

TRANSFORMING THE CULTURE OF CHINESE PROSECUTORS THROUGH GUIDING CASES

INTRODUCTION

In their comparative study of the rise of political liberalism in Europe and America, Halliday and Karpik focused on the important role of lawyers in demanding basic rights for their clients and subsequently mobilizing to demand broader liberalization of the political system.¹ However, after examining a broader range of regimes throughout the world that underwent liberalization in the late 20th century, Halliday et al found that in political systems where lawyers' status was relatively weak, such as South Korea and Taiwan, the decisive impetus for liberalization came primarily from cooperation by other actors exerting greater influence within the broader "legal complex", including judges, legal academics, civil servants, and prosecutors.²

The recent persecution of activist lawyers in China and heavy-handed attempts to restrict the work of civil society groups demonstrates the government's suspicion of their threat to the authoritarian regime, and suggests that political liberalization is still far away.³

¹ Terence C. Halliday and Lucien Karpik, eds, *Lawyers and the Rise of Western Political Liberalism* (Oxford: Clarendon Press, 1997), pp.5-6.

² Lucien Karpik and Terence C. Halliday, "The Legal Complex", Center on Law and Globalization Research Paper No. 11-05 (2011), p.5, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928156 ; and Terence C. Halliday, Lucien Karpik and Malcolm M. Feeley, *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism* (Oxford: Hart, 2007), especially chap 1 by Tom Ginsburg.

³ Hualing Fu (2018) "The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State," *Journal of Contemporary China* 27:112, pp.554-568; and Sida Liu and Terence C. Halliday, *Criminal Defense in China: The Politics of Lawyers at Work* (Cambridge University Press, 2016). Cf. Chinese Human Rights Defenders, *Repression and Resilience: Annual Report on the Situation of Human Rights Defenders in China (2017)*,

Yet simultaneously, unprecedented numbers of legally-trained personnel have entered the senior ranks of the Chinese government, and a significant professionalization of the courts and procuracy has taken place.⁴ This generational personnel shift within China's legal complex has begun to bear fruit in the form of major new legislation and regulations designed to protect basic due process rights and increase transparency within the court system, and in a renewed effort to promote rule of law practices right down to the local court level.⁵

In an attempt to ensure consistency and quality in implementing these newly protected rights, the Supreme People's Procuracy (SPP) has issued fifteen sets of Guiding Cases since December 2010, focusing on key criminal procedure and public interest issues.⁶ These are actual cases resolved by local procurators and then selected by the SPP as approved models for all procurators to follow. These SPP Guiding Cases reveal an aspirational change in the mindset or culture of China's public prosecutors from obedient servants of repressive and corrupt local governments and police to professional champions of justice and the public interest.

pp.24-9, https://www.nchrd.org/wp-content/uploads/2018/02/CHRD-2017-Annual-Report-of-Situation-of-HRDs-in-China_Feb-2018.pdf

⁴ Cheng Li, "The Rise of the Legal Profession in the Chinese Leadership", Brookings Institution (June 2016), <https://www.brookings.edu/wp-content/uploads/2016/06/Read-the-article.pdf>.

⁵ Colin Hawes, "How Chinese Judges Deal with Ambiguity in Corporate Law: Suggestions for Improving the Chinese Case Precedent System," *Australian Journal of Asian Law* Vol 19 No 1 (August 2018): 1-22; and Colin Hawes, Alex K L Lau and Angus Young, "Lifting the Corporate Veil in China: Statutory Vagueness, Shareholder Ignorance, and Case Precedents in a Civil Law System," *Journal of Corporate Law Studies* vol.15.2 (2015): 341-376.

⁶ See all SPP Guiding Cases in Chinese on the SPP website: SPP, *Zhidaoxing anli*, <http://www.spp.gov.cn/spp/jczdal/index.shtml>. No English translations are currently available, so all translations in this article are by the author, who has extensive experience translating Chinese legal texts into English. For issue dates and topics covered by each set of Guiding Cases, see the Appendix.

The SPP's Guiding Cases have been generally ignored by English-language commentators,⁷ in marked contrast with the Guiding Cases issued by the Supreme People's Court (SPC).⁸ Yet the SPP Guiding Cases may have a much broader impact on the operation of the Chinese legal system for three reasons.

First, several of the SPP Guiding Cases focus on procedural and evidential aspects of the death penalty, so if followed by all procurators, they will literally have a life or death impact on criminal suspects.

Second, the SPP Guiding Cases make it clear that a key role of procurators is to uphold the public interest against abuse by powerful officials or corporate interests. Many of the SPP Guiding Cases deal with prosecution of government officials or state representatives such as

⁷ The SPP Guiding Cases are not mentioned at all on the website of the Stanford Guiding Cases Project: see n8 below for relevant citation. Susan Finder (2017) 'China's Evolving Case Law System in Practice', 9 *Tsinghua China Law Review* 245, pp.253-4 mentions them, though she does not analyse their content. Trevaskes and Chen only discuss SPP Guiding Case 2, one of the first to be issued in 2010. See Xingliang Chen, "Guiding Cases for China's Death Penalty", in Bin Liang and Hong Lu, eds, *The Death Penalty in China: Policy, Practice, and Reform* Columbia University Press, 2015, 187-213; and Susan Trevaskes, "Death sentencing for stability and harmony" in Trevaskes, ed, *The Politics of Law and Stability in China* (Edward Elgar, 2014), 127-51.

⁸ The director of the Stanford Guiding Cases Project has claimed that the SPC Guiding Cases "mark the first time that the judiciary of China, a civil law jurisdiction, has embraced anything similar to case law, making the [SPC Guiding Cases] system one of the most significant reforms for increasing the transparency of Chinese law to date." Mei Gechlik and Sharon Driscoll, "Dr. Mei Gechlik on Advances in Chinese Judicial Reform: Guiding Cases," *Stanford Lawyer* February 29, 2016, online <https://law.stanford.edu/2016/02/29/dr-mei-gechlik-on-advances-in-chinese-judicial-reform-guiding-cases/>. See also Stanford Guiding Cases Project at <https://cgc.law.stanford.edu/>. At the same time, other scholars and legal practitioners have questioned the utility of the SPC Guiding Cases system. They note that only a tiny number of SPC Guiding Cases have been issued since 2010 (to date, only 96 cases), and most deal with relatively narrow legal issues that don't come up very frequently. For some recent commentary on SPC Guiding Cases, see Mo Zhang (2017) 'Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China', 26(2) *Washington International Law Journal* 269; Susan Finder (2017); Jinting Deng (2015), The Guiding Case System in China's Mainland, 10 *Frontiers L. China* 449-74; Zhu Mang (2017) 论指导性案例的内容构成 (On the Content and Structure of Guiding Cases), 2017.4 *中国社会科学* (Social Science in China); Zhao Lei (2018) 商事指导性案例的规范意义 (The Normative Significance of Commercial Guiding Cases), 2018.2 *Zhengfa luntan*.

environmental protection and food safety bureaus, urban control officers and police officers, for corruption and criminal negligence. And the eighth set of cases focuses entirely on People's Procurators bringing public interest civil and administrative lawsuits against environmental polluters and the government officials who fail to prevent the pollution. As discussed below, this pilot project has resulted in a huge increase in the number of successful environmental lawsuits in China.

Finally, several SPP Guiding Cases go beyond narrow and specific points of law to cover broad procedural issues that are generally applicable over a wide range of criminal cases. For example, one of the most significant issues is the exclusion of illegally obtained evidence, especially evidence obtained through torture or beating of suspects, which is clearly addressed in SPP Guiding Case 27. The rule in this case can be applied to any criminal prosecution, and if it is followed consistently by local branches of the People's Procuracy, it should reduce the number of wrongful convictions, and in the longer term, remove the incentive for police to mistreat criminal suspects in their custody, a frequent occurrence in China according to international human rights groups.⁹

To be sure, these SPP Guiding Cases are only one part of a broader positive reform effort in the sphere of criminal procedure and regulation of procurators, including a comprehensive revision of the *PRC Criminal Procedure Law* in 2012, regulations issued by the SPP in relation to public interest lawsuits in 2016, and an amended *PRC Procurators Law* in 2017.¹⁰ There is also some ambiguity about the legal status and weight of SPP Guiding

⁹ Human Rights Watch, "Tiger Chairs and Cell Bosses: Police Torture of Criminal Suspects in China" 13 May 2015, <https://www.hrw.org/report/2015/05/13/tiger-chairs-and-cell-bosses/police-torture-criminal-suspects-china> ; Human Rights in China, "Police Brutality," <https://www.hrichina.org/en/topic/police-brutality> ;

¹⁰ Jianfu Chen, *Criminal Law and Criminal Procedure Law in The People's Republic of China: Commentary and Legislation* (Leiden: Martinus Nijhoff Publishers, 2013), chap 3. For SPP regulations on public interest lawsuits, see discussion of environmental Guiding Cases below. For the Chinese text of the *PRC Procurators Law*, see 中华人民共和国检察官

Cases in relation to these more formal legal sources, an issue discussed further in the concluding sections of this article.

Even so, the SPP Guiding Cases clearly demonstrate to people's procurators throughout China how the revised laws and regulations should be applied in practice; they provide local procurators with precedents endorsed at the highest levels of the SPP to support battles against local power interests engaged in criminal activity and environmental pollution. And perhaps most importantly, both the content of the Guiding Cases and the fact that they were issued at all reveals an unprecedented cultural change within the people's procuracy itself from a body that was essentially an extension of the police or local power interests to one that sees itself as a professional and relatively independent institution with a focus on protecting individual rights and the public interest.

As we noted, criminal defence lawyers and civil society groups are still severely restricted in China. This means that any positive cultural shift within the procuracy becomes even more significant, as it may partly compensate for the function these other groups should play in protecting criminal suspects' rights and upholding the public interest. Nevertheless, Halliday and Karpin also provide examples where sustained efforts to improve protection of legal rights failed due to pushback from authoritarian or military leaderships, Egypt being a typical recent case study.¹¹ Due to the continued influence of Communist Party interference in the Chinese legal system, demonstrated in our analysis below, it is too early to say whether the greater respect for basic legal rights revealed by these Guiding Cases is a step towards increased liberalization of the legal complex and political system.

法 amended 1 September 2017, at

http://www.spp.gov.cn/spp/fl/201802/t20180201_363877.shtml

¹¹ Halliday and Karpin (2011), 12; Sahar F. Aziz, "Independence Without Accountability: The Judicial Paradox of Egypt's Failed Transition to Democracy" 120 *Penn State L. Rev.* 101 (2016).

The next section briefly introduces the institution of the People's Procuracy, including major criticisms of its behaviour prior to the introduction of the first set of SPP Guiding Cases in 2010 and the 2012 *Criminal Procedure Law* amendments. The section also provides the official rationale for the Guiding Cases, and briefly explains their legal status.

The article then analyses the unprecedented attention paid in the SPP Guiding Cases to legal rights and the public interest, focusing on four themes: exclusion of tainted evidence; death penalty cases; criminal negligence/corruption of government representatives; and environmental public interest lawsuits. The section on public interest suits demonstrates that the Guiding Cases have a significant transforming or educative function – each set of cases is supposed to act not just as a precedent for procurators but as an educational tool to change the behaviour of local government officials and agents throughout China. The article concludes by identifying gaps that remain to be filled by deeper institutional reforms to ensure that people's procurators can truly accomplish their duty to fight injustice and protect the rights of all criminal suspects.

BASIC FUNCTIONS OF THE PEOPLE'S PROCURACY AND CRITIQUES OF ITS EFFECTIVENESS: GUIDING CASES AS ONE SOLUTION

The functions of the people's procurators in China include initiating criminal prosecutions in the courts; reviewing cases investigated by the public security organs (the police) and determining whether to approve arrest and prosecution of suspects or to exempt them from prosecution; supervising the legality of investigations by police; supervising the judgments of

courts with the power to seek review of cases – effectively an extra level of appeal; and supervising the legality of activities of prisons and other detention centres.¹²

In carrying out their functions, procurators are supposed to “protect citizens’ right to lodge complaints against State functionaries who break the law and investigate the legal responsibility of those persons who infringe upon other citizens’ personal, democratic and other rights.”¹³ They should exercise their authority “independently, in accordance with the provisions of law, and shall not be subject to interference by any administrative organ, public organization or individual.”¹⁴ Finally, in their investigative work, they should “lay stress on evidence rather than readily giving credence to oral statements, and strictly forbid the obtaining of confessions by compulsion.”¹⁵

In practice, Chinese procurators have often fallen short of these admirable ideals. Rather than supervising and carefully reviewing the investigative work of public security organs (the police), procurators have tended to accept their recommendations even when the evidence has many flaws. This was due to a prevailing mindset among procurators that they should cooperate closely with the police to “smash” crime and deter criminals.¹⁶ Disturbingly, this has led procurators to turn a blind eye to obvious torture or mistreatment of suspects in police custody, and contrary to their legal duties, to rely heavily on oral confessions extracted

¹² Summarizing article 5 of the *Organic Law of the People's Procuratorates of the PRC* amended 2 December 1986 http://www.spp.gov.cn/spp/fl/201802/t20180205_364637.shtml (hereafter “PP Organic Law”). For procurator supervision of detention centres, see Xifen Lin and Wei Shen, “Reforms to China's pretrial detention system: the role of the procuratorate,” *International Journal of Law, Crime and Justice* 44 (2016) 183-211.

¹³ PP Organic Law, art 6.

¹⁴ PP Organic Law, art 9.

¹⁵ PP Organic Law, art 7.

¹⁶ Peerenboom, p.312-3. Jiahong He, “Case Study on the Causes of Wrongful Conviction in Chinese Criminal Proceedings,” 10 *Frontiers L. China* 670 (2015), 671-3.

from suspects despite gaps and inconsistencies with other material and witness evidence.¹⁷ It is difficult to calculate how many wrongful convictions resulted from this shoddy procuratorial work, as errors generally only came to light after another person subsequently admitted committing the crime, or in some cases, the “murdered” victims reappeared alive after several years living elsewhere.¹⁸ But Chinese officials have admitted that torture in detention was “common, serious, and nationwide,”¹⁹ and most wrongful conviction cases have involved obvious collusion by procurators in covering up evidential inconsistencies and mistreatment of both defendants and witnesses.²⁰

Besides neglecting their duty to supervise public security organs, local procurators have also been too open to influence by local government leaders. During regular “strike hard” campaigns against crime from the 1980s to early 2000s, this has led them to prosecute suspects indiscriminately (in collaboration with police and courts), without regard to proportionate sentencing principles, in order to meet arbitrary quotas for criminal convictions.²¹ They have also allowed local corrupt officials and their families to escape punishment by abusing their power to “exempt” suspects from prosecution.²²

Finally, procurators have frequently ignored the increasingly stringent rules in successive amendments to the *PRC Criminal Procedure* law designed to protect the rights of suspects. For example, numerous defence lawyers have complained that procurators refused to allow them to meet with their detained clients or to provide them with the evidence against

¹⁷ See H. E. Jiahong; H. E. Ran, “Empirical Studies of Wrongful Convictions in Mainland China,” 80 U. Cin. L. Rev. 1277 (2012); and Huang Shiyuan, “Chinese Wrongful Convictions: Causes and Prevention,” 80 U. Cin. L. Rev. 1219 (2012).

¹⁸ Huang (2012), p.1220-2.

¹⁹ Human Rights Watch (2015): this report does not include page numbers, but see section entitled “Police Abuse in Pre-trial Detention.”

²⁰ Human Rights Watch (2015): section entitled “The Exclusionary Rule.”

²¹ Susan Trevaskes, *Courts and Criminal Justice in Contemporary China* (Lexington, UK: 2007), especially pp.125-7, 178.

²² Jianfu Chen, p.75

those clients in timely fashion before the trial. In some cases, procurators have even arrested defence lawyers and had them jailed on trumped up charges merely for attempting to defend their clients.²³ Likewise, despite the promulgation of clear rules in 2010 requiring the exclusion of confessions and witness statements obtained through coercion, in the period 2010-2011, there were *no* recorded cases where such confessions were excluded, despite credible claims of torture by many suspects.²⁴

The Supreme People's Procuratorate (SPP) has been involved in some of the improvements to criminal procedure rules – the 2010 evidence exclusion rules were jointly issued by the Supreme People's Court and the SPP, for example. However, until recently, the SPP has tended to focus more on watering down such amendments rather than changing the mindset and behaviour of local procurators.²⁵

Despite this checkered history, there are several recent factors that have caused the SPP to adopt a new attitude towards procedural justice, and have increased its determination to improve the competence and reputation of local procurators. Most notably, from the mid-2000s onwards, a great deal of media publicity was given to numerous wrongful conviction cases, which publicly and embarrassingly exposed the shoddy investigative practices and roughshod behaviour of police and procurators.²⁶ Responding to public outrage, both the Legal Affairs Office of the Communist Party's Central Committee and the Supreme People's Court successively released rules and detailed directives on preventing wrongful convictions in 2013, which clearly put pressure on the SPP to follow suit.²⁷

²³ Chen, 80-4; Liu and Halliday, *Criminal Defense in China: The Politics of Lawyers at Work* (Cambridge University Press, 2016), chap 3.

²⁴ Daum (2011), p.700.

²⁵ Peerenboom, p.313; Jianfu Chen, p.61-2

²⁶ He Jiahong (2012), pp.1285-8; Huang Shiyuan (2012), p.1224.

²⁷ He Jiahong (2015), p.689, and for an English translation of the SPC's "Directive on Establishing and Improving Working Mechanisms for Preventing Wrongful Convictions"

Secondly, the appointment of Cao Jianming, the first legally-trained Procurator-General of the SPP, in 2008 was a sign that the SPP was seeking to build a professional legal institution rather than merely behaving like an offshoot of the Ministry of Public Security. Previous Procurator-Generals had all been drawn from Public Security or other Communist Party positions with no legal qualifications.²⁸ Zhang Jun, the current Procurator-General since March 2018, also has a legal background, with three law degrees and decades of experience as a judge and criminal law specialist in the Supreme People's Court.²⁹

Thirdly, the SPC's move toward greater transparency of trials and online publication of court judgments, especially since 2013, means that decisions about admission of evidence and the quality of procurators' arguments can no longer be hidden from public view, and their legal errors will be much more obvious.³⁰ Finally, all procurators hired since 2001 are required to obtain a formal legal qualification and pass the national law exam, and most of the older generation of procurators who lacked any legal training will have retired by now, leading to a generational shift toward greater understanding of rule of law.

This greater focus on formal legal education was part of the Chinese government's broader reforms to improve the professional quality of all legal practitioners, including lawyers, judges and procurators. Prior to 2001, many practitioners, even among senior high court judges, were simply transferred into their positions from other government jobs or the military, without any formal legal training, due to a shortage of qualified law students and a lingering Communist Party suspicion of independent professionals. The introduction of the

(issued 9 October 2013), see Na Jiang, *Wrongful Convictions in China* (Springer 2016), 305-8, available at <https://link.springer.com/content/pdf/bbm%3A978-3-662-46084-9%2F1.pdf>.

²⁸ See Colin Hawes, "Improving the Quality of the Judiciary in China: Recent Reforms to the Procedures for Appointing, Promoting & Discharging Judges," in K.E. Malleon & Peter H. Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006): 395-419, p.401.

²⁹ See Zhang Jun, SPP website, <http://www.spp.gov.cn/spp/gjyld/zhangjun/index.shtml>

³⁰ Hawes, "How Chinese Judges," pp.6-7.

national law exam for lawyers, judges and procurators in 2001, along with stricter legal knowledge requirements for all law practitioners, has gradually led to improvements in the quality of legal personnel, including within the procuracy.³¹

Thus, while the SPP initially appeared to be simply jumping on the same bandwagon as the Supreme People's Court by issuing its own Guiding Cases, surprisingly it has used these Cases to vigorously promote unprecedented respect for criminal suspects' procedural rights, and to demand that procurators act independently and hold local public security organs and government officials strictly to account on behalf of the public interest.

The SPP first issued a "Regulation on Case Guidance Work" in 2010 (amended in 2015), and several other commentaries have appeared on the SPP's website explaining the intended role of SPP Guiding Cases.³² According to the Regulation, the aim of Guiding Cases is to "promote strict fairness in procurators' judicial work and to ensure consistency and correct application of the law" (Art 1). The Guiding Cases must also have a "positive legal and social impact" and "guiding relevance for managing similar cases in the areas of establishing the facts, ensuring reliability of evidence, application of statutes, or correct

³¹ 中华人民共和国检察官法 (*PRC Procurators Law* issued 2001; amended 2017), articles 10(6) and 13; and Hawes, "Improving the Quality," p.397.

³² 最高人民法院关于案例指导工作的规定 (SPP Regulation on Case Guidance Work), amended 9 December 2015, at http://www.spp.gov.cn/zdgz/201601/t20160119_111257.shtml; Liu Shujuan, 规范案例指导工作: 发挥指导性作用 规范司法办案 (Regularize case guidance work: let guidance reach its potential to regularize judicial case management), SPP Website, 1 February 2017, http://www.spp.gov.cn/zdgz/201702/t20170215_181152.shtml; Peng Bo, 最高检明确: 指导性案例不得作为直接法律依据 (SPP clarifies that Guiding Cases should not be used as a formal source of law), *People's Daily*, 19 January 2016, http://www.spp.gov.cn/zdgz/201601/t20160119_111271.shtml; Li Yueping, 强化程序法指导性案例作用 (Strengthening the role of guiding cases in procedural law), *Procuratorial Daily*, 9 February 2016, http://www.spp.gov.cn/llyj/201609/t20160902_165546.shtml; Liu Jinlin, 重视发挥指导性案例法治引领功能 (Another look at how Guiding Cases can help to improve rule of law), *Procuratorial Daily*, 18 November 2016 http://www.spp.gov.cn/llyj/201611/t20161118_173194.shtml.

understanding of policies” (Art 2). In terms of applying the Guiding Cases, Art 3 states that “When referring to Guiding Cases in their case management work, People’s Procurators may quote the relevant Guiding Case as a means of clarifying the law or giving reasons for their decision, but they must not use them to replace statutes or judicial interpretations as the direct legal basis for their disposition of cases” (Art 3).

Apart from these very general statements, the Regulation is silent on the legal force of the Guiding Cases or the consequences of procurators failing to follow them. Other commentaries by SPP officials have slightly clarified the intended function of the Guiding Cases, but there is still no definitive statement on what will happen if procurators ignore them. For example, a director of the SPP’s Policy Research Office stated: “Although the Guiding Cases do not have the binding application force of statutes or judicial interpretations, they possess a relatively strong guiding relevance for all procurators when managing similar cases.”³³

At the same time, the SPP certainly expects all procurators to use the Guiding Cases as a tool for correctly applying statutes and other binding regulations. The SPP’s announcement on the issuance of the second set of Guiding Cases in November 2012 declared: “Implementing this case guidance system can save judicial resources and improve the efficiency of judicial practice; and it can overcome the problem of similar cases being decided inconsistently, thereby bringing about judicial fairness.”³⁴ Likewise, the director of the SPP’s Law and Policy Research Office clarified the requirement that procurators “refer to” the Guiding Cases: “This means that generally speaking [procurators] must follow them. If

³³ Peng Bo (2016).

³⁴ Xu Ridan, 高检院公布第二批指导性案例 (The SPP publishes the second set of Guiding Cases), *Procuratorial Daily* 29 November 2012, http://llzw.spp.gov.cn/gzdt_285/201211/t20121129_55059.shtml

they don't follow them, they need to give an explanation and obtain the approval of their local director or procuratorial committee."³⁵

The rest of this article provides several examples of the above-noted attitudinal shift within the Chinese procuracy by analysing the content of Guiding Cases in the four main categories, and placing them within the context of recent broader reforms to the procuracy and legal system. We begin with one of the most significant issues: the exclusion of confessions and other evidence obtained through coercion.

POLICE BRUTALITY AND EXCLUSION OF EVIDENCE

Guiding Case 27 involves a suspect named Wang Yulei from Shunping County in Hebei Province.³⁶ The facts are briefly summarized as follows:

Around 10pm on 18 February 2014, the Shunping County public security office received a call from Wang Yulei stating that he was currently on his way home and had come across the dead body of a male person lying on the ground with bloodstains beside him. The next day, the Shunping County public security began a formal investigation of the case which resulted in them concluding that Wang Yulei was the main suspect. On 3 March 2014, they detained Wang Yulei in custody on suspicion of murder. Following their interrogation, on 15 March 2014 the public security office made a request to the People's Procuracy that Wang be formally arrested and charged with the crime.

³⁵ Jiang Anjie, 最高人民法院研究室主任陈国庆: 检察机关案例指导制度的构建 (Chen Guoqing, Director of the SPP's Research Office, on the establishment of the SPP's case guidance system), *Fazhi ribao* 5 January 2010, http://www.legaldaily.com.cn/fxy/content/2011-01/05/content_2427651.htm?node=21211

³⁶ The numbers of the Guiding Cases are provided by the SPP on issuance of the cases. SPP website, <http://www.spp.gov.cn/spp/jczdal/index.shtml>.

The Guiding Case then takes a surprising turn. The Shunping County people's procurator noticed that there were several doubtful points and contradictions in the evidence. Apart from Wang Yulei's confession, there was no other evidence linking him to the crime. He had been interrogated nine times, and did not admit guilt until the sixth interrogation. Even then, he wasn't able to give an account that was consistent with the victim's injuries, and no murder weapon was found. Some other key material evidence was not collected, such as DNA from a glove found at the scene, and the autopsy failed to state the probable time of the victim's death. There was also no clear motive for Wang to kill the victim.

Besides these serious evidential gaps, when the procurator interviewed Wang for the first time, he noticed that his right arm was bandaged and apparently injured, and Wang was extremely evasive about how this had happened. The procurator reported this to his superiors, and they set up a video-taped interview with Wang where they promised to protect him, and he finally admitted that the police had mistreated him, and his confession was false. The procurator concluded that this confession was obtained illegally, so it should be excluded. As there was no other evidence linking Wang to the crime, the procurator rejected the public security office's request to formally arrest and charge Wang, and he was released from custody. The Guiding Case then makes it clear that following this decision, the Shunping County people's procuracy supervised the further police investigation, and four months later, the real culprit was apprehended and convicted of murder, receiving a suspended death sentence.

Referring to Articles 54, 79, 86 and 88 of the *PRC Criminal Procedure Law*, the Guiding Case concludes with some “key points” that all procurators should take from this case:³⁷

When reviewing arrest cases, procurators must strictly uphold the principle of legality of evidence. They must be adept at spotting illegally obtained evidence and must resolutely exclude such evidence from consideration. Once illegally obtained evidence has been excluded, if the remaining evidence cannot prove that the suspect has committed the crime, permission should not be granted to formally arrest and charge the suspect. ... Evidence must be obtained through legal means, and this does not include torture, violence or other illegal methods ... Procurators must always carefully review any complaints, tips or other indications by the suspect, their lawyer, witnesses or victims that torture, violence or other illegal evidence collection methods have been used.

As noted earlier, the idea that illegally obtained evidence should be excluded is not unique to this Guiding Case. Article 54 of the *Criminal Procedure Law* was introduced in 2012, and this codified and expanded the evidence exclusion rules jointly issued by the SPC, SPP and Public Security in 2010.³⁸ But as Jeremy Daum noted, the 2010 rules did not seem

³⁷ Guiding Case 27, “Key Points”. For a full English translation of the 2012 amended *PRC Criminal Procedure Law*, which was current when this Guiding Case was issued, see Congressional Executive Commission on China, *Criminal Procedure Law of the People's Republic of China*, amended 14 March 2012, <https://www.cecc.gov/resources/legal-provisions/criminal-procedure-law-of-the-peoples-republic-of-china>. Some minor amendments to the *PRC Criminal Procedure Law* were made in 2018, which affected the numbering of the provisions cited above, which are currently Arts. 56, 81, 88 and 90: For the 2018 amended *Law*, see China Law Translate, *Criminal Procedure Law (2018)*, <https://www.chinalawtranslate.com/en/criminal-procedure-law-2018/> [accessed 19 January 2020].

³⁸ *PRC Criminal Procedure Law (2012)*, arts 53-8: see previous footnote for full citation to English translation of this *Law*. Cf. Jianfu Chen (2013), 84-5; and Jeremy Daum, “Tortuous Progress: Early Cases under China's New Procedures for Excluding Evidence in Criminal Cases,” 43 *N.Y.U. J. Int'l L. & Pol.* 699 (2011).

to change the practice of evidence obtained through torture and other illegal means being used in court.³⁹ Jianfu Chen, writing in 2013, acknowledged that the 2012 *Criminal Procedure Law* filled important gaps in the earlier evidence exclusion provisions, yet he also expressed scepticism about whether they would actually change procurator behaviour.⁴⁰

Surveys conducted during the three years after 2012 seem to bear out this scepticism. A study by Zhang Jian of 486 court judgments decided between 2013 and 2015 where defendants had raised the issue of illegally obtained evidence found that the court approved further investigation of the evidence in only 53 cases. Of these, only 8 cases resulted in illegal evidence being excluded, and the accused was found innocent in only 1 case.⁴¹ The main reason courts provided for refusing to investigate the evidence (in 324 out of 486 cases) was that the procurator had given an “explanation” that had satisfied the court, but as Zhang notes, this falls far short of a thorough evaluation of the allegedly illegal evidence.⁴²

Another study by Wu Hongqi found that procurators were so concerned about maintaining their high conviction rates that they sometimes used alternative methods to introduce evidence that should have been excluded. For example, they would exclude a suspect’s confession that was obviously obtained using torture, but would introduce a second

³⁹ Daum (2011), p.700.

⁴⁰ Chen (2013), p.85-6.

⁴¹ Zhang Jian, 审判中心改革背景下非法证据排除规则的落实与完善 (The implementation and improvement of illegal evidence exclusion rules in the context of reforms to put trials at the centre of adjudication), *Xi'an Dianzi Keji Daxue Xuebao* 26.3 (May 2016), 40 at 41.

⁴² Zhang (2016), 42. See similar findings in a survey of 557 Chinese criminal defence lawyers: Lin Xifen and Dong Kun, 非法证据排除规则运行状况的实证研究: 以 5 5 7 份律师调查问卷为样本 (Empirical research on the application of illegal evidence exclusion rules based on a sample of 557 responses from a lawyer questionnaire survey), *Jiaoda faxue* 2016.3, p.125.

confession obtained from the same suspect at a later stage (when the suspect had presumably resigned himself to his fate, and no longer needed to be beaten to confess to a crime).⁴³

At the same time, Wu noted a significant increase in the number of cases where procurators had voluntarily excluded key evidence since the 2010 regulatory rules were introduced.⁴⁴ But they did this prior to any formal trial proceedings to avoid the risk of a mistrial or acquittal. In this way, procurators could maintain high conviction rates for cases that they actually took to court. Wu concludes that even though the evidence exclusion rules have not led to higher rates of acquittal by courts, they have forced procurators to ensure that cases they do bring to the court are supported by more reliable material evidence rather than confessions obtained through police duress.⁴⁵

By circulating Guiding Case 27 on this topic in 2016, the SPP demonstrated its strong support for a stricter reading of the evidence exclusion rules in the *Criminal Procedure Law*. It provided a concrete illustration to all procurators how these rules should be applied in practice to exclude tainted evidence, using the vivid story of the innocent Wang Yulei. It also explained why they are so important: exclusion of such evidence will not merely prevent innocent people being convicted, but even more important, it will focus the attention of the police on collecting real material evidence rather than relying on forced confessions, and thereby reduce the likelihood of the actual criminals escaping punishment and causing more danger to society. To emphasize the importance of this point, the Guiding Case stated that after Wang Yulei was acquitted, the procuracy and police worked together to reinvestigate

⁴³ Wu Hongqi, 证据排除抑或证据把关: 审查起诉阶段非法证据排除的实证研究 (Evidence exclusion or evidential threshold? Empirical research on the exclusion of evidence at the investigatory stage of lawsuits), *Fazhi yu Shehui Fazhan* 2016.5, 149 at 154-8.

⁴⁴ Wu (2016), p.153.

⁴⁵ Wu (2016), p.164.

and re-examine the evidence, leading to the arrest and conviction of a different suspect, Wang Bin, for the murder.⁴⁶

The other interesting point that emerges from this case is that the decision on excluding evidence was made by the procurator before any formal charges were laid. The suspect was released immediately, removing him from the dangers of police custody and possible further coercion. In this way, the SPP made it clear that procurators must play a pro-active role in “balancing the need to punish crime with the requirement to protect human rights.”⁴⁷ This practice is consistent with Wu’s finding that more procurators are voluntarily excluding tainted evidence before making decisions about bringing cases to court.

Of course, Guiding Cases are not the only method used by the SPP to modify the behaviour of procurators. For example, in June 2017, the SPP co-issued with the SPC and Ministry of Public Security a new set of detailed regulations on exclusion of evidence that plugged some of the loopholes used by police and procurators, such as introducing a second confession from the same suspect after the first confession has been excluded due to duress, or playing carefully edited videos of interrogations rather than providing the full unedited videos to the court and defendant.⁴⁸ But what the Guiding Cases have done is clearly demonstrate to procurators how to apply these rules to real fact situations, and why the rules are important in ensuring that the correct offender is punished.

⁴⁶ See Guiding Case 27, “Result of the Case”.

⁴⁷ Guiding Case 27, “Guiding Significance”.

⁴⁸ See SPC, SPP, MPS, MSS and MoJ, 关于办理刑事案件严格排除非法证据若干问题的规定 (Regulation on several issues relating to strictly excluding illegal evidence when administering criminal cases), 27 June 2017, http://www.spp.gov.cn/zdgz/201706/t20170627_194051.shtml .

Throughout the Guiding Cases, there is a similar emphasis on ensuring that attempts to punish crime do not lead to injustice and wrongful conviction.⁴⁹ It contrasts with the earlier history of the SPP, where cracking down on crime was the overwhelming priority, and human or procedural rights were generally given short shrift. This change of emphasis is particularly clear in two suspended death penalty Guiding Cases.

DEATH PENALTY REVERSALS: OVERTURNING WRONGFUL CONVICTIONS

Guiding Cases 25 and 26 both deal with death penalties suspended for two years. Convicted offenders are incarcerated, but if they do not commit further crimes after two years, their suspended death penalties will normally be commuted to life imprisonment.⁵⁰ Both these Guiding Cases went through appeals and re-trials, without resulting in a challenge to the original guilty verdicts. It was only when the offenders applied to the Supreme People's Procuracy for review that the evidence in both cases was found insufficient, and both offenders were finally acquitted. In Guiding Case 25, the applicant had already been in jail for 15 years, and in Case 26, for 22 years. The reason for this long delay is not clear from the Guiding Cases, but it is likely that the Supreme People's Procuracy did not start to address the problem of overturning wrongful convictions until relatively recently, after it was announced as a key policy priority by the Communist Party's Central Committee and the SPC in 2013.

⁴⁹ The tenth set of Guiding Cases makes it clear that exclusion of tainted evidence should not be limited to offences involving the death penalty or life imprisonment: Guiding Case 39 involved a fraudulent investment scheme where several witnesses claimed they had been cheated by the defendant. Some witness statements were excluded by the procurator because they had not been signed by the witnesses, and so their authenticity was doubtful.

⁵⁰ See *PRC Criminal Law* (amended 2015), arts 48-51. For suspended death penalties, see Xingliang Chen (2015), 191-5; and Trevaskes (2014), 131-4.

The two Guiding Cases are similar in many ways, and their publication together is clearly intended to warn procurators not to rely on suspects' confessions as their main proof of guilt. As the "Key Points" section of Guiding Case 26 puts it: "If there is only a confession and no other objective evidence, or there are contradictions and inconsistencies between a confession and other objective evidence, and this leads to a reasonable doubt about the facts, one should follow the principle that doubt establishes innocence, and the accused should be acquitted."⁵¹

Likewise, in these two cases, as in Guiding Case 27, there is a recognition that abuse of power by the police commonly leads to false confessions, and less weight should be given to confessions when procurators decide whether to go ahead with charging the suspect. Guiding Case 25 concludes:⁵²

Resolutely guarding against wrongful and unjust convictions is crucial for maintaining a fair and just society. The procuracy must uphold the law by correcting errors in criminal judgments that have already been made, and also take more care to exercise proper supervision and restraints when reviewing requests for formal arrest and prosecution ... [especially] if the suspect has made several different confessions and there are contradictions among these confessions, or there are major unresolved contradictions between key points in the confession and other evidence in the case, so that another person could have committed the crime.

What is interesting about these two Guiding Cases is that neither conclusively proved that the accused were innocent. Rather they found that there were inconsistencies between the accused's confessions and the material evidence, and the latter raised reasonable doubt as to

⁵¹ Guiding Case 26 "Guiding Significance".

⁵² Guiding Case 25, "Key Points".

whether the accused committed the crime; but in the previous trials and appeals where the defendants were found guilty, this material evidence was not given much weight compared to the confessions. This was typical of both court and procurator attitudes to confessions in the past, as noted earlier.

Here, however, the accused in both cases are acquitted. In Guiding Case 25, Yu Yingsheng was accused of murdering his wife at home after an argument about money, smothering her with a pillow and then covering up the crime by making it look like an intruder had robbed their home and raped and killed his wife while he was out. He confessed to the crime while in police custody, but after his conviction he retracted the confession and sought to appeal. While the evidence did show that Yu had argued with his wife, there were various inconsistencies between Yu's confession and the material evidence. For example, in his confession Yu claimed that he had re-arranged his wife's clothing to make it look like she had been raped, whereas DNA evidence showed that there was actually another person's semen on his wife's body and her underclothes at the scene of the crime. Other key evidence was either lost by police or not presented to the prosecution, such as a set of another person's finger-prints from the crime scene that was collected by the police, but inexplicably was not forwarded to the original procurator. Likewise, the records of Yu's pager and work telephone, which could have proven his claim that he was at work during the time when the crime was committed, were collected from the phone company but then lost by the police or procurator without explanation.

The inconsistencies in Yu's confession, the material evidence suggesting that another person was at the crime scene, and the loss of some crucial evidence by the police together raised sufficient doubt about Yu's guilt. He was belatedly acquitted and released in 2013.

In Guiding Case 26, Chen Man, a migrant worker in Hainan Province, was found guilty of killing his former landlord with a kitchen chopper and then trying to cover up the murder by setting fire to the landlord's apartment. There was evidence that Chen had a dispute with the landlord over unpaid rent, and the landlord had evicted him a few days earlier. Chen confessed after being held in police custody.

When the case was finally re-examined, there were several inconsistencies between Chen's confession and the other evidence in the case. For example, three witnesses had testified that they were with Chen in another building at the time when the murder took place (the time of the murder had been confirmed by a neighbour who heard screams from the landlord's apartment). This alibi evidence was ignored in the trials and appeals of the case. Likewise, in his confession Chen claimed that he had thrown the murder weapon on the ground, but it was actually found carefully placed on a chopping board in the kitchen having been wiped clean of any blood. And a bloody shirt that was allegedly found by the police at the crime scene was carelessly lost before it could be tested. These inconsistencies and loss of key material evidence together raised a reasonable doubt about Chen's guilt and his conviction was finally overturned.

The SPP's commentary on these two cases, quoted above, makes it clear that overturning wrongful convictions is extremely important, but equally crucial is to prevent such convictions from happening in the first place. The SPP does not spare its own local procurators here either, as it is evident from the litigation history presented in these cases that the original people's procurators failed to challenge the evidentiary discrepancies and brought charges against the accused based on confessions that were riddled with inconsistencies. It is clear from their content that these Guiding Cases have an educational function, attempting to demonstrate to procurators the dangers of relying on dubious confessions rather than putting together a watertight case based on material evidence.

From these cases, one cannot conclude that the SPP is going soft on crime. Indeed, there are two other Guiding Cases where the procurators are praised for challenging court verdicts that were too lenient. For example, Guiding Case 2 praises the Zhejiang Provincial People's Procuracy for successfully challenging a suspended death sentence handed down by the Zhejiang High Court for being too lenient, which ultimately resulted in increasing the penalty to an immediate death sentence. The case involved the pre-meditated kidnapping and subsequent murder of a 9-year old girl.

Guiding Case 18 approves a similar result where the Mianyang Municipal People's Court in Sichuan had originally handed down a suspended death sentence. The accused had committed several violent offences during a night club brawl, including killing a customer at the club, and he was a repeat offender with prior convictions. At the re-trial, the procurator successfully argued that while none of the current offences committed separately would have led to an immediate death penalty, in combination they were sufficiently heinous to make a suspended death penalty too lenient. Guiding Case 18 concludes by setting out some general principles for death penalty cases:⁵³

According to law, it is only appropriate to use the death penalty for criminal elements who commit extremely serious offences. The death penalty should be given for the most serious offences that involve murder, intentional assault, kidnapping or bombing in connection with organized crime, terrorism or violent gangs. If the people's courts do not give the [immediate] death penalty in such cases, the people's procuracy should challenge the verdict based on the law.

⁵³ Guiding Case 18, "Key Points".

Both Xingliang Chen and Susan Trevaskes have separately discussed the SPP Guiding Cases in connection with the death penalty, but only the first set of cases had been issued when they wrote their respective chapters, and Guiding Case 2 is the only death penalty case in that set.⁵⁴ Not surprisingly, neither Chen and Trevaskes considered the SPP Guiding Cases to be dramatically different from the practices applied by courts and procurators previously.

Chen noted that Guiding Case 2 and earlier SPC cases on the use of suspended death penalties “are expected to standardize the imposition of the death penalty,” and because it is easy to compare the facts to other similar cases, they “are expected to have a positive impact on China’s death penalty practice.”⁵⁵ However, various factors, such as the political need to maintain social stability, public support for the death penalty, and pressure from victims, mean that “the restraining effect of guiding cases on imposition of the death penalty could remain rather limited.”⁵⁶ Likewise, Trevaskes, noted that “senior justice authorities in the SPC and SPP have attempted to standardize discretionary decision-making in homicide cases.”⁵⁷

However, these commentaries by Chen and Trevaskes were both published before the SPP’s Guiding Cases 25-27 were issued in 2016. As noted above, these more recent Guiding Cases go way beyond technical distinctions between immediate and suspended death penalties. In all of the previous death penalty SPC and SPP Guiding Cases, the defendants were still found guilty and sentenced to at least life imprisonment. By contrast, in Guiding Cases 25-27, the SPP has issued three strong examples where defendants were totally acquitted after wrongful suspended death penalty convictions, or charges were completely

⁵⁴ Xingliang Chen (2015); Trevaskes (2014).

⁵⁵ Xingliang Chen (2015) p.211.

⁵⁶ Xingliang Chen (2015) p.212.

⁵⁷ Trevaskes (2014), p.149

dropped before trial due to tainted confessions. They display a clear change of emphasis from the earlier cases where punishing crime rather than protecting the basic legal rights of suspects was still the main focus. If the “key points” in these cases are followed properly by all local procurators, as the SPP clearly intends they should be, it could lead to a more activist people’s procuracy that stands up against police brutality and shoddy evidence collection, and refuses to accept dubious confessions at face value due to the risk of wrongful convictions.

OFFICIAL CORRUPTION AND CRIMINAL NEGLIGENCE

One of the major problems that has led to public distrust in the Chinese political and justice systems during the reform period is official corruption.⁵⁸ Not surprisingly, therefore, another major preoccupation of the SPP Guiding Cases is criminal negligence by government officials, which often results from bribery and corruption.

Since 1997, Chapter 9 of the *PRC Criminal Law* has included various offences of “dereliction of duty.”⁵⁹ Most of these provisions require the offender to be a “state functionary,” a term that has been defined very broadly in a 2002 interpretation by the Standing Committee of the National People’s Congress:⁶⁰

⁵⁸ For some useful surveys of corruption in China, see Melanie Manion, *Corruption by Design: Building Clean Government in Mainland China and Hong Kong* (Harvard University Press, 2004); Minxin Pei, *China’s Crony Capitalism: The Dynamics of Regime Decay* (Harvard University Press, 2016); and Hualing Fu, “China’s Striking Anticorruption Adventure: A Political Journey toward the Rule of Law?” in Weitseng Chen, ed, *The Beijing Consensus? How China Has Changed the Western Ideas of Law and Economic Development* (Cambridge University Press, 2017), 249-74.

⁵⁹ Chapter 8 of the 1979 *PRC Criminal Law* included only 8 articles on dereliction of duty compared to 23 in the 1997 amendment.

⁶⁰ NPC Standing Committee, 全国人民代表大会常务委员会关于《中华人民共和国刑法》第九章渎职罪主体适用问题的解释 (Interpretation on the problem of identifying the offender in the PRC Criminal Law, chapter 9, offence of dereliction of duty), 28 December 2002, http://www.npc.gov.cn/wxzl/gongbao/2002-12/30/content_5304795.htm

Staff carrying out public duties in organizations that have been given state administrative management authority under laws or regulations, or staff carrying out public duties in organizations that have been granted delegated authority as representatives of government institutions, or staff who are working for a government institution even though they are not listed as government employees, when they fail to do their duty while carrying out their delegated tasks and they breach one of the relevant criminal offence provisions, should be prosecuted under [chapter 9] offences of dereliction of duty.

Despite this broad definition issued in 2002, local procurators apparently still had difficulty applying the dereliction of duty offences. Many of these offences involved a combination of negligence and corruption by local government officials or agents, and so the failure to prosecute such cases may have been due to external political pressure on procurators rather than ambiguity in the *Criminal Law*.⁶¹

To underscore the urgency of prosecuting such offences, the SPP published five Guiding Cases (4-8) on various kinds of dereliction of duty in 2012, and another five (12-16) specifically dealing with corruption and dereliction of duty in the area of food safety in 2014. These Guiding Cases cover a range of different personnel, including staff working for state-owned enterprises, staff of village or urban residents' committees, contractors hired to assist city management officers in keeping unlicensed vendors off the streets, fair trade office staff

⁶¹ Keith Hand, "Watching the Watchdog: China's State Compensation Law as a Remedy for Procuratorial Misconduct, 9 Pac. Rim L. & Pol'y J. 95 (2000) at 98-103.

protecting consumers from fraud, local public security officers, and food safety and environmental protection agencies.

A key point that is constantly reinforced through these cases is that when the state's delegated officers or agents fail to carry out their duties, it will frequently lead to serious social disorder and danger to ordinary citizens. The people's procurators must step in to penalize those agents with the aim of restoring social order and rebuilding public trust in government institutions. They must not stand by and expect other government agencies to sort out their internal problems and corruption.

In Guiding Case 6, for example, four assistant city management (*chengguan*) agents, who were supposed to prevent unlicensed vendors from setting up stalls in the Huangpu District of Guangzhou, instead extorted bribes from several hundred vendors over a one-year period, allowing them to continue selling on the streets and causing a great deal of congestion, rubbish build up, and disturbance to local residents and shops. When law enforcement officers subsequently tried to clear the streets, they were attacked by angry vendors who thought they had paid for the right to sell their goods, resulting in serious riots and hospitalization of several officers. The Guiding Case declares: "The behaviour of these four defendants seriously impacted on the social and economic order in that district, and on urban and public safety management, causing a negative social influence."⁶² The guiding case then notes that although these agents were not listed as government employees, they were staff carrying out public duties for a state institution, so the appropriate offence was Chapter 9, Art 397 of the *PRC Criminal Law*, "abuse of power by state functionaries in the performance of their duties," and the four defendants were all sentenced to jail terms ranging from 1 to 1.5 years.

⁶² Guiding Case 6, 'Basic Facts'.

The clear implication behind this case is that many kinds of social disorder or disturbance, such as riots by unlicensed street vendors, are not spontaneous occurrences, but result from long-simmering social tensions whose root cause is official corruption or dereliction of duty. Procurators must go beyond prosecuting the obvious culprits – in this case, violent street vendors – to punish those corrupt or negligent officials who allowed the disturbance to happen, as this is the only way to restore social harmony.⁶³

Likewise, in two of the food safety cases, procurators are reminded that they should not merely punish individuals and businesses that sell contaminated food to unsuspecting customers, but should actively investigate the role of food safety officials in allowing the offences to occur. In Guiding Case 15, the defendant businesses had been found processing diseased corpses of pigs into salted meat and salted sausages, and adding harmful substances to preserve them, then selling them as fresh meat in markets. Three local food safety inspectors had accepted bribes from the defendants to look the other way and to give them advance warning of upcoming surprise inspections. As a result, instead of being removed from the food chain immediately, unsafe meat was sold to consumers for over a year, which greatly exacerbated the adverse health consequences. The food safety inspectors were sentenced to jail terms ranging from 2.5 to 7.5 years. And in Guiding Case 16, food safety officers were found to have accepted bribes from businesses selling gutter cooking oil (oil that had already been used for cooking by restaurants and discarded), in order to reduce the offenders' fines and allow them to continue selling the unsafe contaminated oil rebranded as new oil. After the food safety officers were finally prosecuted by diligent procurators, they received jail terms ranging from 2 to 6 years.

⁶³ This point is reinforced in several other cases, such as Guiding Case 7, where two officers of a district Fair Trade Office in Tianjin failed to prosecute an illegal and fraudulent pyramid investment scheme. The Case concludes: "If [people's procurators] find that administrative enforcement staff are abusing their positions to benefit themselves and failing to pass criminal cases over for prosecution, those staff should also be criminally prosecuted".

In this way, the Guiding Cases constantly reinforce the point that when crimes occur, procurators must root out any related corrupt behaviour by responsible officials. Thus, the procurators' role is not merely to prosecute cases but to monitor other administrative arms of the government, so that people do not lose faith in the justice system, and social harmony is maintained.

Even the police should not be immune from prosecution, something that rarely seems to occur when criminal suspects are abused in police detention.⁶⁴ Though not related to torture allegations, Guiding Case 8 focuses on the prosecution of a district police sergeant in Shenzhen, who had received bribes of 300,000 yuan in return for allowing an unlicensed nightclub to continue in business and turning a blind eye to its lack of safety permits and other criminal activity. After the nightclub burned down in a fire, killing 44 people and injuring 64 others, the police sergeant was convicted of dereliction of duty, perverting the law for private gain and accepting bribes, and sentenced to 13 years in prison.⁶⁵ The implication is that procurators should not be afraid to go after police officers when their actions encourage law-breaking.

By contrast, in some situations of social disorder, procurators may find that criminal prosecution of ordinary citizens is not appropriate at all, as it does not resolve the underlying social conflict. The very first Guiding Case issued in 2010 underscores the mediating role of procurators:⁶⁶

⁶⁴ Human Rights Watch (2015), sections entitled "Lack of Accountability" and "Impunity for Perpetrators."

⁶⁵ Guiding Case 8, "Progress of the Case".

⁶⁶ Guiding Case 1, "Key Points".

When procurators take on cases where mass incidents have led to the commission of criminal offences, they must approach them from the perspective of resolving social contradictions. They should gain a deep understanding of the complex elements behind the case, and carefully deal with each element, actively participating in mediating conflicts with the aim of promoting social harmony, and bringing about a resolution that organically combines legal and social impacts.

In Guiding Case 1, a longstanding dispute between two villages over drainage and sewage routes had boiled over into a riot where several residents and police were injured and two police cars were damaged. The police had arrested 17 suspects from both villages, and passed them over to the local procurator, having charged them with causing an affray. Realizing that this was a complex local dispute, the procurator set up a mediation group that visited both villages, listened to the arguments of residents on both sides, sought the assistance of the local government and Party committee to provide a proper drainage and sewage system that would not encroach on the disputed land of either village, and persuaded all the villagers to sign a mediation agreement acknowledging that the dispute had been resolved and promising not to reopen the conflict. The arrested suspects were also given education sessions on the importance of complying with the law, and they expressed their remorse at having used violence to deal with the dispute. The Guiding Case concludes:⁶⁷

The behaviour of the 17 defendants allegedly breached the *PRC Criminal Law* ... and they are suspected of gathering a crowd to cause an affray, so according to the law they should be criminally prosecuted. Yet the 17 defendants' purpose in causing

⁶⁷ Guiding Case 1, "Progress of the Case".

an affray was not for personal vengeance or unconscionable conduct, and the personal injuries and damage to property were minor, with no serious consequences; in addition, the two village committees have signed a mediation agreement, and the 17 defendants have signed undertakings. Therefore, based on the principle of integrating punishment with education, and considering the benefits of promoting social harmony, ... the Shishi City People's Procurator ... made the decision to drop the charges against the 17 defendants.

In this way, the Guiding Cases make it clear that maintaining and promoting social harmony is a fundamental aim of criminal law. Where it would not promote harmony, and on the contrary would likely exacerbate local community tensions, the procurators should use their discretion to drop criminal charges, and instead find alternative ways to reduce those social tensions and resolve the underlying conflicts.

By contrast, in the Guiding Cases involving state officers and agents discussed above, the aim of promoting social harmony requires procurators to go beyond pursuing the obvious perpetrators of harmful criminal conduct, and to prosecute any officials or state agents who have negligently or corruptly allowed that conduct to occur. This is the only way to prevent further recurrence of such harmful conduct and restore public faith in law enforcement institutions, so that ordinary people will not be tempted violently to take the law into their own hands.

ENVIRONMENTAL PUBLIC INTEREST LITIGATION: GUIDING CASES AS EDUCATIONAL TOOLS

The SPP's Guiding Cases may serve two different educative functions. Firstly, they guide procurators throughout China on how to approach certain difficult procedural issues and social conflicts, so they are an internal professional manual for procurators. Secondly, they remind procurators that part of their job is to educate ordinary citizens and government officials on how to comply with the law. These two educative functions are particularly evident in the eighth set of Guiding Cases (28-32), which all deal with environmental public interest lawsuits brought by people's procurators.

Interestingly, none of these five Guiding Cases are criminal prosecutions. They are civil lawsuits against polluters or administrative lawsuits against government bodies that have failed to prevent pollution. In other countries, such public interest lawsuits would generally be brought by civil society groups, such as the Sierra Club or Greenpeace.⁶⁸ The reason for allowing such groups to sue is that frequently local power interests are either benefitting from the harm or have been "captured" through bribery by those committing the harm. This makes it less likely that individual complaints by victims will be addressed.⁶⁹

China's catastrophic environmental situation is well known. A personal account by the writer Sheng Keyi in 2014 gave a vivid picture of the major health and ecological damage caused by pollution of one water system, the Lanxi River in South-Western Hunan Province. Sheng noted that in her youth, the Lanxi River used to be clean enough to bathe in. Fish, flowers and waterbirds were abundant, and on holidays the River was the focus of various activities such as dragon boat races. However, over the past two decades, the Lanxi River has

⁶⁸ Sierra Club, <https://www.sierraclub.org/about>; Greenpeace, <https://www.greenpeace.org/international/>

⁶⁹ Action4justice, "Is Public Interest Litigation for Me?" https://action4justice.org/q_and_a/what-can-pil-do-for-me/

become “lined with factories, from mineral processing plants to cement and chemical manufacturers.... Factories discharge tons of untreated industrial waste into the water every day. Animal waste from hundreds of livestock and fish farms is also discarded in the river. It is too much for the Lanxi to bear. After years of constant degradation, the river has lost its spirit. It has become a lifeless toxic expanse that most people try to avoid. Its water is no longer suitable for fishing, irrigation or swimming. One villager who took a dip in it emerged with itchy red pimples all over his body.”⁷⁰

More seriously, Sheng’s home village now has cancer levels much higher than the national average, and is one of approximately 200 “cancer villages” where residents’ health has been seriously harmed by industrial pollution. The ground water and surrounding soil has also become contaminated so that crops grown in the area are no longer safe to eat. Sheng notes that “some 280 million Chinese people drink unsafe water, according to the Ministry of Environmental Protection. Nearly half of the country’s rivers and lakes carry water that is unfit even for human contact.”⁷¹

As part of its efforts to address these problems, the Chinese government introduced amendments to the *PRC Civil Procedure Law* in 2013 and subsequent provisions in the 2015 *PRC Environmental Protection Law* that permitted “qualified” civil society groups “active in environmental public interest activities” to bring public interest suits against polluters.⁷² There was no shortage of qualified groups: a 2015 news report calculated that over 700 Chinese-registered NGOs would meet the qualification requirements to bring such

⁷⁰ Sheng Keyi, “China’s Poisonous Waterways,” *New York Times* 4 April 2014, <https://www.nytimes.com/2014/04/05/opinion/chinas-poisonous-waterways.html>

⁷¹ *Ibid.*

⁷² *PRC Civil Procedure Law* (amended 1 January 2013), art 55; *PRC Environmental Protection Law* (amended 1 January 2015), art 58.

environmental lawsuits.⁷³ However, the numbers of public interest lawsuits brought by NGOs has remained extremely low, with only six cases filed during the whole of 2016.⁷⁴

A key obstacle is the failure of many courts to require the losing defendants to pay any of the legal costs of the plaintiffs, especially when their lawyers have represented them on contingency fee agreements, which makes bringing such lawsuits prohibitively expensive for most NGOs. Thus, while some major victories against individual polluters have occurred, they are far from sufficient to prevent continuing environmental degradation on a massive scale.⁷⁵

In a further attempt to resolve the twin problems of pollution and lack of litigation – while at the same time maintaining state supervision over the process – the NPC Standing Committee issued a Decision in July 2015 allowing people’s procurators in thirteen provinces and municipalities to experiment with bringing public interest lawsuits to “uphold the authority of the Constitution and laws, the principle of a fair and just society, and to defend

⁷³ Zhang Mingmin, 超 700 家环保 NGO 获诉讼资格 环境公益诉讼春天来了? (Over 700 environmental protection NGOs qualified to bring lawsuits: a new Spring for environmental public interest lawsuits?) *Gongyi shibao*, 14 January 2015, https://gongyi.ifeng.com/a/20150114/40943843_0.shtml . The Supreme People’s Court confirmed in 2015 that courts should adopt a broad interpretation of the term “active in environmental public interest activities” to include any “activities that benefit environmental governance such as public education, legal aid and bringing public interest lawsuits.” Zhang Chun, “Six important environmental cases: A round-up of the key verdicts shaping China’s Environmental Protection Law,” *China Dialogue* 11 April 2017, <https://www.chinadialogue.net/blog/9715-Six-important-environmental-cases/-en> .

⁷⁴ Dimitri de Boer and Douglas Whitehead, “Opinion: The future of public interest litigation in China”, *China Dialogue* 8 November 2016, <https://www.chinadialogue.net/article/show/single/en/9356-Opinion-The-future-of-public-interest-litigation-in-China> ; and Zhang Chun, “Environmental law blunted by crippling court costs,” *China Dialogue* 22 August 2016, <https://www.chinadialogue.net/article/show/single/en/9203-Environmental-law-blunted-by-crippling-court-costs>

⁷⁵ De Boer and Whitehead (2016); Zhang (2016).

the public interests of the State and society.”⁷⁶ While procurators should initially encourage qualified private plaintiffs or relevant government agencies to bring lawsuits or enforcement actions against the tortfeasors, if this failed to correct the harm, the procurators could act as plaintiffs themselves, bringing a civil or administrative action on behalf of the public interest.⁷⁷

The NPCSC Decision and the subsequent SPP Implementing Measures include several areas of law where public interest suits may be brought: “the protection of the ecological environment, protection of resources, state-owned asset protection, state-owned land use rights, and food safety.”⁷⁸ However, the five Guiding Cases (28-32) that illustrate this new public interest lawsuit procedure all focus on environmental pollution and illegal land use/resource extraction issues.⁷⁹

Of the five Guiding Cases, four include administrative lawsuits against the government bodies that have failed to enforce the pollution laws. This proportion suggests that the main problem with protecting the environment and resources in China is a failure of enforcement by environmental, water protection and other government agencies. Statistics issued by the SPP in mid-2017 on the results from the 13 regions testing the new public interest procedure

⁷⁶ National People’s Congress Standing Committee, 全国人民代表大会常务委员会关于授权最高人民检察院在部分地区开展公益诉讼试点工作的决定 (Decision of the NPCSC on granting the SPP power to conduct a public interest litigation pilot project in selected regions), approved 1 July 2015, http://www.npc.gov.cn/wxzl/gongbao/2015-08/27/content_1946100.htm (hereafter NPCSC Decision).

⁷⁷ NPCSC Decision.

⁷⁸ See NPCSC Decision; and SPP, 人民检察院提起公益诉讼试点工作实施办法 (Implementing Measures for the Pilot Project on Public Interest Lawsuits Brought by Peoples Procurators), 16 December 2015, http://www.spp.gov.cn/zdgz/201601/t20160106_110439.shtml (hereafter SPP Implementing Measures), Arts 1 and 28.

⁷⁹ Broader statistics on the two-year pilot program further demonstrate this focus on environmental issues: of cases opened by the procurators, 72% were focused on protecting the ecological environment and resources: Zhang Qian, “Empirical Analysis on Pilot Project of the Procuratorial Organs’ Institution on Public Interest Litigation in China,” *5 China Legal Sci.* 32 (2017), p.34.

confirm this conclusion: among the 9,053 public interest cases started by people's procurators since mid-2015, some 5,162 cases were subsequently resolved by the relevant government enforcement agency before any formal court process began.⁸⁰

Guiding Case 32 is a representative example: seven stone materials processing companies in Jinping County, Guizhou continued to operate despite the local procurator warning the Jinping County environment bureau that the companies were breaching laws against discharging polluted waste into the Qingshui River. The seriousness of the pollution was quite similar to that described by Sheng Keyi in her account of the Lanxi River in neighbouring Hunan Province. Besides causing serious floating waste and effluent problems in the river, the extra sediment also increased the risk of flooding in reservoirs further downriver. The Jinping environment bureau failed to respond to the procurator, and only after one year ordered the companies to pay relatively small fines, but did not stop them operating or require remediation of the polluted waste.

In December 2015, the Jinping County procurator then applied to bring a "centralized jurisdiction" (集中管辖) administrative lawsuit in Fuquan City People's Court against the Jinping environmental bureau. The Guiding Case explains that this centralized procedure takes the litigation away from the defendants' local government region to a higher-level court. This helps to overcome the problem of local protectionism, where local governments and courts may prefer to protect the revenues that they receive and the employment provided by illegal businesses, rather than protecting the natural environment. It is especially important when the harm caused by the illegal behaviour crosses local government boundaries, such as

⁸⁰ Zhang Qian (2017) p.34.

water pollution that benefits the producers but harms those who live downriver in other jurisdictions.⁸¹

In Guiding Case 32, after the centralized lawsuit commenced, the Jinping County environment bureau promised to close down the polluting businesses, but an investigation by the local procurator found that they were still operating. Based on this evidence, the Fuquan City People's Court held that the environment protection bureau had been negligent in carrying out its supervisory duties, and ordered it to act immediately to stop the illegal pollution and close down the infringing companies.

A great deal of publicity surrounded this case, doubtless because it was one of the first to apply the new procedure allowing people's procurators to initiate public interest administrative litigation. The Guiding Case notes that after the court's judgment was published, the Guizhou Provincial Party Committee and Provincial Government leaders ordered the Provincial Environment Protection Office (PEPO) to set up a working group to go to Qiandongnan Prefecture, within which Jinping County is situated, to stop the polluting companies from operating, and then report the results to environmental protection offices at every level throughout Guizhou Province. The PEPO also created a personal responsibility system to ensure that environmental offices throughout the Province would fulfil their enforcement duties and cooperate with procurators bringing other public interest lawsuits. Finally, they required the Jinping County government to create a comprehensive environmental plan to prevent future pollution from all local industrial operations.

In terms of its educative function, the Guiding Case states that during the period of the court proceedings, "the directors of all municipal and county environmental protection offices in Qiandongnan Prefecture, the main managers of all government administrative departments

⁸¹ Guiding Case 32, "Guiding Significance".

in Jinping County, and all directors of townships in the region where environmental degradation is serious attended court to listen to the trial, and in this way a single case being brought in the court served as a salutary warning to educate a whole region.”⁸²

This tendency to treat the Guiding Cases as educational opportunities is common to most of these environmental public interest cases. For example, Guiding Case 31, which deals with polluting electronic waste in Sanming City, Fujian, concludes by noting that the Fujian Provincial Government publicly praised the work of the local procurators in bringing this lawsuit, and ordered the Fujian Environmental Protection Office to circulate it throughout the Province as a warning. Several mainstream media outlets including Chinese Central TV also reported on the results of the case and gave it a positive evaluation.⁸³ Likewise, Guiding Case 30, on illegal deforestation and rock quarrying in Hubei Province, notes that the Party Committee of the local municipality, Shiyan City, strongly supported the procurator’s lawsuit, and arranged for over 70 leaders of relevant administrative agencies in the region to observe the court proceedings. The director of the Yunyang District Forestry Office bowed down and apologized to the court for his failure to prevent the illegal logging, and the Hubei Provincial Forestry Office ordered all forestry departments in the Province to learn from the procurator’s lawsuit, and conscientiously enforce the forestry laws to avoid being sued themselves.⁸⁴

Seen in this broader context, the Chinese government’s promotion of environmental public interest lawsuits by the people’s procurators is a positive development, as it brings both public scrutiny and higher-level government scrutiny on infringing behaviour that is often tacitly permitted by local governments. As noted above, the SPP’s figures on the two-year experiment found that up to the end of June 2017, people’s procurators had opened

⁸² Guiding Case 32, “Results of the Case”.

⁸³ Guiding Case 31, “Results of the Case”.

⁸⁴ Guiding Case 30, “Results of the Case”.

9,053 public interest cases and 5,162 of these cases were resolved prior to any formal court proceedings. The willingness of local government officials to avoid liability by resolving these cases may be because their performance and promotion prospects are now significantly based on their environmental protection record.⁸⁵

Among the cases that were not resolved before trial, 1,150 cases were brought to trial by the procurator plaintiff, and 35 cases were brought by private plaintiffs with the encouragement of the procurator. By mid-2017, 458 of these procurator lawsuits had been decided in favour of the plaintiffs. No cases had been decided in favour of the defendants. The other 692 lawsuits were apparently still ongoing at the time of the report.⁸⁶ In terms of actually protecting the environment, another report concluded that people's procurators in all the pilot regions supervised the remediation of 128,000 hectares of polluted agricultural, forestry, marsh and grasslands, and the clean-up of over 180 square kilometres of polluted waterways; they rectified the illegal behaviour of 1400 businesses, and recovered economic damages of 6.5 billion yuan.⁸⁷

What these figures suggest first is that it is still uncommon for NGOs to bring environmental public interest lawsuits: only 35 such suits were brought in the relevant regions during the two-year experimental period. By contrast, procurators brought 458 successful court actions during the pilot period, which is already over ten times the number of private suits, and presumably a portion of the remaining 692 procurator lawsuits underway will ultimately be decided in favour of the plaintiffs too. Added to that are the 5,162 cases

⁸⁵ Liu Jing, "Smog control more crucial than GDP in officials' evaluation", *China Daily* 16 January 2017, http://www.chinadaily.com.cn/china/2017-01/16/content_27969082.htm ; Michelle Ker and Kate Logan, "New environmental law targets China's local officials", 28 April 2014, *China Dialogue* <https://www.chinadialogue.net/article/show/single/en/6939-New-environmental-law-targets-China-s-local-officials>

⁸⁶ Zhang Qian (2017), p.34, 43-7; Wang Shu, *Jiancha jiguan tiqi gongyi susong ni tui xiang quan guo* (Plans for procurator public interest lawsuits to be expanded nationally), *Xinjing bao* 23 June 2017, http://www.xinhuanet.com/legal/2017-06/23/c_1121195017.htm.

⁸⁷ Wang Shu (2017).

settled before trial, which if supervised properly, will also lead to cessation of polluting activity. In other words, the system of procurator public interest lawsuits is certainly filling a serious gap in the legal enforcement of environmental pollution laws and supervision of relevant government agencies.

Of course, to ensure that local government agencies do actually follow through on their commitments to clean up the pollution, the SPP would need to include in its implementing regulations a system of follow-up checks by procurators. And although the remediation figures noted above look impressive, they are still only a small fraction of the seriously polluted land, air and waterways in China. To give just one example, the Ministry of Environmental Protection carried out a soil survey of samples taken across 6.3 million sq km of land, two-thirds of the country's total, and found that 16% of the samples (equivalent to over 1 million sq km of land) contain higher-than-permitted levels of pollution.⁸⁸ This compares with the 128,000 hectares (just 1280 sq km) of polluted land cleaned up after the thousands of public interest cases won or settled by procurators during the two-year pilot program.

In an attempt to increase the scale of enforcement, Cao Jianming, China's Procurator-General, proposed that the NPC Standing Committee expand the procurator public interest lawsuit procedure from 13 regions to all provinces and regions of China. This was approved in June 2017 through amendments to the *PRC Civil Procedure Law* and *Administrative Procedure Law* to clarify that all people's procurators can now bring lawsuits in the public interest.⁸⁹ Cao Jianming's most recent report to the National People's Congress stated that

⁸⁸ Daniele Brombal, "Accuracy of Environmental Monitoring in China: Exploring the Influence of Institutional, Political and Ideological Factors", *Sustainability* (2017), 9, 324 at p.6.

⁸⁹ Wang Shu (2017); Zhang Qian (2017), p.54-5; 中华人民共和国民事诉讼法 (PRC Civil Procedure Law), amended 27 June 2017, article 55, <http://www.npc.gov.cn/npc/xinwen/2017->

another 10,925 new public interest cases have been opened by people's procurators since the program was expanded.

While this significant increase in the number of cases should assist with reducing environmental pollution, in a debate about the proposed amendments, the NPC Standing Committee's members noted that more encouragement should be given to civil society groups and representative members of the public to bring public interest lawsuits, rather than relying primarily on the people's procurators, who are presumably very busy with their criminal prosecution work.⁹⁰ This would involve clarifying the costs provisions in the two relevant laws to ensure that the losing party in public interest lawsuits will cover the reasonable legal costs of the NGO plaintiffs. However, with the current Chinese leadership's increased suspicion of civil society groups as a potential threat to the Party, such a reform may be difficult to push through.⁹¹ The expansion of procurator public interest lawsuits may be China's best hope for the enforcement of environmental laws in the foreseeable future.⁹²

CRITIQUES OF THE SPP GUIDING CASES

A comprehensive empirical study of the impact of the SPP's Guiding Cases on procuracy behaviour and the administration of justice in China is beyond the scope of this article. Anecdotal evidence suggests that local procurators are familiar with the Guiding

[06/29/content_2024892.htm](http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm) ; and 中华人民共和国行政诉讼法 (PRC Administrative Procedure Law), amended 27 June 2017, article 25, http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024894.htm

⁹⁰ Wang Shu (2017).

⁹¹ Chinese Human Rights Defenders (2017), pp.24-9.

⁹² Among the most recently issued Guiding Cases (dating from 25 December 2018) are two more (49-50) clarifying further procedural issues relating to public interest lawsuits brought by procurators.

Cases and generally follow them when they are faced with similar legal issues, but they do not view the Cases as binding precedents, as there is no penalty or automatic right of appeal if they fail to cite a relevant Guiding Case.⁹³ Moreover, in many situations, no relevant Guiding Case will be available to assist procurators' decision-making, and even where a Guiding Case exists, the relevant legal rule may not be explained properly.

At a 2016 conference on case guidance, one people's procurator from Yunnan Province noted the following problems with SPP Guiding Cases:⁹⁴ 1: The areas of procurator practice covered by the Guiding Cases are not complete, so they cannot fulfil all the needs of procurators in their work; 2: It is not clear how some Guiding Cases are supposed to be typical, or what rules they establish in the application of the law; 3: The Guiding Cases do not provide sufficient explanations or legal reasoning, so their guiding significance is not adequate.

Some of these problems have been addressed in the more recent SPP Guiding Cases. While the first four sets of cases focused primarily on summarizing the facts and the course of the prosecution, with only a couple of sentences on the "key points" of the Guiding Case, from the fifth set of cases onwards, all Guiding Cases have included the legal reasons used by the procurators to support their arguments; and from the seventh set of cases onwards, a relatively detailed section entitled "guiding significance" is added to each case explaining why the legal issues are important and how they should be applied more broadly in other cases. Finally, a noticeable addition to the tenth set of cases (issued in July 2018) is a brief summary of the defendant's or defence lawyer's arguments, including challenges to the legality of evidence, and the procurators' legally supported response. These developments

⁹³ Author's discussion with 28 visiting procurators from Hubei Province, October 2017. Cf. Finder (2017), 254.

⁹⁴ Liu 2016.

should assist local procurators in understanding how to deal with similar procedural issues in their practice.

The SPP has also bolstered the impact of some issues raised in the Guiding Cases by issuing further regulations (in collaboration with other legal institutions) that do have direct legal force, such as the 2017 Regulation on Exclusion of Illegal Evidence. At the same time, the SPP should revise its Regulation on Case Guidance to clarify that the cases are an officially endorsed interpretation of statutes such as the *Criminal Procedure Law*, so procurators should be required to follow Guiding Cases whenever relevant, unless they provide a clear public explanation to the court and defendants. Failure to interpret statutes consistently with the relevant Guiding Cases should provide grounds for appeal by defendants and should result in negative evaluation of procurators' work performance. This would give the Guiding Cases more precedential weight.

CONCLUSION: SPP GUIDING CASES AS EVIDENCE OF A CHANGING PROCURACY CULTURE

Despite these valid criticisms, through these Guiding Cases the SPP does provide powerful support to local procurators who wish to protect the rights of wrongly charged defendants and challenge careless collection of evidence and brutality by the police. The Cases also provide clear guidance on the procedure to be used in public interest cases, and the possibility of moving cases to a “centralized jurisdiction” when local government offices fail to enforce the law. Finally, they make it clear that procurators must carry out their roles with careful attention to correct procedure, cautious supervision of the rule of law both within and outside the court system, and conscientious awareness of the importance of punishing the correct offenders with the appropriate penalties, and avoiding unjust conviction of innocent parties.

To outside observers schooled on liberal democratic rule of law principles, these may appear to be modest developments. Yet as noted in the first part of this article, the people's procurators have previously worked closely with the Chinese police and local governments to punish crime harshly, but with little regard for defendants' procedural rights, the exclusion of tainted evidence, or broader social justice issues such as environmental protection.

The Guiding Cases therefore provide evidence of a cultural shift within the SPP towards a more professional procuracy that is willing to stand apart from local governments and law enforcement agencies when necessary to ensure that justice is done. One could view the Guiding Cases as a form of "soft law" that, even though not formally binding, should influence the interpretation of criminal procedure statutes by procurators who wish to advance their careers by actively contributing to the future direction of legal reform in China.⁹⁵ There are indirect parallels with quasi-judicial or "non-judicial precedent" practices in other countries, such as federal and state prosecutor offices and departments in the United States issuing opinions on legal questions or practices, which exert real though indeterminate influence over prosecutor behavior.⁹⁶ Or perhaps the Guiding Cases are an attempt to create what Peerenboom calls a "cultural ethos" – a process of internalizing the "normative values of rule of law."⁹⁷ From a broader cognitive theoretical perspective, the Guiding Cases illustrate the SPP's efforts to overcome negative institutionalized behaviours

⁹⁵ Jacob E Gersen and Eric A Posner (2008) "Soft Law: Lessons from Congressional Practice" 61 *Stanford Law Review* 573, p.577.

⁹⁶ For discussion of these practices in the U.S., see John O. McGinnis, "Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon," 15 *Cardozo Law Review* (1993): 375-436; Randolph D. Moss, "Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel," 52 *Administrative Law Review* (2000): 1303-30; Arthur H. Harrison, "The Opinions of the Attorney General and the Office of Legal Counsel: How and Why They Are Important," 76 *Albany Law Review* (2013): 217-51.

⁹⁷ Randall Peerenboom, "Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?" (November 6, 2014), available at SSRN: <https://ssrn.com/abstract=2519917> or <http://dx.doi.org/10.2139/ssrn.2519917>, p.7-8.

that have been taken for granted, and to encourage procurators to move from “automatic cognition” to “deliberative cognition,” in other words, to think critically and reflexively about the rights of criminal suspects and the public interest.⁹⁸

Certainly, limits still remain on the kinds of cases where the procurators can stand up against injustice. In highly politicized cases, such as the recent prosecutions of rights defence lawyers and senior Party officials accused of corruption, the trials and convictions proceeded without any protests from procurators, despite clear evidence in many cases of wrongful detention and confessions obtained by torture.⁹⁹ Similar neglect of basic criminal procedure rights has been evident in the recent widescale crackdown on Uighurs in Xinjiang Autonomous Region.¹⁰⁰ Like the Chinese courts themselves, the people’s procurators are still expected to defer to Communist Party authority and prosecute perceived “enemies” of the state, even though occasionally that authority clearly breaches legal protections for such defendants.¹⁰¹

Yet where government agencies and offices, including local Party leaders, are criminally neglecting their duties or engaging in corrupt practices, the Guiding Cases make it clear that local people’s procurators should uphold the interests of ordinary people by bringing criminal prosecutions or public interest lawsuits against those malfeasants, or by

⁹⁸ Paul DiMaggio, “Culture and Cognition”, *23 Annual Review of Sociology* (1997):263–87, pp.270-1.

⁹⁹ Jun Mai, “Swept up in China’s anti-corruption campaign, and forsaken by a secretive, suspect legal system”, *South China Morning Post* 25 July 2018, <https://www.scmp.com/news/china/policies-politics/article/2156620/swept-chinas-anti-corruption-campaign-and-forsaken> ; Hualing Fu (2018) “The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State,” *Journal of Contemporary China* 27:112, pp.554-568.

¹⁰⁰ See Stephanie Nebehay, “U.N. says it has credible reports that China holds million Uighurs in secret camps,” *Reuters*, 11 August 2018, <https://www.reuters.com/article/us-china-rights-un/u-n-says-it-has-credible-reports-that-china-holds-million-uighurs-in-secret-camps-idUSKBN1KV1SU>

¹⁰¹ The leadership of the Communist Party is stated in Article 36 of the *PRC Constitution* (amended 2018), <https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/> ; also Hualing Fu (2017), p.260.

seeking a review of criminal convictions at a higher court level, in order to restore public faith in the government.

Along with the growing professionalization of Chinese judges and lawyers, and the significant increase in transparency of trials and court judgments in recent years, this modest cultural shift within the procuracy should make it harder for corrupt and negligent officials and state agents like the police to abuse their positions and violate the basic rights of innocent people.

APPENDIX: TABLE OF SPP GUIDING CASES

Set and Date of Issuance	Numbers of Cases	Key Themes
1: 15 December 2010	3 cases: 1-3	No single theme: Case 1: settling mass riots; Case 2: challenging suspended death penalty; Case 3: Prosecuting officials who take bribes
2: 21 November 2012	5 cases: 4-8	Prosecuting officials and state agents for criminal dereliction of duty and corruption
3: 27 May 2013	3 cases: 9-11	Prosecuting offence of spreading fake terror information
4: 20 February 2014	5 cases: 12-16	Prosecuting food safety offences and associated official corruption
5: 15 September 2014	3 cases: 17-19	Examples of prosecutors challenging court verdicts as too lenient or too strict
6: 9 July 2015	4 cases: 20-23	Prosecuting offences beyond the limitation period
7: 31 May 2016	4 cases: 24-27	One case on interpreting insider trading provisions; three cases on excluding tainted evidence, especially forced confessions

8: 4 January 2017	5 cases: 28-32	Environmental public interest civil and administrative lawsuits brought by people's procurators
9: 16 October 2017	6 cases: 33-38	Four cases on offence of disrupting computer information systems (hacking); two cases on online theft/fraud
10: 12 July 2018	3 cases: 39-41	Prosecuting financial fraud, including stock pump and dump schemes, online pyramid-loan schemes, and pyramid-selling offences
11: 18 November 2018	3 cases: 42-44	Offences involving sexual or violent abuse of children
12: 19 December 2018	4 cases: 45-48	Offences raising the issue of justified self-defence
13: 25 December 2018	3 cases: 49-51	Two public interest cases correcting negligence by government officials; one case on defamation of revolutionary martyrs
14: 21 May 2019	5 cases: 52-56	Various criminal fraud cases involving fake official or company/bank documents
15: 9 September 2019	3 cases: 57-59	Cases on procurator's duty to monitor and seek review of administrative errors by government institutions or officials