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ARTICLE

Anti-Corruption in a Party-State: Constitutional Implications of China's Supervisory Reform

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Abstract

The 2018 amendments to the People's Republic of China (PRC) Constitution saw the establishment of a system of supervisory commissions, which is a landmark development not only for anti-corruption, but also constitutional law in China. After providing an overview of the background and legal framework of the reform, this article discusses its constitutional implications from three perspectives. First, the reform alters the long-established state structure and creates interesting dynamics of institutional interactions among various branches of state structure. Second, it marks a reversal from the principle of 'party-state separation' and raises difficult issues of interface and transition between the party disciplinary system and the formal legal system. Finally, it legalises the previously extralegal practice of *shuanggui* ('double specifications') and affects the individual rights of those subject to investigation. The article concludes with some brief reflections on what this development indicates for the future of the rule of law in China, and highlights the potential for further research.

Introduction

At the first session of the 13th National People's Congress (NPC) in March 2018, the *1982 Constitution of the People's Republic of China* (Constitution) underwent its fifth and arguably most significant amendment to date. The removal of presidential term limits and the addition of President Xi Jinping's (President Xi) thought to the Preamble have garnered most media and public attention, while the explicit recognition of the principle of Party leadership in the main text of the Constitution[1] is also an important development for Chinese constitutional law and theory. In terms of the actual structure and operation of the party-state apparatus, however, arguably the most far-reaching and fundamental change brought about by the constitutional amendment is the establishment of a completely new branch of state organs known as 'supervisory commissions', headed by the National Supervisory Commission (NSC), to handle supervisory and anti-corruption work, thereby altering the state structure which has remained largely unchanged all the way back to the first Constitution of 1954.

There are many different possible lenses through which these developments can be examined. Most obviously, it can be regarded as the culmination of President Xi's ferocious anti-corruption

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[1]Article 1 of the amended PRC Constitution now states that '[t]he leadership of the Communist Party of China is the defining feature of socialism with Chinese characteristics'. Party leadership was previously mentioned only in the Preamble but not the main text.

campaign and an attempt to institutionalise the success of the campaign by altering the current institutional framework to enhance the effectiveness of future anti-corruption efforts. Alternatively, the reform can also be viewed as part of the broader political trends of centralisation of power and re-assertion of Party leadership in state governance.

Meanwhile, there is another dimension to the supervisory reform which should not be overlooked, namely its implications for the People's Republic of China (PRC) constitutional law. Such implications could at least be explored on three different levels. At the highest, and most abstract level, a key feature of the supervisory reform is that the newly created supervisory commissions would operate jointly with the Party's discipline inspection system – an arrangement that would impact upon the existing theories and understandings of key issues such as party-state relationship, constitutionalism, and the rule of law in the PRC. At the institutional level, the creation of a separate and independent branch of supervisory organs – formally on equal footing with the executive government, court, and procuratorate but enjoying a close relationship with the party apparatus – would also alter the existing institutional balance of power and give rise to new issues as to the dynamics and interactions among various branches of state organs. Finally, at the individual level, the substantial power conferred on supervisory organs in handling corruption investigations, coupled with the legalisation of some formerly extralegal powers, could affect the individual rights of those who are subject to investigation.

While the supervisory reform has proved to be a contentious subject among legal scholars in mainland China and generated a large body of literature, there is limited discussion within the English literature devoted specifically to the constitutional implications of the reform. Nonetheless, scholars have begun to evaluate and situate the supervisory reform within the context of broader themes and developments in Chinese law. For instance, Taisu Zhang and Tom Ginsburg use the establishment of supervisory organs, alongside other aspects of the 2018 constitutional amendments and judicial reforms, as evidence to support their contention that China has experienced a turn towards legality under the President Xi.[2] Fu Hualing, on the other hand, traces the historical development of anti-corruption institutions leading up to the supervisory reform to illustrate the evolving relationship between the Party and the state and analyse how anti-corruption enforcement interacts with the authoritarian nature of the PRC regime.[3] These arguments demonstrate the potential significance of this important new development in informing and transforming our understanding of key issues in Chinese law and politics.

To assess and further develop these arguments, a proper understanding of the nature and implications of the supervisory reform is essential. This article attempts to contribute in this regard by providing an overview of the legal framework of the supervisory reform and a preliminary assessment of its implications for Chinese constitutional law. While the adoption of a legal-oriented approach entails an analysis centred primarily on the constitutional amendments and relevant legal instruments, it is important to not lose sight of the other perspectives mentioned earlier. It would hopefully become apparent throughout the discussion that the legal framework in which supervisory organs operate is necessarily shaped by the political context and motivations that underpin the reform; political and institutional perspectives play an important role in helping us understand why and how the supervisory reform has come about as well as to meaningfully predict its future trajectory. In addition, it is hoped that by drawing upon the extensive discussion in the Chinese literature on the subject, a more nuanced understanding on some of the finer details of the reform could be developed.

The remainder of this article proceeds as follows: the next section briefly explores the historical and political background for the reform, from the historical influences of imperial- and republican-era supervisory institutions to the recent anti-corruption campaign under President Xi. The following section provides an overview of the legal framework that has resulted in the creation

[2]Taisu Zhang & Tom Ginsburg, 'China's Turn Toward Law' (2019) 59 Virginia Law of International Law 306.

[3]Hualing Fu, 'Understanding the Evolving Relationship between the Party and the Law: The Case of China's National Supervisory Commission' (University of Hong Kong Faculty of Law Research Paper No 2020/072, 6 Dec 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3743636> accessed 22 Jun 2022.

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of supervisory organs, including the relevant articles in the 2018 constitutional amendment and the subsequently adopted Supervision Law. It then proceeds to examine the constitutional implications of the reform on each of the three levels mentioned above, discussing in turn its impact on (1) the formal state structure, (2) the relationship between the Party and the state, and (3) individual rights (focusing in particular on the legalisation of the controversial detention power of *shuanggui* (雙規, translated as 'double specifications'[4])). The final section concludes with a preliminary assessment of the reform's overall impact on the rule of law, and highlights the potential for further research on the subject.

Background of the Reform

This section briefly explores the background and underlying motivations that gave rise to the creation of the supervisory commission system. While the supervisory reform flows directly from the anti-corruption campaigns conducted under President Xi and can be regarded as an effort towards institutionalisation to address the limitations of the pre-existing anti-corruption mechanisms, it is possible to go further back in time to trace its origins to supervisory organs that had been established as part of the state apparatus throughout Chinese history.

Historical Background: Supervisory Organs in Chinese History

The tradition of creating designated offices to serve supervisory functions has a long pedigree in imperial China, dating back to the first centralised government established by the Qin dynasty. The principal officials in the Qin court (as followed by the subsequent Han dynasty) were the 'Three Lords and Nine Ministers' (三公九卿 *Sangong Jiuqing*). Under this system, the three top state officials were the Chancellor and the Grand Commandant, who presided over civil and military affairs respectively, and the *Yushi Dafu* (御史大夫, variably translated as 'Grandee Secretary' or 'Imperial Counselor'), who was regarded as a vice-chancellor and exercised the power of disciplinary supervision, including over the Chancellor himself and the Emperor's personal attendants.[5] As the political system evolved in the subsequent dynasties, the *Yushi* office became an increasingly powerful and specialised supervisory institution with comprehensive jurisdiction over imperial officials, and developed the practice of periodically dispatching individual officials to different localities for inspection. Supervisory organs took the name of *Yushitai* (御史台, translated as 'the Censorate') in the Sui and Tang dynasties. During the Yuan-Ming-Qing period, it was known as *Duchayuan* (督察院, translated as 'the Chief Surveillance Bureau'). The historian Charles Hucker characterised it as 'an autonomous agency in the top echelon of the central government, answerable only to the Emperor'.[6] The prominent influence of supervisory officials and their direct access to the Emperor earned them the title of 'the ears and eyes of the Son of Heaven'.[7]

The transition from the Qing dynasty to Republican China in the early 20th century ushered in a break from the imperial past and raised the important issue of designing a constitutional framework for the nascent republic. Revolutionary leader Sun Yat-sen rejected the wholesale transplant of the Western model of separation of (three) powers and, drawing upon the traditions of civil service examination and censorate in imperial China, proposed the addition of two new branches, the Examination Yuan and the Control Yuan (responsible for the selection of bureaucratic candidates and the monitoring of government officials respectively), thereby giving rise to the 'Five-Power Constitution' (五權憲法 *Wuquan Xianfa*). Sun found the Western model of vesting impeachment powers in the legislature unsatisfactory

[4]The rationale for this name is that an official under investigation is required to appear at a *specified* time and a *specified* place to face disciplinary investigation, pursuant to Article 28 of the CPC Regulations on Investigation of Cases by Discipline Inspection Organs.

[5]Wang Yü-ch'üan, 'An Outline of the Central Government of the Former Han Dynasty' (1949) 12 Harvard Journal of Asiatic Studies 134, 147–148.

[6]Charles O Hucker, *A Dictionary of Official Titles in Imperial China* (Stanford University Press 1985) 592.

[7]ibid. In ancient China, the Emperor was often referred to as 'the Son of Heaven' (天子 *tianzi*).

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since it gave rise to the possibility of abuse and legislative hegemony over the executive;[8] this therefore provided the rationale for the creation of an independent supervisory organ.

This was later put into practice in mainland China briefly and later in Taiwan by the Kuomintang regime, with the Control Yuan established as the highest supervisory organ of the state under the *1947 Republic of China Constitution*, exercising powers of consent, impeachment, censure and auditing.[9] Herbert Ma, who later became a grand justice of Taiwan's Judicial Yuan, considered the Control Yuan to be comparable to Western institutions like the Scandinavian Ombudsman and the upper house in bicameral parliamentary systems, but also emphasised that its historical roots and extensive powers distinguished it from its Western counterparts.[10] In modern times, the Control Yuan formally remains part of the Taiwanese constitutional system but has now largely become marginalised. There have been calls for its abolition or reform into a human rights institution,[11] and the latter proposal appears to have prevailed with the creation of the National Human Rights Commission in 2020.[12]

Much like the Republican Control Yuan, the supervisory commissions of the PRC shares similarities with other supervisory bodies but ultimately are unique institutions shaped by the Chinese historical and political context. While anti-corruption bodies in other jurisdictions, such as Hong Kong's Independent Commission Against Corruption or Singapore's Corrupt Practices Investigation Bureau, have certainly served as important models of institutional design,[13] the rich tradition of supervisory institutions throughout Chinese history serves as another source of inspiration from which lessons could be drawn.[14] There is ample room for further research in this regard for scholars of comparative law and legal history.

Political Background: Contemporary Anti-Corruption Campaigns

This is not the first time that state organs have been established to serve supervisory functions in the history of PRC. Upon its founding in 1949, the Committee of People's Control was established as part of the Government Administration Council (GAC), the predecessor of the State Council.[15] The Common Programme,[16] which served as the interim constitution for the nascent republic, also

[8]Eric C Ip, 'Building Constitutional Democracy on Oriental Foundations: An Anatomy of Sun Yat-sen's Constitutionalism' (2008) 9 Historia Constitucional 327, 333.

[9]Constitution of the Republic of China 1947, art 90.

[10]Herbert HP Ma, 'Chinese Control Yuan: An Independent Supervisory Organ of the State' [1963] Washington University Law Quarterly 401.

[11]See eg, Máté Szabó, 'Taiwan's Constitutional Dilemma: Transforming the Control Yuan into a 21st Century Ombuds Institution' (2017) 4 Taiwan Human Rights Journal 3; Ernest Caldwell, 'The Control Yuan and Human Rights in Taiwan: Towards the Development of a National Human Rights Institution?', in Jerome A Cohen, William P Alford & Chang-fa Lo (eds), *Taiwan and International Human Rights: A Story of Transformation* (Springer 2019).

[12]See the Organic Act of the Control Yuan National Human Rights Commission (8 Jan 2020).

[13]Wang Qishan, a Politburo Standing Committee member in charge of anti-corruption and disciplinary matters, reportedly praised the institutions of Hong Kong and Singapore to be worthy of reference at a meeting in August 2014: Wang Baomin & Qi Qiyuan, 'On the Establishment of National Supervisory Commission from the Perspective of Institutional Anti-Corruption' (2017) 3 Beijing Xingzheng Xueyuan Xuebao [Journal of Beijing Administration Institute] 17, 21.

[14]For discussions by Chinese scholars on the supervisory reform with reference to the historical experience of the *Yushi* system, see eg, Zhang Zhongwang & Ruan Xing, 'The Evolution, Characteristics and Modern Value of Supervision System in Ancient China' (2019) 180 Qinghai Minzu Daxue Xuebao [Journal of Qinghai Nationalities University] 151; Zhao Xiaogeng & Liu Yingxin, 'Reflections on the Traditional Chinese Imperial Supervision System' (2020) 73 Wuhan Daxue Xuebao (Zhexue Shehui Kexue Ban) [Wuhan University Journal (Philosophy & Social Science)] 150.

[15]Organic Law of the Central People's Government 1949, art 18. This was one of four committees established, alongside the Committees of Political and Legal Affairs, of Financial and Economic Affairs and of Cultural and Educational Affairs, which together with other ministries, commissions, administrations, etc, made up the GAC.

[16]The Common Program of The Chinese People's Political Consultative Conference, adopted by the First Plenary Session of the Chinese People's Political Consultative Conference on 29 September 1949. This served as the interim constitution for the newly established PRC regime until the first Constitution was adopted by the NPC in 1954.

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required people's supervisory organs to be set up at county- and municipal-level governments or above to supervise the performance of duties by state organs and public functionaries and to propose disciplinary actions for violation of duties.[17] Upon the passing of the first PRC Constitution in 1954, the People's Supervisory Commission became the Ministry of Supervision (MOS) under the new State Council, but it was subsequently abolished alongside the Ministry of Justice in 1959 as the fervour of Maoist political campaigns grew.[18]

In 1987, the MOS was revived and empowered to supervise administrative organs, public servants and other persons appointed by such organs under the *Administrative Supervision Law*.[19] Since 1993, the MOS system had been in 'joint office' with the system of Commission for Discipline Inspection (CDI), the Party's internal organs for enforcing party discipline headed by the Central Commission for Discipline Inspection (CCDI). Alongside the people's procuratorates which enjoyed the legal authority to investigate and prosecute corruption offences, this constituted a tripartite system for anti-corruption enforcement.[20] In the aftermath of the 1989 crackdown, the tripartite system collapsed and gradually developed into a dual-track system instead, with the Party's CDI reasserting political control and leadership over anti-corruption work. However, the legal mechanism operated by the procuratorates remained and arguably became strengthened through professionalisation and institutionalisation, most notably through the creation of the Anti-Corruption Authority (ACA) within procuratorates.[21]

A proper understanding of this pre-existing anti-corruption institutional framework is essential for explaining the motivation behind the supervisory reform. The coexistence of the two systems did not always create positive outcomes, as empirical studies have shown that the institutional interaction between the procuratorate and the CDI was characterised not only by complementarity and convergence, but also competition and conflict given the lack of clear division of power, their diverging *modus operandi*, as well as competing personal and institutional interests.[22] Under the dual-track system, '[e]ach mechanism has its own sphere of influences, institutional design, operating procedures, and political logic'.[23] Meanwhile, the Administrative Supervision Law under which the MOS operated had also been criticised for its limited coverage, creating only an internal supervisory mechanism within the government which excluded legislative and judicial personnel from its jurisdiction, as well as its inability to create effective remedies and procedures for administrative supervision.[24] In addition, apart from the three major institutions introduced above, numerous other state organs also have some role to play in anti-corruption work, including the National Bureau of Corruption Prevention under the State Council, the public security organ and the audit office. This has resulted in a further fragmentation of authority and difficulties in coordinating anti-corruption work, causing commentators to frequently invoke the expression 'nine dragons ruling the water' (九龍治水 *jiulong zhishui*).[25]

[17]Common Programme of the Chinese People's Political Consultative Conference 1949, art 19.

[18]See the Resolution Concerning the Abolition of the Ministry of Justice and the Ministry of Supervision, adopted at the 1st session of the 2nd National People's Congress (28 Apr 1959).

[19]Administrative Supervision Law 1997, art 2 (repealed).

[20]Fu, 'Understanding the Evolving Relationship' (n 3).

[21]ibid; Hualing Fu, 'China's Striking Anticorruption Adventure: A Political Journey towards the Rule of Law?', in Weitseng Chen (ed), *The Beijing Consensus? How China Has Changed Western Ideas of Law and Economic Development* (Cambridge University Press 2017).

[22]Li Li & Peng Wang, 'From Institutional Interaction to Institutional Integration: The National Supervisory Commission and China's New Anti-Corruption Model' (2019) 240 The China Quarterly 967.

[23]Fu, 'China's Striking Anticorruption Adventure' (n 21) 260.

[24]Ma Huaide, 'The Legislative Rationale and Focus of the National Supervision Law' (2017) 39 Huanqiu Falü Pinglun [Global Law Review] 5.

[25]The expression conveys the idea in Chinese mythology that there are many dragons, each ruling over a different body of water. See eg, 'CCDI Official Website: "Nine Dragons Ruling the Waters" in Anti-corruption Won't Do; We Must Clench Our Fists Tightly' (Sina News, 11 Nov 2017) <https://news.sina.cn/gn/2017-11-11/detail-ifynsait7299405.d.html?vt=4> accessed 30 Jul 2022.

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As a result, it has become necessary to consolidate these fragmented forces across the party-state apparatus into a more unified and effective anti-corruption body. This rationale underlying the supervisory reform is reflected in the official statement that the new supervisory system would be 'an authoritative, efficient oversight system with complete coverage under the Party's unified command'.[26]

The impetus for the reform was provided by the vigorous anti-corruption campaign initiated by President Xi since 2012, which has been notable for its long duration, high intensity, and extensive coverage, including the exposure of 'big tiger' senior officials like Zhou Yongkang.[27] Another particularly noteworthy feature of the campaign, however, is the emphasis on institutional and ideological changes aimed at creating a lasting impact on anti-corruption. The most significant changes involved the revitalisation and centralisation of the operation of the CDI system, primarily by strengthening the vertical leadership hierarchy[28] headed by the CCDI and utilising the Central Inspection Group to dispatch ad-hoc teams to provinces and ministries for inspection,[29] a mechanism which echoes the practice adopted by the imperial *Yushi* system. The anti-corruption effort could also be regarded as part of a broader ideological and disciplinary campaign, involving such measures as party education programmes and the 'Eight Regulations' (八項規定 *baxiang guiding*) which proscribed waste and extravagance.[30] The tremendous success and lasting impact of President Xi's campaign generated the momentum for a more comprehensive institutional reform for which the party disciplinary system comes to play a central role.

Overview of the Supervisory Reform

As the high tides of the anti-corruption campaign gradually subsided, a Central Leading Group on Deepening National Supervisory System Reform Pilot Work was established, headed by then-CCDI Secretary and Politburo Standing Committee member Wang Qishan. Pilot initiatives for establishing supervisory commissions were implemented in Beijing, Zhejiang, and Shanxi pursuant to an NPC Standing Committee Decision in 2016.[31] In late 2017, the first draft of the Supervision Law was released for public consultation and the pilot scheme was expanded across the nation,[32] and the new system of supervisory commissions was officially established through the 2018 constitutional amendments.

To put the supervisory reform in place, the 2018 constitutional amendment added a new Section 7 entitled 'Supervisory Commissions',[33] consisting of five articles, to Chapter III 'The Structure of the State' of the PRC Constitution. As constitutional provisions, they are relatively brief and lay

[26]Xi Jinping, 'Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era' (Report at the 19th National Congress of the Communist Party of China, Beijing, 18 Oct 2017) <https://www.mfa.gov.cn/ce/ceil/eng/zt/19thCPCNationalCongress/t1512045.htm> accessed 30 Jul 2022.

[27]See generally Melanie Manion, 'Taking China's anticorruption campaign seriously' (2016) 4 Economic and Political Studies 3.

[28]As is customary in the PRC, CDIs at the local level are subject to 'dual leadership': both vertical leadership by the CDI of the next higher level and horizontal leadership by the party committee at the same level. Such an institutional arrangement renders local CDIs susceptible to capture by the local party/government especially given the latter's substantial influence over the allocation of financial resources and personnel decisions.

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

[30]Ling Li, 'Politics of Anticorruption in China: Paradigm Change of the Party's Disciplinary Regime 2012–2017' (2019) 28 Journal of Contemporary China 47.

[31]Decision of the National People's Congress Standing Committee regarding the Initiation of National Supervisory System Reform Pilot Work in Beijing Municipality, Shanxi Province and Zhejiang Province (25 Dec 2016) <http://www.gov.cn/xinwen/2016-12/25/content_5152757.htm> accessed 3 Jul 2022.

[32]Decision of the National People's Congress Standing Committee regarding the Expansion of National Supervisory System Reform Pilot Work in Different Places of the Country (27 Nov 2016) <http://www.npc.gov.cn/zgrdw/npc/xinwen/2017-11/04/content_2031638.htm> accessed 3 Jul 2022.

[33]With the previous Section 7 on the People's Courts and the People's Procuratorates now becoming Section 8.

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down only the basic features of the supervisory system, leaving details to be worked out in a separate piece of legislation. Article 123 of the Constitution defines the nature of supervisory commissions as 'the supervisory organs of the State'. They are established at various local levels with the NSC as the highest supervisory organ.[34] Each commission consists of a chairman, several vice-chairmen, and members, with the chairman serving the same term of office as the people's congress at the corresponding level.[35] As is customary for party and states organs in China, both vertical and horizontal lines of authority were established: vertically, higher-level commissions direct the work of those at lower levels, with local commissions responsible to the those at the immediately higher level; horizontally, local commissions are also created by and responsible to the people's congress at the corresponding level.[36] Article 127 of the Constitution is an important provision laying down two fundamental principles: the independent exercise of supervisory power, as well as cooperation and mutual checks with judicial, procuratorial, and law enforcement organs, which would be discussed in greater detail below.

At the same NPC session, the *Supervision Law* was passed to provide a statutory framework for the constitution and operation of supervisory organs. The Supervision Law consists of nine chapters and 69 articles, making broad provisions on the general principles of supervisory work (Chapter I), supervisory organs and their functions (Chapter II), their scope and jurisdiction (Chapter III), powers (Chapter IV), and relevant procedures (Chapter V). The first two chapters largely reproduce and elaborate on the principles provided in the Constitution, while the remaining chapters provide important details on the operation of supervisory commissions. Notably, Chapter VII establishes mechanisms for supervision against supervisory organs and personnel themselves, suggesting that the vexed issue of 'who should police the police' has crossed the minds of those responsible for devising the supervisory system. Chapter VIII further provides for legal liability and remedies for violation of the Supervision Law, whether by supervisory organs and personnel or those subject to their supervision.

State Structure: New Institutional Dynamics

It is convenient to begin by examining the implications of the supervisory reform on the formal state structure as this is a relatively more straightforward subject, at least on paper, with much guidance already provided by the constitutional and legislative provisions. In the following sections, I discuss how the newly established supervisory commissions may affect and interact with the other branches of state organs.

Relationship with the People's Congress

The system of people's congress lies at the core of the PRC state structure, being the organ of supreme state power from which other branches of the state emanate. It is broadly equivalent to the legislatures of other political systems in fulfilling law-making, appointment and supervisory functions, and the plenary powers exercised by the NPC are in some sense comparable to the sovereign parliament in parliamentary systems. In addition, however, the people's congress system occupies a unique position within the PRC constitutional framework by providing a purported link between state power and the people, thereby substantiating the fundamental principles of people's democratic dictatorship and democratic centralism embodied in the Constitution. Hence, the NPC and local people's congresses, constituted through democratic elections and accountable to the

[34]PRC Constitution, arts 124–125.
[35]PRC Constitution, art 124.
[36]PRC Constitution, art 126.

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people, are stated to be the organs through which the people exercise state power.[37] All administrative, supervisory, judicial, and procuratorial organs are created by, responsible to, and overseen by the people's congresses.[38]

Like other branches of state power, supervisory organs are responsible to 'the organs of state power creating them', ie, the people's congresses at the corresponding level, in addition to being responsible to the supervisory commissions at the immediately higher level.[39] At the national level, this relationship is manifested in the power of the NPC and its standing committee to appoint and remove the Chairman and members of the NSC,[40] as well as to oversee its work.[41] At the same time, however, supervisory commissions are meant to have 'full coverage' (全面覆蓋 *quanmian fugai*)[42] in conducting supervision over all public officials, and this includes personnel of 'organs of people's congresses and their standing committees'.[43]

Whether such 'personnel' would include deputies of the NPC and local people's congresses is a difficult issue which has given rise to a lively debate among Chinese scholars, often drawing reference from the concept of parliamentary privilege in other political systems. On the one hand, it is difficult to achieve 'full coverage' if deputies are excluded from the commissions' scope of supervision. At the same time, people's congresses are the organs of state power to which supervisory organs are themselves supposed to answer to, perhaps making it inappropriate to place them under the latter's supervision. Hence, many commentators have emphasised the need for circumspection and sophistication in conducting supervision, distinguishing carefully between disciplinary supervision and political supervision, as well as supervision over individual deputies and over the people's congress as a whole.[44]

Turning to the other side of the relationship, the oversight exercised by the people's congress over supervisory commissions is similar to the usual practice adopted to supervise other state organs. Such oversight is consonant with its constitutional role and essential given the substantial powers conferred on supervisory organs. Article 53 of the Supervision Law provides that commissions of supervision shall accept the oversight of people's congresses at the corresponding level and creates three mechanisms for such oversight. First, their standing committees may listen to and deliberate on special work reports (專項工作報告 *zhuanxiang gongzuo baogao*) submitted by supervisory commissions, as well as organise law enforcement inspections (執法檢查 *zhifa jiancha*). In addition, congress deputies may raise questions or inquiries on supervisory work.

These provisions broadly correspond to the existing mechanisms for congressional oversight over the executive, court and procuratorate.[45] There is however one subtle difference: the Supervision Law only requires supervisory organs to deliver *special* work reports but does not impose any general obligation to report on their work to people's congresses as is typical for other state organs.[46]

[37]PRC Constitution, art 2.

[38]PRC Constitution, art 3.

[39]PRC Constitution, art 127. See also art 3 discussed earlier.

[40]PRC Constitution, arts 62(7) and 67(11).

[41]PRC Constitution, art 67(6).

[42]An expression used in Supervision Law 2018, art 1.

[43]Supervision Law 2018, art 15(1).

[44]See Han Dayuan, 'Several Constitutional Issues in National Supervisory System Reform' (2017) 35 Faxue Pinglun [Law Review] 11; Liu Xiaomei, 'State Supervision System and Mechanisms under the People's Congress System' (2018) 36 Zhengfa Luntan [Tribune of Political Science and Law Tribune] 14; Qin Qianhong, 'A Major Difficulty in the Implementation of the National Supervision Law: Whether PC Deputies Can Become Targets of Supervision' (2018) 71 Wuhan Daxue Xuebao (Zhexue Shehui Kexue Ban) [Wuhan University Journal (Philosophy & Social Science)] 139. But cf Guo Wentao, 'Understanding and Justifying the Supervision by Commissions of Supervision over People's Congress Deputies' (2018) 20 Xinan Zhengfa Daxue Xuebao [Southwest University of Political Science and Law] 80 (a more assertive view supporting the supervision by supervisory commissions of over congress deputies).

[45]As provided under the Law on Supervision by the Standing Committees of the People's Congresses at All Levels 2007.

[46]The obligation of the State Council to report on its work to the NPC, and local governments to report on their work to people's congresses at the corresponding level (or their standing committees if not in session), is laid down in the Articles 92

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This is despite the fact that such work report obligation is the primary method for the people's congress to discharge its oversight function. This once again illustrates the unique and complex dynamics at play in the institutional relationship between the two branches. One possible justification given by scholars is that congress deputies often occupy other public offices simultaneously and are themselves subject to supervision, which opens the possibility that they may use their power to vote against the work reports as a means to hinder and exert pressure upon the proper conduct of supervisory work.[47] In August 2020, the NPC Standing Committee heard a special work report given by the NSC for the first time,[48] but it remains to be seen whether a constitutional convention would gradually develop whereby supervisory organs deliver work reports regularly like courts and procuratorates do.

Relationship with Other State Organs

We now turn to examine the relationship between the supervisory commissions and other branches of the state, which represents a slightly less novel situation given that comparisons could be readily made to the existing institutional relationship among other state organs. The key provision is Article 127 of the Constitution, which states that:

> Supervisory commissions exercise supervisory power independently according to the law, free from interference by any administrative organ, public organisation, or individual.
>
> Supervisory organs shall, in handling duty-related violations of law or crimes, cooperate with judicial organs, procuratorial organs, and law enforcement organs, with mutual checks.[49]

This provision lays down the twin principle of (1) independent exercise of supervisory power, as well as (2) mutual cooperation and checks with other organs. The first paragraph largely corresponds to the constitutional provisions concerning the independent exercise of judicial power by the courts (Article 131 of the Constitution) and procuratorial power by the procuratorates (Article 136 of the Constitution) respectively, while the second paragraph appears to be modelled upon Article 140 of the Constitution which provides for cooperation and mutual checks between the courts, procuratorates, and public security organs.[50] Hence, it could be observed that supervisory commissions are regarded as being in a broadly analogous position to courts and procuratorates: on the one hand, the fundamental nature of supervisory work requires a certain level of institutional independence. On the other hand, the smooth handling of individual corruption cases, just like criminal offences in general, inevitably involves cooperation with other relevant state organs which also creates the possibility of mutual checking. It would be interesting to review the

and 110 of the PRC Constitution respectively, while courts and procuratorates at various levels do the same as a matter of convention notwithstanding the lack of corresponding constitutional provisions. For more on this issue, see Qu Xiang-fei, 'A Constitutional Analysis of the Work Report of State Organs – On Supervisory Committee's Work Report' (2017) 15 Beijing Lianhe Daxue Xuebao (Renwen Shehui Kexue Ban) [Journal of Beijing Union University (Humanities and Social Sciences)] 15.

[47]Liu, 'State Supervision System and Mechanisms' (n 44); cf Qu (n 46) (arguing in favour of imposing the same work report requirement for supervisory commissions as other state organs).

[48]'For the First Time! The National People's Congress Hears the Special Work Report of the National Commission of Supervision' (Xinhua Net, 10 Aug 2020) <http://www.xinhuanet.com/politics/2020-08/10/c_1126350258.htm> accessed 4 Jul 2022.

[49]This provision is essentially reproduced in Supervision Law 2018 as Article 4 but with an additional paragraph: 'Where the supervisory organ requires assistance in its work, the relevant organs and entities shall provide assistance in accordance with the law according to the requirements of the supervisory organ.'

[50]Though a slightly different wording is adopted for that article: 'The people's courts, the people's procuratorates and the public security organs shall, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other to ensure the correct and effective enforcement of the law.'

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application of and the difficulties associated with these principles with regard to judicial and prosecutorial work in the past, as a means of evaluating and drawing comparison with the new supervisory organs.

Judicial independence in China is a topic that has attracted much attention from scholars on the PRC legal system.[51] One notable contribution in this area is the notion of 'embedded courts' developed in Kwai Hang Ng and Xin He's fieldwork. Their work suggests that Chinese courts are embedded to the external environment in which they operate from administrative, political, social, and economic aspects, which heavily influences judicial behaviour.[52] It seems likely that similar forces have hampered the efforts of the party disciplinary system in fighting corruption in the past: for instance, the limited effectiveness of local CDIs has been explained as the result of the institutional design of 'dual leadership' system which render them dependent on the local Party Committees, as well as the entrenched local social (關係 *guanxi*)[53] networks, thereby creating an 'upward spiral' which pushes local corruption cases towards higher levels and forces the CCDI to take charge of anti-corruption enforcement.[54] This phenomenon is largely reminiscent of the administrative and social embeddedness faced by local courts.[55] Much effort has been made to tackle these issues and enhance the vertical leadership of the CCDI over the party disciplinary system, particularly during President Xi's anti-corruption campaign as discussed earlier. Hence, the newly established supervisory commissions, which operate jointly with CDIs, are likely to benefit from such developments and stand a much better chance of achieving at least a certain level of institutional independence when compared to local courts and procuratorates.

Turning to the other aspect of the relationship, the formulation of 'mutual checks and cooperation' between supervisory commissions and other organs appear to be drawn from the existing provisions that regulate the relationship between the three key components of the criminal justice system, namely public security organs, procuratorates, and courts (collectively known as 公檢法 *gongjianfa*). However, the relationship between these three organs has been asymmetrical and a power imbalance exists in practice. This is largely due to the dominant position of public security organs, the chiefs of which often take up other key positions such as membership of the local party committee standing committee and leadership of the Politico-Legal Committee, a party organ responsible for directing and coordinating the work of *gongjianfa*.[56] As a result, there is a tendency for procuratorates and courts to focus on cooperating with public security organs, fulfilling the principle of 'mutual cooperation' but failing to provide effective checking against their actions in investigating criminal cases. This creates an 'investigation-centred' system in which court proceedings become a mere formality. There is also little safeguard against abuse of police power, which appears to have motivated efforts to establish a 'trial-centred system' instead as part of the judicial reform in recent years.[57]

[51]See generally Randall Peerenboom (ed), *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge University Press 2009); Lin Feng, 'The Future of Judicial Independence in China' (City University of Hong Kong Centre for Judicial Education and Research Working Paper Series No 2, May 2016) <https://www.cityu.edu.hk/cjer/lib/doc/paper/WK2_The_Future_of_Judicial_Independence_in_China.pdf> accessed 7 Jul 2022.

[52]Kwai Hang Ng & Xin He, *Embedded Courts: Judicial Decision-Making in China* (Cambridge University Press 2017).

[53]The author uses traditional Chinese characters for *guanxi* here. *Guanxi* is written as '关系' in simplified Chinese characters.

[54]Ting Gong, 'The party discipline inspection in China: its evolving trajectory and embedded dilemmas' (2008) 49 Crime, Law and Social Change 139; Hualing Fu, 'The Upward and Downward Spirals in China's Anti-Corruption Enforcement', in Mike McConville & Eva Pils (eds), *Comparative Perspectives On Criminal Justice In China* (Edward Elgar 2013).

[55]Social embeddedness refers to the influences of other social ties and roles held by judges on judicial work, whereas economic embeddedness refers to the fiscal dependence of courts on local governments: see Ng & He (n 52) 22–28.

[56]Hualing Fu, 'Autonomy, Courts and the Politico-Legal Order in Contemporary China', in Liqun Cao, Ivan Y Sun & Bill Hebenton (eds), *The Routledge Handbook of Chinese Criminology* (Routledge 2013); Zhang Jianwei, 'The Actual Substance of Trial-Centricism and Its Path of Realisation' (2015) 27 Zhongwai Faxue [Peking University Law Journal] 861.

[57]Zhang, 'The Actual Substance of Trial-Centricism' (n 56); Notice of the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security on Issuing the Opinions on Advancing the Reform of the Trial-Centered

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Similar dynamics might well arise in the interactions between supervisory commissions and their 'brother agencies', once again thanks to the former's alignment with the powerful party disciplinary system which leaves them in a dominant position at least *vis-à-vis* the traditionally weaker courts and procuratorates. To be clear, the cooperation of other state organs is essential for anti-corruption enforcement to proceed smoothly and successfully, a reality which is well recognised in the statutory provisions. For instance, the Supervision Law provides that supervisory organs may request public security organs to provide assistance in the course of conducting searches or adopting detention measures.[58] The procuratorates, while having lost their investigatory authority over corruption cases under the previous dual-track system, retain the responsibility for examining the materials submitted by supervisory organs and deciding whether to initiate prosecutions. This is a potentially significant gatekeeping role against cases lacking sufficient evidence or involving procedural irregularity.[59] Meanwhile, however, the law also makes clear that it is supervisory organs that would play the central role in handling corruption cases and other duty-related crimes; other states organs are required to provide assistance as required and transfer any clues relating to such offences to supervisory organs.[60] Where the same individuals are involved in both duty-related crimes and other crimes, 'the supervisory organ shall take the lead in conducting investigation, and other organs shall provide assistance.'[61]

Even before the supervisory reform, CDIs have been able to influence the outcome of cases transferred to the legal system, such as by submitting reports on how the case should be concluded and persuading the suspect to accept the sentence imposed.[62] Such influence is likely to be further enhanced with the formal legal status now afforded by the establishment of supervisory organs.[63] Thus, there is a genuine risk that the supervisory-party disciplinary system would come to play such a dominant role in handling corruption cases that other state organs fail to provide meaningful checks on its power and discharge their own functions independently. Hence, prominent constitutional law scholar Qin Qianhong has cautioned against the overemphasis of mutual cooperation at the expense of mutual check and the emergence of 'supervision-centricism', asserting the need to re-affirm 'trial-centricism' in relation to cases handled by supervisory organs.[64]

A final issue to consider is the impact of the supervisory reform on the nature and system of administrative supervision. With the MOS formally abolished and the Administrative Supervision Law repealed with the establishment of supervisory commissions and the enactment of the Supervision Law, the clear inference to be drawn is that the previously internal function of administrative supervision would also be transferred to and taken over by the supervisory organs, in line with the general theme of creating a unified and centralised supervisory system. This is made clear by the removal of the word 'supervision' in the constitutional provisions which stipulate the functions of the State Council and local governments.[65] However, the previous notion of administrative

Criminal Procedure System (10 Oct 2016); 'Reform Puts Trial in Court at Center of Justice System' (China Daily, 12 Oct 2016) <https://www.chinadaily.com.cn/opinion/2016-10/12/content_27031253.htm> accessed 8 Jul 2022.

[58]Supervision Law 2018, arts 24 and 43.

[59]Supervision Law 2018, art 47; Criminal Procedure Law 2018 (CPL), art 170. It is worth noting that an earlier draft of the Supervision Law required procuratorates to solicit the opinions of the supervisory organs before making a non-prosecution decision: Draft Supervision Law, art 45 <https://www.chinalawtranslate.com/en/peoples-republic-of-china-supervision-law-draft/> accessed 10 Jul 2022.

[60]Supervision Law 2018, arts 4 and 34.

[61]Supervision Law 2018, art 34.

[62]Xingmiu Liao & Wen-Hsuan Tsai, 'Strengthening China's Powerful Commission for Discipline Inspection under Xi Jinping, with a Case Study at the County Level' (2020) 84 The China Journal 29.

[63]It is perhaps worth noting that supervisory organs are allowed to make proposals on 'lenient punishment' (從寬建議 *congkuan jianyi*) when the case is transferred to the procuratorates under certain circumstances: Supervision Law 2018, arts 31–32. No other method of influencing procuratorial decisions is otherwise provided under the Law.

[64]Qin Qianhong, 'The Constitutional Positioning of the Supervisory Organs of PRC: Placing the Inter-Relationship Among State Organs at the Centre' (2018) 30 Zhongwai Faxue [Peking University Law Journal] 555.

[65]PRC Constitution, arts 89(8) and 107 respectively. See Amendment to the Constitution of the People's Republic of China (adopted by the 1st session of the 13th National People's Congress, 11 March 2018), arts 46 and 51.

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supervision appears to be more comprehensive and all-encompassing, going beyond administrative discipline and clean government to cover matters such as 'improv[ing] administration', and 'rais[ing] administrative efficiency'.[66] With supervisory commissions focusing primarily on anti-corruption work, the supervisory reform has been characterised as an 'incomplete consolidation of the function of administrative supervision', failing to cover aspects like 'law enforcement supervision' (執法監察 *zhifa jiancha*), and 'efficiency supervision' (效能監察 *xiaoneng jiancha*).[67] It remains to be seen whether and how these remaining functions would be performed (possibly by other existing administrative organs)[68] and whether this would entail a general re-conceptualisation of administrative supervision.

Party-State Relations: Changing Course?

A peculiar feature of the PRC regime is that there are both party and state institutions which co-exist and operate in parallel to each other. It is therefore necessary to go beyond the formal state structure and consider the supervisory reform from the perspective of its impact on the party-state as a whole, particularly in light of the significant role played by party organs in the new institutional design. A major feature of the reform is the 'joint office' (合署辦公 *heshu bangong*, literally meaning 'joining offices for work') between supervisory commissions and CDIs, a common form of institutional arrangement for party and/or state organs with similar functions and roles to remain separate entities in name but share the same office and work closely together on a daily basis. This starts at the highest level with the partnership between the NSC and the CCDI, which has been described as 'the same organization wearing two different hats'.[69] The same arrangement goes all the way down to the CDIs and supervisory commissions at local levels, which 'share the same offices, same personnel, same legal powers and even the same websites'.[70] There is a substantial overlapping in terms of senior membership between the two sets of organs: at the national level, the first chairman of the NSC, Yang Xiaodu, formerly the Minister of Supervision, is also a deputy secretary of the CCDI, while the secretaries of local CDIs typically serve concurrently as the chairman of supervisory commissions at the corresponding level.

In addition to administrative convenience, such an arrangement makes sense from the perspective of institution-building and facilitates mutual reinforcement between the two systems. For the CDI's part, it is true that a similar arrangement already existed before the CDI and the administrative supervision (MOS) system even before the supervisory reform. However, the new institutional design has elevated supervisory organs to the status of a separate branch of constitutional organs, on an equal footing to (rather than subordinated within) the executive branch, hence creating a more powerful partner for the CDI system, which has itself been empowered over the course of President Xi's anti-corruption campaign. Indeed, there is a mutual and dynamic relationship between the campaign and the institutions, and the supervisory reform can be characterised as the retention of the enforcement resources mobilised during the campaign.[71] Amongst the most significant change is the CDI's absorption of one-fifth of agents and staff of the procuratorial system nationwide, '[a]n inter-institutional personnel transfer … unprecedented in the recent history of [PRC]'.[72] This marks a decisive break with the previous dual-track system and allows the CDI to claim monopoly over anti-corruption enforcement.

[66]Administrative Supervision Law 1997, art 1 (repealed).

[67]Qin, 'The Constitutional Positioning of the Supervisory Organs' (n 64) 565–566.

[68]ibid (noting the overlap between such functions and the responsibilities of government organs and departments like the legal offices, inspection departments and appraisal departments).

[69]Feng Lin, 'The 2018 Constitutional Amendments: Significance and Impact on the Theories of Party-State Relationship in China' (2019) 1 China Perspectives 11.

[70]Fu, 'Understanding the Evolving Relationship' (n 3) 9.

[71]Li, 'Politics of Anticorruption in China' (n 30).

[72]ibid 62.

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In a similar vein, the 'joint office' arrangement also provides an important source of support and authority for the newly established supervisory organs. While it is true that they enjoy the same legal status as other branches of state organs, formal equality on paper does not always translate into equal footing in practice, as demonstrated by the relative weakness of local courts discussed earlier. Aligning with the already powerful party disciplinary system thus allows the supervisory organs to establish themselves more easily on the political scene and command respect from other institutional actors, which is particularly important given their thorny task of supervising public officials with 'full coverage'. Overall, the concentration of power in the conjoined system of party disciplinary and supervisory organs fits the objective of creating a unitary, effective, and authoritative anti-corruption institution, and is probably conducive towards addressing the weaknesses of the previous dual-track system and enhancing the effectiveness of anti-corruption work.

However, such a close association between party and state organs also raises difficult issues. First, at the operational level, it remains the case that CDIs are entrusted with the primary responsibility of enforcing party discipline pursuant to the Party Charter and a substantive body of Party rules and regulations, which is distinct from and parallel to national laws.[73] Coinciding with the anti-corruption campaign, several major regulations have been enacted or revised in recent years in an attempt to further institutionalise the party disciplinary system. Notable examples include the CCP Regulations on Disciplinary Sanctions (revised 2015 and 2018), CCP Regulations on Intra-Party Supervision (enacted 2016), and the Regulations on the Work of the CCP Discipline Inspection Commissions (enacted 2020).

The distinction between Party regulations and national laws is not simply a matter of formality: while the majority of public officials are party members themselves and hence subject to party discipline, the former tends to be stricter than laws and not all disciplinary violations amount to criminal offences.[74] After the supervisory reform, however, the 'joint office' arrangement with supervisory organs means that CDIs would also become involved in the enforcement of national laws and become responsible for transferring criminal cases over to the formal legal system for prosecution and conviction. This raises the possibility of blurring the boundary between party regulations and national laws, and the supervisory and disciplinary inspection organs may conflate their respective roles of enforcing the relevant regulatory framework. The situation is further complicated by the fact that the Supervision Law empowers supervisory organs to issue 'governmental sanctions' (政務處分 *zhengwu chufen*) against public officials who violate the law (but presumably without being so serious as to incur criminal liability),[75] a power which is now fully legalised under the *Law on Governmental Sanctions for Public Officials 2020*.[76] It is necessary to both maintain a clear boundary between party discipline (黨紀 *dangji*) and national laws (國法 *guofa*), two regulatory regimes of fundamentally different nature. However, as public officials might often be violating both in the same instance, it is also important to establish a proper link between the two systems, as

[73]For an overview of the historical development of the CDI system and its institutional framework up to 2012, see Ling Li, 'The Rise of the Discipline and Inspection Commission, 1927–2012: Anticorruption Investigation and Decision-Making in the Chinese Communist Party' (2016) 42 Modern China 447.

[74]This has been recognised in official statements: see for example CCP Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law (4th Plenary Session of the 18th Central Committee of the CPC, 23 Oct 2014) <https://www.chinalawtranslate.com/en/fourth-plenum-decision/> accessed 13 Jul 2022.

[75]Supervision Law 2018, art 11. The same article states that supervisory organs 'shall conduct investigations of duty-related *violations and crimes*' (emphasis added), which reinforces the idea that their jurisdiction is not limited to investigating misconduct which amount to criminal offences.

[76]The term *zhengwu chufen* can be translated more precisely as 'political/governmental affairs sanctions', which replaces the previous expression of *zhengji chufen* (broadly translated as 'political/governmental disciplinary sanctions'), imposed on public officials, to be distinguished from (but often lumped together with) 'party disciplinary sanctions' (*dangji chufen*) which is imposed on party members. See further Qin Qianhong & Liu Yida, 'Addressing Properly Seven Pairs of Relationships in Formulating Law on Penalties for Administrative Misconducts' (2019) 3 Fazhi Xiandaihua Yanjiu [Law and Modernisation] 8.

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well as between the supervisory system and the formal legal system. Many Chinese scholars have written on these complex conceptual and operational issues under the broad theme of *jifa guantong, fafa xianjie* (紀法貫通，法法銜接, translated as 'linking up discipline and law, interface between the two laws' – the latter referring to the Supervision Law and the *Criminal Procedure Law* (CPL)).[77]

On a theoretical level, the supervisory reform has raised challenges for some important theoretical frameworks on Chinese constitutionalism and party-state relations, making it necessary to revise the existing theories or formulate new ones that properly account for the latest developments.[78] One influential theory that has come under particular strain is the theory of 'dual normative system' developed primarily by Larry Backer, which postulates that Chinese constitutionalism is grounded on a separation of power fundamentally different from the Western model, with popular sovereign power divided between (1) administrative power assigned to the government and regulated by the state constitution, and (2) supreme political authority vested in the Party.[79]

Some support for this theory can be found in official statements[80] regarding the principle of 'separation between the Party and the state' (黨政分開 *dangzheng fenkai*) in the early reform and opening-up era. While this principle had been an important component of the proposed political and institutional reforms of the 1980s, it was never fully realised as the events of 1989 prompted the Party leadership to refocus attention on economic reform while shelving proposals for changes in the political structure.[81] By integrating the party disciplinary system into the state structure through a high-profile constitutional amendment and the creation of a corresponding branch of state organs, the supervisory reform marks a decisive reversal of the separation principle, demonstrating the willingness of the Party to play a more visible role in state affairs and reassert Party leadership. Indeed, the partnership between supervisory commissions and CDIs is simply the most high-profile component of a broader underlying trend of institutional reforms under President Xi's leadership, whereby party organs took over the activities of state organs across all spheres.[82] Such developments, coupled with the insertion of the principle of Party leadership into the PRC Constitution in the 2018 amendments, suggest that the Party and the state apparatus are becoming more intertwined than ever before since 1978, and cast doubts on whether the separation between political and administrative power as proposed by Backer still remains a useful account of the Chinese constitutional system.

[77]See eg, Wang Siumei & Huang Linglin, 'Research on Several Issues Concerning the Interface between the Supervision Law and the Criminal Procedure Law' (2019) 34 Faxue Luntan [Legal Forum] 135; Xia Wei, 'Jurisprudential Interpretation of and Approaches to "Coherence between Discipline and Law" in Supervision System Reform' (2020) 5 Nanjing Shifan Daxue Xuebao (Shehui Kexue Ban) [Journal of Nanjing Normal University (Social Science Edition)] 120. I am indebted to Zhu Jiangnan for raising the significance of this issue.

[78]See Lin (n 69) for a discussion of the 2018 constitutional amendments as a whole and its impact on the existing theories of political constitutionalism and dual normative system.

[79]Larry Catá Backer, 'Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System' (2012) 30 Boston University International Law Journal 331; Larry Catá Backer & Keren Wang, 'The Emerging Structures of Socialist Constitutionalism with Chinese Characteristics: Extra-Judicial Detention and the Chinese Constitutional Order' (2014) 23 Washington International Law Journal 251. As Lin (n 69) points out, the term 'dual normative system' is coined in Ling Li, '"Rule of Law" in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China' (2015) 2 Asian Journal of Law and Society 93.

[80]See in particular Deng Xiaoping, 'On the Reform of the System of Party and State Leadership' (18 Aug 1980) <http://en.people.cn/dengxp/vol2/text/b1460.html> accessed 19 Jul 2022; Zhao Ziyang, 'On the Separation of the Party and the State' (14 Oct 1987) <http://www.reformdata.org/1987/1014/3027.shtml> accessed 19 Jul 2022.

[81]Li, '"Rule of Law" in a Party State' (n 79); Qianfan Zhang, "The Communist Party Leadership and Rule of Law: A Tale of Two Reforms" (2021) 30 Journal of Contemporary China 578.

[82]Fu, 'Understanding the Evolving Relationship' (n 3) 8. See further Decision of the CPC Central Committee on Deepening the Reform of the Party and State Institutions (adopted at the third session of the 19th CPC Central Committee, 28 Feb 2018) <http://www.lawinfochina.com/display.aspx?id=27798&lib=law&EncodingName=big5> accessed 2 Aug 2022.

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Individual Rights: Legalising Extralegal Detention?

While the supervisory reform raises interesting constitutional implications at the macro- and institutional level, it is at the micro- or individual level that the reform might have the most profound impact given that the primary work of supervisory organs involves the handling of corruption cases which gives rise to the possibility of infringement of individual rights during their investigation. The Supervision Law confers a wide range of investigatory powers on supervisory organs, including conducting interrogations or searches,[83] questioning witnesses,[84] collecting, seizing or impounding property,[85] and issuing wanted notices or restricting exit from China.[86] Such a broad range of powers essentially puts supervisory organs in the same position as other law enforcement agencies like public security organs, but it remains the case that the supervisory process is a distinct regime from criminal investigation and thus not subject to regulation of the CPL, which is problematic given the possibility that supervisory cases would eventually be transferred for prosecution. To mitigate this issue and provide for a better linkage between the two regimes, the Supervision Law provides that evidence collected by supervisory organs may be used in criminal proceedings and requires supervisory organs to comply with 'the requirements and standards for evidence in criminal trials'.[87]

The most controversial power granted to supervisory organs is the power to detain suspects (留置 *liuzhi*, which broadly translates to 'detention/retention in custody'), which is essentially a legalisation of the CDI's previously extralegal power of *shuanggui* (雙規). *Shuanggui* literally translates as 'double specifications', which refers to the CDI's power to require an official to appear at specified place and time for investigation, and amounts to a form of extralegal detention provided under party regulations[88] but lacking a clear basis in national law. The Administrative Supervision Law provides expressly that *liangzhi* (兩指), the corresponding power exercised by administrative supervision organs, should not amount to detention or quasi-detention of the suspects.[89] There has been much debate on the legality of *shuanggui*: the dominant view regards it as a form of unconstitutional and extralegal detention which should be abolished,[90] while some Chinese scholars justify it only as a necessary or transitional measure.[91] When judged solely as a matter of legal formality, it is difficult to escape the conclusion that *shuanggui* was an unlawful and unconstitutional form of detention power exercised by the CDIs given its violation of the constitutional guarantee of personal liberty[92] as well as the principle of 'reservation by law' under the Legislative Law.[93] Larry Backer and Keren Wang, however, have defended the legitimacy of *shuanggui* on the basis of the separation of powers between the Party and the state explained in the previous section, arguing that it is a legitimate expression of political power by the Party over internal disciplinary matters which falls outside the administrative sphere regulated by the PRC Constitution, rendering the critique of unconstitutionality unfounded.[94]

[83]Supervision Law 2018, arts 20 and 24 respectively.

[84]Supervision Law 2018, art 21.

[85]Supervision Law 2018, art 25.

[86]Supervision Law 2018, arts 29–30 respectively. To be clear, such measures are to be taken by public security organs upon determination by supervisory organs.

[87]Supervision Law 2018, art 33. The same article also provides for the exclusion of evidence collected by illegal means, mirroring similar provisions under the CPL. See further n 77 above and the accompanying text.

[88]CPC Regulations on Investigation of Cases by Discipline Inspection Organs, art 28.

[89]Administrative Supervision Law 1997, art 20 (repealed).

[90]See in particular Flora Sapio, 'Shuanggui and Extralegal Detention in China' (2008) 22 China Information 7.

[91]For an excellent review of the existing literature on the legitimacy of *shuanggui*, covering both Western and Chinese views, see Backer & Wang (n 79) 287–300.

[92]PRC Constitution, art 37.

[93]Legislative Law 2015, art 8 provides that, *inter alia*, 'compulsory measures and penalties involving deprivation of a citizen's political rights or restriction of personal freedom' shall only be governed by laws.

[94]Backer & Wang (n 79). On the contrary, the authors regard re-education through labour (*laojiao* 勞教) as unconstitutional since it is an extralegal administrative penal system targeting the general public, which violates the State Constitution itself and the Party's 'mass line'.

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Whatever the merits of this account under the previous constitutional framework, its underlying theoretical basis has now been challenged by the supervisory reform and *shuanggui* should now be evaluated with reference to the new constitutional and legal framework under which it operates by the name of *liuzhi*. The power of *liuzhi* is provided under Article 22 of the Supervision Law, which empowers supervisory organs to detain the suspect pending further investigation under any of the following circumstances: (1) the circumstances of the case are major or complex; the suspect may (2) escape or commit suicide; (3) make a false confession in collusion or forge, conceal or destroy evidence; or (4) commit other conduct that obstructs investigation. Thus, the new framework limits the exercise of *liuzhi* to only four specific scenarios, apparently with the primary goal of facilitating the smooth investigation of the case and preventing obstruction arising from any action on the part of the detainee. While this is no doubt an improvement upon the Party regulation which fails to specify the circumstances under which *shuanggui* may be adopted, the vague formulation of 'major or complex' cases opens the door for its usage in a broad class of cases.

The Supervision Law has also imposed certain procedural limitations on the exercise of *liuzhi*. First, Article 43 of the Supervision Law imposes an approval requirement for the adoption of *liuzhi*: a supervisory organ at or below district-city level shall report to the organ at the immediately higher level for approval, while provincial-level supervisory commissions only need to report to the NSC for record. Article 43 of the Supervision Law also imposes a limit on the duration of *liuzhi*, which shall generally not exceed three months but might be extended by another three months under 'special circumstances'; such extension must again be reported to the next-higher level organ for approval.[95] A positive duty is also imposed on supervisory commissions to 'remove the measure in a timely manner' if found to be inappropriate. Finally, Article 44 provides certain procedural protections for the detainee, including the notification of his family and work unit within 24 hours,[96] the provision of food and drink, rest, security, and medical services, reasonable arrangements for interrogation time, and the requirement that interrogation records be signed by him.

One glaring issue, however, is the fact that there is no provision for the right to legal representatives during the *liuzhi* phase. The official justification seems to be that *liuzhi* is a supervisory measure rather than part of the formal legal proceedings, so it would only be necessary to provide for the right to legal representation (as provided under the CPL) once the case is transferred to the procuratorate for prosecution.[97] This again reflects the tension between the parallel regimes of the supervisory system and the legal system, and goes against the suggestion of the majority of Chinese scholars. As two commentators put it,

> Regardless of the external manifestation or verbal expression used, the background is that the duty-crimes criminal investigation power enjoyed by supervisory commissions is transferred from the people's procuratorates since currently defence lawyers may intervene already at the investigation stage, then there is no reason why lawyers cannot intervene during the duty-crimes investigation stage [by] supervisory commissions in the future.[98]

Given that *liuzhi* essentially amounts to pre-trial detention imposed by supervisory organs upon public officials, the possibility of lengthy detention coupled with the denial of access to lawyers

[95]It is worth mentioning that upon the transfer of the case from supervisory commission, the procuratorate may decide to adopt coercive measures, including arrest or residential confinement pending prosecution decision under the CPL: CPL, art 170. When combined with *liuzhi*, this may constitute lengthy pre-trial detention for the suspect.

[96]This is again subject to exception where doing so may affect the investigation or cause interference with the evidence.

[97]'Zhejiang Commission for Supervision on *Liuzhi*: Under Surveillance From the First Minute till the End' (Sina News, 15 Mar 2018) <https://news.sina.cn/gn/2018-03-15/detail-ifyscsmv8372285.d.html?vt=4> accessed 22 Jul 2022. A further reason given is the fear that allowing access to lawyers at the *liuzhi* stage would create the risk of collusion or destruction of evidence or otherwise obstruct the investigation.

[98]Qin Qianhong & Shi Zehua, 'A Study on the Detention Measures of Supervision Committee' (2017) 4 Suzhou Daxue Xuebao (Faxueban) [Journal of Soochow University (Law Edition)] 9, 17.

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may well constitute violations of important constitutional rights such as the right to personal liberty, equality before law and presumption of innocence.[99] Hence, while the supervisory reform has given a legal footing to *shuanggui* and created a set of provisions to govern its implementation, substantive improvements in human rights protection are limited. It is hoped that further reform would be undertaken to provide better safeguard on individual rights and bring it closer in line with that afforded to ordinary criminal suspects under the CPL.

Conclusion

From the perspective of anti-corruption, the supervisory reform represents the culmination of long-term anti-corruption efforts in China which has intensified and reached new heights under President Xi. It aims to overcome the fragmentation of anti-corruption forces under the pre-existing institutional framework and create a unitary and powerful specialised agency to combat corruption effectively. Beyond its primary rationale, however, the reform has also raised important constitutional issues including how supervisory organs would interact with other state organs; how individual rights would be affected; and how party-state relations and constitutionalism in the PRC should be understood.

Overall, what does this imply for the nature and function of law and, ultimately, the development of the rule of law in contemporary China? If one adopts a relatively basic conception of 'thin rule of law', it is difficult to deny that the supervisory reform represents at least some form of progress, however minimal, by bringing the operation of the party disciplinary system within the formal legal framework (even if only indirectly) and subjecting the previously extralegal practice of *shuanggui* to some form of legal regulation. As Lin Feng puts it,

> For me, such an instrumental approach towards the Constitution and legal norms is better than completely ignoring inconsistency between CCP norms and state norms and openly advocating the supremacy of inconsistent CCP norms above state norms. … My argument is that the most immediate objective for the development of constitutionalism in China is to ensure that all institutions and powers, including the CCP, are subject to state law. What the CCP has done through the creation of supervisory commissions is a step in the right direction. Once this is achieved, the next step is for China to move to the thin rule of law by satisfying its minimum threshold criteria.[100]

Beyond this, however, opinions on the supervisory reform differ. Fu Hualing has criticised the creation of supervisory organs as merely a 'veil of legality that … is too thin to hide the presence of the CDI and is too weak to shield the Party from a legality and legitimacy challenge'.[101] A more positive assessment comes from Zhang Taisu and Tom Ginsburg, who have characterised the supervisory reform as part of a broader 'turn toward law' under President Xi, alongside the 2018 constitutional amendments and judicial reform, under which the law is enforced more rigorously and given greater prominence as a source of political legitimacy.[102] However, even this relatively favourable view may be qualified given that the authors made clear that they are referring to 'legality' rather than any kind of checks-and-balances constitutionalism which imposes real constraints on the Party.[103] Moreover, if the supervisory reform genuinely represents a turn towards legality, it is worth questioning why it involves the party disciplinary system taking over anti-corruption enforcement from the procuratorial system, rather than the other way round, as

[99]ibid; Li & Wang (n 22).
[100]Lin (n 69) 18 (citations omitted).
[101]Fu, 'Understanding the Evolving Relationship' (n 3) 11.
[102]Zhang & Ginsburg (n 2).
[103]ibid 316.

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some scholars have envisaged.[104] Ultimately, the newly established supervisory system is 'decisively more political than legal',[105] as demonstrated from its separation from the formal legal system and the inapplicability of the conventional protections under the CPL. Its status as the junior partner to the CDI under the joint office arrangement is also evidenced by the fact that the NSC chairman is only the deputy director of the CCDI.

Given the intricate issues involved and the relatively short time that has passed since the supervisory reform, this article does not purport to resolve this debate. Instead, it is hoped that by presenting an overview of the complex and multi-faceted constitutional issues arising from the reform, this article would contribute to a better understanding of the significance of this important subject and lay the foundation for further research on both theoretical and practical levels. On the theoretical level, existing frameworks for understanding the Chinese state structure, party-state relations and theories of constitutionalism require major revisions in light of this new development, while empirical data would shed light on how supervisory organs and the accompanying legal framework operate in practice. Furthermore, while the creation of supervisory commissions is an important step, the broader reform and institutionalisation of the supervisory and disciplinary apparatus is still ongoing with the enactment of legislations such as the *Law on Governmental Sanctions for Public Officials* (2020) and the *Supervision Officials Law* (2021), as well as the enactment and revisions to Party regulations mentioned earlier, all of which deserve detailed study. Regardless of how one views the supervisory reform, one thing should be beyond dispute: the supervisory reform is a landmark development that has significant implications for PRC constitutional law, and would serve as fertile ground for further research and discussions among scholars of Chinese law in the years to come.

[104]Fu, 'China's Striking Anticorruption Adventure' (n 21) 269 (raising 'the possibility of a gradual but decisive shift from the *jiwei*- [ie, CDI-] based political mechanism to a legal-centric mechanism in controlling corruption in China').

[105]Fu, 'Understanding the Evolving Relationship' (n 3) 13.

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