

# *Ordering Power under the Party: A Relational Approach to Law and Politics in China*

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## **Abstract**

Existing scholarship of China's legal institutions has primarily focused on individual institutions, such as the court, the police, or the legal profession. This article proposes a relational approach to the study of political-legal institutions in China. To understand the order and exercise of power by various political-legal institutions, the relational approach emphasizes the spatial positions of actors or institutions (the police, courts, lawyers, etc.) within the broader political-legal system and their mutual interactions. We suggest that the changing ideas of the Chinese leadership about the role of law as an instrument of governance have shaped the relations between various legal and political institutions. The interactions of these political-legal institutions (e.g. the “iron triangle” of the police, the court and the procuracy) further reveal the dynamics of power relations at work.

**Keywords:** China, Communist Party, the state, legal institutions, relational approach

## 1. INTRODUCTION

Law and politics are non-identical twins. Terms such as a state of “rule of law” and a “policing” or “law and order” regime<sup>1</sup> depict two contrasting images of the relationship between law and politics: one with strong and independent judicial institutions and another all-powerful coercive state apparatus. Yet these two ideal-typical images are often mixed in empirical cases, including the case of China. Since the People's Republic of China (PRC) was founded in 1949, politics and law have been closely tied together under the administrative umbrella of “political-legal system” (*zhengfa xitong* 政法系统). While it remains to be seen in which direction China is heading in the early twenty-first century, the internal dynamics of its political-legal

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1. Cheesman (2015).

institutions have profound implications for not only the pressing issues of social stability and economic growth, but also the regime legitimacy of the Chinese Communist Party (CCP).

This introductory essay for the special issue on law and politics in China adopts a relational approach to examine the interactions among China's political-legal institutions that have profound yet underexplored impact on everyday law enforcement and broader state–society relations. While the relational approach is a rising theoretical perspective in sociology and related disciplines,<sup>2</sup> it has not yet been extended to the study of Chinese politics or Chinese law. To think about law and politics relationally means to replace the dominant causal perspective in social science with a relational perspective that sees legal and political institutions not as “things,” but as “dynamic, unfolding relations.”<sup>3</sup> Like field theory and ecological theory in sociology,<sup>4</sup> it seeks to locate political and legal actors and institutions in a social space (e.g. China's political-legal system) and examine how each actor or institution (the police, courts, lawyers, etc.) is constituted by their spatial positions as well as their mutual interactions.<sup>5</sup> Our focus here is on how power is ordered in China's political-legal system, yet we see this order as driven not only by status competition or power struggle, as field theorists often emphasize,<sup>6</sup> but also by the interdependence, co-ordination, and exchange among the political-legal actors and institutions.

China's domestic politics is characterized by its high degree of fragmentation both horizontally and vertically.<sup>7</sup> The different ways in which and the extent to which political-legal institutions are shaped and constrained by each other and by other institutions (e.g. the party) warrant a spatial and interactional analysis of their mutual relations. China's political-legal system is composed of five major institutions: the police, the procuracy, the court, the justice bureau and the party's political-legal committee (*zhengfawei* 政法委). In terms of formal institutional design, the court and the procuracy are judicial organs. The police and the justice bureau are parts of the administrative state. The political-legal committee is a party organ that coordinates the other four state institutions. Accordingly, the internal dynamics of the political-legal system is closely tied to the relationship between the party and the government, as well as between the judiciary and the executive branch.

Our relational approach to political and legal institutions emphasizes the changing relations among the five major political-legal institutions in China, especially their spatial positions and mutual interactions. Existing scholarship has primarily focused on one or two individual institutions within the political-legal system, such as the court, the police, or the legal profession.<sup>8</sup> However, China's political-legal institutions are interdependent actors in the social space of the political-legal system. For courts to meaningfully exercise power, other political-legal institutions are to be co-ordinated and conflicts often arise from it. The relational approach begins the analysis from the general principles that govern the relations between Chinese politics and Chinese law, and then examines how those principles manifest in the particular interactions among the five major political-legal institutions. This approach does not regard the political-legal

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2. Bourdieu & Wacquant (1992); Emirbayer (1997); Dépelteau (2018).
  3. Emirbayer, *supra* note 2, p. 281.
  4. Bourdieu (1987); Abbott (2005); Liu & Wu (2016); Fligstein & McAdam (2012).
  5. Liu & Wu, *supra*, note 4.
  6. Bourdieu, *supra* note 4; Bourdieu & Wacquant, *supra* note 2.
  7. Lieberthal & Oksenberg (1988); Lieberthal & Lampton (1992); Mertha (2009).
  8. Trevaske (2010); Stern (2013); Liu & Halliday (2016); Ng & He (2017).

institutions as predetermined social structures<sup>9</sup> but sees them as socially constructed through mutual interactions over time.<sup>10</sup> In other words, we seek to describe and explain the spatial and temporal evolution of China's political-legal relations, as well as the consequences that these relations hold for the choices of individual actors and structural outcomes in the legal system.

In this essay, we first situate the law in the political order by examining the evolving views and practices from the CCP top leadership about the role of law in governance and the party rule. These views and practices shape the institutional design of the political-legal system and contextualize the daily operation of individual actors. At the same time, different agencies are expected to expand their authority whenever possible, as suggested by the literature on organizational rationality.<sup>11</sup> In the subsequent sections, we specify the institutional design of and relational development among the police, the procuracy, the court, and the profession of lawyers. Finally, we examine the relational dynamics of local practices and discuss the implications of our relational approach for future studies on politics and law in China.

## 2. RELATIONS AT THE TOP: SITUATING LAW IN CHINA'S POLITICAL ORDER

Law is a major component of China's political order, albeit an instrumental and subordinate one. In this section, we address two dimensions of situating law in the political order in contemporary China: (1) the role of law vis-à-vis the power of the party and the state and (2) the political significance of the legislature for the party rule. In particular, we examine how the CCP top leadership considers the function and significance of law for the regime and governance. Whereas the political significance of the legislature has increased over time, we find an evolving interpretation about the instrumentality of law for the party-state and the changing importance of legislature in the party's rule. In the 1960s and 1970s, law was mostly marginalized and used occasionally and explicitly to assist class and political struggle. Starting from the 1980s, law has been understood as an important regulatory tool for economic development, a political institution to ensure the party rule, and a governing principle to be followed by the public administration. Nevertheless, law has never been a prominent regulatory tool, a dominant political institution, or the sole governing principle for the Chinese state or the CCP. Administrative regulations, moral and normative standards, and public opinions have always stood next to laws throughout the process of China's political transformation since 1949.

### 2.1 *The Instrumentality of Law*

Based on a textual analysis of the historical evolution of the PRC Constitutions, the CCP's Party Charters, and Party Congress Reports, we identify three sets of ideas over time among China's top leadership about the role of law vis-à-vis the party and the state. First, regarding the instrumentality of law, its particular governing function of facilitating and regulating economic development was recognized only after the 1982 Constitution. Second, regarding the relationship between law and the state, the guiding principles formulated since 1982 exhibit inconsistency regarding judicial independence from administrative interference.

9. Bourdieu, *supra* note 4.

10. Abbott (2016); Liu & Halliday, *supra* note 4.

11. Meyer (1987).

Third, on the relationship between law and the party, the current formal principles indicate tensions and contradictions between the power of the party and that of the law.

First, by tracing the National Party Congress Reports since the establishment of the PRC in 1949,<sup>12</sup> we find that the idea about the specific utility of law for the Communist Party has changed from protecting citizens in the 1950s, assisting class and anti-Gang of Four struggles between the 1960s and 1970s, to facilitating and regulating market activities in the 1980s and onward. The Eighth Party Congress Report delivered by Liu Shaoqi in 1956, the first since 1949, emphasized that the role of law was to protect the civil rights of lawful citizens.<sup>13</sup> This interpretation of law radically changed 13 years later during the Ninth Party Congress in 1969, when Lin Biao stated that law was to help punish those “active counter-revolutionaries against whom there is conclusive evidence of crimes such as murder, arson or poisoning.”<sup>14</sup> After virtually no mention of law in the Tenth Party Congress Report in 1973, Hua Guofeng delivered a report in 1977 during the 11<sup>th</sup> Party Congress. In this report, he suggested that “socialist rule of law” (*shehui zhuyi fazhi* 社会主义法制) was to be strengthened together with the public security work, in order to eliminate the remaining pernicious influence from the Gang of Four.<sup>15</sup> Similarly to Lin Biao’s report during the Cultural Revolution, law was understood as an instrument to serve political struggle within the regime. Starting from the 12<sup>th</sup> Party Congress in 1982, the function of law has been primarily claimed as serving the overall development goals. Whereas the term “socialist rule of law” was used several times in the 12<sup>th</sup> Party Congress Report delivered by Hu Yaobang, the only time law was connected to a specific policy area was to assist, together with administrative regulations, the development of market.<sup>16</sup> Similar ideas about the role of law in assisting and regulating economic development continued into the 14<sup>th</sup> Party Congress in 1992 and the 15<sup>th</sup> in 1997, when law was only associated with economic development.<sup>17</sup>

12. For a list of Party Congress Reports, see <http://cpc.people.com.cn/GB/64162/64168/index.html> (accessed 10 December 2018).

13. “It is necessary, in order to maintain a normal social life and to foster social production, that everyone in the country should understand and be convinced that as long as he does not violate the laws, his civil rights are guaranteed and will suffer no encroachment by any organization or any individual. Should his civil rights be unlawfully encroached upon, the state will certainly intervene” (为了正常的社会生活和社会生产的利益, 必须使全国每一个人都明了并且确信, 只要他没有违反法律, 他的公民权利就是有保障的, 他就不会受到任何机关和任何人的侵犯; 如果有人非法地侵犯他, 国家就必然出来加以干涉).

14. “As for bad people or suspects ferreted out through investigation in the movement for purifying the class ranks, the policy of ‘killing none and not arresting most’ should be applied to all except the active counter-revolutionaries against whom there is conclusive evidence of crimes such as murder, arson or poisoning, and who should be dealt with in accordance with the law” (对于在清理阶级队伍的运动中查出的坏人或可疑分子, 除确有证据的杀人、放火、放毒等现行反革命分子, 应当依法处理外, 都应当采取“一个不杀、大部不抓”的政策).

15. “Strengthen public security work and Socialist rule of law. Eliminate the pernicious influence of these absurdities spread by the Gang of Four” (要加强公安工作和社会主义法制, 要彻底清除“四人帮”颠倒敌我的种种谬论的流毒).

16. “For these types of small commodities, firms can arrange their production according to the market demand. Our government should pass regulations, laws, strengthen the administration of industry and commerce, and assist them to solve the supply issue of some important raw materials” (这类小商品, 可以让企业根据市场供求的变化灵活地自行安排生产, 国家应当通过政策法令和工商行政工作加强管理, 并协助它们解决某些重要原材料的供应).

17. The 14<sup>th</sup> Congress Report: “The Party has put forward the strategic principle of ‘grasping two links at the same time.’ ... that we should develop the economy and at the same time strengthen democracy and the legal system” (党提出一系列“两手抓”的战略方针, 强调...一手抓经济建设, 一手抓民主法制). The 15<sup>th</sup> Congress Report: “A series of laws and statutes commensurate with the development of a socialist market economy were enacted, and law enforcement and the judiciary work were strengthened” (制定了一系列适应社会主义市场经济发展的法律和法规, 加强了执法和司法工作).

Second, regarding the relationship between law and the state, judicial independence was suggested as early as in the 1954 Constitution, yet such a status became ambiguous when law was listed as one of a few principles of governance in later Party Congress Reports and Party Charters. According to the Eighth Party Congress Report made by Liu Shaoqi in 1956, “all state organs must abide by the law.”<sup>18</sup> According to both versions of the PRC Constitution in 1954 (Article 78) and 1982 (Article 126), courts exercise independence in legal ruling.<sup>19</sup> However, starting from the 16<sup>th</sup> Party Congress in 2002, law became but one of the governing principles among others. The term “rule by law” or “law-based governance” (*yifa zhiguo* 依法治国), which suggests that the government’s activities should be under the scrutiny of the law, appeared in the 16<sup>th</sup> Party Congress. Yet “applying both law-based and moral-based governance” (*shixing yifa zhiguo he yide zhiguo xiang jiehe* 实行依法治国和以德治国相结合) was also added in the 2002 Party Charter during the 16<sup>th</sup> Congress. During the 17<sup>th</sup> Party Congress, when Hu Jintao proposed the implementation of “law-based governance” as a “basic strategy” (*jiben fanglue* 基本方略), an “organic integration” (*youji tongyi* 有机统一) of party leadership, people’s will, and law-based governance was also emphasized. This expression of law as the last of the three principles of governance has continued to the latest 19<sup>th</sup> Party Congress and Party Charter.

Third, regarding the relationship between law and the party, continuous and varying efforts have been made to situate law-based governance within the political need of party leadership and legitimate claim of the People’s Republic since 1982. Starting from the Eighth Party Congress in 1956 until the 19<sup>th</sup> Party Congress in 2017, each Party Congress passed a new or modified Party Charter.<sup>20</sup> The first time that “party activities” were promulgated to be “within the limits permitted by the constitution and the laws of the state”<sup>21</sup> was in the 1982 Charter. While this statement remains in place to this date, various modifications have been made about the position of law vis-à-vis the party. “Improving the Socialist legal system with Chinese characteristics” (*wanshan zhongguo tese shehui zhuyi falv tixi* 完善中国特色社会主义法律体系) was added during the 18<sup>th</sup> Party Congress to contextualize the law-based governance into the development of Socialism under the leadership of the CCP. The latest 19<sup>th</sup> Party Congress highlighted the party’s leading role above “government, military, society, and education” (*dang, zheng, jun, min, xue*, 党政军民学).<sup>22</sup> These nuanced phrases suggest a changing understanding within the top leadership about the relationship between

18. “All state organs must strictly abide by the law, and our security departments, procurator’s offices and courts must conscientiously carry out the system of division of function and mutual supervision in legal affairs” (我们的一切国家机关都必须严格地遵守法律(而我们的公安机关、检察机关和法院, 必须贯彻执行法制方面的分工负责和互相制约的制度).

19. One subtle difference between the two Constitutions lies in the specification about subverting agents in 1982 Constitution. According to the 1954 Constitution, the court only follows the law (Art. 78) (人民法院独立进行审判, 只服从法律). According to the 1982 Constitution, courts’ independent adjudication is according to the law and should not be interfered by administrative organs, social associations or individuals (Art. 126) (人民法院依照法律规定独立行使审判权, 不受行政机关、社会团体和个人的干涉).

20. For a list of party charters, see <http://www.12371.cn/special/dzxd/> (accessed 26 March 2019).

21. “The Party must conduct its activities within the limits permitted by the Constitution and the laws of the state. It must see to it that the legislative, judicial and administrative organs of the state and the economic, cultural and people’s organizations work actively and with initiative, independently, responsibly and in harmony” (党必须在宪法和法律的范围内活动。党必须保证国家的立法、司法、行政机关, 经济、文化组织和人民团体积极主动地、独立负责地、协调一致地工作)。

22. For an informative comparison of party charter between 2017 and 2012 versions, please see [http://news.dwnews.com/china/news/2017-10-29/60020303\\_all.html](http://news.dwnews.com/china/news/2017-10-29/60020303_all.html) (accessed 10 December 2018).

the party's supreme role in politics and society and law's limited confining function over the party.

In sum, the brief examination of the CCP's official documents suggests that, for the party, law is an important instrument in facilitating economic development and regulating economic activities since 1982. The function of law in governing society has been acknowledged since 2002, but it has not been regarded as essential for the CCP. Rather, morality and public opinion concurrently serve as two alternatives to law for the purpose of governance. As a result, administrative agencies may ignore the law on the basis of party policy, morality, public opinion, or other political considerations. Finally, the extent to which law may constrain the party's power is ambiguous. When the party's power is defined as above all other actors and institutions in politics and society, how it may be caged by law in practice is debatable. Conversely, Chinese law remains a "bird in a cage" manipulated by the party two decades after Stanley B. Lubman published his seminal book with the same title.<sup>23</sup>

## 2.2 *The Political Significance of the Legislature*

In addition to the textual analysis of how law has been featured in the CCP's party documents, another indicator of how law relates to the party-state is the relationship between the National People's Congress (NPC), the national legislative body, and the Politburo Standing Committee (PBSC), the most powerful organ of the party regime. Whereas the power of legal codes is weak in confining government and party activities in China, what is the political significance of law-making for the party rule? The changing configuration of the PBSC is an informative indicator. The NPC is the highest legislative body in China, though it is often dismissed as a "rubber-stamp" congress by outside observers. The inclusion of its leader in the PBSC represents not only an empowered legislature, but also the perceived importance of formal laws for the party regime. Therefore, we trace whether the Chairman of the NPC Standing Committee is a member of the PBSC and, if he is a PBSC member,<sup>24</sup> whether he concurrently holds other more powerful positions.

It was not until the 14<sup>th</sup> Congress in 1992 that a full-time NPC chairman became a regular member of the PBSC. Between 1956 and 1992, the NPC Chairmen oscillated in and out of the PBSC and sometimes concurrently held other more powerful positions, which indicates the nominal presence but actual weak power or political insignificance of the NPC. The continuous presence of a full-time NPC chairman in the PBSC started from 1992 and continued to this date. This finding about an empowered NPC in the early 1990s is consistent with the existing literature on the increasing power of the legislature vis-à-vis the party. For example, scholars note that there has been the "constrained enhancement" of the NPC power since the 1990s,<sup>25</sup> the eroding party control over the law-making process since 1991,<sup>26</sup> local legislatures' increasing representation of local interests vis-à-vis the party's interests since the 1990s,<sup>27</sup> and the new challenges in the 1990s posed by provincial people's congresses against party nominated leaders.<sup>28</sup>

23. Lubman (1999).

24. No woman to date has held the position of chairmanship at the NPC.

25. Truex (2016).

26. Tanner (1999).

27. Kamo & Takeuchi (2013).



The guiding ideas about the role of law in the political order and the top institutional arrangement in regard to the legislature have important implications on the design, practices, and interactions of various political-legal institutions in China. First, in the 1980s and 1990s, law was embraced as a regulatory tool for economic activities and many new statutes were promulgated in the economic sphere. Meanwhile, as we demonstrate in the next sections, the demand for administrators and enforcers of law enabled the shifting balance of power among the police, the procuracy, and the court, as well as the development of lawyers as a profession.

Second, since the 1990s, the NPC and local people's congresses have become a visible political actor, which led to at least a partial legalization of governance, characterized by increasing legal codes regulating the behaviour of government organs and other public institutions, as well as greater legislative supervision over government officials and courts. The codification of the PRC Judges Law, Procurators Law, Police Law, and Law on Prisons, and the development of the "individual case supervision" (*ge'an jian du* 个案监督) system by the legislature manifest this process, though their effectiveness in practice remains questionable.

Third, in the mid- to late 2000s, as moral teaching and people's will became important governing principles for the party, the political-legal system responded by emphasizing "grand mediation" (*da tiaojie* 大调解) in civil dispute resolution and "ordinary people's feelings" (*renmin qunzhong de ganjue* 人民群众的感觉) in criminal trials—a trend that Minzner calls "China's turn against law."<sup>29</sup> Although this regressive turn was halted after the fall of Bo Xilai and Zhou Yongkang in 2012–13 (see next section for details), the Chinese legal system is still struggling to maintain its autonomy and manoeuvre among the multiple standards of morality, people's will, and, most importantly, the will of the CCP leadership.

When law is an important principle of governance but coexists with other principles, including morality, people's will, and party leadership, how does the party integrate these standards in practice? Delia Lin and Susan Trevaskes's article in this special issue embarks on the important law–morality amalgam adopted by the CCP regime and Xi Jinping administration. They examine the ideational and historical origins of strong and virtuous leadership, the practical integration between morality and party leadership in the construction of "socialist rule of law" (*shehui zhuyi fazhi* 社会主义法制), and the implementation of this law–morality amalgam by Chinese courts. They trace party documents since 2013 and focus on the published "typical cases" (*dianxing an'li* 典型案例) issued in 2015 by the Supreme People's Court (SPC), to demonstrate the practical integration between "Core Socialist Values" (*shehui zhuyi hexin jiazhi guan* 社会主义核心价值观) and legal standards, as well as the supremacy of the party rule. These typical cases include a summary of the case, the court orders and judgment, and the exemplary value implication. In the section concerning exemplary value implications, the court explains how the principles of Core Socialist Values were applied in handling the case. In the section of court orders and judgment, it can be observed that, for Core Socialist Values to be promoted by courts, court orders often involve co-operation from other government authorities and rural traditional authorities.

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28. Manion (2008).

29. Minzner (2011).

### 3. RELATIONS INSIDE THE STATE: THE POLICE, THE PROCURACY, AND THE COURT

Under the leadership of the CCP's political-legal committee (PLC), the police, the procuracy, and the court form an "iron triangle" in China's legal system, especially in the area of criminal justice. The 1979 PRC Criminal Procedure Law (CPL), China's first procedural code since 1949, defined the relationship between these three agencies as "mutual coordination, mutual constraint" (*huxiang xietiao, huxiang zhiyue* 互相协调, 互相制约, Article 5), which has been maintained as a general principle to this date despite two revisions of the CPL in 1996 and 2012.<sup>30</sup> In practice, however, co-ordination, rather than constraint, is often observed among the three agencies. This co-ordinating–constraining balance is a delicate and dynamic one. It is affected by the changing guidelines about the role of law from the central government and the CCP, by the interactive everyday practices of all three agencies, and by the organizational power of the PLC that sits on top of all three agencies.

#### 3.1 *Evolving Guidelines and Shifting Power Balance*

The relative power of the Supreme People's Procuracy (SPP), the SPC, and the Ministry of Public Security (MPS) has gone through changes since the 1980s. In this special issue, Li Ling's article traces how evolving spatial position of the SPC, as well as SPP, in relative to other government ministries and within the party-state. On paper, the SPP and SPC are central-level judicial organs and higher in administrative ranks than the MPS, which is a ministry under the State Council. In practice, however, the police is arguably the dominant actor in both criminal justice and non-criminal forms of coercive social control (e.g. administrative detention<sup>31</sup>). Within the "iron triangle," both the procuracy and the court often play subordinate roles in the criminal process. A widely known joke among legal professionals characterizes the division of labour in China's criminal process as follows: "Police officers cook the dishes, procurators bring the dishes, and judges eat the dishes."

However, there has been a gradual shift in the balance of power within the "iron triangle" that echoes the changing guidelines formed by the CCP leadership discussed in the section above. Chinese judges and procurators in the early twenty-first century are not as passive as they used to be in the 1980s, when "strike hard" (*yan da* 严打) campaigns and the "severe and swift" (*congzhong congkuai* 从重从快) principle dominated China's criminal justice system.<sup>32</sup> From the 1990s, when the practice of using laws to regulate public institutions and government administrations began to take place, both the court and the procuracy experienced a rapid process of professionalization, during which army veterans were gradually replaced by legally trained judges and procurators. Professionalization not only greatly strengthened the legal expertise of the two judicial organs, but also significantly increased their social distances from the police in the social space of Chinese law. Sharing no educational background with most police officers, new generations of Chinese judges and procurators started to see more in common with each other and with lawyers.

30. Liu & Halliday (2009); Liu & Halliday, *supra* note 8.

31. Biddulph (2007).

32. Trevaskes, *supra* note 8; Trevaskes (2006).



In the meantime, the institutional capacity of both the court and the procuracy was also expanded vis-à-vis the police. On one hand, the rise of civil and economic cases substantially reduced the share of criminal cases in judicial work. As reviewed in the previous section, since the early 1990s, the CCP leadership encouraged the use of laws to regulate and assist economic development. With China's double-digit economic growth, the number of civil and commercial cases filed in Chinese courts grew at a stunning speed.<sup>33</sup> This not only increased the courts' workload and personnel needs, but also made criminal cases a less central component of judicial work. On the other hand, the rising anti-corruption demand in the reform era gave the procuracy more autonomy from and power over the police. Instead of merely "bringing the dishes" to the court, procurators obtained the substantive power of investigation and arrest in corruption cases, as well as the procedural power to approve police arrests, through the 1996 CPL revision (Articles 18 and 59). By the early twenty-first century, both the court and the procuracy have become complex and multidivisional organizations, relatively autonomous from the police.

In the 2000s, however, when law, morality, and people's will were put together as the foundation of governance as discussed above, a series of populist policies, such as "grand mediation" in civil disputes and emphasizing "ordinary people's feelings" in criminal justice, were put in place in the 2000s. The grand mediation, for instance, combined judicial mediation by the court with administrative mediation by the local justice bureau and people's mediation by the neighbourhood or village committee. Such policies undermined the status and autonomy of Chinese courts and they were criticized by some legal scholars as "China's turn against law."<sup>34</sup>

### 3.2 *The Political-Legal Committee as the Supervising Coordinator*

The power balance within the "iron triangle" is also affected by the institutional design and practices of the supervising co-ordinator: the PLC. The more this co-ordinating party organ is empowered, the more co-ordination, instead of the checks and balances, among the police, the procuracy, and the court is observed. Furthermore, if the police chief occupies the leadership position of the PLC, then the dominant power of the police vis-à-vis the court and the procuracy is expected to prevail in practice.

The party agency assigned to supervise and co-ordinate political-legal matters can exercise control in various ways. Li Ling's meticulous study of the institutional evolution of party control over courts in this special issue serves as an excellent guide to map the evolution of the supervising coordinative body of the political-legal system. Her study demonstrates that the PLC and its local branches exercise control by instructing courts on certain judicial policies and on judicial outcomes of specific cases.

The PLC gained the most institutional power when a full-time central PLC secretary became a member of the PBSC in the 16<sup>th</sup> (2002–07) and 17<sup>th</sup> (2007–12) Party Congresses.<sup>35</sup> In the context of rising populist policies and emphasis on social harmony, Zhou Yongkang,

33. Liu (2006).

34. Minzner, *supra* note 29.

35. During the 13<sup>th</sup> Party Congress, Qiao Shi, a PBSC member, concurrently headed the PLC, the party disciplinary committee, and the party secretariat.

then China's political-legal tsar, empowered the police within the "iron triangle" by allowing and encouraging the public security bureau chief to assume the concurrent position of the PLC secretary at the provincial and local levels. This institutional arrangement put the police in a dominance position over both the court and the procuracy despite the widening social distances between the police and the other two agencies.

After Zhou's political career ended with corruption charges in 2013, the common practice of the police chief assuming the concurrent position of the PLC secretary has been changed—now PLC secretaries at the local levels can come from the police, the procuracy, or the court, and they usually do not hold concurrent positions in any of the three agencies. At the national level, the central PLC secretary was also removed from the Politburo Standing Committee. This institutional change was part of the broader legal reform outlined in the Communiqué of its Fourth Plenum Session of the 18<sup>th</sup> Party Congress in October 2014, and continued in the 19<sup>th</sup> Party Congress in 2017.

The influence of the PLC on the power dynamics inside the "iron triangle" is not always a result of top-down mandates. To ensure political correctness, for example, the judicial and law-enforcement agencies may proactively seek advice from the PLC. More specifically, in every level of the Chinese judicial and procuratorial systems, there are an adjudication committee (*shenpan weiyuanhui* 审判委员会) and a procuratorial committee (*jiancha weiyuanhui* 检察委员会) composed of the leaders of the court and the procuracy, respectively. These two committees make final decisions on all important and difficult cases (*zhongda yinan anjian* 重大疑难案件) in the legal process. As recent empirical studies have shown, the adjudication committee frequently consults the PLC and the higher-level court to ensure the political correctness of its decisions,<sup>36</sup> which runs the risk of becoming a "black hole of responsibility" in the judicial process.<sup>37</sup>

Overall, as China marched into the twenty-first century, the increasing importance of law to govern economic activities and the rising political significance of the legislature were accompanied by a changing power relation within the "iron triangle." The rise of civil and commercial cases, the professionalization of judges and procurators, and the increasing procedural constraints on the police have improved the autonomy of the court and the procuracy from the police.

However, the power balance of the three judicial and law-enforcement agencies is also shaped and bounded by the agenda and power of their supervisory bodies. In addition to the PLC, the newly established National Supervision Commission (*jiancha wei* 监察委) after the 19<sup>th</sup> Party Congress has added another layer to the complex bureaucratic structure of China's political-legal institutions. To what extent will the party's changing political-legal policies in the 2010s strengthen the court and the procuracy at the expense of the police? When the "iron triangle" becomes a "red rectangle" dominated by the party, how will the four state agencies' preferences be constituted and contested? That is likely to be the question for students of Chinese politics and Chinese law to ponder in the near future.

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36. Wang & Liu (2017).

37. He (2012b).

#### 4. RELATIONS OUTSIDE THE STATE: LAWYERS AND THE PARTY

Outside the state apparatus, the profession of lawyers stands between citizens and state power. Scholars have analyzed the relations between Chinese lawyers and the state in many ways. Michelson, for example, coins the concept of “political embeddedness” to describe the institutional or personal ties between lawyers and the state apparatus, especially the police, the procuracy, and the court.<sup>38</sup> He argues that lawyers who are politically embedded face less professional difficulty in their practice. Liu and Halliday further argue that lawyers’ political embeddedness is inversely associated with their political liberalism—that is, the liberal values towards the protection of basic legal freedoms, the growth of civil society, and the constraints on the abuse of state power.<sup>39</sup> Both Fu and Cullen<sup>40</sup> and Pils<sup>41</sup> focus on human rights lawyers and how the state persecutes them, while Stern positions activist lawyers in the context of China’s authoritarian legality.<sup>42</sup> To this date, however, few studies have gone beyond the state bureaucratic system to confront the relationship between lawyers and the party. That is precisely the task of this section.

The relationship between Chinese lawyers and the CCP has always been a difficult one, despite the changing status and roles of lawyers in China since 1949.<sup>43</sup> In contrast to the high percentage of party members among judges or procurators, only less than a third of Chinese lawyers are party members after the privatization of the legal profession in the 1990s.<sup>44</sup> As outsiders of the party-state apparatus, lawyers as a profession have very limited channels of political participation—only a small number of lawyers are NPC delegates, and it is rare for any lawyer to get a position in the state bureaucracy.<sup>45</sup> Although some Chinese courts have recently begun to recruit judges from lawyers, the number of lawyers who give up their law practice to serve in the judiciary remains tiny. Nonetheless, the CCP’s control over the Chinese bar has gone beyond its control over lawyers who are party members. Through the justice bureaus and bar associations at all administrative levels, the party has begun to exercise influence on the entire legal profession in the 2010s<sup>46</sup> and sanction those lawyers who pursue activism against the regime.<sup>47</sup>

After a brief period in the early to mid-1950s, when the Republican legal profession was restructured according to the Soviet model, the first unhappy encounter between lawyers and the party occurred during the Anti-Rightist Campaign in 1957. Lawyers as a profession were labelled “Rightists” and the profession was abolished altogether. For the next two decades, China did not have any practising lawyer and many older-generation lawyers experienced harsh persecution. This annihilation of lawyers from Chinese society was so complete that, when the legal profession was officially revived in 1980, there was a severe shortage of lawyers for the first several years of China’s reform era.

38. Michelson (2007).

39. Liu & Halliday, *supra* note 8; Liu & Halliday (2011).

40. Fu & Cullen (2008); Fu & Cullen (2011).

41. Pils (2015).

42. Stern (2017).

43. Liu, *supra* note 33.

44. Michelson, *supra* note 38; Liu (2011).

45. Michelson & Liu (2010).

46. McMorrow, Liu, & Van Rooij (2017).

47. Pils, *supra* note 41; Liu & Halliday, *supra* note 8; Stern, *supra* note 42; Fu (2018).

In the 1980s, Chinese lawyers were state employees working in legal advisory divisions (*falv guwen chu* 法律顾问处) following the Soviet model and, later, state-owned law firms. Although there are no reliable statistics on party membership among lawyers in that period, it is likely that the majority of lawyers were party members just like judges and procurators. However, the political status of lawyers was low and their capacity in the judicial process was limited. For example, under the 1979 PRC CPL, lawyers could only be involved in a criminal case seven days prior to trial (Article 110) after the police and procuracy had completed their investigation and prosecution. In other words, lawyers had never been part of the “iron triangle” of criminal justice in China, even when they were insiders of the state apparatus.

In the 1990s, when the top CCP leadership encouraged the use of law to assist and regulate market and economic activities, Chinese lawyers were gradually privatized from the state. Many new partnership law firms emerged across the country, and the majority of state-owned law firms had been reorganized into partnerships by the turn of the twenty-first century.<sup>48</sup> The increase in their social distance from the state had a double effect on Chinese lawyers. On one hand, they obtained more space for political mobilization against the party-state. From the early 2000s to the large-scale “709 Crackdown” on activist lawyers in 2015,<sup>49</sup> collective action among Chinese lawyers was observed in many areas of law such as human rights, labour rights, women’s rights, LGBT rights, and environmental protection.<sup>50</sup> On the other hand, lawyers were further marginalized in China’s political system as they lost the status of state employees and could not “eat the imperial rice” (*chi huang liang* 吃皇粮) anymore. The only official channel for lawyers to participate in Chinese politics was through the people’s Congress and the people’s political consultative conference, neither of which holds substantial power in the political system.

The rise of lawyer activism in the early twenty-first century<sup>51</sup> put the state authorities on high alert. The emphasis on party leadership in governance since the 2000s has been reflected in the regulation of lawyers. Since the late 2000s, the Ministry of Justice began to encourage law firms to set up party cells inside the firm. Dacheng, the largest Chinese law firm, even formed a party committee, as it had a large number of party members. After the “709 Crackdown” on activist lawyers in July 2015, during which more than 200 lawyers were taken in for questioning or detained,<sup>52</sup> the Chinese party-state further strengthened its control over the legal profession in several ways. First, the Ninth Amendment to the PRC Criminal Law (Article 309) banned a number of mobilizing techniques that activist lawyers adopted, such as posting on social media from the courtroom and strategically disturbing court order during trial. Second, despite the fact that only less than a third of Chinese lawyers are party members, the CCP set up a national-level party committee for the whole legal profession in 2017, which parallels the Ministry of Justice and the All-China Lawyers Association to form a dual regulatory structure by both the party and the state administration. Finally, justice bureaus expanded the sanctions on activist lawyers from actions to speeches. Since 2017,

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48. Michelson (2003).

49. Fu, *supra* note 47.

50. Fu & Cullen, *supra* note 40; Stern, *supra* note 8; Liu & Halliday, *supra* note 8; Halegua (2016).

51. Stern, *supra* note 8.; Pils, *supra* note 41; Liu, Liang, & Halliday (2014).

52. Fu, *supra* note 47; Liu & Halliday, *supra* note 8.

several lawyers have received licence suspensions or even been disbarred because of their politically incorrect social media posts.<sup>53</sup>

What about the vast majority of routine practitioners who do not participate in political mobilization? Although their personal safety and licence to practise are not under threat, the strengthening party control and the harsh repression on activist lawyers in recent years have had a chilling effect on every member of the Chinese legal profession. Even for corporate law firms in Beijing and Shanghai, loyalty to the party has become a priority for their survival and success. This can be observed from the fact that a number of senior partners in China's most elite law firms (e.g. King & Wood, Zhong Lun, and Dacheng) have assumed leadership positions in the state-controlled bar associations as well as the newly formed party committee for the legal profession. Political apathy is still an option for many ordinary lawyers, but the party's strong push for all lawyers to stay away from any form of political activism is evident.

However, the demographic change of Chinese lawyers renders the party-state's total control problematic. In 2000, China had approximately 120,000 lawyers, and this total number had tripled to about 365,000 lawyers by March 2018. For the past decade, there have been 20,000 to 30,000 new lawyers joining the bar every year, including some former judges and procurators who resigned from the judicial agencies due to the low salary and heavy workload.<sup>54</sup> The rising number of lawyers and the flow of legal professionals from the procuracy and the court to the bar could potentially pose challenges for the party's control over the legal profession in the future. Across the world, lawyers often play active roles in major political changes.<sup>55</sup> Chinese lawyers are not yet a major political force but, as long as they continue to thrive as a profession outside the state apparatus, they are likely to remain an untamed social group that worries not only corrupt judges, incompetent procurators, or abusive police officers, but the CCP itself.

## 5. LOCAL DISCRETION AND RELATIONAL POWER DYNAMICS

As we have shown above, the national guidelines about the role of law vis-à-vis other governance principles have changed notably over time. In addition, the political significance of the legislature has evolved gradually. Corresponding to these changes, we have observed a general shift in the balance of power within the "iron triangle" of the police, the procuracy, and the court, as well as the professionalization of lawyers and their continuous political struggles outside the state apparatus. Whereas the priorities of local political-legal work generally correspond to national policy shifts, local deviation and regional diversity widely exist because of contextual differences and discretionary power of local agents in China.<sup>56</sup> Therefore, the institutional practices of each enforcer or administrator of the law needs to be placed within local political relations in which they operate.

The existing scholarship on Chinese law has recognized local variations of individual legal institutions, particularly the court. For example, there are notable differences across localities in the level of judges' professionalism<sup>57</sup> and the availability of court funding.<sup>58</sup> These

53. Fu, *supra* note 47.

54. Zheng, Ai, & Liu (2017).

55. Halliday & Karpik (1997); Halliday, Karpik, & Feeley (2007); Halliday, Karpik, & Feeley (2012).

56. Chung (2000).

organizational attributes affect court activities. However, judicial activism manifested by innovative practices of some courts goes beyond the organizational features of one individual institution and invites questions about the broader political context in which these courts operate. For example, when courts selectively allocate appraisal power,<sup>59</sup> initiate new types of verdict,<sup>60</sup> and accept new cases,<sup>61</sup> which political-legal agencies and actors are affected or act as driving forces behind such practices?

We argue that all the relational factors discussed above affect the exercise of power by individual judicial and law-enforcement agencies. Outside of China, scholars have shown that the relationship between courts or judges and other actors affect court inaction or action even after they are empowered formally. The relationship between the procuracy and court, for example, affects the willingness and practice of court adjudication in regimes without consolidated democracy.<sup>62</sup> Conflicts of interest within the judicial system together with the availability of external support can also affect court decisions.<sup>63</sup>

In the case of China, some scholars have applied a relational approach to the study of courts. For example, practices of courts and judges can be affected by the competition of legitimacy between courts and active media,<sup>64</sup> by courts' vulnerability to public outcry,<sup>65</sup> and by courts' strategic interaction with legislative authorities<sup>66</sup> and local government administrations.<sup>67</sup> The empowerment of courts itself may be a result of courts' interactions with local bureaucracies and the procuracy, within the boundary preferred by local political elites.<sup>68</sup>

Based on this growing body of scholarship, we can identify a variety of political and social contexts that compose a relational web in which China's judiciary is embedded, such as other legal professionals, legislative authorities, government authorities, local PLCs, and other social forces such as the media. Some institutional contexts have their internal dynamics as well. For example, the fragmented authoritarianism model of Chinese politics<sup>69</sup> suggests that government agencies across administrative levels, localities, and issue areas have different interests and political goals. A few studies have also demonstrated regional variations in the power of local PLCs, the supervising co-ordinator of judicial institutions, and law-enforcement agencies. Formally, the PLC secretary can convene the court president, the chief procurator, and the police chief for a meeting if they cannot reach the consensus on a case with social, economic, or political significance.<sup>70</sup> In places with powerful PLCs, the secretaries in charge set the tone and principles in these meetings, and the three organizations co-

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57. He (2009a); He (2012a); Woo & Wang (2005).

58. Wang (2013); Gong (2004); Li (2010); He (2009b).

59. Lan (2008).

60. Yu (2014).

61. Kellogg (2007).

62. Popova (2012).

63. Tezcür (2009).

64. Liebman (2011).

65. Lan (2010).

66. Cho (2003).

67. He (2013).

68. Wang & Liang (2018).

69. Lieberthal & Oksenberg, *supra* note 7; Lieberthal & Lampton, *supra* note 7.

70. Zeng & Shi (2012).



ordinate their actions to implement the plan, which sometimes leads to wrongful convictions.<sup>71</sup> However, in other places, PLCs are too weak to gather members of legal apparatus together. Co-ordination has to be done through informal personal relations.<sup>72</sup>

## 6. CONCLUSION

In this introductory essay, we have outlined a relational approach to the study of political-legal institutions in China. This relational approach is necessitated by the evolving order of power relations between Chinese law and Chinese politics. First, the party's guiding ideas, over time, delimit the role of law as one of several principles of governance under the CCP leadership. Accordingly, a discussion about the role of law in China needs to be placed in a context of its relations to other competing governing principles, such as morality and people's will. Second, conforming to the changing governing principles, there has been a shifting balance of power among the police, the procuracy, and the court. Interactions among these organizations further shape the power dynamics of each institution vis-à-vis the others. Third, the profession of lawyers, as a collective actor driven concurrently by professional ethics, market competition, and political constraints, has witnessed simultaneously improved autonomy from the state, as well as continuous dependence on it. Furthermore, the CCP has strengthened its control over lawyers in recent years, especially in response to the rise of lawyer activism. Despite many boundary-spanning activities, legal institutions and actors in China remain bounded by the party-state. Finally, the power dynamics of local practices further call for a relational approach, especially a spatial or ecological analysis, to the study of the varying operations of political-legal institutions on the ground.

As suggested by Lin and Trevaskes in this special issue, the law–morality dialectic in China has long historical roots since the rise of Legalism and Confucianism during the Spring and Autumn and Warring States Periods (circa 770–221 BC). It is still debated by contemporary scholars and placed on the party-state's agenda of maintaining social order. The political environment under the Xi Jinping administration continues to evolve with conflicts, tensions, and speculations. On the one hand, the government launched a series of legal reforms since 2014 that encouraged legal professionalism and more judicial autonomy from local interests. Even though the CCP's control remains unchallenged,<sup>73</sup> these reforms have unsettled the power balance of China's political-legal institutions. On the other hand, under the mandate of stability maintenance,<sup>74</sup> there has been escalating repression of activist lawyers and other human rights activists,<sup>75</sup> as well as a tightening space for civil society.<sup>76</sup> Such conflicting realities demarcate the political environment of China's legal system into a “dual state”<sup>77</sup> structure and raise serious questions about the relative power of legal institutions in Chinese politics.

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71. Yan (2010).

72. Hou (2003).

73. Li (2015).

74. Biddulph, *supra* note 31.

75. Pils, *supra* note 41; Fu, *supra* note 47.

76. Fu & Distelhorst (2018).

77. Fraenkel (1941).

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