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## China's Evolving "Double-Track" Socio-Legal System in Conflict Resolution

Jieli Li

Ohio University, lij@ohio.edu

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### Abstract

Contemporary China's sociolegal control system is built upon a unique organizational arrangement which differs not only from other countries in the world but also from its own past. The very core of this organizational arrangement is what I define as a "double-track" socio-legality with laws and codified regulation mainly concentrated on economic and commercial sectors with the ruling party focusing its administrative control on political and ideological sectors. This institutional context is critical to understanding the nature of social control mechanism in China. The fact is that with all the laws and regulations promulgated in recent years, the newly developed "legal space". if examined carefully, only indicates a long-term strategic effort of the Chinese government to adjust rather than abandon its existing socio-legality of conflict meditation and resolution, making it more adaptable to the new social environment shaped by the forces of globalization.

**Keywords:** *conflict resolution, David Émile Durkheim, grassroots society, Max Weber, People's Republic of China (PRC), political control, socio-legal system*

### Author Bio(s)

Jieli Li received his doctoral degree in sociology from University of California at Riverside. He is currently an associate professor in the Department of Sociology and Anthropology at Ohio University. His research and teaching revolve around social change and development, historical and comparative sociology, sociological theory, and conflict and resolution. His research articles have appeared in some major scholarly journals such as *Sociological Theory*, *International Journal of the Sociology of Law*, *Sociological Perspectives*, *Sociological Focus*, *International Journal of Public Administration*, and *Michigan Sociological Review*, etc. In addition, he currently serves as the council chair of the United Society of China Studies (USCS), president of the Association of Chinese Professors of Social Sciences in the U.S. (ACPSS), and council member at large for the North Central Sociological Association (NCSA). Email: [lij@ohio.edu](mailto:lij@ohio.edu)

## **China's Evolving "Double-Track" Socio-Legal System in Conflict Resolution**

**Jieli Li**

### **Abstract**

*Contemporary China's sociolegal control system is built upon a unique organizational arrangement which differs not only from other countries in the world but also from its own past. The very core of this organizational arrangement is what I define as a "double-track" socio-legality with laws and codified regulation mainly concentrated on economic and commercial sectors with the ruling party focusing its administrative control on political and ideological sectors. This institutional context is critical to understanding the nature of social control mechanism in China. The fact is that with all the laws and regulations promulgated in recent years, the newly developed "legal space". if examined carefully, only indicates a long-term strategic effort of the Chinese government to adjust rather than abandon its existing socio-legality of conflict meditation and resolution, making it more adaptable to the new social environment shaped by the forces of globalization.*

### **Introduction**

For any country in the world, regardless of its nature of political system, socio-legality is a cornerstone of law and order upon which conflict is mediated and resolved, and in this regard, China is no exception. Nonetheless, what has made the China case so interesting to scholars of socio-legal studies is the baffling changes brought about by a wide range of structural reform featuring "Chinese Socialist Characteristics." Indeed, China's socio-legal landscape has undergone a significant alteration under the impact of the profound economic reform and the opening to the world over the past thirty years, yet we are still in a quandary as to whether China is in a transition from "the rule by man" to "the rule by law" or to "the rule of law." If there is a consensus on the definition of "the rule by man" as it is commonly referred to as a totalitarian or authoritarian legality of political system, then conceptual connotation of "the rule by law" and "the rule of law" is far from clear as far as it comes to China's socio-legal development.

There seems to be no more debate nowadays on whether or not China is still in the state of "the rule by man". The Mao era is gone forever, so is a "lawless society" where Mao's words stood up as the ultimate legal authority surpassing all parts of the national constitution which existed in name only (Ladany, 1992). However, we are still debating whether China is on track to make a move toward "legal formalization" (Fa Zhi Hua) – we are still not sure if this "legal formalization" refers to "the rule by law" or "the rule of law." Most research in China socio-legal studies literature has failed to clear up this terminological ambiguity but continues to use "the rule by law" interchangeably with formal legalization (Fa Zhi Hua). Therefore it is imperative that we clarify this conceptual

ambiguity before we can move forward to define the nature of current China's socio-legality. James V. Feinerman (1997, p.280) made an excellent distinction between the two concepts, pointing out that in the rule of law, law is an embodiment of an independent judiciary and civil liberties "as it is understood in the West". but "[I]n the rule by law,' law exists not to limit state power ... but to serve as a mechanism for state power – which can also be exercised by other available means, such as party discipline or leadership fiat." By this distinction, and in close examination of China's socio-legal reform over the past three decades, we can see a clear pattern of transition toward "the rule by law" rather than "the rule of law" as there is no sign indicating that the ruling party is willing to relinquish its grip over the organizational power base of socio-legality.

However, I would argue that the definition of "the rule by law" on its own is far from being sufficient to illuminate the real nature of contemporary China's socio-legal system because formal laws are merely partial means of dispute settlement and there are other organizational means which are also critical to conflict mediation and resolution, particularly in grassroots society. In this sense, China's new socio-legality is unique in that it operates like what I call a "double-track" system that divides society into two realms of control: with one realm on economic and commercial activities and the other on political and ideological affairs.

### **Stages of Socio-legal Development: From a "Single-Track" to a "Double-Track"**

In order to understand the evolution of China's social legal development, we should address the following two questions in a historical and comparative context: (1) How did the socio-legality before 1949 differ from after 1949? and (2) what characterizes the post-1949 socio-legality over the last sixty years? First of all, China's socio-legal control mechanism as constructed after 1949 differed considerably from that in its traditional past in terms of its organizational arrangements. The difference lies in the power of the state to intervene in mediation and adjudication. Such power had never gone below the county level in traditional China in which most civil disputes in grassroots communities were resolved through the mediation of clan leaders or respected elders who played a dominating role in arbitration (Macaulay, 1998; Huang, 1996). But in post-1949 China the communist regime penetrated deep into the grassroots level of society including work units and residential neighborhoods in cities and villages, and the party's local branch heads more often than not got involved in mediation and turned out to be the ultimate authority of arbitration. If we say that the grassroots social control in pre-1949 China relied largely upon the community autonomy and customary/folk mores, such old institutional mechanism has been altered and replaced by a new control mechanism emphasizing party-rule and community dependency in post-1949 China.

The post-1949 development can be divided into three stages of 1949-1978, 1978-1999, and 1999 – Present. The rationale for this division is based on three milestone events in contemporary Chinese history. By the end of 1949, the Chinese Communist Party became the ruler of China after defeating its arch-enemy Nationalist Party in the civil war and the People's Republic of China (PRC) was founded as the result of this regime change.

By the end of 1978, after the death of Mao, the Third Plenary Session of the Eleventh Central Committee of Chinese Communist Party was held in Beijing in which a new policy of economic reform and opening to the world was declared, and from then on China started to embark on the fast track of modernization. The year of 1999 witnessed the Chinese government's crackdown on Fa Lung Gong – a “Qi Gong” exercise organization or a “quasi-religious” organization as some termed it. As will be discussed later, the quick rise of Fa Lung Gong and the protest it made outside of the headquarters of the government turned out to a wake-up call as the Chinese government came to realize that it was losing its grassroots base to Fa Lung Gong which attracted millions of followers and posed a serious threat to the legitimacy of the central party authorities. Because of the Fa Lung Gong Question, the Chinese government made a policy change to aim at bringing back the grassroots society to its control. In the following, I will briefly discuss each of the three stages in China's socio-legal development.

During the first period, from 1949 to 1978, the new foundation of people's mediation institution came into fruition. The main feature of this new institutional mechanism that differed markedly from the traditional past is that the ruling party took over the organizational control of grassroots communities and got directly involved in the mediation and arbitration process. Lubman (1967) gave an excellent account of Chinese communist mediation institution in terms of its organizational arrangements, and he correctly pointed out that it was through the organizational web that the party's authority over mediation process was distributed and wielded across the grassroots society. In a broader historical context, this institutional transformation was part of the then nationwide socialist movement that brought about people's communes in the rural region and the state's partial and later full ownership of private enterprises in the urban region. The radical “Cultural Revolution” initiated by Mao in the mid-1960s carried out the party-state control to the extreme over all various segments of society. Despite this institutional shift, however, the general cultural principle underlying community mediation remained unchanged: collectivism overriding individualism to serve the justice of mediation in dispute resolution.

During the second period, from 1978 to 1999, China's modernization drive with its market-oriented economic reforms dramatically altered economic and social landscapes of the whole country. The reforms indeed substantially undermined the institutional foundation of sociolegality constructed in the earlier period. From the mid 1980s through the 1990s, the reform policy, which was intended to enliven the economy, ended up undercutting the role of the communist party branches in the daily administration of urban work units and rural villages, which greatly weakened the institutional foundation of party-dominated people's mediation mechanisms. By large measure, this period witnessed that the organized social control implemented earlier withered considerably and no long worked well in alleviating social tension. A good case in point was the rise of Falun Gong. It emerged in 1992 and quickly grew into a powerful mass organization. Before it was banned in 1999, it posed a strong organizational challenge to the ruling Community Party. As it turned out, this incident alarmed the party leadership, causing it to mount a systematic effort to regain the party's grassroots organizational control in the years to follow.

I wish to point out that it had never been an original intention of the Chinese government to loosen up its grassroots control in the first place, and all that happened later

seems to be an unintended consequence of a fast-paced economic reform. This was exactly the period of what late Chinese leader Deng Xiaoping called “wading across the river by searching for stepping stones”. which implies a prudent search for a suitable track for China's modernization and development without jeopardizing the legitimacy and domination of the ruling party. Therefore, the changes that took place in China during this period can't be simply explained in the same way as in the textbook cases of other developing countries exemplified in conventional modernization theories. As we have found, the 1989 “Tian An Men Square” incident only points to the fact that under no circumstance was the ruling party ever willing to give up its own establishment of sociolegality, but instead it has consistently tried to make an improvement on it to meet the new challenges.

During the third period of China's sociolegal development, from 1999 to the present, the Chinese government came to realize that regaining the organizational control over the grassroots society is crucial for its legitimacy and survival. Thus in this period the Chinese government has persistently searched for a better institutional foundation of legality for social control. The search for a better legality, however, does not involve restoring the old system as it was in Mao's time, but instead adopting the "double-track legality" as discussed earlier. Thus the government seeks to revitalize the informal people's mediation institution along with its renewed effort of consolidating the ruling party's political control over grassroots communities. On the other hand, this revitalization entails strengthening the role of the party's affiliates, such as the workers' union, youth league, and women's association, in community mediation. The role of these party-sponsored organizations can by no means be underestimated as they often work closely with “people's mediation committees”, “administrative mediation committees” and “public safety committees” currently established at various levels of society. All these seemingly non-party-affiliated organizations are in fact the close associates of the central party authorities, serving as a pliable organizational network to reinforce the party's domination over the grassroots society.

### **“Double-Track” Socio-legality and Its New Development**

In my earlier article (Li, 1996), I argued that China's political structure makes it unlikely for the western style of codified formal legality to work as a suitable social control option for China. It is not because Chinese people prefer informal community-based mediational resolution over Western-style formal court settlement. It is instead because China's judicial system is so deeply integrated into the political institutions that it can hardly function in nonpartisan and independent manner. Judicial settlements and decisions, in other words, are easily subject to the influence of state intervention, especially in those sensitive civil cases. I also argued in my article that China's legal development would most likely lead to a hybrid legality of conflict resolution--a double-track social control system with (1) legal formalization mostly for the commercial and economic sectors and (2) a top-down administrative control over the political and ideological sectors, both to ensure the political legitimacy of the ruling party and societal stability.

In the economic and commercial sectors, China's codification achievement is very impressive. Before 1979, there were virtually no laws or codified regulations on economic and commercial activities regarding foreign investment and foreign companies (Chiu, 1993). The past thirty decades, however, witnessed a massive governmental effort to promulgate a series of laws to be in compatibility with the established legal practice and observance in the world market. This trend of codification compatibility has been reinforced by China's active participation in almost all major regional as well as international economic cooperative and trade organizations such as Asia-Pacific Economic Cooperation (APEC), World Intellectual Property Organization (WIPO), and World Trade Organization (WTO). The "double-track" legality is more evident in the disparity of law-making with an overwhelming proportion of legislations concentrated on economic and administrative sectors. As of 1979, National People's Congress of China passed more than 300 legislative acts and more than a third of them are in the areas of commerce, taxation, banking, labor, business contract, trade, property, bonds and securities, trust, accounting and auditing, and bankruptcy. Moreover, the weight of provincial legislation is tilted more toward the economic and commercial sectors. For example, out of all legislations enacted by People's Congresses of Jiangsu Province and Anhui Province, business-related laws account for 54.7% and 55% respectively (Guo, 1998, p. 603). One distinctive development of "economic/commercial track of legality" is that legal culture and judicial behavior have become more consistent with international norms and practice, or to be precise, "Westernized" in terms of how disputes are mediated and resolved through the arena of the court (Potter, 2001). Yet on the political track of legality, judicial procedure of arbitration has still been very "Chinese" in the sense that the legitimacy and vital interest of party-rule can't be challenged and undermined.

It also is worth noting that there has been an equally significant proportion of legislation on administrative management instituted in parallel development with economic laws, thereby making some long-standing administrative practice formalized in legal codes to bolster the governmental control (Guo, 1998, p. 603). However, what is clearly lacking in this whole codification process is an institution of civil legislations concerning the rights and liberties of individuals and communities in conflict resolution. For example, as the result of the speedy economic development, there has been in recent years a mounting caseload of disputes in land appropriation between individual/or community and the state/or developer, but so far hardly any legislative act to be enacted for the right issue to protect the disadvantaged groups – the area that is deemed politically sensitive because it involves the conflict of interest between the state and individuals in terms of property rights and compensation for appropriation. Therefore, with the court being unable to function due to the lack of codified guidelines, it is not uncommon to see that when individuals sue the government, cases are often smothered (see "When Chinese Sue the State, Cases are Often Smothered", *The New York Times*, Dec. 28, 2005). Even in the judicial profession itself, there have hardly any laws to protect the right and tenure of judges in the court, thus making judicial autonomy virtually impossible when people on the bench fear for job loss and political retribution in their rulings on some sensitive cases.

As a real story goes in Luoyang, China, Judge Li Huijuan made a ruling on the case about local seed prices, and the ruling happened to run into conflict with some interested

groups in high-up governmental places. Li was accused of making “a serious political error” and was subsequently reprimanded. The case itself indicates that political correctness still carries much of weight in the legal system. As Judge Li commented on her own safety, “I am just a female judge who tried to protect the law, but who is going to protect my rights?” (see “A Judge Tests China's Courts, Making History”, *the New York Times*, November 28, 2005). Chinese court system has always been in the subordinating status in relation to the ruling party bureaucracy. Not only are its operative functions supervised behind the scenes by the party-led Commission of Politics and Laws (Zheng Fa Wei) but the court's rulings on cases are one way or another influenced by the state apparatus at various levels. For example, in the city of Harbin, the governmental intervention overruled the court's three innocent verdicts and the angry presiding judges who disclosed this information to the media got censured (see “A Judge Tests China's Courts, Making History”, *the New York Times*, November 28, 2005). As Lieberman (2007) correctly points out, the various legal reforms have been largely technical and are by no means designed to curb the governmental power over the courts.

There is another battle ground in the on-going construction of “double-track” socio-legality – a tug of war between the government and a growing power of lawyers. As of the mid 1990s, with China's economic reform deepened, private law firms was reinstated in China. Yet this privatization of law firms doesn't change much of the nature of the established socio-legality as these firms are closely under surveillance of the justice department of government, and more importantly, like other professional associations, All-China Bar Association is also government-controlled. In recent years, however, it has become apparent that Chinese private law firms are trying to step out of the shadow of government control and started to play more assertive role in conflict resolution, especially in areas considered politically sensitive. One obvious change is that lawyers as a newly rising political force have gained prominence in seeking independence and challenging the authorities by representing disadvantaged social groups and right activists. Among 190,000 lawyers, a group of what have been called activist lawyers has become very active in rights defense which involved sensitive cases like police brutality, ethnic minority discrimination, the rights of political dissidents, and forced eviction of people from their land and houses.

While the growth of independent lawyers is a clear sign of emerging civil society, yet the tolerance for such trend seems to be limited, and the punishment was tactically meted out in an attempt to restrict the “uncharted” development. According to a report, the justice department in Beijing stopped renewing the licenses of 53 lawyers for alleged failure in re-registration (see “China's Harassed Lawyers”, *the New York Times*, July 29, 2009). A close examination, however, discloses that by no coincidence all the disbarred lawyers have been in some way involved in sensitive cases challenging the central and local authorities. Bar association can turn into a handy tool of government to intimidate and penalize those dissident lawyers, and moreover, the disbarment makes lawyers more vulnerable to job loss as well as retaliation from the government. By most accounts, the continued reforms intended to raise the judicial quality is very much restricted in the realm of jurisprudence and there is no clear sign of Chinese party-state being willing to abandon its “double-track” legality of social control and tolerant of any move to undermine or deviate from the party-led administrative control of socio-legal institutions.



### **Resilience of party's grassroots organizational control in mediation and arbitration**

No strong evidence indicates that China's massive campaign on legal formalization over the past decade has been working to dismantle the existing "double track" socio-legal control mechanism, but we only see the resilience of the party's organizational control over mediation and conflict resolution in vast rural regions though this control is taking on different administrative forms. Here is a debate on how China's current reform campaign can legalize the grassroots mediation institution called "people's mediation."

One prevailing assumption among China-based socio-legal scholars is that legal formalization (Fa Zhi Hua), while being extended to the grassroots society, would fundamentally set China on the path toward "the rule of law." Di and Wu (2008) point out a new "developing trend" of socio-legal restructuring characterized by formalization of once informal mediation and resolution mechanism in grassroots society. Though the authors fail to distinguish "the rule by law" from "the rule of law", they nonetheless observed three major changes brought about by the reform: (1) the traditional institution of people's mediation has lost its vigor and efficiency as the result of dramatic modernization and urbanization because the Chinese society is transforming itself from "an acquaintance society" to "a stranger society" in the city and "semi-acquaintance society" in the rural areas. (2) Therefore, the state is embarking on legal formalization, so that more people resort to the judicial approach to settle civil disputes -- an indication that China is in transition to the use of law for conflict resolution. But (3) as the court system gets overburdened with the caseload, and also vast rural areas are not yet accustomed to using the judicial approach, the state has recently implemented a campaign to "revitalize" the weakened traditional mediation institution in an attempt to make it "standardized and systematized" so as to serve as the first line of defense against social conflicts and negative mass incidents. Thus the authors conclude that through legal reforms the traditional people's mediation will eventually evolve into an auxiliary part of formal legality, which with the aid of modernization as well as democratization will transform China from "the rule by men" into "the rule of law."

I contend, however, that the driving force behind the Chinese government's revitalization of people's mediation institution is to regain its organizational grip over grassroots society, which is consistent with its ongoing campaign to revitalize the party's role of political control over the larger Chinese society (Li, 2009). Viewed in this perspective, I see the nature of government-initiated reform as more of structural adjustment to the changing society rather than what Dai and Wu (2008) suggest a formalization movement intended to incorporate informal mechanisms of traditional mediation institution, because the grassroots mediation institution in post-1949 China has never been treated as an arena of legality alone, but also as a medium of educating and mobilizing the masses for political and ideological purposes. By large measure, the distinction of "double track" socio-legality is more evident when it comes to the structure of organizational mechanism in view of how disputes or conflict are mediated and resolved in vast grassroots communities. More laws and codified regulations do not necessarily

mean that the nature of China's existing socio-legality has been altered and the rule by party gives way to the rule by law or the rule of law.

It is important that we understand the different organizational arrangements of social control mechanism in pre-1949 China versus post-1949 China as I have discussed in the preceding section. Otherwise, we could treat both traditional and contemporary institutions of people's mediation as the same entity conceptually. For example, Dai and Wu (2008) seems to get lost in defining what the tradition of people's mediation really is. Although the authors point out the difference between Confucianism and Maoism as separate cultural forces that dominated the way people carried out mediation in pre-1949 and post-1949 China, they never really follow up on such distinction to explore any functional difference that they made in people's mediation, because they generally treat both as the same variable of cultural tradition. Thus we are left wondering which cultural tradition of people's mediation has "waned" and needs to be "revitalized."

Such conceptual ambiguity can be cleared up if we examine the social control system from the institutional perspective. According to socio-legal theories, law, whether being manifest in its formal and informal means of conflict resolution, is not only a representation of society's moral fabrication (in Durkheimian perspective), but more importantly as an instrument or expression of power (in Weberian perspective). Therefore, "law can be exercised in the name of law without being legitimated by it" (Epstein, 1994, p. 28). From Weberian perspective, the real power of social control is embedded in the legality built upon the network of power relations revolving around class, status groups, and party/polity, and through organizational arrangements, power resources such as coercion, rewards, and punishment can be effectively mobilized to serve the interests of the state (Collins, 1975). As such, the ultimate legality is the reality of institutional power (Turk, 1976), and law is nothing but governmental control (Black and Maleski, 1973).

Therefore, the key issue for distinction is that the way people choose to resolve conflict is not just the matter of what they believe as guided by their own community's normative framework, but their choice can also be limited by institutional constraints. This is particularly true for post-1949 China. If we turn our attention to China's socio-legal construction from 1949 to the mid-1970s, we notice a clear pattern of the ruling political party's gradual organizational penetration into the grassroots level of society, a situation that had never been seen before in Chinese history. If we say that in pre-1949 China people's mediation institution was largely operated on the basis of community autonomy with very limited state intervention, such traditional mode gave way to the new mode of social action in post 1949 China characterized by extensive party-state intervention in conflict mediation and resolution. This institutional rearrangement of social control culminated in the "Cultural Revolutionary" period and then declined in the 1980s when China embarked on a massive economic reform and opened to the world.

It is clear that the current revitalization of the people's institution is not simply a return to what the authors vaguely define as "traditional people's mediation institution." The revitalization is actually part and parcel of China's ongoing socio-legal structural adjustment to institutionalize informal mediation mechanism with political control through grassroots organizational rearrangement. In other words, it is a structural "fit-in" process in the face of social changes resulting from the deepened economic reforms. As I mentioned

previously, unlike its traditional past, the people's mediation institution of post-1949 China has been restructured to such an extent that it is not just seen as an informal mechanism of dispute resolution but also as a means of grassroots mobilization for political control. While this combined role of people's mediation was undermined by the economic reforms, a search for a new mode of organizational arrangement to restore it is what I see the current revitalization campaign is aimed at.

It is worth noting that in recent years the campaign of "strengthening" the party's grassroots organizations has been in parallel development with that of "Fa Zhi Hua." The party-led workers' union which is officially called "The Chinese Federation of Trade Union" (ACFTU) has succeeded in getting its cells set up in more than 80% of the newly established enterprises and most of them are private companies. In some economically advanced coastal regions, the rate of unionization in private enterprises is as high as 90%. For example, by 2000 ACFTU with the aid of Shenzhen municipal government drove its cells into 3,000 enterprises with approximately 80,000 workers being recruited (Zhao, 1999, p. 5). There is also considerable evidence indicating the persistent party's membership drive into new social and economic organizations that have emerged out of economic reform. For example, the central party committee claimed that by the end of 2007 its membership in private enterprises (or called "new economic organizations") and non-government associations (or called "new societies") reached up to four million (Liu, 2008).

Evidence also points to a persistent party-sponsored organizational infiltration into foreign-owned enterprises in China. According to China's two official English language newspapers, *China Daily* and *Shanghai Daily*, by 2007 ACFTU has successfully set its footing in about 70% of foreign enterprises, and Wal-Mart became the most recent one that signed a pact with the union (see *China Daily*, January 5, 2007, and *Shanghai Daily*, September 17, 2008). It is therefore reasonable to assume that with the workers' unions moving in, the Chinese government has gained an effective organizational niche of social control in those foreign multinational corporations on Chinese territory. On the other hand, in dealing with rising labor disputes as a result of the recent economic slowdown, what the Chinese government relies on is its organized control network through the direct involvement of labor union, women's association, and youth league that are structurally integrated into factories and business companies to work out mediation and arbitration on their own. The court only plays a second fiddle in labor dispute resolution. This indicates that despite the repeated legalization reforms the judicial institution in China is nowhere near the center stage of social control, and as Xin Chunying, vice chairman of Legislative Affairs of the National People's Congress of the NPC Standing Committee, once commented that the organized mediation through community itself is a more viable solution than going to the court to resolve labor disputes (see "*China to Enact Law Dealing with Rising Number of Labor Disputes*". *Xinhua*, Aug. 26, 2009).

In another recent campaign drive to recapture the control of grassroots society the personnel and organizational department of the central government launched a new five-year program called "Constructing New Countryside" (2008-2012), and part of its program includes selecting 100,000 politically qualified new college graduates and dispatching them to rural communities across the country to serve at least a two or three year term as officials at local village councils. As an incentive, those whose performance are evaluated with

satisfaction at the end of term can be eligible for promotion to permanent position in government office or can also receive preferential consideration if they decide to go back to school for higher academic degrees. The campaign has proved to be very successful and by the end of 2008, the number of participants exceeded the original target of 100,000 and reached up to 130,000. According to new data, about 80% of counties nation-wide have instituted the personnel system of "College-Graduate-Official" (CGO) at the town and village level. For example, almost every village in the outskirts of Beijing has at least two CGOs.

Instead of seeing this new "sent-down" campaign as one of governmental strategies to reduce the pressure on the job market due to the economic slowdown as some scholars argued, I would perceive this campaign as another sign of the ruling party's calculated smart move to regain the control of the grassroots communities which, as discussed, has been much weakened organizationally by the market-oriented economic reforms. By sending down the college graduates to be involved in the daily operations of village council, the central party authorities have inserted one more organizational cell into the control mechanism to either improve or reinforce its grip over the grassroots society. Indeed, as the survey indicates, the "sent-down" officials have become deeply integrated in the village youth league activities and turned out to be another source of community control to balance out the power of some local-based political forces.

### **Institutional Constraints of "Double-Track" Socio-legality**

There is a structurally inherent problem with China's "double-track" socio-legality: whereas the legalization drive requires the increased role of the court in mediation and arbitration, the party-state's organizational control mechanism keeps adjusting itself constantly to the change, yet still adhering to its sole aim as in the past to ensure the legitimacy and domination of the ruling party particularly in political and ideology sectors. Because of such institutional arrangement, frictions and constraints stemming from incompatibility become inevitable, and evidence indicated that the law-making and law-enforcing contradict each other in actual implementation and have become problematic. For example, in order to protect workers' wellbeing, China's national People's Congress recently promulgated labor law which stipulates a series of formal arbitration procedures designed to resolve the labor-management disputes. However, while more workers indeed turned to labor-arbitration committees for assistance, only a small number of grievance cases were processed. Though legal provisions for workers' minimum wages and healthcare and vacation benefits are proclaimed, most of labor-intensive industries nonetheless are rarely in compliance with these provisions in actuality. As a result, instead of reducing workers' discontents, the enactment of labor law has achieved little but instead has intensified labor-management disputes as both sides have raised expectation in deal-making.

How dare enterprises challenge and defy the laws? I argue that what lies behind such defiance is based on the collective awareness that the government simply has no real leverage over those labor-intensive factories, mines and construction companies for the fear

of losing its tax revenues and on the other hand, most companies don't believe that the court is capable of enforcing the law and settle the disputes. This situation reveals a typical phenomenon characterizing the structural constraints of "double-track" legality: while conflict are mostly resolved through mediated deals with the government offices with or without legal provisions, laws thus exist largely in name, not much in real practice. However, to make the matter more frustrating, workers' strikes in China are often organized by disgruntled workers themselves in search for justice, rather than by labor unions which unlike in many other countries often side with the government and factory management. That perhaps is one of the reasons why the worker's strikes more likely turn to violence and it may also help explain a perplexing phenomenon in recent years: as more laws are promulgated, more social riots mount. While formal laws lack a supportive infrastructure to be enforced, and while labor unions fail to mediate effectively on behalf of workers' interest, such institutional constraints would limit the choice of mediation and conflict resolution, making violence very likely to occur as the last resort. Most illustrative is a case of labor riot that erupted in state-owned Tonghua Iron and Steel plant in Northeastern China in 2009, where angry workers, who resisted privatization of their plant and worried about anticipated massive job cut, beat to death an arrogant manager of private company moving in to take over Tonghua. Such tragedy could have been avoided if the labor union in that plant was able to play a more independent role in mediation and if workers had confidence in formal recourse to the court in conflict resolution.

Indeed, recent years witnessed growing social tension and conflict resulting from an enlarged gap of social inequality as well as increased disputes between the state and individuals over house property, land use, and other issues. Some scholars (Di and Wu, 2008) attribute the mounting tension to the overloaded court system being unable to handle too many disputant cases so that they see it as imperative to revitalize community mediation to serve as a supplementary institution to share the burden. As I discussed earlier, the rising social tension has little to do with a short supply of formal judicial assistance because the court is, to large extent, incapable of handling sensitive cases. People are unwilling to go to the court because they don't trust the judicial system, and as He Weifang, a Chinese scholar specialized in constitutional studies, correctly points out that "[T]he public may be skeptical about judicial independence, given the quality of judges and judgments". and he further added that it is a matter of accountability, and "...you can only have accountability if you have independence. Otherwise, it is never clear who made a decision" (see "A Judge Tests China's Courts, Making History", *the New York Times*, November 28, 2005).

Cai and Yang (2005) pointed out through their research that for litigants, the resort to either petitions or lawsuits against state authorities to resolve disputes were generally ineffective or unsuccessful, and therefore many people chose not to go to court as they didn't believe that the judicial adjudication would serve them the justice. According to another survey conducted recently in four Chinese cities, there are as high as 75% of litigants who reported that they found it difficult to use lawsuits in conflict resolution (Cai, 2008). Obviously such institutional restriction on litigation has caused social tension to escalate to such extent that rural mass riots increased in recent years to jeopardize social stability. Therefore, social pressure like that, among others, calls for urgency in reviving the

role of people's mediation to serve as an intermediary, or a cushion, to absorb social tension that can hardly be resolved through formalized judicial procedures due to their inherent incapability.

Yu (2008) attempts to explore why people lack confidence in jurisprudence, pointing out two reasons: (1) they distrust the overall political system due to corruption and incompetence of government officials, and (2) they have a strong disdain for corrupted judges and don't believe they can deliver justice and equity. It seems to me, however, that Yu's explanation is quite superficial, failing to dig out the main culprit for the mounting grievance in China. I would argue that the root cause lies in the unavoidable structural friction between the party-rule and law-rule in "double-track" socio-legality. These are the two institutional forces that clash with each other while running on the same course. Such friction or clash is not obvious, however, in commercial and economic sectors where most cases are contract-related and the court's rulings are mostly technical. Yet when in political sector or the areas where the cases are deemed sensitive, the laws become less effective in arbitration as the party-dominated administrative power can always dictate or over-rule the cases if they are considered to be a threat or danger to the national interest, and more importantly, the legitimacy of the party rule. After all, it is an institutional setup that is blurring the demarcation of rule by party and rule by law, but the current transition through legalization would only make the distinction between the two more blurry, which further reinforces the hybrid nature of "double-track" legality characteristic of "the rule by party-law". It is out of this institutional arrangement that people's skepticism about the judicial justice is derived.

Here is another case of institutional friction in the "double-track" system in which the role of governmental administrative organs and that of judicial organs in mediating and resolving the conflict are blurred to such a great extent that they tend to negate each other. For example, one arm of governmental control in handling populace grievance and disputes is through the state office of letters and visits (Guo Jia Xin Fang Ban) where instead of going to the court ordinary folks can make their complaints directly channeled to the relevant departments of central government. Yet such governmental role of arbitration and adjudication often overlaps and sometimes runs in clash with the role of judicial organs with the result that the court-ruled case could be still challenged by the state office, and similarly the court may not honor the adjudication made by the state office in charge. So such ambiguity and even confusion of institutional role boil down to one popular concern: "who is the final arbiter of law?" And further, "who serves whom – does government serve the law or law serve the government?" As such, a lot of social riots erupted out of such institutional role confusion which in turn creates hurdles for the quick delivery of justice and which also provides a loophole for bribery and corruption.

There has been a lot of discussion in recent years about the prospects of China's electoral democracy at the village level. It is commonly believed that this on-going grassroots democratization would facilitate formalizing the institution of social control in its overall transition to the rule of law. However, the question that begs for answer is whether this budding democracy could survive the institutional impediment to progress. I would argue that given the nature of current "double-track" nature of social control system as discussed above, China's grassroots democratization seems to have a long way to go as

its development has met a strong resistance from the established socio-legal infrastructure. Such institutional constraint is evident in election problems stemming from the party-state's intervention, thus making it difficult, if not impossible, for community to develop democratic collegiality and empower itself for self-governance. On the other hand, democracy itself is a complex process and does not work under all circumstances. Procedural democracy as in the form of direct election will not necessarily lead to civil society if the procedure can be manipulated, and neither does legal formalization mean "the rule of law" if it has no reference to judicial independence (Markoff, 1996). Data indicate that the popular elections for village councils and people's congresses at town and county levels were often directly or indirectly intervened by the party-state apparatuses, and because of this, the implemented democracy is far from prevailing in China's grassroots politics (Ford, 2008; Kennedy, 2002). All the above evidence tells us that unless there is a substantial reform in Chinese political institutions, the on-going grassroots democratization will unlikely alter the fundamental base of socio-legality in which the ruling party dominates.

### *Conclusion*

It is an undeniable fact China has made great strides in socio-legal reform, yet the above evidence shows that the change does not lead the Chinese government to adopt the Western-style formal legality, but to work out its own way to ensure its domination. Serious obstacles have remained to the formation of a rule of law system and progress has proven uneven. Recent data collected from the survey of litigants in Shanghai (Pei et al., 2009) are illuminating in terms of how companies and individuals react to the reformed socio-legality and how they feel about the court as well as its limited judicial power in conflict resolution. Out of 190 companies surveyed, in responding to the question of "Why did you choose a law suit as the way to resolve the issue". only 57 (30%) perceived the litigation as the effective way whereas 79 (42%) chose not to answer the question for unlisted reasons and such high non-response rate may indicate that companies chose not to respond because they were uncertain about any of listed answer choices. Out of 53 companies surveyed, in responding to the question of "What was the actual result of the court's enforcement?" 11 (21%) responded by saying the court "completely enforced the terms of my request". 10 (19%) chose the answer of "completely failed to meet the terms of my requested enforcement". 15 (28%) said "it met less than 1/3 of the terms of my request", 10 (19%) said "It met between 1/3 and 2/3 of the terms of my request". and 7 (13%) said "it met 2/3 or more of the terms of my request." The above data indicate that the majority of company litigants were not satisfied with the court experience.

Out of 214 individuals surveyed, in responding to the question of "What do you think the main factor was in losing your case?" only 3 (1%) responded by saying that "my argument did not have a legal basis". and 40 (19%) thought that "the judge gave the other party favorable treatment" but 142 (66%) chose not to answer. This high no-response rate may indicate that the majority of individual litigants were not so happy about their court experience but probably just wanted to keep it to themselves rather than to disclose it in an

open survey. In addition, data from the survey on individuals are highly consistent with the one on companies in terms of their responding to similar questions: out of 214 individuals, 12 (6%) answered that “my argument did not have a legal basis” and 15 (8%) said that “the judge gave the other party favorable treatment” and 132 (70%) chose not to answer for unlisted reasons, and even after the data was adjusted to exclude those who won the cases the non-response rate remained consistently very high (see Pei et al., 2009).

While the majority of litigants are satisfied with legal resources they can use to resolve the dispute, they are generally unhappy about the court decision, and thought the judgment was biased. Interestingly enough, most respondents chose not to answer in order to conceal their real feeling or a sense of uncertainty. Almost half of the companies surveyed indicated that they would use whatever means it takes to bribe judges and influence their decisions before the trial starts. My interpretation of the overall data is a bit different from Pei and his collaborators in the Shanghai Academy of Social Sciences who conducted the survey. Despite a mixed reaction from both individual and corporate litigants, the data in general reveal a clear pattern of how litigants feel about the court behavior in a “double-track” socio-legality: there is more uncertainty than certainty and more doubt than trust whenever the case is ruled.

China's socio-legality infrastructure is indeed in a critical transition. While economic legislation has continued apace with the demands of the international marketplace, the Chinese Communist Party seems not yet ready to embrace any radical legal reform that might prove detrimental to its authority. Instead, party central authorities have been taking cautious steps to restructure its legal system, making it more adaptable to the constantly changing environment. From the institutional point of view in the sociology of law, law represents a double legality as the technical apparatus for the exercise of state power on the one hand, and as a construct of political ideology on the other (Cotterrell, 1983). All evidence indicates that the “double-track” legality in China has continued with steady incremental development with no end in sight: while all new laws and regulations promulgated in recent years, if examined carefully, are still oriented in larger proportion toward economic and commercial areas, the on-going socio-legal reform in political arena aimed at revitalizing the party's organizational grip over grassroots society only helps to re-energize rather than abandon the party-ruled institutions of social control.

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