

Understanding the Evolving Relationship between the Party and the Law:
The Case of China's National Supervision Commission

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Abstract

This article uses the National Supervision Commission (NSC) as a case study to examine the evolving relationship between the Chinese Communist Party (the Party) and the law. There are three ways to conceptualize the Party's dominance over the law in China's constitutional discourses. Over the past four decades, scholars have attempted to theorize a possible withering-away of the Party leading to the triumph of law, followed by a potential separation of the Party from the law through the development of a dual state theory, but only to find the re-normalization of the Party domination and the re-emergence of an omnipresent Party. The relationship between anti-corruption legal institutions within the Procuratorate and the Party's in-house disciplinary inspection committees offers a good entry point to track and analyze the dynamic relationship between the Party and the law. The principal argument of this paper is that as regime type has a significant, mutually reinforcing impact on anti-corruption enforcement, China's Party state develops its own pattern of anti-corruption enforcement that is defined by its authoritarian nature and in turn reinforces this nature.

Introduction

In 1949 when the Chinese Communist Party (the Party) created the People's Republic of China, there was nothing but the Party and the army it led and continued to lead. Using Zhu Suli's (2007) words, the Party was the root and everything grows from them and as such state-building, economic growth and societal development were all based on that unique political foundation. The Party leads and rules. Everyone recognizes that foundational principle and few have challenged it. But the empirical question of how the Party has led and ruled and the normative question of how the Party should lead and rule are much debated. In particular, how can this leadership be reconciled with other foundational doctrines in the constitution such as people's sovereignty, congressional supremacy, and the rule of law remain contentious issues? Can the revolutionary Party organization eventually evolve into a normal ruling Party to govern the state through constitutional mechanisms? This article uses the new National Supervision Commission (NSC) as a case study to examine the evolving relationship between the Party and the law. The Party intersects with the state at multiple levels and with different intensities. The Party's control over the military and the security force including the police are the tightest and have been framed in terms of the former's absolute control over the latter and the latter's absolute loyalty toward the former. At the same time, the Party's penetration into the social and private sectors is light-touched while deepening. It is in the control of civil servants, mostly of whom being Party members, that one observes a dynamic relationship and tensions between the Party and the State and between political decisions and legal rules in China.

This chapter is divided into four parts. Following the introduction, Part I will present three different conceptualizations of the Party's dominance over the law in China's constitutional discourse. Over the past four decades, scholars have attempted to theorize 1) a possible withdrawal or withering-away of the Party; 2) a potential separation of the Party from the law through the development of a dual state arrangement; and 3) the re-normalization of the Party domination and the re-emergence of an omnipresent Party. Within that political context, Part II delves into the contradictory relationship between anti-corruption legal institutions within the Procuratorate and the Party's in-house disciplinary inspection committee. Part III provides a detailed analysis of the new National Supervision Commission (NSC) and the final part of the paper puts forward the argument that regime type has a significant, mutually reinforcing impact on anti-corruption enforcement, as evidenced by the creation of the NSC. Moreover, China's Party state is developing its own pattern of anti-corruption enforcement which is defined by its authoritarian nature and in turn reinforces that nature.

Conceptualizing Party and Law in China

There are three types of conceptualization in relation to the Party-state (law) relationship in the literature on China's post-Mao political development. (Liberal) Constitutionalists follow a doctrinal linear path of political development: liberal democracy is the best political design and China will follow that particular path of economic, social and eventually political development. In that liberal imagination, competitive elections, a separation of powers, judicial independence, protection of human rights, a market economy and a civil society in various combinations represent best political practice (Qin and Ye, 2017; Fu and Zhai, 2018). China, in the long run, is no exception to that historical destiny. Facing social and economic changes and a corresponding decline in leadership charisma, Party discipline and political ideology, the Party gradually disentangles itself from the economy, society and the executive. Under such theorizing, a rule of law ultimately will prevail and replace the open domination of the Party.

This was a strongly-held view in the 1980s when structural political reform was on the Party's agenda. Examples included the greater level of autonomy in SOE decision-making by the management (Zhang, 2019); the abolition of the Political Legal Committee with supervisory jurisdictions over legal institutions (Fu, 2013); the introduction of competitive local elections (Nathan, 1986); and enhanced autonomy of the press with the possibility of private ownership of the press and the enactment of a media friendly Media Law in sight (Cullen and Fu, 1998; Keller, 2002). There was the possibility that legality, socialist or otherwise, may eventually replace the Leninist Party discipline and the force of law during the social and economic transition, may be able to tame the Party (Potter, 1994, 2003).

While a strong version of this theory, namely an eventual withering away of the Party, is no longer in vogue outside the dissident communities, a weaker version of that liberal imagination remains forceful (Fu and Zhai, 2018; Fu and Buhi, 2018; Qin and Ye, 2017). According to that version, the Party will not wither away but will rationalize and improve its leadership in both

substance and style. In the constitutional law discourses, for example, scholars having firmly recognized and accepted the leadership role of the Party insist on defining its role as a ruling party or a majority Party in the sense of liberal democratic politics. The Party thus rules indirectly and exerts political influences through multiple constitutional mechanisms. There are, for example, Party groups with state institutions, which can internalize Party control without invoking external political intervention; the vast majority of the state officials, including deputies of the congresses, government officials, judges, or office holders in general, are all Party members and are first and foremost loyal to the Party subject to Party's disciplines (He, 2012; Qin and Ye, 2017). The essence of the socialist constitutionalist argument is that the Party should respect, obey by, and govern through constitutional arrangements. The Party's leadership may be perpetual as the Constitution demands, but the Party leads as a ruling Party according to the constitutional order that it creates.

Chinese scholars offered a possibility of rule of law in its thinnest formulation (Fu and Zhai, 2018). With the promotion of socialist legality in China, juridification has gained momentum and a layer of legal rules has been put in place to cover most areas of the economic, social, and political spheres with varying degrees of strength and credibility. The layer of legal rules could be thicker, more effective and arguably credible in spheres such as routine commercial transactions and personal injuries as governed by contract and tort laws; whereas it is thinner in other areas such as corporate governance, protection of property rights and criminal punishment, where legal rules can be substantially weakened; while it may be entirely superficial and little more than cosmetic window-dressing in politically sensitive areas of the constitutional law or public law in general (Fu, 2019). Essentially, legal rules appear to govern on the surface to be controlled by political forces at a deeper structural level. The Party controls through a combination of processes chiefly including appointing law-makers and judges among others, making legal rules, supervising implementation processes, or guiding individual decision-making from behind the back curtain whenever necessary (Fu, 2013; He, 2012). In this way, law replaces and at the same time legitimizes the political process.

The dynamics between shallow rules and the deeper structure in Party-state relations makes China a fertile case for comparative studies in political constitutionalism. Walter Bagehot's study of the English constitution (1963) is particularly useful in explaining the Party and law's relevance to each other in China. For Bagehot, the English constitutional order operates on two layers. On the shallow layer, "signified" institutions, such as the Monarchy and the House of Lords, perform ceremonial functions and capture the public attention and imagination (ibid: 61). On a deeper layer, "efficient" institutions, composed of modern state organs such as the Cabinet and the House of Commons, exert real political control (ibid: 66-69). In the English case, the dignified institutions create a degree of legitimacy and also are able to hide the exercise of real powers from public purview, with varying degrees of success. The signified and efficient institutions work seamlessly in forming a "dual government" structure that offers both effective and legitimate governance (ibid: 263).

In the Chinese case, the Party, facing political decay and economic collapse, suffered a massive legitimacy crisis in the post-cultural revolution era, and law and legal reform offered a partial

remedy for it to regain the right and credibility to rule. Like Bagehots' dignified institution, law in China serves ceremonial public functions to create public confidence in the Party's ability to adopt and to change, and through legal languages, court rituals and a liberal imagination, to divert critical attention of the people away from the Party that wields real power in the shadows. This is of course not to say that law is a puppet of the Party to be used merely to cover up and legitimize the Party, or that the Party is entirely invisible from the critical gaze. The salient point is that the dignified institutions, i.e. legal institutions and discourses in China, interact with the Party organs, the Chinese equivalent to the efficient institutions, in a dynamic and frequently contradictory relationship in producing legitimate and effective governance. Law is not mere window dressing and legal institutions make, and are seen to have made, significant decisions, while the Party surfaces from time to time from the deeper structure to assert open and direct control.¹

The second conceptualization is compatible with the dual state theory as originally put forward by Fraenkel (2010; see also Meierhenrich, 2018) in the conceptual framework of Schmitt (2005; see also Dyzenhaus, 1997). If Bagehot's conceptualization can be used to envisage a scenario where law occupies a shallow horizontal plain with the Party rules operating at a deeper structural level, the dual state theory envisages horizontal compartmentalization - a design that allows the sovereign power to silence law, crowd legal institutions and to govern extra-legally in some fields, while allowing a legal autonomy to exist in other areas (Dyzenhaus, 1997). Legality always has the potential to tie the hands of the Party with the result that the Party may find it necessary to rule directly and hands-on without any legal constraints. Under the dual state conceptualization, the Party may be able to withdraw to the background in some areas and to rule as a ruling Party normally does, in the Bagehot sense, but may manifest itself openly and forcefully in other politically sensitive areas to control and lead directly without subject to any legal constraints.

In Fraenkel's terms, there are therefore two systems operating in parallel and in competition: a normal state where a thick set of legal rules and constituted authorities are put in place to govern forcefully and effectively; and a prerogative state that reins according to its own logic, following its own rules, and aiming at different objectives. But as Fraenkel puts it, there is not a bright line between legal norms and exceptional measures to resist the over-reaching of a prerogative state. In the Chinese case, the Party is the sovereignty that decides what is political and therefore exceptional, in which legal rules would be displaced. The Party oversees the operation of two fuzzy regimes: it is hands-on in countering certain political threats and in doing so excludes or at least significantly marginalizes the legal order while at the same allowing a degree of autonomy in the legal system in regulating routine social and economic affairs (Fu, 2019).

The third conceptualization is an emergence of an omnipresent Party that openly declares its supremacy over law. In contrast, under the conceptualizations of either Bagehot or Fraenkel, while the Party leads and controls it never openly challenges the supremacy of law in China and

¹ For an examination of the deep state in operation in Thailand, see Merieau (2016) and Wilson (2012).

has also managed to avoid answering the question of whom is superior in the relationship between the law and the Party. The Party has denounced this question as a false one to create an ambiguity. The answer is well understood but never answered clearly (Qin and Ye, 2017). With enhanced confidence in the Chinese system, the Party becomes more assertive in proclaiming its right to rule directly. Yet if the Party's direct rule is effective, successful, and legitimate, then the obvious corollary is that it should shed its underground mentality and rule in the bright sunshine instead of lingering in the shadows. After all, a Constitution is about the distribution of political power and the Party, with all its power, is at the heart of the Chinese constitutional order and deserves serious recognition. Scholars on political constitutionalism have long articulated the political foundation of the Chinese constitution (Jiang, 2012; Backer, 2009; Backer and Wang, 2014) which demands the elevation of the legal status of the Party.

The Party is the law in the sense that, first, the Party provides the political foundation of the Constitutional order and thus is an indispensable part of the Chinese system; second, Party rules have a normative power beyond the Party itself and are of general application just as state legal rules. Conceptualizing the constitutional order in this way, the Charter of the Party and that of the State collapse and Party rules and state rules merge into one integrated whole, equally applicable to the entire society, notwithstanding their difference in origins and forms (Backer, 2009; Fu and Zhai, 2018; Horsley, 2019).

Party and Anti-corruption in Comparative Perspective

Towards the end of anti-corruption enforcement, authoritarian leaders ordinarily make anti-corruption legislation, create legal institutions that they control, and then motivate legal institutions for the purpose of proper enforcement. In the former Communist USSR or present day Vietnam, the Party controls a specialist anti-corruption agency located in the procuratorate. In Taiwan, the politics of anti-corruption was played out in the unique institution of the Control Yuan, one of the five powers within the constitutional framework (Chen, 2018). In Singapore, the People's Action Party (PAP) designed an effective anti-corruption system, centered at the Corrupt Practices Investigation Bureau (CPIB) and in turn deriving legitimacy from its effective operation, whereby it delegates anti-corruption investigation powers to a statutory entity without any direct involvement. Similarly, Hong Kong was well-known for its anti-corruption success story under colonial rule which can be attributed to the independent and powerful anti-corruption agency, the ICAC (Manion, 2004).

China followed a similar institutional design in the first decade of its legal reforms (1979-1989). In the immediate aftermath of the Cultural Revolution, which brought China to the brink of economic and political collapse, the Party simultaneously took two measures to rejuvenate and at the same time to discipline the Party. In a crucial move, the Party reconstituted the disciplinary inspection committee, a Party committee responsible for Party's disciplinary matters, by enhancing its independence within the Party hierarchy and its powers in relation to other Party organs with the intention of creating an authoritative mechanism to impose on Party members more ideological consistency and better discipline (Fu, 2013; Li, 2019b).

At the same time, the state also established a distinct legal framework for anti-corruption criminal law enforcement. Following Soviet practice (Partlett, 2018; Partlett and Ip, 2016), the procuratorate was given the power to investigate corruption-related offences committed by state functionaries in their official capacity, including embezzlement, misuse of public funds and bribe-taking. The procuratorate also institutes criminal prosecutions and exercises an overall supervisory jurisdiction over state organs as the Constitution mandates. Following the Soviet design and consistent with practice in other socialist countries, China created a highly vertical anti-corruption system embedded in state supervisory organs. In an otherwise highly fragmented political system with entrenched local autonomy to promote local economies (Lieberthal, 2003), a centralized anti-corruption body located in the procuratorate has the potential to rein in run-away bureaucrats during the volatile economic transition.

In 1986 with the creation of an Ombudsman institution, the Ministry of Supervision, China developed a tripartite system for anti-corruption prevention and operation with the CDI monitoring and disciplining Party members, the Ministry of Supervision handling complaints against civil servants without Party affiliation, and the procuratorate investigating and prosecuting *all* corruption related criminal offences. It was a law-centred design that gave the procuratorate a monopoly over criminal investigation (Li, 2019b).

The procuratorate of course operates within China's political system. While it had a degree of autonomy in law enforcement, it was under Party's tight control. The degree of autonomy the procuratorate enjoyed in anti-corruption enforcement depended on the type of case, the rank of the individual officials under investigation and a general negotiation between the Party authorities at different levels with the procuratorate system. For instance, the procuratorate never had the power to initiate investigation of a Party official above a certain rank without direct authorization from the Party leadership. In general, the procuratorate operated on the surface and had control over a shallow layer of cases while the Party extended its control through its own political accountability mechanism at a deeper level (Fu, 2017; Li, 2019b; Li and Wang, 2019).

The tripartite system described above collapsed in the aftermath of the 1989 protests and the subsequent crackdown. As Chinese economic reforms deepened in the 1980s, corruption became widespread triggering a significant level of public protest. The 1989 anti-corruption movement eventually morphed into a large democratic-occupation movement triggering one of the greatest political crises that the Party has ever faced. In response to a perceived failure of the tripartite enforcement design, the Party revoked the legal experiment in part and re-asserted direct control in anti-corruption coordination and operation. Realizing that the procuratorate on its own would not be able to (and indeed would not be allowed to) play the leading role in anti-corruption enforcement, the Party set up its own anti-corruption body (ibid).

First, the Party absorbed the Ministry of Supervision in 1993. While Ministry was allowed to continue in name, it was effectively merged into the Party's disciplinary system, a typical CCP tactic in which the same team of personnel effectively wears two hats. The Ministry became a

permanent junior partner of the CCDI with the Minister serving as its deputy secretary to symbolize the Ministry's subordinate status to the Party. Second, the Party played the procuratorate's anti-corruption role in two ways. First, it effectively usurped the jurisdictions over the investigation of major corruption offences, i.e. the offences committed by officials above a certain rank and those that were regarded as "big cases" (Li, 2019b).

The practical change to the procuratorate by taking away "big cases" may be less significant than it appeared at first glance. Recall that the procuratorate never had the power to initiate the criminal investigation of an official above a certain rank unless approval was obtained by the Party committee at the same level. Thus, the requirement for prior approval of the Party and the fragmentation between horizontal Party control and vertical procuratorate accountability had significantly reduced the effectiveness and credibility of the procuratorate investigation from the outset. What was given to the procuratorate legally was soon taken away by political machinations. The Party's decision to move the jurisdiction of investigating senior officials out of the office of the procuratorate and transfer it to the CDI system was a response to that anomaly (Li, 2019a).

Second, in addition to its usurpation of the jurisdiction over big cases, the CDI also assumed an overall leadership with respect to the procuratorate and its investigation, including referring cases to the procuratorate for investigation, seconding procuratorate manpower to CDIs to assist the Party's investigation; giving instructions to the procuratorate in performing duties and creating a complicated relationship of complementarity, competition and conflict between the CDI and the procuratorate (Li and Wang, 2019).

The Party also created extensive criminal law powers without legislative authorization of course. Indeed, having developed an exclusive jurisdiction over certain cases, it became necessary for the CDIs to possess the same investigative powers that the procuratorates had, including the power to detain for six months, search and seizure, interrogation, etc. The power of *shuanggui*, that is the power to order a Party member to report at a specific place and at a specific time to answer questions to the satisfaction of the CDI, was tantamount to detention in all but name. Initially the term of detention was near indefinite and was later reduced to six months, with more rules and procedures put in place to rein in abuses (Fu, 2017; Sapio, 2008). The only difference between CDIs and the procuratorate was that the former had no legal or external accountability, whatsoever.

Yet, the Party kept the procuratorate's anti-corruption organ intact and worked with it. With the reduced jurisdiction of the procuratorate, the tripartite system was significantly modified but not dismantled. What emerged in the aftermath of the 1989 crackdown and re-designing of the anti-corruption architecture was the dual system with a relatively clear separation of powers but also a high degree of integration in anti-corruption work. While the Party retained the leading role, the procuratorate remained a separate institution with its own mission and responsibility. Indeed, its work had become regularized, professionalized and institutionalized over the years largely to due to the existential threat posed by the CDIs, culminating in the

creation of an Anti-Corruption Authority (反貪污賄賂局) within the procuratorate (Li, 2019b).

A separate institution, a professional identity, and a need to distinguish itself from the CDIs made the procuratorate more rule-bound. There was political domination, but there was also competition and even resistance against the encroachment of the Party. The fragmentation of power between the two anti-corruption bodies, the lack of coordination and occasional competition, created anxiety and incentives for further concentration of power and the eventual rise of the supervision system (Fu, 2013, 2017; Li and Wang, 2019).

The National Supervision Commission (NSC)

The NSC addresses many of the concerns that the dual system faced. There is first of all a fragmentation concern resulting from the separation of power and a subsequent coordination difficulty. Unity of power has become a code word in China's political system since the rise of Xi Jinping and has driven Chinese political and constitutional reform from 2013. The dropping of the two term limit for state presidency is said to create a genuine unity of three powers: State presidency, Chairman of the military commission, and the Party's General Secretary, all now centralized in the hands of a single person without a term limit (Lin, 2019). The Party has created a series of small groups within the Party system to facilitate and transcend the Party's political control, bypassing formal institutions and with Xi himself in charge of most of the leading groups (Solinger, 2018). The leading groups have since been upgraded into Commissions, supposedly to have a higher degree of permanence and legitimacy. Through the creation of an extra-constitutional system, a range of diverse institutions are brought into a common political framework with the Party at center and with Xi as the well-known "core" (Horsley, 2019). With the Party penetrating further into the state constitutional structure, the state organs are increasingly absorbed into the Party's political machinery, further collapsing the fragile distinction between the Party and the state. In the recent reform, for example, China witnessed an unprecedented spate of taking over of state organs by the Party: the Organization Ministry took over the State Administration of Civil Services; Propaganda Ministry took over the press and film management in the State Administration of Press, Broadcasting and Television; the Central Party School took over the State Administration Institute; the United Front took over State Ethnic Affairs Commission, State Religion Administration, and Overseas Chinese Affairs; and the list goes on.²

The State Supervision Commission is created against this political background.³ The NSC's establishment certainly creates a unity of power by merging most, if not all, anti-corruption

² Plan for the State Council Institutional Reform, http://www.gov.cn/guowuyuan/2018-03/17/content_5275116.htm.

³ For a comprehensive survey of the supervision system, see Xinhua Net, "Proactively Exploring the Practice, Forming Valuable Experiences, the National Supervisory System Has Made Solid Achievements – A Survey of the Pilots in the National Supervision System Reform 积极探索实践 形成宝贵经验 国家监察体制改革试点工作取得实效——国家监察体制改革试点工作综述).

http://www.xinhuanet.com/2017-11/05/c_1121908387.htm

organs into a single entity, most importantly to surgically move the entire Anti-Corruption Authority of the procuratorate to the NSC to form a genuine investigative arm, significantly enhancing the enforcement capacity of the NSC at the grassroots level. In all the official speeches justifying the new supervision system, the key message is the need to concentrate anti-corruption power into a strong fist.

The tripartite structure that was formed in the earlier years of the post-Mao reforms reflected a separation of powers in different anti-corruption organs and the withdrawal of the Party into the background (Fu, 2017). When corruption escalated towards the late 1980s and anti-corruption became politicized with public anger converting into street protests, the Party replaced the tripartite structure with a dual system in which the Party's disciplinary inspection committee played a core function. However, the dual state design was also characterized by a fragmented, inconsistent and contradictory approach that occasionally bordered on chaos. Given the competition between the CDI and the procuratorate in anti-corruption investigations, a merger of some sorts between the two institutions was expected, although the particular shape that the merger was to take was still not clear. The CCDI itself was open-minded about the need for the institutionalization and normalization of anti-corruption work and the importance of both legality and legitimacy.

When the proposal for the NSC was announced it came as a surprise. Instead of an entity with a degree of autonomy to capture and internalize politics, the NSC effectively captured the ACA and the CCDI then acquired the NSC (Li, 2019a), virtually reducing the NSC into the role of an internal but junior partner of the CCDI. The NSC is defined first and foremost as a "political organ" subsuming under the CCDI. For that reason, the NSC does not have a Party group as any organ state organ would be bound to have because it is a Party organ (Shi, 2018). With all its constitutionality and legitimacy, the NSC is no more than a subordinate entity existing within the CDI structure with 100% absorption into the Party apparatus. For example, a member of the Standing Committee of the Politburo, Zhao Leji, is the Secretary of the CCDI. Yang Xiaodu is the founding Commissioner of the NSC, but Yang is simultaneously the first deputy secretary of the CCDI, replicating the old tripartite design in which the Minister of Supervision was the Deputy Secretary in the CCDI. The structural subordination of the NSC to the CCDI is not repeated at the provincial level, where the same individuals serve as CDI Secretary and the Commissioner of the Supervision Commission. The CDI and the supervision system share the same offices, same personnel, same legal powers and even the same websites, with the CDI leadership and supremacy openly displayed.

Another feature of the unity of power is extensive central control over the provincial level supervision commissions (SCs), largely reinforcing and legalizing the existing CCDI practices in which CCDI officials are parachuted to provinces to lead the provincial disciplinary inspection committees. Among the 31 Commissioners, 14 had worked at the CCDI and among them 11 were directly assigned by the CCDI. The SSL created as vertical accountability system, while commission leadership team is nominally appointed by the respective local people's congress and its standing committees, the commissions are accountable directly to the commission at the next higher level (Article 10, National Supervision Law).

Within the unity of power, the Party sits at the pinnacle and is decisively the acquiring and controlling party. While formal accountability may exist in the case of the NSC as will be discussed below, the Party has not concealed the NSC's subsidiary position in relation to the leadership role of the CCDI. The creation of the NSC has thus collapsed the distinction between law and politics, between criminal offences and political obedience, and between the NSC and the CCDI, allowing the Party to enjoy extraordinary power in anti-corruption enforcement and inner Party discipline and also a degree of legality, as discussed below.

Second, there is a legality concern. The dual system with the Party exercising significant law enforcement power, has a clear legality deficit. The CDI system wielded extensive criminal law powers without any constitutional justification or legal authorization, and the Party was hard-pressed to justify its power and fended off criticisms from lawyers and others. In China's international cooperation on anti-corruption, the name of the CCDI and the difficulties in explaining it to foreign institutions were embarrassment to Chinese officials. The creation of the NSC, through constitutional amendment and legislation, is expected to provide much-needed legality, which in turn legalizes and solidifies Party's anti-corruption mechanisms.

The enactment of the National Supervision Law comprised a series of well-planned stages. The Party hoped for the creation of a unified anti-corruption organ that is politically reliable, legally grounded and effective. Legislative implementation followed political instructions in respect of both the timetable and road map.⁴ On 25 December 2016, the Standing Committee of the NPC made a Decision to authorize a supervision commission on a pilot basis in Beijing, Shanxi and Zhejiang respectively.⁵ According to the 2016 Decision, the supervision commission would involve the amalgamation of three organs: the supervision department, corruption prevention authority - an entity created to fulfill China's commitment to the UN Convention against Corruption (UNCAC) - and the ACA of the procuratorate at the same respective level. The status of the Party's CDI was not mentioned in the Decision. According to the Decision, supervision commissions would be set up at the county/district level and above and the People's Congress at the respective level would appoint the chair of the Commission, while the Standing Committee appoints deputy directors and other members of the commission. During the pilot period, national laws that were incompatible with the new supervisory procedures, including the criminal procedural law, were suspended from operation. Based on the pilot, on 4 November 2017 the Standing Committee of the NPC promulgated another Decision to expand the supervision commission nation-wide modelled entirely on the pilot experiments.

Between the 2016 and 2017 Decisions, a fierce academic debate took place among constitutional law specialists and criminal procedural law specialists in which scholars unsatisfied with the shape of the forthcoming National Supervision Law voiced concerns and tried to steer the legislative direction (Buckley, 2017; Horsley, 2018; Lin, 2019). While

⁴ Li Jianguo, Vice Chair, Standing Committee of the 12th National People's Congress, *Explanations of the PRC State Supervision Law 9Draft*) at the First Plenary Session of the 13th National People's Congress on 13 March 2018. http://www.npc.gov.cn/npc/xinwen/2018-03/14/content_2048551.htm.

⁵ http://www.npc.gov.cn/npc/xinwen/sywx/2016-12/25/content_2006117.htm

constitutional scholars focused on the lack of constitutional authorization of the pilot insisting on a constitutional amendment before implementation of the supervision system, criminal law procedural scholars focused their attention sharply on the powers of detention outside of the criminal process and the lack of legal representation in the investigative process.

On 11 March 2018, the NPC amended the Constitution to establish the State Supervision Commission,⁶ as constitutional scholars have demanded. The NSC forms a new constitutional power under the NPC.⁷ On 23 March 2018, the NPC enacted the State Supervision Law.⁸ The law confirms the leadership of the Party over anti-corruption work and establishes the NSC for the purpose of “creating a centralized, unitary, authoritative and highly efficient supervisory system with Chinese characteristics” (article 2). It exercises jurisdiction over “individuals performing a public duty” (公职人员) in the Communist Party and other parties and state organs; and organs that are entrusted by a state organ to manage public affairs; managerial members in SOEs, public educational entities, research institutes, cultural, medical and sports entities, and mass organizations, with a typical Chinese catch-all clause of “any other individuals performing a public duty” (Article 15). The NSL confirms the power of the NPC and its Standing Committee and the local congresses and standing Committees in appointing the chair, deputy chairs and members at the respective levels (Chapter 2); mechanisms for international cooperation (chapter 6); and powers (chapter 4), procedures (chapter 5), and accountability mechanisms (chapter 7) of the supervision commission.

Finally, there is the continuity concern. The NSC is built on the preexisting system of the dual state design (Fu, 2017; Li, 2019a) just like the dual state conceptualization was based on and derived from the shallow/deep state and Party relationship. While the centralization of power in the NSC and the direct role of the Party breaks some new ground and represents a significant departure from the tripartite design, it is more a demonstration of institutional flexibility and resilience than institutional decay or destruction. After all, there is little in the NSC that is truly innovative and provocative in its actual anti-corruption design. Investigators may put on different uniform, follow different protocols, and even obey different rules and procedures, however, the objectives of the supervision system and the larger political context in which they operate remain largely the same.

Does the legislative reform carefully designed to meet the legality challenge break any new ground? Is the NSC more legitimate, credible and effective given that fact that the Party continues to loom large in the shadows? This paper argues that the veil of legality that the NSC creates is too thin to hide the presence of the CDI and is too weak to shield the Party from a legality and legitimacy challenge. Having incorporated the ACA of the procuratorate and removed all the procedural requirements that were previously in place, the NSC and the CCDI behind it are actually less credible than the tripartite system. For many of their critics, the legality that the NSL provides is tainted and such tainted legality can hardly legitimize the new

⁶ <https://npcobserver.com/2018/03/11/translation-2018-amendment-to-the-p-r-c-constitution/>.

⁷ They are executive power of the State Council, the supervisory power of the State Supervision Commission, judicial power of the Supreme People’s Court, and procuratorial power of the Supreme People’s Procuratorate.

⁸ http://www.npc.gov.cn/npc/xinwen/2018-03/21/content_2052362.htm.

regime. The objectives of the NSC are internally contradictory because they confound law enforcement with Party discipline and the commission's power is unnecessary, unreasonable and disproportionate when the NSL is placed in a larger constitutional and legal framework. In the end, instead of signaling the enhanced level of legality and triumph of law, the creation of the NSC represents the taking-over of law by the Party and supremacy of the Party's logic over state law, as elaborated below.

What is precarious about the NSC? At a foundation level, it creates a closed system and the only accountability mechanism is the legislative endorsement of core personnel. However, once a congress appoints the principal officers in the commission, the commission (controlled by the Party) starts to operate entirely on itself and there is no leverage or entry-point through which the congress can exert any oversight. The lack of proper categorization of the NSC is precisely the constitutional difficulty the NSC faces: is it an organ of criminal investigation given its anti-corruption investigative power and responsibilities? Or is it an executive organ given its explicit function in handling complaints and corruption prevention, education and international cooperation? If it were a criminal investigation organ, the NSC's operation, or at least a significant part of it, would in principle be subject to the control of regular criminal procedures. If it were an executive power its decisions would again in principle be subject to judicial review.

To the surprise of most commentators, it became clear during the early deliberations that the NSC would not be subject to any regular legal or judicial controls during the investigative process. The NSC, just like the CCDI it endeavors to legalize, will be a kingdom unto itself. This was the position taken at the very beginning, the only remaining question being how to justify it. Eventually, the justification offered is that the NSC is a "political organ", as mentioned above, and, as a political organ, it is accountable to the congress, but otherwise bears no other legal responsibility and exists outside any accountability mechanisms.

The positioning as a political organ is consequential. First, the supervisory process, broadly defined to include education and prevention on the one hand and complaints, investigation and taking disciplinary action on the other follows principally a political logic, i.e. a combination of political expedience, public satisfaction, and legality. The process involves legal enforcement but legal enforcement constitutes part, even if it is a minor part of that process. Inside the supervisory system, the norms applying are the political ones as made and interpreted by the Party; and former procurators joining the supervision commission are expected to familiarize themselves with the Party's disciplinary rules and procedures (Li and Wang, 2019). Indeed, the supervision commission at each level is dominated by CDI personnel and former procuratorial investigators have largely been marginalized and are invisible in the commissions' leadership structure. The core leadership team in the Commission at different levels tracks that of the CDI at the respective levels, with little contribution from those transferred from the procuratorates. The Directors in the provincial supervision commissions and the Secretaries of the provincial CDI are the same persons of the respective provinces. The size of a provincial supervision committee varies between 8-11 persons composed of director, deputy directors and members. Among the 303 individuals in the provincial commissions, the vast majority came from the the

CDIs of the respective provinces, and only 25 of them came from the procuratorate background.⁹

The supervisory process is decisively more political than legal. Significantly, it is political considerations that determine what cases should be kept inside the system for internal disciplinary proceedings and when a case should be referred for criminal prosecution. Given a clear intention of the Party to shift from punishment that defined the anti-corruption work from 2013-2018, to prevention, and given that the commission, or the CDI behind it, is the sole gatekeeper with little external supervision, it is likely that most cases would be kept inside the system than referred to prosecution and, consequently, there will be a substantial drop in the number of criminal prosecutions in coming years.

Second, the emphasis on NSC's political nature boils down to the scope of the powers that the commission can exercise without legal accountability. Against the demand of all legal scholars, the supervisory system has retained all the power that the Party CDI system has. On one hand, *shuanggui* has mutated into *liuzhi* and survived the legalization test and is now given a legal footing. Indeed, the infrastructure of the previous regime remains intact - suspects are detained in the same facilities, according to same procedures and interrogated by more or less the same officers (Li and Wang, 2019).

On the other, no lawyers are to be allowed throughout the entire investigative process and are accessible only after a case is referred for prosecution. The supervisory procedure, as the Party insists, is political and therefore extra-legal in the normal sense. This extraordinary power is used not because corruption is a serious national threat to China's economic and political stability – nominal legal accountability exists for other political offences such as secessionist advocacy, terrorist and subversive threats against the state. Ultimately, the Party is more than a ruling party, and corruption investigation is regarded as an internal affair (Backer and Wang). Above the law, the Party can build solid internal procedures that will be compatible to if not stronger than the regular legal process, but the political process cannot be subject to any external intervention, legal or otherwise.

Finally, there is the risk that the power of supervision commissions will expand far beyond the civil servants and reach out to fields that are far behind corruption. Upon its creation, the NSC has established an expansive criminal jurisdiction for itself to cover 88 types of criminal offences that are committed by civil servants and those who exercise leadership and managerial positions in the State owned enterprises and public authorities, broadly defined to include hospitals, schools and self-regulatory agencies. In case of dual offences in which a person is subject to NSC jurisdiction and police jurisdiction, the supervision system has the

⁹ Author's own calculation based on official websites of the respective provincial supervision commissions/disciplinary inspection committees.

priority.¹⁰ Clearly, the supervision commission sees itself as the guardian of public interest asserting its power aggressively to sideline other state organs. The future interaction between the NSC as a political organ and the rest of the legal system and the interfacing between the exceptional supervision system and the normal legal process in China's dual state structure is a fertile ground for future research.

Conclusion: Anti-corruption in Party-State

Since regime type has a significant impact on both the pattern of corruption and anti-corruption enforcement, the Party state, like other authoritarian states, develops its own pattern of anti-corruption enforcement, as the Chinese trajectory shows. First of all, anticorruption is a particularly powerful legitimizing tool if its authoritarian leaders have the resolve and the ability to overcome internal political hurdles. Globally, authoritarian states in general are perceived to be more corrupt than their democratic counterparts and also encounter more entrenched resistance in their anticorruption endeavors. Effective investigation and prosecution, an independent judiciary, a vibrant civil society and a fierce watchdog media are often regarded as indispensable institutions providing critical support for effective anticorruption enforcement that are often lacking in authoritarian states (Rose-Ackerman and Palifka, 2016). As such, authoritarians rely nearly principally on centralized political power and Machiavelian maneuvering in anti-corruption enforcement. The anti-corruption roadmap in China since 1979 shows that propensity of political centralization and the marginalization of legal institutions (Li, 2019b).

Second, anticorruption campaigns, if managed properly, can produce high returns for authoritarian leaders. While serving multiple moral, political and legal functions, successful anti-corruption initiatives can also bring political triumphs by removing the leader's political foes from power, bringing his allies and supporters to power, reinforcing the leader's credibility among the general public and international community. Anti-corruption provides an entry to power and also offers a legitimizing legal edifice for political cleansing. In China, Xi Jinping has achieved these goals during the first five years of his terms by launching a ruthless and systematic campaign and NSC reform is expected to allow to solidify, legalize and entrench his power (Fu, 2016; Lin, 2019; Zhang and Ginsburg, 2018; Zhu and Zhang, 2017).

Finally, anticorruption in authoritarian states requires the concentration of political power and in turn reinforces authoritarianism. The political nature of corruption means that the campaign is not started with law enforcement and will not end there either. In that sense, corruption is

¹⁰ National Supervision Commission, Jurisdictional Rules of the National Supervision Commission (Provisional) 《国家监察委员会管辖规定》（试行）(16 April 2018). <https://zhuanlan.zhihu.com/p/70106488>.

often not a technical violation of law but part of a larger challenge to the Party's authority and anticorruption is part of larger political crackdown to discipline Party members, punish political dissent, limit social activism and reinforce political conformity and loyalty. The NSC's mandate has clearly gone beyond legal enforcement and is extended to political discipline and loyalty. The anti-corruption campaign and the creation of the NSC in particular legitimize and institutionalize the Party's control over the state, in a cascading manner reaching the fabric of the society and economy (Fu, 2016).

Anti-corruption campaigns coincide with measures to tighten control over civil society organizations, limit freedom of expression in the media, and crackdown on political dissent. As such, the crackdown is likely to spread to other risks and challenges that are not related corruption, including challenging forces in civil society, social media, the legal profession, religious groups and NGOs in general. After all, the Party is using anticorruption to expunge its enemies broadly defined as anyone who shows a degree of disloyalty and present some risk as perceived by the Party. In that sense, the NSC has spearheaded a renewed effort of the Party to reclaim the state, the economy and the society. The Party has a prerogative kingdom, powerful, resourceful, and unaccountable to any state law. Its control is most intensive in areas at the authoritarian core, it has the potential to reach to the wide social and economic spheres, even though the Party may intentionally limit its presence in those areas. In conclusion, while the creation of a powerful anti-corruption institution and a successful anti-corruption enforcement may entrench political accountability in democratic states, it makes authoritarian states stronger.

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