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

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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 creditable 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.