

# PARTY LEADERSHIP AND RULE OF LAW IN THE XI JINPING ERA WHAT DOES AN ASCENDANT CHINESE COMMUNIST PARTY MEAN FOR CHINA'S LEGAL DEVELOPMENT?

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## EXECUTIVE SUMMARY

The Chinese Communist Party has largely observed a technical, *de jure* separation between itself and the state, including the legal system — even while *de facto* controlling the state apparatus and often disregarding<sup>1</sup> and devaluing the law — for much of the 70 years it has ruled the People's Republic of China (PRC). Party General Secretary Xi Jinping is dismantling that pretense through assertion of comprehensive party leadership<sup>2</sup> over everything, including law. Yet, his push to codify party leadership into law and making explicit the party's command of “socialist rule of law with Chinese characteristics”<sup>3</sup> suggest that Xi appreciates the legitimating power of law. Under his incumbency, the party has made “governing the country in accordance with law,”<sup>4</sup> commonly translated as “law-based governance” (依法治国), a cornerstone of the party's governance strategy, along with Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era.<sup>5</sup> The party, while demanding “absolute”<sup>6</sup> leadership of political-legal work, continues to delegate to state legal institutions the responsibility to address and resolve complex matters on a day-to-day basis in a professional, efficient, fair, and autonomous manner to help maintain social stability and promote economic development.

At the same time, the authoritarian party-state continues to bypass state legal requirements,<sup>7</sup> or adopts<sup>8</sup> and applies illiberal ones,<sup>9</sup> when dealing with what it views as sensitive matters. Relying on extra-legal detentions<sup>10</sup> and other coercive measures, Xi has overseen an unprecedentedly organized and sustained crackdown on civic and labor activists, religious leaders,

journalists, and ethnic and religious minorities — most blatantly in Xinjiang<sup>11</sup> and Tibet.<sup>12</sup> The crackdown has also targeted outspoken academics<sup>13</sup> and students,<sup>14</sup> as well as the legal profession that the party purports to entrust<sup>15</sup> to protect the public's lawful rights and help achieve law-based governance. In practice, the party maintains a dual<sup>16</sup> state and legal system, under which the majority of Chinese people generally enjoy the protection of an increasingly sophisticated body of law and legal institutions, but those deemed a danger to the party-state are handled outside the law.



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The substantive impact of Xi's push to institutionalize and legalize party leadership over everything is not clear. To date, the party appears to view its leadership as primarily political and seeks to promote a professionalized, efficient, and effective state, economy and legal sector. It is sending mixed messages, however. Emphasizing party leadership raises concerns about increased politicization of decisionmaking, with less transparency and accountability, potentially threatening not only

economic and social development, but also the rule-of-law project that is intended to enhance party legitimacy. The party's conditional attitude toward law, reflected in its continued resort to extra-legal means in dealing with perceived enemies, creates uncertainty over the reliability of the party-state's legal commitments both at home and abroad.

## THE PARTY'S RELATIONSHIP TO STATE LAW

Under China's one-party system, the relationship of the party with state law and the legal system is complex and characterized by contention and duality. The party has always exercised *de facto* control of state affairs, through a variety of mechanisms including personnel appointments and party organizations that parallel and intertwine with the state structure. But its constitutional and legal status<sup>17</sup> have generally been left ambiguous.<sup>18</sup> The interplay of formal (legal) as opposed to informal (societal) ordering that characterized traditional Chinese thought<sup>19</sup> and the revolutionary period<sup>20</sup> prior to the PRC's establishment in 1949 is evident in the contemporary juxtaposition of formal state law on the one hand, and extra-legal — but increasingly ordered and more broadly applicable — party regulations on the other. These target ideological and organizational matters, as opposed to strictly legal behavior, and may be used to justify extra-legal coercive measures for “sensitive” or “exceptional”<sup>21</sup> cases.

Following the violent and lawless Cultural Revolution politics of 1966-76, the party under Deng Xiaoping determined in December 1978<sup>22</sup> to establish a modern legal system to facilitate social and economic development, including foreign trade and investment under its Opening and Reform policy, and prevent a return to arbitrary one-man rule. Since then, “legalization” has been intertwined<sup>23</sup> with China's political, economic, and social modernization.

The party's organizational charter (章程, which it translates as its constitution<sup>24</sup> but will be called the “charter” here to distinguish it from the state constitution), has since 1956 required party organizations and members to abide by state law. The charter as last revised in October 2017 by the 19th Party Congress currently stipulates in its preamble

that the party must “act within the framework of the country's constitution and the law”; preserve the “organic unity of Party leadership, the running of the country by the people, and law-based governance”; develop a socialist rule-of-law system with Chinese characteristics and build a socialist rule-of-law country; respect and safeguard human rights; and bring all state work under the rule of law.

The charter's main body more specifically requires party members to have legal knowledge, set a good example in abiding by — and assisting their work units to abide by — laws and regulations, and handle matters in accordance with law. It forbids using against party members any measure that violates the law or the party charter, while requiring that any offending organizations and individuals be held accountable according to law, as well as party discipline. Party members who seriously violate criminal law must be expelled.

On the state side, the preamble to the state constitution<sup>25</sup> (宪法) — the making<sup>26</sup> and amending of which is controlled by the party<sup>27</sup> — has always extolled the party's historical and political leadership. However, in keeping with Soviet law traditions from which the initial 1954 constitution drew,<sup>28</sup> the party was not mentioned in its main body for most of PRC history, save for the short-lived 1975 and 1978 constitutions that constitutionalized party leadership and Chinese citizens' obligation to support it. Indeed, the constitution has stipulated since 1982, post-Opening and Reform, that everyone, including “all political parties,” must abide by the constitution and that no “organization or individual is privileged to be beyond the Constitution or the law.” Even while the party under Xi has denounced Western-style constitutionalism,<sup>29</sup> Xi reaffirmed this language in his October 2017 report to the 19th Party Congress,<sup>30</sup> and it remains in the constitution as revised in March 2018.

Seemingly contradicting the party's leading position, Xi elaborated in that report on the supremacy of the constitution and law. He advocated for increasing public awareness of “the principle underlying rule of law that the Constitution and the law are above everything else and that everyone is equal before the law.” He reminded fellow party members that “no organization or individual has the power to overstep

the Constitution or the law; and no one in a position of power is allowed in any way to override the law with his own orders, place his authority above the law, violate the law for personal gain, or abuse the law.” In so doing, Xi appeared to accord the Chinese term officially translated as “rule of law” (法治) a meaning similar to the Western notion that public as well as private power is constrained by law. However, the party’s concept is intertwined with the more complex notion of “socialist rule of law with Chinese characteristics”: State law reflects the will of the party codified through state legislative processes, and the party thus abides by the law it creates.<sup>31</sup>

The 1982 decision to return to the socialist convention that Deng favored — of not mentioning the party in the constitution’s main text — reportedly reflected<sup>32</sup> a recognition among some party leaders that, since party membership constitutes a minority of the Chinese citizenry (roughly 6% currently), it was more legitimate for the party to operate informally. The current Central Committee, which Xi leads, apparently disagreed, when it decided<sup>33</sup> to write party leadership into Article 1 of the constitution’s main body as the “defining feature of socialism with Chinese characteristics.”

That March 2018 amendment,<sup>34</sup> providing the party with formal constitutional status, together with a companion amendment establishing a new branch of government to consolidate the party’s anti-corruption<sup>35</sup> efforts and a massive reorganization that merged an array of party and state entities, reflects a fundamental turn toward integration of the party with the state and state law. This is being carried out in several ways: strengthening the quasi-parallel body of intraparty regulations; increasing party or joint party-state regulation that encroaches into areas formerly occupied primarily by state law; writing the party’s role in state governance expressly into state law; merging selected state bodies with their party counterparts, thus removing them from the reach of state law and remedies; and emphasizing party-building and the role of party organizations in all public and private entities. This institutionalization and legalization of party leadership<sup>36</sup> is a major shift under Xi. While the practical impact<sup>37</sup> is not clear, it raises concerns over official accountability, transparency, and the entire rule-of-law project more generally.

## INTRAPARTY REGULATIONS

“Law-based governance” means not only governing in accordance with the constitution and law, but also that the party and its members are strictly governed by the party’s own intraparty regulations<sup>38</sup> (党内法规) that dictate ideological, organizational, and operational behavior. Indeed, the party under Xi views regulation-based party governance (依规治党) as a precondition<sup>39</sup> for good state governance. The party’s charter is the most fundamental intraparty regulation.

The intraparty regulation system has been linked with Xi’s vow to restrain “power in a cage of regulations.”<sup>40</sup> “One must build a good cage,” Xi instructed: “If the cage is too loose, or is very good but the door is not closed, and one is free to go in and out, then that is of no use.”<sup>41</sup> The party, like the State Council it leads, recently amended its own rulemaking and archival regulations,<sup>42</sup> — reportedly referred to collectively as the party’s “legislation law”<sup>43</sup> — and introduced the use of five-year<sup>44</sup> rulemaking plans,<sup>45</sup> similar to the five-year lawmaking agendas<sup>46</sup> formulated by the National People’s Congress (NPC) Standing Committee and annual ones<sup>47</sup> compiled by state bodies. The party now requires licensed lawyers to advise both party and state organs<sup>48</sup> on rulemakings and major decisions. It also undertook the first comprehensive review of its regulations and continues<sup>49</sup> to “clean up” and supplement them, again analogous to the periodic rectification (清理) of state regulations.<sup>50</sup> Xi’s rewriting of the party rulebook<sup>51</sup> exceeds that of his predecessors and is centralizing and personalizing party authority.<sup>52</sup>

Intraparty regulations are not simply a parallel system only impacting the 90 million party members.<sup>53</sup> Under Xi, they increasingly have been jointly issued with the State Council or regulate areas formerly managed by the state. Jointly issued regulations traditionally focused primarily on managing officials in party and state organs,<sup>54</sup> where party members constitute<sup>55</sup> 80% of civil servants and 95% of leading officials. Their scope has been extended to also address such issues as law-based government,<sup>56</sup> statistical fraud,<sup>57</sup> and environmental protection.<sup>58</sup> In other cases, party-dominated dual-facing entities like the Cyberspace Administration of China<sup>59</sup> — otherwise known as the Office of the Central Cyberspace Affairs Commission established under Xi in 2014 — issue state rules<sup>60</sup> in their state capacity.

The party also issues policy documents called “opinions,” “decisions,” “plans,” or “notices,” often jointly with the State Council. The number of party and joint party-State Council policy documents has also increased under Xi. They cover everything from legal services,<sup>61</sup> private enterprise financing,<sup>62</sup> social credit,<sup>63</sup> education,<sup>64</sup> food safety,<sup>65</sup> government work inspections,<sup>66</sup> and more. Such documents often provide the policy basis for subsequent legislation and are sometimes cited as the direct basis — rather than a law — for government rules.

Jointly issued party-State Council regulations are considered intraparty regulations and thus exempted<sup>67</sup> from participation<sup>68</sup> and transparency<sup>69</sup> requirements applicable to state legislation. The continued institutionalization of open government<sup>70</sup> mechanisms like access to government records and public participation in government decisionmaking, which Chinese citizens and civic organizations<sup>71</sup> use to engage with the state, is one of the most significant Chinese legal reforms of the last 40 years. The party is subject, instead, to the less rigorous requirements for party rulemaking<sup>72</sup> and transparency.<sup>73</sup> While it has selectively improved public disclosure, including of meetings<sup>74</sup> and activities, the party has published only half of hundreds of documents reportedly approved through June 2019 by the party’s Deepening Reform<sup>75</sup> and Law-Based Governance<sup>76</sup> Commissions established under Xi. Moreover, although certain party decisions can be challenged internally, the party cannot be held accountable to the general public like state agencies, which may be sued<sup>77</sup> for failure to perform statutory obligations, including information disclosure.<sup>78</sup>

## LEGALIZING THE PARTY’S ROLE

In addition to constitutionalizing party leadership and using intraparty regulations to regulate state matters, the party’s leadership role — and obligations relating to the party — are increasingly being written into laws and regulations. China’s 2000 Legislation Law<sup>79</sup> was the first law to specifically mention the party,<sup>80</sup> providing that legislation should adhere to party leadership. China’s Company Law<sup>81</sup> has stipulated since 2005 that party organizations should be established in all companies, which are to “provide necessary conditions” for party organization activities. Since Xi took office,

the party’s leadership role was similarly codified in the 2014 Counter-Espionage Law,<sup>82</sup> 2015 National Security Law,<sup>83</sup> 2017 National Intelligence Law,<sup>84</sup> and 2018 Supervision Law<sup>85</sup> targeting anti-corruption. Some of these laws delegate to party entities certain policy and oversight functions, as would the draft Encryption Law,<sup>86</sup> as well. State Council Volunteer Service Regulations<sup>87</sup> require party organizations be established in and provided necessary conditions by volunteer organizations, while draft 2018 private school<sup>88</sup> regulations would further require that party organizations participate in major decisionmaking and policymaking bodies.

Three recent sets of State Council procedures — on formulating administrative regulations,<sup>89</sup> government rules,<sup>90</sup> and government decisionmaking<sup>91</sup> on major policies and projects — not only specify party leadership but also require certain party consents for designated documents, including annual rulemaking plans and major project catalogues, and when finalizing important documents. Party oversight is not new,<sup>92</sup> but is now more explicit. However, similar to NPC lawmaking, enhanced party leadership in State Council rulemaking and decisionmaking<sup>93</sup> is accompanied by requirements for greater expert input, transparency, and public participation, including 30-day public comment periods for drafts, which increase government accountability to the public.

More worrisome is the specific grant of state powers to the party for the first time<sup>94</sup> since the Cultural Revolution, under the 2015 National Security Law. That law authorizes the party’s secretive National Security Commission<sup>95</sup> — established in 2013 and chaired by Xi<sup>96</sup> — to, among other things, deploy state emergency measures when national security is endangered.

## WHAT DOES PARTY LEADERSHIP MEAN?

Up until 2017, the party charter’s preamble defined party “leadership” to mean “mainly political, ideological and organizational leadership,” which official sources<sup>97</sup> explained meant that the “Party does not take the place of the government in the state’s leadership system.” The 2017 charter replaced that definition with a more expansive but imprecise description of party leadership as “the most essential

attribute of socialism with Chinese characteristics, and the greatest strength of this system,” adding that the “Party exercises overall leadership over all areas of endeavor in every part of the country.”

The Politburo has justified<sup>98</sup> party leadership as consistent with the rule of law, since only party leadership can properly advance law-based governance. Whereas most Xi-era documents refer to the party’s “overall,” “authoritative,” and “centralized, unified” leadership, a January 2019 intraparty regulation<sup>99</sup> requires political-legal units to follow the party’s “absolute” leadership and align law-based governance of the country with intraparty regulation-based governance of the party. It is not clear what “absolute leadership” — also required of the military<sup>100</sup> — means in the context of political-legal work, which is carried out by the courts and procuratorates, as well as public security,<sup>101</sup> state security, and justice authorities. The party explicitly maintains<sup>102</sup> that judicial institutions must exercise their power in an independent and fair manner in line with the law, and the party has prohibited<sup>103</sup> leading officials from interfering in specific cases upon threat of disciplinary and criminal liability. Many documents, including Xi’s 19th Party Congress report,<sup>104</sup> suggest that party leadership is still intended to be primarily political and that state entities — including the political-legal bodies — continue to be expected to perform their functions autonomously and professionally.

The party has historically exercised its leadership in various ways, often behind cover of the state, using state legal processes to convert its decisions into state action. It continues to lead administrative, judicial, legislative, and other work through the appointment of party members to leadership positions in those institutions, through party organizations embedded in them, and through intraparty regulations.

The party — like the State Council — has also long formed leadership small groups (LSGs), comprised of high-level party members from relevant bodies, to collectively tackle specific issue areas such as finance, cybersecurity, and foreign affairs. The number of these, often headed by Xi himself, has proliferated<sup>105</sup> under Xi. The 2013 Party Plenum<sup>106</sup> established a Comprehensively Deepening Reform LSG headed by Xi, under which a sub-group devoted to judicial reform helped push through a series of significant<sup>107</sup> court,

procuratorate, and legal profession initiatives. The 19th Party Congress endorsed<sup>108</sup> setting up yet another LSG, for “advancing law-based governance in all areas,” to provide unified party leadership over the rule-of-law initiative and ensure “scientific lawmaking, strict law enforcement, impartial administration of justice and observance of the law by everyone.”

These two LSGs were elevated to commission status in the 2018 party and state restructuring that also merged<sup>109</sup> a number of party and state bodies. The party’s institutional reform decision<sup>110</sup> — ostensibly to achieve greater efficiency and coordination<sup>111</sup> and modernize governance<sup>112</sup> — along with its restructuring plan<sup>113</sup> significantly expand regulation by or under the direction of more opaque party bodies. Regulation of film, news media, and publications was given solely to the party Central Propaganda Department,<sup>114</sup> while managing overseas Chinese, as well as religious and ethnic affairs, moved directly under the party’s United Front Work Department.<sup>115</sup> The Party Organization Department,<sup>116</sup> which appoints senior party and state officials, picked up sole jurisdiction over public-sector reform and China’s civil service.<sup>117</sup> The Legislative Affairs Office, formerly charged with drafting laws and national regulations, was removed from the State Council, and its functions dispersed and merged with the Ministry of Justice, which also now houses the party’s Central Law-based Governance Commission<sup>118</sup> office, directed by the head of the party’s Central Political and Legal Affairs Commission.<sup>119</sup> The National Academy of Governance, which trains government officials, moved into the Central Party School,<sup>120</sup> which trains party cadres.

This restructuring also followed moves under Xi for the party to take more direct charge in important areas through establishing new institutions, like the party National Security Commission,<sup>121</sup> tasked with policymaking and certain state powers; the Central Cyberspace Affairs Commission headed by Xi, the office of which doubles<sup>122</sup> as the state Cyberspace Administration of China;<sup>123</sup> and the National Supervision Commission (NSC),<sup>124</sup> co-located and merged with the powerful party Central Commission for Discipline Inspection.<sup>125</sup>

Creation of the NSC<sup>126</sup> — approved by the party and accorded constitutional status and its own organic law by the NPC in March 2018 — was intended to legalize<sup>127</sup>

the party's ongoing anti-corruption campaign, as well as expand it beyond party members to all public personnel who exercise public power. Instead, the NSC epitomizes the legal challenges arising from the integration of party and state bodies more generally. Such merged or co-located bodies, dominated by their party counterparts, potentially lie outside the reach of state criminal and administrative law – including China's transparency and due process requirements for imposing obligations and penalties – and any judicial review of their actions. Party leadership exercised through this kind of party-state functional integration, which has increased under Xi, goes beyond political leadership and places nominally state action outside the law on which both party and state action are to be based.

Party leadership is also exercised through specific tasks of central, local- and primary-level party organizations in state organs, the courts and procuratorate, party-led people's organizations, state-owned and private enterprises, social organizations, law firms,<sup>128</sup> and other non-party entities. The party charter has long called for primary-level party organizations to be established whenever an entity has three or more members. Party-building through strengthening primary-level party organizations is a priority for Xi.

The party is pushing to give party-building “legal status” (法定地位) of a sort. For example, a 2016 joint party-State Council instruction<sup>129</sup> calls for “inclusion of Party building in the charters of social organizations” and stipulates that such party organizations should provide opinions on major decisions, important activities, large expenditures, and foreign-related activities. Draft 2018 regulations<sup>130</sup> would implement these instructions by requiring social organizations, as a matter of law, to establish party organizations and include party-building commitments in their charters.

The party also requires, as a matter of policy<sup>131</sup> rather than law, enhanced legal status for party organizations in state-owned enterprises (SOEs), over 90%<sup>132</sup> of which host such organizations. The charter has long ordered party organizations to participate in major decisionmaking of SOEs and collective enterprises. In 2017, the State Council directed<sup>133</sup> SOEs to clarify in their articles of association the legal status of party organizations, including their right to participate in

decisionmaking,<sup>134</sup> in order to help improve SOE efficiency and productivity. Moreover, a recent party regulation requires leading party members in central SOEs to hold board and other management positions and first decide major economic and management matters, before the board or management group makes a final decision.

SOEs that have foreign investors<sup>135</sup> have been pressured to make similar adjustments. More than 30 Hong Kong-listed SOEs<sup>136</sup> had reportedly written the party's role into their charters as of September 2017. This more assertive policy on party involvement in corporate decisionmaking raises concerns<sup>137</sup> among foreign business partners, particularly since the party currently emphasizes political integrity of its officials over competence.<sup>138</sup>

To date, this party “legalization” requirement has not been formally imposed on non-SOE companies. Although all Chinese companies, including private and foreign-invested ones, have been legally required<sup>139</sup> since 2005 to establish and provide “necessary conditions” for party organizations, recent laws<sup>140</sup> and policies<sup>141</sup> relevant to private companies (including the Foreign Investment Law,<sup>142</sup> adopted March 2019) make no mention of the party or party organizations. Moreover, the 2017 charter tasks party organizations in “non-public economic organizations” to carry out party policies and ensure observance of law and healthy enterprise development, but does not stipulate party leadership or require party participation in decisionmaking.

Earlier proposals by the party-state to purchase “special management shares”<sup>143</sup> in private technology companies and secure a board seat appear not to have gone forward. The party must balance its desire for control against providing necessary space for the innovation so vital for economic growth. It acknowledges that the private sector contributes<sup>144</sup> over 50% of taxes, 60% of domestic gross domestic product (GDP), 70% of technical innovation, and 80% of urban labor employment. Indeed, the number of party committees in private companies appears to have decreased from 2017 to 2018. Nonetheless, the informal push for party-building in<sup>145</sup> – and writing the party into legal documents of<sup>146</sup> – private companies continues.<sup>147</sup>

Xi has given seemingly conflicting interpretations of what strengthened party leadership of SOEs<sup>148</sup> means. He has advocated that SOEs are important forces to implement party decisions, enhance economic and social development, and realize major strategies such as his signature Belt and Road Initiative.<sup>149</sup> But he also indicated that party organizations in SOEs should “aim to improve corporate profitability, competitiveness and the value of state assets.”

From a foreign investor’s perspective, requiring SOEs, their joint ventures with foreign companies, and potentially private companies with which they might deal to formalize the role of their party organizations raises concerns over whether party-state priorities might interfere with normal profit-seeking goals.<sup>150</sup> Another key concern is whether explicitly requiring party representatives to approve major decisions before submitting them to the board of directors, which is a company’s highest decisionmaking body, might compromise the board’s fiduciary obligations, without any corresponding party accountability.<sup>151</sup> The push to legalize party decisionmaking authority in companies further blurs the line<sup>152</sup> between the party and the market, as well as the party and the state, and could compound the difficulty of convincing other governments and investors to treat Chinese SOEs and private companies as independent market entities.

## IMPLICATIONS OF PARTY LEADERSHIP AND ITS LEGALIZATION

Some commentators<sup>153</sup> have argued that Xi’s unexpected amendment of the state constitution in March 2018 to remove term limits for the presidency in fact reflects his appreciation of law’s legitimating power.<sup>154</sup> The argument<sup>155</sup> goes that, while Xi is China’s most autocratic leader in decades, he has also paradoxically empowered legal institutions — including the courts, legislature, and regulatory authorities — to operate semi-autonomously under strengthened legal procedures and oversight, as well as more explicit party leadership. The amendment that formally constitutionalizes party leadership and other moves to write the party’s role into law may provide further evidence of Xi’s and the party’s quest for legitimacy through legalizing one-party rule, while not substantively changing its traditional political leadership role.

The 2017 charter does stipulate the party must ensure that state legislative, judicial, administrative, and supervisory organs work independently and responsibly. Party organizations in state organs should assist and supervise chief administrators, but specifically may not lead the organs’ professional work. The party continues to professionalize the legislative process and strengthen the regulatory state and its accountability, through greater transparency in decisionmaking, enforcement, and adjudication. Thus, exercise of party leadership in the legislative and rulemaking arena may, in practice, prove to be somewhat akin to the Office of Management and Budget’s role in reviewing significant U.S. federal agency action to ensure it is consistent with presidential policy priorities. And the principle that the courts and procuratorates should handle cases independently<sup>156</sup> was maintained in the constitution’s 2018 revisions and relevant laws,<sup>157</sup> and is enforced through a party regulation<sup>158</sup> requiring reporting of and discipline for interference by leading officials in judicial cases.



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It is concerning, however, that party leadership is encroaching increasingly on the normal state and legal system. It portends not only increased politicization at the expense of professionalism, but also decreased state transparency and less opportunity for the Chinese public to exercise the participation and orderly contestation procedures for restraining state action that the PRC legal system increasingly affords.<sup>159</sup> This trend may well threaten the party’s decades’-long effort to foster the rule of law and law-based governance that it hopes will bolster its legitimacy.

The persistence of the “exceptional” state, recently expanded by the merged discipline and supervision system, is also at odds with the party’s legitimation-through-legality project. It seems to be rooted in the Maoist concept of two types of contradictions:<sup>160</sup> those among the people and antagonistic ones “between ourselves and the enemy.” Mao Zedong in 1957<sup>161</sup> defined the “enemy” to mean social forces and groups

that resist the socialist revolution and are “hostile to or sabotage socialist construction.” This concept, set forth in preambles to the party charter since 1973, appeared in the January 2019 directive on political-legal work,<sup>162</sup> which urges political-legal units to strictly distinguish and correctly handle the two types of contradictions. Under “socialist rule of law with Chinese characteristics,” the party-state still explicitly reserves to itself the right to operate outside state law “when it interferes with the imperative to eliminate its perceived enemies.”<sup>163</sup>

The party-state’s “normal” legal system—which handles the day-to-day matters that comprise the majority of commercial, civil, criminal, and administrative cases — is maturing both substantively and procedurally. It is also increasingly “offering rules-based solutions to a wide range of social conflicts.”<sup>164</sup> Xi has stated the PRC should continue to learn from, but not copy, “beneficial” foreign rule-of-law experience<sup>165</sup> to improve and develop laws and procedures that deal effectively and fairly with the complex array of issues all countries must address in today’s world. The party promotes the Chinese people’s rights to know about, participate in, express views on, and supervise<sup>166</sup> government action. It continues to popularize law,<sup>167</sup> and cultivate a cultural of legality<sup>168</sup> among both the general public and the party-state that is building expectations and demands for the rule of law.



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The coexistence of that “normal” state with the party’s “exceptional” state, fostering a conditional attitude toward how law is applied, is what is particularly problematic. No standards for determining when one crosses the line to become the “enemy” are publicly available. No process seems to exist to guarantee access for such “enemies” to independent counsel to help challenge, or to an independent body to review, the determination that places one outside the protection of the law. Corruption suspects may be subjected to secretive, coercive detention under the Supervision Law,<sup>169</sup> which denies them the right to a

lawyer or recourse to a court to contest such detention. Activist lawyers disappear into prolonged detention.<sup>170</sup> The Xinjiang authorities point to regulations that do not actually provide a legal basis<sup>171</sup> for the extra-judicial detention being meted out to over a million detainees<sup>172</sup> in the name of counterterrorism.<sup>173</sup>

As the United States and China seek to resolve<sup>174</sup> their complex bilateral trade, investment, and other differences, assertive party leadership and its potential politicization of decisionmaking impact perceptions of whether the PRC can truly guarantee a “stable, transparent and predictable market environment,”<sup>175</sup> and ensure the promised “competitive neutrality”<sup>176</sup> that would require its SOEs to compete with private businesses on a level playing field.<sup>177</sup> The party’s insistence on legalizing its political status increases uncertainty over whether U.S. companies can trust their Chinese SOE and nominally private business partners not to place the political agenda of the ruling party over their mutual business interests. The party’s maintenance of an exceptional state raises questions as to whether the U.S. government can rely on PRC commitments, even when codified into law.

The party is managing an incredibly complex, dynamic, pluralistic, and increasingly sophisticated citizenry in a time of significant challenges domestically — a slowing economy, a demographic time-bomb,<sup>178</sup> and severe air, water and soil pollution, to list just a few. It also faces a difficult international arena in which the PRC is inextricably involved, and where it seeks a more persuasive voice. The party under Xi believes it needs to concentrate power and tighten its control to stave off disaster at home and create a conducive environment abroad. It increasingly looks to the organizational and legitimizing capacity<sup>179</sup> of an open, professionalizing legal system to help ensure continued economic growth and social stability. Ironically, the party’s heightened involvement in state governance without corresponding legal accountability for party-driven actions — and its continued resort to exceptional, extra-legal measures to deal with its perceived enemies — may undermine the very stability of expectations and trust, both at home and abroad, that it needs to succeed.



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