

THE SHAPE OF CHINESE LAW

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Following the Simmelian tradition of social geometry, this essay proposes an analytical framework for understanding the legal system's social forms. It analyzes the basic social forms of the contemporary Chinese legal system in terms of its social structure, operational mode, ideological conflict, and cultural essence. This analytical framework fully recognizes the contradictions and conflicts inherent to the legal system, and it adopts a perspective of social interaction rather than social integration to examine its structure and change. The essay is both an empirical analysis of the social forms of Chinese law and an effort of theoretical innovation for the sociology of law.

INTRODUCTION

What is the “shape” of law? It includes not only the social structure of a formal legal system, but also this structure's internal logic of operation, as well as the cultural and historical processes by which the structure and its logic grow and transform in a given national context. Since the slogan of “constructing the legal system” (*fazhi jianshe*) was proposed in the late 1970s, China's contemporary legal reform has been ongoing for more than three decades. Until today, discourses regarding the “incompleteness” (*bu wanshan*) or “unhealthiness” (*bu jianquan*) of China's legal system still dominate scholarly writings and media reports. Although notable progress in legislation has been made, the implementation of law remains problematic in many ways. Nevertheless, with the collective efforts of China's legal professionals, the formal legal system of the People's Republic of China (PRC) has been mostly established, and its internal logic of operation has gradually become clear. Therefore, how to understand and summarize the basic social forms of the contemporary Chinese legal system will become a key question that Chinese jurisprudence must face in the near future.

In this essay, I will follow the Simmelian tradition of social geometry and provide

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a preliminary sociolegal analysis on the basic social forms of the Chinese legal system.¹ The fundamental insight of this sociological perspective is to emphasize the importance of social forms, or the spatial organization and temporal change of society, in sociological inquiry, as well as the structuring effect of social interaction on such social forms. Just like geometry leaves the inquiries on the contents of nature to physics, chemistry, and other related disciplines, Georg Simmel argues that sociology should also leave the inquiries on the contents of society to economics, psychology, and other related disciplines, but focus on studying social forms. In contemporary American sociology, although the concept of “social geometry” is not frequently used in the mainstream academic discourses, the legacy of Simmel can be found in many theories and empirical studies on the relationship between social structure and social process.² In the sociology of law, however, there are few studies on the social forms of law except for Luhmann’s social system theory and Black’s behavioral theory.³ In this sense, this essay is not only a sociological analysis of the social forms of Chinese law, but also an effort of innovation in sociolegal theory.

The analytical framework that I develop here has four components: (1) social structure: the basic social structure of the legal system, including its internal rules of operation and the communicative forms with its external environment; (2) operational mode: the processes of structural differentiation and integration between the legal system’s various institutions; (3) ideological conflict: the conflict of the basic ideologies and guiding principles that the legal system’s structural differentiation and integration follow; and, (4) cultural essence: the cultural and historical traditions underneath the legal system’s formal structure. To some extent, this analytical framework looks similar to the “AGIL paradigm” in Talcott Parsons’s structural functionalism,⁴ but the fundamental difference is that the perspective of social geometry does not consider the legal system, or any other social system, to be a fully integrated and smoothly functioning machine. Instead, it recognizes the irreconcilable contradictions and conflicts within this system and adopts a perspective of social interaction rather than social integration in examining its structure and change.

1. GEORG SIMMEL, *GEORG SIMMEL ON INDIVIDUALITY AND SOCIAL FORMS*, ed. D. N. Levine, Chicago: University of Chicago Press (1971).

2. See, for example, DONALD N. LEVINE, ELLWOOD B. CARTER, AND ELEANOR MILLER GORMAN, *Simmel’s Influence on American Sociology*, *AMERICAN JOURNAL OF SOCIOLOGY* 81: 813-845, 1112-1132 (1976). DONALD BLACK, *Dreams of Pure Sociology*, *SOCIOLOGICAL THEORY* 18: 343-367 (2000). JOHN L. MARTIN, *SOCIAL STRUCTURES*, Princeton, NJ: Princeton University Press (2009).

3. NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM*, trans. K. A. Ziegert, New York: Oxford University Press (2004). DONALD BLACK, *THE BEHAVIOR OF LAW*, New York: Academic Press (1976).

4. TALCOTT PARSONS, *THE SOCIAL SYSTEM*, Glencoe, IL: Free Press (1951). The “AGIL paradigm” refers to “Adaptation,” “Goal Attainment,” “Integration,” and “Latency Pattern Maintenance.” The four components constitute the basic functional requirements of a social system.

Any holistic theoretical account of the legal system is a risky intellectual adventure, because it could neither comprehensively analyze all the empirical problems nor conduct causal hypothesis testing as in the positive sciences. However, following the writing style of Fei Xiaotong's classic account of the structure of traditional Chinese society,⁵ in this essay I will avoid using theoretical concepts that are too abstract or empirical data that are too concrete, but seek to outline the basic social forms of the contemporary Chinese legal system by relatively plain language and a parsimonious analytical framework.

I. INTERNALLY ROUND, EXTERNALLY SQUARE

The most basic social structure of the Chinese legal system can be summarized in four words: internally round, externally square (*nei yuan wai fang*). "Externally square" refers to the fact that the legal system's external structure is hard and edgy, resembling a "fortress besieged" (*wei cheng*). It is a difficult predicament for the communication between actors inside and outside the system: actors outside cannot easily access the system, while actors inside cannot easily reach out. "Internally round" refers to the fact that the legal system's internal rules of operation are soft, flexible, and convenient for communication. The relations among actors are complex and entangled. The primary way of conflict resolution emphasizes coordination and avoids confrontation. This "internally round, externally square" structure has been gradually constituted in the six decades of socialist legal practice in China since the 1940s. The "internally round" structure has its origin from the judicial practice in the Communist areas before 1949 and it has maintained a relatively stable operational mode until today. The "externally square" structure has been gradually constructed during China's legal reform since the late 1970s. Its basic outlook has been formed but not yet fully institutionalized, and its connection with the "internally round" structure remains problematic.

The history of the "internally round" structure can be traced to the "Ma Xiwu trial mode" of the Shan-Gan-Ning Communist Area in the 1940s. This trial mode is characterized by the mass line (*qunzhong luxian*) of judicial practice, namely, to move the court to people's workplaces and homes and to carefully listen to people's suggestions and critiques on judicial work. As Judge Ma Xiwu, whose work style best represents this trial mode, put it, "The real opinions of the people are superior to the law."⁶ After the

5. FEI XIAOTONG (费孝通), *FROM THE SOIL: THE FOUNDATIONS OF CHINESE SOCIETY* (乡土中国生育制度), trans. Gary G. Hamilton and Wang Zheng, Berkeley and Los Angeles, CA: University of California Press ([1947] 1992).

6. Fan Yu (范愉), *A Brief Analysis On The Ma Xiwu Trial Mode--The Constitution And Fate Of A Civil Dispute Mode* (简论马锡五审判方式——一种民事诉讼模式的形成及其命运), *TSINGHUA LAW REVIEW* (清华法律评论), (1999,2).
Jiang Shigong (强世功), *The Organizational Network of Power and the Governmentality of Law: Ma Xiwu Trial Mode and the New Tradition of Chinese Law* (权力的组织网络与法律的治理化——马锡五审判方式与中国法律的新传统), PEKING

PRC was founded in 1949, this legal ideology, which emphasizes external communication and downplays legal rules, can be observed in various places of the Chinese legal system. Its best manifestation is the word “coordination” (xie tiao) that often appears in public legal discourses. In criminal cases, the police, the procuracy, and the court must coordinate. In civil cases, judges and lawyers must coordinate. In lawmaking, the people’s congress and other state agencies must coordinate. In the judicial process, upper-level and lower-level courts must also coordinate... But what is “coordination”? Its definition cannot be found in the text of any formal law or regulation. In legal practice, coordination implies the flexible use of formal legal rules for the purpose of reaching compromises. It makes the boundaries of these rules more elastic and, when necessary, it can even violate, ignore, or change the rules.⁷ In other words, rules are fixed, but people are flexible. Instead of fighting to bloodshed according to cold legal text, it is better to coordinate with one another, balance mutual interests and needs, and achieve the optimal results for everyone in the system.

In China’s legal practice, why is coordination often better than the strict application of legal rules? This leads to a fundamental question in jurisprudence, namely, whether the purpose of law is to resolve disputes or to establish rules.⁸ If dispute resolution is law’s only ultimate goal, then coordination indeed has its advantages over the strict application of legal rules in reconciling conflicts and reaching consensuses. Take civil dispute resolution as an example. Why is mediation (tiaojie) so important in China’s civil procedure? It is because, in comparison to the “black or white” judicial decisions, the seemingly eclectic mediation procedure not only reduces the judicial costs, but also effectively prevents the litigants from appealing or even petitioning, and thus it is beneficial for maintaining social stability. The problem, however, is that dispute resolution is only one purpose of the making and implementation of law. An equally important purpose is to establish legal rules, that is, to strictly implementing the law and to let both officials and ordinary citizens develop the habit of obeying the law and have good expectations on the consequences of law.⁹ The coordination that widely exists

UNIVERSITY LAW REVIEW (北大法律评论), (2001,2). Li Juan (李娟), *An Analysis on the Origin of the Ma Xiwu Trial Mode* (马锡五审判方式产生的背景分析), LEGAL SCIENCE (法律科学), (2008,2). ZHANG XIPO (张希坡), MA XIWU AND MA XIWU TRIAL MODE (马锡五与马锡五审判方式), (2013).

7. Hou Meng (侯猛), *The Political-Legal Governance in the Context of Judicial Reform: A Case Study of the Basic-Level Political-Legal Committee* (司法改革背景下的政法治理方式——基层政法委员会个案研究), JOURNAL OF EAST CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW (华东政法学院学报), (2003,5). Hou Meng (侯猛), *The Attitude and Expression of Petitioners at the Supreme People’s Court* (最高法院访民的心态与表达), PEKING UNIVERSITY LAW JOURNAL(中外法学), (2011,3).

8. ZHU SULI (苏力), BRINGING LAW TO THE COUNTRYSIDE: A STUDY ON THE GRASSROOTS JUDICIAL SYSTEM IN CHINA (送法下乡: 中国基层司法制度研究), (2000).

9. Ling Bin (凌斌), *Two Roads of the Rule of Law* (法治的两条道路), PEKING UNIVERSITY LAW JOURNAL (中外法学), (2007,1).

in China's legal practice is fundamentally incompatible to establishing rules, because the more coordination, the more difficult is the making and implementation of law. Nevertheless, in the past six decades of recent Chinese legal history, dispute resolution has received more attention from both the state and citizens than the establishment of rules. Accordingly, the value of coordination has been fully realized in legal practice.

Coordination not only means the flexible use of legal rules, but also implies the permeation of power into the legal system. In any specific legal event (e.g., legislation or the judicial process), the power relations among various actors are always imbalanced. The stronger actors can exert pressures on the weaker actors and force the latter to compromise in order to achieve solutions beneficial to the former. In criminal cases, for example, the coordination among the police, the procuracy, and the court is prevalent, but the police have always been the "big brother" (*lao da ge*) in China's political-legal system (*zhengfa xitong*). The head of the local political-legal committee, a Communist Party organ that supervises the judicial and law enforcement agencies, is often the local police chief. Consequently, the police's opinions are more likely to dominate in the process of coordination among the three agencies. In many situations, the procuracy and the court are merely assisting their "big brother" to complete the two procedural steps of prosecution and trial.¹⁰ In the civil mediation procedure, judges also use strategies with compulsory elements, such as persuasion, procedural delay, and the threat of unfavorable judgment, to force litigants to accept mediation. Facing judges who hold the judicial power, litigants are arguably weaker in their power relations and thus they often have to accept the judges' advice.¹¹ Therefore, the "internally round" structure of the Chinese legal system is not harmonious, but full of conflicts of interest and power struggles. These power relations, however, are often disguised by the seemingly harmonious case outcomes.

In comparison to the "internally round" structure, which to some extent reflects China's local historical and cultural roots, the "externally square" structure of the Chinese legal system has been mostly constituted in the three decades of legal reform since the late 1970s. Its main characteristics are the large-scale transplantation of foreign legal institutions and, consequently, the decoupling between formal legal institutions and everyday legal practice. The starting point of China's contemporary legal reform is the serious reflections upon the "legal nihilism" during the Mao era. In the 1950-1970s,

10. JEROME A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963*, Cambridge, MA: Harvard University Press (1968). SHAO-CHUAN LENG AND HUNDAH CHIU, *CRIMINAL JUSTICE IN POST-MAO CHINA*, Albany, NY: State University of New York Press (1985). Sida Liu and Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law*, *LAW & SOCIAL INQUIRY* 34: 911-950 (2009).

11. Zhao Xudong (赵旭东), *Examining the Compulsory Element of Judicial Mediation Rationally* (理性看待法院调解的强制性因素), *THE JURIST* (法学家), (2007,6).

China's entire legal system collapsed in the waves of political campaigns. Lawyers as a profession were labeled "rightists" in the Anti-Rightist Campaign in 1957, and the judicial and law enforcement agencies were destroyed during the Cultural Revolution in 1966-1976.¹² As a result, when a formal legal system that could protect citizens' basic legal rights and facilitate the economic reform was to be established in the 1980s, "local resources" (bentu ziyuan) were scarce.¹³ On the one hand, the socialist legal system had never been established in the first thirty years of the PRC; on the other hand, the legal rules and institutions of the Republican era before 1949 were abolished for ideological reasons. Therefore, the only option at the beginning of China's legal reform was to transplant foreign legislative and institutional experiences on a large scale. The consequence of the continuous institutional transplantation from the mid-1980s to the present is the Westernization of the external structure and academic knowledge of the Chinese legal system, which has produced an increasingly large gap between the legal system and social life – this is what I mean by the "externally square" structure.¹⁴

The "externally square" structure has two important characteristics: (1) the symbolic transplantation of legal institutions; and, (2) the technical devolution of legal knowledge.¹⁵ The symbolic transplantation of legal institutions refers to the serious decoupling between exogenous legal institutions and China's legal practice. The primary function of many transplanted institutions is to gain global legitimacy for China's legal system, not to be applied to specific cases or events. For instance, to attract foreign investors, the legislative activities in the early years of China's economic reform emphasized legal statutes related to foreign and economic legal affairs. Some laws promulgated (e.g., the 1986 Interim Bankruptcy Law) were almost never implemented in practice,¹⁶ while other laws closely related to citizens' basic legal rights (e.g., Labor Law, Administrative Procedure Law, and State Compensation Law) had not been made until the 1990s. Meanwhile, in China's judicial reform, neither the change of judges' attire from military uniform to the robe nor the transition from the inquisitorial to the adversarial trial mode has fundamentally solved the prevalent procedural problems such as "judgment before trial" (xian ding hou shen). They have not established the authority of judges either, but become merely symbols for the legitimacy of the judicial reform. In other words, the transplanted legal institutions are often not for practical use, but for

12. CAI DINGJIAN(蔡定剑), HISTORY AND TRANSFORMATION: THE CONSTRUCTION OF THE LEGAL SYSTEM IN NEW CHINA (历史与变革——新中国法制建设的历程), (1999).

13. ZHU SULI (苏力), THE RULE OF LAW AND ITS LOCAL RESOURCES (法治及其本土资源), (1996).

14. Sida Liu (刘思达), *With or Without the Law: The Changing Meaning of Ordinary Legal Work in China (1979-2003)*, (当代中国日常法律工作的意涵变迁 (1979-2003)), CHINA SOCIAL SCIENCES(中国社会科学), (2007,2).

15. LIU SIDA(刘思达), THE LOST POLIS: TRANSFORMATION OF THE LEGAL PROFESSION IN CONTEMPORARY CHINA (失落的城邦: 当代中国法律职业变迁), (2008), at 3-19.

16. ZHU SULI (苏力), *supra note* 13, at 92-95.

display only. The consequence is the creation of a hard and elegant shell for China's legal system, which covers all the everyday practices that violate the principles of the rule of law and procedural justice.

The technical devolution of legal knowledge refers to the widening gap between the academic knowledge of Chinese legal professionals and its local social context. The academic knowledge is highly technical, characterized by the rigid memorization of legal texts and the blind admiration of Western rule of law ideals. The origin of this technical devolution lies in legal research. From the mid-1980s to the present, an "appropriation and interpretation" research style has become dominant in the Chinese legal academia, that is, to translate foreign legislations and scholarship on a massive scale and then develop local scholarship by repeatedly interpreting the translated texts. Such a research style not only turned a large number of Chinese legal scholars and law students into semi-professional translators, but also constrained the emergence of original legal research. Consequently, when Zhu Suli raised the basic question "What is your contribution?" in the Preface of his groundbreaking *The Rule of Law and Its Local Resources* in 1996, it easily embarrassed most Chinese legal scholars at the time.¹⁷ More importantly, this research style directly influenced legal education. It made the professional knowledge that law students learned in school a highly abstract technical knowledge, which lacks both theoretical innovation and empirical practicality. As soon as law graduates enter the workplace, the weaknesses of this highly technical education are fully exposed. In recent years, with the increasing impact of the national judicial examination on legal education, the orientation of Chinese legal education has become more or less localized. However, its current emphasis is still on the memorization and interpretation of legal texts rather than the critical and reflective legal reasoning, which is the most important training for legal professionals.¹⁸

With the combined effects of the symbolic transplantation of legal institutions and the technical devolution of legal knowledge, a large gap has been formed between the ideas and behavior of Chinese legal professionals and ordinary Chinese people's understanding and expectation of the legal system. On the one hand, legal professionals with formal legal education have developed a sense of superiority based on their technical knowledge and often look down upon lay people's legal views and modes of behavior. On the other hand, in legal practice their expertise cannot effectively respond to people's legal needs. To some extent, the continuing fragmentation of the legal services market and the declining status of the court in dispute resolution reflect ordinary Chinese people's lack of trust in the legal profession, including courts and lawyers.

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17. ZHU SULI (苏力), *supra* note 13, at V-VII.

18. Zhu Suli (苏力), *The Reasoning of Legal Professionals?* (法律人思维?), PEKING UNIVERSITY LAW REVIEW (北大法律评论), (2013,2). ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"*, New York: Oxford University Press (2007).

Accordingly, when in disputes, they sometimes are more inclined to use alternative legal service providers or the letters and petitions (*xinfang*) system to solve problems.¹⁹

Therefore, the gradual formation of the “externally square” structure has increased the distance between the legal system and social life and decreased the status and importance of legal professionals in the larger system of dispute resolution. The emergence of phenomena such as “proactive adjudication” (*nengdong sifa*) and “grand mediation” (*da tiaojie*) in the Chinese judiciary suggests the ineffectiveness of the seemingly professional and institutionalized formal legal system in responding to the legal needs of the Chinese state and society.²⁰ Consequently, the “internally round” structure has become even more important in the system’s practical operation. Arguably, the “internally round, externally square” structure of the Chinese legal system has strong inherent tensions, which I refer to as the ideological opposition between populism and professionalism. The third section of this essay will explain it in detail. Prior to that, I will analyze the basic operational mode of this social structure in the next section. It is also summarized in four words: three positions, one unity.

II. THREE POSITIONS, ONE UNITY

As an operational mode, “three positions, one unity” (*san wei yi ti*) refers to the similar patterns of structural differentiation and integration that exist in many agencies and institutions of the Chinese legal system. First of all, the same legal affair is often related to multiple agencies or institutions – coincidentally, in practice there are often three of them, such as the police, the procuracy, and the court in criminal cases; people’s mediation, administrative mediation, and judicial mediation in civil dispute resolution; or lawyers, basic-level legal service, and citizen representation in the representation of ordinary litigation. Secondly, because these agencies or institutions occupy different structural positions in the legal system, there are inevitable competitions and conflicts of interest among them. Finally, those competitions and conflicts are not unresolvable, but often coordinated through the macro legal policies of the state or the orders of the superior leaders and agencies, which lead to the unique phenomenon of “three positions, one unity.” In this section, I will discuss this operational mode of the Chinese legal

19. Chen Baifeng (陈柏峰), *Repeated Litigation, Letters and Petition, and the Legal Tradition of New China: The Problem of Repeated Litigation in the Transitional Period of Law* (缠讼、信访与新中国法律传统——法律转型时期的缠讼问题), PEKING UNIVERSITY LAW JOURNAL (中外法学), (2004,2). LIU SIDA (刘思达), THE LOGIC OF FRAGMENTATION: AN ECOLOGICAL ANALYSIS OF THE CHINESE LEGAL SERVICES MARKET (割据的逻辑: 中国法律服务市场的生态分析), (2011). CARL MINZNER, *Xinfang: Alternative to Formal Chinese Legal Institutions*, STANFORD JOURNAL OF INTERNATIONAL LAW 42: 103-179 (2006).

20. Zhu Suli (苏力), *On Proactive Adjudication and Grand Mediation* (关于能动司法与大调解), CHINESE LEGAL SCIENCE (中国法学), (2010,1).

system in three aspects, namely, criminal cases, civil dispute resolution, and litigation representation.

In China's criminal procedure, the relationship among the police, the procuracy, and the court is "mutual coordination, mutual constraint" (*huxiang peihe, huxiang zhiyue*). In the first three or four decades since 1949, the police had been the single dominant player in criminal cases, while the procuracy and the court played only complementary roles. In most situations, as long as the police arrested someone, the procuracy would prosecute him or her and the court would make a guilty verdict. It was not until the Criminal Procedure Law was revised in 1996 that the concept of "criminal suspect" (*fanzui xianyi ren*) was officially established in China's criminal justice system – before that, all the suspects who were under the compulsory measures of the police were addressed as "criminals" (*fanzui ren*). In such highly imbalanced power relations among the three agencies, it was impossible to realize "mutual constraint"; instead, both the procuracy and the court were mostly coordinating with the police to strike crimes.²¹

However, since the 1990s, with the increasing professionalization of procurators and judges, as well as the procedural law reforms, the social distance between the police and the procuracy or the court began to increase. In criminal procedure, many measures for supervising the police's investigation work have been established. Furthermore, the ideologies of judges and law enforcement officials have also become divergent, not only focusing on striking crimes, but also increasingly emphasizing the due process of law and human rights protection. Meanwhile, the economic reform and opening up led to a significant increase in the number of civil and commercial cases. Today, in most Chinese courts, civil and commercial cases have replaced criminal cases as the primary case types. Accordingly, the court's main social function has shifted from the "knife handle" (*dao ba zi*) of the proletariat dictatorship to a professionalized and bureaucratic judiciary.²² Although the procuracy's central task is still criminal prosecution, its work jurisdiction has also expanded to other areas, such as anti-corruption and the supervision of civil and administrative cases. The independence of the procuracy from the police has been greatly strengthened too.

In sum, while the "three positions, one unity" operational mode remains constant as a social form, the power relations among the police, the procuracy, and the court have experienced notable changes in the past two decades. Although the police's "big brother" status has not been fundamentally challenged, in many situations it can no longer conduct criminal investigation without supervision as before – from detention and arrest to interrogation and taking evidence, every task of the police could potentially be supervised by the procuracy and/or the court. Meanwhile, with the trial reform from

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21. *Supra note 10.*

22. Liu Sida (刘思达), *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court* (法律移植与合法性冲突: 现代性语境下的中国基层司法), *SOCIOLOGICAL STUDIES* (社会学研究), (2005,3)

the inquisitorial mode to the adversarial mode, the procuracy's prosecution has also been more constrained by judges and defense lawyers than before. Although the acquittal rates in criminal cases remain low in China (as in many other civil law countries), it is already common for the procuracy to withdraw its prosecution in the judicial process.²³

The withdrawal procedure in China's criminal cases well represents the nature of the "three positions, one unity" operational mode. Withdrawal (*che su*) refers to the criminal procedural rule that, during the period between the prosecution and the court's sentence, the procuracy can decide to withdraw the charges against all or some defendants due to certain legal causes.²⁴ This is supposed to be a procedural rule that benefits the defendant and facilitates the procuracy's self-correction of errors, but in the criminal justice practice, it has evolved into a substitute for acquittal verdict and been prevalently used across the nation. The reason for this practice is that, when the prosecution has insufficient evidence in the criminal process, if the court gives an acquittal verdict, then the procuracy and the police would have to provide state compensation to the defendant, and their work performances would also be harmed. In contrast, if the court simply asks the procuracy to withdraw the prosecution, then the case would be "digested" within the criminal justice system – not only no state compensation is necessary, but it could also disguise all the illegal practices (e.g., torture) in the process of investigation and prosecution.²⁵

The prevalent use of the withdrawal procedure in criminal cases suggests that, although the power relations among the police, the procuracy, and the court have shifted in the past two decades, the basic operational mode of "more coordination than constraint" has not been fundamentally changed. When criminal prosecution has defections, the three agencies would coordinate with one another first and seek a solution that benefits all – this is a direct manifestation of the "internally round" structure discussed in the previous section. For criminal defendants and their defense lawyers, however, withdrawal is not the same as acquittal. It neither confirms the innocence of the defendant nor gives state compensation according to the law. The value of lawyer's defense also cannot be fully realized. In other words, under this "three positions, one unity" operational mode, both defendants and defense lawyers are excluded from the core decision-making process of the criminal justice system. They face a hard "externally square" structure and cannot influence how this system works internally. In many situations, they have no choice but to passively accept the result of the coordination among the police, the procuracy, and the court.

In civil dispute resolution, a similar "three positions, one unity" operational mode

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23. ZUO WEIMIN (左卫民) (ed.), *EMPIRICAL RESEARCH ON THE OPERATIONAL MECHANISMS OF CHINA'S CRIMINAL PROCEDURE* (中国刑事诉讼运行机制实证研究), (2009).

24. Article 459 of the 2012 People's Procuracy's Criminal Procedure Rules (Interim) (人民检察院刑事诉讼规则(试行)).

25. Sida Liu and Terence C. Halliday, *supra note 10*.

among people's mediation, administrative mediation, and judicial mediation is also observed. According to the law, those three mediation procedures are conducted by three agencies at different administrative levels, namely, people's mediation committee (renmin tiaojie weiyuanhui), the justice agency (sifa suo), and the court. People's mediation committee is at the most grassroots neighborhood and village level, the justice agency is at the street and township level, and the basic-level court is at the district and county level – the three agencies have distinct structural positions in the state apparatus.²⁶ In terms of personnel composition, people's mediators (renmin tiaojieyuan) in people's mediation committees are often recruited from the same village or neighborhood, judicial assistants (sifa zhuliyuan) in justice agencies are staff members of the judicial administrative system, and judges in courts belong to the judicial system. In terms of work procedure, judicial mediation is part of the formal civil procedure presided by judges and, as soon as the mediation agreement is reached, neither party could appeal to the upper-level court except in special circumstances prescribed by the law.²⁷ In comparison, the mediation of justice agencies and people's mediation committees is more flexible. It can be conducted either by judicial assistants and/or people's mediators, or by the relatives, neighbors, and colleagues of the parties, or by other people with certain knowledge or experience. After the mediation agreement is reached, if the parties disagree on the implementation of the agreement or its content, either party could still file a lawsuit to court.²⁸

It is evident that, under the common name of “mediation,” people's mediation committee, the justice agency, and the court occupy distinct structural positions in civil dispute resolution. People's mediation committee is located at the most grassroots level of society and in charge of the large number of everyday disputes in urban neighborhoods and rural villages. The justice agency is located at the bottom of the state administrative system (i.e., streets and townships). It provides guidance on the work of people's mediation committees but also directly handles some disputes. In the dispute resolution practice of some localities, judicial assistants are also part-time people's mediators.²⁹ When conducting fieldwork in northwest China several years ago, I heard an expression “small matters do not go beyond the village, big matters do not go beyond the township” (xiaoshi bu chu cun, dashi buchū xiangzhen), which vividly characterizes

26. He Yongjun (何永军), *Rural Social Change and the Transformation of People's Mediation* (乡村社会嬗变与人民调解制度变迁), *LAW AND SOCIAL DEVELOPMENT* (法制与社会发展), (2013,1).

27. Articles 93-99 of the 2012 Civil Procedure Law (民事诉讼法).

28. Articles 20 and 32 of the 2010 People's Mediation Law (人民调解法).

29. Fu Yulin (傅郁林), *A Preliminary Report on the Conditions of China's Basic-Level Legal Service: The Case of Rural Basic-Level Legal Service Firms* (中国基层法律服务状况的初步考察报告——以农村基层法律服务所为窗口), *PEKING UNIVERSITY LAW REVIEW* (北大法律评论), (2004,1). You Chenjun (尤陈俊), *Township Judicial Agencies Embedded in the Modernization of the Legal System* (嵌入法制现代化进程的乡镇司法所), *LEGAL SCIENCE EPOCH* (法学纪元), (2005,2).

the logic of operation for this grassroots dispute resolution system.³⁰ In comparison, the court's civil mediation procedure processes a much smaller number of disputes, but those cases are usually more complex and technical. When litigants file lawsuits, the results that they seek are often judicial decisions rather than mediation agreements, and only during the process of litigation they would gradually accept the result of mediation with judges' persuasion.

Nonetheless, the boundaries among these three seemingly very different mediation procedures often get quite blurry in practice because of the long-standing and evolving notion of "grand mediation" in China's judicial policies. "Grand mediation" (da tiaojie) refers to the integration and united action among people's mediation, administrative mediation, and judicial mediation. It creates a work system that is "not only fully working but also mutually connected and coordinated."³¹ In other words, "grand mediation" breaks down the institutional boundaries among the three mediation procedures with the ultimate goal of resolving disputes and maintaining stability. It uniformly files social disputes as cases and distributes them to different mediation channels according to the dispute types. Following this logic, innovative institutions such as "mediation supermarkets" (tiaojie chaoshi) or "grand mediation coordination center" (da tiaojie xietiao zhongxin) emerged in some localities, and some case filing divisions in court even adopted "one-stop service" (yizhanshi fuwu) resembling administrative agencies. Under such a dispute resolution policy, the "mutual coordination" among the court, the justice agency, and people's mediation committee has been greatly strengthened and the relations among them display the similar "three positions, one unity" operational mode as the three agencies in criminal cases.

What are the consequences of this "three positions, one unity" grand mediation model to the everyday work of Chinese judges? The most important is that judges in civil cases are not strictly constrained by formal legal rules anymore, but can selectively use the law according to the particular needs of dispute resolution. To adapt a sociological term, it treats the law as a soft "cultural tool kit" rather than a hard formal rule system.³² Judges' prevalent use of the threat of unfavorable judgment to force mediation, as mentioned in the previous section, is based on the assumption that they have flexibilities and discretions when applying legal rules. Meanwhile, a "back-to-back" (bei kao bei) mediation method also long exists in China's judicial process, that is, the judge does not face the plaintiff and the defendant in court at the same time, but communicates

30. Liu Sida(刘思达) and Wu Hongqi(吴洪淇), *Dispute Resolution and the System of Professions in The Frontier of the Legal Services Market* (法律边疆地区的纠纷解决与职业系统), *SOCIOLOGICAL STUDIES* (社会学研究), (2010,1).

31. Zhu Suli(苏力), *supra* note 20.

32. ANN SWIDLER, *Culture in Action: Symbols and Strategies*, *AMERICAN SOCIOLOGICAL REVIEW* 51: 273-286 (1986).

with them separately, during the mediation process.³³ The advantage of “back-to-back” mediation is that it avoids the direct conflict between the two parties and thus gives judges more room for using different strategies to persuade the litigants to accept the mediation solution. Nevertheless, when the conflict between the litigants is transformed into the bargaining between the judge and the litigant, “back-to-back” mediation also provides the conditions for the judges’ use of compulsory means during the mediation process and thus might lead to violations of the voluntary mediation principle prescribed in the Civil Procedure Law. Furthermore, the long-standing performance targets in the judicial system, such as “mediation rate” (tiaojie lǜ) or “mediation and withdrawal rate” (tiaochelǜ), also provide institutional incentives for judges’ use of compulsory means in mediation.³⁴

In such a mode of dispute resolution, the professional knowledge of judges is important, but even more important is their practical experiences and communicative abilities with litigants. Zhu Suli summarizes the necessary qualities for judges in mediation work as the following: “the person’s age, gender, patience, temperament, social experiences, moral authority (justice), understanding of the social context and the litigants’ thoughts, familiarity of local dialects (if litigants speak dialects), vivid and engaging language, ability to find hidden interests, financial calculation (for the litigants), ability to propose various arrangements, and a certain degree of ‘handling problems not according to the law’ with the assumption of not violating the basic social justice and reason, etc.”³⁵ The re-emphasis of the “Ma Xiwu trial mode” in contemporary civil procedural practice suggests the practical rather than technical orientation of the judicial expertise. Under the general background of “harmonious adjudication” (hexie sifa) and “proactive adjudication” (nengdong sifa), this practical orientation reflects the “internally round” structure of the Chinese legal system and it even has an impact on lawyers. Lawyers’ position in “grand mediation” is ambivalent: on the one hand, if they actively seek to maximize the interests of their own clients and disturb the smooth operation of the mediation process, then it could lead to the antipathy of judges and unfavorable results for their clients; on the other hand, if lawyers actively cooperate with judges in the mediation process, then they could face complaints from clients or even lead to ethical problems.³⁶ In any case, lawyers’ professional knowledge has very limited use in mediation. Sometimes judges would even consider lawyers as the main obstacle for reaching mediation agreements and even try to persuade litigants to change

33. Liu Sida(刘思达), *supra note 22*.

34. CARL MINZNER, China’s Turn against Law, *AMERICAN JOURNAL OF COMPARATIVE LAW* 59: 935-984 (2011).

35. Zhu Suli(苏力), *supra note 20*, at 10.

36. Li Xueyao(李学尧), *The Non-Moral Quality: Dilemma of Modern Legal Ethics* (非道德性: 现代法律职业伦理的困境), *CHINA LEGAL SCIENCE* (中国法学), (2010,1).

or dismiss their lawyers.³⁷

In contrast to the dilemma of lawyers in civil mediation is the emergence of various “lay judges” (*bianwai faguan*) in the judicial process, that is, to use non-legal professionals to complement or even replace judges in mediation work. The theoretical basis of this practice is “alternative dispute resolution” (ADR)³⁸, but empirically speaking, it represents the influence of the logic of people’s mediation and administrative mediation on judicial mediation under the “grand mediation” model. These non-legal professionals do not have law degrees, but they can “use the attitude that people accept to hear claims, use the way that people agree with to investigate facts, use the language that people understand to explain the law, and use the method that people trust to reduce antagonism, improve understanding, and resolve disputes”³⁹ – those are precisely the qualities that legal professionals who are influenced by the “externally square” structure and distant from ordinary social life do not possess. From this point of view, the “three positions, one unity” operational mode in civil dispute resolution is the externalization of the Chinese legal system’s “internally round” structure. On the one hand, it is beneficial for reducing the gap between the legal system and social life; on the other hand, it also violates several procedural requirements of civil litigation from case filing to hearing and thus becomes the target of many criticisms by legal scholars and law practitioners.

In China’s litigation representation, a similar “three positions, one unity” operational mode also exists. Lawyers are often considered the only official profession for litigation representation. However, in China’s recent legal history since 1949, lawyers have never acquired the monopoly over litigation representation. First, influenced by the Soviet Union, the Chinese Communist Party had established the “citizen representation” (*gongmin daili*) system in the legislation of Communist areas even before the PRC was founded. In the PRC Organic Law of the People’s Courts, the specifics of this system are clarified and remain widely used in the judicial practice. The people who do “citizen representation” can be the close relatives of the litigant, be recommended by the relevant social organizations or the litigant’s work unit, or be other citizens permitted by the court. In practice, both law students doing legal aid work and unauthorized practitioners such as “black lawyers” (*hei lüshi*) and “barefoot lawyers” (*chijiao lüshi*) can use this channel to participate in litigation as representatives.⁴⁰ Second, since the

37. LIU SIDA (刘思达), *supra note 19*.

38. FAN YU (范瑜), RESEARCH ON THE MECHANISMS OF ALTERNATIVE DISPUTE RESOLUTION (非诉讼纠纷解决机制研究), (2000).

39. Zhao Juan (赵娟), *Benxi County Court: Dispute Resolution in the “Mediation Supermarket”* (本溪县法院: “调解超市”里定分止争), LIAONING LEGAL NEWS (辽宁法制报), May 9, 2012, URL: http://www.lnfzb.com/news_view.aspx?id=20120509084918317.

40. Ying Xing (应星), *Welcoming Law To The Countryside And “Access To Justice”: A Case Study Of “Barefoot Lawyers” In Rural China* (“迎法入乡”与“接近正义”——对中国乡村“赤脚律师”的个案研究), TRIBUNE OF POLITICAL SCIENCE AND LAW (政法论坛), (2007,1).

1980s, due to the shortage of lawyers at the time, the Ministry of Justice and other central ministries created several occupational groups for legal services, including township legal workers (*xiangzhen falü gongzuozhe*), legal consulting companies (*falü zixun gongsi*), enterprise legal advisors (*qiye falü guwen*), etc. Among them, township legal workers (later renamed as “basic-level legal service workers”) are often called “secondary lawyers” (*er lüshi*) and particularly active in ordinary litigation. In the 1990s, township legal workers exceeded lawyers in both the number of practitioners and the number of cases represented. Until today, in many medium-size and small cities, basic-level legal service workers remain the main type of practitioners in civil litigation and sometimes even appear in criminal cases in which lawyers have monopoly according to the law. Compared with lawyers, basic-level legal service is more affordable but it performs almost the same tasks in civil and administrative litigations. Similar to “lay judges,” these practitioners without formal legal education are often more familiar with local communities and warmer to the clients than lawyers, so they sometimes can generate more positive effects in grassroots litigation and dispute resolution. Nevertheless, once basic-level legal service workers are disembedded from basic-level courts and local communities, their weakness in legal knowledge would be fully exposed.⁴¹

Therefore, lawyers, basic-level legal service, and citizen representation constitute the core system of litigation representation in China. When a citizen needs to go to court, all the three types of practitioners can provide relevant legal services. From lawyers’ point of view, both basic-level legal service and citizen representation are the special products of specific historical periods and their existence is the unequal competition for lawyers who have acquired practice licenses through the national judicial examination. However, from the point of view of the consumers of legal services, the difference among the three is not whether or not they have the lawyer license to practice, but whether or not they can win the case. In China’s judicial practice, there is a well-known saying: “litigation is all about connections (*da guansi jiu shi da guanxi*),” which vividly shows the attitude of litigants when choosing their legal representatives. If a law practitioner has work experiences in local courts or is familiar with local judges to the extent that he or she can use such connections to influence case outcomes, then even if he or she does not have the lawyer license, the litigant would still choose him or her without hesitation. The consequence of this pragmatic attitude is the boundary blurring among the three ways of litigation representation – litigants often use the uniform title “lawyer” to address lawyers, basic-level legal service workers, and unauthorized law practitioners. In some places, even judges address litigation representatives in a similar fashion in court proceedings.⁴²

41. SIDA LIU, *Lawyers, State Officials, and Significant Others: Symbiotic Exchange in the Chinese Legal Services Market*, CHINA QUARTERLY 206: 276-293 (2011).

42. *Ibid.*

Consequently, the three seemingly very different legal service groups constitute a “three positions, one unity” phenomenon similar to that in criminal cases or civil dispute resolution. Although many lawyers have strong attitudes against basic-level legal service and citizen representation, in their work they sometimes have to rely on those practitioners who are well connected to courts and procuracies to solve various problems in the litigation process.⁴³ Meanwhile, many basic-level legal service workers used to work in the local judicial and law enforcement agencies, sometimes as senior judicial officials. Some “black lawyers” are even more powerful – although they do not have any license to practice law, they are able to use the close connections with the judicial agencies to influence case outcomes. Sometimes these “black lawyers” do not even need to appear in court, but manipulate behind the scenes and only use an ordinary lawyer or basic-level legal service worker to substitute them. In other words, underneath the seemingly hostile market competition among lawyers, basic-level legal service, and citizen representation, there exist many complex informal connections and exchange relationships. The “internally round, externally square” structure of the Chinese legal system is also evident in the legal services market.

In sum, the “three positions, one unity” operational mode is the manifestation of the “internally round, externally square” social structure in China’s legal practice, including criminal cases, civil dispute resolution, and litigation representation. On the one hand, multiple agencies or institutions often intervene in the same legal affair; on the other hand, under the state’s macro judicial policies (e.g., striking crimes, harmonious adjudication, or serving the people), the boundaries among these agencies or institutions are ambiguous and their mutual coordination, communication, and exchange are prevalent, sometimes even becoming mutually constitutive. However, the wide existence of the “three positions, one unity” operational mode does not mean that the ideological conflict between agencies or institutions is resolved. In contrast, it is the external manifestation of the continuous conflict between two legal ideologies, or what I call the opposition between populism and professionalism.

III. THE OPPOSITION BETWEEN TWO IDEOLOGIES

Legal ideology refers to the basic ideas and principles that guide a legal system’s operation. The laws of any country must be embedded in the culture, history, and mores of this particular social context. Legal ideology represents not only the legal consciousness of a people, but also the political ideology of a state as well as the cultural

43. ETHAN MICHELSON, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, LAW & SOCIETY REVIEW 40: 1-38 (2006). ETHAN MICHELSON, *Lawyers, Political Embeddedness, and Institutional Continuity in China’s Transition from Socialism*, AMERICAN JOURNAL OF SOCIOLOGY 113: 352-414 (2007). SIDA LIU, *supra* note 41.

and historical symbols of a society.⁴⁴ In many contemporary Western countries where the political and economic systems are relatively stable and social change is incremental, the legal ideology symbolized by the “rule of law” dominates state policies and public discourses.⁴⁵ However, in contemporary China where social change is rapid and the contradictions between the political and economic systems are entrenched, there is no single dominant legal ideology, but the opposition between two competing ideologies, namely, populism and professionalism. The emergence of this opposition is closely related to the evolution of the “internally round, externally square” structure of the Chinese legal system. Simply put, the “internally round” structure corresponds to the ideology of populism, while the “externally square” structure corresponds to the ideology of professionalism. The conflict between those two legal ideologies indicates the inherent tension of this unique social structure.

Similar to the “internally round” structure, the origin of the populist legal ideology is also the mass line and the tradition of “people’s adjudication” (*renmin sifa*), represented by the “Ma Xiwu trial mode.”⁴⁶ Since the PRC was founded in 1949, the mass line of adjudication has always been closely associated with the political ideology of class struggles, which constitutes this legal ideology based on the “people/enemy” binary distinction. The key word of populism is the frequently used concept “people” (*renmin*) in China’s laws, documents, and names of judicial agencies. This concept is both a hard one and a soft one. The hardness of it is mainly realized in criminal cases. “People” are in opposite to “enemies” and it represents state power and social justice. No matter the “people’s police” (*renmin gong’an*), the “people’s procuracy” (*renmin jianchayuan*), or the “people’s court” (*renmin fayuan*), they all assume the responsibility of striking crimes and punishing criminals. In civil cases, however, the concept of “people” is very soft. The primary task of the people’s court is to resolve disputes and maintain social stability, not to establish and implement formal legal rules. The preferred instrument for judges in handling cases is the flexible mediation, not the black-or-white judicial decision. In other words, criminal cases adjust the “contradictions between people and enemies” (*di wo maodun*), whereas civil cases adjust the “internal contradictions among people” (*renmin*

44. CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS*, trans. T. Nugent, eds. A. M.

Cohler, B. C. Miller, and H. S. Stone, Cambridge: Cambridge University Press (1989). ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, trans. H. C. Mansfield and D. Winthrop, Chicago: University of Chicago Press (2000).

45. JAMES J. HECKMAN, ROBERT L. NELSON, LEE CABATINGAN (eds.), *GLOBAL PERSPECTIVES ON THE RULE OF LAW*, London and New York: Routledge (2010).

46. HOU XINYI (侯欣一), FROM ADJUDICATION FOR THE PEOPLE TO PEOPLE’S ADJUDICATION: RESEARCH ON THE POPULIST JUDICIAL SYSTEM OF THE SHANGANNING COMMUNIST AREA (从司法为民到人民司法——陕甘宁边区大众化司法制度研究), (2007). Chen Baifeng (陈柏峰), *Thirty Years of the Mass Line* (群众路线三十年), PEKING UNIVERSITY LAW REVIEW (北大法律评论), (2010,1). STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO*, Stanford, CA: Stanford University Press (1999).

neibu maodun). That is why different strategies are adopted in the two case types.⁴⁷

As a legal ideology, striking crimes is manifested in almost every corner of the Chinese criminal justice system. The “strike hard” (yan da) campaign that has occurred many times since its invention in 1983 is based on this legal ideology that emphasizes the “contradictions between people and enemies.” “Strike hard” means using the style of political campaigns to efficiently strike criminal activities in a given time and place, in which the police, the procuracy, and the court are permitted to go beyond the procedural requirements of the Criminal Procedure Law. During a “strike hard” campaign, the three agencies often act together and handle cases collectively. After criminal suspects are detained, the interrogation follows the principle of “lenience for those who confess, severity for those who resist” (tanbai congkuan, kangju congyan). Once the criminal facts are confirmed, the sentencing is “heavy and fast” (congzhong congkuai). In some places, “grand public sentencing meetings” (gongpan dahui) with thousands of spectators or shame parades of criminals are held to expand the impact of the “strike hard” campaign and fully realize its deterrence effect on crimes. Mobilizing the media and public discourses, “strike hard” campaigns not only give legal sanctions on criminal defendants, but also complement them with moral trials and media condemnations. It adopts a style similar to class struggles by severely punishing the “enemies of the people.”⁴⁸

Arguably, “strike hard” pushes the hardness of populism to its extreme, but it is merely an infrequent campaign after all. In China’s everyday criminal justice practice, this ideology has many more routinized manifestations. For example, In the process of criminal investigation, criminal suspects under compulsory measures do not have the right of silence, but the obligation to answer honestly. For those suspects who refuse to answer questions, the police could even use illegal means such as torture to illicit a confession. Although the Criminal Procedure Law and other relevant statutes explicitly forbid confession by torture, in practice this problem has never been fully restricted because there is neither effective sanctions on the illegal behavior of the investigators nor effective supervisions from the judicial agencies or defense lawyers.⁴⁹ From the ideological point of view, this is precisely because the police put striking crimes as the priority and even the core task of its investigation and put criminal suspects as the “enemies of the people.” Consequently, the protection of the suspects’ procedural rights

47. Liu Sida(刘思达), *On the Concept of “People” in China’s Judicial Practice* (论中国司法实践中的“人民”), JOURNAL OF JUSTICE(司法), (2010,5).

48. Chen Guangzhong (陈光中), *Several Issues on Strike Hard and Judicial Justice* (严打与司法公正的几个问题), CHINA CRIMINAL LAW JOURNAL (中国刑事法杂志), (2002,2). HAROLD M. TANNER, STRIKE HARD! ANTI-CRIME CAMPAIGNS AND CHINESE CRIMINAL JUSTICE, 1979-1985, Ithaca, NY: Cornell University Press (1999). SUSAN TREVASKES, POLICING SERIOUS CRIME IN CHINA: FROM “STRIKE HARD” TO “KILL FEWER” . London and New York: Routledge (2010).

49. He Yongjun (何永军), *China’s Sixty-Year Experience in Controlling Confession by Torture* (中国治理刑讯逼供六十年的经验), LAW AND SOCIAL SCIENCE (法律和社会科学), (2010,7).

is often overlooked.

In criminal trials, the populist ideology is also salient. For instance, procurators often make condemnations and moral teachings on the defendant on behalf of the “people,” and discourses such as “only a death penalty could pacify the people’s anger” (busha buzuyi ping minfen) are also frequently observed. Wang Shengjun, the former president of the Supreme People’s Court, once proposed that criminal trials should take into account “people’s feelings,” which generated much controversy in the legal circle. Furthermore, the structural positions of the prosecution and the defense in China’s criminal trials have always been unbalanced. Defense lawyers have great difficulties in meeting suspects, accessing case files, obtaining evidence, and persuading the court to adopt their arguments. If a lawyer is careless, he or she could be charged by the “crime of lawyer’s perjury” (lüshi weizheng zui) and even sentenced into prison. The fundamental reason is that criminal defense lawyers have never escaped the negative image of “defending for the bad people” since the Chinese legal profession was formally revived in 1980. As the clients that lawyers serve in criminal cases are the “enemies of the people,” if they try too hard to defend for those “enemies” and cause disruptions of the prosecution, then lawyers would become “enemies of the people” themselves. Since the 1997 Criminal Law established the crime of lawyer’s perjury, hundreds of Chinese criminal defense lawyers have been detained, prosecuted, or even convicted. This phenomenon is often considered to be the “professional revenge” of procurators on lawyers, but the “people/enemy” dichotomy behind it is overlooked.⁵⁰

In comparison to criminal cases, in civil cases populism does not mean “struggles” (douzheng), but emphasizes “harmony” (hexie). China has an ancient saying “in practicing the rituals, harmony is to be prized” (li zhi yong, he wei gui)⁵¹, which means to use the Confucian rituals to adjust social relations and to regard harmony as the ideal state of human relations. Although this traditional ideology seems to be at odds with the Marxist theory of class struggles, it has been well integrated with the “Ma Xiwu trial mode,” which emphasizes common sense and downplays legal rules, in China’s civil law practice and produced a dispute resolution model centered on mediation, as discussed in the previous sections. The recent slogans such as “adjudication for the people” (sifa wei min) or “harmonious adjudication” (hexie sifa) are merely the new manifestations of this populist legal ideology that combines traditional Chinese ethics and socialist judicial practice.

What does “harmonious adjudication” imply in China’s judicial practice? Similar to the compromise of the criminal procedure during “strike hard” campaign, civil dispute resolution under populism also means that judges do not have to stick to the various

50. SIDA LIU AND TERENCE C. HALLIDAY, *Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers*, LAW & SOCIETY REVIEW 45: 831-865 (2011).

51. CONFUCIUS(孔子), THE ANALECTS,(论语·学而) Part I.

constraints of the civil procedure; instead, they can move the court to the fields or even the litigants' homes according to the conditions of the case, as well as use reason and common sense to persuade both sides. As long as both parties accept the mediation solution, even if it is far from the legal requirements, it would not harm the "harmony" of adjudication. Under such a judicial ideology, the typical image of contemporary Chinese civil judges is neither the stern and highly respected Judge Bao in traditional plays nor the passive and wig-wearing justices in Anglo-American films, but the grassroots political-legal cadres who adopt the mass line to solve problems for the litigants. Take Chen Yanping, the model judge who was awarded by the central leaders and promoted as a nationwide model in 2010. During the 14 years in which she worked in a grassroots court, Chen handled more than 3,100 cases and there was "not a single wrong case, not a single complaint, not a single petition, the plaintiffs are relieved, the defendants are convinced, and the people are satisfied." Chen was called a "three-more judge" because she "speaks more, walks more, and sheds more tears," as well as a "three-none judge" because she had "no wrong cases, no petitions, and no complaints." A widely promoted quote of her is "I hope for a world without litigation."⁵²

Those who are unfamiliar with the Chinese judicial system might be confused by this last quote – hearing litigation cases is judges' most basic work responsibility, then how could a model judge hope for a world without litigation? In fact, the quote suggests that the ultimate goal of "harmonious adjudication" is to solve the "internal contradiction among the people" outside the state's formal judicial system as much as possible. This not only conforms to the spirit of "rule of ritual" (*li zhi*) and "no litigation" (*wu song*) in traditional Chinese society, but also represents the mass line of the socialist regime. To achieve such a goal, judges cannot passively sit in the courtroom and use the legal rules on the books to handle cases, but must proactively mobilize all judicial and administrative resources to resolve disputes and reach compromises between the two parties. They not only need to reduce the possibility of appeals, but also to prevent the litigants from petitioning or using violent means to resist the law. With the increasing number of "mass incidents" (*quntixing shijian*) in China in recent years, "maintaining stability" (*wei wen*) has become a core political task of all levels of the Chinese state. Accordingly, the logic of judges' behavior in civil dispute resolution has become increasingly similar to that of administrative officials but distinct from the formal legal procedure.⁵³

Some may argue that this phenomenon cannot represent the whole picture of Chinese civil justice, because it is limited to basic-level courts in less developed areas or to certain types of ordinary civil disputes such as divorce or inheritance, but not influential in more developed areas or in commercial cases. This argument makes

52. CARL MINZNER, *supra* note 34.

53. CARL MINZNER, *supra* note 19.

sense to some extent, as populism is indeed more salient in less developed areas and in ordinary civil and criminal cases. Nevertheless, under the macro judicial policy of “harmonious adjudication,” even in commercial cases concerning millions of dollars, the pursuit of hard targets such as the “mediation and withdrawal rate” is still evident throughout the judicial hierarchy. Even in the most developed east coast of China, populist model judges such as Chen Yanping still frequently emerge. The only difference is that, in the commercial cases and in more developed areas populism is often more strongly challenged by professionalism, a competing legal ideology.

In sociology, “professionalization” originally refers to the social process by which an occupation uses its control over education, licensing, professional association, code of ethics, and other means to constitute a collective professional community and achieve market monopoly.⁵⁴ The “professionalism” in the Chinese legal system is a legal ideology transplanted from the Western countries since the economic reform and opening up in the late 1970s. In contrast to populism, professionalism emphasizes the professionalization and elitism of the legal profession in the broad sense (including lawyers, judges, and procurators), as well as the importance of the due process of law in legal practice. It supports professional autonomy and judicial independence and opposes the interference on the legal process from external actors such as the government, the media, and the public.⁵⁵ After three decades of legal reform, particularly the rapid development of legal education, the ideology of professionalism has gained much weight in the minds of many Chinese legal scholars, law students, and law practitioners. It has also begun to influence the legislative and judicial practices.

The core production process for the professional legal ideology is legal education. As discussed earlier, under the influence of the technical devolution of legal knowledge, legal education in contemporary China is largely a technical education dominated by foreign legislations and scholarships. A main feature of this mode of legal education is that it can be detached from the local legal practice and establish in the minds of law students notions such as judicial independence, procedural justice, the legal professional community, and rights activism. Although these notions are often compromised by the social reality after these law students graduate, with the massive expansion of Chinese legal education since the late 1990s, every year hundreds of thousands of new law graduates get jobs in courts, procuracies, law firms, government agencies, and other offices, which has significantly increased the power and legitimacy of professionalism

54. MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS*, Berkeley and Los Angeles, CA: University of California Press (1977). RICHARD L. ABEL, *AMERICAN LAWYERS*, New York: Oxford University Press (1989).

55. Jiang Shigong (强世功), *Manifesto of the Legal Community* (法律共同体宣言), PEKING UNIVERSITY LAW JOURNAL (中外法学), (2001,3).

in the Chinese legal system.⁵⁶ Among the major legal professions, lawyers and legal scholars most evidently represent this ideology because their structural positions in the legal system are outside the state apparatus and less constrained by the state's ideology and policies, and the nature of their work implies challenging state power. Accordingly, lawyers and legal scholars often become the most loyal supporters of the professional legal ideology.

For judges and procurators who are located inside the state apparatus, especially the younger generations who have passed the national judicial examination after 2001, their ideology and behavior often appear contradictory: on the one hand, these legal professionals accept various notions of professionalism through their legal education and judicial practice, identify with the legal professional community, and recognize the due process of law and the protection of litigants' legal rights; on the other hand, due to state judicial policies and the institutional constraints that the judicial agencies face, judges and procurators often have to conduct their daily work according to populism and sometimes even have no choice but to violate the basic principles of procedural justice and professionalism. Nevertheless, the professionalization of Chinese judges and procurators is an unstoppable trend, and the gradual completion of the legislative system also strengthens the technical components of judicial work. In particular, in complex legal cases such as those related to economic crimes, international trade, and intellectual property, highly technical legal expertise and relevant professional knowledge are far more important than the populist "Ma Xiwu trial mode."

Besides legal education, another major production process for professionalism is the institutional changes in legislation and the judiciary, particularly the formal rationalization of legal procedure. As Ji Weidong suggests, legal procedure is not only able to constrain discretion and guarantee rational choice, but also self-restrictive and reflective. It has significant constraining effects on both state power and individual action.⁵⁷ In criminal law, for example, the promulgation of the Criminal Procedure Law in 1979 and its two rounds of revision in 1996 and 2012 constitute a recursive process in which state power is increasingly constrained and the protection of individual rights is expanding. The abolitions of procedures such as "detention for investigation" (shourong shencha) or "exemption from prosecution" (mianyu qisu) have constrained

56. Huo Xiandan (霍宪丹), *The Historical Task and Reposition of Legal Education* (法学教育的历史使命与重新定位), TRIBUNE OF POLITICAL SCIENCE AND LAW (政法论坛), (2004,4). Zhu Suli (苏力), *The Challenges and Opportunities of Contemporary Chinese Legal Education* (当代中国法学教育的挑战与机遇), JURISPRUDENCE (法学), (2006,2). Zheng Chengliang (郑成良) and Li Xueyao (李学尧), *The Connection between Legal Education and Judicial Examination: A Perspective on the Control of Entry into the Legal Profession* (论法学教育与司法考试的衔接——法律职业准入控制的一种视角), LAW AND SOCIAL DEVELOPMENT (法制与社会发展), (2010,1).

57. Ji Weidong (季卫东), *The Meaning of Legal Procedure* (法律程序的意义), SOCIAL SCIENCES IN CHINA (中国社会科学), (1993,1).

the discretions of the police and the procuracy. The transition from the inquisitorial to the adversarial trial mode, as well as the establishment of evidence rules, has also substantiated the once symbolic trial process. And the earlier intervention of defense lawyers into the criminal process imposes an additional external constraint on the abuse of public power.⁵⁸ Although the effectiveness of these procedural changes in the judicial practice is still far from perfect, there is no doubt that China's criminal procedure law today is far more formally rational and conforming to the requirements of professionalism than it was thirty years ago.⁵⁹ Similar processes of formal rationalization can also be observed in civil and administrative procedures. For example, administrative procedure has been created from scratch since the promulgation of the 1990 Administrative Procedure Law. Institutional arrangements such as the reversed burden of proof provide useful procedural supports for Chinese citizens to sue the government.⁶⁰

The ideological opposition between professionalism and populism is self-evident. The former emphasizes the formal rationality of the legal system, whereas the latter emphasizes substantive justice and irrational political and moral values. According to Max Weber's typology of legal thought, the professional ideology corresponds to formal rationality, whereas the populist ideology corresponds to substantive irrationality.⁶¹ The conflict between them is a main theme for understanding China's contemporary legal reform at the ideological level. For the "internally round, externally square" social structure of the Chinese legal system, however, the coexistence of those two legal ideologies makes the integration of the legal system extremely difficult. To borrow Hobbes's concept of "body politic"⁶² and compare the Chinese legal system as a human body, the "externally square" structure is the skin and the "internally round" structure is the flesh, but two different kinds of blood (i.e., professionalism and populism) are running inside this body, which generate many problems and even diseases for the integration of the skin and the flesh.⁶³ However, the analysis so far has not touched the bones of this body, namely, the unity of law and politics (*fa zheng he yi*) deeply

58. SIDA LIU AND TERENCE C. HALLIDAY, *supra* note 10.

59. CHEN WEIDONG (陈卫东) AND XU MEIJUN (徐美君), REPORT ON THE IMPLEMENTATION OF THE CRIMINAL PROCEDURE LAW (刑事诉讼法实施问题调研报告), (2001). CHEN RUIHUA (陈瑞华), FRONTIER ISSUES OF CRIMINAL PROCEDURE (刑事诉讼的前沿问题), (2006). ZUO WEIMIN (左卫民) (ed.), *supra* note 23.

60. MINXIN PEI, *Citizens vs. Mandarins: Administrative Litigation in China*, CHINA QUARTERLY 152: 832-862 (1997). KEVIN O' BRIAN AND LIANGJIANG LI, *Suing the Local State: Administrative Litigation in Rural China*, CHINA JOURNAL 51: 76-96 (2004).

61. MAX WEBER, MAX, *ECONOMY AND SOCIETY*, eds. G. Roth and C. Wittich, Berkeley, CA: University of California Press (1978), pp. 654-658.

62. THOMAS HOBBS, *LEVIATHAN*, Cambridge: Cambridge University Press (1991).

63. A good case is the Li Zhuang case in Chongqing in 2009-2011, see SIDA LIU, LILY LIANG, AND TERENCE C. HALLIDAY, *The Trial of Li Zhuang: Chinese Lawyers' Collective Action against Populism*, ASIAN JOURNAL OF LAW AND SOCIETY 1: forthcoming in 2014.

embedded in Chinese legal culture.

IV. THE UNITY OF LAW AND POLITICS

Across the world, in both civil law and common law countries, in both democracy and authoritarianism, law and politics are always closely connected. Even when their formal structures are highly differentiated (e.g., the separation of power in some Western countries), the revolving door between lawyers and politicians remains open.⁶⁴ In the legal history of Imperial China, although the upper level of the state apparatus has some relatively specialized legal institutions, in the lower-level government the local magistrate's administrative jurisdiction includes many tasks such as taxation and adjudication, and his judicial power also includes the jurisdictions of the judge, the procurator, the police chief, and the coroner in the modern sense. Qu Tongzu calls this unity of law and politics "one-person government" (yiren zhengfu), and He Weifang also labels it "omnipotent government" (quannengxing yamen).⁶⁵ After the political upheavals and social changes of the 20th century, the institutional arrangement and personnel composition of China's local governments have experienced notable changes. As an important component of legal professionalism, the idea of judicial independence has gained some legitimacy in both the legal community and public discourses. In grassroots legal practice, however, the judicial power is still subordinate to the administrative power of local officials. Some widely discussed problems in China's legal academia, such as the "administrative orientation of adjudication" (sifa xingzheng hua) or the "petition orientation of adjudication" (sifa xinfang hua), are merely the specific manifestations of the unity of law and politics.⁶⁶

The unity of law and politics is not only a social structure and a means of

64. TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT*, Chicago: University of Chicago Press (1987). TERENCE C. HALLIDAY AND LUCIEN KARPIK (eds.), *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES*, Oxford: Clarendon Press (1997). TERENCE C. HALLIDAY, LUCIEN KARPIK, AND MALCOLM M. FEELEY (eds.), *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM*, Oxford: Hart Publishing (2007). YVES DEZALAY AND BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS AND THE TRANSFORMATION OF LATIN-AMERICAN STATES*, Chicago: University of Chicago Press (2002). YVES DEZALAY AND BRYANT G. GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE*, Chicago: University of Chicago Press (2010).

65. T' UNG-TSU CH' U (瞿同祖), *LOCAL GOVERNMENT IN CHINA UNDER THE CH' ING (清代地方政府)*, Cambridge, MA: Harvard University Asia Center (1962). HE WEIFANG (贺卫方), *THE IDEAS AND INSTITUTIONS OF ADJUDICATION (司法的理念与制度)*, (1998) at 244-246.

66. WANG QINGHUA (汪庆华), *JUDICIARY IN POLITICS: A SOCIOLEGAL STUDY ON ADMINISTRATIVE LITIGATION IN CHINA (政治中的司法: 中国行政诉讼的法社会学考察)*, (2011).

resource distribution, but also a legal culture. In such a culture, the degree of structural differentiation between the legal system and the political system is extremely low. In the minds of both state officials and ordinary citizens, adjudication is merely one of the many tasks of local governance. On the one hand, it does not require highly trained decision-makers with legal expertise; on the other hand, it is subjected to the influence and interference of the local government. The most salient manifestation of this culture at the institutional level is that many court presidents in China are not legally trained professionals, but administrative officials transferred from local governments. They have diverse educational credentials and work experiences, as well as rich social connections, but they are amateurs for the judicial work. Consequently, a common phenomenon of “amateurs leading professionals” (*waihang lingdao neihang*) emerges inside the Chinese judicial system. Like other government agencies in China, the court is a highly bureaucratic institution. As its leader, the court president is arguably the ultimate decision-maker in the court’s internal power structure. In contrast, those experienced judges who have worked in the judicial system for years could only become division chiefs or vice-presidents.

This institutional arrangement of using experienced administrative officials lacking legal expertise as court leaders seems unreasonable in theory, but it serves several subtle functions in China’s judicial practice. First, because the judicial system lacks independence in both personnel and finance from the local government, and all judges are state employees with formal administrative ranks, a court president with work experiences in administrative agencies can communicate with the local government more easily to solve various problems in the daily operation of the court. Second, when the state’s macro policies change, the judiciary must also adjust its own judicial policies accordingly. For instance, when the Chinese government promoted the idea of “harmonious society” (*hexie shehui*) several years ago, the judiciary also adopted the slogan of “harmonious adjudication.” Court presidents transferred from local governments usually have abundant experiences in responding to such state policies and thus they can serve as brokers between the legal system and the political system. Third, in the judicial process of some “important or difficult cases” (*zhongda yinan anjian*) relevant to the interests of the local government, a court president from the administrative agencies can protect the interests of the local government more effectively and would not uphold the justice and credibility of the judiciary at the expense of the local government. Finally, the court president is usually also the Party Secretary of the court, who represents the Community Party’s control over the judiciary. Zhu Suli maintains that the Party “uses its political ideals, policies, and organizational system to shape all modern state institutions, including the judiciary”⁶⁷, and court presidents play a

67. Zhu Suli (苏力), *The Party in China’s Judiciary* (中国司法中的政党), *LAW AND SOCIAL SCIENCE* (法律和社会科学), (2006,1), at 277.

vitaly important role in this process. This is because, as laymen of the legal system, court presidents can transcend the ideological conflict between professionalism and populism and effectively implement the political ideals of the Party within the judicial bureaucracy.

Therefore, using local administrative officials as court presidents is not only an extension of the traditional “one-person government” model in the overcrowded and highly bureaucratic administrative state of contemporary China, but also an important institutional arrangement for achieving the Party’s leadership on the judiciary. For the “internally round, externally square” social structure of the Chinese legal system, this arrangement digs a hidden tunnel between the external political system and the heart of the “internally round” structure bypassing the seemingly solid wall of the “externally square” structure. In theory, if the president is only in charge of the administrative work of the court and leaves the trial work entirely to the professional judges, then this division of labor would not influence the judicial decision-making process. In reality, however, the court president is also a core member of the adjudication committee (shenpan weiyuanhui), the committee that holds the highest authority over the court’s trial work. Although other members of this committee also include vice-presidents and division chiefs, many of whom are professional judges, as He Xin’s recent study demonstrates, the daily operation of the adjudication committee is significantly influenced by the internal administrative ranks of the court, and the court president holds tremendous power and often becomes the ultimate decision-maker. This is because the court president, despite his or her lack of legal expertise, holds the power for personnel and resource arrangements within the court, and thus all judges, including vice-presidents and division chiefs, must maintain a good relationship with the leader and prefer not to offend him or her.⁶⁸

Since the 1990s, many scholars have analyzed and criticized this erosion of the judicial decision-making process by administrative power, arguing that it provides many conveniences for judicial corruption. In particular, when the court president is corrupt, there is almost no effective means to constrain him or her.⁶⁹ An equally important but often overlooked issue is that this “amateurs leading professionals” institutional arrangement has blocked the career advancement of those judges who are highly qualified both politically and professionally. No matter how excellent they are, most of them could only become the secondary leaders in the judiciary. For these professional judges, although there is a possibility of moving upward from lower-level to higher-level courts, it is still difficult for them to avoid the fate of being led by non-professionals, and it is also rare for any of them to move to government agencies outside the judicial

68. XIN HE, *Black Hole of Responsibility: The Adjudication Committee’s Role in a Chinese Court*, LAW & SOCIETY REVIEW 46: 681-712 (2012).

69. HE WEIFANG (贺卫方), *supra* note 65. LING LI, *The ‘Production’ of Corruption in China’s Courts: Judicial Politics and Decision Making in a One-Party State*, LAW & SOCIAL INQUIRY 37: 848-877 (2012).

system. In other words, local administrative officials without legal expertise can enter the court or even directly assume its leadership position, but professional judges with legal expertise cannot break the “glass ceiling” of the judicial system, let alone become the leaders of local administrative agencies. Similar problems also exist in the procuratorial system – no matter how outstanding a procurator is, there is no opportunity for him or her to become a local government official.

Therefore, for Chinese judges and procurators, the legal system in which they are located becomes an internally closed but externally open system in terms of personnel mobility. It makes these legal professionals inside the state apparatus can only focus on technical judicial work, but cannot participate in the broader politics and state governance. And it is even more difficult for those legal professionals outside the state apparatus, such as lawyers, in-house counsel, and basic-level legal service workers, to participate in politics because they do not even have the formal channel to do so. At most, lawyers could hold part-time positions in the people’s congress or the political consultative conference, and it is easier for them to get into the latter than the former.⁷⁰ In recent years, a “right-protection” (*weiquan*) wave has occurred within the Chinese legal profession. Many lawyers with political ideals seek to use criminal defense, administrative litigation and other means to challenge state power from the outside and to protect the basic legal rights of citizens – this is an inevitable consequence of lawyers’ lack of channels for political participation.⁷¹ In short, the political nature of the contemporary Chinese legal profession has been severely constrained by the unity of law and politics. The profession’s social functions are restricted to the judicial and economic spheres, and it does not play an important role in politics and public life as the legal profession in many other countries does. As a result, the revolving door between lawyers and politicians becomes a one-way door that only opens toward the inside – it is easy for politicians to enter the legal system, but hard for legal professionals to go outside.

Arguably, there is yet an alternative channel for law graduates to participate in politics, that is, instead of becoming judges or lawyers after graduation, they can directly enter central or local administrative agencies by passing the civil servant examination and begin their political career in the state bureaucracies outside the legal system. In recent years, a few law graduates after the Cultural Revolution have already become central leaders in China, which makes Chinese legal professionals see a glimpse of light

70. WANG ZHONGHUA (王中华), RESEARCH ON THE POLITICAL PARTICIPATION OF THE CONTEMPORARY CHINESE LEGAL PROFESSION (当代中国律师政治参与研究), (2012).

71. Liu Sida (刘思达), *The Political Fate of the Legal Profession* (法律职业的政治命运), SJTU LAW REVIEW (交大法学), (2013,1). HUALING FU AND RICHARD CULLEN, *Weiquan (Right Protection) Lawyers in an Authoritarian State: Building a Culture of Public Interest Lawyering*, CHINA JOURNAL 59: 111-127 (2008). HUALING FU AND RICHARD CULLEN, *Climbing the Weiquan Ladder: A Radicalizing Process for Rights-Protection Lawyers*, CHINA QUARTERLY 205: 40-59 (2011).

in their future prospect of political participation. But this channel is at least restricted in two aspects. First, whether or not the law graduates who have only received 3-4 years of legal education can effectively apply the theoretical and technical legal knowledge they learned in school to their everyday administrative work is an open question. Second, compared to other “hot majors” such as economics, management, and engineering, the percentage of law graduates in the Chinese government bureaucracy is still limited and they tend to concentrate in relevant professional agencies such as the legal affairs office (fazhi bangongshi). Whether or not lawyers can gain advantages in the “palace wars” with economists and engineers is also a hypothesis to be tested with time.⁷²

In sum, with the increasing bureaucratization of the modern state and its control over grassroots society, the political and legal systems in contemporary China have differentiated in their formal structures, but the unity of law and politics as a traditional legal culture is not weakened, but strengthened at the institutional level, characterized by the strong dominance of the administrative state over the judiciary. On the one hand, adjudication remains a component of local governance, but its importance has declined with the expansion of the jurisdictions of the local government. Furthermore, because the chief local official is no longer directly in charge of judicial work as in Imperial China, but delegates this power to the inferior officials such as the court president, the chief procurator, and the head of the political-legal committee, the judicial decision-making process is under the various direct and indirect dominance of the administrative power. On the other hand, legal professionals such as judges, procurators, and lawyers have limited channels of political participation beyond the legal system. Only those law graduates who have little experience in legal practice but have entered the state administrative system after graduation from law schools can be expected to partially realize the political ideals of the legal profession. Many Chinese legal professionals consider the unity of law and politics as an institutional obstacle of China’s legal reform. In fact, the administrative and bureaucratic style of governance is not merely an institutional arrangement, but the most stable cultural essence of the Chinese legal system. Even if ideas such as judicial independence gain more legitimacy in the legal circle and in public opinions, even if major institutional reforms occur in the political and legal systems, as long as the legal consciousness of officials and citizens does not change in fundamental ways, it would still be difficult to transform this legal culture with deep historical roots.⁷³

72. Cheng Jinhua (程金华), *Lawyers in Politics: An Analysis and Test* (法律人从政——合理性分析及其验证), PEKING UNIVERSITY LAW JOURNAL (中外法学), (2013,1). YVES DEZALAY AND BRYANT G. GARTH, *supra note 64*.

73. For research on the legal consciousness of Chinese citizens, see MARY E. GALLAGHER, *Mobilizing Law in China: 'Informed Disenchantment' and the Development of Legal Consciousness*, LAW & SOCIETY REVIEW 40: 783-816 (2006).

V. CONCLUSION

In this essay, I have followed the Simmelian tradition of social geometry and proposed an analytical framework for understanding the basic social forms of the legal system. Applying this framework, I have summarized the social forms of the Chinese legal system as four main characteristics: (1) internally round, externally square; (2) three positions, one unity; (3) the opposition between two ideologies; and, (4) the unity of law and politics. Among them, “internally round, externally square” is the Chinese legal system’s basic social structure, “three positions, one unity” is its operational mode, “the opposition between two ideologies” is its ideological conflict, and “the unity of law and politics” is its cultural essence. This social geometrical summary is not about any abstract numbers or shapes, but about the specific formal characteristics of social differentiation and integration behind them. Due to the limits of space, this essay has only discussed the four most notable formal characteristics of the contemporary Chinese legal system in its spatial dimension, but not its temporal dimension, that is, the historical evolution of the legal system and the prospects of its future development. However, the temporal dimension is the key for explaining the causes and processes of social forms, and this important aspect will be discussed in detail in future writings. For Chinese jurisprudence, I hope this exploratory essay can shed light on a new research approach and provide a possibility for the dialogues and integration of the empirical scholarships on various topics of Chinese law. This is, after all, the fundamental task of jurisprudence.