

China's Striking Anti-corruption Adventure: A Political Journey Towards the Rule of Law?¹

China is a high-corruption country and the ruling Communist Party (“the Party”) has made anti-corruption enforcement a top priority. China is also well known for her authoritarian decisiveness in policy making and her effectiveness in policy implementation with a centralized political control contrasting sharply with a decentralized economic policy. This chapter examines two key aspects of this formulation. First, how has the authoritarian characteristic affected China’s anticorruption enforcement; and, second, how is China different from other countries, authoritarian or otherwise, in this regard?

There has been an on-going debate between a “convergence theory” and a “divergence theory” on China’s political-legal development. According to the convergence story, nations differ in their level of legal development largely because of the different levels of economic growth. China is significantly different from high-income countries because China, as a middle-income country, lacks resources and capacity to support an advanced system.² But as China progresses economically, social and legal changes are bound to follow. Consequently, gaps in the legal system will be filled, and the distance between a mature legal system and an emerging legal system will be narrowed. Substantive convergence is the destination of all legal systems even though it may appear in different forms. There is an incremental trajectory along which nations develop their legal system, in a thin sense, and, while sequencing in a certain sense may be important,³ all nations can achieve that trajectory once the necessary conditions are present. In the anti-corruption field, the Party proves to be resolute and innovative in designing anti-corruption strategies and has demonstrated both the will and ability to put corruption under effective control by resorting to measures that are not fundamentally different from international best practices.⁴

While the divergence theory has a long spectrum of arguments, its central argument is that China has a unique system that renders convergence impossible. In Minxin Pei’s cynical formulation of a “trap thesis”,⁵ China’s political model suffers from fatal flaws and is not self-correcting. Following a liberal line of conceptualization, Pei argues that, without meaningful political competition, separation of powers, independent legal institutions and active participation from the civil society, China is unlikely to overcome

¹ Professor of Law, The University of Hong Kong. The author would like to thank Albert Chen, Weitseng Chen, Richard Cullen, Hilary Josephs, and Ben Liebman for their valuable comments on the earlier versions of this chapter.

² Randall Peerenboom and Tom Ginsburg, eds., *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (New York: Cambridge University Press, 2013); Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (Oxford: Oxford University Press, 2008).

³ Randall Peerenboom, “Rule of Law, Democracy and the Sequencing Debate: Lessons from China and Vietnam,” in *Legal Reforms in China and Vietnam: A Comparison of Asian Communist Regimes*, John Gillespie and Albert Chen (eds.) (London and New York: Routledge, 2010).

⁴ Fu Hualing, “Stability and Anticorruption Initiatives: Is There a Chinese Model?” in *Politics of Law and Stability in China*, Susan Trevaskes et al. (eds) (Cheltenham: Edward Elgar, 2014), 176.

⁵ Minxin Pei, *China’s Trapped Transition: The Limits of Developmental Autocracy* (Cambridge: Harvard University Press, 2008); “Is CCP Rule Fragile or Resilient?” *Journal of Democracy*, 23 No. 1 (2012), 27.

its corruption problem that is inherent in the authoritarian system. As a result, the regime becomes increasingly fragile structurally as it sinks deeper into a trap. Any incremental reform, which may prolong regime survival, cannot lead to a fundamental political transformation. Consequently, Pei provides a provocative and dim view of political corruption in China. He concludes that corruption will continue to entrench itself and the anti-corruption mechanisms that rely on the Party's internal disciplinary framework, without the support of law and legal institutions, will not be able to stop the further spread of the trend. As a result the regime must collapse on its own weight before any transformation can occur. Pei's trap thesis has been shared by many others who, in various ways, present a China-collapse thesis.

Others have turned Pei's thesis on its head and argued that what appears to be fatal for Pei is precisely where China's strength lies and contributes to China's authoritarian resilience.⁶ Striking a positive note, many have argued that, instead of converging into a Western political model, China may have discovered a distinct development model based on its effective and decisive political leadership or communitarian social structure. China's anti-corruption efforts deliver precisely because it is led and controlled by the Party at the macro level. This anti-corruption model is legitimate and effective because it is embedded within the Chinese reality and the cultural milieu. Seen from this perspective, China's political system, including its anti-corruption regime works effectively in these Chinese circumstances.

This chapter discusses China's anti-corruption enforcement within the context of the convergence/divergence debate and examines the degree to which the Chinese anti-corruption model converges or diverges from the prevailing "international best practice" that is commonly observed in the high income/low corruption countries. Specifically this chapter will also discuss whether China could develop an anti-corruption system that operates within a rule-based legal framework. The principal argument is that China's anti-corruption practice manifests certain core features that may be unique to the Chinese political context and those features show most strikingly at the height of an anti-corruption campaign. But if we look beyond an exceptional "strike-hard campaign" that targets the "tigers", shift the focus to the more routine enforcement against "flies", and, in particular, observe China's anti-corruption enforcement for a longer time span, it becomes clearer that China does not operate an anticorruption model *sui generis*. As the anti-corruption storm dies down (as it will naturally occur), the enforcement will become more routine, regularized, and institutional. When that happens, the Chinese anti-corruption model, if any, will appear no different from models elsewhere.

This chapter is divided into five parts. Following this introduction, Part II introduces, in broad strokes, the core features of the internal disciplinary inspection committee (*jiwei*) of the Party. *Jiwei* has come to political prominence in the Xi government and is becoming the most powerful force in the Party apparatus. This part explains the political

⁶ Jiang Shigong, "Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China," *Modern China* 36, No.1 (2010): 12; Pan Wei (ed.) *Zhongguo Moshi: Jiedu Renmin Gongheguo De 60 Nian* [*China Model: A New Developmental Model from the Sixty Years of the People's Republic*] (Beijing: China Compilation and Translation Press, 2009).

meaning of Party discipline and the core institutional design that renders the mechanism effective. Yet, despite the ostensible politicization of anti-corruption, the *jiwei* mechanism shares some core characteristics with the most successful anti-corruption stories in other authoritarian systems that one may observe in Hong Kong or Singapore.

Part III then moves beyond *jiwei* to study the much marginalized and neglected legal anti-corruption system in China and its interaction with *jiwei*. While fundamental differences between the two systems remain, they have, over the years, moved closer to one another and have the potential to replicate each other's structure and *modus operandi*.

Part VI examines the anti-corruption mechanism from a historical perspective and offers insights on the degree to which law is relevant to anti-corruption enforcement. Part V concludes this chapter.

I. The Party's dominance

The Party's leadership role is entrenched in the state Constitution. The Party has approximately 80 million members, and all key state posts in China are occupied by Party members.

There are different ways to conceptualize Party leadership. For Backer and Wang,⁷ the Party Constitution and the State Constitution are both integral parts of the Chinese socialist constitutionalism and the Party is not itself constrained by the state Constitution; instead, the Party operates legitimately above and beyond state laws. A more critical view simply accepts the political reality that, constitutional or not, the Party dominates the political process and can rule directly without transforming the Party's will into a particular form of law. As Zhu Suli and others have argued, the root of China's constitutional order is the rule of the Party, and such political order does not only precede the constitutional order in a historical sense but also in the form of the first order rule in a political sense.⁸ The Party exercises its leadership through the Constitution and the laws made by the law-making body that it controls. While state laws reflect the Party's will, the Party operates within the legal framework it has created.

Many scholars have moved beyond merely describing the Party's role in China's constitutional order. These scholars are now treating the Party's monopoly of political power as a key component of an emerging China model and the essence of China's success.⁹ A new generation of scholars has pointed out both the empirical and normative dimensions of an entrenched Party leadership, and the normative dimension, in particular,

⁷ Larry Backer and Keren Wang, "The Emerging Structures of Socialist Constitutionalism with Chinese Characteristics: Extra-Judicial Detention (*Laojiao and Shuanggui*) and the Chinese Constitutional Order," *Pacific Rim Law & Policy Journal* 23, No. 2 (2014): 251.

⁸ Fu Hualing, "Autonomy, Courts and the Political-Legal Order in Contemporary China," in *Handbook of Chinese Criminology* Cao Liqun, Ivan Sun and Bill Hebeton (eds.) (London and New York: Routledge, 2013), 76; He Xin, "The Party's Leadership as a Living Constitution in Reform China," *Hong Kong Law Journal* 42, No.1 (2012), 73; Jiang, *Written and Unwritten Constitutions*, 12; Zhu Suli, "'Judicial Politics' as State Building," in *Building Constitutionalism in China*, Stephenie Balme and Michael Dowdle (eds) (New York: Palgrave Macmillan, 2009), 23.

⁹ Pan, *China Model*.

has gained currency in the public debate. Put simply, the Party does not only rule China. It should do so.

Within China's Leninist Party, political loyalty provides a foundation for the internal disciplinary system of the Party. It is a fundamental rule that individual party members profess a high degree of, if not absolute, loyalty to the Party. No matter how the Party and state relationship is conceptualized, this political system places Party rules over state laws, demands the submission of Party members to Party rules and punishes disloyalty or split loyalty based on religious belief, professional ethic or other callings. In that Leninist tradition, Party members are first and foremost the fabric of the gigantic political machinery before they are citizens of the nation. Party members' loyalty to the Party trumps fidelity to profession, religion, ethnicity and even nation.

According to this political logic, when Party members misbehave, the matter would be more politically significant than legally relevant and *jiwei* enjoys supremacy in investigating and punishing delinquent members.¹⁰ The Party's anti-corruption system serves primarily the objectives of reinforcing political discipline and enhancing political loyalty through punishing individual members.¹¹ Party discipline has its unique historical meaning and political significance. The first internal disciplinary department of the Party was set up in April 1927 in a direct response to the white terror perpetrated by the Nationalist government. On 12 April 1927, the Nationalist government launched a brutal attack on the young Chinese Communist Party, leading to mass murder and mass arrest. The brutality also led to defection of Party members on a massive scale. To regroup and to cope with an existential threat, the Party set up a high level Supervisory Committee (*zhongyang jianshi weiyuanhui* 中央监察委员会) - a ten member committee independent of, and parallel to, the Central Committee of the Party. Although the power and remit of the Supervisory Committee was substantially reduced in 1928, its legacy has remained to this day as a disciplinary mechanism, serving the powerful function to eliminate Party members who have betrayed the Party and punish those who have violated Party rules.¹²

Whenever the Party perceives a major crisis, its disciplinary inspection department would come to the fore stage, gaining more political prominence and power and playing a more direct role in political control. In the post-cultural revolution era, when the Party was determined to abandon revolution in favor of modernization, it restored and strengthened the Supervisory committee to rebuild the Party's integrity and credibility.¹³ In response to

¹⁰ Backer and Wang, *The Emerging Structures*, 251.

¹¹ Fu Hualing, "Wielding the Sword: President Xi's New Anti-Corruption Campaign," in *Greed, Corruption, and the Modern State*, Susan Rose-Ackerman and Paul Felipe Lagunes (eds) (Cheltenham: Edward Elgar, 2015), 134.

¹² Han Feng (ed), "90 Nian Lai Dang De Jijian Jiancha Zhidu de Yanghe Tedian" [The Evolution and Characteristics of the Party's Disciplinary Inspection System in the past 90 Years], *Sichuan University Marxism School (School of Political Science)*, November 11, 2011, <http://www.scu.edu.cn/zxxy/dwgz/jjgz/webinfo/2011/11/1321924224398934.htm>; Wu Meihua, "Zhongguo Gongchandang Jicha Jigou De Lishi Yanghe Ji Qi Zhineng Yanbian" [Historical Evolution and Changing Functions of the Chinese Communist Party's Disciplinary Inspection Organs], *Zhongguo Gongchandang Xinwen Wang* [People.cn], May 6, 2009, <http://dangshi.people.com.cn/GB/138903/138911/9249192.html>.

¹³ Ting Gong, "The Party Disciplinary Inspection in China: Its Evolving Trajectory and Embedded Dilemmas," *Crime, Law and Social Change* 49, No. 2 (2008): 139; Li Ling, "The Rise of the Chinese Communist Party's Disciplinary Institution 1927-2012 – The Operation of the Party Anticorruption Machine," working paper,

the political crisis in the aftermath of the 1989 student movement, the Party, in 1993, merged the Ministry of Supervision, which was in charge of administrative complaints, into the disciplinary system and also placed the entire anti-corruption enforcement, including the legal institutions, under the Party's direct leadership. From that year onward, the Party, through the Central Committee for Disciplinary Inspection ("CCDI"), together with Committees of Disciplinary Inspection ("CDI") at the local levels, has taken a hands-on approach in defining, controlling and punishing corruption. The Xi's government used anticorruption as an effective entry point into a governance reform, and has once again enhanced the political power of *jiwei* in controlling Party members more effectively and directly.¹⁴ Therefore, the more serious corruption is perceived to be, the more political power the CCDI is able to accumulate. It is in that context that one appreciates the symbolic value of Wang Qishan's visit, upon assuming the role as the CCDI Secretary, to the historical site of the first Supervisory Committee in Wuhan where he laid a wreath before the statues of the ten members of the 1927 committee.¹⁵

The Party is firmly in charge of the anti-corruption institutions. It sets agendas, designs institutions, prioritizes issues and determines the scope and pace of the enforcement. The Party's disciplinary institutions and measures, as demonstrated in the recent anti-corruption campaign, have shown three institutional features.¹⁶

The first is the leading role of *jiwei* in investigating corruption cases that are committed by senior Party officials within the respective Party's hierarchy. *Jiwei* performs multiple functions in preventing corruption and enforcing Party discipline but a defining characteristic is its near monopoly over the investigation of corrupt officials of a certain rank and the disposal of those cases. With little exception, major corruption scandals are all first investigated by *jiwei*. In investigating major corruption cases, *jiwei* leads and legal institutions comply.

Jiwei reaches out to all Party and state organs. A significant recent development is extending the reach of the CCDI into core state institutions, including the State Council, the NPC, the CPPCC, and the key political institutions such as the powerful Organization Department. This extension has the potential to undermine a fragile functional separation of powers and to further expand the CCDI's political power. The CCDI regularly dispatches disciplinary officials to be stationed in ministries and, under the new initiative, the CCDI has been sending disciplinary officials directly to the highest organs of state and political power and placing those organs under the direct supervision of the CCDI.

no 1/2015, New York University Law School US-Asia Law Institute (New York University, 2015), https://www.academia.edu/10195921/The_Rise_of_the_Chinese_Communist_Party_s_Disciplinary_Institution_1927-2012_The_operation_of_the_Party_anticorruption_machine; Graham Young, "Control and Style: Discipline Inspection Commissions Since the 11th Congress," *The China Quarterly* 97 (1984): 24.

¹⁴ Fu, *Wielding the Sword*.

¹⁵ "Wang Qishan: Wangji Guoqu Jiu Yiweizhe Beipan" [Wang Qishan: Forgetting the Past Means Betrayal], *Xinhua Net*, November 24, 2013, http://news.xinhuanet.com/politics/2013-11/24/c_118270161.htm.

¹⁶ Fu, *Wielding the Sword*.

This is said to be an unprecedented move and which will significantly enhance the control of the Party over state bodies.¹⁷

The structured and systematic control is reinforced by the Central Inspection Groups (CIG), an *ad hoc* high level working group dispatched from Beijing to review disciplinary matters of state entities at the provincial and ministerial levels. This is the second institutional feature. The CIG was originated in the 1990s to compensate for the institutional inertia on the part of the provincial/ministerial *jiwei*, and was aimed at catalyzing and reenergizing the anti-corruption endeavours. The CIG was revitalized under Xi and under the able leadership of Wang Qishan. In a short period of time, the CIG has become a sharp instrument in breaking up corrupt networks and syndicates, real or perceived, within the Party and has the potential to effect substantial change within the political system toward a “clean” government.

If *jiwei* itself is an extraordinary anti-corruption mechanism that is imposed on the legal mechanism, the CIG represents another layer of enforcement on the Party’s own disciplinary mechanism. In that sense, the CIG is a non-institutional mechanism at the disposal of the Party leaders to solve the agency problem, seeking policy compliance at the provincial level. As such, it is regarded as a disruptive intrusion into the regular exercise of disciplinary authority within the Party.

Briefly, the CIG serves three functions. First, it uncovers and investigates corruption cases within the powerful state organs and SOEs. The CIG’s work is case driven – that is to receive complaints and conduct preliminary investigation in relation to those complaints. The CIG is able to uncover major corruption cases because as agents of the highest authority of the Party, CIG investigators wield significant political power to overcome local and bureaucratic resistance in conducting investigations, serving as an effective forward guard to exposing corrupt networks.

Second, the CIG is to create a downward political pressure and cascade effect so that *jiwei* at the provincial and sub-provincial levels would be sufficiently incentivized to act more aggressively to pursue local corruption (just as the CCDI does at the provincial level). From this perspective, the CIG is not principally interested in any of the cases that come directly to its attention but to pressurize local actors through case investigation. This can be seen with responsibility mechanism that Wang Qishan posits: following a successful CCDI’s investigation, the CCDI would take action against both the corrupt officials under investigation and the officials of the relevant CDIs for failure to take action. By holding local CDIs responsible, the CIG inspection is expected to incentivize local CDIs to act as aggressively as the CCDI.

¹⁷“Zhongjiwei Jiangdui paizhu Shixian Quanmian Fugai: Kanzhu Zhongyang Dang Zheng Jiguan Quanli” [CCDI will Cover the Entire Dispatched Organs: Limiting the Powers of the Central Party and Government Organs] China Net, 7 January 2016, http://news.china.com.cn/2016-01/07/content_37479167.htm.

Beyond holding local CDIs responsible, the CIG aims to reinforce the Party's political control over Party members. Through the high profile inspection tours, the CIG enhances the power and status of the central authority, and ensures the smooth implementation of central decisions. It has been made clear that the anti-corruption regime has served as the most effective tool in swinging the gravitas of political power firmly into Xi's hands.

Finally, there is the institutional feature of *shuanggui*¹⁸ – the *de facto* detention for the investigation of Party officials above certain ranks for violating Party rules during which an explanation at a designated place and time will be demanded. *Shuanggui* is a highly controversial measure that has caused heated debate in China and abroad. Without doubt, *shuanggui* is a form of extra legal detention and a clear violation of the state constitution and domestic law.¹⁹ But is it justifiable and politically feasible?

There are various views on the legality of *shuanggui* depending on the particular conceptualization of the Party/state relationship. For Backer and Wang who are prepared to elevate the Party's Constitution to a status equivalent to the state constitution,²⁰ *shuanggui* is a measure to discipline Party members to ensure the integrity of the Party in power. Thus, *shuanggui* is politically legitimate even if it is in clear violation of the state constitution and legal rules. For others who believe otherwise, the Party must operate under the state constitution, and *shuanggui*, as an aberration to be used to place corruption under control, can only be excused on the grounds of urgency and necessity. As corruption is an entrenched and persistent political problem touching the highest levels of the political power, it has posed an existential threat to the Party state and must be dealt with forcefully and effectively. Legal institutions are weak facing powerful but corrupt syndicates and it takes the Party, with its wherewithal, to punish its powerful delinquent members. The urgency of the matter, coupled with weak legal institutions, creates the necessity for the Party to deal with the corruption expediently outside the legal frameworks through *shuanggui* – a special and temporary power that is tailor-made to suppress corruption despite being itself an aberration.²¹

The combined effect of *jiwei*, CIG and *shuanggui* makes anti-corruption crackdowns an internal affair of the Party, and this may itself be a problem. Because of the highly political nature of high profile cases, the enforcement is seen to be selective, secretive, largely extra-legal, and in any event politically biased, with a clear agenda of rooting out political adversaries and of legitimizing existing political power. Seen from this

¹⁸ *Shuanggui* (双规) is a Party disciplinary measure that requires a Party member under investigation to offer explanation of the alleged problem at a designated place and time. The rules governing *shuanggui* were promulgated by the Standing Committee of the CCDI. on January 28, 1994, and these rules came into effect on May 1, 1994. See Art. 28, Sect. 3 “Zhongguo Gongchandang Jilu Jiancha Jiguan Anjian Jiancha Gongzuo Tiaoli” [Measures Concerning the Investigative Work for Cases Under the Disciplinary Inspection Organs of the Chinese Communist Party], Chinese Communist Party, <http://cpc.people.com.cn/GB/33838/2539632.html> (Chinese only). Alternatively, see Law of the People's Republic of China on Administrative Supervision (hereafter, Administration Supervision Law) promulgated by the Standing Committee of the National People's Congress on May 9, 1997 and revised on June 25, 2010, http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383546.htm.

¹⁹ Flora Sapio, “Shuanggui and Extralegal Detention in China” *China Information* 22, No. 1 (2008): 7.

²⁰ Backer and Wang, *The Emerging Structures*, 251.

²¹ For a review of the debate in China, see *ibid.*

perspective, one may be tempted to note an emerging Chinese model reflecting the unique political landscape of the Party state.

What has been neglected, however, is the fact that this model, to be effective, shares some fundamental characteristics with certain admirable anticorruption models in other countries. Once the focus of the inquiry is shifted from legitimacy and legality to implementation and effectiveness, there is a different perspective on the disciplinary inspection mechanism.

In measuring the success of Hong Kong's well-known Independent Commission Against Corruption ("ICAC"), researchers have pointed out conditions that are necessary for a successful anti-corruption institution: an independent anti-corruption agency with strong political and financial support along with dedicated and professional staff.²² Equally, international anti-corruption practices emphasize the importance of independence, authority, resources and the effectiveness of anti-corruption bodies.²³

In respect of China, the *jiwei* is certainly independent of the organizations and individuals they monitor, investigate and punish; *jiwei* enjoys a high political status and exercises extensive powers. It is a very hierarchical system with rigid upward accountability. Local interference, while it continues to exist, is becoming increasingly difficult.²⁴ On top of its high political status and relative autonomy from local authorities, *jiwei* also has the resources needed to carry out investigations. As a Party organ, *jiwei* may have only limited legal powers and institutional capacity in actual anticorruption investigations, but the real strength of *jiwei* is the leadership it commands over the entire political and legal apparatuses of the anti-corruption. When needed, *jiwei* can pool together resources of state organizations. In most, if not all, of the *jiwei*'s operations, the CDI or CCDI heavily relies on the legal and law enforcement professionals, including the police, procurators and judges, using the legal authority that these professionals may exercise to conduct the investigation. This centralized system, supported by the highest political authority and armed with effective investigative tools, has been effective in containing the spread of corruption in China. The achievement to date under Xi is impressive, representing the most serious purge since the end of the Cultural Revolution – all done in the name of, and through, the disciplinary inspection system.²⁵

The point of departure, however, as the critics are quick in pointing out, is the context in which an anti-corruption agency operates. In Hong Kong, the ICAC is embedded and operates within a legal framework in which the ICAC is made accountable to the legislature, the judiciary and the community at large. Accountability is indeed an integral

²² Richard Cullen and Yang Xiaonan "Executive Government," in *Law of the Hong Kong Constitution*, Johannes Chan and Chin Leng Lim (eds.) (Hong Kong: Sweet & Maxwell, 2015), 321; Melanie Manion, *Corruption by Design: Building Clean Government in Mainland China and Hong Kong* (Cambridge: Harvard University Press, 2004), 27.

²³ Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (New York: Cambridge University Press, 1999).

²⁴ Fu Hualing, "The Upward and Downward Spirals in China's Anti-corruption Enforcement," in *Comparative Perspectives on Criminal Justice in China*, Mike McConville and Eva Pils, (eds.) (Cheltenham: Edward Elgar, 2013), 390.

²⁵ Fu, *Wielding the Sword*, 134.

part of the ICAC's efficiency and is one of the reasons for the ICAC's effectiveness. The rule of law which constrains the ICAC also gives it credibility.

There is a sharp difference between the mainland's and Hong Kong's anti-corruption regimes: China's anti-corruption regime is intertwined with her political system, which is based on political expedience, while the Hong Kong's regime is steeped in her legal system, which is based on the rule of law. The question is, in the long run, can China's Party-driven anti-corruption model evolve into something that is based on the rule of law and is legally accountable? Before we move to discuss that *possibility*, let us first examine China's dual anti-corruption system.

II. China's Dual Anti-Corruption System

The disciplinary inspection system, as powerful as it is, does not function in isolation. It is an elite part of a much larger anti-corruption system. China operates a dual anti-corruption system in which the Party's disciplinary mechanism co-exists with a legal system for anti-corruption enforcement. These are distinct institutions with different historical origins and political ideology.²⁶

A dual system posits that regular and routine issues will be handled by the "ordinary" system while exceptional, and largely political, matters will be handled by the "extraordinary" system. Historically, the Maoist theory of contradictions conceptualizes two types of contradictions: the first is those among the people and the second is those between the people and their enemies. Indeed, this dualism is dictated by Article 1 of the Chinese Constitution²⁷ and is visible in both political and legal theories and practices. Pils has pointed out the co-existence between the "state of norms" and the "state of measures" in analyzing state repression of human rights lawyers;²⁸ and Sapio has offered a broader analytical framework between normal and exceptional states in exploring social ordering in China.²⁹ Distinct types of cases are treated differently because of their political sensitivity and ramification.

This dualism is firmly institutionalized in anti-corruption enforcement: a political mechanism which is dominated by *jiwei* in enforcing Party rules and a legal mechanism which is operated by the procuratorate according to legal provisions. Each mechanism has its own sphere of influences, institutional design, operating procedures, and political logic. The anti-corruption dualism also demands that the two mechanisms interface with each other and in the process affect one another. While the disciplinary mechanism brings political factors to bear in the legal process, the legal mechanism also produces a legal impact within *jiwei*, affecting the organizational structure and the procedural rules of the latter. As well, legal actors strive to enforce anti-corruption rules independent of the *jiwei*

²⁶ Backer and Wang, *The Emerging Structures*, 251. .

²⁷ Article 1 provides: "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China. Sabotage of the socialist system by any organization or individual is prohibited."

²⁸ Eva Pils, *China's Human Rights Lawyers: Advocacy and Resistance* (Abingdon: Routledge, 2014), 224.

²⁹ Flora Sapio, *Sovereign Power and the Law in China* (Leiden: Brill, 2010), 16.

system. To better understand the “extraordinary” part of the system (that is, the political mechanism operated by *jiwei*), one therefore needs to study it in relation to the “ordinary” part of the system (that is, the legal mechanism enforced by the procuratorate). A comprehensive theory of the Chinese legal system, including the anti-corruption regime, needs to pay more attention to “ordinary” justice (see Liebman, Ch[], pp.[]).

Largely due to the Soviet influence, the procuratorate investigates and prosecutes offences committed by civil servants in their official capacity, including corruption. Between 1979 and 1993, China had built an anti-corruption regime within her legal system, which had operated in parallel to the political mechanism of the day (i.e. *jiwei*). Under the Criminal Procedure Law 1979, the procuratorate was in charge of the anti-corruption investigation and a special investigative unit called “Economic Crime Unit” was set up within each level of the procuratorate to conduct anti-corruption investigations. While the level of institutionalization was low, and resources and institutional autonomy of the “Economic Crime Unit” were limited, the procuratorate, while under the firm leadership of the Party, nevertheless operated with a high degree of independence from the *jiwei* system. *Jiwei* restricted itself primarily to internal disciplinary matters within the Party and was not allowed to exercise any coercive powers, such as search, seizure or detention that are necessary for criminal investigation.³⁰

In the aftermath of the June 4th 1989 bloodshed, the Party responded to the call for more effective anti-corruption enforcement. Against a national anti-corruption campaign, Guangdong province proposed a new institution. Inspired by the success of the ICAC in Hong Kong, a young and ambitious Xiao Yang, a deputy procuratorate-general of Guangdong, proposed the creation of an independent anti-corruption bureau – i.e. the Anti-Corruption Authority (“ACA”). This new bureau would bring the task of anti-corruption enforcement into sharp focus and its enhanced status would give it more resources and power. In the aftermath of June 4th protest, there was strong support for institutional innovation from both the Supreme People’s Procuratorate (“SPP”), especially from the then SPP President, Liu Fuzhi, and the Guangdong Party Committee. As a result, the ACA was set up within the Guangdong Procuratorate on August 18th, 1989. Following Guangdong, anticorruption bureaux were created in other parts of the country and, on November 10th, 1995, the SPP set up the National Anti-Corruption Authority (反贪污贿赂总局, “NACA”).³¹ Clearly, the political control exerted by the CCDI over anti-corruption enforcement did not prevent the gradual institutionalization of anti-corruption enforcement within the legal system.

What is the actual working relationship between *jiwei* and the ACA? There are different ways to analyze the dependence of the legal system on the political mechanism (i.e.

³⁰ Li, *The Rise of the Chinese Communist Party’s Disciplinary Institution*, 3.

³¹ In March 1995, five Chinese People’s Political Consultative Conference (“CPPCC”) members who were specially appointed procurators by the SPP tabled a motion for the establishment of a national anti-corruption authority in the SPP at the third Plenum of the Eighth CPPCC Meeting. The motion was sent to the Human Resources Planning Commission which replied favourably within a month. By the end of 1995, nearly all the provinces, about half of the cities and about one third of counties had set up similar anti-corruption authorities.

jiwei). First, *jiwei* has the near monopoly of major cases, cases that involve senior officials – while the legal system handles relevantly minor corruption cases. Hence *jiwei* and its related institution, the CDI, is known for tackling the “tigers” while the legal system and its related institution, the ACA, handles the “flies”. As such, serious cases of corruption are first investigated nearly in their entirety by *jiwei*.

In 1994, the Party authorized the *jiwei* to undertake coercive measures, including detention, on its own delinquent members during anti-corruption investigations.³² Relying on those coercive measures, *jiwei* has been able to exert its jurisdiction over most of the major corruption cases. Only a tiny percentage of cases are referred to the ACA for criminal investigation and prosecution.³³

Most of the more routine corruption offences committed by lower-ranking officials, especially at the intervals of major anti-corruption campaigns, are routinely handled by the ACA. It is no surprise, however, that most corruption offences occur at the basic level of the government and most prosecutions against corruption are initiated by the ACA at corresponding level. While *jiwei* has resources – the CCDI certainly has more resources than the NACA of the SPP in terms of political authority, manpower, and other resources – the CDI lacks resources at the lower levels of China’s governmental and political hierarchy. Put simply, the institutional design allows the CCDI and the CDI at the provincial level to take on large and important corruption cases, but the Party has to rely on the ACA to mainstream the anti-corruption initiatives and to take action against the vast majority of the corruption cases at the lower levels.

A second way to conceptualize the *jiwei*-ACA relationship is to place the ACA’s operation within the long shadow of the CDI’s leadership. From this perspective, the ACA and the entire legal system play a supplementary role in the grand anti-corruption design of the Party.

There are different ways in which the ACA may play that supplementary role. As mentioned, *jiwei* may refer cases to the ACA for investigation and prosecution, and those cases are given priority in the procuratorate. *Jiwei* may also request the ACA’s assistance, in particular to borrow the ACA’s coercive powers, in cases that are under *jiwei* investigation. On the flip side, the ACA may proactively participate in a *jiwei* investigation so as to take advantage of *jiwei*’s procedures (such as treating confessions extracted by the *jiwei* as its own in addition to giving confessions the necessary legal effect or relying on *shuanggui* detention to bypass the time limit placed on pre-trial detention).

III. Anti-corruption enforcement and the Rule of Law

The dual system thesis offers a useful perspective to understand the political role of the *jiwei* in the larger context of anti-corruption enforcement. While this is so, is it sustainable in the Chinese political context? To answer this question, the following

³² Li, *The Rise of the Chinese Communist Party’s Disciplinary Institution*, 3.

³³ Fu, *The Upward and Downward Spirals*, 390. .

analysis places the evolution of the anti-corruption regime in China within the larger context of China's fast-changing legal system.

As with China's governmental budget,³⁴ Chinese law also comes in different varieties. Broadly, there is the official/formal law made pursuant to the Constitution. There is also quasi-formal extra law with questionable legality and constitutionality. Parallel to law and extra-law, one also finds a visible layer of informal "extra-extra law", which has been developing a life of its own. There are two perspectives on those varieties of law. From an empirical perspective, they co-exist and are simultaneously present in different areas of Chinese law, particularly public law and criminal law. In anti-corruption enforcement, legal institutions are certainly at work but certain extra-extra law practices and mechanisms have become institutionalized. Still, it is extra law that has played a leading role in the field and exerted overarching control.

The varieties can also be viewed in evolutionary terms. Over the past three decades, the space within which extra law operates in every aspect of Chinese law has, in general, been shrinking while, correspondingly, the space within which law operates has been expanding.³⁵ Extra-extra legal practices, while continuing to exist, have become largely exceptional. The following sections of this chapter will discuss the extra-extra law, extra law and law in the context of China's anti-corruption regime.

Extra-extra Law

Extra-extra law comprises of government measures that exist in some dark space, seemingly unrelated to any legal framework and devoid of any legal authority. Extra-extra law is an informal political institution characterized by a total lack of legality. It is used to advance some predatory and repressive government policies which cannot be justified by any law or policies. As such, extra-extra law is mired in secrecy and operates without legal accountability. Except for occasional and indirect admissions, such as the quasi-official admission of the existence of "black jails" for petitioners and religious offenders,³⁶ extra-extra law does not officially exist, and, as such, it survives and sometimes thrives because it is effective in achieving certain policy goals that cannot otherwise be achieved through law or extra-law. The legal system in China is regarded as weak and ineffective when it comes to sensitive issues, and, in these situations, extra-extra law expedites the process to the extent that it has become indispensable.

Examples abound. "Black jails" have also been used to detain peasants in violation of family planning policies or those who fail to pay illicit levies; to detain and intimidate

³⁴ It is well known that the Chinese government's budgetary process is convoluted. The concept of a "budget" in China includes a formal and legal budget, an official but quasi-legal extra-budget and an informal, occasionally illegal, extra-extra budget. The government budget is thus a complex mix of budgets of various sources and degrees of legality and legitimacy.

³⁵ Sarah Biddulph, *Legal Reform and Administrative Detention Powers in China* (New York: Cambridge University Press, 2007), 40. .

³⁶ "China: Secret "Black Jails" Hide Severe Rights Abuses Unlawful Detention Facilities Breed Violence, Threats, Extortion," *Human Rights Watch*, November 11, 2009, <https://www.hrw.org/news/2009/11/11/china-secret-black-jails-hide-severe-rights-abuses>.

petitioners who air their grievances in Beijing; and, more recently, to detain Tibetan monks for their alleged challenges to the official policy on religions. These repressive policies are extra-extra law because powers are exercised by the government on an *ad hoc* basis without any legal authorization or procedure, and with little accountability. The forced disappearance of human rights lawyers in 2011 and those who openly supported Hong Kong occupying movement well illustrated official law's vulnerability and the readiness of the Party to resort to extra-extra law. Lawyers and other advocates were typically snatched by internal security authorities and detained in unknown places for interrogation and intimidation.³⁷

There is a fundamental difference between disappearance (i.e. extra-extra law) and abuse of criminal procedure (i.e. law). When the government uses, or even abuses, the law, the government still signals a commitment to law. Using or abusing the law also eschews a degree of legal accountability, publicity and responsibility. This is the reason why the incarcerated human rights lawyers and many others have demanded their day in court so that abuses could be brought to the attention of the law and public scrutiny. A mere legal trapping may not be sufficient to convert a political persecution to a fair legal process, but it is a necessary first step in developing legal accountability against arbitrary power.

Legal rhetoric is important in both justifying and constraining state powers. It may not be possible to reduce law to total irrelevance without incurring cost. The judicial interpretation of the Supreme People's Court (SPC) on the application of sedition and subversion to the 1989 democratic movement activists;³⁸ the legal trappings that the Standing Committee of the National People's Congress and the SPC painstakingly created to justify its prosecution of the Falun Gong;³⁹ and, the courtroom tension between judges and lawyers in some of the Falun Gong trials⁴⁰ are all examples that law matters even at a repressive moment. The mere fact that a criminal charge is mounted necessarily means a degree of accountability. The path of law is a tortuous one, but as long as this is the path to tread, there exists some degree of legal control and accountability that cannot simply be swept away.

Another reason as to why law is important is because extra-extra law serves a fundamentally different objective. Enforced disappearance or "black jails" differs from criminal punishment in fundamental ways. In criminal punishment, the law addresses past offences and the objective is to punish the wrongdoers. In enforced disappearance, the focus is instead on the "risk" that an individual poses, regardless of the offences he or she may or may not have committed. Extra-extra law is thus applied not for the purpose of punishing past offences, but to reduce future risk, with targeted measures taken against individuals to maximize intimidation.

³⁷ Verna Yu, "Tales of Torture: Time Spent in Chinese Police Custody Leaves Victims Permanently scarred," *South China Morning Post*, June 27, 2015.

³⁸ H L Fu, "Sedition and Political Dissidence: Towards Legitimate Dissent in China?" *Hong Kong Law Journal* 26 (1996): 210.

³⁹ Randall Peerenboom, *China's Long March toward Rule of Law* (New York: Cambridge University Press, 2002), 55.

⁴⁰ Fu Hualing, "Human Rights Lawyering in Chinese Courtrooms," *Chinese Journal of Comparative Law* 2, No. 2 (2014): 270.

Torture, for example, may also be used in both law and extra-extra law. But in law, torture is typically used to extract confession to establish criminal liability; while in extra-extra law, it is to inflict fear so that those who are tortured would not speak or act out. Intimidation is therefore at the core of the extra-extra law. As such, in the enforced disappearance cases, no general norms apply; instead, the users of extra-extra law apply particularized stratagems, tailor-made for each individual case. With intimidation at the center of the equation, we see a quantitative change in the method of repression with a sudden turn against law.⁴¹

On the anti-corruption front, internal discipline has been a core instrument to maintain Party integrity and reinforce Party loyalty. Historically, the *jiwei* had the much broader remit in enforcing party rule and had been ruthless in doing so. The Party's disciplinary mechanism is not to enforce the criminal law but to deal with the risk party members might pose to the Party. The mechanism is to apply Party's rules in a highly political fashion. This is a fundamental difference between legal enforcement of anti-corruption law and the Party's application of internal rules.

The application of extra-extra law may be surgical and limited in its scope of application and in the degree of brutality. But these may not be the core issues. The core questions are: Is China moving towards a different doctrine of governance in the name of the a "Chinese model" where legal constraints are regarded as redundant and ineffective and power is unconstrained so long as objectives are to be achieved?

Repressive episodes are recurring events in the post-Mao era, and each generation of leaders have their repressive moments during their terms, especially towards the end of their terms when they hand power over to the next generation of leaders. Deng Xiaoping sent tanks to suppress the 1989 democratic movements and Jiang Zemin smashed the Falun Gong and wiped out the China Democracy Party (CDP), incarcerating most of the CDP members for lengthy terms. Similarly, Hu Jintao crushed the Chartist movement in 2008 and then the so-called Jasmine Revolution and took a generally repressive approach towards governance in the name of harmony and stability.⁴² Xi is most forceful in silencing dissent political or otherwise. In contrast, new leaders, as they emerge to power, appear to be politically open and reform minded. This appearance enhances expectations and invites challenges.⁴³ Once that happens, however, the new leaders typically move decisively to demolish the challenges, creating their repressive moments and leaving a conservative legacy.

Extra Law

The Party and the government have largely relied on extra law to exercise their powers. Extra law is a system and a normative order in which power is neither directly derived from clear legal rules and exercised through properly constituted authorities nor subject

⁴¹ Fu Hualing, "Mediation and the Rule of Law: The Chinese Landscape" in *Formalisation and Flexibilisation in Dispute Resolution*, Joachim Zekoll, Moritz Bälz and Iwo Amelung (eds) (Leiden: Brill, 2014), [page numbers]; Fu Hualing, "Challenging Authoritarianism through Law: Potential and Limit" *National Taiwan University Law Review* 6 (2011): 339; Carl F. Minzner, "China's Turn against Law," *American Journal of Comparative Law* 59 (2001): 935.

⁴² Fu, *Challenging Authoritarianism*, 339.

⁴³ Fu, *Wielding the Sword*, 134. .

to independent oversight (judicial or otherwise) outside the Party. In contrast with law, extra law does not allow deliberation, representation, transparency or decision making that can be regarded as judicial. Extra law has a strong political or policy orientation and the whole system is geared to informal practice, political expediency or mere administrative convenience. China's legal reform in the past 30 years is characterized by a slow transition from extra law to law. Yet, after more than 30 years of law reform and improved legality, the effect of extra law still looms large, especially in core policy areas, such as criminal law and public law.

Examples of extra law also abound. The first example is criminal law. A significant proportion of criminal justice matters are still governed by extra-law. There has been a large gray area when it comes to police powers to punish. Due to ideological commitment and historical legacy, criminal law punishes only "serious offences", leaving "minor offences" to the prerogatives of the police. While approximately one million criminal cases go through the criminal justice process each year, more than 10 million offenses of different severity and nature are dealt with administratively by the police in the name of punishment, treatment or rehabilitation. The hodgepodge of administrative penalties targets prostitutes, drug addicts and a wide range of minor offenders, and the penalties may vary from a verbal warning to incarceration for prostitutes and those who visit prostitutes. This administrative punishment regime is characterized by relative severity in penalty, lack of representation and due process and, in some cases, uncertain legislative authorization.⁴⁴

But rule by extra-law is not limited to the field of criminal law. Another example is media governance. Media governance is essentially a lawless business in China. China's legislature has yet to be allowed to pass a single law to govern the media, which is wholly state-owned and controlled tightly by the Party. Instead, the media is controlled through a well-established political mechanism, armed with strong organizations and detailed procedures, to guide and manage all media outlets in China on an on-going basis. Media governance is particularly an area in which Party norms and organs, instead of legal rules and institutions, act as the ultimate authority.

Extra law has also been extensively used in other regulatory fields, such as tax policy, state secrecy and securities regulation, in which significant issues such as imposition of tax, designation of state secrets, and regulation of insider trading, are subject to internal and often informal rules without clear legislative authorization, a degree of transparency and necessary legal accountability.⁴⁵

The Party's anti-corruption regime, including *jiwei*, the CIG and *shuanggui*, is a typical extra-law design. The Party's leadership rule is constitutionally entrenched and cannot be challenged through any legal measure. The supreme position of the Party necessarily

⁴⁴ Elisa Nesossi *et al*, (eds). *Legal Reforms and Deprivation of Liberty in Contemporary China*. London: Ashgate, 2016.

⁴⁵ Yongxi Chen, *Halfway to Freedom of Information: The Legislative and Judicial Protection of the Right of Access to Information in China*, (London: Ashgate, 2016);; Wei Cui, "What Is the 'Law' in Chinese Tax Administration?" *Asia Pacific Law Review* 19, No. 1 (2011): 75; and Nicolas Howson, "Enforcement Without Foundation? - Insider Trading and China's Administrative Law Crisis," *American Journal of Comparative Law* 60, No. 4 (2012): 955.

means that the Party's rules have certain constitutional legitimacy even though these rules exist entirely outside the legal system of the state. Yet, when the Party has elevated its internal rules to the status of quasi-state law and has placed Party governance and state governance on a compatible footing, it is difficult to simply regard Party rules as constitutionally and legally irrelevant.⁴⁶

Law

The rule of law has once again become a rallying point for China's new round of political-legal reform with the Party pronouncing an unprecedented commitment to developing the socialist legal system.⁴⁷ With that new initiative as the backdrop, there has been renewed concern about the legality of the *jiwei* investigation, especially the use of *shuanggui* against Party members without following legal procedures, and the effort to move the extra-legal practices into a more proper legal framework. Extra law may be fit for crisis management during a transitional period. But it is not sustainable if used as a regular governance tool.

Nevertheless, China has been building a legal order based on law since the late 1970s, and the achievement is most pronounced in civil and commercial law. Chinese public law has also witnessed a gradual, albeit contradictory, process in enhancing regularity, transparency, and juridification. Even in criminal law which is traditionally police-centric and highly politicized, there has been a tendency toward increasing certainty, more effective judicial oversight, and stronger legal representation.⁴⁸ Building a legal order is a long endeavor and China has experienced periodical setbacks and frustration in the process. But the larger trend had been clear: the sphere of law had been expanding, reaching out to and occupying more fields;⁴⁹ and formal rules are occupying more commanding heights in governance in relation to extra-legal rules and practices. The Xi government has, in particular, encouraged the expansion and empowerment of legal institutions in dispute resolution so as to bring more social problems to effective legal resolution. As a result, the legal system is likely to be more autonomous and effective and, in the long run, while the Party will remain "hands-on" in politically sensitive cases, the Party's willingness and ability to intervene in the vast majority of cases are likely to diminish further.

⁴⁶ Backer and Wang, *The Emerging Structures*. See also Larry Backer, "The Party as Polity, the Communist Party, and the Chinese Constitutional State: A Theory of State-Party Constitutionalism," *Journal of Chinese and Comparative Law* 16, No. 1 (2009): 101.

⁴⁷ Randall Peerenboom, "The Future of Legal Reforms in China: A Critical Appraisal of the Decision on Comprehensively Deepening Reform," *Social Science Research Network* (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379161. Law is defined here as a constitutionally legal regime in which properly constituted authorities establish legal norms (in a legal format) and these legal norms are then applied fairly by independent tribunals. There is a credible process of legal representation and judicial deliberation, a degree of transparency and external accountability throughout the decision making process.

⁴⁸ Fu Hualing, "Institutionalizing Criminal Process in China," in *The Development of the Chinese Legal System: Change and Challenge*, Guanghua Yu (ed.) (London and New York: Routledge, 2011), 26.

⁴⁹ Biddulph, *Legal Reform*, 40.

There are several reasons that explain the possibility of a gradual but decisive shift from the *jiwei*-based political mechanism to a legal-centric mechanism in controlling corruption in China. The *jiwei* system as it stands is relatively new. As mentioned earlier, the current *jiwei*-centric model came into being as part of the crisis management in the aftermath of the 1989 student movement and it was specifically set up to address corruption. While the Party launched a brutal crackdown against the democratic component of the student movement, the Party kept the anticorruption component alive by launching one of the largest campaigns against corruption. As part of that campaign, the Party imposed the supremacy of Party in anti-corruption matters by bringing the ACA and other related agencies under *jiwei*'s leadership. The clear objective was to consolidate the diverse resources and to develop a stronger institutional capacity in both policy making and operation.

The current campaign was also made in response to a political crisis faced by the Xi government.⁵⁰ But as the political risk that corruption poses wanes, and as the crisis withers (as it naturally will happen), the Party is likely to shift its focus from combating corruption to a reformist agenda. Once the current wave of anti-corruption investigation and prosecution diminishes, and once the “tigers” have been hunted down, corruption would be perceived as a lesser political risk and anti-corruption would no longer attract the highest political attention. The investigation would be less proactive, focusing more on individuals than their political affiliations and on cases that have taken place at lower levels of the government. Thus, sooner or later, *jiwei* would declare its anti-corruption campaign a victory and, with the number of corruption-related prosecutions declining, shift its priority from investigation to institution-capacity building with a focus on education and prevention. When that happens, anti-corruption is likely to be less a highly-charged political campaign and more of a matter of routine law enforcement.

There have been some subtle changes in *jiwei*'s operations, which indicate a certain surprising deference to the legal system. *Jiwei*, for example, has refrained from using terms such as “cases” to highlight the fact that what *jiwei* handles is no more than complaints. *Jiwei* has come out to state that while there is overlap between *jiwei* and the legal system, the former is not expected to replace the latter. Wang Qishan himself has, reportedly, made the philosophical concession that, “give back to the law the law and to the Party disciplinary system Party discipline.”⁵¹ *Jiwei*'s work is not to handcuff corrupt officials, according to Wang, but to enforce party discipline.

The gradual but visible legal-centric reform is also likely to shift the gravitas from *jiwei* to the ACA, while the latter is developing more credibility and capacity. For one, the ACA is likely to better its treatment of the persons it prosecutes. Part of the reasons why corrupt officials “voluntarily” stay with the *shuanggui* system is that *shuanggui* offers certain advantage and benefits that the legal system fails to offer: the food is better, the accommodation is more comfortable, there is little public embarrassment, and there is

⁵⁰ Fu, *Wielding the Sword*, 134.

⁵¹ “Jiedu: Wang Qishan Zuixin Jianghua Toulou Chu De Jiwei Xindongxiang” [New Trend in *jiwei* Revealed in Wang Qishan's Speech], *Sina News*, July 11, 2015, <http://news.sina.com.cn/c/2015-07-11/004132095831.shtml>.

much less chance for actual criminal prosecution beyond the Party discipline.⁵² Of course, this is all possible because the CCDI is politically of higher status than the NACA and commands more authority.

The institutional advantage that the regular criminal justice system has in comparison with *shuanggui* is negligible. The first advantage is that, while there is no clear-cut time limit for detention under *shuanggui*, there is a time limit for detention in the criminal process. But this advantage is minor. Criminal detention could also be lengthy and the conditions in detention facilities are brutal. The second advantage is that while there is a no access to lawyer for *shuanggui*, an accused in the criminal process is entitled to legal advice and representation. But before legal representation becomes genuinely useful and effective, legal representation is limited at the pre-trial stage.

If the on-going legal reform can place the court at the center of the criminal justice system for the vast majority of the cases, the comparative advantages of *shuanggui* may diminish further and the comparative attraction of the legal system would increase. When more weight is given to lawyers' legal advice and representation, and when fair trials are ensured because courts are more independent, then the incentive structure would change and the gravitas will shift to court trials. This will lead to the decline of *jiwei* in anti-corruption matters. The comfortable detention experienced by those put under *shuanggui* may even have a positive impact on the ordinary criminal justice system just as fortress confinement eventually enhanced the standard of criminal justice in the Europe.⁵³

Another important reason to explain a possible shift from *jiwei* to the criminal justice system (i.e. ACA) is that the political system has started to resemble a legal system where the *jiwei*'s substantive rules and investigative procedures are concerned. The recent reform to promote the rule of law within the Party is likely to engender regularity, professionalism, institutionalization, and, above all, compliance with constitutional and legal rules. The CCDI, for example, has limited the duration of *shuanggui* detention and made the time limit compatible with that under criminal procedure rules. The Party has also re-designed its disciplinary procedures to offer a degree of protection of the rights of individual Party members so that the Party's internal disciplinary process is similar in form, if not in substance, to the legal process.⁵⁴

In many cases, the political mechanism is needed because it has some features that the legal mechanisms lack in order to effectively combat corruption. Those features, such as prolonged detention, are necessary to bypass the procedural constraints and have been shown to be effective in extracting confessions. The system allows the Party to hide behind the veil of Party disciplinary proceeding and to carry out an effective criminal

⁵² Special detention facilities for the privileged are not new. A number of European countries historically operated "fortress confinement" – a comfortable detention facility for the more privileged members of their respective societies. This existed side by side with the harsh justice meted out for the less privileged members. According to Whitman (2004), fortress detention eventually played a positive role in injecting a humanistic element into the whole criminal justice system in European countries. James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between American and Europe* (Oxford: Oxford University Press, 2004), 69.

⁵³ Whitman, *Harsh Justice*.

⁵⁴ Backer and Wang, *The Emerging Structures*, 251.

investigation in the name of Party discipline. But if the *jiwei* system moves closer to the legal mechanism and when the Party's internal disciplinary process and the criminal process resemble each other in substance and in form, the disciplinary mechanism will lose its comparative advantage. The question then becomes: Why rely on the political mechanism when a legal mechanism, which is equally effective and commands greater legitimacy, is available? This is not to say that *jiwei* will disappear. There is no doubt that the dualism as stated above will survive and *jiwei* will continue to be in charge of investigating a limited number of cases relating to high level corruption. But the anti-corruption gravitas is likely to shift to legal institutions for the vast majority of the cases as the current legal reform continues.

IV. Conclusion

The Party is firmly in charge of China's anti-corruption institutions with *jiwei* setting the agenda and leading the investigation of major corruption cases in the name of political expediency. In that largely political process, legal institutions play a marginal and supporting role. This chapter does not deny this political reality. What this chapter does is to provide a cautious reminder that *jiwei*, as powerful as it has been in the past two decades, is part of a larger anti-corruption mechanism. While *jiwei*'s role may be conspicuous in governing a country in the face of a real or perceived political crisis, anti-corruption enforcement has to achieve some form of normalcy where it will need to rely on legal institutions and procedures once the crisis is over. A nation-state cannot be perpetually ruled on the presumption that the state is facing a crisis, and the Party has to allow the legal system to take over and to offer necessary predictability, certainty, and legitimacy. Corruption is a crime common to all human societies. While the syndrome of corruption may differ in different regime types, corruption can be uniformly explained by the lack of effective control over power and wealth and institutions designed to control corruption.⁵⁵ There are successful anti-corruption institutional designs to enhance the accountability and control that have been well-tested and China, despite its unique characteristics, does not present an exceptional case in the long run.⁵⁶

This chapter focuses on the cooperation and to a lesser degree the competition between the politically driven anti-corruption system, or *jiwei*, and a more legal-centric anti-corruption system, arguing for the possibility that, with some exceptions, China has the potential to develop fully a legal-centric anti-corruption regime in the long run. There is no reason that China cannot create a single, unitary anti-corruption body as independent, effective and powerful as the ICAC in Hong Kong. The ACA can operate independently of the CDI on a rigid separation of powers and functions. Historically, the ACA operated with more political independence prior to the 1993 centralization and, at that point in time, there was a genuine effort on the part of the procuratorate to achieve more institutional autonomy on matters relating to anti-corruption enforcement.

⁵⁵ Michael Johnston, *Corruption Contention and Reform: The Power of Deep Democratization* (New York: Cambridge University Press, 2014), 29. .

⁵⁶ Fu, *Stability and Anticorruption Initiatives*, 176. .

In the meantime, the procuratorate has struggled to maintain its institutional autonomy and integrity and indeed, the ACA has resiliently resisted further attempts by the *jiwei* of a more structural fusion. Given that the independence of the procuratorate and ACA from *jiwei* is constitutionally enshrined, this is the reason why attempts at incorporating the ACA into *jiwei* framework have not worked – and were never meant to work. The procuratorate may have humbly deferred to *jiwei*'s instructions where anti-corruption policies and investigation is concerned, particularly in rendering assistance to *jiwei* when *jiwei* carries out its own investigations, but the ACA has always tried to maintain its institutional autonomy. Therefore, the ACA's own operations have never been replaced by the *jiwei*'s.

A single system, which allows *jiwei* certain discretion in enforcing Party discipline but leaves criminal investigation, at least for the vast majority of corruption cases, to the ACA, would be the most optimal design even for China's authoritarian system. There are earlier signs that China may be moving toward that direction. The newly revised Criminal Procedural Law has given the ACA the power to detain persons in major corruption cases, and this power was modeled precisely on *shuanggui* so that in cases where a genuine need to extend pre-trial investigation exists the ACA could rely on clear legal authority instead of relying on *shuanggui*. Furthermore, the anti-corruption legal institutions, the NCAC in particular, may be able to gain more political clout. Since the end of 2014, the ACA has undergone another round of institutional reform. With the endorsement of the Party, the SPP merged another two departments with the NACA to form an anti-corruption agency at the vice-ministerial level.⁵⁷ Under the new design, the NCAC is to have a higher administrative rank headed by a more senior procurator. It will also have more manpower and other resources in view of internal restructuring. Researchers need to pay more attention to the potential juridification of China's anti-corruption regime in which law is prepared to fill the gap that the Party mechanism may eventually leave vacant.

⁵⁷ “‘Shenjiban’ Fantan Zhongju Jiangcheng Zhonggong Xin Fanfu Liji” [A New Anti-Corruption Authority will Become a Sharp Weapon of the CCP], *Xinhua Net*, November 4, 2011, http://news.xinhuanet.com/politics/2014-11/04/c_1113115543.htm.

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