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# Ideology and Organisation in Chinese Law

## Towards a New Paradigm for Legality

ROGIER CREEMERS AND SUSAN TREVASKES

### 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.<sup>1</sup> 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

<sup>1</sup> 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.<sup>2</sup>

<sup>2</sup> 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).

Regardless of whether it involves campaigns or technology-enhanced authoritarianism, ideology is a framing device that explains the process of building the programme of national development needed to bring about a moderately prosperous society under the banner of national rejuvenation. Ideology articulates the method espoused for realising the Party's programme. We see this in Mao's doctrine of contradictions, which builds on Marx's theory of historical progress towards communism. Under this doctrine, history is divided in stages, each characterised by a principal contradiction that manifests itself in smaller, subordinate contradictions. The principal contradiction can be resolved by addressing the smaller ones, after which a new era will begin. After the death of Mao, the principal contradiction has been redefined twice: once by Deng Xiaoping, who declared it to be the contradiction between China's high material needs and low productivity, and once by Xi Jinping. At the 19th Party Congress, Xi declared that the contradiction between 'unbalanced and inadequate development and the people's ever-growing needs for a better life' characterises the current era (Xinhua 2017).

Critical in marshalling the resources and social forces necessary to address these contradictions is the notion of social management. Scientific planning, deeply influenced by the USSR, had been part and parcel of Chinese governance even during the Mao era but was often frustrated or even persecuted during the political turbulence of mass campaigns and the Cultural Revolution. After Mao's demise, Deng Xiaoping oversaw the broad introduction of particular social management approaches, often derived from systems engineering perspectives (Bakken 2000; Hoffman 2017). The leadership started borrowing from Western scholarship eclectically (Pieke 2012), but always with an instrumental perspective. What mattered was not academic validity but political utility. These new approaches were melded together in a comprehensive planning approach that primarily considers the task of reform as an engineering project, which must be broken down in tiered sub-assemblies across departmental and local boundaries. Consequently, Chinese policy has taken the form of a nested hierarchy of documents that, in the end, all refer back to the central Party programme, as laid down in its Constitution and the reports of the five-yearly Congresses. On this basis, policy is gradually made more detailed and specific as one moves from the central leadership to more specific leading groups, ministries and commissions – from the centre to the localities. To make matters easier, priorities are recast as

slogans that are associated with particular leaders, but are often not substantially different.<sup>3</sup>

To summarise, the ideological and organisational elements that lie at the heart of China's governing architecture are hybrid in their functioning. On the one hand, they clearly serve to achieve policy outcomes. Yet at the same time they also serve to communicate unity of form and purpose through the related notions of harmony and discipline. However they are termed, they refer to a political and social order largely defined as the absence of conflict and opposition. In fact, Mao's doctrine of contradictions defines progress as the resolution of various kinds of social, economic and political conflicts, implying that the existence of any such conflict is undesirable in the long run. Understanding this point by itself may be helpful for China observers to refine their expectations. For instance, it assists in redefining the meaning of the word 'reform' (*gaige* 改革). For the CCP, this does not mean progression towards democracy, as is often believed, but being better able to achieve the goals of order, discipline and harmony as they are defined at a particular stage of history. This book intends to go further, by exploring the insoluble tension between the CCP's idealised vision of the future and the messiness inherent in daily human activities. Law, which serves equally to uphold this vision, as well as to manage everyday life, is the prime lens through which to study this juxtaposition.

#### 1.4 The Role of Ideology in Law

The opposition between myth and reality is not new in Chinese law. There is a long-standing, if slightly tired, argument that the imperial legal system emerged as a backstop to punish through law (*fa* 法) those individuals who did not comply with the requirements of ritual and proper custom (*li* 礼) and thus endangered not just the social order but the order of the entire cosmos. This argument overlooks the complex reality of legal practice on the ground, and scholars such as Philip Huang and Perry Keller have discussed the discursive acrobatics and sleights of hand used by imperial officials to manage legal processes in a framework where the sacred legal codes often offered little guidance or assistance

<sup>3</sup> As noted above, while Deng Xiaoping intended to achieve 'moderate prosperity' through the Four Modernisations, Xi Jinping seeks to realise the 'Chinese Dream' through the Four Comprehensives, the first comprehensive of which is a 'well-off society'.

(Huang 1993; Keller 1994). Yet the argument is salient in one very important sense: the conception of law as an element of the imperial cosmology constrained the space available for it to develop into an autonomous epistemic space. As a result, law in China did not develop many of the functions central in Western legal systems, particularly with regard to public affairs. To a considerable degree, the same remains true in today's People's Republic (PRC or China). Although the CCP did not take over the supernatural or cosmological claims of the imperial order, it reified its ideological cocktail of Marxist, Leninist, Maoist and traditional ingredients into a religion-like doctrine that is sometimes better understood through theology than through legal theory. Creemers (Chapter 2) summarises the essence of the CCP's theological construct using the following sequence of ideological logic:

(1) The task of rulers is to lead China towards a predetermined, utopian future. (2) The rulers should be those who have the correct knowledge to realise this process, i.e., the CCP. (3) The CCP identifies and resolves its task by way of its correct political theory. The foundations of this are known, but it needs to be researched how these foundations should be turned into action. (4) This question depends on correctly identifying the primary contradiction defining a particular historical period, as well as all its subordinate contradictions. (5) Once these contradictions are identified, they can be tackled by researching the applicable objective *guitü*. (6) This requires experimentation and political flexibility, and, when solutions are found, they crystallise into doctrine, as well as stronger legal and policy norms.

(p. 44)

In Xi Jinping's China today, there is still is no clear-cut separation between the sacred and the profane: the Fourth Plenum Decision combines 'governing the nation according to law' with 'governing the nation through moral virtue' (*yide zhiguo* 以德治国). Instead, they form a complex and continuously shifting ecosystem in which the sacred justifies the profane, and the profane is seen as having an important impact on the sacred. It is no coincidence that many legal and policy documents state that relatively minor misdemeanours may have a destructive impact on the social order. As a result, PRC law cannot be studied as most Western systems can. While legal scholarship does have a role to play, in some areas it may be more fruitful to understand the CCP as an institution akin to the Roman Catholic church in the heyday of its power. These are both organisations with purchase both on spiritual and temporal matters, plagued with corruption and hypocrisy arising from the

clash between intended sanctity and the crooked timber of human nature.<sup>4</sup> Therefore, an accurate understanding of Chinese law requires an account of how doctrine is created and distributed throughout the system, how the system seeks to maintain internal discipline and coherence, how it searches for means to organise society and the economy in ways that can fit Procrustean ideological demands, and how it engages with calls for change from outside. This understanding can provide the theoretical tools to combine with empirical legal studies to illuminate the central tensions and driving forces of Chinese law.

### 1.5 Party Leadership through Law and Organisation

Since the beginning of the reform era, one of the enduring tensions impacting legal development has been the ongoing friction between the Party's penchant for encouraging 'flexible' local governance practices used to facilitate breakneck economic growth and the requirement of a stable system of routinised law used to regulate that growth. Gradually over the forty-year period of reform and opening up, a system of increasingly effective legal regulation created a demand to expand the state in order to administratively and legally regulate that growth. In turn, as legal and governmental organs expanded, so too did the need for the Party to more effectively regulate society, state and itself. But, notwithstanding this growth of legal regulation, for the economy to expand at the speed required of it to bring about an acceptable level of moderate prosperity, Party leaders deemed it necessary to maintain a high level of flexibility and discretion in policy implementation at local levels of government. Ongoing 'monopolistic and discretionary power' (Chen 2017: 33) exercised at local levels, coupled with the abuse of *guanxi* networks (Broadhurst and Wang 2014), produced decades of ongoing widespread corruption (Gong 2006). Rampant abuse of power together with the ongoing use of flexible 'campaign-style governance' (*yundongshi zhili* 运动式治理) (Biddulph et al. 2012; van Rooji 2014; Qi 2015; Sun 2018) hampered the development of a credible and routinised system of legal regulation, further exacerbating runaway mismanagement, non-compliance and inertia in local government offices across the nation.

To tackle corruption and the related legitimacy crisis, in 2014, the Xi leadership proposed a program of good governance-building based on

<sup>4</sup> One critical difference may be that Catholic doctrine calls for the forgiveness of sins, whereas Party doctrine requires the re-engineering of the human soul.

centralisation reforms and on assuming greater direct Party leadership over all facets of governance. This new program did not attempt to eliminate flexible policy implementation and campaign-style governance, nor did it turn to Western models of dispersed power arrangements for inspiration. Rather, Party leaders began constructing a tighter system of centralised Party supervision and discipline to build the Party's governance capacity (*zhili nengli* 治理能力) into state organs. The Xi leadership understood that this new program of improving governance capacity would require not dispersing power relationships to create independent accountability checks and balances but the opposite: a fully integrated system of central Party-managed discipline and supervision controls. By March 2018 the Party announced this construction project as a 'new-type political-party system' (*xinxing zhengdang zhidu* 新型政党制度) (Lewis Chapter 6). Major constitutional amendments announced on 11 March 2018 require that in order to intensify reform, 'comprehensive Party leadership' must now be exercised in and over all state organisations. The Fourth Plenum of the 19th Party Congress in October 2019 consolidates these tenets (Xinhua News 2019).

Comprehensively embedding the 'leadership of the Party' into the state did not begin at the time of the March 2018 constitutional amendment. Rather it progressively developed over a five-year period from the 2014 Fourth Plenum onwards and through four key organisational changes. The Xi leadership's governance ambition was to create a *sui generis* model of governance based on supervision and discipline as key instruments of perfecting the Party's governance capacity. First, the Party progressively developed tighter intraparty regulations in order for senior Party members to more effectively control the decision-making capacities of lower local Party functionaries, promoting these Party rules as integral to the overall *yifa zhiguo* rule of law system (Zhang X. 2019; Seppänen Chapter 8). Second, Party authorities developed a social credit system as an amplification device for law enforcement, as well as government information integration (Creemers 2018b; Knight Chapter 9). Third, Central Party authorities reinvigorated the role of Party cells within state organs and state-owned enterprises and merged a number of functions between Party and government (Brødsgaard 2018; Fewsmith 2018; D. Zhang 2019). Fourth, the Party greatly expanded its state supervisory processes by establishing a National Supervision Commission (NSC) in 2017, cementing it in law through NSC legislation in 2018 (Li Chapter 7). This state-based anti-corruption and national surveillance entity is now run directly by Party authorities.



To make ideological sense of this *sui generis* model of authoritarian governance, the Party reframed its concept of governing the country according to law and promoted it in the media and through Party propaganda organs progressively from 2013 onwards (Trevaskes 2017; 2018). *Yifa zhiguo* was thus ‘weaponised’ as a new legal framework for Xi-style governance, transformed now into a term that ideologically houses a constellation of not only state laws but also Party regulations and supervisory mechanisms. And along with *yifa zhiguo*, the Party revitalised morality politics, making ‘governing the country by moral virtue’ a key governance objective of its virtuous Leviathan (Lin and Trevaskes 2019).

Improving prospects for greater accountability and compliance within Party-state institutions was one reason for deepening centralised Party control over the Party-state in the post-2014 period. Gaining more direct control over the levers of security in China was another.<sup>5</sup> The expanding opportunities for corruption, non-compliance and inertia created a decade of social unrest in the 2000s. After 2013, given the continuing potential for social unrest to threaten China’s economic miracle, the Party leadership progressively proceeded to directly take over key security, judicial and policing arrangements. This, too, was initiated through legislative means. The first signs of furthering Party integration into state security through law came in 2015 with the legislative embedding of Party control over the National Security Law. This 2015 law gave the Party the authority to directly exercise state powers, a practice, legal scholar Chen Jianfu notes, that ‘only existed during the Cultural Revolution in the PRC’ (Chen 2016: 200). Other laws, including the Counter-terrorism Law (2015), the Foreign NGO Management Law (2016), the National Intelligence Law (2017), revision of the People’s Armed Police Law (2016) and other legislation, further deepened direct Party securitisation of the state. Within this new legislative context, we are now witnessing the ever-expanding use of technology to enforce these new laws and to monitor Party-state officials and citizens alike, bringing about a new era of what some scholars describe as digital

<sup>5</sup> Demotion of the *zhengfa* (politico-legal) portfolio within the Politburo Standing Committee occurred in late 2012 as a result of Security Czar Zhou Yongkang’s demise. For more discussion of the abuse of power under Czar Zhou Yongkang and political networks, see Broadhurst and Wang 2014. For a discussion of changes in the security sphere in the early Xi period, see Wang 2014.

authoritarianism or technology-enhanced, ‘networked authoritarianism’ (Creemers 2017; 2018a).

Within this tripartite law–ideology–organisation context that we have described above, this book explores the ideological nature of the law and its impact on Party-state organisation in the following manner. It is structured in two parts: the first four chapters focus on the nature of the law–ideology relationship and discursive shifts under Xi, and the second half examines changes to the structures of power that aim to realise the Party’s ambitions to create a high-functioning disciplinary regime. The first half explores ideological and discursive qualities of law, particularly in the current Xi Jinping period. The second half examines how law and legal regulation have come to support the disciplinary ambitions of the Party today.

### 1.6 Writing on Law and Ideology

Our first contributor, Rogier Creemers, explores the importance of ideology in both delineating the space law occupies in China’s governing order and shaping some of its fundamental substantive aspects. Through studying the evolution of three aspects of statecraft – what is the purpose of politics? who should be in charge? and by what method should they govern to achieve that purpose? – it sketches the epistemological framework that structures the CCP’s worldview. First, this worldview is teleological: the purpose of politics is to achieve the utopian promises made by Marxist doctrine and to echo concepts of harmony predominant in the imperial age. Moreover, this teleology is aimed at the level of the nation; the individual is of little importance and is subordinate to the needs of the collective. Second, it requires rule by a knowledge elite. The CCP’s Leninist tradition justifies single-party rule by holding that the CCP alone possesses the wisdom and knowledge required to enable national progress. It remains the vanguard of the entire nation. This, also, echoes imperial practices, most notably the meritocratic examination system. Lastly, the CCP has developed a methodology by which it claims to be able to set the agenda, identify circumstances and tasks, and guide implementation. This is based on Marxist and Maoist elements, such as dialectics and the doctrine of contradictions, but it has also incorporated elements of social science, particularly complex systems theory. This worldview is essentially monist: it holds that there is one single correct approach to reality, which contains (and, indeed, integrates) moral and factual truth. Under this conception, and in line with the requirements of

harmony, any social conflict or contradiction is, *in se*, illegitimate and needs to be resolved. This has considerable implications for the space law is given, as well as for some of its substantive aspects. First, there are many areas of public life where law (as opposed to administration) plays no meaningful role, particularly in the area of constitutional law. Second, ideology infuses the language in which legal issues are framed and discussed, co-opting it as a political tool, rather than an autonomous epistemic space. Lastly, ideology creates benchmarks for meritocratic progression and Party discipline, influencing legal actors' conduct and limiting the extent to which legal rationality is applied.

In Chapter 3, Gloria Davies focuses on two aspects of ideology that help to determine how we can look at law in China. She contrasts two different ways of thinking about ideology, engaging with the question of ideology in two distinct sites, one implicit and the other explicit. She first considers how the disciplinary rules and conventions of academic work – ideas such as academic freedom – sustain the discursive dominance of certain patterns of understanding. Second she looks at the dominance of ideology under Xi Jinping, particularly how it has worked to undermine academic inquiry in China in some areas and to produce a more explicitly political understanding of China's 'socialist rule of law' in others. In the first part of the chapter, she observes that to critically engage with 'ideology' is to encounter an always-expanding spectrum of connotations. At one end there remain simplistic equations of ideology with 'doctrine' or 'dogma'. At the other, we find ever more refined arguments (and problematising of these arguments) about how the ideologically structured nature of upbringing, education and socialisation shapes and constrains people's understanding of themselves and the world. She recognises that one particularly productive outcome of ideology's semantic and theoretical overload is that it has encouraged scholars to attend to both rhetorical and actual aspects of ideology. She argues that to the extent that ideology is shaped by spoken and written communications, texts and images, its imprint as a dominant pattern of understanding, whether religious or secular, is contingent as much on the persuasiveness of what it promises and represents as on its institutional entrenchment. Formal ideology, such as that of the CCP, succeeds when people make sense of their lives using its language. This was demonstrably the case in the first three decades of CCP rule when the Party leadership made Mao Zedong Thought virtually synonymous with the Party to secure the Party's authority.

Until recently, their wordings and formulations of Mao's 'Socialism with Chinese Characteristics' as a label for Party and national ideology have sought to reflect a collective-style leadership. The challenge for these Party leaders has been that as China has become more cosmopolitan and culturally diverse, the popular authority of Party ideology has greatly diminished, even as it remains integral to China's political culture. With these issues in mind, Davies' chapter explores Party ideology as a cultural and linguistic phenomenon of China's Party-state system. Under consideration are recent developments under Xi Jinping's administration to re-fortify Party authority, such as intensification of the ideological management of schools and universities, the imposition of increasingly harsh penalties for dissent and the inauguration in October 2017 of 'Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era'.

Our third contributor, Ewan Smith, introduces a persuasive argument about the functioning of rule of law in China under Xi Jinping. Smith argues that Party leadership has shifted the dominant understanding that rule of law functions to rectify institutions to understanding that it 'rectifies' or disciplines individuals, as state and as non-state actors. Here he reframes the argument he introduced in an earlier article (2018) on rule of law discourse-building in the Hu Jintao era and up until the Fourth Plenum, amplifying that account in light of both developments in Party doctrine under Xi Jinping and the broader themes in this volume. The original article charted the evolution of Party doctrine on rule of law from the 16th Party Congress to Fourth Plenum of the 18th Central Committee, using reported content of Politburo study sessions to shed light on the leadership's deliberations. In particular, it explained two developments: how the concept of governing the nation according to law or 'rule of law' in China was reconciled with the concept of 'Party leadership' by presenting the two as parts of an 'organic unity', and how the rule of law evolved from a system or process that rectifies institutions into a system or process that rectifies cadres. Under Xi Jinping, these ideas have been developed further. The result of these two movements is that the rule of law has been explicitly subordinated to 'Party Leadership', and the law has been recast as one form of social control among many. Moreover, the rule of law under Xi is explicitly superstructural. It yields to basic economic changes, including China's development needs. Finally, whereas earlier accounts suggest a foreign idea under cautious inspection, CCP doctrine under Xi identifies rule of law in China as indigenous and unrelated to Western accounts. These shifts in the Party's frame of reference in relation to rule of law see it now, under Xi Jinping, as 'not merely an

ephemeral concept, but a superstructural concept', relativised as 'socialist rule of law with Chinese characteristics' in the new era.

Delia Lin and Susan Trevaskes continue this discussion of Party leadership through an examination of key assertions about the nature of law and morality under the Xi administration, identifying that these assertions have been to frame and embed the Xi leadership's ambitions 'to lead over everything' through greater supervision and discipline, including promoting morality-based 'self-discipline'. They first look at rule of law discourse in the Xi era: how it has come to describe not only state law but also Party rules, regulations and modes of governance including 'governing the nation through moral virtue'. Xi-era discursive emphasis on Party leadership has sought to bring ideological coherence to this *sui generis* framework of rule of law by claiming that the Party, by dint of its leadership status, has moral supremacy to rule. Its ubiquitous power gives it not only built-in moral authority to govern but also the authority to ideologically interpret the nature of social conflict and disputes amongst the people it governs. Lin and Trevaskes identify how the current discourse has reignited the ideological import of morality from the Mao and pre-Mao eras to affirm the Party's contemporary moral supremacy to 'govern the nation according to law' through core socialist values. Thus, in China today a particular brand of its socialist morality is integrated into the overall ideological mix to justify and explain how and why the Party needs to bring about a rejuvenated and spiritually civilised well-off society. The upshot of this is that the Party intends for both state functionaries (including judges) and society at large to reinterpret the way that they understand social conflict and dispute: that is, to see conflict and dispute and illegal behaviour as a moral issue first and foremost that needs to be solved through the conduit of the law (as opposed to seeing these as legal disputes that have a secondary moral dimension).

### 1.7 Writing on Law, Ideology and Organisation

The chapters in the first half of the book, discussed above, concern changes in the ideological makeup of Party rule under Xi Jinping. Those changes have presaged shifts in the structural makeup of the Party's governance over the state and its citizens. In the second half of the book we refract the lens from the language of legal ideology to the structures of Party-state power and, in particular, the structures of power which exist to constrain, supervise and, when necessary, discipline and punish behaviour.

In Chapter 6, Margaret K. Lewis looks at the ‘new-type political-party system’ (*xinxing zhengdang zhidu* 新型政党制度) announced in 2018 and at related attempts by the Party-state to export its governance ethos to international contexts. In the first part of the chapter, she provides readers with a fine-grained outline of the internal power structures that explain the relationship between state and Party both in an historical context and under Xi Jinping. Analysing movements in the Party-state relationship in recent years, she notes that under Xi Jinping, the official position towards permitting constraints on the concentration of power has shifted from quiet rejection in the pre-Xi period to overt hostility today, a phenomenon with implications beyond China’s borders. Since China’s projection of its governance strengths are nowadays propagated not only domestically but across the globe, the words that the Party uses to describe its structure of governance matter, as it reaches beyond borders ‘with money, surveillance technology, and military hardware’ and into international organisations where it takes each available opportunity to celebrate the authoritarian ideal that consolidation of power is a superior form of government.

She cautions against validating some of the discourse of the current Party approach to governance in international arenas such as the UN Human Rights Council, as an attractive alternative to traditional understandings of government based on a separation of powers.

In Chapter 7, Ling Li focuses on how the Party operates in the governance space in China, using the evolution of the disciplinary regime of the Party to demonstrate what she sees as the defining feature of China’s single-party state: two separate seats of power and sources of legitimation which enable the Party to use a variety of ways to impose authoritarian control over state affairs. She begins with an analysis of the conceptual qualities of the Party-state and then, through a historical examination of the evolution of the disciplinary regime of the Party-state, she demonstrates how the dual seats of power operate to sustain authoritarian governance in China.

Her study explores supervision and discipline in the context of the structure of China’s Party-state. In China these have evolved through the development of a particular structure of Party-state power that enables the Party to claim it can effectively supervise state actors in the absence of a western-liberal system of accountability and checks and balances. Li examines the establishment and preservation of dualism – two separate seats of power and sources of legitimacy – that she argues is the defining characteristic of the mode of operation of the type of single-party state

that China represents. Her analysis of the particular organisational features of China's Party-state draws on a description of the evolution of this dualism and the historical development of anti-corruption institutions as an exemplar of how the Party governs through supervision and discipline in China. She connects this discussion in the latter part of the chapter with the contemporary development of the NSC. In this way, the chapter presents an historical evolution that can explain the establishment of the Commission, which represents the apex of Party-state disciplinary and supervisory ambitions in China today.

In Chapter 8 by Samuli Seppänen we move to a discussion about another aspect of the architecture of Party-state power: the issue of Party rules in the organisation of the Party-state and their relationship to the overall *yifa zhiguo* system. Seppänen examines arguments around how we are to understand how the Party governs itself and society, and, in doing so, he explores a curious political and cultural moment in contemporary China, a paradox in current rule of law thinking. Curiously, institutional reforms have coincided with equally prominent efforts to establish a 'rational' system of intraparty regulations within the CCP. Xi Jinping describes intraparty regulations as a 'cage' which must constrain the Party cadres' uses of power. Intraparty regulations are also constitutionally important for the Party, since they determine – at least formally – whether an act of an individual Party member is an act of the Party itself. This dual posture produces a number of anomalies which illustrate how fraught is the Party's governance project (and illiberal legal thought more generally). Under Xi Jinping, Central Party authorities have further developed Party rules, but they have done so under the rubric of what they describe as 'rule of law reform' in order to better constrain Party members' power. Rule of law reform in this era has also seen the limiting of law-based governance in line with the expansion of the Party's extra-legal disciplinary rules and supervision regime to better control the actions of Party and state officials. But why continue promoting law-based governance while seemingly working to undermine that governance through the expansion of a Party disciplinary and supervision regime? The expansion of the Party's disciplinary and regulatory regime into spheres that were once the preserve of the state legal system has prompted many legal and political scholars to take on a 'commonsense' approach: to assume, following an instrumentalist tradition, that the 'political' and the 'legal' are not necessarily in tension with each other since they both sit under a system of 'rule by regulations'. Seppänen problematises the commonsense narrative of understanding the Party



rules-law nexus in China and, in doing so, describes an alternative way of understanding 'the political' in China. He explores such anomalies through texts of both the Chinese leadership and legal scholars on intraparty regulations, particularly in the context of the newly established National Supervisory Commission.

The focus of the final chapter moves from internal Party governance and discipline to disciplining and controlling both state actors and the general populace alike through the mechanism of social credit. Adam Knight in his study on China's social credit system (*shehui xinyong tixi* 社会信用体系) examines how the Party-state is harnessing modern technology to automate processes for consolidating and expanding its power both organisationally and ideologically. Knight begins with a short history of the social credit system, from its origins as a 'technology of risk' in the financial services market to its current role as a disciplinary 'technology of regulation'. This technology of regulation today has expanded into measures to enforce judicial decisions and, more widely at the local level, to enforce model behaviour on a wide range of fronts, 'in the pursuit of a state-arbitered moral ideal'. In this shift from a technology of managing financial risk to a technology of social regulation, the Party-state has applied advances in automation to augment existing social and political control strategies through a punishments and rewards system. It is, as Knight describes it, as a model of "divide and conquer" governance, part of the overall ideological repertoire of *suzhi* ('human quality') behavioural management techniques.

A shift has occurred on two fronts, organisationally and conceptually. As Knight notes, organisationally, social credit's evolution reflects a movement in policy innovation and implementation from the centre to the periphery, promoting the localisation of social credit experimentation. At the centre, development of policy in relation to social credit has been scarce on detail to allow not only local jurisdictions but also national state ministries to fill the void through customised policy innovation. Social credit's development and roll out has been a prime example of the importance of what Heilman and Perry have described as adaptive governance; localised piloting and experimentation in Chinese policy-making through campaign-style policy innovation (Heilmann and Perry 2011). The space left for interpretation of policy has enabled both local and national authorities to employ social credit systems to a wide range of issues that go far beyond its original purpose of social credit introduced in decades past.



Conceptually, social credit's development from a narrow policy goal to an increasingly broad array of punishment and reward initiatives is part of a political move by the Party to promote the ideological spread of what Knight calls *chengxin* (诚信) culture ('honesty and credibility' culture) under Xi Jinping. Knight attributes this conceptual shift to a *chengxin* culture as integral to the Party-state's broader paternalistic aspirations in China today.

## 1.8 Conclusion

Ideology is indeed foundational to law and its operation in China. It is not simply an external veneer to justify the actions of legal and Party-state actors but the discursive underpinning of legal rules – framing actions and decisions that permeate all aspects of law and organisation in China. This volume is the first study of its kind to interrogate the relationship between law, ideology and organisation in contemporary China. Particularly in the current Xi Jinping era, ideology is not merely a branding exercise but a framing mechanism to articulate the CCP's endeavour to reach its end goal of national rejuvenation. The blueprint of this end goal is manifest in the 'Four Comprehensives' ideological goal of '(1) comprehensively building a well-off society' through the ideologically-inspired mechanisms of (2) comprehensively deepening reform, (3) comprehensively implementing the rule of law and (4) comprehensively strengthening Party discipline. Politically-charged words and slogans have become the bricks and mortar of a construction process to renew the Party's central role in Chinese state and society. This process is aimed at fashioning a new-style political system in which, in the words of the newly amended CCP Constitution, the Party 'leads over everything'. Law, in turn, is to be mobilised as a key, but not the sole, conduit to realise this leadership, raising important questions concerning the direction of future legal reform. This book seeks therefore to address two major points of discussion to illuminate scholarship and policy on law in China: how ideology has come to shape and reshape the law and the legal system in China today, and how law has become an integral tool to uphold the Party's ambitions to govern itself, society and the economy.

The contributors examine the ideological underpinnings of socialist law, how they have shifted in recent years under Xi Jinping, and the way that they have reshaped the structure and organisation of political and legal power in China today. This reshaping has been achieved in ways that allowed the Party to more closely supervise and discipline both

everyday citizens and Party members through laws and regulations and innovative governance approaches and technologies in order to achieve the goals of order, discipline and harmony. These goals are the foundational pillars upon which the Party seeks to achieve its much lauded endgame goal of a great national rejuvenation.

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