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社会主义法

## Socialist Law

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**S**ocialist law, both in the Soviet Union and in Mao's China, emerged as a system of legal principles based on the historical realities of socialist revolution. The role of the Communist Party in both nations was to lead over all aspects of the law in order to bring about the realisation of communism. In his *Law of the Soviet State*, Soviet legal theorist Andrei Vyshinsky theorised Soviet law as a system of norms of conduct based on relations of domination. Soviet law, he stated:

... is the aggregate of the rules of conduct established in the form of legislation by the authority of the toilers and expressive of their will. The effective operation of these rules is guaranteed by the entire coercive force of the socialist state in order to defend, to secure, and to develop relationships and arrangements advantageous and agreeable to the toilers, and completely and finally to annihilate capitalism and its remnants in the economic system, the way of life, and human consciousness—in order to build a communist society.<sup>1</sup>

The theory of socialist law that developed in the People's Republic of China (PRC) borrowed heavily from Vyshinsky's theory of the law and the state. In a Mao-era dictionary of jurisprudence, socialist law is defined as 'the aggregate of rules of conduct enacted and approved by the state, expressing the will of the dominant class, the application of which is guaranteed by the coercive force of the state.'<sup>2</sup> Of utmost importance to the theory of socialist law in both China and the Soviet Union, was the prominence given to the normative nature of the law, an emphasis which had its roots in political principles taken directly from the philosophy of Marxism. Legal scholar Phillip Chen notes the following in relation to Vyshinsky's theory of law:

The ‘theory of law’ Vyshinsky has in mind is evidently not a theory of positive law. It is a theory which has to produce ‘legal principles.’ But these legal principles are not the positive law that is to be established on the basis of these principles. If they are to be ‘legal’ principles, they are legal not in the sense of positive law, but in the sense of norms of an ideal law, the law that ought to be established in a socialist society. It stands to reason that these principles are the ideal norms of a socialist law.<sup>3</sup>

China’s socialist legal system developed out of this defining principle: that the Party utilises state law to regulate social relations in order to advance the cause of the dominant class and ultimately for the realisation of communism. As such, law had to be flexible and open to the vicissitudes of socialist development and class struggle, not bound by the strictures of detailed positivist legal statutes. Throughout periods of state bureaucracy and legal system-building (the mid-1950s) and in the age of mass campaigns (from the late 1950s to the late 1970s), socialist law continued to be conceived of as a system of norms of human behaviour based on the relations of domination; that is, the Party dominating on behalf of the people, with the application of the law open to constant change based on the requirements of Party policy.<sup>4</sup>

#### *Socialist Rule of Law from Jiang to Xi*

The concept of a socialist rule of law (*shehuizhuyi fazhi*) emerged as a defining reform-era ideology after the Mao period. It developed along the same principles as those observed by Chen and Keller above in relation to socialist law: it was conceived as a strategy to realise the broad governance agendas of the Party. The Deng Xiaoping leadership of the 1980s promoted it as a way of differentiating their reformist regime from the chaos of the Party’s Mao-era ‘rule by man’ (*renzhi*) governance style (see Hurst’s essay in the present volume). In the 1990s, Jiang Zemin sought to improve Deng’s notion of rule of law by coining a new phrase, ‘governing the nation in accordance with the law’ (*yifa zhiguo*). First put forward by Jiang in the mid-1990s, *yifa zhiguo* refers to the institutionalisation of law-based governance across all areas of the state. It was inserted into the Constitution in 1999 and declared China’s governing strategy for reform.

The vagaries of core Party policy priorities, which shift each decade or so as the Party leadership group changes, means that *yifa zhiguo* contains a level of ambiguity and flexibility that can accommodate different nuances of meaning, apt for political leverage.<sup>5</sup> The formula was used to promulgate and validate legal reforms through the Hu Jintao era of the 2000s but it was not the central discursive tool employed to define the Hu leadership’s overall agenda of ‘Harmonious Society’ (*hexie shehui*). In contrast, *yifa zhiguo* has come to the ideological foreground in the present Xi era.

Xi Jinping’s leadership group has endowed *yifa zhiguo* with a more compelling Party-centric stance, by giving its Jiang-era focus an ideological upgrade in late 2014. *Yifa zhiguo* is now an integral part of Xi’s ambitious ideological plan for a rejuvenation of Chinese Communist Party (CCP) governance and supervision over the state through law. The new administration’s theoretical contribution to socialist legality has been to assert the idea that ‘socialist rule of law’ and ‘Party leadership’ (*dang de lingdao*) are two entirely complementary concepts, and that given this truism the Party must exercise

its rule through all processes of *yifa zhiguo*. As is explicated in more detail below, this assertion is important for strategic reasons, as it further embeds the Party into the state through law, in order to maintain the supremacy of Party rule so that the people remain masters of the nation.

### *Party Leadership as the Core Mechanism of Accountability*

Political discourse frames the parameters of governance in China. In the Xi era, the Party's governance discourse of *yifa zhiguo* operates conceptually and in practice as a key ideological lever to identify and affirm power relationships for governing the nation. In Xi's new era of socialism, given the corruption epidemic and the Party's response to it, the Chinese leadership claims that the need for virtuous governance—or 'governing the nation through moral virtue'—is even more crucial now than ever before.<sup>6</sup> Building on Jiang Zemin's original interpretation of *yifa zhiguo*, the Xi-era claim is that the Party's role should be to focus on monitoring and supervising government employees in a much more comprehensive way than in previous years. Hence, in this thinking, Party leadership itself is the core mechanism of accountability. Given the idea that the government must be accountable to the people through the conduit of Party leadership, the Xi administration declared in 2017 that an all-encompassing new mechanism for greater accountability is required, and moved to expand the parameters of the authority of Party leadership to incorporate routine supervision and monitoring of the activities of all employees of the state. Among other innovations, the upshot of this political upgrade of *yifa zhiguo* is the establishment of the National Supervision Commission (NSC), a behemoth supervisory and prosecutorial structure that was piloted in some provinces in 2017. This is supposedly a state- (rather than Party-) based mega anti-corruption and national surveillance body that effectively merges state and Party surveillance structures by integrating same-level Party commissions for disciplinary inspection, government corruption prevention agencies, and state prosecution offices.<sup>7</sup>

Broadly speaking, the NSC monitors and inspects all state civil servants across China to ensure that they comply with laws such as the National Civil Service Law and the Criminal Law. In this respect, the Commission has the power to monitor, investigate, and, where necessary, detain any personnel working for any enterprise—including a school or university, cultural, medical or sports institution, or mass organisation—that is effectively operated or owned by the state.<sup>8</sup> A new State Supervision Law passed in March 2018, gives the NSC a total of 12 main powers. Notably, these include the power to investigate (*diao cha*) and detain (*liu zhi*) any China-based government employee (both Party members and those without Party membership) for any work-related infringement, illegal behaviour, or suspected crime as defined by administrative, civil, or criminal law. Xinhua News Agency boasts that merging state and Party anti-corruption apparatuses 'will overcome longstanding rule of law problems in China,' since it will 'improve rule of law thinking and *yifa zhiguo* methods in the state's capacity to punish corruption.'<sup>9</sup> The NSC will exercise much greater surveillance and supervisory power over the nation's legislature, judiciary, police, and procuratorate than any previous organisation.

Since the Fourth Plenum in 2014, Xi Jinping has repeatedly declared that for *yifa zhiguo* to be effective, the Party must be able to exercise its legitimate leadership over all government activities, including those of the legal and security systems.<sup>10</sup> Party supervisory power over all functionaries including both Party and non-Party members, concentrated with Xi at the helm in Beijing, now sits above any claim to supervisory authority or accountability that might be made by military, legal, or security institutions or personal.<sup>11</sup> We saw the first signs of this bold move in 2015 with the promulgation of the State Security Law, which grants a Party authority state powers and allows such powers to be exercised directly by a Party authority—a practice that only existed during the Cultural Revolution in the PRC.<sup>12</sup> Further moves were made again in late 2017 with the announcement that amendments to the People's Armed Police (PAP) Law now place the PAP under direct control of the Central Military Commission run by Xi himself.

### *The Party Leads Over Everything*

The opening paragraph of this essay gives us the necessary clues to understand from whence this ideological rationale for Xi's bold new era of the Party 'leading over everything' is derived: it comes from the Soviet and Mao-era idea that the Party must dominate through a system of norms of conduct *based on relations of domination*. In refocussing Jiang-era *yifa zhiguo* to pay much greater ideological attention to Party leadership, Party theorists now claim that Xi's *yifa zhiguo* is an advancement on both Deng and Jiang's thinking on law.<sup>13</sup> The historic decision of the Fourth Plenum of the Eighteenth Party Congress in late 2014 contains two key assertions about the Party and the law that are new to the theorising of law in China. The first assertion relevant to this claim is that the authority of the leadership of the Party is entirely compatible with the rule of law. The second is the imperative that 'the authority of the leadership of the Party must be implemented across the entire process of governing the country in accordance with the law.'<sup>14</sup>

Xi's revised interpretation of *yifa zhiguo* rests on the assertion that there is a fundamental harmony between three key conceptual elements of power in China: the 'rule of law,' 'Party leadership,' and the idea that 'the people are the masters of the nation.'<sup>15</sup> The rationale thus becomes as follows: it is only through Party representation of their interests that the people of China can claim their place as the rightful masters of the nation.<sup>16</sup> A so-claimed harmony of interests between the people and the Party legitimates the Party's right to represent the people. Bringing the Party and the people together under the *yifa zhiguo* umbrella allows Xi to promote the idea that the Party, as the vanguard of the people, must always and forever remain present and supreme throughout the entire process of the law. This includes not only the making of law but also the process of enforcement of the law.<sup>17</sup> To leave no one in doubt of its ambitions, in late 2017, the phrase 'the Party leads over everything' (*dang shi lingdao yiqie*) was inserted into the Party's Constitution.<sup>18</sup>

By reworking Jiang Zemin's original interpretation of *yifa zhiguo*, the Party has codified its leadership of everything. The 'New-style Party Political System' (*xinxing dangzheng zhidu*) announced in March 2018 rests on two main political truisms: first that 'the Party leads over everything' and second that the Party's main government

accountability mechanism is in fact the Party leadership itself. The underlying ethos behind this new style of governance is that concentrated power under the core leadership of the Party in Beijing is a more effective accountability mechanism than Western-liberal dispersed power-type arrangements. This is justified by dint of the ideological assertion that the Party that holds this concentrated power is the purist representation of the people.<sup>19</sup> It is its representational status that makes the Party virtuous and thus most capable of leading: it leads over governance in China because its leaders possess an advanced nature, capable of representing the will of the people.

Among other strategies, the Party aims to achieve its ambition to ‘lead over everything’ in Xi Jinping’s China by ‘organically unifying’ (*youji tongyi*) intra-party law with state law—that is, by directly governing the nation through all processes of the law. The Xi administration’s ideological focus on ‘comprehensively integrating’ (*yiyuanhua*) the Party into the state through law reconstitutes the Chinese governance landscape through a reassertion of, and renewed focus on, the idea of Party-dominated governance over everything, an ideal which was first espoused by communists in Yan’an during the 1930s.<sup>20</sup> This integration of Party and state law is, to date, most evident in the supervisory ethos and laws that govern the NSC, particularly those relating to the investigatory powers of officials.<sup>21</sup> It is also evident in the intention, announced in May 2018, to fully incorporate the Party’s ‘socialist core values’ into all legislation over the next five to ten years, and in so doing, making accountability based on socialist values ‘the core’ of the legislative system.<sup>22</sup>

### *New Thinking, Old Roots*

The focus of this essay on Party dominance enables us to discern how Mao-era socialist law and Xi-era *yifa zhiguo* are from the same ideological family tree: the latter derives its basic precept—that is, the idea of law being a system of norms of conduct based on the relations of domination—from the former. Hence, a consistent legitimising rationale in Xi-era Party propaganda has been the claim that for the Party to exercise leadership effectively, it must both supervise and remain supreme over the institutions that administer the law—that is, it must be above the law—so that it can effectively represent the people. Party supremacy over and via the law is based on the assumption that since it is the people who are the masters of the nation, the Party does not need to build overall structures of law that protect ‘the people’ from the people’s very own manifestation of power: the Party.<sup>23</sup> On the contrary, the Party’s effective supervision of state officials confirms the claim that China is governed by the Party in ‘accordance with the law.’ This does not mean that the Xi leadership has in any way—so the narrative goes—ignored the importance of government accountability. On the contrary, it is seeking to redefine how accountability operates. To this end, to a much greater extent than in previous decades, accountability is now provided through supervision by Xi Jinping, the Politburo Standing Committee, and the Party-run NSC in a manner that protects the people against individual illicit behaviour within the Party-state at the lower levels. Therefore, Xi Jinping has Mao-era socialist legal ideology to thank for his ‘Party leads over everything’ ambitions since his *yifa zhiguo* is indeed a system of norms of conduct based on the relations of domination—Party domination.

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