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Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic of China

Nanping Liu

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International Law; Commercial Law; Law
TRICK OR TREAT: LEGAL REASONING IN THE SHADOW OF CORRUPTION IN THE PEOPLE’S REPUBLIC OF CHINA

Nanping Liu†

With Michelle Xiao Liu

If a judgment does not give reasoning, then it is no more than an administrative order.—The Author

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†J.S.D., LL.M, Yale Law School, 1993, 1988; Master of Laws, Law School of Wuhan University, China, 1984. Co-Founder of Liu and Wang, Attorneys at Law, the People’s Republic of China. (The firm website: http://www.liuandwang.com; the personal website: http://www.nanpingliu.com). Dr. Liu was formerly associate professor of Hong Kong University, Faculty of Law. Michelle Xiao Liu earned her Bachelor of Business Administration at The George Washington University in 2004. The authors wish to acknowledge Matthew Williams who drafted and helped to edit several sections of this article during his internship with the firm and afterwards. The authors also wish to acknowledge Lauren Katz, who drafted the section on comparative judicial opinions and conducted the final editing of the draft during her summer internship with the firm. The authors also are grateful for the research and editing assistance by Andy Guo and Hunter Zhang. The authors also express thanks to the editors of the journal. The authors provided the general argument, structure, preliminary research, and finalized the article’s content. The authors also appreciate the valuable contributions of Zhang Yong, Xu Zeyang, Jane Jiang, and numerous mainland judges and lawyers who shall remain anonymous for security reasons.
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I. Introduction and Background

After the 4th Session of the 10th National People’s Congress (NPC) in March 2006, the Standing Committee of the NPC released voting results for the Working Reports of the Government, the Supreme People’s Court (SPC)¹ and the Supreme People’s Procuratorate (SPP).² In what appeared to be a clear message to the public, a striking 16.9% of the delegation disapproved of the work of the courts.³ In contrast, only 0.59% disapproved of the work of the government.⁴ This example of official discontent with the courts’ performance was not an isolated case, but rather reflects sustained national disapproval of judicial officials. As early as February 2001, the Shenyang Municipal People’s Congress in Northeast China’s Liaoning Province rejected the working report of the city’s intermediate court.⁵ For the first time, the people’s congress vetoed a working report of a judicial organ.⁶ From a comparative perspective, these voting results are odd. In the West, citizens generally direct their grievances regarding policies and the execution of those policies

¹ China has a continental, or civil code, legal system that emphasizes codified statutory law over case law. The court system has four levels: approximately 3,000 Basic People’s Courts at the local level; 390 Intermediate People’s Courts at the city and prefecture levels; 31 High People’s Courts at the provincial level; and one Supreme People’s Court ("SPC") in Beijing at the national level. Within this structure, there are approximately 200,000 judges. It is noteworthy that there are estimated to be twice as many judges in China as practicing lawyers. See Keith Henderson, The Rule of Law and Judicial Corruption in China: Half-way Over the Great Wall, in GLOBAL CORRUPTION REPORT 151, 151-52 (2007), available at http://www.transparency.org/content/download/19093/263155.
³ 2006 was the first time that the precise number of votes was released. The results were as follows: Government Report (2858 approve, 17 oppose, 12 abstain), SPC Report (2257 approve, 479 oppose, 146 abstain), SPP Report (2361 approve, 363 oppose, 159 abstain). See News Releases, NPC Website, http://www.npc.gov.cn/ (last visited Dec. 12, 2006).
⁴ Id.
towards the government; it is therefore odd that in China, judicial organs are blamed more than Congress or the head of state. Given that judicial organs are under the umbrella of the Chinese Communist Party (CCP), what sort of performance or activities by judges would elicit such a direct and unfavorable response towards the judiciary itself?

Widespread judicial corruption is among the chief concerns of the people's congresses. Corruption in judicial institutions raises concerns because these institutions are fundamental to enforcing citizens' rights and upholding the integrity of the legal system. Ordinary citizens' perceptions of corruption in the judicial system narrowly range from total loss of faith in the nation's judges to believing that a significant portion of judicial officers are highly corrupt.

Generally, the PRC definition of corruption in the criminal law is similar to legal definitions in other countries. Since judges have a special status in society, the SPC holds judges to a higher standard of ethical behavior pursuant to national regulations, which accords with Western practices. The SPC has implied that restraints on judicial behavior shall be interpreted liberally, which leaves significant discretion to individual judges to define the regulations of professional conduct. One recurring example is the scope of permissible communication between judges and lawyers. Since judges have limited resources and time constraints, they

7 See generally Jeffrey J. Mondak & Shannon Ishiyama Smithey, The Dynamics of Public Support for the Supreme Court, 59 J. POLITICS 1140 (1997) (claiming that "to know the courts is to love them"); Craig Cummings & Robert Y. Shapiro, Can the Supreme Court Lead Public Opinion? A Novel Experiment in Survey Design, PUBLIC OPINION PROS, MAR. 2006, http://www.publicopinionpros.com/from_field/2006/mar/cummings.asp (stating that Americans view the Supreme Court more favorably than they do the legislative and executive branches); RASMUSSEN REPORTS, SUPREME COURT UPDATE (Sept. 2008), http://www.rasmussenreports.com/publi_conten/politics/mood_of_america/supreme_court_ratings/supreme_court_update (asserting that ratings for the Supreme Court are much more positive than those of Congress).

8 By law, the standing committees of the National People's Congress at different levels are empowered to supervise the courts, the procuratorates, as well as other state institutions. See XIAN FA art. 67, § 6 (1982) (P.R.C.).

9 See, e.g., Jim Yardley, A Judge Tests China's Courts, Making History, N.Y. TIMES, Nov. 28, 2005, at A1 (reporting that Chinese legal reformers are working to counter public perceptions that too many judges are corrupt or unqualified).


sometimes openly encourage lawyers to communicate the details of a pending case outside of the courtroom, usually by calling the judge directly on his personal line.\(^{12}\) Although this behavior is not appropriate, it has become a common practice for judges to directly discuss their case with one party's attorney without the other party's knowledge.\(^{13}\) These questionable judicial practices facilitate corruption, illustrated by the cases below.

On March 15, 2003, the former president (院长, \textit{yuanzhang}) of the Liaoning Provincial High People's Court, Tian Fengqi, was sentenced to life in prison for taking bribes totaling RMB 3,000,000.\(^{14}\) On December 24, 2003, Mai Chongkai,\(^{15}\) former president of the High People's Court in the wealthy southern province of Guangdong, was found guilty of accepting bribes totaling RMB 1,060,000 and sentenced to fifteen years in prison.\(^{16}\) In 2004, thirteen judges from Wuhan's Intermediate Court were convicted of accepting bribes totaling RMB 4,000,000.\(^{17}\) As the investigation into these judges expanded from early 2002 to June 2003, Hubei Procuratorial organs brought cases against ninety-one judges from around the province, including numerous court presidents, vice presidents (副院长, \textit{fu yuanzhang}), chiefs (庭长, \textit{tingzhang}), and vice court division chiefs (副庭长, \textit{fu tingzhang}).\(^{18}\)

\(^{12}\) See, e.g., Yardley, \textit{supra} note 9, at A1 (describing an incident where a "representative" of a litigant company asked for a personal meeting with the presiding judge outside of court).

\(^{13}\) Id.


\(^{16}\) The president (院长, \textit{yuanzhang}) of a Chinese court can virtually decide the result of almost every case accepted by the court with the help of the adjudicatory committee (审判委员会, \textit{shenpan weiyuanhui}). See Liu Nanping, \textit{Opinions of the Supreme People's Court: Judicial Interpretation in China} 33 (Thomson Professional Pub. Canada ed., 1997) for a detailed description of the organization and functions of the adjudicatory committee.

\(^{17}\) For this type of situation, there is a special Chinese term 窝案 (\textit{wo'an}). This means that many of the officials in the same governmental organ have been involved in the same or similar corrupt activities.

Similar monetary relationships were revealed in Urumqi's Intermediate Railway Transport Court in early 2006. The corruption in that case was significant in that it not only involved individual judges, but also implicated the entire court collectively, where an entire unit was charged with accepting bribes (单位受贿罪, danwei shouhui zui). In that case, from 2000 to 2005, under the leadership of the then-court president Yang Zhiming, the court accepted or extorted bribes totaling more than RMB 4,510,000 and placed the money into a private account to be used for the personal interests of its staff. In 2006, five judges from Shenzhen's Intermediate Court were arrested for accepting bribes totaling over RMB 10,000,000.

On March 10, 2008, Mr. Xiaoyang, the former president of the SPC, pointed out in his last report to the NPC that the number of judges who committed some form of judicial corruption in 2007 had decreased by fifty-three percent, compared to the number in
2003. However, since the focus of this article is on the problem of legal reasoning in judicial opinions, whether or not the aforementioned statistics are accurate or exaggerated is insignificant. Furthermore, these are only the available statistics.

However, this paper focuses on how judges write judicial opinions within a pervasive culture of judicial corruption instead of providing a methodological analysis of the scope of corruption in the Chinese judiciary. This author’s experience is that when a client first approaches a lawyer to handle a litigation matter, the client’s primary concern is over whether the lawyer has a personal relationship with the judge. Such a relationship ensures a fair trial at a minimum and a favorable trial at best. It was recently reported that even the former vice president of the SPC was confined to confess his corruption acts under the CCP’s internal discipline. While this does not suggest that every Chinese judge is corrupt, it shows that the opportunity for corruption is prevalent in the judicial system. Any type of case ranging from small, insignificant matters to important matters of national interest can be compromised by corruption. Corruption may come from higher political pressure or an exchange of interests between the parties. Different judges may be more susceptible to different kinds of bribes or pressures, and thus a discussion of the general nature of the corrupt acts is irrelevant to this discussion. It is also

23 See 法官违纪违法被查处人数逐年下降 [The Number of Judges Who Were Prosecuted Decreased Year by Year], XINHUA, Mar. 10, 2008, http://news3.xinhuanet.com/misc/2008-03/10/content_7758918.htm (claiming that the number of judges who commit judicial corruption decreased from 468 in 2003 to 218 in 2007). Ironically, the results of this voting report concerning judicial approval were not released to the public.

24 See generally FOCUS: Petitioners in China Highlight Rampant Court Corruption, ASIAN POL. NEWS, Sept. 14, 2004,http://findarticles.com/p/articles/mi_mOW DO/is_2004_Sept_14/ai_n6271270/pg_1?tag=artBody;coll (noting that corruption in Chinese courts is under constant criticism from officials and the populace alike). Huang Songyou, the former vice president of the SPC, has been detained (双规, shuanggui, a form of party disciplinary investigation at specified time and specified place) by party disciplinary officials over his alleged role in a Guangdong corruption scandal on October 15, 2008. Mr Huang is the judge with highest position who has been put on the shuanggui (双规). For more information on this problem in Chinese, see the discussion available at Former Vice Chairman of Provincial High Court Huang Songyou Under Internal Party Investigation, http://news.sina.com.cn/c/2008-10-29/085616547655.shtml (last visited on Jan. 5, 2009).

unnecessary to name specific courts and judges implicated in corruption beyond the examples provided, because the issue is not which judges from which courts are corrupt, but rather how a general atmosphere of corruption affects the adjudication of justice from the perspective of judicial opinion writing. The author’s experiences illustrate that observers and practitioners may recognize the “shadow of corruption” from certain inconsistent acts, documents, correspondences, or even the tone and language used among the litigants and or judges.

The public knows about these instances of judicial corruption because they have been exposed and disseminated through the media. However, a more interesting inquiry is how to determine whether a judge has been corrupted without an official criminal investigation.

This article argues that judges write their opinions within a highly corrupt environment, and due to the lack of customary or codified requirements to produce well-reasoned opinions based on relevant facts and legal principles, judicial opinions have become a method through which judges can shroud corrupt behavior. In China, trial judgments (panjue shu) and written orders (caiding shu) assume a traditional instructive approach (mingling zhuyi), which ignores the major issues raised by the parties and usually lacks clear legal reasoning or analysis.

26 These comments are a response to Professor Peerenboom’s criticism of a draft of this manuscript, claiming that the paper did not address how representative these cases are, even just in Shenzhen courts, as well as a lack of an analytical framework for corruption - what type of cases; what level of courts; who bribes whom (which judges in the court); how much is paid, etc. The paper was further criticized for not providing a framework to show how representative these issues [of corruption] are. The author’s position is that it is unnecessary to provide potentially unreliable data to claim that the nature of judicial corruption is believed to be widespread by both legal practitioners and the public. In China, personal experiences are often more reliable than data, and the author has no reason to believe that his experiences and those shared by his colleagues are not representative of the majority of lawyers in China. To summarize, these concerns are irrelevant due to the culture of corruption, its prevalence in the legal system, and its marginal relevance to the thesis of this paper. Furthermore, it is neither appropriate nor possible to give specifics on “who bribes whom” and how much money is involved, since this information is completely circumstantial and varies in every case. See E-mail from Randy Peerenboom, Professor of Law, University of California at Los Angeles, to the author. (April 9, 2008, 11:16 PST) (on file with author).


28 See HONGYI CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 114 (Lexis Law Pub. 1998). Here, Chen states
Judges' use of verbal acrobatics and lack of sound legal reasoning in these documents is enough to indicate that a decision was made unjustly and that there may have been some negotiations behind closed doors with one party. This article will condition the reader to readily identify the potential signs and argues that reform of judicial writing is critical to the integrity of the legal system.

In order to understand the weakness of Chinese judicial opinions, some background information is necessary to illustrate the unique features of the Chinese courts' decision making process. First, Chinese courts reach their decisions collectively. A collegial bench is formed before a courtroom hearing or trial can be held. One of the judges in the collegial bench is selected as the chief judge (审判长, shenpanzhang) and oversees the trial procedure. A judgment is issued by the court, rather than in a judge's personal name. The collegial bench thus makes the decision as a collective unit. Where the collegial bench fails to reach a consensus, the majority decision is determinative. However, some difficult cases are submitted to the court's adjudicatory committee (审判委员会, shenpan weiyuanhui), and the committee — acting as the highest collective body in the courthouse — may exercise its discretion as to whether to accept a

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The typical judgment of a Chinese court is short and does not set out lines or steps of legal reasoning and logical analysis in a way as detailed as in the judgments in common law courts. Relevant statutory provisions may be referred to, but the precise relationship between them in their application to the case will not usually be discussed at length. As there is no established doctrine of precedent, case law will seldom be referred to in the judgment. Lawyers' submissions are not usually responded to in the judgment. Dissenting judgments are not allowed.

Id.

29 Id. See also JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK 64 (ABA Section of Intl Law 2005) ("[T]here is no formal system of judicial precedent" in the Chinese legal system.)


31 Id.

32 See P.R.C. Civil Procedure Law, art. 42.

33 Id.

34 See P.R.C. Civil Procedure Law, arts. 42-43.

case from the collegial bench. In addition, internal practices and regulations allow senior level judges (deputy head judges or senior judges within certain judicial divisions) to review cases and offer their opinions on how they would rule. This practice is especially widespread where the collegial bench of the court of appeals cannot reach a consensus on whether or not to reverse the trial court’s judgment. If these senior judges cannot reach a consensus or desire further supervision, the case may be submitted to the adjudicatory committee to issue a judgment. Finally, this internal process lacks transparency because detailed discussions between judges (sometimes including the opinions of the adjudicative committee) are held as opinion records (评议笔录, pingyi bilu), usually called “internal files” (内卷, neijuan) within the profession, and are not open to the public. Since judges do not accept individual recognition for their judgments, neither the relevant parties nor the public can determine who was responsible for making the decision and what legal arguments were discussed.

These special features of the Chinese judicial system suggest two things. First, although an assigned judge (主审法官, zhushen faguan) drafts the opinion, his or her opinion must be endorsed or approved by other judges at either the same or higher level. Since a consensus is required, litigants may attempt to influence or “corrupt” one or more judges to convince the collegial bench to rule in their favor. When this occurs, it is not surprising that subsequent judicial opinions fail to identify the important issues and relevant facts. Consequently, judicial opinions are often not written according to a legal analysis based on the governing law.

36 P.R.C. Court Organic Law, arts. 11-14. For more information about the court’s adjudicatory committee (审判委员会, shenpan weiyuanhui) and its internal operation, see Qiang Weiqing, DECISION MAKING BY JUDGES (2008) at 24-31. For information about the hidden rules, or invisible rules (潜规则), of decision making by judges, see id. at 214-220. The author, Mr. Qian Weiqing, was a judge for more than twenty years with experience at all of the four levels of the courts in China before he started practicing law ten years ago.

37 Telephone Interview with a judge, Shenzhen Intermediate People’s Court, Shenzhen, (Mar. 24, 2008).

38 Telephone Interview with a judge from the Shenzhen Intermediate People’s Court, in Shenzhen, P.R.C. (Mar. 25, 2008). PRC lawyers usually have access to the external files (外卷, waijuan) only, which contain the evidence and documents presented by the parties to the court. See P.R.C. Civil Procedure Law, art. 43 (2007).

39 See P.R.C. Court Organic Law, arts. 10-17.

and principles of legal methodology. Second, these special features also suggest that because judges' "internal files" of the case are not open to the public, and all decisions are issued in the name of the court, it is almost impossible for outsiders to accuse individual judges of succumbing to inappropriate influences or blatant corruption merely by reading the problematic judicial opinions, unless that judge is subsequently investigated for such behavior.41

Since China is governed by statutory law, trial decisions are often written in a relatively simple form (as compared to common law jurisdictions where citing case law to support an opinion is the norm), regardless of the court or subject matter.42 Whether the opinions written by Chinese judges are professional or well written is entirely another matter. Realizing that oversimplified court decisions leave the judges too much latitude to mishandle cases, the SPC has stipulated its expectations regarding their quality and content on several occasions, and the regulations have become more critical and specific as expectations rise.43

In 2005, the SPC released a notice concerning a new campaign in civil and administrative court departments to "standardize judicial behavior and promote judicial impartiality."44 Among other things, the notice acknowledged that judicial opinions still lack a complete summary of the case's procedural history, improperly state the parties' claims and arguments, poorly narrate

41 Telephone Interview, supra note 38 (Mar. 25, 2008). See also P.R.C. Civil Procedure Law, art. 43 (2007).

42 See Zimmerman, supra note 29, at 64; see also Chen, supra note 28, at 114.

43 For example, in 1992, the SPC released a collection of judgments and order models, 法院诉讼文书样式 (试行) [Judgment and Order Models (Trial)] to serve as a guide for different types of cases. In 1999, the SPC issued the revised model for criminal cases, and required courts at all levels to attach great importance to the writing of judicial decisions, 法院刑事文书样式, [Judgment and Order Models for Criminal Cases], Notice of the Sup. People's Ct. # 12, Apr. 30, 1999. The SPC also integrated the issue of judicial decision drafting into the 1999 Five Year People's Court Reform Plan, and set out specific requirements regarding the quality of judicial decisions in 人民法院五年改革的纲要, [The 1999 Five Year People's Court Reform Plan], Notice of the Sup. People's Ct. # 28, Oct. 20, 1999. Despite all of the SPC's efforts, the problem persists.

44 In 2005, the SPC published another notice in greater detail entitled 最高人民法院关于在全国法院民事和行政审判部门开展“规范司法行为，促进司法公正”专项整改活动的通知, [The Circular of the SPC on the Special Campaign for “Standardizing Judicial Behavior and Promoting Judicial Impartiality” in the Civil and Administrative Adjudication Sectors of the National Court System], Notice of the Sup. People's Ct. # 11, Jul. 15, 2005. This document noted that the SPC was working on yet another document concerning civil judgment writing entitled 关于人民法院制作和使用民事文书的若干规定, [The Regulations Concerning Civil Judgment Writing] which was to be released in the near future.
the facts of the case, inadequately explain the decision's reasoning, and incorrectly cite substantive and procedural law -- all of which, it declared, works to the detriment of judicial authority, integrity, and justice.\footnote{Id.}

Root causes of judicial corruption are extensive and will be discussed briefly in a later section. While reforms of the legal education system have been significant in the nation's reform process that began in 1978, the traditional court operations and judicial decision-making have remained largely static during this period.\footnote{See Stephanie M. Greene, Protecting Well-Known Marks in China: Challenges for Foreign Mark Holders, 45 AM. BUS. L.J. 371, 383 (2008).} The SPC struggles to "standardize" the behavior of the judiciary because too many judges thrive on a traditional instructive approach, to the detriment of individual litigants and the public. The courts' working style is still characterized by the issuance of authoritative orders, generally without providing clear legal reasoning.

The fundamental reasons for these practices are historical. First, throughout China's dynastic history, the judicial system was under the direct control of the central imperial government.\footnote{See DERK BODDE \& CLARENCE MORRIS, IMPERIAL CHINA 113 (1967) (noting that the judicial system of imperial China from top to bottom was highly centralized and controlled by Peking); Jonas Grimheden, The Reform Path of the Chinese Judiciary: Progress or Stand-Still? 30 FORDHAM INT'L L.J. 1000, 1004-05 (2007) (noting that during the Imperial era, magistrates, who were representatives of the Empire, were in charge of the lowest courts and beginning in the Tang Dynasty were scrutinized by censors, who fell under the Censorate, a special ministry-level entity).} Under the imperial government, there was "judicial arrogance," (司法傲慢, sifa aoman), meaning the concept of legal reasoning was undesirable.\footnote{See BODDE \& MORRIS, supra note 47, at 541 (suggesting that judges were supposed to be systematic and effectuate a few important imperial policies by strictly applying imperial codes, which attempted to foresee all possible variations of every offense).} Second, the Communist Party's expansive and powerful autocratic governing principles encouraged the judiciary to adopt an instructive approach to decision making.\footnote{See Phyllis L. Chang, Deciding Disputes: Factors That Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes, 52 LAW \& CONTEMP. PROBLEMS 101, 115 (1989) (noting judicial independence has never existed in practice in China; if the Communist Party did not directly intervene in the decision-making process, it exerted control over the judiciary through control over judicial personnel); see also He Weifang : 司法改革的困境与路径 [The Dilemma and Route to the Reform of the Judicial System], available at http://blog.sina.com.cn/s/blog_488663200100b0nw.html, (last visited Sept. 23, 2008).} Today, it seems that judges prefer writing decisions according to the
instructive methodology for three reasons: (1) it is simple and efficient, (2) the losing party can appeal or apply for a re-trial if dissatisfied, and (3) it is conducive to concealing corruption. In today’s rapidly evolving legal and social environment, the Chinese are increasingly aware of their legal rights. This article will examine, however, that the Chinese are often denied justice by judges because they are not getting clear explanations of the law to which they are entitled.

Interest in writing this article began when, after working for seven years as a professor of law in Hong Kong, the author wanted to know more about the often perplexing decisions handed down by mainland courts. The author left his high-paying job to personally search for these answers. His experience practicing law in Shenzhen has shed a great deal of light on the judicial system, and this article contains several first-hand accounts of how the Chinese legal system works in practice. Due to the political sensitivity and legal nuances of this topic, the author’s examples are all taken from personal experiences or cases in which he has gained privileged information. Since the author practices in Shenzhen, most of the cases were tried or affiliated with the Guangdong courts.

In thinking of an appropriate title for this article, the author remembered when his kids were growing up in the United States. They loved Halloween when they could go door to door asking, “Trick or treat?” One evening’s work could yield buckets of free candy, and they would return home grinning from ear to ear. It occurred to the author that many Chinese judges behave like American children on Halloween. Their work appears to be a game in that they address each party by asking, “Trick or treat?” Whichever party “treats” the judge ensures that the other party gets “tricked.” Some judges even purposely postpone delivering a decision in the hopes that one or both parties may feel compelled to “treat” him. Every day appears to be Halloween in a Chinese court.

Most research on judicial corruption in China tends to create a general picture and typically does not utilize a case study methodology to analyze the institutional and cultural foundations

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that facilitate corruption.\textsuperscript{51} This lack of case studies may be because researchers cannot gain information about individual cases without personal involvement.\textsuperscript{52} Based on the author’s personal experience, this article provides a detailed analysis based on recent cases to demonstrate that weak judicial opinion writing can be manipulated and often contributes to judicial corruption; it does not address in detail the pervasiveness of corruption. In fact, it may be futile to seriously discuss questions of scale, since statistics about judicial corruption are inherently impossible to obtain and statistical records in China are notoriously unreliable.\textsuperscript{53} Thus, personal experiences are perhaps more reliable than data analysis.\textsuperscript{54} This article further focuses on the influence of bribery and judges’ relationships with litigating parties affecting the judge’s decision-making. At the outset, it should be noted that the Chinese judiciary’s dependence on the State may facilitate the mishandling of justice. For example, government officials or committees may interfere with judges’ rulings, resulting in unfair decisions that are enforced nonetheless.\textsuperscript{55}

Specifically, Part II describes the author’s perception of cases with which he was involved that demonstrate judicial corruption. Part III includes four case studies that categorize the common

\textsuperscript{51} See, e.g., Henderson, \textit{supra} note 1, at 151-59 (2007) (discussing the legal-judicial transformation occurring in China).

\textsuperscript{52} See Chang, \textit{supra} note 49, at 116 (“Access to primary judicial materials . . . is extremely limited. The Chinese judicial system remains essentially a closed institution, largely impenetrable not only to foreigners but also to most Chinese . . . copies of court decisions are not published, and even Chinese law specialists cannot count on access to them.”). \textit{See also id.} at 117 n.52 (“[M]aterials for analyzing the judicial process will remain scanty as long as Chinese legal authorities rigidly adhere to the reasoning that since courts do not make law, there is no need to publish decisions other than the occasional one of special significance.”).

\textsuperscript{53} Sida Liu, \textit{Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court}, 31 \textit{LAW \\& SOC. INQUIRY} 75, 80 (2006). \textit{See also Henderson, \textit{supra} note 1, at 154-55 (noting that judicial corruption is a serious problem in China, particularly at the local level, but there is a dearth of data to confirm the practice and the accuracy of available data is questionable).}

\textsuperscript{54} For example, there was a large discrepancy between central and local governments’ data of the gross domestic product. \textit{See} \textbf{刘存：地方政府 GDP 注水折射我国统计体制缺失, [The False Local Government’s Data of Gross Domestic Product Reflects the defects of the Nation’s Statistics System ]}, available at http://finance.sina.com.cn/review/20060810/13342810255.shtml, (last visited Sept. 23, 2008). Furthermore, in China, statistical data and research are often unreliable because of inattention to methodology and even intentional reporting inaccuracies.

\textsuperscript{55} \textit{See} Melissa S. Hung, Comment, \textit{Obstacles to Self-Actualization in Chinese Legal Practice}, 48 SANTA CLARA L. REV. 214, 233 (2008) (“In practice, the Chinese legal system is basically a subservient arm of the government, not an independent entity.”).
problems in court judgments and the techniques used by judges to confuse or write evasively. The analysis of each case is subdivided into Case Background, Legal Analysis and the Story Behind the Decision. Part IV puts these cases in perspective by laying out the evolution and specifics of the SPC regulations, and also provides an example of a professionally written judgment. Part V reflects on the myriad underlying causes of corruption. Part VI offers one method of combating the problem, and Part VII offers a few concluding thoughts.

II. How to "Trick or Treat"56

The following case reveals an example of how judges play "Trick or Treat."

A. Case Background

For a few years, Zhuzhou Electric Locomotive Works (Zhuzhou), a Chinese company located in Hunan Province, had been producing scaffolding series products for Sunshine International Corporation (Sunshine), a U.S. company from Tennessee.57 In November 2001, the two parties signed a Non-Disclosure and Non-Competition Agreement (Agreement) regarding the product samples and blueprints provided by Sunshine.58 The Agreement stipulated that Tennessee law was to be applied to disputes arising under the Agreement and that Sunshine was to be compensated $20,000 each time Zhuzhou breached its obligations under the Agreement.59 In April 2004, Zhuzhou began production of a similar product for another U.S. company.60 As a result, Sunshine brought suit for breach of contract, seeking compensation of RMB 300,000 (roughly

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56 In thinking of a title for this article, it occurred to the author that many Chinese judges behave like American children on Halloween in that they seem to address each party by asking, “Trick or treat?” If one party “treats,” the judge ensures that the other party gets “tricked.” Some judges even allow both parties to “treat” him. See Cheng Jianhui, 廊坊广阳双胞胎判决书幕后 [The Story Behind Twin Judgments in Guangyang, Langfang], Oct. 17, 2004, http://yzdsb.hebnews.cn/20041017/ca421004.htm (describing how a judge in Langfang Guangyang makes two opposite judgments in a single case).
58 Id.
59 Id.
60 Id.
The author represented the defendant.\textsuperscript{61} The court of the first instance ruled in favor of the plaintiff.\textsuperscript{62} Upon appeal, the higher court reversed the judgment.\textsuperscript{63}

\textbf{B. Legal Analysis}

The first major issue in this case concerned the applicability of foreign law to the Chinese court.\textsuperscript{64} Should Chinese courts apply the foreign law agreed upon by the contracting parties? Is the choice of law valid under Chinese law? If so, which party should be responsible for instructing the court on the foreign law?

Chinese law is clear on the question of whether Tennessee law can be used in this case.\textsuperscript{65} Under the Civil Code of 1986 and the Contract Law of 1999, parties to a contract involving foreign interests may choose the law to be applied to the settlement of disputes arising from the contract, except as otherwise stipulated by law.\textsuperscript{66} The author therefore expected the court to apply foreign law.

However, the court of first instance, the Changsha Intermediate People's Court (Intermediate Court), reasoned that the choice itself was valid but that the defendant failed to provide sufficient evidence to prove the content of the applicable Tennessee law within the prescribed time period.\textsuperscript{67} Therefore, the court concluded that foreign law could not be ascertained in this case and that Chinese law should apply instead.\textsuperscript{68}

\textsuperscript{61} Id.

\textsuperscript{62} Id.

\textsuperscript{63} See Zhuzhou Electric Locomotive Works at 4.

\textsuperscript{64} Id.

\textsuperscript{65} The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law. If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied. See General Principles of the Civil Law (promulgated by Nat'l. People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 145, LAWINFOCHINA (last visited Oct. 31, 2008) (P.R.C.).

\textsuperscript{66} See id. ("The parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law.").


\textsuperscript{68} See Zhuzhou Electric Locomotive Works at 5-6.

\textsuperscript{69} Id. at 6.
The Chinese law concerning this type of situation is also straightforward. A Chinese court may ascertain the applicable foreign law through (1) the parties to the litigation; (2) the central authority of [the] contracting country under the agreement of judicial assistance between China and the foreign country; (3) the Chinese embassy or consulate in the foreign country; (4) the foreign country’s embassy or consulate in China; or (5) Chinese or foreign legal experts.\textsuperscript{70}

Chinese law will be applied if the applicable foreign law can’t be ascertained through the above means.\textsuperscript{71} However, it should also be noted that in making choice of law decisions, Chinese courts will often “take an inquisitorial approach and actively investigate the substance of the foreign law.”\textsuperscript{72}

In generally accepted Chinese judicial practice, however, there are only four situations in which the court may conclude that the applicable foreign law cannot be ascertained and apply Chinese law. These situations occur when (1) the involved parties refuse or are unable to provide the content of the foreign law; (2) the foreign statutory or case law provided by the parties is incomplete, irrelevant, or contradictory; (3) the law provided by the parties does not comply with the required procedures or format, such as lack of notarization or certification; and (4) when the relevant Chinese court takes an active role in ascertaining the relevant foreign law and it is unable to do so.\textsuperscript{73}

The Intermediate Court thus issued a remarkable judgment because its decision stated that the defendant’s evidence on foreign law and expert testimony provided by a U.S. law professor\textsuperscript{74} was both “incomplete” and submitted late, and that the defendant had not followed the procedures of notarization by the county clerk and certification by the state secretary.\textsuperscript{75} Because

\textsuperscript{70} Zhang, \textit{supra} note 67, at 84.

\textsuperscript{71} \textit{Id.}


\textsuperscript{74} George W. Kuney, then Associate Professor of Law and Director at Center for Entrepreneurial Law, University of Tennessee College of Law, together with Donna C. Looper, Adjunct Professor of Law at University of Tennessee College of Law, presented a legal research paper regarding the applicable Tennessee law at issue.

\textsuperscript{75} See Zhuzhou Electric Locomotive Works at 4.
defendant's expert testimony was deemed inadmissible, the Intermediate Court claimed that the applicable foreign law could not be ascertained.\textsuperscript{76} Accordingly, the court stated that the relevant Chinese law should be applied and that the plaintiff was to be compensated.\textsuperscript{77}

The defendant spent more than RMB 500,000 (approximately $73,000) on court costs, producing evidence and providing expert opinion on the foreign law, which was more than the compensation at stake in the case.\textsuperscript{78} The submitted information had all the necessary certifications and was submitted on time.\textsuperscript{79} The judgment's claims were simply false.\textsuperscript{80} Further, the plaintiff did not provide any evidence or expert testimony on Tennessee law, nor did the Intermediate Court do its own gathering of evidence to ascertain it.\textsuperscript{81} In short, the judgment ignored the most important legal issues pertinent to this decision, placed the entire burden of proof on the defendant and then dismissed the submitted material.\textsuperscript{82}

The second major legal issue raised by the opinion was whether the products made for the second American company violated the Agreement.\textsuperscript{83} It was believed that in order for the plaintiff to have a claim of breach, it must first prove that the information in question actually qualified as a trade secret under Tennessee law.\textsuperscript{84} A "trade secret" in Tennessee is defined as "the whole or any portion or phrase of any scientific or technical information, design, process, procedure, formula or improvement which is secret or of value."\textsuperscript{85} The subject matter of a trade secret, however, does not include matters of public knowledge or general

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} See Zhuzhou Electric Locomotive Works at 5.
\textsuperscript{82} See id.; see generally Sunshine Int'l Corp. v. Zhuzhou Electric Locomotive Works, 3 Chang Zhong Min 129 (Hunan Interm. People's Ct., 2004).
\textsuperscript{83} See Zhuzhou Electric Locomotive Works at 5.
\textsuperscript{84} Id.
knowledge in the industry, or ideas that are easily ascertainable or disclosed by a marketed product.\textsuperscript{86} For a plaintiff to have a cause of action, the trade secret must have been communicated to the defendant in confidence and the defendant, in turn, must have used that information to the plaintiff’s detriment.\textsuperscript{87}

As stated above, however, the court did not apply Tennessee law.\textsuperscript{88} The applicable law, therefore, should have been the Anti Unfair Competition Law (AUCL).\textsuperscript{89} Under the AUCL, a manager may not use or permit others to use technical or business information maintained in secrecy by its legal owners, which is unknown by the public and may create business interests or profits for its legal owners.\textsuperscript{90} The term “manager” is defined as “the legal person, the other economic organi[z]ations and individuals who deal with commercial business or profitable service.”\textsuperscript{91}

The defendant submitted sufficient evidence to prove that Zhuzhou’s production for the second American company was based on technical know-how that had been developed and legally owned by that second American company even before the existence of Sunshine.\textsuperscript{92} The plaintiff did not even submit evidence in support of its claims concerning the trade secrets in question.\textsuperscript{93} However, the judgment of the Intermediate Court never mentioned these facts in its reasoning, and completely failed to cite either of these laws.\textsuperscript{94}

On appeal, the court of second instance, the Hunan Provincial High People’s Court (High Court), overruled the Intermediate Court’s judgment.\textsuperscript{95} It first acknowledged that the parties’ contract was clear and valid in its choice of foreign law, and then explained that Chinese law could only be applied in such a situation when

\textsuperscript{86} Hickory Specialties, 592 S.W.2d at 587 (citing Allis-Chalmers, 255 F. Supp. at 653).
\textsuperscript{87} Id. at 586.
\textsuperscript{88} See Zhuzhou Electric Locomotive Works at 7.
\textsuperscript{90} Id. art. 10.
\textsuperscript{91} Id. art. 2.
\textsuperscript{92} See Zhuzhou Electric Locomotive Works at 7.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
neither of the parties, nor the court, could ascertain the applicable foreign law. It further explained that the burden of proof regarding the foreign law should be borne equally by the parties, and that the defendant's evidence on the foreign law was submitted on time according to procedural requirements, while the plaintiff did not submit any evidence whatsoever. In fact, after reviewing the expert opinion, the case was decided according to Tennessee law. On the question of whether the defendant violated the Agreement, the judgment explained that the plaintiff had submitted no evidence regarding how the information qualified as a trade secret. Accordingly, the plaintiff's claims were dismissed. The drastic contrast in these two judgments is perplexing.

1. Story Behind the Decision

This case is a clear example of a Chinese judge fixing (搞定, gaoding) a case in favor of the plaintiff before the trial. After the trial was concluded, the author spoke with the judge regarding the facts of the case. Behind closed doors, the judge admitted that the defendant's submissions were not late and that he agreed with the defendant's position. The judge implied that the plaintiff's lawyer had settled the issue with one of his superiors. Thus, the outcome was beyond his control.

Upon the defendant's appeal, the case went to Hunan Provincial High People's Court. The defendant's in-house counsel told a deputy to the provincial People's Congress, one of his superiors, about the reasons for not winning the case at the trial of first instance. Furious, this deputy to the Hunan's People's

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96 Id.
97 Id.
98 See Zhuzhou Electric Locomotive Works at 6.
99 Id.
100 Id.
101 "To fix" (搞定, gaoding) or "to settle" (摆平, baiping) is a popular expression in Chinese meaning to manipulate or to negotiate a favorable outcome through means that are most often unfair or illegal.
102 Interview with the Judge from the Hunan Interm. People's Ct., in Changsha, P.R.C.
103 Id.
104 Id.
105 Id.
106 Id.
Congress went directly to see the president of the High Court to demand a fair trial, which ultimately brought about a different outcome.\textsuperscript{107} Also, in a dramatic turn not uncommon in China, the plaintiff's lawyer was prominently absent during the second trial; he had already been arrested and charged with bribery.\textsuperscript{108} The High Court judge issued a thorough, clear, and reasonable judgment that addressed all the key legal questions.\textsuperscript{109}

III. Analyzing Judicial Deceit

This section will discuss four major flaws that, when detected in judgments, often indicate a judge may be trying to hide corruption. The flaws are often the result of techniques used by judges to confuse or to write evasively and usually distort either the law or the language. The two most common problems with a judgment's technical approach are contradictory rationales (前后矛盾, qianhou maodun) and abuse of legal power or inappropriate use of the law (法律适用错误, falü shiyong cuowu). The two most common problems with a judgment's analytical approach are evasion of legal issues at hand or partiality to one side (对一方的偏信, dui yifang de pianxin) and unclear or non-existent reasoning (说理不清, shuoli bu qing). Each of the four types is illustrated by an example.

A. Technical Approach

1. Example One: Contradictory Rationales

a. Case Background

In March 2000, a Chinese mini-bus transportation company in Shenzhen ("Company") entered into driver employment contracts (驾驶员聘用合同, jiashiyuan pinyong hetong) with two new

\textsuperscript{\textsuperscript{107} Phone conversation with the co-counsel representing the case several days after the trial.}

\textsuperscript{\textsuperscript{108} Cite author for proposition that attorney had been arrested. See also Henderson, supra note 1, at 156 (noting that some of China's 100,000 lawyers depend on bribes to win lawsuits); Wing Lam & Zenobia Lai, The Wuhan Court Bribery Case, 1 CHINA RIGHTS FORUM 30, 31 (2005) (noting it is not uncommon in many Chinese law firms for lawyers to either bribe judicial officials directly or act as facilitators by introducing the briber to court personnel and that low salaries make judicial personnel vulnerable to the temptation of accepting bribes).}

\textsuperscript{\textsuperscript{109} See generally Zhuzhou Electric Locomotive Works at 6.}
employees ("Drivers"). According to the contracts, each Driver paid a guarantee (保证金, baozheng jin) of RMB 60,000 (approximately $8750) so that they could each operate a mini-bus. The Drivers' salaries were equal to RMB 527 per month plus eighty-five percent of the total amount of the monthly revenue generated from the operation of the mini-bus exceeding RMB 13,000. The Drivers were not given a copy of their contracts. Shortly after beginning employment, both were fired for violating their employer's internal rules, and half of each Driver's guarantee was withheld. Without a copy of their labor contract, the Drivers' legal representation analyzed the cause of action as a leasing contract dispute (租赁合同纠纷, zulin hetong jiufen), and filed a complaint with a Shenzhen District People's Court ("SDPC"). The Company then submitted copies of the driver employment contracts and insisted that the cause of action was a labor dispute rather than a contract dispute. The reasons for the Company's preference to try the case as a labor dispute were initially unclear. After reviewing this evidence, the SDPC agreed with the Company's position, dismissed the case, and sent

110 See Li Hongshen v. Shenzhen Tiancheng Transportation Corp., 1 SHEN ZHONG FA MIN 2132, at 1-3 (Guangdong Prov. City of Shenzhen Interim. People's Ct., 2001); Zhang Ziban v. Shenzhen Tiancheng Transportation Corp., 1 SHEN ZHONG FA MIN 2133, at 1-3 (Guangdong Prov. City of Shenzhen Interim. People's Ct., 2001).

112 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 1-3; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 1-3.

113 Although prohibited by law, many Chinese employers withhold a copy of the labor contract, or simply do not use a written contract at all. Thus, if the employer breaches the contract, the employee will not have any proof of the existence of a labor relationship. See Labor Contract Law (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), art. 16, ISINOLAW (last visited Oct. 31, 2008) (P.R.C.) (noting employer and employee must both sign the labor contract and keep a copy of the document); China Plans Criminal Penalties to Run-Away Employers of Unpaid Workers, PEOPLE'S DAILY ONLINE, Dec. 29, 2005, available at http://english.peopledaily.com.cn/200512/29/eng20051229_231463.html (noting that less than twenty percent of employees of small or medium-sized private businesses have signed labor contracts with their employers).

114 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 4; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 4.

115 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 4; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 4.


117 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 5; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 4-5.
it to a labor arbitration committee.\textsuperscript{118}

The labor arbitration committee surprised the defendant with an unfavorable ruling. According to the \textit{Ministry of Labor Opinion on Several Issues Concerning the Implementation of the Labor Law}, an employer, when entering into a labor contract with its employees, may not require a deposit, guarantee fund, or mortgage payment.\textsuperscript{119} The arbitration committee’s reasoning was simple: since the Company’s act of taking the guarantee was against law, it must be returned to the Drivers unconditionally.\textsuperscript{120} The defendant Company refused to comply with the arbitral award and filed a new suit with the same court that had sent the case to the labor arbitration committee in the first place.\textsuperscript{121}

\textit{b. Legal Analysis}

The two legal questions in this case centered on whether labor or contract law should govern in this case, and whether or not the guarantee payment should have been returned.\textsuperscript{122} Remarkably, when the case re-entered the SDPC, the judgment proclaimed that the contract was not a simple labor contract but that it also had the characteristics of a contract for undertaking a project (*chengbao hetong*).\textsuperscript{123} The judgment went on to explain that the guarantee payment was a “performance guarantee bond” (履約保

\textsuperscript{118} Labor disputes must first be addressed through arbitration before a case can be presented to a people’s court. \textit{See} Labor Law (promulgated by Standing Comm. Nat’l People’s Cong., July 4, 1994, effective Jan. 1, 1995), art. 79, LAWINFOCHINA (last visited Oct. 31, 2008) (P.R.C.) (“Once a labour dispute occurs, the parties involved can apply to the labour dispute mediation committee of their unit for mediation; if it cannot be settled through mediation and one of the parties asks for arbitration, application can be filed to a labour dispute arbitration committee for arbitration. Any one of the parties involved in the case can also apply to a labour dispute arbitration committee for arbitration. The party that has objections to the ruling of the labour arbitration committee can bring the case to a People’s Court.”).


\textsuperscript{120} \textit{See} Li Hongshen, 1 \textit{SHEN ZHONG FA MIN} 2132, 5; Zhang Ziban, 1 \textit{SHEN ZHONG FA MIN} 2133, 4-5.

\textsuperscript{121} \textit{See} Li Hongshen, 1 \textit{SHEN ZHONG FA MIN} 2132, 3; Zhang Ziban, 1 \textit{SHEN ZHONG FA MIN} 2133, 3-4.

\textsuperscript{122} \textit{See} Li Hongshen, 1 \textit{SHEN ZHONG FA MIN} 2132, 3-4; Zhang Ziban, 1 \textit{SHEN ZHONG FA MIN} 2133, 3-4.

\textsuperscript{123} \textit{See} Li Hongshen, 1 \textit{SHEN ZHONG FA MIN} 2132, 4; Zhang Ziban, 1 \textit{SHEN ZHONG FA MIN} 2133, 4.
which furnished the necessary consideration to give the contract legal effect, and the withholding of half of the bond was thus a "reasonable act." A ruling was issued in favor of the Company.

The Drivers appealed, but the Shenzhen Intermediate People’s Court (Intermediate Court) issued a similar ruling, describing the contract as a “mixed contract” (混合合同, hunhe hetong) that had both "labor relationship content and ordinary business transaction content." Further, it stated, "Whatever the nature of the contract, liability for the Drivers’ misconduct is unaffected." Thus, the decision of the SDPC was upheld. The Drivers submitted a petition to the Guangdong Provincial High People’s Court (High Court) to seek an order for a retrial, but failed. The plaintiffs, the Drivers, later presented their petition to the SPC, and are still waiting for a reply.

Two major contradictions emerged during the process of this litigation. Most obviously, the same court that sent the case to

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124 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 4; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 4.
125 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 4; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 4.
126 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 5; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 4.
127 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 5; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 4.
128 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 5; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 4.
129 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 5; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 4.
130 The Chinese judicial system works under a system where the second instance is purportedly final (二审终审制). However, there is also an institutional arrangement referred to as trial supervision procedure (审判监督程序, shenpan jiandu chengxu) or retrial procedure (再审程序, zaisheng chengxu), in which a litigant who is unsatisfied with the result of the second trial petitions for retrial. If the Supreme People’s Court finds some definite errors in a legally effective judgment, it may order the original trial court to conduct a retrial. Nanping Liu, A Vulnerable Justice: Finality of Civil Judgements in China, 13 COLUM J. ASIAN L. 35, 42-43, 75 (1999). However, according to SPC’s Regulations on the Remanding and Retrial of the Civil Case 2002 (最高人民法院关于人民法院对民事案件发回重审和指令再审有关问题的规定), each court, at all levels, that starts the retrial can only conduct one retrial of the same case in general. Note that the wording of “the courts at all levels” in SPC’s judicial interpretations doesn’t include the SPC itself. Additionally, if the court affirms the original judgment in the retrial, the court will not accept the procuratorate’s re-protest according to SPC’s Reply Concerning Whether to Scrutinize the Holdings of Various Civil, Economic, and Administrative Cases That Were Procedurally Reaffirmed Upon Lower Court Retrial, But Were Re-Protested by the People’s Procuratorate (最高人民法院关于人民检察院提出抗诉按照审判监督程序再审维持原裁判的民事、经济、行政案件，人民检察院再次提出抗诉应否受理问题的批复) (1995).
labor dispute arbitration later declared in another judgment that there was more involved than a "simple labor contract." 131 Secondly, each court proposed the notion of a "mixed contract," a term for which there is no legal basis in Chinese law. 132 If the court believes the case to be a labor dispute, arising from a labor contract, it should apply the Labor Law, as well as local labor regulations. 133 In contrast, a dispute arising out of a contract for undertaking a project (承包合同, chengbao hetong) is governed by Contract Law, even though it does not specifically provide for this particular type of contract. 134 Thus, because the law governing each type of contract is different, the notion of a "mixed contract" is conflicting in nature.

In deciding on the nature of the contract, the two courts also ignored some basic facts of the case, including: (1) the name of the contract itself, "Driver Employment Contract," which is a typical labor contract name; (2) that the contracting parties are referred to in the contract as the "employing unit" and the "laborer;" (3) that the contract actually provided that it should be governed by the Labor Law of the People's Republic of China and the Regulations on Labor Contract of Shenzhen Special Economic Zone; and (4) that the contract also provided that any dispute shall be initially submitted for labor arbitration. 135

Why did the two courts go out of their way to decide the case in favor of the Company according to contract law?

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131 See Shenzhen Tiancheng Transportation Corp. v. Li Hongshen, 1 SHEN FU FA MIN 1297, at 2 (Guangdong Prov. City of Shenzhen Futian Basic People's Ct., 2001); Shenzhen Tiancheng Transportation Corp. v. Zhang Ziban, 1 SHEN FU FA MIN 1298, at 2 (Guangdong Prov. City of Shenzhen Futian Basic People's Ct., 2001).

132 See Li Hongshen, 1 SHEN FU FA MIN 1297, 2; Zhang Ziban, 1 SHEN FU FA MIN 1298, 2.


134 See Contract Law (promulgated by the People's Cong., March 15, 1999, effective Oct. 1, 1999), art. 124, LAWINFOCHINA (last visited Oct. 31, 2008) (P.R.C.) ("Where there is no express provision in the Specific Provisions hereof or any other law concerning a certain contract, the provisions in the General Principles hereof apply, and reference may be made to the provisions in the Specific Provisions hereof or any other law applicable to a contract which is most similar to such contract.").

135 See Li Hongshen, 1 SHEN ZHONG FA MIN 2132, 1-4; Zhang Ziban, 1 SHEN ZHONG FA MIN 2133, 1-4.
c. Story Behind the Decision

Mini-bus transportation is a type of public utility in Shenzhen Municipality, and only companies with a strong government background or connections can acquire this type of business. This partly accounted for why the Company in this case received such favorable treatment from the courts. More significantly, at the time of the case, the Company employed more than 1000 drivers, and losing the lawsuit would have ruined the financial standing of the Company, for the Company would have had to return the guarantee money to all of their drivers, totaling more than RMB 60,000,000. Therefore, the lawyer for the plaintiff speculated that the Company used a lot of money to fix (搞) the case. Supporting this lawyer's theory was the fact that the attorney for the Company was a former judge who had strong connections with the court system in the Shenzhen area.

It is the author's observation that some judges turned lawyers occasionally try to attract business by suggesting that their former connections to the inner workings of the courts can help their clients prevail. Though they may not personally represent clients in the courts over which they used to preside, they may still have the ability to influence the judges to issue a favorable ruling.

2. Example Two: Abuse of Legal Power

The following case began in a Shenzhen basic court ("lower
The parties in this case, Mr. Wang and Mr. Cai, conducted a real estate transaction before the real estate laws and regulations in China underwent dramatic changes.139

In 1992, Mr. Wang built a house and sold it to Mr. Cai for RMB 1,200,000. Mr. Cai took out a mortgage on the house totaling RMB 2,000,000 in April 1993.140 Five years later, Mr. Wang was sued by a creditor to whom he owed RMB 74,790.141 The lower court decided against Mr. Wang, who then refused to pay the money.142 The enforcement division of the court could not find any assets with which to implement the judgment, so it seized property that Mr. Wang no longer owned, the house sold to Mr. Cai in 1992.143 Naturally, Mr. Cai objected to the seizure of his property, but the lower court dismissed the objections (驳回裁定, bohui caiding) that were submitted.144 When Mr. Cai appealed, the court of second instance (high court) invalidated the lower court’s dismissal and ordered the lower court to correct its mistake on November 30, 2000.145 This order was ignored, and within several weeks the lower court sold the house for RMB 400,000, one-third of the original purchase price eight years prior.146 In December 2001, the lower court still refused to obey the higher court’s order, citing its right to review (复议权, fuyi quan) those higher court orders that it deems proper.147

a. Legal Analysis

This case provides two instances of inappropriate application

138 Protests over its outcome quietly continue today in the form of articles written to the SPC and petitions in China’s system of logging written and verbal complaints (信访, xinfang).

139 Real estate law was almost non-existent in China in the early 1990’s. The real estate transaction between Mr. Wang and Mr. Cai was therefore carried out according to rules laid out in relevant central government or local government policy documents. The case details were provided by a Shenzhen lawyer. See generally Patrick A. Randolph Jr. & Lou Jianbo, Chinese Real Estate Mortgage Law, 8 PAC. RIM L. & POL’Y J. 515 (1999).

140 Case background on file with the author.

141 Id.

142 Id.

143 Id.

144 Id.

145 Id.


147 For more information on this case in Chinese, see Why the Purchased House Disappeared, supra note 146. See also 案外人的房产仍未执行回转 [The House of the Uninvolved Person Yet to Be Returned by Recovery of Execution] 法律服务时报 [LAW SERVICE TIMES] (P.R.C.), April 11, 2003.
of the law. First, the written order (裁定书, caidingshu) on the dismissal of Mr. Cai's objections cited the parties’ failure to complete legal procedures enacted after 1992.\textsuperscript{148} The judge applied these new procedures retroactively, effectively invalidating the original contract and depriving Mr. Cai of his right of ownership of the house and the bank's right to the mortgage.\textsuperscript{149} The second legal mistake was procedural. Article 204 of China's Civil Procedure Law reads:

If, during the course of enforcement, a person who is not involved in the case raises a written objection to the subject matter of the enforcement, the people’s court shall review the written objection within 15 days after receiving it. If the objection is tenable, the people’s court shall rule to suspend the enforcement on the subject matter; and if the objection is untenable, it shall be rejected. If a person who is not involved in the case or a party involved is not satisfied with the ruling and considers that there is an error in the original judgment or ruling, it shall be dealt with according to the procedure of adjudication supervision; and if a written objection is irrelevant to the original judgment or ruling, the relevant party may file a lawsuit with the people’s court within 15 days after the ruling is served.\textsuperscript{150}

The "Provisional Regulations of the SPC on Several Issues in People’s Court’s Enforcement Work" goes into further detail:

**Article 72**: If in the course of execution a person who is not involved in the case raises an objection with respect to an object of the execution, and if upon review the objection is tenable, this must be submitted to the Court President for approval of a written order recommending

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\textsuperscript{148} See Shenzhen Shi Baoan Qu Renmin Fayuan minshi caidingshu (Order of the Basic People's Court of the City of Shenzhen Ward of Baoan) BAO FA ZHI 411-1, at 1-2 (1998).

\textsuperscript{149} Id.

suspension of the execution concerning that object.\textsuperscript{151}

\textbf{Article 73}: If in the course of execution a person who is not involved in the case raises an objection with respect to an object that is not an object of the execution, and if upon review the objection is tenable, this must be submitted to the Court President for approval of a written order to end the execution. Any execution proceedings already underway shall be immediately canceled or revoked, and the object of execution should be returned to the person not involved in the case.\textsuperscript{152}

The objection was tenable according to Article 72 of the "Provisional Regulations of the SPC on Several Issues in People's Court's Enforcement Work," but it was ignored by the lower court. It is unknown whether or not the Court President was informed. The lower court's violation of the procedures for following the order of the higher court was equally egregious. The "Provisional Regulations of the SPC on Several Issues in People's Court's Enforcement Work" specifies:

\textbf{Article 130}: If [a] higher court[] discover[s] irregularities or errors in the written orders, judgments, notices or executions of the lower courts, it shall promptly order the lower courts to correct the mistake and notify the relevant courts to temporarily suspend the execution.

When a lower court receives an order from a higher court, it must immediately correct the mistake. If the lower court believes that the order was given in error, it may apply for a review within five days of receiving the order.\textsuperscript{153}

According to Chinese law, the lower court had five days to demand a review of the order.\textsuperscript{154}

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\textsuperscript{151} 最高人民法院关于人民法院执行工作若干问题的规定（试行）[The Provisional Regulations Concerning Several Issues of People’s Court’s Enforcement, art. 72] (July 8, 1998) (S.P.C.).

\textsuperscript{152} Id. at art. 73.

\textsuperscript{153} Id. at art. 130.

\textsuperscript{154} Chris X. Lin, \textit{A Quiet Revolution: An Overview of China’s Judicial Reform,} 4 \textit{Asian Pac. L. \\& Pol’y J.} 255 (2003). However, the lower court did not do this and instead immediately sold the house, responded to the order a year later, and cited a
b. Story Behind the Decision

The president of the court of judgment execution (执行庭庭长, zhixingting tingzhang) was the judge who dismissed Mr. Cai's objections and was awfully eager to sell the property.\footnote{Case background on file with the author.} Sources indicate that the editor seeking compensation from Mr. Wang was a relative of this judge's girlfriend.\footnote{Id.} Although the judge has since been removed from his position, Mr. Cai's property still has not been returned to him.\footnote{Id.}

The mortgagee of Mr. Cai's property, an Agricultural Bank in Guangdong Province, later said that the property's title and other documents were attained by the court of execution by claiming the need to carry out an "investigation," and that they were never returned.\footnote{Id.} It seems the court of execution obtained the documents from the bank through deception and thus was able to use the power of the court to freeze the property and proceed to sell it to satisfy the judgment.\footnote{Id.} This is one example of how creative judges can be in tricking or treating parties to a lawsuit.

B. Analytical Approach

1. Example Three: Evasion of Legal Issues At Hand

The following case also occurred in Shenzhen. The author represented the defendant.\footnote{Id.}

a. Case Background

In April 1999, a Singaporean construction company ("General Contractor") contracted to complete a housing project for the Shenzhen Municipal Housing Bureau ("Housing Bureau") (深圳住宅局, Shenzhen zhuzhaiju).\footnote{See Yakeben Design Mgmt. Service Corp. v. Shenzhen Jinzhong Group, 1 YUE GAO FA MIN 77, at 1-2 (Guangdong High People's Ct., 2004).} Shenzhen Municipal Housing Bureau was no longer an official governmental body, but a government-sponsored institution (事业单位, shiye danwei).\footnote{Shiye danwei are public institutions organized by the state organs or other}
The General Contractor subcontracted part of the project to a local Chinese construction company (Subcontractor). The two builders signed a construction contract (施工合同, shigong hetong) for RMB 180,000,000. They also signed a supplemental contract (补充合同, buchong hetong), which stated that if government housing policy or the Housing Bureau’s requirements regarding the project changed and extra costs consequently occurred, the General Contractor would pay the Subcontractor the extra costs. The payment of these extra costs was conditional on whether or not the Housing Bureau paid the General Contractor. If the General Contractor could not get the additional funding from the Housing Bureau, the Subcontractor would be responsible for the increased costs.

After construction began, another supplemental agreement was signed by the two builders which adjusted the contract price to RMB 189,000,000. One clause of the new agreement stated, similar to that of the previous agreement, that the new contract price would be paid only after the General Contractor entered into a new agreement with the Housing Bureau.

Upon completion of the project, the Subcontractor demanded the higher price, but the General Contractor insisted that the precondition of the supplemental agreement had not been
fulfilled. Indeed, four years after signing the second supplementary agreement with the Subcontractor, the General Contractor was still unsuccessful in its effort to obtain a new agreement with the Housing Bureau regarding the additional project expenses.170

The Subcontractor sued the General Contractor for the difference between the two project prices.171 The General Contractor in turn commenced arbitration procedures with the Chinese International Economic and Trade Arbitration Commission (CIETC), against the Housing Bureau for the increased costs and asked the court of first instance (lower court) to stay the judicial proceeding until the arbitration was completed.172 The court refused, and decided the case in favor of the Subcontractor.173 The Guangdong Provincial High People’s Court (high court) affirmed the Lower Court’s ruling on appeal.174

A law firm in Beijing represented the Contractor at the lower court, and the author took over the case upon appeal.175 The discussion below concerns the judgment of the high court in 2004.

b. Legal Analysis

The legal questions at issue involved which contract price clause was valid and whether the Subcontractor should be compensated for the increased costs. The legal opinion that the author submitted to the court exhausted every possible legal argument relevant to the appellant’s claim.176

Most importantly, the author reviewed the law concerning conditional contracts (附条件的合同, *fu tiaojian de hetong*).177 According to the General Rules of the Civil Law, “A civil juristic act may have conditions attached to it. Conditional civil juristic acts shall take effect when the relevant conditions are met.”178 The

169 Id. at 17.
170 See Yakeben Design Mgmt. Service Corp., 1 YUE GAO FA MIN 77, 6.
171 See Shenzhen Jinzhong Group, 1 SHEN ZHONG FA JING 488, 1.; id. at 1.
172 Case background on file with the author.
173 Id.
174 Id.
175 Id.
176 Id.
177 Id.
relatively new Contract Law stipulates further as follows:

**Article 45:** The parties may agree that the effectiveness of a contract be subject to certain conditions. A contract whose effectiveness is subject to certain conditions shall become effective when such conditions are accomplished. The contract with dissolving conditions shall become invalid when such conditions are satisfied.

If a party improperly prevents the satisfaction of a condition for its own interests, the condition shall be regarded as having been accomplished. If a party improperly facilitates the satisfaction of a condition, such condition shall be regarded as not to have been satisfied.

**Article 46:** The parties may agree on a conditional time period as to the effectiveness of the contract. A contract subject to an effective time period shall come into force when the period expires. A contract with a termination time period shall become invalid when the period expires.

The judgment did not address any of these laws. In fact, not one of the author’s major legal arguments was even mentioned. The ruling instead focused on the specific claims of the Subcontractor regarding the extra work it had done. The judge avoided the main legal issues in the case and instead detailed eighteen pages of specifics regarding extra payment to the defendant. Concerning the supplemental contract, the decision said that the conditional clause of the supplemental contract was void because four years had passed and a new agreement had not

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180 Id.

181 This sort of trickery in writing judgments has been widely examined, and another example is available. See 华为前员工案被告家属驳斥判决漏洞百出 [Defendant’s Relatives in Ex-employee of Huawei Case Refuted that the Judgment was Full of Loop-holes], available at http://tech.tom.com/1121/1367/20041210-144816.html (last visited Dec. 10, 2004).

182 See generally Yakeben Design Mgmt. Service Corp., 1 YUE GAO FA MIN 77.

183 See id.

184 Id.
been reached between the General Contractor and the Housing Bureau, nor would one be reached in the foreseeable future.\textsuperscript{185} In other words, the high court reasoned that since the condition was impossible, the conditional contract was void.\textsuperscript{186} Thus, according to the high court, the subcontractor must be compensated for his extra work, regardless of the disputed effectiveness of the supplemental contract.\textsuperscript{187}

The judgment also ignored the fact that the General Contractor had already started an arbitration procedure according to the dispute resolution procedures in its general contract with CIETAC in Shenzhen, against the Housing Bureau seeking payment for the extra work at issue.\textsuperscript{188} This act can be viewed as a good faith effort by the defendant to fulfill the condition, even though the defendant was under no obligation to do so given that the conditional term was effective by itself.

c. Story Behind the Decision

This case was handled by another firm, which lost in the Lower Court.\textsuperscript{189} When the case was appealed to the high court, the author represented the appellant Contractor.\textsuperscript{190} The author held a meeting with his client and several of his firm’s managers the day before the trial. During this meeting, the author’s co-counsel received an anonymous phone call from a man who said that he could help the author’s party prevail. The man explained that he had internal connections within the court and would be willing to help the author for a small portion of the money at stake.\textsuperscript{191} After refusing the help of the stranger, the author called a former student of his. Both the student and his wife were judges at the high court, although neither was the presiding judge for this case. The author asked over the phone how they thought the high court was viewing the case.\textsuperscript{192} The author spoke with his former student’s wife, who

\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} See generally Yakeben Design Mgmt. Service Corp., 1 YUE GAO FA MIN 77.
\textsuperscript{188} Id.
\textsuperscript{189} See Shenzhen Jinzhong Group, 1 SHEN ZHONG FA JING 488, 1.
\textsuperscript{190} See Yakeben Design Mgmt. Service Corp., 1 YUE GAO FA MIN 77, 1.
\textsuperscript{191} The author’s colleague and co-counsel, Mr. Qiu Yanghua, received the phone call.
\textsuperscript{192} It is important to clarify what are considered to be appropriate forms of communication between judges and lawyers. Due to the time constraints during a trial, judges openly encourage lawyers to communicate case specifics outside of the
said that she thought the judge would agree with the defendant’s view and that a favorable ruling would probably be forthcoming. But after the court released the eighteen-page judgment, the author was informed that the court ignored each of the author’s major arguments.\footnote{Telephone conversation with the author.}

The phone call received during the meeting has two possible explanations. First, with most courts publicizing cases on the docket, there are surely people who pretend to have connections with the court and attempt to profit from whatever decision is made by making deals with one or more sides of the dispute. Secondly, there is the possibility that corruption in court cases has evolved into a lucrative business for interfering outside agents. Based on the skewed reasoning and legally groundless outcome of this case, the latter seems more likely. Furthermore, the author’s counsel informed him that the caller knew details about the case that someone searching online would not know.\footnote{Telephone conversation with the author. The caller specifically stated, “We pay attention to the largest cases.”}

Such calls are likely common practice, and the Subcontractor and its attorneys turned out to be more receptive to the call.

Given the nature of this case’s outside interference, it is worth mentioning that China might be one of the few remaining jurisdictions in which court fees can still depend on the amount of money at stake in a case.\footnote{See 人民法院诉讼收费办法 [The People’s Court Fees Charging Measures] (S.P.C.) (1989). However, such charges have been replaced by the new rules. See 诉讼费用缴纳办法 [The People’s Court Fees Charging Measures], State Counsel, effective April 1, 2007.} Large cases where damages are substantial become a large source of income for the court.\footnote{Lawsuits are divided into two categories (non-property and property) for the purpose of charging court fees. The People’s court charges a nominal fee for non-property cases, which are further divided into several subcategories, e.g. divorce cases (RMB 10 to 50 for each case if no property is involved). Court fees for property cases are charged on a progressive percentage of the cash value of the property in dispute: RMB 50 for property worth less than RMB 1000; four percent for the amount between RMB 1000 to 50,000; three percent for the amount between RMB 50,000 to 100,000;}

\begin{footnotes}
\footnotetext[1]{Telephone conversation with the author.}
\footnotetext[2]{Telephone conversation with the author. The caller specifically stated, “We pay attention to the largest cases.”}
\footnotetext[3]{See 人民法院诉讼收费办法 [The People’s Court Fees Charging Measures] (S.P.C.) (1989). However, such charges have been replaced by the new rules. See 诉讼费用缴纳办法 [The People’s Court Fees Charging Measures], State Counsel, effective April 1, 2007.}
\footnotetext[4]{Lawsuits are divided into two categories (non-property and property) for the purpose of charging court fees. The People’s court charges a nominal fee for non-property cases, which are further divided into several subcategories, e.g. divorce cases (RMB 10 to 50 for each case if no property is involved). Court fees for property cases are charged on a progressive percentage of the cash value of the property in dispute: RMB 50 for property worth less than RMB 1000; four percent for the amount between RMB 1000 to 50,000; three percent for the amount between RMB 50,000 to 100,000;}
\end{footnotes}
caller may have gained financial information concerning the case from the court's case filing division. Fees for appeals similarly benefit higher level courts. It is hardly surprising that Chinese government and court buildings are so nice.

China's litigation fees contribute to a corrupt environment to a certain degree. In an atmosphere where collecting money is not only a primary object of concern but also a court function, court officials may compromise their ethical obligations for self-interest. The courts have become a lucrative business enterprise, encouraging those outside to seek profit. In China, the act of paying court fees not only conflicts with the courts' commitment to justice, but also encourages corruption within the system to take place.

2. Example Four: Unclear or Non-existent Reasoning

Some readers may find it strange that this section is independent. Are not all these cases plagued by unclear or non-existent reasoning? This category highlights the subtle difference between judgments that leave a reader feeling cheated and those that leave the reader feeling confused.

two percent for the amount between RMB 100,000 to 200,000; 1.5% for the amount between RMB 200,000 to 500,000; one percent for the amount between RMB 500,000 to 1,000,000; and half a percent for the amount over RMB 1,000,000.

197 The fee structure for the appellate court is the same as that of the court of first instance.


199 On June 15, 2006, China Business News published an article entitled "Foxconn Workers: the Machine Punishes You to Stand 12 Hours," which described harsh working conditions and low pay for workers at the Taiwan-funded company. On July 4, 2006, Foxconn filed suit in Shenzhen, demanding RMB 30,000,000 as compensation for defamation by the article's journalists. It is believed that the substantial court fee (amounting to RMB 160,010) was a driving force behind acceptance of the suit by the Shenzhen Municipal Intermediate People's Court. Some legal scholars claim the court had misused its discretion when deciding to hear this case. See 报道"超时加班": 两记者大价索赔 3,000 万 [Two Journalists Sued for RMB 30 Million for Reporting on "Excessive Overtime Work"], 南方都市报 [SOUTHERN METROPOLITAN NEWS] (P.R.C.), Aug. 28, 2006, at A16.

200 Judgments lacking clear reasoning reflect arbitrary decision-making on behalf of the judges. This lack of clear reasoning inevitably leads to court appeals and protests. The case of Liu Yong is an example. Liaoning Higher People's Court amended the judgment produced by the court of first instance, but later it was amended a second time by the SPC. However, there is confusion surrounding the reasoning behind the court's final decision. See Zhou Yilin, 判决书: 中国司法能否从此作起 [Judgment: Can Judiciary in China Start Here], available at http://www.jiaxingnh.jcy.gov.cn/ArticleShow.asp?ArticleID=111 (last visited Nov. 25, 2008). See also Chen Ruihua, 判决书中的正义: 从刘涌案件改判看法院对刑讯逼供的处理问题 [Justice in Judgment: How Courts Deal with Exacting A Confession by Torture in Liu Yong Case], available at
The author was the defendant in the following case. It is simple and fairly trivial but was selected for this very reason, as bribery and illegal relationships commonly plague cases that lack public attention or wide repercussions. Although the dispute in the following case is typical and fairly inconsequential, it nonetheless helps to illustrate how inadequate judicial reasoning facilitates corruption in Chinese courts.

**a. Case Background**

In December 2002, the author and another Shenzhen lawyer entered into a partnership agreement (律师合伙协议, lüshi hehuo xieyi). 201 The agreement stated that if either party wished to withdraw from the partnership, he must apply three months ahead of time, and the application must be approved by each member of the agreement. 202 The new partner paid an entrance fee that would be returned as long as the withdrawal procedures were followed as stipulated. 203 In April 2003, the new partner wished to withdraw without giving any advance notice. 204 He demanded that the author immediately sign the Law Firm Transfer Application Form (职业律师转所申请表, zhiye lüshi zhuansuo shenqing biao), a government document that officially allows attorneys to move to a different firm. 205 The document was signed in May, effectively taking the new partner off of the firm’s payroll, and he promptly demanded the return of the entire entrance fee. 206 The author assumed he would receive the remaining balance of the entrance fee after three months of operating costs were deducted, as the new partner had not given three months’ notice as stipulated by the partnership agreement.

**b. Legal Analysis**

The key issue in this case was the impact the government document had on the original agreement. The author believes that


201 See Liu Xiping v. Liu Nanping, 1 SHEN FU FA MIN 3509, at 1 (Guangdong Prov. City of Shenzhen Futian Basic People's Ct., 2003).

202 Id.

203 Id.

204 Id.

205 Id.

206 Id.
the two documents were exclusive, and thus neither should have any legal impact on the other.207 One was a private agreement and the other was a form that helps the government keep track of legal professionals.208

The court of first instance held that the partnership agreement was still effective, but that signing the Transfer Application Form modified the partnership agreement and invalidated the clause requiring three months notice.209 The judgment's rationale was that the defendant's signature sufficiently indicated the plaintiff's completion of performance (履行完毕, lüxing wanbi) with the firm.210

However, this rationale suggests that all financial issues were settled between the two parties.211 If financial obligations between the two parties had been settled by the signature, on what grounds was a lawsuit filed? How could the judge determine that all financial affairs were settled according to a signature on a public document that did not involve the party's private agreements? If the court truly believed that all affairs had been settled, this should have meant that the partnership fee had been forgone or settled.212 The judge completely failed to explain his legal reasoning, and failed to apply governing law to the facts.213 The judgment simply raised more questions than it answered. In essence, no law was cited and no explanation provided.214

The court of second instance upheld the lower court's ruling.215 With regard to the agreement's stipulation of three months notice, it mentioned that the defendant could have filed a counter-claim (反诉, fansu)216 in pursuit of the three months of operating

207 See Liu Xiping, 1 SHEN FU FA MI 3509, at 1
208 Id.
209 Id.
210 Id.
211 In Chinese law practice, a lawyer is required to finalize all legal and financial matters with his current employer or fellow partners before he can officially be transferred to work at another law firm. “履行完毕” (lüxing wanbi) appears on the Law Firm Transfer Application Form as evidence that all issues between firm partners are settled. The author's belief was that, in signing the document, his partner could then begin the governmental procedures for transferring firms.
212 See Liu Xiping, 1 SHEN FU FA MI 3509, 6-8.
213 Id.
214 Id.
216 For the provision and procedures of counter-claim, see The Civil Procedure Law,
Unfortunately, counter-claims must be filed at the court of first instance.  

**c. Story Behind the Decision**

After the first judgment was released, the plaintiff called the defendant and laughed at the defendant for not fixing the case himself, and for instead relying on books. Though it remains unclear to what degree the plaintiff bribed the judge, it is likely that at least a fancy dinner was involved. The defendant then called a friend to tell her about what had happened. His friend chuckled, agreed that he was indeed too “bookish” and said to let her handle it—she was friends with the Intermediate Court judge. Perhaps another fancy dinner was involved. This may be a good chance of testing the notion of “trick or treat”.

As the second trial got underway in the Shenzhen Intermediate Court, the plaintiff interrupted the judge to explain that a trial was not necessary. He made such statements in the courtroom with an instructive tone, implying he had fixed the case. The verdict was still in favor of the plaintiff. The judge acknowledged the defendant’s counter-claim in his judgment, presumably both as a result of pressures from above and to remind the parties that the defendant could still attempt to claim the three months’ worth of (promulgated by the Standing Comm. of the National People’s Congress, Oct. 28, 2007, effective April 9, 1991), arts. 52, 126 LAWINFOCHINA, available at http://www.lawinfochina.com/law/display.asp?db=1&id=6459&keyword=the Civil Procedure Law.

217 See Liu Xinping, 1 SHEN ZHONG FA MIN 1248, at 10-11..

218 Counter-claims, as defined by Chinese legal professionals, are claims which have “connections to but are also separate (or independent)” from the plaintiff’s claims. For example, A requests B to pay rent (plaintiff’s claim) but B asks A to repair the apartment (counter-claim). In this example, the higher court contended that the defendant should have filed a counter-claim for the three months of operating costs. How could this be a counter-claim when the complaint filed by the plaintiff in the court of first instance specifically asked the court to find that the defendant should return the fees in question for the three months of operating costs? The logic is astoundingly circular. Considering that the defendant’s position was simply a defense to the plaintiff’s claim, on what grounds could the judge argue that a counter-claim should have been filed?

219 Phone call was made by the Plaintiff to the Defendant several days after the judgment was received in 2003.

220 See Liu Xinping, 1 SHEN ZHONG FA MIN 1248, 11. To invite a judge to dinner is not encouraged, although it is not technically bribery. However, in practice, lawyers do occasionally extend an invitation to communicate with the judge on the merits of the case. Mr Qian also discussed and even encouraged this method as a way to have more of an opportunity to convince the judge, as the time for argument in the court room is limited or restrained. See Weiqing, supra note 36, at 266-69.
operating costs in another lawsuit. This case can serve as an example of how easily the system can be manipulated, even where there is little money at stake and no social repercussions.

The primary focus should be on securing a fair trial, rather than winning the case. If judges give clear legal reasoning for their decisions, then justice is more likely to be served and the verdict will likely be more respected by both the winning and losing parties. These examples from personal practice are not intended to excuse losing a case, but rather to expose the difficulties of practicing law in a culture of corruption where a fair trial is not assured. The author does not expect to win every case, but there does exist the basic expectation that the verdict be accompanied by legal reasoning. In China, winning or losing a case does not necessarily reflect the lawyer’s skills or knowledge due to the prevalence of corruption in the practice of law. A workable and non-corrupt approach is possible, as will be discussed later. These positive results further show that the verdict is not the most significant aspect of the trial, but rather the judge’s legal reasoning.

Before analyzing reform efforts by the SPC, the following section offers a comparative overview of the commonalities and differences in judicial opinions from the major common law and civil law legal systems. This section is included to highlight the critical deficiencies in Chinese judicial opinions and re-emphasize that Chinese judges must address the major issues and legal reasoning in their opinions to ensure that justice is served.
IV. Comparative Law Approach to Judicial Opinion Writing

A. Overview: The General Goal of the Judicial Opinion

Judicial opinions serve multiple goals and are a reflection of a country's judicial sophistication and political values. Judicial opinions provide guidance to lawyers and courts, persuade readers of the rightness of the decision, constrain judge's arbitrary actions, and legitimize their efforts. This section will argue that: (a) identifying the major issues; and (b) providing well-reasoned opinions furthers these goals, which ultimately leads to greater predictability, consistency, and accountability in the legal system.

B. Identifying and Addressing Major Issues and Providing Legal Reasoning


French judicial opinions are highly stylistic, and aim "to apply settled law to facts" through a process of "deductive logic." An opinion is rendered in a long sentence composed of several hundred words, where each clause has a specific function in reaching a seemingly mechanical conclusion from the relevant law and facts. The statement of the applicable law actually begins by stating the legal issue in question. In addition to this stylistic requirement, the French judicial system has a significant institutional process to ensure that the major issues are identified and discussed:

After the lawyers have submitted their arguments in a case, it is turned over to an officer called a conseiller-rapporteur, who prepares a report analyzing the issues in the case. In many cases a government officer called an avocat-generale prepares a memorandum containing a balanced analysis of the issues, including considerations of economic and social policy, and a

226 Id. at 92.
227 Id. at 94.
This practice exemplifies the critical importance that the French system places on issue identification. Although there are many critics of the French judicial opinion, these criticisms are focused on the lack of judicial reasoning and failure to allow dissenting opinions. Critics do not dispute that the French judicial system identifies and addresses the major issues in each case.

It is argued that the French judicial opinion has evolved from France’s political experiences under an absolute monarchy and the Revolution of 1789. Judges were part of the governing elite that used its judicial power to suppress the working classes and protect the interests of the monarchy. After the Revolution, government institutions were restructured to restrict the judicial branch’s authority. In the modern French system, power is centralized in the legislature, and the judicial branch is authorized to act as a technician in applying the law to the facts, without stating its reasons. Opinions are submitted anonymously by the court, and no dissenting opinions are permitted.

Supporters argue that this system prevents judicial arbitrariness by forcing a judge to only address the specific legal issue and governing law in question, which prevents the judge from creating new law by engaging in social policy and other analyses. However, critics contend that French judges do have significant opportunities to create law through statutory interpretation, and that the lack of judicial reasoning increases the chances of judicial arbitrariness.

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228 Id. at 113.


230 See Wells, supra note 225, at 101.

231 See infra Kirby, note 249.

232 See Wells, supra note 225, at 115.

233 Id. at 103.

234 Id. at 104.

235 Id.

236 Id. at 114.

237 Id. at 98.

238 See Wells, supra note 225, at 97.

239 Id. at 98-101.
While it is beyond the scope of this article to determine whether or not the lack of judicial reasoning is problematic for the French judicial system, it is important to point out that the French legal community has created an alternative method to provide judicial reasoning to official judgments:

After an important case is decided, a law professor, lawyer, or even a judge always writes an analysis, similar to an American case comment, describing the doctrinal background and implications of the holding. Sometimes these articles even serve as surrogates for concurring or dissenting opinions, revealing hidden tensions on the Court.\textsuperscript{240}

French judges are selected pursuant to a national judicial civil service exam at the end of law school, and thus perceive themselves as part of the bureaucratic structure rather than the political structure.\textsuperscript{241} Wells argues that "other features of the legal system, in particular the judicial selection process and its emphasis on strictly professional qualifications rather than political litmus tests, probably provide adequate safeguards against judicial abuse of power in France."\textsuperscript{242} Thus, although French judicial opinions do not provide legal reasoning, the system has other safeguards to deter judicial arbitrariness. Opinions are publicly discussed and debated in intellectual circles, and judges have no incentive to make decisions based on political motives since the judiciary is independent from the other branches of government.\textsuperscript{243}

2. The French Model is Not Appropriate for China

Chinese conservatives may argue that the French model is appropriate for China, considering that Chinese courts follow a similar civil law approach and process to judicial opinion writing. As exemplified above, French opinions are intentionally brief and lack legal reasoning. However, despite external similarities, the French model is not an appropriate model for China due to significant institutional and cultural differences. First, the French

\textsuperscript{240} Id. at 114.
\textsuperscript{241} Id. at 128-29.
\textsuperscript{242} Id. at 114.
judiciary is politically independent from the executive and legislative branches.\textsuperscript{244} Political independence ensures that there is no political interference in the decision-making process, and thus the French public is not concerned about the potential for political manipulation of judicial opinions.\textsuperscript{245} Clearly, the Chinese judiciary is deeply integrated into the Chinese Communist Party, which greatly increases the possibility of political interference.\textsuperscript{246} Second, French judges receive competitive civil service salaries, and do not function within a culture plagued by corruption.\textsuperscript{247} The public's lack of concern for judicial corruption exemplifies its trust in the professionalism and integrity of their judges. However, Chinese judges work in a culture plagued by corruption, which significantly increases their opportunities to engage in corrupt behavior. When a large amount of money is at stake, both parties will feel greater pressure to "treat" the judge to secure a fair or favorable verdict for their client.\textsuperscript{248} Even if a lawyer does not want to engage in any form of corruption, his client may pressure him to do so out of fear that if the other side "treats" the judge then their party will be at a disadvantage.

Therefore, the French political structure and societal expectations safeguard against the potential for judicial corruption. Thus, the lack of legal reasoning in judicial opinions does not affect the legitimacy of that system. However, the above discussion illustrates that the French system is not an appropriate model for China since the Chinese judiciary lacks political independence and cultural safeguards to protect it from corruption.

3. Civil Law Approach: German, Spanish, and Japanese Systems

The Honorable Justice Michael Kirby of Australia argues that the German and Spanish form of judicial opinions more closely resemble the common law style of opinion writing, rather than the technical approach adopted by France and Italy, as noted above. Kirby states that in these jurisdictions, "constitutional decisions

\textsuperscript{244} Id.
\textsuperscript{245} See Wells, supra note 225, at 127.
\textsuperscript{247} See Wells, supra note 225, at 128-29.
\textsuperscript{248} See id. (citing Stanley B. Lubman, Bird in a Cage: Legal Reform in China After Mao, 19 BERKELEY J. INT'L L. 1 (2001)).
are longer, more wide-ranging, even literary. Each important point of law raised by each litigant may be argued through to its conclusion...249 A review of Japanese Supreme Court cases is in accordance with this practice, as each case stated the legal issues under discussion before providing its reasoning and analysis.250

German courts cite legal reasoning in their opinions in a manner similar to U.S. common law opinions.251 The difference is that the German law focuses on statutory interpretation rather than distinguishing case law.252 Disclosing judicial reasoning serves as an important check on judicial power by allowing public scrutiny to police the misapplication of law. For example, in a highly publicized case in 2007, a German judge cited the Koran in its reasoning to refuse to grant a battered Muslim woman a speedy divorce.253 Although the judge provided for her safety by placing a restraining order on her abusive husband, the German press immediately publicized the ruling, stirring public anger.254 Eventually, the judge was removed from the case and another judge granted the victim an immediate divorce based on legal principles.255


Issue identification is an essential element of the American judicial opinion. Intuitively, it would be impossible to engage in rigorous legal reasoning without first identifying the legal issue under discussion. Legal writing is a required first year course in American law schools, which challenges students to identify major legal issues from complicated facts, and then conduct legal research to determine the governing law. This standard of legal

251 See Kirby, supra note 249, at 6 (citing PROFESSOR ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000)).
254 Id.
255 Id.
writing is reflected in practice as graduates apply these skills to writing legal memos, contracts, and judicial opinions.256

If a party fails to state the legal issues on which its case is grounded, the court will dismiss the case pursuant to a motion for a failure to state a claim upon which relief can be granted.257 Often, attorneys will bring up several and even conflicting legal issues to broaden the chances that the judge will find merit in at least one of its claims.258 Generally, the judge cannot rule on an issue that was not presented to the court, and thus the judge’s role is to address each issue stated by the parties and give its reasoning for its legal conclusion.259 Therefore, American judges would not be able to engage in the critical task of legal reasoning if they failed to identify and address the major legal issues stated by the parties.

The form of U.S. judicial opinions developed from British history, where the “English practice of reporting the reasons for judicial decisions took root as early as the thirteenth century as a means of instructing lawyers and law students.”260 During periods of political and social upheaval, the English and American judges “were admired as bulwarks of liberty against the danger of authoritarian government.”261 Thus, in contrast to French judges, “American judges would never have thought to hand down rulings in hard cases without explanations. They lacked a conceptual foundation, such as the divine right of kings that would have permitted them to assert such a power.”262 This tradition of issuing a reasoned opinion persists in the common law system, and

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256 American Bar Association 2008-2009 Standards for Approval of Law Schools, Chapter 3, Program of Legal Education, Standard 302, Curriculum (a)(3), available at http://www.abanet.org/legaled/standards/standards.html ((a) A law school shall require that each student receive substantial instruction in: (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession; (2) legal analysis and reasoning, legal research, problem solving, and oral communication; (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year).


258 Fed. R. Civ. P. 8(a); see generally McCormick v. Kopmann, 161 N.E. 2d 720 (Ill. App. 1959) (holding that where inconsistent counts are pleaded in the alternative, the legal sufficiency of each count presents a separate question, and it is not ground for dismissal that allegations in one count contradict those in another count).


260 See Wells, supra note 225, at 126.

261 Id. at 125-26.

262 Id. at 126.
supporters of this institution believe that it guards against judicial arbitrariness by forcing judges to disclose their logic to public scrutiny.\textsuperscript{263}

Arguably, a reasoned opinion is most important to the losing party to a lawsuit, because it provides a minimum assurance that the party's legal arguments were addressed fairly according to quality legal analysis.\textsuperscript{264} In the United States, higher courts review questions of law rather than questions of fact. Thus, a lower court's legal analysis is critical to an appellant in determining whether or not to challenge the lower court's legal judgment. Where the lower court's judgment offers strong legal reasoning, it is likely to be upheld in the higher court. Therefore, legal reasoning is important to ensure that the legal system is fair and impartial and safeguards against judicial arbitrariness by exposing the judge's legal analysis to superior judges in the case of appeal.

\textbf{C. Comparison: Regulations of Chinese Judicial Opinions Must Require Judges to Address Major Issues and State Legal Reasoning}

Chinese judicial opinions sometimes selectively omit certain facts of the case and fail to provide logical, clear reasoning to show how the verdict was reached. Some critics may argue that Chinese judges lack the proper education and training to write reasoned judicial opinions.\textsuperscript{265} While this may be true of some judges, the author's experience shows that judges can write well-reasoned, persuasive opinions of high quality when they feel pressured to do so.\textsuperscript{266}

\textsuperscript{263} CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 1 (2000) ("a judge should uphold the integrity and independence of the judiciary").


\textsuperscript{265} See Peter K. Yu, \textit{From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century}, 50 AM. U. L. REV. 131, 214 (2000). "The Great Proletariat Cultural Revolution took away some of the most qualified members of the legal profession resulting in a majority of lawyers who are too young to serve as judges. Furthermore, many Chinese judges are retired military officials who have no formal legal education." \textit{Id.}

In conclusion, despite differences between various civil law and common law approaches, each of these judicial systems emphasizes the importance of identifying the major legal issues. Thus, the judge’s primary duty and obligation is to identify the major legal issues in the case and address them accordingly in the court’s opinion. The French system places critical importance on identifying the major legal issues, and has an institutional process to ensure that these issues are addressed appropriately.\textsuperscript{267} In the United States, a judge cannot ignore any of the major issues raised by the parties, regardless of their opinion of the issue’s importance to the case.\textsuperscript{268} The judge must give a reason for dismissing the issue so that the parties understand that their perspective was considered.\textsuperscript{269} This practice contrasts with common practice in China where judges typically only purposefully select certain issues raised by the parties and fail to address other important issues, which could have a significant influence on the outcome of the case.\textsuperscript{270} Enabling judges to select which issues to address distorts the legal reasoning provided and facilitates corruption by allowing judges to skew the issues in one party’s favor. As a general principle, Chinese judges must be required to identify and respond to all of the legal issues in their opinions in order to uphold the legitimacy of the Chinese judiciary to both the Chinese public and the international community.

Despite differences in their legal approaches, the European and U.S. systems all have independent judiciaries, which safeguard the court’s political independence. Since China does not have an independent judiciary, providing clear legal reasoning for judicial opinions is even more important because exposing a judge’s legal analysis may indicate corruption or digressions. Since achieving political independence is not a foreseeable short-term goal, the

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\textsuperscript{267} Chodosh & Mayo, supra note 229, at 388.

\textsuperscript{268} CODE OF CONDUCT FOR UNITED STATES JUDGES, supra note 263.

\textsuperscript{269} Id.

courts should focus on raising the standard of judicial reasoning to act as a public supervising mechanism over judges.

Furthermore, as discussed above, it is significant that the common law approach to legal reasoning has become the preferred model, even among civil law jurisdictions such as Germany and Japan. While civil law countries generally use statutes as the basis of their legal reasoning and common law jurisdictions use case law, the analytical process is generally the same. There is also an increased blending of the two systems, as common law jurisdictions increasingly engage in statutory analysis, and civil law jurisdictions consider the precedents of higher courts. The present institutional weaknesses and widespread corruption in China suggest that Chinese courts need to engage in a sophisticated level of legal reasoning to reasssure both parties that judgments are based on legal analysis. Legal reasoning will significantly increase the quality of judicial opinions, which will raise the public's respect for and trust in the legal system. This result will lead to greater social and economic stability as civilians and commercial parties are better able to predict the court's legal analysis based on the facts of their case. Thus, legal reasoning, as an essential component of the rule of law, ensures that opinions are administered "fairly, rationally, predictably, consistently and impartially. Collectively, these values are fundamental to the administration of justice."273

V. SPC Regulations and Standards

As mentioned in the Introduction, the SPC has long been engaged in efforts to improve the quality of judicial opinions written by Chinese judges. Although its function is not primarily to curb rampant judicial corruption, this is one of its goals. Upon the forthcoming release of regulations concerning the quality of legal documentation in civil cases, the SPC will have promulgated five documents during a fifteen-year period concerning the ways in which judges should write decisions and

271 Kirby, supra note 249, at 6.
272 Id.
273 See Spigelman, supra note 264.
fill out other paperwork. The SPC has also tried to set good examples for all Chinese judges by publishing well-written judgments in its official gazette (最高人民法院公报, zuigao renmin fayuan gongbao). Nonetheless, serious problems remain.

As early as 1992, the SPC issued a provisional guideline specifying the formats for judgments and other court litigation documents. The SPC then revised the 1992 models relating to criminal proceedings and issued the Court Criminal Litigation Documents Models in 1999.

In 1998, the SPC held a meeting attended by all high court presidents (高院院长, gaoyuan yuanzhang), the consensus of which was also integrated into the People’s Court Five Year Reform Plan (人民法院五年改革纲要, renmin fayuan wunian gaige gangyao) issued by the SPC in 1999. The document stated that enhancing the quality of judicial decisions and other court paperwork required greater emphasis to be placed on ascertaining and analyzing the contested evidence. Courts must show the process of the adjudication and make the reasoning behind their decisions open to the public. Behind this consensus and the desire to improve the quality of judicial documents is the

275 The forthcoming document 关于人民法院制作和使用民事裁判文书的若干规定 [the SPC Regulations Concerning the Making and Applying of Civil Judgments] is mentioned by the SPC in its Notice on July 15, 2005.


277 最高人民法院关于印发“法院刑事诉讼文书样式”（样本）的通知 [The SPC Notice Concerning the Issuance of “Court Criminal Litigation Documents Formats” (Models)], Notice #12, April 30, 1999.

278 See 最高人民法院关于印发“法院刑事诉讼文书样式”（样本）的通知 [The SPC Notice Concerning the Issuance of “Court Criminal Litigation Documents Formats” (Models)], Notice # 12, April 30, 1999.

279 人民法院五年改革纲要 [the People’s Court Five Year Reform Plan], SPC, Notice #28, (Oct. 20, 1999).

278 Id. at art. 13 reads:

Facilitating reform process of, and enhancing the quality of, the judicial documents. The focal points of the reform regarding judicial documents are to improve the analysis and examination of the contested evidence and to enhance the reasoning behind court decisions. Through recording the adjudicating process and making public the reasoning behind court decisions, judicial documents shall be made the embodiment of judicial justice and the good teaching materials of rule of law to the general public.

281 Id.
acknowledgment by the SPC that for too long most of the judgments were oversimplified; judges lacked legal reasoning in admitting evidence and reaching decisions, obscuring the adjudication process and leaving judgments with weak persuasive power to the litigants.282

A. Publishing Selected Model Judgments

As an attempt to regulate the quality of judicial opinions,283 for the past several years the SPC has been publishing what they view as sound, professional judgments selected from all over the country in its official gazette and website.284 The hope is that subordinate judges will follow these examples to improve the quality of their own judgments. The publication is careful to edit judgments to protect the privacy of litigants, especially women and minors, and other judgments focus only on procedural matters.285 Court verdicts on the most important and nationally known cases are published by the national media, while other cases are published in government documents, and most non-sensitive cases are available on the Internet.286 A special library has also been established by the Chinese Supreme Court to allow public access to all publicized court papers.287 Under Chinese law, court verdicts should be announced in front of the public, but it is the author’s experience that in practice verdicts are only delivered in private to the litigants and their attorneys.

In another area of SPC reform, the format of court papers is also undergoing changes in some developed regions of China. Judges used to announce that a judgment was made based on a

282 See 王铭山 (then SPC Vice President), 关于人民法院五年改革纲要的说明 [The Official Explanation of the People’s Court Five Year Reform Plan], Oct. 20, 1999.
284 On June 19, 2000, the SPC, for the first time, posted on the internet copies of court verdicts. This move further suggested its encouragement of public participation in the legal process. With the exception of the SPC publishing full text verdicts on the Lin Biao and Jiang Qing counter-revolutionary figures in the People’s Daily in 1981, the move was unprecedented. See China’s Supreme Court Publicizes Verdicts in Full Text, available at http://english.peopledaily.com.cn/english/200006/19/eng20000619_43380 .html (last visited Nov. 19, 2008). For a full discussion of the Gazette, see NANPING LIU, OPINIONS OF THE SUPREME PEOPLE’S COURT: JUDICIAL INTERPRETATIONS IN CHINA (1997).
285 Id.
287 Id.
certain article of a certain law, without even citing the specific contents of the law. In the past two decades, court papers were only three to five pages in length. But today, some papers have grown to twenty or thirty pages to detail all the evidence and the arguments and analysis included in the trials, and are written in a manner that is understandable to the general public. A detailed analysis of one of these model judgments is exemplified by New Oriental School v. ETS/GMAC.

B. New Oriental School v. ETS/GMAC

On December 27, 2004, Beijing's High Court (High Court) issued three judgments on a copyright and trademark infringement claim filed against China-based New Oriental, an English-training institution, by U.S.-based Educational Testing Services (ETS) and the Graduate Management Admission Council (GMAC). One of the judgments, dealing with ETS's Test of English as a Foreign Language (TOEFL) test materials, was later published on the website of the SPC. The case generated great publicity both in China and abroad. As is the norm in China, when a case is under intense public scrutiny, the judges will strictly follow the laws and regulations in determining the case, and the resulting judgment usually will be one of exemplary value. The following is a summary of the case and an analysis of the judgment.

ETS and GMAC jointly filed an action against New Oriental School in July 2002 for copyright and trademark infringement of test materials that the Chinese training school used in its test

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288 See China's Supreme Court Publicizes Verdicts in Full Text, supra note 284.
289 Id.
290 In China, court verdicts do not necessarily establish legal precedents. However, important decisions made by the SPC are often noted and may take precedent. While the SPC and courts around the world issue internal court rules, the SPC is somewhat unique in that it issues "judicial interpretations" of laws, regulations, and conflicting lower-court decisions, which are theoretically binding on all courts. This body of jurisprudence is important in China where laws and regulations are quickly evolving, and are oftentimes conflicting and/or ambiguous.
292 See Judgment of Beijing High People's Court, supra note 291.
preparation program.\textsuperscript{293} The Beijing No. 1 Intermediate People's Court ("Intermediate Court") found for the plaintiffs. The judgment ordered New Oriental to pay RMB 6,400,000 to ETS and GMAC in damages.\textsuperscript{294}

New Oriental appealed the decision to the High Court. In addition to some factual issues, New Oriental raised two major legal issues: (1) test materials are not protected under Chinese copyright law, and, therefore, ETS had no copyright interests to the TOEFL test materials; and (2) New Oriental's use of the word "TOEFL" in its training materials was only of a narrative or descriptive nature, not as a trademark to indicate the origin of the products or service, and therefore did not constitute a trademark infringement.\textsuperscript{295}

In the judgment of the High Court, the copyright claim was sustained but the trademark verdict was reversed.\textsuperscript{296} Here we will take a close look at the legal reasoning used by the High Court in examining the various issues on appeal.

C. Sustaining the Copyright Infringement Judgment

The High Court's judgment is summarized below and is an example of providing clear and professional legal reasoning.

The PRC and the USA are both parties to the Berne Convention for the Protection of Literary and Artistic Works. According to Article 2, Clause 2 of the PRC Copyright Law and Article 3 (1) (a) of the Berne Convention for the Protection of Literary and Artistic Works, the PRC has the obligation to protect the works of U.S. nationals in China. According to Article 2 of Regulations for the Implementation of the Copyright Law of the PRC, the "works" in the Copyright Law refer to intellectual creations with originality in the literary, artistic, or scientific domain, insofar as they are capable of being reproduced in a tangible form.

TOEFL test questions are divided into four parts: listening, grammar, reading, and writing, and

\textsuperscript{293} \textit{Id.}
\textsuperscript{294} \textit{Id.}
\textsuperscript{295} \textit{Id.}
\textsuperscript{296} \textit{Id.}
are designed and developed under the direction of ETS. The Court acknowledges that every test question is created through a creative design process whereby each test question is produced by the creative work of many persons according to the company’s procedures. Therefore, the questions possess originality, and fall within the domain of works covered by the Copyright Law, and is entitled to the protection of the law of this country. The compilations of test questions as sets of exams shall also be protected by the law of this country.

According to the ascertained facts of this case, New Oriental has, for commercial purposes and in its interest to promote public sales, reproduced and distributed the TOEFL test questions. Its use of the works exceeds the scope of fair use of copyrighted materials by teachers for educational use. Therefore, this Court cannot accept New Oriental’s fair use argument. New Oriental has an alternative argument claiming that it is an educational institute run by private resources and is a not-for-profit organization according to the Law on Promotion of Private-run Education. This Court believes that the purpose for which New Oriental was established is not relevant to the question of whether it has committed a copyright infringement. As long as New Oriental has reproduced and distributed the copyrighted test questions for profit, the acts themselves will inevitably constitute an infringement upon ETS’s copyright interests. Therefore New Oriental’s argument does not have legal merit.

In addition, in 1997 New Oriental’s legal representative, Yu Minhong, executed a written pledge to Beijing Administration for Industry and Commerce stating that it guaranteed that infringement upon other company’s intellectual property rights would not occur again. New Oriental also signed a License Agreement with China Sinda Intellectual Property Limited in that
same year. These agreements both support the conclusion that New Oriental had recognized ETS's copyright interests to TOEFL test questions, and that New Oriental clearly knew that its acts had infringed upon ETS's copyright interests.

In summary, New Oriental has infringed upon ETS's copyrights by reproducing and openly distributing TOEFL test questions, and should bear legal responsibility for its actions. At the same time, this Court shall point out that, considering the special nature of the TOEFL test questions and the special purposes and methods of use thereof by New Oriental, if New Oriental's classroom teaching activities involving TOEFL test questions shall fall within the scope of fair use, as provided for in Article 22 of the Copyright Law, then it shall not constitute an infringement upon the other party's copyrights. 297

In upholding the Intermediate Court's decision that copyright infringement had occurred, the High Court provided strong legal reasoning to rebut the arguments raised by New Oriental on appeal.

First, the judgment mentioned China's obligations under the Berne Convention for the Protection of Literary and Artistic Works. It also properly cited the definition of “works” under PRC Copyright Law from Article 2 of Regulations for the Implementation of the Copyright Law of the PRC (Implementation Rules). The High Court was confronted with the issue of whether test materials met the requirement of “originality” as set forth in Article 2 of the Implementation Rules. By finding that several experts were required to create every question of the standardized test, the High Court concluded that the test forms adequately met the burden of proving legal originality. 298 “Furthermore, since the questions were original, the compilation of the questions should also be protected” by an extension of the same legal reasoning. 299


298 See Teng, supra note 291.

299 Id.
The High Court proceeded to dismiss the fair use defense of the appellant-defendant by reasoning that New Oriental’s acts relating to the use of TOEFL test questions reached far beyond the scope of fair use as provided by the Implementation Rules. In general, the High Court did not ignore any major issues presented, and delivered comprehensive and convincing reasons for upholding the copyright infringement decision. The decision, selected by the SPC, serves as a good example for Chinese judges.

D. Reversal of the Trademark Infringement Judgment

The part of the judgment addressing the issue of trademark infringement is translated below:

In the present social condition of our country, publishing is a special industry under strict governmental control. Publication is a special type of commodity, the origin of which is usually indicated by the author and the publishing entity. In the present case, although ETS has legally registered the trade mark “TOEFL” for publications and audiotapes, and New Oriental has prominently used the word “TOEFL” on “TOEFL Series Teaching Material” and “TOEFL Listening Tape,” the use of “TOEFL” by New Oriental is only descriptive or narrative. The purpose of the use is to explain and emphasize that the contents of the publications are related to TOEFL tests, and to help the readers to identify the contents, not to indicate the origin of the publications. Thus New Oriental’s use of “TOEFL” is unlikely to cause misidentification and confusion regarding the origin of the products among the readers. The judgment of the first instance erred in finding that the acts of New Oriental infringed upon ETS’s exclusive rights to the trademark, and thus this Court reverses the judgment.

The Intermediate Court had found that because ETS had registered “TOEFL” as its trademark for certain classes of

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300 Id. The High Court also refused to take the status of New Oriental as a private institution, supported by special government policies, into consideration. Id.
301 Id.
commodities, under the PRC Trademark Law, the U.S.-based entity had exclusive rights to the mark. The Intermediate Court also found that New Oriental had printed the word "TOEFL" on the cover of its teaching materials and distributed the materials for profit. For example, some of New Oriental's materials were entitled "GRE Series Textbooks" and "TOEFL Grammar." According to the Intermediate Court, New Oriental's use of the mark constituted trademark infringement since ETS and GMAC had registered the mark, and New Oriental's use of the marks in its publications fell within a particular class of goods that ETS and GMAC had registered for protection.

On appeal, the High Court accepted New Oriental's argument that its actions did not constitute trademark infringement because it only used ETS's trademark on its "publications and cassettes . . . for descriptive purposes." Specifically, the use of the word "TOEFL" was used solely to "explain and emphasize that the books are related to" the official test. Using the trademark in a descriptive manner allowed consumers to identify the "main contents of the books." Furthermore, the Beijing High Court concluded "that since the use of the trademarks were used in a descriptive sense, consumers would not be confused as to whether the books published by New Oriental were affiliated with or published by ETS or GMAC."

In addition to the efforts of the SPC, legal scholars and practitioners nationwide have offered their expertise to help Chinese judges improve the quality of their legal writing. Some critics point to the lack of transparency and low level of public scrutiny as the main reasons for substandard judgments. Some
critics have suggested, with the exception of special cases specifically forbidden by law, every judgment should be published and made accessible to the general public.\textsuperscript{312}

\subsection*{E. Introducing the Concept of Dissenting Opinions}

The experiment of permitting judges to write dissenting opinions reflects an attempt to legitimize the judicial process to the public and make individual judges more accountable for their work; or, in the words of the Shanghai No. 2 Intermediate Court, to “bring sunshine to the court room” and to “make judges feel responsible” for their decisions.\textsuperscript{313} Thus, experimentation with dissenting opinions by select courts is one aspect of broader efforts to reform how judges write decisions.

The Shanghai No. 2 Intermediate Court “became the first court in Shanghai to include a dissenting opinion in its judgment.”\textsuperscript{314} This landmark Chinese case involved a real estate contract dispute between a Shanghai developer and a securities firm in Henan Province.\textsuperscript{315} The facts of the case were undisputed, “but one of the judges on the three-judge panel which presided over the case strongly disagreed with the other two on how to rule on the key issue.”\textsuperscript{316} The court published both the majority and the dissenting opinion, closing with the statement that “based on the principle of majority rules, this panel decided, after discussion, to rule by the following majority opinion.”\textsuperscript{317} As an additional reform measure, the Shanghai court has also begun publishing judges’ comments at

\begin{itemize}
\item \textsuperscript{312} Since most Chinese courts, especially those in more developed regions, have their own websites, it is presumably feasible for judgments to be published online. However, only a handful of carefully selected judgments have been posted online thus far. See He Weifang,判决书上网难在何处？ [Why is it so Difficult for Judgments to be Posted Online?], 法制日报 [LEGAL DAILY] (Beijing), Dec. 15, 2005. See also Tong Songqing & Zhang Dongwei,法院判决书公开化的社会价值及最佳方式 [Judgments: Ideals Ways to Publish and Its Benefits to Society], http://www.law110.com/firstcreat/200300010.htm (last visited Oct. 31, 2008).
\item \textsuperscript{314} \textit{Id.}
\item \textsuperscript{315} \textit{Id.}
\item \textsuperscript{316} \textit{Id.}
\item \textsuperscript{317} \textit{Id.}
\end{itemize}
TRICK OR TREAT

the conclusion of the proceedings.318

Several major Chinese newspapers, including the People’s Daily, one of the CCP’s main sources of disseminating government information, and the Legal Daily, have called on other courts to follow Shanghai’s lead.319 However, in a legal system where most court decisions are not officially published, only a handful of selected cases are published by the SPC’s official monthly bulletin for their “particular instructional value,” and it is unlikely that most courts will assume the additional burden of including dissenting opinions in their judgments, absent an institutional mandate.320

Despite changing attitudes, Chinese judicial leaders continue to run their courts as “administrative units.” 321 As part of a large bureaucracy, the courts attach little importance to individual accountability, and they feel most comfortable with centralized and collective decision-making.322 In the Chinese judiciary, even when a judge disagrees with his colleagues’ opinion of a case, a judge may not feel compelled to challenge their colleague to reconsider the legal issue, nor are judges likely to take the initiative to write an individual dissenting opinion.323 As the prevailing norm established by custom, with both recent and historical origin, court decisions are generally very brief documents. Decisions are typically a half-dozen pages, consisting only of a highly compressed and over-simplified summary of the facts and a statement of the court’s holding.324 Notably, there are normally no details explaining how and/or why a judge arrived at his decision, either “in terms of legal reasoning or factual analysis.”325 Similarly, decisions usually fail to address in any

318 See id.
319 See Legal Reform, supra note 313, at 7. See also Yang Tao, 禁止自带饮料案给我们什么启示? [What Enlightenment is Gained from Soda Case?], available at http://news.xinhuanet.com/comments/2005-06/25/content_3133617.htm (last viewed Oct. 31, 2008). The publication of dissenting opinions in judgments carried out in Guangzhou, Shanghai, and Beijing was part of judgment reform efforts. See Zhang Yue, 判决书改革理出透明审判 [Reform of Transparency of Trial by Improving Independence of Judge], http://qqzz.net/magazine/1672-5883/2005/27/187794.htm (last viewed Nov. 25, 2008).
320 Legal Reform, supra note 313, at 7.
321 Id.
322 See id.
323 See id.
324 See id.
325 Id. at 6.
depth the specific arguments raised by the litigants; thus the attorneys and their clients do not know if their legal arguments were considered by the court in their chambers.\textsuperscript{326}

The weaknesses of this form of judgment, which is another example of what some critics call the opaque, "black-box" (黑箱作业, heixiang zuoye) nature of the judicial process, have been obvious for some time.\textsuperscript{327} The need for reform began to receive serious attention in the late 1990s.\textsuperscript{328} Various levels of courts, including the SPC, have asked judges to "state the rationale for their rulings and discuss the points raised by the parties in their decisions."\textsuperscript{329} Change has not been dramatic, but it has been real. Although most decisions are still brief statements that oversimplify the facts, judges presiding over cases involving complex commercial disputes have issued multi-page opinions that analyze the legal issues in dispute.\textsuperscript{330} Many judges are conscious of the importance of justifying their conclusions. The Foshan Intermediate Court in Guangdong Province issued a judgment of over 100 pages in July 2004.\textsuperscript{331} However, even with additional pages, Chinese courts generally still do not display sophisticated legal reasoning.\textsuperscript{332}

Since Chinese courts are supposed to make collective decisions "reflecting the consensus of a panel of judges," it would be natural for the judiciary to reject the proposal of including dissenting opinions as violating the basic principles of the judicial system.\textsuperscript{333} However, it is important to realize that in reality, the presiding judge of a panel or the head of the court division usually determines the outcome of a case.\textsuperscript{334}

Thus, the question becomes whether dissenting opinions will eventually become standard practice in Chinese courts.\textsuperscript{335} Even in Shanghai, it is unclear if judicial dissent will ever be more than an

\textsuperscript{326} See Legal Reform, supra note 313, at 6.
\textsuperscript{327} Id.
\textsuperscript{328} See id.
\textsuperscript{329} Id.
\textsuperscript{330} See id.
\textsuperscript{331} See id.
\textsuperscript{332} See Legal Reform, supra note 313, at 7.
\textsuperscript{333} Id.
\textsuperscript{334} See id. See also Weiqing, supra note 36, at 20-24.
\textsuperscript{335} See id.
experiment. The Shanghai court stressed the unique nature of the case and made it clear that the disclosure would not include the name of the “dissenting judge, details of the decision-making process, or any information concerning ‘national secrets’ and personal privacy.” There have been no reports of subsequent dissenting opinions published by the Shanghai court. Without an “institutional change” that bestows upon individual judges the power to control the outcome of their cases, alongside a sense of responsibility and individual pride in a judgment, it is unlikely that dissenting opinions will become a regular occurrence. The introduction of dissenting opinions may curb corruption to a certain degree, but it will not solve the fundamental root-causes since the court system in China is not politically or institutionally independent.

F. Key Elements of a Model Judgment

Other legal scholars and practitioners have focused their research on discerning the fundamental elements of a good judgment. This section provides an overview of the information necessary to write a good judgment. Good judgments provide litigants an explanation of the judge’s legal reasoning, which generally precludes a judge’s attempt to cover up illegal activities to unjustly favor a particular party.

A Chinese judgment normally consists of five essential parts. The first is the Introduction (首部, shoubu), which includes the title of the judgment and case number, the general information of the litigants, the cause of action, the procedural history, and a summary of the parties’ complaints and defenses. An opinion’s statement of procedural history and the summarization of the complaints and defenses are especially important. The requirements for this part of the judgment are

336 See id.
337 Id.
338 See Legal Reform, supra note 313, at 7.
339 See id.
341 See id.
342 Id.
simple: to make the trial process public so that the parties and the general public will know how the judicial system works, and to succinctly and clearly summarize the claims and defenses of the parties to establish the foundation for the judge’s legal analysis. However, it has been shown that in order to play “Trick or Treat,” the judge may conceal or misrepresent the lower court’s specific holding, or purposefully ignore or misrepresent some key points of a party’s complaint or defense.

The second part of a Chinese court opinion consists of Facts and Evidence (事实, shishi) and is important to our discussion for similar reasons. The facts can be divided into four sections: (1) a narration of the evidence (or a full account of all the evidence) produced by the parties (举证叙述, juzheng xushu); (2) a narration of the cross-examination (or a summary of the parties’ opinions regarding the admissibility of each party’s evidence) (质证叙述, zhizheng xushu); (3) a narration of the authentication of evidence, which lays out the court’s opinion on the admissibility of the evidence (论证叙述, lunzheng xushu), also stating the reasons for a judge’s decision, based on the previous three sections; and (4) a summary of facts that the court believes to be true (事实叙述, shishi xushu).

The third part is the reasoning (shuoli), which usually begins with the words “this court holds” (本院认为). The requirements for good reasoning include a correct identification of the nature of the case at issue, an accurate interpretation of the applicable law, and a logical application of the law to the facts. The reasoning section is where judges can play tricks regarding the applicable law. As mentioned, the reasoning section is the weakest point of a Chinese court judgment and is the focal point of the judgment reform campaign.

The last two parts of the judgment are the Main Body (主文, zhuwen), which lays out the court’s decisions in a numbered list,

343 Id.
344 Id.
345 Id.
346 See He Yun, supra note 340.
347 Id.
348 Id.
349 Id.
350 Id.
and the Conclusion (尾部, weibu). The conclusion lists the name of the appellate court, the time limit of appeal, the names of the presiding judges and the clerk responsible for issuing the judgment, along with the official seal of the court, and the date and time the judgment was made.

G. Persistant Problems with Judgments

Despite reform efforts, problems with judgments persist. In 2005, the SPC officially recognized that judgments had not improved by issuing a notice of another special campaign in civil and administrative adjudication bureaus of the court system. The object of the special campaign was to “standardize judicial behavior and promote judicial impartiality.” The notice identified nine types of problems that the SPC sought to redress through the campaign, summarized below:

(1) widespread violations of law and breaches of discipline among administrative and civil judges and other court officials; (2) irregularities in handling cases and inefficiencies in the adjudication management system of the courts; (3) weak trial supervision and incorrect application of the law; (4) weak adherence to trial timeliness and judicial efficiency; (5) irregularities in trial decisions and judgments; (6) problems with attaching too much importance to substantive matters while ignoring or neglecting the procedural due process of a trial (重实体，轻程序, zhong shiti, qing chengxu); (7) a judge’s inappropriate language and behavior, contributing to low public approval; (8) neglecting the role of mediation during the trial process; and (9) inconsistencies in the application of law.

The campaign was primarily concerned with the personal corruptibility of judges and the poor quality of their opinions. The notice went into great detail and acknowledged the
seriousness of these problems, which have existed for a significant amount of time.\footnote{Id.}

In the same notice discussed above, the SPC identified six additional major problems: (1) incomplete record of court proceedings, including failure to state the time of acceptance, pre-trial mediation, or evidence of other exchanges; (2) inappropriate or complete failure to summarize the parties’ claims or defenses; (3) unclear or illogical narration of the facts; (4) inadequate reasoning or complete lack of reasoning; (5) improper citation of the substantive and procedural law; and (6) wordy and unclear language in a judgment’s Main Body (主文, zhuwen), leading to difficulties or disputes in enforcement.\footnote{He Yun, supra note 340. For more information with regard to the present state of the trial judgments (判决书, panjue shu) and the written orders (裁定书, caiding shu) issued by Chinese courts such as questions with no answers (有问无答, youwen wuda), see Weiqing, supra note 36, at 70-75.}

As it contemplated measures to redress these problems, the SPC emphasized in its notice that courts must act in strict accordance with the five-year plan’s expectation that judges use “good analysis and clear reasoning that convinces both parties” (辨法析理, 正败皆服, bianfa xili, zhengbai jiefu).\footnote{Id.}

Furthermore, courts must identify the important legal issues in dispute, provide concrete reasoning for how the dispute’s facts were ascertained, disclose its justification for the decision, and avoid basic technical mistakes.\footnote{Id.}

Not surprisingly, each problem identified by the SPC could actually provide judges with the opportunity to play “trick or treat” with the involved parties. The central issue is not that the courts and judges lack resources or the capability to comply with SPC regulations, as illustrated in the previous discussion. Rather, reforms are hindered by judges’ unwillingness to perform extra work\footnote{Following the SPC’s efforts, courts in Guangdong Province set up a mechanism through which litigants may attempt to resolve remaining questions after a trial has ended. By giving litigants a specified time period and method in which they can address any final issues, the courts began to see a rapid decrease in the number of letters of complaint. In the first half of 2006 alone, these letters decreased by 25.3%. See 判决疑问法官要解答 [Judges Need to Reply to Litigants’ Questions on Judgments], 南方都市报 [SOUTHERN METROPOLITAN NEWS] (China), July 19, 2006, at A15.} and to end or expose their own corruption.\footnote{One insider even commented that judges rarely read more than three pages of any statement of defense. Therefore it is rare for a statement of defense to play any significant role in a judge’s ruling. See Zhang Jian, 代理词与神经病 [Statement of
VI. Reasons for and Methods of Judicial Corruption

While judicial corruption emerged as a national public issue as early as 1992, most cases were not exposed until the late 1990s. There are many reasons for judicial corruption's higher profile in the public consciousness, including "the expanding role of courts in the economy and the political process."

Not all judges are willing or able to resist unethical interference. A number of different situations need to be considered, with a focus on three specific elements: (1) the seriousness of interference; (2) the gravity of the behavior requested of the judge; and (3) the manner and degree of involvement.

Sometimes a judge's general attitude may actually facilitate corruption. Rather than offer money in exchange for compliance or deference, a party can appeal to a judge by inviting him to a glamorous restaurant or sponsoring his child for an education abroad. The relationship is legal, the judge has not broken any criminal law, and only by chance will he or she have overstepped disciplinary or deontological rules.

Seemingly harmless actions such as going out to dinner may mark the starting point for a judge's effective involvement in corruption. It is unusual to approach a judge with a direct offer of a bribe, since acceptance would be highly unlikely. Nor will a judge normally solicit a bribe without absolute assurance of the giver's discretion. The creation of a conducive atmosphere through hospitality gives the potential briber an opportunity to gauge a judge's availability. Nevertheless, the judge's future

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361 The 2004 Five People's Court Reform Plan re-emphasized the need to improve the level of judgments, SPC Notice # 18, Oct. 26, 2005.
362 See Henderson, supra note 1.
363 Id.
365 See id.
366 See id.
367 See id.
368 See Colombo, supra note 364, at 108.
369 See id. at 108.
370 See id.
371 See id.
conduct may express partiality by unconsciously dedicating more attention to that party’s future cases.\textsuperscript{372} Some judges monitor their behavior so as not break any laws; others completely betray the ethical code of their profession; still others assume a middle position.\textsuperscript{373}

\textit{A. Causes of Judicial Corruption}

Why does a judge become corrupt? What determines the frequency and severity of corruption? Why does the magnitude and nature of corruption vary between China and other countries? Understanding and transforming “legal tradition” or “legal culture” provides a different approach to eliminating judicial corruption.\textsuperscript{374} “If judges are examined in their local context, one gains a deeper insight into what it means for them to use public office for private gain.”\textsuperscript{375} Judges are members of their society like everyone else; they live with the public and share the external culture.\textsuperscript{376} They are tied into a network of relationships at every level from the personal to the professional.\textsuperscript{377} Judges have to be responsive to the demands of the culture outside the courtroom or face the consequences of being labeled as different, or even a pariah.\textsuperscript{378}

In the social conditions that prevail throughout China’s diverse cities and villages, judges must be fully integrated into the legal culture of the general public if they want their careers to survive.\textsuperscript{379} They find themselves under pressure from influential groups, like government, business, and criminal networks. Judges may also fear repercussions from informal networks of extended family, friends, and neighbors.\textsuperscript{380} For a judge working in this environment, the “form, extent, and significance of corrupt

\textsuperscript{372} See id. at 107.
\textsuperscript{373} See id. at 108.
\textsuperscript{375} Id. at 100.
\textsuperscript{376} See id. at 101.
\textsuperscript{377} See id.
\textsuperscript{378} See id.
\textsuperscript{379} See id. at 103.
\textsuperscript{380} See Kurkchiyan, \textit{supra} note 374, at 103.
practices become indistinct because they reflect local norms of networking, exchanging favors and gifts, and offering and receiving payoffs to ensure favorable outcomes” which are not only permissible, but expected by the public.\textsuperscript{381}

1. A Judge’s Mentality

Regardless of the dominant culture or tradition within any particular society, all judges should be held to a high level of honesty and integrity. However, in reality, culture plays a large role in determining the likelihood of corruption.\textsuperscript{382} The importance of this cultural impact and its implications for the propensity of a judge to “use public office for private gain”\textsuperscript{383} can be illustrated by a brief analysis of judges’ general mentality in China.

Perhaps the greatest contributor to judicial corruption in China is not a lawyer’s money but a judge’s mentality.\textsuperscript{384} The minds working inside today’s court system are still rooted in the traditions of a half century ago.\textsuperscript{385} The inclination among judges to rule simply and hastily rests in a feeling of arrogance and entitlement and the notion that they will not be held accountable for their decisions.\textsuperscript{386}

2. No Independent Judiciary

A second reason for such pervasive corruption is that the courts are not independent from the Chinese government.\textsuperscript{387} Until relatively recently, China had no tradition of separation of powers, and the courts were seen as little more than another administrative

\textsuperscript{381} Id.

\textsuperscript{382} See Kurkchiyan, supra note 374 at 100. See also Weiqing, supra note 36, at 214-15.

\textsuperscript{383} Id. at 100.

\textsuperscript{384} For example, in 2006, five judges from Shenzhen’s Intermediate Court were arrested for accepting bribes totaling over RMB 10,000,000. The Report states that the lawyer involved did not offer to give bribes to judges in general.

\textsuperscript{385} See Yardley, supra note 9, at A1.

\textsuperscript{386} Part of the judge’s attitude stems from the widespread belief that the law is unchallengeable. In a civil law country without judicial review, offering minimal explanation has both traditionally and recently reduced the chances of getting into trouble. As this practice continues, many judges have found a way to profit from it. See Bringing More Accountability to the Courts, 1 CHINA L. & GOVERNANCE REV. 6, 6-7 (2004), http://www.chinareview.info/issue1/images/Issue%20No%201.pdf.

\textsuperscript{387} See Yardley, supra note 9, at A1.
Article 126 of the Constitution explicitly states that "the people's courts shall, in accordance with the law, exercise judicial power independently, and are not subject to interference by administrative institutions, public organizations or individuals." However, the provision is directly contradicted by article 128, which provides that the SPC "is responsible to the National People's Congress (NPC) and its standing committee" and that the "local people's courts at different levels are responsible to the organs of state power which created them." With five official legal methods of interference in court affairs, the practical result is that these avenues become more commonly used than they should be and thus further contribute to corruption.

Attaining finality in a legal dispute is an important test to determine the independence of the judiciary in modern society. Finality is a critical part of Western legal systems, which provides clear procedures to file a lawsuit and opportunities to appeal a verdict. Economic progress depends on an authoritative judiciary that provides clear, consistent legal analysis in which investors and citizens can predict the results of their behavior. However, justice in China is by nature "a justice of the masses" (大众正义, dazhong zhengyi) under the leadership of the CCP.

Therefore, any person or institution could have a say in justice, either by reporting to the relevant authority or by bringing a
lawsuit if legally permitted. The "Western doctrines of standing" as well as mandated and enforceable professional standards are lacking in China. However, it is the CCP, not the judge, who has the final say on legal matters. If the CCP continues to possess exclusive leadership and retain final power over the entire government, including the judiciary, then the term "court of law" is a misnomer in China. If the judiciary is not allowed to rule on controversial legal issues, then it becomes just another bureaucratic government institution. Due to the fact that courts lack political independence and ability to issue a final determination on legal issues, there are endless opportunities for retrial, which contribute to the prevalence of corruption.

3. Low Judicial Salaries

Corruption is also linked to low judicial salaries. In a rapidly growing economy with potential employment options expanding, judges are leaving their profession in favor of more lucrative positions. This is especially true of judges who can easily transfer to a law firm using networks of support that are already in place.

Even in recent years as caseloads have skyrocketed, some jurisdictions have seen a decrease in judicial salaries; for example, the political center of Beijing is one of the last places that one would expect judges to be underpaid, but in 2004 the Mayor of Beijing announced that judicial salaries in city courts would be...

396 See id.
397 See id.
398 See Yardley, supra note 9, at A1.
399 Therefore, without separation of powers, we will not see the kind of modernization similar to the West, but only the modernization that China already had a thousand years ago during the prosperous Tang Dynasty. See Liu, supra note 130, at 98.
400 See id. at 97.
402 While it is difficult to draw a causal link between a judge's salary and his professionalism or performance, there does seem to be a correlation between the two elements. Under-funded judiciaries are unlikely or unable to offer the salaries and benefits that will attract and retain qualified and/or quality candidates. "You pay peanuts, you get monkeys," President Lee Kuan Yew is quoted as saying when explaining why Singapore's judges are paid five times more than their US counterparts. See id. at 49.
reduced to equal other municipal government jobs.\textsuperscript{403} This low pay structure does not foster a community of judges with a high regard for judicial ethics, nor will it raise productivity.

4. The Judiciary as a Business

It is particularly alarming that the government has been running the court system as a type of business.\textsuperscript{404} According to the \textit{Measures on the Management of Court Fees of the People's Courts} jointly issued by the SPC and the Ministry of Finance,\textsuperscript{405} and the \textit{Notice on Implementation of the Measures on the Management of Court Fees of the People's Courts} issued by the Higher People’s Court and the Bureau of Finance of Guangdong Province, all court fees shall be directly paid to the special account opened by the provincial financial bureau.\textsuperscript{406} Afterwards, fifteen percent of the money is to be allocated by the provincial government for expenditures on improving the court system of the whole province, and the remaining eighty-five percent will be returned to the courts in the form of subsidiary operation fees (业务补助经费, \textit{yewu buzhu jingfei}), which is to be used by the courts to cover every sort of expenditure, including fringe benefits for judges and other employees.\textsuperscript{407}

The financial arrangement regarding court fees seems to actually create a business atmosphere in the court system, with a primary concern to make money rather than pursue justice. In this atmosphere, it is only too natural for judges to try to fulfill their own financial interests through all conceivable means, including manipulating judicial opinions.\textsuperscript{408}

\textsuperscript{403} Additionally, judges could not accept bonuses for exceeding a set number of cases. This decision was not released publicly.


\textsuperscript{405} \textit{人民法院诉讼费用管理办法} [Administrative Measures for the People’s Court Fees], jointly issued by the SPC and the Ministry of Finance, No. (1999) 406, July 22, 1999.

\textsuperscript{406} 关于贯彻“人民法院诉讼费用管理办法”实施意见的通知 [Notice Regarding the Implementation of the Administrative Measures for the People's Court Fees], jointly issued by the Guangdong Higher People's Court and the Bureau of Finance of Guangdong Province, No. 9, Jan. 31, 2000.

\textsuperscript{407} In the event of a case withdrawal, a portion of the court fees is returned to the disputing parties. If a case is withdrawn before the judge has ruled, half of the prepaid court fees must be returned.

\textsuperscript{408} Judges may seek ways to supplement their low salaries. A judge in Kaifeng Yuwang Tai District Court forged a litigant’s signature to end a divorce case, then wrote
The justice system does not exist in a vacuum. Society at large has a role in molding and monitoring the justice system. Recognizing and preventing corruption in the judicial system requires both a combination of localized approaches targeted at the judiciary itself, and wider initiatives targeting the legal culture of the general public. While the success of any such reforms is highly circumstantial, it can be inferred that reforms will only be successful if they take established local legal practices and culture into consideration. Therefore, this Article’s view is that the root cause of corruption is more systemic, and cannot be framed simply in terms of court independence. Higher salaries, stronger audits, and effective mechanisms of control and punishment may be used to combat corruption, but fine-tuning the institutional framework by applying a cost-benefit analysis, while important, is not sufficient by itself. Corruption in the court system must be viewed in the context of corruption nationwide and in many aspects of Chinese society.

5. Methods of Effectuating Corruption

Within the Chinese legal profession some lawyers or their clients will ask judges to play poker or *Majiang* (麻将), with the intention of losing the money to the judges. Also, if the lawyer and judge are well acquainted with each other, the lawyer may take the judge out for a sauna bath (桑拿). In response to these and other widespread ethical issues, in March 2004, the SPC and the Ministry of Justice jointly issued guidance regulating the relationship between judges and lawyers, which specifically

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409 See Kurkchiyan, *supra* note 374.

410 *Id.* at 103.

411 The comparatively low status and remuneration of judges, and the judiciary’s subordinate nature in the government structure, are among the early causes of judicial corruption. Although the causes of corruption are multiple and context-specific, the first measures to fight judicial corruption include training and raising salaries. These are only pre-conditions for reducing judicial corruption, however, and are not sufficient to redress the problem entirely. See Yang & Ehrichs, *supra* note 401.

412 See Kurkchiyan, *supra* note 374, at 100.
forbade judges from privately and unilaterally meeting with a party and its attorney. 413 Despite these efforts, the cultural dependence on corruption has not been sufficiently eradicated and thus parties appear to generally rely on alternative routes to accomplish the same ends. The following list provides some general methods parties use to achieve their desired outcomes:

- Accepting bribes from litigants
- Fabricating rulings in exchange for money
- Making decisions based on instructions from local government parties or senior judicial officials, rather than the law or facts
- Succumbing to the demands of local officials, criminal networks, local clans, social networks, or economic interests
- Blackmailing litigants into paying for, or excluding, evidence
- Assigning, dismissing, delaying, or refusing to accept cases, or refusing to properly enforce court decisions,
- Trading law enforcement services for personal gain
- Extorting kickbacks from intermediaries for passing cases to certain lawyers
- Manufacturing court cases
- Embezzling court funding
- Abusing the power of judges to order suspension of business operations, the confiscation of property, the eviction of tenants, or fair compensation and labor rights. 414

The Supreme People’s Court and the Ministry of Justice have jointly issued regulations, calling to build a “separation barrier” between judges and lawyers. 415 The High Court of Guangdong Province previously implemented a similar system, where lawyers are disallowed to examine materials at any venue other than designated court reception centers. 416 These measures are criticized as too passive. 417

415 Id.
416 Id.
417 Id.
6. Role of Lawyers in Judicial Corruption

Many legal practitioners in China believe that litigators are at the root of the corruption problem.\footnote{See Four Lawyers Lose Jobs After Bribing Judge, supra note 137.} They possess the money, motive, and the know-how (familiarity with the judges and the system) to bend a judge’s ruling in their favor. One example of a way in which lawyers exploit their position is through the use of contingency fees (风险代理费, fengxian daili fei), which are predetermined and given to lawyers if they are successful.\footnote{For more information about contingency fees, see The Measures for Lawyers’ Service Charges, promulgated by the Justice Department of PRC in 2006, available at http://www.moj.gov.cn/lsgzgzzds/2008-07/21/content_905383.htm (last visited Oct. 12, 2007).} Judges willing to participate can acquire a handsome bonus.\footnote{Id.} These fees are allowed only in civil and administrative cases, and yet lawyers still use them in criminal cases when their clients are unaware of their illegality.\footnote{Id.}

In general, behavior among lawyers who act as a component of the judicial corruption machine can be characterized in three ways: (1) acting as the “couriers” or conveying litigants’ desires to judicial officers, and judicial officers’ demands to litigants; (2) turning a blind eye to clients whom they suspect to have bribed a judge; and (3) manipulating the speed and efficiency of court proceedings.

Some lawyers bribe officials to expedite the resolution of their cases; others see a delay in resolution as an opportunity for financial gain on behalf of, or from, their clients.\footnote{Judicial corruption in China shares similarities with the problem in other developing countries. See Arnold Tsunga & Don Deya, Lawyers and Corruption: A View from East and Southern Africa, in GLOBAL CORRUPTION REPORT 92 (2007), available at http://www.eeldis.org/go/what-s-new&id=33536&type=Document.}

Noting that creating disincentives for lawyers may not be enough, scholars suggest that disciplining lawyers, regulating the admission of new lawyers into practice, and applying periodic renewals of practice certificates and continuing legal education for renewal of practice licenses would appropriately monitor the quality of lawyer in practice.\footnote{Id. at 95-96.} Unsurprisingly, some lawyers do not believe these practices would be adequate, because they fail to address the likely possibility that corruption would persist even if
every lawyer was ethically sound because the role of soliciting corrupt behavior would simply transfer from lawyer to client. Indeed, correcting the fundamental causes of corruption in Chinese courts is an area that requires further study.

7. A Way to a Fair Trial

Aware of rampant corruption, clients seeking to hire a lawyer often may consider whether or not that lawyer or law firm has any close connections to the court that will have jurisdiction over the case. For typical, low profile cases, the attorney may attempt to thwart any corruptive activities by writing to the judicial committee, or if the case involves a sensitive subject matter, by involving the media, as illustrated by the TOEFL case.

The cases that follow illustrate the few times while practicing in China where the author was issued sound legal judgments. These are optimistic examples of how justice can be obtained through legal and honest methods.

On April 30, 2006, the author was invited to provide legal services to Jiada Chemical Co. (Jiada). The same day, the author sent an email to the general manager of Jiada stating his rate of legal service fee. Jiada asked the author to join their meeting with American investors on May 1, 2006. After the meeting, the author conducted research and provided a memorandum according to Jiada’s needs on May 13, 2006. In another meeting on May 13, Jiada required the author to draft three documents, including an agreement between Jiada and its subcontractors, both in English and Chinese, and a related memorandum.

On May 16, Jiada suddenly contacted the author to cancel the legal service contract, paying for services rendered between May 1 and May 13, but rejecting the invoice for services rendered

424 Some judges and lawyers form illicit networks in which to exchange bribes for favors. See Liu Songjie, 深圳中院腐败窝案调查 [The Investigation on Shenzhen Intermediate Court Corruption Case], 凤凰周刊 [PHOENIX WEEKLY] (P.R.C.), Nov 25, 2006, at 32.
425 See Kurkchiyan, supra note 374.
426 See Teng, supra note 291.
427 Case background on file with the author.
428 Id.
429 Id.
430 Id.
431 Id.
between May 13 and May 16, and for work on clarifying the agreement.\textsuperscript{432} The author brought an action against Jiada to claim the balance outstanding.\textsuperscript{433}

The first major issue was whether the email sent by the plaintiff actually constituted an offer. Two sub-issues add a level of complication to this case. The first is that the defendant claimed he did not receive the email offer.\textsuperscript{434} The second is that a regulation specifies that in order to obtain legal services, the parties must present a signed and written agreement.\textsuperscript{435}

The Court of first instance, the Shenzhen Futian District People's Court (First Instance Court), provided sufficient reasoning: the email was sent to the email address printed on the business card of the defendant's general manager.\textsuperscript{436} It was to be expected that the email reached the designated receiver. Moreover, the defendant paid part of the legal fee according to the rate specified in the email. The First Instance Court, therefore, held that the defendant had received the email and agreed to the rate of legal service and other contents in the email. The judgment confirmed that the email was an effective offer, and the defendant's acts constituted an acceptance thereto.\textsuperscript{437}

The second major issue was whether the defendant required the plaintiff to provide further services on May 13, 2006. The plaintiff submitted testimony written by two witnesses.\textsuperscript{438} As these two witnesses were employees or ex-employees of the plaintiff, the People's Court did not adopt their testimony directly due to conflicts of interest.\textsuperscript{439} After examining other evidence, the First Instance Court found their testimony to be corroborated by

\textsuperscript{432} Id.
\textsuperscript{433} Case background on file with the author.
\textsuperscript{434} Id.
\textsuperscript{436} Case background on file with the author.
\textsuperscript{438} Case background on file with the author.
the oral testimony of the defendant's witness. As the oral testimony noted above was not fully identical to the witness' written testimony, the First Instance Court held that the oral testimony should prevail. Thus, the testimonies of the plaintiff's witnesses were accepted.

Besides resolving those two major issues, the First Instance Court also stated that the plaintiff provided continuous legal services to the defendant from May 1 to May 16, during which period the parties had not made any alteration to the rate of services. In the end, the First Instance Court issued a judgment against the defendant.

This quality of analysis on each issue is rarely found in Chinese judgments. The judge weighed each argument carefully and produced a detailed and logical judgment, which addressed and connected all of the major facts of the case. Even some of the author's colleagues admitted that it was very rare to read such a judgment. In a recent phone call with a former Jiada public relations representative (the defendant), it was implied that the judge of first instance was indeed contacted, but refused to be influenced. The author also learned that the judge has a reputation of being honest and fair. To be safe, the plaintiff still wrote a letter to the First Instance Court's president and adjudicatory committee expressing a concern for possible case fixing in the second instance trial. The letter indicated that winning or losing the case was of secondary importance to the judgment being clear in logic and reasoning. In general, a case may be monitored more closely if there is a letter to the leaders of the court. It is not certain what exactly played a role in the high quality of the judgment, but it is assumed that sending a letter to alert court leaders can only make a positive impact.

Unsatisfied with the outcome, the defendant (appellant)

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440 Case background on file with the author.
441 Id.
442 Id.
443 Id.
444 Interview with professional colleagues.
445 Telephone Interview with former Jiada public relations representative (Mar. 2, 2008).
446 Case background on file with the author.
447 Letter from Plaintiff to President of First Instance Court and Adjudicatory Committee (on file with author).
448 See generally Weiqing, supra note 36, at 266-69.
TRICK OR TREAT

On June 5, 2007, the plaintiff sent a letter to the court president, judicial committee members and the judges of the collegial bench, to suggest that they supervise this case and also to ask to be provided with a convincing judgment using clear reasoning. However, during a phone conversation with the plaintiff’s lawyer, the presiding judge unexpectedly insisted that it would behoove the plaintiff to settle the case as the judges of the bench failed to reach consent, implying that if the court were to make a decision, it would not be in the plaintiff’s favor. The plaintiff’s attorney then seemed to sense that the judge may have been pressured to fix the case.

The court commenced mediation in favor of the defendant. To counter the unfair mediation and any possible acts of corruption, the Plaintiff went on the offensive again by sending another letter on Oct. 31, 2007, this time to the court’s Division Head as well as to the court president and judicial committee members. The letter was also copied to the court’s president and adjudicatory committee, the chief of the Division, and the Standing Committee of Shenzhen People’s Congress suggesting increased supervision over this case, which the Division Head, by phone, agreed to. Plaintiff’s attorney called the presiding judge again regarding the mediation, and it appeared that the judge changed his attitude and became more reasonable. Eventually, the presiding judge informed the plaintiff that the chances of successful mediation were slim.

The letter may have played a role in preventing the case from being fixed and may have provided the incentive to produce a well-written judgment. The Second Instance Court issued a

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450 Telephone Interview with Presiding Judge of the Second Instance Court.
451 Case background on file with the author.
452 Id.
453 In theory, the congress is empowered as the entity to supervise the work of the people’s court. See Legal System of China Legislative Branch, http://www.lawinfochina.com/Legal/index.asp (last visited Oct. 7, 2008). However, the effect depends on the matter in dispute. The court will pay a certain degree of attention to the supervision of the congress. Some individual representatives may also make a complaint for some unjust decisions in reality and this may work sometimes. For instance, see the text accompanying supra note 106.
454 Telephone Interview with Presiding Judge of the Second Instance Court.
455 Case background on file with the author.
The judgment that seemed to be a compromise to both parties. The judgment was likely issued after the Division Head's review of the case as the judgment had only partly reversed the court decision of first instance. The decision explained that the email offer was accepted by the defendant and fully affirmed the other major issues raised and reasoning given by the court of first instance. However, the court held that the defendant would only be obligated to pay a partial amount of the legal service fee, based on the principle of conventional practice and fairness (常理与公平, changli yu gongping), which was used to determine whether the plaintiff's service fees were reasonable. It is well known that the principle of conventional practice and fairness may be used only where no specific laws or regulations existed. It is important to note that this decision was not based on any specific law or provisions, and thus should not be considered a well-reasoned judgment according to law. In fact, there are official regulations detailing the standards used to calculate legal fees, but the judge failed to cite this regulation in his judgment and did not attempt to reference it when he applied his own standard.

The plaintiff assumed at the time that the judge may have been pressured to favor the defendant, and actually discovered on March 2, 2008, via a phone conversation with the defendant's above mentioned public relations representative, that this was indeed the case. However, that source did not disclose whether the expense to fix the case was a mere dinner or a bundle of cash. Instead, he laughed and changed the subject.

This case highlights the effectiveness of a suggested new

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456 The author called the head of the division asking when the judgment was to be issued and he responded by repeating: "Very soon, very soon." Telephone Interview with Division Head.

457 Case background on file with the author.


459 This shows that the court did not intend to view this case as a serious legal issue. The court wished to appease the other side by sacrificing the Plaintiff's claims and by issuing a compromise in the legal fees due to the Plaintiff. See 广东省律师计时收费计算规则（试行） [Guangdong Province Lawyers’ Billable Hours and Service Fee Regulation] (promulgated by Guangdong Province Bar Association, Nov. 5, 2004), available at http://www.dyhlawyer.com/service_detail.asp?service_id=3.

460 Telephone conversation with public relations representative for the defendant (March 2, 2008).

461 Id.
approach in preventing courtroom corruption. Whereas before dissatisfied litigants could only seek an explanation after the judgment was given, now it is possible to communicate with the court about each party’s legal expectations before receiving a judgment.

In another recent example, the supervision office of the Shenzhen Nanshan District Court (dudaoban), after receiving a letter of this sort, called a meeting with the author and his clients to discuss the details surrounding their concerns and/or complaints about possible instances of corruption. This case involved legal issues concerning the protection of the residents’ rights (weiquan). A restaurant operating within the club wished to expand its business. Government officials seemed to turn a blind eye to the restaurant owners’ plans, which went against zoning regulations for the space in question in the original city planning agenda. Instances of possible bribery and corruption were observed by the residents, and included the witnessing of restaurant management handing out red envelopes of money (hongbao) to city management officials. In another instance, officials of the Environmental Protection Agency publicly denounced the activities of the restaurant and issued a fine for RMB 50,000, but later did not follow up with this charge. The legal issue was whether or not the city management authority (chengguan) should perform its obligations to correct zoning violations in a private housing complex.

Concerns regarding possible corruption were stated in the letter mentioned above and mailed to the president of the court as

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462 See generally Liu Hui v. OCT Local City Mgmt., 1 SHEN NAN FA XIN 4 (Guangdong Prov. City of Shenzhen Nanshan Basic People’s Ct., 2008).

463 See 最高人民法院督导员工作条例, [Regulations of the SPC on the Supervision Officer], (promulgated by Supreme People’s Court, Sept. 17, 1998, effective Sept. 17, 1998), art. 3.

464 Case background on file with the author.

465 Id.

466 Id.

467 Id.

468 Id.

well as other relevant local superior state organs. In a meeting with the director of the supervision office, the director stressed to the author and his clients that the president of the court as well as other members of the judicial committee had paid careful attention to the letter and had arranged for the director to meet with them. The director also indicated that he was closely following the trial and that he planned to launch an investigation. The director suggested that the author write another letter specifying the relevant legal issues to the judicial committee, which also had authority to determine the case. In a phone call between the author and the director, the director mentioned that after speaking with the presiding judges, he felt that the judges were well aware of the importance of this case and planned to issue a fair and transparent judgment. The unpublished judgment stated the relevant procedural regulations and applied them directly to the factual record of this case to determine that the defendant had not complied with the regulations within the proscribed statute of limitations. Finally, the court held that the city management authority (城管, chengguan) had failed to perform its obligations and should perform such obligations within sixty business days from the effective date of the judgment ((2008)).

470 Writing letters to court officials is a method Qian Weiqing discusses as a way to increase the chances of receiving a fair verdict. See Weiqing, supra note 36, at 266-69 (2008).
471 Interview with the Director of Supervision Office.
472 Letter from author, attorney, Liu & Wang to President of the Nanshan District Court (Mar. 7, 2008) (on file with author).
473 For more information on the judicial committee, See Liu, supra note 16.
474 Telephone Interview with Director of the Supervision Office.
475 Liu Hui v. Nanshan Shi Qu Chengshi Guanliju Shenzhen Nanshan, District Court 2008 (unpublished opinion). The relevant section states, “According to the regulations, cases involving reports by the people should be accepted by the City Management and law-enforcement departments where it falls within the scope of cases involving the supervision of government official’s obligations. After being accepted, in accordance with the requirements for registering a case, the case should be registered within ten days and should be promptly investigated. Investigating and processing the case should be completed within three months, and may be extended by one month under special circumstances. After the investigation is completed, the City Management and law enforcement departments should handle the case in accordance with the facts, laws and regulations. In this case, the Defendant, the City Department, has the duty to carry out an investigation and prosecute the scope of Shenzhen City’s Nanshan District’s land use violations and non-conforming building acts. After receiving the plaintiff’s report, although the Defendant, the City Department carried out the case-filing procedures, and investigated the work, the evidence presented by the Defendant cannot prove that it reached a corresponding decision within the statutory period. Therefore, the Defendant did not complete the performance of its legal obligations, and thus constitutes administrative non-performance.”
Since this case found in favor of the plaintiff based on legitimate legal reasoning, it appears that the letters did in fact help to prevent an unreasonable judgment based on corrupt activities that the author had reason to believe had taken place.

The author believes that writing a letter increases the chances of receiving a fair verdict for his client, regardless of whether or not corruption actually took place. The letter is a preventive measure in that if there is no corruption, there will be no negative impact on the client and will only help to ensure that the case receives the highest attention by the judicial committee. If corrupt acts have taken place, it is an effective way to prevent those acts from affecting the judgment. Bribing the court president or other judicial committee members of the court is an effective “trick” to fixing a case. Furthermore, because the president has the ultimate decision-making power, the court president may select certain facts favorable to the “treating” party to convince the other judicial members to agree to his legal approach. This tactic may succeed despite the intended oversight function of the committee because the other committee members are not well informed of the facts and legal issues in the case, or do not challenge the president’s authority since they themselves may not have an interest in the outcome of the case. Even if a party does not have a relationship with the court president, bribing a regular member of the judicial committee could have a significant impact on the judgment because that member may use selective facts and legal arguments to influence other members.

Thus, Chinese courts may take proactive approaches to combat corruption when they are given a positive incentive to do so. Writing letters to court officials gives such positive incentive because it expands the scope of involvement beyond an individual judge, which thus creates an ad hoc check and balance system within the judiciary, involving mutual scrutiny and supervision in the decision making process. This effect was confirmed by the director of the supervision office of the Shenzhen Nanshan District Court after the judgment was issued.\(^\text{477}\) Corrupting one judge is easy; corrupting a whole group of court officials is a much greater challenge.

\(^{476}\) Id.

\(^{477}\) Telephone Interview with author (name omitted for privacy) (July 15, 2008).
VIII. Final Thoughts and Outlook

Many scholars and practitioners have argued that the Chinese legal system itself is responsible for court corruption. Often, it is not until a corrupt act has been exposed that one may pay attention to a case decision. In analyzing the content and wording of judgments, one can often sense or even confirm when corruption has taken place through a judge’s lack of reasoning or evasion of discussing key issues. There has been little to no research to date on the connection between judgments and corruption. This Article has therefore tried to examine corruption from a new perspective: the interaction between corruption and lack of sound legal reasoning in judgments. As this Article has demonstrated, some judgments may obviously reveal acts of corruption, whereas others may be more subtle. One point is clear, the traditional instructive approach, i.e. issuing judgments without clear reasoning, gives judges a “green light” to hide possible corrupt acts. As a result, such “judicial arrogance” is not effective in resolving legal disputes. Furthermore, unclear judgments and lack of legal explanations in the decisions may further stoke the fires of public discontent with the judiciary. Perhaps this problem is the foundation of “Petitioners’ Village” (上访村, shangfangcun) in Beijing.478

It is interesting to note that this instructive approach has been used to serve the CCP’s political needs for administrative purposes, and now coincidentally it has effectively facilitated judges’ pursuit of unethical and often criminal economic interests.479 During the Mao Era, some critics of Chairman Mao employed tactics such as debates, conferences, and even physical fights to reject Chairman Mao’s programs.480 However, some writers decided to use publication as a vehicle to attack the CCP and Chairman Mao indirectly.481 In 1962, Mao Ze Dong endorsed the statement, “Using stories for anti-CCP activities is a clever invention (利用小说进行反党是一大发明, liyong xiaoshuo jinxing fandang shi yi da faming),” made by Mr. Kang Sheng (康生) about the author of

479 Id.
the novel “刘志丹 Liu Zhi Dan.” Today, some judges similarly use judgments as a mechanism to fool (忽悠, huyou) the parties for the purpose of exchanging personal interests. The difference is that Mao’s reference was specific to Chinese society, whereas this invention of the Chinese judiciary is more of a “global contribution” to justice (在判决书中玩弄法律于股掌之间并为腐败披上合法外衣，也该算是世界级的贡献。). In China, where scrutiny and control of performance are strong but corruption has nevertheless become part of normal life, a judge need only make a point of playing it safe to avoid being caught, regardless of whether his decisions are corrupt. Safety from exposure may be achieved by handing down elaborate judgments, paying meticulous attention to procedure and sticking to the safe interpretation of evidence and legal principle. On the surface, the law may seem to be fully observed, even while the judgment is used for private gain.

Although the SPC has made some efforts to standardize the writing of judicial opinions, it has not strictly enforced these regulations. Although Chinese judges have the capabilities to offer clear reasoning, the legal system and culture, in addition to corrupting incentives, make writing these kinds of judgments (like in a common law jurisdiction) undesirable. As an important note, some judges and officials believe that legal reasoning may not be necessary for some politically sensitive cases or cases that do not have specific regulations or rules to apply.

Today’s China has a new legal system, and citizens are more aware of their legal rights than at any other point in modern Chinese history; as a result, they are playing an increasingly important role in supervision. However, while legal

483 See Jianhui, supra note 56.
484 See Defendant’s Relatives in Ex-employee of Huawei Case, supra note 181.
485 See Judgment and Order Models, supra notes 43-44.
486 Id.
consciousness continues to pressure the legal system to perform fairly, judges continue to adhere to the traditional instructive approach of writing judicial opinions. The author does not presume that perfecting judgments will effectively end judicial corruption, or that one can always detect corruption just by reading a judgment, or even that lack of sound legal reasoning in judgments may always indicate corruption, as it could be due to political interference. However, it must be recognized that a lack of accountability for poorly-written decisions does provide judges room to maneuver. Thus, bad judgments are not due to a lack of qualified judges to write them, but rather, are due to the traditional instructive approach (命令主义, mingling zhuyi) as well as a lack of political and economic independence in the legal system. The kind of social engineering that is chosen to stamp out corruption must be sophisticated rather than simplistic, and meticulously tailored to fit the shape of the society that it is intended to help. Improving both practitioners' and the public's ability to detect corruption is a small step toward eliminating the ability to trick or to fix (搞定, gaoding).