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Legality, discretion and informal practices in China's courts : a socio-legal investigation of private transactions in the course of litigation

Li, L.

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*Legality, discretion
and informal practices
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*A socio-legal investigation of private
transactions in the course of litigation*

Ling Li

Leiden University

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Abbreviations

AEBB	Anti-Embezzlement-and-Bribery Bureau of the People's Procuratorates
CCP	Chinese Communist Party
CCDIC	Central Committee of the Discipline Inspection Commission of the Chinese Communist Party
DIC	Discipline Inspection Commission of the Chinese Communist Party
MOI	Ministry of Inspection
NBCP	National Bureau of Corruption Prevention
NPC	National People's Congress
PRC	People's Republic of China
SOE	State-owned enterprise
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate
WCPB	White-collar Crime Prevention Bureau

Chapter 1 Introduction

On 14 January 2010, a mystic criminal trial was scheduled in the Intermediate Court of Langfang, a satellite city 50km southwest to Beijing. The Grand Adjudication Hall, the largest trial room in the court, was made available one week ahead just for this event. The trial was treated with an unprecedented level of secrecy. The identity of the defendant was not revealed until the opening of the trial. Traffic blocks were set up 500m away in all streets leading to the court building, which kept away the media and any inquisitive audience. The trial lasted 10 hours unstopped. The following day, a standardized brief report was disseminated through the major press. Huang Songyou, the vice-president of the Supreme People's Court (SPC) was on trial in Langfang Intermediate Court. During the trial, Huang was prosecuted for bribe-taking of 3.9 million *yuan* while serving at the SPC and of embezzling 1.2 million *yuan* while serving as the president of the Intermediate Court of Zhanjiang City, Guangdong Province.¹

Huang's trial revived the memory of the public when he was detained one year ago in 2008, which marked the climax of a series of actions taken by a special task force of the Central Committee of the Discipline Inspection Commission (CCDIC)². Proceeding the detention of Huang was the detention of Yang Xiancai, former Director of the Enforcement Bureau of Guangdong High Court and five high-profile lawyers, all from Guangdong, one of the most prosperous provinces of the country.³ Yang and the lawyers are suspected of having colluded with Huang in the alleged corrupt conduct mentioned above.⁴

As the highest judicial official who was removed from office and punished due to corruption since the establishment of the PRC, Huang's case has a significant impact on judicial development in China. It highlights the severity of the problem of corruption in the entire judiciary, which the SPC had long been reluctant to admit in public.⁵ More importantly, as a judge with the highest rank in the judiciary, Huang's case poses as a strong challenge to the official explanation of the occurrence of judicial corruption, which is the moral decadence of the individual poorly-educated and undisciplined offenders.⁶ Even if that were true for the 12,349⁷ judges, who had been reportedly investigated and punished for corruption during the past decade, how would one explain the collusive

¹ http://www.dzwww.com/xinwen/guoneixinwen/201001/t20100102_5296556.htm

² As a part of the CCP organizational apparatus, the CDIC is the highest anti-corruption institution, which has both the investigative and sanctioning power. For more details, see Chapter 7.

³ http://news.hexun.com/2010-01-15/122365094_1.html

⁴ Ibid.

⁵ Only after the exposure of Huang's case, the SPC for the first time admitted in public that judicial corruption is not an isolated or sporadic incident but a persistent and pervasive defect in the adjudicative process in China's courts. See "Fighting Judicial Corruption Tops Agenda," *China Daily*, 1 May 2009.

⁶ See the annual working reports of the SPC.

⁷ The total number of 12,349 is calculated according to the statistics provided in the annual SPC work report. The number covers 13 years between 1993 and 2007 (the statistics of 1997 and 2002 are missing). A break down of the number can be seen in Chapter 2.

corruption detected in, for instance, Shenyang Intermediate Court, Jilin High Court, Wenzhou Intermediate Court, each of which involves at least half dozen of judges. Also, how would one explain the resurface of corruption in the Wuhan Intermediate Court, Shenzhen Intermediate Court and Fuyang Intermediate Court after swift anti-corruption campaigns which had reportedly purged the “rotten apples”?⁸

Unlike the authorities, whose explanation is suspiciously blame-diverting, scholars instead paid attention to more structural factors. One representative group of such explanations can be summarized as the “resource insufficiency” argument. These insufficiency includes the lack of political power of courts *vis a vis* other state organs and the lack of financial and human resources of the judiciary.⁹ However, this argument is directly confronted by Huang Songyou’s case since serving as the standing vice-president of the highest judicial institution Huang had one of the most prestigious offices in the state machinery. Huang holds a doctoral degree of law and an appointment as a law professor in four reputable law schools in the country. How can one then explain the corrupt conduct of Huang who was *not* lacking political, financial or human capitals? Similarly, how can one use the “resource insufficiency” argument to explain, for example, the case of Tang Jikai, a “star” “expert judge” well-trained both in China and abroad, who not only took bribes from litigants during his term of office as vice-president of Changsha Intermediate Court but also offered bribes to his superior in exchange for promotion? How can one explain the conduct of Wu Zhenhan, an “erudite” judge, who took bribes of 6 million *yuan* from litigants and subordinate judges during his term of office as president of Hunan High Court?

In contrast to the above-mentioned factors, which do not seem able to explain the cause to the persisting and pervasive occurrence of corruption in China’s courts, some other factors, such as the role of the Chinese Communist Party (CCP) in interfering court affairs, the lack of independence of the judiciary, the lack of accountability of judges, do seem to have a closer connection to the functioning or rather dysfunction of the judiciary and to the related malpractices.¹⁰ Furthermore, some authors also pointed out that certain “cultural” factors, such as the indulgence of what has been named as “guanxi-practice”,

⁸ See news report at the following links http://blog.sina.com.cn/s/blog_4cd8a3a40100ilz7.html, <http://news.sina.com.cn/c/1/2006-10-13/062711224922.shtml>, <http://news.163.com/06/0909/17/2QJJFTPT00011SM9.html>.

⁹ For example, see Keyuan Zou, "Judicial Reform Versus Judicial Corruption: Recent Developments in China," *Criminal Law Forum* 11 (2000). Xin He, "Zhongguo Fayuan De Caizheng Buzu Yu Sifa Fubai [Lack of Financial Funding and Judicial Corruption in China's Courts]," *ershiji shiji (21 Century Bimonthly)*, no. 2 (2008). Yuwen Li, "Court Reform in China: Problems, Progress & Prospects," in *Implementation of Law in the People's Republic of China*, ed. Chen Jianfu, et.al. (Kluwer Law International, 2002).

¹⁰ For example, see Ting Gong, "Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China," *China Review* 4, no. 2 (2004).

have also fueled corruption.¹¹ However, none of these studies has sufficiently investigated through which mechanism these factors have contributed to the corrupt practices that have been found in China. Instead, the causal relations between these factors and the occurrence of corruption are, in a frequent manner, only ambivalently, if not wrongly, assumed¹² and insufficiently treated.¹³ The absence of a thorough investigation on these factors and their relation to corruption is not only because of the sensitiveness of the topic and of the issues concerned but also because of the lack of a comprehensive understanding of how corruption is carried out in the political, social and legal setting of China's courts. The necessity to gain such an understanding shall not be permissively ignored since it is the key to the many questions mentioned above which have been raised but not satisfactorily answered. To gain such an understanding will also enable a more precise diagnosis of the problem of judicial corruption and a more comprehensive evaluation of the roles of certain formal and informal practices associated with corrupt conduct. This is exactly where this thesis starts.

1.1. Main research questions

Different from most corruption literature, which delves directly into the question of why corruption takes place, this thesis firstly asks how corruption takes place. Therefore, the main question this thesis deals with is how corruption participants carry out corrupt conduct in the litigating process in courts and what factors in particular are attributable to their completion and success. Through the answers to the main question, this thesis will also discuss the root causes of corruption in China's courts and the reasons of its persistency and resiliency against concentrated anti-corruption investigations and severe sanctions.

1.2. Definitions

Corruption is broadly defined in this research as the abuse of entrusted/public power in exchange for private gain/benefit, a succinct definition adopted by the Transparency

¹¹ For example, see Thomas Gold, et. al., "An Introduction to the Study of Guanxi," in *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi* ed. Thomas Gold, Doug Guthrie, David Wank (Cambridge: Cambridge University Press, 2002).

¹² For example, in explaining the relation between the guanxi-practice and corruption, Mayfair Yang mistakenly assumed that corruption is impersonal, short-term oriented transaction while guanxi-practice is long-term oriented and personal. For more details, see Chapter 3.

¹³ For example, a lot of scholars pointed out the connection between judicial corruption and the lack of judicial independency. However, explanation on how and why is rarely seen. For such literature, see for example Gong, "Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China." Keith Henderson, "The Rule of Law and Judicial Corruption in China: Half-Way over the Great Wall," in *Global Corruption Report 2007: Corruption in Judicial Systems*, ed. Transparency International (Cambridge: Cambridge University Press, 2007).

International,¹⁴ World Bank¹⁵ and widely accepted in corruption literature.¹⁶ The definition does not exclude conduct such as embezzlement or misappropriation of public fund; however, the typical corrupt conduct falling into this definition is bribery, a concept that is sometimes used almost interchangeably with “corruption”.¹⁷ As the most salient, resilient and damaging form of corrupt conduct,¹⁸ bribery remains the main focus in this thesis except in Chapter II, which provides an overview of various forms of corrupt conduct, not exclusive to bribery. To be more specific, bribery, in this thesis, refers to the offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of an official in the discharge of his or her public or legal duties, regardless of whether it constitutes a crime. For the sake of simplicity, “corruption” is often used as being synonymous with “bribery” unless it is specified otherwise. Throughout the thesis, the term “bribery” is inter-exchangeable with the term of “corrupt exchange”.

1.3. Methodology

To answer the questions mentioned above, this thesis collected empirical data from the following sources, which are classified into three groups. The first group consists of officially reported (and thus often punished) corrupt conduct. These reports concern a total number of 398 judges of various ranks served in various divisions of courts. This dataset covers all administrative regions and all levels of courts in China, from the lowest people’s tribunal to the Supreme People’s Court. All these cases were collected between 2005 and 2009 by regularly screening the legal sections of major internet news outlets and newspapers or magazines focusing on legal affairs and corruption issues¹⁹. A

¹⁴ The terms “entrusted power” and “private gain” are used by the Transparency International. See http://www.transparency.org/news_room/faq/corruption_faq

¹⁵ The terms “public power” and “private benefit” are used by the World Bank. See Vito Tanzi, “Corruption around the World: Causes, Consequences, Scope, and Cures,” *IMF Staff Papers* 45, no. 4 (1998). p.564.

¹⁶ For more definitions, see Arvind K. Jain, “Corruption: A Review,” *Journal of Economic Surveys* 15, no. 1 (2001). Robin Theobald, *Corruption, Development and Underdevelopment* (Duke University Press, 1990).

¹⁷ For example, see Robert Klitgaard, *Controlling Corruption* (University of California Press, 1988). Peter Graeff, “Why Should One Trust in Corruption?,” in *The New Institutional Economics of Corruption*, ed. J.G.Lambsdorff et. al. (London and New York: Routledge, 2005). Diego Gambetta, “Corruption: An Analytical Map,” in *Corrupt Histories*, ed. Emmanuel Kreike, William C. Jordan (University of Rochester Press, 2004).

¹⁸ According to the recent researches, the significance of bribery has been increasing both in terms of its occurrence and the volume of the bribes involved. Qinghua Meng, *Shouhuizui Yanjiu Xin Dongxiang [New Trends and Implications of Research on Bribery]* (Beijing: Fangzheng, 2005). pp.3-10. Yong Guo, “Corruption in Transitional China: An Empirical Analysis,” *The China Quarterly* 194, no. June (2008). p.357.

¹⁹ These sources include the legal sections of www.sina.com and www.xinhuanet.com, Fazhi Ribao (Legal Daily), Jiancha Ribao (Procuracy Daily), Jiancha Fengyun (Procuracy Affairs), Nanfang Zhoumo (Southern Weekly), Caijing Magazine and Minzhu yu Fazhi (Democracy and Rule by Law) and

supplementary number of cases have been located by using the popular PRC domestic search engines *baidu* and *google*.²⁰ Twenty-one of these cases are supported by court judgments, the procuratorate's statements or the defense's statements. Also included in this group of data are surveys and assessment carried out by other legal academics concerning corrupt activities in China. This first group of data, from officially reported cases, also includes 100 cases concerning corruption in anti-corruption institutions spanning from 1985 till 2009. This dataset is analyzed in Chapter 7 on corruption in anti-corruption institutions. These cases concern mainly the procuratorates and agents of the internal party discipline inspection commissions rather than judges. Information concerning these cases comes from media reports of court-trials or press releases from courts or related investigative bodies, principally the party discipline inspection commissions and the procuratorates.²¹ In Chapter 3 on the "performance" of bribery, I also employed cases concerning corrupt conduct of officials in public institutions outside of the justice system.

The second group of data consists of personal account of unreported corrupt conduct. It includes over 100 hours' formal and informal focused interviews about details of corrupt practices. I conducted these interviews during 2005-2008. I interviewed 12 lawyers in various parts of the country. Some of the interviews were one-off. But with some lawyers, I was able to do follow-up interviews intermittingly through face-to-face meetings, phone calls or emails at different stages of the research. Apart from the 12 lawyers, I also conducted interviews with 2 judges, 2 procuratorates and 2 officials in the legislatures. I found that attempts to interview judges on the topic of judicial corruption are difficult. Even with judges, whom I went to law school with, the mere reference to the topic made them nervous. Their knowledge about my affiliation with a foreign institute made them even less hesitating in rejecting my request for interview. I also conducted rather informal interviews with people of all walks of life whoever I happened to meet and could strike a conversation with. Due to the confidential nature of this group of data, information of these interviews is not exhaustively applied in the thesis. However, they are critical in helping me to develop an "intimate" understanding of the corrupt behavior and to choose the proper perspective for my investigation. Finally, this group of data, about personal experience of corruption, also includes numerous blog posts and bulletin board

Anti-corruption Weekly published on Zhengyi Wang, an internet-based magazine run by the Supreme Procuratorate.

²⁰ A considerable proportion of the cases was initially posted at "tangan dangáguan", a web-blog hosted by Zhang Hongjian, a procuratorator in Heilongjiang Province, whom I owe thanks to.

²¹ These sources include the legal sections of *Fazhi Ribao* (Legal Daily), *Jiancha Ribao* (Procuracy Daily), *Jiancha Fengyun* (Procuracy Affairs), *Nanfang Zhoumo* (Southern Weekly), *Caijing Magazine* and *Minzhu yu Fazhi* (Democracy and Rule by Law) and Anti-corruption Weekly published on Zhengyi Wang, an internet-based magazine run by the Supreme Prosecutorate. They also include the legal channels of two major internet news websites in China: www.sina.com and www.xinhuanet.com.

discussions concerning individuals' personal experience of corrupt practices in courts, which I collected regularly during the period of this research.

The last group of data used for this thesis consists of information indicating the formal and informal practices concerning adjudicative conduct in China's courts. The data includes regulations of the Chinese Communist Party (CCP or the party) and policies and internal directives including opinions, instructions and guidelines issued by the Supreme People's Court (SPC), the Supreme People's Procuratorate (SPP), and the Central Committee of the Discipline Inspection Commission (CCDIC). Also included in this group of data are internal regulations of individual courts investigated, memorandum, personal accounts or official reports written by legal practitioners, including lawyers and judges. All empirical data mentioned above are in the Chinese language.

1.4. Analytical framework

To answer the question how corruption participants carry out corrupt conduct in the litigating process in courts and what factors in particular are attributable to their completion and success, this thesis developed the following framework to analyze the above-mentioned empirical data. This framework treats corruption as a contracting process, which includes four phases: 1) initiation of the exchange; 2) negotiation of the exchange; 3) contractual performance; and 4) enforcement of the contract in case of non-performance. By dissecting corrupt conduct into these four phases, the framework helps to break down the complexity of the conduct into several recognizable parts, each of which has different yet inter-relating functions in completing the corrupt conduct concerned. Such a framework is a valuable analytical instrument to extract and assemble dispersed empirical data from discursive narrations, case-reports and other sources as mentioned in the previous section so as to provide a more complete scene of corruption in China's courts. Applying such a framework will not only offer a close-up portrait of how a secretive practice such as corruption is carried out in China's courts in reality but also provide the basis for a more precise diagnosis of what factors have enabled, facilitated and/or proliferated such practices in which phase and how.

Apart from the "four-phase" framework, which guides and links different chapters of the thesis, other existing theoretical findings on corruption developed by different scholars from various disciplines are also employed to advance the analyses in different chapters of the thesis. Since each chapter has provided space for more elaborate introduction of these theoretical findings, here I will only introduce those, which have an overall influence of the thesis.

The first and foremost is the institutional economics of corruption, which has influenced the thesis most. The institutional economics of corruption considers corruption as “a form of contracting amenable to analysis from the viewpoint of transaction-cost economics”.²² “Trust”, “opportunism”, “risk” and “transactional cost” are among the key analytical instruments of this body of scholarship. In his seminal work, Husted was the first to point out that “corruption can be conceived as the transferal of a service between the bribe donor the bribe recipient”, which covers both the “according-to-rule” transactions and “against-the-rule” transactions.²³ According to Husted, three behavioral assumptions of transaction-cost economics are applicable to corruption.²⁴ The first is bounded rationality, which refers to the unpredictability of where and to whom a bribe shall be provided. This unpredictability makes *ex ante* planning difficult for the bribers. The second is opportunism, which rises when simultaneous performances of the exchange parties are difficult. The third assumption is asset specificity. Asset specificity refers to the difficulty of redeploying assets to their next best alternative use without a significant sacrifice in value. For example, if a litigant fails to deliver the bribe to a judge after the judge has delivered the agreed corrupt service to the litigant by rendering a decision in the litigant’s favor, the judge cannot redeploy the asset, namely the court decision, to other uses. In other words, the asset under exchange is deprived from and is valuable only in specific circumstances. This type of assets is considered to have “idiosyncratic attributes”.²⁵ Transactions involving such assets require different safeguard mechanisms, for example, incentive alignment, private ordering and trading regularities, in order to prevent opportunism.²⁶

After Husted, Lambsdorff took the flag of the institutional economics of corruption. His catch-phrase - “contracting in the shadow of the law” represents the key attribute of corrupt conduct.²⁷ In this article, Lambsdorff made a convincing analysis about how corruption participants strive to overcome the barriers of illegality and secrecy and also to minimize transactional costs in the contracting process. In particular, Lambsdorff identified three sequential stages of the corruption contracting process, where transaction costs arise. The first is contract initiation, including partner seeking and determination of contract conditions. The second stage is contract enforcement, in which transaction costs are generated to prevent opportunism, which is particularly conspicuous in corrupt

²² B. W. Husted, "Honor among Thieves: A Transaction-Cost Interpretation of Corruption in Third World Countries," *Business Ethics Quarterly* 4, no. 1 (1994). p.17.

²³ Ibid. p.19. Also, Philip Oldenburg, "Middlemen in Third-World Corruption: Implications of an Indian Case," *World Politics* 39, no. 4 (1987).

²⁴ The rest of this paragraph is a summary of Husted, "Honor among Thieves: A Transaction-Cost Interpretation of Corruption in Third World Countries." pp.17-27.

²⁵ Ibid. p.20.

²⁶ Ibid.

²⁷ J.G. Lambsdorff, "Making Corrupt Deals: Contracting in the Shadow of the Law," *Journal of Economic Behavior & Organization* 48 (2002). This is also the reference of the summary in the rest of this paragraph.

contract due to its illegality and the lack of legal protection. The third stage is what Lambsdorff calls “aftermath”, which refers to the risk of denunciation and extortion after the completion of the contract. By identifying the significance of transactional costs entailed in corrupt transactions, Lambsdorff explained why middlemen take an important role in corrupt transactions and why corrupt transactions are often grafted with legal exchange. In one of his later works in collaboration with Mathias Nell, Lambsdorff explored the effectiveness of “asymmetric penalties and leniency”, proposing to impose “asymmetric” punishment on bribers and the bribed so as to “destabilize” the contracting relations as an alternative anti-corruption policy.²⁸

The “four-phase” framework developed in this thesis is built on and adds to what has been developed by the above-mentioned pioneers of institutional economics of corruption. Unlike Lambsdorff’s framework, which has a chosen focus on the impact of transactional costs on initiating and enforcing a corrupt deal, the framework developed by this thesis instead examines the full cycle of the contracting process. It included the negotiation phase and in particular the contractual performance phase, which is quintessential in the contracting process of corruption even though transaction cost is not a major concern in this phase. By including all the four phases and completing the full cycle, the framework is able not only to identify precisely which factors have facilitated the contracting process in which phase but also to demonstrate the structural relations among these factors. Such a demonstration will help to explain the dynamics, persistence and resilience of the corrupt activities under investigation.

Apart from the institutional economics of corruption, the analysis of this thesis, as a whole, is also greatly influenced by two other conceptual frameworks. The first is the principal-agent-client model, which was firstly proposed by Klitgaard and has since then been widely adopted in corruption studies as a definitional framework of corruption.²⁹ Indira Carr summarized the model most succinctly, which I quote in full below.

“Based on the principal-agent-client model, corruption occurs when an agent betrays the principal’s interest in pursuit of his own by accepting or seeking a benefit from the service seeker, the client. The conditions for corruption present themselves when the principal is in a powerful position and the agent to whom the principle has entrusted to carry out the services has an element of discretion in administering the services and there is a lack or near lack of accountability.”³⁰

²⁸ Johann Graf Lambsdorff, Mathias Nell, "Fighting Corruption with Asymmetric Penalties and Leniency," in *CeGE Discussion Paper* (Georg-August Universität Göttingen, 2007).

²⁹ Klitgaard, *Controlling Corruption*. pp.22-4. 74.

³⁰ Indira Carr, "The Principal-Agent-Client Model and the Southern African Development Community Anti-Corruption Protocol," in *The Selected Works for Indira M. Carr* (University of Middlesex, 2007).

In the context of judicial corruption, the bribed judges are the agents; their constituents are the principals and the bribing litigants, their representatives or other court-users are the clients. The framework is highly illustrative in helping us to understand the structural relations among the main participants of corruption. This understanding underpins the analysis of the entire thesis even though it is not expressively addressed in each chapter.

The other conceptual framework that has an overall influence of this thesis is the one on social exchange, which was originated from the late prominent sociologist George Homans and advanced by other social scientists in a wide range of disciplines.³¹ According to Peter Blau, "Processes of social association can be conceptualized ... as an exchange of activity, tangible or intangible, and more or less rewarding or costly, between at least two persons...Social exchange can be observed everywhere once we are sensitized by this conception to it".³² Concepts, such as, reciprocity, gift, favor, reputation, exchange and power and exchange and cooperation, that are intensively investigated in these studies,³³ are found most useful in understanding corruption as a form of exchange. Since these studies generally do not have a specific focus on corruption, they are therefore not expressively engaged in the rest of the thesis. However, these studies are most enlightening in helping me, especially at the early stage of this research, to theorize my empirical understanding of corruption in the frame of exchange, and hence deserve to be mentioned here.

1.5. Limitation

The most significant research obstacle of this thesis is the access to empirical data due to the evidently sensitive nature of both the investigated conduct and of the habitat where the conduct takes place. In a highly politicalized legal system, certain court statistics are

³¹ L. Cosmides, "The Logic of Social Exchange: Has Natural Selection Shaped How Humans Reason? Studies with the Wason Selection Task," *Cognition* 31, no. 3 (1989). L. Cosmides, J. Tooby, "Cognitive Adaptions for Social Exchange," in *The Adapted Mind: Evolutionary Psychology and the Generation of Culture*, ed. L. Cosmides, J. Tooby (Oxford University, 1992). L. D. Molm, "Structure, Action, and Outcomes: The Dynamics of Power in Social Exchange " *American sociological review* 55, no. 3 (1990). Walter Nord, "Adam Smith and Contemporary Social Exchange Theory " *American Journal of Economics and Sociology* 32, no. 4 (1973). John; Michael J. Lovaglia Skvoretz, "Who Exchanges with Whom: Structural Determinants of Exchange Frequency in Negotiated Exchange Networks," *SOcial Psychology Quarterly* 58, no. Sep (1995). B.F. Meeker, "Decisions and Exchange," *Americal Sociological Review* 36, no. Jun (1971). Toshio et. al. Yamagishi, "Network Connections and the Distribution of Power in Exchange Networks," *The American Journal of Sociology* 93, no. Jan (1988).

³² Peter M Blau, *Exchange and Power in Social Life* (John Wiley & Sons, 1964). p.88

³³ George Caspar Homans, *Social Behavior: Its Elementary Forms* (New York: Harcourt, Brace & World, Inc., 1961), Blau, *Exchange and Power in Social Life*, Richard M. Emerson, "Social Exchange Theory," *American Review of Sociology* 2 (1976). J. Thibaut, Kelley, H. H., *The Social Psychology of Groups* (New York: Wiley, 1959). Robert Axelrod, "The Evolution of Cooperation," *Science* 211, no. 4498 (1981). L. C. Becker, *Reciprocity* (1990). Rajiv Sethi, E. Somanathan, "Understanding Reciprocity," *journal of Economic Behavior & Organization* 50, no. 1-27 (2003).

protected as state secrets, especially those concerning corruption of judges. Court judgments concerning judicial corruption are not provided in public case databases. The most important form of court case file (*fujian*), which records the decision-making process in the adjudicating process, is classified and kept away even from the litigants and their representatives, let alone researchers. Although I have exhausted all alternative means to collect data, which is sufficient enough to allow me to re-enact the events of corruption for the purpose of this research, the data set could be better sampled and more systematic to permit more rigorous analyses. The impact of this limited access to data varies depending on the specific task set for different chapters, which will be specified in the introductions of each chapter.

1.6. Structure

This book is structured into eight main chapters. After the introduction, Chapter 2 provides an overview of corrupt conduct in China's courts, its various forms of presence, the salience of different conduct in different group of judges in different groups of courts. Chapter 3 presents the main analytical framework, namely "corruption as a contracting process". By analyzing patterns of the four phases identified in the contracting process, I conclude that the initiation phase and the phase of contractual performance on the part of the bribed are of critical importance to the successful completion of the contracting process. Correspondingly, the initiation phase is closely investigated in Chapter 4 and the contractual performance on the party of the bribed is examined in Chapter 5 and 6. Chapter 7 probes into anti-corruption measures and practices, especially corruption in anti-corruption institutions from a micro perspective. Chapter 8 presents the conclusion. Since all the main chapters are designed as self-standing articles, their self-contained form and structure are mostly preserved in this thesis.

Chapter 2 Corruption in China's Courts - An overview of scope and general patterns

(Included in *Judicial Independence In China: Lessons For Global Rule Of Law Promotion*, Randall Peerenboom ed. Cambridge University Press, 2010)

2.1. Introduction

Corruption in China's courts is a rather neglected field of study in both the Chinese and English language academic circles. Although scholars and commentators have pointed out various deficiencies in the operation of courts, their relation to corruption has never been closely examined, let alone systematically investigated.³⁴ Policymakers as well as scholars seem rather more ready to attribute judicial problems to external factors, such as undue interference from the Chinese Communist Party (the CCP or Party), lack of resources and local protectionism. Even when scholars do pay attention, they do so most often only in passing.³⁵ This casual treatment of corruption in the courts has resulted in the marginalization of the problem in academic discourse. As a result, corruption in the courts appears omnipresent yet untraceable and elusive.

The relative scarcity of studies on this topic is perhaps attributable to the evidently sensitive nature of the topic, which makes empirical research difficult. The fact that corruption is openly denounced and severely punished in China makes interviews with judges or other court officials extremely difficult.³⁶ Even for punished and closed corruption cases against court officials, access to case-files is highly restricted. For researchers, attending court trials sometimes may yield interesting findings.³⁷ However, what is seen in courtrooms provides little information on what happened behind the scenes. Therefore, a preliminary examination on the existence and salience of various corrupt conducts in contemporary China's courts proceeds any further comprehensive studies on the subject, which will be provided in the rest of the thesis.

³⁴ Edited volumes on this topic include Yaxin Wang, et.al., "*Falü chengxu yunzuo de shizheng fenxi* [A Positive Analysis to Practice of Legal Procedures]," (Beijing: Law Press China, 2005). Suli Zhu, ed., *Falü he shehui kexue* [Law and Social Science] (Beijing: Law Press, 2006). Yefu Zheng, et.al., ed., *Beida qinghua renda shehuixue shuoshi lunwen xuanbian* [Selected Theses for Master-Degree in Sociology from Peking University, Qsinghua University and Renmin University] (Jinan: Shandong People's Publishing House, 2006).

³⁵ Li, "Court Reform in China: Problems, Progress & Prospects." pp.57-8; Dingjian Cai, "Development of the Chinese Legal System since 1979 and Its Current Crisis and Transformation," *Cultural Dynamics* 11, no. 2 (1999). pp.152-4; Zou, "Judicial Reform Versus Judicial Corruption: Recent Developments in China." pp.328-9. Henderson, "The Rule of Law and Judicial Corruption in China: Half-Way over the Great Wall." Benjamin L. Liebman, "China's Courts: Restricted Reform," *The China Quarterly* 191 (2007). p.627.

³⁶ During my fieldwork, I made several attempts to interview judges and other court officials. Some declined the request. Some agreed to be interviewed but were clearly reluctant to discuss corruption in the courts.

³⁷ Liang's recent work provides a valuable "thick-description" of the operation of the courts by attending open court-hearings, shedding light on various discriminative and unfair court practices. Bin Liang, *The Changing Chinese Legal System, 1978-Present: Centralization of Power and Rationalization of the Legal System* (New York, London: Routledge, 2008).

This chapter seeks to answer three main questions : What types of corrupt behavior exist in China's courts? Do the different types of corruption occur with equal salience in different court-divisions, different types of cases, courts at different levels and for different groups of judges? How can the findings be interpreted and explained? In answering these questions, I adopt an inductive analytical framework developed from a comprehensive study of about 350 court corruption cases, spanning the years 1991 to 2008. These cases are supplemented by numerous media reports, diaries and essays written by court-users about their court experience during the same period of time. Unlike the policy- or solution-oriented approaches adopted in most current studies,³⁸ I attempt in this chapter to investigate, describe and analyze the basic factual features of corruption in China's courts, which will be used as the basis for the more in-depth studies in the following chapters.

2.1.1. Analytical framework

In this chapter, I divide corrupt conduct into three sub-categories: Type A involves cases where corrupt judges have physically abused litigants, illegally seizing and detaining them by force. Type B represents corrupt conduct without exchange between the judge and litigants, such as embezzlement, misappropriation of assets, swindling litigants and serious negligence. Type C represents mainly bribery and favoritism.³⁹ The cases investigated in this research include both those punishable and punished in accordance with PRC Criminal Law and those that do not meet the minimum legal requirement for criminal indictment but involve violations of ethical, professional or Party disciplinary rules.

2.1.2. Data sources

The data includes 350 cases corresponding to 341 individual judges and 9 non-judge court officials, including 4 court clerks, 4 court accountants and 1 court bailiff.⁴⁰ In each of these cases, a judge or court official was punished for one or in some cases several corrupt acts according to the CCP anti-corruption disciplinary regulations or the Chinese criminal code. Information concerning these 350 cases comes from media reports of court-trials or press releases from courts or related investigated bodies, principally the

³⁸ Gong, "Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China." Xin He, "Zhongguo fayuan de caizheng buzhu yu sifa fubai [Lack of Financial Funding and Judicial Corruption in China's Courts]," *ershiji shiji (21 Century Bimonthly)*, no. 2 (2008). Henderson, "The Rule of Law and Judicial Corruption in China: Half-Way over the Great Wall."

³⁹ These cases are often referred to as *jinqian'an*, *renqing'an*, *guanxi'an* (literally translated as money case, personal-feeling case and connection case).

⁴⁰ Since the number of non-judge subjects in the database is limited, for ease of reference this group is also referred to as "judges".

procuratorates or the discipline inspection commissions of the local CCP. 21 of these cases are supported by court files, such as court judgments and statements by prosecutors or defendants. The cases were collected between 2005 and 2008 by regularly screening the legal sections of major internet news outlets and newspapers or magazines focusing on legal affairs and corruption issues⁴¹. A supplementary number of cases have been located by using the popular PRC domestic search engines *baidu* and *google*.⁴²

2.1.3. Data configuration

The data are summarized by when the corrupt act was detected rather than by the time the corrupt act was committed, since many cases involve multiple corrupt acts, extending over several years. Among the 350 judges, 12 were accused of corruption in the period of 1991-1999, 183 in the period of 2000-2004 and the remaining 155 in the period of 2005-2008. It is difficult to ascertain the cause of this imbalance. It could be that reports of recent cases are more visible and accessible online than reports of earlier cases. It could also be the result of increasing incidences of violations, increased efforts against corruption, or both.

Concerning court levels, 55 out of the 350 judges served in high courts (*gaoji renmin fayuan*) at the time of detection and 151 in intermediate courts (*zhongji renmin fayuan*). The remaining 144 judges served in basic level courts (*jiceng fayuan*), of which 60 were in urban districts, 73 in counties and 11 held appointments in people's tribunals (*renmin fating*). The Supreme People's Court (SPC) is not represented in this database, although the openly reported on-going investigation against the SPC vice-president Huang Songyou suggests it is highly likely that a corruption prosecution will be pursued.⁴³

At the regional level, the data covers all provincial-level administrative regions except Shanghai City, Qinghai Autonomous Region and Tibetan Autonomous Region. Different regions have different rates of representation in the database. However, the regional representation in the database should not be mistaken with that of the actual occurrence

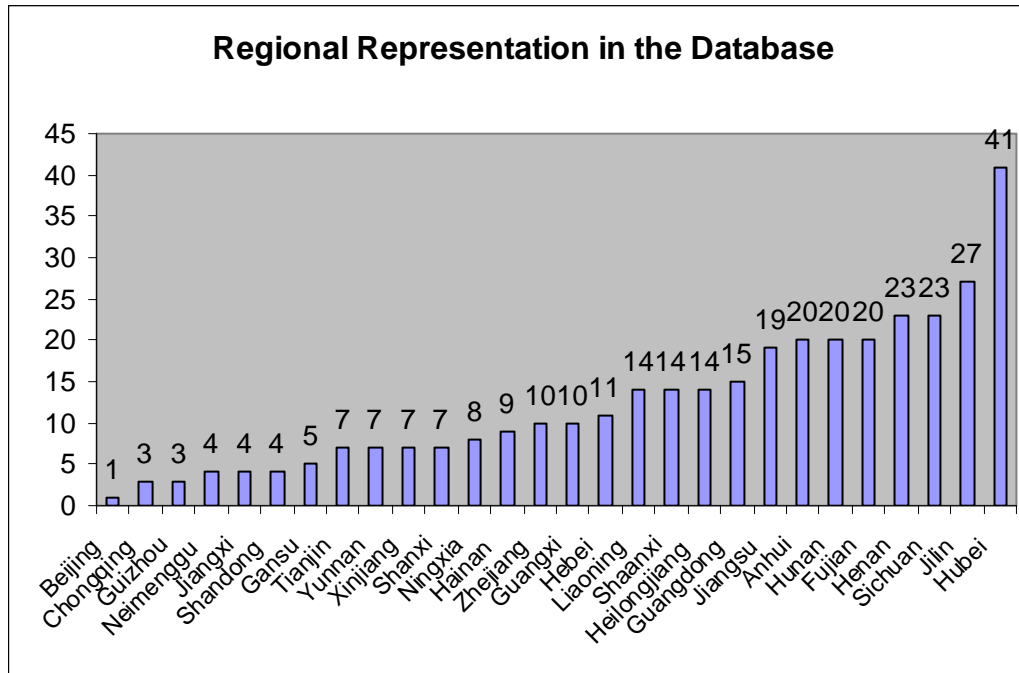
⁴¹ These sources include the legal sections of www.sina.com and www.xinhuanet.com, Fazhi Ribao (Legal Daily), Jiancha Ribao (Procuracy Daily), Jiancha Fengyun (Procuracy Affairs), Nanfang Zhoumo (Southern Weekly), Caijing Magazine and Minzhu yu Fazhi (Democracy and Rule by Law) and Anti-corruption Weekly published on Zhengyi Wang, an internet-based magazine run by the Supreme Procuratorate.

⁴² A considerable proportion of the cases was initially posted at “*tangan danganguan*”, a web-blog hosted by Zhang Hongjian, a procuratorator in Heilongjiang Province, whom I owe thanks to.

⁴³ Since the public media are under strict control by the central government, pre-prosecution media reports of corruption cases, especially those concerning high-profile officials, often serve as a means for the political leadership to “prepare” the public, providing guidance about how the case should be perceived. Among the cases studied, a prosecution is most likely to take place, followed by a conviction, when the media reports start to “demonize” the suspect already in the investigation period, which is exactly what is happening with the case of Huang Songyou.

of corruption.⁴⁴ Rather, it is more an indication of the visibility of corruption in public media, which is a mixed result of many factors that are beyond the scope of discussion here.

Figure 2.1



So-called “political corruption,”⁴⁵ or cases where judges render partial decisions in response to political pressure, is not represented in the database and hence not discussed in this chapter. What Wang describes as judicial corruption in a “special environment,”⁴⁶ that is institutional corrupt practices carried out semi-officially by courts, such as illegal over-charging of litigation fees, is also not represented in the database. Crimes committed by court personnel but unrelated to the exercise of a court’s function are also excluded.

⁴⁴ For example, Shanghai had reportedly investigated and punished 8 court officials in 2006 and 14 in 2005. See “Shanghai Court Officials Sign Anti-corruption Pledge First Working Day after Spring Festival (2007)”, <http://news.qq.com/a/20070226/000696.htm> and “Shanghai Court Officials Sign Anti-corruption Pledge First Working Day after Spring Festival (2006)” <http://news.eastday.com/eastday/node37/node189/node4644/userobject1ai63508.html>. However, no publicly-reported corruption cases were found during the research period concerning corruption in the Shanghai courts.

⁴⁵ Gong, “Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China.”

⁴⁶ Yaxin Wang, “Sifafubai’ xianxiang de yizhong jiedu [An Interpretation of ‘Judicial Corruption’],” *Sixiang zhanxian* 31, no. 4 (2005). p.50. fn.2.

Lastly, the database includes only cases for which official investigations had been completed and which were reported by official sources with specific allegations. Among the 350 judges, only two were acquitted on the grounds of “lack of evidence.”⁴⁷ Due compliance to the criminal procedure in the process of investigation has been considered in the data-selection. This resulted in the elimination of two cases, in one, the evidence was unreliable due to having allegedly been procured by forcible means; in the other, there was competing evidence that the prosecution had acted out of revenge against the defendants, even though the prosecuted corrupt acts of the defendants may also have occurred.⁴⁸ For the remainder of the cases, compliance to the Chinese Criminal Procedure Law can only be generally assumed to have been observed, in the absence of any observable indication to the contrary.

2.1.4. Limitations

Since most of the data was obtained from the media, the configuration of the cases is as much an indication of the slant of media coverage and different propaganda policies of different regions as of the frequency of actual instances of corruption. Due to the lack of up-to-date studies, and more importantly due to the scarcity of data, this chapter must, inevitably, remain methodologically exploratory as well as tentative in its findings and conclusions. The lack of scientific sampling of the data means the result may be skewed by media bias and my selective and hence possibly imbalanced exposure to the media coverage.

It has proved laboriously difficult to generate a sizable database from official press releases, the main source of information that is currently available for this kind of research.⁴⁹ However, the representativeness of the database could be much improved if other reliable means of data collection could be accessed and used to expand the case coverage.

⁴⁷ In this case, two judges from Gansu High Court were prosecuted for bribe-taking because their family members had purchased apartments from a litigant’s company at a below-market-value price while the litigant’s case was pending in their court. One judge was also given a mobile phone by the same litigant. In their defense, one judge argued that he had no knowledge of the purchase while the other argued that the price-benefit was not illicit because the judge’s father-in-law was an employee of the litigant’s company. The court acquitted the judges on the ground of “unclear facts” and “insufficient evidence”. For details, see “Two Gansu High Court Judges Became Suspects of Bribery in Their Adjudication of A Civil Case”. <http://news.tom.com/1002/20040703-1058395.html>.

⁴⁸ I would like to thank Christiane Wendehorst, who raised the issue at the 2nd Annual Conference of European China Law Association in Turin, Italy, in 2008, where an earlier version of this chapter was presented.

⁴⁹ Media case reports have been used as the major source of data for statistic analysis in the following research studies on corruption: Guo, "Corruption in Transitional China: An Empirical Analysis." Alan P. L. Liu, "The Politics of Corruption in the People's Republic of China," *American Political Science Review* 77 (1983). Wenhao Cheng, "An Empirical Study of Corruption within China's State-Owned Enterprises," *The China Review* 4, no. 2 (2004).

2.2. Corruption in China's courts - scope and prevalence

How serious is corruption in China's courts? This has been the most frequently asked question during my research. The scale of corruption in the courts can be gauged by reviewing published data released by official sources. However, it is impossible to measure the actual scale with accurate quantitative data since many corrupt acts remain undetected. Since statistics concerning court affairs are officially considered as "confidential (*jimi*)" or even "absolute confidential (*juemi*)" state secrets,⁵⁰ access to original court data of any kind is extremely difficult to obtain, let alone data concerning corruption. The most visible index is the total number of court personnel who were investigated and punished for misusing or abusing adjudicative or court enforcement power for private benefit, as presented in SPC working reports each spring.

Table 2.1 The SPC National Figures for Court Personnel Investigated for Corruption⁵¹

Year	1993	1994	1995	1996	1997	1998	1999	2000
No. of cases investigated	850	1094	962	1051	NA	2512	1450	1292
Year	2001	2002	2003	2004	2005	2006	2007	
No. of cases investigated	995	NA	794	461	378	292	218	

According to SPC reports, the number has continuously declined since 1998. Compared to the total of more than 190,000⁵² judges in the country as a whole, the figure of 218 corruption incidents for the year of 2007 appears moderate.⁵³ However, as shown in Table 2 some of the data released by local courts through the local media cast doubt on the accuracy of the SPC figures in Table 1. For example, the number of court personnel

⁵⁰ "[Regulation on Strengthening Judicial Statistics of People's Courts]," ed. The Supreme People's Court (1985). Part IX. Art. 29.

⁵¹ Note: "Punished" refers to both criminal punishments and administrative sanctions. All numbers refer to court personnel only (so do not include corrupt prosecutors or police). The national figures for 2007 and a few local figures refer to judges only. The figure of investigated and punished judges released in the SPC Report (2004) is 794, but 468 in the SPC Report (2008). I assume that this discrepancy is a typo and that the larger number 794 refers to the number of investigated and punished court personnel rather than judges only. Sources: The SPC Annual Reports

⁵² Jingwen Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004) [China Legal Development Report (1979-2004)]* (Beijing: People's University, 2007), p.19.

⁵³ Yulin Fu, Randall Peerenboom, "A New Analytical Framework for Understanding and Promoting Judicial Independence in China," in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, ed. Randall Peerenboom (New York: Cambridge University Press, 2010).

investigated in 2006 for corruption in just five provinces (out of 32 provincial-level administrative regions) is 585, or more than twice the SPC's total nationwide figure.

Table 2.2 Annual Figures for Court Personnel Investigated and Punished (*chachude*) for Corruption⁵⁴

Year	Local figures released by local courts	National figures released by the SPC
2007	252 4 provincial regions: Shaanxi, Hebei, Jiangxi, Hubei; 3 cities: Nanjing (Jiangsu), Linfen (Shanxi), Shizuishan (Ningxia) 1 basic court: Beilin District of Suihua city (Jilin)	218
2006	697 8 provincial regions: Shanxi, Henan, Ningxia, Hunan, Liaoning, Hubei, Hainan, Shanghai 2 cities: Ha'erbin (Heilongjiang), Xuzhou (Shandong)	292
2005	597+80 ⁵⁵ 8 provincial regions: Liaoning, Hainan, Zhejiang, Shanxi, Henan, Guangdong, Jilin, Shanghai	378
2004	298+31 ⁵⁶ 5 provincial regions: Hunan, Hainan, Fujian, Jilin, Liaoning 1 city: Guilin (Guangxi)	461
2003	884 9 provinces: Shanxi, Liaoning, Shaanxi, Henan, Anhui, Hainan, Jiangsu, Hubei, Xinjiang 1 city: Cangzhou (Hebei)	794
2002	386 4 provincial regions: Hubei, Hunan, Liaoning, Neimenggu	NA ⁵⁷

⁵⁴ Note: Some of the statistics from local courts only roughly correspond to the full calendar year as listed in the left column. For example, some figures only represent the results of an anti-corruption campaign in a particular month. Some figures start and end in the middle of the calendar year. In two cases, the figures also cover the first half of the next calendar year; this is indicated where applicable. All data and sources are on file with the author.

⁵⁵ The figure for Guangdong province covers 2005 and the first half of 2006.

⁵⁶ The figure for Liaoning Province covers 2004 and the first half of 2005.

⁵⁷ Sources: The SPC Annual Reports and local media reports on file with the author.

The origin of this discrepancy is difficult to explain. There is relatively little incentive for the local courts to inflate the number. Do the local courts perhaps “shrink” the numbers before they are submitted to the SPC, or does the SPC manipulate the data after collecting it from the local courts? Irrespective of the correct explanation for the discrepancy, it appears that the actual level of corruption in courts is more serious than the SPC reports suggest.

Furthermore, when looking at these numbers, it should be borne in mind that the detection of corruption in the courts is usually, if not always, tied to a particular case. When a judge is caught for corruption in one case, previous cases tried by the same judge will not normally be examined. It is only when a suspect confesses to other as yet undetected corrupt acts in exchange for lenient punishment that this case-by-case approach is modified to some limited extent. However, the total number of unlawful and unethical acts in a corrupt judge’s career can never be accurately ascertained, especially for those had been corrupt for many years before being caught.

2.3. Type A - extreme cases involving physical violence

Corrupt conduct involving physical abuse of the victim mainly refers to those acts that deprive the victim of her/his physical liberty, such as the illegal seizure and detention of litigants. There were six such cases among the total of 350. In a notorious case in Jiangxian County, Shanxi Province, the former vice court-president of the county court Yao Xiaohong instructed his subordinates to beat a litigant to death just because the litigant attempted to challenge Yao’s arbitrary decision.⁵⁸ In another case in Rongcheng County, Hebei Province, Yin Hexin, the then chief of the economic division of the county court was “hired” by two plaintiffs to “enforce” payment of debt from their disputant, who resided in another province. Having accepted 10,000 *yuan* “litigation fee” Yin and his colleagues kidnapped the defendant from his home. Struggling and shouting for help, the disputant was handcuffed from behind and covered with the judges’ clothes over his head. Hours later, the disputant was found suffocated to death.⁵⁹ In at least four cases, the judges committed violent corrupt conduct at the request of friends or relatives. At the moment of detection, all six judges served in basic-level courts, five of at the county level.

There are too few cases in this category to conduct a more segmented analysis. In reality there are most certainly more cases of this type, though not necessarily all with fatal

⁵⁸ “How Can A Court Become the ‘Palace of Hell’? (1999)”, <http://www.cyd.net/cyd/zqb/19990715/GB/9560^Q515.htm>.

⁵⁹ “To Make Money Court Issues Quota to Judges, To Collect Debt Judges Killed Human Life (1998)”, <http://www.gmw.cn/01shsb/1998-07/27/GB/688^SH14-215.htm>.

consequences. Nonetheless, the comparatively low representation of this type of corruption in this database may suggest that the use of physical violence is not typical for corruption in China's courts. The explanation for the violence in these cases, both in terms of its existence and its low representation in the database, may well be that the courts enjoy only limited policing power via the so-called "judicial police" (*sifa jingcha*),⁶⁰ whose formal purpose is to uphold court orders and assist in enforcing asset-related judgments. This feature of the distribution of power also separates corruption in courts from that in other law enforcement institutions, such as the procuratorates and the police, which enjoy a wider range of policing powers involving restricting an individual's physical freedom, and in which the deprivation of a victim's liberty is the principal form of corrupt conduct.

2.4. Type B - corruption without exchange (non-bribery)

Corruption in this and the next category does not involve violence. However, the absence of physical force does not necessarily imply an absence of any kind of force, coercion or threat. Instead, some acts in this category involve the use of symbolic power, which extracts deference through the presence of symbols of court power, such as a court document or a court official riding in a court vehicle. It is this kind of power, imbued with the threat of coercion, that enables some judges to compel voluntary submission or cooperation from their subjects in order to obtain their corrupt gain without needing to resort to physical violence or intimidation. Judges from basic courts continue to dominate this type of non-bribery corrupt conduct (47 out of the total of 79 judges). Six judges were from high courts and 26 from intermediate courts.

The main form of corrupt conduct in Type B is theft. 69 judges were punished for embezzlement and/or misappropriation of court funds or seized assets. Nine judges were found guilty of fraud (four of them also conducted embezzlement and/or misappropriation). Six judges, including one, who also conducted embezzlement, were involved in serious incompetence and negligence at work, such as losing case-files and failing to hold an open trial for 19 years.⁶¹ Since there is no clear indication in the available materials that the judges had received external incentives to be deliberately negligent (though this is generally more likely), "effort-saving" is assumed to be the private benefit in these five cases.

Among the 69 embezzlement and misappropriation cases, it is not surprising to find that more than one third took place in enforcement divisions, where large volumes of seized

⁶⁰ Regulation of Judicial Police in People's Courts, The Supreme People's Court (1997)

⁶¹ "Hainan Lingao Court Failed to Hold Open Trials for A Small Case for 19 Years (2006)", <http://news.sina.com.cn/s/2006-07-29/09219601648s.shtml>.

assets are administered. In these cases courts largely failed in discharging their mandated role as guardian of the seized assets for litigants. Instead, easy opportunities for embezzlement and misappropriation were nurtured by the lack of monitoring, especially monitoring by the litigants to whom the assets belong. Tan Yongxing, an enforcement judge in Longgang District (Basic) Court, Shenzhen City, misappropriated 13 million *yuan* for gambling in a year, and had gambled away nearly half of it when he was caught.⁶² Li Zhengda, an enforcement judge in Jilin High Court embezzled 40 million *yuan* over eight years. Despite complaints from litigants, the investigation somehow only started after he had retired from his job and was about to leave the country.⁶³

Other than the enforcement judges, 4 court accountants and 20 court presidents or vice presidents were also apprehended for embezzlement or misappropriation. Both accountants and court administrative leaders have easy access to the public coffers. Cheng Wei, an accountant in Tianjin Maritime Court, had successfully embezzled 1.69 million and misappropriated 140 million *yuan*, mostly from court accounts of seized assets. Cheng ultimately left a 100 million *yuan* “black hole” at Tianjin Maritime Court.⁶⁴ There is no information about how the loss in these cases was settled with the litigants to whom these assets actually belong. It is surprising, though, that within Type B only one judge came from the case registration division, which is responsible for collecting litigation fees, the principal source of court income.

Apart from theft, seven judges were accused of usurpation of assets through deception and/or illegal seizure. One judge from Heishan County Court in Liaoning Province swindled 990,000 *yuan* from a gullible buyer, who believed the judge’s story of a fake court auction.⁶⁵ In Hunan Province two judges loaned money to a construction sub-contractor who had been commissioned by a corporate developer. Knowing that the developer had deep pockets, the judges raised the interest rate of the loan to 20 times above the market rate, which the sub-contractor obviously would not be able to pay. The judges then brought a lawsuit against the sub-contractor in their own court in the name of an acquaintance, rendered a court decision in their favor and enforced the judgment by freezing the account of the corporate developer.⁶⁶

⁶² “Thrown Millions in Gambling Judge Became Prisoner (2000)”, http://gzdaily.dayoo.com/gb/content/2000-12/07/content_42133.htm.

⁶³ “Exploiting Loopholes, Jilin High Court Li Zhengda Embezzled Millions (2006)”, http://news.qq.com/a/20060216/000869_1.htm.

⁶⁴ “No. 1 Biggest Judicial Corruption Case in Tianjin Involving More Than *yuan* 100Million (2006)”, http://news.163.com/06/0418/14/2F0ES2P30001124J_3.html.

⁶⁵ “Liaoning Heishan County: Judge Chewed Receipt, Court Denied Responsibility (2004)”, http://house.people.com.cn/xinwen/article_04_10_12_2340.html.

⁶⁶ See case digest in Shigui Tan, *Zhongguo sifa gaige yanjiu [A Study on Judicial Reform of China]* (Beijing: Law Press China, 2000). p.123.

In two cases, judges seized assets from non-litigants just by dressing up in court uniforms and showing fake court documents. Li Shengyin, a county-court judge from Hebei Province, used a forged court order to appropriate assets worth seven million *yuan* from a bankrupt state-owned enterprise under the eyes of the factory guards. They “invented” a contractual dispute case with the enterprise after the usurpation, using remote relatives as plaintiffs and forging evidence.⁶⁷

2.5. Type C - corruption through exchange

In this sub-category, corruption occurs in the form of an exchange. In this chapter ‘exchange’ is not limited only to monetary transactions, or *jinqian* case (cases influenced by monetary bribes), as in the SPC classification. It also includes exchanges performed in the form of a favor under the principle of reciprocity. Oftentimes such favors are not immediately or directly associated with a monetary value or payback. Nonetheless, these favors necessarily have great value for the recipients.

For example, Su Jiafu, the former chief of the criminal division of Gutian County Court, Fujian Province, confessed that he acquitted three defendants on a rape charge not just because he was offered the 6000 *yuan*. Rather, it was also because one of the defendants turned out to be the son of the director of the local police bureau, who had done a favor to Su before in a battery case involving Su’s brother. Su considered that it was time for him to return the favor.⁶⁸ Su acquitted the defendants by recognizing the victim’s cries as a form of sexual consent against all other contesting evidence. This is a typical example of what the SPC terms a “*renqing* case,” a case influenced by an exchange of favors. Sometimes, the litigant does not yet have an established reciprocal relationship with the judge when the litigation is brought to court. In such circumstances, a favor exchange is often conducted through an intermediary, the so-called *guanxi*, a person who is familiar with both parties and guarantees that the favor is properly registered and returned. *Jinqian*, *renqing* and *guanxi* cases are all denounced by the SPC and all three fall into the category of corruption through exchange in this chapter.

This section is arranged along the three phases of litigation, which also correspond to the three major functional court divisions: case registration (*li’an*), adjudication (*shenpan*) and enforcement (*zhixing*). A summary of litigation procedure in China’s courts provides the context for this discussion.

⁶⁷ The case drew media attention only when the employees of the state-owned company held a public protest and physical conflict ensued with the local police. An investigation by the local Procuratorate followed. Xinhuanews Net, Fazhi News, 12 December 2003, available at http://news.xinhuanet.com/legal/2003-12/12/content_1228524.htm.

⁶⁸ Tan, *Zhongguo sifa gaiqe yanjiu [A Study on Judicial Reform of China]*, p.123.

2.5.1. Brief introduction to litigation procedure in China's courts

In the 1990s, the SPC launched an institutional reform, dividing courts into several divisions according to the chronological order of the litigating process. Before this reform, courts were only divided according to the nature of the case⁶⁹ and each court division was mandated to complete the entire process from case registration, court hearing, panel adjudication, and issuance of verdict to enforcement of the judgment. Under the previous system, the judge who registered a case might well be the same judge who heard and decided the case and who enforced the judgment. This concentration of power is believed to have increased opportunities for corruption in courts.⁷⁰

Under the reform, a further division of power was carried out resulting in three separate court divisions: case admission/registration, case adjudication and judgment enforcement. Each performs different functional judicial power.⁷¹ At the same time, a separate adjudicative supervisory division (*shenpan jiandu ting*) was also established, charged with correcting glaring mistakes and injustices in closed cases using a special procedure.⁷²

The normal sequence of the litigation procedure is as follows. The plaintiff brings his statement of action to the case registration division (*li'anting*), where the case will be examined and archived and the litigation fee will be decided. Once the litigation fee is received, the case will then be assigned to the responsible adjudication division (*shenpan ting*). The adjudication division will hold court hearings and issue the judgment after deliberating in a panel – either a small collegial panel set up within the court-division (*heyiting*) or a grand collegial panel (*shenpan weiyuanhui*) set up at the court-level - depending on the nature of the case. A few cases can be handled according to a simplified procedure and are subject to the decision of a single judge instead of a panel.⁷³

A victorious plaintiff can go to the enforcement division of the first instance court to apply for enforcement if the defendant fails to perform his obligation voluntarily.⁷⁴ The enforcement division will examine the application and decide whether the enforcement

⁶⁹ Namely, whether the case is civil, criminal or commercial. The Organizational Law of People's Courts (1979), Ch.2.

⁷⁰ Shouguang People's Court (Shandong Province), "*Dali'an' jizhi de yunxing moshi yu chengxiao* [The Operational Model and Effect of the 'Grand Case-Registering' Mechanism]," *Sifa shenpan dongtai yu yanjiu* [Research on Judicial Development] 1, no. 1 (2001). pp.95-7.

⁷¹ Jianxin Ren, "Annual Report of the Supreme People's Court," (1998).

⁷² Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004)* [China Legal Development Report (1979-2004)]. p.189.

⁷³ Civil Procedural Law (1991). Ch. 12-13.

⁷⁴ Civil Procedural Law (1991). Art. 207.

will be carried out. Within two years after the court judgment has taken effect, if evidence of serious injustice can be provided, litigants are entitled to apply for *zaishen*, a re-examination and re-trial of a closed case at the adjudicative-supervisory division. The procedure can also be initiated by the court that had rendered the judgment, its superior court or the procuratorate.⁷⁵

Among the 350 judges included in the database, 304 were involved in corruption through exchange in the form of either specific monetary payment or unspecific reciprocity. 179 judges were bribed for their favorable decisions in the adjudicative procedure; 91 were bribed for the same in the enforcement procedure and 7 in the case registration procedure.⁷⁶

2.5.2. Adjudication phase

179 judges rendered perceptibly favorable court decisions to the favor-seeking parties in exchange for monetary bribes or other forms of favors. Usually, judges would render perceptibly favorable decisions to the party from whom they had taken or expected to take bribes, against the interest of the other party. However, a few especially “greedy” and manipulative judges⁷⁷ managed to take bribes from both parties and yet made both believe that they had been treated favorably. The most infamous example is Meng Laigui, the then Chief of the Adjudicative-Supervisory Division of Shanxi High Court. Meng had conducted the so-called “eating from the defendant after having eaten from the plaintiff (*chile yuangao chi beigao*)” in 10 out of 21 cases, in which Meng had taken bribes.⁷⁸ Most of these cases underwent lengthy mediations presided over by Meng, who took advantage of asymmetric information of the litigants to play off the two sides and manipulate their expectations.⁷⁹

Among the 179 judges who were bribed in the adjudication phase, at least 57 took bribes in criminal cases, and 111 in civil cases.⁸⁰ Among the 111 civil cases 95 were about contractual disputes and tort. Court insolvency cases, in particular, always seem to attract

⁷⁵ Civil Procedural Law (1991). Art.177, 185.

⁷⁶ The remaining 27 judges conducted corrupt exchange in court administrative affairs, for example, taking bribes from subordinates in exchange for promotion or taking bribes from bidders in exchange for court procurement contracts.

⁷⁷ For example, see <http://news.sina.com.cn/c/2003-01-20/180136143s.shtml> and <http://news.tom.com/Archive/1002/2003/7/17-35160.html>.

⁷⁸ “Corrupt Judge Meng Laigui ‘Eating from Defendant After Having Eaten from Plaintiff’ (2007)”, <http://news.163.com/07/0703/03/3IEPKLR200011229.html>.

⁷⁹ For similar practice, see the case of Cheng Kunbo, the former court-president of Huanggang Intermediate Court. “Faguan de fubai tongmeng [Corrupt Coalition of Judges],” *zhongguo xinwen zhoukan* [China Newsweek], Apr. 19, 2004.

⁸⁰ In some cases, there was no information concerning the type of case in which bribery took place. In other cases, judges took bribes in multiple cases, civil and criminal, and hence are counted twice.

a high volume of bribes. Having just passed the Bankruptcy Law and obviously lacking experience of such cases, the SPC established a pilot program in the Shenzhen Intermediate Court and Tianjin High Court. Both courts wound up with high-profile corruption scandals. Some lawyers revealed that in these cases the court insolvency proceedings are opaque, which makes it difficult for creditors to supervise and allows great discretion to the court in choosing the members of the insolvency committee.⁸¹ In these scandals, where high volumes of assets are at stake, corrupt exchanges develop not only between judges and the creditors/debtors in exchange for a manipulated price of the auctioned items; but also between judges and professional service providers, such as auctioneers, asset-assessors and lawyers, in exchange for court commissions. The SPC was alerted by similar practices detected in many other courts.⁸²

No case reviewed in this research concerns administrative litigations. However, one case involving corruption in an administrative review procedure may be worth of mentioning. Lou Xiaoping, who served as the deputy director of the Justice Bureau of Hainan Province, was prosecuted for taking 400,000yuan from a farm manager who had applied for an administrative review of a decision made by Sanya City concerning the confiscation of his land. Consequently, Lou rendered a decision in the farm manager's favor. When the bribery was detected six years later, Lou had already been appointed as the vice president of Hainan High Court. Lou was sentenced to a term of imprisonment of 11 years for bribe taking and for illicit enrichment, namely, having a significant increase of his assets which he can not reasonably explain in relation to his lawful income.

The low volume of administrative actions in China's courts in general⁸³ might be the direct explanation for the low incidence of administrative cases in the database. Nonetheless, Lou's case is special because we would normally assume that biased decisions in administrative disputes would be rendered only in favor of governmental institutions. However, as Fu has shown, that there seems to be less corruption between plaintiffs and courts in administrative cases is more likely to be because most of the plaintiffs have no money or status.⁸⁴ If the plaintiff has substantial resources, as the farm manager in Lou's case, the decision may also be tilted in the plaintiff's favor.

⁸¹ "Five Former-judges from Shenzhen Intermediate Court Suspected of Corruption, Three Sentenced (2007)", <http://news.sina.com.cn/c/1/2007-03-24/093512601837.shtml> and "Several Judges from Tianjin Courts Fall Due to Corruption (2008)", http://news.xinhuanet.com/local/2008-07/29/content_8834976.htm.

⁸² The SPC referred to the practices as the "blowing wind of insolvency cases (*guaqile pochanfeng*)". See "Several Opinions of the Supreme People's Court on Strengthening the Adjudicative Ability and Raising the Standard of Adjudication (2005)," Note.13.

⁸³ Detailed statistics can be found in Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004) [China Legal Development Report (1979-2004)]*. Ch.4.

⁸⁴ Hualing Fu, "Putting China's Judiciary into Perspective: Is It Independent, Competent, and Fair?," in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, ed. Erik G. Jense, Thomas C. Heller (2003). p.212.

2.5.3. Enforcement phase

It is conspicuous that 79 judges had conducted corrupt exchange in the enforcement phase. A law graduate, after having worked as an intern in a local law firm for a year, said in an interview, “I thought the operation of the adjudication procedure was dark. But now I realize that the darkness only begins when it comes to judgment enforcement.”⁸⁵

In practice, both plaintiffs and defendants can bribe the enforcement personnel in order to either expedite or delay the procedure, depending on which party is making the request. To help the plaintiffs, exceptional measures can be employed to facilitate the enforcement, including advanced enforcement (*xianyu zhixing*),⁸⁶ seizing assets that are located outside of one’s jurisdiction (*yidi zhixing*),⁸⁷ designating a specific court to enforce a particular case not necessarily within the court’s jurisdiction (*zhiding zhixing*) and requesting that a case be transferred from lower courts to a superior court for the purpose of enforcement (*tiji zhixing*).⁸⁸ Some enforcement personnel, after taking bribes from the plaintiff, were also caught seizing assets from third parties unrelated to the litigation.⁸⁹

Other than accelerating the procedure, plaintiffs also bribe enforcement judges in order to prioritize their court award in litigation involving multiple creditors. For example, after taking 100,000 *yuan* a former judge from Hunan High Court satisfied a creditor’s court award by appropriating the amount from the defendant’s account that had been frozen in another pending case for the benefit of a different plaintiff.⁹⁰ A lawyer expressed his

⁸⁵ Interview L013.1. More complaints and remarks from lawyers about court malpractice in the enforcement procedure can be found at “Truth of *zhixingnan*”

http://12203.1cnlaw.com/Essay_Topic.htm?fn=20080927091446; “Judges, why don’t you enforce the judgment when the defendant is solvent”; http://club.pchome.net/topic_1_15_1814718_.html; “Lawyer out of solutions”, <http://www.acla.org.cn/forum/printthread.php?Board=fzsp&main=702008&type=post>

⁸⁶ In one case, a well-connected plaintiff had her claimed assets seized and delivered even before the trial started through the *xianyu zhixing* (advanced enforcement) procedure (*xianyu zhixing*). Court Judgment (2006) [Huaihua Intermediate Court No.52], Ruanling People’s Procuratorate vs. Tang Jikai

⁸⁷ In the so-called “*Changhang* incident” in Hubei province, several judges from Shiyan Intermediate Court once seized assets worth of millions from someone over whom the court had no jurisdiction and who had never been informed about let alone heard in the framed litigation. It was later found out that the judges had shares in the plaintiff’s pledging business. “A Fraud Case Led to Discovery of Greedy Judges”, *Worker’s Daily Tianxun Online*, 29 Nov. 2003. More such examples include Li Zhengda, former judge from Jilin High Court; Wu Chunfa, former judge from Guiyang Intermediate Court; and the group corruption case of judges from Wuhan intermediate court, including former deputy court president Ke Changxin.

⁸⁸ A more detailed local study about *yidizhixing* and *tijizhixing* written by a judge from Chongqing High Court is on file with the author.

⁸⁹ See the report “Anci District Court of Langfang City Illegal Enforcing Non-Litigant’s Property” *Legal Daily*, Jan. 11, 2002; “Enforcement Staff Ignore Defendant’s Property for Months but Freeze Property of Owners Not Related to the Litigation”, *Guangming Daily*, Nov. 25, 2005.

⁹⁰ Court Judgment (2005) [Hunan High Court final No.129] Loudi People’s Procuratorate vs. Wang Kuang

concern in an interview that a court award was unlikely to be realized automatically if the plaintiff does not provide a monetary incentive to the enforcement judges, especially when there are many creditors and much is at stake.⁹¹

In some cases judges also accede to requests from losing defendants to stall the enforcement, temporarily or indefinitely. As a matter of common sense, requests from defendants for inaction or delayed action are much easier to satisfy than requests from plaintiffs for proactive enforcement, since the latter would naturally require more effort and more resources. Another approach to the stalling of enforcement is to start a *zaishen* case, the exceptional retrial procedure mentioned above. Under the Civil Procedure Law, once a *zaishen* application is granted, enforcement proceedings are suspended.⁹² A judge in Sichuan High Court was once paid 160,000*yuan* by a defendant for this “service”.⁹³

The enforcement procedure is likely to become precarious when both the plaintiff and the defendant seek to influence the judge. In a contractual dispute between two real estate developers in the capital city of Guangxi Province, the disputed apartment building was seized and re-seized several times, leaving the primary victims, the real estate buyers, totally unprotected.⁹⁴

That enforcement procedures are particularly fertile ground for corruption stems in part from litigants’ increasing willingness to pay as the fulfillment of their objectives draws closer. In addition, excuses for judges’ corrupt conduct are easy to find. For example, when stalling the enforcement procedure after bribes have been taken from defendants, judges can justify their inaction by resorting to subterfuges such as local protectionism, the lack of vehicles and human resources, the lack of cooperation from the defendants and the lack of authority.⁹⁵ On the other hand, if “tough enforcement” is meted out, the

⁹¹ Interview L014.1.

⁹² “Opinions on the Application of the Civil Procedure Law (1991)”, The Supreme People’s Court. Art. 206.

⁹³ “Two Judges From Sichuan High Court and Chengdu Intermediate Court Were Sentenced for Bribe-taking (2005)”, <http://www.justice.gov.cn/epublish/gb/paper147/5/class014700001/hwz672714.htm>.

⁹⁴ “A Guangxi Court Released Seized Assets, Plaintiff Got Nothing in Eight Years after Winning the Litigation (2006)”, <http://news.sohu.com/20060802/n244576787.shtml>.

⁹⁵ After taking money from a defendant, Ke Changxin, the former vice-president of Wuhan Intermediate Court, instructed to stall the enforcement of the defendant’s case. The plaintiff resorted to the court-president, who then pressed the vice-president to proceed the enforcement procedure. Ke instructed both the defendant and the enforcement personnel. On the day of enforcement when the court personnel arrived at the defendant’s residence, the defendant resisted the court order and threatened the enforcement personnel by slaughtering a live rooster in front of them and hanged it on his door. The enforcement personnel withdrew from the scene immediately. See “*Jiekai wuhan zhongyuan de heixiazi* [Uncover the ‘Black Box’ of Wuhan Intermediate Court]”, *Minzhu yu fazhi* [Democracy and Rule by Law], Vol. 6, Issue 1, 2004.

conduct can be described as a demonstration of the court's endeavors to realize litigants' rights and enhance its authority.⁹⁶

Court auction procedures, administered by enforcement divisions, are especially prone to corruption. In three cases involving three judges, who had taken 22 bribes in total during enforcement procedures, 11 bribes were from plaintiffs, 4 from defendants and 7 from auctioneers. In the database as a whole, 14 judges were punished for taking bribes either from auctioneers in exchange for the court commission or from buyers in exchange for a manipulated lower-than-market price of the auctioned item.

2.5.4. Case registration phase

This research uncovered only seven judges from case registration divisions (*li'anting*) who had engaged in corrupt exchange. Two were from intermediate courts and five from high courts. The seemingly low corruption rate in this court division, especially in the lower courts, is not surprising. With litigation fees constituting a major portion of the income for many lower-level courts, charging litigants an additional "entry fee" on top of the litigation fee would risk deterring litigants from going to court all together, resulting in a loss of litigation fees for the court and consequently corruption opportunities for judges in other court divisions. To ensure that courts are the ultimate dispute-resolution institution, the Civil Procedure Law also clearly provides that "a court must accept a case if the plaintiff has indicated a specific defendant, the dispute and his claims"⁹⁷ and appeal is provided as a "right" of litigants.⁹⁸ Both leave comparatively little discretion to judges for manipulation, especially in the case of an application to appeal.

No litigant in the investigated cases was found paying monetary bribes to judges in order to obtain an appeal. In contrast, acceptance into the *zaishen* procedure is notoriously troublesome and is more likely to involve monetary bribes.⁹⁹ Since *zaishen* is an exceptional procedure, its acceptance is strictly controlled, to ensure the authority, effectiveness and predictability of court judgments. This creates a large gap between the demand for *zaishen* from litigants and the supply of this procedure by the courts. At the same time the screening criteria for acceptance are vague and leave substantial room for

⁹⁶ The aforementioned former enforcement judge Li Zhenda from Jilin High Court was even awarded a medal for his "contribution" to the court. These reasons were also mentioned in an interview with a judge and two other interviews with lawyers.

⁹⁷ Civil Procedure Law (1991) Art.108.

⁹⁸ Civil Procedure Law (1991) Art.147.

⁹⁹ Discussions on this topic can be found in lawyers' online discussion groups; for an example, see http://www.fl365.com/gb/nhlaw/bbs/topicnew.asp?TOPIC_ID=98458&FORUM_ID=58&CAT_ID=&Topic_Title=%C1%A2%B0%B8%C4%D1.

manipulation.¹⁰⁰ Within the data sample, five judges responsible for reviewing *zaishen* cases were found to have taken bribes. Two of them reportedly boasted in identical terms to the bribing litigants, saying “Your case had reached its last stop here in my division”.¹⁰¹

It should be noted that first-instance case registration is not trouble-free for litigants and lawyers. Although it is not a procedural phase characterized by serious bribery, complaints abound as to the phenomena “difficult [surly] court personnel; difficult to obtain entry into the court system; and difficult to get things done in the courts” (*liannankan, mennanjin, shinanban*),¹⁰² which have been repeatedly denounced by the SPC.¹⁰³ Typical behaviors include the arbitrary refusal to permit the filing of a case. A young lawyer once had the registration of an action rejected because, according to the chief of the registration division, “the length of the contract was too short”.¹⁰⁴ Several complaints of this kind were posted online against the Chaoyang District Court of Beijing. On one occasion, as revealed by lawyer Liu Xiaoyuan in his blog, the court rejected a medical negligence case because the lawyer did not provide the proof of cremation of the deceased in addition to the death certificate. In another case involving a contractual dispute, lawyer Liu, after having provided the detailed postal address of the defendant, was told that the case could not be registered if he could not provide a special geographic code for that address, which is only commonly known to the police.¹⁰⁵ In an extreme case,

¹⁰⁰ Because of the abundant judicial problems emerged in the procedure, the Civil Procedure Law was amended in 2008, aiming to improve the transparency and efficiency of the examining procedure over *zaishen* application. See “New Civil Procedure Law: Examination of *Zaishen* Application Better regulated, More Transparent and More Efficient”, *People’s Courts Daily*, Apr. 12, 2008. For further study on the *zaishen* procedure, see Yulin Fu, “*Minshi shenpan jiandu zhidu de shizhengxing fenxi* [An Empirical Analysis of the Supervisory System of the Adjudicative Process in Civil Litigations]”, in *Falü Chengxu Yunzuo De Shizheng Fenxi* [A Positive Analysis to Practice of Legal Procedures] (Beijing: Law Press China, 2005).

¹⁰¹ See supra note 41 on the case of Meng Laigui. See also

<http://www.chinavalue.net/Media/Article.aspx?ArticleId=9149&PageId=1>.

¹⁰² A couple of examples can be found at <http://www.xici.net/b641398/d39976989.htm> and <http://chinahunyin.com/list.asp?unid=482>.

¹⁰³ For details, see reports on the SPC’s *Guifan sifa xingwei zhuanxiang zhenggai huodong* [special rectification campaign on regulating judicial behaviours].

¹⁰⁴ Interview L013.1. Similar complaints from lawyers can be found at “Descriptions and explanations of *li’an nan*”, <http://www.9ask.cn/blog/user/fyhaolvshi/archives/2008/41476.html> and “Lazy Beijing judges”, <http://www.acla.org.cn/forum/printthread.php?Board=44&main=682368&type=post>. For a summary of the problem of “*li’annan*”, see the interview with Professor Xu Xin in *China Adjudication Magazine*: “*Jiejue ‘liannan’ yao lizu zhongguo guoqing* [To Resolve the Problem of Difficulty in Case-Registration One Needs to Consider the Current Situation of the Country]”, *zhongguo shenpan* [China Adjudication] 2007. An electronic copy can be found in the interviewee’s blog: http://www.fatianxia.com/blog_list.asp?id=8057.

¹⁰⁵ See the blog of Liu Xiaoyuan lawyer: http://blog.sina.com.cn/s/blog_49daf0ea010005iw.html. Similar complaints about mis-handling of case registration applications by the same court can be found in “Resolving the impasse of *li’annan*” <http://club.news.sohu.com/r-fazhi-78818-0-0-10.html>.

a lawyer was even assaulted by a judge in Tianjin Nankai District Court, when the lawyer tried to challenge an unjustified rejection.¹⁰⁶

It is noteworthy, however, that the rejections are hardly ever made in written form,¹⁰⁷ making it difficult for litigants or lawyers successfully to challenge such rejections. According to a report in the Legal Daily, one lawyer was left with no option but to appear in court accompanied by a notary officer to witness the rejection so as to secure evidence, an innovative as well as desperate measure.¹⁰⁸

On the other hand, some court users report that if the litigant or lawyer has the right connections or “guanxi” in courts, the registration procedure can be surprisingly smooth and efficient. A lawyer proudly revealed in his blog that with the help of his “judge mates” (*faguan xiongdi*) he had once completed all court procedures and had a defendant’s bank account frozen in less than two hours from the moment he began to draft the plaintiff’s statement of case.¹⁰⁹ In another instance, Zhan Xiaoyong, the son of a former court president of the Hunan High Court, once successfully completed the notoriously difficult *zaishen* acceptance procedure on the same day, just a few hours after the announcement of the verdict of the appeal.¹¹⁰

2.6. General findings and interpretation

The first general finding of this chapter is the striking dominance of Type C corrupt conduct, corruption through exchange without any direct physical impact on the victim. Among the total of 389 corrupt acts (some judges were detected and punished for, for example, both embezzlement and bribe-taking) committed by the 350 judges, 303 acts,

¹⁰⁶ The report on this incident stated that when the administrative court division of Tianjin Nankai Court rejected a class-action law suit, the lawyer representing the plaintiffs attempted to challenge the court’s rejection by asking for an explanation, and refused to leave the court. During the argument, the then chief of the administrative court division came to the scene and tried to strangle the lawyer with his hands. This notorious incident was widely disseminated because the judge shouted at the lawyer and litigants that “*wo jiushi fayuan; fayuan jiushi wo* [I am the court and the court is me].” For details, see “Tianjin Judge Assaulted Lawyer: Investigation Team Suggested Removing the Judge from Court Leadership (2006),” *Huaxia Shibao* [*Huaxia Times*].

¹⁰⁷ There are also many complaints from lawyers and litigants that court clerks took evidence from them without issuing any acknowledgement about whether, when and what has been submitted by litigants or their representatives and received by courts. This practice makes it difficult to hold courts responsible when files are found to be missing. For details, search “*fayuan bu gei shouju* (no acknowledgement of receipt of evidence by courts)” at www.baidu.com.

¹⁰⁸ “First Public Notary Case of Securing Evidence for the Act of Registering a Case in Court (2007),” http://www.legaldaily.com.cn/0705/2007-08/12/content_678775.htm.

¹⁰⁹ The webpage of this story has been removed from the website but is on file with the author.

¹¹⁰ The information was disclosed as a piece of “side-information” in the defendant’s statement of Ao Wanquan, a former judge and deputy chief of the economic-case court-division in Hunan High Court, who was later prosecuted for bribe-taking.

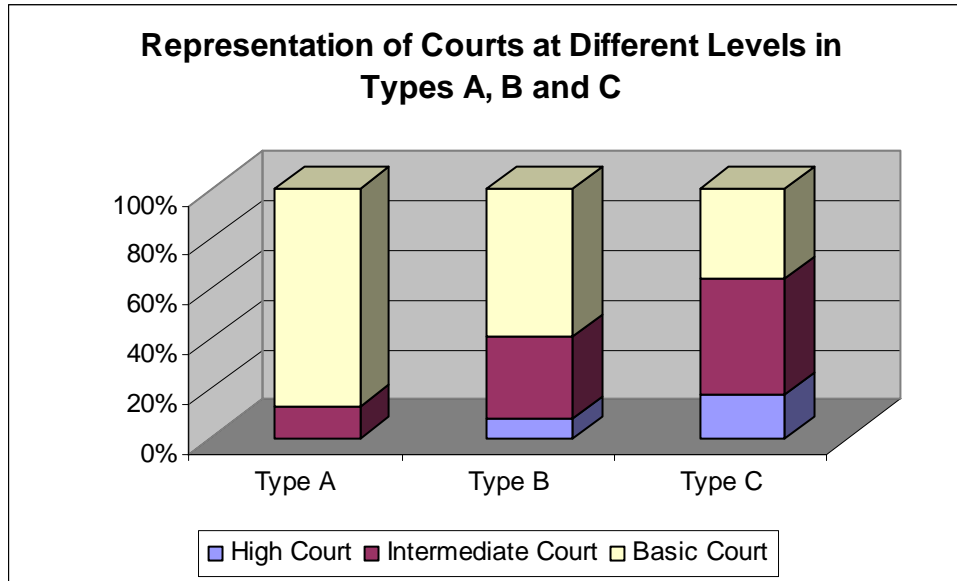
that is 78% of all, belong to Type C, corrupt exchange. This result is to be expected because Types A and B normally leave traces of evidence of corruption, such as missing assets or a direct victim, which makes the conduct riskier and its practitioner more vulnerable to exposure. Bribery and favoritism are instead based on a voluntary agreement between the exchange parties either in terms of a monetary transaction or an unspecified reciprocation, from which both parties benefit. This creates a sense of equilibrium, which sustains secrecy and makes the corrupt conduct more difficult to detect. Indeed, this form of corruption is widespread not just in the courts but in Chinese public institutions in general, as illustrated in Guo's recent work.¹¹¹

This dataset also suggests that judges from intermediate and high courts appear to be more likely to engage in Type C corruption than in Types A and B. In fact, no judge serving in high courts or above in this database was involved in corruption described in Type A. Physical violence is rare, and found mainly in basic courts, suggesting that upper courts judges have a higher sense of professionalism and a self-identity that inhibits such behavior. Higher court judges also appear to be less likely than lower court judges to engage in theft or misappropriation of funds. Judges from higher courts represent 8% of such Type B cases in the dataset, while intermediate court judges account for 33%.

In contrast, for Type C, exchange-based corruption, high-court and intermediate-court judges accounted for 17% and 47% respectively. However, this finding does not necessarily suggest that fewer cases of corrupt exchange occur in lower courts than in higher courts. It is more likely that punishable corrupt-exchange activities in higher-level courts are more visible than those committed by judges in lower courts. Greater sums or promises of reciprocal favors are likely to be required in order to influence judges in higher courts (overseeing higher stakes cases). This in turn makes these cases more visible: the media and the relevant judicial disciplinary committee are generally more likely to focus on cases in which judges accept large bribes from litigants or their lawyers in major cities, rather than on cases where litigants try to influence judges in remote countryside courts by delivering to them, for instance, 5 liters of cooking oil.

¹¹¹ Guo, "Corruption in Transitional China: An Empirical Analysis."

Figure 2.2

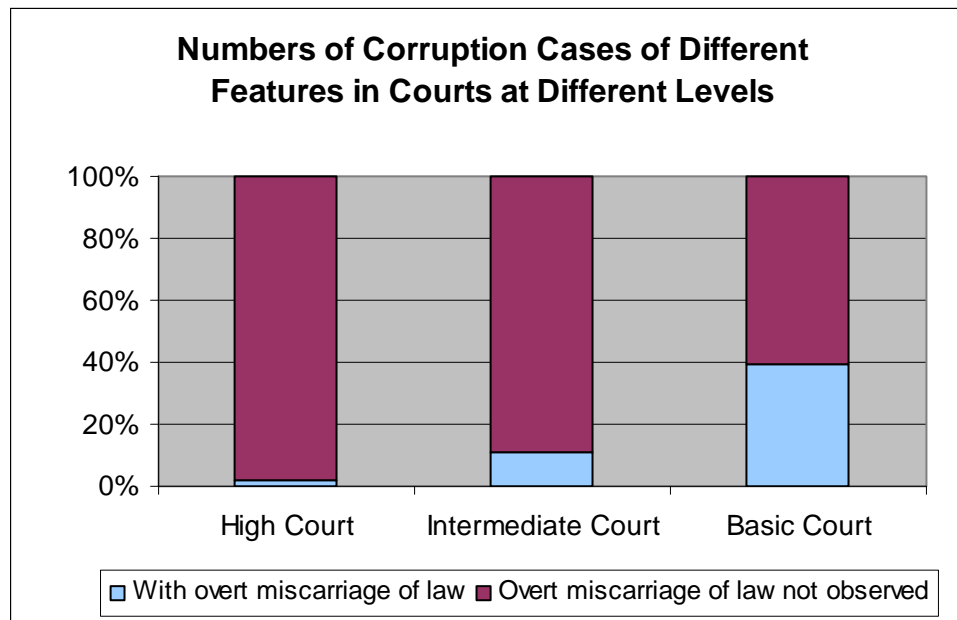


The second and related finding is that very few high-court judges in the cases digested in this research committed the crime of rendering a court decision in violation of the prescription of law (*wangfacaipanzui*). In other words, few high-court judges were engaged in corrupt activities which resulted in overt miscarriages of law, such as rendering favorable decisions for litigants by forging court documents or instructing litigants to forge evidence or commit perjury. Among the 79 corrupt exchanges committed by basic court judges, the ratio between corrupt exchange with and without resulting in overt miscarriage of law is 1:1.5. In contrast, the ratio drops to 1:11 and 1:48 in intermediate courts and high courts respectively. One possible explanation for this phenomenon could be that the complexity of cases presented in higher courts leaves more room for manipulation of discretion. Another possible explanation is that higher court judges are generally better educated and experienced in interpreting the law, and hence more capable of exploiting the law for corrupt purposes.

On the other hand, “collective corruption” cases (*chuan’an yao’an*) are more often found in higher courts, such as the corruption scandals in the provincial high courts of Jilin, Hunan, Liaoning, Tianjin and intermediate courts of major cities, including Changsha, Wuhan, Shenyang and Shenzhen. These scandals are characterized by collusive and sometimes organized corrupt conduct of judges from different court divisions and from

courts at different levels, who shared “clients” and the resulting corrupt benefits.¹¹² In some of these courts, corruption was so deep-rooted that corruption scandals continued to resurface even after the courts had gone through anti-corruption purges and the corrupt judges had allegedly been removed and replaced.¹¹³

Figure 2.3



The third general finding is that the occurrence of bribery relating to court-management affairs is closely correlated to the position of the offender. 15 judges took kickbacks from contractors in court construction projects; of these, 13 were court presidents at different levels. 12 judges, all of whom were court presidents, including four from high-courts, took bribes from their subordinates for court appointment and promotion.¹¹⁴ This finding is not surprising given that the decision-making power over court finances and personnel management is concentrated exclusively in the hands of top court leaders. This finding reinforces the conclusion of Ren and Du’s work, namely that “first-in-command”

¹¹² For example, in the Changsha scandal, corrupt cooperation was found among judges from Hunan High Court and Changsha Intermediate Court. In the Wuhan scandal, cooperation existed among judges between Wuhan Intermediate Court and Shiyan Intermediate Court. The recent investigation against Huang Songyou, the former vice-president of the SPC, also indicates that there was cooperation between the SPC and the Guangdong High Court.

¹¹³ Such incidences have been found in the following courts: Fuyang Intermediate Court, Wuhan Intermediate Court, Shenzhen Intermediate Court and Jilin High Court.

¹¹⁴ The four courts are Liaoning, Hunan, Heilongjiang and Guangdong High Courts.

officials in other public institutions are highly susceptible to corruption as a result of the concentration of power.¹¹⁵ Meanwhile, as the data discussed in this chapter show, the distribution of corruption in litigation-related affairs, although still dominated by functional leaders (161 out of 273 are judges above the rank of deputy division chief), is more dispersed among all judges. Indeed, within the dataset 126 judges without any leadership function were found conducting exchanges with litigants or lawyers while performing either adjudicative or enforcement functions.

The fourth general finding is that, at least on the basis of the datasets reviewed for this chapter, the number of detected cases of corruption committed in the litigation process, including the adjudication and enforcement phases, has increased steadily in recent years compared to cases of corruption conducted in other court-management-related areas. Notably, since 2005 the number of corruption cases detected in the enforcement divisions has equalled that found in the adjudicative divisions. It suggests that corruption in the litigation process, especially in the enforcement phase, is becoming at the very least more visible in media reports. Data collection methods will need to be improved in order to determine whether this also indicates an increase of the actual occurrence of corruption incidents in these procedural phases and court divisions.

Nonetheless, this trend would seem to coincide with the implementation of a series of SPC instructions aiming at strengthening the capacity of the enforcement divisions in higher courts.¹¹⁶ The most important of these instructions was the decision taken in 2000 to establish enforcement bureaus.¹¹⁷ This decision in fact raised the administrative rank of the enforcement divisions and of their top administrative leaders, thereby turning the enforcement divisions into the most powerful divisions in the courts.¹¹⁸ In contrast, the less powerful case registration divisions attract only petty forms of corrupt-exchange, which is mainly achieved through “work-to-rule” practices, discharging the minimum amount of work possible and following the rules to the letter so as to impede progress rather than achieving the aim of the rules. The only exception to this pattern is the *zaishen* procedure, in which the acceptance of a case has an immediate benefit and value to applicants and hence is able to attract and justify the more “serious” bribes.

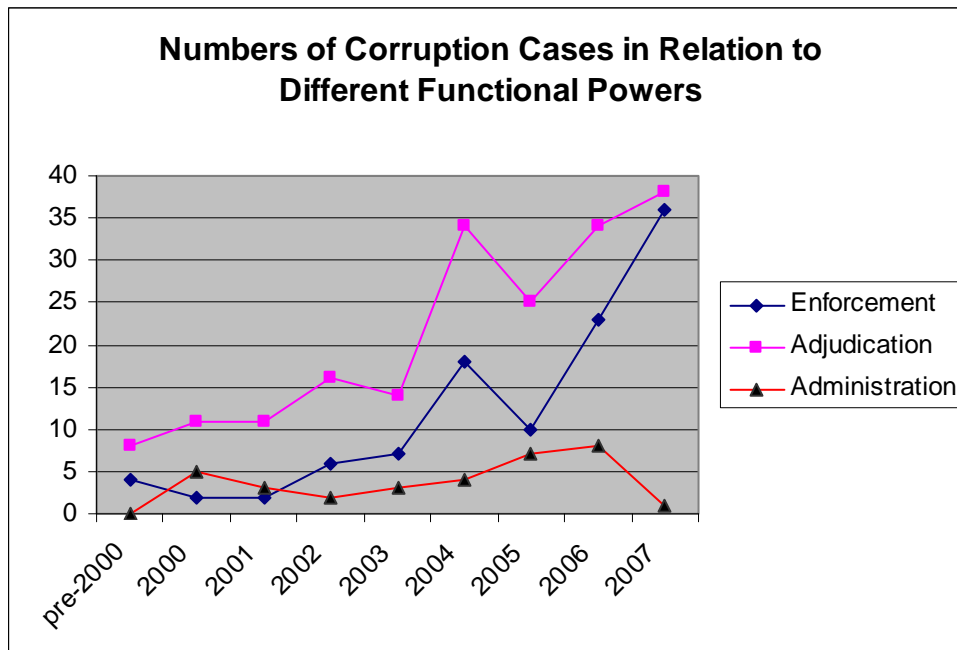
¹¹⁵ Jianming Ren, Zhizhou Du, "Institutionalized Corruption: Power Overconcentration of the First-in-Command in China," *Crime, Law and Social Change* 49 (2008).

¹¹⁶ "Announcement of the Supreme People's Court Concerning Issues Related to the Reform of Enforcement Divisions of People's Courts (2000)", SPC.

¹¹⁷ Since the reform, the administrative rank of the chief of the enforcement court-division has been a half-rank higher than those of other court-divisions. "Announcement of the Supreme People's Court Concerning Issues Related to the Reform of Enforcement Divisions of People's Courts ", (2000).

¹¹⁸ Interview Z019.

Figure 2.4



The last general finding is that although corrupt exchange can occur in either civil or criminal litigation, civil and particularly commercial litigation dominates. Among the cases studied, the number of corrupt-exchange activities detected in the adjudicative phase in civil litigation doubles that found in criminal litigation. Taking account that the average first-instance case-intake ratio between civil and criminal litigations in China is about 7.5:1,¹¹⁹ the amount of corrupt activities taken place in criminal litigations, as suggested in this dataset, is much higher than what should be expected. Since the method for data-collection in this research is not ideal, here one can only speculate the causes to this result. A possible explanation is that in criminal cases the defendants are more willing to bribe because of the high stake involved. It could also be explained as that requests from bribers in criminal cases are easier to be granted because the resistance from the antagonists in criminal cases is weaker than that in civil cases. After all, in civil cases what is requested by one party has to come from the other party; however in criminal cases if a judge grants a bribing defendant, for example, a shorter term of

¹¹⁹ Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004)* [China Legal Development Report (1979-2004)]. p.207.

imprisonment, protest would be much weaker either from the victims¹²⁰ or the public prosecutors.¹²¹ The data also shows that more corruption was detected in commercial litigation (95 cases) than in non-commercial civil cases most probably because commercial litigation involves in much greater material interests, which more readily justify and better accommodate the costs of more “expensive” bribes as well as the higher transactional costs associated with illegal transactions.

As demonstrated above, corruption, by definition, shadows power. This is also demonstrated by the absence of corruption cases in courts involving the enforcement of judgments in criminal cases, over which courts do not enjoy the full competence. In such cases, whether a person is jailed, for how long or whether she/he has her/his property taken away may well be tainted by corrupt decision-making by individuals from other law-enforcement institutions rather than the courts. In fact, as emerged in some of the investigated cases, resourceful defendants and their families may seek out opportunities for favored treatment through bribing prison-administrators, which is akin to litigants in civil and commercial litigation bribing judges in courts. Such practices range from obtaining practical privileges in prison¹²² to more substantive preferential treatment, such as grant of probation, bail on medical leave and sentence reduction.¹²³ In some prisons, the “cost” of a bribe is clearly correlated to the amount of the reduction of sentence.¹²⁴

¹²⁰ According to Huang’s conversation with a basic court judge, what crime victims care most is the civil compensation. Criminal punishment is and should not be their [the victims’] concern, said the judge. Jialiang Huang, “*Falü zai jiceng gayuan zhong de shijian luoji* [Logic of Law in Operation in Lower Courts in China],” in Beida Qinghua Renda Shehuixue Shuoshi Lunwen Xuanbian [Selected Theses for Master-Degree in Sociology from Peking University, Qsinghua University and Renmin University] ed. Yefu Zheng, et.al. (Jinan: Shandong Renmin, 2006). pp.28-29.

¹²¹ To judge from the annual working reports of the Supreme Procuratorate, the performance of public prosecutors is evaluated mainly by the number of prosecutions and convictions.

¹²² See the report on Ma Jianguo, the convicted former governor of Jinniu District, Chengdu City. While serving his sentence in a local prison, he kept several prison administrators on his payroll. In return, Ma enjoyed the freedom of wearing his own clothes, having meals brought in, using his mobile phones to run his company businesses, and even attending banquets held for him in the city.

<http://news.sina.com.cn/c/1/2006-09-08/072010953673.shtml>. Another example concerns the convicted local gang leader Liu Wenyi, who was granted a reduction of sentence and released on the ground of “significant technology contribution” to the prison. It was later found out that the so-called “contribution” was his purchase of a heating boiler for the prison. In addition to the boiler, Liu also “contributed” money to the deputy director of the prison and other prison administrators. See http://www.china.com.cn/law/txt/2007-11/08/content_9196874.htm.

¹²³ The shrewd businessman Zhou Zhengyi, who was directly linked to the fallen Shanghai Mayor Cheng Liangyu, bribed four prison administrators in order to obtain a sentence reduction. The effort only failed because of the high-profile nature and political sensitivity of his case in relation to the former mayor. See <http://www.why.com.cn/epublish/node4/node12488/node12489/userobject7ai99708.html>. For a review of these and similar malpractices, see Shixing Jiang, “*Jianyu ganjing zhiwu fanzui yufang duice* [Prevention and Counter-Measures against Professional Crimes Committed by Prison Cadre-Officers],” in *Zhongguo Zhiwu Fanzui Yufang Diaocha Baogao* [Investigative Report on Professional Crimes and Its Prevention of China], ed. Criminology Research Society of China (2004). pp. 381-2.

¹²⁴ A report revealed that the price of a one-year sentence reduction in the Dalian prisons was known to be 12,000yuan. Jiaxun Lü, Hu Qishu, “*Dui Liaoning Daliانشi sifa jiguan gongzuo ren yuan zhiwu fanzui*

The change of habitat of corruption is because the enforcement of criminal judgments involving the punishment of imprisonment is administered by the Ministry of Justice and its branches rather than courts.¹²⁵ Courts retain, however, the discretion to grant probation, enforcement without imprisonment and to render pecuniary penalties,¹²⁶ a field which in practice is far from corruption-free.¹²⁷ Customary practices had been found in some courts, where a fixed amount observation fee for a sentence suspension (*huanxingkaochafei*) is collected semi-officially from criminal defendants and the profits are later allocated proportionally among all court personnel involved.¹²⁸

2.7. Conclusion

Based on the data analyzed in this research, corruption has been found flourishing in the central court divisions, at almost all levels of the judicial system, involving all types of judges, regardless of whether the litigation was civil or criminal. Distinctions remain in terms of the prevalence of corruption of different types. By classifying corruption in China's courts into three types, this chapter attempts to demonstrate that each type exhibits different features depending on their particular context in courts at different levels and in different court divisions. On the basis of the data collected, extreme cases involving physical coercion and overt miscarriage of law appear mostly and in a mostly highly visible manner in courts at the lowest level. More "subtle" forms of corruption seem more conspicuous in higher courts. Among court-divisions, corruption is distributed unequally as well. According to the cases studied, corrupt-exchange activities are mostly concentrated in the adjudicative divisions of the courts. However, corruption has also grown rapidly in the enforcement divisions, making the enforcement and adjudicative divisions almost indistinguishable in terms of the salience of corruption. By contrast, due to their structural constraints, case registration divisions appear to be less prone to corrupt practices.

qingkuang diaocha ji yufang [Investigation and Prevention of Professional Crimes Committed by Personnel in the Justice System in Dalian City, Liaoning Province], in *Zhongguo zhiwu fazui yufang diaocha baogao* [Investigative Report on Professional Crimes and Its Prevention of China], ed. Criminology Research Society of China (2004). p.353.

¹²⁵ Law of Prisons of the People's Republic of China (1994). Art.10

¹²⁶ Criminal Law (1997) Ch. 3 and Ch. 4.

¹²⁷ Liu Yaming, "Zhiwu fazui anjian shiyong huanxing qingkuang diaocha fenxi [An Investigation and Analysis of the Use of Suspended Sentence in White-Collar Crimes]," *Network of prevention of white-collar crime* (2004). <http://www.yfw.com.cn/shownews.asp?id=36265>.

¹²⁸ "Rendering suspended sentences after taking money from defendants is illicit adjudication (2007)", <http://news.sina.com.cn/c/pl/2007-03-26/154612617436.shtml>. In most cases investigated for this research no distinction was made between reducing a substantive sentence and granting probation or enforcement without imprisonment. But in at least two cases judges were charged for taking bribes from relatives of the defendants for granting enforcement without imprisonment. See also see Yaxin Wang, "'Sifafubai' xianxiang ce yizhong jiedu [An Interpretation of 'Judicial Corruption']," *Sixiang zhanxian* 31, no. 4 (2005) p.50. fn.2

This chapter also shows that judges heading various administrative court divisions and sub-divisions constitute a major group of corruption offenders in the dataset employed. Possessing multiple functional powers, judges in this group are able to conduct corruption through exchange in various types of court affairs, ranging from the rendering of biased decisions in litigation, the granting of court commissions, the assignment of court procurement contracts, to the appointment and promotion of judges. That bribery has played a role in the appointment and promotion of judges, especially in four high-courts, is a matter for concern. It is not difficult to imagine the effect on litigation in these courts under a leadership which was inclined to retain judicial posts for sale. This phenomenon suggests that at least in some courts corruption is not just an isolated event but has instead become part of an organizational culture. This is further confirmed by outbreaks of corruption recurring in certain courts which had ostensibly already been “purged” of corrupt judges. The following chapters will provide more in-depth studies of corrupt behavior in China’s courts, especially of corrupt exchange, the most vigorous and resilient type of all.

Chapter 3 Corruption as a contracting process – The general analytical framework

3.1. Introduction

In the limited volume of previous studies on corruption in China's courts, Keyuan Zou attributed the problem non-discriminatively to virtually all known court deficiencies.¹²⁹ Ting Gong firstly made a distinction between "political corruption" in courts, referring judges rendering partial judgments under political pressure, and "personal corruption", referring to corrupt conduct on judges' own initiatives. Gong then attributed the "political corruption" to the lack of judicial independency and the "personal corruption" to the lack of accountability of judges.¹³⁰ Xin He, however, argued that judicial independency would not reduce corruption in China's courts since there was no reasons to believe that judges could be better trusted than other Chinese officials in exercising their public power honestly. Instead, He postulated that insufficient court funding was the main cause.¹³¹ Based on personal court experience, Nanping Liu insisted that it is poor reasoning in court rulings that has led to the overspreading corrupt practices in courts.¹³²

All the factors identified in the afore-mentioned studies have indeed represented certain elements of the environment in which corruption is conducted. However, their association with the environment in which corruption takes place does not necessarily mean they are the causes of corruption. In order to articulate the linkage between these factors and corruption in China's courts, one has to probe into the corrupt conduct itself, an important step that is missing in the current studies. This is exactly the primary task of this thesis, which is to investigate how corruption participants carry out corrupt conduct in the litigating process in courts and what factors in particular are attributable to their completion and success.

In order to gain the full picture of how corruption is conducted, this thesis needs an analytical framework, which provides the basic understanding of the corrupt conduct and can be used as an instrument to organize and analyze data. Next in the introduction of this chapter, I will provide a brief picture of the analytical framework developed and applied in the thesis. Then in the main body of this chapter I will elaborate about the main contents of the framework, how it is applied in this research and the general findings. In the conclusion the implications from the general findings will be mentioned.

Inspired by Lambsdorff's pioneer work, which examines the transactional costs of corruption as illegal transaction, this thesis developed a self-contained analytical

¹²⁹ Zou, "Judicial Reform Versus Judicial Corruption: Recent Developments in China."

¹³⁰ Gong, "Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China."

¹³¹ He, "Zhongguo Fayuan De Caizheng Buzu Yu Sifa Fubai [Lack of Financial Funding and Judicial Corruption in China's Courts]."

¹³² Nanping Liu, "Trick or Treat: Legal Reasoning in the Shadow of Corruption in Prc," *North Carolina journal of International Law and Commercial Regulation* 34 (2008).

framework based on the conceptual idea of treating corruption as a contracting process. By analyzing the empirical data collected in this research, this thesis identifies four sequential phases of the contracting process, namely, initiation of the exchange, negotiation of the exchange, contractual performance of the exchange and enforcement of the exchange in case of non-compliance. The immediate benefit of this analytical framework is that it will be able to break up the complicated phenomenon of corruption into several distinguishable but chronologically connected fractions. Such a treatment will divide the corrupt conduct into several static frames, of which in-depth examination can be performed. Meanwhile this analytical framework will also be able to restore the dynamics of corruption, which is consisted of a series of inter-related actions. In other words, this analytical framework has the potential to permit a precise diagnosis of what have caused the corrupt conduct in China's courts but also an illustration on whether and how these causal factors are linked.

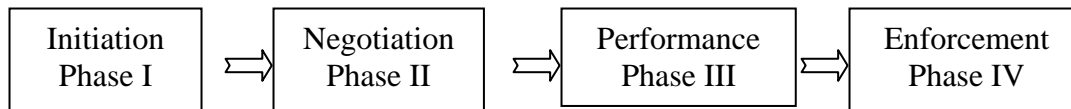


Chart 3.1. Corruption as a contracting process

It is necessary to point out that the four phases taken together represent an “ideal” picture, a model of the contracting process. In reality some of the sequences may be carried out simultaneously and some, for example, the enforcement phase, may not take place at all. Nevertheless, each of the four phases has distinct and independent functions. By employing this analytical framework, this chapter will answer the following questions. Firstly, how are corrupt deals made in the litigating process from the perspective of corruption participants? Secondly, according to the corrupt conduct observed in each phase, which phases are most decisive to the successful completion of the contracting process and what factors are most decisive to the successful completion of such phases? As mentioned in Chapter 1, this chapter focuses on bribery, which, for the sake of simplicity, is used interchangeable to “corrupt exchange” and “corruption”. Bribe is defined as a tangible or intangible inducement, offered or given to a person of entrusted power in order to influence this person’s decision in the process of exercising his power for the interests of the provider of the inducement.

Empirical data used in this paper consist of firstly focused interviews of legal practitioners, particularly lawyers, during 2005-2009. The second source of data is 288

publicly reported bribery cases taken place in China's courts. Information concerning these 288 cases comes from media reports of court-trials or press releases from courts or related investigated bodies, principally the procuratorates or the discipline inspection commissions of the local Chinese Communist Party (hereinafter the CCP).¹³³ 21 of these cases are supported by court files, such as court judgments and statements by prosecutors or defendants. Collected between 2005 and 2008, the 288 cases correspond to a total number of 273 individual judges and 15 court officials without judicial functions, including 3 court clerks, 1 court accountants and 11 court bailiffs. In each of these cases, corrupt conduct had been detected and punished in accordance with the CCP anti-corruption disciplinary regulation or the Chinese criminal code. For all the cases, the author assumed that due investigative procedure had been observed in the investigation and prosecution unless there is information indicating the opposite.¹³⁴ The empirical data also include, with no less significance, numerous online diaries and essays concerning malpractices in China's courts, of which only factual accounts are extracted and employed in the analysis of this chapter. It is important to note that what is presented in this chapter shall, by no means, be understood as a general picture of all litigation in China's courts. Corruption may not take place at all and for many reasons. However, this paper concentrates on what happens when it does take place.

The rest of the paper is structured in four parts corresponding to the four phases of the contracting process as mentioned earlier, i.e. initiation, negotiation, contractual performance and enforcement in case of non-compliance.

3.2. Phase One - initiation

Initiation in corrupt exchange refers to the stage where one party exhibits and communicates his intent to corrupt exchange to the other potential exchange party. Such an opening is a prerequisite for any exchange to take place. However, in corrupt exchange, constrained by the illegality of corruption, neither the briber nor the bribed can exhibit their intent to exchange by openly advertising their businesses. Any direct enquiry would also be risky since potential counterparts may not be inclined to corruption and even prefer denouncing the request.¹³⁵ Therefore, to convey one's corrupt intent to the other party without incriminating oneself becomes the first task of corruption participants.

¹³³ These sources include the legal sections of *Fazhi Ribao* (Legal Daily), *Jiancha Ribao* (Procuracy Daily), *Jiancha Fengyun* (Procuracy Affairs), *Nanfang Zhoumo* (Southern Weekly), *Caijing Magazine* and *Minzhu yu Fazhi* (Democracy and Rule by Law) and *Anti-corruption Weekly* published on Zhengyi Wang, an internet-based magazine run by the Supreme Procuratorate. They also include the legal channels of two major internet news websites in China: www.sina.com and www.xinhuanet.com.

¹³⁴ The author discovered and discarded one case, in which a convicted judge claimed through his family member on internet that he had been tortured during the investigation. There is no official response to this claim from the court or the procuratorate concerned.

¹³⁵ Lambsdorff, "Making Corrupt Deals: Contracting in the Shadow of the Law." p.223.

Based on the cases digested, this research found that corrupt judges are less keen in taking the initiative in the initiation phase. In only 12 of the 288 cases was it the judge who initiated the corrupt exchange by soliciting bribes from litigants or lawyers. All 12 of these judges served in the lowest first-instance court, also called basic courts (*jiceng fayuan*), four in urban areas and eight in rural areas. In these cases, corrupt judges promised to perform certain court services for litigants or lawyers as an item for sale. For example, Zhang Qijiang, a former judge in a urban basic court in Henan Province, promised to render a litigant a favorable judgment on two conditions. The first is that the litigant pays 10,000 *yuan* to hire a lawyer. As to the second condition, the judge said: "Nowadays it would normally cost an 'operational expense (*huodong jingfei*)' of 50,000-80,000 *yuan* to deal with a claim beyond a million *yuan*, such as yours. Since we used to be colleagues, I will give you a discount and only take 50,000 *yuan*."¹³⁶

However, implicit solicitation from judges is much more common. Implicit solicitation means that instead of explicating the demand for a bribe, a judge takes certain actions to compel the court-user to take the initiative and offer the judge a bribe. In such circumstance, it is difficult to tell whether it is the judge or the court-user who had taken the initiative.¹³⁷ According to the data collected, the most common approach of implicit solicitation is to deliberately slow down the work-pace. A lawyer said: "A judge can slow down the litigating process at any stage of the litigation and hence provoke you to open your mouth and offer to bribe".¹³⁸ Indeed "*tuo* (to delay acting)", together with "*na* (grabbing)", "*ka* (obstructing)" and "*yao* (demanding)", are the four types of commonly recognized corrupt behavior of court staff as well as of personnel working in many other public institutions.¹³⁹ This practice is frequently seen, for instance, in the procedure for the enforcement of judgments administered by courts, in which delayed action or inaction has almost become the normal practice.¹⁴⁰

According to the data studied, another common approach of implicit solicitation is to emphasize one's discretionary adjudicative power to bring damages to the potential

¹³⁶ "'Jietiaoan' Zhong De Faguan [the Judge in the 'Iou Case']," *China Youth Daily*, 21 September 2005.

Available at http://news.xinhuanet.com/legal/2005-09/21/content_3519571.htm

¹³⁷ This pattern of the frequent appearance of implicit solicitation is also identified in Fuliang Zhan, *Tanwu Huilu Fanzui Jiqi Zhencha Shiwu [Crime of Embezzlement, Bribery and Practical Issues Involved]* (Beijing: Renmin, 2006). p.207.

¹³⁸ "Investigating the 'Corruption Collusion' in the Shenzhen Intermediate Court," *Phoenix Weekly* 33, no. 238 (2006).

¹³⁹ Yuanqiong He, "Zhanzai Tianping De Liangduan - Sifa Fubai De Boyi Fenxi [Standing on Both Ends of the Scale - an Analysis of Judicial Corruption from the Perspective of Game Theory]," *zhongwai Faxie* 19, no. 5 (2007). p.572. Liu, "Trick or Treat: Legal Reasoning in the Shadow of Corruption in Prc." p.191.

¹⁴⁰ For more detailed description of such practices, see Ling Li, "Corruption in China's Courts," in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, ed. Randall Peerenboom (New York: Cambridge University Press, 2010).

exchange party.¹⁴¹ During a visit at a judge's office in an urban basic court, a law-firm intern witnessed the following scene. Upon a lawyer's request for an update of a case he represented, a female judge told the lawyer that she could apply either of two particular regulations and accordingly decide the case in favor of or against the interest of the lawyer's client. The lawyer immediately took out 500yuan from his wallet and put the cash into the judge's handbag lying on her desk.¹⁴²

Nonetheless, in more cases it is the court-user, who takes the initiative to communicate the corrupt intent with judges by providing the latter private inducement. In these cases, the court-user has acquainted with the judge through previous encounters or through an introduction from an intermediary. Corrupt exchange taking place in this manner is usually referred to as "guanxi-practice" and officially recognized as "guanxi-case" and "favor-case" by the SPC.¹⁴³ In this type of cases, the judge takes a rather passive role, who refrains himself from taking the initiative but only decides whether or not to endorse the initiative of the briber. In these cases, bribers move first by offering banquets, entertainments or other forms of gratuities, during which a certain level of mutual understanding of the exchange is expected to establish between the briber and the to-be-bribed. In the process, the briber takes a rather proactive role in making appointment to meet the judge privately, offering gifts, closing the psychological distance and consolidating the trust,¹⁴⁴ which sets the ground for the next phase of the contracting process, namely, the negotiation of exchange terms. Such practices are evidently more salient in cases involving judges of higher ranks and from higher courts. According to the cases studied in this research, high-profile corruption committed by high-ranking judges had always been conducted with caution. Their bribers were either close friends or people introduced by close friends or family members.¹⁴⁵

Compared with the high-group judges, the main explanation to the eagerness of the low-group judges in engaging in the corrupt exchange is their structural lack of corrupt opportunities. Courts at the lowest level, especially those in rural areas are generally suffering from insufficient caseload and accordingly enjoy less corrupt opportunities. The average number of first-instance case-intake in the people's tribunal is 86 cases/per tribunal; while the average intake of only first-instance cases in the rest of the courts (incl. basic courts and above) is 946 cases/per court plus the average of 1,353 appeals and

¹⁴¹ Interview C011.

¹⁴² Interview Y017.

¹⁴³ See the annual working report of the SPC in 1994 and onwards.

¹⁴⁴ Interview T028.

¹⁴⁵ For example, see the scandal of Shenzhen High Court in 2007, the scandal of Tianjin High Court involving three judges in 2008, the scandal of Jilin High Court in 2007, the scandal of Hunan High Court in 2005 and the most recent case of Huang Songyou, former vice-president of the SPC.

retrial cases in the appeal courts (intermediate courts and above).¹⁴⁶ Within a court, judges of lower-ranks enjoy less judicial discretion and hence less corrupt opportunities compared to judges of higher-ranks. Equally importantly, the case-intake in lower courts is also different from that in higher court in terms of the significance of the claim. According to Chinese procedural laws, the significance of the case, either in terms of its economic or other cognitive value to litigants, is an important criterion for the allocation of jurisdiction to courts at different levels.¹⁴⁷ The general rule is that higher courts take cases involving higher economic value or more severe crimes.¹⁴⁸ Also, higher courts can direct caseloads by setting the bar of case registration according to the economic value of the plaintiff's claim in civil and commercial cases.¹⁴⁹ For example, to reduce the caseload, an intermediate court can raise the bar and divert more cases to basic courts. To increase the caseload, the court can lower the bar and include more cases from basic courts.¹⁵⁰ The consequence of this situation is that the litigants assigned to the low-group judges generally have low-claims and hence have less capacity and willingness to bribe because of the limited value involved in these cases.¹⁵¹ This situation provokes the low-group judges to be more active so as to capitalize their judicial power when the opportunity presents itself.

Another explanation to this behavioral pattern is that the low-group judges are less deterred by the legal and moral barriers preventing the initiation of corrupt exchanges compared with judges from the high-group. As mentioned in the previous paragraph, the low-group judges' potential to profit economically from corrupt exchange is limited.

¹⁴⁶ The statistics are based on the Table 4-01, 4-02, 4-06 in Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004)* [China Legal Development Report (1979-2004)].

¹⁴⁷ Civil Procedural Law (2007) Chapter II, Section 1. "Regulation on Jurisdiction of First-Instance Civil and Commercial Cases," ed. Supreme People's Court (2008). Criminal Procedural Law (1997). Article 18, 19, 20.

¹⁴⁸ For example, in the same year of 2006, the average economic value of claims is 22,436,850yuan per case of all civil cases tried in the SPC, 13,335,227yuan per case of all civil cases tried in the High Court of Shaanxi Province and 98,041yuan per case in average in intermediate courts and basic courts in the same jurisdiction of Shaanxi Province. Sources of the statistics: Annual Report of the SPC (2006) and Annual Report of Shaanxi High Court (2006).

¹⁴⁹ Interview of a basic court judge. R034.

¹⁵⁰ Ibid.

¹⁵¹ Recent research showed that the vast majority of the basic courts are short of cases so much so that they are actively "looking for cases (*zhao anyuan*)" by attempting to locate and persuade perspective litigants to bring cases to their courts. According to Ran's research, only 10% of basic courts have an overload of case-intake. The rest are actually having a shortage of case-intake. However, the average amount of caseload for each judge is highly unbalanced among courts. For example, some courts complained about the overload of cases. One extreme case is Bao'an District Court of Shenzhen City, which reported an annual caseload of 577 per judge. However, the average annual caseload per judge was only 22 (based on statistics of 2001) according to Zhu et al. For the report on Bao'an District Court see <http://news.163.com/09/0316/08/54GTTNSP0001124J.html> For the national average figure, see Zhu, Jingwen, ed. *Zhongguo Falü Fazhan Baogao (1979-2004)* [China Legal Development Report (1979-2004)]. Beijing: People's University, 2007. p.196.

Since the economic value of the bribe is an important threshold for criminal and disciplinary punishment, the petty forms of bribery conducted by the low-group judges generally attract less attention from anti-corruption institutions.¹⁵² In other words, the low-group judges are less deterred by the legal risk compared with their colleagues in higher courts. In the same vein, judges from the low-group also face less moral censure barriers compared to the judges of higher rank in higher courts. It is therefore not surprising to find that among all the cases digested in this research, the judges, who have committed bribe-solicitation or extortion, all belong to the low-group.¹⁵³

Apart from being more passive in the initiation phase of the contracting process of corruption, compared with the low-group judges, the high-group judges are more selective in choosing their exchange counterparties. Wu Zhenhan, a former president of Hunan High Court, was charged for taking 33 bribes worth of 8.8 million *yuan*. All the bribers were introduced to Wu through his family members.¹⁵⁴ Similarly, the recently convicted president of Beijing Xicheng District Court Guo Shenggui took most of the bribes from litigants or lawyers through his brother.¹⁵⁵ Another example is the case of Yang Duoming, a former vice court-president of Guangxi High Court. One of his convictions was for having taken a bribe from a subordinate in exchange for Yang's endorsement of the latter's promotion. Interestingly, the subordinate did not give the bribe to Yang directly himself, even though they shared the same work place. Instead, the subordinate asked a judge from a distant local court, who was known having a close relationship with the vice-president, to deliver the bribe.¹⁵⁶

In the corruption scandals in Shenzhen Intermediate Court, Wuhan Intermediate Court, and more recently, in Wuxi Intermediate Court, Tianjin Intermediate Court and Tianjin High Court, bribe-taking judges had mainly interacted with lawyers, with whom they

¹⁵² Focusing on high-profile cases (*da'an yao'an*) has been dominating the anti-corruption policies since Deng Xiaoping's leadership. In a speech in 1989, Deng requested the anti-corruption institutions to "expose at least 10-20 major cases". Such a deterring strategy has been implemented by the following Chinese leaderships. For more details, see a collected volume of official speeches edited by Wang Deying, a former vice-director of the Central Disciplinary and Inspecting Committee of the CCP. Deying Wang, *Juebu Yunxu Fubai Renzi You Cangshenzhidi - Tupo Da'an Yao'an De Shijian Yu Sikao [Nowhere to Hide - Practices About and Reflections Upon Successful Detection of Major Corruption Cases]* (Beijing: Fangzheng, 2001). See also Jianghui Li, "Jiceng Jijian Jiancha Jiguan Zuzhi Jianshe Wenti Zouyi [a Discussion on the Issues of Organization-Building of Grassroot Discipline Inspecting Institutions]," *Diaocha yanjiu*, 24 August 2007. Available at <http://www.qinfeng.gov.cn/Html/2007-8-24/101259.Html>

¹⁵³ See the beginning of this section, the 2nd paragraph.

¹⁵⁴ *The P.R.C. vs. Wu Zhenhan*, Criminal Judgment, No. 858 [2006], the 2nd Intermediate Court of Beijing.

¹⁵⁵ Heyan Wang, "Xijie Beijing Xichengqu Fayuan Qianyuanzhang Guo Shenggui an [a Detailed Analysis of the Case of Former President of Beijing Xicheng Court, Guo Shenggui]," *Caijing* 2007.

¹⁵⁶ "Yang Duoming Shouhuian Jishi [a Report on the Bribery Case of Yang Duoming]," *Minzhu yu fazhi*, 16 August 2005. Available at <http://news.sina.com.cn/c/2005-08-16/14337512522.shtml>

maintained long-term exchange relationship.¹⁵⁷ In the scandal of Wuhan Intermediate Court, as much as 44 lawyers were involved in bribe-giving.¹⁵⁸ Some corrupt judges never “dealt” directly with litigants but certain lawyers, revealed by an insider after the Shenzhen Intermediate Court scandal, which brought down five judges, including the vice-president of the court.¹⁵⁹ Despite that the costs of the bribes are eventually borne by litigants, such practices are considered as “the rule of the game”.¹⁶⁰

The involvement of lawyers as intermediaries in the corrupt exchange has greatly reduced the search costs for both litigants and judges. From the perspective of litigants, the costs of searching for the “right” judge could be prohibitively high. The trust-building process that is demanded in corrupt exchange with judges from the high-group is especially time-consuming and requires premeditated network-building and -maintenance, which constitutes a high volume of transactional costs. In addition, a litigant normally can not predict when and where future litigation will take place until a dispute presents itself. Therefore, such networking conduct is difficult to plan in advance for litigants. However, all the afore-mentioned challenges can be contained well by lawyers if they specialize in the profession. The main reason is that the transactional costs involved in networking are mainly fixed costs, more like a one-off entrance fee.¹⁶¹ Therefore, for a lawyer, the costs of each exchange with one specific judge or one specific group of judges decrease as the number of the exchange with the same judge or same group of judges increases. This is exactly the reason that many corrupt lawyers specialize in specific courts and with specific judges.¹⁶² Evidently, this specialization allows the lawyers to conduct exchange repetitively with certain judges and reduces the transactional costs by sharing them

¹⁵⁷ Also see “Lüshi Xinghui Faguan - Yizhong ‘Sifayawenhua’ De Jiedu [Lawyers Bribing Judges - an Interpretation of the ‘Judicial Sub-Culture’],” *Nanfang Dushi Bao*, 1 February 2009.

¹⁵⁸ See <http://news.qq.com/a/20061013/001034.htm>.

¹⁵⁹ According to an informant, the investigated judges would never respond to the initiatives taken by litigants. “Investigating the ‘Corruption Collusion’ in the Shenzhen Intermediate Court.” An in-house lawyer once confided in me that litigants are usually excluded from attending the banquets hosted by their lawyers for judges so as to conceal the identities of the judges. Interview T028. An anonymous judge also made this point in an online essay posted on the popular legal forum hosted by the Tianya Internet Community (*tianya shequ*). Yishuimenke, “Zhongguo Faguan Shencun Zhuangkuang Zhi Yuanshengtai Diaocha [a Participating Observation of the Lives of Chinese Judges],” (2006), <http://www.tianya.cn/techforum/content/219/2225.shtml>.

¹⁶⁰ “Investigating the ‘Corruption Collusion’ in the Shenzhen Intermediate Court.”

¹⁶¹ Matthias Schramm, Markus Taube, “On the Co-Existence of Private Ordering and a Formal Legal System in the Pr China,” (Duisburg University, 2003), p.187.

¹⁶² Interview C011. L013. L015. Also, Chen Zhuolun, one of the top ten model lawyers in Guangdong, had a long-term close relationship with Yang Xiancai, former director of Guangdong High Court, who was closely associated in corrupt exchange with Huang Songyou, former vice-president of the SPC. Lawyers in the inner circle shared the knowledge that certain cases would not stand a chance in Guangdong High Court without Chen’s representation. <http://finance.sina.com.cn/roll/20090528/05156281815.shtml> The news coverage on the recent corruption scandal in Chongqing High Court revealed similar collusive practice between Wu Xiaoqing, former director of Chongqing High Court and Hu Yanyu, Wu’s mistress, who had, ironically enough, also been awarded a top ten female model lawyer in Chongqing before the uncovering of the scandal. For related news report, see <http://news.sohu.com/20091201/n268604288.shtml>.

among various clients. In addition, the involvement of intermediaries, in particular lawyers, serves as the insulation between the briber and the bribed, hence protecting both from being incriminated by the other. With the lawyers as the go-between, negotiation becomes easier as well. Lawyers can also help judges to launder the bribes and litigants to stand auditory scrutiny of the expenses spent on bribing.¹⁶³

The disadvantage of employing intermediary services is that such services entail direct costs. Such costs are more readily justifiable for high-profile litigants and the high-group judges, whose safety concern and opportunity costs of time outweigh the cost of middle-men. In contrast, the low-group judges, who are less constrained by safety concerns or the opportunity costs of time, appear more likely to conduct corrupt exchange with litigants directly. In fact, some of these judges specifically discourage litigants from hiring lawyers because they considered that they deserve and could gain more corrupt profits if lawyers are not involved in the corrupt exchange and hence the judges can cut the handling costs of the intermediaries.¹⁶⁴ Moreover, a judge in a rural village or small town is much more accessible for a litigant compared with a judge sitting in, say, a high court in a metropolitan city. For example, in one of the cases studied, a group of plaintiffs in a class lawsuit went to bribe the judge directly during the first-instance litigation in the county court. When the case was appealed to the prefecture intermediate court, the villagers started to look for lawyers to broker the corrupt exchange.¹⁶⁵

3.3. Phase Two - negotiation

First of all, it is important to mention that in many cases negotiation may already take place at the initiation stage, for example, when a judge expresses his corrupt intent by putting forward a specific request or when a litigant initiates corrupt exchange by offering a specific bribe. In this framework, negotiation is differentiated from initiation not in terms of chronicle sequence but in terms of function. To be more specific, negotiation refers to the process whereby corrupt participants attempt to settle what each shall give and take or perform and receive in a transaction between them.¹⁶⁶ Negotiation in corrupt exchange has a different form compared with negotiation in legal transactions because of the need to conceal the corrupt intent. Instead, the usual basic steps of negotiation in corrupt

¹⁶³ Interview C011. L014. Also see the case of Lou Xiaoping, former president of Hainan High Court, who once received a bribe worth 400,000yuan. Lou instructed a lawyer to issue a receipt of the same amount to the briber, on which the bribe was itemized as litigation fee. See *Hainan Provincial Procuratorate, Hainan Branch vs. Lou Xiaoping*, Criminal Judgment, No.112 [2004]. Hainan Intermediate Court.

¹⁶⁴ Interview R034. L013.

¹⁶⁵ Jie Liu, "Yiqi Hetong Jiufen Yinqi De Sifa 'Heishao' [a Judicial 'Black Whistle' in a Contractual Dispute]" *Dangfeng yu lianzheng* 2002. Available at http://www.qinfeng.gov.cn/admin/pub_journalshow.asp?id=100393&chid=100075

¹⁶⁶ Leigh Thompson, "Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues," *Psychological Bulletin* 108, no. 3 (1990). p.516.

exchange include 1) the briber decides the amount of the bribe to offer; 2) the bribed decides whether to accept, reject the offer or counteroffer. Acceptance generally implies that the bribed has agreed to render certain services favorable to the briber. Sometimes, the exact content of the service is addressed in precise terms and sometimes it is only vaguely addressed by the briber, such as “Please treat our case favorably”.

However, it does not mean that the bribed has no say on the amount of the bribe. Instead, the bribed judges have plenty of opportunities to negotiate about the amount of the bribe in the contractual performance phase as the litigation proceeds and the judge’s perception of the cost and value of his service evolves. For example, in a commercial litigation in the Luexian County Court of Shaanxi Province, a judge divided his delivery of the corrupt service into several phases, which typically include registering the case, holding the trial, rendering judgment and enforcement of the judgment in case of non-voluntary performance of the losing party. The judge would not move to the next phase until the litigant had performed first, which include hosting banquets and/or arrange holiday trips, including visits of prostitutes for the judge.¹⁶⁷ A similar example is Zhong Naixin, former deputy chief of the enforcement division of Shenzhen Intermediate Court. Zhong once considered a bribe of 100,000yuan offered by the enforcement applicant was disproportionately low compared with what the applicant expected to benefit from Zhong’s service. He suspended the delivery and halted the enforcement procedure. Zhong said to the applicant: “The enforcement entails costs, which is a lot.” He then indicated his exact demand – an additional bribe of 300,000yuan.¹⁶⁸ An alternative and popular approach of renegotiation by the bribed is to provide the briber with a bundle of paid bills, typically for fares, banquets, gas and other services, and demand reimbursement.¹⁶⁹ According to the data collected, such requests to raise the bribe were usually satisfied by the bribers unless the request becomes extremely excessive and exploitive.

This research also finds that once the corrupt intent has been communicated and agreed upon, the exchange is rarely aborted due to the exchange parties’ difference on exchange terms. It seems that the bribed often accept what is offered them unless the bribe is extremely insignificant.¹⁷⁰ For example, Wu Zhenhan, the afore-mentioned former president of Hunan High Court, reportedly refused a bribe of 5,000yuan because it was too little.¹⁷¹ The high rate of successful completion of corrupt exchange negotiation can

¹⁶⁷ “Faguan Piaochang Dangshiren Maidan [Judge Visit Prostitute Litigant Foot the Bill],” *Yantai Evening Post*, 31 July 2004. Available at http://www.shm.com.cn/ytwb/2004-07/31/content_180550.htm

¹⁶⁸ Shigui Tan, *Sifa Fubai Fangzhi Lun [Preventing Judicial Corruption]* (Beijing: Law Press, 2003), pp.95-6.

¹⁶⁹ Interview C011. T028.

¹⁷⁰ Among the eight interviewees, who admitted incidences of bribing judges, none had reported rejection of bribes.

¹⁷¹ “Hunan Yuan Gaoyuan Yuanzhang De Fanzui Daolu [Path to Criminal: Story of the Former President of Hunan High Court],” *Liaoning Fazhi Bao*, 24 December 2004.

be attributed to two reasons. The first reason is the existence of a “wide positive bargaining zone”,¹⁷² which has facilitated the agreement. A positive bargaining zone is the price range which is marked by a bottom and a ceiling price of negotiators respectively (also known as reservation price), permitting each of them to benefit from settling at any price within that range. Since the respective reservation prices remain concealed during negotiations, the wider the range, the more likely the price offered by one party will fall in that range and hence be accepted by the other. For example, assuming that 1) a judge is willing to deliver a corrupt service at an inducement of a nice bottle of wine (say, worth 1,000yuan); 2) a litigant is willing to pay for a corrupt service as long as the price is less than half of the expected benefit; 3) the litigant expects a net benefit of 1 million from a favorable judgment. The bargaining zone will be between the price of a bottle of wine and 0.5 million. It means any gift or amount of bribe offered by the litigant will be accepted by the judge as long as it is worth more than 1,000yuan. A mutually accepted price, at which both exchange parties are better off, is more likely to be reached when the bargaining zone is, say, between 1,000 and 500,000yuan than between 1,000 and 1,100yuan.

The range of this bargaining zone in corrupt exchange is normally wider than that in lawful transactions. In lawful transactions, the item for sale usually involves production costs, which are virtually zero in corrupt exchange. The main costs of the corrupt service delivered by corrupt judges are the costs of perceived risk, which includes the risk of both legal and moral sanction. One’s perception of the risk of legal sanction is low when the apprehension rate of corruption is low, even though the related punishment might be severe. When judicial ethics has not taken root and corrupt practices are pervasive, the moral sanction is not necessarily targeted at the corrupt conduct but very often at the monopolization of the corrupt opportunities and profits. Hence, a corrupt judge can effectively reduce this moral risk by engaging in reciprocal collaboration and sharing the corrupt profits with his peers.¹⁷³ Consequently, in corrupt exchange, the seller’s reservation price is comparatively “cheap”. Meanwhile, the services delivered by corrupt judges are usually of great value to the bribers, which constitutes a high reservation price for buying. A large gap between the minimum price to sell and the maximum price to buy creates a wide bargaining zone, which makes consensus easier to reach.

The second reason for the ease of negotiation in corrupt exchange is that the corrupt service offered by judges as the object of exchange is consumer-specific, time-dependent and perishable. Selling a service is unlike selling a good. For the latter if the seller misses one selling opportunity, he may still have another opportunity to sell the good to another customer. However, if one misses an opportunity to sell a service to a customer, one loses

¹⁷² Thompson, "Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues." p.517.

¹⁷³ Interview C011.

that opportunity since the service cannot be stored and carried forward to another customer.¹⁷⁴ Therefore, in most situations, turning down an offer of a bribe from a litigant constitutes a net opportunity loss for a judge. It is understandable, therefore, that corrupt judges usually accept what are offered them and only negotiate through withholding the deliveries of the services expected by the bribers. The bribers, on the other hand, simply do not have many choices of their exchange parties due to the monopolistic position of judges in delivering the court services. Consequently, bribers, who are locked in the exchange relationships by their initial investments and constrained by their limited bargaining power, tend to be submissive to judges' demands for more bribes. Meanwhile, safety-conscious judges would nonetheless seek to secure a sustainable exchange by limiting their desire for a higher price within the bargaining zone so as not to provoke the litigants to drop out from the exchange relationship.

For example, in a criminal litigation in the Intermediate Court of Bengbu City, the defendant, a judge charged of bribe-taking, and the prosecutor contested on whether a bribe of 8,600yuan was extracted by the defendant or voluntarily offered to him by a litigant. The court ruled that the bribe was extracted. The reason of this ruling is that the litigant only benefited 18,600yuan from the corrupt service delivered by the judge and it is against the common sense of the litigant to voluntarily offer almost half of expected benefit as the bribe unless it is imposed upon him.¹⁷⁵ A survey among 85 bribers revealed similar results. In the survey, all respondents considered that the bribe should not be more than half of the expected benefit. More specifically, 56.2% of them considered that a figure equals to 10% of the expected benefit would be acceptable; while the rest of the respondents are willing to offer an amount between 10% - 50% of the expected benefit.¹⁷⁶

Data examined in the course of this research also reveal that the negotiating approach can be affected by the closeness of the relation of the negotiating parties. Same as in any types of exchange, the negotiation of corrupt exchange will be influenced by the negotiator' perception of and attraction to the other party, his or her intelligence,

¹⁷⁴ This feature is also termed as "asset specificity". The asset offered in corrupt exchange is referred to as "idiosyncratic assets" by Husted in his seminal work bringing the concept of transactional cost to the analysis of corruption. According to Husted, corrupt transactions "often involve investments in human capital with little salvage value outside the particular transaction or relationship". Therefore, one cannot recover let alone benefit from the investment if one cannot perform and deliver corrupt services. See Husted, "Honor among Thieves: A Transaction-Cost Interpretation of Corruption in Third World Countries." p.21. For discussions on this feature of services in a more general sense, see Russell Wolak, et. al., "An Investigation into Four Characteristics of Services," *Journal of Empirical Generalisations in marketing science* 3 (1998). p.27.

¹⁷⁵ *Bengbu People's Procuratorate, Bengshan Branch vs. Dong Xiaohui*, court judgment No. 162 [2006], Bengbu Intermediate Court, Anhui Province.

¹⁷⁶ Gufeng Huang, Rui Li, "Haizhuqu Jianchayuan Dui Xinghui Renyuan De Wenjuan Diaocha Baogao [a Survey Report of Bribe-Giving Conducted by Haizhu District Procuratorate]," (2006).

sociability, expertise, skill, ability, cooperativeness, competitiveness, trustworthiness, fairness and other attributes that the negotiator makes to explain and to predict the behavior of his bargaining opponent.¹⁷⁷ When the negotiator likes, trusts and is ready to engage in future exchanges with his opponent, he would be more flexible on the exchange terms.¹⁷⁸ Far-sighted bribers, aiming for long-term exchange relationship, would not request the repayment of their bribe(s), even when the bribed fails to deliver the promised service for contingent reasons.¹⁷⁹ Instead, such a briber would insist that he continues to be owed thereby demonstrating his generosity, trust and commitment to the relationship with the bribed. This in turn will nurse reciprocal trust and ease the negotiation in future exchanges.

When a sufficiently strong bond has developed between the briber and the bribed, trade can even develop into joint venture based on the integration of interests.¹⁸⁰ Such a joint-venture structure requires a one-off negotiation on the distribution of the gained from future corrupt ventures and hence avoids the higher transactional costs that would otherwise have to be spent in each transaction. Such arrangement is more common when the briber expects to conduct regular exchange with the bribed, for example, such as between lawyers and judges for client-referring, and between auction houses and courts for court commissions. Negotiation in such relational exchange is more straightforward and explicit. For example, in two written agreements between a few court leaders of the Urumqi Railway Intermediate Court and an auction firm and an asset appraisal firm respectively, the parties agreed that the former guaranteed to procure court service contracts to the latter firms against a commission fee of 30% and 40% of the value of the respective commissions.¹⁸¹ The corrupt scandal taken place in the Hunan High Court uncovered similar practices.¹⁸²

3.4. Phase Three - contractual performance

In petty forms of corrupt exchange, the entire contracting process is usually completed in a short span of time, when some of the phases are compacted in one and swiftly switch from one to another. For example, when a police officer accepted a 20yuan banknote

¹⁷⁷ Thompson, "Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues." p.518.

¹⁷⁸ Dean G. Pruitt, "Strategic Choice in Negotiation," *American Behavioral Scientist* 27, no. 2 (1983). pp.181-3.

¹⁷⁹ Interview M033.

¹⁸⁰ It is also known as variable-sum or integrative negotiations, when the exchange parties' interests are compatible. Thompson, "Negotiation Behavior and Outcomes: Empirical Evidence and Theoretical Issues." p.516.

¹⁸¹ Limei Shi, Jianjun Shi, "Wutie Zhongyuan Shexian Danwei Shouhui an De Qishi [Revelation of the Case of Bribe-Taking of Wutie Intermediate Court]," *Zhengyi Net*, 28 August 2007. Available at http://www.jcrb.com/xueshu/wysf/200806/t20080613_21334.html

¹⁸² *Beijing People's Procuratorate, 2nd Branch vs. Wu Zhenhan*, Criminal Judgment, No. 858 [2006], the 2nd Intermediate Court of Beijing.

offered by a traffic rule offender in exchange for dropping a ticket, the contracting process, including the initiation, the negotiation (if necessary) and the performance of bribe-giving and bribe-taking, the contractual performance of the briber is merged with the initiation. Likewise, the contractual performance of the bribed can combine negotiation. The entire contracting process can complete in a couple of minutes.

For corruption taken place in courts, the contractual performance, however, is much more complicated, especially when the exchange involves greater volume of bribe and more complex corrupt services. Adding to the challenge is the enhanced difficulty to conceal the corrupt conduct. Unlike the previous phases, the performance phase is the only phase in the contracting process, during which corruption participants need to engage outsiders, either being institutions or individuals, in order to perform their contractual obligations. This is the only phase, therefore, during which corrupt conduct is more likely to be detected. This section will be divided into two parts, focusing on the performance of the bribers and the bribed respectively.

i. Contractual performance of bribers – delivery of the bribes

Evidently, the main contractual obligation of a briber is to deliver the bribe without exposure. A briber shall deliver the bribe to the bribed with the fewest witness, not only for the safety concern of the briber himself but also for the concern of the bribed. In a class action in the Intermediary Court of Shenmu City, Shaanxi Province, four litigant-representatives were to deliver a bribe of 2,000yuan to a judge.¹⁸³ Considering that it would be awkward for the judge to take the money in front of the four of them, two litigants decided to wait outside. The other two visited the judge's residence. To their surprise, when one of the litigants put the money packed in an envelope on the table, the judge appeared infuriated and threw the envelope together with the two litigants out of his home. Confused, the two litigants gathered with the other two for a group discussion. Soon an understanding was reached. They believed that the judge threw them out because they were being too indiscreet. Two was still too many. This time only one litigant was selected to go in again. Infuriated as the judge was, he did not refuse to open the door and let the litigant in for the second time. The litigant uttered nothing. He went in, dropped the envelope on a table and left immediately. Without any more drama, this time, the envelope stayed.¹⁸⁴

Envelope, as a container, is ideal for the delivery of cash-bribes. It is low-profile. It is light. It hides well *if* fits. One lawyer interviewee told me that he once visited a judge to

¹⁸³ For more details of the case, see http://www.qinfeng.gov.cn/admin/pub_journalshow.asp?id=100393&chid=100075.

¹⁸⁴ Ibid.

deliver a bribe. They met in the corridor in the court building outside the judge's office. The judge wore a shirt. The lawyer inserted an envelope into the judge's chest-pocket. Only by then the lawyer noticed that the envelope was a bit shorter than the length of the banknotes. Consequently, the envelope sat in the judge's pocket with the edges of the banknotes exposed, calling for attention. It was understandably an awkward moment. After a few seconds of hesitation, the lawyer took the first move. He nipped the envelope out and slipped it into the judge's trousers pocket.¹⁸⁵ Sometimes, envelopes are inserted in case-files and delivered to the bribed judges at the latter's offices or other public places.¹⁸⁶ When the bribe is too voluminous, it can be wrapped with newspaper and delivered to the bribed in paper shopping bags.¹⁸⁷

How exactly to deliver the bribe and when largely depends on the briber's understanding of the preferences of the bribed. The manner of delivery is more accommodating when the bribed has a low perception of both the legal and moral risks of the exchange. However, the delivery will require more subtle design when the bribed is particularly sophisticated and discreet. For example, some bribers deliver the bribes to the bribed at wellness clubs by placing the bribe in the private locker.¹⁸⁸ Evidently, the purpose of doing that is not to surprise the bribed but to protect the bribed from being caught in the exchange scene.

For bribers, the safe delivery is not only about managing the scene of delivery but also about covering the track of bribing from auditors. In China, expenses spent on entertaining officials, for example, the costs of hosting banquets, visiting entertainment venues, purchasing gifts and reimbursing holiday trips, are generally acceptable as "operating costs". However, for cash-bribes, private individuals or enterprises and state-owned enterprises or institutions experience different level of auditory scrutiny. Benefited from loose monitoring, bribers, who run private businesses, are less refrained from bribing in cash. For them, such expenses can be registered in the book as "operating costs" or "public relation costs (*gongguanfei*)". Some "reckless" bribers mark the book entry with blunt honesty and indicate clearly on whom a particular amount has been spent. However, private bribers are more profit-maximization oriented and hence are more cost conscious. Bribers, who are state-owned enterprises (SOE) or governmental institutions, are less cost-conscious but are subject to more stringent auditory rules.¹⁸⁹ Therefore, SOE litigants are more open to gift-bribes instead of cash.¹⁹⁰ Litigants, who are or

¹⁸⁵ Interview C011.

¹⁸⁶ Ibid. Interview T028.

¹⁸⁷ Tang Jikai vs. Ruanling County People's Procuratorate, Criminal Judgment, 2nd Instance, No. 52 [2006]. Huaihua Intermediate Court, Hunan Province.

¹⁸⁸ Interview C011.

¹⁸⁹ Interview T028. C011. L014. S016.

¹⁹⁰ Ibid.

represent SOE or governmental institutions, are also capable to provide other non-cash inducement, such as landing a job for the relatives/friends of the bribed judge¹⁹¹ or commissioning public procurement contract to relatives/friends of the bribed judge.

For example, Tang Jikai, former vice-president of Changsha Intermediate Court, once asked for a favor from the president of a local hospital, which had a pending case in Tang's court. The favor was to grant a public procurement tender of the hospital to a friend of Tang. Tang did not receive anything from the hospital directly but 50,000yuan commission fee from his friend.¹⁹² In some other cases, the inducement is so personal and intangible, which seems contentious even to be labeled as "bribe". For example, Su Jiafu, a county court judge in Fujian province obtained a favor from the director of the local police bureau, who treated Su's brother favorably during a police investigation in a battery case. Not long after, the police director's son was prosecuted for rape in Su's court. Being grateful for the previous favor received from the police director, Su rendered an acquittal in front of strong evidence against the son.¹⁹³ Under the current anti-corruption legal framework, such favor exchange, when it is not manifested with money, equity or other tangible properties, is not recognized as an indictable offense, unless the exercise of public power has broken other laws.¹⁹⁴ For example, in the previous case, Su Jiafu was not prosecuted for bribe-taking but for rendering a sentence beyond one's discretion based on private interests (*xusi wangfa zui* and *wangfa caipan zui*).¹⁹⁵ In other words, if Su had, for example, imposed a more lenient sentence to the son within his discretion instead of acquitting him, he would not have been indicted. This toleration of favor-exchange provides plenty of room for safe delivery of private inducement based exactly on the same rationale as in "corruption proper".

¹⁹¹ Interview C011.

¹⁹² Tang Jikai vs. Ruanling County People's Procuratorate, Criminal Judgment, 2nd Instance, No. 52 [2006]. Huaihua Intermediate Court, Hunan Province. Similar practices are also found in the case of Xu Yafei, former vice-president of Hubei High Court. For details, see <http://www.1488.com/gb/Popular/lawnews/Default.asp?lawnews=203>.

¹⁹³ Shigui Tan, *Zhongguo Sifa Gaige Yanjiu [a Study on Judicial Reform of China]* (Beijing: Law Press China, 2000). p.123.

¹⁹⁴ According to the Chinese Criminal Law (1997), Art. 385, bribe is defined as *caiwu* (money and objects of value). In practice, it had been usually interpreted as money and tangible properties until the promulgation of a new anti-bribery law, which include equities and a few other types of benefits as bribe. Nonetheless, the form of the bribe is still limited to objects of value. According to the research office of the Supreme People's Procuratorate, it is "unrealistic" to extend the range of bribe and to cover any benefits, tangible or intangible. See Guangyu Zheng, *Tanwu Huilu Duzhi Qinquan Zuian Dingzui Zhengju Jiexi [an Interpretation and Analysis of the Evidence for the Conviction of Crimes of Corruption]* (Beijing: China Procuracy, 2002). p.64. Guoqing Chen, ed. *Xinxing Shouhui Fanzui De Rending Yu Chufa [Recognition and Punishment of New Types of Crime of Bribery]* (Beijing: Law Press, 2007). pp.178-9.

¹⁹⁵ Chinese Criminal Law (1997) Art. 399. Zheng, *Tanwu Huilu Duzhi Qinquan Zuian Dingzui Zhengju Jiexi [an Interpretation and Analysis of the Evidence for the Conviction of Crimes of Corruption]*. pp.199-202.

Bribes delivered in the form of intangible services bear less legal risk. However, such service is limited in terms of its economic value and is not sufficient as a reward for the bribed for corrupt services worth of tens of thousands or even millions of *yuan*. In such high-profile corrupt transactions, the involvement of intermediaries, especially lawyers, is particularly important. Lawyers can help the constrained bribers to cover the paper trail of the bribe by including it in the legal consultancy fee, which is legitimate expense that can be claimed by the briber as operating costs. The lawyers will then share his consultancy fee with judges on his own initiative or upon requests of the judges.¹⁹⁶

How a bribed judge launders the bribe after having received it is not yet an urgent concern since public officials are not required to disclose their assets. In addition, there are plenty of loopholes in the financial system, which allow the bribed to accumulate and convert their illegal proceeds to other forms of assets or to launder it in the stock markets or through other business investments.¹⁹⁷

ii. Contractual performance of the bribed – delivery of corrupt services

Contractual performance of the bribed is much more intricate than the performance of the briber. It is because the performance of the bribed, namely, the delivery of the corrupt service, requires the corrupt judge to transform his corrupt intent into an institutional act of the court concerned. This conduct very often involves a series of actions, visible to other judges, uncompromising litigants and other observers.

In general, corrupt services in litigation are delivered in two approaches. The first approach requires overt and active rule-breaking. Its typical conduct includes applying or threatening to apply physical force against the antagonist of the briber in order to satisfy a specific demand of the briber, such as, to honor and collect a debt.¹⁹⁸ Corrupt services can also be delivered by tampering with evidence, juggling or even fabricating court documents. Wang Shengjie, former judge of Shangqiu intermediate court, tampered with

¹⁹⁶ Interview L013. C011.

¹⁹⁷ One example is Ma De, the protagonist of the biggest office-selling scandal in 2004, which involved 265 officials and eventually brought the fall of Han Guizhi, a former vice party-secretary of Liaoning Province. The investigator found that Ma's son had opened a bank account using a forged ID, into which Ma had transferred as much as 20,000,000 *yuan* of illicit income. See "Quanguo Zuida Maiguan an Diaocha [an Investigation of the Biggest Office-Selling Case]," *News Weekly* 2005.

¹⁹⁸ Just to name a few, for the case of Zhou Wenguang, a former judge of Shenqiu County Court, see Jia Song, et. al., "Jianli Wangfa Faguan Cheng Qiutu [Violating the Law for Benefits, Judge Became Prisoner]," *Jiancha fengyu [Procuracy affairs]* 2001. For the case of Li Zhengda, a former court official in Jilin High Court, see Ligu Wu, "Zhixingyuan Zuan Zhidu Loudong Jingtun Qianwan [Enforcement Official Took Advantages of Loopholes of Court Regulations and Grabbed Ten Million Rmb]," *fazhi yu xinwen [Rule by law and news]* 2006. For the case of Yin Hexin, a former divisional director of Rongcheng County Court, Hebei Province, see Jirong Luo, Qiang Xin, "Yiqi Faguan Zhizao De Feifajujin an [an Illegal Detention Committed by Judges]," *Hebei Daily* 1998.

a land certificate to help a litigant to win a case.¹⁹⁹ During the course of this research, at least two courts were reportedly detected for having fabricated litigations for banks so that the banks could use the court decisions to claim and write off certain loans as “dead accounts (*daizhang huaizhang*)”, which enabled the management of the bank to usurp the repayments of the loans collected from the uninformed debtors.²⁰⁰

It would be difficult to provide an exhaustive list of this type of corrupt conduct. However, all these practices share one thing in common, which is a high level of risk, since the conduct concerned evidently involved visible rule-breaking and is hence relatively easy to detect. Such conduct is therefore more readily adopted by those risk-taking judges, who lack the necessary discretion and legal knowledge to maneuver the law so as to keep their corrupt conduct in the safe range.

Slightly more cautious corrupt judges would refrain from the afore-mentioned conduct. Instead, minimum compliance with procedural rules will be observed. For example, they will seek to keep the necessary paperwork in order, including the required application forms, letters of proof, certificates, professional reports etc, while knowingly avoiding to check the authenticity of these documents and the legality of the manner in which they were produced and obtained. Lü Zonghui, a former judge in Jingmen Intermediate Court was once approached by the relative of a defendant, who had committed murder and was expected to receive a death penalty. Lü implicitly instructed the defendant’s relative to “get” a report of good conduct (*ligong*), which is the only circumstance that a stay of execution could be rendered according to the law. The relative bribed a police captain, who then staged an interrogation of the defendant. In the interrogation, the defendant reported a piece of fake “intelligent information”, which was fed to him by the captain in

¹⁹⁹ See the case of Wang Shenjie, a former vice divisional director of Shangqiu Intermediate Court, Henan Province, available at http://www.cnr.cn/hnfw/xwzx/yw/200711/t20071130_504642041.html

²⁰⁰ An example is what happened in the scandal of Jinzhou Communication Bank. In 2002 three accountants in the Bank discovered that the Bank management was usurping the Bank’s reserve fund by forging court decisions in corrupt collaboration with three courts. Based on fabricated evidence brought by the Bank, the courts issued court decisions without informing the defendants, let alone holding court hearings, to demonstrate that the Bank had failed to collect their loans after having exhausted all legal means. Based on the court documents, the Bank was able to claim and write off the “dead and bad loans (*daizhang huaizhang*)” worthy of 0.2 billion yuan, which enables the management to usurp the repayments of the loans collected from the uninformed debtors. The scandal exposed three courts in Jinzhou City, Liaoning Province (available at <http://news.qq.com/zt/2005/boguscase/>). Similar practices were detected in the case of Wang Guozhi, a former judge in a basic court of Renzhou City, who fabricated 28 such court judgments (available at <http://www.china.com.cn/chinese/news/1080411.htm>), and the case of former president of Guangde County Court of Xuancheng City, Anhui Province, who fabricated more than a hundred of such judgments (available at <http://news.sohu.com/20050523/n225666902.shtml>). For more in-depth analyses of the impact of these court-bank collusive practices, see Yingmao Tang, Liugang Sheng, “*Minshangshi Zhixing Chengxu Zhong De "Shuanggao Xianxiang"* (“Two High” Phenomenon in the Enforcement Procedure of Court Judgment in Civil and Commercial Cases),” *falv yu shehui kexue (Law and Social Science)* 1 (2006).

advance. The defendant's report was considered as good conduct and the captain issued a statement accordingly to the court. The judge readily admitted the statement as mitigating evidence and, based on it, rendered a stay of execution. Similarly, in Wuhan Maritime Court, two judges knowingly accepted fake documents provided by a plaintiff and rendered a decision as the latter requested. The decision netted the judges 200,000 *yuan* "gratitude fee" and the plaintiff a profit of 2,100,000 *yuan* as a result of tariff evasion.²⁰¹ Accountancy firms, law firms and forensic institutions frequently engage in such deceitful practices.²⁰² Even public notaries are occasionally found fraudulent in their practices.²⁰³ Such practices are especially pervasive in the administration of prisons.²⁰⁴ Bribed prison-warders accepted forged medical reports and reports of good conduct and thereby granting medical-release or reduction of sentence to prisoners.²⁰⁵ In Jilin province, a notorious gang-leader, Liu Wenyi, was granted a reduction of his sentence on the ground of "technological achievement". The achievement turned out to be that Liu had paid to install a heating system in the prison apart from bribing the administrative staff.²⁰⁶

The second approach to deliver corrupt services in courts does not require overt rule-breaking. Instead, it is based upon the judge's capacity to exercise a wide margin of discretion and the ability to manipulate such discretion. One often quoted example of the wide discretion is that of sentencing in criminal cases. Taking the crime of bribe-taking

²⁰¹ "Wuhan Haishi Fayuan Liang Faguan Tanzangwangfa Bei Panxing [Two Wuhan Maritime Court Judges Sentenced for Corruption]," *Wuhan Morning Post*, 14 April 2004.

²⁰² For a more focused study on the role of intermediary institutions in corrupt practices, see Yueqin Lin, "Shehui Zhongjie Zuzhi De Fubai Zhuangkuang Yu Zhili Duice Yanju [Corrupt Practices of Intermediary Institutions and Its Policy Control]," (Chinese Social Science Academy 2009).

²⁰³ For example, see the report on Zhixin Public Notary Office in Shenzhen City, available at <http://news.sohu.com/25/06/news203070625.shtml> Also in the Changhang Case in Shiyang city, a few judges illegally seized a company's assets for a pledging house, in which they had shares, through fabricated documents, including a forged public notary certificate issued by a notary officer. Report of the case is available at <http://news.sina.com.cn/s/2004-01-06/09141515748s.shtml>

²⁰⁴ At the time of writing, the SPC issued a new regulation, according to which an open public hearing must be held for all court decisions on probation and sentence reduction in criminal cases concerning white-collar crimes. See <http://news.163.com/09/0711/07/5DU5KFT90001124J.html>.

²⁰⁵ Li, "Corruption in China's Courts." Also see Sheng Wang, "Zoulun Jianguan Changsuo Zhiwu Fanzui De Yufang [Prevention of White-Collar Crimes in Prisons and Other Custodial Institutions]," in *Zhongguo Zhiwu Fanzui Yufang Diaocha Baogao [Investigative Report on Professional Crimes and Its Prevention of China]*, ed. Criminology Research Society of China (2004). pp.373-7. Jiaxun Lü, Hu Qishu, "Dui Liaoning Dalianshi Sifa Jiguan Gongzuo Renyuan Zhiwu Fanzui Qingkuang Diaocha Ji Yufang [Investigation and Prevention of Professional Crimes Committed by Personnel in the Justice System in Dalian City, Liaoning Province]," in *Zhongguo Zhiwu Fanzui Yufang Diaocha Baogao [Investigative Report on Professional Crimes and Its Prevention of China]*, ed. Criminology Research Society of China (2004).pp. 352-7. For more such cases, see also Yifei Gao, "Heimu Xia De Zhengyi - Shenshi Qianguize Xia Yihua De Sifa [Justice under the Black Sky - Examining the Dissimilized Judicial System under the Hidden Rules]," *Xueshu Zhonghua*(2005).

²⁰⁶ "Odd Prison-Release of Jilin Gang-Leader after Only Serving 3 Years for a Sentence of Imprisonment of 20 Years," *Xin Wenhua Newspaper*, 9 December 2008.

for example, the discretion on sentencing ranges from a term of imprisonment of three years to seven years in cases involving a bribe of 5000-50,000yuan, from a term of imprisonment of five years to a lifetime imprisonment in cases involving a bribe of 50,000-100,00yuan, and from a term of imprisonment for at least 10 years to the death penalty in cases involving a bribe beyond 100,000yuan. Guidance to the exercise of this discretion is extremely general.²⁰⁷ In civil litigation the discretion is even wider, unlimited by the bars that are set by law in criminal cases. Misuse or abuse of such discretion has become such a widespread practice that in a national court congregation concerning civil litigation affairs, former SPC President Xiao admonished courts to do their uttermost to have the discretion more tightly regulated.²⁰⁸

Other than in substantive matters, discretion also exists in procedural matters. For example, this research found that some corrupt judges took advantages of the pro-mediation policy²⁰⁹ in civil litigation to promote their corrupt interests without overt rule-breaking. Typical conduct is to withhold trial or to refrain from reaching a court decision in the name of performing mediation while attempting to cajole one litigant to compromise to his antagonist, who has bribed the judge. Such tactics can be employed through the entire litigating process, even including the enforcement procedure after a court judgment has been issued. For example, a litigant posted on his blog that when he rejected a judge's proposal for mediation in an enforcement procedure in a county court, the judge said, "Mediation can be conducted at any stage of the litigation". Eventually, the plaintiff was compelled to agree to suspend the enforcement, compromising on the rights that had already been granted to him by the court judgment.²¹⁰ Similar practice was recently uncovered in the SPC. In order to compromise a court ruling through "enforcement mediation (*zhixing hejie tiaojie*)", a defendant lawyer paid 100,000yuan to a SPC judge, who worked in the case-registration division, to broker a corrupt deal with the judges in the enforcement division.²¹¹

²⁰⁷ Chinese Criminal Law (1997) Art. 383, 385.

²⁰⁸ Yang Xiao, "Yao Jin Zuida Keneng Guifa Faguan De Ziyoucailiang Quan [Making the Uttermost Efforts to Regulate Judges' Judicial Discretion]" (speech at the The 7th National Congregation on the Adjudicative Affairs in Civil Cases, 2007) available at <http://business.sohu.com/20070109/n247498786.shtml>

²⁰⁹ According to the Civil Procedure Law (1991) Article 86, the court should preside mediation and promote settlement as much as possible. According to the national statistics, in average 58% of civil litigations were concluded by settlement through court mediation annually since 1979 to 2004. Statistics is derived from Table 4-17 in Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004)* [China Legal Development Report (1979-2004)].

²¹⁰ A plaintiff revealed on an internet bulletin board about her court experience in Fanchang County Court, Yueyang City, Hunan Province in 2007. Available at <http://www.tianya.cn/publicforum/Content/law/1/62130.shtml> under the username of "duzi ai shang ceng lou".

²¹¹ The SPC report did not reveal whether and how much bribe had been offered to the enforcement judges. "Zuigaoyuan Tongbao Liu Qi Weifan 'Wugyanjin' Dianxing Anli [the Spc Announce Six Typical Cases of Judges Violating the 'Five Prohibition' Regulation]," *Xinhua Net*, 6 May 2009.

Two judges revealed the secret behind this type of “forced mediation” in an interview, “Who would take the trouble to mediate ... unless the judge has to take care of one party’s interests that are difficult to justify according to the law”.²¹² Mediation has the advantage as a safe approach to deliver an unlawful service because it is based on a seemingly voluntary compromise of the victim rather than a forced act, which might result in overt rule-breaking. Meng Laigui, the afore-mentioned former head of the adjudicative and supervisory division of Shanxi High Court, had a special preference for mediation. He took bribes from both litigants in ten cases,²¹³ most of which underwent lengthy mediations. In these cases, by holding separate mediation sessions with one party at one time, Meng took advantages of asymmetric information, playing off both sides, manipulating their expectations and making both believe that they were favorably treated.²¹⁴ This so-called back-to-back (*beikaobei*) mediation strategy has been widely adopted in many courts, which, in assistance with other institutional defects, can be easily abused by judges for corrupt purposes.²¹⁵

In terms of contractual performance of the bribed, a good delivery is a safe delivery. Delivery that conceals its illegality is important for corruption to survive and thrive. When a corrupt service is delivered through manipulation of discretion, it is difficult for the other litigating party or monitors to challenge the decision unless evidence of bribery is established. It is vital to point out here that the distribution of discretion varies greatly among judges, which has a direct and deep impact on the patterns and dynamics of corruption in China’s courts. Allocation and administration of the exercise of such discretion is the main theme of decision-making in China’s courts. A more comprehensive study on this topic will be presented in Chapter 5 and 6.

3.5. Phase Four - enforcement in case of non-performance

As mentioned in the beginning of Section 3.4, in petty forms of corrupt exchange, the exchange parties perform almost simultaneously, which makes the enforcement phase unnecessary. The enforcement becomes imperative when the exchange parties do not perform simultaneously. It means that the party that performs first risks non-performance by the other party. This risk becomes greater in corrupt transactions because of its lack of

²¹² Interview R034. C011.

²¹³ “Corrupt Judge Meng Laigui ‘Eating from Defendant After Having Eaten from Plaintiff’ (2007)”, <http://news.163.com/07/0703/03/3IEPKLR200011229.html>.

²¹⁴ For similar practice, see the case of Cheng Kunbo, the former court-president of Huanggang Intermediate Court. “Faguan de fubai tongmeng [Corrupt Coalition of Judges],” *zhongguo xinwen zhouban* [China Newsweek], Apr. 19, 2004.

²¹⁵ Jingfu Ran, et. al., “Fayuan Tiaojie De Xianzhuang Wenti Yu Duice Yanjiu [Current Situation, Problems and Solutions Regarding Court Mediation],” (Beijing: China Social Science Academy, 2003). p.29.

support from legal enforcement institutions.²¹⁶ Difficulties in producing evidence, such as written contracts, receipts etc., which can prove the existence of a corrupt agreement, constitutes additional obstacles for possible legal resolution.²¹⁷ For corrupt exchange in courts, very often, a time gap separates the contractual performance of the briber and that of the bribed simply because the corrupt service to be delivered by the bribed usually involves a series of actions, which requires gradual, continuous and non-retractable investment of resources, and hence cannot start and finish “on the spot”.

Generally, the exchange party with less bargaining power is compelled to perform first. In corrupt exchange in courts, judges are more inclined to and capable of requiring the briber to perform first due to their stronger bargaining position. The usual practice is to take a down payment to protect the judge from premature contract cancellation by the briber.²¹⁸ According to the cases studied, it is almost always court-users, who provide down payment to the bribed judges, as an assurance of the briber’s commitment to the exchange relationship. For example, Wu Zhenhan, the afore-mentioned former president of Hunan High Court, had been charged for taking bribes from 10 bribers. Each of the bribers had provided down payments to Wu before Wu delivered the service.²¹⁹ Judges, whose positional power is not strong enough to request down payment, would at least synchronize their performance with that of the briber by withholding their performance until the bribe is delivered. For example, some judges simply withhold from rendering the judgment just to wait for the briber to perform first.²²⁰

The briber, however, should be able to calculate the right amount of the down payment, which should be neither too insignificant to assure the judge nor too significant to bear as a possible financial loss in case of non-performance of the bribed judge. As a solution, the full amount of the bribe is typically delivered in two parts in practice. The first part is the down payment delivered at the beginning of the contracting process. The rest is to be delivered after the bribed has fulfilled his obligation. In litigations involving claims of great value and prolonged litigating process, the number of installments may rise. For example, Huang Guozhen, former vice-president of Fushun Intermediate Court, Liaoning Province, had taken as many as nine installments totaling 920,000yuan from one litigant in one case and six installments totaling 1,200,000yuan from another litigant in another case.²²¹

²¹⁶ Lambsdorff, "Making Corrupt Deals: Contracting in the Shadow of the Law." p.227.

²¹⁷ Ibid. p.227.

²¹⁸ It is also termed as a “hostage” by Lambsdorff. Ibid. p.229.

²¹⁹ *The Procuratorate vs. Wu Zhenhan*, Criminal Judgment, No. 858 [2006], the 2nd Intermediate Court of Beijing.

²²⁰ Interview C011.

²²¹ See <http://gmyfz.yzdb.cn/2007-8/babaiwan.htm>.

Installment can reduce the risk of opportunistic behavior to a certain extent but cannot completely prevent such conduct from taking place. In case that one exchange party behaves opportunistically, the most common sanction applied by the other party is to denounce the non-performer in his social network²²² and to refuse cooperation and even to create obstacles for the non-performer in their future encounters.²²³ Occasionally, particularly vengeful participants apply more extreme sanctions. For example, Zhang Qijiang, former judge of Xinxiang Intermediary Court in Henan Province, once solicited 50,000yuan from a litigant in exchange for a judgment in the latter's favor. However, the litigant only provided the judge an IOU and promised to cash the IOU when the judgment was delivered. Eventually, the judgment was delivered but not to the satisfaction of the briber, who refused to pay the bribe. Determined to retaliate, the judge brought a suit against the litigant in a neighboring court dressed up as a loan dispute based on the IOU note. The litigant, who did not mention the corrupt nature of the IOU in the trial, lost the case. Compensation awarded against him amounted to almost a million yuan including a horrendously high penalty interest award. Armed with the court award, the judge bankrupted the litigant, who was driven into homelessness.²²⁴

When a briber is "cheated" by a non-performing judge, remedial measures such as private denunciation and termination of future cooperation are not as effective as they are for the "victimized" judges because judges generally have a more advantageous structural position than court-users in their exchange relations. A judge can always wait and choose to exchange with the next litigant; whilst a court-user has much less options in choosing the judge. Nonetheless, the bribers enjoy a certain degree of advantage if they choose to retaliate through public denunciation of the corrupt act because the anti-corruption law is more lenient to the briber than to the bribed. It means that a briber is quite likely to be exonerated of bribery if he confesses and brings the bribed to the anti-corruption authorities.²²⁵ For example, in the notorious scandal of Shenzhen Intermediate Court, its former vice-president Pei Hongquan was allegedly denounced by a lawyer, Pei's long-time partner in a series of corrupt exchanges, because of a dispute over the distribution of corrupt profits totaling 20 million yuan. The lawyer proposed 50:50 while Pei insisted for a share of 90%. In view of a breaking partnership, the lawyer denounced Pei to the party disciplinary committee. With the incriminating evidence that the lawyer provided, Pei was convicted for bribe-taking and illicit enrichment and sentenced to life

²²² Also termed as "reputation" in Lambsdorff, "Making Corrupt Deals: Contracting in the Shadow of the Law." p.230.

²²³ It is also called as "repetition" in Ibid. p.231.

²²⁴ "'Jietiaoan' Zhong De Faguan [the Judge in the 'Iou Case']."

²²⁵ For more details about the differentiated legal treatment between bribers and the bribed, see Ling Li, "Performing' Bribery in China - Guanxi-Practice: Corruption with a Human Face " *Journal of Contemporary China* 20, no. 69 (forthcoming in 2011).

imprisonment. There is no report about the punishment of the lawyer.²²⁶ Another example is that of Guo Shenggui, former president of Beijing Xicheng District Court. Guo once accepted a painting worth of a million *yuan* from the family of a criminal defendant in exchange for an acquittal. Guo denied the charge of embezzlement but held the defendant guilty for misappropriation. The defendant's family was disappointed and attempted to reclaim the painting but failed. It was revealed during the investigation that Guo had offered the painting to a superior of his as a present. The defendant's family denounced Guo to the authority, which triggered a full-fledged investigation against the latter. The briber was not punished.²²⁷

It is noteworthy that public denunciation is only bribers' last resort. After all, the denunciation would not refund the bribe to the briber. In addition, a denunciation does not always result in the fall and punishment of the denounced. Sometimes, the denunciation might even generate greater damages to the denouncer, if the denounced enjoys strong political privilege and protection. For example, when Jia Yongxiang, former president of Shenyang Intermediate Court, received confidential letters denouncing Liang Fuquan, former vice-president of the same court, Jia did not carry out an investigation against Liang but forwarded the letters to the latter as a favor. Liang reciprocated Jia's favor with a cash payment totaling 36,000*yuan*.²²⁸ In another case, Pan Yile, former vice-president of Guangxi High Court, also obtained protection from the anti-corruption authority and intercepted a denouncing letter. Pan even read out the letter to the denouncer on the phone and threatened to revenge.²²⁹

To summarize, despite of the lack of support from formal legal institutions, corrupt exchange is largely self-enforceable. It is partly because most corruption participants consider the exchange as fair trade, of which a level of general reciprocity is expected and honored. The self-enforceability is also because of a certain form of checks and balances established between the briber and the bribed. For bribers, the threat of public denunciation of the corrupt act produces strong deterrent effects, which compel safety-conscious corrupt judges to be trustworthy and "fair".²³⁰ For the bribed, their

²²⁶ "Lüzheng Jiaren Liaofan 'Mingxing Fagua' [a 'Star Judge' Fell in the Hand of a Beautiful Female Lawyer]," *Dang de shenghuo* 2007.

²²⁷ Wang, "Xijie Beijing Xichengqu Fayuan Qianyuanzhang Guo Shengui an [a Detailed Analysis of the Case of Former President of Beijing Xicheng Court, Guo Shenggui]."

²²⁸ The Journal of China Disciplinary Inspection, *Shenyang 'Mu Suixin, Ma Xiangdong' an Chachu Jishi [a Journalistic Report on the Investigation and Conviction of the Cases of Mu Suixin and Ma Xiangdong]* (Beijing: Fangzheng, 2002).pp.151-2.

²²⁹"Rang Falü De Tiankong Geng Chunjing - Pan Yile Luowang Ji [Purify the Sky of Law - a Report on the Conviction of Pan Yile]," *People's Daily*, 16 July 1998. Available at <http://web.peopledaily.com.cn/9807/16/current/newfiles/c1010.html>

²³⁰ Interview L014. More elaborate discussion on the importance of trust in corruption can be found in Eric M. Uslaner, "Trust and Corruption," in *The New Institutional Economics of Corruption*, ed. J.G.Lambsdorff

advantageous bargaining power enables them to compel the bribers to perform first so as to minimize possible damages from opportunism. This deterrence-oriented enforcement mechanism functions effectively, which has greatly compensated the lack of enforcement support from formal institutions due to the illegality of corrupt exchange.

3.6. Conclusion

By examining the four phases of the contracting process of corruption, the analytical framework presented in this chapter allows us to re-enact how corruption is carried out and develops in its full cycle. It helps us to zoom in the observed conduct and to gain a closer understanding of the “logic” of corruption, based on which further cause-and-effect analysis can be developed. This framework, as a simplified model, certainly cannot be expected to cover every scenario of corruption. Instead, in reality, as mentioned in the previous sections, some corrupt exchange takes a more simplistic form in which certain phases are shortened or congregated; some takes a more complicated form, in which certain phases are expanded and mixed with other phases. Nonetheless, this framework has identified four basic phases in the contracting process, which are pivotal to the success of corruption. An examination of what factors have contributed to the efficient and successful completion of the contracting process will bring us closer to a more precise understanding of the cause-and-effect of corruption.

For example, this chapter finds that the high success ratio of negotiation in corrupt exchange is largely due to the wide bargaining zone, which is inherent in all corrupt exchange. This wide bargaining zone is derived from the fact that a considerable proportion of the costs of the object of corrupt exchange are exempted from the exchange parties but borne externally either by a specific third party or by the anonymous public. This factor is built in the nature of corrupt exchange and hence can only be contained to a certain extent but cannot be removed.

At the enforcement phase, this chapter finds that most corrupt exchange are able to complete their full cycle with the assistance of the preventive enforcement measures such as the down payment and the “rationed” delivery without being hampered by the lack of legal enforcement support. This self-enforceability of corrupt exchange is particularly enhanced by the current asymmetric Chinese anti-corruption policy, which is in favor of bribers over the bribed. This favorable discrimination has compensated the bribers’ disadvantage in the corrupt exchange relationship, in which the bribers are often exposed to the risk of opportunism by being compelled to perform first. The “pro-briber” policy constitutes an effective threat of retaliation for the benefit of bribers, which facilitates

et. al. (London and New York: Routledge, 2005). For discussion on the role of trust in cooperative relations in general, see Diego Gambetta, ed. *Trust: Making and Breaking Cooperative Relations* (1988).

contractual compliance from the bribed as well. Thus, a form of checks and balances is achieved, which compels compliance from both parties and smoothens the otherwise problematic enforcement phase.

This chapter also finds that the initiation phase is of particular importance to the success of corrupt exchange, though the “style” of initiation may differ depending on the relational structure between the potential briber and the bribed. Being constrained by a low case-intake and hence fewer exchange opportunities yet encouraged by lower exchange barriers, judges and other court officials in lower courts from poorer regions (the “low group”) are generally less inhibited to expressively communicate their corrupt intent, if so minded. As the litigating process moves up in the hierarchy of the court system, initiation of corrupt exchange becomes more subtle and more complicated. Communication of corrupt intent relies more on inferences and signals and requires a trust-building procedure known as *guanxi*-practice. At the high-end of the spectrum are judges holding executive positions in high-ranking courts, such as intermediate courts in capital cities and those above in the hierarchy. The combination of more exchange opportunities and higher legal, moral and cognitive barriers in conducting corruption compels judges from this “high group” to be more cautiously selective in choosing both the time and the partner for conduct of corrupt exchange. Connection or *guanxi* becomes absolutely necessary so as to protect exchange safety. Professional intermediaries are more frequently employed, who shield the judges from being directly incriminated by discontented bribers. More details of this initiation phase and the role of the *guanxi*-practices will be presented in chapter 4.

At the performance phase, the absence of an effective and comprehensive anti money-laundering system makes it easy for bribers to transfer bribes to the bribed in various forms.²³¹ When the corrupt exchange takes the form of favor exchange, which does not involve a straightforward payment of money or other tangible assets, the bribe is almost immune from detection. As for the corrupt judges, the requested court service can be delivered in one of two different approaches, depending on the individual judges’ different risk attitudes and also their capacity to exercise and manipulate discretion. The risky approach, that often results in overt and active rule-breaking, is taken by corrupt judges, who are risk-taking, enjoy little discretion and are incapable of manipulating the discretion within certain limits. When the second approach of delivery is taken, which is through manipulating judicial discretion either on substantive or procedural issues without overtly breaking the rules, the corrupt act remains hidden unless the bribe is detected. Delivery of corrupt services themes the contracting process of corrupt exchange

²³¹ Ning Yu, “Fanxiqian Baogao: 350 Jia Jigou Bei Chachu [Anti Money-Laundering Report: 350 Financial Institutions Punished],” *Shanghai Zhengquan Bao*, 5 September 2008. “Anti Money-Laundering Report 2007,” (Central Bank of China, 2008).

not only because the corrupt service is the main object of exchange, but also because in this phase the bribed has to interact with the formal institutions in order to fulfill his contractual obligations. The high volume and frequency of the occurrence of corrupt exchange in China's courts indicates that certain features of the current judicial system in the country enable judges to perform their duties largely unchecked. What exactly are these features? This question will be answered in Chapter 5 and 6.

Chapter 4 Understanding the initiation phase – Unveiling the “guanxi-practice”

(forthcoming in the Journal of Contemporary China vol. 20, no. 69, 2011, under the title of *‘Performing’ Bribery in China - Guanxi-Practice: Corruption with a Human Face*)

4.1. Introduction

In the autumn of 2003, five judges from three different courts in China received identical letters from Zhai Xuejun, a lawyer, who recently started to practice law in Beijing. The letter read, "I would like to have friendly cooperation with you...to share the litigation resources and the profits. You are welcome to introduce me to litigants in cases that you preside over...under the following conditions: 1) the claim of the dispute is more than 300,000yuan; 2) the litigant has not retained a lawyer or it is possible to have that lawyer replaced; 3) the litigant is likely to win the case or to have the damages claimed by the other party reduced...I will let you share 40% of the retainer as your commission fee [author's translation]." Attached to the letters was the lawyer's business card. A couple of months later Zhai was summoned by the Beijing Bureau of Justice, to which the letters had been forwarded by the judges. Not long thereafter an administrative decision was reached by the Bureau disbaring Zhai on the ground of violation of the Chinese Lawyers' Law.²³² After the event, one of the judges, who had handed in the letter, said in an interview: "When I received the letter, I found it funny at first but then felt it was over the top. I knew many people tried to engage in *guanxi*-practice with judges. But the way this lawyer did it is really exceptional."²³³ Apparently, what caught the judge's attention was not the lawyer's attempt to bribe but the "way" it was conducted. It makes one wonder: what makes Zhai's "way" "exceptional"? What is "the way" in which bribery is supposed to be conducted and what makes the so-called *guanxi*-practice special?

These are the questions that are seldom asked and addressed in scholarly literature on corruption in China. Most existing literature focus on the causal relations between corruption and the external political, economic and social environments, such as decentralization,²³⁴ marketization,²³⁵ anti-corruption design,²³⁶ judicial dependence²³⁷

²³² See "Subtle Entanglement between Judges and Lawyers," *21 Century Economic Report*, 30 Jun. 2005.

²³³ Ibid.

²³⁴ Yufan Hao, Michael Johnston, "Reform at the Crossroad: An Analysis of Chinese Corruption," (Dept. of Political Science, Colgate University, 1995).

²³⁵ Ibid. Yan Sun, *Corruption and Market in Contemporary China* (Ithaca and London: Cornell University Press, 2004). Ting Gong, "Forms and Characteristics of China's Corruption in the 1990s: Change with Continuity," *Communist and Post-communist Studies* 30, no. 3 (1997). Tak-wing Ngo, "Rent-Seeking and Economic Governance in the Structural Nexus of Corruption in China," *Crime, Law and Social Change* 49 (2008).

²³⁶ M. Manion, *Corruption by Design: Building Clean Government in Mainland China and Hong Kong* (Harvard University Press, 2004). Andrew Wedeman, "Win, Lose, or Draw? China's Quarter Century War on Corruption," *Crime, Law and Social Change* 49 (2008). F. Sapio, "Shuanggui and Extralegal Detention in China," *China information* 22, no. 1 (2008). Stephen K. Ma, "The Dual Nature of Anti-Corruption Agencies in China," *Crime, Law & Social Change* 49 (2008). Qianwei Zhu, "Reorientation and Prospect of China's Combat against Corruption," *Crime, Law and Social Change* 49 (2008).

and political privilege.²³⁸ The enabling role of corrupt participants seldom attracts academic attention. Enabling in this context means that once the motivation of corruption has been established, corruption actors can also strategically plan their conduct to overcome the legal, moral and cognitive barriers, which are supposed to obstruct corruption. In order to investigate this enabling factor, one has to look into the interacting process of corrupt exchange at the micro-level. This is exactly the point of departure of this chapter. To put it in the overall analytical framework of this thesis, this chapter deals with, in particular, the beginning of the contracting process of corrupt exchange, namely the initiation phase, which is laid out in the previous chapter. More exactly, this chapter will seek to answer the following questions: 1) how exactly does corruption, notably bribery, start between a briber and the bribed; 2) why is corruption being conducted the way it is, and in particular, what role does guanxi-practice play in the process and why?

It is necessary to point out here that the relationship between guanxi-practice and corruption has been debated for a long time, dividing China scholars. However, there seems much less argument about the significance of corruption and the salience of guanxi-practice as two separate social phenomena in China. Neither is there disagreement that the two phenomena are *somehow* connected. Differences of opinion stem from the fact that some scholars believe that guanxi-practice is “part of [the] cultural root” of corruption,²³⁹ fuelling the country’s rampant corruption;²⁴⁰ whereas others insist that guanxi-practice is distinct from corruption.²⁴¹ The latter group of scholars find guanxi-practice distinguishable from corruption since corruption is where two parties “enter into an impersonal relationship” and are “geared up to short-term immediate gain”;²⁴² while guanxi-practice instead is “geared towards the cultivation of long-term mutual trust and the strengthening of relationships”²⁴³ and hence adds “an element of

²³⁷ Hao, "Reform at the Crossroad: An Analysis of Chinese Corruption." p.19. Olivia Yu, "Corruption in China's Economic Reform: A Review of Recent Observations and Explanations," *Crime, Law & Social Change* 50 (2008). p.174.

²³⁸ Shuntian Yao, "Privilege and Corruption: The Problems of China's Socialist Market Economy," *American Journal of Economics and Sociology* 61, no. 1 (2002). Ke Li, et.al., "Institutionalized Corruption and Privilege in China's Socialist Market Economy: A General Equilibrium Analysis," *Pacific Economic Review* 10, no. 3 (2005). Xiaobo Lü, *Cadres and Corruption, the Organizational Involvement of the Chinese Communist Party* (Stanford: Stanford University Press, 2000). Hilton Root, "Corruption in China: Has It Become Systemic?," *Asian Survey* 36, no. 8 (1996).

²³⁹ Yu, "Corruption in China's Economic Reform: A Review of Recent Observations and Explanations." p.170.

²⁴⁰ Gold, "An Introduction to the Study of Guanxi." p.3.

²⁴¹ P. Steidlmeier, "Gift Giving, Bribery and Corruption: Ethical Management of Business Relationships in China," *Journal of business ethics* 20, no. 2 (1999). Alan Smart, "Gift, Bribes and Guanxi: A Reconsideration of Bourdieu's Social Capital," *Cultural Anthropology* 8, no. 3 (1993).

²⁴² Carol A.G. Jones, "Capitalism, Globalisation and Rule of Law: An Alternative Trajectory of Legal Change in China," *Social & Legal Studies* 3, no. 1 (1994). p.205. Such opinion is also most famously held by Mayfair Yang. See

²⁴³ Ibid.

humanity to otherwise cold transactions”.²⁴⁴ Following this line of argument, some scholars believe that guanxi features “a culture of civility”²⁴⁵ and functions as a “stabilizing alternative”²⁴⁶ or some kind of social glue fostering social harmony and solidarity²⁴⁷ and “complementing” the incomplete legal system²⁴⁸. This chapter, by investigating how corruption takes place, will also seek to answer the question where and how corruption and guanxi-practice connect, and hence will also endeavor to provide new insights hitherto missing in the above discussion.

Empirical data used in this chapter come from four types of sources. The first is formal and informal focused interviews of some 100 hours’ duration about unreported everyday corrupt practices. These interviews were conducted by the author during 2005-2008. The second is court documents or press release about cases involving bribe-taking, bribe-receiving or intermediating of bribery. The third source consists of numerous online diaries and essays concerning individuals’ personal experience of corrupt practices. Last but certainly not the least, this chapter also draws examples from *Celadon* (*Qingci*, in Chinese), a quasi-autobiography authored by an “insider”. This last source, the book *Celadon* needs a special introduction. The book contains the story of the rise and fall of an owner of an auction house, who obtained lucrative auction commissions from courts through “guanxi-practices”. Matching the story of the protagonist, the author Hu Gang (pen name Fushi), was convicted for bribing three judges with the sum of 490,000yuan in exchange for court auction commissions in 2003.²⁴⁹ Hu wrote *Celadon* in his cell during his one-year incarceration.²⁵⁰ After publication, the book attracted a large readership for it captured “the delicacy” between business and guanxi-practice, which is “worshiped and adeptly utilized by businessmen” in contemporary China.²⁵¹ In an attempt to verify the objectivity of the episodes this chapter drew from the book, the author enquired Hu Gang by email, to which Hu responded as follows, “...the episodes you mentioned are fictional

²⁴⁴ Gold, "An Introduction to the Study of Guanxi." p.3.

²⁴⁵ Ming-cheng M Lo, Eileen M. Otis, "Guanxi Civility: Processes, Potentials, and Contingencies," *Politics & Society* 31, no. 1 (2003). p.143.

²⁴⁶ Jones, "Capitalism, Globalisation and Rule of Law: An Alternative Trajectory of Legal Change in China." p.215.

²⁴⁷ Lo, "Guanxi Civility: Processes, Potentials, and Contingencies." Mayfair Mei-hui Yang, "The Gift Economy and State Power in China," *Comparative Studies in Society and History* 31, no. 1 (1986). ———, "The Resilience of Guanxi and Its New Deployments: A Critique of Some New Guanxi Scholarship," *The China Quarterly* 170 (2002).

²⁴⁸ P.B. Potter, "Guanxi and the P.R.C. Legal System: From Contradiction to Complementarity," in *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi*, ed. Thomas Gold, et. al. (2000). pp.194-5.

²⁴⁹ Information is obtained from the court judgment of the criminal case against one of the judges Wang Kuang. Court Judgment, Loudi People’s Procuratorate vs. Wang Kuang, 2nd instance, Criminal Division, Hunan High Court [2005] No.129.

²⁵⁰ Chenggong, "yige paimaihang laobao de mimi yu chanhui [The Secret and Confession of a Boss of an Auction House]," *nanfang zhoumo* [Southern Weekly], 28 Feb. 2007

²⁵¹ Fushi, *Qingci* [*Celadon*] (Changsha: Hunan Wenyi, 2006). Cover page.

as well as representative and objective as real life examples ... there are probably no other alternatives to obtain real life examples [with detailed information about the performance of bribery] unless you have access to interrogation records of the investigative bodies ... guanxi-practices in court litigation embody more of the hidden social codes of conduct, which most often can only be comprehended in mind but difficult to articulate”.²⁵² Just as Hu had predicted, during the course of this research the author could not find any other source of documentation, which records the intricate interactions between bribers and the bribed more meticulously than *Celadon* does. Nevertheless, the author has attempted to mitigate the limitation inherent in this source of data by employing many real-life examples to confirm the conduct described in the *Celadon*. However, reliance on examples from a quasi-autographical text to underpin some of the arguments deployed in this chapter remains its main limitation.

In this chapter, corruption is defined as the misuse of entrusted power in exchange for private benefits. Among all types of corrupt activities, the focus of this chapter is bribery, which has become the most common as well as damaging type of corruption in China in recent years.²⁵³ Through out this chapter, “bribery” is used as being synonymous with “corruption”. In order to avoid possible confusion which is likely to rise because of the equivocal nature of the term “guanxi”, this chapter uses “guanxi-practice” as an amalgamated concept representing the conduct and the process of conduct of soliciting, receiving, offering or delivering a service by one party to another, which satisfies the following conditions: 1) the service involves the exercise of entrusted power by one party, resulting in favorable treatment to the other, which also means that at least one of the parties is endowed with entrusted power, most notably, from a public entity; 2) the service is delivered either as a reciprocation to a favor previously received from the other party or as an act to generate proper reciprocation from the other party in the specified or unspecified future. “Guanxi-exchange” is occasionally used interchangeably with “guanxi-practice”. The equivalent Chinese expressions of this concept include most phrases, in which “guanxi” is used as an entity on which an agent can act upon, such as “*gao guanxi*”, “*la* (to pull) *guanxi*”, “*zou* (through) *guanxi*”, “*tuo* (to present something through) *guanxi*” or “*guanxi yunzuo* (operation of *guanxi*)” rather than a quality of relatedness, such as “*xing guanxi* (sexual relationship) or “*tongxue guanxi* (classmate relation)”.

The rest of chapter is structured in three parts. The first two parts draws the picture of how corruption at the micro-level takes place between bribers and the bribed through *guanxi-practice* and gift-giving. The third part answers the question why corruption takes

²⁵² Email communication with Fushi, 4 June 2009.

²⁵³ Guo, "Corruption in Transitional China: An Empirical Analysis." p.357.

place in the way described in the previous sections and what role *guanxi*-practice plays in the process and why.

4.2. *Guanxi*-practice in bribery - one example

If Zhai's approach to bribing was deemed too bizarrely "exceptional" to be acceptable by the judge, as shown in the story introduced at the beginning of this chapter, what, one must ask, would a supposedly acceptable approach consist of? To answer this question, one would need to have direct access to the bribery scene. This requirement would, however, constitute an insurmountable challenge to the researcher since the type of corrupt exchange investigated in this chapter is conducted in clandestine environment, which means that the only witnesses of the exchange are also participants of the exchange. The second-best solution is to rebuild the scene from the practitioners' narrative. In doing that, one needs to be careful in choosing the relevant form of material, providing the narrator maximum space for elaboration and truthful reenactment. *Celadon*, the quasi-autobiography introduced above provides us such a rare opportunity. Centered on the life of Zhang Zhongping, a successful auctioneer, the book draws a vivid portrait of how this allegorical protagonist managed his business through *guanxi*-practices with court officials. Like its author, the protagonist of *Celadon*, Zhang, runs an auction house in a provincial capital city. Zhang's business primarily comes from court commissions. The italicized text is the author's own summary of one episode from the book.

Zhang knew through his contacts that Hou is the judge directly responsible for a pending auction commission. Zhang wants to obtain Judge Hou's endorsement. But at this moment, Zhang is hardly an acquaintance of this judge. During one of his regular visits in the office of the enforcement division Zhang learned that Judge Hou had a drinking habit. Today Zhang is delivering to the judge a full case of "health-preserving" liquor featuring a mysterious aphrodisiac formula presented in fine porcelain. The liquor case is heavy and Judge Hou's apartment is on the 7th floor of a residential complex without a lift. Zhang could have had his assistant deliver the gift. However, he decided to make it personal. When Zhang finally showed up at Judge Hou's doorstep, panting and puffing, the judge was a little surprised and immediately invited Zhang in. Putting down the case, Zhang explained, "It is a gift to me from a friend who runs a liquor manufactory. I don't drink. So I want someone who would actually enjoy it to have it." Judge Hou asked: "How much does it cost?" Zhang said, "The product has not been put on the market yet. So I don't know the price. But I do know that it cost my friend millions just for the trademark and the formula." Hou said nothing. During

the visit Zhang did not mention a word about the court commission. On the same visit Zhang noticed that Hou was quite concerned about his son's calligraphic performance. After the visit, Zhang managed to persuade a famous calligraphist to agree to see the son. Soon the tutorship is arranged. Zhang paid the tuition fee without asking the judge for permission. The judge did not say much. He just patted Zhang on his shoulder.

After having made this tutor arrangement, Zhang is treated almost like a family member by Judge Hou's wife. He can pay casual visits to the judge's home without an appointment. During one such visit, Zhang asked for two pieces of calligraphic exercise of Judge Hou's son, which he put up to an artwork auction held by a company run by his former colleague. He then asked a friend to bid for the calligraphy as he instructed. A few days later, Zhang visited Judge Hou again and brought an envelope. Zhang explained it was some money he earned for Xiaoping, Judge Hou's son. The envelope contains 3,600yuan in cash. Judge Hou appeared angry and said, "Are you kidding me?" Zhang responded: "I am not kidding. It is indeed the market price of Xiaoping's calligraphy." Judge Hou said, "Tell me the truth. Are you behind this operation?" Zhang said, "How is that possible? The auction was not even hosted by my company." Zhang showed Judge Hou the auction certificate and added: "I've even deducted 10% off the income on your behalf as auction commission fee. It can stand any investigation." Zhang put the envelope on the table. Judge Hou asked no further questions.

It was only before Zhang was about to leave that Judge Hou raised the topic of the court auction. "The court would soon decide to which bidding auction house to give the auction", the judge said, "The selection procedure is not clear yet..." Then the judge revealed the name of the manager of the auction applicant. Zhang immediately proposed, "How about we go fishing together another day, you, me and Manager Yan (the auction applicant) ... There will be no agenda and no business talk. We just go out and breathe some fresh air. What do you say?" Hou said, "Boss Zhang, it is not like that I am consulting you on anything... I have never said anything about the auction ... you arrange whatever you want." Zhang said, "Of course, of course."²⁵⁴

Compared with the story introduced at the beginning of this chapter, auctioneer Zhang's career shared many common characteristics with that of lawyer Zhai. They both started their business from scratch, so to speak. Both moved to a new business and a new city.

²⁵⁴ Fushi, *Qingci [Celadon]*. Ch 8.

They both faced the same problem – a lack of clients. Their work was centered on the same institution – the courts. And they both committed the same illicit conduct – seeking to acquire businesses opportunities from judges in an unethical and unlawful manner. Their respective performance, however, is worlds apart. So are the outcomes. Firstly, lawyer Zhai offered the judge a future conditional profit-return, while Zhang provided unconditional gratuities to the judge ahead of any future arrangements. Secondly, lawyer Zhai sent a proposal for an illicit business deal via post to a group of judges, who hardly knew him personally; while Zhang deliberately avoided uttering, let alone putting down in written form, any words that might incriminate his judge. In short, lawyer Zhai took corruption as a simple and straight-forward market transaction while auctioneer Zhang embarked on a painstakingly elaborate process building trust, deploying gifts and gratuities before entering the transaction. In an interview, Hu Gang, the author of *Celadon*, revealed that he had spent half a year to build trust with a high-court judge before he was given the first court commission.²⁵⁵ In colloquial Chinese language, this strategic trust-building process is exactly what *guanxi*-practice is about.

4.3. *Guanxi*-practice and gifts

According to a survey among 100 persons, who were prosecuted for bribe-giving, 94.2% stated that they would “warm up the relationship” first before they would bribe with money.²⁵⁶ The “warm-up” always starts with the offerings of gifts or other gratuitous services for the benefit of the bribed and at the expense of the briber. Gifts foster a sense of indebtedness,²⁵⁷ as experienced *guanxi*-practitioners often say: “The thing is half done once the gift is accepted”.²⁵⁸ When an official accepts a gift, it normally means that the official is willing to repay the debt to the gift-giver in their future encounters. Gift-giving has, therefore, almost become an expert skill of experienced *guanxi*-practitioners, such as, the protagonist of *Celadon*.²⁵⁹ In analyzing this process of gift-giving, it is worthwhile to introduce the following themes.

²⁵⁵ See http://www.csonline.com.cn/news/chsh/200608/t20060806_504840.htm

²⁵⁶ According to the survey report, 85 of the 100 persons responded. The survey was conducted by Haizhu District Procuratorate in Guangdong Province in collaboration with the Clean Politics and Governance Research Center of Tsinghua University. Gufeng Huang, Rui Li, "Haizhuqu Jianchayuan Dui Xinghui Renyuan De Wenjuan Diaocha Baogao [Survey Report of Bribe-Giving Conducted by Haizhu District Procuratorate]," (2006)

²⁵⁷ Marcel Mauss, *The Gift*, trans. Ian Cunnison (New York: Norton, 1967).

²⁵⁸ This is a statement that the author heard very often during her fieldwork in China.

²⁵⁹ Popular self-help books can be easily found on how to have your gifts accepted. By searching on the online bookstore, www.dangdang.com, the key word “gift-offering (*songli*)” hits 203 results. If one puts in the words “*lingdao*(superior)” and “*songli*(gift-giving)” in the search column of www.baidu.com, suggested topics include “how to give gifts to [your] superior”, “what gifts to give to [your] superior”, “what to say when presenting a gift to [your] superior”, “skills of gift-giving to [your] superior” etc.

4.3.1. Choosing a “gift”

A good gift draws the bribed into a relationship. A poor one repels the bribed and invites rejection. Zhang’s first gift to Judge Hou, the case of liquor, is an example for a good gift. First of all, the gift is valuable. “It costs millions just for the trademark and formula”. Yet, the fact that the product has not yet been put on the market results in a sense of ambiguity in terms of its value, which can be employed as a defense for any possible future corruption investigation. Zhang’s meticulous deliberation impressed the judge, who responded in the book, “You really used your brain in choosing this gift. If people from the procuratorate ask about it, we can simply say I am helping you to conduct a pre-market customer evaluation”.²⁶⁰ Zhang’s second gift, the tutorship for Judge Hou’s son, was probably the most appreciated. It is not only because the service is of great value to the judge but also because it demonstrates Zhang’s “sincere” care for the judge’s family. Since then, the trust in the relationship between Zhang and the judge reached a high level. Zhang’s third delivery, consequently, that of the cash, is no longer perceived as threatening and disturbing.

Evidently, what constitutes a good gift varies from case to case and from time to time. What was popular as a gift in the 1960s, such as a basket of eggs or a piece of fine cloth, will now be considered contemptible inappropriate even in rural villages. Twenty years ago banqueting in VIP chambers of restaurants used to be a popular inducement on its own. Nowadays it only serves as a “get-to-know-each-other” exercise.²⁶¹ The contemporary increase of the economic value of gifts seems to be commensurate with the increase of the GDP. In recent years it is international luxury items that frequently appear in the evidence lists in corruption prosecutions.²⁶² At the time of writing, prosecutors in Chongqing City found more than 100 items of international designer’s clothes and 200 pairs of expensive shoes in the residence of a local official, who took bribes worth 1,600,000yuan.²⁶³ According to some studies, the rapid rise of consumption of luxury-products in China, being the third largest in the world,²⁶⁴ is partly attributable to the spreading of corruption.²⁶⁵

Choosing a good gift is not always easy. From a briber’s viewpoint, the first issue to be decided is how much should be spent on the gift. It should not be too expensive so as to

²⁶⁰ Fushi, *Qingci [Celadon]*. Ch.2. p18.

²⁶¹ Interview T.028.

²⁶² Just to name two examples, see the case of Wang Xuebing, former Chairman of China Construction Bank, and the case of Mu Suixin, former Mayor of Shenyang City, Liaoning Province.

²⁶³ See http://news.xinhuanet.com/legal/2008-12/16/content_10510994.htm.

²⁶⁴ It is estimated that China will consume 29% of the world’s luxury goods by 2015, making it second only to Japan. <http://seekingalpha.com/article/81603-luxury-products-in-china>.

²⁶⁵ See http://service.china.org.cn/link/wcm/Show_Text?info_id=128850&p_qry=SARS.

contain the briber's risk of economic loss in case the bribed official fails to deliver the expected service in the future. It certainly should not be too cheap to invite rejection either. A rule of thumb is that the value of the gift should be proportional to the value of the service that one has in mind requesting. Two packs of cigarettes will unlikely go down well if one desires to obtain a public procurement contract worth millions. In fields where corruption takes place regularly, bribes are taken as regular kickbacks, the rate of which is more or less commonly understood by the "insiders".²⁶⁶

Once its value has been decided, the choice of the gift becomes easier to make. After all, the best gift is the gift most appreciated by its recipient. China is no longer an economy of acute scarcity. Ordinary commodities can hardly please sophisticated officials, who already enjoy various privileges and benefits. Some bribers spend a lot of time on investigating and discovering personal preferences of targeted officials. An interviewee told me in confidence: "One has to have *some* kind of hobby".²⁶⁷ Many do. Mai Chongkai, former president of Guangdong High Court, was able to perfect his performance in golf-playing after having played on numerous golf-courses across the country, all as treats from his favor-seekers.²⁶⁸ Hao Heping, the main character in the notorious national drug-safety scandal in 2007, once accepted three golf-club membership cards with a total value of 500,000yuan from pharmaceutical manufacturers in exchange for favors in license application.²⁶⁹ During an anti-corruption campaign in 2000 in Guangdong province,²⁷⁰ the location of 70 golf courses,²⁷¹ 135 golf-club payment-cards were confiscated from officials and five officials were asked to resign from their honorary positions in various golf associations.

Mahjong, a popular gambling game in China, is also often used as a setting for bribing. For a long time, *mahjong*-playing has become a routine program of guanxi-practice after banquets. It is a service provided by almost all tea-houses, nightclubs or other entertaining establishments. While playing the game, bribers can bribe, for instance, by deliberately losing to the targeted official. Bribers call this game-playing as *yewupai* (game-for-business)²⁷², since it is not really a gambling contest if one party contrives to lose. The only problem with this approach to bribing is that the bribed could also attribute

²⁶⁶ For example, according to an internal analytical report on judicial corruption by Huang Jianliang, a journalist of The Procuratorate Daily, some "customary practice (*hanggui*)" has developed among participants of corruption in courts. For instance, the distributing ratio of profit gained from court auctions is known to be 4:3:3, which means that 40% goes to judges involved, 40% goes to the auction house and 30% is spent on expenses of running costs and the cost to "*dadian*" other officials on contingent issues. Excerpt of the report can be seen at <http://news.sohu.com/20061202/n246751848.shtml>.

²⁶⁷ Interview T.028.

²⁶⁸ See <http://www.southcn.com/news/gdnews/gdtdodayimportant/200312200081.htm>.

²⁶⁹ See <http://sports.sohu.com/20070612/n250528660.shtml>.

²⁷⁰ See http://news.xinhuanet.com/house/2004-05/25/content_1489203.htm.

²⁷¹ Ibid.

²⁷² *Celadon* has an elaborated description of the scene in Chapter 3.

his winning to his own good luck or good skill rather than to the “generous help” from the briber. To avoid this kind of “misunderstanding”, experienced bribers would organize a game for the targeted official with others and provide the official with the betting-money, instead of participating and deliberately losing. If the official wins, the briber would insist that the official keep the win as “*xinkufei*”, meaning allowance for the labor.²⁷³ “*Yingle shi nide, shule shi wode* (whatever won is yours, whatever lost is mine)”, as the briber would say. Bribing-through-gambling has become so popular that this approach to bribing was recently recognized and incorporated in the criminal law against bribery.²⁷⁴ When some officials are no longer content with the challenge of traditional *mahjong* games, they visit Macau, the closest place to mainland China, where professional casinos legally operate.²⁷⁵ One of the notorious gamblers is Ma Xiangdong, former deputy major of Shenyang City, Liaoning Province, who visited Macau 17 times in a period of two and half years. When he lost all his bets, he called in “help” from his briber. Once, when a briber once complained about the liquidity problem of his company, the deputy major, who was in charge of zoning and public construction, waived taxation worth of 12 million *yuan* for a construction project undertaken by the briber’s company. In exchange, Ma was able to “borrow” from the briber 500,000US\$, all being spent in casinos.²⁷⁶ Not surprisingly, these big-spending officials soon became the favorite clients of those casino-owners.²⁷⁷

In comparison to these gamblers, some officials are found amenable to artistic gratification. A few corporation executives once commissioned the State Orchestra to play a symphony composed by Wang Yi, former vice-chairman of the China Securities Regulatory Commission, who, “by accident”, discovered his “talent” in composing in his late 40s during a trip to the Tibet Plateau.²⁷⁸ Compared with Wang’s hobby, art collection is more popular among “artistically minded” officials, which possibly coincides with a significant boost to antique and art markets in China.²⁷⁹ A director of a local police bureau in Wenzhou City, Zhejiang Province, had collected several hundreds

²⁷³ “Former Chief-prosecutor Bribe-taking in Gambling Games and Was Sentenced for 8.5 Years”, Aug. 29, 2007. http://news.china.com/zh_cn/domestic/945/20061029/13707123_3.html. Also see the Defendant’s Statement in the public prosecution against Tian Zixiang, the Director of the Appraisal Center of Agricultural Machinery.

²⁷⁴ “Guanyu Banli Shouhui Xingshi Anjian Shiyong Falü Ruogan Wenti De Yijian [Opinions on the Prosecution and Adjudication on Cases of Bribe-Taking]”, jointly issued by the Supreme People’s Court and the Supreme Procuratorate in 2007. Art.5.

²⁷⁵ See report at <http://news.tom.com/1002/3291/2005121-1785942.html>. Also see “Chinese Officials ‘lost millions’”, BBC News, Jan., 10, 2009 at <http://news.bbc.co.uk/1/hi/world/asia-pacific/7821747.stm>

²⁷⁶ Court judgment: Nanjing City Procuratorate vs. Ma Xiangdong, Criminal Division, Nanjing Intermediate Court [2001] No.110.

²⁷⁷ See report at [http://www.chinanews.com.cn/zhonghuawenzhai/2001-04-01/new/\(12\)%201.html](http://www.chinanews.com.cn/zhonghuawenzhai/2001-04-01/new/(12)%201.html).

²⁷⁸ See the link <http://www.caijing.com.cn/2008-06-12/100069029.html>

²⁷⁹ For a brief history of the development of the art market in China since the economic reform, see http://www.china.com.cn/culture/txt/2008-11/30/content_16875708.htm.

of antique items as presents from “friends”.²⁸⁰ In a poorly monitored auction industry, pieces of art constitute a wise choice of bribe favored by some for their money-laundering function. The usual practice is that firstly the would-be bribed puts a piece of antique of little value up for auction and then the briber buys off the piece in the auction at the agreed price with the agreed terms of payment.²⁸¹ In another case discovered by prosecutors in Nanjing City, a real-estate developer bought off two paintings directly from an official, who was in charge of state confiscation of land. The appraised value of the painting was 3,000yuan, whereas the developer paid 1,000,000yuan.²⁸²

In general, gifts are preferred over pure money at the initial stage of guanxi-practice, when the trust is not yet strong. Meanwhile, a modern invention - shopping-card (*gouwuka*, basically a voucher in the shape of a plastic card with a magnetic stripe, on which information of the credit can be stored) - makes the perfect graft between money and gift.²⁸³ The State Council had issued a regulation prohibiting shopping-card issuance in 2001 but the cards are simply too popular to be banned in practice.²⁸⁴ Usually, such cards are issued by large shopping malls, which offer a wide range of product lines to satisfy diversified needs of card holders. During one of my interviews, an owner of an intermediating company excused herself in the middle of the conversation and told me she had to rush off to deliver some shopping-cards as presents of the upcoming Spring Festival to her “patrons”, who helped her in winning some public procurement biddings that her company represented.²⁸⁵ According to a local procuratorate, 92 percent of the officials prosecuted for bribe-taking in its jurisdiction in 2007 had accepted shopping-cards from bribers, among whom one had taken as many as 45 cards, worth of 110,000yuan. None of these officials had rejected a shopping-card when it was offered them.²⁸⁶ Some officials are completely at ease when receiving piles of shopping cards but feel uncomfortable with money.²⁸⁷ A 5,000yuan bribe was rejected twice by a county official in Shandong Province but was accepted when the same amount was transferred

²⁸⁰ See <http://www.zjol.com.cn/05zjc/system/2006/11/04/007969601.shtml>.

²⁸¹ See <http://finance.sina.com.cn/money/collection/yspmarket/20050413/11231513614.shtml>; also see <http://www.cnhubei.com/200502/ca691716.htm>.

²⁸² See http://news.xinhuanet.com/legal/2008-02/26/content_7670023.htm.

²⁸³ Shopping card is so popular that an online market of swapping and exchanging has been established in some cities. Just to name a few, <http://shop.nnsky.com/zhuanti/card/card.asp> (for shopping-cards issued in Nanning city); http://bj.fenlei168.com/F_MaiMai/17B457SOQOSOSOSOS0B0Z1.html (Beijing); <http://sz.ganji.com/gouwuka/> (Shenzhen).

²⁸⁴ See “Notification of the Termination of Issuance and Circulation of Shopping Vouchers” (2001), Issued by the Ministry of Economy and Trade, The People’s Bank and the *Jiufeng* Office of the State Council.

²⁸⁵ Interview M.033.

²⁸⁶ Jinzeng Lu, “Shopping-Card Induces Civil Servant Crimes (*Gouwuka Yi Youfa Zhiwu Fanzui*),” <http://www.jcrb.com/200707/ca616445.htm>.

²⁸⁷ See prosecutors’ commentary at http://news.xinhuanet.com/legal/2008-02/19/content_7627862.htm

into a shopping-card delivered by the same briber.²⁸⁸ Shopping-cards are accepted as a popular form of bribe because it provides its recipients the discretion to choose or consume the gifts at their own convenience. It is transferable and is accurate in value, which makes it much easier for both bribers and the bribed to register how much has been offered and accepted. In short, it is as good as money but without the latter's projection of venality.

4.3.2. Addressing a "gift"

After a bribe has been chosen, the next step is the delivery. It is only at that point one would realize how to address the bribe becomes "an issue". As Noonan detected, "there is no specific, unambiguous word for bribe" and "no common terms designating and denigrating the briber and the bribee".²⁸⁹ Bribers with some common sense would understand that a bribe should not be addressed as a "bribe" or explained as an "inducement" for an illicit service, since those words project dashing instrumentality of the briber and illegality to its recipient, who is the last person a briber wants to offend. As demonstrated in the story between Zhang and Judge Hou in *Celadon*, the choice of language is all important. Some words shall never be used in any circumstances. Some can be used only in relation to certain persons, with whom a trusting relationship has been established. Risk and trust are both subjective perceptions, which respond to the slightest observation of behavior. This is certainly the case in the Chinese culture, where reading between the lines is a regular communicative practice.²⁹⁰ Therefore, when a term of reference to the bribe is required, euphemism is indispensable. In all the cases investigated in this research, terms such as "bribe (*huijin*)", "bribery (*huilu*)" "bribe-giving/taking (*xinghui/shouhui*)" have never been employed by bribery practitioners for self-references. In this context, euphemism is probably the most noticeable behavioral pattern in the performance of bribery.

In the course of this research, the following common euphemisms have been found, for example, "*yanjiuqian*" (money for cigarettes and liquor), "*yidian xiaoyisi*" or "*yidian biaoshi*" (a little expression [of gratitude]) and *haochu* (benefits). Coded language is employed in circumstances, where a higher degree of discreetness is required. For example, in one scene of delivery, a briber pointed to a shopping bag and said to Tang

²⁸⁸ *supra* note 54.

²⁸⁹ John T. Noonan, *Bribes* (1984).

²⁹⁰ Bob Hodge, Kam Louie, *The Politics of Chinese Language and Culture: The Art of Reading Dragons* (London and New York: Routledge, 1998). ch.5. pp.96-119. Ambiguity of the Chinese language as a linguistic feature was discussed in the following literature: Matthew Ricci, *China in the Sixteenth Century: The Journals of Matthew Ricci 1583-1610* (New York: Random House, 1953), Hui-ching Chang, "The 'Well-Defined' Is 'Ambiguous' - Indeterminacy in Chinese Conversation," *Journal of Pragmatics* 31 (1999). Q. S. Tong, "Inventing China - the Use of Orientalist Views on the Chinese Language," *Inventions* 2, no. 1 (2000).

Jikai, former vice-president of Changsha Intermediate Court, “there is *mi* (refers to cash but literally means rice) in it”.²⁹¹ Euphemisms are also applied when bribers talk about their own act of bribery to a third party. The most frequently used phrases include “*dadian*”,²⁹² “*goudui*”,²⁹³ and most notable of all, the “*guanxi-practice*” expressions as enlisted in the introduction of this chapter. These “*guanxi-practice*” expressions include, for instance, “*zou guanxi*” (go through *guanxi*), “*tuo guanxi*” (to do something through *guanxi*), “*guanxi yunzuo*” (operation of *guanxi*), “*huodong guanxi*” (to activate *guanxi*), etc.²⁹⁴ In some public sectors, in which corruption is pervasive and bribery a common practice, euphemisms become less evasive. “*xiaoyisi* (a little expression)” is substituted by comparatively more direct terms, such as, “*haochufei* (benefit-fee)” or “*xinkufei* (fee for the labor)”, which suggest what is offered is a payment of a service.²⁹⁵

In general, we use euphemisms when we are reluctant to utter some semantically transparent terms to denote unsettling topics.²⁹⁶ In the account of bribery, nothing is more “unsettling” than the concept of corruption and any normative terms related to it. Not to rub something into the face of the bribed is the least a briber can do and the least that would be expected from him by the bribed.²⁹⁷ There is little doubt that no briber wants to present himself as offensive or threatening when he is at the mercy of the bribed.

4.3.3. Acceptance of a “gift”

Sometimes when the bribed official has difficulties to settle with a venal image, only employing euphemisms will not be sufficient for the bribe to be accepted. It is especially the case when an official is offered a bribe for the first time.²⁹⁸ Under this circumstance, further persuasion becomes necessary. According to a survey among 100 officials, who

²⁹¹ Court Judgment: Ruanling County Procuratorate vs. Tang Jikai, 2nd Instance, Huaihua Intermediate Court [2006] No.52.

²⁹² Among these expressions, *dadian* is the only one that was inherited from imperial times and still popularly applied. The term “*dadian guanxi*” hit 2,120,000 results when searched on www.baidu.com. (8 Dec., 2007). If one expands the search and include terms, such as “*shangxia* (literally means up and down) *dadian*”, “*qianhou* (literally means front and back) *dadian*”, the number of hits will be even higher.

²⁹³ The term was originally used to refer wine blending. This evolved meaning is more popularly used in the southwest China.

²⁹⁴ As a linguistic phenomenon, the semantic meaning of “*guanxi*” in these phrases has evolved beyond “a status of relatedness” and become an independent entity by itself, which the practitioners can “operate”, “activate” and “do something through”.

²⁹⁵ These terms repetitively appeared in the cases investigated in this research and can be easily located in corruption reports in the media.

²⁹⁶ Matthew S. McGlone, Jennifer A. Batchelor, "Looking out for Number One: Euphemism and Face " *Journal of Communication* 53, no. 2 (2003). p251.

²⁹⁷ Experiments also found that instead of concern for the addressee’s feelings, speakers apply euphemisms “out of concern for themselves for self-presentational purposes”. Ibid.

²⁹⁸ Gufeng Huang, Rui Li, "Haizhuqu Jianchayuan Dui Xinghui Renyuan De Wenjuan Diaocha Baogao [Survey Report of Bribe-Taking Conducted by Haizhu District Procuratorate]," (2006)

were prosecuted for bribe-taking, the most convincing persuasions are “This is what you deserve. Don’t be too humble” and “you are not giving me face if you don’t accept it”.²⁹⁹ Another common but somewhat circuitous tactic consists of setting up an imaginary straw man first and then to claim that the bribe is to cover the expense of engaging the straw man rather than the bribed to carry out the necessary corrupt acts. For example, one of my interviewees reported that she had once invited an official to dinner, to whom she had submitted an application for a residence permit. After dinner she handed the official an envelope containing cash. At first, the official declined to accept it. My interviewee insisted, saying, “Please take it. What I requested is not an easy task. This (the money in the envelope) is not for you but for you to *dadian*³⁰⁰ other officials. This is just to cover your expenses.”³⁰¹ As she expected, the envelope was then accepted.

The auction house owner Zhang in *Celadon* excelled in this art of performance. In order to avoid possible rejection of the gift or gratuity that he offered, Zhang always thoughtfully provided the judge with alternative reasons for acceptance, thereby neutralizing the venality projected by the gift. For example, during his first visit, Zhang stage-managed the scene by carrying the heavy liquor-case all the way up to the judge’s apartment on the seventh floor. When the judge saw Zhang appear at his doorstep, next to the liquor-case, heavily-breathing, the judge said, “I shall accept your kind intent...If I don’t accept your gift and insist that you carry it all the way back downstairs, you would curse me in your mind, wouldn’t you?” In this twisted discourse, it looks as though the judge had decided to accept the gift not because it was a gift which he would actually enjoy having but because he did not want to be “*bujin renqing*” (behaving without any consideration for the other party). In fact, the judge appeared to be actually doing Zhang a favor by accepting his gift.

Great resemblance is found in a similar speech of the Empress Dowager over a century ago when she accepted gifts at her extravagant 60th birthday party, which took mandarins two years to prepare. Having announced previously that she did not want anything costly in view of the hardship of foreign wars inflicted upon the country at that moment, nevertheless, the Empress decided to take the treasures sent in from all corners of the country. In her acceptance speech, she said, “The gifts were presented by officials, who want to comply with tradition. Their intent is sincere. If I don’t accept them ... it will be me being unreasonable ... I will grant them a favor and accept the gifts.”³⁰²

²⁹⁹ Ibid.

³⁰⁰ See footnote 60.

³⁰¹ Interview H.022.

³⁰² Hengjun Ren, *Rules in the Officialdom of Late Qing Dynasty [Wanqing Guanchang Guize Yanjiu]* (Haikou: Hainan, 2003), pp.125-6.

In order to reduce the venality of bribe-taking, many bribers choose to deliver the gifts at traditional holidays or other ritual occasions, including weddings and funerals in the family of the targeted official, when gifts are customarily exchanged. According to the aforementioned survey conducted by Haizhu Procuratorate among 100 bribers, 45.8% of the respondents said they would choose to bribe during the spring festival.³⁰³ Such occasions seem to have provided more legitimacy to cash-bribes, addressed as “*lijin*” (gift-money) wrapped in red envelopes (*hongbao*). When the competition for favor is intense, in order to maintain a good relationship with the targeted official, bribers feel compelled to send *hongbao* on any occasion which entails financial costs for the family of the targeted official, such as traveling, illness, moving, and opening of school-terms of the official’s children. According to the same survey among 100 bribers mentioned above, 50.2% of the respondents had chosen to bribe during the months of August and September, the time of the commencement of new school terms.³⁰⁴

For risk-conscious officials, whether to accept a bribe does not only involve an issue as to *what* is offered but also as to *who* offers it. According to the previously mentioned survey among bribe-taking officials, 80% of the respondents stated that they would choose to accept bribes selectively depending on who the bribers are. 47% chose to accept from “people who look loyal and trust-worthy”; 40% chose to accept from “people who look rich”.³⁰⁵ The weight of these “extra variables” increases as the value of the public resources that an official is entrusted to allocate increases. It is because these officials are usually “chased after” by many bribers.³⁰⁶ Hence they can afford to be “picky” and choose to exchange only with bribers, who are not only generous with “gifts” but also have “likable” disposition. It will be over-ambitious to attempt to generalize the qualities required for the “likableness”. However, in the context of bribery, a few characteristics are quite identifiable, for example, generosity, loyalty and discreetness, all as indications of whether the briber is likely to act opportunistically. This is exactly why in situations where *guanxi*-practice is called for, the participants would emphasize the importance of the quality of the personal relationship between the favor-seeker and the favor-grantor. This is also why “*guanxi*-practice” phrases are named after the word “*guanxi*”, which indicates the existence of a personal relationship. The quality of this relationship (*guanxi*) is a variable that affects the decision of the person concerned on whether he would engage in a certain exchange.

³⁰³ *Supra* note 24.

³⁰⁴ *Ibid.*

³⁰⁵ Gufeng Huang, Rui Li, "Haizhuqu Jianchayuan Dui Xinghui Renyuan De Wenjuan Diaocha Baogao [Survey Report of Bribe-Taking Conducted by Haizhu District Procuratorate]," (2006)

³⁰⁶ For example, Xu Guoyuan, former major of Chifeng City confessed that people who had bribed him were so many that it was easier for him to recollect the names of those who had not bribed him rather than those who had. See <http://china.huangjiu.com/roll/2009-08/534042.html>.

4.4. *Guanxi-practice and corruption*

Research shows that corruption in China is becoming more “intensified” and “institutionalized”;³⁰⁷ that corrupt activities are more secretive; and that they involve greater economic value and complex arrangements.³⁰⁸ Such corrupt operations are certainly not the same as a traffic officer receiving 50yuan from an offender in exchange for dropping a ticket, an operation which is simple, finishes on the spot and leaves little evidence. Judicial corruption for example can not finish with a single act; it is regulated by more complicated procedures; it involves multiple players and its completion takes a much longer period of time. Corruption becomes more risky as the problem of corruption has been moved to the top of the political agenda and anti-corruption campaigns have become more intensive. Even though the overall apprehension rate is low, officials are facing the risk of more severe punishment than in many other countries, if detected and convicted.³⁰⁹

This illicit feature of corrupt exchange entails two risks for its participants. The first is the risk of external exchange safety, which refers to detection and punishment. The second is the risk of internal exchange safety, which rises when one of the exchange parties behave opportunistically. Such risk occurs, often enough, when the performance of two parties does not take place simultaneously, which is exactly the case of the more complex type of corrupt conduct just explained above. The party who performs first bears the risk of non-performance of the other party. Compared with legal transactions, the risk of opportunism in corrupt transactions is more significant since the loss resulting from non-performance can not be redressed through legal institutions because of the illegality of the exchange.

Sentiments of moral repugnance and censure towards corruption are, presumably, not as prevalent in China as in western countries since the boundary between state and society is rather “blurred” and the concept of public interest has not yet taken root. Nevertheless, individuals are certainly more aware of public ethics today especially since the government adopted a strategy of identifying with anti-corruption dissidents in the

³⁰⁷ Andrew Wedeman, "The Intensification of Corruption in China," *The China Quarterly* 180 (2005). p.920. Guo, "Corruption in Transitional China: An Empirical Analysis." p.364. Ren, "Institutionalized Corruption: Power Overconcentration of the First-in-Command in China."

³⁰⁸ Ting Gong, "Dangerous Collusion: Corruption as a Collective Venture in Contemporary China," *Communist and Post-communist Studies* 35 (2002). Haibin Ma, "Dangqian Zhiwu Fanzui De Tedian Yuanyi He Fasheng Fazhan Qushi Jiqi Fangfan Duice [Characteristics, Causes, Trends and Counter-Measures Regarding White-Collar Crimes in Contemporary China]," in *Zhongguo Zhiwu Fanzui Yufang Diaocha Baogao [Investigative Report on Professional Crimes and Its Prevention of China]*, ed. Criminology Research Society of China (2004).

³⁰⁹ The most severe sentence of bribe-taking and embezzlement is death penalty. Chinese Criminal Law. Art.383, 385.

official political narratives as a means to “retain and even strengthen its political legitimacy”.³¹⁰ Cognitive dissonance, related to moral censure, also constitutes a barrier to the contracting process of corrupt exchange. Cognitive dissonance is the psychological experience of discomfort and unease caused by the disparity of one’s related cognitions.³¹¹ In the context of bribery, it consists of a contradiction of what one claims in public and what one does in private. For example, most people would normally feel a sense of unease taking a bribe after having delivered a public speech promising honest conduct in office.

The risk of detection and punishment, the risk of opportunistic behavior of the other exchange party, the moral costs and the cognitive dissonance constitute the main barriers, impeding the contracting process of corrupt exchange. A direct manifestation of such obstacles is the cumbersome initiating process involving the exhibition and communication of the intent to conduct corrupt exchange, a prerequisite for any transaction to take place. We tend to be blind to the significance of exhibition and communication of intent to exchange because firstly we exchange most things we need in established market-places, where the intent to exchange is evidently displayed and secondly in day-to-day non-corrupt social contexts such intent to exchange can be naturally expressed. However, in corruption, unscrupulous revelation of one’s intent to exchange something which should not be subject to exchange can be incriminating, which raises the risk of exposure and sanction. Moral awareness and cognitive dissonance will also hold potential corrupt participants back from manifesting their intent.

However, these barriers are placed asymmetrically between the bribers and the bribed. Firstly, the bribed are facing more severe legal sanction than the bribers if the corrupt activities are detected. According to the Chinese Criminal Law (1997), the offense of giving a bribe is subject to prosecution only when the value of the bribe exceeds 10,000yuan, whereas for the offense of taking a bribe the threshold is half of that amount, i.e. 5,000yuan. The highest sentence for the offense of giving a bribe is life imprisonment, while for taking a bribe it is the death penalty. Bribers are not subject to prosecution if their bribe is turned down; however, bribe-solicitation, regardless of its result, is an

³¹⁰ Carolyn L. Hsu, "Political Narratives and the Production of Legitimacy: The Case of Corruption in Post-Mao China." p.52.

³¹¹ Cognitive dissonance is “one of the most influential theories” in social psychology. The gist of this theory is that when two cognitions are relevant to one another, they are either consonant or dissonant. Two cognitions are consonant if one follows the other and they are dissonant if one implies the opposite of the other. Psychologically, people feel more comfortable when their cognitions are consonant or consistent. The theory proposes that people have a motivational drive to reduce dissonance by changing their attitudes, beliefs, behavior or by justifying or rationalizing their attitudes, beliefs or behavior. Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford, CA: Stanford University Press, 1957). Eddie Harmon-Jones, Judson Mills, "Chapter 1: An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory," in *Cognitive Dissonance: Progress on a Pivotal Theory in Social Psychology*, ed. Eddie Harmon-Jones, Judson Mills (1999).

indictable and more serious offence than passive bribe-taking.³¹² The success or failure of anti-corruption campaigns is always measured by reference to the number and the rank of the bribed officials that are convicted and punished but not by that of the bribers. Far fewer bribers than the bribed are prosecuted and punished despite the fact that each act of bribe-taking has to correspond to an act of bribe-giving.³¹³ Even when bribers are prosecuted, lighter sentences including exoneration of punishment or even withdrawal of charges are frequently offered them, if they agree to expose and to testify against the official they bribed.³¹⁴

Secondly, the moral scrutiny is stronger for the bribed than the bribers. The reason is that the public is generally more inclined to be sympathetic to and to identify with bribers, who are often perceived as victims of the predatory conduct of the officialdom in an authoritarian culture. The act of bribe-giving is more likely to gain empathy from the public and to be considered as an act induced by duress. In contrast, the bribe-taking officials are generally considered privileged, venal and greedy. Such perception is only reinforced by the governmental propaganda strategy, which tends to demonize corrupt convicts and attributes corruption to individual moral decay rather than dysfunctional institutions.

Thirdly, the bribed is expected to experience stronger cognitive dissonance compared with the bribers. Between bribers and the bribed, it is the latter that need to address their dedication to public interests and their moral excellence in public office to maintain the legitimacy of their office. Inevitably, such a moral and upright image will be debunked at the scene of corrupt exchange, which will bring about unappealing psychological experience.

Similar to the asymmetric placement of the barriers between bribers and the bribed, the bargaining powers of bribers and the bribed are unevenly distributed as well, only that this time the bribed is placed in an advantaged position. Such imbalance is primarily the result of the gap between the supply of valuable public resources controlled by a few and the demand of many for the supply of these resources.³¹⁵ In other words, there are usually more potential bribers than bribed. Hence, the bribed generally has much greater discretion in choosing his exchange parties compared to the bribers. Information asymmetry is another factor attributable to the imbalance due to the wide discretion

³¹² Chinese Criminal Law (1997). Art. 386, 383, 390.

³¹³ For example, according to The Procuratorate Daily, the numbers of persons prosecuted for bribe-taking and bribe-giving were 12:1 during Jan. 1999 - Jun. 2000 in Jiangsu Province. In Guangzhou City, the ratio was 10:1 in 2000-2001 and 6:1 in 2002. Shuming Li, "Yaobuyao Dui Xinghui 'Wangkaiyimian' [Shall We Show Leniency to Bribers?]," *The Procuratorate's Daily*, 17 Oct. 2007.

³¹⁴ Chinese Criminal Law (1997). Art.68, 390.

³¹⁵ Ren, "Institutionalized Corruption: Power Overconcentration of the First-in-Command in China."

enjoyed by officials in interpreting vague rules, regulations and inconsistent procedures prevalent in the legal and administrative system of the country. In the process of corrupt exchange this opaque state of affairs can be easily manipulated to the officials' advantages.³¹⁶

What is observed in the scenes of bribery and the process of *guanxi*-practice reflects a mutual recognition by the bribers and the bribed of the asymmetric distribution of the legal, moral and cognitive barriers and of the unequal distribution of the bargaining power between them. Pressurized by their disadvantaged bargaining position and encouraged by the lesser risk and lower possibility of legal sanction, bribers often take a proactive role in taking the initiative to communicate the corrupt intent. They are sensitive to cues and opportunities presented to them. In contrast, the bribed often choose to remain passive and responsive as an optimal strategy. However, being passive does not mean being weak. On the contrary, as this chapter has demonstrated, the bribed usually have the control of whether, at which point and to which extent he would commit himself, promise and deliver the requested service, depending on whether the exchange safety is safeguarded and whether the above mentioned legal, moral and cognitive barriers are properly dealt with.

Guanxi-practice is a trust-building process, which is designed to remove the barriers mentioned above. Regarding the legal barrier, experienced bribers carefully control the contracting process and deliberately create some time lapse between gift-giving and favor-seeking. During the corruption investigation against the deputy major of Suzhou city, who was later convicted of taking bribes worth of 100 million *yuan*, a briber confessed to the investigator that the money he gave the deputy major was a gift not attached to any specific request. The briber continued, it would be too "vulgar" if one only thought of gift-giving at the advent of a specific request.³¹⁷ By placing a chronological distance between the two acts, bribers help to loosen the causal link between bribe-giving/taking and the delivery of corrupt service, which hides the corrupt intent and at the same time generates an alternative classification of the exchange conduct as a product of an affective relationship, such as "*renqing wanglai*" (exchange of favors), rather than the materialization of the intent to abuse public power. In some regions and public sectors, officials taking cash from bribers on ritual occasions (*lijin*) has seemingly become such a normal practice that moral justification is not even called for.³¹⁸

³¹⁶ Shige Song, "Quanli Zhuanhuan De Yanchi Xiaoying: Dui Shehuizhuyi Guojia Xiang Shichang Zhuanbian Guocheng Zhong De Jingying Zaisheng Yu Xunhuan De Yizhong Jieshi [the Lapsing Effect of Power-Transfer: An Interpretation of the Elite Reproduction and Recycle in the Process of Market Transition of Socialist Countries]," *China Sociology* 4 (2005).

³¹⁷ See <http://news.sina.com.cn/c/2008-11-21/095616699381.shtml>.

³¹⁸ For example, see the policy notification issued by Anhui CCP authorities in an attempt to stop the trend of *lijin* offering and taking. http://www.ah.xinhuanet.com/xinwen/2004-01/21/content_1532929.htm

At the same time, *guanxi*-practice also solves the internal exchange safety problem for the officials. As shown in the chapter, the practice almost always starts with the favor-seekers providing gifts and other gratuities to the targeted officials, showing their commitment. The process could be lengthy and costly. The author of *Celadon* revealed that he spent 200,000 *yuan* in *guanxi*-building in the first year of his business operation.³¹⁹ Recently, an excel spreadsheet was accidentally discovered by internet users, which listed the proposed expenditure on “public relationship building (*gongguanfei*)” of a small Chinese company to bribe local officials and other stake holders in a provincial city in 2009. The total cost amounts to 1.06 million *yuan*.³²⁰ These gifts and treats serve as a “down payment”, which helps to limit the damages of possible future opportunistic behavior of the bribers for the benefit of the bribed.

Guanxi-practice also helps the bribed to overcome the moral and cognitive barriers. For example, in *Celadon*, Zhang’s premeditated acts made judge Hou’s acceptance of the liquor, the tutorship and the cash look natural rather than inappropriate. Zhang successfully replaced a context in which a gift is prohibited by prescribed formal rules with a context in which acceptance of a gift is expected, in compliance with tradition and social convention. An otherwise venal and unlawful context of bribery was transformed into one filled with sentiments of kindness, care and understanding. In the process, intent to exchange is implied and communicated through acknowledgment and endorsement of friendship, goodwill and gifts.

In this changed context, the meaning of gift is no longer that represented in the traditional gift-exchange custom. Its disguise as private inducement for illicit service is not very difficult to recognize. Firstly, such *guanxi*-practice always takes place in a principal-agent-client relationship. In other words, the gift-receiver always holds an entrusted office, mostly public office, from whom the gift-giver has obtained or expects to obtain favored treatment. Secondly, the direction of the flow of gifts is one-way traffic, namely, from the one with lower or no power and authority to the one with higher power and authority. Thirdly, the gift is no longer a “token” of friendship or affection, but bears great economic value, which far exceeds that involved in traditional gift-exchange. For example, Mu Suixin, former Mayor of Shenyang City, had accepted in two years’ time three luxury Swiss watches, one gold *shoutao* (a type of peach symbolizing longevity), 20,000 *yuan*, 60,000 HK\$ and 10,000 US\$, all presented as “gifts”, from Liu Baoyin, a corporate chief director.³²¹ Fourthly, the benefits returned to the briber is always of

³¹⁹ See http://www.csonline.com.cn/news/chsh/200608/t20060806_504840.htm

³²⁰ The spreadsheet can be found at https://spreadsheets.google.com/ccc?key=p8HQ5LYG2qBA3YU3B_gSLfA.

³²¹ Dalian City Procuratorate vs. Mu Suixin, Criminal Division, Dalian Intermediate Court [2007] No.153.

greater value than the value of the gift(s) given (otherwise, the exchange will be pointless), not at the costs of the favor-grantor but of a public collectivity – the principal.³²² For example, in the aforementioned example of Liu Maoyin, in exchange for his Swiss watches and other gifts, the favors returned to him from the mayor included the release of fifteen cars, smuggled by Liu and seized by the local police, a public procurement contract for the purchase of eight luxury cars from Liu's company and a waiver of taxation of a construction project of Liu's company.³²³

Nevertheless, *guanxi*-practice only functions on the condition that a mutual understanding of the evolved meanings of the gift-giving process is shared by the gift-givers and the gift-receivers. In this sense, *guanxi*-practice is a conspiracy between its practitioners to overcome the legal, moral and cognitive barriers by utilizing the social institutions of reciprocity and custom of gift-giving in order to facilitate the contracting process of an illicit activity. The process of gift-giving serves not only as a tacit expression of the intent to engage in corrupt-exchange but also as a demonstration of the briber's trustworthiness and commitment to the exchange relationship.

4.5. Conclusion

Coming back to the story mentioned earlier in the introduction, it is not surprising that lawyer Zhai failed to obtain endorsement of his corrupt initiative from the targeted judges by simply posting them a written proposal. Instead of seeing it as a victory of anti-corruption efforts, this chapter employs this example to present a different perspective on the understanding of corruption. As this chapter has demonstrated, failure or success of corrupt transactions is not only contingent upon the external environment but also upon the internal transactional mechanism. In this sense, lawyer Zhai failed his quest not necessarily because judges in China are not corruptible but more likely because he misunderstood how corruption was conducted. He mistook corrupt exchange for a legal market transaction and expected the targeted judges, who hardly knew him, to risk their careers by acknowledging and endorsing a corrupt conspiracy. Doing so, he skipped the trust-building process and provided insufficient commitment while manifesting his ignorance of the judges' legal and exchange safety concerns. Moreover, he failed to observe customary etiquettes and codes of conduct, which are supposed to help the judges to remove their moral and cognitive barriers to bribe-taking. His plan was poorly thought through and devoid of any understanding of how corrupt exchange operates. Lawyer Zhai's misunderstanding stems from his lack of awareness that corruption is more than bribes changing hands. The attempt to draw academic attention to this

³²² For a more comprehensive analysis of the social cost of *guanxi*-practice, see Ying Fan, "Guanxi's Consequences: Personal Gains at Social Cost," *Journal of Business Ethics* 38, no. 4 (2002).

³²³ *supra* note 89.

endogenous feature of corruption is an attempt to improve our understanding of how corruption operates and accordingly seek for more effective solutions to control it.

By investigating the interactions between bribers and the bribed in the process of initiating corrupt transactions, this chapter finds that the illegality of corruption compels its practitioners to resort to “alternative operating mechanisms” to break down the legal, moral and cognitive barriers so that the contracting process can proceed. Guanxi-practice functions exactly as this “alternative operating mechanism”. It facilitates the contracting process of an illegal transaction not only by minimizing the otherwise prohibitively high transactional costs created by the legal barrier, but also by removing the moral and cognitive constraints of the bribed. Gifts, its main prop, are used as an initial payment from the briber, to demonstrate the briber’s commitment, to close his distance to the targeted official and to set up an alternative social context, in which the exchange activities can be rationalized and re-defined. Performed with tactics and etiquettes, guanxi-practice seamlessly grafts a corrupt and legally unenforceable agreement upon a social setting, in which venality is neutralized and rationalized. In this re-defined social reality of corruption, an instrumental relationship is perceived or at least presentable as a reciprocal relationship based on social commitment.

Therefore, this chapter contends that corruption, in particular bribery, is not a “cold”, “impersonal” transaction, oriented at immediate short-term gain, but an exchange with a rather “human” interface between its practitioners, which is designed to prepare the bribed to overcome the legal, moral and cognitive barriers that will otherwise obstruct the exchange from taking place. It is rather ironic that contrary to the views advanced by some western China scholars, who attempt to distinguish gifts from bribes, and guanxi-practice from corruption, guanxi-practitioners are striving to blur these boundaries. The very existence of equivocation, excuses and camouflage, so characteristic of guanxi-practice, demonstrates a shared sense of awareness of the illegality and impropriety of the conduct. Were it not for this awareness, such a heavy-loaded masquerade would be meaningless. In fact, the very term of “guanxi-practice” is a euphemism, used to conceal the confrontation with the “unsettling topic” of corruption.

This chapter has demonstrated how the social and cultural institution of “guanxi-practice” has “smoothed” the otherwise cumbersome initiating phase of the contracting process of corrupt exchange. However, it only marks the start of the contracting process. In the next two chapters, I will explain how corrupt service is delivered by judges or court officials in the litigating process, which lies in the center of the contracting process, namely, the contractual performance phase.

**Chapter 5 The delivery phase - Part I:
decision-making as a key to understand court operation**

5.1. Introduction

As mentioned in Chapter 3, this Chapter will probe into the contractual performance of judges, namely how they manage to deliver corrupt services in courts to bribers safely. This phase lies in the center of corrupt exchange in courts not only because the corrupt service is the main object of exchange but also because it is the phase, where the corruption participants have to extend their activities beyond the dyad of the briber and the bribed and hence to face possible challenge and scrutiny from the formal institution where the act is carried out. Execution of such act, no matter whether it is about an acquittal, a dismissal of a case, an award or the enforcement of an award, is necessarily subject to the rules regulating court decision-making. Therefore, in order to understand what has facilitated the delivery of corrupt services in courts, it is important to first understand how court decisions are made. More specifically, this chapter intends to answer the following questions: 1) who has the power to make which kind of decisions in courts and how is the decision-making process regulated; 2) what are the main features of the decision-making process; and 3) how do these features affect the contracting process of corrupt exchange in terms of the contractual performance of bribed judges?

This chapter mainly introduces the main court decision-making bodies and the features of the decision-making process. The next chapter will illustrate how these features affect the delivery of corrupt services in China's courts. This chapter is divided into two sections. The first section introduces the CCP's administration of the ranking system and the general principles regarding decision-making, which are followed by all public administrations, including courts. Then the second section introduces the main decision-making bodies concerning court affairs and the main features of court decision-making. Empirical data employed in this chapter include firstly the regulations of the Chinese Communist Party (CCP or the party) governing and affecting decision-making in courts; secondly, policies and directives issued by the Supreme People's Court (SPC), including opinions, instructions and guidelines; thirdly, internal regulations of individual courts investigated; and lastly commentaries, memo, essays and reports written by judges and other legal practitioners.

5.2. CCP rules on decision-making

In order to exert complete control over the state, the CCP implanted a ranking system and certain principles of decision-making in all public institutions. To understand decision-making in China's courts, it is necessary first to understand these basic elements of the CCP rules on decision-making in general.

5.2.1. The ranking system

The ranking system is a key factor in understanding public administration in China. In general, this ranking system refers to a “unified, pyramidal, rigidly stratified national bureaucratic system”.³²⁴ It very much resembles the *nomenklatura* of the former Soviet Union,³²⁵ which refers to “a list of positions, arranged in order of seniority, including a description of the duties of each office”.³²⁶ However, bureaucratic hierarchy has a much deeper historic root in China, a country with the largest and oldest bureaucracy in the world.³²⁷ Elaborate classification of officials’ ranks and close observation of the hierarchical order is the signature of Chinese bureaucracy throughout its history.³²⁸ Since the CCP took power, this ranking system had developed into a much more mature and complex system, which maps out all executive posts in all institutions over which the CCP exercises control.

All the posts enlisted in the *nonmenklatura* are ranked at six levels. Each level has two scales: chief (*zhengzhi*) and secondary (*fuzhi*). The rank of the cadre should correspond to the rank of the post.³²⁹ The CCP has the exclusive power to administer these posts and their appointments.³³⁰ Since the number of nominated candidates usually equals the

³²⁴ Huai Yan, *Organizational Hierarchy and the Cadre Management System*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995). p.44.

³²⁵ M. Manion, "The Cadre Management System, Post-Mao China: The Appointment, Promotion, Transfer and Removal of Party and State Leaders," *China Quarterly* (1985). J.P. Burns, "Strengthening Central Ccp Control of Leadership Selection: The 1990 Nomenklatura," *The China Quarterly*, no. June (1994). Maria Edin, "State Capacity and Local Agent Control in China: Ccp Cadre Management from a Township Perspective," *China Quarterly* (2003).

³²⁶ Kjeld Erik Brødsgaard, "Institutional Reform and the Bianzhi System in China," *China Quarterly* 170 (2002). Fn.8.

³²⁷ As early as 1100-256 BC, Zhou Dynasty already boasted a number of 3,675 officials. A more mature bureaucratic management system (*junxianzhi*), characterized by a ranking system, was developed as early as Qin Dynasty (221-207BC), the first imperial dynasty in China. Qingyuan Wei, Bai Hua, *Zhongguo Guanzhishi [History of the Chinese Bureaucratic Institution]* (Shanghai: Oriental Publishing Centre, 2001). pp.10-4.

³²⁸ *Ibid.*

³²⁹ Occasionally, cadres of higher rank are assigned to a post of a lower rank in order to raise the profile of the post without changing the rank of the post. It is because the ranks of the posts of an institution are all hierarchically linked. To raise the rank of the executive post of an institution means all posts in the institution will be raised.

³³⁰ "Regulation Concerning the Recruitment and Promotion of Party and Governmental Cadres," (The CCP Central Committee, 2002). Art.2(1). For literature on the ranking system of China in the English language, see Melanie Manion, "The Cadre Management System, Post-Mao: The Appointment, Promotion, Transfer and Removal of Party and State Leaders," *The China Quarterly*, no. June (1985). Hon S. Chan, "Cadre Personnel Management in China: The Nomenklatura System, 1990-1998," *The China Quarterly* 179 (2004). Maria Edin, "State Capacity and Local Agent Control in China: Ccp Cadre Management from a Township Perspective," *The China Quarterly* 173 (2003). Lawrence R. Sullivan, "The Role of the Control Organs in the Chinese Communist Party: 1977-83," *Asia Survey* 24, no. 6 (1984). Burns, "Strengthening Central Ccp Control of Leadership Selection: The 1990 Nomenklatura." For more empirical research on the topic, see Carol Lee Hamrin, Suisheng Zhao, ed. *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995).

number of vacant posts, competition takes place mostly in the course of the nomination procedure, which is subject to few explicit rules. Competition intensifies when it concerns posts of higher ranks because of fewer vacancies of such posts. The selection and nomination is conducted by the superior party committee indicated in the job title list.³³¹ Since most candidates are similarly eligible according to the often broadly defined selection criteria, the selection is strongly influenced by the personal preferences of the individual leaders of selection bodies.³³² The pyramidal structure of the ranking system suggests that the majority of the ranked posts remain at the bottom with restrained discretion on a limited range of issues and a very few on the top with much less inhibited discretion on a much wider range of issues.

5.2.2. *General features of CCP decision-making*

Controlling the appointment and management of executive posts in public institutions helps top-level party leaders to exercise and retain complete control over the administrative machinery of the state. However, wielding this power alone would not ensure the party leaders sustained control once such appointments have been made. To solve this “defect”, the top-level party leaders developed two strategies. The first is to endow the top-level party leaders with the ultimate decision-making power regarding public affairs through a loosely regulated decision formulation process. The second is, in contrast, to discipline the relationship between the top-level party leaders as superiors and the leaders in all public institutions as subordinates, which requires the latter to unconditionally execute the decisions reached by the former. This superior-subordinate discipline is imposed upon all ranks in the ranking system. It ensures that the instruction from the very top leadership reaches the targeted posts at all levels in the chain of command and will be firmly executed.

5.2.2.1. *Formulation of decisions – the “democratic centralism”*

In this chapter, the term “formulation of decisions” refers to the process in which an opinion is formed, developed, discussed, finalized and transformed into an authoritative decree. The term is largely the same as “decision-making” but is used more so as to make contrast to “execution of decisions”, which is introduced in the next sub-section.

³³¹ "Regulation Concerning the Recruitment and Promotion of Party and Governmental Cadres." Ch.3-6. Before 1983, the Central Committee exercised directly control of the recruitment and promotion of cadres two levels down. Since the cadre management reform in 1984, the Central Committee decided to control only one rank down to increase incentives of subordinates as well as to ease the managerial burden. Also see Suisheng Zhao, *The Structure of Authority and Decision-Making: A Theoretical Framework*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995). p.238.

³³² Yan, *Organizational Hierarchy and the Cadre Management System*. p.41. Zhao, *The Structure of Authority and Decision-Making: A Theoretical Framework*. p.236-7.

Formulation of decisions in the CCP follows the principle of “democratic centralism” (*minzhu jizhong zhi*).³³³ According to the CCP Charter (2002), “democratic centralism” can be summarized as a combination of two decision-making approaches. The first is the “democratic approach”, which means that decisions on critical issues shall be decided in a “collective decision-making process” through panel deliberation. The second is the “centralistic approach”, which means that regarding other “non-critical” issues individual leaders are competent to make decisions on their own according to the division of labor among the leaders.³³⁴

In practice, two features of the decision-formulation process are most noteworthy. Firstly, as the most important public institution in the country, the CCP’s exercise of power is not constrained by the Constitution. For example, the latest Constitution (2004) does not have any rules restraining the CCP’s exercise of power but only highlights its leadership in the preface. Similarly, the role of law is only mentioned in passing in the preface of the CCP Charter.³³⁵ The CCP is not regarded as an administrative organ. For that reason, its decisions and its procedure of decision-making are not subject to administrative review either. Instead, the superior party committee, which is responsible for composing the subordinate party committees, is the arbitrator of disputes rising among the subordinate party committees or their members. The internal party discipline inspection committee is mandated to inspect individual members’ abuse of power, such as corruption, but not institutional abuse of power of the party organization.

Secondly, the party rules regulating the decision-formulation process are few in number as well as vague, open-ended and lack sanctions. For decisions formulated through the “democratic approach”, the main explicit rule contained in the CCP Charter is that the majority rules. However, the Charter does not specify what constitutes a majority. Moreover, the Charter reserves an unspecified number of exceptions to the rule of majority. For example, according to the Charter, when controversy arises concerning decisions on critical issues, voting should be suspended except in emergent circumstances.³³⁶ However, what constitutes a “critical issue”, a “controversy”, or an “emergencies” is not specified.³³⁷ Since the collective decision-making process will be

³³³ Guoguang Wu, *“Documentary Politics”: Hypotheses, Process and Case Studies*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng’s China - Perspectives from Insiders* (M.E. Sharpe, 1995). p.26.

³³⁴ CCP Charter (2002). Art.10(5).

³³⁵ In its preface, the CCP Charter states that the Party shall operate within the Constitution and the law. However, no institution or procedure is designated to check the exercise of power of the CCP. CCP Charter (2002). Preface.

³³⁶ CCP Charter (2002). Art.16.

³³⁷ For example, according to the memoir of Zhao Ziyang, former Chief Secretary of the CCP, who had been forced to step down and kept under house arrest since 1989, on the decision of the announcement of the martial law in May 1989, two of the five members of the standing committee of the Politburo voted in

invoked only for “critical issues”, it means that in daily institutional operation, each leader can apply a narrow interpretation of the “critical issues” and make decisions on a wide range of affairs through the “centralistic approach” without the need to resort to the collective decision-making process.

For decisions formulated through the “centralistic approach”, which are made by individual leaders on their own, rules are even scarcer. The exercise of the “centralistic” decision-making power is constrained more by the individual leader’s competence, which is based on the division of labor. Among all leaders, the head of the decision-making body enjoys the widest competence. The head also has a particular advantage in the collective decision-making process due to the vagueness of the rules and due to his position as the chair person of the deliberation panel. This latter function comprises authority to initiate a collective decision-making process, to decide on attendance and to preside over the deliberations. By manipulating the deliberation process, the head has the advantage to incorporate and translate his individual preference into a collective decision to enhance the legitimacy of a decision that may not be representative of the collective opinion and also to shift the responsibility in case that the decision leads to negative consequence. The challenge to the head, though, lies in its cost and inefficiency due to the extra time and resources needed for politics maneuvering in the deliberation process.

Adding to the “free environment” of the decision-making in the CCP is the fact that the election of the members of the decision-making body lacks transparency and public involvement. As mentioned in Section 1.1, the nomination of candidates to key posts in all public institutions is all subject to top-down control.³³⁸ Public involvement only takes place to a limited extent at the grass-root level.³³⁹ At the top level, the nomination procedure and practices within *zhongnaihui* (CCP Headquarter) have been closely

favor of the announcement, two against, one abstained. The “discrepancy” was clear. According to the rules, the issue should be submitted to the full panel deliberation of the Politburo. However, Deng concluded the discussion by saying that he agreed with the “majority opinion”, namely, the announcement. In the preface of the memoir, Zhao’s then secretary Bao Tong commented that maybe Deng thought the affair was not “significant” enough for the full panel deliberation or maybe the concept of “rule” did not exist in Deng’s mind. Ziyang Zhao, *Gaige Licheng [Course of Reform]* (H.K.: New Century, 2009). Preface. p.10.

³³⁸ The superior party committee nominate and appointment leaders of party institutions. For leaders of non-party governmental institutions, the official appointment is completed by the people’s congress, which endorses the nomination of the party committee. For further reference about the importance of personal loyalty as a criterion for leader selection, see, for example, Xuezhong Guo, “Dimensions of Guanxi in Chinese Elite Politics,” *The China Journal* 46, no. Jul. (2001).

³³⁹ Direct election by the public is conducted at the village level and the urban neighborhood level. Organizational Law of Village Committee (1987). Organizational Law of Urban Neighborhood Residents’ Committee (1989).

guarded. It is the most privileged information, about which outsiders can only speculate.³⁴⁰

The afore-mentioned features of “democratic centralism” suggest that this principle is not designed to promote democracy in decision-making in its real sense. The question therefore arises as to what its real function is? From the perspective of the supreme central leadership, this “democratic centralism” greatly resembles an ancient Chinese governing strategy,³⁴¹ which aims to solve a managerial dilemma. This dilemma consists of squaring the need to shift workload by delegating power from the central leadership to regional and sectional leaders with the need for the means that would enable the center leadership to monitor and supervise the latter’s exercise of power. The major obstacle to effective supervision is the classic problem of information asymmetry, which the conventional wisdom has described as “The mountain is high and the emperor is far way”. As a response to overcome this obstacle, the central leadership reserves the power not only to appoint the chief leader of every administrative region and ministry, but also a number of deputy chiefs, who answer to the chief leader but cannot be removed, demoted or transferred even by the chief leader. This institutional arrangement effectively weakens the potential threat from the leaders dispatched to take charge of far-flung resource-rich regions and influential ministries. Holding the power to select the deputy leaders, who are more or less equally placed in the collective decision-making body with the chief regional or ministerial leader, manifests a sense of distrust among the regional or ministerial leadership. The reservation of the power to appoint deputy leaders, consequently, makes coalition-building against the central leadership more difficult. The same rationale and practices are copied, repeated and executed downwards from the regional or ministerial leaders to the leaders at the prefecture level and from the prefecture to the county levels.

5.2.2.2. Execution of decisions – the party discipline

In contrast to the “soft” and accommodating rules on the decision formulation process, the rules governing execution of these decisions are termed as “discipline (*jilü*)”, and appear vigorous and rigid. According to the CCP Charter, decisions of superior party

³⁴⁰ H. Lyman Miller, "Politics inside the Ring Road: On Sources and Comparisons," in *Decision-Making in Deng's China - Perspectives from Insiders*, ed. Carol Lee Hamrin, Suisheng Zhao (M.E. Sharpe, 1995). p.229.

³⁴¹ The same as the ranking system, this practice also has a historical root. In order to prevent public administrators from outgrowing the royal power, Chinese emperors usually avoided to delegate important decision-making power to one post but, rather unnecessarily, to parallel posts (for example, having two prime ministers, or sending an eunuch to “assist” the prime minister). Such practices were devised to maintain a level of mutual constraint among these posts to the benefit of the emperor’s despotic control. Qian Lin, *Zhongguo Gudai Quanli Yu Falü [Power and Law in Ancient China]* (Beijing: CUP Press, 2004). pp.260-1. Such practices, termed as “imperial managing strategy”, had played a very important role for the despotic control over the state in ancient Chinese history. Wei, *Zhongguo Guanzhishi [History of the Chinese Bureaucratic Institution]*. p.82.

organizations must be strictly observed and “firmly executed” by subordinate party organizations.³⁴² In the earlier history of the CCP, all party members were granted the right to speak freely about party policies in meetings and publication.³⁴³ They were also entitled to criticize any member of the Party on any issue.³⁴⁴ However, since 1976 these clauses were gradually removed from the Charter.³⁴⁵ Only in the revised CCP Charter (2002), party members are “re-granted” the right to “attend” discussions of party affairs but “they shall voluntarily keep their thoughts in line with the party central committee and must not openly express any views or remarks in disagreement with the basic theory, lines, principles and experience of the Party”.³⁴⁶ The discipline is consolidated by the CCP Regulation on Punishment of Disciplinary Violation, which showed the least tolerance of conduct challenging the hegemonic position of the CCP and conduct that defies the “political disciplines” as well as the “organizational disciplines”.³⁴⁷

In practice, this party discipline results in very indirect and oblique communication between subordinates and superiors and an absence of direct argumentation in meetings, in deference to members of superior status, which hinders and discourages independent thinking and debates in the decision-making process.³⁴⁸ The discipline is further enhanced by the superior’s possession of loosely checked discretionary power in their managing of institutional affairs. Those who are reluctant to follow superiors’ instructions can be easily punished with discrimination at work and have their career development arrested. This is especially the case in the institutions where appointment to public posts is highly competitive³⁴⁹ and “following the superior(s)” is the dominating work ethos.³⁵⁰ The discipline is edified by the ritualization of the hierarchical order in daily events, in which officials are expected to attend rank rituals in every possible detail.

³⁴² For example, see CCP Charter (1945). Art.14. CCP Charter (2002). Art.15.

³⁴³ Charter (1945) (1956) Art.3(1). Party member has the right to have free and pertinent discussion on the execution of party policies in party meetings and publication. For a more detailed historical account of the development of the CCP democratic centralism, see Stephen C. Angle, “Decent Democratic Centralism,” *Political theory* 33, no. 4 (2005). pp.524-7.

³⁴⁴ Charter (1945) (1956) Art.3(4).

³⁴⁵ The first revision of the CCP Charter (1977) after the Cultural Revolution, however, showed no toleration of opposition and disagreement, let alone protection of the democratic rights of party members. Instead, it was replaced with “party members shall have the courage to fight against any speech or conduct that is not in line with Party principles” and “party members shall be loyal to the Party ... and complete the tasks instructed by the Party enthusiastically”. See CCP Charter (1977). Art.2.

³⁴⁶ CCP Charter (2002) Art.7. Bill of Rights of CCP Members (2004). Art. 12.

³⁴⁷ CCP Regulation on Punishment of Disciplinary Violation (2003). Ch.6 and 7.

³⁴⁸ Carol Lee Hamrin, Suisheng Zhao, *Introduction: Core Issues in Understanding the Decision Process*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995). xxxi

³⁴⁹ In the annual national civil servant recruitment examination, in average 78 candidates compete for one junior rank post. For posts in charge of valuable resources, the competition could be as intense as 4,584 candidates competing for one post. See <http://learning.sohu.com/20081026/n260248589.shtml>

³⁵⁰ Jiaqi Yan, *The Nature of Chinese Authoritarianism*, ed. Carol Lee Hamrin, Suisheng Zhao, *Decision-Making in Deng's China - Perspectives from Insiders* (M.E. Sharpe, 1995). p.7.

For example, when conferences convene, the order in which officials arrive, speak, and are seated is specifically arranged according to the rank order.³⁵¹ When the rank could not be further divided to manifest the power hierarchy, rules on the sequence of appearance of leaders of the same rank are specifically established and carefully observed.³⁵² Even at banquets, the seating plan follows certain rules, complying with the order of the power hierarchy.³⁵³

However, that this strict top-down control is compromised by a monitoring issue. This monitoring issue refers to the fact that, given the size and the complexity of the territory and its population, it is prohibitively costly for the top-leader to monitor the implementation of every decision that they have reached through a long chain of command at each subordinate level due to information asymmetry. Monitoring is particularly problematic when the interests of the central leadership are incompatible to that of the local. However, this does not mean that the central leadership has lost control over the state. It means, instead, that the center leadership has to prioritize objectives that are most crucial to their immediate interests and accordingly to mobilize and concentrate monitoring resources on the implementation of decisions that are made to achieve these objectives.³⁵⁴ Meanwhile, the central leadership has adopted a strategy, which is to divide the power and delegate it to a collective decision-making body, which is composed of one chief and several deputy leaders. In the decision-making body, the chief leader has superior status *vis a vis* the deputy leaders; however, the chief leader has no power to appoint, remove or transfer the deputy leaders. This strategy encourages distrust among the subordinate leaders and cancels out the individual strength of each member of the decision-making body. Hence it helps the superior leadership to constrain individual subordinate leaders from taking advantages of their direct access to resources and to prevent them from outgrowing the central power, which might lead to fragmentation and hence threaten the hegemonic position of the supreme central leadership.³⁵⁵

³⁵¹ Yan, *Organizational Hierarchy and the Cadre Management System*. p.44.

³⁵² For general remarks on this "informal politics" see <http://lateline.muzy.net/news/ll/chinese/1498633.shtml?cc=30805>, http://vip.book.sina.com.cn/book/chapter_100453_66515.html and <http://pk75329.bokee.com/viewdiary.30113366.html>

³⁵³ Apparently, the best seat is the one facing the door of the chamber, which is least disturbed by the traffic in the chamber but is provided with the direct view to oversee the traffic in the chamber. The worst are the ones closest to the door because their occupants are disturbed not only by the traffic of the guests, but also traffic of waiters, who enter and put dishes on the dining table over the shoulders of the persons who happen to sit there. Interview. L.035. During this research, the author also located a blog post illustrating this practice. See <http://wuyuhui1212.blog.163.com/blog/static/10539247420096282473886/>

³⁵⁴ Edin, "State Capacity and Local Agent Control in China: Ccp Cadre Management from a Township Perspective."

³⁵⁵ For more literature on the tension of the central-local relations and the potential threat and problem of fragmentation, see Susan Shirk, *The Political Logic of Economic Reform in China* (Berkeley: University of California Press, 1993). Kenneth G. Lieberthal, "Introduction: The "Fragmented Authoritarianism" Model and Its Limitations," in *Bureaucracy, Politics and Decision Making in Post-Mao China*, ed. K.G.

In summary, in order to retain control over the state, the CCP central leadership has developed a ranking system, which connects and subordinates the leaders of all public institutions to the supreme leadership of the CCP central decision-making body. To safeguard its monopolistic political position, the CCP central leadership also dispenses itself from any constitutional obligation by placing no constraint on its decision formulation process. To ensure that such uncontested decisions can reach down to and be fully executed at the ground level, the CCP central leadership also disciplines the hierarchical order of the ranking system, which requires subordinates to unconditionally comply with and execute instructions from their superiors. Meanwhile, a monitoring problem exists, which leaves room for non-compliance at the local levels. To solve the problem, policy/task prioritization is necessary and sharing of power among leaders is required. These conditions exist in all hierarchical relationships of public administration in the country, including the relationship between the central and local governments as well as the relationships between the CCP/government and courts and between superior and subordinate courts.

5.3. Decision-making bodies in courts

Decision-making in China's courts greatly resembles that in the CCP as introduced above. Before elaborating this resemblance, this section will firstly introduce who can make decisions on judicial affairs both inside and outside of a court.

Lieberthal, D.M. Lampton (Berkeley: University of California Press, 1992). Y. Huang, "Central-Local Relations in China During the Reform Era: The Economic and Institutional Dimensions," *World Development* 24, no. 4 (1996). Edin, "State Capacity and Local Agent Control in China: Ccp Cadre Management from a Township Perspective." Andrew C Mertha, "China's "Soft" Centralization: Shifting Tiao/Kuai Authority Relations Source," *The China Quarterly* 184, no. 1 (2005).

5.3.1. At the internal level

Chart 5.1 Internal power structure of China's courts

Following the “democratic centralism” principle, the decision-making bodies within courts all take the collegial form. These decision-making bodies are hierarchically placed, roughly classified at three levels. As shown in Chart I, the top level is the party-group, headed by the court president. According to the CCP Charter, a party-group is defined as a party organ in a non-party institution dispatched by the party committee, which share the same territorial jurisdiction (hereinafter the “territorial party committee”) as that of the court. The court president is necessarily a party member and the head of the party group.³⁵⁶ Other members of the party group include all court-level leaders (*yuanji lingdao*), mainly, a multiple number of vice-presidents, the head of office of the party discipline and inspection committee, and sometimes the director of the political department.³⁵⁷ Court-level leaders, who are not party members, are not members of the party-group but can attend party-group meetings with no right to vote.³⁵⁸ According to an internal directive of one county court, the mandate of the party-group includes “to inform and execute instructions from superior party organs; to discuss court annual agenda ... to discuss and administer activities concerning thought construction (*sixiang jianshe*), institutional construction (*zuzhi jianshe*) and attitude construction (*zuofeng jianshe*)...to decide issues concerning court recruitment, professional training, job assignment, promotion, appointment, award, resignation and lay-off; to deliberate judicial affairs and to pass court internal regulations concerning court administration, political work and human resource management; to discuss issues concerning court infrastructure construction and staff benefits and staff welfare; to discuss issues concerning applications and reports to be submitted to the superior governing bodies.”³⁵⁹

The decision-making body next under the party-group is the court adjudicative committee (*shenpan weiyuanhui*), which is also headed by the court-president. Other members are court-level leaders and division-level leaders.³⁶⁰ It means that all members of the

³⁵⁶ Infiltration of party members in non-party institutions started when the CCP was established in the 1920s. The infiltrating team was called *dangtuan* (party union) and later *dangzu* (party group). See The CCP Charter 1927, 1945 and 1956.

³⁵⁷ This research found no official documents on the constitution of the court party-group. The members indicated here are a summary based on the news reports on activities of party-group members of the SPC and the lower courts.

³⁵⁸ As a measure to promote “multi-party democracy”, non party-member judges are appointed to a limited number of deputy executive positions in some courts. According to a recent speech of vice-president of the SPC (who is not a party-member), there are a total number of 252 non party-members appointed to executive posts in courts all over the country. Among the 252, eight were appointed as vice-presidents in eight high courts. See http://www.humanrights.cn/cn/zt/qita/rqxz/wanexiang/4/t20090625_471768.htm. These court leaders can attend party-group meetings but possess no right to vote.

³⁵⁹ It is excerpted from the procedure of the party group of the Jiashan County Court of Zhejiang Province. The file can be accessed at http://www.jscourt.org/asp/news_show.asp?classid=3&nclassid=9&id=1029.

³⁶⁰ Practice varies from court to court in regard to whether a court leader, who does not perform judicial functions, shall be appointed as a member of the court adjudicative committee. In some courts, directors of political department or even logistic department are also appointed as members of the court adjudicative committee. See Ruihua Chen, “Zhenyi De Wuqu [the Holdup of Justice],” *Peking University Law*

party-group are members of the court adjudicative committee, with the occasional exclusion of non-judge members.³⁶¹ The party-group nominates the candidates for membership of the court adjudicative committee, who will be formally appointed by the people's congress upon the approval of the territorial party committee.³⁶² The main function of the adjudicative committee is to deliberate on individual cases, which are submitted by the court president and are considered "important" or "difficult".³⁶³

Next under the court adjudicative committee operates the collegial panel (*heyiting*), which is established in each court division that performs judicial functions. In lower and smaller courts, one court division only hosts one collegial panel; whereas in some higher and larger courts one division may host several panels. The collegial panel is usually composed of three members, including one head-judge, one "responsible judge", and the third member could be either a judge or a people's assessor.³⁶⁴ The constituency of the panel should be "relatively stable".³⁶⁵ Each collegial panel is chaired by the head-judge, who presides over the adjudicative procedure. Before a SPC reform launched in the late 1990s, the head-judge was nominated by the court president or the divisional director in a case-by-case manner. After the reform, head-judge becomes a permanent certified executive post, which is appointed by the court president through a qualification procedure.³⁶⁶ Once a case is assigned to a head-judge, the head-judge can nominate himself or one of the other two panelists (not the people's jury in any case) as the "responsible judge". The "responsible judge" is responsible for interacting with litigants. The responsible judge prepares and attends the court hearings, proposes a ruling and performs other tasks handed to him by the head-judge.³⁶⁷ In some courts, the responsible

Review 1, no. 2 (1998). p.384. Zheng Liu, "Lun Woguo Shenpan Weiyuanhui Zhidu De Xianshi Kunjing Ji Qi Gaijin Silu [the Significant Dilemma of the Adjudicative Committee and Considerations on Reform Measures]," *Xingshi sifa luntan [Criminal justice forum]* 1 (2008). pp.38-9.

³⁶¹ For example, in replying an inquiry from a regional people's congress, the National People's Congress instructed that a DIC representative should not be appointed as a member of the court adjudicative committee if the representative is not a judge. See

http://www.npc.gov.cn/npc/xinwen/lfgz/xwdf/2004-08/19/content_363189.htm. However, in practice, the practice may vary from court to court. For example, see Liu, "Lun Woguo Shenpan Weiyuanhui Zhidu De Xianshi Kunjing Ji Qi Gaijin Silu [the Significant Dilemma of the Adjudicative Committee and Considerations on Reform Measures]." p.39. ft.4.

³⁶² *Notification on Equipping Cadres in People's Courts and Procuratorates*.

³⁶³ Organizational Law of People's Courts. Art.11.

³⁶⁴ Organizational Law of People's Courts. Art.10. In most cases, the people's assessor has little involvement in the adjudicative process and plays a more decorative rather than substantial role in the judicial decision-making. For more information on this subject, see Liang, *The Changing Chinese Legal System, 1978-Present: Centralization of Power and Rationalization of the Legal System*. pp.146-7, 151-2, 197-9.

³⁶⁵ For example, see Working Procedure of the Collegial Panel of Wuhou District Court, Chengdu City, Sichuan Province. Art.6.

³⁶⁶ The SPC, "Measures of Appointment of Shenpanzhang in People's Courts," (2000).

³⁶⁷ For example, see the Working Procedure of the Collegial Panel of Wuhou District Court, Chengdu, Sichuan Province (available at <http://www.whfy.gov.cn/remark.asp?id=137>). Art. 8 listed sixteen obligations of the Head-judge, most of which are related with organizing meetings and decision-making.

judge can delegate some of his preparatory work to the court recorder (*shujiyuan*), if available.³⁶⁸ When a court president or divisional director sits in a collegial panel, he is automatically the head-judge.³⁶⁹

In basic courts, namely, local county courts (in rural areas) or district courts (in urban areas), cases, to which an expedited procedure (*jianyi anjian*) is applied, can be adjudicated by a single judge without a collegial panel. This expedited procedure is not typical in the cases represented here and hence not discussed in the rest of the chapter.

Art. 9 listed ten obligations of the responsible judge, all concerning examination and investigation of the case through interacting with litigants. Art. 10 listed six obligations of other panel members, which require limited involvement in the adjudication process. Similar regulations are found, for example, in the following courts: Kunming Intermediate Court (Yunnan Province), Jincheng Intermediate Court (Shanxi Province), Zhuzhong Intermediate Court (Hunan Province), Jiyuan Intermediate Court (Henan Province).

³⁶⁸ For example, see the Working Procedure of the Collegial Panel of Wuhou District Court, Chengdu, Sichuan Province, Art.13.

³⁶⁹ Ibid. For more about the reform in practice, see the memo of a symposium on this subject organized by the National Judge's School on Yuqian Bi, ed. *Sifa Shenpan Dongtai Yu Yanjiu [Research on Judicial Development]*, vol. 1 (Beijing: Law Press,2002). pp.1-19.

5.3.2. *At the External level*

Chart 5.2 External power structure of China's courts

At the external level, courts are required to operate under the “leadership” of the party. This leadership is implemented in courts through the court party-group, which is directly subordinated to the territorial party committee. As a branch dispatched by the party, the court party-group is obliged to follow party rules, including “executing party guidelines, directives and policies; discussing and making decisions on significant issues about the institution concerned; managing cadres ... completing tasks assigned by the party and the state; and supervising the work of subordinate party organs.”³⁷⁰

Other than the “territorial party committee”, courts are also subject to supervision by their superior courts on judicial affairs, which constitutes the so-called “double administration” (*shuangchong guanli*).³⁷¹ Supervision from superior courts is sometimes also called “vertical administration” (*chui zhi guanli*) because, unlike the territorial party committee, which shares the same territorial jurisdiction of the court that it monitors, the superior court enjoys a higher level of jurisdiction. Between the “double administration” of the territorial party committee and the immediate superior court, the former takes the leading role. It is mainly because the territorial party committee has the decisive power in nominating court leaders (*renquan*), while the superior court is only assisting in the process.³⁷² The former also has the jurisdiction over court financial affairs (*caiquan*) since it provides the main part of court funding, in particular, judges’ salaries.³⁷³

Nevertheless, the superior court has the jurisdiction to monitor subordinate courts on daily court affairs (*shiquan*), for instance, issuing adjudicative guidance, policies, interpretations, ruling on appeals, launching campaigns, organizing training courses and performance evaluation. Meanwhile, as the political power of the judiciary grows, the SPC is becoming a strong competitor against regional and local powers in controlling lower courts. One of the most overt attempts of the SPC to assert power is the launching of a new judicial ranking system,³⁷⁴ which excludes territorial party committees and is solely regulated by the SPC. However, this new judicial ranking system has not shown much impact since it fails to gain support from the Treasury and is not able to link it to

³⁷⁰ CCP Charter (2002) Art.46.

³⁷¹ Courts, as well as a few other specialized public institutions, are subject to the so-called “double leaderships” (*shuangchong lingdao*) of the party committee of the same territory and of the court at the superior level. For details, see *Notification on Equipping Cadres in People’s Courts and Procuratorates*.

³⁷² *Regulations on Party Groups of People’s Courts Assisting Local Party Committee to Manage Court Cadres*, Fa zu zi [1984] No.3.

³⁷³ The local government is responsible for most of the operational costs of courts as well as judges’ salaries. Since 2003 the national treasury also provides a certain amount of funding annually to courts to subsidize especially the purchase of equipments and the maintenance of court buildings. See *Notification about Special Central Subsidy to Political and Legal Institutions*. Ministry of Finance [2003]. No.69. The document can be accessed at <http://www.fc110.gov.cn/zcfg/bwfg/200909/45878.html>.

³⁷⁴ *The Preliminary Regulation on Judges’ Ranks*.

judges' salary, benefits and other welfare items as much as the ranking system controlled by the territorial party committees does.³⁷⁵

Apart from the territorial party committee and the superior court, some other public institutions can also exert influence over court decision-making by sending instructions to court leaders. These institutions include, for example, the government, the people's congress and the police, as shown in Chart II. Among these institutions, only the people's congress has formal authority to monitor court affairs.³⁷⁶ Governmental institutions, instead, are prohibited from interfering in judicial affairs, according to the Constitution.³⁷⁷ However, when leaders of these governmental institutions send instructions to court leaders, their authority is not necessarily based upon their governmental offices, but on their positions in the territorial party committee. Under the current practice, the head of the government is necessarily a member of the leadership of the territorial party committee. So is the head of the police.³⁷⁸ When court leaders take instructions from these leaders, who hold two positions, one in the party and the another in the government, it is practically difficult as well as unnecessary to check or distinguish the source of the authority of the instructions concerned.

5.4. Features of decision-making in courts

The features which characterize CCP decision-making as introduced in Section 1 also characterize decision-making in China's courts. The decisions discussed here in this section include all decisions reached by judges on behalf of the courts in the entire course of litigation, including decisions related to case-registration, the adjudication and the enforcement of court awards in case of non-voluntary performance.

5.4.1. Formulation of decisions – the “democratic centralism”

Following the principle of “democratic centralism”, all court cases, except those adjudicated under the expedited procedure, are heard and deliberated by a collegial decision-making body, namely the collegial panel or the court adjudicative committee as

³⁷⁵ See the speech of vice-president of the SPC, Li Guoguang, at the National Conference on Implementing Regulation on Judges' Ranks.

³⁷⁶ For literature on this subject in the English language, see Randall Peerenboom, "Judicial Accountability and Judicial Independence: An Empirical Study of Individual Case Supervision," *SSRN eLibrary* (2008). For a collected volume on the same subject in the Chinese language, see Zhiping Liang, ed. *Ge'an Jiandu Yu Sifa Gongzheng [Individual Case Supervision and Judicial Fairness]*, vol. 2, Hongfan Pinglun [Hongfan Review] (2005).

³⁷⁷ Chinese Constitution (2009). Art.126.

³⁷⁸ Recent practices show that the head of the police is also often granted an executive position (*changwei*) in the party committee to take in charge of political-legal affairs. Zhu, ed. *Zhongguo Falü Fazhan Baogao (1979-2004) [China Legal Development Report (1979-2004)]*, p.180.

introduced in Section 5.3.³⁷⁹ Adjudication in these collective decision-making bodies represents the “democratic approach” of court decision-formulation. As mentioned above in Section 5.2.2, court rules regulating this process are lax, giving the court president, who normally also chairs the deliberation panel, a particular advantage in the formulation process. The court adjudicative committee decides by majority ruling. However, members of the court adjudicative committee have unequal voting power despite that the rules suggest otherwise. According to the SPC guidelines as well as the internal procedural rules of individual courts studied in this research, the court president can suspend the voting based on the magnitude of “controversy”.³⁸⁰ What constitutes “a high magnitude of controversy” is not specified. In addition, the court president, as the chair of the decision-making body, can decide when to commence a deliberation, who should attend the deliberation, how to summarize the deliberation and when to call for a vote.³⁸¹ Through manipulating these procedural rules, the court president can rather easily induce consent of committee members, who owe their appointments to the court president.

Similar rules apply in the deliberation of the collegial panel. The deliberation follows the rule of majority. However, if the head-judge finds himself in the minority, he has the opportunity to request the panel to re-deliberate and re-vote.³⁸² If the head-judge is still not satisfied with the result of the re-deliberation, he can present the case to his superior, the divisional director, for review. In practice, if a head-judge has a significant interest in a particular case, he has many ways to secure the majority’s support in a panel, which normally consists of only three members.³⁸³ For example, the head-judge can set the tone at the beginning of the deliberation, which makes any dissenting opinion appear as a

³⁷⁹ Article 10 of the Organizational Law of the People’s Courts states that cases will be adjudicated by courts in a collegial manner. According to the same law, the court adjudicative committee, as the higher decision-making body on adjudicative affairs, operates under the “democratic centralism” principle.

³⁸⁰ For example, see Art.24 of the working procedures of the court adjudicative committee of Jincheng Intermediate Court (Shanxi Province), Art.34 of the procedure of Naxi District Court of Lu Zhou City (Sichuan), Art.10 of Kunming Intermediate Court and Art.26 Wenshanzhou Intermediate Court.

³⁸¹ For example, see Art.13, 14, 17, 21, 24 of the Working Procedure of the Court Adjudicative Committee (2007) of Jincheng Intermediate Court, Shanxi Province; Art.30, 33, 34(4), 36(4), 37, 38, 39 of the Working Procedure of the Court Adjudicative Committee of Guangdong High Court (2008); Art. 2(1), (2), (7), (9), 3 (1), 4(2) of the Working Procedure of the Court Adjudicative Committee of Luohu District Court, Shenzhen City, Guangdong Province. Also see Chen, “Zhenyi De Wuqu [the Holdup of Justice].” p.403.

³⁸² For example, see the procedures on the court adjudicative committee in Jincheng Intermediate Court, Shanxi Province (Art.24), Guangdong High Court (Art.38), Naxi District Court of Luzhou, Sichuan Province (Art.9), Kunming Intermediate Court, Yunan Province (Art.34). Also see the procedures on the collegial panel in Wuhou District Court, Chengdu, Sichuan Province (Art.16,24), 2nd Civil Division of Yunan High Court (Art.47), Zhejiang High Court (Art.18), Kunming Intermediate Court, Yunan Province (Art.16).

³⁸³ By law, the collegial panel shall consist 3-7 judges (including people’s jury) in criminal cases and any odd number in civil cases. Criminal Procedural Law. Art.147, 202. Civil Procedural Law. Art.40. In practice, this research has not come across a single case, of which the collegial panel is consisted of more than 3 judges. It means as long as one judge concurs the opinion of the head-judge, that opinion will prevail as the majority opinion. The practice was also confirmed in an interview conducted by the author with a high court judge. Interview. Z.019.

challenge of the head-judge's authority. The head-judge can summarize the contested issues and the "majority opinion" in a manner which is close to his opinion, and adopt the decision accordingly. The head-judge can also replace a non-cooperative fellow judge with a "cooperative" people's assessor as a panelist.³⁸⁴ Some judges openly complain that such practices make "deliberation" akin to a ritual rather than a procedure to foster genuine debate and discussion.³⁸⁵ For this reason, the SPC stipulates that during the collegial panel deliberation the responsible judge shall speak first and the head-judge last in order to mitigate the "following" pressure.³⁸⁶ However, in practice, if the outcome of a case is vital to a head-judge, the head-judge can allocate himself to the role of responsible judge. In this way, the head-judge can deliver the first speech not as the head-judge but as the responsible judge.³⁸⁷ When dissenting opinions emerge, the head-judge has the authority to decide whether the disagreement is "serious" (*zhongda fenqi*) and consequently decide whether to submit the case to superior court leaders for examination and arbitration.³⁸⁸

The "centralistic approach" of decision-making is represented by the so-called "*pian zhidu*" (the approval system), which was not written down in the Organizational Law of the People's Court but has a far more significant influence upon court administration.³⁸⁹

³⁸⁴ Currently, there are few rules regulating the appointment of people's assessors as panelists in the collegial panels. In rural courts, the practices are so flexible and informal that sometimes judges, who were in a rush, would simply find whoever available around the court room to fill the bench. Interview. W020.

³⁸⁵ A judge Xuan Yi elaborated on the "collegial panel in reality" in his LLM dissertation. According to Xuan, only the responsible judge is involved in the court hearings. The other two panel members are more like "escorts". During the hearings, some of them read files of other cases which they are responsible of, or read books or newspapers. Sometimes, the "escort" judges excuse themselves immediately after the opening session of the court hearing. Yi Xuan, "Woguo Faguan Duli Shenpan Linian Xianzhuang Ji Duice Tanxi [on the Concept, Present Conditions and Countermeasures of the Judge's Independent Trial in Our County]" (East University of Political Science and Law, 2006). pp.22-3. Evidence of such practices can be easily found in the Chinese language sources. In English language literature, similar practices were also documented in Liang, *The Changing Chinese Legal System, 1978-Present: Centralization of Power and Rationalization of the Legal System*. pp.159-60. Evidence of similar practices can also be found in the following online posts from judges: Songping Tan, Xiaochun Li, "Several Issues About Collective Adjudication," <http://www.chinacourt.org/public/detail.php?id=161447>. Guofeng Zhang, "Shenpan Heyizhi Yunzuo De Jige Wentu [a Few Issues on the Operation of the Collegial Panel in the Process of Adjudication]," *zhongguo Fayuan Wang [People's Courts Network]* (2004). Chengxiang Wu, "Analysis of the Current Operation of the Adjudicative Panel," Chongqing 1st Intermediate Court, <http://www.cqcourt.gov.cn/Information/InformationDisplay.asp?newsid=44996>. For a rationalizing interpretation of this practice, see Suli, "The Adjudicative Function and Administrative Management of Courts," *Zhongwai Faxue*, no. 65 (1999). p.43.

³⁸⁶ The SPC, "Measures on the Working Procedure of the Collegial Panel in People's Courts," (2002). Art.10.

³⁸⁷ Tan, "Several Issues About Collective Adjudication." Zhang, "Shenpan Heyizhi Yunzuo De Jige Wentu [a Few Issues on the Operation of the Collegial Panel in the Process of Adjudication]."

³⁸⁸ SPC, "Measures on the Working Procedure of the Collegial Panel in People's Courts." Art. 12.

³⁸⁹ Weiping Zhang, "Improvement of the Operational System of People's Courts," *Research in Law and Commerce* 77 (2000). p.4. For a more comprehensive empirical study on this subject, see Shuping Luo, "Shenpan Weiyuanhui "Shenpi Anjian" Zhidu Ying Yu Quxiao [the Practice of Adjudication by Seeking

The *pi'an zhidu* refers to a series of rules regulating the issuance of official court documents, which grant individual court leaders the decision-making power on certain court affairs by examining and approving drafts of court documents before issuance.³⁹⁰ This “centralistic” *pi'an zhidu* encompasses the “democratic approach” of court decision-making. For example, when a rank and file judge intends to submit a case to the court adjudicative committee, it has to be approved by the head-judge, divisional director and the court president.³⁹¹ The “centralistic approach” covers virtually all court affairs. According to Article 105 of the Chinese Civil Procedural Law, interim court decisions on requests for disqualification, extension of the time constraint of legal proceedings, the issuance of court orders on fines, permission to summon a litigant to court by force, and on court orders imposing custody, are all to be signed by the court president. In some courts, court orders to freeze litigants’ bank account, court warrant, the waiver or reduction of litigation fees as well as “any other document that the court president sees necessary” are all subject to the approval and endorsement by the court president.³⁹² Vice-presidents are also entitled to examine and approve certain court documents, but within a comparatively narrower range.³⁹³ Such authority is granted to individual court leaders, not the court adjudicative committee. It means that by controlling the processing of court documents, individual court leaders can influence the decision-making without going through a group deliberation in the court adjudicative committee.

Similar prerogatives are reserved for divisional directors, who can frustrate a collegial panel’s decision from being translated into a court decision by refusing to endorse it.³⁹⁴ The same applies in relations between the head-judge and other panelists in the collegial panel. In practice, when unanimous decision is not reached, the head-judge will firstly decide whether the decision is “seriously controversial” and whether it should be

Approval from the Adjudicative Committee Should Be Abandoned],” *sifa gaige lunping [Judicial Reform Review]* 3 (2002).

³⁹⁰ The SPC, Procedures on the Issuance of Official Documents in People’s Courts (1996). Ch. 6. For more literature on this topic, see Zhang, “Improvement of the Operational System of People’s Courts.” p.6. Luo, “Shenpan Weiyuanhui “Shenpi Anjian” Zhidu Ying Yu Quxiao [the Practice of Adjudication by Seeking Approval from the Adjudicative Committee Should Be Abandoned].”

³⁹¹ The Criminal Procedural Law as well as internal procedural rules in all the courts investigated in this research all includes a reservation clause, which grant the court president and/or the deputy vice-president the authority to instruct lower decision-making bodies to submit a particular case to the court adjudicative committee for deliberation as long as he considers necessary. For example, see the Procedures of Adjudicative Committee of Helan County Court, Ningxia Hui Autonomous Region. Art.6. The document is available at <http://www.nxhlfy.gov.cn/23/2008-12-8/7843001@369.htm>. Procedures of Adjudicative Committee of Luohu District Court, Shenzhen, Guangdong Province. Art.1(3)4. Procedures of Adjudicative Committee of Kunming Intermediate Court, Yunnan Province. Art.14(9), 15(5), 16(4), 17(6), 18(4). For similar discussions, see also Chen, “Zhenyi De Wuqu [the Holdup of Justice].” pp.385-6.

³⁹² See the Preliminary Regulation on the Issuance of Court Documents of Jiashan County Court (2007). Art. 1. Available at http://www.jscourt.org/asp/news_show.asp?id=2027

³⁹³ Ibid.

³⁹⁴ Zhang, “Shenpan Heyizhi Yunzuo De Jige Wenti [a Few Issues on the Operation of the Collegial Panel in the Process of Adjudication].”

presented to the divisional director. The divisional director will then examine the decision and decide whether the case shall be presented to the court president or vice-president in charge, who will then decide whether or not the case should be submitted to the court adjudicative committee for deliberation.³⁹⁵ Compared to the collective decision-making, the exercise of this “centralistic” decision-making power is even more difficult to check. For example, when a court president silently disapproves a collegial panel’s decision simply by inaction, namely by either not endorsing it or not submitting it to the court adjudicative committee for deliberation, the court internal regulations provide no formal solution for the collegial panel to solve the impasse.³⁹⁶ To guarantee decisions that are reached through such a non-democratic approach will be fully implemented at the lower levels, a strict “following discipline” is imposed to regulate the superior-subordinate relationship to ensure full execution of decisions that are reached in the top. This “following discipline” features both the relation between court leaders and their party superiors and the relation between court leaders and their court subordinates.

5.4.2. Execution of decisions – the “following discipline”

First of all, the absolute majority of members of the court party-group, the top court decision-making body, are party members.³⁹⁷ They are automatically subject to the CCP disciplinary rules, including following superiors’ instructions. The most “superior” superior of the judiciary is the CCP central leadership. In a recent speech in the National Political and Legal Conference, the serving PRC President Hu Jintao said, “Political and legal work has to ... serve the party and state agenda. To maintain the party as the ruling party ... is the primary political task of the political and legal institutions.”³⁹⁸ In that speech, Hu also required judges to uphold firstly the “supremacy of the party’s mandate”, secondly the “supremacy of the people’s interests” and lastly the “supremacy of the constitution and laws”.³⁹⁹ Soon after the speech, a political campaign labeled “the three supremacies” (*sange zhishang*) was launched by the SPC and carried out in all courts through out the country. In a national political study course for judges above the rank of

³⁹⁵ For example, Art. 3(2) of the Working Procedure of the Court Adjudicative Committee of Luohu District Court, Shenzhen, Guangdong Province states that before a case can be submitted to the court adjudicative committee, the responsible judge shall fill a form and have it examined and approved by each court leader till the court president or the vice-president in charge. For more description of the practice, see Luo, “Shenpan Weiyuanhui “Shenpi Anjian” Zhidu Ying Yu Quxiao [the Practice of Adjudication by Seeking Approval from the Adjudicative Committee Should Be Abandoned].” p.57. Guohong Lan, “Reconstructing Internal Court Management System [Fayuan Neibu Guanli Tizhi Zhi Chonggou],” *Fengtai Court Net* (2009).

³⁹⁶ The SPC guideline only indicates that dissenting judges in the collegial panel can apply for a review once regarding the decisions of the court adjudicative panel but not to the individual acts of the court president.

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³⁹⁸ See http://www.rmzxb.com.cn/szyw/t20071226_171754.htm.

³⁹⁹ Ibid.

president of high court, the SPC president Wang Shengjun reiterated that “courts must submit to the party’s leadership... The party’s leadership can only be strengthened and can not be doubted, loosened, weakened and especially can not be taken simply as a figurehead.”⁴⁰⁰

In fact, the “three supremacies” campaign directly attacks the growing demand for judicial independence from reform-minded judges and academic lawyers. In pledging to follow the “three supremacies”, Tang Jianfu, president of Junxian County Court (Henan Province), wrote that the demand for judicial independence had led to some troublesome judicial practices, for example, emphasizing judges’ passive and impartial role in the adjudicative process. Tang condemned such practices since he considered that regarding “law as the only supremacy” had tainted the “dignity of the rule of law” and destroyed “the good image of people’s courts and judges”.⁴⁰¹

Political campaigns such as that of the “three supremacies” are by no means new in the courts of contemporary China. Just before President Hu took office, a series of political campaigns initiated by the former PRC President Jiang Zemin entitled respectively “three- representative” (*sange daibiao*) and “three-emphasis education” (*sanjiang jiaoyu*) had dominated the political activities in courts for several years.⁴⁰² Contrary to the apparently hollow ideology-filled political slogans, discourses and study meetings that feature in these campaigns, a rather concrete objective is pursued by the campaign initiators. This objective is to raise the general awareness of the ultimate power of the party leaders and to strengthen the discipline of unconditional compliance in superior-subordinate relationships.⁴⁰³ It means that the following discipline applies not only to the hierarchy between court top leaders and their party superiors but also to the hierarchy within courts from court top leaders down to the rank-and-file judges. After having achieved that objective, instructions from the central leadership of the CCP can

⁴⁰⁰ See an excerpt of Wang Shengjun’s speech posted on the website of Tai’an Intermediate Court at <http://www.tacourt.gov.cn/html/dtljh/2009-6/dtljh18599694.shtml>.

⁴⁰¹ See <http://hnfy.chinacourt.org/public/detail.php?id=74056>.

⁴⁰² Information about these political campaigns can be easily accessed on the internet by searching the keywords “*sanjiang jiaoyu*” or “*sange daibiao*”.

⁴⁰³ This “hidden” objective is well understood by people who had been exposed to Chinese political campaigns. In the bulletin board of the chinacourt.org website, a bulletin visitor posted a question, “Now judges are required to emphasize politics. Forgive me if I am slow on this, is strictly complying with law not to emphasize politics? What is to emphasize politics?”. More than ten visitors answered to the post. One said, “[to emphasize politics] means to rule the case according to how you are instructed to rule by your superiors”. Another said, “... to be explicit, to emphasize politics means to follow your superior. Do what your superior has said.” Other visitors provided similar comments. For details, see <http://bbs.chinacourt.org/index.php?showtopic=294090>. Similar remarks can also be found, for example, in the following blog posts http://blog.sina.com.cn/s/blog_5a3baaa00100alg5.html and http://blog.sina.com.cn/s/blog_48b8489b0100021x.html.

reach courts at all levels with a minimum of friction or resistance through the chain of command mapped out by the power hierarchy inherent in the ranking system.

Under the principle of the “three supremacies”, problems will not arise when the interests of the party or court leaders are aligned with public interests and the outcome of the application of law. However, when the interests of the party collide with law and public interests, asserting the “party’s supremacy” will contradict certain constitutional principles, which are formally supported by the party.⁴⁰⁴ This contradiction is most conspicuous in the so-called “political” and “sensitive” cases, involving the vindication of citizens’ constitutional rights and thereby confrontation with the arbitrary use of power. In order to cover this contradiction and to avoid such confrontation in litigation, courts have no choice but to disregard the law, mainly by violating procedural rules and/or rendering arbitrary court decisions devoid of rational legal argument since rational legal thinking would inevitably impede the realization and consolidation of the political interests of the party. Inevitably, such an approach hinders the development of rational legal thinking and weakens its role in the judicial decision-making process. As will be elaborated later in the next chapter, it is this institutional design on decision-making in courts that greatly affects the delivery of corrupt services in the adjudicative process despite the fact that the CCP’s political interests are involved in only a minor fraction of all court cases.

Instructions made in an arbitrary fashion are replicated in the court decision-making process. When a court president, vice-president or divisional director makes a decision on a case either through the collective decision-making process or the “centralistic” *pi’an zhidu*, the decision is made through simple instructions without reasoning.⁴⁰⁵ The instruction has to be faithfully executed by the responsible judge in the adjudication and the court ruling. The leaders, who made the instruction, do not write the legal opinion nor do their names appear on the court ruling.⁴⁰⁶ If the subordinate judge fails to observe the

⁴⁰⁴ What happened in a recent interview between a journalist and the director of the Zhengzhou Municipality Zoning and Construction Bureau is an example, in which the party’s self-purported claim as the embodiment and the “representative” of “the people’s interests” was debunked. In the interview, the journalist questioned the bureau director why the bureau permitted some real estate developer to turn a piece of land, which was allocated to develop residential complex for low-income citizens, into the construction of up-market luxury residences. The bureau director responded with a question to the journalist, “Do you speak for the party or for the people?” The question implies and consequently exposes an informally shared understanding of the dichotomy between the party’s interests to the people’s interests. The story has raised great attention from and discussion among citizens on the internet. For detailed report of the story, see Zhengzhou zoning bureau <http://news.163.com/09/0617/09/5C0HSV0S0001124J.html>. Another dialogue between a journalist and an official of the Pet Management Office of Zhengzhou City had generated similar effect. For details see <http://news.sina.com.cn/c/2009-11-06/153418991902.shtml>

⁴⁰⁵ Suli, “The Adjudicative Function and Administrative Management of Courts.” p.41.

⁴⁰⁶ “The Reply on the Issue Concerning the Signature of Court President on Court Judgment,” ed. SPC (1969). Haiying Huang, “Jitifuzezhi Shibi Zouyi [Remarks on The “Collective Responsibility”],” *Renmin sifa [People’s Adjudication]*, no. 2 (1988). p.68.

law and/or the rational legal reasoning in order to execute the instruction, he will be normally exonerated, since he is not the judge who made the decision.⁴⁰⁷

For a court leader, the decision whether to exert influence through direct instruction or through a consent-seeking process in the collegial decision-making body is based on a trade-off. The advantage of influencing a court decision through direct instruction stems from its efficiency while the disadvantage is that it exposes the court leader and makes it difficult for the court leader to avoid responsibility for the act if it is called for. As to the approach of influencing a court decision through a consent-seeking process, its disadvantage is its inefficiency because it demands time and other resources to mobilize and maneuver so as to induce consent. Its advantage is that it helps the court leader to avoid responsibility. As mentioned in the previous sub-section, a subordinate will not be held responsible for executing a wrong decision. At the same time, if the wrong decision is reached through a collective decision-making process, the responsibility will fall on the collective decision-making body, which means that in practice no individual will be held accountable.⁴⁰⁸ For example, according to an internal regulation of the Zhejiang High Court, if a case is considered a “wrong case” and the ruling is based on the instruction of the court adjudicative committee, the judges of the collegial panel, who made the ruling, will not be held responsible, unless the collegial panel has misrepresented the facts and accordingly misled the court adjudicative committee. The regulation is silent on the issues of responsibility and sanctions for misconduct in such circumstances.⁴⁰⁹ The same is found in the regulation of the Changsha Intermediate Court.⁴¹⁰ Such decision-making environment has substantially hindered the development of the rational legal thinking and the establishment of the rule of law. It has also inevitably reduced the predictability and stability of law and weakens the public trust placed in the legal system in general.

In open court regulations, the “following discipline” is not manifested in a manner as straightforward as it is in party organizations. In courts, only regulations on the decision-making process of the court adjudicative committees have laid down explicitly that decisions reached by the adjudicative committee must be implemented by the collegial panel.⁴¹¹ However, the “following” pressure is imposed upon rank and file judges through other indirect means. For example, in recent years, courts have introduced

⁴⁰⁷ For example, see the Regulation on Evaluation of Adjudicative Performances of Zhejiang High Court, Art.14. also the Regulation on Evaluation of Adjudicative Performances of Changsha Intermediate Court (Hunan Province), Art.25.

⁴⁰⁸ The following literature was all written by judges based on their working experience. Luo, "Shenpan Weiyuanhui "Shenpi Anjian" Zhidu Ying Yu Quxiao [the Practice of Adjudication by Seeking Approval from the Adjudicative Committee Should Be Abandoned]." Huang, "Jitifuzezhi Shibi Zouyi [Remarks on The "Collective Responsibility"]." Wu, "Analysis of the Current Operation of the Adjudicative Panel."

⁴⁰⁹ Rules on Case Evaluation and Examination, Zhejiang High Court [2008]. Art.14.

⁴¹⁰ Rules on Case Evaluation and Examination, Changsha Intermediate Court [2005]. No. 51. Art.25

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a series of measures to allow court leaders to supervise and evaluate the work performance of subordinate judges.⁴¹² Such evaluation is then treated as the basis for promotion, demotion, award and punishment. With their career and even livelihood held in the hands of their superiors,⁴¹³ the rank and file judges do not only follow but also are encouraged to apply law “creatively” to please their superiors.⁴¹⁴ Understandably, in such an environment, rational legal thinking, which is essential to the rule of law, is difficult to take root.

5.5. Conclusion

This chapter has demonstrated that under the guidance of an instrumental view of law and courts, courts are incorporated in a party-state bureaucratic structure, which is designed to serve, channel and execute the political agendas of the party through court affairs by activating a chain of command disciplined to follow instructions. Simultaneously, courts have also inherited two of the most significant features of decision-making from the CCP, namely a loosely supervised procedure about the formulation of decisions and a strictly disciplined procedure of the execution of such decisions. This political arrangement is detrimental to law and justice not because how it places the party’s interests before law but because how court decision-making has been designed and institutionally regulated to achieve that end. Such an institutional design of court decision-making is damaging since once it is established, it can be abused not only for the political interests of the party but also for the corrupt interests of individuals, who are entrusted with decision-making power at any level of the hierarchy. This will be elaborated in the next chapter.

⁴¹² In some court, the collegial panel will not only have to follow the decision of the court adjudicative committee, the panel and the panel members will also be appraised of their performance by the court adjudicative committee in each case that is submitted to the court adjudicative committee. For example, see Chapter 5 of the Working Procedure of the Court Adjudicative Committee (2007) issued by Jincheng Intermediate Court, Shanxi Province. Available at <http://jcfy.jconline.cn/3/2007-9-5/10001@19.htm>

⁴¹³ An example can be found in the case of Mai Chongkai, former president of Guangdong High Court. Mai had reportedly arrested the career advancement of a court official simply because the court-subsidized flat allocated to Mai by the official’s department was not to Mai’s full content. Renzhou Liu, "Jujiao Mai Chongkai Chenglun De Guiji [Zooming in the Falling Trajectory of Mai Chongkai]," *Jiancha fengyun [Procuratorial Review]*, no. 3 (2004). Also Available at http://www.uibe.edu.cn/upload/up_jcsjc/alfx/alfx_07032002.html.

⁴¹⁴ Interview C011.

**Chapter 6 The delivery phase - Part II: the relation
between decision-making and corruption in courts**

6.1. Introduction

For a judge with corrupt intent, success of the corrupt activity largely depends on whether he can deliver the promised corrupt service without exposing such corrupt act. The capacity to deliver includes the capability to translate and transform an individual decision, supposedly fulfilling one's corrupt interest, into a court decision in accordance to the law. Chapter 5 has illustrated how the decision-making power is exercised and regulated in China's courts. This chapter will show that the features described in Chapter 5 regarding court decision-making have provided the most nurturing environment for the delivery of corrupt services in the adjudicative process. The lack of scrutiny of the formulation of decisions allows party leaders or court leaders to frame or incorporate corrupt interests into public interests with little reasoning. The strict superior-subordinate discipline of unconditional compliance enables the superiors to effectively execute such decisions into court decisions with minimum resistance. Execution conducted in this manner encourages and sometimes requires subordinate judges to disregard adjudicative procedures and to discard rational legal reasoning. When such arbitrary practices have been systematically registered in courts, any judge can conveniently utilize the established level of tolerance of arbitrariness for their own initiative to carry out corrupt activities as long as their private interests do not run into conflict with the private interests of their superiors. This condition has greatly facilitated the contractual performance of the bribed and hence smoothed the contracting process of corrupt exchange.

This chapter will exemplify how the particular way of decision-making has enabled and facilitated corrupt practices and how the power structure has affected the dynamics of corruption in China's courts. Empirical data used for the case studies include focused interviews of legal practitioners, particularly lawyers, during 2005-2009 as well as court documents or press releases of cases involving judges who had committed bribery in performing their court duties. The total number of these cases amounts to 398, all taking place over the period of a quarter of a century spanning 1985 till 2009.⁴¹⁵ This chapter is divided in two sections, one focusing on the delivery of corrupt services, one focusing on the dynamics of corruption in China's courts.

6.2. Delivery of corrupt services in courts

⁴¹⁵ These sources include the legal sections of *Fazhi Ribao* (Legal Daily), *Jiancha Ribao* (Procuracy Daily), *Jiancha Fengyun* (Procuracy Affairs), *Nanfang Zhoumo* (Southern Weekly), *Caijing Magazine* and *Minzhu yu Fazhi* (Democracy and Rule by Law) and *Anti-corruption Weekly* published on Zhengyi Wang, an internet-based magazine run by the Supreme Procuratorate. They also include the legal columns of two major internet news websites in China: www.sina.com and www.xinhuanet.com.

In China's courts, allocation of judicial decision-making power is highly stratified. As shown in Chapter 5, Section 5.3.2, within a court, the court president tops the power hierarchy. Next are other members of the party-group, the highest decision-making body, followed by the divisional directors, who are also members of the court adjudicative committee. Further down are the head-judges and at the bottom are rank and file judges. Beyond the court, leaders of the territorial party committee can also influence court decisions by exerting influence upon the court president. The data studied show that party leaders and court leaders deliver their corrupt services mainly by sending down their instructions through the chain of command since these leaders do not carry out court activities at the ground level. "Frontline judges", in contrast, mainly deliver their corrupt services through their concrete judicial conduct by distorting the fact-finding process and by misinterpreting the law, taking advantage of the institutional tolerance of disregard of law. When the "frontline judges" commit to corruption, they have to ensure that their practices do not encroach upon the interests of their superiors.

6.2.1. Party leaders

The "party leaders" in this section refer to members of the decision-making bodies of the party apparatus, many of whom also hold key positions simultaneously in the governmental institutions. Due to the scarcity of materials concerning the CCP decision-making body at the central level, cases included in this section only cover party leaders at and below the provincial level. In examining these cases, it is noteworthy that although an increasing number of party leaders are prosecuted and convicted for corruption each year, only a few had reportedly conducted corruption in court affairs. However, it does not necessarily lead to the conclusion that party leaders are refrained from conducting corrupt exchange by interfering in court cases. Instead, one likely explanation of this low representation is that for a party-leader the value of power over courts is marginal comparing the value of power over other public affairs because of the weaker authority of courts *vis a vis* other public institutions. According to the data studied in this research, the detected corrupt acts of corrupt party-leaders mostly involve taking bribes in, for example, allocating public funds, awarding commissions of lucrative public procurement contracts, personnel management and permission of land confiscation.⁴¹⁶ To obtain corrupt benefits by exercising their power in interfering court cases seem not particularly salient or attractive. Nevertheless, this research has been able to trace a few examples of corrupt practices committed by party-leaders by interfering with court affairs, which will be illustrated below.

⁴¹⁶ For example, in the case against Mu Suixin, former mayor of Shenyang City, Liaoning Province, the prosecutor listed 60 corrupt conduct, among which only one was related to a court case. Dalian City Procuratorate vs. Mu Suixin, Criminal Division, Dalian Intermediate Court [2007] No.153.

First of all, what is striking is that these cases share a common feature in terms of the pattern of delivery of corrupt services – all appear “effortless”. For example, in order to help a local business tycoon to obtain favored treatment in a litigation tried in a court within his jurisdiction, Mu Suixin, former mayor of Shenyang City (Liaoning Province), had a brief conversation with the then president of Liaoning High Court during the break of a party meeting. Afterwards, the high-court president gave instructions to his subordinates and favored treatment was granted to the tycoon. In exchange the tycoon offered Mu cash and gifts worth of 850,000 *yuan* over a period of three years for the favor obtained from the court case as well as from other occasions.⁴¹⁷ In Zhuzhou, Hunan Province, Zeng Jinchun, the deputy chief of the Zhuzhou Party Committee, once had received a similar request from a plaintiff, who pleaded for Zeng’s help to obtain a favored court decision in a contractual dispute. After having received a bribe of 20,000 *yuan*, Zeng contacted the court. The plaintiff won the case. During the appeal, the defendant established contact with Zeng and asked for his favor in the appeal. In the meantime, the defendant successfully landed a job for Zeng’s mistress. Pleased, Zeng contacted the vice-president of the appeal court, which is also under his jurisdiction. The court reversed the decision of the first instance court and turned down all the claims of the plaintiff. Immediately after the decision was rendered, Zeng received a sum of 200,000 *yuan* from the defendant as a demonstration of the latter’s gratitude.⁴¹⁸

Party leaders can not only obtain corrupt benefits through influencing individual court decisions but also through the appointment of court leaders. For example, the aforementioned Liaoning Mayor, Mu Suixin, had helped to promote Liang Fuquan to become the deputy chief secretary of the party-group of Shenyang Intermediate Court. After the promotion, Mu received 20,000*yuan* from the new appointee.⁴¹⁹ Furthermore, corrupt party leaders can also interfere with other court affairs and conduct corrupt exchange with firms, which provide professional service to courts. In Chongqing city, Zheng Wei, deputy chief of the Chongqing Yuzhong District Party Committee, was once approached by an owner of an auction firm, who wanted to have his firm enlisted by the Yuzhong District Court so that the firm can tender for court auction commissions. Zheng contacted the court and the auction firm was enlisted. For this service, the auction firm owner paid Zheng a tribute of 50,000 *yuan*.⁴²⁰

Unfortunately, public case reports seldom review how exactly a party leader instructs a court leader. Instead, a euphemistic term, “*da zhaohu*” (literally translated as “to say hi”)

⁴¹⁷ Dalian City Procuratorate vs. Mu Suixin, Criminal Division, Dalian Intermediate Court [2007] No.153.

⁴¹⁸ Statement of the Changsha People’s Procuratorate against Zeng Jinchun [2008] No.2.

⁴¹⁹ Dalian City Procuratorate vs. Mu Suixin, Criminal Division, Dalian Intermediate Court [2007] No.153.

⁴²⁰ Chongqing No.5 People’s Procuratorate vs. Zheng Wei, Court judgment, 1st instance, Chongqing No.5. Intermediate Court [2009]. Available at

<http://www.bizteller.cn/trade/news/newsSearch/newsContent/68207183.html>.

was commonly employed to describe this kind of private conversation in which a superior addresses a specific personal request to a subordinate. When such a request was realized through court decisions, the authority of the instructor becomes the basis of the decisions. For example, in the afore-mentioned case concerning the Chongqing Yuzhong District party leader Zheng Wei and the request from the auction firm, after Zheng instructed the leader of Yuzhong District Court (whose identity was not disclosed in the court judgment), the court leader instructed the responsible judge to take care of the case and told him that the firm was recommended by a district leader.⁴²¹ In Fuquan County Court (Guizhou Province), a plaintiff was denied access to 1,480,000 *yuan*, the amount of his court award, which the court had collected from the defendant on the plaintiff's behalf. "Some leader had instructed (*da zhaohu*) the court to freeze the money" was all that the plaintiff was told.⁴²²

Even though the instructed court leaders did not necessarily know the details of the exchange between the party leader and the favor-seeker, they seemed to share an understanding that they were not in a position to question the instruction but were obliged to follow it even if the instruction was in breach of the law. In fact, what troubles some court leaders most is not that party leaders interfere in court affairs but that some party leaders instruct rather ambiguously, leaving it to the court leaders to guess their intention. For example, Fu Yulin found in her research that according to her interviews, when a people's congress leader (most are also party members) intends to interfere with a court case, he/she would not express his/her intention directly but imply it indirectly by displaying dissatisfaction with the court decision on the case concerned without giving specific instructions. Judges are then left to guess the preferences of the leader. If they guess correctly, the leader will let the case pass by withdrawing his right to "monitor" court performances. If not, the judges will continuously be summoned by the leader to report the case progress to his office.⁴²³

6.2.2. Court leaders

As mentioned in the previous section, the decision-making power of different judges varies greatly. So do their corrupt opportunities. A judge's position in the power hierarchy corresponds to the range and the value of his decision-making power and hence the number of corrupt opportunities. Among the 398 cases studied in this research, 236 cases were about corrupt conduct committed by judges, who held an executive position

⁴²¹ See supra 104. Court judgment. Chongqing No.5 People's Procuratorate vs. Zheng Wei.

⁴²² See the report at <http://news.sohu.com/20090211/n262174423.shtml>.

⁴²³ Yulin Fu, "Minshi Shenpan Jiandu Zhidu De Shizhengxing Fenxi [an Empirical Analysis of the Supervisory System of the Adjudicative Process in Civil Litigations]," in *Falü Chengxu Yunzuo De Shizheng Fenxi [a Positive Analysis to Practice of Legal Procedures]* (Beijing: Law Press China, 2005). p.113.

(including deputy position) at or above the divisional level. A judge's position in the power hierarchy is also proportionate to the volume of corrupt benefits that can be collected. For example, according to the dataset of this chapter, between a group of 13 high court judges with no executive function and a group of 17 high court judges with executive functions,⁴²⁴ the average amount of bribe that had been taken was 1,660,000yuan for judges with an executive function and 207,000yuan for judges without executive functions. For example, Wu Zhenhan, former president of Hunan High Court had received a total sum of bribes worth 5.8 million yuan just from one litigant.⁴²⁵ Whereas the highest amount of bribe received by a rank and file high court judge was less than 9% of what Wu had taken.

Other than its effect on opportunities for corruption, a judge's position in the power hierarchy also determines the means of delivery of corrupt services. Similar to party leaders, court leaders do not normally carry out court actions at the ground level.⁴²⁶ Instead, they carry out their duties mainly through making instructions. Compared with party leaders, court leaders can influence court decisions in a more regular manner thanks to the power they are endowed with by the *pi'an zhidu* as mentioned in Section 3.2, which is to examine and approve drafts of court decisions before they are rendered. Many of the instructions are written on the drafts submitted by the subordinate judges. For example, the convicted former president of Guangdong High Court, Mai Chongkai instructed his subordinate to render favorable treatment to specific litigants by writing remarks, such as, "deal with the case properly, with heed and expedition".⁴²⁷ Some court leaders used more discreet language, such as "please adjudicate the case according to the law" by Zhou Wenxuan, convicted former president of Wuhan Intermediate Court,⁴²⁸ or "this case needs careful examination" by Wu Zhenhan, convicted former president of Hunan High Court.⁴²⁹ These "coded messages" would have entirely lost their meaning in the eyes of outsiders. Only judges who work in the institution can understand the important messages conveyed in such seemingly redundant instructions. For example, judges who worked with the afore-mentioned former president of Guangdong High Court, Mai Chongkai, were aware of a "customary" rule that the litigant whose name is closest

⁴²⁴ In the dataset, only about the half of the cases concerning corrupt high court judges has indicated the exact amount of bribes taken.

⁴²⁵ *The Procuratorate vs. Wu Zhenhan*, Criminal Judgment, the 2nd Intermediate Court of Beijing [2006] No. 858.

⁴²⁶ In order to contain this practice, the SPC issued a directive requiring court leaders, including court-presidents, vice-presidents, divisional directors and deputy directors to attend court hearings in a minimum number of cases. The exact number is left to be decided by each court's superior court. SPC Directive [2007]. No.14.

⁴²⁷ See the report at <http://past.tianjindaily.com.cn/docroot/200402/10/xb01/10171301.htm>.

⁴²⁸ See the report at <http://news.sina.com.cn/c/1/2007-07-20/072613488841.shtml>

⁴²⁹ Zili Xu, "Court President Conduct Corruption for the Benefit of Adopted Son, the Whole Family Was Brought Down," *Jiating* 414, no. October (2007). Available at <http://xia.cnfamily.com/200710/ca34133.htm>.

to Mai's written instruction is the party to be given favorable treatment.⁴³⁰ Sometimes, the instruction is more direct and explicit for instance when the court leader entrusts the subordinate with the corrupt conspiracy. An example is the afore-mentioned former president of Hunan High Court, Wu Zhenhan. When Wu was approached by a litigant for a favor, Wu instructed Li Xiaohua, former director of the political department of the same court, to take care of Yan's cases and asked Li to report to him if it was necessary for him to step in.⁴³¹ In circumstances where a corrupt court leader could not wait for the subordinate judge to submit a draft on which to indicate his instruction by written remarks, the leader can demand the bribing litigant or his representative to submit a "case-report" to the court, addressing and rationalizing their demands. The court leader can then endorse the report with supporting remarks and send it to the subordinate judge to execute.⁴³² This makes the instruction seemingly less personal.

Leaders of appellant courts can deliver corrupt services not only by instructing judges in their own courts but also judges in the subordinate courts. For example, a district court not only ruled in favor of a litigant but also waived her litigation fee because Tang Jikai, former vice-president of Changsha Intermediate Court, had asked the district court leaders to take care of the litigant (so-called "dazhaohu") at a banquet hosted by the litigant for Tang and the district court leaders. During this period, Tang and his wife had received a total sum of gifts worth 143,700 *yuan* from the litigant.⁴³³ Li Xiaohua, former director the political department of Hunan High Court, located also in Changsha City, once instructed the leaders of the Changsha Intermediate Court, to render a reduced sentence in an embezzlement case. Having received 200,000 *yuan* from the defendant, Li instructed the intermediate court judges to "try to reduce the amount of embezzlement under 10,000,000 *yuan* and to control the sentence below the term of imprisonment of ten years".⁴³⁴

⁴³⁰ Liu, "Jujiao Mai Chongkai Chenglun De Guiji [Zooming in the Falling Trajectory of Mai Chongkai]." Also Available at http://www.uibe.edu.cn/upload/up_jcsjc/alfx/alfx_07032002.html. For other report of the customary court practices of implicit instructions, see Weidong Chen, "Xingshi Ershen Fahui Chongshen Zhidu De Fansi Yu Sikao [Re-Examining the 'Send Back for Retrial' Decision in the Appeal of Criminal Cases]," (Renmin University).

⁴³¹ *The Procuratorate vs. Wu Zhenhan*, Criminal Judgment, No. 858 [2006], the 2nd Intermediate Court of Beijing.

⁴³² Interview L.013. Also see the case report of Wang Zhiwen, former court president of Dachuan County Court, Sichuan Province. Tan, *Sifa Fubai Fangzhi Lun [Preventing Judicial Corruption]*. pp.109-11.

⁴³³ See *Procuratorate vs. Tang Jikai*, Huaihua Intermediate Court, Hunan Province [2006] No.52

⁴³⁴ Jianliang Huang, Chen Qiuhua, "Faguan Tanwu, Huilu Fanzui Fenxi [a Criminological Analysis of Embezzlement and Bribery Committed by Judges]" *Fazhi Pinglun Zhoukan [Rule of Law Review Weekly] (neicangao [For Internal Communication only])* (2005).

The loosely scrutinized procedures concerning the formulation of decisions combined with strict discipline of execution of superiors' instructions allows a court leader to influence a court decision according to his personal preference, which is directed not by a set of explicit rules laid down in the law but, in the case of corruption, by who brings more bribe. In a divorce case, by juggling with court decisions, Cheng Kunbo, former president of Huangshi Intermediate Court, received 10,000 *yuan* from the husband and 5,000 *yuan* from the wife respectively.⁴³⁵ Meng Laigui, former director of the Adjudicative-Supervisory Division of Shanxi High Court, had operated in a similar manner,⁴³⁶ which is described in a popular satiric proverb as "eating off of plaintiff and then defendant (*chi'le yuangao chi beigao*)".⁴³⁷ Reluctant to be taken advantage of by one judge in a bidding and aware of the court power structure and how it operates, more cost-efficiency-oriented litigants avoid entering in a bid and instead seek to spend the bribe on judges or other decision-makers, who can better guarantee a favorable decision.⁴³⁸ A lawyer once reminisced with great pride on how he once successfully won a "grand" case by having made the right choices of which decision-makers to approach after having investigated and acquired information on the moves that the other litigating party had taken. He said: "I feel I am more like a director and my work is to put the right actor at the right place and let them play".⁴³⁹

Bound by the strict discipline to follow instructions, in the cases studied subordinate judges seldom examine or question the legitimacy of the instructions given them by court leaders. Likewise, court leaders' in these cases seldom question instructions from party leaders. Furthermore, in these cases it seems an established practice that the breach of law and judicial ethics is exonerated if such conduct is carried out to execute a superior's instruction. In all the cases investigated, no judge had been punished for carrying out a corrupt leader's instruction to deliver a corrupt service on the leader's behalf, unless the judge was found having also taken bribes for the service. From the policy-maker's viewpoint, it is logical that the subordinate judge is exonerated for the unlawful and unethical actions taken to execute the instructions. The reason is that to punish a judge for his misconduct in carrying out instructions is to invite the judge to examine the legitimacy of each instruction given to them and that will impede the execution of decisions from above. Punishing subordinate judges who take bribes on their own initiative is not in conflict with the discipline, since their bribe-taking is not part of the instruction.

⁴³⁵ For details of this report, see <http://www.cnhubei.com/200304/ca240652.htm>.

⁴³⁶ For more details, see Li, "Corruption in China's Courts."

⁴³⁷ Zhizhi Yang, "Cong Minyao Kan Woguo Fazhi Jianshe [to Assess the Development of Legal Establishment in Our Country from Folklores]," (2007).

⁴³⁸ Interview L.013. L.014. L.015.

⁴³⁹ Interview L.013.

In contrast, for judges, who insist to comply with the law at the “expense” of disregarding instructions, the consequence could be tragic. Wang Yaguang was a judge from Fuping County Court, Shaanxi province. In 1994, Judge Wang presided over an administrative dispute. The plaintiff sued the local construction and zoning bureau for dismantling his house. The defendant claimed that they did that because the plaintiff had not obtained a construction permit. The court found that the plaintiff had applied for such a permit and had even paid the fee for it. It was the defendant who had failed to issue the permit. During the adjudicating process, the president of the County Court instructed Judge Wang to render a decision in favor of the defendant. Believing that the defendant should take the blame and responsibility for the plaintiff’s damages, Judge Wang drafted a ruling against the defendant and submitted it to the court adjudicative committee for deliberation. The adjudicative committee rejected the ruling and instructed Judge Wang to revise it. Judge Wang made a compromise. He ruled against the defendant but reduced the award of damages to the plaintiff. As soon as the ruling was issued, the defendant made a strong protest to the court president. Immediately, the court president summoned the adjudicative committee to meet. The committee decided that Judge Wang did not follow the committee’s decision, violated court discipline and should be punished. The committee demanded that Judge Wang write a statement of self-criticism. Judge Wang wrote such a statement, in which he rebutted the committee’s decision and refused to admit that he had done anything wrong. Soon thereafter, the court removed Judge Wang from his job and warned all court staff in a notification that Judge Wang’s mistake was “on purpose not [due to] negligence... it was an issue of his political stance not of his professional competence.” Judge Wang started to complain to higher authorities but to no avail. Witnessing Judge Wang suffering and struggling, the court president told the judge, “Go on complaining. The more you complain, the more leaders I will acquaint. Let’s see whom the superior authority will believe.” By the time the media coverage of this case began, Judge Wang had been demoted and removed from his adjudicative post for seven years. The most humiliating aspect of all is that as one of the only three judges in the court with a law degree, Judge Wang was asked to attend a training course. His first assignment was to read Mao’s *Against Liberalism*.⁴⁴⁰

6.2.3. “Frontline judges”

In comparison to judges who are court leaders, “frontline judges” (*yixian faguan*) are those judges, who sit in the collegial panel, examine and investigate cases by interacting with litigants and other court-users, and carry out court functions at the ground level. “Frontline judges” are usually judges at the bottom of the power hierarchy, who do not

⁴⁴⁰ For the full report of the story, see Guangming Huang, “The Price for a Judge to Pay for Offending His Superiors ” *Southern Weekend*, 23 March 2001.

hold any executive functions.⁴⁴¹ When the “frontline judges” commit corruption on their own initiative, information about the practices are better exposed and hence allow a closer examination of the delivery of corrupt services in the litigating process.

First of all, as explained in the previous section, any court superior, from court leaders to divisional leaders, can intervene in the adjudicative process at the ground level. Therefore, for a corrupt “frontline judge”, to succeed with the delivery of a corrupt service, he has to make sure that his corrupt interest is not in conflict with the interests of the superiors. It means that corrupt opportunities for “frontline judges” are limited to cases, which lack either political or corrupt interests for their superiors. Among the 398 cases investigated in this research, 162 cases concern corruption committed by “frontline judges”. According to these 162 cases, “frontline judges” can deliver corrupt services in the course of litigation by distorting the fact-finding process, by manipulating the interpretation of the law, or most often, through the combination of both.

In a legal environment, where power prevails over law and authoritarianism preempts rational legal thinking and practices, the fairness of a legal proceeding greatly depends on the moral standard and integrity of the judge who presides over the proceedings. When a judge intends to take advantage of this authoritarian environment and to abuse his power, it can be more easily done by, for example, distorting the fact-finding process, including admitting evidence without giving the other party an opportunity to contest it, arbitrarily excluding legitimate evidence, obstructing the access to evidence and manipulating the forensic examination procedure.⁴⁴² In this environment, from the perspective of a defendant in a criminal trial, the difference between conducting and not conducting corruption could be life or death. For example, in a murder trial in Jingmen Intermediate Court (Hubei Province), Lü Zonghui was the responsible judge. The defendant’s relative came to Lü and asked for help. Lü told the family that according to the law, the defendant could be sentenced to death unless the defendant could provide evidence for mitigation of sentence, such as providing evidence of an undiscovered further crime or leads to dissolve another crime. The family followed the advice and with a bribe obtained a lead from the captain of the local police. The family leaked the “lead” to the defendant, who then reported the “lead” to the police in a framed interrogation.⁴⁴³ Based on the

⁴⁴¹ In 2007, the SPC issued a directive, which requires court leaders and divisional directors to sit in collegial panel and attend court hearings in a minimum amount of cases per year. Lower courts have the discretion to decide on the exact amount. When they do, they are automatically the head-judge, who can designate a responsible judge to do the preparative work. SPC Notification [2007] no.14.

⁴⁴² For example, see the documented story of a plaintiff Zhu Dinglong in Dinglong Zhu, *Guansi [Lawsuit]* (Beijing: Law Press, 2007). p.268. Such practices can also be found in the cases compiled in Tan, *Sifa Fubai Fangzhi Lun [Preventing Judicial Corruption]*. pp.67-126.

⁴⁴³ According to the Procuracy Daily, convicts of corruption are often found being given mitigation based on “meritorious performance”. Quite a few were detected having conducted fraud (*jia ligong*), namely convicts “buying” off tips from investigators and “reporting” it back to investigators, which would be

defendant's "report" in the interrogation, the captain issued a testimony confirming the defendant's "meritorious performance" for the court's reference. During the court hearing, judge Lü announced the discovery of mitigating evidence and admitted it immediately. When the victim's family requested the court to disclose this evidence, the judge denied the request on the ground that the evidence is "adjudicative secret". The judge dismissed the challenge from the victim's family and rendered a decision of reprieve from the death sentence.⁴⁴⁴ During the litigation, Lü accepted 8,000yuan and solicited various gifts from the defendant's family.

Huang Xiaoguang, a former judge of Chenzhou Intermediate Court (Hunan Province), had safely accumulated bribes for several years from prosecuted local thugs, mostly drug traffickers in exchange for a reprieve from death penalty. His corrupt conduct was concealed so well that he was even recommended in 2006 to the SPC to review death penalty sentencing at the national level until his corrupt conduct was exposed.⁴⁴⁵ According to the cases investigated, it is also common for "frontline judges" to abet litigants to obtain and submit, for instance, fake age or medical certificates in order to facilitate the decision-making concerning probation, parole, reduction of sentence or executing a sentence out of prison based on deceitful medical certificate or deceitful "meritorious performance".⁴⁴⁶

Forging evidence is an approach to deliver corrupt services in criminal cases as much as in civil cases. Fan Qiyang and Zhang Jinhan, former judges of Wuhan Maritime Court, knowingly admitted a fake contract as the basis of their ruling, which legitimized the litigant's purchase of a smuggled oil tank. For this service, the judges were rewarded with a bribe of 200,000yuan.⁴⁴⁷ Former judge Wang Shenjie from Shangqiu Intermediate Court (Henan Province), instead of waiting for the litigant to solicit his corrupt service, volunteered to deliver a "favor" to a plaintiff in a tort case concerning a land dispute. Based on the knowledge that the plaintiff was well connected with party leaders, the judge hoped that the plaintiff could return his "favor" by helping to advance his career or to land a job for his offspring. As the "responsible judge" in the case, Wang, on his own initiative, tampered a land certificate by scratching off important information and replacing it with his own handwriting. Wang admitted the certificate as evidence without disclosing it at the court hearing. Wang accordingly rendered a decision in favor of the

recognized as "meritorious performance", as the defendant had done in the case described above in the main text. For reports on this phenomena, see <http://www.jcrb.com/zhuanti/ffzt/tglg/>

⁴⁴⁴ The People's Courts Publishing House, "People's Court Case Report (Criminal Section)," 47 (2005), p.550-9.

⁴⁴⁵ See <http://old.jfdaily.com/gb/jfxww/xlbk/bkwz/node36356/node36358/userobject1ai1869606.html>.

⁴⁴⁶ Examples can be found in the case of Wu Yunfa, former judge of Liu'an County Court, Anhui Province, and the case of Zhang Gusheng, former judge of Yongshun County Court, Hunan Province. Tan, *Sifa Fubai Fangzhi Lun [Preventing Judicial Corruption]*, pp.101-4, 108-9.

⁴⁴⁷ See the report at http://www.chinalawedu.com/news/2004_4/15/1403097759.htm.

plaintiff. By the time the corrupt conduct was discovered, the judge had not yet been promoted; however, the plaintiff had awarded the judge a sum of 210,000yuan in cash.⁴⁴⁸

In another case, former judge Jiang Guoliang from Yancheng Intermediate Court (Jiansu Province), Jiang received a request from a defendant, who was prosecuted for manslaughter, accompanied by 5,000yuan as well as various gifts. Jiang delivered his corrupt service by tampering with an interview transcript, based on which, he interpreted a decisive traffic regulation in favor of the defendant.⁴⁴⁹

Compared with the previous examples for the delivery of corrupt services, exercising stipulated discretion is a much safer approach. The vagueness, ambiguity and sometimes inconsistency featuring in Chinese laws leaves large room for this exercise. In Taizhou Intermediate Court (Sichuan Province), a bank manager was prosecuted for embezzlement of 3,000,000yuan. Upon a bribe, the collegial panel dismissed the charge, defined the conduct as an administrative violation and acquitted the defendant.⁴⁵⁰ Wide discretion also exists in sentencing in criminal cases. The Chinese Criminal Law normally only indicates two to three scales of the sentence for each crime. Judges are granted discretion to decide on the exact term of sentence based on the “circumstances (*liangxing qingjie*)” of the case concerned. For instance, according to the Chinese Criminal Law (1997), the sentences for the crime of embezzlement for more than 100,000 yuan range from imprisonment of more than ten years to life-imprisonment, and even the death penalty, if the “circumstance” of the case is “particularly serious”.⁴⁵¹ There are few instructions on how the “circumstance” should be gauged. In court judgments, the reason for this exercise of discretion is seldom elaborated. Judges are not legally bound by their own previous decisions or that of their peers’ in the same or superior courts.⁴⁵² Overwhelmed by the large number of complaints on judges’ abuse of their discretion with regard to sentencing, the SPC only recently launched an experimental guideline to “standardize” the exercise of sentencing discretion for a few selected types of crimes.⁴⁵³

In civil cases, the room for manipulation of stipulated discretion is at least as wide as that in criminal cases. A public-interest lawyer once represented a group of pollution victims in an environmental tort case against a factory. When the presiding judge decided to award only 30% of the plaintiffs’ full claim of damages, the lawyer asked for the basis of

⁴⁴⁸ See the case report of former judge Wang Shenjie, available at http://news.shangdu.com/category/10003/2007/11/30/2007-11-30_840426_10003.shtml.

⁴⁴⁹ “Two Senior Citizens Fought for the Dignity of Law”.

⁴⁵⁰ See <http://sc.news.163.com/06/1028/08/2UGOM82K00500079.html>

⁴⁵¹ Chinese Criminal Law (2009). Art.383(1).

⁴⁵² During a presentation in the 2nd Annual Conference of the European Chinese Law Studies Association, Chao Xi reviewed that even the SPC judges do not follow their precedent cases according to his interviews.

⁴⁵³ See related report at http://news.xinhuanet.com/legal/2009-06/01/content_11464962.htm.

the number. The judge simply ignored the question.⁴⁵⁴ In a contractual dispute case tried in Zhuji County Court (Zhejiang Province), former judge Lou Zemin awarded an excessively large sum of damages to the plaintiff in exchange for a reward of 130,000yuan.⁴⁵⁵ Overall, it seems easier for prosecutors to scrutinize a judge's abuse of power in criminal cases than in civil cases. Among the case materials collected in this research, cases concerning judicial corruption in criminal cases tend to provide detail information about how the corrupt service was carried out in the adjudicative process than those in civil cases, even though corruption is likely to occur in both to the same extent.⁴⁵⁶ A possible explanation is that in criminal cases abuse of judicial discretion which results from the misapplication of law is easier to identify because of the range of benchmark sentencing standards laid down in the Chinese Criminal Law, against which violation can be gauged. Such a "benchmark", however, is much less obvious in the Chinese Civil Law.

Enjoying only limited corrupt opportunities, some more risk-averse "frontline judges" chose to deliver corrupt services by engaging their superiors. For example, when a former judge Wu Chunfa from Guiyang Intermediate Court (Guizhong Province) was approached by an auctioneer for favored treatment in a court auction commission, Wu said he could not decide on that issue. Wu then introduced the auctioneer to his supervisor, Xi Lilong, former director of the court enforcement bureau. After having been promised a sum of money as a "gratitude fee", Xi instructed Wu to satisfy the auctioneer's demand.⁴⁵⁷ Li Xiaohua, former director of the political department of Hunan High Court, was once approached by Yan Caihong, an owner of an investment conglomerate, who had multiple cases pending in Hunan High Court. Without the decision-making power to deliver the corrupt services that Yan asked for, Li introduced Yan to Wu Zhenhan, the then president of the Hunan High Court. This brokerage earned Li a bribe of 370,000yuan from the litigant.⁴⁵⁸

Therefore, "democratic centralism", which is characterized by a loosely scrutinized process of formulation of decisions and a strictly disciplined execution of these decisions, has greatly facilitated the delivery of corrupt services in China's courts in three respects. Firstly, it allows party leaders and court leaders to conceal their corrupt intent by framing or incorporating it into uncontestable instructions and to deliver corrupt services by effectively translating their individual decisions into court decisions by manipulating their endowed power to intervene in the judicial decision-making process any time. It

⁴⁵⁴ Minutes of the Conference on Legal Right Assertion of Pollution Victims (2009)

⁴⁵⁵ See <http://www.148com.com/html/583/83675.html>.

⁴⁵⁶ Li, "Corruption in China's Courts."

⁴⁵⁷ See the report at http://www.xinhuanet.com/chinanews/2006-06/07/content_7196104.htm

⁴⁵⁸ *The Procuratorate vs. Wu Zhenhan*, Criminal Judgment, No. 858 [2006], the 2nd Intermediate Court of Beijing.

also enables them to deliver corrupt services in a highly effective manner by mobilizing subordinate judges through the chain of command with minimal resistance from them. Secondly, subordinating law to power also hinders the development of the rule of law and rational legal thinking. It tolerates and sustains practices that disregard procedural rules and are devoid of rational legal reasoning. Such environment enables “frontline judges” to deliver corrupt services in the judicial decision-making process on their own initiative as long as they observe and avoid potential conflicts between their own interests and the political or private interests of their superiors. For example, in the 398 cases studied, none of the judges had been found taking bribes from litigants, who were involved in the “politically sensitive” cases. It is not only because these litigants usually hold strong ideological beliefs and are less likely to offer bribes but also because these cases concern the pivotal political interests of the supreme CCP leadership. Taking bribes in these cases will be suicidal or “bringing fire to one’s own body (*yinhuo shaoshen*)”, as a pertinent Chinese idiom would have it. Thirdly, to subject law to power damages the predictability of law, which generates bribes from both litigants, who intend to obtain a better than fair decision, and from litigants who are compelled to bribe in order to avoid a less than fair decision. The proliferation of corrupt conduct in turn increases the expectation of judicial corruption and reinforces the belief in the supremacy of power rather than of law.

6.3. Dynamics of corruption in courts

As introduced in Chapter 5, decision-making in China’s courts has features that allow personal power to supersede law. The dynamics of the power structure inherent in the litigating process therefore also defines the dynamics of corruption, if pursued. It makes corruption a multi-facet and a multi-player game. Litigants can seek to influence the outcome of litigation by conducting corrupt exchange with different judges or others who can influence the judges concerned. The multi-instance nature of litigation provides both litigants a spacious ground to level their dispute by deploying and re-deploying their economic, social and political capital to induce favorable decisions. When both litigants are more or less equally resourceful in terms of social, political and economic capital and equally committed to win the case through any means, the outcome is often lose-lose because the extra resources they invest in corruption may eventually be canceled out, which brings the case back to the starting point. The following case may serve as an illustration of this.

In 1994, Shenmu County, Shaanxi Province, a group of villagers brought a civil suit against a well-connected mine-developer. The villagers bribed the judge in the basic court, but lost the case. Having consulted a lawyer, the villagers believed that they lost the case because their bribe was insignificant compared with the influence exerted upon the court by the defendant. More importantly, the bribe was only offered to the responsible judge,

but not to the court leaders. The villagers chipped in more “bribe-funds” and appealed to the Shenmu Intermediate Court. This time, they bribed three judges, including a vice-president and a divisional director, of the intermediate court. They won the case but soon received a stay of execution because the defendant started an exceptional retrial procedure in the provincial Shaanxi High Court. The case was sent back to the appellant Intermediate Court. The villagers bribed the retrial judge, who, after having taken the bribes, sustained the previous judgment. However, the defendant managed to stall the enforcement procedure, which gave him a chance to invoke yet another re-trial procedure at the provincial High Court almost a year later. This time the High Court revoked all the previous court decisions and sent the case back to the first trial court again. Two years later the dispute was eventually closed with a settlement between the villagers and the mine-developer.⁴⁵⁹

According to a lawyer, these “lose-lose cases” are usually the result of compulsive decisions by vengeance-charged litigants, who simultaneously or consecutively engage different power-holders to support their demands through corruption whereby the court simply becomes an extended field of the “battle ground” of their dispute.⁴⁶⁰ After several rounds of litigation, accumulated litigating expenses, the cost of bribes and the high transaction costs involved in corrupt exchange, none of the litigants emerges as a winner. However, when the litigation takes place between two parties with unmatched influencing powers, the outcome of the litigation can be more easily manipulated by the party, who enjoys the power advantage.⁴⁶¹ The aggrieved party usually either accepts its fate silently or embarks on a long, rough and uncertain road of petitioning, also known as letter and visiting (*xinfang*), to Beijing.⁴⁶²

From the perspective of the judges, the outcome of the corrupt activities is also dynamically associated with interactions among the bribe-takers. According to the cases studied, this research finds that the disciplined hierarchical structure in courts makes corruption alliances easier to forge in superior-subordinate relationships. Such alliances increase the efficiency of the delivery of corrupt services because the enhanced safety allows direct communication among the corruption participants and improves coordination among various judicial posts, which are in charge of different phases of the adjudicative process. Such coordination integrates the corrupt services that are fragmented due to division of power among the registration division, the adjudication

⁴⁵⁹ Liu, "Yiqi Hetong Jiufen Yinqi De Sifa 'Heishao' [a Judicial 'Black Whistle' in a Contractual Dispute]".

⁴⁶⁰ Interview L.011.

⁴⁶¹ I asked a lawyer what the chance of such a disadvantaged litigant to have a fair trial would be, the lawyer answered he would never want to represent such a litigant. Interview W.029.

⁴⁶² For more empirical research and detailed analyses on this topic, see articles of Yu Jianrong at his personal blogs <http://yujianrong.vip.bokee.com/> or at http://www.cngdsz.net/old/discourse/scholar_list.asp?scholarid=25.

division and the enforcement division. The integration in turn reduces the transactional costs of the corrupt exchange. This study finds that in courts where such alliances have been forged, the delivery of corrupt services is transformed from the what Scott termed “parochial corruption”, namely, “a situation where only ties of kinship, affection, caste, and so forth determine access to the favors of power-holders”,⁴⁶³ to “market corruption”, in which corrupt services are offered in a more “non-discriminatory” manner to whoever pays the required amount of bribes. For example, investigators of the corruption scandals in the judiciary of Hunan Province found that, externally, certain “trade rules (*hanggui*)” have emerged regulating the price and the allocation of corrupt profits.⁴⁶⁴ Internally, all bribes collected were shared among judges, who cooperated with each other in panel deliberations and other mandated procedures.⁴⁶⁵ An anonymous unofficial source revealed more predatory practices involving the collusion between the detained SPC vice-president Huang Songyou and the director of the enforcement bureau of the Guangdong High Court.⁴⁶⁶

Among the allied corrupt judges, “clients” are usually jointly managed and profits are shared. Prosecutors found that, for instance, more than half of the 23 bribes taken by former judge Liu Juping of Wuhan Intermediate Court (Hubei Province) were shared with other judges.⁴⁶⁷ Normally, the illicit profit would be distributed among the “corrupt allies” in proportion to the judges’ position in the power hierarchy and their role in the corrupt activities. For example, when former judge Wu Zhilin received 10,000yuan from a litigant, he kept 3,000 to himself, offered 3,000 to a colleague and 4,000 to the court-president.⁴⁶⁸ When He Qingyuan, former vice-president of Changli County Court (Hebei Province) solicited a few leather jackets from a litigant, he first reserved two for himself, two for the court president and then allocated the rest to other staff members involved.⁴⁶⁹ The frontline judges are most of the time at the bottom of the pecking order, doing most of the labor but getting the least amount of profit.⁴⁷⁰ Sometimes, the individual perceptions of these participants greatly vary as to the value of their roles in the corrupt activities. For instance, when Wen Zhipeng, a former official in the Legal Office of Hainan Province, told his superior Lou Xiaoping, the later president of Hainan High Court, that he had collected 400,000yuan from a briber, Lou told Wen to keep 10,000 for himself. It was only during the investigation of the case that it was found Wen

⁴⁶³ J. C. Scott, *Comparative Political Corruption* (1972). p.88.

⁴⁶⁴ Huang, “Faguan Tanwu, Huilu Fanzui Fenxi [a Criminological Analysis of Embezzlement and Bribery Committed by Judges] ”.

⁴⁶⁵ Ibid.

⁴⁶⁶ This post can be accessed at <http://www.studioclassroom.net/bbs/viewthread.php?tid=14127>.

⁴⁶⁷ See the report at <http://news.sina.com.cn/c/2004-04-16/05522320106s.shtml>

⁴⁶⁸ “Judges Standing in the Defendant’s Dock,” *Zhengfu fazhi* [Government and Rule by law], no. 6 (1997).

⁴⁶⁹ See the report at <http://www.people.com.cn/GB/shehui/44/20030120/911470.html>.

⁴⁷⁰ Interview. L.013.

had actually collected 600,000 instead of 400,000 *yuan* and secretly “intercepted” 200,000 *yuan* as his “fair” share.⁴⁷¹

Among the 398 cases studied, collusive conduct had been detected in the corruption scandals in Tianjin High Court, Hunan High Court, Jilin High Court, Wuhan Intermediate Court (Hubei Province), Shenzhen Intermediate Court (Guangdong), Tianjin Intermediate Court (Tianjin Municipality), Changsha Intermediate Court (Hunan), Fuyang Intermediate Court (Anhui), Jingzhou Intermediate Court (Hubei), Jingmen Intermediate Court (Hubei), Nantong Intermediate Court (Jiangsu), Wenzhou Intermediate Court (Zhejiang), Chengdu Intermediate Court (Sichuan), Changchun Intermediate Court (Jilin), Guangzhou Intermediate Court (Guangdong), Yancheng Intermediate Court (Jiangsu), Shenmu Intermediate Court (Shaanxi), Mudanjiang Intermediate Court (Jilin). One interesting finding that emerged from studying these cases is that in the afore-mentioned scandals, collusion usually involves one court-president or one vice-president with one or a few divisional leaders and rank and file judges. In other words, collusion seldom takes place just between the court president and vice-presidents.⁴⁷² This pattern is also discernible in corruption cases detected in other public institutions.⁴⁷³ It suggests that the infusion of distrust among top executive leaders as intended by the “democratic centralism”-principle is taking effect. Trust and loyalty is indeed easier to develop in superior-subordinate relations, where one owes a job or career to the other, rather than in more equal relations, such as between the members of the collective leadership. And that trust is one of the vital ingredients of collusive corruption.

Among these equals, investigators of the Wuhan Intermediate Court scandals found that the customary practice was non-interference.⁴⁷⁴ However, this is not always the case. Since the discipline of unconditional compliance does not apply in equal relationships, their equal status provides these leaders with the incentive and capability to compete for corrupt opportunities and profits. Escalation of such “turf battle” may eventually end in exposure and apprehension of the participants of corruption. For this, one court auction in Hunan High Court provides the best illustration. In this case, a shopping mall located in Shenzhen City was to be auctioned as part of a standard enforcement procedure of a court

⁴⁷¹ <http://www.hinews.cn/news/system/2004/08/12/000000717.shtml>

⁴⁷² The only exception is Fuyang Intermediate Court.

⁴⁷³ This includes 100 cases concerning officials in other public institutions convicted for corruption between 2005-2009. Only in the corruption scandal of Shenyang City, two top leaders, the mayor and the deputy mayor stepped down together. However, even in this case, the two leaders fell together not because they colluded in corruption but because both of them were corrupt and the mayor refused to cover the corrupt conduct of his deputy, which facilitated the investigation. See Inspection, *Shenyang 'Mu Suixin, Ma Xiangdong' an Chachu Jishi [a Journalistic Report on the Investigation and Conviction of the Cases of Mu Suixin and Ma Xiangdong]*.

⁴⁷⁴ Huailiang Hua, "Jiekai Wuhan Zhongyuan Fubai Wo'an De "Heixiazi" [Open The "Black-Box" Of the Group Corruption Case of Wuhan Intermediate Court]," *minzhu yu fazhi [democracy and law]* 2004.

award. A total number of five plaintiffs had submitted a joint claim in the auctioned asset worth of 0.4 billion *yuan*. The high value of the auctioned asset has attracted special attention from two groups of judges in Hunan High Court, one from the economic adjudicative division and the other from the enforcement division. All aimed at pocketing the lucrative auction commission, part of which was customarily attributed to judges as kickbacks.⁴⁷⁵ Eventually, the court decided that the shopping mall would be divided into two packages, each division put in charge of one package. The economic adjudicative division commissioned the auction to an auction house, in which the son of the court president had a share. The enforcement division commissioned their service to an auction house, managed by the son of another former president of the court and then party leader of Hunan Province. During the auction, it was also discovered that the Shenzhen Intermediate Court, which had immediate jurisdiction over the shopping mall, also processed claims over the disputed asset. Consent could not be reached among the three interest groups concerning the distribution of the proceeds from the auction. The dispute was even presented to the SPC, which demanded that the Hunan High Court transfer a portion of the proceeds to the Shenzhen Intermediate Court. The Hunan High Court did not follow this instruction as the income from the auction sale had mostly been appropriated by the judges from Hunan High Court. Escalation of this conflict eventually led to a high-profile corruption investigation against Hunan High Court, which brought the collapse of the corrupt network, including the fall and conviction of the president of the Hunan High Court.⁴⁷⁶

⁴⁷⁵ According to the current auction law, the auction firm can claim up to 5% of the total value of the auctioned item respectively from the seller and the buyer for a service with little production cost. The auction commission is then distributed between the court and the auction firm. According to an internal report from the Procuratorate Daily, the customary practice is that the court takes 40% of the auction commission. The auction firm takes the 30%. The rest 30% is usually spent on operational costs, which include the cost of bribes offered to officials from other public institutions. Huang, "Faguan Tanwu, Huilu Fanzui Fenxi [a Criminological Analysis of Embezzlement and Bribery Committed by Judges] ". Similar distribution rate is also found in the report of the corruption scandal of Ulumiqi Railway Court (Xinjiang Autonomous Region) and most recently of the sandal of Taizhou Intermediate Court (Zhejiang). According to other cases investigated during this research, against a fair amount of bribe, the court can also help the buyer to auction off the asset at a price much lower than the market price. The court can also collude with the seller. The seller can set up a scarecrow company to buy off his own asset at a lower-than-market price. This way, the seller can keep his asset and impede the creditor from realizing his full claim. Victims of these practices are the innocent creditors or innocent buyers. In a recent case in Taizhou Intermediate Court, an innocent buyer paid for the auctioned real estate but was not able to obtain the estate. The case was reported by the Chinese Youth Daily. According to the report, the court had an agreement with every candidate auction firm that was short-listed by the court for the tendering. Based on the agreement, the court is entitled of 40% of the auction commission. Apart from that, the court also has large room of manipulation in deciding what and how the auction is to be performed. For details of the case, see http://zqb.cyol.com/content/2009-10/23/content_2900306.htm.

⁴⁷⁶ Dongwen Li, "Heibai Zhijian De Shenzhen Dongmen Dashijie [Shenzhen Da Shijie in Both the Black and White Worlds]," *Nanfang Dushi Bao [Southern Metropolis Newspaper]*, 31 August 2005.

The scandal of Hunan High Court is not the only case, in which competition for lucrative corrupt profits eventually led to the collapse of the corrupt network. For example, associated with the exposure of corrupt conduct of Pei Hongquan, former vice-president of Shenzhen Intermediate Court, was a court bankruptcy case with an estimated value of 160,000,000 *yuan*. Behind the fall of Huang Songyou, former vice-president of the SPC and Yang Xiancai, former director of the enforcement bureau of Guangdong High Court, was the enforcement of a court award involving real estate property located in the capital city of Guangdong Province, with an estimated value of one billion *yuan*.⁴⁷⁷ Similarly, the most recent scandal in Chongqing High Court, which brought down Zhang Tao, its former vice-president, and Wu Xiaoqing, its former director of the enforcement bureau, was associated with the auction of a piece of land with an estimated value of 36,500,000 *yuan*.⁴⁷⁸ In short, among court leaders of equal rank, the contrived mutual-constraint element of the “democratic centralism” functions not only as an obstruction of political conspiracy in the collective leadership but also as a barrier preventing them from colluding as a means to optimize corrupt opportunities and profits. In fact, their equal position provides these leaders with the incentive and the capacity to compete for more decision-making power and related benefits since the discipline of unconditional compliance does not apply in equal relationships. Eradicating one’s political rival by exposing the latter’s corrupt activities seems the most effective approach since it removes the competition without necessarily limiting the power attributed to the post to be taken over. However, this type of “democratic centralism” has little effect in fundamentally reducing corruption since this “democratic” arrangement is not designed to promote political liberty and accountability but to help the superior power to monitor subordinates’ performance and hence maintain its authoritarian control over the state. Under this instrumental view of democratic mechanism, measures of checks and balances are more likely to serve to allocate corrupt opportunities and profits rather than to reduce them.

6.4. Conclusion

Chapter 5 has identified the two most significant features of decision-making in China’s courts, namely a loosely supervised procedure about the formulation of decisions and a strictly disciplined procedure of the execution of such decisions. This chapter has demonstrated that it is this particular manner of decision-making applied in the adjudicative process that has enabled and sustained corruption in China’s courts. It is responsible for having greatly eased the critical phase of contracting process of

⁴⁷⁷ Ling Yuan, "Huang Songyou Xianru Zhongcheng an Neimu Jiaoyi [Huang Songyou Trapped in the Insider Trading in the Zhongcheng Plaza Case]," *Liaowang Dongfang Zhoukan [Oriental Outlook Weekly]*, 10 November 2008.

⁴⁷⁸ See the report at <http://news.sina.com.cn/c/sd/2009-04-20/172717648648.shtml>

corruption, namely the delivery of corrupt service as the object of exchange for bribes. Immediately associated with this finding is the fact that this particular manner of decision-making is systematically applied in all courts, which may help to explain why corruption permeates in courts across the country despite of their different location and jurisdiction and regardless of the finance status of the court and the salary of individual judges. It is these institutional factors that have not only generated and enhanced the incentives of corruption but also created and expanded opportunities of corruption for each member holding a position in the institution. Under these circumstances, the group political interests of the party coincide with the corrupt interests of every individual in the chain of command. Consequently, the institutionalization of the judiciary as part of consolidated party-state structure also institutionalizes corruption in China's courts.

This chapter also demonstrated that the features of court decision-making mentioned above have also affected the dynamics of corrupt activities in China's courts. From the litigants' perspective, such a litigating process generally favors resourceful litigants, who have sufficient political, social and economic capitals to dispose. When the litigants are equally resourceful, the outcome of the litigation becomes more precarious, depending upon the nature of the case, each litigant's dedication to the case, the "quality" and the effectiveness of each litigant's corrupt network as well as other contingencies. From the judges' perspective, a judge's position in the power structure of the court not only determines the volume of opportunities as well as profits of corruption but also the means of delivery of corrupt services. The higher the rank of a judge, the greater the opportunities as well as profits of corruption, and the safer the means of delivery of corrupt services. This particular manner of decision-making in courts is also conducive for coalition and collaboration among judges who share a superior-subordinate relationship. Such coalition and collaboration increases the efficiency and expands the volume of corrupt activities since it greatly reduces the transactional costs entailed in the communication and the coordination in the course of delivery of corrupt services. All these features described above have made corruption in China's courts a multi-player, multi-dimensional and dynamic phenomenon instead of being one-on-one, one-dimensional and static.

**Chapter 7 Extending the applicability of the
framework – Decision-making and corruption in
anti-corruption institutions**

7.1. Introduction

The previous chapter has discussed how the social institution of guanxi-practice and the political institutional design of China's courts in terms of decision-making have facilitated the contracting process of corrupt exchange and resulted in the proliferation of corrupt activities in the process of litigation. This chapter will discuss how corruption can similarly arise in other public institutions, in particular, the specialized anti-corruption institutions due to their exposure to similar conditions.

In terms of anti-corruption efforts, China claims the largest volume of anti-corruption regulations⁴⁷⁹ and anti-corruption campaigns,⁴⁸⁰ hosts the most empowered anti-corruption enforcement agencies – the Discipline Inspection Commissions of the Chinese Communist Party (hereinafter the DICs)⁴⁸¹ with the most populated manpower⁴⁸² and the most severe punishment.⁴⁸³ However, accompanying the rise of power of these institutions is the rising number of incidences of corruption committed by anti-corruption agents. By the time of writing, 6 DIC secretaries and 14 procuratorate directors and deputy directors in charge of anti-corruption prosecution, including a director from the Supreme People's Procuratorate, had been reportedly punished for corrupt conduct during anti-corruption investigations.⁴⁸⁴ Meanwhile, 35 presidents and vice-presidents of the People's Procuratorates, including 7 high-ranking presidents at the provincial level, had been punished for corrupt conduct while performing their duties.⁴⁸⁵ This chapter will demonstrate how on the one hand the institutional design of anti-corruption institutions has created a permissive environment of corruption in these institutions and on the other hand how the presence of corruption in anti-corruption institutions has seriously affected the effectiveness of anti-corruption measures and efforts. In doing that, this chapter also links to the findings of the previous chapters,

⁴⁷⁹ According to a New York Times interview of Professor Gao in Chinese Academy of Social Science, China has promulgated 1200 laws, rules and directives against corruption. For details, see http://www.nytimes.com/2009/09/04/business/global/04corrupt.html?_r=1

⁴⁸⁰ Melanie Manion, "Corruption by Design: Bribery in Chinese Enterprise Licensing," *The Journal of Law, Economics & Organization* 12, no. 1 (1996). p.2.

⁴⁸¹ The Discipline Inspection Commission is granted the power to detain corruption suspect for 2 months, which can be extended to an unspecified period of time, before court trial. Working Procedures of Case Investigations for the Discipline Inspection Commissions. Art.28.

⁴⁸² The ratio between the number of public officials and the number of DIC agents (not including prosecutors) is 8.3:1 in China, namely, in average one anti-corruption agent monitors eight officials. The ratio is 153:1 in Hong Kong and 2000:1 in Singapore. "International Heat of The "Anticorruption Storm" in China," *International Herald Leader* 26 June 2008. Available at <http://www.gzjj.gov.cn/redShow.asp?ArticleID=6507>

⁴⁸³ The highest criminal punishment of bribe-taking and embezzlement is death penalty. Chinese Criminal Law (1997). Art. 383(1).

⁴⁸⁴ Cases are on file with the author.

⁴⁸⁵ Ibid.

which identify certain factors as the common causes of corruption in courts as well as in specialized anti-corruption institutions.

Data of this chapter firstly come from authoritative sources, such as laws, bylaws, internal regulations, guidelines of the major anti-corruption institutions, most notably, the party discipline inspection commissions and the procuratorates. The second source of data consists of approximately 100 cases concerning corruption in anti-corruption institutions spanning from 1985 till 2009. Information concerning these cases comes from media reports of court-trials or press releases from courts or corruption investigative bodies, principally the party discipline inspection commissions and the procuratorates.⁴⁸⁶

It is necessary to note that this chapter is to identify certain features in corruption investigation while using only limited data. Access to information on the detailed practices of anti-corruption institutions, especially information on corrupt practices in these institutions is strictly controlled. Therefore, the findings of this chapter shall be primarily applied only to the materials indicated in this research. More general application shall be conducted with caution and be tested when freer access to data can be gained.

The rest of the chapter is divided into four parts. Section II introduces the institutional structure of anti-corruption institutions, including the main actors and their structural relations with the political institution of the CCP. Section III discusses features of decision-making in the main anti-corruption institutions. Section IV connects the features of decision-making discussed in Section III with the occurrences of corrupt activities, employing reported cases collected during the course of the research.

7.2. Organizational structure of anti-corruption institutions

According to the recent OECD (Organization for Economic Co-operation and Development) review of anti-corruption institutions in various countries, the main models of these institutions include institutions specializing in law enforcement, institutions focusing on preventive measures, policy development and co-ordination, and institutions

⁴⁸⁶ These sources include the legal sections of *Fazhi Ribao* (Legal Daily), *Jiancha Ribao* (Procuracy Daily), *Jiancha Fengyun* (Procuracy Affairs), *Nanfang Zhoumo* (Southern Weekly), *Caijing Magazine* and *Minzhu yu Fazhi* (Democracy and Rule by Law) and *Anti-corruption Weekly* published on Zhengyi Wang, an internet-based magazine run by the Supreme Prosecutorate. They also include the legal channels of two major internet news websites in China: www.sina.com and www.xinhuanet.com.

with all above functions.⁴⁸⁷ China hosts all three types, some of which have overlapping functions.

7.2.1. Main anti-corruption institutions

The first group of anti-corruption institution is the Discipline Inspection Commission of the Chinese Communist Party (DIC), which is designed as a multi-purpose anti-corruption institution, encompassing all the functions mentioned above.

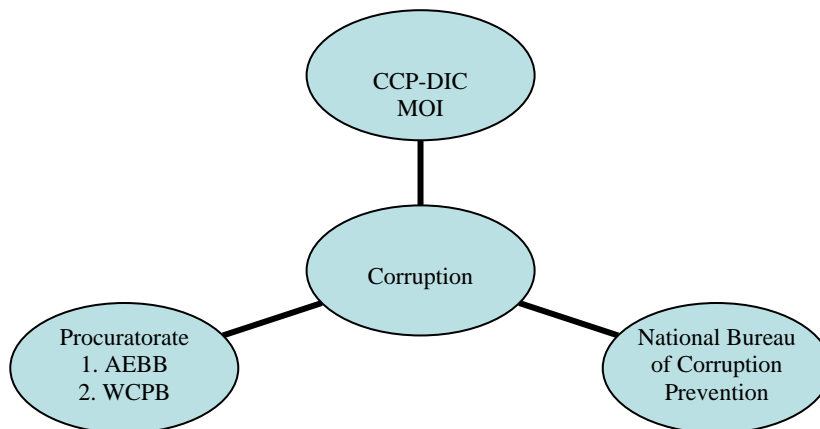


Chart 7.1 Outline of Anti-Corruption Institutions in the PRC

According to the Charter of the Chinese Communist Party, the current main tasks of the DIC are to collect information from the public, to conduct pre-prosecution investigation of corrupt conduct of party members and to coordinate among various anti-corruption institutions.⁴⁸⁸ Since the DIC can only exercise jurisdiction over party-members, the People's Inspection Committee was established in 1949 at both the national and local level to scrutinize disciplinary violation of civil servants, who are not party members.⁴⁸⁹ The committee was dismantled in 1959 and restored as Ministry of Inspection (MOI) in

⁴⁸⁷ Dan Dionisie, Francesco Checchi, "Corruption and Anticorruption Agencies in Eastern Europe and the Cis: A Practitioners' Experience," (UNDP Bratislava Regional Centre, 2008). pp.7-15. OECD, "Specialised Anti-Corruption Institutions - Review of Models," (Anticorruption Division, OECD, 2006). pp.5-8.

⁴⁸⁸ CCP Charter (2002). Ch.8.

⁴⁸⁹ Propaganda Office CCDI, *A Brief Course of the Institutional Development of Discipline Inspection Commissions* (Beijing: China Fang Zheng Press, 2002).p.4.

1986.⁴⁹⁰ In 1993 the MOI was merged into DIC. Since then, the MOI and the DIC share the same personnel and facilities but carry out their activities under their respective names of offices.⁴⁹¹

The second group of anti-corruption institution is the people's procuratorates. More specifically, a specialized branch of the procuratorates, the Anti Embezzlement and Bribery Bureau (AEBB), is responsible to carry out the anti-corruption activities. The AEBB and the DIC-MOI have different but also overlapping functions in terms of corruption investigation. In general, the DIC-MOI has higher authority and is entitled to perform the preliminary investigation and to decide whether an indictment is necessary. When indictment is deemed necessary, the DIC will transfer the case to the procuratorate for further investigation to secure evidence and to prosecute. Other than the AEBB, the White-collar Crime Prevention Bureau (WCPB) was also established within the procuratorates. Its function mainly concerns prevention-oriented anti-corruption research, consultation and training.

The third group of anti-corruption institution is the National Bureau of Corruption Prevention (NBCP), which was established under the directorship of the Minister of Inspection in 2007.⁴⁹² There is no clear division of labor between the NBCP and the White-collar Crime Prevention Bureaus of the procuratorates, which were established earlier.⁴⁹³ Lastly, it is important to note that apart from the specialized anti-corruption institutions, the head of each public institution is also responsible to monitor, investigate and punish disciplinary violations committed by his staff members. The rest of the chapter will focus on the investigative activities, mainly carried out by the DIC-MOI (which will be abbreviated as DIC in the rest of the chapter) and the AEBB of the procuratorates. In other words, preventive anti-corruption institutions are not featured in this chapter.

7.2.2. Anti-corruption institutions and the party

The same as courts, all anti-corruption institutions in China are incorporated into the cadres' ranking system, which is administered by the party. Such an institutional design clearly helps the party to exercise control over anti-corruption activities. More specifically, the incorporation of the ranking system in anti-corruption institutions means that all permanent posts in these institutions are assigned with a rank. Each post is delegated certain decision-making power corresponding to its rank. The

⁴⁹⁰ Ibid. p.5.

⁴⁹¹ Ibid. p.6.

⁴⁹² Official website of the Bureau. <http://politics.people.com.cn/GB/8198/114315/114316/6763150.html>

⁴⁹³ Annual Report of the Supreme People's Procuratorate of 2003. Information available at <http://news.qq.com/a/20090310/001269.htm>

commander-in-chief has the highest rank and accordingly the widest decision-making power in the given institution. At the national level, the CCDIC answers only to the Central Committee of the CCP.⁴⁹⁴ So is the Supreme People's Procuratorate.⁴⁹⁵ The regional and local DIC and procuratorates are subject to dual-administration (*shuangchong guanli*). It means that they are subordinate to both the party committee of the corresponding geographical jurisdiction and the respective DIC or procuratorate at the superior level. Between the DIC and the procuratorate of the same geographical jurisdiction, the former enjoys more power since the top leader of the DIC has an important seat (usually only second to secretary of the party committee) in the decision-making body of the party committee,⁴⁹⁶ a privilege that the procuratorates do not have.

Nonetheless, the procuratorates are endowed the power to conduct corruption investigation on its own initiative as long as the investigation does not encroach upon the jurisdiction of the DIC or is not of immediate interest of the leaders of the DIC. According to the data collected during this research, the procuratorates' self-initiated corruption investigations are notably concentrated on offenders of lower-ranks, especially those who serve in SOEs, and corruption in the private sectors, which falls out of the jurisdiction of the DICs. Apart from having a lower political status, the procuratorate is out-powered by the DIC also due to its limited investigative measure. Unlike the DIC, the procuratorate is subject to Article 133 of the Criminal Procedural law, which requires the procuratorate to release the detained suspect in 24 hours if sufficient evidence for arrest cannot be established.⁴⁹⁷ This legal constraint limits the investigative power greatly compared with the DIC even though in practices the constraint can be circumvented through various means, for example, by applying for extensions.⁴⁹⁸

7.3. Decision-making in anti-corruption institutions

Since all anti-corruption institutions are state apparatus and are incorporated in the ranking system, the rules that feature the decision-making process in China's courts, as introduced in Chapter 5, also fully apply in the anti-corruption institutions. These rules

⁴⁹⁴ CCP Charter (2002). Ch.8.

⁴⁹⁵ The highest decision-making body of the SPP is its party-group, which is bound by the party rules. The political status of the party group is defined in Chapter 9 of the CCP Charter (2002).

⁴⁹⁶ This reform was launched as a measure to empower the DICs. CCDI, *A Brief Course of the Institutional Development of Discipline Inspection Commissions*. p.43.

⁴⁹⁷ Criminal Procedural Law. Art. 133

⁴⁹⁸ Interview H022. Also see Ling Yue, "A Study on the Legal Regulation of Hidden Unlawful Practices of Extended Detention [Yinxing Chaoqi Jiya De Falv Guizhi Yanjiu]," *Hebei Legal Study [Hebei Faxue]* 25, no. 10 (2007). Jie Zhao, "Consequences and Control on the Hidden Unlawful Practices of Extended Detention [Shilun Chaoqi Jiya De Weiha Yu Kongzhi]," *Hebei Legal Study [Hebei Faxue]* 24, no. 11 (2006).

are characterized by a loosely monitored process of formulation of decisions and strictly disciplined process of implementation of such decision.

7.3.1. General features

The above-mentioned characteristics of decision-making are most conspicuous in the DIC, which, unlike other anti-corruption institutions, are part of the party apparatus. One immediate example is their exclusive power to apply *shuanggui* (meaning “two designations”), an “extra-legal” investigative measure. This measure allows the DIC investigator to detain the suspect for interrogation for a lengthy period of time without a charge.⁴⁹⁹ According to the DIC regulations, the *shuanggui* measure can be applied during the preliminary investigation, which can take two months with a one-month extension if necessary.⁵⁰⁰ At the formal investigation procedure, the detention can take three months with possible extension.⁵⁰¹ The *shuanggui* measure is highly effective in extracting confession from the suspects. Such confession is used as key evidence for conviction and sanction.⁵⁰² Despite that the Criminal Procedural Law prohibits torture during interrogations, courts are not competent to conduct independent judicial examination on this issue and to exclude such evidence produced by the investigative bodies.⁵⁰³ Legal consultancy for the suspect is not allowed or provided during the DIC investigation.⁵⁰⁴ Once the DIC has concluded its investigation, it can render the sanction, ranging from warning to removal from office and revoking of the CCP membership,⁵⁰⁵ according to its own procedure, which is non-transparent and governed by few rules. The

⁴⁹⁹ The full expression of *shuanggui* is “to report at the designated time and at the designated place”. In practice, a more accurate expression should be “to be interrogated and to wait for being interrogated at the designated place (usually a confined place) for a designated length of time”. It should be noted that this detaining measure is a prerogative for the DICs. Procuratorates, for example, are subject to the criminal procedures. According to article 133 of the Criminal Procedural Law (1996), the procuratorate can detain a suspect of corrupt crimes for 24 hours and has to release the suspect if it finds the detention is not warranted. Meanwhile, article 134 states that the procuratorate can decide whether to arrest a suspect in 10-14 days, which implies that the detention can last to two weeks maximum if doubts are not removed. For a more elaborate historical introduction of this measure, see Sapio, “Shuanggui and Extralegal Detention in China.”

⁵⁰⁰ DIC Regulation of Case Inspection. (1994). Art.15

⁵⁰¹ DIC Regulation of Case Inspection. (1994). Art.39.

⁵⁰² Only in recent years, the Supreme People’s Procuratorate as well as the Supreme People’s Court started to demand from investigators other forms of evidence to complement confession for conviction in courts. One slogan of this campaign is “zero-confession (*ling kougong*)”. However, this does not reduce the value and the need to extract confession in the investigation since the confession can provide important leads to the discovery of other forms of evidence.

⁵⁰³ Only recently, the Supreme People’s Procuratorate issued a directive requiring procuratorates to exclude evidence obtained through torture in felony concerning the application of death sentence. For the report on the directive, see http://opinion.nfdaily.cn/content/2009-08/11/content_5531190.htm

⁵⁰⁴ Interview C011. H022.

⁵⁰⁵ Directive on Disciplinary Sanctions of the CCP (2004) Art.10.

DIC is not competent to render criminal punishment but is responsible to transfer cases to procuratorates for prosecution if the DIC finds the offense is indictable.

As an inner-party disciplinary organization, the DIC enjoys an “extra-judicial” or “above-judicial” status and its decisions have a quasi-legal or above-legal effect. In other words, the decisions of the DICs are not challengeable by any institution or individual other than its leaders in the superior party organization.⁵⁰⁶ This research has not come across a case, where a prosecutor prosecutes an offender or drops the charge against an offender because the prosecutor disagrees with the decisions of the DIC. In fact, for high-profile cases, the DIC sometimes engages both the procuratorate and the court concerned at the investigating stage so that the procuracy and the judiciary can be properly instructed at an early stage and their concerns, if any, can be incorporated in the investigative strategy.⁵⁰⁷ In this circumstance, the following prosecution and trial will be a showcase since the conviction and sentencing will have already been determined during the investigation.⁵⁰⁸ In procuratorates, the decision-making process has similar features but their decision-making power is limited due to their institutional constraint, which places them inferior to party apparatus, including the DICs.

To ensure the implementation of decisions that are reached through a loosely regulated and unchecked procedure, strict discipline is applied in and among anti-corruption institutions to regulate the superior-subordinate relationships. For example, the Supreme People’s Procuratorate (SPP) has been repetitively emphasizing that the relationship between the superior and subordinate procuratorates is a relationship of leading and being led⁵⁰⁹ rather than supervising and being supervised,⁵¹⁰ as stipulated in the Constitution (2004).⁵¹¹ According to the Notification on Registration and Report of Leads of Important Cases in Preliminary Investigation Level issued by the SPP, all leads concerning officials, who hold a rank of or beyond *xian/chu* level, have to be registered and submitted to the superior procuratorate within five days since discovery.⁵¹² Such

⁵⁰⁶ The “above-judicial” status of the party is suggested by Article 126 and 131 of the Constitution, which do not place party organizations under the constraint of not interfering the judiciary and the procuracy from exercising their power independently.

⁵⁰⁷ Such practice is usually referred to as “*lianhe ban’an* (collaborated investigation)”, which is most frequently applied in investigations initiated by the Central DIC. Examples can be found in No. 8 Section CDIC, *Practices and Research on Corruption Investigation* (Beijing: China Fangzheng, 2003). Wang, *Juebu Yunxu Fubaifenzi You Cangshenzhidi - Tupo Da’an Yao’an De Shijian Yu Sikao [Nowhere to Hide - Practices About and Reflections Upon Successful Detection of Major Corruption Cases]*

⁵⁰⁸ Such show-trial is often referred to as “*xianding houshen* (trial after conviction)”, which has a frequent appearance in discussions on Chinese criminal procedural practices.

⁵⁰⁹ For example, see SPP Opinions on Strengthening the Leadership of Superior Procuratorates over Subordinate Procuratorates [2007].

⁵¹⁰ In comparison, for example, in the judiciary, superior courts “supervise (*jiandu*)” the performance of subordinate courts. PRC Constitution (2004). Art.127.

⁵¹¹ PRC Constitution (2004). Art.132.

⁵¹² SPP Regulation [1995] No.17.

top-down control is further strengthened in recent years. In 2005, a regulation was issued which requires all local procuratorates that are below the provincial-level to obtain approval from the provincial procuratorate first before they can drop a charge.⁵¹³ In 2008 another regulation was issued, which takes the decision-making power on making an arrest from local procuratorates to provincial procuratorates as well.⁵¹⁴

Between the DIC and the procuratorate, the former enjoys a more superior political status, as mentioned in Section 7.2. For cases which the DIC exercises its jurisdiction, the DIC has the discretion to decide whether or not to send the case to the procuratorate for indictment.⁵¹⁵ If the DIC decides to send the case for prosecution, a conviction usually follows.⁵¹⁶

Strict discipline is applied not only in inter-institutional relations but also in the inner-institutional relations. It means that within each anti-corruption institution decision-making power is highly concentrated in the hands of the staff with superior ranks. Namely, all decisions concerning important issues such as the initiation of investigation, the application of detention measures and the conclusion of an investigation, have to be approved by the top leaders of the anti-corruption institution concerned.⁵¹⁷ Such authoritarian organizational culture has a notably conspicuous display in procuratorates.⁵¹⁸ On an internet bulletin board, a young procuratorator instructed new law graduates on “how to behave as a new-comer in procuratorates” and said, “Try to make a good impression to your superiors and colleagues ... everyone cares about his status ... be careful not to offend them ... always hide your true opinion”.⁵¹⁹

Such top-down disciplinary control is even more rigid in the DICs. Since the DICs are party institutions, the relationship between superior-subordinate DICs is immediately subject to the CCP disciplinary rules, which require the subordinate party institution to implement decisions and to execute instructions from the superior party institution

⁵¹³ SPP Regulation [2005] No.15. Available at http://law.baidu.com/pages/chinalawinfo/6/66/e25627b04ed47bd51c8595def4b251f7_0.html

⁵¹⁴ In 2008 the SPP launched a new procedural measure, which requires local procuratorates to acquire approval from a superior procuratorate (at the provincial level at least) for decisions to arrest a corruption suspect as well. The measure is termed “*shuang baobei, shuang baopi* (double reports on case-registration, double application for approval)”.

⁵¹⁵ CCDI [1989]. No.7. Art.1. Also Yongjian Guan, ed. *Investigating Procedures of Dic* (China Fang Zheng Press,2006). p.190.

⁵¹⁶ Manion, *Corruption by Design: Building Clean Government in Mainland China and Hong Kong*. p.133.

⁵¹⁷ Interpretation of the Guidelines of the Working Procedure of the DICs (1994). Art. 9, 18, 19, 22, 40. SPP, "Decisions on Issues Concerning Internal Checks and Balances in Anti-Corruption Investigation," in No. 27 (1998). Art. 8. ———, "Decisions on Certain Issues Concerning Anti-Corruption Investigation," in No. 27 (1999). Art.21.

⁵¹⁸ Interview of a local procuratorate conducted in 2007.

⁵¹⁹ The essay was removed from Tianya Net Bulletin Board but is on file with the author.

unconditionally.⁵²⁰ To guarantee that the discipline will be smoothly followed by DIC agents, “personality screening” starts at the recruitment stage. For example, in DICs, choosing the “right” staff is considered crucial.⁵²¹ The primary criteria of selection are the candidate’s political performance and *dangxing* (literally means “party spirit” and actually means one’s tendency to follow leaders).⁵²²

In an organization governed by such rules on decision-making, dissidents can easily be singled out, ostracized and given discriminative treatment since the leaders enjoy great discretion in task assignment, performance evaluation and promotion.⁵²³ It means that opposition from bottom-up will be rare and can be easily frustrated, if occurs. For example, Luo Ziguang, former DIC chief secretary of Loudi City, Hunan Province, had once conspired with a colleague to “take down” a provincial leader by exposing certain illicit conduct of the latter. Before they were able to make any impact, the conspiracy was detected and Luo was detained by the Hunan Provincial DIC for “political corruption issues”, including, “maliciously attacking certain provincial leader”. It was never disclosed whether Luo and his colleagues’ allegation against the “provincial leader” was investigated and whether it was true. Instead, an investigation was soon carried out against Luo for his own corrupt conduct. Luo was found having taken bribes from various favor-seekers worth of 310,000 *yuan* and sentenced to a term of imprisonment of 11 years.⁵²⁴

7.3.2. “Rank jurisdiction (*jibie guanxia*)”

Other than the general features mentioned in the previous section, the decision-making in anti-corruption institutions is regulated by a distinctive rule, namely, the “rank jurisdiction”. It means that an anti-corruption institution cannot carry out an investigation against a suspect, who holds a rank above that of the investigating institution, unless such an investigation is instructed or approved by the superior institution, which has appointed the suspect.

⁵²⁰ CCP Charter (2002). Art.15, 43, 44.

⁵²¹ CCDI, *A Brief Course of the Institutional Development of Discipline Inspection Commissions*. p.64.

⁵²² *Ibid.* p.73.

⁵²³ Trade unions do not have an independent role to protect employees’ from exploitation by the employer, in this case, the State. Feng Chen, “Between the State and Labour: The Conflict of Chinese Trade Unions’ Double Identity in Market Reform,” *The China Quarterly* 176 (2003). pp.1025-8. The only institutions to address such discrimination are more likely to take the side of the employer rather than the employee, if such complaints can be lodged at all. For illustration of the difficulties for citizens to sue the State, see Kevin J. O’Brien, Lianjiang Li, “Suing the Local State: Administrative Litigation in Rural China” *The China Journal* 51 (2004).

⁵²⁴ In this case, Luo may well be truly guilty for the crime of bribe-taking. However, an investigation against him would probably have never been carried out had he not offended the higher power first. See the report at <http://news.sina.com.cn/c/2004-07-26/09073200972s.shtml>.

Since the ranking system is applied in all public institutions and administered by the same procedures, the rank competence can be easily identified. Taking the procuratorates as an example, according to the “rank-jurisdiction”, county/district (*xian/qu*) procuratorates have jurisdiction over officials of a rank at the township (*xiangzhen*) and village (*cun*) -level; city procuratorates have jurisdiction over officials of a rank at the county (*xian/chu*) -level; provincial procuratorates over officials of a rank at the city (*ting/ju*) -level; and the Supreme People’s Procuratorate (hereinafter SPP) over officials of a rank at the province (*sheng/bu*) –level.⁵²⁵ National leaders (typically, the Politburo members) are not indicated in the regulation, which suggests that no procuratorate has the competence to initiate an investigation against a national leader. Similar rules apply to the DICs. According to the working procedure of the DICs, the authority of an investigating body corresponds to its rank and the rank of the investigated. In other words, a DIC secretary has no authority to initiate an investigation against an official higher than his own rank.⁵²⁶ To do that, approval from the DIC at the superior level has to be obtained. Meanwhile, the subordinate anti-corruption institutions are obliged to follow the leads handed down by their superior institutions and to start investigation according to the instructions.⁵²⁷

The following case will provide a more concrete understanding of the “rank jurisdiction” in practice. The case is about Hu Jianxue, former party secretary of Tai’an City, frustrated an investigation initiated by his subordinate Gong Pihan, former president of Tai’an City Procuratorate, until Gong Pihan obtained support from the superior leaders. The story began with a fraud case handled by Gong’s procuratorate in 1994.⁵²⁸ The investigation led to detection of corrupt conduct of Yan Kezheng, the then deputy captain of the district police bureau. “A leader of the city party committee” specifically instructed Gong not to dig further. However, Gong was determined to get to the bottom of the case. Before Gong was able to take any further action, he was summoned by Hu Jianxue, the chief party secretary of Tai’an City. Hu instructed Gong to hold the investigation until a party committee deliberation on the case is conducted. Gong waited but the meeting was never held. Eager to advance the investigation, Gong had a detailed report delivered to Hu, enlisting the evidence and requesting for the permission to resume the investigation. Hu ignored the report. Being stonewalled by Hu, Gong called for help from his other superior, Zhao Changfeng, the president of the provincial procuratorate. Under the support from the provincial leader, Gong was able to detain the key perpetrator and witness, Yan

⁵²⁵ Notification on Strengthening Investigation on Grand and Significant Cases, Issued by the Supreme People’s Procuratorate in 1993. Art.3.

⁵²⁶ Working Procedure of the DIC (1984). Art. 4. Art.10, Guidelines of the Working Procedure of the DICs (1994). Art.17.

⁵²⁷ Guidelines of the Working Procedure of the DICs (1991). Art.10(5).

⁵²⁸ The title is the translation of the Chinese title of the journalistic report of the case. Yamin Li, “Taishan Jiao Xia De Jiaoliang [a Wrestle at the Foot of Mount Tai].”

Kezheng, the deputy police captain. During the interrogation, Yan leaked partial information about corrupt conduct of some high-rank city party leaders, including the party secretary Hu Jianxue.

As the investigation progressed, the more evidence Gong was able to acquire, the more desperate Hu became. He even once had words passed on to Gong, promising Gong a promotion if he could close the case. Gong rejected the proposal. At the same time, the provincial procuratorate took over the case from the city procuratorate and formally established an investigation against Hu Jianxue. In order to increase the authority and determination of the provincial procuratorate, at one point of the interrogation, a vice-president of the Supreme People's Procuratorate was brought in to show the suspects that the superior power was on the side of the investigators. Soon after the visit, a primary suspect confessed his corrupt conduct and that of Hu. Two days later, Hu was arrested and later convicted of having taken 99 bribes worth 600,000 *yuan*.

Although the investigation was eventually successfully carried out, Gong had suffered serious psychological distress during the investigation due to the difficulties laid to him because of the rank jurisdiction.⁵²⁹ Even with his integrity, courage and perseverance, Gong would not have won the battle against the party secretary, had he not obtained support from the superior power from the provincial procuratorate up to the Supreme People's Procuratorate.⁵³⁰ In reality, such support was, to a great extent, contingent. Had Hu Jianxue managed to gain protection from the superior power, Gong could have been forced to abort the investigation and likely to face personal revenge brought against him. In fact, after the event, Gong was later transferred from the procuratorate to the Provincial Department of Justice, which handles administrative legal affairs and has no investigative function. The only public report about Gong after Hu Jianxue's case is him inspecting the order of a national judicial exam.⁵³¹

Gong Pihan's experience shall not be an isolated case. The reason that this case was publicly reported is because Hu Jianxue, the corrupt official, had fallen out of power and protection. Had Gong failed to obtain support from the provincial leaders and forced to

⁵²⁹ According to the report, Gong was almost driven to insanity because of the personal pressure placed on him by Hu Jianxue and his collaborators during the investigation. See *Ibid*.

⁵³⁰ According to the reports of the "front-line" anti-corruption investigators, suspects of corruption usually demonstrate a sense of defiance towards the investigator, whose ranks are usually inferior to that of the suspects. Most suspects also show great resistance towards the investigation on the belief that their patron, or "guanxi", would come to rescue. Therefore, successful interrogation very often relies on the engagement of the leader of the investigating institution, whose rank matches or supersedes the rank of the suspect, in the interrogation. It is often this final push that breaks the psychological defense system of the suspect and leads to valuable confession. Such reports can be found at <http://law.law-star.com/cac/305048835.htm>, <http://www.cnjccn.com/html/200863015192816336.html>, <http://www.psychcn.com/enpsy/200210/144933305.shtml>.

⁵³¹ See the report at <http://www.laiwu.gov.cn/006news.asp?id=7408>.

withdraw the investigation, what had happened would probably never fall in the public's view. Even in the report of Gong Pihan, the battle was largely portrayed as a victory of wise individual leaders against evil individual corruption offenders. The institutional defect of the "rank jurisdiction" is seldom challenged.

Subjecting anti-corruption investigation to the strict rules of rank-jurisdiction shows the strong desire of the top political leadership to reserve top-down control over anti-corruption investigations. It grants privileges for the powerful, places them above the law and manifests a questionable commitment to uproot corruption. This practice together with those concerning the decision-making process mentioned in the previous sub-section constitutes the environment of anti-corruption institutions where the corrupt activities studied in this research took place.

7.4. Corruption in anti-corruption institutions

Handling the leads (*anjian xiansuo*) is the start of any anti-corruption investigation.⁵³² In a recent public interview, a former director of Jianli County (Hubei Province) Inspection Bureau summarized current practices on how citizens' reports are handled in the local DIC.⁵³³ According to this director, 90 percent of the leads will go to the chief secretary of the DIC directly after it has been collected from the post, phone calls or other means. Then three scenarios will follow, depending on the closeness of the personal relationship between the chief secretary and the condemned official. The first scenario is when the chief secretary happens to bear a grudge against the official. The chief secretary would instruct the investigating agent to start the investigation "seriously" and "immediately". When the reported corrupt conduct is confirmed, the chief secretary would set the tone of the concluding remark to ensure that his opinion will be followed before he holds the commission meeting. The second scenario is when the chief secretary has a fairly good relationship with the condemned official. The chief secretary would then intercept the report, not to register it, and summon the official for a "talk". During the conversation, the chief secretary would leak the report and emphasize the severity of its consequences if he decides to initiate an investigation, until the official pleads for help

⁵³² Public reports reveal that 80 percent of the leads of corruption cases come from citizens' reports (*qunzhong jubao*) either by letters, phone calls or even emails. See the press release of the SPP <http://www.gmw.cn/01gmr/1998-07/21/GB/17760%5EGM4-2110.htm>. Other than citizens' report, the lead may also come from targeted investigation of anti-corruption agents and leads handed over by the superior anti-corruption institutions or other authorities. Anti-corruption agents normally react actively towards the leads, which are detected by themselves from their targeted investigation. They are also expected to act actively towards leads instructed and transferred to them by superior authorities. Directive of Case Investigation of the DIC (2004) Art.10(5). Rules on Leads Processing of the People's Procuratorates (2009). Art. 38-43. Also, see an article on "How to successfully complete the cases handed over by the superior authorities" at the website of a local procuratorate <http://www.yyjcw.gov.cn/Article/ArticleShow.asp?ArticleID=90>.

⁵³³ Available at http://news.qq.com/a/20070612/002512_1.htm

and registers the “help” as a personal favor to be reciprocated. The last scenario is when the chief secretary is indifferent to the condemned official. Then the normal procedure will follow.

According to the cases studied, the Jianli official’s summary is a pertinent description of the corrupt practices during anti-corruption investigations and it is applicable not only to lead-handling but all phases in the investigative process. The rest of this section will demonstrate such practices employing real cases. These cases are categorized in two groups. The first group refers to the scenario, in which an investigation is conducted for the private benefits, either financial or non-financial, of the investigator. The second group refers to the scenario, in which an investigation is NOT conducted due to the private benefits of the investigator. The cases to be introduced concern the DICs and the procuratorates as the external monitors of corruption as well as the leaders of the public institutions concerned as the internal monitors of corruption.

7.4.1. Scenario I – corruption by carrying out investigation

The first scenario refers to the situation where an anti-corruption investigation is conducted to realize the investigator’s private interest. Such private interests include both financial and non-financial interests.

7.4.1.1. For non-financial corrupt interests

To conduct an investigation for non-financial private interests is mainly conduct, which is carried out to take revenge and/or to remove a political rival or threat. Some of the revenges were carried out based on true evidence of corrupt conduct; some were carried out by perjury, such as the case of Jia Ailing, a 51-year-old judge in Luoyang Intermediate Court, Henan Province. Judge Jia had been wrongfully imprisoned for almost a year on the ground of a false corruption charge because she had offended the head of the local procuratorate. In 2001, Jia was assigned a contractual dispute case. During the litigation, Jia declined a bribe offered by one of the litigants, who was introduced to Jia by the president of the local procuratorate. Jia did not yield to the pressure and proposed an impartial ruling to the court adjudicative committee. Although the court adjudicative committee rejected the ruling proposed by Jia and rendered the final decision in favor of the procuratorate president’s acquaintance instead, Jia’s defiance to the instruction of the procuratorate president was evident. Soon after the closure of the court case, the local procuratorate initiated an anti-corruption investigation against Jia based on a false allegation of the litigant, who reported that Jia had extorted 15,000 *yuan* from his girlfriend during the trial. The investigators reexamined all previous cases that Jia had adjudicated and interrogated more than 80 litigants, none of

whom reported having succeeded in bribing Judge Jia. Without sufficient evidence, Jia was arrested and put into custody nonetheless. Jia had been kept in custody for 265 days until a report of Jia's grievance attracted the attention of Luo Gan, the then chief secretary of the CCDIC. Upon Luo's interference, Jia was eventually acquitted and released.⁵³⁴ However, there is no public report about whether the perjuring litigant and the head of procuratorate president have been held accountable.

In this case, Judge's Jia's mistreatment was not only a result of the fact that decisions on restricting suspects' freedom are not scrutinized by an independent judiciary; it is also a result of the particular way of decision-making in anti-corruption institutions, which permits an ungrounded decision formed by an individual leader to be unconditionally implemented by subordinates. When the investigators had failed to obtain any evidence of corrupt conduct of Judge Jia, none of them seemed to have challenged their superior's decision and asked for the judge's release. Law and justice are arrested by blatant abuse of power and the only effective remedy comes from the interference of the higher power, in this case, a national leader from Beijing. In this aspect, Judge Jia should consider herself lucky that her case had eventually attracted attention and gained sympathy from the CCDIC secretary. Li Guofu, another victim of abuse of anti-corruption investigative power, was, however, not that fortunate.

Li Guofu, an entrepreneur from Fuyang City, Anhui Province, was once a protégé of Zhang Guo'an, the then chief secretary of Yingquan District of Fuyang. Having worked closely with Zhang for a long time, Li knew quite a few "dirty secrets" of Zhang, particularly about the extravagant construction project of the Fuyang city hall, which was nicknamed "White House" because of their resembling external outlook. Soon Li started to send report letters to authorities exposing Zhang's corrupt conduct in the construction project. However, one of Li's letters was intercepted by a friend of Zhang, who worked as a secretary of the Fuyang city municipality. Zhang was immediately informed of the letter. Outraged, Zhang ordered to intercept the rest of Li's report letters from the post offices and instructed the then president of the district procuratorate to establish a corruption case against Li. The prosecutor followed the instruction and Li Guofu was soon arrested. At the same time, upon Zhang's instruction, Li's mother and son-in-law were also arrested for false corruption allegations. Six months after having been detained, Li was prosecuted for embezzlement, bribe-taking, forging government documents and seals, all based on ungrounded allegations. Li was denied access to lawyer and visits from his family. The day before a scheduled, Li was allowed for the first time to meet his lawyer. Just a few hours before the meeting, Li was found dead in the detention center from some unnatural cause. The procuratorate insisted that Li hanged himself, which Li's

⁵³⁴ Available at http://www.onlyit.cn/mba_article/at_m/at_m_06143_558.htm

family found unconvincing.⁵³⁵ The procuratorate did not release the body to Li's family and coroner's examination was not conducted. The case was later reported by a national newspaper China Youth's Daily and broadcasted by a few civil-right activists, which generated wide public attention. In order to avoid a public crisis, Anhui provincial leaders instructed an investigation to be carried out against Zhang three months after Li's death. Zhang was prosecuted for plotting and avenging as well as taking 52 bribes worth 3.6 million *yuan* during his term in office.⁵³⁶ However, the delayed punishment of Zhang could never bring back the life of Li Guofu to his family.

In the above two cases, the vicious vengeance of the procuratorate president in Judge Jia's case and the party secretary in Li Guofu's case are shocking. However, we should also take notice that in neither of the two cases the revenge could have been succeeded through the two vindictive leaders' individual efforts if their ungrounded decisions had not been loyally and effectively implemented by their subordinates. This strictly disciplined superior-subordinate relationship is one critical feature of the decision-making process in anti-corruption institutions as well as courts, which had been discussed in Chapter 5 and 6. This institutional design constitutes the deeper root of corruption in anti-corruption institutions as well as other law enforcement institutions, which sustains corruption even after individual corruption offenders have been exposed and removed. In some cases, such as that of Judge Jia mentioned above, her vindication has not necessarily led to the punishment of the perpetrators, a demand that she had not seemed to insist in pursuing. After having been jailed for 265 days, Judge Jia probably felt, understandably, too grateful for being able to regain her freedom and for her reinstatement to the court she used to work at. Tan Shibin, another victim of abuse of anti-corruption power, is not as lucky as her.

As a former vice-president of Lianyuan County Court, Hunan Province, Tan Shibin was framed and wrongfully charged for abuse of judicial power in a court auction presided by him in 2000. Tan was detained for 292 days before he was acquitted and released. However, the acquittal would never regain Tan the job as a judge. In fact, a leader "from above" had explicitly instructed that Tan should never be reinstated in the justice system, if to be reinstated at all."⁵³⁷ Tan lamented, "As a court vice-president, with all evidence at hands, it had been so difficult to prove my innocence. Imagine how difficult it would be if it happened to an ordinary folk."

⁵³⁵ The family later found that Li's both eyes went blind before the death, which makes suicide difficult to commit in a guarded detention center. In addition, the lawyer found that the alleged place where Li hanged himself is of the same height of Li, which makes suicide by hanging unlikely to succeed. For more information on the case, see the defense lawyers' website <http://www.imlawyer.org/Article.asp?ArticleID=666>.

⁵³⁶ A news column dedicated to this incident can be accessed at <http://news.sohu.com/s2008/baigongjubao/>

⁵³⁷ Available at <http://news.163.com/06/1030/05/2ULIMG6T0001124J.html>

7.4.1.2. For financial corrupt interests

Unlike in the circumstance where an anti-corruption investigator conducts an investigation as a personal revenge against the victim, when an anti-corruption investigator conducts an investigation for private financial benefits, they will have to engage someone, who can gain from the conduct of the investigator and hence is willing to provide the benefits to the investigator accordingly. This is exactly the rationale of the conspiracy between Wang Liwei, former deputy manager of the state-owned Xinhua bookstore, and Liu Guoqing, former director of the AEBB of Guizhou Province Procuratorate. Wang had a lasting personal grudge with the chief manager of the same bookstore, whom Wang considered as a career rival and whom Wang believed was corrupt. Wang sought for help from Liu Guoqing to launch an anti-corruption investigation against his rival. Upon Liu's instruction, Wang wrote a citizen's report letter (*jubaoxin*), enlisting his allegations against the chief manager. After having received the letter, Liu, however, did not immediately launch the investigation. Instead, Liu said to Wang, "There are some problems. The allegation lacks evidence". When Wang started to worry, Liu mentioned in passing, "Recently, I bought a new apartment but I am short of money for interior decoration. Do you have some money?" Afterwards, Wang gave Liu a bank card, which had 179,000 *yuan* in the current account. Only then, Liu personally instructed his subordinate to proceed with the investigation.⁵³⁸

In this case, it seems that the AEBB director was able to control the progress of the investigation, either the launching or the suspension, simply by giving orders to his subordinates. The director's capacity to exploit the decision-making process was well-understood by the deputy bookstore manager, which is why he solicited the corrupt "service". However, what the deputy manager was not aware of is that his antagonist, the chief bookstore manager, is better connected than he had thought. This gave the case an interesting twist - the investigation backfired. It turned out that before the investigation against the chief manager could produce any fruit, the chief manager had managed to mobilize the provincial DIC, which has a higher rank and hence higher authority than the AEBB, to initiate an investigation about the investigation. Out-powered, the conspiracy between the AEBB director and the deputy manager was exposed. The AEBB director was convicted and sentenced to a term of imprisonment of 13 years. Meanwhile, the allegations against the bookstore chief were "forgotten" and never investigated again.⁵³⁹ It seems that when power game has taken over the investigation, law and truth recedes to the background.

⁵³⁸ Court Judgment, 1st instance, Criminal Division, Guiyang Intermediate Court [2003] No.117

⁵³⁹ Court Judgment, 1st instance, Criminal Division, Guiyang Intermediate Court [2003] No.117. The judgment does not mention the result of the corruption investigation against the bookstore chief manager Gong.

The capacity of anti-corruption agents to exploit the decision-making process does not only allow them to gain corrupt interests by launching ungrounded investigations but also by carrying out investigations that are within their duty to carry out. In the following case, Zhang Zihai, a corruption victim, was left no choice but to “buy” from the local AEBB director the evidence in order to prove his loss from corruption.

Zhang Zihan, a peasant from a county in Anhui Province, used to run a restaurant close to the county council, who was Zhang’s main patron. The county council kept a tally at the restaurant but never fully paid its bills. Zhang was soon driven to bankruptcy. In 1996 he brought an action against the county council at the county court. The court was instructed by the county council not to take the case. Zhang was then forced to bring the case to the appellant court - Fuyang Intermediate Court, where the case was registered. In two years’ time after the registration, the presiding judge had solicited countless banquet-treats from Zhang before the judge eventually facilitated a settlement between Zhang and the county council. In the settlement, both litigants agreed that the county council would pay back Zhang half of his claim, 270,000 *yuan*. Zhang received 30,000 *yuan* immediately but the rest 240,000 *yuan* had never come. Only three years later Zhang was told that the rest of the settlement had already been paid to and embezzled by the Fuyang Intermediate Court. However, the court denied having received the payment. Zhang had no power to request the city council to provide evidence of the payment either. Then Zhang sought for help from the AEBB director of the local procuratorate. The director promised to help Zhang to secure the payment slips from the county council. Meanwhile, the director indicated that the endeavor would entail costs. With appreciation and understanding, Zhang immediately said that once his court award being realized, he would make a contribution to the procuratorate for the construction of the new office building. The director said, “Nonsense. The procuratorate has money. How come the procuratorate needs money?” Then the director requested for 40,000 *yuan*, paid up front in cash.⁵⁴⁰ In this case, for the corruption victim Zhang Zihan, the decision-making process of anti-corruption investigation seemed so precarious that the only way suggested to him to engage the anti-corruption institutions in order to protect his right and interests is to provide private incentive to the investigator.

7.4.2. Scenario II – corruption by NOT carrying out investigation

In this scenario, “no investigation” refers to the cover-up of a corrupt practice so as not to trigger an investigation. It also includes suspension of an on-going investigation as well as a premature conclusion of the investigation. The most recent example is the corrupt

⁵⁴⁰ See <http://www.cctv.com/news/china/20050524/101742.shtml>.

conduct of Ding Xinfu, former president of Jianxi Provincial Procuratorate, the procuratorate of the highest rank, who is convicted of corruption. According to his verdict, Ding had dropped a charge of bribe-taking against a suspect after having taken a bribe of 300,000 HK\$. Ding also granted probation to a suspect of tax evasion in exchange for 1,450,000 *yuan*, which was handed to his son.⁵⁴¹ Similar practices are found in the case of Wu Xing'an, former AEBB director of Fushun Procuratorate, Liaoning Province.⁵⁴²

Among all the corrupt anti-corruption investigators, the most notorious for abusing of power is Zeng Jinchun, who was ranked as the "No. 1 corrupt DIC chief secretary". In 2008 Zeng was sentenced to death for having collected illicit income of 60 million *yuan* during his nine years in office as the chief secretary of the DIC of Chenzhou City, Hunan Province. According to the related reports, the decision-making process was so easily exploitable that once Zeng firstly instructed a subordinate to detain a corrupt official. Then upon the receipt of 100,000 *yuan* from the official, Zeng instructed to have the official released. However, soon after the release, Zeng instructed to detain the official again until an additional 1000 US\$ was paid.⁵⁴³

Since the most immediate monitor of corrupt activities is the head of each public institution, the covering-up may start there already before it reaches specialized anti-corruption institutions. For example, When Jia Yongxiang, former president of Shenyang Intermediate Court received a letter reporting corrupt conduct of his subordinate, Liang Fuquan, a vice-president of the same court, Jia handed the letter directly to Liang. Afterwards, Liang gave Jia 20,000 *yuan* and 2,000 US dollars as a gesture of appreciation for "being taken care".⁵⁴⁴ The cover-up may not have been exposed were it not because Jia's involvement in a much grander corrupt scandal involving criminal activities of a local mafia.⁵⁴⁵

Sometimes when the evidence of corrupt conduct of the suspect is too strong and too risky for the anti-corruption investigator to cover, the investigator can render a lenient sanction to close the case. For example, Peng Jinyong, former Secretary of the DIC of Changde City, Jiangsu Province, had rendered a lenient sanction to a corrupt police captain after having received 5,000 British pounds and 8,000 HK dollars from the latter. Peng also instructed the police bureau to make sure the captain "properly" reinstated.⁵⁴⁶

⁵⁴¹ See <http://news.sina.com.cn/c/2006-02-13/10019086114.shtml>.

⁵⁴² See http://news.xinhuanet.com/legal/2007-01/31/content_5680165.htm.

⁵⁴³ Procuratorate's Claim, Changsha People's Procuratorate [2008] No.2

⁵⁴⁴ China Inspection Editorial Team, *Shenyang 'Mu Suixin, Ma Xiangdong' an Chachu Jishi [a Documented Report of the Investigation of Mu Suixin and Ma Xiangdong]* (China Fang Zheng Press, 2002), p.152.

⁵⁴⁵ For more about the scandal, see *Ibid.*

⁵⁴⁶ Available at <http://bm.jxxdxy.com/qlzf/details.asp?classid=11&newsid=190&page=1>.

Sun Xiaohong, former president of Kunming Intermediate Court and later Yunnan High Court, was removed from office for smuggling and unlawful public spending in 1999 but reinstated to the Director of Bureau of Commerce of Yunnan Province three years later.⁵⁴⁷

Understandably, a leader would have stronger incentive to help his subordinate to cover corruption from investigation if the leader was also a participant of the corrupt conduct. Fuyang Intermediate Court in Anhui Province was one such court, where corruption was operated like an enterprise, featured by collusion from the court leaders down to the rank and file judges. A local procuratorator revealed that a drug trafficker once bribed two judges in the Fuyang Intermediate Court through a county court judge. The procuratorate had to abort the investigation because of obstruction from the leader of Fuyang Intermediate Court, who stated that the alleged bribe was not a bribe but a fee charged by the court.⁵⁴⁸

Sometimes, a corruption offender can not only succeed in having his case dropped by the investigating body but also obtaining confidential information about the informant of the crime so as to seek revenge. For example, when Pan Yile, former vice-president of Guangxi High Court, was forwarded a report letter with corruption allegation against him by a “friendly” party leader, Pan threatened the informant and read out the letter to the informant in defiance.⁵⁴⁹ Leakage of confidential information by anti-corruption investigators not only provides the corruption offenders a chance to destroy evidence but also put the corruption informants in perils. The case of Li Wenjuan is a typical example. As a tax accountant in Anshan State Taxation Bureau, Li detected irregular practices of the bureau and reported it to the National State Taxation Bureau in 2000. The national bureau then forwarded her report back to the Anshan Bureau, where Li worked. Li was firstly transferred to a post in a remote location, then fired, arrested and detained in a labor education camp for one year as an administrative punishment. After having served the administrative punishment, Li was still out of job and her family was continuously threatened by thugs. It was only until her story was picked up by a news program run by the national television network CCTV, the CCDIC intervened and reinstated Li in a region away from her foes. During the TV interview, Li lamented that she was too naive to think that she could correct mal-practices just because she was on the side of justice.⁵⁵⁰

⁵⁴⁷ Available at <http://www.people.com.cn/GB/wenhua/22226/31113/31114/2266503.html>.

⁵⁴⁸ Available at http://www.cniciw.gov.cn/info_disp.php?id=2373.

⁵⁴⁹ Available at <http://www.people.com.cn/9807/16/current/newfiles/c1010.html>.

⁵⁵⁰ Available at <http://news.sina.com.cn/c/2006-03-28/12009463503.shtml>. A video clip of the CCTV interview can be accessed at <http://cctv.sina.com.cn/news/2006-03-28/13094.html>. Lü Jingyi was another whistle-blowers who was imprisoned by Li Changhe, former secretary of the political commission of Pingdingshan party committee. Lü was heavily injured and survived his wife in an assassination ordered by Li. CCDI, *Ban'an Shijian Yu Yanjiu [Experience and Research on Case Investigations]* (Beijing: China

Lacking of effective institutional support, corruption informants, especially whistle-blowers, who report the crime not out of private but public interests, are sometimes tragically exposed to persecution by the corrupt suspects because of the protection of corruption offenders by the anti-corruption investigators.⁵⁵¹

Anti-corruption institutions become such powerful institutions that some corrupt leaders of these institutions can exert influence in other public affairs, such as the approval of land use, commission of public procurement contracts and promotion of cadres. In fact, many corrupt leaders in anti-corruption institutions were initially investigated not because the corrupt exchange they had conducted during anti-corruption investigation but in other public affairs mentioned above. For example, the aforementioned notoriously corrupt DIC leader Zeng Jinchun was initially investigated for his monopolistic control of coalmine exploitation in Chenzhou City, which had led to accidents and physical conflicts among various interests group. The investigation showed that a great part of his corrupt profit was derived from racketeering in the local mine operation.⁵⁵² Similar practices were found in the cases of Mu Xincheng, former director of AEBB of Fanzhi County Procuratorate in Shanxi Province,⁵⁵³ and Xiong Jinxiang, former secretary of the DIC office in Tongguan Police Bureau, Shannxi Province.⁵⁵⁴ Zheng Wei, former DIC leader of Chongqing Yuzhong District, was initially investigated for his peddling in a profitable real estate construction project.⁵⁵⁵ In Changde City, Hunan Province, Peng Jinyong, former DIC Secretary of Changde City, had such a reputation that he could instill fear in his subordinates when they failed to deliver a “favor”.⁵⁵⁶ So is Li Baojin, former president of Tianjin People’s Procuratorate, who was one of the most influential figures in the circle of Tianjin real estate developers. Li once told his followers in private, “I did not know the power of the procuratorate was so great until I took the office. I can investigate against anyone whom I want to investigate.”⁵⁵⁷

In general, the particular institutional design of anti-corruption institutions that governs the decision-making process creates the same environment as that of other public institutions, where corruption pervades and persists. The cases introduced in this chapter only represent a small portion of corrupt activities in today’s anti-corruption institutions. Nonetheless, it demonstrates that the occurrence of these activities is not only the result

Fang Zheng Press, 2003). p.193. More stories about whistle-blowers in China, see <http://news.tom.com/zhuizong/jubaoren/>.

⁵⁵¹ For more about the persecution of whistle-blowers, see a feature column at <http://news.tom.com/zhuizong/jubaoren/>

⁵⁵² Available at <http://www.zgjr.com/News/2009814/index/043257618200.shtml>

⁵⁵³ Available at <http://www.chinanews.com.cn/gn/news/2009/06-26/1750063.shtml>

⁵⁵⁴ See http://news.xinhuanet.com/legal/2008-04/25/content_8049844.htm.

⁵⁵⁵ Chongqing No. 5 Procuratorate vs. Zheng Wei, Chongqing No. 5 Intermediate Court [2007] No. 195

⁵⁵⁶ Available at <http://bm.jxxdxy.com/qlzf/details.asp?classid=11&newsid=190&page=1>.

⁵⁵⁷ Available at <http://news.sina.com.cn/c/2008-03-04/120515072604.shtml>.

of moral decadence of individual corruption offenders but also an outcome of the institutional defect in decision-making, assisted by the discriminative practices of “rank jurisdiction”, based on which anti-corruption investigations are carried out.

7.5. Conclusion

This chapter intends to demonstrate and explain how corruption occurs in anti-corruption institutions. By showing how decisions are made in anti-corruption institutions, this Chapter intends to identify the deeper root of corruption in anti-corruption institutions. This chapter concludes that the fact that decisions of applications of investigative measures are largely exempted from judicial examination provides the investigators greater opportunities to abuse their power in exchange for private interests of great value. The disciplined superior-subordinate relationship, which is originally designed to induce unconditional compliance and top-down political control, guarantees the effective implementation of decisions, which are reached to serve private interests of those, who enjoy the unconstrained decision-making power. Under this condition, corruption offenders can effectively deploy a much greater volume of human and institutional resources to fulfill their corrupt objectives. Corruption proliferates.

In the meantime, the “rank jurisdiction” stratifies the power of anti-corruption institutions at various levels as well as their related corrupt interests. In doing that, it preserves the current power structure and allows the powerful and resourceful to continue to conduct corruption with impunity. It also raises doubt on the sincerity of the anti-corruption measures, impairs its trustworthiness, weakens its deterrent effect and enhances the common belief in power rather in law. It is not surprising that when high-rank politicians, such as Wang Huaizhong, former deputy chief party secretary of Anhui province, fell out of power and was put under investigation for his corrupt activities, his first attempt was to seek for protection from “above”. He readily fell in a scam set up by a few “guanxi swindlers”, who claimed to have strong connections in the CCDIC in Beijing. Wang paid the swindlers over one million *yuan* as the “operating fee”. Upon receiving the money, the swindlers disappeared.⁵⁵⁸ It is neither surprising that when an offender is exposed and punished, the offender and the observers are more inclined to attribute the punishment to the offender’s falling out of protection of power rather than his breach of law. Consequently, it encourages the potential corruption offenders to invest more in power as a counter strategy rather than refraining themselves from abusing power. The effects of the anti-corruption measures are therefore greatly mitigated.

⁵⁵⁸ See related report at <http://www.people.com.cn/GB/paper2086/11500/1037374.html>.

In conclusion, by analyzing corruption in anti-corruption institutions and associating its occurrence with the institutional design of these institutions, this chapter addresses a more fundamental cause of the ineffectiveness of anti-corruption measures and practices in China that has been dispersedly observed and discussed in the previous studies. The chapter adds to our understanding of the complexity of the scene of corruption in which power consolidates private interests and private interests guide the exercise of power. The findings of this chapter also suggest that “the tendency to exploit power” and “the desire to preserve power” seems two pivotal drives and original sources to which various forms of dysfunctional governing, in this case, corruption control, can be traced back. How to contain these drives is a more fundamental issue that any good/clean-governance program has to be confronted with. And to solve this issue requires a change of perception of power, which is a more daunting task in a country with 2000 years’ history of authoritarianism.

Chapter 8 Conclusion

On 19 January 2010, five days after the court trial was publicly announced, Huang Songyou, former vice-president of the Supreme People's Court, was convicted for both charges of bribe-taking and embezzlement and sentenced to life imprisonment. The court found that Huang was guilty of taking bribes worth 3.9 million *yuan* from four lawyers in exchange for favoritism in litigation during his term of office in the SPC.⁵⁵⁹ Huang was also found guilty of embezzling 1.2 million *yuan* when he served as the president in the Zhanjiang Intermediate Court, Guangdong Province, before he was promoted to the SPC.⁵⁶⁰ During the investigation of Huang, at least four of Huang's subordinates in the enforcement division of the SPC were sanctioned and removed from their offices because of their involvement in Huang's case.⁵⁶¹ One SPC judge from the case-registration division was also removed and convicted for bribe-taking.⁵⁶² The SPC scandal provokes one to ask why a well-educated, respected and decently-paid judge, such as Huang Songyu, would commit corruption; and what commonalities does Huang's case share with the corrupt conduct committed by the rest of the 12,349 judges, who had been reportedly investigated and punished for corruption during the past decade?⁵⁶³

In order to answer these questions, this thesis started from investigating *how* corruption is carried out in China's courts. Without this important step, however, that is usually missing in the analyses of current studies, an accurate diagnosis and deeper understanding of this social-legal phenomenon cannot be obtained. In doing that, this thesis adopts a new analytical framework, which is partly inductively developed from systematic study of the empirical data and partly resulted from the inspiration of established theories on corruption, in particular, new institutional economics of corruption. This analytical framework treats corruption as a contracting process, which includes four phases: 1) initiation of the exchange; 2) negotiation of the exchange; 3) contractual performance; and 4) enforcement of the contract in case of non-performance. This framework guides the direction and contents of the thesis and overarches the sub-frameworks applied in each chapter fitting to the specific topics discussed.

Using the empirical data introduced in Chapter 1, the thesis has demonstrated certain features and patterns of corrupt conduct in each of the four phases, which are then used to identify which factors have facilitated the contracting process of corrupt activities under investigation. The thesis concludes that the high occurrence of corrupt activities that are found in China's courts reflects a high degree of efficiency of the contracting process of

⁵⁵⁹ See <http://news.sina.com.cn/c/2010-01-19/125119499756.shtml>.

⁵⁶⁰ Ibid.

⁵⁶¹ See <http://www.infzm.com/content/39581>.

⁵⁶² See http://www.china.com.cn/policy/txt/2009-05/06/content_17732015.htm.

⁵⁶³ The total number of 12,349 is calculated according to the statistics provided in the annual SPC work report. The number covers 13 years between 1993 and 2007 (the statistics of 1997 and 2002 are missing). A break down of the number can be seen in Chapter 2.

corruption as a form of exchange. Through investigations of each phase of the contracting process, the thesis found a number of factors, which have attributed to this contracting efficiency. Some of these factors are closely associated with the environment in which corruption takes place; while some others are inherent in the nature of corrupt exchange regardless of its social, political and cultural backgrounds.

In demonstrating how exactly corruption is carried out, this thesis intends to show that as long as judicial power, as a form of public power, has to be delegated and exercised by individual judges or court officials, the incentive to conduct corruption will always exist. This is due to the externality of corrupt conduct, which allows corruption participants to enter into a deal, in which both are better off with an external cost transferred to the public and/or individual victims. In explaining how corruption flourishes in the enabling social institution of *guanxi*-practice and the permissive political institution of courts in terms of decision-making, this thesis highlights the complexity of corruption and corruption control. It is because, by hinging on these social and political institutions, corruption is institutionalized as well, in a parasitic manner. In this circumstance, corruption grows into a “hidden norm” (*qian’guize*) with its own rules and codes of conduct, which guide the choices of both the providers and applicants of public services. When corruption has developed from an occasional deviant behavior into a social norm, it is able not only to capture the law enforcement, including the anti-corruption institutions, but also to resist reformative measures by subverting formal rules with the “hidden norm”.

8.1. Main findings

Through an overview analysis of various corrupt activities in China’s courts, Chapter 2 finds that corruption takes place in the central court divisions, at almost all levels of the judicial system, regardless of its hierarchical level and geographic location. Such conduct may involve all types of judges, regardless of their competence or salary. Chapter 2 recognizes, however, that the prevalence and the features of the corrupt conduct are more closely associated with the capacity and the value of the decision-making power withheld by the offender.

In studying the negotiation phase, Chapter 3 finds that once the corrupt intent has been successfully communicated between the briber and the bribed in the initiation phase, consensus on the exchange terms is usually easy to reach, which makes the negotiation highly efficient. This is because, unlike in lawful exchange, the provider of the corrupt service bears no production costs of the object of exchange, which, however, are usually of great value to the buyers. It means that corrupt judges, as the providers of corrupt services, are able to sell at a low minimum price, whereas corrupt court-users, the buyers,

will be willing to pay a high maximum price for the corrupt service. The combination of a low bottom-price to sell and a high ceiling-price to buy results in a wide range of price options that would benefit both the buyer and the seller. This feature is inherent in the principal-agent-client structure of corruption. Due to this nature of corruption, the specific environment in which corruption takes place can affect the range of the bargaining zone but cannot diminish it. This finding is in accordance to the established understanding that corruption can only be controlled but not eradicated.

At the same time, the thesis also identifies several attributive factors that are actually closely associated with the political, social and cultural environments in which corruption takes place. Such factors include firstly the balanced contracting relationship between the briber and the bribed, which favors the bribed in terms of the bargaining power and the briber in terms of legal and moral barriers. To be more specific, on the one hand, the weaker bargaining power enjoyed by the bribers provokes them to act proactively and to break the “awkwardness” of the initiation phase of the contracting process without too much concern of the legal and moral risks of their action due to the lower legal and moral barriers confronting them. On the other hand, although the stronger bargaining power enjoyed by the bribed allows them to act passively and vet for the “right” exchange party in the initiation phase, the higher legal and moral risks of corruption that they are facing, in case of exposure, prevent them from behaving opportunistically and force them to commit to delivering the corrupt service as promised. This condition relaxes the opening and consolidates the ending of the contracting process. And this particular pattern of the distribution of the bargaining power and contracting barriers is characteristic of the specific legal, political and social environments in China where corruption takes place, such as the orientation of anti-corruption policies and the content and application of legal procedures in terms of transparency, proper exercise of discretion and guaranteed access to remedies for corruption victims.

This balanced contracting condition is almost inseparable from the next attributive factor to corruption, which is the institution of the so-called “guanxi-practice”. Chapter 4 finds that the endemic social and cultural conduct of guanxi-practice functions as an effective and efficient “operating mechanism” of corruption as a form of exchange. It is a highly effective practice which reduces the legal, moral and cognitive barriers that prohibit the communication of corrupt intent and hence has greatly improved the efficiency of the otherwise prohibitively costly initiation phase of corrupt exchange. Chapter 4 contends that the causality link between guanxi-practice and corruption is the inverse of the view held by many. It is not that the participants of corruption are compelled to corrupt conduct because of the existence of certain reciprocal relationship, but on the contrary, these participants adopt guanxi-practice as an enabling operating mechanism that

facilitates corruption. In this sense, guanxi-practice is not only “fuelling” corruption, but is a necessary and integral part of corruption in China.

The third attributive factor that is related to the environment where corruption takes place is the particular structure and features of decision-making in China’s courts. Chapter 5 and 6 finds that this particular decision-making mechanism in China’s courts has played an enabling role in the proliferation of corrupt opportunities and has greatly facilitated the delivery of corrupt services in the contractual performance phase of corrupt exchange in the litigating process. This manner of decision-making is primarily an outcome of the Chinese Communist Party (CCP)’s political dominance over the judiciary, its instrumental view of law and courts as well as the societal subscription to authoritarianism. Hence, this thesis casts doubts on the effectiveness of fundamentally controlling judicial corruption by launching incremental judicial reforms without carrying out the necessary political reform to subject the party to law and to replace the supremacy of power with the rule of law.

Chapter 7 demonstrated that the same factors that have facilitated corruption in China’s courts have also contributed to the proliferation of corruption in anti-corruption institutions, which are similarly incorporated to the ranking system and governed by similar rules and practices of decision-making. Chapter 7 employs a number of cases to illustrate how anti-corruption measures, in these cases, had been abused to serve private interests of anti-corruption agents. These activities will inevitably divert valuable investigative resources to the cases that are driven by private interests of anti-corruption agents. The most damaging effect of corruption in anti-corruption institutions is that it raises doubt on the sincerity of the anti-corruption measures. When an offender is exposed and punished, the offender and the observers are more inclined to attribute the punishment to the offender’s falling out of either favor or protection of power rather than his breach of law. This understanding consequently encourages the potential corruption offenders to invest more in power or to exchange favor with the law-enforcement agent as a counter strategy rather than refraining himself from abusing power.

8.2. Looking ahead

Controlling corruption in China’s courts is not an easy battle. A comprehensive therapeutic prescription warrants another systematic research, which goes beyond the objective of this thesis. However, the findings of this thesis have identified a few critical factors, without addressing which the battle will unlikely succeed. These factors concern the two most widely applied anti-corruption measures, namely, institutional reform and anti-corruption enforcement. In terms of institutional reform, changing the way that court decisions are made is essential. Such reform shall firstly increase transparency and

accountability concerning the process of the formulation of court decisions. The reform measures shall aim to enhancing the quality of rationalization in decision-making, protecting procedural rights of litigants, engaging them closely in the adjudicative process, increasing scrutiny from the media and civil society and providing them wider and easier access to court hearings, trials and judgments. Secondly, more fundamental measures have to be taken to dispose the strictly disciplinary authoritarianism in court decision-making process. Such measures shall ensure that judges are appointed and promoted based on merits and that judges not fired or removed from complying with law rather than instructions. The main challenge of the above-proposed reform measures is that the disciplinary authoritarianism featuring court decision-making was originally placed in courts to safeguard that decisions reached by political party leaders will be unconditionally implemented in courts through the adjudicative process. Therefore, a reform to dispose the authoritarianism will necessarily require the establishment of judicial independence. It is not because corrupt activities taken place in courts are always resulted from unlawful demands from the CCP leaders but because this particular decision-making mechanism has enabled and spurred the delivery of corrupt services in China's courts.

Meanwhile, it is important to note that to win the battle against corruption it is not sufficient to reform the judicial institution alone without dealing with the social institution of guanxi-practice. In fact, compared with the daunting task of political reform, to reduce the significance of guanxi-practices is even more challenging since such practices stem from more discursive factors, such as the societal tolerance of venality, the cultural indulgence of duplicity and relative morality as well as the popular neglect of the value of integrity, honesty and universal trust. To change such an environment in which guanxi-practices operate demands much more patience, persistence, wisdom and strategic design. In challenging this social institution, it is critical to have a clear definition of guanxi-practice to be able to participate in the rather mingled guanxi-debates. Such a definition shall recognize the involvement of entrusted power as a key element so as distinguish guanxi-practice from the general social interaction between any related individuals. It is also important to be able to discern the popular false dilemma, which unnecessarily places one's commitment to law and to sentimental relations in a fallacious dichotomy.

As to the other controlling measure, namely, anti-corruption enforcement, it is important to modify the current "briber-friendly" policies and related legal measures, which have unwittingly helped corruption participants in stabilizing their otherwise frustrated contractual relations due to the need for concealment and the lack of protection from formal legal institutions. Confronting both the bribers and the bribed with similar sanctions will disturb the balance of the contractual relationship between the bribers and

the bribed. It will deter the bribers more effectively from initiating corrupt exchange blatantly and hence frustrate the contracting process to a greater extent. In the mean time, institutional reforms have to be carried out in anti-corruption institutions in order to safeguard anti-corruption enforcement from being captured by corruption and power. Such reformative measures include, first and foremost, placing corruption investigation under judicial scrutiny so as to limit the abuse of anti-corruption power. Secondly, reformative measure has to be introduced to lift the “power-friendly” jurisdiction control based on the rank of the suspect. Only then, the objective of anti-corruption can be deemed as credible and sincere, which will in turn enhance its deterring effects.

Lastly, it is equally important to address that to effectively control corruption, reformative measures, which are not limited to the ones mentioned above, have to be implemented in a concerted manner in order to produce the optimal effects. It is because systemic corruption, as a result of evolvement from individual deviant conduct into informal normative behavior, is an institutionalized practice, which has a high capability of self-rehabilitation and self-reproduction. Isolated or ill-coordinated measures will not be able to produce the sufficient level of impact, which is necessary in order to change the belief system of the wide population from a belief in the supremacy of power to the supremacy of law. To align various political, economic, legal, social and cultural forces to carry out such a grand group action, a committed political leadership with high coordinative capacity is indispensable. It requires a political consensus of a true dedication to the rule of law. It also demands concerted societal efforts to nurture rational legal thinking, to reward honesty, to promote integrity, to encourage defenses for public interests and human rights, and eventually to replace the faith in the supremacy of power with the faith in the supremacy of law.

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Legality, discretion and informal practices in China's courts
- A socio-legal investigation of private transactions in the course of litigation

Summary

As is generally recognized, the functioning of China's legal system is seriously impaired by widespread corruption in courts. This thesis intends to identify the systemic causes of corruption in China's courts by firstly investigating *how* corruption is carried out in China's courts. Apart from the introducing and concluding chapters, this thesis is consisted of six main chapters.

Chapter 2 develops a typology of various corrupt activities in China's courts and examines its general patterns. It finds that corruption takes place in the central court divisions, at almost all levels of the judicial system, regardless of its hierarchical level and geographic location. Such conduct may involve all types of judges, regardless of their competence or salary. Chapter 2 recognizes, however, that the prevalence and the features of the corrupt conduct are more closely associated with the nature, range as well as value of the decision-making power held by the offender. Chapter 2 also shows that among all corrupt activities corruption conducted in the form of exchange, namely bribery or favoritism, is the most prevalent and resilient type. This particular type of corruption is then selected as the focus of the rest of the thesis.

Chapter 3 sets out with an introduction of the main analytical framework, which overarches the thesis. This analytical framework treats corruption as a four-phase contracting process, namely 1) the phase of initiation of the exchange; 2) the phase of negotiation of the exchange; 3) the phase of contractual performance; and 4) the phase of enforcement of the contract in case of non-performance. This framework is employed in an endeavor to analyze the empirical data collected from various sources and to demonstrate in details the features and patterns of corrupt conduct in each of the four phases so as to identify more accurately which factor(s) has(have) facilitated corruption in China's courts. In doing that, Chapter 3 identifies two phases that are most critical to the completion of corrupt exchange. The first phase is the initiation phase, in which corrupt intent is communicated between potential exchange parties. The second phase is the phase of contractual performance, especially that of the bribed. These two phases are further examined respectively in Chapter 4 and in Chapter 5 and 6, demonstrating how these two phases are completed by corruption participants in China's courts and what factors have facilitated the process and contributed to its "success".

Chapter 4 recognizes that the initiation phase is facilitated by the omnipresent and omnipotent "*guanxi*-practice" in China. It finds that *guanxi*-practices are effective in reducing the legal, moral and cognitive barriers that prohibit the communication of corrupt intent and hence have greatly improved the efficiency of the otherwise prohibitively costly initiation phase of corrupt exchange. Chapter 5 and 6 identifies the decision-making mechanism in China's courts as a structural factor, which has facilitated the delivery of corrupt services in courts and resulted in the proliferation of corrupt

opportunities. Chapter 6 also discusses the dynamics of corrupt activities in China's courts, which appear as a multi-player, multi-dimensional and dynamic phenomenon instead of being one-on-one, one-dimensional and static.

Chapter 7 investigates corruption in anti-corruption institutions and finds that the same factors that have facilitated corruption in China's courts have also contributed to the spreading of corruption in anti-corruption institutions, which are governed by similar rules of decision-making and which are exposed to the same social institution of guanxi-practices. Following the above-mentioned findings, some policy recommendations are provided in the concluding chapter suggesting the directions of future reforms.

Legaliteit, discretionaire bevoegdheid en informele praktijken in de Chinese rechtspraak - een socio-juridisch onderzoek naar particuliere transacties bij rechtszaken

Samenvatting (Summary in Dutch)

Zoals algemeen wordt erkend, wordt het functioneren van China's rechtssysteem ernstig geschaad door wijdverbreide corruptie in rechtbanken. Dit proefschrift wil de systematische oorzaken van deze corruptie blootleggen door in de eerste plaats te onderzoeken *hoe* corruptie wordt bedreven in China's rechtbanken. Naast het inleidende en het concluderende hoofdstuk, bestaat dit proefschrift uit zes hoofdstukken.

Hoofdstuk 2 ontwikkelt een typologie van verschillende soorten van corrupt gedrag in China's rechtbanken en onderzoekt de algemene patronen daarin. Het blijkt dat corruptie plaatsvindt in de centrale divisies van rechtbanken, op vrijwel alle niveaus van de rechterlijke organisatie, ongeacht hiërarchische positie of geografische locatie. Dergelijk gedrag kan voorkomen bij alle typen rechters, ongeacht hun juridische capaciteiten of salaris.

Dit hoofdstuk laat echter zien dat het voorkomen en de kenmerken van corrupt gedrag nauw samenhangen met de reikwijdte, de aard en de waarde van het vermogen/de macht/de bevoegdheid van de overtreder om bindende beslissingen te nemen. Ook blijkt in hoofdstuk 2 dat van alle vormen van corruptie, de corruptie bedreven in de vorm van een uitwisseling, namelijk omkoping of bevoorrechtiging, het meest verbreid en ook het meest hardnekkig is. De rest van het proefschrift richt zich dan ook op dit type corruptie.

Hoofdstuk 3 begint met een uiteenzetting van het analytische kader van dit proefschrift; corruptie wordt beschouwd als een proces dat de vier fasen van een contract doorloopt. Dit zijn 1) de fase van initiëring van de uitwisseling; 2) de fase van onderhandeling over de uitwisseling; 3) de fase van de contractuele prestatie; en 4) de fase van afdwingen van de prestatie in het geval dat deze uitblijft. Dit kader wordt gebruikt voor de analyse van empirische gegevens vergaard uit verschillende bronnen; in detail worden de kenmerken en patronen van corrupt gedrag in elk van de vier fasen aangetoond. Op deze wijze kunnen de factoren die corruptie in China's rechtbanken mogelijk maken beter worden onderkend.

Daarbij identificeert dit hoofdstuk de twee fasen die het meest cruciaal zijn voor een succesvolle uitvoering van de corrupte transacties. De eerste is de initiëringfase; hierin wordt de intentie van corruptie gecommuniceerd tussen de mogelijke 'contractpartijen'. De tweede fase is de fase van uitvoering/nakoming, met name door degene die is omgekocht. Deze twee fasen worden vervolgens verder onderzocht in de hoofdstukken 4, 5 en 6. Hierin wordt beschreven hoe deze fasen worden doorlopen en afgerond door de corruptiepartners in China's rechtbanken, en welke factoren dit proces vergemakkelijken, respectievelijk leiden tot een 'succesvolle' afloop.

Hoofdstuk 4 stelt vast dat de initiëringfase wordt vergemakkelijkt door de in China alom aanwezige en almachtige '*guanxi*-praktijk'. Uit het onderzoek blijkt dat er op zichzelf wel

juridische, morele en cognitieve belemmeringen bestaan die de communicatie van corrupte bedoelingen zouden kunnen verhinderen; deze worden evenwel door de *guanxi*-praktijken effectief teniet gedaan. Door deze praktijken geschiedt de initiëring van de corruptie-uitwisseling veel efficiënter, en is zij niet langer prohibitief kostbaar.

Hoofdstuk 5 en 6 identificeren het besluitvormingsmechanisme in China's rechtbanken als een structurele factor die het gemakkelijker heeft gemaakt om in rechtbanken corrupte diensten te verschaffen; hierdoor heeft het aantal gelegenheden tot corruptie sterk kunnen toenemen. Hoofdstuk 6 behandelt ook de dynamiek van corrupte activiteiten in China's rechtbanken; corruptie blijkt een dynamisch verschijnsel te zijn met vele dimensies en vele spelers, in plaats van een statisch, eendimensionaal, één-op-één verschijnsel.

Hoofdstuk 7, dat corruptie in anticorruptie-instellingen onderzoekt, laat zien dat dezelfde factoren die corruptie in rechtbanken hebben vergemakkelijkt ook hebben bijgedragen aan de verspreiding van corruptie in anticorruptie-instellingen. Deze laatste worden immers geregeerd door dezelfde besluitvormingsregels, en staan bloot aan dezelfde maatschappelijke instituties van *guanxi*-praktijken. De onderzoeksbevindingen worden in het slothoofdstuk gevolgd door een aantal beleidsaanbevelingen die als oriëntatie kunnen dienen bij toekomstige hervormingen.

Curriculum Vitae

Ling Li was born on 27 December 1972 in China. After having graduated from the Southwest Jiaotong University, she worked as a civil servant in Shandong Province. In 1997 she started to pursue her legal studies at the Northwest University of Political Science and Law in Xi'an, China. After graduating with a MA degree in international law in 2000, she was appointed as a lecturer in the international law department of the same university. In 2002 she was selected to participate in the EU-China Legal and Judicial Cooperation Program (Lawyer's Component) and studied European law in Europe. In July 2005, she joined the Van Vollenhoven Institute of Leiden University as a PhD researcher. Her most recent publications include "Corruption in China's Courts," in *Judicial Independence in China: Lessons for global rule of law promotion*, ed. Randall Peerenboom (Cambridge University Press, 2010) and "'Performing' bribery in China - Guanxi-practice, corruption with a human face", *Journal of Contemporary China* vol. 20 no.69 (2011).