
Ideology and Organisation in Chinese Law

Towards a New Paradigm for Legality

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1.1 Introduction

In decades past, in their analysis of the objective of post-Mao legal reform, Chinese and foreign observers generally agreed: the country was on its way to some form of the rule of law, or *fazhi* (法治). Throughout the 1990s and the early 2000s, it even seemed that both sides shared broad agreement on the fundamental elements of this term. Legal education and the legal profession were given considerable support, legislative and judicial processes became increasingly professionalised, and rule of law-related concepts entered the meticulously curated jargon of Chinese Communist Party (CCP or Party) ideology. Yet by the second half of the Hu Jintao administration, the momentum of reform gradually changed direction. Hu's security czar, Zhou Yongkang, presided over the rapid expansion of a security apparatus (Wang and Minzner 2015). Formal litigation increasingly made way for non-judicial conflict resolution methods such as mediation and arbitration (Liebman 2011; Minzner 2013), manifested in a renewed attention to the 'Ma Xiwu' method of dispute settlement (Zang 2010; Liebman 2011). While Zhou Yongkang himself was politically disgraced and imprisoned, the security state continued to grow from strength to strength in the new Xi Jinping period. Early on in the new Xi Jinping era, a prominent public debate concerning the role of the Constitution in governing the country (Creemers 2015) heralded successively a far-reaching anti-corruption campaign (Li 2018), a growing crackdown against activist lawyers and, perhaps most importantly, an authoritative decision on the role of law at the historic Fourth Plenum of the 18th CCP Congress in 2014 (hereafter 'the 2014 Decision').

The 2014 Decision, for the first time in Party history, made rule of law its central theme, heralding a new interpretation of the Jiang Zemin-era

concept of ‘governing the nation according to law’ (*yifa zhiguo* 依法治国). Its top billing in this historic Congress signalled sharp rhetorical change in socialist rule of law theory, which now claims that supremacy of the Party over all areas of the state is a fundamental requirement of the rule of law. Crucially, the 2014 Decision made a novel claim about the value of *yifa zhiguo* in terms of the Party’s governance ambitions: the CCP must exercise its leadership *through all processes* of ‘governing the nation according to law’ (Trevaskes 2018). This means that Party rule through the conduit of the law is the central organising principle for changes in Xi-era governance, in particular, for reforms that seek to enhance accountability and professionalisation.

The 2014 Decision thus put paid to any lingering doubts that the law itself can act as the ultimate constraint on power in China. Since the Party exercises its leadership through all processes of *yifa zhiguo*, law cannot be the ultimate constrainer of Party power. While the 2014 Decision enabled the Party to ‘come out of the shadows’ (Chen 2016) to be loud and proud about its authority over and above the law, the question of law–Party supremacy was in fact dealt with ideologically a few years earlier. During the Hu Jintao era (2002–2012), the Politburo initially considered the possibility that it might have to change its leadership style to accommodate the rule of law. It conducted a series of study sessions to debate the precise configuration of the rule of law–Party nexus. By 2014, the meaning given to the rule of law had come to accommodate the primacy of Party leadership. As Ewan Smith says, this change highlighted a shift in emphasis from institutions to individuals: the rule of law came to be recast as a theory of individual obedience to the Party-state, rather than a theory of how Party power could be constrained through institutions, standards and procedures (Smith 2018).

As a result, from a rule of law perspective, the 2014 Decision comes across as almost self-contradictory. On the one hand, it explicitly supported the further professionalisation of the judiciary and the enhancement of accountability rules and regulations through a series of impressive reforms that sought to build into the system meaningful constraints on the power of police, prosecutors and judges (Zhang 2016; Biddulph et al. 2017). Trials and not mediation were to become the centre of the judicial process, measures were put in place to reduce the oft-abused discretion of courts to reject cases at the filing stage, and cross-jurisdictional circuit courts were introduced in a bid to reduce the influence of local governments on court proceedings. Yet at the same time, the 2014 Decision clearly asserted the Party’s authority over the

legal process, as well as the fact that virtue and morality enjoy equal standing to law in terms of normative power. The 2014 document called for more effective mechanisms to implement the Constitution and sanction unconstitutional conduct, but it also underlined the role of Marxist and socialist doctrine.

How can these seemingly mutually exclusive points be reconciled? The central argument of this book is that to understand how law operates in China, particularly how law relates to ‘reform’ and ‘development’, we need first to appreciate the nature of ideology and its relationship to law. We argue that ideology is not merely an external device that sits outside the law to justify or rationalise legal rules, actions and decisions of Party-state actors. Rather, ideology is intrinsic to the logic of legal rules, actions and decisions: therefore it permeates all aspects of law and is in essence the architectural scaffolding within which law operates. Second, we need to appreciate the role that law (and more broadly, rule-based governance) is granted within the overall organisational framework of the Party-state. This framework existed for decades before the development of law was given consistent attention and priority, and this conditions the manner in which legal rationality has been introduced.

To tease out this two-pronged argument in more detail, it is necessary to study in greater depth the ‘top-level design’ (*dingceng sheji* 顶层设计) the Party envisages for its governing architecture; doing so will reveal the logic by which the CCP has made law into a pillar of this overarching political project. Indeed, the Fourth Plenum Decision itself explicitly indicates that although ‘legal construction’ may be a centrally planned project of considerable importance, it nevertheless serves as a mere subassembly in a much greater system of political thought and action. As such, the leadership does not pursue any specific legal arrangement for its own sake or merit, but for the utility it has in the grander scheme of national ‘grand rejuvenation’ (*weida fuxing* 伟大复兴).

Ideological visions frame the exercise and constraints of law’s role in China’s development. Deng Xiaoping’s ideological vision was to achieve ‘moderate prosperity’ (*xiaokang* 小康) through the Four Modernisations. Xi Jinping’s version of this is the ‘Chinese Dream’, which the Party leadership intends to realise through the Four Comprehensives (*sige quanmian* 四个全面). These comprehensives comprise one overall goal of ‘comprehensively building a well-off society’, and three organisationally based implementing tools that are to be put to use to realise that goal – ‘comprehensively deepening reform’, ‘comprehensively implementing the rule of law’ and ‘comprehensively strengthening Party

discipline' (Song 2017). This approach clearly expresses the relationship between the Party's ideological goal (national rejuvenation through the building of a well-off society) and the instrumental mechanisms through which it is to be achieved (reform, rule of law and Party discipline). Articulation of this law-ideology relationship contrasts with two lines of inquiry that have dominated Chinese law studies in the past: teleological, 'rule of law'-oriented research and bottom-up law and society approaches.¹ While the question of China's trajectory towards the rule of law was an attractive one both from Chinese domestic developmental perspectives and modernisation theory-influenced ideas concerning convergence with liberal democratic forms of governance, Donald Clarke long ago warned that such normative approaches risk obviating elements characteristic to the nature of Chinese law. Phenomena incongruent with a commonsensical reading of the rule of law would thus be considered aberrations, even though they would be eminently logical or functional within the Chinese context (Clarke 2003). Heeding his warning, this book will focus on the distinctive ideological, substantive and structural elements that make Chinese law what it is, and the dispositions for future change this entails. Consequently, this book will primarily investigate how the legal system is conceptualised, designed and reformed from the top down, and to a lesser extent how it functions in reality. This is not to belittle the great contributions that, for instance, legal sociology has made to academic insights of Chinese law in action, the functioning of legal institutions and legal consciousness among officials and citizens. Rather, it is to say that law on the books, or more abstractly, central beliefs, ideas and policies about how law should operate, are equally important. To be sure, particularly as the Xi leadership seeks to impose greater central control over all elements of the Party and the state, the official playbook forms the context within which the law is acted out in specific cases. Moreover, in China's Leninist system, with increasing limits to participation and external input, the Party-state remains the single venue where politically salient decisions can be negotiated and made.

Therefore, this book will build on a classic paradigm to study the Chinese Party-state: that of ideology and organisation (Schurmann 1968). Briefly put, this framework holds that Party ideology, consisting of both consistent and changing elements, informs the way the Party structures and governs itself, the state and society. Developed on the eve

¹ For an example of a bottom-up law and society approach, see Ng and He 2017.

of the Cultural Revolution, this paradigm has been rightly accused of ‘mistaking myth for operational reality’ and excessive state-centredness (Johnson 1982). We do not dispute this criticism if the purpose of inquiry is to better understand the actual daily conduct of social actors. Yet within law, particularly if the purpose is to better understand the framing and intention of ongoing legal reforms, we propose to turn the criticism on its head. In the manner in which the CCP governs China, myth and reality interact continuously. Building on a long imperial tradition in which the sacred and the profane were not institutionally or structurally separated, current-day Party leaders concurrently attempt to weave narratives about a transcendent cause, to reorient the functioning of political and legal structures in pursuit of that cause, and to manage the daily acts of officials and citizens. Law is one of the prime means used for these purposes, and the interactions, tensions and incompatibilities between them condition outcomes to a significant degree. In other words, we do not argue that operational reality is unimportant, nor do we wish to imply that the content of Party documents accurately describes actuality on the ground. Our claim is that both myth and reality are indispensable in building a correct and informative picture of Chinese law that assists observers in gaining a better understanding of the elements and logic of legal reform, instead of seeing Chinese law primarily as an incompletely developed system or, at worst, an aberration.

1.2 Bringing Ideology Back In

Ideology, defined in this book as a complex arrangement of ideas and assumptions that explains the world as it is and provides normative recommendations for political action, has been central to Chinese politics for centuries. The Confucian project of imperial rule survived with a remarkable degree of continuity for the better part of two millennia. At its core lay the idea that the primary task of governance is to ensure social order and cosmological harmony, with moral virtue being a prime enabling condition. A purported past golden age, exemplified by highly virtuous rulers such as Yao and Shun, could be recreated if all knew their place in society and conducted themselves accordingly. The Emperor, dubbed the Son of Heaven, ruled on the basis of a Heavenly Mandate. Yet this mandate was conditional: Heaven would allow an immoral ruler to be overthrown, for instance, through rebellion or foreign invasion. Ritual (*li*) was the external manifestation of this ideology, and the correct

performance of ritual would ensure harmony, or the absence of social conflict.

As the Empire waned and disappeared, many of the supernatural and cosmological elements of imperial doctrine went with it. Instead, the nation (*minzu* 民族) became the primary locus for ideological allegiance, and restoration of its historical position of wealth and strength took centre stage in Chinese political thought (Schell and DeLury 2013). Now that China is wealthier and stronger than it has been for at least two centuries, Xi Jinping has reiterated that narrative as the ‘Chinese Dream of the Great Rejuvenation of the Chinese Nation’ (*Zhonghua minzu weida fuxing de Zhongguo meng* 中华民族伟大复兴的中国梦). In one of his first speeches as General Secretary, current president Xi Jinping claimed that ‘[s]ince 1840, we have struggled continuously, and have unfolded a brilliant prospect for the great rejuvenation of the Chinese nation in the territory of China. All of us can feel that we are closer to this objective of the great rejuvenation of the Chinese nation than at any other time in history, and we have more confidence and more ability to realise this objective than at any time in history’ (Xi 2012). Nevertheless, Xi warned,

[l]ooking back at the past, comrades in our entire Party must keep firmly in mind: if we are backward, we will take a beating, only development enables self-strengthening. If we look at the present, the entire Party must keep firmly in mind that the path decides destiny, and looking for a correct path is not easy at all. . . . History tells us, the historical destiny of every person is closely connected to the future destiny of the entire country, and with the future destiny of this nation. Only when the country does well, and the nation does well, can everyone do well. Our historical task of fighting for the great rejuvenation of the Chinese nation is glorious and arduous, and requires generation after generation of us Chinese to unwaveringly make common efforts.

(Xi 2012)

In Xi Jinping’s world, ideological faith, encapsulated in coded words and slogans, has become the bricks and mortar of a construction process to renew the CCP’s central role in Chinese state and society, and bring about the intended rejuvenation of the nation. This process is aimed at fashioning a new-type political system (Lewis Chapter 6) in which, in the words of the CCP Constitution, amended in 2017, the Party ‘leads over everything’ (Brødsgaard 2018; Fewsmith 2018). Law, in turn, is to be mobilised as a key conduit to realise this leadership, raising important questions concerning the direction of future legal reform.

In tenor and approach, Xi Jinping represents a shift in tone and emphasis from his predecessors. The Deng, Jiang and Hu generations unfolded in the aftermath of the Cultural Revolution. Wary of repeating the catastrophes of the Maoist era, they toned down the romantic, heroic narrative of the revolution and replaced it with stolid technocracy, pragmatism and the promise of economic growth. The volume on ideological campaigns was turned down. Yet by the end of the Hu Jintao leadership, even though China had seen explosive economic growth, complaints grew about a moral vacuum in Chinese society, while the Party itself was increasingly battered by corruption scandals and protests. Burgeoning social media, in particular, made these political discussions much more visible. Xi's answer to this has been to emphasise the supremacy of the Party over all matters. This claim necessarily stresses the moral rectitude and discipline required of Party cadres, as well as stepping up propaganda and control efforts online, often with language that sounds as much religious as political. Building on the theme of the 'Chinese Dream', official propaganda now emphasises faith and confidence in the Party (cf., Xi 2015) – of which Xi Jinping is now the 'core' (*hexin* 核心).

There are two major elements to this notion of faith: a claim to legitimate authority and a claim to moral authority. With regard to legitimacy, Xi's new doctrine of 'Socialism with Chinese characteristics for a new era' moves away from the priority given to economic growth, in favour of a more diverse set of requirements that are to bring about a state of national rejuvenation. These range from the rule of law and social values to green development and international harmony. Yet the most important one is ensuring Party leadership over 'all forms of work in China' (Xue 2018). The Party is not perfect: the need for greater discipline is one of the central points of Xi's ideology, and the fight against corruption must remain a top priority. Nonetheless, only the Communist Party of China, it is held, possesses the intellectual resources necessary to steward the deified nation's future progress. These resources remain strongly rooted in Marxism, while instrumentally, selectively and creatively absorbing eclectic building blocks of language, meanings and methods inspired by traditional Chinese custom, republican and Communist history, as well as contemporary social science. Therefore, Party members and cadres are required to have confidence in the path, the system, the theory and the culture proposed by the CCP. The fundamental righteousness of the Party's belief system also invests it with moral authority: one of its tasks is to – paternalistically – define the good life.

This is expressed in ideological notions, such as the ‘socialist core values system’ (*shehui zhuyi hexin jiazhi tixi* 社会主义核心价值观体系), as well as the increasing attention paid to ‘honesty and credibility’ (*chengxin* 诚信) in social and economic life. Morality is not merely seen as a guideline for individual conduct; it is also explicitly connected to the overall prosperity and welfare of the nation, for instance in the documents outlining the social credit system (State Council Notice 2014; Creemers 2018b; also see Chapter 9). In other words, the Party’s role as moral guardian is a crucial aspect of its overall programme for social and economic change (Lin and Trevaskes 2019).

The goal of the ideological project in Xi’s world is thus not to create primarily actionable ideas or political debate but a liturgy that assists in maintaining discipline and assessing the performed loyalty of officials. At the same time, ideology also creates a straitjacket for the single-party system. It is bound by the foundational premises of its various strands of belief, no matter how incongruous they might be.

Language, often in the form of ‘*tifa*’, or slogans and imagery, has been central in this myth-building project and is meticulously manicured, revised and renewed by institutions such as the Central Propaganda Department and the Central Party School (Schoenhals 1992). Nonetheless, despite all efforts to maintain an external appearance of systemic integrity, which is in itself meant as a display of the fundamental correctness of its theory, the myth often remains somewhat of a patchwork. In order to protect its external integrity and authority, tensions between various objectives or beliefs are elided or ignored, deeper inquiry is often eschewed, many political issues are simply ignored, and empirics are not allowed to get in the way.²

² As Shue and Thornton argue, it is not helpful in understanding the governance of China to ascribe to it an order or structure it does not have. In particular, they take issue with the theatrical metaphors often used in this context, such as the Party’s repertoire or playbook. In their view, this metaphor suggests Chinese leaders dispose of rehearsed scenarios acted out under specific circumstances, where society is reduced to a mere audience. This would pay insufficient regard to fragmentation within the leadership, the agency of individual political actors and the uncertain circumstances under which they operate. Instead, they propose the notion of a fairground, where various acts are played out at the same time, with only a limited degree of central coordination and with continuous interplay between the various tents (Shue and Thornton 2017). On a similar basis, Jonathan Benney proposes the notion of bricolage as a characteristic of the use of aesthetic resources in Chinese politics. Under this conception, Chinese leaders use discrete ‘bricks’, or units of information in a way similar to Lego pieces: they can be disassembled and reassembled on the go, creating new intellectual structures suited to the political needs of the time.

As the Party claims legitimacy on the basis of the power of its ideology, it can only admit ignorance in highly constrained ways, such as the idea of a ‘learning party’ (*xuexixing zhengdang* 学习型政党). Brooking no political competitors, the CCP is obliged to either comprehensively deal with socio-economic claims or ignore them at the risk of fomenting dissent. In short, the lofty ideals and aspirations of the myth create the benchmarks by which the Party is evaluated, and failure to meet these benchmarks therefore can only be the Party’s responsibility.

1.3 Ideology in Disciplining the Party-State

Within the context described above, ideology is thus the corpus of belief that, at least in the Party’s view, animates how it governs itself and society. This book will argue that ideology shapes beliefs about approaches to governance and organisation that occur on three levels. First, it informs how the Party attempts to restructure itself to counter new challenges; second, it provides a methodology for the creation of policy; and, third, it provides the justification for the state to intervene in individuals’ lives.

It is tempting to ascribe the Party’s *modus operandi*, with its focus on internal discipline and obedience, exclusively to its Leninist heritage. It is, perhaps, slightly more accurate to suggest that this Leninist form of organisation slotted relatively easily into a historical context that shared many of its essential traits: both Leninism and the Chinese empire were founded on a form of elite rule based on the understanding of a specific corpus of knowledge, where paramount leaders held near-absolute power and space for contestation was highly limited. Equally, as Patricia Thornton has suggested, there is a tradition of mobilising morality to justify top-down political intervention and strengthen discipline (Thornton 2007). It is no coincidence that the Xi leadership has supported greater study of topics such as the Ming dynasty imperial censorate to provide inspiration for the reform of internal supervision structures (Xu 2019). As a result, they face similar tensions: it is difficult to reconcile strict discipline with the policy innovations necessary for economic growth and social adaptation; it is difficult for the centre to obtain accurate information about the functioning of government (the mountains are

Moreover, Benney (2020) suggests, this process turns concepts or actual meanings into mere signs and slogans in a process he refers to as ‘mystification’, removing it from critical analysis or its adoption by contrary voices.

high and the emperor is far away); and inadequate oversight encourages rule-breaking and corruption. Nonetheless, basing itself on both its own experiences and that of foreign precedents – most notably the Soviet Union (USSR) – the Party has nailed its colours to the mast when it comes to the foundations of its structure. No factionalism is permitted; the Party must retain authority over the military; and the doctrine of the Six Nos precludes multi-party governance, federalism, multi-cameralism, the separation of powers, the full privatisation of the economy and ideological pluralism. To address these issues within these sharp political boundaries, the Party continues to experiment with new organisational approaches. An old one is the Party School system, where for decades aspiring officials have become socialised in the Party's mode of operation and still return there when they are promoted, or for regular brushing up. The Party School system remains one of the key channels for the inculcation of official ideology into the cadre corps (Pieke 2009). More recently, technology has provided new ways for disciplining and oversight. It is no coincidence that the first section of the plan for the development of the social credit system is dedicated to monitoring officials' conduct (State Council Notice 2014; Creemers 2018a; 2018b).

A logical subsequent question in this discussion of ideology is to what extent officials actually believe in official ideology. The importance of acts of performative loyalty (*biaotai* 表态) means it is easy to mistake outward compliance with internalisation, which means demonstrated conduct is not necessarily a reliable guide to deeply shared belief. This, in turn, goes some way towards explaining the remarkably low level of internal opposition to the profound twists and turns the Party has taken in its seven decades in power. Yet at the same time those performative acts also indicate the importance of at least a certain degree of compliance with the myth. Moreover, the myth may operate at different cognitive levels: a particular official may be sceptical about Xi Jinping's specific *modus operandi* yet broadly agree with the leadership on economic policy. Lastly, the CCP now has greater technological, cognitive and organisational resources at its disposal than it did even in the recent revolutionary past. Instead of the exegesis of the Maoist canon that dominated Party life under the Cultural Revolution, the Party declares itself to be a 'learning party' (Tsai and Dean 2013). Mass campaigns have made way for controlled policy experimentation. Digital technologies provide new and more reliable ways for the centre to obtain knowledge about local conditions (Social Credit Plan 2014; Creemers 2018a).