confront their witnesses, judges efficiently and conveniently dispose of most of their cases.

### E) TRIALS ISOLATED FROM THE PUBLIC

According to 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 instructions on how to implement this provision. Judges are thus able to manipulate the process to deprive a defendant of the right to public trial. In Yang's trial, which should have been open to the interested public and press, civilians and journalists who arrived at the courthouse were told that an observer permit was required to enter the building and that all permits had been reserved by other observers.<sup>87</sup> 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.<sup>88</sup>

While depriving a defendant of a public trial is troubling, more concerns are raised from the inappropriate publicity of criminal trials, such as trying a corrupt official in an auditorium attended by hundreds of government officials.<sup>89</sup> In these circumstances the trial is transformed into a propaganda event.<sup>90</sup> In order to send the desired political message to the audience, the trial

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87. See Ye Feng, *Yangjia Xijingan Kaishen Weixuanpan [Trial of Yang Jia Case Opened without Judgment]*, XIN JING BAO [NEW BEIJING NEWS], Aug. 27, 2008.

88. See Shao Jian, *Yangjia an gongkai shenli yinggai mingfuqishi [The Public Trial of Yang Jia Should Have Been True]*, YANZHIAO WANBAO [HEBEI EVENING NEWS], Aug. 31, 2008.

89. Other examples include trying a notorious criminal in a municipal public square where thousands of people can observe, or trying a young adult defendant who is charged of robbing students in a high school lecture hall.

90. For intensive observation and analysis of mass trials and sentencing, see Susan Trevaskes, *Propaganda Work in Chinese Courts: Public trials and Sentencing Rallies as Sites of Expressive Punishment and Public Education in the People's Republic of China*, 6 PUNISHMENT & SOC'Y 5 (2004); *Public Sentencing Rallies in China: The Symbolizing of Punishment and Justice in a Socialist State*, 39 CRIME, L. & SOC. CHANGE 359 (2003).

must be so carefully prepared to the point that they are sometimes rehearsed in advance.<sup>91</sup>

#### F) 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 supposed to be a forum where evidence is brought in and then processed by judges, lawyers and other participants involved in the trial and verdicts are produced.

A trial is not only a contest between the prosecution and the defense, but also a dialogue between the judge and the parties, through which the judge considers the facts and analyzes the law. The trial is the core and climax of a criminal procedure, while investigation and prosecution stages function as preparatory proceedings. The trial, and only the trial, is the proper basis of the final verdict.

It is not clear what kind of trial CPL-1996 was intended to produce. In some criminal cases judges actually rely on the hearings to form their opinions, but other trials, such as Yang Jia's, may only be a simple verification process to confirm what the judges have already determined beforehand. Such a trial is little more than a rubber stamp to publicly authorize a pre-trial conclusion. The actual fact-finding process is conducted and finished well before trial by the judge reading the prosecution files, without the presence or interjection of either parties. The live presence of parties during the trial contributes little to shaping the judges' minds.

Why has CPL-1996, which was expected to create a functioning adversarial-style trial framework, ended up with such a distorted trial model? Most scholars argue that the judges are to blame; trial judges care more about their own convenience and efficiency than the fairness of the trial or the procedural rights of the defendants. For many judges, trying cases is little more than a regular office job and they believe that they are supposed to quickly and cheaply finish the case and collect their paycheck. So long as they can correctly dispose of the cases assigned to them, their focus is on making the work more comfortable and less stressful, while doing no damage to their salaries or positions.<sup>92</sup>

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91. See Lan Rongjie, *supra* note 60.

92. See Lan Rongjie, *supra* note 60.

Understandably, judges prefer reading dossiers in their private offices rather than sitting on the bench under the scrutiny of lawyers and the public. Once they have formed a general conclusion by reading the dossiers, few judges would tolerate a lengthy trial that could consume considerable time and resources and yet result in a conclusion identical to the one they had already reached. Instead they blindly accelerate their trials, going straight through the required legal proceedings without addressing any point not mandated by existing laws.<sup>93</sup>

If any quality control for judges' work and production exists, it is found in the explicit requirements of statutes, such as the appointment of free counsel to a juvenile defendant, informing the defendants of their rights, or holding an open hearing. However, the statutes are only the minimum required for a judicial proceeding and can only ensure a basic legality for the proceeding. Without adhering to fundamental principles of justice such as fairness and transparency, to the spirit as well as the letter of the law, trials can still be manipulated and distorted. For instance, seating an unconscious defense attorney at the defense table might technically fulfill a legal obligation, but would not create the fairness intended by the law. If the system overlooks these manipulations, actively encourages their occurrence or fails to take them seriously, unfair verdicts will continue to result across China.

As demonstrated by Yang's trial, even in a case with significant political importance that attracted the scrutiny of the public, China's criminal trial process is converted into a mere formality. Due to judges' pretrial access to prosecution files, absent witnesses and cooperative defense lawyers, most cases are finished quickly and smoothly, and the evidence rule of mutual corroboration 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, instead focusing on how to obtain a correct verdict while adhering to the letter of the law in the quickest and most convenient way possible.

### III. WRONGFUL VERDICTS: HOW THE MANIPULATION OF TRIAL PROCEDURES CAUSES FALSE CONVICTIONS OR ACQUITTALS

There would be considerably less academic criticism and public outrage over the manipulation of trial procedures if the substantive correctness of a verdict could be guaranteed. However, the reality is that these manipulated trials often result in

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93. *Id.*

wrongful convictions and acquittals, or sentences which are disproportionate to the crime. Occasionally, innocent defendants have been sentenced to death and executed.<sup>94</sup> Although not the only cause of these incorrect verdicts, manipulation of trial procedures is more likely to lead to the affirmation and validation of errors made by the police and prosecutors. Thus, criminal defendants are often deprived of their last chance to be protected against false prosecution in court.

Theoretically, well-designed trial procedures should insulate judges from unwanted external influences or interferences, and consequently enhance a judge's impartiality and independence. For example, the immediate release of a verdict after trial could prevent an outsider from wining and dining a judge after the trial to influence the verdict as released, a practice used by many defense lawyers or defendants' relatives in China. However, requiring this may also prevent judges from giving full consideration to the case in delivering their verdict. A balance must be drawn between a judge's diligence and independence; in other words, between factual truth and procedural fairness. Considering that China's judiciary is struggling to retain public confidence due to judicial corruption, procedural fairness appears more desirable than factual truth. Outside influences still impose substantial threats to a judge's integrity even in ordinary cases, where there is a particularly small possibility of critical factual error.<sup>95</sup> Under these circumstances then, an untainted verdict released right after the trial may be preferable to a careful but time-consuming process.

In the United States, elaborate precautions are taken to shield a fact finder, such as a jury, from extraneous influences.<sup>96</sup> To ensure the integrity of a judicial decision and guarantee the

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94. 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 yu yidi diaocha* [Nie Shubin's False Execution Still Pending, Public Call for Relocation of Venue to Avoid Corruption], NANFANG ZHOUMO [S. WKLY.], Mar. 24, 2005.

95. See Tan Zongfu, *Dangting Xuanpan Yiyi Zhongda* [Immediate Release of Judgment is of Great Importance], 5 XINAN ZHENGFA DAXUE XUEBAO [J. S.W. U. P. & L.] 83 (2000); Lubman, *supra* note 80, at 394.

96. See, e.g., *State v. Griffin*, 563 A.2d 642, 644 (Vt. 1989); *Bracken v. State*, 939 So. 2d 826, 830 (Miss. Ct. App. 2006).

accused of 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 are excused in *voir dire*. Improper contact by parties with jurors during the trial may result in the dismissal of the affected juror or even a mistrial,<sup>97</sup> and jurors' use of wireless communication devices is banned during deliberation.<sup>98</sup>

With respect to bench trials, procedural restrictions upon judges are not as tight, although the United States Supreme Court has stated that "the structure and style of the criminal process. . . are of the sort that naturally complement jury trial, and have developed in connection with and in reliance upon jury trial."<sup>99</sup> Professional judges are presumed to be capable of resisting outside influences. They are expected to be able to disregard evidence which would be kept from a jury but naturally cannot be avoided by the judge. Additionally, fact-findings are not required to be rendered without delay after the trial; instead, judges are free to consider the case for as long as they deem necessary, even while trying other cases. Thus, bench trials seem to rely more on a judge's professional ethics and personal judgment, rather than sophisticated procedural devices, to resist outside influences. In fact, most Western countries need not worry about a judge's susceptibility to outside interference in ordinary cases. The constitutional frameworks which provide for judicial independence, checks and balances, an aggressive press, and freedom of speech establish a highly integrated judiciary. Such a well-balanced constitutional framework is not yet available with respect to China's criminal justice system, but CPL-1996 nevertheless relies on a judge's personal ethics and judgment to resist outside influences. As a result, when a judge chooses to improperly consider outside influences, he may find few institutional barriers to his misconduct.

Yang Jia's trial is one seemingly ordinary criminal case which illustrates Chinese judges' inclination to manipulate procedural safeguards to ensure efficiency and convenience. This manipulation is generally tolerated by both courts and the public, because in most cases, judges are still able to reach substantively

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97. See, e.g., *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); *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).

98. See *Commonwealth v. Rodriguez*, 828 N.E.2d 556 (2005).

99. *Duncan v. Louisiana*, 391 U.S. 145, 150 (1968).

correct and superficially legal verdicts. However, if a malleable trial encounters significant outside influence, the proceeding might be manipulated to further the interests of the outsider, rather than to merely pursue efficiency and convenience.

A) PUBLIC OUTRAGE: A CO-CONSPIRATOR TO  
IRRESPONSIBLE JUDGES?

On the night of January 20, 1994, She Xianglin, a 29-year-old security guard of Jinshan County, Hubei Province, discovered that his wife, Zhang Zaiyu, was missing. Zhang's family suspected that She Xianglin was somehow involved in Zhang's disappearance, since he was rumored 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 properly identified, but Zhang's brother identified the body, which had a similar height, weight, and hairstyle as Zhang Zaiyu, as his sister's. She Xianglin became a prime suspect and was arrested and charged with murder. After eleven days of continuous interrogation including torture and sleep deprivation, 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 admitted to four inconsistent plans at different times, including conspiring with a friend, who later presented a successful alibi. No murder weapon was ever discovered, nor were there any eyewitnesses. In addition to She's confession, the prosecution could only provide three circumstantial witnesses to prove that She had had an affair with another woman. Despite these unresolved issues and lack of direct evidence, prosecutors decided to continue to pursue the case.<sup>100</sup>

When the Jingshan County PSB proposed an official indictment for the first time, the procuratorate turned it back and instructed the PSB to collect more evidence to clarify the case. Three months later, without any new evidence, the PSB sent the case back to the Jingshan Procuratorate, stating that all other evidence had disappeared due to the time elapsed. In the mean time, the alleged victim's grieving family, joined by hundreds of angry townspeople, protested at the Jingshan County government, demanding a harsh punishment for She and accusing local officials of taking bribes from She to delay his case. Under this enormous public pressure, a consensus was finally reached with

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100. Liu Binglu, Wu Xuejun, *Tanxun shaqi an juti liucheng: she xianglin youzui tuiding quan jilu* [A Full Scale Documentary of Presumed Guilty for She Xianglin: Probing on the Wife-Murder Case], XIN JIN BAO [NEW BEIJING NEWS], Apr. 14, 2005.

the Jingshan Procuratorate. According to a file disclosed to investigators and journalists eleven 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."<sup>101</sup>

The entire city was shaken when She Xianglin was first tried in the Jingzhou Intermediate Court on October 13, 1994. The grieving family of Zhang, along with angry crowds, stormed into the courthouse and demanded a "quick conviction and swift execution"<sup>102</sup> 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, She was convicted of premeditated murder of his wife, and sentenced to death.

She Xianglin appealed to the 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.<sup>103</sup> The appellate court, without a hearing, immediately found reasonable doubts concerning the conviction. The court did not acquit She directly on appeal, although doing so would have been within the court's authority.<sup>104</sup> Instead, the High Court reversed the conviction and remanded the case for a retrial, with instructions to the trial court to resolve their specific concerns.

Unable to obtain more evidence from either side, the Jingzhou Intermediate Court returned the case to the prosecution, stating there were "unclear facts and insufficient evidence."<sup>105</sup> The Jingzhou Procuratorate subsequently sent it back

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101. Wang Gang, *Jueding she xianglin mingyun de zhifazhe* [Those Law Enforcement Officers Who Determined She Xianglin's Destiny], 15 XINWEN ZHOUKAN [NEWS WKLY.] 20 (2005).

102. *Id.* However, those observers might not get into the courtroom. According to She's own recollection, his first instance trial was closed to the public, which was obviously in violation of the law. Sun Chunlong, Zhang Yuan, Huang Hong, *She xianglin shi an beihou de sifa youxi* [The Judicial Games Behind She Xianglin's Wife-Murder Case], LIAOWANG DONGFANG ZHOUKAN [OUTLOOK ORIENTAL WKLY.], Apr. 15, 2005.

103. 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 Chuyi: Yige Canku de Falv Wanxiao: Hanyuan 11nian She Xianglin Jiaporenwang* [Acquitted on April Fool's Day: a Crucial Legal Joke: She Xianglin Being Wronged for 11 Years and Lost His Family], NANFANG ZHOUMO [S. WKND.], Apr. 7, 2005.

104. CPL-1979, art.136.

105. 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 prosecu-

to the Jingshan PSB, which had originally taken charge of the investigation. During the next two years, while She remained in jail, the Jingshan PSB did not collect any additional evidence, and the Jingzhou Procuratorate repeatedly indicted She based on the same evidence. The court never accepted the indictment, because it did not want to acquit She or face another reversal from the High Court. The case finally became a stalemate between the court and the procuratorate. In the meantime, Zhang's family continued to petition various authorities in local government regarding the court's failure to convict She.<sup>106</sup> Eventually, the Jingmen CPPLC, the special agency supervising all local judicial institutions, grew tired of the petitions and ordered local courts to convict She and avoid appellate review by the High Court.

It is not unusual in China that PSBs, procuratorates, and courts are all heavily influenced by public opinion, although this influence may compromise the integrity of the criminal justice system. One of the 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 a "mass line" (*qunzhong luxian*) policy.<sup>107</sup> The term "mass line," a political slogan popularly used in China's revolutionary era half a century ago, suggest the judiciary address the public's needs by carrying out justice with their participation.<sup>108</sup> This was an obvious departure from the professionalism approach emphasized during the past decade under the leadership of the former Chief Justice, Xiao Yang. The new president of the SPC, Chief Justice Wang Shengjun, particularly defined "mass line" with respect to the death penalty, arguing that

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tion evidence is not sufficient to prove its case. CPL-1996, art.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 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.

106. Wang Gang, *supra* note 101. For a better understanding of China's petition system and its pressure upon local officials, see Carl Minzner, *Xinfang: An Alternative to the Formal Chinese Legal System*, 42 STAN. J. INT'L L. 103 (2006); Xie Zhuoyan, *Petition and Judicial Integrity*, 24 J. POL. & LAW 24 (2009).

107. Wang Qijing, *Xin Yilun Sifa Tizhi Gaige Zhixiang [The Direction of the New Round of Judicial Institutional Reform]*, LIAOWANG [OUTLOOK WKLY], 2009. The author is the Vice Secretary of the Central CPPLC.

108. Sun Chunying, Caili, *Cong Manzu Qunzhong Sifa Xuqiu Chufa Lai Shenhua Sifa Tizhi Gaige [Deepen Judicial Institutional Reform by Addressing the Masses' Judicial Need]*, FAZHI RIBAO [LEGAL DAILY], Dec. 18, 2008.

the death sentence should be grounded upon the law, social order, and public opinion.<sup>109</sup>

From a political standpoint, it is understandable that the government and courts take the public's opinion, particularly their outrage, very seriously, even at the cost of compromising the rule of law. As a regime not established on genuine democracy, the CCP needs public confidence to maintain its legitimacy, power and governance. Addressing the public's needs and responding to public outrage are important for establishing and maintaining public confidence.<sup>110</sup> However, as there is not a system of democratic representation, judges and governmental officials are all part of bureaucracies. Thus, they are most sensitive to and responsive to the needs of their respective superiors, rather than to those of the public. This results in judges frequently disregarding the public's needs in their own pursuit of efficiency and convenience, as noted above. Only when significant public outrage triggers threats to social stability, or stubborn individuals continue to petition higher authorities and discredit local agencies, are responses initiated to address the demands of the public.

The past decade, in particular, has seen growing economic disparity and governmental corruption, resulting in considerable tension between the government and the public. A single case could trigger serious social instability. The government has therefore become increasingly sensitive to the public's concerns and pledged continuous efforts to establish a harmonious society.<sup>111</sup> "Stability overrides everything else" is a political slogan proposed by the current President of China and promoted as a primary political principle. In any case where judicial integrity conflicts with social stability, the former is usually compromised.<sup>112</sup>

When the family of She's wife and hundreds of angry townspeople protested to the local government the case became a political issue, with the potential for significant social instability.

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109. Wu Bo, *Biena Zhixinglv he Laobaixing Shuoshi [Don't Mention Enforcement Rate to the People]*, NANFANG DUSHI BAO [S. DAILY], Apr. 11, 2008.

110. See Peerenboom, *supra* note 50, at 1050-51.

111. 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.

112. For example, many courts are inclined to satisfy a stubborn petitioner's illegal demands in exchange of his/her giving up, as continuous petition, particularly to central agencies, is widely regarded as an indicator of social instability. See Zhang Yonghe, etc. *Jiceng Fayuan Shesu Xinfang Yanjiu: Minyi yu Sifa [On Lawsuit-related Petition in Basic Courts: Public Opinion and Justice]*, 5 YUNNAN DAXUE XUEBAO FAXUEBAN [YUNNAN L.J.] 121 (2010).

This forced local authorities to approach the situation with extreme caution, especially local police officers who had formerly worked with She. Any leniency shown to She would have invited suspicion of corruption,<sup>113</sup> and thus the PSB was unwilling to risk letting She go free, although possibly aware of the flaws in the case. She was thus “presumed” guilty and could not be released unless convincing exculpatory evidence could be presented. Similarly, no prosecutor would cross the line and dismiss the case. Pressure was eventually directed at the judges, who were empowered to render a definitive decision as to whether She was guilty. The trial judges, who did not have final say over She’s conviction and execution, shifted the burden onto the appellate court. The appellate judges also sought to avoid the issue and simply reversed the conviction and remanded for a new trial.<sup>114</sup>

It was obvious that no one in the judicial system, including the police, prosecutors or judges, dared to release She, although many of them probably believed him innocent. Every party involved feared public outrage and potential personal responsibility, and chose to shift accountability to another agency. Finally, the Jingmen CPPLC was forced to intervene, but also did not acquit the defendant. Rather, they chose to convict She of murder to accommodate the public outrage, while only sentencing She to fifteen years in prison to preserve the possibility for a further correction.<sup>115</sup> Thus, the reasonable doubts and flaws in She’s case did not necessarily grant him an acquittal, but only a compromised leniency. This approach is called “*yizui congqing*” (leniency for suspected crimes) by Chinese scholars, as opposed to the “*yizui congwu*” (acquittal for suspected crimes) called for

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113. 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 officer, 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 Yunyong, *Sichuan Dazhu Qunti Shijian Zhuiji: Chuanyan Wei Cengqing Gongzhong Xouxiang Shikong [Sichuan Dazhu Mass Incident Report: Unclarified Rumors Cause Uncontrollable Public]*, NANFANG DUSHIBAO [S. DAILY], Feb. 4, 2007. However, somehow ironically, 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, 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 100.

114. Sun Chunlong, *Supra* note 102.

115. Tang Weibin, *Yuanan shi Zenme Zaocheng de? She Xianglin Shaqi An Zhuzong [How a Wrongful Case Was Generated? Probe into She Xianglin’s Wife-Killing Case]*, FAZHI RIBAO [L. DAILY], Apr. 8, 2005.

by the CPL-1996.<sup>116</sup> As a judge of the Jingmen Intermediate Court recalled nine years later, the CPPLC was clearly aware of the ambiguity of She's case, but also knew that they needed to provide the public with a conviction or risk serious social unrest.<sup>117</sup>

## B) 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<sup>118</sup> resulted from an unfortunate cycle of avoiding accountability.<sup>119</sup> Having followed the proceedings for years, the Jingmen CPPLC<sup>120</sup> eventually convened a meeting on October 8, 1997, with the participation of officials from the courts, procuratorates and PSBs of both the county (basic) level and municipal (intermediate) level. A compromise was reached among the several institutions to convict She while granting him a lenient sentence. The compromise was not only made to avoid an execution, which is necessarily irreversible, but to ensure that the case would be kept in the jurisdiction and not subject to review by the already skeptical Hubei Province High Court.<sup>121</sup>

At that point, She's remanded trial had not been scheduled, but every figure involved, including Party officials, prosecutors and police officers, were bound by the CPPLC's decision and

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116. 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 Caipan Wenti Yanjiu: yi Sharen Anjian wei Shijiao de Fenxi* [Research on Wrongful Death Penalty Case: from the Perspective of Homicide Cases], FASHANG YANJIU [L. & COM. RES.] (2005).

117. Sun Chunlong, *supra* note 102.

118. 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 areas 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.

119. Wang Gang, *supra* note 101.

120. 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.

121. 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.

knew the final verdict. All that was left was to hold a trial for show and sentence She to prison for fifteen years. This would cloak the CPPLC's decision in apparent legality, regardless of how many reasonable doubts still remained. Once the CPPLC made its decision, the case was essentially finished.

Finally, the criminal justice system had found its guidance and was ready to move forward. On March 31, 1998, She Xi-anglin was indicted again, but this time by the Jingshan County Procuratorate, an institution not authorized to handle premeditated murder cases. Seventy-five days later, the last day remaining under the statute of limitations set by the CPL-1996, the Jingshan County Court rendered its decision, convicting She of murder and sentencing him to a fifteen year prison term, the maximum sentence a county court could ever impose. One episode is worth mentioning: as indicated in the dossier, two judges went to interrogate She in the detention center before the trial.<sup>122</sup> 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]."<sup>123</sup> On September 22, 1998, after four and half years in custody, She's conviction was finally affirmed and he was transferred to a prison to serve the remaining years of his sentence.

Six years after his final sentence was ordered, She's wife, the alleged victim, suddenly reappeared on March 28, 2004.<sup>124</sup> The entire town, along with the justice system, was shocked. After another four days, on April 1, April Fool's Day, She was released from prison. He might have believed his sudden freedom was a big joke, that took places over 10 years.

However, not everyone had been convinced by the CPPLC's decision. The appellate judge<sup>125</sup> responsible for drafting the

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122. Under articles 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.

123. Liu Binglu, *supra* note 100.

124. As Zhang Zaiyu recalled, in January, 1994, she ran away after a quarrel with She Xianglin, her husband, and finally went to Shandong Province, 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 103.

125. 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.

court opinion had become skeptical of the verdict, and had proposed to return the case to the trial court. However, as an important case with such politically sensitive issues only the CPPLC or the Adjudicative Committee were empowered to make a final ruling. The Adjudicative Committee, comprised of court leaders, including the court president, vice presidents, division chief judges,<sup>126</sup> and other senior judges, is empowered to rule on all politically sensitive cases through a simple majority vote. The three judges sitting on the bench at trials are usually not members of the Committee and thus have no vote in the final determination of the case. But, the Adjudicative Committee members rarely attend a trial<sup>127</sup> or read any dossiers. They simply listen to the reports of the trial judges, discuss it amongst themselves and take a vote.

For less politically sensitive cases, the judges hearing the trial may have the exclusive power to make final decisions, but this varies depending on the specific jurisdiction. In general, the single judge or the collegial panel hearing the trial can rule on ordinary cases, although certain jurisdictions require that these opinions be approved by the division chief judge before being released. Cases which result in a suspension, fine, or other non-prison term sentence may be required to be sent to a vice president for approval.<sup>128</sup> But all cases dealing with acquittals, death penalty convictions, and other sensitive or controversial issues must be reported to the Adjudicative Committee, the highest decision-making body within the court.<sup>129</sup> In some jurisdictions, the

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

127. 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 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. Had there been any witnesses who testified at She' trial or appeal, they would not 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.

128. 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.

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

Criminal Division General Meeting,<sup>130</sup> or the presiding judge of a panel, may be considered separate decision-makers and empowered to decide certain cases.<sup>131</sup> In one county court the author observed in western China, no individual judge could decide a single case; all criminal cases had to 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 were resolved by the judges who heard the trial, leaving only 3 percent to be decided by the Adjudicative Committee.<sup>132</sup>

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 a local CPPLC, court president or 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 seriously, nor does any judge or litigator challenge these 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 the quality and political correctness of the process.<sup>133</sup> Court leaders are presumed more competent, experienced, politically reliable, and less corruptible than lower judges, and thus are empowered to supervise lower judges, review their decisions, and evaluate their performance despite the lack of a law authorizing them to do so. As such, court leaders, who wield considerable influence upon lower judges' evaluations and promotions, do not have to cite any legal foundation if they wish to interfere with a case.

As mentioned above, China lacks an effective constitutional mechanism to hold the court system accountable, allowing China's judges to find loopholes and let their personal interests influence their decision-making. There is little doubt that China's leaders are aware of this fundamental defect,<sup>134</sup> but without appealing to institutional reforms like judicial independence

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130. 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.

131. For empirical data, see Lan Rongjie, *supra* note 60. For general description of the hierarchy of decision-making, see also Lubman, *supra* note 80, at 397.

132. Lan Rongjie, *supra* note 60.

133. See Woo, *supra* note 66, at 582.

134. 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/>.

or greater freedom of speech, the only conceivable solution left for leaders is bureaucratic supervision, a double-edged-sword. Judges are closely monitored, and their decisions are carefully scrutinized, resulting in potentially severe punishments for violators. Collective decision-making, such as review by Adjudicative Committee and Criminal Division General Meeting, is widely adopted to prevent individual corruption.<sup>135</sup> However, bureaucratic supervision allows inappropriate interference from supervisors, who themselves may not be effectively supervised. Corruption, irrationality, bias, and irresponsibility may all find a way into the final verdict through this so-called supervision process.

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 controlled by the local CPPLC, and his opinions and findings were irrelevant because the final decision had already been made. The judge's only real purpose was to stage a trial that appeared 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.<sup>136</sup> This bureaucratic supervision system, which was designed to enhance the quality of adjudication, resulted in a grave error being forced upon the very judges pushing for the correct outcome.

### C) INVISIBLE OUTSIDE INFLUENCES: THE MAN BEHIND THE CURTAIN

Although bureaucratic influence is illegal, it is a widely accepted reality and thus receives some degree of regulation. Unregulated are the informal pressures that come upon the decision making process through the social interactions of the decision makers, as noted above.

Outside influence from individuals in direct contact with judges is more wide spread than bureaucratic influence. As mentioned above, bureaucratic interference usually exists in sensitive or controversial cases, while in ordinary cases, lower judges may

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135. This is one of the main reasons why the adjudicative committee system was not abolished in CPL-1996, despite being under fierce attack for decades. As some defenders argued, a 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 Weiyuanhui Zhidu de Kaocha yu Sikao [Observation and Analysis of Adjudicative Committee System of Basic Courts]*, 2 BEIDA FALV PINGLUN [PEKING L.J.] 343 (1999).

136. Sun Chunlong, *supra* note 102.

hold the authority to make a final decision without being reviewed by their supervisors. It is in these cases that personal relationships are more effective in obtaining a favorable verdict, particularly when the judge has a broad range of discretion over disputed issues. For instance, a defendant charged with robbery without mitigating or aggravating factors may be sentenced to a three-to-ten-year imprisonment under China's Criminal Law.<sup>137</sup> An independent judge may impose a four-year sentence, which is the average punishment for similar cases, and therefore will not arouse suspicion from either the public or supervisors. However, a phone call from a friend of the judge, asking for leniency on behalf of the defendant, may result in a reduced sentence of three years. Most times the judge will not need an excuse to justify this adjustment, because it is completely within his discretion. Some prudent judges may try to find a justification through factors such as a confession or the cooperation of the defendant.<sup>138</sup> In a society where inter-personal relationships are highly appreciated, a judge is often connected to many individuals who may have connections to a defendant appearing before that judge.<sup>139</sup> Empirical research conducted in a prison in northern China revealed that defendants with connections to influential figures were likely to get a sentence reduction of 16.7 months, a significant advantage when compared with their fellow criminals.<sup>140</sup> Although this research did not present any actual evidence of outside influences upon the sentencing process, its implications are strong.

A bribe is another outside influence which can sway a judge at least as well as a social connection. Without an effective anti-corruption mechanism, there are always numerous incentives and opportunities to bribe a governmental official to further one's interests. Judges may be particularly tempted, as they have broad discretion and authority to rule on a variety of lucrative commer-

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137. China Criminal Law, art.263.

138. 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 congkuan, 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. See Ji Weidong, *Sifa yu Minyi [Justice and Public Opinion]*, CAIJING [FIN. & ECON.], 2006; Gui Youzhong, *Huanxing Zhidu zai Sifa Shijian zhong Cunzai de Wenti [Existing Problems of Suspended Imprisonment in Practice]*, QINGHAI JIANCHA [QINGHAI PROCURATORATE] (2000).

139. A popular saying goes, "*anzi yi jinmen, liangbian dou tuoren*" (once a case flows into the docket, the judge will be chased by agents of both parties).

140. Liu, Jianhong, *supra* note 71, at 297.

cial disputes and on the fate of criminal defendants. China's Chief Justice has frankly acknowledged that some judges use judicial power to further personal interests.<sup>141</sup> The chief judges of several provincial high courts, as well as one vice president of the SPC, have been removed from bench for corruption in the past few years.<sup>142</sup> 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 often a popular expression referred to judges.

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.<sup>143</sup> However, because She had worked closely with local police, the public suspected that some officers might have taken bribes from him to deadlock the prosecution. Suspicion pushed the victim's family to protest at the county government and even petition the provincial capital. It also forced local police and prosecutors to treat She harshly to avoid being suspected of corruption, even though they were not convinced of his guilt.<sup>144</sup> Being tough against an infamous defendant was 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 common among judicial officers, which can prove costly to a defendant's rights. Under China's State

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141. Tian Yu, Chen Fei, Yang Weihai, *Zuigao Fayuan Huiying Sida Mingan Huati [The Supreme Court Responds to Four Sensitive Topics]*, XINHUA NET, [http://news.xinhuanet.com/misc/2008-03/10/content\\_7757158.htm](http://news.xinhuanet.com/misc/2008-03/10/content_7757158.htm).

142. 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. In 2003, a total number of 468 judges were removed for violation of judicial ethics. Chen Fei, Zhang Jingyong, *Faguan Weifa Weiji Renshu 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](http://news.xinhuanet.com/misc/2008-03/10/content_7758918.htm). In the central province of Henan, 400 judges were disciplined or fired during a period of only six months in 2006. Li Lijing, *Henan: Jinnian Siyue Yilai 400 ming Weiji Weifa Faguan Shou Chufen [Henan: 400 Judges Were Disciplined since April for Violation of Law and Ethical Rule]*, XINHUA NET, <http://news.163.com/06/1023/17/2U4RTSEG000120GU.html>.

143. It was a murder case in the poor countryside, involving no monetary disputes. Moreover, the high level of public anger drew a great amount of attention from the local community, government and the courts, resulting in the case being decided by the CPPLC instead of an individual judge. As a result, it was almost impossible for those putting forth the verdict to seek a bribe.

144. See Wang Gang, *supra* note 101.

Compensation Law, once a criminal prosecution is dismissed, or ends in acquittal, the detained defendant is entitled to be compensated for his loss of liberty and damage to property by the state.<sup>145</sup> The police officers, prosecutors, and judges involved in the case<sup>146</sup> can also be found personally liable, and subject to discipline or prosecution. This provision seems aimed at protecting criminal defendants from arbitrary prosecutions, but it actually discourages prosecutors and judges from releasing a possibly innocent defendant and causing a colleague to be penalized, particularly in rural jurisdictions, where officers are generally well connected and frequently socialize with each other.<sup>147</sup> Personnel exchanges between the PSB, procuratorate, and court are also quite common.<sup>148</sup> It is not surprising then that judges and prosecutors try to protect their fellow judicial officers by avoiding an acquittal or dismissal, even if they have reasonable doubts. They would rather transfer the blame than let the defendant walk away. She's case presented a clear example where no one in the system wanted to jeopardize a fellow judicial officer's career by acquitting an innocent man, especially when there was also a high level of public outrage and bureaucratic interference.<sup>149</sup>

#### D) 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 high-profile defendant guilty. Bureaucratic supervisors, with or without legal authority over a given case, can set aside the trial judge's opinion and make a final decision. Less apparent outsiders, through personal connections or bribes, can sway a judge. In this case, under these formidable pressures, the judges chose to disregard their reasonable doubts and sentenced She to

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145. Guojia Peichang Fa [State Compensation Law], art.15.

146. 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.

147. 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 102.

148. For instance, when 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.

149. See Sun Chunlong, *supra* note 102.

prison. Nevertheless, She's trial still appeared legal if we examine it in accordance with the bare text of CPC-1996. From beginning to end, the procedural safeguards mandated by CPL-1996 were applied, but were still manipulated to accommodate the interests of outside influences. These procedural defects allowed outside influences to affect the judges, leading to the wrongful conviction and imprisonment of an innocent man for eleven years.

### *1. Forum Shopping: Manipulation of Jurisdictions*

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 initiated by the Jingshan County Court and affirmed by the Jingmen Intermediate Court, an agency that normally has no final say over murder cases. The only reason the jurisdiction was changed, as stated by the Jingmen CPPLC, was to avoid appellate review by the 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 review by higher courts. A result of this was that She would not be sentenced to death, since the longest sentence permitted to be affirmed by an intermediate court is 15 years.

Similar instances of hierarchical or geographic manipulating jurisdictions to influence the outcome, or forum shopping, are common in China. Changing the hierarchical jurisdiction, such as the Jingmen CPPLC did, is usually employed to avoid a specific court. For defendants facing a potential death penalty or life sentence, moving the first trial from an intermediate court to a basic court results in an immediate reduction of the possible maximum penalty. Relocating geographical jurisdiction, or change of venue, is also effective in pursuing desired verdicts. For example, in the western province of Sichuan, a rich and well-connected businessman charged with fraud managed to relocate his trial to a desirable basic court,<sup>150</sup> where he bribed the vice president and consequently received a very light sentence. This

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150. 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], Aug. 9, 2005. However, this was not 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.

illegal leniency enabled him to flee abroad immediately after the trial,<sup>151</sup> leaving almost 10 high-ranking local officials involved in this scheme to be arrested.<sup>152</sup>

Chapter 2 of the CPL-1996 states that jurisdictional adjustment is permissible, but must be authorized by a higher court; no further guidance is provided by the CPL-1996, leaving significant opportunities for illegal manipulation. In practice, jurisdictional changes are more likely to be adopted officially, particularly in anti-corruption cases where the defendant is a former official of a specific jurisdiction and has potential influence over local judges.<sup>153</sup> Moreover, it usually requires cooperation between the procuratorate and the court,<sup>154</sup> making it far more difficult to effect a jurisdictional adjustment through bribery. However, if a jurisdictional change is completed out of personal interest, it usually involves the widespread corruption of multiple parties.

## 2. *Manipulating Case Assignments: Choosing the Right Judge*

The CPL-1996 is also silent on how cases are to be assigned to individual judges. In practice, ordinary cases are assigned to judges sequentially by registration number, a mechanism similar to random assignments.<sup>155</sup> For sensitive cases court leaders usually reserve discretion to choose the judges. For example, when She Xianglin was re-tried in 2005 after his wife reappeared, the collegial panel was presided over by the chief judge of the criminal division of Jingshan County Court,<sup>156</sup> who rarely tried cases

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151. 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.

152. Ren Ke, *supra* note 150.

153. See discussion above on arguments over whether Yang Jia should be tried in Shanghai.

154. 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.

155. Each case is given a serial number when registered into the court docket. Likewise, each judge of the criminal division also has a number. 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.

156. Liu Binglu, *supra* note 100.

personally.<sup>157</sup> This might have been a signal that the court took this trial more seriously and wanted to put the most reliable judge in charge, but it is also conceivable that court leaders picked out a particular judge to whom they had conveyed specific instructions.

Corruption, again, is a major concern when dealing with case assignments. Once the case assignment process can be altered, it may be manipulated by corrupt judges to promote illicit interests. Some courts have attempted to avoid this by establishing a computer-based case assignment system.<sup>158</sup> However, as long as court leaders still reserve the privilege of assigning desired judges to sensitive cases, illegal interference, most times through corrupt judges, can find a way to exert control over a proceeding and obtain a favorable verdict.

### 3. *Manipulating Dossier Transfer Proceedings to Cripple the Defense*

No formal pretrial discovery is required by the CPL-1996. Rather, Article 150 requires that a copy of the prosecution's dossier be transferred to the court along with the indictment. Article 36 grants access to these files to defense lawyers, which could be construed as a primitive form of discovery. However, the CPL-1996 requires only a partial transfer in ordinary cases, likely for the purpose of restraining a judge from forming biases. This means that only evidence selected by the prosecutor 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 their efforts to defend their clients effectively. The recently revised Lawyer's Law takes a more progressive approach, requiring the prosecution disclose its dossier directly to defense lawyers, instead of through the court.<sup>159</sup> However, since CPL-1996 has not been revised accordingly, some local

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157. 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.

158. 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), Jan. 15, 2009. [http://www.hunan.gov.cn/tmzf/xxlb/ttxw/200901/t20090130\\_151328.htm](http://www.hunan.gov.cn/tmzf/xxlb/ttxw/200901/t20090130_151328.htm).

159. See Lawyer's Law (revised October 2007, effective June 1, 2008), art.34.

procuratorates still refuse to make full disclosures to the defense counsel.<sup>160</sup>

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. In ordinary cases, defense lawyers have little problem obtaining material evidence for their defense, but in controversial cases, prosecutors may choose to carefully restrict what they transfer to the court and hold back critical evidence. As a result, defense lawyers may not be well prepared, and may be frustrated when the prosecutor suddenly presents previously unrevealed evidence at trial.

Manipulating a defense lawyer's access to the prosecution file, by and large, exists only in sensitive cases, where the government, including both the court and the procuratorate, is hesitant to disclose sensitive information to the defense,<sup>161</sup> or tries to undermine a zealous defense counsel who may make it more difficult to convict the defendant. The government might not completely deny the defense counsel any access, which is obviously in violation of the law, but by manipulating the discovery process, it can effectively cripple his defense.

#### 4. *Manipulating Publicity*

When She Xianglin was initially convicted in 1994, his trial was closed to the public, including his parents.<sup>162</sup> This contradicted both the CPL-1979 and CPL-1996 which, as noted above, only permits cases involving state secrets, personal privacy or juvenile defendants to be tried in a closed-door courtroom. She's trial, like Yang's, did not meet any of these criteria. A reasonable explanation for the secretive trial might be to protect the court's reputation. The court was well aware that many of the remaining unresolved doubts would be presented at trial, but it

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160. 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 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 Xiuding hou Lvshifa Zhixing [New Lawyer's Law conflicts with CPL, Congress: Apply Revised Lawyer's Law], FAZHIBAO [LEGAL DAILY], Aug. 17, 2008.

161. 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." She's lawyers suspected "something is hidden in the dossier." See Sun Chunlong, *supra* note 102.

162. *Id.*

would have to convict She anyway.<sup>163</sup> A closed-door trial, under these circumstances, could shield the court from public criticism and preserve its reputation. Additionally, the closed doors prevented an outraged public from disrupting the court proceedings.

Technically neither She nor Yang was deprived of the right of public hearing. The rationale was that due to the limited capacity of the courtroom, only a certain number of observers could be accommodated. Therefore, a permit was required to enter the courthouse. However, the court did not disclose how, and to whom, those permits were distributed. In this regard, it would be reasonable to speculate that, in practice, only those unlikely to cause a disruption could obtain permits. Through this process, judges are able to assemble supporters, rather than neutral observers or even aggressive supervisors. Additionally, in a case where the judges are affected by illegal interferences and render a suspicious verdict, whether a conviction or an acquittal, this trial is also hidden from the public. "Sunshine is the best disinfectant," as Chinese court leaders always claim.<sup>164</sup> When the doors of a courtroom are closed to the public, corruption, abuse of discretion and outside influence are all more likely to corrupt a courtroom, increasing the chances for an incorrect verdict.

##### 5. *Manipulating Evidence to Validate Unreasonable Discretion*

Few judges would doubt that She Xianglin was tortured to obtain a confession. A number of unreasonable inconsistencies existed among his several confessions, and She fiercely retracted all confessions at trial. Nevertheless, not a single judge dared to exclude his confessions, although some doubted the truth behind these confessions and requested corroborative evidence.<sup>165</sup> In the end, the court simply picked one of She's four confessions, utilizing the one which could best support a murder conviction. No explanation was given by the court to illustrate why this particular confession was found to be more reliable, or why She's torture defense was not accepted.

Moreover, even if She's confessions were admissible, an impartial court should still have needed more evidence to support 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

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163. See Wang Gang, *supra* note 101.

164. See e.g. Ye Doudou, *Jiang Bixin: Yangguang shi Zuihao de Fangfuji* [*Jiang Bixin: Sunshine is the best disinfectant*], CAIJING [FIN. & ECON.], <http://www.caijing.com.cn/2009-03-13/110120689.html>. Jiang Bixin is a Vice President of the SPC.

165. See Wang Gang, *supra* note 101.

negated the conviction. Nevertheless, pressured by public outrage and bureaucratic interferences, and likely also concerned with the protection of the involved prosecutors and police, the court convicted She anyway, allegedly supported by “clear facts and sufficient evidence.”<sup>166</sup>

With little guidance on the admissibility of evidence or standards of proof, CPL-1996 grants judges broad discretion over evidentiary issues. When outside influences intervene, these already weak evidence rules will more likely be manipulated to accommodate illegal influences. Conflicting evidence, such as She’s multiple confessions, can be carefully selected to suit a desired outcome, with little legal support to justify the arbitrary selection. The standard of proof of “clear facts and sufficient evidence” as stated in Article 162 of CPL-1996, which is theoretically very high but practically highly ambiguous, might also be compromised, although usually in the name of reasonable discretion.

#### 6. *Ignoring Torture Claims*

At all of his four trials, She Xianglin clearly stated that he had been tortured to confess to a crime he had not committed. Without any corroborative evidence, however, none of the four courts supported his torture defense, although some judges did suspect the truthfulness of his confessions.<sup>167</sup> Such tragic occurrences are not unique to She’s case. Despite being explicitly forbidden by CPL-1996,<sup>168</sup> torture is still frequent in the criminal justice system of contemporary China. The SPC, moving further than the NPC and its Standing Committee, has pledged to exclude all confessions obtained through torture,<sup>169</sup> but in practice, this promise has rarely been fulfilled, and often times ridiculed, by lower courts. When confronted with a request to suppress a coerced confession, most trial judges will require the defendant to provide sufficient evidence, such as physical injuries or witness testimony, to prove the existence of torture or other police misconduct.<sup>170</sup> However, most tortured defendants are in police cus-

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166. 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.

167. See Wang Gang, *supra* note 101.

168. CPL-1996, art.43.

169. Ganyu Zhixing Xingshi Susong Fa Ruogan Wenti de Jieshi (Interpretations on Various Issues of Implementing Criminal Procedure Law), art.61.

170. In Liu Yong’s case, *discussed supra* at note 36, the defense lawyer presented the testimony of Liu’s jailors, who witnessed the torturing of Liu. 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.” 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.

tody and have no means either to produce or to preserve evidence related to police torture. In this regard, the SPC directive, which once won national applause when released, holds little practical use in the courtroom.

This does not mean that Chinese judges are blind to reality, nor does it indicate that they intentionally, or even recklessly, convict innocent defendants. As interviews with over 50 trial judges revealed, most judges are personally aware that many confessions are inappropriately, sometimes illegally, obtained through torture or other forms of police misconduct.<sup>171</sup> At the same time, they also believe that most confessions remain truthful and the defendants are indeed guilty. Some judges even indicated in off-record conversations that torture might be a useful method to extract truthful confessions. To a certain extent, many judges feel comfortable using coerced confessions to convict a defendant, since they remain quite confident that the verdict is substantively correct.

The judges' confidence, in part based upon their seasoned experiences, is also deeply rooted in China's engrained tolerance of police torture and the evidence rule of mutual corroboration. For more than 3,000 years, a confession has always been the primary piece of evidence in China's criminal justice system. Confessions seem indispensable in a criminal case, not only for a successful investigation, but also for a proper indictment and a correct conviction. Accordingly, the right to keep silent, although globally accepted, is not recognized in CPL-1996, which, on the contrary, demands all criminal suspects and defendants speak to authorities.<sup>172</sup> Especially at the police investigation stage, overwhelmed by ever-growing crimes and personnel shortage,<sup>173</sup> most PSBs (rural branches in particular) rely heavily on confessions to extract tangible evidence and witness testi-

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Many scholars 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 questioned why the process began with Liu. This public pressure led 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](http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=25267).

171. See Lan Rongjie *supra* note 60.

172. CPL-1996, arts.93, 139 & 155.

173. 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 ECON. REP.] Feb. 5, 2005.

mony.<sup>174</sup> Empirical research shows that in more than 98 percent of all criminal cases, defendants make at least one confession during a police investigation, regardless of whether it is truthful or not.<sup>175</sup> 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 expend 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, the truth of a confession seems more important. All judges are aware that coercion or torture could result in a false confession, but they are also clearly aware of the reality that most confessions are an indispensable part of a police investigation.<sup>176</sup> Automatic exclusion of all coerced confessions as required by the SPC directive sounds attractive in theory, but enforcing such a standard in practice will inevitably impair the police's ability to combat crimes, which may eventually lead to a loss in public confidence – a cost the government cannot bear. A compromise, laid out in CPL-1996, is to verify confessions with corroborative evidence before admitting them. A voluntary confession alone, without supporting evidence, is not deemed sufficient to secure a conviction;<sup>177</sup> but once confirmed by evidence, even a coerced confession can be considered by the judge.<sup>178</sup> It may seem unfair to the defendant to admit a coerced confession,

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174. Without sufficient professional training or technical support, criminal investigation, particularly in rural areas, is quite primitive. DNA tests, fingerprints, wiretapping, use of the 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 CRIM. SCI.]* 96 (2007).

175. 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 will not 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 contain statements considered relevant and important. In extreme cases, police officers may intentionally ignore exculpatory statements made by the suspects. See Zuo Weimin, *supra* note 30.

176. See Zuo Weimin, Zhou Hongbo, *Cong Hefa dao Feifa: Xingxun Bigong de Yujing Fenxi [From Legal to Illegal: Contextual Analysis of Torture]*, 10 *FAXUE [JURISPRUDENCE]* 31 (2002).

177. CPL-1996, art.46.

178. Strictly speaking, 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.

but once corroborated, it is usually truthful in substance, and bares less risk of producing a false verdict. Given the reality that confessions are indispensable to a police investigation, this rule of mutual corroboration may enhance the reliability of these confessions, and protect the defendant from being arbitrarily convicted upon insufficient evidence. This compromise, in some ways, is a situation where something is better than nothing.

However, this situation also creates a loophole to validate otherwise inadmissible confessions, and actually contributes to the widespread existence of police misconduct. Once a judge has corroborated a confession, he may not care whether it was obtained legally or through torture, and may simply deny the defense's request for suppression. If, as in most cases, the defendant has no evidence to prove the alleged torture, the judge may feel comfortable in accepting a confession obtained through torture.<sup>179</sup> In extreme cases, even when the defense manages to provide sufficient evidence, the judge may still choose to turn it down and admit the coerced confession.<sup>180</sup> In other cases, the evidence used to corroborate a confession, such as She Xianglin's motive to kill his wife, could also be untruthful or ambiguous, and may eventually result in a false conviction.

### 7. *Selectively Responding to Critical Issues*

To be persuasive, court opinions must soundly address all critical issues through reasoning grounded in the evidence and applicable law. For a trial judge reporting to a supervisor, a tailored opinion selectively responding to certain issues may look

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179. 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 RES.] 107 (2004).

180. 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, *Xingxun Bigong Niang Yuanan, Siqiu Du Peiwu Yishu de Xuelei Kongsu [Torture Caused False Conviction: Death Roll Criminal Du Peiwu's Bloody Denouncement]*, NANFANG ZHOUMO [S. WKND.], Aug. 24, 2001.

more appealing than an opinion that raises and squarely deals with all issues. By choosing to address only the issues that are favorable to the judge, the opinion stands a greater chance of being approved by the supervising judge, who has no first-hand knowledge of the facts and arguments.

CPL-1996 does not specifically address this problem. Some court rules require opinions to respond to all critical issues, but no procedural safeguard has been 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."<sup>181</sup> For instance, at She Xinglin's trial his defense went beyond denying the murder charges but to presenting several defense witnesses. 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.<sup>182</sup> Additionally, two bus drivers, who were on duty the night She's wife went missing, testified that She had taken their buses while looking for his wife, sometime between 2:30 AM and 6 AM. These testimonies, if considered by a neutral tribunal, most likely would have negated She's conviction, but were not mentioned in either the trial court's or the appellate court's opinions.<sup>183</sup> All the judges, ordered by the local CPPLC to convict She, could do little more than turn a blind eye to this exculpatory evidence.<sup>184</sup>

If judges are allowed to tailor an opinion to suit their conclusion, then further opportunities arise for corruption and outside influences. Observers, such as the media, who have no access to the entire dossier, are unable to discover whether the verdict has been doctored, and may be led to believe the court rendered a

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181. Cohen, *supra* note 67, at 242.

182. 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 100. Jia Yunyong, *Hubei Jingshan Shaqi An: Bei Yuan'an Gaibian Mingyun de Yiqun Ren* [The Wife-Murder Case of Hubei Jingshan: the People Whose Lives Were Changed by the False Conviction], NANFANG DUSHI BAO [S. DAILY], May 5, 2005.

183. 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 inadmissible evidence may not be listed in the opinion, it can still affect the judges' consideration. Moreover, the defendant, if not represented by any legal counsel, may never get to know of the existence of this evidence.

184. See Wang Gang, *supra* note 101.

substantively correct verdict. In this way, a tailored opinion which selectively responds to certain issues, can dress injustice in a beautiful veil.

### 8. *Consulting Higher Judges Before Trial*

In sensitive cases which attract public attention, in addition to reading the prosecution's dossier carefully before trial, trial judges may consult court leaders or even appellate judges and government leaders.<sup>185</sup> A final conclusion, instead of a tentative one based on reading the dossier, may be reached before the hearing. This practice is popularly referred to as "decision first, trial later" (*xianding houshen*). The meeting held by the CPPLC in She's case clearly illustrates this practice of reaching a definitive conclusion well before the trial is held.<sup>186</sup>

Such pretrial consultations often occur in sensitive cases to ensure politically correct results, and are sometimes mandated.<sup>187</sup> Even in non-sensitive cases, some controversial legal issues are 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 serve as binding legal authority within the jurisdiction, furthering uniformity and consistency of approach to that issue.<sup>188</sup> To lower court judges, such an instruction will not only reduce the reversal rate on appeal,<sup>189</sup> but also shifts work to other judges; thus, judges have strong incentives to consult a higher court in ad-

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185. See Lan Rongjie, *supra* note 60.

186. See Wang Gang, *supra* note 101.

187. No such mandate is open to the public, although many lawyers, including the author, clearly know its existence and have seen official documents bearing it.

188. 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 Xietiao Jizhi de Ruogan Sikao [Some thoughts on Establishing a Coordination Mechanism between Higher and Lower Courts]*, APPLICATION OF LAW [FALV SHIYONG] (2007).

189. 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 Zhidu [Between Tradition and Reality: Case Consultation System]*, FAXUE [JURISPRUDENCE] (2005). 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 [SOC. RES.] 85 (2006).

vance. In terms of procedural fairness, pretrial consultation has been criticized by academics as undermining judicial independence, depriving defendants of their right of effective appeal, and creating loopholes for outside influences.<sup>190</sup> As a response to this criticism, various courts, including the SPC, have promulgated multiple rules to regulate and limit these consultations,<sup>191</sup> but many local judges still find this practice quite tempting, especially in sensitive cases.<sup>192</sup>

### 9. *Reporting to Higher Judges After Trial*

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, particularly sensitive or complicated ones, the single judge or the collegial panel sitting at a trial is not authorized to make a final decision. A hierarchical review by an individual court leader, a collective decision-making body, or sometimes by both, is mandated to authorize the judicial decision. As these supervising judges seldom attend the actual trials, few decisions can be rendered immediately after the trial concludes.<sup>193</sup> Most trial hearings conclude without a verdict, with a single judge, or the corresponding judge of a collegial panel, drafting a proposal opinion to report to one or more supervisors, who will then take up to several months to release the final decision.

In theory, the defendant is entitled to appear before the judge who renders the ultimate decision,<sup>194</sup> but when the judge

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190. See Amnesty International, *supra* note 8; Clarke, *supra* note 32, at 178; Wan Yi, *supra* note 189.

191. For example, in 1986 and 1995, SPC issued two directives for consultation, regulating the scope and steps of seeking consultation with SPC.

192. See Hou Meng, *Anjian Qingshi Zhidu Heli de Yimian: cong Zuigao Renmin Fayuan Jiaodu de Sikao [A Reasonable Side of Case Consultation System: from the Perspective of the SPC]*, 8 FAXUE [JURISPRUDENCE] 126 (2010).

193. 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 it 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, *Zhidu Sheji yu Zhidu Shijian Zhijian: Xingshi Dangting Xuanpan Zhidu Shizheng Yanjiu [Between the Design and Practice of Regulations: Empirical Research on Immediate Rendering of Court Opinion in Criminal Case]*, 5 ZHONGGUO XINGSHIFA ZAZHI [CHINA CRIM.SCI.] 93 (2008).

194. This is required by the principle of directness in many civil law systems. See Zhu Yulin, *Zhijie Yanci Yuanze Tanxi [Analysis of the Principle of Directness and Verbalism]*, 12 GUANGXI SHEHUI KEXUE [GUANGXI SOC. SCI.] 73 (2007).

who authorizes verdicts is a supervisor behind the scenes, defendants are deprived of this right. Moreover, the independence of the trial judges is impaired, and additional opportunities are created for outside influences to manipulate a trial's outcome. For example, after the trial closes, defendants often realize that no more evidence can be presented and that their only option to receive leniency is through bribery.<sup>195</sup> Therefore, in practice, many deals that determine the outcome of a trial are reached in the period after the trial and before the release of the final decision.<sup>196</sup>

#### IV. CONCLUSION

Yang's and She's cases are exceptional in China's criminal justice system in terms of both the crimes committed and the sentences received, but not in terms of how the judges handled the trials. It is quite ordinary for the procedural safeguards prescribed by CPL-1996 to be superficially implemented to maintain a veneer of legality, while at the same time 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 a fair trial, which is to produce a reliable and legitimate verdict through a well-designed system and adjudication, is largely missing, while wrongful verdicts, including false convictions or acquittals, and disproportionate sentences, are likely to result when outside influences play a role.

It would be unfair to say, however, that the legislature actually predicted and expected these types of manipulations when drafting CPL-1996. By contrast, as drafted by a team led by liberal scholars,<sup>197</sup> CPL-1996 unequivocally aimed to promote procedural fairness and human rights, resulting in a law which has been often criticized as too radical and Westernized.

Two fundamental flaws consisting of an institutional defect and a technical failure potentially reveal why the law has been vulnerable to unintended manipulation. First, generally Chinese judges are held more accountable in practice to the CCP and

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195. See Jing Hanchao, *ZHONGGUO SIFA GAIGE CELUN [STRATEGIC ANALYSIS OF CHINA'S JUDICIAL REFORM]*, (Zhongguo Jiancha Chubanshe [China Procuratorate Publishing House 2002]).

196. *Id.*

197. 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.

their supervisors than they are to the law or the people.<sup>198</sup> As soon as political needs are accommodated, or supervising judges are satisfied, it matters little whether the correct outcome is reached. Moreover, since the public has little influence upon the selection, retention, promotion or removal of judges, it makes little difference whether the trial or the verdict is actually convincing to the accused, their lawyers or other observers. As a result, when driven by personal interest or outside influences, judges often face no institutional barriers in choosing to sacrifice procedural fairness. Second, given the absence of a responsible judiciary, CPL-1996 fails to take precautions and create a self-protective procedural system, which could, not institutionally but technically, resist intentional manipulations by judges. Provisions of CPL-1996 are so malleable and vulnerable that judges are always able to find ways to legally manipulate a trial. As in Yang's and She's trials, although neither received a fair trial, both trials were considered legal and the defense found no legal remedy available.

It is always easier to diagnose problems than to articulate a solution. The institutional defect, which seems apparent to most legislators and scholars, is not easily corrected as without constitutional reform a sufficiently responsible judiciary cannot be established in China. A practical, though imperfect, fallback solution 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 would acknowledge the reality of institutional flaws but address them through the sophisticated restructuring of procedural safeguards, making criminal trials less vulnerable to manipulations. A judge's discretion over procedural issues would be subject to more restrictions, which in turn could also shelter judges from outside influence. Individual safeguards would be clearly defined, leaving little space for tampering. Violations of any safeguards, even superficially conforming to the text of the law but in contrast with the principles of a fair trial, would not be tolerated, and a procedural remedy would be granted to the defendant. In summary, a technical solution would focus on offsetting institutional flaws by well-designed procedures,<sup>199</sup> which could, to a certain degree, ensure a fair trial by relying on the procedures themselves, rather than on unreliable judges.

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

199. See Gao Yifei, *Chengyu Chaoyue Tizhi [Procedure Overrides Institution]*, (ZHONGGUO FAZHI CHUBANSHE [CHINA LEGAL PUBLISHING HOUSE 2007]).