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## **New Approaches to the Study of Political Order in China**

Donald C. Clarke

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# New Approaches to the Study of Political Order in China

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Donald C. Clarke<sup>1</sup>

## Abstract

Both Xueguang Zhou and Jiang Shigong are interested in the way in which China's political order actually functions, but for different reasons. Zhou takes how things are—in this case, the way central-local relations work—more or less as a given and seeks to provide an explanation. Jiang, on the other hand, writes precisely because he believes that how China's political order actually operates has received far too little attention in constitutional scholarship. Zhou focuses on the narrow issue of collusion between different levels of lower-level government when faced with demands from a higher-level authority. His focus is useful in drawing attention to this ill-understood feature of central-local relations. Yet many of the problems he discusses seem to be less those of collusion as such and more those of ordinary principal-agent conflicts. Jiang calls for less formalism and more realism when analyzing China's constitutional order. While fully acknowledging the merits of Jiang's proposed methodology, the comment finds that Jiang's own approach retains some formalist elements.

## Keywords

implementation, central-local relations, constitution, people's congress, Communist Party, democratic parties

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<sup>1</sup>George Washington University Law School, Washington, DC, USA

## Corresponding Author:

Donald C. Clarke, George Washington University Law School, 2000 H Street, NW, Washington, DC 20052, USA

Email: [dclarke@law.gwu.edu](mailto:dclarke@law.gwu.edu)

Both Xueguang Zhou and Jiang Shigong are interested in the question of the way in which China's political order actually functions, but for different reasons. Zhou takes how things are—in this case, the way central-local relations work—more or less as a given, so to speak, and seeks to provide an explanation. Jiang, on the other hand, writes precisely because he believes that how China's political order actually operates has received far too little attention in constitutional scholarship.

## Xueguang Zhou on Collusion among Local Governments

He'll sit here and he'll say, "Do this! Do that!" *And nothing will happen.*  
 Poor Ike—it won't be a bit like the Army. (Neustadt, 1990: 10)

President Harry S. Truman's prediction of how Eisenhower would experience the presidency might have been said about any number of directives sent out by the Chinese central government over the years. The Chinese language is full of phrases describing the problems of implementing central policy, from *tian gao huangdi yuan* ("Heaven is high and the Emperor far away") to the more contemporary *shang you zhengce, xia you duice* ("those above have policies, and those below have countermeasures"). A rich literature has sprung up analyzing central-local relations, and Xueguang Zhou's article is the latest contribution to this literature.

The article adopts a principal-agent model of central-local relations. In the standard principal-agent model, the agent never perfectly realizes the wishes of the principal; the agent has its own interests, those interests diverge from those of the principal, and the principal can only limit (at some cost) but never eliminate the agent's self-interested behavior. The article looks at one particular manifestation of agency costs in China: collusive behavior by local governments and local officials as they attempt to hide information from superior levels of government.

Zhou in principle is not interested in all kinds of agency costs and information asymmetries; he focuses specifically on collusion, which he defines as

cooperative behaviors between lower-level local government (or an agency) and its immediate supervising government (or agency), often in the form of various coping strategies to deal with policies, regulations, and inspections from the higher authorities, which is inconsistent with the original intentions behind the policies.

In other words, he is setting out to analyze and explain one very particular aspect of local *duice* (countermeasures)—cooperation by *two or more* levels of subordinate government agencies—in the face of upper-level commands. If a city government, for example, bamboozles central authorities without assistance from the provincial government or subordinate district governments, there is no collusion in Zhou's sense going on, and the phenomenon is beyond the purview of Zhou's article.

The article is an excellent contribution to the literature on central-local relations in China, in particular because of its analysis of different kinds of flexibility in central policy, which the author describes as flexibility “by purposive design” (good), “by unintended design” (understandable and reasonable), and “by special interests” (bad). The author also lays out three intriguing paradoxes—the paradox of uniformity in policy making and flexibility in implementation, the paradox of incentive intensity and goal displacement, and the paradox of impersonal bureaucracy and personalization of administrative ties—that inform his analysis of collusion.

Particularly illuminating is his discussion of incentive intensity and goal displacement. He draws attention to the specific features of the incentive system—to wit, the principle of shared responsibility—that encourage different levels of government to cooperate with each other to hide information from an agency superior to both.

In other places, as illuminating as the discussion is on the issue of why policy is not perfectly implemented, the specific link to collusion (as narrowly defined by Zhou) is less clear. For reasons of space, the discussion below will focus on the article's treatment of the paradox of uniformity in policy making and flexibility in implementation.

As Zhou sees it, uniformity in central policy making necessarily implies flexibility in local implementation. He makes two key claims:

- A. By definition, national policies must be made through a centralized process, and the content of such policies is necessarily uniform, disregarding variations across localities and areas.
- B. The more uniform the state policy and/or the greater the separation between policy making and implementation, the less the fit between the policy and the local conditions, therefore the greater flexibility allowed in the implementation process.

The problem with Statement A is that any proposition that is true *by definition* can only tell us something about language; it cannot tell us anything about the real world. I do not want to dwell on this point, however, and will

read the statement as an empirical (and plausible) claim that the Chinese central government *in fact* formulates a large number of policies that disregard variations across localities and areas.

But even this more limited claim has some problems that deserve further exploration. First, any policy can be uniform if stated at a sufficiently high level of abstraction. For example, it is certainly true that in every part of China today there is a policy that the state shall have something to say about family size and that nobody in China shall be exempt from its rules. Thus formulated, it is a uniform policy that permits no local variation. But because it is stated at such a high level of abstraction, it is not very useful for understanding the actual nuts and bolts of birth control policy. If the policy is formulated in terms of "How many children can this particular family have?", then there is plenty of local variation.

Second, I do not agree that national policies made through a centralized process must necessarily disregard variations across localities and areas; the evidence is to the contrary. Sometimes the local variations are explicitly written into the central policy. This is so for all policies, for example, that attempt to redistribute wealth from wealthier areas to poorer ones or to promote certain regions through tax breaks. The regions receiving the benefit must be explicitly identified in the central policy document. Thus, for example, regional variation in tax rates on foreign-invested enterprises is specifically provided for by central-level policy, and benefiting areas are specifically identified (Guojia shuiwu zongju, 1999).

Sometimes the central policy explicitly contemplates local variations initiated from below, but such variations must be approved by the center. This can be seen, for example, in the 1950 Marriage Law, which contemplated variations from its rules in minority nationality areas (Zhonghua renmin gongheguo hunyin fa, 1950: Art. 27).

Sometimes the policy specifically contemplates local variations and delegates the power to make such variations to local authorities without the need for further approval. This can be seen in a Supreme People's Court document interpreting the terms "relatively large" and "huge" amounts in the Criminal Law's prohibition of extortion: the larger the amount, the longer the sentence. The Supreme People's Court provided a permissible range of values for each term and delegated to provincial-level courts the power to fix the specific value for that province (Zuigao renmin fayuan, 2000).

And sometimes the policy is worded so vaguely as to make variation at the local level, which is where implementation takes place, inevitable. Zhou acknowledges this point in his typology of flexibility, which includes central policy intentionally phrased in vague terms with the expectation that localities

will fill in the details. This kind of policy can be called “uniform” and intolerant of local variation only in the most formal way; local variation is both expected *and desired*.

None of this is, of course, to deny that some central policies *are* uniform and intolerant of local variation; it is just to deny that they must necessarily be so and to affirm that policies in different areas show different degrees of uniformity and tolerance for local variation.

This much seems to be acknowledged in Statement B, which contemplates varying degrees of uniformity in central policy, presumably including low degrees. I am uncomfortable, however, with the way in which the proposition is stated. It seems almost to posit a kind of “flexibility constant” in Chinese politics: all policies are implemented with an equal degree of local flexibility, since greater uniformity in formulation is always offset by greater flexibility in implementation, and where there is less uniformity in formulation, there is less flexibility in implementation.

And yet again, why should this necessarily be so as an empirical matter? We know that different central policies are enforced with different degrees of rigor and uniformity. The center is prepared to tolerate a great deal of diversity in some areas, but in other areas (e.g., the crackdown on Falun Gong) it insists on uniformity and achieves more of it.

Finally, let us link this discussion with the issue of collusion. The article contains a third key proposition:

C. The more uniform state policy is, the more distant it is from local conditions, and the greater the extent and legitimacy of flexibility in the implementation process, the more likely is collusive behavior among local governments.

My concern is that Statement C comes very close to being a tautology. In effect, it parallels Statement B above, except that this time the response to uniformity is not flexibility but collusion. Logically, then, it would seem that the article sees collusion and flexibility in implementation as covariant, if not essentially synonymous. Indeed, Zhou writes that “one may argue that collusion and flexible implementation are the same type of behavior with different labels,” with the former used for behavior considered illegitimate and the latter used for behavior considered legitimate.

But if this is so, then the special definition given to collusion by Zhou seems not to apply any more. Local governments wishing to implement a policy flexibly, either legitimately or illegitimately, might do so in cooperation with higher or lower levels, but they also might not. And this brings me

back to my original doubts about the usefulness of the narrowly defined concept of collusion.

Although the article defines the term carefully and narrowly, it really seems to be about much more. The discussion of each paradox does, indeed, touch on issues relevant to collusion from time to time: the principle of shared responsibility mentioned earlier, for example, and the rule of cadre rotation, designed to prevent collusion fostered by dense informal relationships among long-serving officials. But the discussion also includes—very usefully, in my view—observations about principal-agent problems that have nothing to do, strictly speaking, with collusion. For example, many of the counterproductive effects of officials' incentives (e.g., focusing on the statistics of achievement instead of the reality, or currying favor with superiors) would be present whether or not collusion occurred. And the uniformity-flexibility tension would also be present even without collusive behavior.

A short comment such as this cannot, of course, do justice to the full article, and necessarily focuses on points worth discussing instead of simply repeating points of agreement. Zhou has identified an interesting and potentially important subset of local government coping strategies well deserving of further research.

## Jiang Shigong on China's Unwritten Constitution

Jiang Shigong's article addresses an issue of fundamental importance: what is the real constitution of China? As he suggests, "it is well known that Chinese politics does not function completely according to this written constitution—there is a wide gap separating constitutional representation and constitutional practice." Western scholars have long noted this gap. William Jones, for example, once wrote that "[t]he constitution seems to bear no relation to the actual government of China" (Jones, 1985: 710), and Jerome Cohen before him wrote of "the gap that has existed between modern China's constitutions and the reality of a personalized party-military dictatorship" (Cohen, 1978: 839).

The question for scholars is what to do about this gap. One response is to ask what the Constitution (the capital-C document known as the *xianfa*) actually does. This is the approach taken by Jones and Cohen in their work cited above. Reluctant to dismiss it out of hand as a mere sham, they point to its political significance.

Another response is to ask what the constitution (the small-c concept denoting the rules of the political game) actually *is*. This approach has been taken much less often. Dicey (1999 [1886]) had no choice but to ask this question,

Britain having no written constitution to distract him. But scholarship on China's constitution has generally focused on the written documents bearing that name and not, in Jiang's terms, on "the real constitutional or political rules by which Chinese politics function." Jiang's undertaking to explore exactly that subject, therefore, is welcome and indeed absolutely necessary.

In many ways, the article offers a refreshing and realistic approach to Chinese constitutional studies. Jiang's essential argument is that it is too formalistic to complain that China has "a constitution without constitutionalism," because this complaint focuses on the written constitution and thus fails to consider that it might be possible to find constitutionalism elsewhere.

He rightly points out something that is often overlooked by admirers of the U.S. constitution: this written document works only because of an accompanying unwritten constitution (see, e.g., Rezvani [2005], or for a more polemical take, Quirk [2008]). Indeed, the written constitution, like any formal structure, could hardly function without the set of informal and sometimes unacknowledged understandings that have sprung up around it (Scott, 1999). It is the unwritten constitution, for example, that says that the Supreme Court can invalidate legislation for unconstitutionality. Of course, the Supreme Court itself has said so, most famously in the 1803 case of *Marbury v. Madison*. But we still need to explain why this bootstrapping argument worked. The Supreme Court has this power because its assertion of this power has been accepted by the other branches of government and is now entrenched as an American political tradition. The transaction costs of assembling a consensus to overturn this tradition are very high.

Still, studies of the American unwritten constitution are of limited relevance to Jiang's project, because no one doubts that in the United States the unwritten constitution works together with the written constitution. In China, on the other hand, one could plausibly start from the presumption that it is *only* the unwritten constitution that is worth studying if one is interested in the real rules of China's political order. And in studying this unwritten constitution, it is essential to keep an open mind about what materials will contribute to our understanding.

Thus, I hope that scholars will take up Jiang's challenge to examine a broad range of materials: political practices, Chinese Communist Party (CCP) documents, and speeches of Party and state leaders, among others. To do as he suggests will enrich Chinese constitutional studies immensely.

At the same time, it must be said that in his own analysis of China's real constitution, Jiang has perhaps insufficiently heeded his own advice. He has identified several important areas for study: the relationship between the CCP and the National People's Congress (NPC), the position of the state chairman



and what he calls the “trinity system” of rule (the same person heading the Party, the state, and the army), central-local relationships, and the “one country, two systems” structure. But his own analysis in many cases has some of the same formalist problems he justifiably criticizes in others.

This is most obvious in his assertion that the “real government” and “fundamental law” of post-1949 China, “affirmed in political practice,” is “the system of multi-party cooperation under the leadership of the CCP.” In an article that rejects formalistic and ideological approaches, it is surprising to see this asserted as describing the actual political system of China. Students of Chinese politics disagree on many things, but I know of no disagreement over the political role of the so-called democratic parties: it is minimal and symbolic only. This is not the place to go into a lengthy analysis of the democratic parties, a task that has been ably undertaken by others (see, e.g., Seymour [1987]; Groot [2004]). A few facts, however, are suggestive. In 2003, the total membership of the democratic parties was 525,800; the membership of the CCP in 2002 was more than 66 million (Groot, 2004: 204). The democratic parties are subject to restrictions in their recruiting and do not even select their own leaders (many of whom are CCP members); that is done through the CCP’s United Front Department (Groot, 2004: 200–02).

But these are just illustrative details; the skeptical reader is urged to consult more specialized works or standard textbooks on the Chinese political system. We could perhaps give the last word to Zhu Suli, the current dean of Beijing University’s Faculty of Law and by no means an anti-Party radical:

Although China officially sports a number of other political parties, these parties all operate under the authority of the CCP. In fact, some of these other parties’ leaders are themselves also CCP members—including, as I recall, former or current leaders of the China Democratic League [Zhongguo Minzhu Tongmeng], the China Democratic National Construction Association [Zhongguo Minzhu Jianguo Hui], the China Zhi Gong Party [Zhongguo Zhi Gong Dang], and the Taiwan Democratic Self-Government League [Taiwan Minzhu Zizhi Tongmeng]. It is true that since 1978, these parties have been given some space for autonomous policy formation, and the CCP has developed various formal and informal institutions for gathering and selectively adopting their policy advice. However, the overall system remains one that operates under the ultimate control of the CCP. (Zhu, 2009: 25)

The main point is that China is fundamentally a single-party dictatorship along fairly standard Leninist lines (Burns, 1999). This simple phrase can

hardly, of course, capture the complexities of China's actual political order, and to stop the analysis there would be foolish. But surely it is better, if we are trying to get away from formalism, to *start* there than to start with a conception implying that China's democratic parties play any significant role.

Along the same lines, the article makes a number of other claims about China's actual political system that are explicable only as expositions of formal rules or official statements. For example, the article states that China's system of people's congresses is based on the Soviet model, which in turn is similar to the British parliamentary system. It is hard to know what similarities, other than those purely of form, Jiang might have in mind. The Supreme Soviet was a powerless rubber stamp with uncontested elections; this hardly describes the British parliament.

Elsewhere, and more significantly in terms of understanding China's actual (as opposed to formal) political order, the article asserts that the Communist Party "politically represents" the classes of workers and peasants. This statement is problematic on two levels.

First is the issue of whether the statement accurately describes whose interests the Communist Party represents. Of course, the Communist Party has traditionally presented itself as representing worker and peasant interests, but whether it actually does so seems worth more exploration, in an article that is after all devoted to looking at the reality behind the forms, than Jiang gives it.

Indeed, the whole question of the representativeness of various political bodies and their members is not explored in this article. Jiang asserts without argument that members of the CCP and the democratic parties enjoy the support of the masses by virtue of their political ideals, historical mission, and class interests, and that members of the National People's Congress are democratically elected through a legal process.

But surely a mere *ipse dixit* is not sufficient when making such highly contestable statements. Whether the CCP and its members enjoy the support of the citizenry (a term that I prefer as less burdened with Leninist elitism than "the masses") in preference to alternative parties can in some sense never be known, since the CCP does not allow such alternatives to exist.<sup>1</sup> And as is well known, members of the NPC are selected not directly by voters, but indirectly by lower-level people's congresses. While we cannot label such a process *per se* nondemocratic, the selection process is nevertheless controlled by the Party with sufficient closeness as to make the label "democratic" questionable (Cabestan, 2006). Although Jiang need not, of course, agree with my own views, it is unfortunate that the article

does not acknowledge the highly controversial nature of these assertions and attempt to defend them.

Second, the question of whose interests the Communist Party represents even in theory, let alone in practice, has recently become much less clear. This is because under Jiang Zemin's leadership, the Party adopted the policy of the "Three Represents" (*san'ge daibiao*), according to which the Party represents (a) the developmental requirements of advanced social forces of production, (b) the forward direction of China's advanced culture, and (c) the fundamental interests of the overwhelming majority of the people (*zui guangda de renmin*). Not only did the Party adopt this slogan, it also began to admit private businesspeople into its ranks.

The third element of the Three Represents is particularly important in considering Jiang's argument about the key role of multiparty democracy under the leadership of the Party. "People" (*renmin*) in Chinese political discourse refers not just to workers and peasants, but to all those who support the socialist system. That would certainly include, as a formal matter, the so-called democratic parties, their members, and those whose interests they purportedly represent. In other words, the theory of the Three Represents, much like Khrushchev's theory of "the state of all the people" (Brinkley, 1973), changes the CCP from one that purports to represent a particular segment of society to one that purports to represent all of society (or at least all of society that matters) (Groot, 2004). But if the CCP now represents everyone, who is left for the democratic parties to represent? What is the point of listening to them, when their members can now voice their opinions directly within the CCP?

A good example of the promise of Jiang's approach is his treatment of the common complaint that the NPC is merely a rubber stamp.<sup>2</sup> Jiang criticizes those who use this label, but not because he believes it is not a rubber stamp. Instead, he suggests that to call it such reveals a misunderstanding about China's political system, since the label contains an implicit normative claim that the NPC should *not* be a rubber stamp. This normative claim, in Jiang's view, is rooted in an inappropriate Western model of China's constitutional order.

Jiang's response is to argue that under China's actual constitutional structure, the NPC and its Standing Committee "must necessarily function" as a rubber stamp. This is because the CCP "exercises the power of substantive political decision making" (let us leave aside as already discussed Jiang's qualifying "through deliberation in consultation with the democratic parties"), and the great majority of representatives in the NPC and its Standing Committee are CCP members, who must follow the CCP's political decisions. "In this sense, the will of the NPC and that of the CCP are unified since they both represent the will of the people."

Jiang's argument still works on its own terms even if the CCP and the NPC do not represent the will of the people, so we do not have to accept that premise (discussed above) in order to evaluate the argument. His larger, and quite valuable, point is that we cannot understand what the NPC actually does if the questions we ask about it are always based on a preconceived notion of what it ought to be doing. In Kuhnian terms, the rubber stamp obsession reveals the use of the wrong paradigm (Kuhn, 1962).

In this particular case, however, it happens that a closer attention to actual politics, instead of to the formal claim that the CCP and the NPC represent the will of the people, might lead to a different understanding, *based on Chinese reality*, of the NPC's constitutional role. Western scholarship has long challenged the "rubber stamp" characterization as too simple (O'Brien, 1990: 37; Dowdle, 1997: 1; Tanner, 1999: 4; Cho, 2002: 725; Dowdle, 2002: 81). This is not to say, of course, that the NPC is turning into a feisty parliament that will challenge the Party. It is to say that it has become a significant arena of policy formation, with particular leaders using it as a power base the way others might use the Party or the State Council. Thus, while Jiang has a point in saying that we cannot understand much about the NPC simply by pointing out that it does not function in a way it was never intended to function, his acceptance of the rubber stamp metaphor also seems to miss something important about its function in the Chinese political system.

Jiang's article is a welcome call for more realism and less formalism in the study of what might broadly be termed the Chinese constitutional order. It suggests some important subject-matter areas in which such a study might be done and demonstrates the methodology and sources with which to do it. I believe that the article is not completely successful in escaping from the formalism that it criticizes, but that only shows how difficult, and necessary, this escape is.

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1. I do not wish to be understood as trying to make a complicated question simple. The issue of legitimacy and popular support is well explored in Gilley (2008).
2. Certainly the complaint is common in China. A search of mainland Chinese Web sites (i.e., *jingnei* in Chinese terms) on google.cn using the terms *renda* (NPC)

and *xiangpi tuzhang* (rubber stamp) yielded 22,100 hits. Oddly, the Western work cited in support of the assertion that the NPC is often dismissed as a rubber stamp actually takes exactly the opposite view in its opening sentence, stating, “Chinese legislatures are no longer ‘rubber stamps’ in the reform era” (Cho, 2002: 725).

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## Biography

**Donald C. Clarke** is a professor of law at the George Washington University Law School, where he specializes in modern Chinese law. His recent research and writing has focused on issues of law and economic reform, and he recently edited a volume on *China's Legal System: New Developments, New Challenges* (2008).