

THE EMERGING STRUCTURES OF SOCIALIST CONSTITUTIONALISM WITH CHINESE CHARACTERISTICS: EXTRA-JUDICIAL DETENTION AND THE CHINESE CONSTITUTIONAL ORDER

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Abstract: China is developing its own distinctive path towards socialist constitutionalism and rule of law, one that reflects China's history and its unique circumstances but also conforms to the general principles of transnational constitutionalism. The Chinese constitutional order is grounded on a principal of separation of powers that distinguishes between an administrative power assigned to the government and a political authority assigned to the Chinese Communist Party ("CCP"). This constitutional order is reflected in two related but distinct legal contexts—*laojiao* (the system of administrative detentions, re-education through labor, or “劳动教养”) and *shuanggui* (the system of intra-CCP discipline of its cadres, “双规”). This article develops a theory of Chinese socialist constitutionalism through an examination of these structures for extra-judicial detention. On the basis of this reading of Chinese socialist constitutionalism, it will suggest why *laojiao* is constitutionally problematic, but *shuanggui* is constitutionally sound under the current Chinese constitutional framework. *Laojiao* deals with general conduct obligations of individuals imposed through, and fully subject to, the administrative order established under the leadership of the CCP, elaborated through the State Constitution. Deviation therefrom breaches both the State Constitution and the CCP's mass line. *Shuanggui* deals with political rather than administrative breaches that touch on the integrity of the role of the CCP as Party in Power. It is in this sense beyond the competence of the administrative authorities represented by the government apparatus and relates to the constitution of the CCP rather than the constitution of the state and its administrative authority over the people. As a consequence, the *shuanggui* system is not subject to the same constitutional difficulties as *laojiao*. Legitimacy is not perfection, and the article ends with a consideration of the ways in which *shuanggui* might be reformed to better conform with the CCP's own organizational line and its constitutional principles.

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I. INTRODUCTION

Extra-judicial or administrative detention by the state, *laojiao*,¹ has raised important issues of constitutionalism in China. The related practice of extra-judicial detention by the CCP, *shuanggui*,² have raised equally important issues about the relationship between the CCP, the state, and the nature of constitutionalism in China. In both cases, the issues can be understood as focusing on two principal questions. The first goes to the constitutional legitimacy of *laojiao* and *shuanggui*. Legitimacy implicates the ways in which Chinese constitutionalism itself fits within emerging global notions of constitutional legitimacy, that is, whether China is a legitimately constitutional state. The second assumes the constitutional legitimacy of each practice, but considers whether the implementation of each system sufficiently conforms to Chinese constitutional requirements. Constitutional implementation implicates the way in which Chinese normative principles can constrain the practices of important political institutions.

The issues of the constitutional legitimacy and constitutional implementation of *laojiao* and *shuanggui* provide an important window for understanding the normative structures of Chinese constitutionalism and its distinct basis for the organization of administrative and political power. It is well understood now that China is developing its own distinctive path toward socialist constitutionalism and rule of law.³ Socialist constitutionalism with Chinese characteristics reflects China's history and its unique circumstances, but also conforms to the general principles of

¹ "Laojiao" (劳动教养) originated in the CCP's 1955 campaign against counter-revolutionaries. HUMAN RIGHTS IN CHINA, REEDUCATION THROUGH LABOR (RTL): A SUMMARY OF REGULATORY ISSUES AND CONCERNS, 1 (2001), available at http://www.hrichina.org/sites/default/files/publication_pdfs/hric-rtl.pdf. Current legislation dates from 1957, when the NPC Standing Committee authorized the State Council to administer reeducation through labor. *Id.* at 2; see *infra* Part II. For discussion of the Anti-Rightist Campaigns of 1957-59, see, e.g., René Goldman, *The Rectification Campaign at Peking University: May-June 1957*, 12 THE CHINA Q. 138, 138-163 (1962) (China); Frederick C. Teiwes, *The Purge of Provincial Leaders 1957-1958*, 27 THE CHINA Q. 14, 14-32 (1966) (China).

² *Shuanggui* is the name by which the system of intra-CCP discipline of CCP cadres, or 双规, is known. It has existed as a means of disciplining CCP cadres since 1927. In its current form, it has become part of the structures through which politics has been institutionalized in post-Revolutionary China. Thus institutionalized, *Shuanggui* is now commonly understood as a Chinese anti-corruption term, translated as "double designations," which is used to question Party members being investigated for violating Party discipline. The plain meaning of the words, according to Gan Yisheng, secretary-general of the CCDI, suggests that Party members are requested to attend questioning sessions at a designated place and for a designated duration. See *infra* Part III through Part V.

³ RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 532 (2002).

transnational constitutionalism.⁴ The core premise of the Chinese constitutionalist order is the relationship between CCP and the state institutions.⁵ The principle of scientific development, solidified as an important part of the core of the CCP Line, is grounded in the premise that a successful constitutionalist system not only needs to adhere to core substantive constitutional principles and norms, but also needs to be a “living constitution”—one that both reflects socio-political realities present at hand in order to avoid personification, and also adheres to the CCP’s foundational mass line.⁶ In Western political terms, the mass line might thus be understood as including characteristics of the core democratic principles of the political organization of the state.

China, like the vast majority of states since the eighteenth century,⁷ has adopted a written constitution.⁸ Like the majority of states, the legitimacy of its government and governmental actions is assumed to be judged by or through their conformity to the provisions of that document.⁹ However, China is also organized on the basis of Marxist-Leninist principles, which are accorded constitutional effect.¹⁰ Its principal organizing effect is evidenced in a distinctive approach to separation of powers. While Western constitutions are grounded in the amalgamation of all administrative and political authority in a government, whose combined powers are separated among executive, legislative, and judicial functions,¹¹ the Chinese constitutional order is grounded on a principal of separation of powers that distinguishes between an administrative power assigned to the

⁴ See generally, Jiang Shigong, *Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China*, 36 MODERN CHINA 12, 12-46 (2010).

⁵ See Backer, *Party, People, Government, and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 B.U. INT’L L. J. 331, 331-408 (2012); Jiang Shigong, *supra* note 4, 12-46.

⁶ Jiang Shigong, *supra* note 4, 12-46.

⁷ See, e.g., ZACHERY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 36-64 (2009); see generally, HENC VAN MAARSEVEEN & GER VAN DER TANG, WRITTEN CONSTITUTIONS: A COMPUTERIZED COMPARATIVE STUDY (1978).

⁸ See XIANFA (1982) (China), available at <http://english.people.com.cn/constitution/constitution.html> (last visited March 8, 2014); see also Pu Zengyuan, *A Comparative Perspective on the United States and Chinese Constitutions*, 30 WM. & MARY L. REV. 867, 869 (1989) (stating that: “The current Constitution of the People’s Republic of China was adopted in 1982. Although labeled a revised constitution, it is actually a newly drafted one. It reflects the new development of socialist democracy. For the first time, the new Constitution provides that the building of a high level of democracy is one of the basic tasks of the state.”).

⁹ See, e.g., Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1789-1851 (2005).

¹⁰ Zhao Qian, *A Thought of Taking CPPCC as Chinese Professional Supervisory Institution of Unconstitutional Behavior in Applying Law*, 7 CAN. SOC. SCI. 71, 71 (2011).

¹¹ Bruce A. Ackerman, *The New Separation of Powers*, HARV. L. REV. 633, 691 (2000).

government and a political authority assigned to the Chinese Communist Party.¹² Administrative constitutional power is organized within the State Constitution; the CCP is vested with a leadership through which the political authority of the people is expressed.¹³ Western critics sometimes err by suggesting that the Chinese approach to constitutionalism is not legitimate constitutionalism, because the Chinese constitutional system does not conform to the organizational forms of Western states.¹⁴ Chinese academics sometimes commit the same Western style error in reverse by conceding to the West the control of the definition of constitutionalism, suggesting that constitutionalism is itself incapable of universalization because its forms are grounded in ideological values unique to Western states. Some argue that any alternative form of constitutionalism, including socialist constitutionalism, is impossible because these variants do not imitate Western forms precisely.¹⁵

China's distinctive separation of powers template reflects a normative foundation for government different from that embraced in Western states. In Chinese separation of powers approaches, the principles of democracy and popular sovereignty, understood through the principle of the "mass line,"¹⁶ are divided between an institution with political leadership authority

¹² Larry C. Backer, *Towards a Robust Theory of the Chinese Constitutional State: Between Formalism and Legitimacy in Jiang Shigong's Constitutionalism*, (Consortium for Peace and Ethics, Working Paper No. 5-1, 2013) at 16, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2262555.

¹³ Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012), preamble (China), available at <http://english.CCP.people.com.cn/206972/206981/8188089.html>, (stating that "[l]eadership by the Party means mainly political, ideological and organizational leadership.")

¹⁴ See generally Tom Ginsburg, *Constitutionalism: East Asian Antecedents*, 88 CHI.-KENT L. REV. 11 (2012); but see Michael W. Dowdle, *Of Comparative Constitutional Monocropping: A Reply to Qianfan Zhang*, 8 INT. J. CON. L. 977 (2010).

¹⁵ Yang Xiaoqing, *Xianzheng yu renmin minzhuzhidu zhi bijiao yanjiu* (宪政与人民民主制度之比较研究) [A comparative study of constitutional democracy and the people], 2013 HONGQI WENGAO ISSUE 10, 4 – 10 (May 21, 2013), available at http://www.qstheory.cn/hqwg/2013/201310/201305/t20130521_232618.htm.

¹⁶ The "mass line" is a principle with constitutional dimensions. It has been inscribed in the Chinese State Constitution since 1954. XIANFA art. 17 (1954) (China) provided: "[a]ll organs of state must rely on the masses of the people, constantly maintain close contact with them, heed their opinions and accept their supervision." In its current form it is found in XIANFA art. 27 (1982) (China): "[a]ll state organs and functionaries must rely on the support of the people, keep in close touch with them, heed their opinions and suggestions, accept their supervision and work hard to serve them." The scope is now focused on all organs of government. The preamble to the Constitution of the Chinese Communist Party provides: "[t]he Party follows the mass line in its work, doing everything for the masses, relying on them in every task, carrying out the principle of 'from the masses, to the masses,' and translating its correct views into action by the masses of their own accord." Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov.

(the CCP) and an institution with administrative authority (the government). Both government and CCP are organized in accordance with their own logic and within the limits of their authority and function. The government is organized on the basis of the State Constitution. The State Constitution provides for the organization of government,¹⁷ commonly understood as exercised at its highest levels through the State Council and National People's Congress ("NPC") organs and the regulation of the use of government power, including in relation to the people of China.¹⁸ For a long time, the government, through police officials, has appropriated for itself the power to administratively detain individuals through a process that bypasses the standard provisions of criminal and civil law. This *laojiao* system targets all citizens, bypasses both prosecutor and court, and is used to police anti-social behaviors, some of which are political in character and some of which have been criminalized under appropriately authorized action of the NPC. *Laojiao* is often referred to as the "Chinese labor camp system" in the West, and not without good reason.¹⁹

The authority of the CCP is acknowledged in the Constitution,²⁰ but is framed by the ideological premises on which the political order is founded²¹—under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the important thought of "Three Represents," and the concept of scientific development.²² These describe the normative limits of

14, 2012), preamble (China). Xi Jinping recently relied on the mass line as a critical support for anti-corruption efforts. See Raymond Li, *Xi looks to legacy of Mao for inspiration to solve corruption*, SOUTH CHINA MORNING POST (June 19, 2013), available at <http://www.scmp.com/news/china/article/1263927/xi-looks-legacy-mao-inspiration-solve-corruption>.

¹⁷ Michael W. Dowdle, *Realizing Constitutional Potential*, 23 CHINA BUS. REV. 31 (1996).

¹⁸ See Tong Zhiwei (童之伟), *Ruhe caineng jiang quanli guanjin zhidu de longzili* (如何才能将权力关进制度的笼子) [*How to Restrict Power in the Cage of Regulations*], JUSTICE NETWORK LEGAL MICROBLOGGING (Feb. 27, 2013), <http://libertyzw.fyfc.cn/b/735339> (last visited Feb. 22, 2014), translated in LAW AT THE END OF THE DAY (May 3, 2013), <http://lbackerblog.blogspot.com/2013/05/part-xxviiiizhiwei-tong-series-how-to.html#more> (last visited Feb. 22, 2014).

¹⁹ Andrew Jacobs, *Opposition to Labor Camps Widens in China*, N.Y. TIMES (Dec. 14, 2012), http://www.nytimes.com/2012/12/15/world/asia/opposition-to-labor-camps-widens-in-china.html?pagewanted=all&_r=1 (last visited Feb. 22, 2014).

²⁰ XIANFA art. 1 (1982) (China).

²¹ Larry C. Backer, *The Rule of Law, the Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the "Three Represents"), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16 J. OF TRANSNAT'L L. & CONTEMP. PROBS. 29 (2006), available at <http://ssrn.com/abstract=929636>.

²² All but the last are expressed in the State Constitution. See XIANFA preamble (2004). All are acknowledged in the Communist Party Constitution. See Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012) GEN. PROGRAM (China).

the powers of government and CCP,²³ and suggest the structures of deep rule of law within Chinese constitutionalism, one that is acknowledged as not fully realized.²⁴ The CCP is organized on the basis of its own constitutional instrument, and its constitutional role is not specified within the State Constitution.²⁵ The leadership role of the CCP includes the authority to organize itself and to exercise authority over its members.²⁶ This authority also includes a power to detain CCP members suspected of corruption or other breaches of discipline, under the *shuanggui* system.²⁷ This is administered almost completely outside the system of government established through the State Constitution, but within the institutional framework of the organization of the CCP itself.²⁸

Both *laojiao* and *shuanggui* have come under increasing criticism in China as well as in the Western press.²⁹ *Laojiao* has been criticized as irremediably in conflict with both constitutional protections accorded individuals and with a number of general laws adopted by Chinese state administrative organs.³⁰ *Shuanggui* has been criticized as extra-constitutional because state organs do not administer it.³¹ It is also criticized as failing to conform to the protections afforded individuals under the

²³ See Backer, *supra* note 21; Tong Zhiwei, *Abandoning RTL a Critical Step Toward Complete Rule of Law*, SINA.COM (Feb. 5, 2013), http://blog.sina.com.cn/s/blog_6d8baa340101drap.html (last visited Feb. 24, 2014).

²⁴ Hu Jintao, *Full text of Hu Jintao's report at 18th Party Congress*, Part XII, XINHUA (Nov. 17, 2012), http://www.china.org.cn/china/18th_cpc_congress/2012-11/16/content_27137540.htm (last visited March 8, 2014).

²⁵ Tong Zhiwei, *supra* note 18; Jiang Shigong, *supra* note 4, at 12.

²⁶ See Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012) GEN. PROGRAM (China).

²⁷ See *id.* art. 37-42.

²⁸ Larry C. Backer, *Communist Party and State Discipline in China: Exploring Shuanggui (双规) and Shuang kai Part I*, LAW AT THE END OF THE DAY (Aug. 2, 2011), <http://lbackerblog.blogspot.com/2011/08/communist-party-and-state-discipline-in.html> (last visited Feb. 24, 2014); see also Larry C. Backer, *Communist Party and State Discipline in China Part II: Brief Introduction to Shuang Kai and Pix Inside Shuang gui Facility*, LAW AT THE END OF THE DAY (Sept. 17, 2011), <http://lbackerblog.blogspot.com/2011/09/communist-party-and-state-discipline-in.html> (last visited Feb. 24, 2014).

²⁹ The most notorious criticism of *laojiao* was an article by the Chinese language magazine, *Lens*, which is part of a chain of magazines that includes the well-known business magazine, *Caijing*. See Adam Taylor, 'Tiger Bench' and Other Horrific Torture Methods Reportedly Used at Chinese Work Camp, BUSINESS INSIDER: MILITARY AND DEFENSE (April 9, 2013), <http://www.businessinsider.com/alleged-torture-in-chinas-laojiao-2013-4> (last visited Feb. 24, 2014). *Shuanggui* generates substantial coverage in the Western press. See Jonathan Kaiman, "Fears for China's Shuanggui detainees After Wenzhou Official Dies," THE GUARDIAN (UK) (April 12, 2013), <http://www.guardian.co.uk/world/2013/apr/12/fears-china-shuanggui-detainees> (last visited Feb. 24, 2014).

³⁰ See *infra* Part II.

³¹ See *infra* Part III.

Chinese constitution and otherwise applicable law.³² Recently, Chinese authorities have indicated an intention to reform or perhaps abolish the *laojiao* system.³³ There has been no indication of any intention to change the *shuanggui* system, though it remains subject to censure especially with respect to the way in which it is applied. *Laojiao* and *shuanggui* represent both an expression of constitutional authority within a system in which power is separated between administrative and political functions, and a useful means for examining the character and structures of Chinese constitutionalism.

The article seeks to scientifically develop³⁴ a way of understanding the form and character of the Chinese constitutional system by examining *laojiao* and *shuanggui* in the context of the Chinese State-Party constitutional system.³⁵ Part II analyzes *laojiao* within the Chinese constitutional system. It starts with a formal description of *laojiao* from within China, continues with an analysis of the constitutional critique of *laojiao*, and argues that under the scientific development of Chinese constitutionalism, *laojiao* no longer accords with Chinese constitutional norms. In addition, *laojiao* no longer accords with the political guidance of the CCP, and especially the “mass line.” Together with the “mass line” and under the guidance of the CCP, a state apparatus must be formed and maintained for the people. *Laojiao* targets the masses, and in that sense duplicates and to some extent subverts the administrative order created through the governmental system founded on the Chinese Constitution, which itself reflects the CCP Line. As an extra-judicial form of administrative discipline directly against the masses, the *laojiao* system not only violates constitutional principles, but it is also contrary to the CCP's

³² See *infra* Part III.

³³ Liu Yuanhui, *Abolition of Re-Education Through Labor a Milestone*, CRI ENGLISH (Nov. 15, 2013), <http://english.cri.cn/6909/2013/12/28/2561s805553.htm> (last visited Feb. 24, 2014) (noting that “[o]n Nov 15, 2013, the Third Plenum of the 18th Communist Party of China Central Committee issued its resolutions to implement a long list of comprehensive reforms. Among the reforms is the abolition of the controversial ‘re-education through labor’ policy, abbreviated as *laojiao* in Chinese. The move has been hailed, both at home and abroad, as a milestone in the development of China's legal sector.”).

³⁴ This is a deliberate reference to the Chinese constitutional principle of scientific development, put forward at the Third Plenary Session of the 16th CCP National Congress in 2003. See XIANFA preamble (1982) (China); Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012), preamble (China); *Scientific Concept of Development & Harmonious Society*, COMMUNIST PARTY OF CHINA, 17TH NAT'L CONG., (2007) (China), <http://www.china.org.cn/english/congress/227029.htm> (last visited Feb. 24, 2014).

³⁵ Cf. Michael W. Dowdle *Constitutional Listening*, 88 CHI.-KENT L. REV. 115, 135 (2012).

mass line. It is unnecessary and poses a major roadblock to the development of a CCP-led harmonious socialist society under the guidance of rule-of-law.

Shuanggui is different from *laojiao*, and the article then turns to a consideration of *shuanggui* within Chinese constitutionalism. Parts III through V thus focus on the basis for that difference between *shuanggui* and *laojiao*, and then develop the basis for a constitutional defense of *shuanggui* and its critical importance to understanding Chinese constitutionalism from out of that difference. Though some of the techniques associated with Intra-Party discipline may be similar to the *laojiao* system, *shuanggui* serves a very different purpose. *Shuanggui* deals with political rather than administrative breaches that touch on the integrity of the role of the CCP as Party in Power. It is in this sense beyond the competence of the administrative authorities represented by the government apparatus and relates to the constitution of the CCP rather than the constitution of the state and its administrative authority over the people. As a consequence, the *shuanggui* system is not subject to the same constitutional difficulties as *laojiao*, but may benefit from scientific development under China's rule of law constitutional system.

This application serves as the means through which we elaborate our theory of the Chinese characteristics of constitutionalism: the Chinese constitutional order is founded on a separation of powers framework that is quite distinct from that embraced in the West. In place of the allocation of all political and administrative authority in a government, the powers of which are then divided among executive, legislative and judicial branches, the Chinese constitutional system separates power among a political order, defined by the CCP's constitution, conventions and practices vested in the CCP, and an administrative order, defined by the State constitution, laws, regulations and practices, and vested in this more narrow sense in the government of China.

Part III starts with a formal description of the *shuanggui* system from within. It then considers critically the constitutional attacks on the legitimacy of *shuanggui*, and its conventional justification under or around the State Constitution. Part IV then elaborates our theory of Chinese constitutionalism within the context of *shuanggui*. It considers the difficulties of defending *shuanggui* on the basis of conventional analysis without fully considering the place and legitimacy of the CCP within Chinese constitutionalism. The paper will suggest, ultimately, that it is quite plausible to understand *laojiao* as no longer falling within the administrative limits of the government as expressed in the State Constitution, but that *shuanggui* as legitimate and falling within the legal limits of scientifically

developing Chinese constitutionalism. Both conclusions are possible only when one understands Chinese constitutionalism in its comprehensive and systemic context. That understanding, in turn, is based on an appreciation of the constitutional role of the CCP and of Marxist Leninist and Mao Zedong thought, Deng Xiaoping theory, and the Three Represents in providing the substantive basis of the Chinese constitutional system.³⁶ In this context, *shuanggui* is essential for the performance by the CCP of its own constitutional obligations according to the premises of its own constitution and thus subject to law under the State Constitution.

Once the legitimacy of *shuanggui* is thus properly understood, one can move from the false issue of its legitimacy (embedded within the larger issue of the legitimacy of the current Chinese constitutional system itself) to the far more important one of the appropriate construction of *shuanggui* and its implementation as a device of Party discipline in light of Chinese constitutional principles, but outside the jurisdiction of any government ministry or court. That is the object of Part V. It begins a preliminary consideration of the issue of the constitutional obligations of the CCP in the construction and implementation of *shuanggui*. The path to understanding the real character of the Chinese constitutional system lies in an understanding of *laojiao* and *shuanggui*.

II. LAOJIAO AND THE STATE CONSTITUTION

In 2012, reports began circulating of an intention by the NPC to consider the elimination of the *laojiao* system.³⁷ For example, China Daily reported that:

Ying Yong, president of Shanghai High People's Court . . . noted in a proposal submitted during this year's NPC session, held in March in Beijing, that the system has contributed greatly to social order and improved economic development. Even so, the country finds itself amid different circumstances than were present fifty years ago and has established a legal system. *Laojiao* should therefore be modified, he said.³⁸

³⁶ See generally Backer, *supra* note 21; Backer, *supra* note 5.

³⁷ Zhao Yining, *Lawyers Calling for Reform of Laojiao System*, CHINA DAILY (Aug. 16, 2012), http://www.chinadaily.com.cn/china/2012-08/16/content_15679394.htm (last visited Feb. 24, 2014).

³⁸ *Id.*

Indeed, public criticism of the system had been increasing, especially in light of recent cases of abuse of the administrative detention provisions by local officials.³⁹ Recently released detained persons have begun to seek compensation for their detention, though to date unsuccessfully.⁴⁰ Almost a year later, the Communist Party, through its Third Plenum of the 18th Party Congress, indicated that *laojiao* would be phased out and eventually eliminated. The movement from strong institutional support in the 1950s through eventual elimination suggests a significant scientific development of the Chinese constitutional system.⁴¹ We will suggest here that *laojiao* seriously contradicts the basic CCP line as it is currently operated, and on that basis alone it must either be abolished or reformed. Section A of this Part II will briefly consider recent developments in the organization and deployment of *laojiao*. Section B will then turn to an examination of the *laojiao* system itself. Section C then considers the constitutionality of *laojiao* within the parameters of Chinese socialist constitutionalism.

A. *Recent Developments*

By the end of 2013, there appeared to be a political consensus that the *laojiao* system was to be abolished.⁴² This was not the first time that the *laojiao* system has been on the brink of abolition. In 2003 at the start of Hu Jintao's first term, "127 people's representatives to the National People's Congress proposed motions to reform *laojiao*, and the NPC Legislative Affairs Commission began to produce a draft law titled 'Law for the Education and Correction of Illegal Conduct' (*weifa xingwei jiaozhi fa*) that would have eliminated *laojiao* as an administrative punishment."⁴³ But by

³⁹ Deng Shasha, *China to reform Re-Education Through Labor System*, XINHUA (Jan. 7, 2013), http://news.xinhuanet.com/english/china/2013-01/07/c_132086402.htm (last visited Feb. 24, 2014).

⁴⁰ In one case involving a woman detained after seeking greater punishment for the people who abducted, raped, and prostituted her eleven-year-old daughter, an intermediate People's Court refused to award compensation. Zhao Yining, *supra* note 37. In another case, the city's *laojiao* committee turned down Tang's previous request for compensation of CNY 2,400, arguing the decision "was withdrawn not because it was wrong, but out of humanitarian concerns." *Id.*

⁴¹ Yang Yi, *China Focus: China's 'Laojiao' site to change role after abolishment*, XINHUA (Nov. 17, 2013), http://news.xinhuanet.com/english/china/2013-11/17/c_132895129.htm (last visited Feb. 2014) (quoting Wang Qiliang, associate dean of Law School in Yunnan University, stating that "[t]he reeducation through labor system has accomplished its historical mission. China has a much improved legal system now").

⁴² *China Issues Detailed Reform Roadmap*, XINHUA (Nov. 15, 2013), http://news.xinhuanet.com/english/china/2013-11/15/c_132891922.htm (last visited Feb. 24, 2014).

⁴³ Jerome A. Cohen, *Reforming China's Criminal Procedure: An Introduction to This Symposium*, 24 COLUM. J. OF ASIAN L. 213, 218 n. 8 (2011).

the end of 2003, momentum for abolition had stalled on the opposition of the Ministry of Public Security.⁴⁴

The Chinese authorities again signaled the possible abolishment of its controversial *laojiao* system during the National Conference on Procuratorial, Judicial, and Public Security Affairs that took place in Beijing earlier in 2013. According to several major Chinese news sources, Meng Jianzhu, Secretary of the Central Political and Legal Commission, announced during the National Conference that “the re-education through labor system will be terminated by the end of this year upon approval from National People’s Congress Standing Committee.”⁴⁵ In addition, “[i]n October, Zhou Qiang, President of the Supreme People’s Court, China’s top judicial body, urged courts nationwide to “take concerted action” in aiding *laojiao* reform by streamlining court hearing procedures for minor offenses and promoting the use of community correction to better rehabilitate criminals.”⁴⁶

Secretary Meng’s comment signaled a critical development. It comes at a time when the *laojiao* system is receiving increasing public scrutiny following several well-publicized scandals relating to the use of extra-judicial detention by local governments against “contumacious” individuals.⁴⁷ Although the Xinhua news agency later replaced terminate with further reform the *laojiao* system in its official report of the National Conference,⁴⁸ subsequent development nonetheless supports the speculation that China’s central government is committed to phasing out its half-century old labor camp system.⁴⁹ On February 5th, the Yunnan provincial government announced that Yunnan Province would no longer approve cases in which people are sent to re-education labor camps on grounds of

⁴⁴ *Id.*

⁴⁵ Quanguo Zhengfa Gongzuo Huiyi: Jinnian Tingzhi Shiyong Laojiao Zhidu (全国政法工作会议: 今年停止使用劳教制度) [National Conference on Procuratorial, Judicial and Public Security Affairs: Terminating *Laojiao* System This Year], CHINA.COM (Jan. 7, 2012), <http://news.china.com/domestic/945/20130107/17618589.html> (last visited Feb. 24, 2014).

⁴⁶ Yin Pumin, *Ending an Outdated System*, BEIJING REVIEW, (Dec. 5, 2013), http://www.bjreview.com.cn/nation/txt/2013-12/02/content_580796_2.htm (last visited Feb. 24, 2014).

⁴⁷ Lilian Lin, *Mother’s Labor-Camp Sentence Sparks Fury*, THE WALL STREET J. (Aug. 6, 2012), <http://blogs.wsj.com/chinarealtime/2012/08/06/mother%E2%80%99s-labor-camp-sentence-sparks-fury/> (last visited Feb. 24, 2014) (describing a case where “[t]he plight of a mother sentenced to a labor camp for demanding tougher punishment for those who allegedly raped and forced her daughter into prostitution has rallied China’s online community — and even prompted an official rebuke from the Communist Party’s main mouthpiece.”).

⁴⁸ Tong Zhiwei, *supra* note 23.

⁴⁹ *Id.* (noting that “although a Xinhua news dispatch later that day replaced ‘stop using’ with ‘further advance the RTL system reform’ it did not deny that recently the central government has decided to go with the historical trend and popular wish for the gradual discard of the RTL system”).

threatening national security, petitioning by causing unrest, and smearing the image of officials.⁵⁰ The Secretary of Yunnan's Politics and Law Committee told reporters that the *laojiao* approval process has been suspended for all cases within the province.⁵¹ It is probable that other provinces will follow the lead of Yunnan and Guangdong provinces in abolishing the use of *laojiao* and repurposing those facilities. The extent of those changes will depend, in turn, on the direction and scope of reform that is finally set as state policy by the CCP and as law by the NPC.

That direction and scope became clearer in November 2013. On November 15th, 2013, the CCP released a key policy document summarizing the economic and political reforms approved by the Third Plenary Session of the eighteenth CCP Central Committee.⁵² The document specifically mentions judicial reforms, calling for a "fair, efficient and authoritative socialist judicial system" for the purpose of "safeguarding the rights and legitimate interests of the people."⁵³ It stresses the need to "uphold the constitution and laws, deepen reforms in administrative law enforcement, and ensure independence and fairness in prosecuting bodies and courts."⁵⁴ Most significantly, the document announced the plan to abolish the *laojiao* system as a part of the major effort to improve judicial practice and protection of human rights.⁵⁵

On the basis of this CCP policy document, the NPC system has also begun to move forward on reform. At its bi-monthly session in December 2013, the NPC began consideration of a bill to eliminate *laojiao*.⁵⁶ The bill

⁵⁰ Chen Weijun, *Guangdong and Yunnan Announce the Abolition of Forced Labor Camps (Laojiao)*, ASIANEWS.IT (July 2, 2013), <http://www.asianews.it/news-en/Guangdong-and-Yunnan-announce-the-abolition-of-forced-labor-camps-%28laojiao%29-27072.html> (last visited Feb. 24, 2014).

⁵¹ *Yunnan Zanting Sanzhong Xingwei Laojiao Shenpi: Chouhua Lingdaoren Xingxiang Buzai Laojiao* (云南暂停三种行为劳教审批: 丑化领导人形象不再劳教) [*Yunnan Suspends Three Types of Laojiao Approval, Including Smearing the Image of Political Leaders*], XINHUA (Feb. 7, 2013), http://news.xinhuanet.com/legal/2013-02/07/c_124332693.htm (last visited Feb. 24, 2014).

⁵² *China Issues Detailed Reform Roadmap*, *supra* note 42.

⁵³ *Id.*

⁵⁴ *China to Overhaul Judicial System: Communique*, XINHUA (Nov. 15, 2013), http://news.xinhuanet.com/english/china/2013-11/12/c_132882473.htm (last visited Feb. 24, 2014).

⁵⁵ *China to Abolish Reeducation Through Labor*, XINHUA (Nov. 15, 2013), http://news.xinhuanet.com/english/china/2013-11/15/c_132891921.htm (last visited Feb. 24, 2014) (quoting Wang Gongyi, former senior researcher with the Ministry of Justice, as stating "in practice there are no rigid procedures to regulate how the committee should decide the criminal facts and the application of punishment."); see also *China Issues Detailed Reform Roadmap*, *supra* note 42. For the original Xinhua report, see http://news.xinhuanet.com/english/china/2013-11/15/c_132891922.htm.

⁵⁶ *NPC Addresses Laojiao System at Bi-Monthly Session*, WANT CHINA TIMES (Dec. 24, 2013) (Taiwan), <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20131224000134&cid=1101> (last visited Feb. 24, 2014).

was sponsored by the Chinese State Council.⁵⁷ It calls for the elimination of *laojiao* in its current form because it was no longer necessary.⁵⁸ It was also reported that: “[o]nce *laojiao* is abolished, relevant laws, judicial interpretations, and documents will be adjusted accordingly. The State Council will organize departments to administer the annulment of the system, including setting free those still in labor camps, reassigning police in charge of *laojiao*, and changing the function of locations to other purposes.”⁵⁹

It is important to note that although the *laojiao* system is markedly coming to an end, the future role of existing *laojiao* facilities across China and their personnel remain uncertain. Western commentators have also suggested caution, noting that the Article 73 Revised Criminal Procedure Law continues to permit house arrest under a set of broad criteria and that detention in places other than the home will still be permitted for “crimes endangering state security, crimes of terrorism and particularly serious crimes of bribery.”⁶⁰ In addition, it is not clear that related detention measures, *laogai* (reform through labor), *juiye* (forced job placement), *hourong shencha* (shelter and investigation), custody and repatriation laws, juvenile offender camps, and psychiatric hospitals laws will be reformed.⁶¹ Moreover, the resolution of the Third Plenum of the 18th Party Congress indicated that it was also imperative to “enhance the community correction system.”⁶²

Despite these concerns, the conventional architecture of the *laojiao* system appears to be on the brink of reform. Shortly after the

⁵⁷ *Id.*

⁵⁸ *Id.* (noting that “[t]he bill holds that constant improvement to the legal system has made *laojiao* superfluous to the nation’s current legal setup”).

⁵⁹ *Id.*

⁶⁰ Stanley Lubman, *Will Re-Education Through Labor End Soon?*, THE WALL STREET J. (Feb. 4, 2013), <http://blogs.wsj.com/chinarealtime/2013/02/04/will-re-education-through-labor-end-soon/> (last visited Feb. 24, 2014).

⁶¹ For a short description of these measures, see LAOGAI RESEARCH FOUNDATION, LAOGAI HANDBOOK 16-23 (2008), available at <http://laogai.org/system/files/u1/handbook2008-all.pdf>.

⁶² See *Community Correction Expands as RTL Contracts*, DUI HUA HUM. RTS. J. (Dec. 19, 2013), <http://www.duihuahrjournal.org/> (last visited Feb. 24, 2014) (explaining that the Ministry of Justice is drafting a new Community Correction Law that will serve as a means of undertaking the supervision of a host of former prisoners in China); *Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gonganbu, Sifabu Guanyu Yinfa ‘Shequ Jiaozheng Shishi Banfa’ de Tongzhi* (最高人民法院、最高人民检察院、公安部、司法部关于印发《社区矫正实施办法》的通知) [*Notice of the Supreme People’s Court, Supreme People’s Procuratorate, Ministry of Public Security, and Ministry of Justice Regarding Issue of Implementation Measures for Community Correction*] (Jan. 10, 2012), translated in *Community Correction Expands as RTL Contracts*, DUI HUA HUM. RTS. J. (Dec. 19, 2013), <http://www.duihuahrjournal.org/2013/12/community-correction-expands-as-rtl.html> (last visited March 24, 2014).

announcement, the official Xinhua news reported that *laojiao* institutions across China are seeking new roles after the decision to abolish the reeducation through labor (“RTL”) system.⁶³ For instance, the former *laojiao* center of reeducation through labor in Xishuangbanna Dai Autonomous Prefecture in southwest Yunnan is set to be transformed into a drug rehab center.⁶⁴ According to the Director of the Justice Bureau of Xishuangbanna Dai Autonomous Prefecture, the key to the functional transformation of the former *laojiao* institutions is “to advocate a greater role for the local society, based on the existing infrastructure.”⁶⁵ These recent developments provide important background for the abolishment and ongoing reforms of the *laojiao* system.

B. *The Laojiao System in a Legal Context*

The term “*laojiao*” is an abbreviation of “*laodong jiaoyang* (劳动教养),” which literally translates as “reeducation through labor.” *Laojiao* targets those individuals who have committed “minor offences” that do not amount to criminal liability.⁶⁶ It is a compulsory administrative penal system that seeks to “reform and correct” those individuals through forced labor and detention.⁶⁷ Professor Tong emphasizes the administrative nature of the *laojiao* system and its avoidance of the constitutional safeguards for criminal prosecutions and bypass of the judicial system and its safeguards.⁶⁸ This is ironic, especially when it has been reported that “RTL detainees are mostly treated just like prisoners in the criminal justice system, although now, unlike in the past, they are generally segregated from inmates convicted of criminal offenses.”⁶⁹ Moreover, according to “reports from political detainees and others, conditions in RTL camps are generally abusive, with overcrowded, unsanitary living conditions; inadequate food; endemic violence; and excessive working hours being among the major

⁶³ Yang Yi, *supra* note 41; see also *Petitioner's Account of RTL Reforms*, DUI HUA HUM. RTS. J. (Nov. 20, 2013), <http://www.duihuahrjournal.org/2013/11/petitioners-account-of-rtl-reforms.html> (last visited Feb. 24, 2014).

⁶⁴ *Laojiao site to change role after abolishment*, CHINA DAILY (Nov. 17, 2013), http://www.chinadaily.com.cn/china/2013-11/17/content_17111104.htm (last visited Feb. 24, 2014) (noting that Xishuangbanna borders on Myanmar and Laos, as well as the Golden Triangle—one of the world’s major sources of drugs. The geographic location of Xishuangbanna may play a significant role in the decision to transform the former *laojiao* camp into a drug rehab center.).

⁶⁵ *Id.*

⁶⁶ LAOGAI RESEARCH FOUNDATION, *supra* note 61.

⁶⁷ See generally, Tong Zhiwei, *supra* note 23.

⁶⁸ *Id.*

⁶⁹ HUMAN RIGHTS IN CHINA, *supra* note 1.

concerns.”⁷⁰ Indeed, some have suggested that the prison enterprises might be incompatible with the market economy and might hinder modernization.⁷¹ Nationwide, there are now close to 300 RTL centers, according to official statistics.⁷²

Laojiao received its present name from the 1957 ordinance titled “Resolution on Approving the Decision of the State Council on the Issue of the Reeducation through Labor.”⁷³ The 1957 resolution remains the principle document providing the legal basis for the *laojiao* system, stipulating as its objective: “[i]n accordance with Article 100 of the Constitution of the People’s Republic of China, for the purpose of reforming those idling, law-breaking, discipline-breaching, duty-neglecting but work-capable individuals into self-reliant people of new work ethic.”⁷⁴

Paragraph V of the 1957 regulation provides that *laojiao* authorities are established by the provincial level governments, and the entire *laojiao* process is handled by the local civil affairs and public security departments.⁷⁵ This was modified in 1979 when the NPC Standing Committee approved “Supplementary Provisions by the State Council on Reeducation through Labor” in 1979.⁷⁶ The Supplementary Provisions established Reeducation Through Labor Management Committees (劳动教养管理委员会) as the sole organ responsible for reviewing and approving *laojiao* cases.⁷⁷ The regulations do not require these committees to release

⁷⁰ *Id.*

⁷¹ Yang Liangqing & Wang Yijun, interview with Liu Shien, *Jianqi fenkai hou jianyu shengcha dingwei de sikao*, (司法部部长谈监狱体制改革：让监狱告别营利) [*Some Thoughts on Prison Production after the Separation of Prison and Enterprise*], SOUTHCHN.COM (Dec. 5, 2003), <http://www.southcn.com/news/community/shzt/prison/outline/200405101067.htm> (last visited Feb. 24, 2014), cited in LAOGAI RESEARCH FOUNDATION, *supra* note 61.

⁷² HUMAN RIGHTS IN CHINA, *supra* note 1, at 31-33.

⁷³ BUREAU OF REEDUCATION-THROUGH-LABOR ADMIN., *Zhongguo Laodong Jiaoyang Zhidu Jianjie* (中国劳动教养制度简介) [*Introduction to China’s Reeducation Through Labor System*] (2002) http://www.legalinfo.gov.cn/moj/ldjyglj/2003-05/28/content_19622.htm (last visited Feb. 24, 2014). Some trace the origins of the system to the 1954 “Regulations on Reform Through Labor.” See LAOGAI RESEARCH FOUNDATION, *supra* note 61.

⁷⁴ *Guowuyuan guanyu laodongjiaoyang wenti de jue ding* (国务院关于劳动教养问题的决定) [*Resolution on Approving the Decision of the State Council on the Issue of the Reeducation through Labor*] (approved by the Standing Comm. Nat’l. People’s Cong., Aug. 1, 1957), section 1 [hereinafter *Resolution*]. Article 10 of the Ministry of Public Security’s 1982 trial practices on re-education through labor listed six categories that refine those of the 1957 Resolution, lumping labor insubordination together with counterrevolutionary activity and pretty criminality. See HUMAN RIGHTS IN CHINA, *supra* note 1.

⁷⁵ *Resolution*, *supra* note 74.

⁷⁶ LAOGAI RESEARCH FOUNDATION, *supra* note 61.

⁷⁷ *Guowuyuan guanyu laodongjiaoyang de buchong jue ding* (国务院关于劳动教养的补充规定) [*Supplementary Provisions by the State Council on Reeducation through Labor*] (approved by the Standing Comm. Nat’l. People’s Cong., Nov. 19, 1979).

written opinions to explain how decisions in individual cases were made.⁷⁸ Neither the courts nor the People's procuratorate are involved in the *laojiao* process.

Laojiao appears to have been developed as a tool of the political, social, and economic reorganization of China in the first decades after the establishment of the People's Republic. It served as a means of political control of non-Party members, especially during the period of the Anti-Rightist Campaigns,⁷⁹ as well as to discipline the labor force during an initial period of Soviet style collectivization.⁸⁰ But it also had some connection to political notions underlying the people's democratic dictatorship at the heart of the Socialist Party-State.⁸¹ *Laojiao* eventually evolved to serve four principal functions: controlling political dissidents, maintaining public order, facilitating police criminal investigations, and suppressing drug use by addicts.⁸² It thus combined political and social order elements that have since clouded its scope and function as the Chinese state apparatus developed, especially after the end of the Cultural Revolution. Thus, as the political control elements of *laojiao* became less prominent, the public security departments further expanded the scope of the *laojiao* system to include drug addicts, prostitutes, and compulsive gamblers.⁸³ Habitual offenders became an important element in the 1970s, as were suspects

⁷⁸ Jaime A. FlorCruz, *Reforming China's Controversial Labor Camps*, CNN (Oct. 18, 2012, 10:48 PM), <http://www.cnn.com/2012/10/18/world/asia/china-forced-labor-camps/> (quoting a Beijing lawyer, that "current regulations do not require the *laojiao* management committees to release a written verdict to explain how their decisions were made, so it is difficult to know if a decision was fair").

⁷⁹ See *Resolution*, *supra* note 74, section 1; see also, Amy Li, 'Not a single person' persecuted in the Anti-Rightist Movement, says vice director of CASS, SOUTH CHINA MORNING POST (May 14, 2013), <http://www.scmp.com/news/china/article/1237558/not-single-person-persecuted-anti-rightist-movement-says-vice-director> (last visited March 6, 2014) (explaining that "[t]he Anti-Rightist Movement, which lasted from 1957 to 1959, consisted of campaigns to purge alleged rightists within the Communist Party both in China and abroad. The term "rightists" was largely used to refer to intellectuals accused of favoring capitalism over collectivization.").

⁸⁰ Fu Hualing, *Dissolving Laojiao* at 2 (University of Hong Kong, Working Paper, April 27, 2009), available at <http://ssrn.com/abstract=1395552>.

⁸¹ In 1987, Deng Yuzhen wrote: "[a] socialist state's Laogai facilities . . . as an important component of the people's democratic dictatorship, Laogai facilities of all levels are established- prisons, Laogai camps, Laojiao camps, and juvenile criminal camps, all of them are tools representing the interests of the proletariat and the masses exercising dictatorship over a minority of hostile elements originating from exploiter classes." LAOGAI RESEARCH FOUNDATION, *supra* note 61.

⁸² *Id.*

⁸³ Wang Yijun, *Laojiao zhidu gaige zainan* (劳教制度改革难在哪) [What are the Difficulties for Laojiao Reforms], CHINA YOUTH DAILY 11 (September 6, 2012) available at http://zqb.cyol.com/html/2012-09/06/nw.D110000zqnb_20120906_2-11.htm.

against which insufficient evidence could be accumulated, and since the 1980s, drug users.⁸⁴

Before 1979, detention was for an indefinite period, with some reports of detentions for several decades.⁸⁵ The Supplementary Provisions provided for detention of individuals in *laojiao* labor camps for up to four years. Currently, detentions are fixed at one to three years with a possible additional year extension, with extensive regulations developed by the Ministry of Public Security and the Ministry of Justice covering the operation of the system.⁸⁶

C. *The Constitutionality of Laojiao*

The policy shifts and criticism of the *laojiao* system suggest the value of considering its legitimacy, as formally developed, under the constraints of the Chinese constitutional system. This section examines *laojiao* from a constitutional perspective. It starts with an analysis of the conformity of the law of *laojiao* to the obligations imposed on the state apparatus under the Chinese constitutions as adopted from 1954. It suggests that while the *objectives* of the *laojiao* system fall clearly within the constitutional authority of the state apparatus, there is no direct authority for the means chosen to operationalize the *laojiao* system as adopted. The administration and implementation of the *laojiao* system became more constitutionally problematic after the adoption of the 1982 State Constitution. The section then considers the possibility that *laojiao* can be defended as a species of the controversial doctrine of constitutional necessity. But that argument is rejected as incompatible with the Chinese constitutional system itself and increasingly viewed as illegitimate as a constitutional device. The contradictions between necessity and the rule of law premise built into the 1982 State Constitution is explored. But this traditional Western style constitutional analysis does not end the matter. Under core premises of Chinese Constitutionalism, the interpretation of the legitimacy of *laojiao* is also dependent on an analysis of that system for its conformity to the CCP line—that is, the fundamental principles of political leadership through which the CCP undertakes its leadership role. A review of Chinese

⁸⁴ Fu Hualing, *supra* note 80, at 3. For useful statistics on this last point, see *id.* at 4. Fu notes further that the reform of *Laojiao* was to some extent tied to the efforts to reform Chinese drug laws. *Id.* at 4-5. Fu argues that with the reform of the drug laws the utility of *Laojiao* has been substantially eroded, thus the opening for reform. *Id.* at 6.

⁸⁵ HUMAN RIGHTS IN CHINA, *supra* note 1, at 2.

⁸⁶ *Id.* at 3.

constitutional principles—scientific development, the mass line, and the principles of people’s democratic dictatorship—suggests that *laojiao* seriously contradicts the basic CCP line as it is currently articulated.

The 1957 Resolution formalizing the *laojiao* system was supposedly adopted “in accordance with Article 100 of the Constitution of the People’s Republic of China.”⁸⁷ That Constitution of the People’s Republic of China, enacted in 1954,⁸⁸ was subsequently revised in 1975, 1978, and 1982.⁸⁹ Article 100 of the 1954 Constitution provides that: “[c]itizens of the People’s Republic of China must abide by the Constitution and the law, uphold discipline at work, keep public order and respect social ethics.”⁹⁰ Article 100 became Article 53 in the current 1982 version of the Constitution, and the language of the article remains substantially unchanged.⁹¹ Article 53 describes the basic duties of citizens; and it suggests a basis for the legitimacy of many of the objectives of *laojiao*. But it does not explicitly provide authority for exercise of the means by which the state may exercise authority to ensure compliance with these citizen obligations. The means for such exercise of authority, then, if exercised by the state apparatus, must be found in other provisions of the State Constitution. But it is unlikely that any such support can be found.

Indeed, in the absence of interpretive gap-filling, there is little by way of direct authority for the means chosen to operationalize *laojiao* in its current form. The 1954 State Constitution characterizes work as a “matter of honor,” and the State is empowered to encourage citizens to “take an active and creative part in their work.”⁹² More importantly, while the principles of people’s democratic dictatorship might have found expression in the 1954 State Constitution’s authorization of the State organs to “suppress all treasonable and counter-revolutionary activities”⁹³ and to

⁸⁷ *Resolution*, (promulgated by the 78th meeting of the Standing Comm. of the Nat’l People’s Cong., Aug. 1, 1957), available at <http://www.hrichina.org/chs/jue-ding/guo-wu-yuan-guan-yu-lao-dong-jiao-yang-wen-ti-de-jue-ding>.

⁸⁸ XIANFA art. 100, 17 (1954) (China), available at <http://www.hkpolitics.net/database/chicon/1954/1954ae.pdf>.

⁸⁹ See, e.g., William C. Jones, *The Constitution of the People’s Republic of China*, 63 WASH. U. L. REV. 707, 711-14 (1985), available at <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=2203&context=lawreview>.

⁹⁰ See XIANFA art. 17 (1954) (China).

⁹¹ See XIANFA, art. 53 (1982) (China), available at <http://english.people.com.cn/constitution/constitution.html> (requiring citizens to abide by the constitution and the law, keep state secrets, protect public property, observe labour discipline and public order, and respect social ethics.).

⁹² XIANFA, art. 16 (1954) (China).

⁹³ *Id.* at art. 19.

deprive certain classes of individuals of political rights,⁹⁴ “at the same time it provides them with a way to earn a living in order to enable them to reform through work.”⁹⁵ However, Article 89 of the 1954 State Constitution also prohibited arrest “except by decision of a people’s court or with the sanction of a people’s procuratorate.”⁹⁶

Thus, while it might have been possible to develop a *laojiao* system within constitutional norms, such efforts would necessarily fall within the scope of Article 89, something to which the *laojiao* regulations failed to conform. By citing Article 100 (now 53) of the 1954 State Constitution, the 1957 Regulation implies that the administrative apparatus may forcefully deprive a citizen’s personal freedom for the purpose of enforcing work discipline or promoting social ethics, even when the given individual is without any criminal liability or has committed a minor offense that does not amount to incarceration under the criminal code. Such disciplinary system is markedly problematic, as both 1954 and 1982 versions of the Chinese Constitution offer protection from arrest and detention without judicial process for Chinese citizens. Article 89 of the 1954 Constitution provides that: “[f]reedom of the person of citizens of the People’s Republic of China is inviolable. No citizen may be arrested except by decision of a people’s court or with the sanction of a People’s Procuratorate.”⁹⁷ Article 37 of the 1982 Constitution also confirmed the due process requirement.⁹⁸ Moreover, Article 19 of the 1954 State Constitution was reformed and appears now as Article 28 of the 1982 State Constitution, limiting the power to punish political actions through the criminal law.⁹⁹ Yet Article 1 of the 1982 State

⁹⁴ *Id.* (specifically designed to deprive feudal landlords and bureaucrat-capitalists of certain rights).

⁹⁵ *Id.*

⁹⁶ *Id.* at art. 89.

⁹⁷ *Id.*

⁹⁸ See XIANFA, art. 37 (1982) (China), available at <http://english.people.com.cn/constitution/constitution.html> (providing that “[t]he freedom of person of citizens of the People’s Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people’s procuratorate or by decision of a people’s court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens’ freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited.”).

⁹⁹ Article 28 of the 1982 State Constitution originally provided that the “[s]tate maintains public order and suppresses treasonable and other counter-revolutionary activities; it penalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals.” XIANFA, art. 28 (1982) (China). This article was amended in 1999 to provide that the “[s]tate maintains public order and suppresses treasonable and other counter-revolutionary activities; it penalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals.” In either case, it appears clear that these political acts, when undertaken by individuals other than members of the CCP are to be treated under the criminal law and the regular structures for the institutionalization thereof through the State Constitution and the laws enacted thereunder. See *Zhonghua renmin gongheguo xianfa xiuzhengan* (中华人民共和国宪法修正案)

Constitution still speaks to a blanket prohibition against political subversion of the socialist system, though there is no indication that this prohibition would be treated differently from other forms of criminality, including treason.¹⁰⁰

Against the explicitly written language from Article 37 is the fact that the entire reeducation through labor process is without judicial review and completely bypasses all judicial organs of the state, such as the People's Court and People's Procuratorate.¹⁰¹ Furthermore, Article 5 of the State Constitution imposes strict duty for state organs to adhere to constitutional principles.¹⁰² Equally important, to the extent that the *laojiao* system is grounded in political discipline of the people, for example through the original focus on anti-social and counter-revolutionary elements, it falls outside the powers of state organs and implicates the authority of the CCP, except to the extent it is transposed into law through the procedures specified in the State Constitution.¹⁰³ In the absence of a designation as an administrative offense under the civil or criminal law, the government itself under the State Constitution would be obligated to defer to the CCP, but would be unable to reach individuals directly, consistent with Article 37 of the 1982 State Constitution.

In addition, a number of administrative and personal abuses have been reported. Beyond its extra-judicial administration of avoiding procedural protection afforded under the criminal law, critics have suggested that the scope of *laojiao* is unacceptably vague.¹⁰⁴ It is broad enough to provide

[Amendments to the Constitution of the People's Republic of China], (adopted by Standing Committee of the National People's Congress, 1999), http://www.law-lib.com/law/law_view.asp?id=433 (last visited March 1, 2014).

¹⁰⁰ XIANFA, art. 1 (1982) (China) available at <http://english.people.com.cn/constitution/constitution.html> (providing that "[t]he socialist system is the basic system of the People's Republic of China. Sabotage of the socialist system by any organization or individual is prohibited.").

¹⁰¹ See, e.g., LAOGAI RESEARCH FOUNDATION, *supra* note 61; cf. Lin Min, *An Archaic Form of Justice*, SHENZHEN DAILY (Aug. 13, 2012), http://www.szdaily.com/content/2012-08/13/content_7069313.htm (last visited March 1, 2014).

¹⁰² See XIANFA art. 5 (1982) (China) available at <http://english.people.com.cn/constitution/constitution.html> (stating that "[n]o law or administrative or local rules and regulations shall contravene the constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual may enjoy the privilege of being above the Constitution and the law.").

¹⁰³ XINFA art. 28 (1982) (China), available at <http://english.people.com.cn/constitution/constitution.html>.

¹⁰⁴ See generally, KLAUS MÜHLHAHN, *CRIMINAL JUSTICE IN CHINA: A HISTORY* 216-17 (2009); cf. John Givens, *Laojiao Terrorism of China*, BEFORE IT'S NEWS (June 11, 2013), <http://beforeitsnews.com/international/2013/06/laojiao-terrorism-of-china-2459950.html> (last visited March 1, 2014); Lin Min, *supra* note 101.

local officials with cover to punish anyone, the penalties under *laojiao* are harsher than those provided for similar crimes under the criminal law, local authorities have added their own regulations making the rules incoherent, and the facilities and treatment of *laojiao* detainees are worse than those in penal facilities.¹⁰⁵ More troubling is the essence of *laojiao* administration—it is operated by the local police without oversight by the procurate or the courts.¹⁰⁶ In effect, the *laojiao* system itself is essentially beyond any power granted to any administrative organ established within the government established through the State Constitution. *Laojiao* effectively creates a penal system that bypasses the careful structures of constitutional restraints and in the process also breaches the basic separation of powers at the heart of Chinese constitutionalism.

Even if one were inclined to accept this line of reasoning, it might still be possible to construct a constitutional argument supporting *laojiao* based on a species of the controversial doctrine of constitutional necessity, one which justified subordinating rule of law to action necessary to preserve the political and social order.¹⁰⁷ Necessity would have to be framed around the need to establish the power of the state and to ensure that the ruling ideology was not subject to undermining by people dedicated to regime change within a state only recently emerging from nearly a century of turmoil,¹⁰⁸ a state which still faced substantial opposition from militarily powerful states inalterably opposed to the political premises on which the new government was established,¹⁰⁹ and to its territorial ambitions.¹¹⁰ In that context, it might be essential to treat citizens as potential enemy combatants and to move

¹⁰⁵ HUMAN RIGHTS IN CHINA, *supra* note 1.

¹⁰⁶ Mark Magnier, *China Thinks of Closing its Reeducation Prisons*, LOS ANGELES TIMES (Mar. 5, 2007), available at <http://articles.latimes.com/2007/mar/05/world/fg-reeducate5>.

¹⁰⁷ Leslie Wolf-Phillips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity* 1 THIRD WORLD Q. 97, 110 (1979). On the tension between perceived rule of law and necessity in constitutional states, see generally Gerard N. Magliocca, *The Gold Clause and Constitutional Necessity*, 64 FLA. L. REV. 1243 (2012).

¹⁰⁸ See, e.g., LI CHIEN-NUNG, *THE POLITICAL HISTORY OF CHINA 1840-1928* 8-11 (Ssu-Yu Teng & Jeremy Ingalls trans., 1956).

¹⁰⁹ See, e.g., CONG.-EXEC. COMM'N ON CHINA, 113TH CONG., ANNUAL REPORT 138-42 (Comm. Print 2013), available at <http://www.cecc.gov/sites/chinacommission.house.gov/files/AR13DJ.PDF>; cf. Kristen A. Stilt, *Constitutional Authority and Subversion: Egypt's New Presidential Election System*, 16 IND. INT'L & COMP. L. REV. 335, 336 (2006) (observing “[m]ost recent scholarship on constitutional change is grounded in an evolutionary model...in which nations proceed from authoritarian forms of government to democracy.”).

¹¹⁰ See, e.g., Bonnie Glaser, *Armed Clash in the South China Sea: Contingency Planning Memorandum No. 14*, COUNCIL ON FOREIGN RELATIONS (Apr. 2012), <http://www.cfr.org/world/armed-clash-south-china-sea/p27883> (last visited March 6, 2014); see also Michael Ivanovitch, *China and Japan Trading Goods and War Threats*, CNBC.com (Dec. 29, 2013), <http://www.cnbc.com/id/101300548> (last visited March 1, 2014).

decisively against them in ways that might have otherwise violated principles on which the relationship between citizen and state are founded. This would be similar to the argument recently made by the U.S. government to support extreme measures, including extra-judicial killing,¹¹¹ against international opposition.¹¹² The fact that the 1957 Resolution targets “counter-revolutionists and anti-socialism reactionaries” implies that the *laojiao* system emerged as a political device to consolidate the power of the incipient Chinese government during the tumultuous early years of the People’s Republic. More importantly, the early political focus of *laojiao* was consistent with the class struggle principles inscribed in the 1954 State Constitution.¹¹³

Yet what might be framed as a constitutional necessity—the need to protect the state against domestic counterrevolutionary insurgents—can also easily be used to undermine rule of law development. Indeed, the revolutionary conditions of the 1950s can hardly serve to support extra constitutional measures more than half a century later when conditions had changed substantially. To be sure, the problem associated with the *laojiao* system is not unique to China. The United States, too, has been criticized for violating the due-process requirement—most notably for the Japanese-American interment during WWII and the more recent Guantanamo Bay controversy.¹¹⁴ Similar to the Japanese internment camp and the Guantanamo Bay prison, China’s labor camp system was also created in

¹¹¹ *U.S. Justifies Drone Attacks, Says it’s Lawful*, THE TIMES OF INDIA (Oct. 23, 2013), http://articles.timesofindia.indiatimes.com/2013-10-23/us/43323901_1_drone-attacks-civilian-casualties-obama-administration (last visited March 1, 2014) (quoting White House Press Secretary, Jay Carney, as saying “[t]he U.S. counterterrorism operations are precise, they are lawful, and they are effective.”); see also Owen Bowcott, *The Legal Dilemma Over Drone Strikes: Justified Killings or War Crimes?*, THE GUARDIAN (UK) (Aug. 2, 2012), <http://www.theguardian.com/world/2012/aug/02/drone-strikes-thorny-legal-questions> (last visited March 1, 2014).

¹¹² Stephanie Nebehay, *U.N. Experts Urge U.S., Yemen, to Explain Erroneous Drone Strikes*, REUTERS (Dec. 26, 2013), <http://www.reuters.com/article/2013/12/26/us-yemen-strike-un-idUSBRE9BP0EV20131226?feedType=RSS&feedName=worldNews> (last visited March 1, 2014); see also Peter Magulies, *The Fog of War Reform: Change and Structure in the Law of Armed Conflict After September 11*, 95 MARQ. L. REV. 1417, 1471-85 (2012).

¹¹³ See, e.g., XIANFA art. 10 (1954) (China) (providing that “[t]he policy of the state towards capitalist industry and commerce is to use, restrict and transform them. . . . The state prohibits capitalists from engaging in any unlawful activities which injure the public interest, disturb the social-economic order, or undermine the economic plan of the state.”); *id.* at art. 19 (providing that “[t]he state deprives feudal landlords and bureaucrat capitalists of political rights for a specific period of time according to law”).

¹¹⁴ See, e.g., Symposium, *The Long Shadow of Korematsu*, 40 B.C. L. REV. 1 (1998); David Luban, *The War on Terrorism and the End of Human Rights*, in *WAR AFTER SEPTEMBER 11* 51 (Verna V. Gehring ed., 2002); Editorial, *Bagram: A Legal Black Hole?*, L.A. TIMES (May 26, 2010), <http://articles.latimes.com/2010/may/26/opinion/la-ed-bagram-20100526> (last visited March 1, 2014); Editorial, *Backward at Bagram*, N.Y. TIMES (June 1, 2010), <http://www.nytimes.com/2010/06/01/opinion/01tue1.html> (last visited March 1, 2014).

response to unique exigencies that arose during unusual periods. *Laojiao*, then, appears to serve as the “civilian” counterpart to *shuanggui*. Just as *shuanggui* was to discipline CCP cadres,¹¹⁵ *laojiao* was to discipline bourgeois elements as a means of establishing the people’s democratic dictatorship¹¹⁶ now fundamental to Article 1 of the State Constitution. This was possible only by basing the protections of citizenship on designations of membership in specific economic classes, which was itself implied within the 1954 State Constitution with its emphasis on class struggle.¹¹⁷ As a revolutionary party, the CCP-led government in its early years adopted harsher measures against its political opponents, justified by necessity and the revolutionary character of the socialist state building project.¹¹⁸ Yet the comparisons to the now discredited necessity-based actions of the United States and Japan should be telling,¹¹⁹ and one that if accepted would suggest the illegitimacy of *laojiao* within globally accepted parameters of constitutional principles already embraced in China.

Thus, a traditional Western style of constitutional analysis produces a strong case against the legitimacy of *laojiao* under the State Constitution. But that analysis is not entirely true to the analytical framework that reflects the separation of power and constitutional structures of China. As suggested above, under principles of Chinese constitutionalism, the constitutional analysis does not end at the text of the State Constitution—it is also necessary to determine whether *laojiao* is illegitimate as inconsistent with the fundamental principles of political leadership expressed through the CCP. That determination requires an analysis of the conformity of *laojiao* to the CCP line with constitutional dimension. As a consequence, the only possible way to defend the constitutionality of *laojiao* is to show that it is a proper expression of political will that can be harmonized with the governance principles to which the CCP adheres.

A review of Chinese constitutional principles leads to the strong conclusion that *laojiao* seriously contradicts the basic CCP line as it is currently articulated, and on that basis alone it must either be abolished or reformed. The key to reform under the CCP constitutional line would be to

¹¹⁵ See *infra* Part III.

¹¹⁶ Mao Zedong, *The People’s Democratic Dictatorship: In Commemoration of the 20th Anniversary of the Communist Party of China* (June 30, 1949), in *SELECTED WORKS*, VOL. 5 411-23, available at <http://www.fordham.edu/halsall/mod/1949mao.html>.

¹¹⁷ XIANFA art. 1, 10, 19 (1954) (China); see generally Mao Zedong, *supra* note 116, at 411-23.

¹¹⁸ Mao Zedong, *supra* note 116, at 411-23.

¹¹⁹ See, e.g., Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1811 (2010).

incorporate *laojiao* within the Penal Code through invocation of NPC legislative processes and administration by the procurate and courts. To rephrase this in the style of Western constitutional discourse, it is important to note that even if *laojiao* appears to conform to the letter of the State Constitution, it may violate the fundamental constitutional principles on which the state is organized, as these are elaborated by the CCP in accordance with its role within the Chinese constitutional system.¹²⁰ On that basis, *laojiao* is an unconstitutional assertion of state power. For this purpose, the analysis turns from the State Constitution and law to the constitutionally significant principles of governance developed by the CCP in its role as the party in power, under whose leadership the political parameters of the administrative apparatus of the state is supposed to be undertaken.¹²¹

The analysis necessarily starts with the CCP principle of scientific development.¹²² The constitutional questions about *laojiao* within the framework of Chinese socialist constitutionalism itself serves better as a reminder of the utility of action grounded in the constitutional principle of scientific development.¹²³ Both the State Constitution and the Constitution of the CCP have progressed beyond a focus on narrowly defined class struggle.¹²⁴ In comparison with its Western counterparts, the Chinese constitutional development is only in its nascent stage—it is still rudimentary and suffers from many shortcomings. It can be said that the most critical deficiency for the Chinese constitutional system is the unbridgeable gap between “form” and “reality.” The *laojiao* system clearly reflects such deficiency—a conspicuously unconstitutional penal system has

¹²⁰ The nearest analogy is to an interesting facet of German constitutional jurisprudence that accepts the premise that constitutional principles embedded within the Basic Law may trump specific provisions therein. See generally, Gerhard Leibholz, *The Federal Constitutional Court in Germany and the “Southwest Case,”* 46 THE AM. POL. SCI. REV. 723 (1952).

¹²¹ Backer, *supra* note 12, at 11.

¹²² XIANFA, general program (1982) (China) (providing that “[i]t is an important guiding principle for China’s economic and social development and a major strategic thought that must be upheld and applied in developing socialism with Chinese characteristics.”).

¹²³ COMMUNIST PARTY OF CHINA, 17TH NAT’L CONG., SCIENTIFIC CONCEPT OF DEVELOPMENT & HARMONIOUS SOCIETY (2007), CHINA.ORG <http://www.china.org.cn/english/congress/227029.htm> (last visited March 1, 2014) (stipulating that “[t]he Scientific Concept of Development means putting people first and aiming at comprehensive, coordinated and sustainable development. To put people first, we should take people’s interests as the starting point and foothold of all of our works, make continuous efforts to meet various needs of the people and promote an overall development of the people.”).

¹²⁴ Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat’l People’s Cong., Nov. 14, 2012, effective Nov. 14, 2012), preamble (China) (providing that “[o]wing to both domestic circumstances and foreign influences, class struggle will continue to exist within a certain scope for a long time and may possibly grow acute under certain conditions, but it is no longer the principal contradiction.”).

managed to persist for more than half-a-century in spite of the clear intent of CCP line articulated through the Party and State Constitution. The success of the project of Chinese socialist constitutional construction directly affects the legitimacy of the Chinese government under CCP leadership.¹²⁵ Constitutionalism, at its core, is grounded in a precise set of fundamental principles with constitutional effect.¹²⁶ Constitutionalism can only function through the internalization and normalization of its principles into the public memory.¹²⁷ The discipline and internalization of a constitutional ideal is achieved through a prolonged process of consolidation that involves both institutional design and increasingly strict compliance with constitutional principles in administrative practice.¹²⁸ The failure of constitutional development, whether Western or socialist, whether created on the American or Chinese model, opens the door to delegitimation and the rise of opposition movements whose object is to replace the existing order.¹²⁹ It follows that the rule of law is in fact a rule of norms, and it is impossible to promote constitutional norms without consistent adherence to both written and unwritten constitution.¹³⁰

Laojiao functions as a pervasive administrative penal system that targets the general public. It bypasses formal judicial and prosecutorial power in a way that is similar to the disciplinary techniques of *shuanggui*,

¹²⁵ The General Program of the CCP Constitution makes this clear. Though socialist modernization privileges economic development, it remains committed to the Four Cardinal Principles as the basis for building the state. To that extent, the CCP “leads the people in promoting socialist democracy. It integrates its leadership, the position of the people as masters of the country . . . builds a socialist country under the rule of law, consolidates the people’s democratic dictatorship, and builds socialist political civilization.” *Id.* That requires that it “strengthens state legislation and law enforcement so as to bring all work of the state under the rule of law.” *Id.*

¹²⁶ See Backer, *supra* note 21.

¹²⁷ See Walter F. Murphy, *Constitutions, Constitutionalism and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 3 (Douglas Greenberg et al. eds., 1993), available at http://www.vanuatu.usp.ac.fj/courses/LA207_Public_Law_1/Readings/la207_murphy.html (noting that “a constitutional text that requires its officials to swear to support it can forge a moral bond. Much of the text may thus become part of the nation’s customs. Children may learn about it in school as the “proper” way of politics, and later, as adults, internalize its provisions; mature citizens may come to look on it as prescribing rules for a just society; and officials may habitually put most of its command into practice.”). See generally Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5, 6-7 (2002).

¹²⁸ Cf. Moritz Hartmann, *Administrative Constitutionalism and the Political Union*, 14 GERMAN LAW J. 695 (2013) (describing a construction of a constitutional administrative union in the EU). This notion of progress and temporality is made explicit in both the CCP and State Constitutional texts, which contain strong suggestions of the process of scientific development of political and administrative structures toward the socialist ideals expressed therein.

¹²⁹ Cf. Tom Ginsburg et al., *When to Overthrow Your Government: The Right to Resist in the World’s Constitutions*, 60 U.C.L.A. L. REV. 1184 (2013).

¹³⁰ The object is to avoid what is now better understood as abusive constitutionalism. See David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189 (2013); cf. Jiang Shigong, *supra* note 4, at 12-46.

which is only applied to CCP members.¹³¹ But *shuanggui* ought to apply only with respect to the obligations that come from membership in the CCP, obligations that are beyond the jurisdiction of the State Constitution. Ordinary citizens, the target of *laojiao*, do not bear a special relationship to the State; CCP cadres are in a vastly different position. Indeed, the scientific development of the Chinese constitutional system from its 1954 to its current framework suggests that the political disciplining of citizens must now occur within the State Constitution rather than beyond it. That notion is now a basic part of the CCP line expressed through the State Constitution itself.¹³² As the CCP has transitioned from its role as a revolutionary party into a ruling party that represents the will of the masses, a system that was designed in the Revolutionary Period and justified as necessary to promote stability is itself increasingly becoming a major source of instability, and is criticized as such.¹³³ As such, *laojiao* appears to contradict the political settlement evidenced by the adoption of the 1982 State Constitution itself. A fundamental principle of Chinese constitutionalism derived therefrom is that the political leadership of the CCP is effectuated through the government and that the structures of that implementation are set out in the State Constitution. The CCP's political leadership of the masses, then, is government work. To conform to the State Constitution is a necessary consequence of conformity to the CCP's political leadership and the basic expression of the principle of the people's democratic dictatorship enshrined in Article 1 of the State Constitution.

It follows, then, that being an extra-judicial form of discipline directly against the masses, the *laojiao* system not only violates constitutional principles, but it is also contrary to the CCP's "mass line." The "mass line" is a foundational principle for the CCP¹³⁴—it expresses the need for the

¹³¹ See *infra* Part III; see also Larry C. Backer, *Abolishing Laojiao 劳动教养 in China; is Shuanggui Next?*, LAW AT THE END OF THE DAY (Jan. 7, 2013), <http://lbackerblog.blogspot.com/2013/01/abolishing-laojiao-in-china-is.html> (last visited March 1, 2014).

¹³² XIANFA art. 28 (1982) (China).

¹³³ See *infra* Part III; see also Backer, *supra* note 131.

¹³⁴ The theory of the mass line is probably the strongest part of the legacy of Maoist "populism." It is now deeply implanted in CCP ideology, and it would be difficult to reject it without altering the ideology as a whole. The legitimation of populism means that it has been accepted as a fundamental principle of the Chinese political system—that is, it has acquired an aura of "constitutionality." James R. Townsend, *Chinese Populism and the Legacy of Mao Tse-tung*, 17 ASIAN SURVEY, 1011 (1977). Its importance was reaffirmed in 2013 when China's leadership called on local officials to promote the "mass line" education campaign to boost development and people's livelihoods. See *Officials Urged to Promote 'Mass line' Campaign*, NEWS OF THE COMMUNIST PARTY OF CHINA (July 17, 2013), <http://english.CCP.people.com.cn/206972/206976/8329485.html> (last visited March 1, 2014) (explaining

party to stay connected with the general public by both adequately serving and representing the interest of the masses.¹³⁵ It forms part of the general program of the CCP Constitution.¹³⁶ It is central to the idea of the so-called Party's style of work—the integration of theory with practice, the forging of close links with the masses, and the practice of self-criticism.¹³⁷ The CCP maintains its proper role by leading, advising, and pointing the way forward, and by ensuring that the state organs would adhere to the constitutional principles, which reflects the Party line for a government that best serves the people.¹³⁸ In this respect it is useful to remember Deng Xiaoping's remarks made in 1957:

The Party's leadership position is stipulated in the Constitution. If the Party wants to exercise good leadership, it should constantly overcome subjectivism, bureaucratism and sectarianism, accept supervision and expand democracy within the Party and the state. If we do not accept supervision or work to expand democracy within the Party and the state, we shall surely cut ourselves off from the masses and make big mistakes.¹³⁹

that “[m]ass line” refers to a guideline under which CCP officials and members are required to prioritize the interests of the people and persist in representing them and working on their behalf.”).

¹³⁵ See COMMUNIST PARTY OF CHINA, 11TH CENTRAL COMMITTEE, GUANYU JIANGUO YILAI DANG DE RUOGAN LISHI WENTI DE JUEYI (关于建国以来党的若干历史问题的决议) [RESOLUTION ON CERTAIN HISTORICAL ISSUES FACING THE PARTY SINCE THE FOUNDING OF THE STATE], sec. 30, para. 2 (June 27, 1981), available at <http://CCP.people.com.cn/GB/64162/64168/64563/65374/4526448.html>.

¹³⁶ Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012), GEN. PROGRAM (China) (providing that “the Party follows the mass line in its work, doing everything for the masses, relying on them in every task, carrying out the principle of “from the masses, to the masses,” and translating its correct views into action by the masses of their own accord.”).

¹³⁷ Mao Zedong, On Coalition Government, Speech before the Seventh National Congress of the Party (Apr. 24, 1945) available at http://www.marxists.org/reference/archive/mao/selected-works/volume-3/mswv3_25.htm (last visited Mar. 1, 2014). This was reinforced and approved during the leadership of Deng Xiaoping. See Deng Xiaoping, Uphold the Four Cardinal Principles, Speech at a forum on the principles for the Party's theoretical work (Mar. 30, 1979) available at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1290.html> (last visited Mar. 1, 2014).

¹³⁸ Larry C. Backer, *Thoughts on Emerging Trends in Chinese Constitutional Thought on the Eve of the 18th Party Congress*, LAW AT THE END OF THE DAY (Nov. 06, 2012), <http://lbackerblog.blogspot.com/2012/11/thoughts-on-emerging-trends-in-chinese.html> (last visited March 6, 2014).

¹³⁹ Deng Xiaoping, The Communist Party Must Accept Supervision, Speech delivered at a meeting of cadres in Xi'an (Apr. 8, 1957), in SELECTED WORKS OF DENG XIAOPING VOL. 1 1957 available at <http://english.peopledaily.com.cn/dengxp/vol1/text/a1310.html>.

The current CCP leadership has confirmed the fundamental obligation to adhere to the mass line.¹⁴⁰ This was noted by Xi Jinping, who recently wrote that: “[t]o fully utilize the Party’s advantage in connecting with the masses, the most important is the need to adhere to our party’s basic principles, thoroughly implement party’s general policies for the masses, so that all the works of the Party may reflect the will and interest of the people.”¹⁴¹ Xi also described the connection between the principle of scientific development and the mass line: “[w]e shall maintain and develop the progressiveness and pureness of the party through our work ethic and style.”¹⁴² Taken together, this suggests the CCP’s understanding that the mass line itself obligates both state apparatus and CCP to adhere to its basic principles, including necessarily the State Constitution, to the extent it applies to the rules for making and enforcing law based systems.

It follows that through the principle of adherence to the mass line, the CCP is obligated to form a government for the people, which has been accomplished through the promulgation of a written constitution. The Chinese constitution therefore reflects the official Party Line.¹⁴³ The CCP is bound by its own party line—a fundamental tenant of the legitimacy of the CCP as the party in power. As an extra-judicial form of administrative discipline directly against the masses, the *laojiao* system not only violates constitutional principles, but it is also contrary to the CCP’s mass line. The continuing presence of the reeducation through labor system poses a major roadblock to the development of a CCP-led harmonious socialist society under the guidance of rule of law. What may be seen from the analysis is a system designed in the Revolutionary Period to promote stability increasingly becoming a major source of instability as China continues to develop under CCP leadership. The CCP’s scientific development principle itself suggests that when an administrative discipline system becomes a relic from the past, it is time for it to go.

Because *Laojiao* can be understood as the civilian equivalent of the *shuanggui* (Party discipline) system, it is possible that these moves may portend at least some revisions to the current form or operation of the

¹⁴⁰ *CCP’s Mass Line Campaign Not a Short Term Movement*, NEWS OF THE COMMUNIST PARTY OF CHINA (July 15, 2013), <http://english.CCP.people.com.cn/206972/206976/8325279.html> (last visited Mar. 1, 2014).

¹⁴¹ See Xi Jinping, “*Shizhong jianchi he chongfen fahui dang de hute youshi* (习近平：始终坚持和充分发挥党的独特优势) [Always uphold and fully exercise the unique advantages of the CCP] NEWS OF THE COMMUNIST PARTY OF CHINA (Aug. 1, 2012), <http://theory.people.com.cn/n/2012/0801/c83846-18644456.html> (last visited Mar. 1, 2014).

¹⁴² *Id.*

¹⁴³ Backer, *supra* note 5, 331-408.

shuanggui system, and perhaps even its abolition. What it will replace it is unclear. On the other hand, even though the techniques are similar, *shuanggui* serves very different purposes and is targeted to a group of people with substantial political obligations as members of the Party in Power. *Laojiao*, on the other hand, targets the masses, and in that sense duplicates and to some extent subverts the administrative order created through the governmental system created through the Chinese Constitution. It is unnecessary. *Shuanggui* deals with political, rather than administrative, breaches that touch on the disciplinary functions of the Party. It is in this sense beyond the competence of the administrative authorities represented by the government apparatus. This constitutional framework may demand some refinement in the *shuanggui* system, but not necessarily its elimination.

III. *SHUANGGUI*: SYSTEM IN CONTEXT AND THEORIES OF LEGITIMACY

One of the more interesting issues of Chinese state institutional organization is the relationship between the Communist Party and the state. The previous section suggests that although the CCP does not enjoy an extra-constitutional role in Chinese political organization, it does exist autonomously from the state and its organs.¹⁴⁴ Indeed, under the constitution that established them and defined their powers, state organs are understood to be required to accept the leadership role of the CCP.¹⁴⁵ This is basic to the understanding of constitutional fidelity of state organs under the Chinese state constitution.¹⁴⁶

The leadership role of the Communist Party within the Chinese constitutional framework has a number of important effects for the construction of Chinese constitutionalism. Many of these roles remain insufficiently explored.¹⁴⁷ Of particular interest is the relationship between the CCP and the organizing framework of government through the State Constitution. The nature of the CCP's autonomy within that structure, or the extent to which that autonomy is connected at all with the framework

¹⁴⁴ See generally, *id.*

¹⁴⁵ XIANFA preamble, art. 1 (1982) (China). Central to this argument is the notion of people's democratic dictatorship enshrined within the Chinese constitutional order in Article 1.

¹⁴⁶ Larry C. Backer, *A Constitutional Court for China within the Chinese Communist Party: Scientific Development and the Institutional Role of the CCP*, 43 SUFFOLK U. L. REV. 593 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1308598.

¹⁴⁷ Cf. Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L LAW 533 (2007); see generally, *The essays of Tong Zhiwei*, in *LAW AT THE END OF THE DAY*, available at <http://lcbackerblog.blogspot.com/2012/02/zhiwei-tong-on-criminal-law-and-justice.html> (last visited Mar. 1, 2014).

developed through the State Constitution, remains an object of study with substantial importance to an understanding of the division of political and administrative authority within the State.¹⁴⁸

One of the lesser known of these issues grounded in the role of the CCP within the Chinese constitutional system, particularly because it has few analogues and therefore little resonance in the West, is the institutional power of the CCP to discipline its members. CCP discipline is something quite different from the sort of intra-group discipline of Western political parties or (outside of Islam perhaps) the disciplining of members within religious communities.¹⁴⁹ Because CCP members wield substantial political power as members of the political organ that retains the authority to set and protect the political framework within which the state government operates, member discipline becomes an intensely political issue. It is bound up in the primary requirement of the Party to lead by example,¹⁵⁰ and it affects the legitimacy of the institution of the Party to preserve its leadership role within the Chinese constitutional system. But because CCP members also serve as officials within the state apparatus, CCP discipline has a significant connection to the operation of the government. That connection may bring the institutions of the state and law into play, especially in the context of disciplinary investigations that are grounded on what are shown to be violations of national law. But if the process and protections afforded individuals in state prosecution and CCP discipline are distinct, how are these two important mechanics of legitimating actions—one focused on the integrity of the CCP in its leadership role, the other focused on the government in its administrative role—to be harmonized?

This section starts with a description of *shuanggui* in its institutional context. The object is to give the reader a general overview of *shuanggui*:

¹⁴⁸ See generally, Backer, *supra* note 5.

¹⁴⁹ The literature on political party discipline in the U.S. and Europe is voluminous. See, e.g., Jon X. Eguia, *Voting Blocs, Party Discipline and Party Formation*, 73 GAMES AND ECON. BEHAVIOR 111-135 (2011); William B. Heller & Carol Mershon, *Dealing in Discipline: Party Switching and Legislative Voting in the Italian Chamber of Deputies, 1988-2000*, 52 AM. J. OF POL. SCI. 910 (2008); Joseph M. Colomer, *Policy Making in Divided Government: A Pivotal Actors Model with Party Discipline*, 125 PUB. CHOICE 247 (2005); GARY COX & MATHEW MCCUBBINS, *LEGISLATIVE LEVIATHAN* (1993); Krehbiel, Keith, *Where's the Party?*, 23 BRIT. J. OF POL. SCI. 235 (1993).

¹⁵⁰ One example is the report on Xi Jinping's 2013 speech during a CCP Central Committee meeting. See *Duizhao jiancha zhongyang baxiang guiding luoshi qingkuang taolun yanjiu shenhua gaige zuofeng jucuo* (对照检查中央八项规定落实情况讨论研究深化改进作风举措) [Review and inspect the implementation of the eight new provisions of the Central Committee and discuss research initiatives to deepen improve the governance style], PEOPLE'S DAILY (June 26, 2013), available at <http://politics.people.com.cn/n/2013/0626/c1024-21971250.html>; see also Russell Leigh Moses, *Xi Jinping's Rare Scolding of Top Party Leaders*, CHINA REAL TIME (June 26, 2013), <http://blogs.wsj.com/chinarealtime/2013/06/26/xi-jinpings-rare-scolding-of-top-party-leaders/> (last visited Mar. 1, 2014).

what is *shuanggui*, how it was created, who enforces it, the procedural framework of *shuanggui* investigations, and the manner in which cases can be transferred between different government organs and party discipline inspection organ. It then turns to the issue of *shuanggui* and its legitimacy issue, considering the state of the literature about the practice. The question of its application, specifically of the failures of local officials to adhere to the official rules and the implications of that failure, are taken up later.¹⁵¹

A. *The Shuanggui System*

What, precisely, is *shuanggui*? To answer that question it is important first to distill its operation in theory and as it is elaborated in official sources.¹⁵² In general, *shuanggui* is commonly understood to refer to a specific procedure for cadre discipline under regulations adopted by the CCP.¹⁵³ It is commonly seen as a measure that was first used in its current form in Liang Xiangyin's embezzlement investigation in 1989.¹⁵⁴ At that time, due to Liang's position as governor of Hainan province, a special investigation group was established by the Central Commission of Discipline Investigation ("CCDI") and the Ministry of Supervision of the People's Republic of China ("MOS").¹⁵⁵ The investigation did not proceed smoothly because one key witness refused to release any useful information and her confinement was about to expire.¹⁵⁶ It was obvious that in order to avoid any potential liabilities, the key witness planned to collude with the suspect to make identical confessions and ruin the investigation. At that

¹⁵¹ See *infra* Part V.

¹⁵² These official sources represent the distillation of investigations conducted by my research assistant Gao Shan. To make the analysis more realistic, sources consulted are those routinely available to the common Chinese citizen. The object is to "see" *shuanggui* from within the legal-constitutional perspective of Chinese constitutionalism, rather than from the perspective of a privileged official or an outside researcher.

¹⁵³ See *Zhongguo gongchandang jili jiancha jiguan anjian jiancha gongzuo tiaoli* (中国共产党纪律检查机关案件检查工作条例) [*Investigation Regulations for the Discipline Inspection Organ of the Communist Party of China*] (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994) [hereinafter *Investigation Regulations*], translation by Keren Wang, <http://lcbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited March 6, 2014). "*Shuanggui*" can be roughly translated as "double-designated," which refers to Article 28, section 3 of the Regulations of CCP on Discipline Regulations that provides CCP disciplinary organs the right to detain cadres suspected of party rule violations by demanding "relevant individuals appear at a designated time and place to provide explanations regarding all aspects of the case." *Id.* at art. 28.

¹⁵⁴ Flora Sapio, *Shuanggui and Extralegal Detention in China*, 22 CHINA INFORMATION 7, 7-37 (Feb. 19, 2008), (describing the history of detentions of officials in historical context and linking the practice, at least as to form, with those going back to prior regimes), available at <http://cin.sagepub.com/content/22/1/7>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

point, the minister of MOS, Wei Jianxing, instructed the investigation group to detain the key witness until the necessary information was obtained.¹⁵⁷

Later in an internal meeting of MOS, this procedure was institutionalized as the “designated duration and designated place” rule.¹⁵⁸ During the 1990s, the rules of the CCP on disciplinary regulations incorporated this rule, which began to be understood in the popular mind as “*shuanggui*.”¹⁵⁹ The term itself is a “contraction of the two ‘specifics’ as spelled out in the Rules on Investigation.”¹⁶⁰ *Shuanggui* as a detention procedure is contrasted with the similar procedures of *liangzhi* (两指). *Shuanggui* only applies to the CCP member.¹⁶¹ For non-CCP members who work for governments or state owned enterprises and violate administrative disciplines, the rule of *liangzhi* will apply.¹⁶² *Shuanggui* was based on the CCP’s internal disciplinary regulations.¹⁶³ *Liangzhi* is authorized through the PRC Law on Administrative Supervision and approved by the NPC.¹⁶⁴ MOS enforces this rule and the law of administration and supervision.¹⁶⁵ Thus, in theory, the rule of *shuanggui* is more like an internal auditing rule of a corporation, and *liangzhi* is a public rule that applies to the whole society. Although *shuanggui* and *liangzhi* are different systems based on different authorities, in the real world their boundaries are very vague.¹⁶⁶

The reason for the ambiguity arises from the fact that in practice, MOS and CCDI are actually administrated by the same group of people

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 10-11.

¹⁵⁹ *Id.* at 11-12.

¹⁶⁰ *Id.* at 11.

¹⁶¹ *Id.* at 15.

¹⁶² Article 20, Section 3 of the Law on Administrative Supervision provides: “[i]n investigating violations of the rules of administrative discipline, a supervisory organ may adopt the following measures in light of actual conditions and needs: . . . (3) to order the persons suspected of violating the rules of administrative discipline to explain and clarify questions relevant to the matters under investigation at a designated time and place; however, no such persons may be taken into custody or detained in disguised form.” This “designed time and place” is what people called *liangzhi*. Thus, for officials who are party members, they subjected to the rule of *Shuanggui*; for all officials irrespective of their party membership, they may subject to the rule of *liangzhi*. See *Zhonghua renmin gongheguo xingzheng jianchafa* (中华人民共和国行政监察法) [*People’s Republic of China Law on Administrative Supervision*] (promulgated by the Standing Comm. Nat’l People’s Cong., May 9, 1997) (China).

¹⁶³ See Backer, *supra* note 153.

¹⁶⁴ See Sapio, *supra* note 154.

¹⁶⁵ *Id.*

¹⁶⁶ Ye Zhusheng, *Shuanggui: Between Discipline and the Law*, SOUTH REVIEWS (June 10, 2013) reprinted in *Corruption, Shuanggui and Rule of Law*, DIU HUA HUM. RTS. J. (June 27, 2013), <http://www.duihuahrjournal.org/2013/06/corruption-shuanggui-and-rule-of-law.html> (last visited Mar. 6, 2014) (noting that “[i]n 1993, the Central Commission on Discipline Inspection (CCDI) and the Ministry of Supervision came to operate under one roof, so that in practice it is generally difficult to distinguish between *shuanggui* and *liangzhi*.”).

under two different titles.¹⁶⁷ Moreover, the institutions also share administrative and support functions; they share even the same website portal.¹⁶⁸ The merged administration is no accident. On February 17, 1994, the CCP's Central Committee and the State of Council agreed to the merger of MOS and CCDI with a sharing of functions.¹⁶⁹ MOS remains an organ of and under the control of the State of Council, and CCDI remains an organ of and under the control of the CCP's Central Committee.¹⁷⁰ Thus, for example, MOS's minister at each level served as the deputy secretary of CCDI.¹⁷¹ But effectively they operate together as a single unit, though formally distinct, with the CCDI taking the lead in most cases.¹⁷²

This connection has grown since 2012. In September 2013, the new anti-corruption web site was unveiled,¹⁷³ effectively merging the operations of CCDI and MOS. The website for CCDI and MOS has included procedures for popular complaints against official corruption, whether by Party cadres or officials. There are four ways of reporting or filing a case: personally visit the headquarters; write letters to report a case; make a phone call; or report a case on the website.¹⁷⁴

Because most of the government officials are also CCP members, this arrangement might well be considered reasonable and practical.¹⁷⁵ But the result also substantially increased the jurisdictional reach of both organs. As

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., *The Emerging Forms of Chinese Anti-Corruption Institutions*, LAW AT THE END OF THE DAY (Oct. 10, 2013), <http://lbackerblog.blogspot.com/2013/10/the-emerging-forms-of-chinese-anti.html> (last visited Mar. 6, 2014).

¹⁶⁹ On its website, CCDI has a detailed description on the development of MOS and CCDI, see *Lishi Yanse* (历史沿革) [Historical Background], CCDI.ORG (last updated Aug. 8, 2013), http://www.ccdi.gov.cn/xxgk/lsyg/201308/t20130826_9195.html (last visited Mar. 6, 2014).

¹⁷⁰ *Id.*

¹⁷¹ See Zhou Yu, *Quanli Zhiyue De Zhongguo Yujing* (权力制约的中国语境) [Power Restriction in the Chinese Context], in JINAN: SHANDONG PEOPLE'S PRESS 151 (2007).

¹⁷² See Ye Zhusheng, *supra* note 166. The article notes that "[i]n 1998, the CCDI and Ministry of Supervision issued the Notice on Several Questions Regarding the Use of Liangzhi and Shuanggui Measures by Discipline Inspection and Supervision Organs, which stipulated that shuanggui facilities could neither be set up in offices of judicial organs, places of detention, or facilities for custody and repatriation . . . nor could dedicated *liangzhi* or *shuanggui* facilities be built." *Id.*

¹⁷³ Wang Qishan, *Zhongyangjiwei Jianchabu Wangzhan Zhengshi Kaitong Wang Qishan Zhao Hongzhu Dao Wangzhan Daoyan* (中央纪委监察部网站正式开通 王岐山赵洪祝到网站调研) [Wang Qishan and Zhao Hongzhu Inspect the Newly Opened Website of Central Commission for Discipline Inspection and Ministry of Supervision] CNTV (Sept. 2, 2013), <http://news.cntv.cn/2013/09/02/ARTI1378088781220166.shtml> (last visited Mar. 6, 2014).

¹⁷⁴ Larry C. Backer, *The Emerging Forms of Chinese Anti-Corruption Institutions*, LAW AT THE END OF THE DAY (Oct. 10, 2013), <http://lbackerblog.blogspot.com/2013/10/the-emerging-forms-of-chinese-anti.html> (last visited Mar. 6, 2014).

¹⁷⁵ *Id.* This is evidenced in practical terms, including the merging of reporting to both Party and State policing agencies on the same website. See *id.*

a result of the merger, party members are subject to CCDI's investigation when they violate either the party or administrative disciplines.¹⁷⁶ Thus, when one considers *shuanggui*, one must understand that at times it refers not merely to the investigation of CCP offenses, but also of violations of duty imposed on the Party member in his or her administrative role.¹⁷⁷

Shuanggui might be viewed as an efficient way against officers' violation of discipline, especially relating to official corruption.¹⁷⁸ But it can also be viewed as an appropriate means of disciplining individuals with heightened political authority.¹⁷⁹ This is true despite notions that the system as effectuated may impact its legitimacy under the Chinese constitutional system.¹⁸⁰ Government officers are said to be afraid of *shuanggui* because of the application of two of its principal characteristics. First, *shuanggui* is a serious investigation that is conducted in a very secret way.¹⁸¹ Second, there is a sense that the methods of interrogation can be effective and dangerous to the health and safety of the subjects under investigation.¹⁸²

CCDI agents are responsible for receiving complaints, filing cases, conducting investigations, and making punishment decisions.¹⁸³ Each agent

¹⁷⁶ *Id.*

¹⁷⁷ On the merger of function and jurisdiction, *see infra* Part V.

¹⁷⁸ *Policing the Party*, THE ECONOMIST (Sept. 1, 2012), <http://www.economist.com/node/21561895> (last visited Mar. 1, 2014).

¹⁷⁹ *See Official Fear: Inside a Shuanggui Investigation Facility*, DIU HUA HUM. RTS. J. (July 5, 2011), <http://www.duihuahrjournal.org/2011/07/official-fear-inside-shuanggui.html> (last visited Mar. 1, 2014) (Noting that there are "[t]wo reasons likely contribute to such support. First, *shuanggui* detainees are commonly accused of unpopular acts of corruption and graft. Second, *shuanggui* is almost exclusively used against Party members, who are part of an elevated socioeconomic group that comprises only 6 percent of Chinese citizens.")

¹⁸⁰ *See* Ye Zhusheng, *supra* note 166. Ye writes that "[t]here are mainly two occasions when this word comes into public view. The first is when relevant authorities announce that some official is 'suspected of a serious breach of discipline and undergoing investigation by the [party] organization.' . . . The second is whenever an official under *shuanggui* dies for whatever reason and the official's relatives, scholars, and lawyers raise all sorts of questions, but the public's attitude ranges somewhere between "he got what he deserved" to "complete disregard." *Id.*

¹⁸¹ Andrew Jacobs, *What do the Rulers of China Fear? 'Shuanggui,'* HERALD TRIBUNE (June 15, 2012), <http://www.heraldtribune.com/article/20120615/ARCHIVES/206151023> (last visited Mar. 1, 2014).

¹⁸² Referring to a story published in *South Review*, a magazine based in Guangzhou, China, a Western reporter wrote: "[I]ittle is known of how investigators go about extracting the confessions which frequently emerge. Suicides and mysterious deaths while under *shuanggui* are not uncommon. Former detainees report being subjected to simulated drowning, beatings, and cigarette burns. In recent months, several cases of extreme brutality under *shuanggui* have appeared in the public domain." Natalie Thomas, *How the Communist Party Weeds Out Its Delinquents*, THE ATLANTIC (June 21, 2013), <http://www.theatlantic.com/china/archive/2013/06/how-the-communist-party-weeds-out-its-delinquents/277116/> (last visited Mar. 1, 2014) (discussing the cases of Yu Qiyi and Jia Jiuxiang).

¹⁸³ *Investigation Regulations* (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), translation by Keren Wang, <http://lbackerbog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited Mar. 6, 2014).

functions effectively like a combination of a police officer and a prosecutor. As the principal organ for the operation of the CCP's internal anti-corruption mechanism, CCDI works under the Party Central Committee.¹⁸⁴ The local discipline inspection commission works under the dual leadership of the CCP committees at the same level and discipline inspection commissions at the next higher level.¹⁸⁵ The term of office of discipline inspection commissions is the same as that of the Party committees.¹⁸⁶ In practice, the secretary of CCDI also serves as the member of CCP's standing committee at the same level.¹⁸⁷

At the CCP's top level, since the re-establishment of the CCDI, four out of five secretaries of CCDI have also served as politburo members of the CCP.¹⁸⁸ The formal location of the CCDI within the CCP organization structure indicates its importance within the highest level of the CCP organization.¹⁸⁹ At the provincial level, the organization might look like this:¹⁹⁰

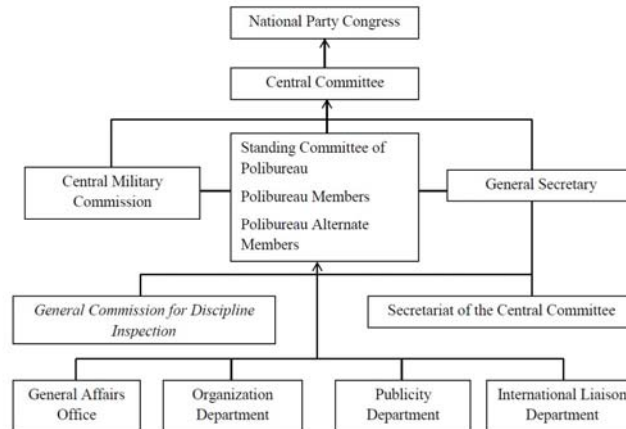
¹⁸⁴ For detailed explanation on the structure of CCDI and Party Committee, see "Lianggui" De Youlai ("两规"的由来) [The Origin of the "Lianggui"], QIUZHI (求知) [SEEK KNOWLEDGE] 1, 42 (2004), available at <http://www.cqvip.com/QK/81994X/200401/9087094.html>; for a detailed chart illustrating the organization structure, see *Organization Chart of the 18th CCP Central Leadership*, PEOPLE'S DAILY ONLINE, <http://english.CCP.people.com.cn/206972/207121/index.html> (last visited Mar. 6, 2014).

¹⁸⁵ See Joseph Fewsmith, *Promoting the Scientific Development Concept*, 11 CHINA LEADERSHIP MONITOR 1, 5 (2004), available at <http://www.hoover.org/publications/china-leadership-monitor/article/6226>. Joseph Fewsmith believed this arrangement, started since the beginning of Hu's presidency designed to improve the authority of CCDI, is, in his opinion, not working well.

¹⁸⁶ Backer, *supra* note 28.

¹⁸⁷ *Id.*

¹⁸⁸ See *Lianggui De Youlai*, *supra* note 184.



¹⁸⁹ *Id.*

¹⁹⁰ *Id.* Chart prepared by Gao Shan for this article.

General office [in charge of the general administration of the department]	Legislation office	Responsible for research and outreach, explanation of CDI policy
	Education office	Educate party members and officials against the violation of discipline and evils of corruption
	Party's integrity office	Responsibility for the conduct of local CCP meetings and study groups focused on the discipline system
	Prevention office	Incorporated with the branches of MOS and worked together against misconduct in the workplace.
	Operation office 1, 2, and 3	Investigation of CCP member in state owned enterprises and other organizations
	Archive	Records keeping function
	Reception Office	Receive the complaints from the public
	Organization office	Human resources functions at the local level for CDI
	Reviewing Office	Charged with the review of investigations and examinations of those under suspicion
	Enforcement Office	Responsible for the conduct of investigations throughout the district
	General Inspection Office	In charge of general inspection tasks and responsible for the election of the district's special inspector

The place of *shuanggui* within the Chinese legal system, and the political and constitutional implications of its character as extra-legal, provides a base from which one can consider the relationship between law, legal process, the state, and the Party apparatus, under the umbrella of the Chinese constitutional system. If, indeed, *shuanggui* exists outside the law, then its legitimacy and methods are subject to question within the framework of the law system developed through the NPC system, which Western and some internal criticism consider important for the legitimacy of the system.

But is it possible to consider *shuanggui* as within the legal system, even if beyond the reach of the legal process and rule systems derived from actions of the NPC and the state constitution? More precisely, if lawfulness can derive from sources outside or beyond the State Constitution, might those serve as a basis for understanding the normative framework within which *shuanggui* can exist within the structure of Chinese constitutionalism? The source of constitutional authority, and its democratic institutionalization, might be found within the constitution of the CCP itself. Reliance on the CCP Constitution would also have to rest on the idea that the CCP Constitution itself forms a part of the constitutional structure of China. If that is the case, then *shuanggui* cannot be understood without an understanding of the construction of Chinese constitutionalism. That is, an understanding of the relationship between State and Party Constitution in the formation of the Chinese constitutional system—not grounded in a single document constituting a state apparatus, but instead based on a dual set of constituting actions. One action is directed to the formation of the state apparatus while the other is directed to the constitution of the political

superstructure of the nation. Within this context, the debate about *shuanggui* and its application can take on a substantially distinct character.

B. *Shuanggui and the Legitimacy Issue*

The issue of *shuanggui* raises a number of legal issues that touch on the relationship between government, CCP, and the organizing methodologies of sovereign power (through a constitution or otherwise). The context in which these issues currently arise tends to be corruption among CCP cadres and the way it may be dealt with legitimately within their Chinese constitutional order.¹⁹¹ But by its very nature, *shuanggui* poses a question about that constitutional order—*shuanggui* may be necessary, but its techniques and the authority under which it is implemented appear nowhere in the instruments that define state power, and only in those that constrain the powers of the CCP. To what extent does that framework render *shuanggui* illegitimate or non-constitutional? Does the fact that *shuanggui* exists outside the parameters and constraints of the State Constitution mean that *shuanggui* is extra-constitutional and therefore illegitimate, or does it suggest that the State Constitution does not entirely contain the Chinese constitutional instruments? This section considers the state of the academic, and to some extent popular, debate on these issues. It starts with a brief analysis of the Western approach and then considers the more nuanced Chinese debates.

1. *Western Theories of Shuanggui Legitimacy*

For Westerners, the legitimacy of the mechanics of Party discipline, like the role of the CCP itself, is difficult to properly understand for lack of legitimating institutional analogies from which to draw. The actual process of discipline is not analogous to the process systems that are at the heart of Western practice. A typical exchange, reflecting the distinct perceptions of Chinese officials and Western media, is reflected in the contrast between Western reports of *shuanggui* investigations and CCP responses to those

¹⁹¹ Since 2004, there have been long discussions about the legitimacy of *shuanggui* in relation to Constitutional Order among Chinese academics. Views are varied, but the majority expressed their concerns on the constitutionality of *Shuanggui*. See Wang Jingui, “*Shuanggui*” *Yu Zishou: Hefaxing Wenti Yanjiu* (“*双规*”与自首: 合宪性问题研究) [Study on the Constitutionality Problems of “*Shuanggui*” and Confession], 8 LEGAL SCIENCE MONTHLY 60, 62 (2005); See also Yu Zhong, *Lun ‘Shuanggui’ Zai Woguo Quanli Jiandu Tizhi Zhong De Diwei* (论“*双规*”在我国权力监督体制中的地位) [On “*Shuanggui*” in the Power Supervision System in China], 6 J. OF SOCIALIST THEORY GUIDE 19 (2006).

reports. A Financial Times story from a few years ago well illustrates the Western approach in the popular press.¹⁹² Mitchell writes:

Like so many cadres before him, Mr. Xu disappeared into the jaws of the Chinese Communist party's disciplinary inspection commission. . . . In theory, officials caught up in this extra-judicial twilight zone are merely making themselves available to party investigators and can be released later without stain. In reality, the commission's targets are routinely handed over to government prosecutors months or even years later, all but gift-wrapped for summary show trials and sentencing.¹⁹³

Mitchell described another *shuanggui* proceeding in similar terms:

In a more famous example of *shuanggui* in action, in 2003 the head of Bank of China's Hong Kong subsidiary disappeared for two years before resurfacing in a courtroom in Changchun, a city in the country's far north-east. There he was convicted for a corruption spree that had allegedly begun nine years earlier in Shanghai. When it comes to "renditioning" suspects from one jurisdiction to another, the disciplinary inspection commission appears to be as accomplished as the CIA.¹⁹⁴

The CCP refused to make any substantive comment other than a confirmation that the *shuanggui* system was invoked, a typical response to media stories about *shuanggui*.¹⁹⁵

On the one hand, there is a suspicion of arbitrariness and abuse through the application of a procedure that usurps the role of the State and the application of law in the prosecution of criminal offenses, by labeling them offenses against Party discipline.¹⁹⁶ On the other hand, there is a suspicion of political criticism directed at the leadership role of the CCP

¹⁹² Tom Mitchell, *The Case of the Chinese Mayor who Wasn't There*, FINANCIAL TIMES (Aug. 12, 2009), <http://www.ft.com/cms/s/0/220818fa-8765-11de-9280-00144feabdc0.html#axzz2qyQktiMI>. (last visited Mar. 1, 2014).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* For a typical official response to media inquiries about *shuanggui*, see Xiao Qiang, *CCP Official Explains "Double Designations,"* PEOPLE'S DAILY ONLINE (Sept. 26, 2006), http://english.peopledaily.com.cn/200609/26/eng20060926_306561.html (last visited Mar. 1, 2014). The CCP official simply responded that *shuanggui* "means Party members are requested to attend questioning sessions at a designated place and for a designated duration."

¹⁹⁶ *Policing the Party*, *supra* note 178.

directed to its internal and process driven methods of internal Party discipline, which is separate from the criminal prosecution role of the state.

At the heart of these differing perceptions is the problem of corruption.¹⁹⁷ Corruption can be understood as both a political and a criminal act. The difficulty for the West is the inability to separate the political from the criminal element inherent in corruption.¹⁹⁸ This is inherent in Western constitutional separation of powers notions in which political and governmental power are also conflated within a state apparatus. But where political and administrative power is separated, as it is formally developed in China, it is possible to view corruption by individuals with political authority (within the CCP) as distinct from the financial corruption of abuse of office within the administrative apparatus of the state. Consequently, it is difficult for Westerners to comprehend a disciplinary organization that treats the political (breaches of CCP discipline and threat to the political order and its aspirations) and criminal elements (perversion of administrative system for personal gain) of corruption through distinct institutional organs. It sometimes follows that the West tends to applaud Chinese anti-corruption efforts,¹⁹⁹ but to criticize those efforts that are not undertaken through an institutional model, grounded in criminal regulation, which is central to Western notions of appropriate divisions of functions in the organization of government and the assertion of political power.²⁰⁰

That difficulty explains the contradiction in Western popular press coverage of *shuanggui*. The contradiction is made more difficult because of the popular support in China for anti-corruption efforts in any form.²⁰¹ The illegitimacy issue, then, arises from a Western unwillingness to concede the

¹⁹⁷ See generally Yunhai Wang, *Corruption and Anti-Corruption Policy in Today's China*, 33 HITOTSUBASHI J. OF L. AND POL. 1, 1-5 (2005); Gillian Wong, *China Drops Death Penalty for some Economic Crimes*, WASH. POST (Feb. 25, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/25/AR2011022500889.html> (last visited Mar. 1, 2014).

¹⁹⁸ In effect, by defining corruption as the use of public power for private gain, modern approaches to corruption tends to conflate both political action and criminality. Thus for example, the United Nations Convention Against Corruption "introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. It calls for preventive measures and the criminalization of the most prevalent forms of corruption in both public and private sectors." Kofi A. Annan, Forward in United Nations Convention Against Corruption, G.A. Res. 55/61, U.N. Doc. A/58/422 (Dec. 14, 2005), available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (last visited Mar. 6, 2014).

¹⁹⁹ See, e.g., Celia Hatton, *How Real is China's Anti-Corruption Campaign*, BBC NEWS (Sept. 4, 2013) <http://www.bbc.co.uk/news/world-asia-china-23945616> (last visited Mar. 1, 2014).

²⁰⁰ Sometimes the issue is posed as a cultural one. See Lilja Zhang, Op-Ed., *Author: In China, 'Everyone is Guilty of Corruption'*, CNN (Oct. 23, 2013), <http://www.cnn.com/2013/10/23/opinion/china-corruption-lilja-zhang/> (last visited Mar. 1, 2014).

²⁰¹ *Policing the Party*, *supra* note 178.

possibility of the division of power between an administrative structure and a political structure, each operated under its own system, but bound together by a common ideological framework.²⁰² Thus, while the Western press tends to find the methodologies of *shuanggui* unsettling, at the same time, the Western press appears to favor stories that confirm the vigor of CCP responses to corruption and its extirpation.²⁰³

The Western press pays less attention to the processes or systems used to effectuate these anti-corruption campaigns unless it touches on other, politically sensitive matters, usually centered on the legitimacy of the Chinese State-Party system.²⁰⁴ For example, the Washington Post reported the following:

“The big obstacle, I think, is corruption. Because there still is a very strong sense that corrupt officials must die among the Chinese population at large,” said Joshua Rosenzweig, research manager for the U.S.-based human rights group Dui Hua Foundation. “The revulsion for that offense is so strong that there would be a potential political cost to eliminating the death penalty for corruption.”²⁰⁵

Shuanggui, then, brings into stark focus the connection between Party discipline, criminality, corruption and the legitimacy of the organization of the state.

For all the interest of the institution of *shuanggui* in the Western popular media, there are few studies of the practice in the West. Among the best was a piece published by Flora Sapio first as an article²⁰⁶ and then in a monograph.²⁰⁷ Professor Sapio ultimately argues that:

²⁰² See Backer, *supra* note 21.

²⁰³ See, e.g., Jaime A. FlorCruz, *Chinese Communists, 90 Years Later, Still Fighting Corruption*, CNN (June 25, 2011), <http://edition.cnn.com/2011/WORLD/asiapcf/06/25/china.corruption/index.html> (last visited Mar. 1, 2014) (reporting the 2011 CCP anti-corruption campaign largely in a positive light).

²⁰⁴ Gillian Wong, *China Drops Death Penalty for some Economic Crimes*, WASH. POST (Feb. 25, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/25/AR2011022500889.html> (last visited Mar. 1, 2014).

²⁰⁵ *Id.*

²⁰⁶ See Sapio, *supra* note 154. Professor Sapio cites only two studies of the practice undertaken in the West. *Id.* at 26, n.3. See Graham Young, *Control and Style: Discipline Inspection Commissions since the 11th Congress*, 97 THE CHINA Q. 24 (1984); Chang I-Huai, *An Analysis of the CCP's Role in Mainland China's State Supervisory Systems*, 34 ISSUES & STUDIES 38–78 (1998).

²⁰⁷ FLORA SAPIO, SOVEREIGN POWER AND THE LAW IN CHINA (2010).

Shuanggui is nothing new: it is just solitary confinement under a different name. Therefore it could be labeled as a “neotraditional” practice the regime is unable to suppress. Coupled with other factors, *shuanggui* could eventually cause the regime to collapse. . . . The standardization of Party norms on detention has not changed the nature of *shuanggui*, which remains a form of extralegal detention and should therefore be abolished.²⁰⁸

She remains critical, suggesting that *shuanggui* detainees do not enjoy any of the protections offered defendants under the State Constitution and may therefore be more vulnerable to human rights abuses.²⁰⁹

Sapio has argued that the Chinese Party apparatus itself has taken the position that *shuanggui* exists outside the law and requires justification through an appeal to exceptional circumstances.²¹⁰ This position mirrors those of Chinese scholars who have argued for the legitimacy of *shuanggui* by necessity.²¹¹ Furthermore, Sapio notes that:

The CCDI has openly stated that *shuanggui* is an extra legal measure. The official position on this measure has never denied the existence of serious legislative conflicts between regulations on *shuanggui* and the Constitution of the CCP, the Constitution of the PRC, the Criminal Procedure Law, and the Law on Legislation.²¹²

Citing Professor Han and Professor Tang, Professor Sapio characterizes the principal argument justifying *shuanggui* as relating “to the presence of extraordinary circumstances, as officials’ power to obstruct investigation, the launch of anti-corruption campaigns, and the difficulty that complex forms of corruption pose to investigations.”²¹³ As a consequence, there appears to be a space beyond law within which certain activities of state and Party organs may function.²¹⁴

²⁰⁸ See Sapio, *supra* note 154 at 24-25.

²⁰⁹ Kaiman, *supra* note 29.

²¹⁰ Sapio, *supra* note 154 at 23.

²¹¹ SAPIO, *supra* note 207, at 96.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 20-26 (distinguishing between law and sovereign power).

Prominent Western scholars of China also have noted the potential tensions in a system in which the Communist Party invokes a rule system not derived specifically from or managed through the laws enacted under the umbrella of the State Constitution and its NPC legislative structure:

Shuanggui poses a challenge to our understanding of the Chinese legal system. It is frankly admitted by just about everyone involved to be unlawful—in the Chinese system, all forms of detention must be authorized by law passed by the National People’s Congress or its Standing Committee, and *shuanggui* has no such authorization. Yet it is open—the existence of the system itself is not a state secret—and pervasive. Thus, it cannot be dismissed as a mere aberration; a proper understanding of the system has to account for *shuanggui* as a constitutive element, not a mistake.²¹⁵

These criticisms should not be dismissed, but rather, as attempted below, they may be reframed and thus better understood within the Chinese constitutional context. From that context, arguments for reform of the sort noted by these scholars might be strengthened.

2. *Chinese Theories of Shuanggui Legitimacy*

Within China, there is “[o]pposition and struggle between ideas.”²¹⁶ This arises because *shuanggui* has been viewed as an important method of disciplining corruption, but there is also substantial criticism when the method itself appears arbitrary or excessive.²¹⁷ Chinese scholarship on *shuanggui* might be usefully grouped into three categories. The first include those who defend *shuanggui* on acquiescence and utilitarian theories. The second include those scholars who might be understood as *shuanggui* reformers. The last include scholars who consider the constitutional dimensions of *shuanggui* directly. Each is discussed briefly in turn.

²¹⁵ Donald Clarke, *Shuanggui and Extralegal Detention in China*, CHINA LAW PROF. BLOG (Mar. 1, 2008), http://lawprofessors.typepad.com/china_law_prof_blog/2008/03/shuanggui-and-e.html (last visited Mar. 6, 2014).

²¹⁶ MAO ZEDONG, ON CONTRADICTION (1937), reprinted in SELECTED READINGS FROM THE WORKS OF MAO TSETUNG 85, 93 (1971) (explaining that “[o]pposition and struggle between ideas of different kinds constantly occur within the Party; this is a reflection within the Party of contradictions between classes and between the new and the old in society. If there were no contradiction in the Party and no ideological struggles to resolve them, the Party’s life would come to an end.”).

²¹⁷ See, Ye Zhusheng, *supra* note 166 (noting that *shuanggui* can be deployed not only an anti-corruption weapon, but also as a tool for political infighting).

The majority of the scholarly work considered below takes a neutral approach, which has produced a number of distinctive analytical approaches. Most concede the efficacy of *shuanggui* and avoid constitutional issues, suggesting a constitutional approach similar to the Western notion of legitimacy through acquiescence.²¹⁸ Among these variations, an important line of thought suggests that *shuanggui* is a special measure necessitated under the current realities of the Chinese political situation. These scholars look to the effectiveness of the process or its utility. The justification of *shuanggui* is grounded on a variety of functional grounds, for example, history, the characteristics of the CCP, the less developed state of the legal system, and the reality of corruption.

The historical justification of *shuanggui* is, at its base, comparative in nature.²¹⁹ This combines elements of constitutional necessity and appeals to the sui generis nature of the Chinese constitutional project.²²⁰ Some scholars analyze the history background of the CCP's birth and make a comparison between China, Russia, and Western countries.²²¹ They start with the insight that the CCP is not organized like Western political parties. As a revolutionary party, both the powers and functions of the CCP must be understood as different from those of Western political parties. In Western countries, the political party's main activity is election. As a revolutionary party, the CCP faces a different struggle that justifies harsher measures, especially against internal opponents. Those harsher measures have been institutionalized as *shuanggui* as the CCP evolved from revolutionary to administrative roles.²²²

²¹⁸ The role of acquiescence and tradition in U.S. constitutional jurisprudence is venerable. See Larry C. Backer, *Elements of Law 3.0 Notes and Readings IV-E (The Role of the Courts: Constitutional Interpretation; A Special Case?)*, LAW AT THE END OF THE DAY (Nov. 24, 2013), <http://lbackerblog.blogspot.com/2013/11/elements-of-law-30-notes-and-readings.html> (last visited Mar. 6, 2014) (discussing *McColloch v. Maryland*, 17 U.S. 316 (1819)).

²¹⁹ Yang Tao, "Shuanggui" *Bianqian De Sikao* ("双规" 变迁的思考) [Examining the Transformation of "Shuanggui"], 6 DEMOCRACY & SOCIETY 15, 15-17 (2006), available at <http://www.cqvip.com/QK/82838X/200606/23577874.html>.

²²⁰ *Id.* at 15.

²²¹ *Id.*

²²² *Id.* at 16. In *shuanggui*, under the view of CCP's transformation from Revolutionary Party to Administration Party, Yang Tao states that "considering the history background of China at the time when the CCP was built, similar to the situation of CPSU, CCP needed a violent revolution to win the battle. This means, CCP had to possess the power of depriving its member's right to life and liberty by the party discipline. Although, *shuanggui* could be traced to practices that predated the rise of the CCP to a leadership position, it has been part of the architecture of the CCP since its founding. That pedigree is its claim to legitimacy." *Id.*

Another school accepts *shuanggui* as a temporary aberration.²²³ It suggests that as time goes by, as a result of the development of the society and the CCP itself, *shuanggui* may be optimized or even replaced in the future. The “special measures” justification is also grounded in a comparative approach. Its advocates argue that unlike Western political parties, which are only in charge of the government operations, the CCP has an absolute power over the whole of society and the nation.²²⁴ Using harsh internal discipline is necessary in maintaining the party’s polices and limiting the abuse of power.²²⁵ Other scholars in this camp argue that due to the special arrangement of power allocation in China, the CCP needs to assert a crude process of internal discipline.²²⁶ Moreover, China’s current special political arrangement determines the fact that the prosecution only amount to a small portion of the accountability of the state power. In most cases, enforcement is achieved through other measurements, such as *shuanggui*.²²⁷

A group of Chinese scholars justify *shuanggui* on the basis of the less-developed state of the Chinese legal system and tend to argue that the lack of appropriate legislation and the less developed state of the legal system render special measures like *shuanggui* both popular and necessary.²²⁸ Zhu Weijiu, consultant of the State Council, nicely illustrates this perspective.²²⁹ She suggests:

In countries where the legal system is less developed, the supervision of the state power is normally informal. The legal

²²³ Liu Heng, *Discussion on the Justification of Shuanggui on the Reality Ground*, 5 ACAD. J. OF SHANXI PROVINCIAL COMMITTEE PARTY SCH. OF C.P.C 33, 33-34 (2006).

²²⁴ *Id.*; cf. XIANFA preamble (1982) (China) (stating that “[t]he system of multi-party cooperation and political consultation led by the Communist Party of China will exist and develop in China for a long time to come”).

²²⁵ Liu Heng, *supra* note 223.

²²⁶ Wang Yixing, *Zhongguo Gongchandang Dangnei Zeren Yanjiu* (中国共产党党内问责制研究) [*Researches on CCP’s Internal Accountability System*], CNKI.NET (May 2005), <http://lib.cnki.net/cdm/80000-2009116952.html> (last visited Mar. 6, 2014) (noting that “[i]n western countries the governing power is at the hand of the party’s core member, who works in the framework of the government structure. However, unlike the western party, CCP’s non-core members possess enormous power after CCP assumed a leadership role in governing China. Because such power projects absolute influence on the government’s administration, CCP needs stronger internal discipline to regulate party member in the current government structure.”).

²²⁷ *Id.*

²²⁸ Yang Tao, *supra* note 219.

²²⁹ See Zhu Weijiu, *Zhuanbian Fazhi Guannian Tuijin Yifa Xingzheng* (转变法治观念 推进依法行政) [*Transform the Rule of Law Concept and Push Forward Governance According to Law*], THE REVOLUTIONARY COMMITTEE OF THE CHINESE KUOMINTANG (Oct., 10 2008), http://www.minge.gov.cn/minge/txt/2008-10/10/content_2511995.htm (last visited Mar. 1, 2014).

liability is always replaced by other liabilities. Such as in China, the CCP's discipline fills in the vacancy of the insufficient public law regulations.²³⁰

They point out that during the social transformation from command economy to market economy, the society was in lack of law, and the judicial department was in lack of technique or experience to defeat corruption.²³¹ Under such reality, CCP authorities needed access to measures like *shuanggui*.²³²

Lastly, some scholars elaborate variations of a "transformation theory," combining elements of arguments from the other justificatory schools.²³³ The arguments are also grounded on the basic premise that *shuanggui* is a special measure. Scholars who advance the "transformation theory" parallel the arguments of constitutional necessity made in defense of *laojiao*. First, they argue that *shuanggui* was a reasonable reaction to harsh historical and institutional realities.²³⁴ They also argue that regardless of its constitutionality, *shuanggui* has proven to be an efficient special measure for a society still undergoing a process of social transformation.²³⁵ During this reformatory period, Yang posits, the State Constitution is under the process of reform itself. Thus, it is reasonable and acceptable to have some conscious flaws in the regulations that violate the Constitution until the process of reform is completed.²³⁶

Arguments from history and necessity also point to the temporary nature of *shuanggui* and the likelihood of its reform to better conform the theory of Chinese constitutionalism with the applied realities of the practice. For these Chinese scholars, *shuanggui* will be optimized and follow the rule of law or even be replaced by an alternative legal regime. This replacement theory takes one of three forms.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ The argument suggests something like a living constitution theory—that the constitution, and its permissible limits, must be understood within the historical context in which it is applied. See, e.g., Yang Tao, *supra* note 219, at 16. The notion has been contentious among high level American judges. Compare William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. DAVIS L. REV. 2 (1985), with William H. Rehnquist, *The Notion of a Living Constitution*, 29 HARV. J. L. & PUB. POL. 401 (2006).

²³⁴ Yang Tao, *supra* note 219.

²³⁵ *Id.*

²³⁶ *Id.*

The first of these emphasizes the “work in progress” aspect of *shuanggui*.²³⁷ Some scholars analyze the reason why *shuanggui* will be optimized in the future.²³⁸ They point out modern political theory suggests that the government has to win the support of the people by democracy and rule of law.²³⁹ Although CCP developed from a violent revolution, it cannot follow its old routine forever. Thus, as an administration party, CCP shall emphasize the cooperation of the different classes of society, especially the importance of democracy and cooperation. The CCDI’s issuance of detailed regulations²⁴⁰ on the time and procedural issues relating to the conduct of *shuanggui* investigations is the best evidence to suggest that the CCP is attempting to reform *shuanggui* so that it follows a rule of law framework, even if the law followed is that of the organization of the CCP.²⁴¹ Such opinion is not isolated because most of CCP’s official publications had emphasized the importance of internal party democracy and ethical education in maintaining CCP’s policies and its discipline.²⁴²

The second looks to developing parallel administrative structures for *shuanggui* outside the government.²⁴³ One article in the CCP Party School’s journal suggests that the CCP will reform its *shuanggui* process to harmonize more explicitly with parallel proceedings authorized for criminal matters under NPC legislation.²⁴⁴ In effect, one might view this as a means of recasting *shuanggui* as the political process that might run parallel to the administrative process against suspects who are also Party cadres.

The third argues that *shuanggui* should eventually be replaced by a judicially administered system.²⁴⁵ Some scholars, for example, argue that *Shuanggui* ought to eventually be replaced with judicial measures. Zhou

²³⁷ See, e.g., Cai Xia, *The Maintaining of CCP’s Constitution*, STUDY TIMES (Aug. 2009), http://www.china.com.cn/xsbs/txt/2006-08/09/content_7066378.htm (last visited Mar. 1, 2014).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Investigation Regulations* (promulgated by the Cent. Comm’n for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), arts. 7 and 28, translation by Keren Wang, <http://lbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited Mar. 6, 2014).

²⁴¹ Cai Xia, *Weihu Dangzhang De Jichu Gongzuo* (维护党章的基础工作) [The Maintaining of CCP’s Constitution], STUDY TIMES (Aug. 2006), http://www.china.com.cn/xsbs/txt/2006-08/09/content_7066378.htm (last visited Mar. 1, 2014).

²⁴² *Id.*

²⁴³ Cao Shenbing, *Discussion on How to Make CCP Internal Regulation in Coordinate with the Law*, LAW AT THE END OF THE DAY (Feb. 2002), http://lbackerblog.blogspot.com/2011_09_01_archive.html (last visited Mar. 1, 2014).

²⁴⁴ See *id.*

²⁴⁵ Zhou Yezhong, *Fanfu Changlian Jidai Shixian Sange Zhuanxing* (反腐倡廉亟待实现三个转型) [Three Transformations that are Urgently Needed for Anti-corruption], LEGAL DAILY (Aug. 25, 2000), <http://www.cqvip.com/QK/81128X/200101/15029911.html> (last visited Mar. 1, 2014).

Yezhong has developed a theory of *shuanggui* “transformation from discipline leading to law.”²⁴⁶ These approaches may also provide for a remedial mechanism that also incorporates this last position, providing a basis for the establishment of a reviewing office inside CCP.²⁴⁷

While most articles concede the efficiency of *shuanggui* and avoid the constitutional issue, groups of scholars confront the constitutional issue directly. The first line of scholarly argument asserts that *shuanggui* violates the Chinese Constitution.²⁴⁸ The violation arguments are grounded in a sense of the deficiencies of *shuanggui* to follow or apply the procedural protections afforded through the Chinese Constitution.²⁴⁹ One critique suggests that *shuanggui* directly violates the State Constitution, and in particular, the provisions of equal protection, personal freedom, and due process.²⁵⁰ The constitutional argument starts with the normative effect of the State Constitution’s Preamble, which states that the State Constitution provides the basic norm of conduct.²⁵¹ Thus, theoretically, the CCP and its internal discipline ought to comply with the Constitution. However, in practice, *shuanggui* investigations violate Articles 33²⁵² and 37²⁵³ of the Constitution. During *Shuanggui* investigations, investigators may violate due process and personal freedom by confining the suspect in the premises for inquiries.²⁵⁴ Such inquiries may constitute an illegal detention without

²⁴⁶ *Id.*

²⁴⁷ *Cf.* Backer, *supra* note 146.

²⁴⁸ Wang Jingui, *supra* note 191, at 61, 62.

²⁴⁹ Two articles share this minority view. One is from YAN YUANG CHUN QIU, a journal published by an old general and former senior CCP officials. See Shao Yanxiang, “*Shuanggui*” *De Banfa Yaobuyao Gaiyigai* (“双规”的办法要不要改一改) [*Shall we Reform the Shuanggui?*], 2009 YAN HUANG CHUN QIU 77, 77-79 (Mar. 2009). The second article was published in LEGAL SCIENCE, a well-known law journal published by East China University of Political Science and Law. See Wang Jingui, *supra* note 191, at 62.

²⁵⁰ See Wang Jingui, *supra* note 191, at 62.

²⁵¹ The preamble of the state constitution provides that “[p]eople of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings in the country must take the Constitution as the basic norm of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.” XIANFA preamble (1982) (China).

²⁵² *Id.* at art. 33 (providing that “[a]ll persons holding the nationality of the People’s Republic of China are citizens of the People’s Republic of China . . . equal before the law. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law.”).

²⁵³ *Id.* at art. 37 (providing that “[t]he freedom of person of citizens of the People’s Republic of China is inviolable. No citizen may be arrested except with the approval or by decision of a people’s procuratorate or by decision of a people’s court, and arrests must be made by a public security organ. Unlawful deprivation or restriction of citizens’ freedom of person by detention or other means is prohibited; and unlawful search of the person of citizens is prohibited.”); *id.* at art. 38 (providing that “[t]he personal dignity of citizens of the People’s Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.”).

²⁵⁴ See Wang Jingui, *supra* note 191, at 62.

the participation of judicial departments.²⁵⁵ Moreover it has been suggested that *shuanggui* is used as a tool for plea bargaining—especially to avoid prosecutions under law.²⁵⁶ For example, the Commission of Discipline Investigation (“CDI”) or CCDI may use *shuanggui* as a plea bargain in order to get cooperation from the suspects. This practice, it has been argued, violates the constitutional equal protection rule, which requires that “all citizens of the People’s Republic of China are equal before the law.”²⁵⁷

A second line of constitutional critique posits that *shuanggui* created an extrajudicial procedure, which has harmed the judicial and political system, and created a zone of illegitimacy that ultimately harms the state.²⁵⁸ The illegitimacy argument is also grounded on the idea that *shuanggui* operates within an extrajudicial zone whose existence harms the judicial and political systems.²⁵⁹ *Shuanggui* cannot replace the investigation of law enforcement departments. It would follow under this critique that to keep this special measure creates a mechanism for the assertion of power without constraint, and that, constructed as a power system beyond or outside law, may ultimately reduce protections to the suspect and damage the legal system. The constitutional critique is unusually strongly worded.²⁶⁰

But there are also scholars who take the opposite view about the constitutionality of *shuanggui*, especially in its relation to Articles 33 and 37 of the State Constitution. One of the more interesting critiques is that of Liu Zhigang who responds directly to the arguments made by Wang Jingui.²⁶¹ Liu provides three reasons to explain why *shuanggui* does not violate the Constitution. First, Liu argues that *shuanggui* applies to the relationship between the CCP and each member.²⁶² This relationship is a “special relationship” that is not covered by the Constitution. Second, denying the application of *shuanggui* is ideologically illegitimate, an expression of romanticism and radical-left thinking that disregards the reality of Chinese

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Shao Yanxiang, *supra* note 249, at 78-79.

²⁵⁹ See *id.*

²⁶⁰ See Shao Yanxiang, *supra* note 249, at 79. Shao Yanxiang writes, “[t]he measurement of *Shuanggui* is identical to illegal detention. CCDI cannot replace the judicial departments and CCDI have no right to confine the freedom of the people. No one or entity shall exceed the Constitution. The argument of keeping *shuanggui* involves the position of CCP in relation with law and politics. Moreover, the orientation of *shuanggui* will affect the reform of nation’s politic system and legal system.” *Id.*

²⁶¹ Liu Zhigang, “*Shuanggui*” *De Hexianxing – Jianyu Wang Jingui Xiansheng Shangque* (“双规”的合宪性——兼与王金贵先生商榷) [Responses to Wang Jingui, *The Constitutionality of “Shuanggui”*], 11 LEGAL SCIENCE 9, 11-14 (Nov. 2005).

²⁶² *Id.*

society.²⁶³ Third, Liu suggests that “[i]nsisting on the leadership of CCP” is a basic principle of the State Constitution.²⁶⁴ Without the CCP’s strong leadership, there is no basis for the protection of people’s right. Thus, even though *shuanggui* may violate someone’s rights, in order to protect the interest of maintaining the CCP’s leadership, *shuanggui* might be entitled to special treatment. He adopts an interest analysis in which he concludes that the interest of maintaining a strong CCP leadership role is more important than the niceties of constitutional provisions ostensibly protecting individual rights.²⁶⁵

Another scholar seeks to transpose Western constitutional notions of special measures in defense of the extra constitutional legitimacy of *shuanggui*.²⁶⁶ Liu justifies his argument that *shuanggui* will survive as a constitutional exception by citing the example of Taiwan and Germany to prove that reserving an exception for special measures is reasonable.²⁶⁷

Taken together, most scholarship suggests discomfort with the institutional structures and practices of *shuanggui*. This scholarship advances the proposition that *shuanggui* is illegitimate or unconstitutional, flawed but necessary, a transitional vehicle in post-Revolutionary times, or that it is exceptional, but still a legitimate expression of power. More importantly, these approaches agree on the centrality of the Chinese State Constitution to the analysis of the role of *shuanggui*, and, through the device of *shuanggui* itself, of the role of the CCP in the Chinese constitutional order. Relying implicitly on the two fundamental principles of constitutionalism—1) the identity of the entirety of state power within a constitution, and 2) the premise that constitutional ideology marks the limits of constitutional discourse—the standard analyses start from the presumption of the Chinese State Constitution’s primacy and measure everything from that base.

The reality of *shuanggui* suggests something more subtle than evidence of the willingness of an extra-constitutional institution, the CCP, implementing extra-legal measures. Liu Zhigang comes closest to arguing

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Liu Heng *Shilun Shuanggui De Xianshi Zhengdangxing*. (试论双规的现实正当性) [On the Substantive Legitimacy of Shuanggui], 2006 J. OF THE PARTY SCHOOL FOR THE DEPARTMENTS DIRECTLY UNDER SHANXI PROVINCIAL COMMITTEE OF THE CCP, 1674-76 (May 14, 2006).

²⁶⁷ *Id.* Particularly interesting is the argument that “special relationship” is an important German administrative law theory and being adopted and developed in Taiwan and Japan. Under this theory, first, it excludes the application of constitution; second, it excludes the application of law; third, it excludes the judicial review. This theory is in fact creating an extrajudicial region.

this, but even he ultimately returns to the characterization of *shuanggui* as a justifiable exception, and essentially extra-constitutional, measure.²⁶⁸ Indeed, these explanations, critiques, and defenses are to some extent unsatisfying precisely because they do not appear to start from a deeper understanding of the foundational premises of the Chinese constitutional state. It is to a consideration of *shuanggui* within what this paper would argue the appropriate way of understanding the basis of distinctive Chinese constitutionalism that we turn next.

IV. THE LEGITIMACY OF *SHUANGGUI* WITHIN THE CHINESE CONSTITUTIONAL SYSTEM

The authority of CCP officials to enact and enforce *shuanggui* does not derive from an authority vested in state officials under the State Constitution. As a consequence, some question *shuanggui* because it was neither enacted by action of the NPC nor does it conform to laws enacted under the State Constitution that apply to government criminal actions and investigations. It follows that scholars, especially in the West, are inclined to suggest that the disciplinary processes of *shuanggui* exist outside the Chinese constitutional system and that it violates rule of law requirements.²⁶⁹ Some scholars further suggest that the CCP exceeds its constitutional role by enacting and enforcing *shuanggui*, and it is to that extent acting unlawfully.²⁷⁰ These scholars then argue that CCP and *shuanggui* must conform both to the rules of the Constitution and the laws enacted through the NPC system. The nonconformity to these legal norms leads some to question the legitimacy of *shuanggui*,²⁷¹ and, more broadly, the role of the CCP in the Chinese constitutional system.²⁷²

This line of thinking, and its conclusions about the position of CCP and *shuanggui* in relation to the state, arises from an emerging global consensus about the relationship of states to the legitimacy of their governmental systems.²⁷³ That consensus is grounded on two very simple principles. The first is *one state—one constitution*: many people have come to accept this principle as the basis of all legitimate constitutional theory,

²⁶⁸ Liu Zhigang, *supra* note 261, at 12.

²⁶⁹ See *supra* Part III.

²⁷⁰ See *supra* Part III.

²⁷¹ Sapio, *supra* note 154, at 20-21.

²⁷² See generally Backer, *supra* note 21.

²⁷³ See generally Larry C. Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671 (2009).

though it has been questioned by Chinese scholars.²⁷⁴ Many theorists add a corollary principle, derived in part from ideas made popular by Italian fascists in the 1930s²⁷⁵ and then reworked for the needs of Marxist Leninist states in the 1960s:²⁷⁶ within the constitution, everything; outside the constitution, nothing. It is possible to posit that much of what now constitutes the foundations of constitutionalism is grounded on these principles—the constitution provides all of the basic rules for the organization of the state and the substantive principles on which its people are organized. Any action, organization, or principle outside of, or inconsistent with, the constitutional framework is necessarily illegitimate. The legitimacy of the construction of government, the limits of distribution of power to this government, the means by which the government may use its power, and the persons against whom such authority may be asserted are all judged from within the organizing framework of these principles.

Most governments have subscribed to these basic rules implicitly. Virtually all states have developed a written constitution that serves as the expression of the political will of the people and the highest law of the land.²⁷⁷ Those states without written constitutions, including, most prominently, the United Kingdom, rely instead on a series of important political settlements, agreements, and juridical principles, which together constitute the constitution of the nation.²⁷⁸ Most theorists, relying on these principles and the acquiescence of states in their authority expressed through consensus discernable by their actions, judge the legitimacy of governments and the validity of law or policy enforced by such governments by their relationship to constitutions.

The basic principles of traditional constitutionalist analysis have been misapplied to the Chinese constitutional context. To that extent, the

²⁷⁴ Jiang Shigong, *supra* note 4, 12.

²⁷⁵ See BENITO MUSSOLINI, *THE DOCTRINE OF FASCISM* (1932), reprinted in *THE SOCIAL AND POLITICAL DOCTRINES OF CONTEMPORARY EUROPE* 164-68 (Michael J. Oakshott ed., 1939), available at <http://www.constitution.org/tyr/mussolini.htm> (stating “*tutto nello Stato, niente al di fuori dello Stato, nulla contro lo Stato*,” which translates to “[e]verything in the State, nothing outside the State, nothing against the State.”).

²⁷⁶ See Fidel Castro Ruz, *Discurso Pronunciado como Conclusión de las Reuniones con los Intelectuales Cubanos*, DEPARTMENT OF VERSIONS (June 1961), <http://www.cuba.cu/gobierno/discursos/1961/esp/f300661e.html> (last visited Mar. 1, 2014) (stating “*esto significa que dentro de la Revolución, todo; contra la Revolución, nada*,” which translates to “[w]ithin the revolution, everything; against the revolution, nothing.”).

²⁷⁷ See, e.g., ELKINS ET AL., *supra* note 7, 36-64.

²⁷⁸ See, e.g., Mark D. Walters, *The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law*, 51 U. TORONTO L.J. 91 (2001); Jo E.K. Murkens, *The Quest for Constitutionalism in UK Public Law Discourse*, 29 OXFORD J. LEGAL STUD. 427 (2009). For an interesting discussion of the evolution of this concept in the 21st century, see DAVID DYZENHAUS, *THE CONSTITUTION OF LAW* (2006).

conclusions about both CCP and *shuanggui* are erroneous. The conventional analysis, whether applied by Chinese or Western theorists, ignores the distinct features of the Chinese constitutional system by mistaking the State Constitution for the Chinese constitutional system. The State Constitution is merely a part and not the whole of China's constitutional system. Put simply, the Chinese constitutional system is in the aggregate grounded in an unwritten constitution.²⁷⁹ Like the traditional U.K. system, it "includes all rules which directly or indirectly affect the distribution or exercise of the sovereign power in the state."²⁸⁰ This unwritten constitution is made up of a combination of important written documents and a core of unwritten principles that are noted in the core set of written documents. The fundamental documents that form the Chinese constitutional system include the State Constitution and the CCP Constitution. Its principles, inscribed in the preamble of the State Constitution and the General Program of the CCP Constitution, include Marxism-Leninism, Mao Zedong thought, Deng Xiaoping theory, and the important thought of "Three Represents." Together, these instruments can be understood to serve as the whole of the constitution of the People's Republic. Separately, each of these fundamental documents and principles describes an important component part of that constitution: the State Constitution focusing on the organization of the administrative apparatus and its direct relationship to the people; the CCP Constitution serving as the umbrella through which the political apparatus of the nation is organized through the institution of the Communist Party; and the political principles serving to define the substantive framework within which the CCP and the administrative apparatus of state must undertake their respective roles.²⁸¹

Understood in this way, both the CCP and the system of discipline under the system of *shuanggui* take on a substantially different character. The focus of analysis moves from issues of legitimacy grounded in the extra-constitutional character of *shuanggui* and of the CCP itself, to a focus on the conformity of both to their respective obligations and the norms on which the Chinese constitutional system is based. *Shuanggui*, in effect, is extra-constitutional precisely because *shuanggui* falls outside the

²⁷⁹ See generally Jiang Shigong, *supra* note 4.

²⁸⁰ ALBERT VENN DICEY, OUTLINE OF SUBJECT: THE TRUE NATURE OF CONSTITUTIONAL LAW 15 (1915) (noting that constitutional systems ". . . include[] (among other things) all rules which define the members of the sovereign power, all rules which regulate the relation of such members to each other, or which determine the mode in which the sovereign power, or the members thereof, exercise their authority.").

²⁸¹ See generally Backer, *supra* note 5; see also Jiang Shigong, *supra* note 4.

competence of the Constitution, whose role is to administration of the state apparatus and the relationship of that apparatus to the people. Instead, *shuanggui* falls within the legitimate competence of the CCP to be administered under its line, which necessarily includes the principles through which the State Constitution was structured.

If the issue of legitimacy becomes irrelevant, then the analysis shifts to the conformity of *shuanggui* to the constitutional principles that frame the organization and operation of the CCP. The discussion of both, then, like the discussion of the governmental system and its disciplinary mechanisms in other constitutional states, can be analyzed for conformity to the organizing principles enshrined in its constitution and the effectiveness of its implementation. This is the natural result of the application of both Deng Xiaoping and Western constitutional theory.

To understand the connection between *shuanggui*, the State Constitution, and the Chinese constitutional system, it might be useful to go back to the first principles. The object of this exposition is not to engage in pedantic historicism, but rather to extract and apply its principles, principles that still strongly influence the character of Chinese constitutionalism and the framework structures of Chinese separation of powers doctrine. It is also to suggest that a generation of scholarship that ignores this fundamental understanding of the structural framework of Chinese constitutionalism may not understand correctly the character of the constitutional framework that prevails in China.

A useful place to start is Deng Xiaoping's 1980 speech "On the Reform of the System of Party and State Leadership,"²⁸² discussed and endorsed by the Politburo on August 31, 1980. The speech is ostensibly about changes in the leadership of the State Council. But Deng uses the issue of State Council membership to raise a number of important issues that demonstrates a conception of the relationship of State and Party, and of the role of the State Constitution within the constellation of higher principles, which together describe the approach to the construction of Chinese State-Party constitutional system in its modern form. Deng describes four principal issues with the pre-1980 constitutional organization of State and Party apparatus: 1) over-concentration of power hindering the practice of socialist democracy by state organs and the CCP's democratic centralism; 2) bureaucratism and formalism evidenced by the practice of permitting cadres

²⁸² Deng Xiaoping, On the Reform of the System of Party and State Leadership, Speech Before the Political Bureau of the Central Committee of the Communist Party of China (Aug. 18, 1980), available at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1460.html> (last visited Mar. 8, 2014).

to hold too many positions or acquire too many deputies;²⁸³ 3) the failure to adequately distinguish between the responsibilities of the CCP and those of the government apparatus;²⁸⁴ and 4) a failure to institutionalize leadership succession within the Party, requiring a greater willingness of older cadres to cede front line positions to younger members and for younger members to accept guidance and leadership from older cadres.²⁸⁵

In order to achieve the core objectives of a socialist state, Deng felt it was critical to separate the administrative functions of the state from the leadership functions of the CCP.²⁸⁶ That separation, in turn, was not meant to create a hierarchical relationship between State and Party, with the State Constitution in a privileged position as against the CCP. Rather, the object was to apply a principle of separation of functions which in the aggregate would define the Chinese constitutional system. That becomes clear in Deng's vision for changes both in the State Constitution and in the development of the Commission for Discipline Inspection.²⁸⁷ With respect to the Constitution, Deng focused on the relationship between the administrative function of the State, the construction of government, and the

²⁸³ *Id.* Deng described the complex character of bureaucratism: “[b]ureaucracy remains a major and widespread problem in the political life of our Party and state. Its harmful manifestations include the following: standing high above the masses; abusing power; divorcing oneself from reality and the masses; spending a lot of time and effort to put up an impressive front; indulging in empty talk; sticking to a rigid way of thinking; being hidebound by convention; overstaffing administrative organs; being dilatory, inefficient and irresponsible; failing to keep one's word; circulating documents endlessly without solving problems; shifting responsibility to others; and even assuming the airs of a mandarin, reprimanding other people at every turn, vindictively attacking others, suppressing democracy, deceiving superiors and subordinates, being arbitrary and despotic, practicing favoritism, offering bribes, participating in corrupt practices in violation of the law, and so on. Such things have reached intolerable dimensions both in our domestic affairs and in our contacts with other countries.” *Id.*

²⁸⁴ *Id.* Deng justified distinguishing government and party responsibilities by stressing that “[t]hose principal leading comrades of the Central Committee who are to be relieved of their concurrent government posts can concentrate their energies on our Party work, on matters concerning the Party's line, guiding principles and policies. This will help strengthen and improve the unified leadership of the Central Committee, facilitate the establishment of an effective work system at the various levels of government from top to bottom, and promote a better exercise of government functions and powers.” *Id.*

²⁸⁵ *Id.* Deng noted “[i]t is of great strategic importance for us to ensure the continuity and stability of the correct leadership of our Party and state by having younger comrades take the ‘front-line’ posts while the older comrades give them the necessary advice and support.” *Id.*

²⁸⁶ *Id.* Deng noted “[i]n the political sphere, to practice people's democracy to the full, ensuring that through various effective forms, all the people truly enjoy the right to manage state affairs and particularly state organs at the grass-roots level and to run enterprises and institutions, and that they truly enjoy all the other rights of citizens; to perfect the revolutionary legal system; to handle contradictions among the people correctly; to crack down on all hostile forces and criminal activities; and to arouse the enthusiasm of the people and consolidate and develop a political situation marked by stability, unity and liveliness.” *Id.*

²⁸⁷ *Id.* at part V. Deng explained that “the Central Committee has already set up its Commission for Discipline Inspection, and is now considering the establishment of an advisory commission . . . Together with the Central Committee itself, these commissions are to be elected by the National Congress of the Party, and their respective functions and powers are to be specified.” *Id.*

role of the people in these institutions.²⁸⁸ Popular participation was understood to be focused on the state organs and organized through the provisions of the State Constitution.²⁸⁹ The state organs, in turn, were understood as defining the administrative sector, but not the totality of the constitutional system.²⁹⁰

That division between administrative and political organs was made clear by Deng's emphasis on the fundamentally distinctive character of separation of powers under principles of Chinese constitutionalism. Separation of powers, at the fundamental level of Chinese constitutionalism, was not between the legislative, executive, and judicial power of the state apparatus, which in turn serves as the repository of all political and administrative power. Rather, as this essay seeks to demonstrate, the fundamental separation of powers, on which the Chinese constitutional system rests, was meant to be between the administrative organs, represented by the State Council, and the political organs, represented by the Central Committee. Deng has discussed the relationship between the CCP and the state apparatus in following terms:

...[A] truly effective work system will be set up for the State Council and the various levels of local government. From now on, all matters within the competence of the government will be discussed and decided upon, and the relevant documents issued, by the State Council and the local governments concerned. The Central Committee and local committees of the Party will no longer issue directives or take decisions on such matters. Of course, the work of the government will continue to be carried out under the political leadership of the Party. Strengthening government work means strengthening the Party's leadership.²⁹¹

Thus, Deng does not appear to suggest that the construction of a state apparatus grounded in the provisions of a State Constitution would come to define and regulate, through its substantive and organizational provisions,

²⁸⁸ *Id.* Deng noted “[o]ur Constitution should be made more complete and precise so as to really ensure the people's right to manage the state organs at all levels as well as the various enterprises and institutions, to guarantee to our people the full enjoyment of their rights as citizens, to enable the areas inhabited by minority nationalities to exercise genuine regional autonomy, to improve the system of people's congresses, and so on. The principle of preventing the over-concentration of power will also be reflected in the revised Constitution.” *Id.*

²⁸⁹ *Cf.* XIANFA art. 2 (1982) (China).

²⁹⁰ *Cf. id.* at arts. 2, 5, 10 and preamble (the preamble provides that “[t]he system of multi-party cooperation and political consultation led by the Communist Party of China will exist and develop in China for a long time to come”).

²⁹¹ Deng Xiaoping, *supra* note 282.

the practices and exercise of leadership by the CCP itself. Nor was it meant to impose norms on the organization and functioning of the CCP, especially in its internal workings. Instead, Deng sees “[t]he purpose of reforming the system of Party and state leadership is precisely to maintain and further strengthen Party leadership and discipline, and not to weaken or relax them.”²⁹² For this purpose, Deng assumed the power of the Party over its own organization and discipline within the logic of the State-Party system—a matter for the Party rather than for the State, and thus one necessarily beyond the ambit of the State Constitution.²⁹³

Thus, Deng’s theory might appear to be grounded in a distinction between political and administrative power, which he understood in the form of the division of authority between State Council—the chief administrative authority of the state apparatus (its government)²⁹⁴—and the Central Committee, the highest authority within the CCP. Each is understood to be ordered in accordance with the logic of its own role-function, and both together must represent the entirety of the exercise of the sovereign power of the people.

This is made clear, perhaps, in Deng’s famous speech, “Uphold the Four Cardinal Principles,” delivered in 1979 at a forum on the principles for the Party’s theoretical work.²⁹⁵ For the state and its organs, there is the constitution and law. For the political and its apparatus, there is socialist democracy which operates within its own governance framework. Both adhere to the same set of substantive principles from which deviation is not possible. Within that framework, both the administrative and the political organs may establish their operational systems. Of principal interest in that regard are the last three principles—to uphold the dictatorship of the proletariat, the leadership of the Communist Party under the constraining

²⁹² *Id.* Deng further explains that “[i]n a big country like ours, it is inconceivable that unity . . . could be achieved among our several hundred million people . . . in the absence of a Party whose members have a spirit of sacrifice and a high level of political awareness and discipline, a Party that truly represents and unites the masses of people and exercises unified leadership.” *Id.*

²⁹³ *See id.* Deng observed that “[t]his work should be performed by Party committees and leading cadres at all levels, as well as by all other Party members . . . the decisive condition for success is that all Party members, especially those in leading positions, be the first to do what they expect the masses to do. Thus, for our ideological and political work to be successful, it is necessary to improve the leadership provided by the Party and to improve its leadership system.” *Id.*

²⁹⁴ Deng’s use of the term State Council is now perhaps better understood as a shorthand reference to the complex of State Council and NPC as the legislative and executive arms of the administrative organs of the State whose work, and whose relationship with the masses and democratic principles is the object of the State Constitution.

²⁹⁵ Deng Xiaoping, *supra* note 137 (describing the four cardinal principles, a foundation of the modern Chinese state: keep to the socialist road; uphold the dictatorship of the proletariat; uphold the leadership of the Communist Party; and uphold Marxism-Leninism and Mao Zedong thought).

ideological framework of Marxism-Leninism, and Mao Zedong thought. The first two suggest the distinctive approach to issues of democracy that are coherent only in the context of a division of competence between government and Party.²⁹⁶ Indeed, for Deng, it is the connection between the masses and the CCP, and not between the people and the government, that is the essence of democratic organization and the direct line for political power delegation.²⁹⁷ Specifically, the relationship between the CCP and the masses reflects the way in which the state undertakes its administrative program under the leadership of the CCP, which is responsible for formulating the political direction of the state apparatus.²⁹⁸ The last suggests the fundamental political constraints on the CCP itself—a CCP that does not develop and advance communism in China is itself illegitimate.

Deng Xiaoping theory, then, provides a useful starting point for the construction of Chinese constitutional systems, one that is built into both the State and CCP Constitutions themselves. It requires the development of the logic of the Chinese situation within the theoretical framework of the realities confronting China, but also the avoidance of the petrification of theory and practice at some fictional “golden age.”²⁹⁹ But it is grounded on

²⁹⁶ *Id.* Deng justified the dictatorship of the proletariat by stressing that “...we must recognize that in our socialist society there are still counter-revolutionaries, enemy agents, criminals and other bad elements of all kinds who undermine socialist public order, as well as new exploiters who engage in corruption, embezzlement, speculation and profiteering. And we must also recognize that such phenomena cannot be all eliminated for a long time to come. The struggle against these individuals is different from the struggle of one class against another, which occurred in the past (these individuals cannot form a cohesive and overt class). However, it is still a special form of class struggle or a special form of the leftover, under socialist conditions, of the class struggles of past history.” *Id.*

²⁹⁷ *Id.* Deng explained that “[i]n reality, without the Chinese Communist Party, who would organize the socialist economy, politics, military affairs and culture of China, and who would organize the four modernizations? In the China of today we can never dispense with leadership by the Party and extol the spontaneity of the masses. Party leadership, of course, is not infallible, and the problem of how the Party can maintain close links with the masses and exercise correct and effective leadership is still one that we must seriously study and try to solve. But this can never be made a pretext for demanding the weakening or liquidation of the Party’s leadership.” *Id.*

²⁹⁸ *Id.* On the leadership role of the CCP, Deng explained that “[i]t is quite obvious that under these circumstances extensive readjustment may be accompanied by small or big disturbances. We can avoid them only if we have strong, centralized leadership and a strict sense of organization and discipline, only if we strengthen our efforts to maintain public and political order and to educate people in this regard, and only if we firmly improve the style of work in the Party and take further steps to restore its fine traditions of seeking truth from facts, following the mass line and working hard.” *Id.*

²⁹⁹ *Id.* Deng warned against ideological fundamentalism, stressing that “[w]e will not, of course, backtrack from scientific socialism to utopian socialism, nor will we allow Marxism to remain arrested at the level of the particular theses arrived at as long as a century ago. This is why we have often repeated that it is necessary to emancipate our minds, that is, to study new situations and solve new problems by applying the basic tenets of Marxism-Leninism and Mao Zedong Thought.” *Id.*

the political premises of the dictatorship of the proletariat,³⁰⁰ and the leadership of the Communist Party. Those principles make no sense overlaid on Western notions of separation of powers within a government into which all political power of the people is vested and for which one constitution is developed to organize this power.

Applying the insights of Deng Xiaoping theory helps to better understand the universe of the Chinese constitutional system. China is governed under a constitution, but that constitution is not the State Constitution.³⁰¹ The State Constitution itself points to that conclusion.³⁰² To reject that position is to ignore the realities of the fundamental basis for the organization of the State and to subvert the core organizational feature of the government—a separation of powers between the administrative apparatus in the State Council-NPC and the political apparatus in the Central Committee and CCP apparatus. Post-revolutionary China has long rejected the idea that the State Constitution alone defines the full extent of the power organization in China, rather than defining the administrative powers of the state and providing gateways to extra-administrative power, the sources of which lays with the people.³⁰³ In Western states, the whole of the sovereign power of the people is organized through a single constitution that then divides this power among three branches of the government that embody that power and manage its use in accordance with the ruling ideology. In China, the fundamental division of power is organized differently. It starts with a division between administrative and political functions, and creates two sets of organs for their respective administration. Each is governed in accordance with its own constitution, and both embody only that power only to the extent permitted under the ruling ideology—Marxist Leninist and Mao Zedong thought, Deng Xiaoping theory, the important theory of the Three Represents, and scientific development. To treat the State Constitution as the embodiment of the whole of the Chinese constitutional order, then, is to transform the Chinese constitutional system into something it is not.

As a consequence, the basis of the legitimacy of the *shuanggui* system is not to be found in the State Constitution, but rather in the constitution of the CCP. The fact that *shuanggui* is not grounded in the provisions of the State Constitution, or that it is not subject to the provisions of law required to implement the administrative obligations of the state toward all of its

³⁰⁰ Now understood more broadly as the peoples' democratic dictatorship. See XIANFA art. 1 (1982) (China).

³⁰¹ Jiang Shigong, *supra* note 4, at 40-43.

³⁰² See *supra* Part II, regarding the constitution's application to Laojiao and the mass line.

³⁰³ See, e.g., XIANFA arts. 1, 17, 27 (1954); cf. Jiang Shigong, *supra* note 4, at 12.

citizens does not affect its constitutional legitimacy. *Shuanggui* is necessarily extra-constitutional in the same way that the constitutional role of the CCP is also beyond the State Constitution's competence—one limited to ordering the administrative responsibilities of the government and its relationships and obligations to all Chinese citizens. But to call it extra-constitutional is to fail to understand the scope of the Chinese constitutional system itself. In this case, it may fall within the Chinese constitutional order, but outside the constitutional competence of the government formed under the State Constitution.

Consequently, the legitimacy of the *shuanggui* system must be grounded in meta-constitutional principles applicable especially to the CCP and its activities. This follows from two core premises of the Chinese constitutional system. The first is that the State Constitution does not provide the legal basis for the regulation of Party activities, including its internal discipline procedures under the *shuanggui* umbrella. The second is that the CCP necessarily adheres strictly to its own line, including the political principles on which the provisions of the State Constitution are based. But where are these constraining principles to be found? The answer has already been suggested: those constitutional principles are found in the superior constitutional principles of Marxist Leninist, Mao Zedong theory, Deng Xiaoping theory, and the important thought of the Three Represents, referenced in the State and CCP Constitutions.³⁰⁴ Because those overarching constitutional principles apply in equal measure to the interpretation of the State Constitution and its provisions, the result is a tendency to harmonize the basic operating rules of administrative and CCP detention systems. But the source of authority for each derives from different sources—administrative systems through the State Constitution, and Party systems through the constitutional principles of the political organization of society. *Shuanggui* provides a framework for deriving those principles as applied. It also provides the context for the improvement and development of these systems in line with constitutional principles. Legitimacy is preserved, and the “epistemological basis for analysis”—the knowledge base that allows one to develop an analytical framework in the first place—is uncovered. It is in this sense, perhaps, that one can understand.

³⁰⁴ See XIANFA preamble (1982) (China); Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012), general program (China). The latter adds the scientific outlook on development as an important principle of governance.

This also suggests the last issue relating to the constitutional legitimacy of *shuanggui*—one that touches on the relationship between the CCP and the State Constitution and that requires the constitutionalization of the role of the CCP and its separation from State organs.³⁰⁵ As a consequence, then, a better way to understand the relationship is based on connection rather than hierarchy.³⁰⁶ The Constitution has developed under the leadership of the CCP and reflects the ideology central to the CCP's political mission. It is an important expression of the application of ideology in the articulation of the structures of the administrative apparatus and of the proper relationship between state officials and the people they serve, so that both will work toward the ultimate political goals of the nation.

As a consequence, the CCP must follow the principles of the constitution because it precisely reflects and is the product of the political work of the Party. But the CCP is not obliged to follow the letter of the State Constitution itself precisely because it is meant for the regulation of the administrative and not the political sphere. Theoretically, then, there can be little space between the Party and the Constitution. The Constitution and the Party exist in a harmonious and reciprocal relationship rather than in a vertical one. Likewise, the state and the Party must be understood as working in a harmonious and reciprocal relationship, each sensitive to the role of the other. It is in this sense that one can understand Xi Jinping's recent reminder that "all must act in conformity with the Constitution and the laws," while also noting his remarks to the Politburo in February 2013 that "the rule of law and the rule of virtue must go hand in hand, and the rule of law must be better observed in social management."³⁰⁷ To act in conformity with the Constitution and the law means that the administrative organs must act in accordance with the law and within the jurisdictional and political constraints imposed under the leadership of the CCP through the State Constitution. But it also means that all individuals must conform their behavior to the law.

³⁰⁵ Cf. Tong Zhiwei, *Bujin Yao Kending "Dahei," Yeyao Fouding "Heida"* (不仅要肯定“打黑”也要否定“黑打”) [We must not only Affirm the "Anti-crime" Campaign, but also deny the use of "Black Methods"], FALU WEIBO (Apr. 19, 2011), <http://libertyzw.fyfc.cn/art/966841.htm>, (last visited Mar. 1, 2014), English translation available at <http://cbackerblog.blogspot.com/2012/02/part-ixzhiwei-tong-series-we-must-not.html>.

³⁰⁶ Backer, *supra* note 138.

³⁰⁷ *Xi Jinping Says all must Act in Conformity with Constitution, Laws*, XINHUA (Feb. 24, 2013), http://news.xinhuanet.com/english/china/2013-02/24/c_132189143.htm (last visited Mar. 1, 2014).

Most importantly, it requires the CCP to adhere to its own line.³⁰⁸ Xi Jinping has emphasized recently that this means applying the mass line to the work of the CCP, including *shuanggui*.³⁰⁹ But it is also expressed in the principles implemented through the State Constitution as an expression of the Mass Line. The Constitution begins, “[t]his Constitution affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state in legal form; it is the fundamental law of the state and has supreme legal authority.”³¹⁰ Note how the meaning may appear clearer when critical words are stressed. The object of the Constitution is more modest than its Western counterparts—it means only to define the system and tasks assigned to the state and then only to the extent it is to apply in legal form. It has nothing to say about the political system and the tasks assigned it, except, perhaps through Article 1 and its reference to the people’s democratic dictatorship,³¹¹ to which form of political structure the constitution must serve in the legal sphere. The Constitution likewise reinforces the limited scope of its application, and its administrative-legal character, by emphasizing its supremacy within the legal sphere (in the construction of those rules through which to organize the state and arrange for the fulfillment of the state’s obligations, there defined, to the people). Within that sphere, the Constitution has supreme legal authority, though not political authority. Indeed, notwithstanding that all power in the PRC belongs to the people,³¹² “[t]he organs through which the people exercise state power are the NPC and the local people’s congresses at different levels.”³¹³ To determine the constitutional framework

³⁰⁸ On this point, the CCP Constitution states that “[t]he Communist Party of China takes Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the important thought of Three Represents and the Scientific Outlook on Development as its guide to action. . . . All Party members must cherish the path, the theories and the socialist system that the Party has explored and created after going through all the hardships; and they must keep to them all the time and continue to develop them. Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat’l People’s Cong., Nov. 14, 2012, effective Nov. 14, 2012), GEN. PROGRAM (China).

³⁰⁹ Raymond Li, *supra* note 16 (reporting on a CCP teleconference in Beijing hosted by the senior party leadership in 2013 “to kick-start a clean-up campaign to reinforce the ‘mass line’ of its 80 million members . . . Xi, who became party leader seven months ago, said the year-long campaign would be a ‘thorough clean-up’ of undesirable work styles such as formalism, bureaucracy, hedonism and extravagance.”).

³¹⁰ XIANFA preamble (1982) (China).

³¹¹ *Id.* at art. 1 (stating that “[t]he People’s Republic of China is a socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants.”).

³¹² *Id.* at art. 2.

³¹³ *Id.* Here the contrast with the language of Article 2 of the 1954 Constitution (stating “the organs through which the people exercise power are. . .”) is telling. Likewise the 1982 State Constitution provides only that “[c]itizens have the right to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary.” *Id.* at art. 41.

for the assignment and constraints on the political authority, the constitution itself points elsewhere—to the CCP,³¹⁴ to the ideological framework within which both political and administrative power must be exercised,³¹⁵ if it is to be exercised legitimately, and to the documents that organize that political authority.³¹⁶

As such, the leadership of the CCP, as the party in power, is not itself constrained by the State Constitution. While Party cadres as individuals must adhere to lawful conduct as specified in the State Constitution, the CCP as an institution is not limited by the rules imposed on the State through the State Constitution. The sources of CCP power lie elsewhere within Chinese constitutionalism. Article 1 of the State Constitution incorporates this notion by adhering to the framework of people's democratic dictatorship (State Constitution Article 1 "The People's Republic of China is a socialist state under the people's democratic dictatorship"). The idea is bound up both with the conception of the constraints on political rights and thus with the definition of "the people" for purposes of conferring political authority and participatory rights.³¹⁷

In a sense, then, the question reminds us that the Three Chinese Characteristics (三个至上)³¹⁸ do not exist apart, but must be understood as three parts of a single insight—the socialist road is created by the application of socialist ideology through socialist institutions. A careful reading in

The object is confine popular action against state organs but not with respect to political matters which are expressly extra constitutional in scope and vested in the CCP. *Id.* at art. 1.

³¹⁴ *Id.* at preamble.

³¹⁵ *Id.* at preamble, arts. 1, 5 (Article 5 specifically provides that "[t]he state upholds the uniformity and dignity of the socialist legal system.").

³¹⁶ Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012) GEN. PROGRAM (China).

³¹⁷ This was famously expressed by Mao Zedong at the time of the founding of the People's Republic. He stated, "[y]ou are dictatorial. My dear sirs, what you say is correct. That is just what we are. All the experiences of the Chinese people, accumulated in the course of successive decades, tell us to carry out a people's democratic dictatorship. . . . These two things, democracy for the people and dictatorship for the reactionaries, when combined, constitute the people's democratic dictatorship. Why must things be done in this way? Everyone is very clear on this point. If things were not done like this, revolution would fail, the people would suffer and the state would perish." Mao Zedong, *The People's Democratic Dictatorship* (June 30, 1949), available at <http://www.fordham.edu/halsall/mod/1949mao.html> (last visited Mar. 6, 2014).

³¹⁸ Hu Jintao introduced the concept of the Three Chinese characteristics or the Three Supremes (*San ge Zhishang*, 三个至) in 2007. The Three Supremes include: "Supremacy of the business of the CCP" (*Dang de shiye zhishang*, 党的事业至上); "Supremacy of the interests of the people" (*Renmin liyi zhishang* 人民利益至上); "Supremacy of constitutional law" (*Xianfa falü zhishang*, 宪法法律至上). It was met with a mixed reaction. CHINA MEDIA PROJECT, THREE SUPREMES, <http://cmp.hku.hk/2010/11/12/6603/> (last visited Mar. 1, 2014).

context makes clear that coordination rather than separation are stressed: the business of the CCP is supreme precisely because it furthers the supremacy of the interests of the people, which are expressed through the constitution and laws. To view these as adversarial rather than complementary, then, seeks to import a Western construct of constitutionalism on a system within which the mediation of such tensions are not the basis for political organization.³¹⁹ The key to the relationship of the State and the Party, then, should be coordination rather than separation; harmonious society principles suggest that it is more preferable to make improvements based on the existing framework rather than drastically altering the entire system.³²⁰ So, the Constitution is the Communist Party line!³²¹ If the State Constitution is the CCP Line, then adherence to the principles of the State Constitution is not merely compatible with CCP practices, but an affirmation of the official expression of the CCP line as translated into the administrative sphere. As such, all CCP cadres are bound to follow the State Constitution as an integral part of their Party work. This follows not because the State Constitution requires it, but because the political authorities do, consistent with the political foundations of the state. It is in the form of the State Constitution, that the CCP's fundamental political policies can be framed for the people and implemented through the administrative organs.³²² It is in this sense that rule of law with Chinese characteristics becomes evident. The state organs are subject to the State Constitution and the laws because they have been bound to this rule under the leadership of the CCP in enacting the State Constitution. For administrative organs to disregard the law or the constitution is the same as rejecting the core expression of the CCP line. But the CCP is bound by constitutional principles precisely because they reflect the basic thrust of the CCP line it has embraced. In both cases, the State

³¹⁹ Cf. Jerome A. Cohen, *Body Blow for the Judiciary*, COUNCIL ON FOREIGN RELATIONS (Oct. 18, 2008), <http://www.cfr.org/china/body-blow-judiciary/p17565> (last visited Mar. 1, 2014) (reporting that many Chinese judges are "confused and unhappy about this apparent return to the past, to the use of law as an instrument of 'proletarian dictatorship' implemented through the 'mass line' in the guise of 'democratisation.' How to reconcile the newly propagated 'mass line' with legal norms and procedures must be a particular challenge for SPC vice-presidents and provincial high court chiefs."). Please note that Cohen's report reflects a reading of Chinese constitutional development that singularly focuses on the events that occurred after the fall of the Gang of Four while severing the rest of the Chinese constitutional history. Such view is grounded upon the premise that the courts must inexorably move to a position where they would be the arbiters not just of administrative implementation of constitution and law (which they ought to be duty bound to do), but that this authority and the State Constitution on which it is based, would then invert the political relationship between CCP and courts as an instrument of the state apparatus.

³²⁰ Backer, *supra* note 138.

³²¹ *Id.*; Backer, *supra* note 12, at 12.

³²² Backer, *supra* note 21.

Constitution and constitutional principles represent the expression of the will of the people through the exercise of the people's democratic dictatorship.

This essential nature of socialist rule of law is sometimes misunderstood by some who seek to substitute Western notions of the rule of law, applicable to the facts of their organization, to the Chinese situation.³²³ In particular, it is important to note that socialist rule of law does not suggest the inferiority of the CCP or the people to an unbending law system. Nor does it reject rule of law as a basic normative framework of the constitutional order. What makes the system socialist is both the focus on the State's duty to develop the productive capacity of China³²⁴ and the separation of powers framework understood as the constitutionalization of the Four Cardinal Principles.³²⁵

The supremacy of the State Constitution and law means that these collective expressions of norms developed under CCP leadership can never be inferior to the rule of any person or the arbitrary conduct of any small group of individuals. The law serves the people by ensuring that rules and not individual will serves as the basis for the construction of socialist democracy in China. As Hu Jintao stressed in his 2012 speech before the Eighteenth Party Congress, "[p]arty organizations at all levels and all Party members and officials, especially principal leading officials, must willingly abide by the Party Constitution as well as its organizational principles and guiding principles for its political activities; and no one is allowed to place oneself above the Party organization."³²⁶ Of course, in many instances, the functional result of the application of administrative or political systems will be quite similar and the operational rules will have to tend to operate harmoniously. That is a necessary consequence of the constraints of the substantive framework within which both systems must operate. Yet, similarity in approach does not mean that the source of their authority is the same nor does it suggest that one must defer to the other. It is precisely because, as Yang Xiaoqing argues, the supremacy of the people's interest permits the CCP to develop rules for the discipline of its own members in the discharge of the heavy obligation of CCP leadership, that *shuanggui* is a

³²³ Yang Xiaoqing, *supra* note 15.

³²⁴ Deng Xiaoping, *We Review the Past to Open Up a Path to the Future*, THE SELECTED WORKS OF DENG XIAOPING (Sept. 5, 1988), <http://dengxiaopingworks.wordpress.com/2013/03/18/we-review-the-past-to-open-up-a-new-path-to-the-future/> (last visited Mar. 8, 2014) (observing that "the focus of our work should be shifted from class struggle to developing the productive forces and modernizing the country"). This idea is also captured in the notion of socialist modernization in the CCP Constitution general program.

³²⁵ Deng Xiaoping, *supra* note 137.

³²⁶ Hu Jintao, *supra* note 24.

legitimate expression of power.³²⁷ As Hu has pointed out, “[w]hen the Party maintains its strength and close ties with the people, China enjoys prosperity and stability and the Chinese people live in peace and happiness.”³²⁸

It is precisely because the CCP is also bound to follow its own line, to remain true to the revolutionary principles on which the state was established in 1949, that principles expressed in the State Constitution must also be applied as applicable to the particular circumstances of the *shuanggui* system. The CCP retains its leadership authority as it remains true to the principles on which it was founded and scientifically develops them for the welfare of the people. The Constitution and the Party, the administrative units of the government and the political organization under the leadership of the CCP, produce constitutional unity in a way that is consonant with the political premises under which the Chinese state is organized.

Yet for all of the elegance of the theory elaborated in this section, it is necessary to confront an important substantive criticism: the failure to appear to deal directly with a seeming contradiction within the constitutional order itself. The core of that contradiction centers on what might be argued to be the inherent ambiguity of the CCP and State constitutional language. This is particularly acute where the Chinese State Constitution appears in places to claim to be governing both administrative and political orders³²⁹ and similarly where ambiguous claims of the CCP appear to suggest that it is simultaneously above or outside the Constitution and also within and subservient to it.³³⁰ It is plausible, though, to argue that the language of the constitutional documents can lend themselves to diverse interpretation—aided in part by the rich foundational materials of pre-packaged ideological

³²⁷ Liu Zhigang, *supra* note 261, at 11-14.

³²⁸ Hu Jintao, *supra* note 24.

³²⁹ See, e.g., XIANFA art. 5 (1982) (China) (stating that “[n]o organization or individual may enjoy the privilege of being above the Constitution and the law. The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law.”). If the CCP is an “organization” is it not subject to the State Constitution? See *id.* art. 28 (stating that “[t]he state maintains public order and suppresses treasonable and other counter-revolutionary activities; it penalizes actions that endanger public security and disrupt the socialist economy and other criminal activities, and punishes and reforms criminals.”). If the State is assigned this task, then does that include overseeing the internal affairs of the CCP? Lastly, if the CCP is an “organization” for purposes of the State Constitution, then is it subject to the constraints of Articles 1 and 5, which provide the State with the authority to constrain its unlawful or subversive activities? We have suggested that a closer reading of these provisions with an emphasis of the differences between state activities and political activities changes the meaning of these provisions.

³³⁰ See, e.g., Xi Jinping Vows “Power Within Cage of Regulations,” XINHUA (Jan. 22, 2013), http://news.xinhuanet.com/english/china/2013-01/22/c_132120363.htm (last visited Mar. 1, 2014) (reporting that “[d]uring a CCP disciplinary watchdog meeting . . . Xi ordered enhanced restraint and supervision on the use of power, [Xi] said, ‘[p]ower should be restricted by the cage of regulations.’”).

approaches ready made for that purpose. Indeed, both Western and European Soviet perspectives have been applied to stretch the ambiguities of the extant language of the Chinese Constitution in multiple directions.³³¹

There is ambiguity nonetheless. On the one hand, Article 1 speaks to the construction of a socialist state under the people's democratic dictatorship. On the other, Article 5 declares that no organization or individual may enjoy the privilege of being above the Constitution and the law. The 1999 revision to Article 5 added, "[t]he People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law." If one reads these two provisions as each having independent legal significance, then it might be possible to suggest that Article 5 modifies Article 1. If that is accepted then it might suggest that the CCP is also not above the Constitution in a literal sense (that is that the CCP in its constitutional role is within rather than beyond the State Constitution). But a better and more coherent reading of the constitutional provisions would start by understanding that, with the adoption of a people's democratic dictatorship as the basis of the form of constitutional governance in China, then necessarily, the role of the CCP cannot be understood as falling within it. The concept of the people's democratic dictatorship, central to the understanding of the construction of the Chinese constitutional order, then, must be read into Article 5 to avoid constitutional incoherence. Admittedly the people's democratic dictatorship is under-theorized. Moreover as a constitutional doctrine, it has become more than a mere reflection of the initial iteration by Mao Zedong in 1949, which is no longer sufficient, standing alone, to explain the concept or its constitutional significance.³³² But at its core, the concept of people's democratic dictatorship makes clear that the Constitution serves both as a superstructure over the state and as an expression of the power of the people expressed through the CCP, which remains both beyond the specific law of the constitution, and yet embraces its principles as the concrete expression of its democratic dictatorship.³³³ The people's democratic dictatorship speaks not to individuals, but to the leadership role of a representative body of the people themselves—the CCP—of the body politic. That body politic is

³³¹ See generally, Backer *supra* note 5.

³³² This is a deficiency we expect to help remedy in future work.

³³³ See Mao Zedong, *supra* note 116, at 411-23 (wherein Mao described people's democratic dictatorship as a system "under the leadership of the working class [through the Communist Party] and based upon the alliance of workers and peasants. This dictatorship must unite as one with the international revolutionary forces. This is our formula, our principal experience, our main programme.").

above the Constitution and the law, as articulated in Article 5, but not above its own principles.

One approach out of that ambiguity is to avoid foreign ideological error and instead apply a Chinese Marxist approach to the Chinese Marxist Constitutional order, one that is committed both to its coherence and to a democratic ideal, the seeds of which are embedded in the current structure of the Chinese political order. The key to that approach may be in the Constitutional preamble—the most frequently modified portion of the Chinese constitution,³³⁴ and in the general program of the Constitution of the CCP. The Constitution of the CCP translates the people's democratic dictatorship into more elaborate language:

The Communist Party of China leads the people in promoting socialist democracy. It integrates its leadership, the position of the people as masters of the country, and the rule of law, takes the path of political development under socialism with Chinese characteristics, expands socialist democracy, improves the socialist legal system, builds a socialist country under the rule of law, consolidates the people's democratic dictatorship, and builds socialist political civilization.³³⁵

The Preamble to the State Constitution amplifies this concept. Paragraph 2 of the Constitution sets the template: “[t]he people's democratic dictatorship led by the working class and based on the alliance of workers and peasants, which is in essence the dictatorship of the proletariat, has been consolidated and developed.”³³⁶ Paragraph 7 of the Preamble provides the structures of the roadmap within which the parameters of the Constitution are drawn:

Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong thought, Deng Xiaoping theory and the important thought of “Three Represents,” the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system

³³⁴ See ZHONGHUA RENMIN GONGHEGUO XIANFA (1982) for a listing of amendments in 2004, 1999, 1993 and 1988.

³³⁵ See Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012), GEN. PROGRAM (China).

³³⁶ XIANFA preamble, para. 2 (1982) (China).

and work hard and self-reliantly to modernize industry, agriculture, national defense and science and technology step by step to turn China into a socialist country with a high level of culture and democracy.³³⁷

Here, one can see both the interaction of state and Party Constitution and their consonance with respect to the place of the CCP as something both above the law it makes for the administrative organs of the state and the protection of the people, yet also deeply embedded within constitutional principle. The CCP must adhere to its own principles and apply them internally as its own law because to fail to do so betrays the essence of the people's democratic dictatorship on which the legitimacy of both state and Party are grounded.³³⁸ Indeed, the CCP Constitution itself makes clear that "The Party must conduct its activities within the framework of the Constitution and laws of the country."³³⁹ But within the framework does not mean subject to. Rather, it relates to the means by which Party leadership is undertaken, under rule and principle rather than under the will of individuals.

Still, what may strike some critics as a particularly strong weakness is that the expression of the actual constitutional order presented here cannot be readily extracted from the original sources. The article is unable to point to any single statement in any single document that clearly and authoritatively says what is suggested here—that is, no PRC document or leader has ever directly and simply said: administrative power is vested in the government and political power is vested in the CCP. Therefore, it might be argued that if our insights have any relation to reality then surely the State Constitution, the Party Constitution, or Party leaders could have said as much. Yet both documents and individuals are silent on this point or unusually opaque. Because they do not speak directly, as we have noted, the principal issue in Chinese constitutionalism is the relationship of the Party and the state. A more definitive official pronouncement remains to be delivered.

³³⁷ *See id.*

³³⁸ The General Program of the CCP emphasizes that in order to lead the people of all ethnic groups in China in attaining the great goal of socialist modernization, the Communist Party of China must adhere to its basic line, strengthen its governance capability and vanguard nature, and comprehensively carry forward the great new undertaking to build itself in a spirit of reform and innovation. Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012), GEN. PROGRAM (China).

³³⁹ *Id.*

The dearth of documentation and clarity may also be explained to some extent, though the explanation may ultimately prove unsatisfying. The Chinese understand their constitutional order as a moving target—that is, the CCP itself has been undergoing structural changes within the broad understanding of Marxist-Leninist theory that has made the likelihood of excavating an unchanging approach to constitutional conception difficult at best.³⁴⁰ That understanding is inherent in the concept of “socialist modernization” referenced in both State and CCP constitutions.

In a sense, modern Chinese constitutionalism began at the end of a revolutionary period that extended through the adoption of the 1982 Constitution. The Chinese themselves might suggest that one ought to understand the foundations of Chinese constitutionalism as a system from that point.³⁴¹ While drawing heavily from the Revolutionary (through 1949) and post-Revolutionary period (1949-1982) for foundations,³⁴² the system and its current ideological foundations can be understood in its stable form after the current governance settlement was attained in 1982.³⁴³ But that progress and the fairly recent movement from post-Revolutionary foundations to the institutionalization of the governing ideology of a Party in Power have left substantial lacunae and surface contradictions that have not yet been fully addressed. Yet to point to tensions between these three distinct periods of Chinese governance ought not necessarily to suggest contradiction. Rather they might suggest development, a point made repeatedly in the constituting documents of the Chinese State and Party. Development appears to be at the heart of the ideological foundations of the state and CCP, but development within a clearly delineated set of ideological constraints.³⁴⁴ Those foundations are apparent in the Constitution itself—

³⁴⁰ See BENNY TAI, *XIANZHENG·ZHONGGUO: CONG XIANDAIHUA JI WENHUA ZHUANBIAN KAN ZHONG GUO XIANZHENG FAZHAN* (憲政·中國：從現代化及文化轉變看中國憲政發展) [CONSTITUTIONALISM AND CHINA: EXAMINING THE DEVELOPMENT OF CHINESE CONSTITUTIONALISM THROUGH THE LENSES OF MODERNIZATION AND CULTURAL TRANSFORMATION] (2011) (author expresses similar ideals in his book about the development of Chinese constitutionalism).

³⁴¹ Cheng Yunjie et al., *Xinhua Insight: CCP Constitution Enshrines Scientific Outlook on Development as part of Action Guide*, XINHUA (Nov. 14, 2012), http://news.xinhuanet.com/english/special/18CCPnc/2012-11/14/c_131974409.htm (noting that “[s]ince the current Constitution was endorsed in 1982, the Party has made six revisions in accordance with the country's changing conditions and the Party's latest achievements in adapting Marxism to China's practical situation.”).

³⁴² See BENNY TAI, *supra* note 340.

³⁴³ For an interesting commentary on this point, see *Guevara Dilemma and Transformation of the Chinese Communist Party*, INFORMATION SECURITY INDUSTRY NEWS WATCH (Aug. 21, 2013), <http://news.securemymind.com/17897.html> (last visited Mar. 1, 2014) (author is identified as a professor at the National Defense University).

³⁴⁴ These constraints remain well marked by the Four Cardinal Principles, which were explicitly incorporated into both the CCP and State Constitutions—to keep to the socialist road, to uphold the

and the changes therein are well tracked in the changes to the Constitution's Preamble, a part of the Constitution whose effects tend to be underestimated.³⁴⁵

This paper agrees that the complexity of this explanation supports the criticism of opaqueness and therefore of our constitutional argument. Indeed, our review of the literature within China³⁴⁶ suggests that the ambiguities have permitted substantial variation in approaches to constitutional analysis within China that has aided the “legitimacy” debate among constitutional scholars outside of China. One might suspect that part of the reason is historical—the constitutional system is still developing towards the theoretical structures we have outlined here, and its tensions with conceptions of the Pre- and Post-Revolutionary period suggest areas of substantial contestation.³⁴⁷ This paper also concedes that both this complexity and the ambiguities it spawns could serve as a veil behind which anti-constitutional practices may be masked.³⁴⁸ But one might also suspect, as the next section illustrates, that the difficulty of clarity also lies in the tensions inherent not in theory, but in the difficulties of conforming practice to theory in a constitutional system that has only recently emerged as something of a coherent and institutionalizable whole.

As the next section illustrates, the sometimes substantial gulf between the way the system might be theorized and the way it works suggests that any theory of a coherent and distinctly Chinese socialist constitutional order necessarily abstracts away from a more complicated historical, political, and legal reality that proves the difficulties of “integrating the basic tenets of

people's democratic dictatorship, to uphold the leadership by the Communist Party of China, and to uphold the Marxism-Leninism and Mao Zedong Thought—are the foundation on which to build the country. For more information on the Four Cardinal Principles, see Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012) GEN. PROGRAM (China).

³⁴⁵ See *supra* Part IV.

³⁴⁶ See *supra* Part III.B.

³⁴⁷ A subject that we acknowledge but leave for elaboration in future work.

³⁴⁸ That is a danger that the Chinese themselves have conceded since the time immediately before the promulgation of the current State Constitution, in pointing, for example, to the errors of Mao Zedong during the cultural revolution. See Randy Shipp, *China Blames 'Mao's Mistakes,'* CHRISTIAN SCI. MONITOR (Dec. 23, 1980), <http://www.csmonitor.com/1980/1223/122319.html> (last visited Mar. 1, 2014). (pointing to cult of personality, the official party newspaper People's Daily commented that “[c]omrade Mao Tse-tung committed mistakes which brought the party and the people great misfortunes in his last years, especially when he personally started and led the 'Great Cultural Revolution.'”). See also, *Mao Zedong, Biography*, CHINA DAILY (Oct. 7, 2007), http://www.chinadaily.com.cn/china/200707/10/content_6142547.htm (last visited Mar. 6, 2014) (stating “[i]t is true that Mao Zedong made gross mistakes in his later years, but when his life is judged as a whole, his indisputable contributions to the Chinese revolution far outweigh his mistakes, and his merits are primary and his errors secondary.”).

Marxism-Leninism with the concrete practice of the Chinese revolution.”³⁴⁹ Yet this is an important concession that strengthens legitimacy—it may suggest that, like the contradictions between a United States Constitution that proclaimed democracy and protected the structures of slavery and was founded on equality but deprived women of substantial political and economic rights, the sometimes wide gulf between theory and practice points to the ordinary work of constitutional development common even to the most advanced constitutional states. It is to the some of the specifics of that constitutional development, to the task of integrating theory with practice within Chinese constitutionalism, that this paper would turn next.

V. *SHUANGGUI*—FROM CONSTITUTIONAL LEGITIMACY TO OPERATIONAL ISSUES

Understanding *shuanggui* as a legitimate expression of CCP authority over its own members leaves open an important question—has *shuanggui* been scientifically developed and implemented in line with the CCP line? Beyond the issue of constitutional legitimacy, that question forms the most important element for the study of *shuanggui* in China today. It is a question that has been taken up at the highest levels of the CCP.³⁵⁰ The theoretical legitimacy of a power to act, developed in the preceding section, can only be the starting point of analysis. It is then necessary to determine whether *shuanggui* in fact remains true to the CCP line as it is applied or whether it requires development and reform. It is to this latter point that this article now turns. This issue requires an analysis of the implementation of *shuanggui* in light of the CCP line and its reflection in the principles embedded in the State Constitution as the clearest expression of the CCP line. The CCP line can be understood in the Western context as the foundational normative principles that bind CCP and its cadres; to have effect, it must bind in a way that law binds ordinary citizens.

The starting point is a description of *shuanggui* as currently constituted. The article then considers the possible ways in which the

³⁴⁹ Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012), GEN. PROGRAM (China).

³⁵⁰ See Keith Zhai, *Communist Party Seeks to Reform its 'Shuanggui' Anti-Corruption Investigations*, SOUTH CHINA MORNING POST (Nov. 21, 2013), <http://www.scmp.com/news/china/article/1361851/communist-party-seeks-reform-anti-corruption-investigations> (last visited Mar. 1, 2014) (reporting that “[t]he nation’s top prosecutions body invited several anti-corruption experts to give advice on reform of the *shuanggui* interrogation system on the same day the party’s top leaders finished their third plenum meeting that mapped out a series of political and economic reforms.”).

current implementation of *shuanggui* itself conforms to the CCP line, especially as it has been elaborated through the principles of the Chinese Constitution, as appropriately applied to the political work of the CCP itself. The article notes, however, that because the distinction between administration and politics is never as explicitly or clearly drawn in practice as it is in theory, ultimately our justifications for *shuanggui* are weakened in practice—that is, because our justifications are grounded on this different logic (different spheres of legitimacy and authority), our argument is only as strong as the distinction. It is thus to practice, as Deng Xiaoping consistently suggested,³⁵¹ that the strength of the CCP's political project, and its legitimacy, may be tested, and where necessary, reformed to better conform to the CCP line.

A. *Shuanggui Procedures*

Having considered the legal framework of *shuanggui*, the following section will examine the procedural aspects of *shuanggui* to better consider its compatibility with Chinese constitutional constraints. At a general level, the procedures constituting *shuanggui* have been substantially routinized. All investigations at the CCDI or CDI levels are supposed to be conducted in accordance with procedures and regulations promulgated at both levels. Investigations are generally commenced by a preliminary verification.

There is a difference between *shuanggui* investigation and *shuanggui* measurement. The point is that *shuanggui* measurement, which restricts people's freedom, is an option during the *shuanggui* investigation under specific circumstances. Not every party member who violates a discipline will be subject to the investigation of *shuanggui*.³⁵² *Shuanggui* measurement applies to CCP members under two circumstances. First, *shuanggui* applies to individuals who may be subject to the punishment of suspension or who are likely to flee, fabricate, destroy evidence, or otherwise obstruct the

³⁵¹ See Deng Xiaoping, *supra* note 137.

³⁵² See *Investigation Regulations* (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), art. 14(2), translation by Keren Wang, <http://lbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited March 6, 2014) (providing that “[f]or those minor violations that do not need to be punished under the Party discipline, the relevant Party organization should be advised to take appropriate action on the violation.”).

investigation.³⁵³ Second, it applies to individuals who hold positions above the county or section level.³⁵⁴

Generally, at the provincial level, *shuanggui* is not to be used unless the CCDI or CDI already possesses some solid evidence that there is a violation of CCP or administrative discipline.³⁵⁵ Accordingly, a certain amount of investigative work usually precedes the start of a formal *shuanggui* proceeding. The preliminary verification process commences with the filing of a complaint.³⁵⁶ Information is usually gathered from the time a complaint is lodged until a decision is made whether to proceed.³⁵⁷ CCDI or CDI can accept complaints and reports produced internally that involve the members of central committee or members of CCDI or CDI at the same level; each organization can also receive preliminary matter that involves party officials and lower level party organizations.³⁵⁸

Once preliminary verification is completed, a case can be filed.³⁵⁹ The *shuanggui* investigation itself will start if the person subject to the preliminary verification is believed to have any serious violations.³⁶⁰ Even at this stage, the CDI has discretion to transfer the investigation to the People's Procuratorate ("PP") or police if the CDI believes there may be criminal activity involved. The manner of filing depends on the position of

³⁵³ Jiekai "Shuanggui" De Menglong Miansha (揭开“双规”的朦胧面纱) [*Lifting the Secretive Veil of "Shuanggui"*], CHINA.COM (Aug. 27, 2003), <http://www.china.com.cn/chinese/2003/Aug/392945.htm>, (last visited Mar. 6, 2014).

³⁵⁴ *Id.* It used to be commonly the case that officers of a university or a college who possess administrative titles were not subject to *shuanggui* investigation, but that has changed.

³⁵⁵ See Yanpeng Feng, *Tebie Quanli Guanxi Lilun Shijiao Xia De Dangnei "Shuanggui" Zhidu* (特别权力关系理论视角下的党内“双规”制度) [*The Intra-Party "Shuanggui" System Under the Theoretical Lens of Special Power Relations*], 23 LEGAL SYS. & SOC'Y 199, 199-200 (2009).

³⁵⁶ *Id.* at 199.

³⁵⁷ After receiving the complaint or report, CCDI or CDI may conduct a preliminary verification not to exceed two months. If it believes that there are facts of violation, it shall file the case. If necessary, the verification can be extended for an additional month. For complex and important matters, further extensions are permitted at the discretion of the local CDI office. *Id.*

³⁵⁸ *Investigation Regulations* (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), art. 10, translation by Keren Wang, <http://lbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited March 6, 2014).

³⁵⁹ See Larry C. Backer, *Central CCP Inspection Tour Working Process—Developing Mechanisms for Supervision and Monitoring of Anti-Corruption Efforts in China*, LAW AT THE END OF THE DAY (Nov. 22, 2013), <http://lbackerblog.blogspot.com/2013/11/central-CCP-inspection-tour-working.html> (last visited March 6, 2014); see also Zhong Jiwei Wangzhan Gongbu Jijian Jiancha Jiguan Xinfang Jubao, Chaban Anjian Deng Gongzuo Chengxu, (中纪委网站公布纪检监察机关信访举报、查办案件等工作程序) [*CCDI Website Reported Discipline Inspection Organs Petition, Investigating Cases and Other Procedures*], COMMUNIST PARTY OF CHINA NEWS (Sept. 2, 2013), <http://fanfu.people.com.cn/n/2013/0902/c64371-22773604.html> (last visited Mar. 1, 2014).

³⁶⁰ See Backer, *supra* note 359.

the individual under investigation within the CCP. For members of the CCP or CDI standing committee, such as the chief and the deputy secretary, the decision to file a case shall be made by CDI's next higher level.³⁶¹ Before making such a decision, the relevant CCP committee's opinion shall be considered. For other CCP members, the decision to file the case can be made by opinions of the local CCP committee.³⁶²

The most well-known aspects of *shuanggui* begin at this stage. Once the investigation commences, the individual is sequestered and notified of the investigation in the presence of the CDI's investigator.³⁶³ The individual is not permitted to contact the outside world during the investigation without CDI's permission. During the course of the investigation, the judicial departments are expected to cooperate with CDI investigators to provide any evidence that is necessary for the investigation. In addition to the use of the judicial authority of the state sector, CDI investigators possess the power of search and seizure of any items that may be necessary for the investigation. In addition, the CDI may freeze the bank accounts of individuals subject to investigation and limit their travel.³⁶⁴

The period of investigation may not exceed three months.³⁶⁵ When it is necessary, and at the behest of the investigating unit, the investigation may be extended an additional month. For important and complex cases, further extensions of up to three months are permitted.³⁶⁶ For cases not resolved within three months, the CCDI or CDI at the provincial level can

³⁶¹ See *Investigation Regulations* (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), art. 7, translation by Keren Wang, <http://lcbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited Mar. 6, 2014).

³⁶² *Id.*

³⁶³ *Zhong Jiwei Wangzhan Gongbu Jijian Jiancha Jiguan Xinfang Jubao, Chaban Anjian Deng Gongzuo Chengxu* (中纪委网站公布纪检监察机关信访举报、查办案件等工作程序) [*CCDI Website Reported Discipline Inspection Organs Petition, Investigating Cases and Other Procedures*], COMMUNIST PARTY OF CHINA NEWS (Sept. 2, 2013), <http://fanfu.people.com.cn/n/2013/0902/c64371-22773604.html> (last visited Mar. 1, 2014).

³⁶⁴ See *Investigation Regulations* (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), art. 28, translation by Keren Wang, <http://lcbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited March 6, 2014).

³⁶⁵ *Id.* at art. 39.

³⁶⁶ *Zhong Jiwei Wangzhan Gongbu Jijian Jiancha Jiguan Xinfang Jubao, Chaban Anjian Deng Gongzuo Chengxu* (中纪委网站公布纪检监察机关信访举报、查办案件等工作程序) [*CCDI Website Reported Discipline Inspection Organs Petition, Investigating Cases and Other Procedures*], COMMUNIST PARTY OF CHINA NEWS (Sept. 2, 2013), <http://fanfu.people.com.cn/n/2013/0902/c64371-22773604.html> (last visited Mar. 1, 2014).

grant further extension to cases originating from a lower level CDI.³⁶⁷ In the absence of special circumstances, the total period of *shuanggui* investigation shall not exceed six months.³⁶⁸ A *shuanggui* investigation concludes with a determination of culpability and an assessment of punishment. This usually occurs within a month of the completion of the investigation. If the decision is made by the CDI above the county level, that CDI is to consider the opinion of CCP committee in suspect's employed organization.³⁶⁹

CDI officials emphasize that *shuanggui* is not a criminal investigation, that it is not a substitute for a criminal investigation, and that it is not a method for depriving a person under investigation of their freedom.³⁷⁰ While this is true in theory, in practice the methodologies of *shuanggui* produce a grey zone that raises questions, many of which remain substantially unresolved. This lack of resolution is illustrated by the methodologies of investigation. Usually, CDI or CCDI will summon a suspect to a specific place for inquiry. During the investigation, the suspect is not allowed to leave the premise or contact the outside world.³⁷¹ The site of the investigation can be a hotel room or a resort. Usually, the suspect is accompanied by the investigators at all times³⁷² and constantly monitored, even when he goes to the bathroom. Although there is no data about the specifics of treatment during investigation, reports of suicides during this phase of *shuanggui* have appeared, as well as reports of excessive tactics that might have resulted in death.³⁷³

Punishment, *shuangkai*, is distinct from the process of investigation leading to punishment, *shuanggui*. People frequently incorrectly use the

³⁶⁷ Zhonggong Zhongyang Guanyu Jinyibu Jiaqiang Guifan Banan Gongzuo De Yijian (中共中央关于进一步加强规范办案工作的意见) [Opinions on Central Commission on Discipline Inspection Regarding to Further Strengthening the Standard of Investigation] (Mar. 19, 2009), <http://wenku.baidu.com/view/128d8725ccbff121dd368329.html> (last visited Mar. 1, 2014).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ Some of these reports are published in the Western media. In April, the death of Yu Qiyi, a chief engineer at the state-owned Wenzhou Industry Investment Group who was detained and interrogated upon suspicions of receiving a RMB 2 million bribe (about USD 320,000) from a local company CEO, caused shock online when pictures emerged of his bruised and swollen body. Just a few weeks later, Jia Jiuxiang, a Henan court official who had found himself caught up in a property-related graft investigation, also died whilst in the custody of *shuanggui*. Official claims that Jia died of a heart attack were rejected by his family, who stated that he had no history of heart problems. See Natalie Thomas, *How the Communist Party Weeds Out its Delinquents*, THE ATLANTIC (June 21, 2013) <http://www.theatlantic.com/china/archive/2013/06/how-the-communist-party-weeds-out-its-delinquents/277116/> (last visited Mar. 1, 2014); *Policing the Party*, *supra* note 178.

terms interchangeably. According to the Article 10 of CCP's regulation on discipline, there are five different kinds of punishments, including: 1) warning; 2) severe warning; 3) removal from CCP posts; 4) probation within the CCP; and 5) expulsion from the Party.³⁷⁴ Usually two of the possible punishments, removal from the party posts (*kai chu dang nei zhi wu* 开除党内职务) and expulsion from the party (*kai chu dang ji* 开除党籍) draw the most widespread media attention.

Generally, any disciplinary measure to be taken against a CCP member must be discussed and approved by the general membership of the CCP branch concerned, and reported for approval to the primary Party committee concerned.³⁷⁵ If the case is relatively important or complicated, or involves the expulsion of a member, it is reported to a Party CDI at or above the county level for review, examination, and approval.³⁷⁶ Under special circumstances, a CCP committee or a CDI at or above the county level has the authority to decide directly which disciplinary measures will be taken against a Party member.³⁷⁷

The punishment of removal from CCP posts is subject to a number of rules and practices.³⁷⁸ First, there are rules for determining what constitutes a CCP post from which a person can be removed.³⁷⁹ Second, the

³⁷⁴ *Investigation Regulations* (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), at art. 10, translation by Keren Wang, <http://lbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited Mar. 6, 2014).

³⁷⁵ Any decision to remove a member or alternate member of the Central Committee or a local committee at any level from his or her posts within the Party, to place such a person on probation within the Party or to expel such a person from the Party must be approved by a two thirds majority vote at a plenary meeting of the Party committee to which he or she belongs. In special circumstances, the decision may be taken first by the Standing Committee of the Political Bureau of the Central Committee or the standing committee of a local Party committee, pending confirmation at the plenary meeting of the Party committee. Such a disciplinary measure against a member or alternate member of a local Party committee is subject to approval by the higher Party committee. For more information, see Backer, *Communist Party and State Discipline in China Part II*, *supra* note 28.

³⁷⁶ *Investigation Regulations* (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), at art. 17, translation by Keren Wang, <http://lbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited March 6, 2014).

³⁷⁷ *Id.* at art. 42.

³⁷⁸ Zhongguo Gongchandang Zhangchen (中国共产党章程) [Constitution of the Communist Party] (Promulgated by the Eighteenth Nat'l People's Cong., Nov. 14, 2012, effective Nov. 14, 2012), at art. 39-40 (China).

³⁷⁹ Party's posts are generally considered to mean leader positions that are subject to either election or appointment. Such leader positions include: CCP committee member in all levels, CCP standing committee member, secretary, deputy secretary and members of CDI at all levels, members of CDI committee, the secretary or deputy secretary. This punishment is necessary for members who's malpractice is serious enough to cease his party duty but not serious enough for a period of probation within the party. See Backer, *supra* note 375.

punishment determination must be specific as to which posts are affected by the removal order. Where an individual is appointed to multiple posts, the decision shall clearly state whether all the positions or one of the positions should be subject to the order of removal. Third, where the individual holds multiple posts, removal decisions must start with the highest level post and then proceed down to the most modest post held by the individual. Fourth, in addition, the CCP can also suggest that a non-CCP institution also remove the person from his post.³⁸⁰ This usually applies to the affected individual's posts within the state apparatus or an SOE. Removal has long-term effects as well. Within two years of the punishment, that person may not get any recommendations or take a position that is higher or equal to the one from which he was removed.

Expulsion is the ultimate Party disciplinary measure. The CCP disciplinary inspection working regulations suggest that this punishment be invoked sparingly.³⁸¹ In deciding on or approving an expulsion, Party organizations at all levels are required to study all the relevant facts and opinions and exercise extreme caution.³⁸² People are usually subject to the punishment of expulsion from the Party when it is shown that the CCP member intentionally violated criminal law;³⁸³ was deprived of a political right by the courts; or committed a negligent or involuntary crime for which the CCP member was sentenced to more than three years imprisonment. After being expelled from the Party, that person cannot rejoin the Party for five years. If there are other punishments imposed, those must be carried out as well.

³⁸⁰ See *Investigation Regulations* (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), translation by Keren Wang, <http://lcbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited March 6, 2014).

³⁸¹ *Id.* at arts. 26 and 27, (providing that expulsion is the ultimate Party disciplinary measure. In deciding on or approving an expulsion, Party organizations should study all the relevant facts and opinions and exercise extreme caution.)

³⁸² *Id.* at art. 38 (stipulating that “[a]fter the end of the investigation, the investigation team shall review the work and shall assist the Party organization where the violation originated to sum up the experience and lessons.”). Article 34 also provides that “[i]f there is significant disagreement within the investigation team on the nature of the disciplinary violation, the liability of the relevant personnel, or on the attitude of the party under investigation on his or her violation, and if consensus cannot be reached after the discussion, the investigation report shall be drafted in accordance with the opinion of the investigation team captain.”) *Id.*

³⁸³ *Id.* at art. 36. For example, a member or alternate member of the Central Committee who has seriously violated the criminal law shall be expelled from the Party on decision by the Political Bureau of the Central Committee; a member or alternate member of a local Party committee who has seriously violated the criminal law shall be expelled from the Party on decision by the standing committee of the Party committee at the corresponding level.

It is at this point that *shuanggui* becomes especially interesting from a constitutional point of view. Once the investigation is completed and punishment assessed, there is another decision that is sometimes made—a decision to transfer the person to the State for prosecution.³⁸⁴ In practice, the central organs of the CCP only have a very general rule about the transfer. In fact, each province may have its own detailed rules regarding the procedural of transferring.³⁸⁵ Yet that transfer implicates the separation of powers between the administrative state and CCP, and the application of the State constitution as principle and as law.³⁸⁶

These forms and tensions are illustrated here by the practices of Shandong province.³⁸⁷ Transfer has been built into a program of cooperation that involves the CCP of Shandong, PP, DPS, CDI, the Department of Organization of Shandong, and the Auditing office of Shandong. The program is designed for the cooperation between the different organs of the government in fighting the violation of the party or administrative discipline.³⁸⁸ Transferring a case between different organs is subject to the rules of this program, one which appears to blend the authority of the Party over its cadres with the authority of the state over its citizens.³⁸⁹

The cooperation program is run through a central unified office, whose leader is a member of CDI's standing committee in charge of the investigation reviewing and examining.³⁹⁰ Other members are come from other affiliate government organs and are in charge of the external cooperation in those organs.³⁹¹ Each member organization is expected to set up its own internal organs as a channel of cooperation. This organizational

³⁸⁴ *Id.* at art. 44.

³⁸⁵ See Fujian Sheng Xingzheng Jiancha Anjian Yicong Guiding (福建省行政监察案件移送规定) [Regulations on the Transfer of Administrative Supervision Cases for Fujian Province] (promulgated by the Standing Comm. Of Fujian People's Cong., July 30, 2010) (China), <http://www.fjcdi.gov.cn/html/sfgzd/20131120/1641429.html> (last visited Mar. 1, 2014).

³⁸⁶ *Id.*

³⁸⁷ Shandong Sheng Jiwei, Sheng Wei Zuzhi Bu, Sheng Fayuan, Sheng Gonganting, Sheng Jianchating, Sheng Shenjiting Guanyu Zai Chachu Weijiweifa Anjian Zhong Jiaqiang Xiezu Peihe De Banfa (山东省纪委, 省委组织部, 省法院, 省检察院, 省公安厅, 省监察厅, 省审计厅关于在查处违纪违法案件中加强协作配合的办法) [Shandong Province Commission for Discipline Inspection, the Provincial Organization Department, the Provincial Court, The Provincial Procuratorate, the Provincial Public Security Bureau, the Provincial Supervision Department: Ways to Strengthen Coordination and Cooperation in the Investigation and Discipline Violation Cases] (2011) [hereinafter *Shandong*] (China).

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.*

³⁹¹ *Id.* at art. 6.

structure permits transfers of cases in any direction and from any of the participants to others.³⁹²

In Shandong, if CDI investigates and, believes the suspect committed a crime, CDI forwards the written statement of the case to the police or PP in accordance with the rule of jurisdiction.³⁹³ The brief should be submitted within fifteen days of the suspect's admission of any substantial criminal evidence.³⁹⁴ Within one month after CDI's standing committee discusses the case, CDI transfers the case to PP or the police.³⁹⁵ Similar rules apply to transfers to or from judicial bodies. The court is required to notify the relevant CDI during the first instance and second instance of the trial if the defendant is subject to the jurisdiction of CDI or MOS. Courts are required to notify CDI about any decision and deliver the written judgment within fifteen days.³⁹⁶

Functionally, if in the course of a criminal investigation the prosecutor or police find that a CCP member involved in the matter might be subject to any discipline punishments, they are required to transfer the case to CDI or CCDI with jurisdiction in the matter.³⁹⁷ For cases under PP investigation in Shandong, the relevant CDI or CCP committee makes the decision to file a case if the suspect is a CCP official at the county, city, or province level.³⁹⁸ If the suspect is a party member or subject to administrative discipline, PP is required to transfer the case file within one month after the end of the investigation and allow the relevant CDI to decide whether to prosecute, whether PP withdraws the prosecution or not.³⁹⁹ For cases under criminal investigation by public security, if the suspect is a party member or subject to administrative discipline, the investigator shall transfer the case file within fifteen days of initial detention. The investigator shall also notify the relevant CDI and CCP committees within one month of the decision of the decision to withdraw.⁴⁰⁰

³⁹² See Fujian Sheng Fagu (福建省法规) [Fujian Province Transfer Regulation] (promulgated by the Standing Comm. Of Fujian People's Cong., July 30, 2010) (China), <http://www.fjcdi.gov.cn/html/sfgzd/20131120/1641429.html> (last visited Mar. 1, 2014).

³⁹³ Shandong, *supra* note 387, at art. 9.

³⁹⁴ *Id.* at art. 10.

³⁹⁵ *Id.* at art. 9.

³⁹⁶ *Id.* at art. 12.

³⁹⁷ *Id.* at art. 3.

³⁹⁸ *Id.* at art. 8-10.

³⁹⁹ *Id.* at art. 10.

⁴⁰⁰ *Id.* at art. 11.

The extent of discretion exercised by CDI, PP, and judicial officials is thought to be great.⁴⁰¹ The failure to report or explain the way discretion is exercised can at times produce popular criticism that can damage the reputation of the CCP.⁴⁰² A recent example of such criticism is the Xiamen Yuanhua case.⁴⁰³ Although there was no confirmation from the authorities, there were widespread rumors swirling around the Xiamen Yuanhua smuggling case. Some of these rumors suggested that the entire administrative apparatus attached to the Xiamen export port was involved in some way in the smuggling. Due to the scale of corruption, the CDI at that time made a decision not to transfer suspects to the PP as long as they returned their bribes or their bribes did not exceed a certain amount. Consequently, *shuanggui* reflects the contradictions of conceptual clarity and operational imperfection.

B. *Scientific Development of the Operation of Shuanggui*

The description of *shuanggui* procedures suggests both the tensions between a theory of constitutionalism within which *shuanggui* might be defended as legitimate, and its practice, some aspects of which might themselves fall outside the constraints and expectations of that theory. To paraphrase Fu Hualing's recent conclusions about the fight against corruption in China, *shuanggui* is a double edged sword: "[p]rosecution legitimizes the CCP by demonstrating its political will to fight corruption, but it also has potential to undermine the legitimacy of the CCP by showing to the world that its institutions have rotted their roots."⁴⁰⁴ This section suggests that there is merit in the "gap thesis" relating to corruption in China.⁴⁰⁵

The CCP has been moving from its revolutionary and early institutional structures to the institutionalization of its post-revolutionary

⁴⁰¹ Fu Hualing, *The Upward and Downward Spirals in China's Anti-Corruption Enforcement*, in *COMPARATIVE PERSPECTIVES IN CRIMINAL JUSTICE IN CHINA* 409 (2013).

⁴⁰² *Id.*

⁴⁰³ The People's Daily described the August 1999 probe into the case of the Lai Changxing smuggling group, noting that "[t]he investigation found out what the group and others had smuggled was mainly refined oil, vegetable oil, cars and cigarettes with a worth of CNY 53 billion (approximately USD 6.4 billion) and a customs-duty evasion up to CNY 27 billion since 1996." Huang Ying, *An Actual Record—Xiamen Yuanhua Smuggling Case*, PEOPLE'S DAILY (Apr. 29, 2001), http://english.people.com.cn/200104/29/eng20010429_68943.html (last visited Mar. 1, 2014).

⁴⁰⁴ Fu Hualing, *supra* note 401, at 409.

⁴⁰⁵ *Id.* at 391. The gap between legal and political norms and practices can be narrowed through enhanced disciplinary action and institutional innovation. *Id.* at 391-92.

governance structures.⁴⁰⁶ That development is harder than it sounds. To succeed, it must avoid the errors of European Marxist Leninist states, principally those now understood as embodied in the personality cult of Stalinism, while retaining its fidelity to first principles that look toward a time of widespread democratic organization exercised within the political framework of Marxism. The CCP, no longer an outside force, has set for itself the task of scientifically developing those structures to ensure the movement toward deepening socialist democracy. The decision nearly a decade ago to expand membership in the CCP indicated a willingness to transform the CCP from a revolutionary Party to a vanguard party representing all the people.⁴⁰⁷ But the CCP still has some way to go before it can fulfill this obligation that it has imposed on itself.⁴⁰⁸

Modern political theory, grounded in notions of popular sovereignty,⁴⁰⁹ suggests that the government has to win the support of the people by democracy and rule of law.⁴¹⁰ Thus, it is useful to capitalize on popular support for the objectives of *shuanggui* by greater efforts to eliminate the negative part and optimize the positive part of *shuanggui*.⁴¹¹ Officials have emphasized that “there are stringent regulations governing ‘double designation’ procedures which must be pre-approved.”⁴¹² Corporal punishment is banned, a Party member’s dignity must be respected throughout the questioning, and the CCP takes a more active role in policing violation of these rules.⁴¹³ During “double designations,” the relevant Party members are still regarded as comrades as they have not proven to have violated laws.⁴¹⁴

Yet in his Report to the Eighteenth Party Congress, Hu Jintao noted:

All Party members must heighten their sense of urgency and sense of responsibility and focus on strengthening the Party’s governance capacity, advanced nature and purity. We should continue to free up our minds and carry out reform and

⁴⁰⁶ Cf. Backer, *supra* note 12.

⁴⁰⁷ Backer, *supra* note 138.

⁴⁰⁸ *Id.*

⁴⁰⁹ See, e.g., LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 23 (New York: Columbia University Press, 1990) (noting that enlightenment ideals of “popular sovereignty and representative government” are the general principles of “republicanism”).

⁴¹⁰ Yang Tao, *supra* note 219.

⁴¹¹ Cf. Ye Zhusheng, *supra* note 166.

⁴¹² *Id.*

⁴¹³ See Xiao Qiang, *supra* note 195.

⁴¹⁴ *Id.*

innovation, and uphold the principle that the Party should supervise its own conduct and run itself with strict discipline.⁴¹⁵

This point applies with some strength to the review of the actual implementation of *shuanggui*.⁴¹⁶ This section begins a brief review of potential areas where the implementation or practice of *shuanggui* may be improved. These are framed around two principal areas—the first touching on how to optimize the execution of *shuanggui*, the second focusing on how to minimize the contradiction between state statute and relevant *shuanggui* legislation. Just as Deng suggested, “[t]he point is that the Party must provide good leadership; only through constant improvement can its leadership be strengthened.”⁴¹⁷

With these foundational ordering premises in mind, the article considers very briefly two broad categories of areas where the practice of *shuanggui* might be modified to better conform to the CCP line. The first suggests methods for optimizing *shuanggui*. The second suggests approaches for identifying and minimizing the contradictions between the constitutional theory of *shuanggui* and *shuanggui* in practice.

1. *Optimizing Shuanggui*

Having suggested the contradictions of operational imperfection, is it possible to suggest reform that conforms to both the CCP line and the logic of *shuanggui* within Chinese constitutionalism. This sub section posits four potential areas of reform. The first considers the need to develop rule of law structures within CCP governance. The second considers the possibility of incorporating process regularity in system administration. The third goes toward administrative coordination between CCP and state corruption systems. The last considers transparency as an important element in building up the legitimacy of *shuanggui*.

⁴¹⁵ See *infra* Part XII; Hu Jintao, *supra* note 24.

⁴¹⁶ See Tong Zhiwei, *supra* note 305.

⁴¹⁷ Deng Xiaoping, On the Reform of the System of Party and State Leadership, Address before the Political Bureau of the Central Committee of the Communist Party of China (Aug. 18, 1980), endorsed by the Political Bureau (Aug. 31, 1980), available at <http://english.peopledaily.com.cn/dengx/vol2/text/b1460.html> (last visited Mar. 1, 2014).

a. *Developing rule of law structures within CCP governance*

One of the areas that merit attention centers on developing rule of law structures within CCP governance and managing the exercise of discretion by officials participating in *shuanggui*. Critical to the operation of the *shuanggui* system in line with the CCP line is the continued scientific development of rule of law processes for operating the system. That development has two principal components. The first relates to the way in which *shuanggui* rules are adopted, and the second relates to the manner in which these rules are implemented by the appropriate CCP officials.

With respect to the first, on May 27, 2013, CCP's Central Committee adopted two documents to regulate the rule-making process within the CCP.⁴¹⁸ The two newly-published regulations are the first formal documents to regulate intra-CCP legislation since the founding of the CCP nearly a century ago.⁴¹⁹ One document, "Regulation on Drafting Intra-CCP Legislations,"⁴²⁰ provides the appropriate party organs that are authorized to draft, approve, publish, amend, and abolish party regulations and the procedures those party organs should follow. The other document, titled "Regulation on Filing Intra-CCP Legislative and Normative Documents,"⁴²¹ provides the rules on how intra-Party regulations should be filed, recorded, reviewed, amended, and abolished.

The official news agency was quoted as describing these regulations as "the first formal documents to regulate the formation of CCP rules since the founding of the CCP in 1921."⁴²² They will affect more than 82 million members and four million CCP organs.⁴²³ The newly published regulations are based on a temporary regulation on the formation of party rules issued in 1990.⁴²⁴ The two pieces of regulations are collectively referred to as the

⁴¹⁸ Zhang Qian & Yao Chun, *CPC to Sharpen Intra-Party Management*, XINHUA (May 28, 2013), http://europe.chinadaily.com.cn/china/2013-05/28/content_16538335.htm (last visited Mar. 1, 2014).

⁴¹⁹ *Id.*

⁴²⁰ *Zhongguo Gongchandang Dangnei Fagui Zhiding Tiaoli* (中国共产党党内法规制定条例) [*Regulation on Drafting Intra-CCP Legislations*], COMMUNIST PARTY OF CHINA NEWS (May 28, 2013) <http://dangjian.people.com.cn/n/2013/0528/c117092-21635860.html> (last visited Mar. 1, 2014).

⁴²¹ *Zhongguo Gongchandang Dangnei Fagui He Guifanxing Wenjian Beian Guiding* (中国共产党党内法规和规范性文件备案规定) [*Regulation on Filing Intra-CCP Legislative and Normative Documents*], COMMUNIST PARTY OF CHINA NEWS (May 28, 2013) <http://dangjian.people.com.cn/n/2013/0528/c117092-21635861.html> (last visited Mar. 1, 2014).

⁴²² Zhang Qian & Yao Chun, *supra* note 418.

⁴²³ *Id.*

⁴²⁴ Guo Junkui (郭俊奎), *Zhonggong Shouci Yongyou Dangnei "Lifafa" Youhe Zhongda Yiyi?* (中共首次拥有党内“立法法”有何重大意义?) [*What is the Significance of the CCP's First Intra-Party "Legislation Law?"*], COMMUNIST PARTY OF CHINA NEWS, (May 28, 2013), <http://CCP.people.com.cn/pinglun/n/2013/0528/c241220-21641845.html> (last visited Mar. 6, 2014).

“intra-Party legislation law” by the official CCP news-outlet,⁴²⁵ and their adoption is considered an important step towards augmenting the CCP’s internal management and sharpen intra-Party supervision.⁴²⁶

This move advances the CCP line by applying its constitutional principles, which are also embedded in their own way within the administrative structures of the government through the State Constitution, to the rulemaking authority of the CCP with application to its own cadres. In the official announcement of the new approach, the scientific development of the rule of law was emphasized.⁴²⁷ For example, Professor Jiang Ming’an, Law School of Peking University, told Xinhua news agency that an “important aspect of the rule of law in China” is reflected through the efforts by the new CCP leadership to formalize intra-party management and strengthen party rules against power abuses.⁴²⁸

With respect to the second, in the discussion about the Zeng case, one of the biggest issues spotlighted the application of discretion and the secrecy of proceedings. As one *shuanggui* investigator points out, during the past few years, CCDI issued new guidance and rules summarizing the positive measurements of *shuanggui* and eliminating the negative parts of it.⁴²⁹ These documents set some detailed rules that aim at limiting the discretionary power of CDI.⁴³⁰ For example, *shuanggui* will apply only when CDI had possessed a minimum quantum of valid evidence of serious violation of CCP discipline; when it is necessary for investigation; and when some certain level of CDI has such authority.⁴³¹ Other requirements include written request for *shuanggui* approval and mandatory filing of approval to the province CDI level as a record.⁴³² Furthermore, it is important to maintain the safety of the suspect during *shuanggui* since creating a less aggressive atmosphere for the investigation is important.⁴³³ Additionally,

⁴²⁵ *Id.*

⁴²⁶ Zhang Qian & Yao Chun, *supra* note 418.

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ Cheng Zhikui, Jianglan, *Shuanggui Zhidu de Fazhan yu Wanshan*, *Wenyi Shenghuo: Xiaoxiong Kan* 3, 268 (2011).

⁴³⁰ See *Investigation Regulations* (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China, Mar. 25, 1994), translation by Keren Wang, <http://lcbackerblog.blogspot.com/2012/12/investigation-regulations-for-discipline.html> (last visited Mar. 6, 2014).

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ Cheng Zhikui, Jianglan. “Shuanggui Zhidu de Fazhan yu Wanshan.” *Wenyi Shenghuo: Xiaoxiong Kan* 3, 268 (2011).

enacting detailed procedural rules such as filing systems and authority threshold can limit discretionary power.

b. Process Regularity

Due process and other secondary measures might better conform to the CCP line as well in a number of respects. As Hu Jintao has suggested, the CCP “should improve the system of discipline supervision and inspection, improve the unified management of representative offices of Party commissions for discipline inspection, and enable discipline inspectors to better play their role of supervision.”⁴³⁴ In “The Major Principle for the Anti-Corruption System,” the author emphasizes the importance of the due process and transparency against *shuanggui* abuse.⁴³⁵ It is important to note that due process refers to the principle embraced by the CCP, one of the applications of which has been expressed in the State Constitution⁴³⁶ not the principle incorporated into the operation of the administrative organs of the state. Yet due process might also include transparency.⁴³⁷ Without appropriately framed transparency, it is fairly easy for *shuanggui* to be abused by the authorities. As Chinese constitutional law scholar Tong Zhiwei points out, “[b]y only affirming the anti-crime campaign without denying or reminding concerned parties to pay attention to the ‘black methods’ is likely to encourage the tendency to illegally handle cases, torture and other serious violations of the basic civil rights. This tendency must be corrected.”⁴³⁸ Detailed rules can help enforce due process and limit discretion, which might reduce the likelihood of the excess that resulted in the death of an official undergoing *shuanggui* in Wenzhou.⁴³⁹ The recent adoption of the “CCDI Case Supervision and Management Rules”⁴⁴⁰ is a positive step towards the fulfillment of the due process requirement. It is

⁴³⁴ See Hu Jintao, *supra* note 24.

⁴³⁵ Zhou Yezhong, *supra* note 245.

⁴³⁶ XIANFA at art. 37 (1982) (China).

⁴³⁷ See, e.g., Alberto Alemanno, *Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy*, EUR. L. REV. (forthcoming 2014), available at <http://ssrn.com/abstract=2303644>.

⁴³⁸ Tong Zhiwei, *supra* note 416.

⁴³⁹ Josh Chin, *Six Indicted in Drowning of Chinese Official*, THE WALL STREET J. (Sept. 4, 2013) <http://online.wsj.com/news/articles/SB10001424127887324123004579054822242047370> (last visited Mar. 6, 2014) (stating that the case “shines a rare light on the Communist Party’s murky internal process for investigating cadres, known as *shuanggui*.”).

⁴⁴⁰ See Zhongguo Gongchandang Jilü Jiancha Jiguan Anjian Jiandu Guanli Gongzuo Guize (中国共产党纪律检查机关案件监督管理工作规则) [Chinese Communist Party Discipline Inspection Organs Case Supervision and Management Rules], adopted Jan. 19, 2012, http://www.ccdi.gov.cn/flfg/cyfg/201307/t20130717_6570.html (last visited Mar. 1, 2014) (giving detailed regulation on the time and procedural issue of conducting *shuanggui* investigation).

also important to note that secondary measurements like education, as internal democracy construction is critical to the optimization of *shuanggui*.⁴⁴¹ These secondary proposals are not new though. In 2000, the scholar Zhou Yezhong proposed that by perfecting the complaint system, reporting system, withdrawal system, and anti-corruption education system, one could build a firewall of anti-corruption. Zhou also suggests paying attention to the importance of management of government servants and their ethical education.⁴⁴²

c. *Coordination among CCP and administrative systems*

Shuanggui might also better conform to CCP governance principles and further socialist democracy and its responsibilities under dictatorship of the proletariat principles by adopting measures to improve the quality of investigation. These innovations might usefully target the development of coordinated cooperation mechanisms between state and CCP investigative units. In practice, some provinces have established coordination between local prosecutors and administrative supervision department that enhances the quality of investigations.⁴⁴³ Coordination can enhance the transparency and efficiency of anti-corruption investigations. The objective of coordination is useful, especially in criminal matters. But once the State organs are involved, an individual's constitutional protections under the State Constitution and criminal law must also be respected. For that reason, perhaps, simultaneous investigation ought to be avoided.

An important institutional reform would have to center on implementing the important theory of the separation of CCP and administrative organs by creating clearer separation between MOS and CCDI operations. To remain true to the separation of administrative and political power, it makes some sense to separate the proceedings of an agency that is bound by the letter of the State Constitution from a political organ that is not. To combine the two comes dangerously close to the amalgamation of State and Party against which Deng Xiaoping warned and

⁴⁴¹ Zhu Lianghao, *Fanfu Changlian Fagui Zhidu De Jiben Yuanze* (反腐倡廉法规制度的基本原则) [Basic Principles for Anti-Corruption and Anti-Graft Systems], 2010 DANGZHENG LUNTAN 3, 51-53 (2010), available at <http://info.zjlib.cn/lzwhpdf/xsyj/%E5%8F%8D%E8%85%90%E5%80%A1%E5%BB%89%E6%B3%95%E8%A7%84%E5%88%B6%E5%BA%A6%E7%9A%84%E5%9F%BA%E6%9C%AC%E5%8E%9F%E5%88%99.pdf>.

⁴⁴² Zhou Yezhong, *supra* note 245.

⁴⁴³ Larry C. Backer, *Communist Party and State Discipline Part III: Chinese Scholars' Views of Shuang Gui Inter Party Discipline System*, LAW AT THE END OF THE DAY, (Sept. 23, 2011) <http://lbackerblog.blogspot.com/2011/09/communist-party-and-state-discipline.html> (last visited Mar. 6, 2014).

which was abandoned with the adoption of the State Constitution system in 1982.

d. Transparency measures might be useful

In addition, transparency is an important emerging element of Chinese rule of law constitutional principles being developed under the leadership of the CCP. The “Intra-Party Legislation Law” described above includes an important element of transparency, which requires the CCP to publish all of its regulations “except in a few special cases.”⁴⁴⁴ Professor Zhen Xiaoying, with the Central Socialist Academy, was specifically quoted in the official reporting of the adoption of the “Intra-Party Legislation Law” as suggesting that “more transparency will prevent the CPC from issuing ineffective or empty rules and help reduce bureaucracy. The new rules also regulate that the CPC should have both annual and five-year plans for drafting and amending party rules.”⁴⁴⁵ The report was careful to tie this enactment to the development of the transparency principle as one with constitutional principle dimension through reference to Xi Jinping’s approach to CCP constitutionalism, which is grounded in the constraint of rule of law.⁴⁴⁶ The report emphasized that:

The new leadership has promised to ‘lock the power in the cage’ so, first of all, the cage of the laws and party regulations should be strong enough, said Prof. Ye Duchu, with the Party School of the CPC Central Committee. Building the framework of rules will affect generations and help safeguard the long-term rule of CPC in China, Ye said.⁴⁴⁷

The embrace of transparency as a foundational element of CCP operation has important ramifications not merely for the internal operation of the CCP, but it will likely have spillover effects onto constitutional principles applicable by the government through the State Constitution. It will be interesting to see how the CCP development and application of transparency will affect the administrative organs of the state which will be expected to act within the scope of individual jurisdictions.

⁴⁴⁴ Zhang Qian & Yao Chun, *supra* note 418.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*; see also Tong Zhiwei, *supra* note 18.

⁴⁴⁷ Zhang Qian & Yao Chun, *supra* note 418.

2. *Minimize the Contradictions*

It could be useful to identify and minimize generally the contradictions between the constitutional theory of *shuanggui* and *shuanggui* in practice. This subsection briefly describes three potential methods. The first looks to regulatory incoherence. The second looks to strengthening equal applicability rules. The last method reminds that optics are important and the CCP must remain careful to avoid reform that appears to contradict its leadership role.

a. *Reducing the regulatory incoherence between state organs and CCP*

This might require coordinating *shuanggui* with the criminal law where appropriate, for example, in matters of corruption. Regulatory incoherence has become an important issue in governance throughout the world. Governance scholars and policymakers have begun to understand how the failure to coordinate rule systems that apply to individuals could weaken enforcement efficiency and respect for the integrity of the system.⁴⁴⁸ This has been noted by some Chinese scholars. They argue, for example, that the CCP should address the contradiction between *shuanggui*'s legislation and state law.⁴⁴⁹ Some argue that such coordination ought to maintain the NPC's exclusive legislation power, avoiding legislation that limits or deprives CCP members of their constitutional rights.⁴⁵⁰ Yet as suggested above, this approach suffers from the failure to recognize that the CCP is not subject to the State Constitution. However, the approach has embraced this principle, which it has endorsed for inclusion within the State Constitution, and applied to the administrative organs of state. Still, the failure to coordinate gives rise to the perception of conflict and poses the risk that contradictory positions might be taken by CCP and State officials. These incoherent regulatory results can be avoided. Some have suggested, for example, a need to separate different legislation authorities, and to set up

⁴⁴⁸ The issue of regulatory incoherence, for example, was a central element in the movement toward the adoption of the U.N. Guiding Principles for Business and Human Rights. It was nicely described by the Special Representative of the UN Secretary General for Business and Human Rights. See John G. Ruggie, Special Representative of the Secretary-General, *Remarks at the Public Hearings on Business and Human Rights Sub-Committee on Human Rights European Parliament*, Brussels, (April 16, 2009), http://www.corporatejustice.org/IMG/pdf/EP_April_2009Ruggie.pdf (last visited March 1, 2014).

⁴⁴⁹ See *supra* Part IV.

⁴⁵⁰ See *supra* Part III.B.

some communication mechanism so that the CCP's legislation can coordinate with the national statutes. Furthermore, some have pointed to the need to incorporate intra-party disciplinary rules within national law and eliminate the specialness of *shuanggui*.⁴⁵¹ Incorporation into national law is constitutionally unnecessary, but coordination between the political and national systems is useful and avoids contradiction between law and CCP systems.

At the same time, it is important to note that the functions of the criminal law and the CCP's disciplinary systems are distinct. To that end, there should be no effort to aggregate both into a single system. Rather, where they might overlap, coordination is important. But the preservation of the distinctive functions of administrative organs and the political work of the CCP requires the development of distinct approaches to many activities that may be deemed dangerous to the state, including those centering on corruption.

b. Procedure should be developed that ensures that all CCP cadres, whatever their position, are equally subject to discipline

Hu Jintao noted, “[w]e must ensure that all are equal before discipline, that nobody has the privilege of not observing it and that no exception should be made in its enforcement.”⁴⁵² The current system of *shuanggui* does not necessarily result in equal treatment for Party officials who are subject to discipline equally. To that end, it is likely that systems of review might have to develop that ensure that all discipline cases are heard by CCP committees unconnected to the officials charged. Two reforms are of particular importance. The first is the adoption of strong conflict of interest rules. The second is to ensure that lower level officials are always investigated by officials at a higher level, but in a different province.

⁴⁵¹ See Cao Shenbing, *Dangnei Fagui Yu Guojia Falv Xietiao Lujing Tanta* (党内法规与国家法律协调路径探讨) [*Investigating Various Approaches of Harmonizing Party Rules with National Law*], *Tansuo* 2, 34-37 (2010), available at <http://mall.cnki.net/magazine/Article/SUTA201002010.htm> (providing that the CCP “shall establish regular communication and cooperation working mechanism between the legislature department of NPC and CCP. Through this working mechanism, each department can discuss, clarify and solve the contradiction between different authorities.”).

⁴⁵¹ This practice is later proved to be a good example of the cooperation between CCDI and other legislatures.

⁴⁵² See Hu Jintao, *supra* note 24.

- c. *The integrity of the shuanggui system requires implementation that avoids the appearance of systemic corruption*

One of the great criticisms of *shuanggui* is that it could simply be used as a tool of factional political partisanship and retribution. Along these lines are the structural criticisms of *shuanggui*, like the fact that the CCP places the CDI under the CCP leadership at the same level. As such, the CDI is dependent and cannot supervise the party committee to which it is responsible. CDI effectiveness therefore depends on the support of the local CCP chief. If the local CCP unit or its leader is corrupt, *shuanggui* will at best only institutionalize the corruption, and at worst be used to silence whistleblowers. How can this be managed?

VI. CONCLUSION

The key to understanding rule of law in China hinges on an appropriate understanding of the way separation of powers is applied as a constitutional matter. In the United States, all popular power is vested in the government and that power is divided by function: legislative, executive, and judicial. The constitution represents the organization of the entire power of the people now vested in the state apparatus. As a consequence, the separation of powers within government becomes a central issue of constitutional legitimacy.

In China, popular power is divided differently. Administrative power is vested in the government and political power is vested in the CCP. In contrast to the American system of division of authority between legislature, executive, and judicial branches, the Chinese constitutional system divides authority between the State Council/NPC organs and the CCP and its organs. A document that organizes the administrative apparatus of the state cannot be understood the same way in China as in the United States. The State Constitution does not organize the entirety of sovereign power in China—it organizes only the administrative apparatus. The CCP is the institutional form of the expression of popular power that expresses its will under the State Constitution's recognition (Article I) of the people's democratic dictatorship. As a consequence, the separation of powers between government and Party becomes a central issue of constitutional legitimacy. In China, that relationship is constrained by the ideological structures within which the People's Republic was created—the mass line and Marxist-Leninist theory scientifically developed through the CCP.

The harsh measures institutionalized into the two unique disciplinary systems—*laojiao*, a state based political disciplinary system, and *shuanggui*,

CCP's internal party discipline system—provide a useful context in which the form and operation of legitimate Chinese constitutionalism can be understood, and the policy behind these institutions can be legitimately debated. While both *laojiao* and *shuanggui* bypass formal judicial process, *shuanggui* is a narrowly-applicable CCP internal discipline system that only targets Communist Party cadres; *laojiao* targets all citizens with an almost unbounded discretion vested in the police administration. With a better understanding of the fundamental organization of Chinese constitutionalism, the analytical basis for testing the legitimacy of *laojiao* and *shuanggui* under general principles of constitutionalism, naturalized within the Chinese constitutional system, becomes clear. *Laojiao* has become illegitimate in the post-revolutionary period precisely because the CCP and government have progressed to the point where socialist rule of law has come to be understood as application of the rules expressed in the State Constitution, and through it, under the laws created by government organs.

Extra-constitutional measures exercised by state organs are effectively beyond the powers of the state organs. On the other hand, *shuanggui* focuses on the powers of the CCP to organize itself and to protect its integrity in accordance with its own logic. *Shuanggui* goes to the protection of the legitimacy of the people's democratic dictatorship itself. As a consequence, the basis of the legitimacy of the *shuanggui* system is not to be found in the State constitution, but rather in the constitution of the CCP. But to understand *shuanggui* as a legitimate expression of Party power is not to accept its implementation in every form. The CCP itself is constrained by the mass line, which has been expressed clearly by the CCP itself through the principles it has adopted and applied to the State Constitution. Those principles, together with core, scientifically developed principles of Party objectives, mark the framework within which a legitimate system of *shuanggui* must be further developed.