

“Rule of Law” in a Party-State: A Conceptual Interpretive Framework of the Constitutional Reality of China

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Abstract

This article identifies and conceptualizes the structural features of the Party-state and proposes a “dual normative system” as a framework to interpret the constitutional reality of China. This framework has four components: (1) structural integration of the Chinese Communist Party (CCP or the Party) and the state; (2) reserved delegation of authority to the state; (3) bifurcation of state decision-making processes; and (4) cohabitation of the two normative systems: one of the Party and one of the state. This article demonstrates that the political reforms in China since the 1980s have not separated the power of the Party and the state, but have created an increasingly institutionalized dual normative system that is more complex compared with the previous fused system, yet more pliable to adjustments and more open to different interpretations, including to that of the “Party-state constitutionalism”, which interprets the “rule of law” as compatible with the rule of the Party.

Keywords: constitutionalism, Party-state, CCP, rule of law, political reform, rule by law

1. INTRODUCTION

During the last two decades, we have witnessed a remarkable ascendance of the rule of law on a global scale, which makes it the single political ideal that has gained universal endorsement by governments and political regimes that may otherwise be worlds apart if measured against any other political parameters.¹ Its universal appeal must at least partially be attributable to the fact that, as a concept, the rule of law embodies on the one hand “an accepted measure worldwide of government legitimacy”²—a commodity desired by any ruling regime—while on the other hand being a term that is so loosely constructed³ that anyone can commit to it without articulating what exactly the commitment is. This is

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1. Tamanaha (2004), p. 1–4.

2. *Ibid.*, p. 3.

3. *Ibid.*

exactly the context in which the rule of law discourse in China is embedded. It was at the 15th National Party Congress in 1997 that the General Secretary of the Chinese Communist Party (CCP or the Party) Jiang Zemin first announced “governing according to the law (*yifa zhiguo*)” as a ruling paradigm for the Party, which has since then been consistently endorsed by Jiang’s successors.⁴ In 2011, the Chinese State Council released a White Paper on the *Socialist Legal System with Chinese Characteristics*. The lengthy and “densely written” statement contains much that plagued its readers only with more confusion about the nature of the Chinese legal system.⁵ The document offered a historical account of the establishment of the Chinese legislative system after 1949 and a categorized index of pieces of legislation that have been promulgated since the 1980s. But, when it comes to its “Chinese characteristics”, the narrative veered towards tautology, providing little clarification regarding the status of law and courts vis-à-vis the Party. What then exactly does “the socialist legal system with Chinese characteristics” mean? Is it the harbinger of a “rule of law democracy”⁶ or, rather, the certification of the “rule by law” whereby the ruling authority stays above the law—a paradigm typical for authoritarian regimes?⁷

In recent years, the inherent conflict between the rule of law as commonly understood in the West and the rule of law as proclaimed and practised in China has revived the constitutional debate in China.⁸ This very Journal just published an article in its November issue, 2014, where her editor Ji Weidong called for “the rule of law in a Chinese way” and proposed to strengthen the parliamentary and judicial authority of the state as a vehicle to achieve democracy.⁹ What is more relevant to this article, however, is the discussion of “Party-state constitutionalism” between Jiang Shigong and Larry C. Backer.¹⁰ The discussion was broadened in 2010 and again in 2014 on the intellectual platform provided by the journal of *Modern China*.¹¹

In Jiang’s various pieces, he called for a “non-formalistic”¹² examination of constitutionalism in China that is not restricted to the texts of the Constitution of the People’s Republic of China (PRC), but also includes the “unwritten constitution”, including (1) the Party Constitution, namely the Party Charter; (2) “constitutional conventions”, namely the “trinity” of the head offices of the Party, the state, and the People’s Liberation Army; (3) “constitutional doctrine” that guides central-local relations; and (4) “constitutional statutes”, namely the Hong Kong Basic Law.¹³ Backer, who subscribed to the same argument, also found the Party’s leadership over the state a constitutional reality and proposed to establish a constitutional court within the CCP as an approach to “institutionalize the actual positions of the CCP as the Party in power within a constitutional system”.¹⁴

4. Jiang (1997).

5. Clemons (2011).

6. Ji (2014).

7. Ginsburg (2008).

8. Backer (2010); Hand (2011).

9. Ji (2014).

10. Jiang (2014a); Jiang (2014b); Backer (2014a); Backer (2014b).

11. For the editor’s introductions to these two special issues, Huang (2014); Huang (2010).

12. Jiang (2010), p. 13.

13. *Ibid.*

14. Backer (2010), p. 165.

Both authors highlighted and conditioned their theses upon one structural feature of the Party-state: the "separation of the Party and the state".¹⁵ It refers to the division of functions between Party and state institutions, which was, as a theory, first raised by Lenin in 1919.¹⁶ Such theory was adopted by the CCP when it took control of the state in 1949. However, it remained mostly as a theory and had hardly ever been practised in reality. In the 1980s, as the economic reform started, a political reform. Under the name of "Party-state separation (*dangzheng fenkai* 党政分开)" was also launched by Deng Xiaoping and later championed by Zhao Ziyang.¹⁷ According to Jiang and Backer, the reform has separated the powers of the Party and the state.¹⁸ The Party conducts "indirect and flexible governance" through policy-making and the state, presumably, conducts "direct governance" by implementing the policies advanced by the Party.¹⁹ The "political power" turns the Party into a "political decision-making apparatus" and provides the state with "the substantive political values and norms"²⁰ while the state institutes the rule of law, to which the Party has committed.²¹ Since the state Constitution honours the Party's leadership and the Party vows to abide by state laws in the Party Charter, the cohabitation of the two authorities embodies the "Chinese-style constitutionalism"²² or Party-state constitutionalism.²³

In this article, I share the positivist approach that Jiang and Backer proposed but with a different goal. The goal is not to devise an innovative institutional design or a discourse that can reconcile the inherent conflict between the supremacy of the law and the supremacy of the Party so as to make the concept of the rule of law compatible with a Party-state—an endeavour that both aforementioned authors ambitiously attempted. Rather, the goal is to interpret and conceptualize the relation between the Party and the state and the operating mechanisms based on which they interact as they do in reality. In this article, I will focus, consequently, on the Party-state separation reform (hereinafter "separation reform") because it was central to the thesis of Party-state constitutionalism advanced by Jiang and Backer and also because I concur with both authors and consider the "separation reform" a critical focal point to examine the institutional development of the Party-state over the last three decades.

In examining the key institutional changes regarding the relation between the Party and the state since 1949, I found that a more radical measure of structural segregation of the Party and the state was attempted and experimented for a short period around 1986–88 and was abruptly terminated in 1989. Since then, the Party quickly restored and continuously consolidated the structural integration of the Party and the state. I also found that the distinction between the "political power" of the Party and the "administrative power" of the state is far from being as clear-cut as Jiang and Backer suggested. To the contrary, the Party has retained exclusive decision-making power in day-to-day administration of

15. Jiang (2014b), p. 202.

16. Xu, Yaotong. "Dangzheng Guanxi Renshi De Lishi Huigu [a Historical Review of the Party-State Relation]." *Journal of Tianjin College of Public Administration* 6, no. 2 (2004): 5-10. p.5.

17. Jiang (2014a), pp. 147–53; Backer (2010), pp. 115–30.

18. Backer (2010), pp. 115–30; Jiang (2014a), pp. 147–53.

19. Jiang (2014b), p. 202.

20. Jiang (2014a), pp. 148–9.

21. *Ibid.*, p. 155; Backer (2010), p. 129.

22. Jiang (2014a).

23. Backer (2010).

“state matters” in reserved areas and selectively participates in and dominates the decision-making process of “state matters” in other areas. What has been “separated” is the state decision-making process that has been bifurcated into two associated parts. Such bifurcation helps to veil the Party’s footprints when it penetrates state power. This bifurcation and concealment of the Party’s penetration of state authority helps the Party-state to operate under a dual normative system—a Party normative system that regulates the Party-state sphere and a state normative system that regulates the state-society sphere. Such a dual normative system creates room for the Party-state to adapt and be more responsive to social demands without losing the institutional tools to rein in the state and centralize power.

The rest of the article is divided into four sections. Section 2 provides a brief historical review of the evolution of the Party-state and how it arrived at the current stage. Section 3 explains the key institutional components of the Party-state structural integration and the process of its consolidation after 1989. Section 4 illustrates the functional division of labor between the Party and the state and how this arrangement leads to the bifurcation of decision-making process in state institutions. Section 5 proposes the “dual normative system” as a conceptual framework for a better, more accurate understanding of the relation between the Party and the state and of the “constitutional reality” in China. Section 6 provides the conclusion. For the sake of simplicity, I will not discuss the status of Hong Kong and Macau in the Party-state structure because of their special political-legal status under the principle of “One-Country Two-Systems”.

2. EVOLUTION OF THE PARTY-STATE

As a modern form of government, the Party-state (or *dangguo*), as both a political concept and a political reality, was first established in China, not under the CCP’s rule, but under the rule of the national government formed by the Nationalist Party (also known as the KMT). Disappointed with the cold political reality of multiple-Party politics that had led to a series of military coups and political assassinations, Sun Yat-sen, the founder of the KMT, found faith in the Party-state system as the only vehicle to unite the then much-divided China as well as the political form of governance.²⁴ Once the KMT had taken control of the state, it immediately adopted the one-Party dictatorship and began to build the Party-state. It was also under the national government that the ruling class, namely the KMT at that time, and the state became two connected yet separate institutions. This was a historical change of governance, since, for the past 2,000 years, the imperial family, as the ruling class, and the state had been one and the same.

However, the KMT’s one-party dictatorship had never been truly successful, especially at the local levels of the state. Corruption was rampant and local Party institutions could not exercise effective supervision of activities of local government officials. Even instructions from the central KMT could not reach local governments or were frequently ignored by the latter. This regulatory failure was partially due to the KMT’s half-hearted commitment to dictatorship, since, according to Sun Yat-sen’s political blueprint, governing through Party dictatorship (*xunzheng*) was only a makeshift phase to prepare the nation for the ultimate phase of constitutional governance (*xianzheng*). Therefore, under the national government, local governments and local Party institutions were separated by design so that the Party and

24. Mo (2014); Fu (2006).

the government could check each other's power.²⁵ In practice, however, this limited separation of powers was too problematic to make governance effective. Instead of checks and balances, the system produced a state of pure anarchy.

In contrast to the KMT's loose organization and lax discipline, the CCP presented itself as a shining example of the opposite: strong discipline, centralized authority and high mobilization capacity. In most of the CCP-controlled areas, Party leaders were leaders not only of the Party, but also of the military and of the governments under their control. This fusion of the Party, the military, and the government (*yiyuanhua lingdao*) suited the CCP perfectly well, which was a guerrilla force with pockets of occupied areas scattered in remote countryside of a vast country and separated from each other by immensely challenging geographic barriers. This fused structure, in which the Party, the military, and the government shared one decision-making body, had increased the efficiency and effectiveness of the CCP's commanding system, which is critical to the survival of the CCP through its revolutionary struggles.²⁶

Upon taking over the state from the KMT, the CCP gradually terminated the fusion and started to rebuild the Party-state. First of all, the CCP carried forward its practice of alliance building and strategically proposed to establish a coalition government with other acknowledged political organizations.²⁷ In June 1949, three months before the official announcement of the establishment of the PRC, the CCP assembled all major social forces and held the first Chinese People's Political Consultative Conference (CPPCC), which consisted of delegates from a range of political parties and organizations as well as independent delegates to discuss the formation of a democratic government. Consequently, the CPPCC was mandated to act as an ad hoc legislature, which had promulgated the Law of Organization of the Central Government as well as the Charter of the CPPCC, *de facto*, the first PRC Constitution (also known as the Common Program). The CPPCC also elected members of the Central Government Committee, in which non-CCP members had a significant number of seats.²⁸

This pluralistic political arrangement was short-lived, however. Within a few years, and after a series of political campaigns and purges, the CCP had successfully either converted or annihilated all non-conformist social and political organizations and transformed the Chinese society into a homogenized monolith. As anticipated by the Party, all acknowledged non-CCP political organizations had declared allegiance to the leadership of the CCP as the result of the so-called "peaceful reform of nationalistic capitalists", a political campaign launched by the CCP in 1953.²⁹ In 1954, the CPPCC transferred its legislative function to the CCP-controlled National People's Congress (NPC) and, gradually afterwards, during the Cultural Revolution, ceased all its activities.³⁰ At the height of the Cultural Revolution, state institutions were

25. Huang (2008), p. 5; Fan (2007), p. 18.

26. Fan (2007), p. 41.

27. Xu (2010b), pp. 24–7.

28. *Ibid.*, pp. 67–9.

29. Fan (2007), p. 258.

30. Even though the institution of the CPPCC was restored in 1979, it has since remained only as a non-binding advisory body to the NPC. At the same time, the practice of alliance building was restored. The Party now opens a limited number of secondary seats in decision-making bodies of selected state institutions to non-Party cadres, who will be vetted, groomed, and pre-approved by the Party for their appointments, as long as such allocation is kept in safe

paralyzed, if not completely destroyed, and replaced by the newly assembled revolutionary Party institutions. The country was, once again, driven to a state of paralyzing anarchy, until the end of the Cultural Revolution, which brought Deng Xiaoping back to power.

Having witnessed the atrocities which resulted from Mao's totalitarianism and a suffocating relationship between the Party and the state, Deng revisited the Leninist theory of division of functions between the Party and the state and believed that the Party could rule the state with maximum administrative efficacy only through a more assertive programme that could separate the function of the Party from that of the state. In 1980, Deng held an extended Politburo meeting and delivered a speech on the "Reform of the Ruling System of the Party and the State". One of the four issues presented in the speech was about how to solve the problem of the fusion of the Party and the government (the word "government" is frequently used in Chinese as an equivalent of "state") and the problem of the Party's inclination to replace the government (state). In the speech, Deng proposed that "some of the central Party leaders shall relinquish their positions in the government and concentrate their energy to manage the Party, Party lines and Party policies".³¹ Allegedly, the real purpose of these reform proposals was to reduce the power and influence of the then Party leader Hua Guofeng.³² Nevertheless, after Hua had relinquished his power, the speech was taken for its face value and had virtually become a guiding principle document for the political reform ensued.³³

It is important to note that, in Deng's blueprint, separating the Party from the state did not mean that the Party would relinquish its monopolistic control over the state. Rather, it was more a strategic choice to retain better control by controlling less. Zhao Ziyang, the then Party General Secretary and the earnest advocate for the separation reform, made it clear that the separation is a separation of functions, the purpose of which is not to reduce the power of the Party, but to enhance the Party's managerial potency by delegating day-to-day governance to state institutions. It was believed that only by freeing itself from performing the day-to-day governmental functions could the Party focus on issues of greater significance. And only by extricating itself from the governmental activities could the Party be objective enough to coordinate conflicts among and to monitor the performance of state institutions.³⁴ During the 1980s, a series of political reforms was launched to delegate power from Party committees to the state institutions, including state-owned enterprises, to assist the concurrent economic reform. Party offices with functions that overlap with corresponding state institutions were abolished.³⁵ Party-groups placed at secondary-level state institutions were no longer considered necessary and hence disbanded.³⁶

(*F*'note continued)

balance. These non-Party-member appointees will be subject to the same cadre management system, which controls their appointments, promotions, transfers, and demotions.

31. Institutional Reform of the ruling system of the Party and the State [*dang he guojia lingdao zhidu gaige*], delivered by Deng Xiaoping on August 18, 1980, available at <<http://cpc.people.com.cn/GB/64184/64186/66697/4495007.html>>.

32. Wu (2014a).

33. Jiang (1987).

34. See Zhao Ziyang's speech at the preparatory meeting of the 7th plenary meeting of the 12th Central Party Committee, available at <<http://dangshi.people.com.cn/GB/165617/173273/10415395.html>>, <http://news.xinhuanet.com/ziliao/2005-02/05/content_2550447.htm>; also see Hsiao (1995).

35. Li (2004b).

36. *Ibid.*

These reforms released long-repressed entrepreneurial energy and opportunities and led to a miraculous economic growth sustained for a decade that dazzled economists around the world. However, they also exposed many regulatory failures, resulting in inflation, rampant corruption, and growing social inequality.³⁷ At the same time and due to loosened Party supervision, liberal ideas and thoughts introduced from the "capitalist West" made their first appearance in China. Social discontent was quickly mobilized, facilitated by the "defected"³⁸ state media and liberal intellectuals. Civil public assembly and demonstrations started to surface in university campuses and streets. The turn of events taking place in Eastern Europe and in the Soviet Union did nothing but encouraged the protesters, who had garnered support not only from the politically enthusiastic university students, but also from the politically more cautious working class as well as the otherwise indifferent broader citizenry. For weeks, the central government remained divided and paralyzed, unable to control the protests, until the introduction of martial law and eventually the crackdown on June 4, 1989.

The democratic movement in 1989 was the most regime-threatening political crisis that the Party had gone through since 1949. Fearing losing its grip on the state, the Party-state separation reform was immediately halted.³⁹ Since then, the very concept of "Party-state separation" (*dangzheng fenkai*) has disappeared from Party speeches and policies. The once abolished Party institutions were restored.⁴⁰ Delegation of power was retracted and weakened Party-groups in public institutions were reinstated to a leading role.⁴¹ The Party, however, did not supplant the state as it had done before. Instead, it started to experiment a kind of dual normative system, which is mounted upon a consolidated Party-state structure that chains the state to the Party but has reduced and separated the Party's engagement in state decision-making.

3. STRUCTURAL INTEGRATION OF THE PARTY AND THE STATE

Integration of the Party and the state means that Party institutions are embedded in state institutions but the two are not fused. Instead, both institutions remain self-contained and yet linked together. They are self-contained because all Party institutions are subject to the Party normative system, where all Party institutions are established and organized according to the Party Charter and all Party activities are regulated by Party disciplines and Party rules; in the state institutional system, all state institutions are established and organized according to the Constitution and state activities are regulated by state laws, which are enacted by people's congresses (not the Party) and enforced by people's courts that consist of judges elected by the people's congresses (again, not the Party). Simultaneously, the two systems are integrated into a grid that grants the Party direct access to the state decision-making process.

This gridded Party-state structure consists of two key components: regimentation and the interlocking of decision-making bodies. Regimentation refers to the hierarchical design of all Party and state institutions as well as of each single post within them. Regimentation is critical in establishing a web of chains of command, which are relied upon to channel and,

37. Shi (1990).

38. Walder (1998), p. 56.

39. Chen & Gang (2011).

40. Xu (2009); Chen & Gang (2011).

41. Li (2004a).

more importantly, to enforce instructions from the apex of the Party to the lowest level where the potency of the central authority begins to attenuate as the chain of command extends and scatters to cover an extensive territory. The well-studied ranking system is the embodiment of the regimentation. The system has borrowed some core concepts from the Soviet *nomenklatura* but it also bears indigenous features of the bi-millennial Chinese imperial ranking system and hence remains as “eclectic” as the Chinese state itself.⁴²

Briefly speaking, the control of the ranking system is highly centralized in the hands of Party institutions, though the administration of some less critical posts are retractably delegated to the Ministry of Human Resources of the state.⁴³ The allocated rank determines the pay scale, social benefits, and most importantly the boundaries of the decision-making power of each public office.⁴⁴ The rank is a good indicator of the status of a public institution or serving official in a gigantic bureaucratic system.⁴⁵ Such an index of power is vital for the operation of the commanding system because only with the assistance of this index of power can a recipient of an instruction discern and ascribe appropriate value to the authority of the instructions received. Based on this assessment, the recipient can then decide whether and to what extent an instruction shall be enforced and which level of priority and intensity of efforts should be given to the varied demands from different directions. The regimentation is pivotal in establishing and maintaining a clear and delineated web of chains of command that maps the power of both the Party and the state, which forms the foundation for the centralized regularization—a topic to be elaborated on in the next section. In addition, since all executive posts both in the Party and the state are integrated in a single nomenclature and subject to the centralized management by the Party, it allows a pool of carefully vetted and groomed political elites to be shared for employment in either or both Party and state institutions and transferred back and forth between Party and state posts. This practice, also termed “cross-fertilization”⁴⁶ or “Party-state spiral ascent”,⁴⁷ has become more and more institutionalized since Hu Jintao’s administration.⁴⁸

The second institutional arrangement of the gridded Party-state structure is the interlocking of Party and state decision-making bodies or what is called the “interlocking directorate”.⁴⁹ Here, what needs to be stressed is that the Party interlocks its decision-making bodies with those of the state not only by appointing individual Party officials to take key offices of all state institutions, but also by planting Party-groups in the decision-making bodies of these institutions, through which the Party can latch onto the state in a more structured and consolidated manner. As its name suggests, a Party-group is a collective body. Other than the chair, who is usually also the head of the state institution where the Party-group is installed, a Party-group also includes all other Party members who hold executive offices of the same state institution. For example, members of the Party-group of a provincial government typically include the governor, all deputy governors except the

42. Shambaugh (2000a).

43. For more comprehensive studies of the *nomenklatura* system, see Manion (1985); Burns (1994); Edin (2003).

44. Yan (1995).

45. Burns (2006), p. 38.

46. Zhu (2010), p. 55.

47. Feng (2010), p. 100.

48. See China Broadcast Network (2012).

49. Shambaugh (2000b).

deputy who is not a Party member (usually not more than one),⁵⁰ the head of the governor's office, and one assistant governor. Unlike the subsidiary Party committees established in state institutions, which are responsible for Party-building matters, such as recruiting new Party members, indoctrination, and collecting Party-member fees,⁵¹ Party-groups are distinctively mandated "to implement and enforce the Party-line, Party guidelines and policies; to deliberate and decide important matters in their institutions; to manage cadres ... and to complete the tasks handed over to them by the Party and the state" (Party Charter, Article 46).

Party-groups, as collective decision-making bodies, are subject to "democratic centralism", the organizational principle for all Party institutions. It means that, for important issues, decisions need to be deliberated and reached in a collective manner, in which circumstances majority opinion rules. The institutional design of the Party-group, which appears unique for Chinese communism,⁵² subjects the otherwise "on-the-loose" state executives to a collective and organized decision-making platform, where an internal checks and balances mechanism is administered. It can help the Party leaders at the top to limit the extent of arbitrariness of authoritarian decision-making and to control the abuse of power at the lower level without sacrificing their own entitlement to and benefit from exercising decision-making power of the same authoritarian style.

The Party came to realize the significance of Party-groups for the survival of the Party-state only after 1989. Before the democratic movement in the late 1980s had escalated to threaten the Party's survival, the Party was considering disintegrating the Party-state structure by releasing the interlocking of the decision-making bodies of Party and state institutions. Proposals were made to abolish the Party-groups, and even the Party standing committee, as the approach to transform the Party's function and reduce its degree of engagement in day-to-day state governance.⁵³ For example, when the Party Charter was amended in 1987, Article 46 drastically reduced and limited the installation of Party-groups only in the decision-making bodies of people's congresses, political consultancy conferences, and people's associations, and removed them from other state institutions except those listed above, economic organizations (including state-owned enterprises), and cultural organizations (including educational institutions and mass media). After 1989, the Party-groups were quickly reinstalled and their role was strengthened. When the Party Charter was amended for the first time after 1989, Party-groups were reintroduced to decision-making bodies of all state institutions, people's associations, economic organizations, cultural organizations, and other non-Party institutions. Their tasks include: to realize Party lines, principles, and policies; to discuss and decide major issues of the institution where it is installed; to unite non-Party-member cadres and rank and files; and to complete the assignments handed down by the Party.⁵⁴ Party-groups must follow instructions from the Party committees

50. To justify the proclaimed multiple-Party political system led by the CCP and to provide a minimal level of representation of other political parties in state decision-making bodies, usually one deputy post is saved for a person who is a member of one of the eight democratic parties or an independent who has no official political affiliation to any Party. Candidates for this post will go through the same vetting process as Party members. The appointed deputy governor can be invited to Party-group meetings, in which he/she enjoys the status of an observer with no voting right.

51. For a more detailed explanation of the differences between these two Party organizations, see Zheng (2009).

52. *Ibid.*, pp. 111–12.

53. Wu (2014b).

54. Party Charter (1992), art. 46.

which dispatched the Party-groups.⁵⁵ In the Amendment of the Party Charter in 2002, Article 46 added two more provisions: one articulated that the role of Party-groups is to provide core leadership to the institution where they are installed; one authorized Party-groups to manage cadres in the institutions where they are installed.

To conclude, through regimentation and the interlocking of decision-making bodies, the Party subjects the state to a subordinate status. The superiority of the authority of the Party is not established in state laws. To be clear, no law promulgated by the National People's Congress has granted the Party with a privileged status above the state or the state law. Instead, the superior authority of the Party over the state is achieved through the regimentation and the interlocking of Party and state decision-making bodies. As explained above, the Party-groups that are installed in the decision-making bodies of state institutions are subsidiary Party offices dispatched by Party committees. As a subsidiary office, the Party-group is bound by Party rules and disciplines to report and to answer to the Party. So are individual members of Party-groups. Since members of the Party-groups are not ordinary Party-member government employees but key decision makers holding executive offices in the state institutions concerned, to have the Party-group answer to the Party is to have the state answer to the Party. In other words, the Party has turned the state into its agent by implanting subsidiary Party offices, namely Party-groups, in state institutions to direct and control the latter's decision-making process.

4. RESERVED DELEGATION OF AUTHORITY AND BIFURCATION OF DECISION-MAKING

As the Party hastened to reconsolidate the Party-state structure, the separation reform was pushed forward on a different front: a division of authority between the Party and the state. As mentioned in the introduction, the separation reform promoted a withdrawal of the Party from state matters of secondary significance so that the Party could focus on more critical issues and the state can perform its functions more properly.⁵⁶ This "separation" clearly differs in meaning from Montesquieu's "separation of powers", since, in structural terms, the Party and the state are not dissected, but more consolidated, as explained in the previous section. Hence, the separation reform does not separate the Party and the state, but has made a rough demarcation of "Party matters" and "state matters" that allows more systematic delegation of authority to state institutions to conduct day-to-day governance.

Generally speaking, "Party matters" are matters for which the Party has retained exclusive decision-making power so as to realize the Party's leadership over the state. These matters cover three areas: political, ideological, and institutional.⁵⁷ To realize the Party's leadership in the political area mandates the Party to identify and articulate political tasks, political objectives, and political directions for state development, and to draw up the roadmap, guiding principles, and policies in order to achieve the identified and articulated political tasks, objectives, and directions.⁵⁸ To realize the Party's leadership in the ideological areas

55. Party Charter (1992), art. 47.

56. What is the fundamental approach to realize the Party's leadership? [*gongchandang lingdao de jiben fangshi shi shenme?*—Party training material published at the official website of the CCP (on file with the author).

57. *Ibid.*

58. *Ibid.*

mandates the Party "to equip the people with Party ideologies through propaganda work and thoughts and political education" conducted by Party institutions.⁵⁹ The Party's leadership in institutional areas mandates the Party to establish Party organizations and appoint Party members to the decision-making bodies in the People's Liberation Army, state institutions, social groups, enterprises, urban communities, and grass-roots rural communities.⁶⁰

When the Party engages in policy-making, its activities are usually subject to the collective decision-making process. Once a consensus is reached, the decision will be issued, depending on the nature of the decision, in the name of committee decision (*jueyi*), decision (*jueding*), order (*mingling*), communique (*gonggao*), internal communique (*tonggao*), or opinion (*yijian*), and disseminated to relevant Party institutions in the form of notice (*tongzhi*).⁶¹ The Party-groups installed in the decision-making bodies of state institutions are responsible for converting and operationalizing the Party decisions into state decisions. For example, the Party recently issued a decision at the 3rd Plenum of the 18th Party Congress, which had laid out a reform blueprint, including more than 300 specific reform measures covering all spectrums of political, economic, and social activities.⁶² The contents of such Party decisions are usually just specific enough to point out the directions of the next phase of policy development to be fulfilled by the respective state institutions. The legislatures are mandated to turn certain policies into laws and regulations⁶³ and the judiciary to take steps that are the best fit to realize the objectives of the Party policies through judicial activities.⁶⁴

However, "Party matters" are by no means limited only to policy-making activities because of two important reservations. First, the Party reserves the exclusive decision-making power concerning ideological issues and institutional issues at both policy-making and daily administration levels. In order to suppress any competitive ideology to take root in China, the Party spares no efforts on ideological indoctrination, which permeate every aspect of public life in China. The Party propaganda department, one of the most highly ranked Party departments, is directly involved not only in policy-making regarding ideological issues, but also day-to-day activities concerning ideological indoctrination and censorship of information in the press, publishing institutions, and mass media.⁶⁵ The same practice applies to the "institutional issues", which concern primarily the appointments of members of decision-making bodies of both Party and state institutions. The Party monopolizes not only the power to make electoral or personnel policies regarding public offices, but also the power to handpick candidates to executive offices in all public institutions.⁶⁶

59. *Ibid.*

60. *Ibid.*

61. Wei (2012).

62. For a better summary of the document, see Shambaugh (2013).

63. Decision on Building the Party's Governing Capacity, passed by the 16th Central Party Committee in 2004.

64. *Ibid.*

65. For example, the Party organizational departments have their own staff on vetting candidates for executive posts in Party or state institutions; the Party propaganda departments also have their own staff in charge of censorship and can give direct instructions to news outlets. A collection of these instructions can be found at <<https://chinadigitaltimes.net>> under the satirical title of the Ministry of Truth. For the Party's close involvement in shaping public opinions, see Tsai (2014).

66. Party Charter, Preface, Work Report of 16th Central Party Congress.

The second reservation is that, outside of the two prioritized ideological and institutional (appointments of key public posts) areas, the Party reserves the power to intervene, selectively and reactively, with the decision-making process regarding any individual state matter if and when the stake involved reaches a level that warrants the Party's attention and action. To be able to effectively exercise this power, the Party has to be confident that it is informed promptly of matters of critical interest to it so that intervention can be initiated at the earliest possible stage. This is realized through demanding officials to submit requests to Party superiors for instructions before important decisions are made and/or to submit reports to the same superiors on the outcome of decisions regarding major and significant matters (*zhongda shixiang qingshi baogao zhidu*, hereinafter "instruction-and-report").

This practice was first adopted by the Party during the land revolution in the late 1920s.⁶⁷ A Party decision was issued in 1928, which required all provincial Party committees to submit regular reports to the Central Party Committee. It contained details about how the report should be drafted and submitted, including the frequency, deadlines, category of issues, contents, and level of confidentiality. The decision also made it clear that failure to report would be punished by suspension of funding.⁶⁸ In the late 1940s, as the civil war escalated, Mao decided to extend the practice and apply it to Party leaders and military commanders of the highest rank directly under him, in an effort to enhance the central Party's authority as well as, if not more so, his personal authority. Mao drafted an instruction, famously known as *zi yu dian*, and issued it under the name of the Central Party Committee. The instruction demanded all Party and military leaders to submit military and/or policy reports to be written by themselves, not their secretaries, and to be sent to Mao regularly.⁶⁹ The instruction-and-report practice was considered of critical importance for the Party's revolutionary victory.⁷⁰ Without it, concerted military actions, conditioned upon centralized decision-making, would have been impossible, as would have been the military success of the Red Army, had it not been able to optimize its limited resources when facing a rival military force that was much larger and far better equipped than itself.⁷¹ After 1949, the Party continued to observe this practice and included it in Article 10(4) of the Party Charter as a part of the Party's organizational discipline. As indispensable as it was for the Party's military strategic planning and execution, the disciplinary practice is also crucial in times of peace in facilitating and improving centralized decision-making, thereby strengthening the efficacy of the Party's rule over the state.

The mandatory instruction-and-report practice constitutes an information loop, which continuously feeds the Party leaders at the top with information collected by their agents in the field. This pool of information shall direct the leaders' attentions and serve as the factual basis for their decision-making activities. In addition, according to Article 10(4) of the Party Charter, lower Party institutions are required to seek instructions from their superiors before decisions are made for matters of critical importance and for matters of secondary importance. Party institutions are required to handle them independently and responsibly and report about

67. See Xiong & Yang (2012).

68. *Ibid.*

69. Zhang (2008); Xiong & Yang (2012).

70. Zhang (2008); Xiong & Yang (2012).

71. Wang (2010).

the development of the matters afterwards. The provision intends to strike a balance, for the benefit of Party leaders, between their need to safeguard top-down control over decision-making at lower administrative levels and that of preventing avoidance of work and/or discharging responsibilities by their subordinates. To make such a balance even remotely possible, the general principle stated in Article 10(4) has to be operationalized—a task left in the hands of each individual Party institution, which will specify and notify its subordinate institution(s) of the scope and range of issues that are subject to the instruction-and-report requirement.⁷² As a pivotal Party discipline, the requirement applies to all Party institutions, including the Party-groups in all state institutions. As mentioned in the previous section, since members of the Party-groups include the core and the majority of members of the decision-making bodies of state institutions, to subject the Party-groups to the discipline of instruction-and-report is to subject the state to the same.

The instruction-and-report request can be submitted in a formal approach, presented in written “documents” (*wenjian*), or an informal approach conducted orally on the phone or in a face-to-face conversation.⁷³ If the reported matter is of critical significance and/or the response to the request will impact other similar matters, then a collective decision-making process may be triggered. Once a consensus is reached, a decision will be issued in the name of the collective leadership.⁷⁴ For issues that do not warrant a collective decision-making process, a response can be made by individual Party leaders in the form of remark-instruction (*pishi*). For example, Party leaders often make hand-written annotations on reports or requests for instructions submitted by subordinate institutions,⁷⁵ or journalistic exposes about official misconduct on issues that fall within the Party leaders’ assigned portfolio.⁷⁶ Such remarks have no prescribed authority in Party

72. A typical list of issues that a Party organization is required to seek instruction from the superior Party organization includes: matters concerning application of Party policies and regulations that need clarification; matters concerning issues that are not addressed in existing Party policies and regulations; matters with unique circumstances that require flexible application of Party policies and regulations; emergencies that will significantly affect the Party’s interest; all other specific matters that a Party organization is not allowed to make decisions without instructions from the superior Party organization. A typical list of issues that a Party organization is required to report to the superior Party organization includes: progress and outcome of implementation of important policies and decisions issued by the superior Party organization; self-review of regular work performance; outstanding problems and noticeable trend of ideological development among cadres; serious accidents concerning public safety; serious incidents that will affect social stability; and all other specific matters that are required to report by the superior Party organization. Regulations that the author used as references in compiling the above lists include, but are not limited to, regulations issued by the following bodies: Liaoyuan City Agricultural Committee (http://www.jlagri.gov.cn/Html/2012_03_05/83009_83125_2012_03_05_115263.html); Puko District (Nanjing City) Traffic and Transport Bureau (http://www.pkjt.gov.cn/dflz/lzjs/201103/content_0323_46311.htm); Zhoukou City People’s Government (<http://www.zhoukou.gov.cn/html/402881121bfd857011bfe2613590038/2013020108033035.html>). The Party Secretariat Office of Heshan City (<http://qlgk.heshan.gov.cn/yghs/ShowArticle.asp?ArticleID=312>).

73. For example, see Rules on Report and Request for Instruction Concerning Important Affairs, Issued by Chengde City Quality and Technological Inspection Bureau.

74. Handling of Party and Government Official Documents Act, jointly issued by the Central Party General Office and State Council General Office, Chapters 4 and 5.

75. For example, on January 28, 2013, the Party General Secretary Xi Jinping made an annotation remark (*pishi*) on the Supreme People’s Court’s Annual Work Report of 2013; the remark was sent back to the Supreme People’s Court the next day. Upon receiving the annotation remark, the Supreme People’s Court president immediately held an extended Party-group meeting on the same day to share and study the essence of remark. See <<http://www.chinacourt.org/article/detail/2014/01/id/1209786.shtml>>. Reportedly, the Amendment of the Party Charter in 2002 was also incorporated into opinions of the then Party General Secretary Jiang Zemin through self-initiated instruction (*zhishi*) and instruction embedded in annotation remarks (*pishi*). See the transcript of the CCTV interview regarding the drafting process at <<http://news.sina.com.cn/c/2002-12-09/2311835187.htm>>.

76. One of the recent examples is: at the wake of the terrorist attack at Xinjiang, the Party General Secretary issued an instruction to handle the case decisively and firmly and to clamp down any kind of violent crimes according to the law.

regulations; however, in practice, these are vested with higher authority and priority, since they are addressed by specific Party leaders to specific recipients concerning specific issues.⁷⁷ They are also perhaps the most popular form of Party instructions, since they are not subject to collective decision-making. This kind of remark-instruction is often more time-sensitive and geared to particular incidents and specific person(s) of interest. The contents of these instructions are rarely accessible by the public.⁷⁸ Depending on the rank of their authors, such instructions carry tremendous authority.⁷⁹

When the Party engages in decision-making either through policy-making or day-to-day governance, its exercise of power is not separated from that of the state. What has been separated is the decision-making process in state institutions. Instead of a fusion of Party activities and state activities, state decision-making has been bifurcated, with one phase taking place backstage, as it were, in the Party institution and the other taking place “onstage” in the state institution. The bridge between them is provided by the Party-groups installed in the decision-making bodies of state institutions, which are serving both the Party and the state. The bifurcation of state decision-making process is a direct outcome of the division of authority as explained in the previous section. The division of authority puts the Party at the control end of the decision-making process and makes it easier to isolate and conceal Party activities from state activities. Such an arrangement creates a measured distance between the Party and the state. It helps to shield the Party from being held accountable for state actions, even when such state actions are based on the Party’s instructions. In addition, it provides a level of structural coherence for state institutions,

(*F*’note continued)

The instruction was cited widely in the mass media and by the Xinjiang Party Secretary Zhang Chunxian in a meeting held at Xinjiang immediately after the event. Central leaders are known to make occasional *pishi* regarding local governmental malpractices exposed in prime-time news programmes broadcasted on the Chinese Central Television Network. For a review of this practice, see Unknown Behind-the-scene Stories about Focus Interview and the Right of Public Opinion, available at <<http://www.people.com.cn/GB/14677/22114/32760/32766/2415702.html>>.

77. See (2002). Notice on Issues regarding the Handling of Instruction Documents (*pishijian*) of State Council Leaders, issued by the State Council Office in 2002, No. 37. Regulations adopted by regional and local governments contain the same rules. See (2003). Notice on Further Standardizing Submission of Official Documents and Implementation of Leaders’ Instruction Documents, issued by Zhejiang Province Government in 2003, No. 96. (2002). Notice Regarding the Handling of State Council Leaders’ Instruction Documents, issued by Jiangsu Province Government Office in 2002, No. 57. (2006). Notice on Rules regarding the Handling of Leader Commorades’ Instruction Documents (*pishijian*), issued by the Zibo City Government Office in 2006, No. 60. (2004). Notice on Further Standardizing the Handling of Leaders’ on Documents (*pishijian*), issued by the State Council Office issued by Zhejiang Province Fuyang City Government Office in 2004, No. 9. Also see an essay published on the official website of Tianjin City Jinnan District Party Committee. Cheng, Yu, Four To-Dos Regarding How to Handle Leaders’ Instructions. The author worked at Sichuan Party Committee Office, <http://jinqwb.tjtn.gov.cn/office_pages.asp?id=66>.

78. See (2008). Dazu County Notice on Issues regarding the Handling of Instruction Documents of City and County Government Leaders, issued by Sichuan Province, Dazu County Government Office in 2008. No.56.

79. For example, in 1987, *Southern Weekend Newspaper* reprinted the published book *Deng Xiaoping’s Life in Jiangxi (1969–1973)*, which was pre-approved by Deng Xiaoping’s son Deng Pufang, on a number of consecutive issues of the newspaper. After having reprinted part of the book in three issues, the Chief Editor Zuo Fang received a telephone conversation transcript from the provincial Party Committee. The transcript recorded an instruction of the deputy director of Deng Xiaoping’s office, who demanded the provincial Party Committee to order *Southern Weekend* to stop reprinting the book. The transcript that Zuo Fang received had already been remarked with more concrete instructions by various leaders based on their readings of the transcript. These instructions include: (1) *Southern Weekend* shall immediately terminate printing the book; (2) *Southern Weekend* shall submit a self-reprimand letter to the Central Party Secretariat Office; (3) *Southern Weekend* shall undergo a rectification reform and learn the lesson from the incident. After having read the original and remarked instructions, the editor Zuo Fang suspected that local Party leaders may have over-read into the original transcript because the reprinted book was published with approval from Deng Xiaoping’s son. The editor also noticed that the transcribed oral instruction from Deng’s office carried a courteous tone. Eventually, Zuo managed to persuade the local leaders and made a phone call to Deng Xiaoping’s office for clarification. He was correct and the self-reprimand and rectification reform, punishments imposed by the provincial Party committee, were proved unintended and unnecessary. Zuo (2014).

based on which a semi-autonomous legal system can be utilized as a regulatory tool for state governance.

5. COHABITATION OF TWO NORMATIVE SYSTEMS

This article finds that the combination of the aforementioned structural features allows the Party-state to operate under two normative systems.⁸⁰ One is the Party normative system that regulates "Party matters" according to Party rules and regulations, which are dictatorial and disciplinary, designed to safeguard the potency of the chain of command and to maintain centralized power in the Party. The other is the state normative system that regulates "state matters" according to state laws and regulations. As a principle of the PRC constitution, state power is allocated to four branches: the People's congress, the administration, courts and procuratorates. The nominal relation between the four branches has the appearance of the separation of powers despite the fact that the People's Congress is given greater symbolic power than the other three. Divisions of functions are observed by these four branches, which helps to increase the legitimacy and credibility of the state authority and also to place a level of checks and balances upon state institutions when they exercise their delegated decision-making power while the Party is not on constant watch.

The two systems are each self-contained but also constantly overlap. When they overlap, their relationship is, however, not equal, or mutually binding as contended in both Jiang's and Backer's theses, but competing, resembling the competition between the "Party-state logic" and the "republic logic" discussed by Xu Sijian. Instead, the two systems are unequal, with the overriding authority pre-assigned to the Party normative system. The superiority of the Party normative system is manifested and realized by the Party's preservation of exclusive decision-making power in marked key areas and issues as explained in the previous section. When the Party exercises this exclusive decision-making power, either in policy or day-to-day governance matters, its activities are not bound by the state laws. Instead, the Party's superior rank, as defined in the *nomenklatura*, allows its authority to override the authority of state institutions. For example, the Party Discipline and Inspection Committee (DIC), the Party disciplinary body, is authorized to exercise coercive investigative power that exceeds the limit stipulated in the Criminal Procedure Law.⁸¹ The Party's superior rank also allows it to intervene with the judicial decision-making process to shape, if not dictate, adjudicative outcomes in marked cases, which is the more evident example of the superior authority of the Party to that of the state.⁸²

However, due to the bifurcation of the state decision-making process, as mentioned earlier in the previous section, the Party exercises its supervisory power over the state discreetly, situated backstage through Party-groups installed in state institutions. For example, the activities of the Party disciplinary investigations are rigorously protected from public view before the cases concerned are transferred to state institutions for prosecution and trial.⁸³ The Party's participation in judicial decision-making is also kept as an internal record, denied access to

80. The view is also shared by Xu (2010a).

81. Li (2014b).

82. Li (2014a).

83. Li (2014b).

both litigants and the public.⁸⁴ The same practice applies to the nomination for key public offices. The process of candidate nomination is held behind closed doors and its record is kept confidential.⁸⁵ Such practices are usually justified by claiming that the relationships between the Party and Party-groups are Party internal matters and hence are not subject to the transparency requirement as more frequently laid down in state laws. This allows the Party to have factual control over the state without the need to claim an above-the-law status.

The significance of this institutional design has been largely neglected by China's legal scholars. Effectively obscuring its above-the-law privileged status in the law, the Party provides the law-based state normative system with an extent of autonomy and an air of integrity, without which the state law would face much greater difficulty in commanding regulatory authority with regard to the market economy and modern society that work best in a regulatory system that provides fair and equal treatment to all actors, regardless of their political affiliation. Moreover, if the law prescribes explicit extra-legal privilege to the Party, it will fly in the face of the pronounced communist ideal, which portrays the Party as the guardian of the people's interest in a proclaimed egalitarian society—a critical source of moral legitimacy of the communist rule. Therefore, it is a matter of strategic necessity that the Party keeps its footprints out of any public manifestation of the state legal system, including the Constitution (the Party is only mentioned in the preamble) and any other law promulgated by the state legislature.

Under this dual normative system, the Party relies on a state legal system that it sanctions and empowers to regulate state matters and state-society relations. By delegating the lion's share of regulatory responsibilities to state institutions, the Party can concentrate on issues of greater strategic importance, including centralizing power that is fragmented as the result of delegation. As mentioned earlier in this article, this institutional design was conceived by Lenin but developed and operationalized by the CCP in the course of the "separation reform". In 1987, then Party's General Secretary Zhao Ziyang delivered a speech at the 13th National Party Congress, substantiating Deng's embryonic idea on political reform into a more concrete policy: "The Party realizes its leadership over the state through its political leadership The Party realizes its political leadership through "converting Party decisions to the will of the state through legal procedures (hereinafter 'legal conversion')."."⁸⁶ Zhao Ziyang's reformative agenda was to disintegrate the Party-state structure and loosen the chain of the state from the Party. In the wake of the 1989 crackdown, the disintegration was abruptly halted. The phrase of Party-state separation was indefinitely erased from Party discourses. However, the actual practice of "legal conversion" has survived.

Such conversion takes place when, for example, a Party policy is communicated to the Party-group of the standing committee of the people's congress, then translated into, for example, state appointment of a public office or a Bill, and thereafter passed into law.⁸⁷ Similarly, it can also take place when a Party decision to remove and punish a state official is communicated to the Party-groups of the procuratorate and court, which will translate the

84. Li (2014a); Li (2012).

85. Li (2008).

86. See "Work Report Delivered by General Party-Secretary Zhao Ziyang to the 13th National Party Congress" (1987).

87. "Jiang Zemin on People's Congress", available at the official website of the National People's Congress, <http://www.npc.gov.cn/npc/rdgl/ldrld/2003-07/03/content_316501.htm>.

decision into prosecution and conviction.⁸⁸ The "conversion" is formulated and communicated seamlessly between the Party and the state institutions, thanks to the consolidated Party-state structure. The communication is kept backstage, bifurcated from state actions and shielded from public view. Because of the bifurcation, the practice of "conversion" and any associated evidence that can discredit the legal system is filtered out from public view. As long as the conversion remains backstage, the state normative system can present itself with an untainted image—one that adheres to the law. Meanwhile, the Party normative system continues to operate and dominate, but in an air of mysterious seclusion—its potency and ubiquity are deeply felt but practically invisible and untraceable.

After decades of experiments and adjustments, this dual normative system was considered greatly successful and was consequently elevated to and retained as a principle of national policy under the name of "ruling-through-the-law strategy" at the 15th Party Congress in 1997, which has been consistently endorsed by all Party leaders thereafter.⁸⁹ This ruling strategy has benefited the Party in that it allows the Party to delegate a significant amount of governing authorities to the more professionalized state institutions, which can regulate more effectively and efficiently; simultaneously, it also allows the Party to shift an equally significant amount of responsibilities and accountabilities to state institutions for regulatory failures, especially when the aggrieved public needs to be placated. This is why it is usually the premier, governors, and mayors (state executives), not the Party-secretaries (Party executives), who are the first to respond to public safety emergencies and apologize for governmental wrongdoings at incidents of public scandals.⁹⁰ In the meantime, there is also undeniable evidence that the Party has become more and more conscious with self-restraints and "taking the lead" to comply with the law⁹¹ so as to preserve at least a minimal measure of credibility for the state legal system.

6. CONCLUSION

In 2013, at the TED Global conference, Eric X Li, a contemporary Chinese "red-capitalist" and effective public speaker, delivered a speech under the title of "The Tale of Two Political Systems", which soon attracted an online audience of over two million. In his speech, Li argued that the often-heard criticism that China was lagging behind in political reforms was unjustified. Li further explained that, if we alert ourselves and reject the Western "rhetoric trap" that political reform only means free political competition and universal suffrage, we would realize that China has never stopped political reform and that China would outperform other political systems because of its unique Party-state structure. Li's speech resonates among many constitutional scholars in and outside China, as I have explained in the introduction of this article. As a reflection of this newly emerging trend of searching for innovative interpretations of the constitutional reality in China, I traced the evolution of the Party-state relation since 1949. Then, I examined the structural features of the "Party-state" by analyzing the "separation reform" that was launched in

88. Li (2012).

89. See a research project conducted by a Party school researcher, Sang (2006).

90. In a recent interview, Li Xueqin, director of the research office of the Central Party Discipline and Inspection Commission, mentioned that in public safety scandals it is almost always government executives who are held accountable, but not Party executives (Party-secretaries). *People's Daily* (2013).

91. This was well presented in, for example, Hand (2011); *People's Daily* (2014).

the 1980s and continues to develop today. I examined the development of the Party-state relation since the “separation reform” was launched in the 1980s, which was also central to the discussion of the “Chinese-style constitutionalism” or the “Party-state constitutionalism” that I examined in this article. Based on the findings resulting from this examination, I propose the “dual normative system” as a conceptual framework enabling a better understanding of the institutional structure of the Party-state and the constitutional reality in China.

This dual normative system consists of first an integrated Party-state structure, which is achieved by regimentation of the Party and state institutions through the *nomenklatura* system and the interlocking of their decision-making bodies through the installation of the Party-groups. Once the integration of the Party-state is consolidated, the Party delegates a vast magnitude of authority to the state by roughly demarcating “Party matters” and “state matters.” In the delegation process, the Party made two important reservations. The first reservation is the exclusive decision-making power on political, ideological and institutional (appointments of key public posts) matters. The second reservation is the power to intervene in state decision-making activities on any matter if the stakes involved in the matter concerned reach a level that calls for the Party’s attention and action.

The power of the Party to intervene with state decision-making activities and the exercise of such power have necessarily bifurcated the decision-making process in state institutions. Bifurcation means that state decision-making activities are divided into two parts. The first part takes place between the Party and Party-groups installed in state decision-making bodies, where instructions are communicated from the former to the latter. Their relation and interactions are regulated by Party rules and immune from scrutiny by the state legal system unless the Party subjects itself to the latter voluntarily. The second part takes place within state decision-making bodies where Party-groups are installed. When state decision-making bodies make decisions, the installed Party-groups are to ensure the Party instructions that they have received will be loyally translated into properly operationalized state acts. Once translated, state decisions will be implemented and enforced through the state legal system, which is, compared with the Party system, more transparent and procedurally bound.

Such bifurcation enables the cohabitation of two normative systems. The Party normative system regulates the Party-state sphere, where centralization of power and preservation of authoritarianism are dealt with. There, regulation follows Party rules which are enforced by Party disciplines. The state normative system regulates the state-society sphere, where most of the economic and social activities take place. In that domain, regulation is based on state laws sanctioned by the Party. The two normative systems could be compatible or complementary most of the time, since the Party sanctions the state laws. On occasions when Party interests diverge from state interests and the Party regulations are at odds with state laws, the Party normative system enjoys superior authority. However, it operates backstage and is bifurcated from the comparatively more transparent decision-making process taking place in state institutions. The bifurcation obscures and veils any clash that might occur between the authorities of the Party and the state. Compared with the previous monolithic structure of the Party-state, this institutional design makes the normative system of the Party-state more complex yet more pliable to adjustments and more open to different interpretations, including the “Party-state constitutionalism.”

In conclusion, the above-proposed conceptual framework of the Party-state shares one common feature with the constitutionalism advanced by Jiang and Backer. This common feature is the recognition of the authority and the associated importance of the Party as the source of an independent normative system in China. However, this conceptual framework differs from that of these authors in two aspects. First, it is clear about the unequal relationship between the two normative systems. Second, it provides an explanation of how the Party is able to impose its overriding authority upon the state and at the same time make the state normative system appear credible enough to be operative.

REFERENCES

- Backer, Larry Catá (2010) "A Constitutional Court for China within the Chinese Communist Party? Scientific Development and a Reconsideration of the Institutional Role of the CCP." 43 *Suffolk Law Review* 101–32.
- Backer, Larry Catá (2014a) "Jiang Shigong 强世功 on 'Written and Unwritten Constitutions' and Their Relevance to Chinese Constitutionalism." 40 *Modern China* 119–32.
- Backer, Larry Catá (2014b) "Toward a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism." 40 *Modern China* 168–95.
- Burns, John P. (1994) "Strengthening Central CCP Control of Leadership Selection: The 1990 Nomenklatura." 138 *The China Quarterly* 458–91.
- Burns, John P. (2006) "The Chinese Communist Party's Nomenklatura System as a Leadership Selection Mechanism: An Evaluation," in K.E. Brødsgaard, ed., *The Chinese Communist Party in Reform*, Zheng Yongnian, Florence, KY: Routledge, 33–58.
- Chen, Lifang, & Xiao Gang (2011) "The Evolution of the Concept of Separation of the Party and the State." 6 *Beijing Party History* 61–3.
- China Broadcast Network (2012) "Central Party Organizational Department Recognize the Fruits of the Cadre Rotate Program and Claim such Practice will be Normalized," *China Broadcast Network*.
- Clemons, Steve (2011) "America's Edge: China's Socialist System of Laws with Chinese Characteristics," *The Atlantic (Online)*, 11 November.
- Edin, Maria (2003) "State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective." 173 *China Quarterly* 35–52.
- Fan, Xiaochun (2007) "Zhongguo da Xingzhengqu Yanjiu: 1949–1954." ["A Study on the Grand Administrative Region: 1949–1954."] PhD dissertation, Chinese Central Party School.
- Feng, Junqi (2010) "Cadres in Zhongxian County." PhD dissertation, Peking University.
- Fu, Chunyang (2006) "KMT's Party-State as a Political System." PhD dissertation, Wuhan University.
- Ginsburg, Tom, ed. (2008) *Rule By Law: The Politics of Courts in Authoritarian Regimes*, Cambridge: Cambridge University Press.
- Hand, Keith J. (2011) "Resolving Constitutional Disputes in Contemporary China." 7(1) *University of Pennsylvania East Asia Law Review* 51–159.
- Hsiao, Pen (1995) "Separating the Party from the Government," in C.L. Hamrin, & Suisheng Zhao, eds, *Decision-Making in Deng's China: Perspectives from Insiders*, New York: M.E. Sharpe, 153–62.
- Huang, Lixin (2008) "Gongheguo Chuqi Beijingshi Chengqu Jiceng Zhengquan Jianshe Yanjiu (1949–1954)." ["Power Building at the Urban District Basic-Level in the Early Years of the Republic in Beijing (1949–1954)."] PhD dissertation, Capital Normal University.
- Huang, Philip C.C. (2010) "Introduction to 'Constitutionalism, Reform, and the Nature of the Chinese State: Dialogues among Western and Chinese Scholars, III.'" 36 *Modern China* 3–11.
- Huang, Philip C.C. (2014) "The Basis for the Legitimacy of the Chinese Political System: Whence and Whither? Dialogues among Western and Chinese Scholars, VII—Editor's Introduction." 40 *Modern China* 107–18.

- Ji, Weidong (2014) "The Rule of Law in a Chinese Way: Social Diversification and Reconstructing the System of Authority." 1 *Asian Journal of Law and Society* 305–38.
- Jiang, Huanhu (1987) "The Fundamental Guiding Thought of the Political Reform of China: Reflection on Deng Xiaoping's Speech on the Reform of the Governing System of the Party and the State." 7 *Xuexi he Yanjiu* 5–7.
- Jiang, Shigong (2010) "Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China." 36 *Modern China* 12–46.
- Jiang, Shigong (2014a) "Chinese-Style Constitutionalism: On Backer's Chinese Party-State Constitutionalism." 40 *Modern China* 133–67.
- Jiang, Shigong (2014b) "How to Explore the Chinese Path to Constitutionalism? A Response to Larry Catá Backer." 40 *Modern China* 196–213.
- Jiang, Zemin (1997) "Work Report for the 15th National Party Congress," 12 September 1997, online <http://www.bjreview.com.cn/document/txt/2011-03/25/content_363499.htm>.
- Li, Cheng (2008) "From Selection to Election? Experiments in the Recruitment of Chinese Political Elites." *China Leadership Monitor* (Fall).
- Li, Ling (2012) "The 'Production' of Corruption in China's Courts: The Politics of Judicial Decision-Making and Its Consequences in a One-Party State." 37 *Law & Social Inquiry* 848–77.
- Li, Ling (2014a) "The Party and People's Courts: Judicial Dependence in China." unpublished manuscript, US-Asia Law Institute, New York University School of Law, pp. 1–37.
- Li, Ling (2014b) "The Party Disciplinary Institutions: 1927–2012." unpublished manuscript, US-Asia Law Institute, New York University Law School, pp. 1–41.
- Li, Shaopeng (2004a) "A Review and Commentary of Deng Xiaoping's Thought on the Separation of the Party and the Government." ["Deng Xiaoping 'dang zheng fenkai' sixiang shuping."] 5 *Qinghai Normal University Review (Philosophy and Social Science)*.
- Li, Shaopeng (2004b) "A Review of the Deng Xiaoping Thought on the 'Party State Separation'." 5 *Qinghai Normal University Academic Journal*.
- Manion, Melanie (1985) "The Cadre Management System, Post-Mao China: The Appointment, Promotion, Transfer and Removal of Party and State Leaders." 102 *China Quarterly* 203–33.
- Mo, Shixiang (2014) "The Root Cause of Sun yet-Sun's Decision to Choose the Party-State System," in Historical Archives on Hu Yaobang, online <<http://www.hybsl.cn/beijingcankao/beijingfenxi/2010-12-13/24035.html>>.
- People's Daily (2013) "Party-Secretaries Rarely Held Accountable—Must Change," *People's Daily*, 23 December.
- People's Daily (2014) "Report on Xi Jinping's Speech at the Central Political-Legal Work Conference," *People's Daily (Overseas Edition)*, 9 January.
- Sang, Xuecheng (2006) "Converting the Propositions of the Party to the Will of the State According to Law." 5 *Wei Shi* 12–15.
- Shambaugh, David (2013) "Breaking Down China's Reform Plan," *The National Interest*, online <<http://nationalinterest.org/commentary/breaking-down-chinas-reform-plan-9476>> (last accessed 3 November 2014).
- Shambaugh, David (2000a) "Introduction: The Evolving and Eclectic Modern Chinese State," in D. Shambaugh, ed., *The Modern Chinese State*, New York: Cambridge University Press, 1–15.
- Shambaugh, David (2000b) "The Chinese State in the Post-Mao Era," in D. Shambaugh, ed., *The Modern Chinese State*, New York: Cambridge University Press, 161–87.
- Shi, Tianjian (1990) "The Democratic Movement in China in 1989: Dynamics and Failure." 30 *Asian Survey* 1186–205.
- Tamanaha, Brian (2004) *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press.
- Tsai, Wen-Hsuan (2014) "How the 'Networked Authoritarianism' was Operated in China: The Amalgamation of the CCP's Historical Legacy and Internet Technology," presented at the 56th Annual Conference of American Association of Chinese Studies, Washington, DC.

- Walder, Andrew (1998) "Collective Protest and the Waning of the Communist State in China," in M. Hanagan, ed., *Challenging Authority: The Historical Study of Contentious Politics*, Minneapolis, MN: University of Minnesota Press.
- Wang, Chaoguang (2010) *CCP-KMT Political Struggle and the Destiny of China: 1945–1949*, Shehui: Kexue Wenxian.
- Wei, Jianzhou (2012) *Composition of Party and State Institution Official Documents (Latest Edition)* [*xinbian dangzheng jiguan gongwen xiezuo*], Beijing: Red Flag Publishing House.
- Wu, Wei (2014a) "Deng Xiaoping's Speech on the Reform of the Governing System of the Party and the State," *New York Times (Online Chinese)*, 21 January.
- Wu, Wei (2014b) "Party-State Separation Must Start with a Reform of the Organizational System," *New York Times (Online Chinese)*, 21 January.
- Xiong, Hui, & Yifang Yang (2012) "A Historical Review of the Practice of Request for Instruction and Report during the Liberation War Period." 4 *CCP History Research* 28–38.
- Xu, Baoyou (2009) "Characteristics and Reform of the Party-State Relation in the Transitional Era." 2 *Contemporary World and Socialism* 128–32.
- Xu, Sijian (2010a) "Party-State or Republic: A Inherent Logic of the Vicissitude of the Political Development of the CCP." ["'dangguo' haishi 'gongheguo': zhonggong zhengzhi bianqian de yige neizai luoji."] 45 *Political Science Forum* (September) 37–68.
- Xu, Yue (2010b) "On the Establishment of the Central Administrative Institution of the New Republic from 1949–1954." ["1949–1954 nian zhongguo zhongyang xingzheng tizhi yanjiu."] PhD dissertation, Naikai University.
- Yan, Huai (1995) "Organizational Hierarchy and the Cadre Management System," in Carol Lee Hamrin, Suisheng Zhao, & A. Doak Barnett, eds., *Decision-Making in Deng's China: Perspectives from Insiders*, Armonk, NY: M.E. Sharpe.
- Zhang, Ying (2008) "Mao Zedong's Contribution to the Establishment of the Practice of Request for Instruction and Report in the CCP." 8 *Digest of Party History* 23–4.
- Zheng, Yongnian (2009) *The Chinese Communist Party as Organizational Emperor Culture, Reproduction and Transformation*, London, New York: Routledge.
- Zhu, Suli (2010) "The Party and the Courts," in R. Peerenboom, ed., *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, New York: Cambridge University Press, 52–68.
- Zuo, Fang (2014) *How Steel Was Not Tempered?* [*gangtie shi zenyang lian bu cheng de*], Hong Kong: Tiandi Tushu.