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Chinese President Xi Jinping and his fellow Politburo Standing Committee members at the Chinese Communist Party's Fourth Plenum. (Credit: Xinhua)

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## In a Fortnight

### SPECIAL ISSUE ON CHINA'S FOURTH PLENUM

By Nathan Beauchamp-Mustafaga

*As Editor, I have the distinct pleasure of introducing a special issue of China Brief, focused on the Chinese Communist Party's Fourth Plenum and its theme of yifazhiguo (依法治国), often translated as the "rule of law," though, as one contributor notes, the term is better translated as "rule according to law." China Brief has brought together leading experts on the Chinese legal system and foreign policy to contribute their analysis on the implications of the 18th Central Committee's annual meeting in Beijing on October 20–23.*

Overall, the analysts find limited promise in the announced reforms, and many reasons to be skeptical about the long-term trajectory of the Party's relationship to the law. The Fourth Plenum's Decision document distanced the Party from earlier reform efforts in the 1990s and 2000s for constitutional issues and judicial independence. While few details are currently available for the major initiatives, Chinese President Xi Jinping's emphasis on the "great rejuvenation of the Chinese nation" and cultural self-confidence has now extended into the Chinese legal field,

as the Plenum's Decision and comments by senior leaders explicitly indicate that further inspiration for China's legal reforms will come from within China, not from the West or other Asian nations. This exclusionary outlook by the Party will likely extend into the international arena, as China moves to generate support for its rise to great power status through favorable changes to the international legal system.

In this special issue, Jerome A. Cohen examines the Plenum through the lens of its declared "National Constitution Day" on December 4. Reflecting the troubled history of legal reform in China, this new observance is actually the third legal-focused celebration set on this date, following two abandoned pronouncements dating back to 1982 and 2001. Cohen argues the Decision represents meager progress in empowering the Standing Committee of the National People's Congress (NPCSC) to fulfill its responsibility to enforce the Chinese Constitution, and the Decision's use of "constitution" (*xianfa*) instead of "constitutionalism" (*xianzheng*) reflects President Xi's continued suppression of the latter term and the dim prospects for the Party submitting itself to the constitution in the future. Yet, Cohen finds hope for future legal reforms both in the very theme of *yifazhiguo* for the Plenum and the attention paid to the issue by the Chinese government, media and, perhaps most importantly, the Chinese public.

Taking a comprehensive view of the Plenum and its Decision document, Carl Minzner highlights the three core takeaways: modest technical legal reforms, strengthened Party control and indigenous sources for future reforms. Understanding the importance of terminology for the Party, Minzner makes a clear distinction between the "rule of law" as the Party translates *yifazhiguo* and a more accurate translation of "rule according to law." Similar to Cohen's discussion of the NPCSC's lack of independence from the Party, Minzner contends the Decision institutionalizes Party control over legislation, which will not only make the role of the NPC, China's "rubber-stamp" legislature, even more perfunctory, but also reduce the space for legal advocates to push for greater reforms, since the Party's implicit power to review legislation is now explicit. Furthermore, President Xi's efforts to refocus the Chinese state on China's own history suggests the Chinese legal field may become more isolated from the international community, as "foreign

models" are no longer acceptable in China.

Willy Lam, a Jamestown Foundation Senior Fellow, explores the elite politics behind-the-scenes of the Plenum. Lam suggests President Xi has signaled his own unrivaled power in the Decision, since Xi was the lead author and included himself in the traditional Party theoretical lineup of Mao Zedong and Deng Xiaoping, something neither Jiang Zemin nor Hu Jintao accomplished while still in office. This expanded power also carried over to Xi's anti-corruption office, as the Central Commission for Disciplinary Inspection gained greater sway over the military's own graft investigations. Yet, Xi's clout appears to be limited to policy, as the Chinese president experienced several apparent failures in planned personnel moves. Xi was unable to promote his favored military confidants, Zhang Youxia or Liu Yuan. More importantly, the lack of a public announcement of former Politburo Standing Committee (PBSC) member Zhou Yongkang's fate—undoubtedly sealed, but still in need of an official verdict—may signify opposition by Party elders. Yet, this opposition is likely more concerned with the prosecution of a former PBSC member—once immune from corruption charges—than an actual attempt to protect Zhou from his inevitable downfall.

Broadening the scope of analysis, Timothy Heath discusses the Plenum's implications for the Chinese government's foreign policy. Heath follows the history of previous fourth plenums and finds they often foreshadow major changes in China's behavior in the international community. Heath argues that the Party's attempt to consolidate control over the domestic legal system will likely have repercussions for Beijing's use of international law in its foreign policy moving forward. Chinese leaders' talk of "upholding the rule of law" abroad is contingent on the rule of law favoring China, meaning Beijing will pick and choose the international legal tools that serve its interests—leveraging its veto in the United Nations Security Council but ignoring the Philippines' arbitration of their disputed maritime border in the South China Sea through the International Tribunal on the Law of the Sea (ITLOS). This increased emphasis on international law as not only a rhetorical device to criticize the United States but also as a tool to support China's continued rise in Asia nevertheless provides an opportunity for Washington to encourage Beijing's continued adherence to international norms.

Refocusing on the grassroots level, Jerome Doyon and Hugo Winckler consider the impact of the Decision on local courts and their judicial independence from local officials. Doyon and Winckler contend that the announced policies do provide some semblance of judicial independence, but at the cost of increased control by central authorities in Beijing. In one of the Decision's few explicit restrictions on Party power, local governments are now required to document cadres' interference in legal proceedings and, in turn, cadres will be evaluated on their respect for the "rule of law" for promotions—but provides no further details, suggesting officials may end up policing themselves.

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## China's New National Constitution Day: Is It Worth Celebrating?

By Jerome A. Cohen

In one of its few precise actions, the recent fourth plenary session of the current Central Committee of the Chinese Communist Party declared December 4 to be "National Constitution Day" ([China News](#), November 1). The Standing Committee of China's National People's Congress, ever responsive to the Party's lead, promptly enacted this decision into law, as it did the decision's corollary requiring all appointed government officials to swear to uphold the Constitution. This was the slender immediate harvest of the Fourth Plenum's unprecedented focus on "governing the country according to law" and especially "according to the Constitution."

Will December 4 now become a milestone in Chinese history? May 4 (1919) will forever be remembered as the date that launched modern China's first mass movement in its tortuous struggle to achieve democracy and the rule of law. June 4 (1989), on the other hand, will go down in infamy as the date of Deng Xiaoping's heartless slaughter, near Beijing's Tiananmen Square, of hundreds of youthful Chinese heirs to the aspirations of the May 4 generation.

How should the Chinese people and foreign observers interpret December 4? Should it be dismissed, as many oppressed Chinese human rights defenders claim, as solely a propaganda ploy, an occasion for hollow slogans issued

to enhance the Party's mobilization of the Constitution as an instrument for consolidating its dictatorial power over an increasingly restless and complex society? Or should it be seen as a prominent symbol of significant, if limited, progress in the growth of "constitutionalism," the process of curbing arbitrary political power by subjecting rulers as well as the ruled to government under law?

For years, some law-reforming Chinese scholars urged China's leaders to establish National Constitution Day as a symbol of a hoped-for comprehensive effort to raise popular rights consciousness and thereby provide greater public support for transforming the Constitution from an ineffectual listing of attractive goals to a vibrant and enforceable guarantor of human rights. Indeed, this is actually the Party's third attempt to exploit December 4. When the current Constitution was first promulgated in 1982, the Party labeled this date "Implement Constitution Day." In 2001, during another law reform era, the date was rebranded "Legal System Propaganda Day" ([People's Daily](#), December 5, 2001). Neither attempt made a substantial impact on the country.

Is National Constitution Day likely to be more effective? Or is it merely a sop to assuage constitutional reformers' disappointment at the Fourth Plenum's failure to announce any substantial institutional improvements? After all, the Third Plenum, just a year ago, and some of the earlier statements of the nation's new leader, Xi Jinping, had encouraged the belief that the Party might finally, sixty-five years after the establishment of the People's Republic of China (PRC), introduce an enforceable system of constitutional law to which the Party itself would be subject.

Before the ink had even dried on the Fourth Plenum's documents, the Party's increasingly harsh suppression of free speech almost undermined its plans for a new Constitution Day. November 4 almost eclipsed December 4 when an enterprising Chinese journalist reported that, on the former date, Shen Yongping, an innovative Chinese producer of documentary films, would be prosecuted for an alleged "illegal business operation." The charge was based on his having shown his impressive video history of successive Chinese governments' efforts to achieve constitutionalism since the end of the Manchu dynasty over a century ago! Apparently to reduce the ridicule of the Party that this news had begun

to generate, the authorities announced that the trial of the hapless cinematographer, already jailed for several months, would be postponed, without setting a new trial date ([Civil Rights & Livelihood Watch](#), October 24). The prosecutors lamely claimed that they needed more time to revise the indictment!

Is the Fourth Plenum likely to stimulate genuine “constitutionalism” instead of continuing a “socialist constitution with Chinese characteristics”? The Chinese term for “constitutionalism” (*xianzheng*) does not once appear in the Fourth Plenum’s lengthy, verbose Decision, while “constitution” (*xianfa*) pops up 38 times! Today’s Party leaders, following Mao Zedong, Deng Xiaoping and their Soviet mentors, associate constitutionalism with the Western concept of separation of powers, which they fiercely reject. For many months before the Third Plenum, the Party Central Committee’s notorious “Document No. 9” even prohibited public discussion of “constitutionalism and democracy,” which was the very first of the “seven unmentionables” it condemned as a sinister Western plot to “change the flag” and inflict “the Western model” on China’s political system (translated by [ChinaFile](#), November 8, 2013).

Nevertheless, many inside and outside the PRC had clung to the hope that the Party, apart from again requiring a public celebration of, as well as an oath of allegiance to, the Constitution, would endorse some government mechanism for effectively protecting the badly-abused constitutional rights of the people.

The most obvious option for accomplishing this would be to strengthen China’s only authorized channel for handling constitutional claims—the Standing Committee of the National People’s Congress (NPCSC). Although the NPCSC has in recent years received hundreds of citizens’ complaints alleging constitutional violations and many other citizens’ proposals for constitutional interpretations, it has, at least formally, played the role of the reluctant dragon. It has yet to issue a ruling on any of these requests, preferring instead either to ignore them or to handle them via non-transparent, informal or indirect means. [1]

NPCSC officials maintain that many constitutional problems have been resolved through behind-the-scenes “internal working mechanisms” that feature consultation

with offending agencies and informal pressure upon them to accept “voluntary” compliance with the law. As Chinese scholars have pointed out, this enables such agencies to “save face,” a key consideration when one PRC institution carries out its constitutional obligation to check the power of another. It also relieves the NPCSC of the burden and political risk of publicly articulating the rationale for its conclusions.

In the best-known attempt to elicit a formal response from the NPCSC, in 2003, during a very brief period of Party openness to constitutional reform, three scholars challenged the constitutionality of a national regulation that had been invoked by the police to justify detention of college graduate Sun Zhigang, who had died in their custody (Stéphanie Balme and Michael W. Dowdle ed., *Building Constitutionalism in China*, p. 226). The nature of this case, its timing and the nationwide publicity that the media had been allowed to give it, made it seem a golden opportunity to finally spur the NPCSC to formal action. After intense non-public intra-governmental deliberations, however, the Party decided to avoid the need for what would have become a legal landmark by having the author of the challenged regulation—China’s highest administrative organ, the State Council—repeal it. At the time, the scholars who brought the challenge were widely celebrated. As they continued their legal activism, however, they met official oppression. One, Xu Zhiyong, is now serving a long prison term, and another, Teng Biao, has had to choose exile to escape arrest.

Disappointingly, the Fourth Plenum offered almost no new prescriptions for strengthening the capacity or the will of the NPCSC to shoulder its responsibilities for interpreting and applying the Constitution. The Plenum repeatedly emphasized the importance of supervising the conduct of government agencies and correcting their misconduct. Yet, apart from generally urging improvements in the existing system for reporting to the NPCSC national and local government regulations for possible review of their constitutionality, it offered little guidance.

Many complex questions remain to be answered, particularly which of the many types of government-issued documents qualify as “normative documents” and therefore must be submitted for review. The Plenum’s mere admonition that “all normative documents” are

subject to review does not help to delineate their scope. Even more sensitive is the question whether rule-making documents issued by the Party alone or in conjunction with government agencies should be subject to NPCSC review. The Party, it should be noted, in 2012 had already decided to institute a separate, but publicly inscrutable, Party review process for its own rule-making documents, which affect the lives of its 87 million members. This was endorsed by the Fourth Plenum's Decision, but, again, with no indication of what this process involves. A secretive Party review process may, of course, seriously undermine whatever review process the NPCSC is seeking to develop, and today the entire complex area of Party-state legal relations is messier than ever.

The references to improving procedures for the filing and review of "normative documents" reveal the Party's preeminent concern for the Constitution's articulation of government structure and the allocation of competence among various institutions. The Party appears less concerned with citizen-government relations than with intra-government ones—particularly the relationships between central and local governments.

Many reformers, including some influential legal experts within the Party bureaucracy, had hoped that the official process for coping with both types of matters would be bolstered by the Fourth Plenum's establishment of a constitutional commission under the NPCSC, but there was no mention of this possibility. It may yet happen, however. The Soviet Union, which spawned China's constitutional system, finally established a constitutional commission within the USSR legislature only at the very end of the Gorbachev era, just before the USSR's collapse.

Actually, the Basic Law Committee established by the NPC's enactment of the Basic Law for Hong Kong in 1990 presented the opportunity for China to experiment with what could have, in effect, become a constitutional commission to interpret what has often been called Hong Kong's "mini-constitution." The NPCSC could have decided to accept the recommendations offered by that committee of political-legal experts, half from Hong Kong and half from the Mainland, as binding interpretations of the Basic Law. That arrangement would have been somewhat analogous to the British colonial system's resort to the Judicial Committee of the

Privy Council in the United Kingdom's House of Lords for formal and final adjudication of constitutional and legal disputes relating to Hong Kong. Had the NPCSC been permitted to seize that opportunity, it would have established an impressive precedent for developing a constitutional commission for the entire nation.

By now, readers unfamiliar with China might well be asking: What about a role for courts in enforcing China's Constitution? The central government of the Republic of China, prior to moving to Taiwan in 1949 after losing to the Communists in the civil war, did establish a Council of Grand Justices that was supposed to function as an independent constitutional court. In recent decades, that originally innocuous court has played an increasingly important role in Taiwan's transition from Chiang Kaishek's version of Leninist dictatorship to today's vibrant political democracy.

Yet, despite proposals by many Chinese legal experts, the PRC has never come close to embracing the idea of a constitutional court. That would be contrary to the fundamental premise of the PRC governmental system, which places the NPC at the apex of official power, with the executive branch, the judiciary and the procuracy (prosecution) all reporting to it from their subsidiary positions. In the view of Party leaders, establishment of a constitutional court would place the judiciary on a par with the NPC and its Standing Committee contrary to Communist political-legal theory. This is one of the principal reasons why Chinese leaders and the mass media they control religiously insist that "governing the country according to the Constitution" is absolutely different from "Western constitutionalism and democracy."

China's regular courts, however, although weak in power and prestige and not explicitly authorized to engage in constitutional adjudication, have occasionally sought to do so. Indeed, in the heady law-reform atmosphere of the earliest years of this century, the Supreme People's Court (SPC) tried to endow the ordinary courts with the power of judicial review of the legality of government actions. One SPC vice president, who was behind what Party leaders immediately deemed an illicit power-grab, was even unwise enough to proclaim that the innovative SPC ruling in what became known as the Qi Yuling case was the equivalent of Chief Justice John Marshall's *Marbury v. Madison* opinion establishing judicial review

in America (see *China Brief*, April 2, 2009).

The Party quietly put an end to this extraordinary chapter. Not long after, the activist SPC vice president, Huang Songyou, was sacked, convicted of corruption and sentenced to life imprisonment. His superior, the then-presiding SPC president, Xiao Yang—an impressive and politically savvy reformer—was himself rumored to be in danger of retaliation. Under Xiao Yang’s successor, a Party apparatchik, the SPC publicly annulled the Qi Yuling ruling, which had briefly been thought a landmark precedent. It is noteworthy that Xiao, in an apparent retreat from his earlier support for judicial review, recently endorsed the more conventional idea of a constitutional commission within the NPCSC.

Yet China’s increasingly informed and litigious citizens continue to press its more than 3,000 courts to vindicate claims based, at least in part, on constitutional values and provisions. Occasionally, but perhaps not as often as previously, judges still seek ways to provide satisfaction by finding statutory or other bases on which to ground sympathetic decisions.

For the foreseeable future, non-transparent, informal, consultative techniques developed by the NPCSC may suffice for settling intra-governmental constitutional disputes. They are unlikely to prove satisfactory, however, for disposing of the growing number of citizen demands for constitutional protection against a broad range of arbitrary official actions. These demands are undoubtedly being fostered by the current campaign for “governing according to the Constitution” as well as by improved economic, social, educational and communications conditions.

We can therefore anticipate greater pressures for the NPCSC to establish a functioning, credible, open process for handling constitutional disputes between citizens and the state, and perhaps even between citizens and the Party as the Party’s domination of the government becomes gradually more transparent. The assistance of some type of constitutional commission will undoubtedly look increasingly attractive to the NPCSC if it wishes to quell popular frustration and cynicism over the lack of an effective forum for dealing with constitutional disputes.

Furthermore, as those constitutional pressures grow,

they may also cause Party leaders to give more careful consideration to the possibilities for the courts to assist the NPCSC, not rival it. For example, when constitutional claims arise in a case, the court, instead of formally refusing to deal with the issues as now required, could be authorized, with the approval of the provincial-level high court, to seek their determination by the NPCSC, postponing its final judgment until the NPCSC has responded. A similar system has proved feasible in Taiwan, where, in accordance with a creative interpretation of the Constitutional Court, a judge troubled by a constitutional problem can suspend court proceedings while applying for the guidance of the Constitutional Court; to avoid being inundated with such applications, the Constitutional Court exercises discretion whether or not to grant review.

The struggle for constitutional government is far from over in China. To be sure, the Fourth Plenum came up short on immediate institutional reforms. Yet it has stimulated greater interest and ferment among the country’s increasingly sophisticated citizens. Although liberal constitutional reformers are currently outnumbered and their freedom to debate the future is sharply restricted by the “people’s democratic dictatorship,” even the current repressive administration cannot indefinitely afford to ignore a rising demand for government under law. So, let us hope that the PRC’s new National Constitution Day will prove more successful than its predecessors in spurring popular support for genuine constitutionalism!

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## Notes

1. Many fine essays have been published in English and Chinese on the subject of constitutionalism in China. For ambitious newcomers to the field, I suggest starting with Keith Hand, “Resolving Constitutional

Disputes in Contemporary China,” 7 University of Pennsylvania Law Review 51 (2011).

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## After the Fourth Plenum: What Direction for Law in China?

By Carl Minzner

On October 23, Chinese authorities concluded their annual Party plenum, focused on “ruling China according to law” (*yifa zhibiao*)—the first time that top Chinese leaders have designated law as the central focus for the meeting. In the weeks since, observers have been parsing the full plenum decision for signs as to the future direction of Chinese legal reform (for the original Chinese text of the full decision, see [People’s Daily](#), October 29).

First introduced into a Party plenum decision in 1997, and incorporated into the Chinese constitution in 1999, “rule according to law” has proven a contested term for Chinese state and society alike. Authorities have used it as an umbrella to promote a range of administrative and legal reforms. Citizens and activists have sought to use both the rhetoric associated with the term, and the practical reforms accompanying it, as wedges to promote deeper institutional and political change in an authoritarian state.

Now, the Decision has given Chinese President Xi Jinping the opportunity to put his own gloss on the concept. Broadly speaking, this takes three forms.

### Technical Legal Reforms to Improve Governance

First, the Decision gives support to a range of technical legal reforms aimed at strengthening governance of state and society.

For example, the Decision seeks to centralize judicial power to help curb the interference of local authorities in court decisions. The Supreme People’s Court will create circuit tribunals (*xunhui fating*) for handling “important” cases that implicate multiple administrative jurisdictions. The Decision green-lights experiments with similar cross-jurisdictional local courts and procuratorates. This parallels the Party’s 2013 Third Plenum Decision, which gave birth to experimental reforms in six provinces

removing control over court personnel and funding from the hands of local authorities, and vesting it with provincial authorities (see [China Brief](#), March 20; [China Brief](#), June 19). 2015 will likely see similar bureaucratic experimentation as the recent Decision gives rise to its own implementation efforts. Corresponding reforms may also take place within official cadre evaluation systems, as officials are instructed to keep records of the frequency of interference by local authorities in judicial decisions and link such interference to their career evaluations and salaries.

The Decision also provides support for concepts of judicial professionalism and litigation stressed during the late 1990s and early 2000s, but that had gone into eclipse in recent years. Starting around 2005—and particularly with the appointment of Wang Shengjun as Supreme People’s Court (SPC) head in 2008—official rhetoric shifted against those earlier concepts, and in favor of politicized mediation and populist judging as a means to do whatever it takes to resolve citizen disputes—including throwing legal norms out the window. [1]

Now, the 2014 Decision strikes a somewhat different tone. Trials are supposed to be the center of the litigation system (*shenpan wei zhongxin de susong zhidu gaige*). Citizen petitions are to be led back into legal channels (*ba xinfang naru fazhibiao guidao*). And judicial professionalization is being stressed once again (*tuijin fazhi zhuanmen duiwu zhengguihua, zhuanzhu, zhiyehua*).

Such developments suggest that central Party authorities have given China’s legal technocrats, such as those surrounding current SPC head Zhou Qiang, a certain degree of room to maneuver. This is not limited to the judicial reforms discussed above, but also includes a range of administrative, procedural and transparency-related reforms as well ([Freedominfo.org](#), November 4; [Beijing Daily](#), November 2).

Naturally, the boundaries of this space are highly contested. Faced with internal Party opposition, language that “ruling China according to law” also incorporates the concept of “governing China according to the constitution” was apparently withdrawn from earlier drafts of the Decision during the eight-month long drafting process. As Qian Gang notes, it was only placed back in the document on the very last day of the plenum ([China Media Project](#),

November 10). Skirmishes continue over the meaning of the language. Chinese state-run media has stressed that it is not equivalent to concepts of “Western” constitutional democracy (CCTV, November 5). Former SPC president Xiao Yang, strongly identified with late 1990s reform efforts, has revived proposals to create a constitutional committee within the national legislature charged with reviewing the legality and constitutionality of laws (see [China Brief](#), May 11, 2012; [Beijing Youth Daily](#), November 8).

### Strengthened Party Control

Second, the Decision emphasizes that central support for legal reforms does not mean any change the core principle of one-party political control.

The Decision reiterates the “Three Supremes” concept from the administration of former president Hu Jintao, which emphasizes Party doctrine and the popular interest as equal (if not superior) sources to the constitution and law as sources to guide the work of Chinese judges and prosecutors. It also clearly states that political-legal committees will remain the core organizational channel for implementing Party control of the legal system.

But the Decision goes beyond mere rote recitation of Party control. It also takes steps toward enshrining it in a more institutional manner. For example, the Decision provides that all legislation implicating “important” policy decisions should be reported out of the national legislature for central Party leaders to “discuss and decide.” Similarly, all “important” amendments of existing laws are to be reported to the Party committee within the National People’s Congress.

Of course, this simply reflects the way Party authority is actually exercised in practice. But this new phrasing also makes a difference. The Chinese constitution itself only contains a single reference to the general principle of Party political control. Consequently, it was quite possible for Chinese activists and academics in the late 20th century to imagine that central invocations of concepts such as “ruling China according to law” might open space to build up autonomous legal institutions, while simply acknowledging the overarching political role of the Party as a general background principle. Liberal intellectuals could consequently question the role of political-legal

committees in controlling specific legal actors, such as the courts, without necessarily being perceived as challenging Party rule. Such arguments now become problematic when confronted with a central policy restatement that bakes in Party control of day-to-day operations in a much more explicit manner.

The Decision similarly curtails other grey zones that some had used to promote reform. Party plenum documents from the late 1990s and early 2000s made references to bottom-up institutions such as elections and voting within their discussions of legal reform. [2] Those have been toned down, if not eliminated. Specific calls have been added for stronger Party political controls over the very actors who had attempted to use legal channels to press for deeper reforms. Lawyers are to be the target of greater political indoctrination (*jiaqiang liushi duiwu sixiang zhengzhi jianshe*). Legal academics too, are singled out. The Decision stresses the need to construct a cadre of politically reliable legal scholars, conscious of the Chinese national character (*zhengzhi lichang jianding ... shuxi zhongguo guoqing de ... faxuejia*).

### Return to the Past

Third, the plenum has begun the process of stamping the legal field with the “China Dream,” a core propaganda meme that has emerged since Xi Jinping’s 2012 accession. This doctrine represents a pivot back to Chinese history and traditional culture—heavily assailed by Communist leaders during the 20th century—as a foundation for Party legitimacy (see [China Brief](#), March 20).

The Decision calls on Party authorities to “absorb the essence of Chinese legal culture” and promote “traditional Chinese culture to increase the moral content of rule-of-law efforts.” A similar tone was struck in the collective study session led by President Xi for Politburo members immediately prior to the plenum meeting, and which focused extensively on history and traditional culture. Summarizing the content of that session, Xi stated: “The appropriate road and methods for solving China’s problems can only be found within China itself” ([Xinhua](#), October 13).

This marks a shift from the late 20th century. When Chinese leaders initially raised the concept of “ruling China according to law” to a core Party catchphrase, they

gave officials and scholars wide scope to look outwards for models to consider in the search for solutions to the institutional challenges confronting China. Of course, Party plenum documents of the time included clear language that China would not adopt “Western” political institutions such as multiparty democracy or separation of powers. [3] But foreign legal models were fair game.

Both state officials and social activists capitalized on this space. In 1998, then-presidents Jiang Zemin and Bill Clinton even reached a formal agreement on expanding bilateral cooperation in the field of rule-of-law. [4] U.S. State Department funding for programs in China followed soon after. In December 2002, when former president Hu inaugurated the modern practice of regular Politburo study sessions with a collective session devoted to constitutional law, Chinese legal activists took note. Subsequent years saw Chinese scholars, lawyers and judges rely on the Chinese constitution, laws and legal rhetoric as tools to contest state actions, most notably with the 2003 challenge to the legitimacy of the controversial “custody and repatriation” detention system. Some drew on foreign legal sources for inspiration, including U.S. Supreme Court cases such as *Marbury v. Madison* and *New York Times v. Sullivan* (*New York Times*, November 25, 2005; *Southern Metropolis Weekly*, September 27, 2012, [translated](#) by Human Rights in China).

Now, this space is closing. Repression of Chinese rights lawyers has escalated. Figures such as Xu Zhiyong and Pu Zhiqiang have disappeared into state detention. Foreign-funded organizations have come under tighter scrutiny. And the Decision has strengthened ideological warnings regarding the applicability of foreign models, explicitly noting that China will “not copy foreign rule-of-law ideas or models.” Nor is this trend limited to law. Xi Jinping has issued criticism of “weird” modern architecture, and called on artists to take inspiration from traditional Chinese culture (*Xinhua*, October 15; *People’s Daily Online*, October 16). Censors have blocked foreign television programs such as the “Big Bang Theory” (*Guardian*, April 27). Textbooks are being altered to increase the content of classical Chinese poetry, while that devoted to modern social critics once praised by Party authorities, such as Lu Xun, is being reduced (*Fazhi Wanbao*, September 10; *South China Morning Post*, September 8, 2013). [5]

## Conclusion

Both foreign and Chinese media have referred to the Decision in translation as promoting the “rule of law” (*Xinhua*, October 23; *Economist*, November 1). This is somewhat misleading. For most English-speaking mass audiences, this concept evokes ideas of bottom-up citizen rights and independent adjudication of legal norms. Neither of these is central to the Party aims expressed in the Decision.

In contrast, there is a third core meaning included in the English term “law” that is very much tied to how Party authorities seek to use the terms *fa* and *yifa zhiguo*. It is encapsulated in the concept of “order.” Improved, top-down centralized governance—this is what Party authorities seek. Party authorities are promoting legal reforms to improve their orderly governance of society. They are also promoting entirely extra-legal ones to improve internal Party governance. Many Western observers would not associate reforms to the secretive Party disciplinary system along with court reforms, but from the perspective of Chinese authorities, these are part and parcel of the same thing.

In summary, the Decision continues to promote technocratic legal reforms in China, subject to one-party political control. But it also takes clear steps to redefine the concept of “rule according to law” by neutering elements it deems dangerous, such as bottom-up participation and autonomous legal forces, in favor of a heavily top-down version, one increasingly being clad in classical Chinese garb.

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## Notes

1. Carl Minzner, [China’s Turn Against Law](#), 59 *Am. J. Comp. L.* (2011).
2. See, for example, the 2000 and 2001 Party plenum statements, [Zhonggong zhongyang guanyu zhiding guomin jingji he shehui fazhan di shiwu nian jihua de jianyi](#), issued October 11,

2000; [Zhonggong zhongyang guanyu jiaqiang he gaijin dang de zuofeng jianshe de jueding](#), issued September 26, 2001.

3. See, for example, the 2001 Party plenum Decision, [Zhonggong zhongyang guanyu jiaqiang he gaijin dang de zuofeng jianshe de jueding](#), issued September 26, 2001.
4. For an excellent recounting of the birth of this initiative, see Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 *Wm. & Mary Bill Rts. J.* 603 (2003).
5. Naturally, this is not to suggest that returning to China's own past is in any way wrong. In fact, a careful, even-handed parsing of China's own history for possible legal or institutional solutions to problems facing China today might be a useful corrective to much of the past hundred years, which has often emphasized blind importation of concepts from the West, whether liberalism or Marxism. But this is quite different from the creation of a new state-sanctioned, politically correct, nationalist historical narrative that is simply served up as a utilitarian tool to legitimate modern authoritarian rule.

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## Xi Consolidates Power at Fourth Plenum, But Sees Limits

By Willy Lam

The Chinese Communist Party (CCP) pledged to promote rule of law with Chinese characteristics at the Fourth Plenary Session of its Central Committee. President Xi Jinping, also Party General Secretary, promised that the CCP would lead the nation in “strengthening the implementation of the Constitution and promoting administration by law.” “Only if the CCP rules the country in line with the law will people’s rights as masters of the nation be realized and the state and social affairs be handled in line with the law,” said the communiqué of the four-day conclave, which was held behind closed doors in a Beijing military hotel last month ([Xinhua](#), October 23). While Chinese citizens await the establishment of institutions such as a Constitutional Court to ensure strict observance of the Constitution and the law, the 61-year-old Xi has emerged from the plenum with more authority and thus greater ability to ignore the rule of law than ever.

### Xi Endows Himself With Official Mantra, Much Earlier Than Predecessors

Xi's status as the most powerful Chinese leader since late patriarch Deng Xiaoping (1904–1997) was enshrined by the much-awaited plenum. The communiqué urged all cadres and Party members to “take as guiding [principles] Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, the important thoughts of the ‘Three Represents’ and the scientific outlook on development, and to deeply implement the spirit of General Secretary Xi Jinping’s series of important talks” ([Xinhua](#), October 23; [China News Service](#), September 29). This was the first time that Xi’s edicts and dictums were cited in a top Party document in the same breath as those of Mao and Deng. Moreover, while the “important thoughts of the ‘Three Represents’” and the “scientific outlook on development” were the brainchildren of ex-presidents Jiang Zemin and Hu Jintao, respectively, their names are never mentioned alongside their well-known mantras largely due to the recognition that these two bodies of ideas were the products of collective leaderships. Equally important is the fact that the theoretical contributions

of Deng, Jiang and Hu were cited in CCP documents as “guiding principles” for the Party and state only after their retirement from the Politburo and Central Committee. Xi, on the other hand, is expected to serve as paramount leader until the 20th CCP Congress, slated for 2022 ([Ming Pao](#) [Hong Kong], October 24).

That Xi is a hands-on leader is also illustrated by the fact that he chaired the drafting team that produced the Fourth Plenum document, entitled *Decision on Major Issues Concerning Comprehensively Advancing Rule of Law*. The vice-chairmen of the high-level drafting body were two Politburo Standing Committee (PBSC) members, National People’s Congress (NPC) Chairman Zhang Dejiang and Secretary of the Central Commission for Disciplinary Inspection (CCDI), Wang Qishan, who is a Xi confidante ([People’s Daily](#), October 29; [Ta Kung Pao](#) [Hong Kong], October 29). The sole regional representatives on this committee—Zhejiang Party Secretary Zhao Zhengyong and Zhejiang Governor Li Qiang—are deemed Xi loyalists (See [China Brief](#), February 15, 2013; [New Beijing Post](#), October 30). Similarly, Xi headed the drafting group that put together the *Decision on Major Issues Concerning Comprehensively Deepening Reforms*, which was endorsed at the Third Plenum of the 18th Central Committee last November. The vice-chairmen of the drafting unit for the Third Plenum were two PBSC members, ideology and propaganda chief Liu Yunshan and Executive Vice-Premier Zhang Gaoli ([People’s Daily](#), November 15, 2013). It is significant that Premier Li Keqiang, the only representative of the Communist Youth League Faction on the PBSC and the only Politburo member with a law degree, was not involved in the handling of the rule-of-law document, just as he was excluded from the November 2013 economic reform package.

### **CCDI Continues Politics Above Law Approach, Reaches Military**

The plenum witnessed the no-holds-barred aggrandizement of the powers of the CCDI, China’s highest graft-busting body, which is noted for its lack of transparency. While the Fourth Plenum emphasized that all Party and government organs had to function within the parameters of the Constitution and the law, the CCDI’s activities are not subject to the oversight of either NPC legislators or judges. Given that many of the “big tigers” who have been nabbed since the 18th Party

Congress are deemed members of “anti-Xi factions,” such as that headed by former PBSC member and security tsar Zhou Yongkang, Xi has been accused of using the CCDI as a political tool to destroy or intimidate his enemies ([South China Morning Post](#), July 29; [Reuters](#), April 16). While speaking at the Fourth Plenary Session of the CCDI, which was held immediately after the Central Committee plenum, Wang warned mid- to senior-ranked cadres: “The more senior and powerful the official, the more respect for and fear of [the law] he should have.” “He should adopt a cautious attitude, as though he were walking on thin ice,” added Wang, who, like Xi, is a senior princeling. “He should never do things without regard to the law” ([China News Service](#), October 25). The question of whether the nation’s top graft-busters are subject to proper legal and judicial supervision, however, goes unanswered ([Hong Kong Economic Journal](#), August 7; [China Review News Agency](#) [Hong Kong], May 2).

With the blessings of General Secretary Xi, the CCDI has, since late 2012, undergone a series of personnel changes that testify to its growing clout. For the first time ever, the top echelon of the CCDI boasts staff members who have backgrounds as senior cadres in the Ministry of Public Security, the courts and the procuratorate. At the just-ended Fourth Plenary Session of the CCDI, Vice-Minister of Public Security Liu Jinguo was made a Deputy Secretary of the Commission. Other Deputy Secretaries include former vice-president of the Supreme People’s Court Zhang Jun and former head of the Procuratorate of Sichuan Province Chen Wenqing ([Ta Kung Pao](#), October 27; [Phoenix](#), January 17). The CCDI has also extended its tentacles to the People’s Liberation Army (PLA), where graft-related matters are usually investigated by disciplinary-inspection units within the army. Since late 2011, however, General Du Jincai, who is Vice-Director of the PLA General Political Department in charge of disciplinary issues, has assumed the concurrent title of Deputy Secretary of the CCDI ([People’s Daily](#), November 16, 2012). This means that Commander-in-Chief Xi could maintain a tighter control over the top military brass with the help of the much more experienced and better-equipped civilian graft-busting unit.

## Silence on Zhou Suggests Upper Limits to Xi's Power

It is also clear, however, that even a leader as tough as Xi has to contend with discordant notes in the Party. One example is the fact that the Central Committee failed to reach a decision on what to do with the disgraced Zhou Yongkang. This was despite the fact that Xi's ability to break the tacit taboo that "serving and former PBSC members are untouchable" could be considered one of his major achievements since coming to office in 2012. The CCDI announced in late July that Zhou—who was in charge of the political-legal establishment from 2007 to 2012—was being investigated for "gross disciplinary infractions;" but there was no mention of the former security chief at the plenum. This was despite the fact that four key Zhou associates and cronies found guilty of economic crimes—former China National Petroleum Corporation (CNPC) President Jiang Jiemin, former CNPC deputy general manager Wang Yongchun, former assistant minister of public security Li Dongsheng, and former deputy Party secretary of Sichuan Province Li Chunchun—were kicked out of the Party during the plenum. After all, the CCDI started probing Zhou's vast corruption ring as early as December 2012. There was widespread expectation that Zhou would at least be relieved of his CCP membership at the plenum. However, both the official China News Service and the semi-official Hong Kong China News Agency have reported that an official verdict on Zhou would only come at the Fifth Central Committee Plenum, which could take place as late as October 2015 ([Hong Kong China News Agency](#), October 25; [China News Service](#), October 24). The lack of an announcement of Zhou's punishment at the Fourth Plenum would suggest that his supporters, likely led by ex-president Jiang, are resisting Xi's power play more than he expected. This may also suggest that the interest blocs in the CCP elite that Xi has failed to win over are finally starting to oppose Xi's self-aggrandizement and to set limits to his power accumulation.

It is an open secret within Beijing that a plethora of Party elders—including former PBSC members and ex-presidents Jiang and Hu, former vice-president Zeng Qinghong, along with former premiers Li Peng and Wen Jiabao—were opposed to disciplinary action against Zhou. President Xi took advantage of the National Day

banquet at the Great Hall of the People, which was held on September 30, to orchestrate at least a façade of unity among the retired Party-state leaders (see [China Brief](#), October 10). No fewer than 15 former PBSC members, including Jiang, Hu, Zeng, Li and Wen, showed up for the festivities. While these elder statesmen apparently gave their approval for the incrimination of Zhou, it might be to their advantage that the investigation into the biggest corruption scandal in CCP history be drawn out over an extended period: Contretemps that Xi and the CCDI's Wang may have encountered regarding the Zhou case could predispose them against tackling another retired PBSC member during the rest of Xi's first five-year term (2012–2017) ([Ming Pao](#), October 1; [Wall Street Journal](#), September 30; [Voice of America](#), September 30).

Yet another possible setback for President Xi, who heads the Princelings Faction (a reference to the offspring of top cadres), is that he failed at the Fourth Plenum to promote either Commander of the General Armaments Department Zhang Youxia or Political Commission of the General Logistics Department Liu Yuan to the post of Vice-Chairman of the policy-setting Central Military Commission (CMC). This was despite widespread reports that one of the two heavyweight princelings—General Zhang is the son of famed General Zhang Zongxun and General Liu is the son of the late state president Liu Shaoqi—would be elevated to the CMC leadership to help Xi consolidate his control over the PLA ([BBC Chinese Service](#), August 1; [Reuters](#), August 1). Despite the perception that the military establishment is a cornerstone of Xi's power base, the commander-in-chief's extensive anti-graft campaign in the PLA may have cost him the support of a sizeable chunk of officers. This could be behind Xi's decision to hold a large-scale meeting of generals in Gutian, Fujian Province, soon after the Fourth Plenum. The Gutian conclave, whose theme was the top brass's "absolute loyalty to the party leadership" echoed the famous Gutian Conference of 1929, in which Chairman Mao Zedong secured the undivided fealty of senior members of the Red Army, the PLA's precursor ([South China Morning Post](#), November 9; [People's Daily](#), November 2).

## Xi's Power at Plenum Highlights Contradiction

It is symptomatic of the new realities of Chinese politics that even as the Fourth Plenum was supposedly geared toward providing legal guarantees for achieving Xi's much-vaunted goal of "putting power in the cage of systems and institutions," the president's personal clout has kept expanding ([China News](#), January 22, 2013). Despite the plenum's rhetorical commitment to Chinese-style rule of law, the conclave made it indisputably clear that legal and judicial reforms could only take place under tight Party control. "It is a basic experience of our country's socialist legal construction that [the principle of] Party leadership is applied throughout the entire course of *yifazhiguo* [governance according to law]," said the Plenum's *Decision*. "Our Constitution has established the leading position of the Chinese Communist Party. Insisting on Party leadership is the fundamental premise of socialist rule of law as well as the [political] basis of the Party and state" ([People's Daily](#), October 23). As General Secretary Xi has become the symbol, if not also the personification, of the world's largest political party, buttressing the Party's authority will inevitably result in the further empowerment of its unrivalled helmsman. This will form a fundamental contradiction with China's attempt to pursue any true legal reform until the Party and its leader are truly constrained by the same laws as the people they rule.

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## Fourth Plenum: Implications for China's Approach to International Law and Politics

By Timothy Heath

At the recently completed Fourth Plenum of the 18th Party Congress, Chinese leaders directed efforts to reform existing international institutions and laws and promote alternative values, political principles and legal arguments that better accord with China's needs. These directions reflect a broader, whole-of-government effort to compete with the United States for influence, especially in Asia. At the same time, however, the instructions in the Fourth Plenum open opportunities for the two countries to increase cooperation on shared interests as well as expand dialogue on divergent issues.

Much of the media attention surrounding the recently concluded Fourth Plenum has understandably focused on the topic of the Chinese Communist Party's (CCP) approach to law ([Xinhua](#), October 28). While the fourth plenum of any Central Committee has traditionally focused on such "Party building" topics, it is worth underscoring that they also contain important instructions for every other policy topic. For example, former Chinese president Hu Jintao designated the expansion of international propaganda a "major strategic task" at a propaganda conference in 2003 ([Xinhua](#), December 8, 2003), a task the Fourth Plenum of the Sixteenth Party Congress carried the following year. The same 2004 plenum decision document also carried the strategic directive to "contain Taiwan independence," an important adjustment that would define PRC policy toward Taiwan for years to come ([People's Daily](#), September 20, 2004).

### CCP and Law: Links to Policy, Values and Authority

Because of the strong linkages between domestic and foreign policy, analysis of the latter necessitates some analysis of the former for context. Much ink has been spilt on the best way to translate the Party's pursuit of the phrase, "to use law to rule the country" (*yifa zhibiguo*), a central theme of the recently concluded Plenum. As others have pointed out, the Party's interest in bolstering the country's legal infrastructure stems from its pursuit of a more balanced, sustainable model of economic

growth and the development of reliable and efficient government and social services to address the root causes of social discontent (*New York Times*, October 20).

One way to understand the Party's approach to law for domestic policy is to thus recognize that the CCP seeks the development and enforcement of laws and institutions under the conditions that these: first, serve the Party's political objectives; second, reflect values that reinforce the legitimacy of the CCP's authority and its political system; and third, enable China's leaders to retain final say over the enforcement of the laws. Since these tenets of the Party's views on law also guide the Chinese government's international actions on legal issues through Chinese foreign policy, these points merit closer examination.

The Party's rule through law starts with its policy objectives. Indeed, Chinese officials routinely depict the Party's policies and the government's laws as intricately related. At a central work conference on law and politics, Chinese President Xi Jinping explained that the CCP's policies and the country's laws "both reflect the people's fundamental will and are essentially in conformity with each other" (*Seeking Truth*, January 8).

The Party's top strategic priorities remain the elevation in the comprehensive standard of living for the people and the revitalization of the nation as a great power, ideas at the center of President Xi's "China Dream." To achieve these goals, Party leaders recognize that they must increase their overall governance ability, which in turn requires a greater reliance on laws, institutions and policy mechanisms. At a conference earlier this year, Xi stated that the Party's "mission" is to find a "stable and effective governing system" to ensure the nation's rejuvenation (*Xinhua*, February 17). A *People's Daily* commentary has elaborated on this point, explaining that the development of "leadership and organizational systems" is "more fundamental, comprehensive, stable and long lasting" than less institutionalized forms of authority (*People's Daily*, April 14).

In addition, the CCP regards its system of law as based on a set of values that reaffirms its authority. One scholar explained that a country's core values represent its "ideological sovereignty." He explained that adherence to the Party's core values provides an "institutional

guarantee" that the legal and governance system do not conflict with the political system dominated by the Party (*Seeking Truth*, April 16). Reflecting this point, in December 2013, the CCP issued detailed directives aimed at "bolstering socialist core values" and promoting the "Chinese dream of national rejuvenation." Among the socialist core values sought by the CCP are "national values" of "prosperity, democracy, civility, harmony, freedom, equality, justice and rule of law." It also includes "individual values" of "patriotism, dedication, integrity and friendship" (*Xinhua*, December 23, 2013).

The belief that laws and institutions should serve the needs of the CCP's political objectives and support the legitimacy of its political system is reinforced by the principle that the Party should control the articulation and implementation of law. This principle can be seen in the idea, captured in the Plenum decision, that the Party holds a "leadership position" in all steps of developing and enforcing law. The basic idea is that the Party leaders set the policy goals and then develop laws and legal mechanisms to help the Party realize its objectives in a stable, efficient manner.

Under these conditions, law is not an alien, "objective" tool of statecraft that can help or hinder the Party in realizing its goals. Instead, the CCP views a robust system of laws and institutions as a necessary and useful tool for realizing policy objectives in a manner that reinforces its legitimacy. Just as the Party wants Chinese law to serve its domestic policy objectives at home, the Chinese government wants international law to serve China's international policy objectives abroad.

### Foreign Policy Through International Law

These points provide necessary context for analyzing the Fourth Plenum's directives on foreign policy. China's leaders do have a strong incentive to support a more rigorous enforcement of international laws, but they have an equally strong incentive to revise those laws to better accord with the Party's strategic objectives and political values at home and abroad. In addition, China has a strong incentive to promote reforms in the international order that enhance its ability to control the terms of enforcement.

The Fourth Plenum decision clearly directed officials

to support and enforce international law. It called for officials to “perfect internationally oriented legal and regulatory systems.” Senior Chinese leaders in recent speeches have also emphasized the importance of upholding international law. In one speech, President Xi argued that all countries should “jointly promote the rule of law in international relations.” He explained that this required all parties to “abide by international law and well-recognized basic principles” ([Xinhua](#), July 7). Similarly, Foreign Minister Wang Yi recently declared that countries should “make joint efforts to promote the rule of law in international relations” and “abide by international law and universally recognized basic principles governing international relations.”

However, the Fourth Plenum decision also makes clear that upholding of international law is strongly influenced by how much those laws serve China’s strategic objectives. As an increasingly powerful nation, China is finding the possibility of employing and shaping international laws and institutions an attractive option for maximizing its interests. As Wang Yi put it, the promotion of international rule of law “serves China’s inevitable needs for peaceful development ([Chinese Foreign Ministry](#), September 28). The most important of these strategic objectives remains the imperative to shape a favorable security environment and to secure core interests.

The imperative to shape a favorable security environment can be seen in the directives to increase involvement in the creation and enforcement of international law and in the instructions to control transnational threats. The fourth plenum directed officials to “vigorously participate in the formulation of international norms” and “strengthen our country’s discourse power and influence in international legal affairs.” The decision also called for expanding involvement in international judicial efforts to target international “terrorists, separatists and religious extremists,” as defined by Chinese authorities. This suggests China may be more willing to provide some level of support to international law enforcement or political efforts that target terrorist or other extremist groups, but only if Beijing judges that such groups could contribute to unrest in Xinjiang and Tibet.

These instructions also reflect broader currents that seek a revision of international norms to favor Chinese interests. In one recent speech, President Xi declared that the five

basic principles of peaceful coexistence have become the “basic norms governing international relations” as well as the “basic principles of international law.” Reflecting a desire to cultivate political allies to balance against the industrial West, Xi stated that the principles had “effectively upheld the rights and interests of the developing world” and “played a positive role” in building a “more equitable and rational” international political and economic order ([Xinhua](#), July 7). China’s promotion of international groups that elevate the voice of developing powers or limit the role of the United States, such as the Shanghai Cooperation Organization (SCO), Conference on Interaction and Confidence Building Measures in Asia (CICA) and the East Asian Summit, exemplify this imperative.

The Plenum also carried directives to use law to “safeguard the country’s sovereignty, security, and developmental interests,” longstanding code for China’s core interests. This suggests China will invest more resources into shaping international norms, principles and laws to better defend China’s right to control its core interests. A symptom of this trend is the Fourth Plenum’s directive to “strengthen internationally oriented legal services” and “safeguard the proper interests of our country’s citizens and persons abroad.” This suggests China will invest more resources toward legal support to the implementation of trade agreements, civil and economic litigation, disputes over property rights and the defense of Chinese businesses from anti-dumping and other trade protection measures, among other needs (see, for example, the [China International Conference for Commercial Legal Services](#), held May 29–30).

But the directive also carries important implications for China’s approach to sovereignty disputes with other countries. It is clear Chinese officials do not see greater engagement in international law as a risk to its sovereignty claims. As President Xi has repeatedly emphasized, China has no intention to “compromise its core interests” ([Xinhua](#), March 11). An improvement in the use of legal and administrative measures merely serves instead to complement the government’s use of economic, civil, maritime and military resources to consolidate de-facto control of all of its claims. This does not mean China will now participate in the international legal venues preferred by the United States and its allies, however. The United States, after all, has traditionally shown considerable

reluctance to back international courts that rule against its interests. In the legal case before the International Tribunal on the Law of the Sea (ITLOS) put forward by the Philippines, China is similarly unlikely to participate in the suit because the outcome is not likely to favor its interests. Moreover, participation in the suit would represent an internationalization of an issue China has long sought to keep bilateral (see [China Brief](#), June 4). China will instead likely invest more resources into devising and disseminating new and retooled legal arguments that reaffirm its sovereignty over the South China Sea and delegitimize the involvement of Association of Southeast Asian Nations (ASEAN), the United States and other international actors.

The Fourth Plenum also underscored China's interest in strengthening international institutions over which it wields significant authority, especially the United Nations. Foreign Minister Wang pointed to the UN Charter as a "solid foundation for building international rule of law through the true and universal application of international law in all countries." China's possession of a veto vote makes the United Nations an appealing vehicle for articulating and enforcing international law. Wang also called for diluting the power of the United States and its industrialized allies when he advocated for "an equal and democratic participation in making international rules" by increasing the role of developing powers. This is likely to mean that China will keep seeking ways to advocate for the interests of itself and other rising powers through institutions such as the G-20 and working groups within the United Nations, such as the International Telecommunication Union (ITU). Wang also argued for an interpretation of law more responsive to Chinese preferences when he stated, "national and international judicial institutions should avoid overstepping their authority in interpreting and applying international law" ([Chinese Foreign Ministry](#), September 28).

### **Implications for the United States: More Competition and Cooperation**

China's growing interest in international law and institutions should not be read as a sign of growing sympathy for the exercise of U.S. power. On the contrary, it is more accurate to view this development as evidence that China intends to compete more effectively with the United States in the "court" of international opinion

and legal authority, even as it seeks to sustain stable and cooperative bilateral ties. In this sense, such behavior in the field of international law would complement its competition with the United States for influence in the domains of finance, trade and political influence, especially in Asia (see [China Brief](#), November 7, 2013). At the same time, there remains considerable ground for China and the United States to sustain international cooperation.

Beijing is developing a competitive philosophy of international law to displace those elements of the international order that do not serve its purposes. China has put considerable energy behind the ideas and concepts related to the five principles of peaceful coexistence, which reverberate through many important Chinese diplomatic concepts, such as the "new Asian security concept," "new type great power relations," and the "harmonious world." The principles and derived concepts at bottom support the development of a multipolar order characterized by a functional equivalent of spheres of influence through which great powers address common threats and resolve disputes in overlapping regions via negotiation and dialogue.

Chinese authorities appear intent on turning on its head the argument that China should "adhere to international norms and laws" by casting the United States and its allies as the irresponsible outliers to internationally accepted behavior. Reflecting themes commonly seen in Chinese commentary, Foreign Minister Wang stated that the main obstacles to the promotion of international rule of law rested with countries that practiced "hegemonism, power politics and all forms of 'new interventionism,'" which he said pose a "direct challenge" to "basic principles of international law." He sharply criticized the "double standard approach to international law" in which the same unnamed countries "use whatever suits their interests and abandon whatever does not."

And yet, despite clear signs of growing competition, China retains with the United States powerful incentives to maintain high levels of cooperation. The economies of both countries dominate the world economy and remain deeply intertwined. Moreover, although China chafes at aspects of the international order, it remains a major beneficiary of the system overall. China gains enormously from the trade and financial regimes defined

by the World Trade Organization and related institutions, as well as the authority granted it within the United Nations and related bodies. Moreover, the expansion of economic and other interests into the far reaches of the globe and the proliferation of transnational threats drives China to seek greater cooperation with the United States and other nations. The agreement by U.S. President Obama and President Xi to cooperate politically at some level against the Islamic State organization is merely the latest symptom of this reality ([Reuters](#), November 2). As Foreign Minister Wang acknowledged, “The more China develops, the greater its needs to cooperate closely with other countries and the more it desires a peaceful and stable international environment” ([Chinese Foreign Ministry](#), September 28).

Whatever one may think of the legitimacy of China’s proposed principles, values and legal arguments, these will almost certainly appear with greater frequency and emphasis in the coming years. China’s successful collaboration with Russia to push for a revision of norms and constrain U.S. authority in cyberspace should be seen as a harbinger of future Chinese and Russian collaboration ([Bloomberg](#), March 3). Beijing will continue to scan the existing architecture of international norms and principles, upholding those that serve its purposes and seeking partners to revise or circumvent those which it finds counter to its interests. While this may always have been true in the past, the sheer amount of resources available to an increasingly powerful China carries considerably more consequences for the world today.

China’s growing appreciation of the utility of international law opens opportunities for the United States to develop policies that accommodate Chinese concerns while upholding the integrity and stability of norms and principles favored by the great majority of the world’s nations. To the extent that the United States and its allies demonstrate to China that existing norms, laws and institutions provide the best means of addressing its concerns, the United States can minimize the damage to its credibility and protect the overall stability of the international order. Balancing the demands to defend U.S. interests, maintain the integrity of the international system and respond to Chinese concerns will require considerable creativity, flexibility and courage on the part of the United States, China and world policy makers to

meet the challenge.

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## The Fourth Plenum, Party Officials and Local Courts

By Jerome Doyon and Hugo Winckler

The Fourth Plenum of the 18th Congress of the Chinese Communist Party (CCP) focused on transforming the country’s legal system and passed the *Decision Concerning Some Major Questions in Comprehensively Moving Forward and Governing the Country According to the Law*. The Decision calls for the transformation of several aspects of the Chinese legal system, including the reform of local courts and their relationship with local political authorities by making courts more autonomous from local officials. The Decision also aims to ensure a higher level of legal education for Party cadres, all while keeping the legal system in the hands of the Party.

The Party is working to reform the roughly 3,000 local-level courts in order to tackle two major issues: the corruption and inefficiency of the judicial process, as well as the supervision of local Party cadres. Beijing is particularly concerned with the increasing number of protests in the face of local courts’ inability to enforce citizens’ constitutional rights against corrupt local officials. This new Decision thus attempts to reduce corrupt officials’ ability to interfere with the normal legal process at the grassroots level. Yet the key question is if the central authorities can strengthen local courts’ autonomy from corrupt officials while maintaining political control over the legal system—and the answer appears to be that the Party is unwilling to truly attempt to find this balance.

## A New Level of Courts Will Not Fix Local Issues

The Decision sets forth two measures intended to transform the existing court structure. First, the Supreme People's Court (SPC) will establish "circuit tribunals" to run major administrative and civil cases that overlap more than one administrative region. These tribunals will render their ruling on behalf of the central-level SPC. The second reform will establish People's Courts and People's Procuratorates, whose jurisdiction will transcend administrative districts and will be responsible for cross-regional cases. Contrary to the former, the latter implies the creation of a new set of courts, but the Decision does not clarify how these new courts will be integrated into the present system.

The creation of new tribunals and a new layer of courts to handle "cases that cross administrative regions" appears redundant, even though circuit tribunals shall handle "major cases." It is not clear yet what kind of cases the tribunals will handle, but they will mostly likely be large commercial claims. These reforms are clearly less ambitious than what was proposed after last year's Third Plenum, which focused on separating judicial jurisdictions from local government control. [1] This need for new jurisdictions suggests the Party may not believe possible, or support, the creation of an independent local judiciary free from the influence of corrupt cadres.

## Toward Legally Skilled Officials

One of the new Decision's main goals is to prevent local officials from interfering with judicial proceedings. It calls for the monitoring, recording and reporting of officials' interference in legal cases. As noted by Ma Huaide, Vice President of China University of Political Science and Law, this is the first time the Party has vowed in an official document to hold Party officials responsible for such behavior ([Xinhua](#), October 23). Currently, few details exist regarding the implementation of this oversight mechanism—in particular, there have been no public determinations for who will investigate and report the unlawful interference of local officials. Will it be in the hands of the local Political-legal committees, under the local Party apparatus? The Decision in fact reemphasizes these local committees' coordinating function between judicial, law enforcement and Party institutions, suggesting there is little room for true independent oversight of local

officials. While the goal is to put pressure on local cadres to prevent them from meddling in judicial cases, the law alone is evidently still not enough to constrain officials. The Party-state is merely trying to make interference more costly for its own cadres.

According to a district Party secretary, the main effect of the new Decision on local cadres' work is that they "now have to understand the legal process," which they could often largely ignore in the past (Authors' Interview, Beijing, November 1). In response to this increased emphasis on cadres' responsibility to uphold the legal system, local Party-state authorities will likely establish legal advisory teams, consisting of legal consultants and lawyers, to ensure their work follows the law. The Party will also place an increasing emphasis on educating officials on legal issues. The study of the constitution and the legal system will now be compulsory content within Party schools and Party study groups. Furthermore, according to the Decision, respect for the "rule of law" will become an important criteria for evaluating cadres' work and will influence their promotion opportunities, in addition to the exiting evaluation system based on GDP growth and environmental impact, among others factors.

This ultimately boils down to a contradictory message: the Party must inject itself into the legal system in order to prevent its own cadres from interfering in the legal process. More than systematically preventing local officials from interfering, the Party has decided to resort to methods outside of the "rule of law" by focusing on improving cadres' behavior. The Party's continued lack of faith in the legal system can only reinforce citizens' lack of hope in resolving their own issues through legal means.

## A "Professionalization" of the Legal Profession Under Party Leadership

Chinese legal professionals' lack of specialization has been an ongoing issue for the Party since the early 1990s. While there have been modest improvements over the years for judges' training programs, new judges often lack practical legal experience once they finish their studies. This lack of practical experience, combined with an increasing workload—since 2007, the number of judges has remained largely the same while the number of cases has increased by 50 percent—has become both the cause

and the consequence of numerous resignations among judges ([Wall Street Journal](#), October 21).

The Decision highlights two seemingly contradictory propositions for professionalization. First, the Decision hints at establishing a new training system for judges. In addition to going further in establishing a uniform pre-appointment training system for judges and procurators, an official-like career track will be established. Junior judges will have to begin their career at low-level courts and then, depending on their performance, may be promoted to higher-level courts. Similar to other new programs under the Decision, there are few details regarding who will be in charge of evaluating and promoting judges throughout their career. At the same time, the Decision calls for developing opportunities for legislators, lawyers, officials and even military cadres to become judges. This appears to contrast with the express purpose of the judicial exam—to create professional judges and limit the nomination of inexperienced Party cadres. This contradiction between the increasing emphasis on judicial education while also opening the door to inexperienced Party officials makes it hard to imagine how these two initiatives will co-exist without the Party ignoring the compulsory working experience at the grassroots. This limited answer to professionalization suggests an uneasy compromise was reached during the Plenum.

The Decision also aims to standardize the handling of legal cases by limiting their media coverage. In recent years, local court cases have made national news after initially being shared on social media, creating a potential populist challenge to the judicial system. The Decision seeks to neuter this populist pressure by restricting media coverage and ensuring it conforms to the Party line. This represents a shift in China's media policy, since media organizations could previously cover local legal proceedings without much Party oversight. This reform is in line with the Party's other attempts to control public speech, including new regulations restricting information sharing on the Internet ([Chinafile](#), October 9). Yet if this measure aims at a more standardized judicial system, the restriction of media coverage will make it harder to hold judges responsible outside the Party-state's intervention and will therefore greatly reduce courts' independence.

### A Step Backward After the Third Plenum?

The Fourth Plenum's Decision does not stand on its own; it must be analyzed as a follow up to its "sister decision" (*xiemeipian*) from last year's Third Plenum in order to fully understand its implications ([People's Daily Online](#), October 28). [2] The Third Plenum's Decision called for the centralization of local courts' and prosecutorates' budgets and personnel management to the provincial level in an effort to weaken the influence of local officials over the judicial system. Currently, local judges are still mostly appointed and removed by local People's congresses; hence judges' job stability is highly dependent on local Party committees. This centralization was seen as the Third Plenum's most promising reform for the development of the rule of law (see [China Brief](#), March 20). Just after the Third Plenum, Meng Jianzhu, the central Political-legal commission's secretary, called for a rapid implementation of this reform ([People's Daily](#), November 25, 2013).

Yet the Fourth Plenum's Decision does not mention last year's centralization effort, which could suggest a step backward for China's legal reforms. Nonetheless, some comments from senior officials provide hope for its future implementation. Su Zelin, deputy director of the Central Legal Committee for the People's Congress, asserted that the rationale behind the Fourth Plenum's judicial reforms is to make courts more independent from local administrations, but also closer to the central government. Thus, according to Su, the Third Plenum's reforms have not been abandoned, but rather changes in court reorganization will take time, as numerous legal questions still have to be addressed—the Constitution must be amended, along with the present People's Court organization law and the judges' nomination and dismissal system ([People's Court Daily](#), October 27). [3] This may explain the discrepancies between the decisions of both Plenums. The centralization reform for local courts' and prosecutorates' budgets and personnel management at the provincial level is in fact undergoing a trial phase, as it was part of a new Five Year Plan issued by the SPC this July and is in the pilot stage in Shanghai, Guangdong, Jilin, Hubei, Hainan and Qinghai ([Xinhua](#), July 7; [Beijing Times](#), June 16). [4]

## Trading Local Independence for Dependence on Beijing

The Fourth Plenum Decision highlights the central government's desire to limit local protectionism and make courts autonomous from local Party authorities. If the Party is able to fully implement the recent Decision, along with the Third Plenum's reforms, local courts may very well become more responsive to grassroots concerns and more independent from local officials. However, for the time being, the inherent contradictions between the various reform efforts appear to inhibit genuine changes at the local level, and no clear timeframe for implementation has been provided. The transformation to a more influential local judiciary should be diligently monitored as a bellwether for greater legal reform at higher levels of the Chinese government. Still, independence from local governments comes at the price of recentralization and therefore an increased dependence on higher levels of the Chinese government.

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## Notes

1. The Third Plenum's Decision called for exploring new "ways to establish a judicial jurisdiction system that is appropriately separated from the administrative divisions." For the time being, every administrative level contains a court jurisdiction, which has no separate budget. This means local governments are in charge of all judicial expenses, including salaries and daily expenses. In practice, the Third Plenum's proposal meant that courts' budgets would have to be centralized or shared by more than one administrative district. Therefore, the local courts would, in theory, become freer from the interference of local

cadres ([People's Court Daily](#), October 27).

2. The full name of the Third Plenum Decision document is "CCP Central Committee Resolution Concerning Some Major Issues in Comprehensively Deepening Reform" ([Xinhua](#), November 15, 2013).
3. Article 101 of the Chinese Constitution and Article 35 of the Organic Law on judicial organization provide that local People's Congresses have the power to recall presidents of People's Courts and chief procurators of People's Procuratorates at the corresponding level. They also stipulate that judges are appointed and removed by the standing committees of the local People's Congresses at the corresponding levels. Therefore, any change in the system for appointing the courts' president, vice president and judges requires a reform of the constitution and organic laws ([Constitution of the PRC](#); [Organic Law of the People's Courts of the People's Republic of China](#)).
4. The full name of the SPC's July plan is the "Fourth Five Year Plan Regarding the Reform of People's Courts" ([Xinhua](#), July 9).

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