

ARTICLE

CHINA'S DUAL STATE REVIVAL UNDER XI JINPING

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ABSTRACT

Under President Xi Jinping, China has undergone autocratic reclosure. Drawing on Fraenkel's 1940 analysis of Germany's then dictatorship as a duality of coexisting normative and prerogative modes of governance established to normalize 'emergency' exemptions from legality, this Article argues that this process can be understood as a Dual State revival at a point in time when rule of law is also being corroded in liberal-democratic systems with more robust legal institutions and protections.

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I. INTRODUCTION

On January 18, 2018, the Beijing-based lawyer Yu Wensheng launched an online appeal addressed to the Chinese Communist Party (“CCP”) to amend of the Constitution of the People’s Republic of China (“PRC”).¹ Some of the changes he proposed were the excision of the Constitution’s long and oft-amended Preamble and for the PRC President to be chosen through a competitive election.² The following morning, while taking his small son to school, Yu was accosted by dozens of armed police officers who criminally detained him; he was later charged with inciting to subvert the power of the State, a crime carrying a punishment of up to fifteen years imprisonment.³ His detention surprised no one; Yu himself had expected to be detained.⁴

Two months later, the National People’s Congress decided to revise Article 1 of the Constitution, a decision that further entrenched the Party leadership as well as “Xi Jinping Thought”⁵ and strengthened the President’s position by eliminating the presidential term limit;⁶ it also provided a mantle of legality for a Party-led detention mechanism to investigate Party discipline violations. The March 2018 constitutional amendment was a symbolic culmination of Jinping’s efforts to inaugurate a “New Era”

1. Guanyu Xiuxian de Gongmin Jianyi—Yuwen Sheng Zhi Zhonggong Shi Jiuda Erzhongquanhui de Gongkaixin (关于修宪的公民建议——余文生致中共十九大二中全会的公开信) [*Citizen’s Proposal on Constitutional Amendment—Yu Wensheng’s Open Letter to the Second Plenary Session of the 19th National Congress of the Communist Party of China*], Weiquanwang (维权网) [RIGHTS PROTECTION NETWORK] (Jan. 18, 2018), http://wqw2010.blogspot.com/2018/01/blog-post_18.html [<https://perma.cc/2CXL-QC3Q>].

2. *Id.*

3. Tom Phillips, *Outspoken Chinese Human Rights Lawyer Yu Wensheng Held by Police*, GUARDIAN (Jan. 18, 2018), <https://www.theguardian.com/world/2018/jan/19/outspoken-chinese-human-rights-lawyer-yu-wensheng-arrested> [<https://perma.cc/9CZF-JSK4>].

4. Yu Wensheng Detained Incommunicado and Charged with ‘Disrupting Public Service,’ FRONT LINE DEFENDERS (March 1, 2022), <https://www.frontlinedefenders.org/en/case/yu-wensheng-released-after-completing-sentence> [<https://perma.cc/AW2X-UPCP>].

5. John Garrick & Yan Chang Bennett, “Xi Jinping Thought,” 113 CHINA PERSP. 99, 99–105 (2018), <https://doi.org/10.4000/chinaperspectives.7872> [<https://perma.cc/5LPS-LYE8>].

6. James Doubek, *China Removes Presidential Term Limits, Enabling Xi Jinping To Rule Indefinitely*, NPR: THE TWO-WAY (March 11, 2018) <https://www.npr.org/sections/thetwo-way/2018/03/11/592694991/china-removes-presidential-term-limits-enabling-xi-jinping-to-rule-indefinitely>.

(*xin shidai*) of strengthened Party leadership and clearer articulation of principles of authoritarian law, drawing on some of the best-known proponents of autocracy among legal scholars, including prominently Carl Schmitt.⁷

The aftermath of the 2018 constitutional amendment presents a good opportunity to return to one of Schmitt's earliest and most influential critics, Ernst Fraenkel. His 1941 analysis of "the Dual State" is deeply critical of the idea of authoritarian legality that has globally regained traction in recent years.⁸ This Article argues that China's system bears important features of a Dual State, adapted to altered 21st century conditions including contemporary communication technology, and that it may be contributing to new Dual State formations at a global level. This assessment has implications not only for how we understand governance in China, but also for the question of how China's governance model interacts with liberal democracies.

II. THE "DUAL STATE'S" SUBVERSION OF RULE OF LAW PRINCIPLES

Ernst Fraenkel wrote about a country that had had some measure of rule of law during the Weimar era, but which was being undermined by the fascist Nazi government by the time he emigrated in 1938. He tried to capture the character of the German political-legal system as it had developed since the seventeenth century.⁹ As the subtitle of *The Dual State: A Contribution to the Theory of Dictatorship* indicates, his work addresses the features of a generic system. Fraenkel's critical analysis discusses the working of the regime, as well as the arguments of scholars

7. See Dr. Heike Holbig, *China after Reform: The Ideological, Constitutional, and Organisational Makings of a New Era*, 47 J. OF CURRENT CHINESE AFF. 188, 195 (2018); See generally Ireneusz Paweł Karolewski et al., *Carl Schmitt and Democratic Backsliding*, CONTEMP. POL. THEORY (2023) <https://doi.org/10.1057/s41296-023-00625-5> [<https://perma.cc/L4J2-GRWR>].

8. See generally ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (2017).

9. See generally *id.* Fraenkel drew on a necessarily limited understanding of Nazi Germany. He had limited opportunities to learn of its crimes, and some of Nazi Germany's worst crimes had not been committed yet. The theory Fraenkel articulated, while prescient about some later developments, is not an account that directly grapples with the crimes against humanity that have become Nazi Germany's central features from our vantage point.

supporting the Nazis, such as Carl Schmitt and Ernst Rudolf Huber.¹⁰

In a *Dual State*, Fraenkel argues, it is assumed that the “political sphere” is not governed by legal rules; rather, it is

“regulated by arbitrary measures (*Maßnahmen*), in which the dominant officials exercise their discretionary prerogatives. Hence the expression ‘Prerogative State’ (*Maßnahmenstaat*).”¹¹

The sphere of the “prerogative” is juxtaposed with the “normative” state as a sphere of legal rules; together, they form a “Dual State,” whose defining feature is the “co- existence of legal order and lawlessness”¹² and of “of legal and arbitrary actions.”¹³ In Fraenkel’s analysis, while this duality has important historical predecessors, it took on a new significance in the ‘unification of leadership’ of the Nazi German state.¹⁴ The Enabling Act (*Ermächtigungsgesetz*) of March 1933 allowed for the imposition of martial law and – had impirarily by empowering the executive to legislate (Article 1) – suspended the separation of powers;¹⁵ it was used to deny protection of the law to ever-widening circles of enemies targeted by measures such as expropriation and protective custody.¹⁶ Therefore, the “political sphere” decides who is an enemy, and importantly, anybody *might* be so designated. In this new, radically non-liberal, form of order, reliance on and suspension of the law are combined.¹⁷ The state of norms and state of measures (normative / prerogative state) cannot be analyzed as

10. Ewald Grothe ERNST RUDOLF HUBER, PORTAL RHEINISCHE GESCHICHTE [RHINELAND HISTORY PORTAL], BIOGRAPHIEN <https://www.rheinische-geschichte.lvr.de/Persoenlichkeiten/ernst-rudolf-huber/DE-2086/lido/57c8345586e8e9.99187498> [<https://perma.cc/68AC-5LSY>] (last visited Nov. 12, 2022).

11. FRANKEL, *supra* note 8, at 3.

12. *Id.* at 24–25.

13. *Id.* at 39.

14. FRANKEL, *supra* note 8, at 154.

15. *The Enabling Act*, HOLOCAUST ENCYC.,

<https://encyclopedia.ushmm.org/content/en/article/the-enabling-act> [<https://perma.cc/3LC6-FUJ8>] (last visited Nov. 12, 2022).

16. *See id.*

17. “The legend of the legal revolution is built around Adolf Hitler’s identification of his person with public ‘order’; the history of the illegal coup d’état is characterized by the identification of ‘order’ with Hitler’s person. . . This attempt to veil the true character of the martial law dictatorship by legalistic tricks was brought about by the means of plebiscitary democracy.” FRAENKEL, *supra* note 8, at 13.

though they were separate and unrelated phenomena. Rather, in Fraenkel's analysis, the Enabling Act purported to entrench the suspension of legality by law, understood in a formalistic way as a system of governance according to laws; thus "the legal system necessary for the functioning of private capitalism"¹⁸ could be maintained.¹⁹ The normative and prerogative states do not complement, but rather compete with each other.²⁰

The coexistence of legal order and lawlessness is, according to Fraenkel, "most impressively demonstrated by the confinement in concentration camps of persons who have been acquitted by the courts" on the grounds that political discretion must be exempt from judicial review.²¹ As the example of "protective custody" (also known as *Schutzhaft*,^{22a} a precursor to internment in concentration camps) shows,²³ political discretion has the potential to permeate all legal decisions. It extends also to what might seem like banal private law cases, since it is the political sphere that gets to decide when law's role must be diminished.²⁴

There is a direct complementarity between Schmittian,²⁵ anti-liberal conceptions of law and the Dual State. As Fraenkel writes,

"Whether the decision in an individual case is made in accordance with the law or with 'expediency' is entirely in the hands of those in whom the sovereign power is vested. Their sovereignty consists in the very fact that they determine the permanent emergency. 'The sovereign is he who has the legal power to command in an emergency' as Carl Schmitt has formulated in his book *Politische Theologie [Political Theology]*. From this follows the principle that the presumption of jurisdiction rests with the Normative State.

18. *Id.* at 73.

19. *Id.* at 59 (arguing that Nazi Germany was not quite totalitarian).

20. *Id.* at 46.

21. *Id.* at 39.

22. *Law and Justice in the Third Reich*, HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/article/law-and-justice-in-the-third-reich> [<https://perma.cc/3Q9B-ZJE9>] (last visited Nov, 12, 2022).

23. *Id.*

24. The National- Socialist state has insisted that law be eliminated from the sphere of politics and that the definition of the boundary lines between the two rests in the hands of the political authorities themselves. Minister Frick left nothing further to be said on this subject when he declared: "It is self- evident that questions of political discretion should not be subject to review in the administrative courts." FRAENKEL, *supra* note 8, at 38.

25. "Schmittian," refers to the conceptions of the law based on the work of Carl Schmitt, discussed in the quoted passage that follows.

The jurisdiction over jurisdiction rests with the Prerogative State.”²⁶

On the basis of a Schmittian, totalist conception of sovereignty, it would be wrong to follow laws in “political” cases. In Nazi Germany, even a case of homosexuality between two monks could become a political offense, although “[n]either the offense as such nor the person of a completely inconsequential monk has even the slightest connection with politics.”²⁷ Likewise, racist (and genocidal) ideology led the highest court in Germany to find that non-Aryans could no longer have equal rights with Aryans; indeed, non-Aryans, according to this ideology, could be deprived of all rights, in which case they suffered a “civil death.”²⁸ In his 1941 publication, Fraenkel concluded that the Dual State was incompatible with the rule of law in its basic premise; hence, the creation (or the further entrenchment) of the Enabling Act must be understood as the “death sentence for the rule of law.”²⁹

Importantly, rule of law’s “death sentence” is passed in the name of a deeply illiberal, ideologically driven, conception of justice. Since “[t]he Prerogative State claims that it represents material justice and that it can therefore dispense with formal justice,”³⁰ the Dual State affects not only how pre-existing legal norms are used in specific cases, but also the content of norms themselves. The Emergency Decree of March 1933 gave the Nazis total legislative power, leading, inter alia, to the Nuremberg Laws³¹. “No person in contemporary Germany has any guarantee that his status as a ‘constructive force’ will not be denied by some

26. FRAENKEL, *supra* note 8, at 57.

27. *Id.* at 42.

28. *Id.* at 95. (quoting the chilling decision of the *Reichsgericht* of 27 June 1936 in translation: “The National-Socialist philosophy. . . requires that German law recognize only persons of German origin or those who by law are declared equal to them and that only Aryans should enjoy all legal rights and privileges. It is merely a renewal of old principles to distinguish between groups having all legal rights and those who have only a limited number of rights. The complete deprivation of all rights is described a “civil” death: the case before this court permits an analogy.”).

29. *Id.* at 45.

30. *Id.* at 46.

31. *Id.* at 87; *Nuremberg Laws*, HOLOCAUST ENCYC., <https://encyclopedia.ushmm.org/content/en/article/nuremberg-laws> [<https://perma.cc/L7J2-NR9E>] (last visited Nov, 1, 2022).

agency of the party or of the state and that he will not lose the protection of the Normative State.”³²

In a Dual State system, not only is the normative state unable to articulate and honor the requirements of rule-of-law-based justice. While referencing Fraenkel’s example of the unlawful administrative denial of a birth certificate by the officials of the Nazi German state, Donald Clarke observed that “the existence of regular behavior is not the sign of legality or rule of law.”³³ Such a system is also subject to requirements of “justice” (or of justificatory narratives involving *claims* about justice)³⁴ that may include the authorities’ removal of the law’s protection from individuals who, according to a liberal, human-rights-based perspective, must be protected. Nazi Germany’s courts not only abdicated their responsibility to resist unjust legislation, but also in some instances, adopted the view that the country’s “true” Constitution was the program of the Nazi party, vaguely equated with “general welfare.”³⁵ As discussed in Chapter 9 of *The Dual State*, a “communally oriented ideology” is employed to justify overriding legal rules when this ideology requires it.³⁶

According to Frankel, only on the basis of a normatively rich and universalistic understanding of law’s connection with justice can we understand the enormity of the Dual State system’s attack on the rule of law.³⁷ His critique of the way in which the regime

32. FRAENKEL, *supra* note 8, at 63.

33. Donald C. Clarke, *Order and Law in China Order and Law in China*, 16-17 GW L. FACULTY PUB’L & OTHER WORKS (Aug. 25, 2020), https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2762&context=faculty_publications [<https://perma.cc/WQX6-2GE5>]; *see also* Donald C. Clarke, *Is China a Dual State?*, GEO. WASH. UNIV. SCHOOL OF L. (Dec. 15, 2022), <https://doi.org/10.2139/ssrn.4317126> [<https://perma.cc/5MH3-ZNRV>] (arguing that the Dual State concept does not apply to China’s legal political system).

34. *See* RAINER FORST, *NORMATIVITY AND POWER: ANALYZING SOCIAL ORDERS OF JUSTIFICATION* 112 (2017). (Forst recognizes that power exercise calls for evaluative or normative assessment, at least when power needs to be understood as noumenal, rather than physical power, denoting “what is going on when someone acts for certain reasons for which others are responsible.” *Id.*

35. FRAENKEL, *supra* note 8, at 83, 85. Fraenkel argues that the courts have refused to transform the economic organization of the system fully in conformity with Nazi visions; rather, the capitalist economy remains in place.

36. *Id.* at 128, 191. In Chapter 5, Fraenkel relates this argument to the substitution of the idea of justice with “relative justices” in Hegel and Marx.

37. Douglas G. Morris discusses Fraenkel as one of two “Jewish, secular, left-wing Social Democrats” drawing on natural law perspectives. Douglas G. Morris, *Write and*

invokes totalitarian conceptions of “justice” that make reference to moral traditions is precise and targeted. What Fraenkel criticizes is not the invocation of “justice” *per se* in legal reasoning but, rather, the relativistic ideas informing Nazi claims about justice.³⁸ In Chapter 4 on “The Repudiation of Rational Natural Law by National-Socialism,” Fraenkel explains that the rejection of the very idea of universal values has been crucial to the construction of narratives justifying Nazi ideology. Such examples include Carl Schmitt’s “statement that we are today experiencing the bankruptcy of *idées générales*” and the claim by another Nazi ideologue that “there is no right residing in the stars; there is no equal right which is innate in the individual; there is therefore no universal transethnic Natural Law.”³⁹ Fraenkel argues that the repudiation of rational natural law (and universal values) was a historical legacy used by Germany’s new dictators.⁴⁰ “For more than a hundred years, we have been intellectually denying every type of Natural Law while our conscience has simultaneously been demanding its acknowledgment.”⁴¹

Consistent with this view, Fraenkel argues that “the notion that a right must be respected because it has been respected for a long time and is supported by an old tradition is as alien to National-Socialism (which is guided strictly by considerations of political opportunism) as the belief in rational Natural law.”⁴² Neither a tradition of respect for natural rights nor a progressive argument for such respect, would be accepted in the German Dual State. National-Socialism’s repudiation of rationalist, enlightenment-driven natural law theories is a matter of historical record.⁴³

Resist: Ernst Fraenkel and Franz Neumann on the Role of Natural Law in Fighting Nazi Tyranny, 42 *NEW GERMAN CRITIQUE* 197, 198 (2015).

38. See FRAENKEL, *supra* note 8, at 128.

39. *Id.* at 110.

40. See *id.* at 111.

41. *Id.*

42. *Id.* at 123.

43 See FABIAN WITTECK, NATIONALSOZIALISTISCHE RECHTSLEHRE UND NATURRECHT: AFFINITÄT UND AVERSION [NAZI JURISPRUDENCE AND NATURAL LAW: AFFINITY AND AVERSION] 25 (2008) (discussing the fact that “individualistic rationalist natural law [*individualistisches Vernunftnaturrecht*]” was “subject to a frontal attack” by nationalist socialist jurists such as Dietze, Freisler, and Larenz, even though according to Wittreck (and indeed Fraenkel), their own theories made claims about relativistically conceived, “racially pure” ideas of natural justice).

As Fraenkel points out early on, the concentration camp—understood as what it was when the manuscript was produced, i.e. before the atrocities of concentration and “extermination” camps were fully understood—is emblematic of the Prerogative State in Nazi Germany.⁴⁴ The Nazi persecution of Jews in the name of obscure yet influential notions of race led to a portrayal of the Jewish as an enemy race to be fought by any and all means considered necessary: “[T]he concentration camp is not only an essential component in the functioning of the National- Socialist state, but also an indication of the enduring character of the sovereign National- Socialist dictatorship.”⁴⁵

The Dual State theory shows how violence and arbitrariness can be integral parts, rather than just incidental failures, of a modern system of governance. It shows that these systems cultivate a peculiar conception of law, not restricted to but typical of dictatorship. Along with a preference for power-centered conceptions of law, such systems favor romantic, emotionalized, anti-rationalist ideas of a higher justice that help further heighten the role of political power as a custodian of this super-legal justice.

Both the Dual State’s affinity with Schmittian conceptions of law and its incompatibility with the rule of law are relevant to contemporary, as well as historical settings. Dual State theory speaks to the challenges currently encountered by deteriorating liberal-democratic systems that increasingly give in to enemy and war rhetoric, suspend rights and other central principles of rule of law, and show anti-democratic tendencies. Viewed from this perspective, it is hardly surprising that the reception of Carl Schmitt’s work underwent a revival in the United States and beyond in the wake of the 9/11 attacks.⁴⁶ “Dual state” variants of

44. Compare Book #56961 (*THE DUAL STATE A CONTRIBUTION TO THE THEORY OF A DICTATORSHIP*), THE LAW BOOK EXCHANGE, <https://www.lawbookexchange.com/pages/books/56961/ernst-fraenkel-e-a-shil/the-dual-state-a-contribution-to-the-theory-of-dictatorship> [https://perma.cc/N9Y7-5P3K] (last visited Mar. 13, 2023) (describing that the book was written in the late 1930’s), *with News of Holocaust Death Camp Killings Becomes Public for First Time*, HISTORY: THIS DAY IN HISTORY, (May 31, 2022) <https://www.history.com/this-day-in-history/news-of-death-camp-killings-becomes-public-for-first-time> (describing that the true horrors of the holocaust became public in 1942).

45. FRAENKEL, *supra* note 8, at 12–13.

46. Kim L. Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, U. PA. J. CONST. L. 1001, 1068 (2004); Kim L. Scheppelle, *North*

non-democratic, illiberal states are not compatible with rule of law commitments. Their use of law, according to the analysis presented here, fails to justify their coercive power because the law can be suspended or superseded by invoking ideologically-driven, antiliberal conceptions of justice. They may produce legal rules that are generally followed. But this does not mitigate the moral flaws of a Schmittian theory of law according to which “the positive law can at best determine who is to decide whether there is an emergency that requires a wholesale suspension of the law”.⁴⁷

As discussed in the following sections, Fraenkel’s analysis of the Dual State also speaks to the trajectories of autocratic systems that, like China, are lapsing back into theories and practices of governance more deeply hostile to rule of law principles. In this context, this Article can help articulate a challenge to the simplistic belief in sequentialist legal reform—the belief, for example, that the promotion of “commercial rule of law” could promote the rule of law in other areas. It also speaks to the problem of the global erosion of legality.

III. THE FORMATION OF THE DUAL STATE IN CHINA’S POST-MAO REFORM ERA

For the first decades of its existence, the system of the People’s Republic of China relied on a broadly Marxist-Leninist view of law.⁴⁸ Law’s significance was diminished by the tenets of a theory deeply skeptical of the idea of moral value, and particularly critical towards the capitalist and bourgeois values central to political-legal liberalism. Although – under the influence of the evolution of “socialist legality” (i.e., Vyshinsky) in the Soviet Union – law and legal institutions were accorded an instrumental value during the initial years of the construction of the new state,⁴⁹ and while it would be wrong to claim that there was no law in the Mao

American Emergencies: The Use of Emergency Powers in Canada and the United States, 4 INT’L J. CONST. L. 213, 213–43 (2006).

47. Lars Vinx. *Carl Schmitt*, STANFORD ENCYC. OF PHIL, <http://plato.stanford.edu/entries/schmitt> [<https://perma.cc/L8NC-QD4N>].

48. See generally ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 72, 74 (5th edition, 2018).

49. See *id.* at 30–31.

era,⁵⁰ the Party's attitudes and actions diminished the role of law and legal institutions. Recurrent campaigns during the last decade before Mao's death, the "Cultural Revolution" period, led to severe personal persecution of countless individuals associated with the law, the stalling of the legal construction process and dismantling of existing institutions, and to what Albert Chen characterizes as "the demise of the legal system."⁵¹ The opinion piece "In Praise of Lawlessness," often cited to capture views and sentiments of the era, insists that the only true law is the law of the proletariat.⁵² The piece insists on class-based divisions between the People and its enemies, and it thus rejects what is valuable about the notion of legal-rule-following: namely the central, if in some iterations minimalistic, idea of formal equality.⁵³

This stance is reminiscent of the Schmittian approach examined earlier.⁵⁴ However, Maoist China's rejection of the value of law and legal institutions is more wholesale because Mao era conceptions of socialism reject the central principles and practices of private law that fascist conceptions like Schmitt's purported to commit to. This is important because law in the Mao era was therefore a less central and explicit aspect of governance than in the Nazi German Dual State. Schmittian and Maoist ideas of governance are thus both deeply anti-liberal, but in different ways.

After the death of Mao Zedong in 1976, the Chinese Party-State initiated a legal revival that raised many hopes of an eventual transition to rule of law, conceived in terms of a global constitutional model. It is fair to raise doubts about the sincerity of

50. Albert Chen sets out a number of laws and regulations enacted in the 1950s and points out that institutions central to the legal process, including the judiciary, procuracy, and legal profession were institutionalized in the early years of the Mao era. *See id.*

51. *Id.* at 35–36.

52. Wufawutianzan (无法无天赞) [In Praise of Lawlessness], PEOPLE'S DAILY (Jan. 31, 1967) ("In our minds, what is 'non-existent' is the 'law' of the bourgeoisie and the 'heaven' of capitalism, and what is 'existent' is the 'law' of the proletariat and the 'heaven' of socialism."); *see also* ROBERT WEATHERLEY, MAKING CHINA STRONG: THE ROLE OF NATIONALISM IN CHINESE THINKING ON DEMOCRACY AND HUMAN RIGHTS 114 (1st ed., 2014).

53. H.L.A. HART, THE CONCEPT OF LAW, 160 (1961) (describing the act of "treating like cases alike"). *See generally* Petar Popović, Hart on the Role of Justice in the Concept of Law: Some Further Remarks, 13 JURISPRUDENCE 489 (2022), <https://doi.org/10.1080/20403313.2022.2077514> [<https://perma.cc/JXE3-8YVH>].

54. Schmitt in his later years admired Mao. Thomas Fröhlich, *From 'Carl Schmitt on Mao' to 'Carl Schmitt in China,'* in CARL SCHMITT AND LEO STRAUSS IN THE CHINESE SPEAKING WORLD: REORIENTING THE POLITICAL 61, 61 (2017).

the Party leadership's commitment, at any point in the Reform and Opening era, to protecting legal rights.⁵⁵ This era, which lasted for some four or five decades,⁵⁶ undoubtedly saw a flourishing of liberal legal ideas in wider intellectual and public life: human rights discourse was championed by scholars such as Li Buyun⁵⁷ in the 1990s, as human rights and rights defense (*weiquan*) became an increasingly important idea underpinning the contention between Chinese citizens and the Party-State as a "paradoxical consequence" of June Fourth 1989.⁵⁸ In part at least, these ideas were revived by protagonists who could draw upon a pre-PRC liberal political legal discourse in China.⁵⁹ These concepts became

55. Glenn Tiffert has challenged "the genealogy through which the Party today authenticates a distinctively socialist and proprietary variant of that concept," arguing persuasively that (as of 2017), "the Party invokes Chinese characteristics to surgically excise the rule of law's imported, liberal associations, but not its Marxist-Leninist ones, which are instead Sinicized by the likes of Mao and Deng." In fact, Tiffert argues, the post-Mao era reverts to China's Republican period to "wrap the concept of the rule of law in the banner of socialism to release it from its Mao-era ignominy." Quoting the 1940 President of the Judicial Yuan he points out that the KMT attitude at the time was similar to that adopted by the CCP today: "In 1940, Ju Zheng, President of the Nationalist Judicial Yuan argued, 'The rule of law must suit the age. . . Currently, there are many forms of rule of law being implemented by various nations. There is capitalist nation rule of law, socialist nation rule of law, and fascist nation rule of law. However, we need none of those. The rule of law that we need is one that harmoniously joins with the spirit of the Three People's Principles, that has the elements of the Three People's Principles within the rule of law's spirit.'" Glenn Tiffert, *Socialist Rule of Law with Chinese Characteristics: A New Genealogy*, in *SOCIALIST LAW IN SOCIALIST EAST ASIA* 72, 73, 74, 76–77 (Huangling Fu et al. eds., 2018).

56. CARL MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* 108 (2020). The author does not precisely date the end of the reform era, but broadly references 'the last two decades of the twentieth century and ... the first decade of the twenty-first.' While there is room for debate about this periodisation, it should be noted that Xi Jinping himself used the term "New Era" with increased frequency from 2017 onwards; sometimes, "New Era" discourse is applied retrospectively to the decade since Xi came into power. Hugo Jones *Forging the "New Era": The Temporal Politics of Xi Jinping*, *THE DIPLOMAT* (Oct. 1, 2022), <https://thediplomat.com/2022/09/forging-the-new-era-the-temporal-politics-of-xi-jinping/> [<https://perma.cc/RFL6-VR94>].

57. Discussed, with different emphases, by ELENA CONSIGLIO, *CHINESE LEGAL THEORY AND HUMAN RIGHTS: REARTICULATING MARXISM, LIBERALISM, AND THE CLASSICAL LEGAL TRADITION* 191 (2019); SAMULI SEPPANEN, *IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA: USEFUL PARADOXES* 115–23 (2016).

58. Andrew J. Nathan, *China and International human rights—Tiananmen's paradoxical impact*, in *THE IMPACT OF CHINA'S 1989 TIANANMEN MASSACRE* 207–20 (Jean-Philippe Béja ed., 2011).

59. Glenn D. Tiffert, *Epistrophy: Chinese Constitutionalism and the 1950s*, in *BUILDING CONSTITUTIONALISM IN CHINA* 59–76 (Stéphanie Balme and Michael W. Dowdle eds. 2009).

“remade in the vernacular,”⁶⁰ and are now part of the vocabulary used to discuss questions of justice, law, and power.

However, throughout the Reform Era, Party leadership, and the ideas and institutions cementing it also remained in place. There was a widely shared assumption, captured in the notion of the “politically sensitive” (*zhengzhi mingan*), that a certain realm of the political existed and that within this realm, the ordinary rules of the legal system being constructed must be suspended.⁶¹ Like in the original German Dual State, who counts as a political enemy, was left to the sovereign, defined in political terms: the Party.⁶² The continued repression of political enemies at times took the form of prosecution and punishment based on criminal law, first as “counter-revolutionaries” and then, after the revision of the Criminal Law, as perpetrators of crimes against national security.⁶³ Other times, it took the form of extra-legal state-centered violence, e.g. through enforced disappearances. These practices, from the perspective of Fraenkel’s analysis, are practices of a Dual State whose normative part is corrupted by “political” exigency and many of whose repressive measures are “prerogative” in nature.⁶⁴ Their continuance in the Reform and Opening era and beyond makes it impossible to claim that China is a rule of law state. Yet, much of public and scholarly discussions suggest that the realm of these measures are shrinking, as the title of Peerenboom’s 2002 book *China’s Long March Toward Rule of Law* well illustrates.⁶⁵

As noted earlier on in Part II,⁶⁶ under Dual State theory, the relationship between the normative and the prerogative states is one of “competition.” This concept can apply to different

60 . SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE*, 1 (2006).

61. For example, the courts, lawyers’ associations, and other bodies had special rules for dealing with sensitive legal cases, as discussed in EVA PILS, *CHINA’S HUMAN RIGHTS LAWYERS: ADVOCACY AND RESISTANCE* 104–45 (2014).

62 . Eva Pils, *Rule-of-Law Reform and the Rise of Rule by Fear in China*, in *AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION* 105 (Fu Hualing & Chen Weitseng eds., 2020) (discussing the significance of the concept of enemies).

63. *Id.* at 107.

64. Such cases are discussed in Eva Pils, *The Party’s Turn to Public Repression: An Analysis of the “709” Crackdown on Human Rights Lawyers in China*, 3 *CHINA L. & SOC’Y REV.* 1–48 (2018).

65. RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARDS RULE OF LAW* (2002).

66. FRAENKEL, *supra* note 8, at 46.

trajectories in the formation of a Dual State. In historical comparison, the evolution of the Chinese legal system in the post-Mao era appears to have reversed the system's decline and collapse observed in Germany. There, as set out in Part II, what Fraenkel analyzed was a legal system undermined and corroded by the rise of the prerogative state and the concurrent corrosion of legal norms.⁶⁷

By contrast, in the Chinese Reform and Opening era, one can argue that there was barely a normative state to begin with. After the Cultural Revolution was officially declared over at the 11th Party Congress in 1977,⁶⁸ the normative state was built up as part of the legal reform efforts. The buildup started from the extremely thin initial normative basis of constitutional, statutory, and other provisions as well as severely weakened, if not dismantled, legal institutions remaining after the Cultural Revolution.⁶⁹

From the start of "Opening and reform," according to the analysis proposed here, a normative state under (re-)construction began to compete with the pre-existent prerogative state. This competitive relationship is clearly envisaged by some of the proponents of rule of law principles at the time, for example, Li Buyun, one of the co-authors of an article advocating the notion of "ruling the country with law." The authors explicitly juxtapose the rule of law (*fazhi*) principle with that of the "rule of men" (*renzhi*), and argue that the two principles are incompatible and reject "the tyrannical idea that [a leader's] words can make and unmake law."⁷⁰

The 1982 Constitution's Article 5, a product of the post-Mao era, now stipulates that "[t]he People's Republic of China governs the country in accordance with law (*yi fa zhi guo*) and establishes socialist legal governance " and that "[a]ll State organs and armed

67. See *supra* Part II.

68. Eleventh National Congress of Chinese Communist Party: Extracts from the Political Report by Hua Kuo-Feng, *Chairman of the CCP Central Committee, to the 11th National Congress of the CCP (delivered on August 12, 1977 and adopted on August 18, 1977)*, in 13 CHINA REPORT 57-84, <https://doi.org/10.1177/000944557701300606> [<https://perma.cc/GM5U-KB7U>].

69. CHEN, *supra* note 48.

70. Li Buyun et al., *Yifazhiguo (以法治国) [Ruling the country with law]* (1981), <https://chinalaw.org.cn/portal/article/index/id/21312/cid/278.html> [<https://perma.cc/R4KJ-9HMS>]. Having initially been orally delivered, the article was published under a different title in 1981.

forces, all political parties and social groups, and all enterprises and institutions must abide by the Constitution and other laws.”⁷¹ In part drawing upon the legislative reform blueprints abandoned in the 1950s, the party-state proceeds to engage in a legal revival process that encompasses the enactment of key laws defining the criminal justice process and creating private law mechanisms fundamental to the new socialist market economy.⁷² The party-state has revived institutions central to the legal process revived, reopened law schools, and launched programs for the dissemination of legal knowledge in the wider population.⁷³

If the creation of a Dual State in Germany in 1933 was a “death sentence for the Rule of Law” according to Fraenkel,⁷⁴ the emergence and strengthening of the normative state in China, where arbitrariness (a prerogative state) had seemed to rule in the decade immediately preceding the Reform Era, gave liberals a reason to hope for incremental improvements.⁷⁵ There was hope that reform might allow a genuine systematic commitment to the rule of law to take hold eventually, as a result of normative state growth, and book titles such as *Towards an age of rights* and *China's Long March towards the rule of law* were expressive of such hopes.⁷⁶ The value commitments, analyses, and practices of liberals committed to systemic (albeit gradual and if possible, peaceful) change require that the prerogative state be brought under control and diminished. The Dual State, from the perspective of the reform era, is therefore unstable and transitory; it should and eventually might be superseded by a rule of law state.

71. Zhonghua Renmin Gongheguo Xingshi Susongfa (中华人民共和国刑事诉讼法 (1982 年)) [PRC Criminal Litigation Law (1982)], passed on December 4, 1982, promulgated and effective as of December 4, 1982.

72. See Naoise McDonagh, *China's Socialist Market Economy and Systemic Rivalry in the Multilateral Trade Order*, 76 *AUSTL. J. OF INT'L. AFFAIRS* 712, 712–33 (2022); see also Barry Naughton, *Is China Socialist?*, 31 *J. OF ECON. PERSP.* 1, 3–24 (2017).

73. See CHEN, *supra* note 48.

74. See FRAENKEL, *supra* note 8, at 45.

75. See EVA PILS, *COMPARATIVE PERSPECTIVE ON CRIMINAL JUSTICE IN CHINA* 411–38 (Michael McConville & Eva Pils eds., 2013); see also Rachel E. Stern, *Activist Lawyers In Post-Tiananmen China*, 42 *L. & Soc. Inquiry* 1, 234–51 (2017).

76. See Zouxiang Quanli de Shidai: Zhongguo Gongmin Quanli Fazhan Yanjiu 走向权利的时代: 中国公民权利发展研究 [Toward a time of rights: a perspective of the civil rights development in China], (Xia Yong (夏勇) ed., 1999); see also PEERENBOOM, *supra* note 65.

Accordingly, although political repression remains a very important feature of the Reform and Opening Era, the role of the Party and the use of repressive, illegal and at times criminal methods to protect Party rule cannot be permitted to be visible. For example, human rights lawyers are forcefully disappeared and sometimes tortured.⁷⁷ But the authorities strive to give an impression of adherence to the rule of law and basic human rights norms of liberty of the person.⁷⁸ In doing so, they sometimes make some genuine concessions to liberal principles, by subscribing to international norms such as the prohibition of torture, and by enacting legislations reflecting these and related principles domestically.⁷⁹ Internal Party “discipline” is maintained by methods similar to those of dissident persecution. Again though, these methods and the rules that govern them are kept in the shadows.⁸⁰

In line with this transitional understanding of the system, the evolving practices of human rights advocacy during this era consisted of efforts to expose the repressive practices that had remained in the shadows, challenge them in the light of constitutional and international human rights norms, and reduce or even abolish their use. The abolition of a detention mechanism in 2003 following a death in custody is a prime example of these efforts. This series of events, referred to as “the Sun Zhigang Incident,” has become an important reference point for the Chinese human rights movement, as well as for discussions of constitutionalism in China.⁸¹

Both reform and repression in the post-Mao era have occurred in the context of increasingly complex transnational ties and exchanges. They concur with not only China’s, but also many

77. See PILS, *supra* note 61, at ch. 6.

78. Katrin Kinzelbach, *Resisting the power of human rights: The People’s Republic of China*, in *THE PERSISTENT POWER OF HUMAN RIGHTS* 164–79 (2013) (describing an account of the rise of norm contestation.)

79. See EVA PILS, *HUMAN RIGHTS IN CHINA: A SOCIAL PRACTICE IN THE SHADOWS OF AN AUTHORITARIAN SYSTEM*, ch. 2 (2018).

80. *Id.* at 42.

81. See generally ZHANG QIANFAN, (*Xianfa Jiangyi* 宪法学讲义) [LECTURES ON CONSTITUTIONAL LAW] (2011); ZHANG QIANFAN, *THE CHINESE CONSTITUTION: A CONTEXTUAL ANALYSIS* (2014); Keith J. Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People’s Republic of China*, 45 *COLUM. J. OF TRANSNATIONAL L.* 114 (2006); Teng Biao, *Rights Defense and New Citizen’s Movement*, in *HANDBOOK ON HUMAN RIGHTS IN CHINA* 605–30 (2019).

other countries “opening” in the course of globalization. They must thus be understood in the context of challenges to the constitutional order in other parts of the world. While the Chinese society has strived for rule of law improvements, a number of developments have posed new threats to the rule of law in western countries. In the United States, the experience of 9/11 attacks has led, *inter alia*, to a new search for justifications of war and the so-called “war on terror.”⁸² The “war on terror,” in turn, led to a shocking corrosion of basic human rights standards, including what Sikkink has called a phase of “deep backlash and denial” in the context of an intentional system of torture practiced by US agents on its detainees held outside of US territory and in Guantanamo Bay.⁸³ The revival of torture practices by the US authorities is an important example of what one might call a prerogative state revival in countries with relatively well-entrenched rule of law. It is accompanied, as scholars such as Teschke have noted, by a surge of interest in Schmittian legal theory, especially Schmitt’s influential account of emergency powers, in Anglo-American legal scholarship.⁸⁴ Teschke characterizes this as “a hyper-politicized neo-conservative US administration acting outside the conventional remit of international law, while neutralizing its junior partners across the capitalist zone and externalizing international political opposition from the field of legitimate geopolitics altogether—terrorists, pirates and [‘]rogue states[‘].”⁸⁵

As a result, by the time of the “Sun Zhigang Incident” in 2003 and the 2004 revision of Article 33 of the PRC Constitution, which now provides that “the state respects and protects human rights”

82. As Teschke and others have pointed out, this, in turn, intensifies the ongoing wave of the Carl Schmitt reception. Schmitt not only developed a theory of the state of emergency as a state to be decided by (not further specified) sovereign power. More widely, he argued that that “the essence of the political” was “the sovereign decision to go to war against an enemy” as a decision divorced from moral constraints, and it is not difficult to see how attractive these ideas must have been in the Anglo-American world around the turn of the century. Benno Teschke, *Decisions and Indecisions*, 67 *NEW LEFT REV.* 61, 65 (2011).

83. THOMAS RISSE ET. AL., *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 149 (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink eds., 2013).

84. Teschke, *supra* note 82, at 61.

85. *Id.* at 64.

in China,⁸⁶ human rights have been dealt a severe blow in the country that has served as the most important reference point and example for liberal reformers in China. Political interest in state-of-emergency legislation and academic interest in Carl Schmitt soon began to flourish also in China, partly on the basis of perceived threats of terrorism.⁸⁷ Schmitt's works were translated by Chinese scholars,⁸⁸ and scholarship has turned from intensive study of the theories of constitutionalism to the study of theories and arguments that can help explain and justify an alternative model of "authoritarian legality".⁸⁹

These efforts can be seen as groundwork for the "new era" under Xi Jinping.⁹⁰ However, these efforts were in tension with what was widely assumed to be the direction of legal reforms: Just before Xi took office, the World Bank and the PRC State Council Development Research Center released a joint "China 2030" report in 2012 that expressed these beliefs: emphasizing the interdependency of long-term economic development, socio-political stability, and the rule of law.⁹¹ This orthodox developmentalist conception of the rule of law prompted excellent empirical investigations into systematic violations of human rights and rule of law principles. But it compelled observers to understand such violations as mere lapses from a path whose

86. Teng, *supra* 81 at 605; Hualing Fu & Michael Dowdle, *The Concept of Authoritarian Legality: The Chinese Case*, in *AUTHORITARIAN LEGALITY IN ASIA: FORMATION, DEVELOPMENT AND TRANSITION* 63, 63 (Weitseng Chen & Hualing Fu ed., 2020); Songcai Yang, *Human Rights Education in China: Motivations and Difficulties*, 7 *HUM. RTS. EDUC. IN ASIA-PAC.* 265, 268 (2016).

87. Mehdi Hasan, *One Million Muslim Uyghurs Have Been Detained by China, the U.N. Says. Where's the Global Outrage?*, *THE INTERCEPT* (Aug. 13, 2018), <https://theintercept.com/2018/08/13/china-muslims-uighur-detention/> [<https://perma.cc/7N5T-7XUP>] ("By September 2002, both the U.N. and the United States had listed ETIM as a "terrorist organization"—throwing the Uighurs under the geopolitical bus.") (quoting Bequelin).

88. Scholars involved in Schmitt reception include Chen Duanhong, Hu Angang, Jiang Shigong, Tian Feilong, Wang Shaoguang and Zhang Xundong. Jean Christopher J. Mittelstaedt, *Understanding China's Two Constitutions: Re-Assessing the Role of the Chinese Communist Party*, *EUR. CHINA L. SOC'Y* (2015).

89. See Jackson T. Reinhardt, *Totalitarian Friendship: Carl Schmitt in CONTEMPORARY CHINA*, 12 *INQUIRIES* J. 1 (2020).

90. Jones, *supra* note 56.

91. World Bank Grp. [WBG] & Development Rsch. Ctr. of the State Council, the People's Republic of China, *China 2030: Building a Modern, Harmonious, and Creative Society* (2013), <https://openknowledge.worldbank.org/handle/10986/12925> [<https://perma.cc/ERJ6-7QFJ>].

direction towards improved rule of law was already decided. Accordingly, options for change were framed as incremental reforms. For example, the American Bar Association's Rule of Law Initiative (ROLI) and the EU-China Law School and its precursor, the EU-China Legal and Judicial Cooperation Program, were exponents of this approach.⁹²

Some scholars, including Suli and Jiang Shigong produced analyses of China's constitution and legal political evolution that endorsed Party leadership as a foundational, axiomatic assumption.⁹³ Only since the advent of Xi Jinping, however, a wider intellectual shift appears to have taken place. Increasingly, scholars are abandoning the mainstream liberal view of post-Mao Chinese legal scholarship and searching for accounts of the legal-political system that, in their view, fits China's reality better.

IV. RECONCEPTUALISATION OF LAW AND REVIVAL OF THE PREROGATIVE STATE UNDER XI

Xi's leadership has brought an era dominated by paradigmatic belief in a gradual transition to an end through a number of systemic changes.⁹⁴ The symptoms of change have included a concentration of internal Party control, intensified repression of widening circles of civil society and ethnic minorities, the "going out" policies of the "Belt and Road Initiative," and attempts to influence the norms and mechanisms of the United Nations.⁹⁵

92. For the preferred language of cooperation and transition used by these institutions, see, e.g., *ABA Rule of Law Initiative*, AM. BAR ASSOC. (2022), https://www.americanbar.org/advocacy/rule_of_law/ [https://perma.cc/2LYJ-4WVU]; Eur. Comm'n, *EU-China Relations: a Maturing Partnership*, EUR-LEX, <https://eur-lex.europa.eu/EN/legal-content/summary/eu-china-relations-a-maturing-partnership.html> [https://perma.cc/A4D3-BKGJ] (last accessed Aug. 11, 2022); *China-EU School of Law Celebrates 10th Anniversary in Beijing*, EUR. EXTERNAL ACTION SERV. (Nov. 15, 2018), https://www.eeas.europa.eu/node/53844_en [https://perma.cc/NR29-XBPV]. "Rule of law orthodoxy" had long been subjected to criticism. See, e.g., Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 14, 2003), <https://carnegieendowment.org/publications/index.cfm?fa=view&id=1367&prog=zgp&proj=zdr1> [https://perma.cc/Q9AG-RUJ3]; Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endowment for Int'l Peace Working Paper, Paper No. 30, 2002).

93. See FRED R. DALLMAYR & ZHAO TINGYANG, *CONTEMPORARY CHINESE POLITICAL THOUGHT: DEBATES AND PERSPECTIVES* 29 (2012).

94. MINZNER, *supra* note 56 at xviii.

95. Chun Han Wong & Keith Zhai, *China's Xi Jinping Shrugs Off Criticism in Push for Even More Control*, THE WALL ST. J., (Mar. 3, 2023) <https://www.wsj.com/articles/chinas->

Since early 2013, there have been a series of political pronouncements and legislative reforms. In the first four to five years, this mainly included efforts to entrench and render more visible the principle of Party leadership and the position of the Party (leadership) as protector against internal and external enemies. In 2013, the Party-issued Document Number Nine dismissed the very idea of universal values,⁹⁶ and in 2014 it announced that “Party Leadership and Socialist Rule of Law are identical.”⁹⁷ In doing so, the Party echoed—perhaps consciously—a Carl-Schmittian conception of the relationship between law and “the political.”⁹⁸ It seemed to draw on attempts by neo-authoritarian, nationalist scholars and advisers such as Jiang Shigong and Wang Huning. Party leadership on this interpretation was no longer a hindrance, but rather foundational to constitutional order.⁹⁹ In 2015, the National Security Law framed the struggle for security as one against foreign and domestic enemies, including perceived “enemy forces” within the wider Chinese society as well as those considered disloyal within the

xi-jinping-shrugs-off-criticism-in-push-for-even-more-control-f5992354; Kristen A. Cordell, *The Evolving Relationship Between the International Development Architecture and China's Belt and Road*, BROOKINGS, (Oct. 2022) <https://www.brookings.edu/articles/the-evolving-relationship-between-the-international-development-architecture-and-chinas-belt-and-road/> [<https://perma.cc/XYE8-F5LK>].

96. *Document 9: A ChinaFile Translation*, CHINAFILE (Nov. 9, 2013), <http://www.chinafile.com/document-9-chinafile-translation> [<https://perma.cc/WQF4-YPPD>].

97. *Zhonggong zhongyang guanyu quanmian yi fa zhi guo ruogan zhongda wenti de jue ding* (中共中央关于全面推进依法治国若干重大问题的决定) [CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward] (enacted Oct. 23, 2014), *translated in* CHINA COPYRIGHT & MEDIA (Oct. 28, 2014), https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/?utm_source=The+Sinocism+China+Newsletter&utm_campaign=57cbf7cd4e-Sinocism10_29_1410_29_2014&utm_medium=email&utm_term=0_171f237867-57cbf7cd4e-29606421&mc_cid=57cbf7cd4e&mc_eid=dcccecfb2 [<https://perma.cc/48PT-JM4H>].

98. *See generally* CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab ed., Univ. of Chicago Press 2007).

99. Jiang Shigong, *Zhongguo xianfa Zhong de bu chengwen xianfa* (中国宪法中的不成文宪法 理解中国宪法的新视角) [Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China] 36 *MODERN CHINA* 12–46 (2010).

Party.¹⁰⁰ In 2016, the Foreign NGO Management Law followed this trend by treating foreign civil society organizations as, in principle, suspect.¹⁰¹

From 2016, new norms, slogans, and policies were more directly geared towards the inculcation of autocratic governance principles. For example, Xi declared in February 2016 that “the Party’s media must bear the Party’s surname,” suggesting that the media must propagate the Party’s theories, line, principles, and policies in such a way that “the People’s masses will spontaneously put them into action.”¹⁰² In 2017, the State Council Regulation adopted restrictive new rules demanding, *inter alia*, that religious believers must practice core socialist values and not advocate, support, or fund “religious extremism.”¹⁰³ In March 2018, the PRC Constitution was amended, *inter alia*, to extend the presidential term of office: an important change of the rules that removed one of the very few, quite primitive, yet crucial mechanisms the Party had put in place to limit the concentration of power.¹⁰⁴ This constitutionally entrenched a model for investigating (albeit not formally adjudicating) offences committed by Party officials (the new Supervision Commission).¹⁰⁵ In late April 2018, another new

100. Zhonghua Renmin Gongheguo Guojia Anquan Fa (中华人民共和国国家安全法) [National Security Law of the People’s Republic of China] art. 2, passed on July 1, 2015 at the 15th meeting of the Standing Committee of the 12th National People’s Congress.

101. Stanley Lubman, *China’s New Law on International NGOs – And Questions About Legal Reform*, WALL ST. J.: CHINA REAL TIME BLOG (May 25, 2016, 9:14 PM), <http://blogs.wsj.com/chinarealtime/2016/05/25/chinas-new-law-on-international-ngos-and-questions-about-legal-reform/> [https://perma.cc/8A7S-D3WK]; Edward Wong, *Clampdown in China Restricts 7,000 Foreign Organizations*, N.Y. TIMES (Apr. 28, 2016), http://www.nytimes.com/2016/04/29/world/asia/china-foreign-ngo-law.html?_r=0 [https://perma.cc/78DY-QPRT].

102. SINA, *Dang he Zhengfu Zhuban de Meiti Bixü Xing Dang* (党和政府主办的媒体必须姓党) [The Party- and Government-sponsored Media Must Bear the Party Surname] (Feb. 19, 2016), news.sina.com.cn/c/nd/2016-02-19/doc-ixprucu3024202.shtml [https://perma.cc/R5AR-2BXP]; see also Josh Rudolph, *Xi’s State Media Tour: “News Must Speak for the Party”*, CHINA DIGIT. TIMES (Feb. 19, 2016), chinadigitaltimes.net/2016/02/191569 [https://perma.cc/W3HS-XMPC].

103. Zongjiao Shiwu Tiaoli (宗教事务条例) [Regulation on Religious Affairs] (promulgated by the State Council, Aug. 26, 2017, effective Feb. 1, 2018), art. 4, 63, 73.

104. Kevin Rudd, *What the West Doesn’t Get About Xi Jinping*, N.Y. TIMES (Mar. 20, 2018), <https://www.nytimes.com/2018/03/20/opinion/xi-jinping-china-west.html> [https://perma.cc/J5NN-EKEJ].

105. Flora Sapio, *The National Supervision Commission: A “Subaltern History”*, 48 MODERN CHINA 754–84 (2022). Earlier, a change to the criminal procedure law, effective from 2013, had created rules on “surveillance in a designated place,” which suspended crucial protections for suspects and the investigation stage of the criminal process. JOINT

law was passed “to protect heroes and martyrs,” stipulating that “the entire society shall honour, study, and champion the heroes and martyrs.”¹⁰⁶ Following a slew of legislations orientated towards national security in mainland China, the central authorities imposed a national security law on the Hong Kong Special Administrative Region in June 2020.¹⁰⁷

Fraenkel’s Dual State theory aids in the understanding of these changes, not only by drawing attention to the possibility of concurrent growth of the normative and prerogative states, but also by engaging with the normative claims of a Dual State system and thus providing a conceptual framework for their critical evaluation. Two examples concerned with the Party-State’s repression of its “enemies,” considered here in greater detail, can help illustrate the resurgence of the Prerogative State and of an ideology supporting it: the persecution of human rights defenders, and the persecution of Uighur and other ethnic minority Muslims.

In the so-called “709 Crackdown” on human rights lawyers that started in July 2015,¹⁰⁸ hundreds of lawyers and supporters were subjected to detentions or coerced “chats” and requested to sign statements promising no further involvement before being released.¹⁰⁹ Within days from the first detentions, state-controlled newspapers and national Chinese television carried elaborate,

CIVIL SOCIETY REPORT SUBMITTED TO UN COMMITTEE AGAINST TORTURE—October 2015, CHINESE HUM. RTS. Defenders, <https://www.nchrd.org/2015/11/joint-civil-society-report-submitted-to-un-committee-against-torture-october-2015/> [<https://perma.cc/Z47Y-CZSZ>] (last visited Aug. 11, 2022).

106. Zhonghua Renmin Gongheguo Yingxiong Lieshi Baohu Fa (中华人民共和国英雄烈士保护法) [PRC Law on the Protection of Heroes and Martyrs] (promulgated by decision of the National People’s Congress Standing Committee on Apr. 27, 2017), http://www.npc.gov.cn/npc/xinwen/2018-04/27/content_2053965.htm [<https://perma.cc/77DY-5EX4>].

107. The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, LN 136 of 2020, B2345 (in Chinese); an unofficial translation is available at <https://www.gld.gov.hk/egazette/pdf/20202448e/egn2020244872.pdf> [<https://perma.cc/VQD9-YSDV>].

108. Fu Hualing, *The July 9th (709) Crackdown on Human Rights Lawyers: Legal Advocacy in an Authoritarian State*, 27 *J. of Contemp. China* 554–68 (2018); *See* PILS, *supra* note 61.

109. William Nee, *China’s 709 Crackdown Is Still Going On*, *THE DIPLOMAT: POLITICS*, (July 09, 2021) <https://thediplomat.com/2021/07/chinas-709-crackdown-is-still-going-on/> [<https://perma.cc/SBA4-AP7R>].

lengthy reports on the detained human rights lawyers.¹¹⁰ Some reports likened them to gangs of criminals, describing them as a “rights defense ring.”¹¹¹ Later, the party-state authorities coerced some of the lawyers and their co-workers to make elaborate statements of submission to the authority of the Party-State during their carefully rehearsed criminal trials; others were forced to give “interviews” to the media.¹¹² After some months, some of the victims began to disclose how they had been treated in detention—including descriptions of various abuses and torture methods such as forced drugging.¹¹³ It was plain that these measures violated fair trials rights and other fundamental principles of the rule of law.¹¹⁴ The public propaganda generally portrayed the victims as being or already reformed.¹¹⁵ It also showed repentant victims who were grateful to the Party for allowing them to return to its welcoming fold.¹¹⁶

The Party saw rights advocates as enemies not only because of the challenges they posed to the Party-State in individual cases but also because of what they stood for and propagated: liberal political-legal changes. Propagandistic videos merging images of rights defender groups—rarely more than a handful of people, peacefully holding up a banner or two—with footages of American troops invading the Middle East well illustrated their threat as it was portrayed towards the public.¹¹⁷ From the perspective of the

110. *China Human Rights Lawyers Concern Group report on the 709 Crackdown*, BUS. & HUM. RTS. RES. CENTRE, <https://www.business-humanrights.org/en/latest-news/china-human-rights-lawyers-concern-group-report-on-the-709-crackdown/> [https://perma.cc/7WVH-Q5BU] (last visited Mar. 10, 2023).

111. See, e.g., *Gui quan zhen luan – yi tu du dong “weiquan” quan* (贵圈真乱——一图读懂“维权”圈) [Your Circle is a Real Mess—A graphic explaining the “Rights Defence” Ring], LEGAL DAILY (法制日报) (July 13, 2015), http://www.legaldaily.com.cn/zt/content/2015-07/13/content_6168094.htm?node=73108.

112. See PILS, *supra* note 61.

113. See Nee, *supra* note 109; Eva Pils, *A New Torture in China*, ASIA DIALOGUE (Aug. 10, 2017) <https://theasiadialogue.com/2017/08/10/a-new-torture-in-china/> [https://perma.cc/P5D6-GV3W].

114. See generally TOM BINGHAM, *THE RULE OF LAW* (2011) (discussing the connection between the rule of law and fair trial rights); see also ROBERT H. WAGSTAFF, *TERROR DETENTIONS AND THE RULE OF LAW: US AND UK PERSPECTIVES* 114–46 (2013).

115. See PILS, *supra* note 61.

116. See *id.*

117. Grace, *Video warns of foreign-backed “Color Revolution”*, CHINA DIGITAL TIMES (Aug. 3, 2016) <https://chinadigitaltimes.net/2016/08/hk-activist-branded-us-backed-separatist-govt-video/> [https://perma.cc/6VBF-YQNE].

authorities, the threat these human rights lawyers represented was dramatic and existential.¹¹⁸

The “709 Crackdown”, similar civil society crackdowns, and related propaganda have dealt a serious blow to human rights defenders and the larger liberal community. The effect of this repression went well beyond its immediate targets. Under Xi Jinping’s rule, these groups have been publicly vilified.¹¹⁹ Propaganda around this issue has intensely engaged with generating a sense of threat within Chinese society, and spent considerable energy on instructing Chinese people on how to recognize this threat.¹²⁰ These propaganda schemes clearly adopt a preventative, caring, and protective rhetoric; it uses the language of “education” to justify incarceration.¹²¹ For example, Falungong practitioners were subjected to “education and conversion” (*jiaoyu zhuanhua*) in “legal education centers” known to have involved torture and led to deaths in custody.¹²²

The persecution of perceived enemies in China’s far west has targeted several ethno-religious groups comprising millions of people. Most of the measures affecting Uighur and other predominantly Muslim ethnic minorities are concentrated in the autonomous region of Xinjiang.¹²³ The “terrorism threat” the Party-State projects onto these communities is presented as more remote but also more violent than the “threat” from human rights defenders, because of the association with violence: Xinjiang Muslims are vilified as originators of a potentially deadly terrorism connected to internationally recognized terrorist organizations.¹²⁴ There have been violent incidents and uprisings against repressive

118. 林乐媛 [Lin Leyuan], *颜色革命 Color Revolution*, YOUTUBE (Aug. 4, 2016), <https://www.youtube.com/watch?v=8qBt-i9ErSY> [<https://perma.cc/SB5N-5Q2J>].

119. Lily Kuo, *China’s Anti-Spy Campaign: Cash Rewards and Warnings of Dangerous Times*, *THE GUARDIAN* (May 10, 2018), <https://www.theguardian.com/world/2018/may/10/chinas-anti-spy-campaign-cash-rewards-and-warnings-about-red-heads> [<https://perma.cc/4F6D-NXJW>].

120. *See id.*

121. Teng Biao, *What is a “Legal Education Center” in China*, *CHINA CHANGE* (Apr. 3, 2014), <https://chinachange.org/2014/04/03/what-is-a-legal-education-center-in-china/> [<https://perma.cc/ABD6-8JNH>].

122. *Id.*

123. *See* Lindsay Maizland, *China’s Repression of Uyghurs in Xinjiang*, *COUNCIL ON FOREIGN RELATIONS* (SEP. 22, 2022) <https://www.cfr.org/background/china-xinjiang-uyghurs-muslims-repression-genocide-human-rights> [<https://perma.cc/DS9L-RRHQ>].

124. *See Id.*

Han Chinese rule in Xinjiang, but as Smith Finely has argued, any connection with the persecution wave unleashed on Xinjiang in the Xi Jinping Era is at best extremely tenuous; it does not remotely justify the party-state's repressive actions.¹²⁵

As in the case of civil society and human rights advocates, the crackdown was preceded by individuated repression. The 2014 detention and life imprisonment of Xinjiang Uighurs' most prominent advocate, Ilham Tohti, and prison sentences against several of his students is a case in point.¹²⁶ The Party also prepared the crackdown by sharpening its rhetoric and rules, including the March 2017 Xinjiang Autonomous Region Regulation on De-extremification.¹²⁷ The De-extremification Regulation assumes the existence of extreme religious views associated with terrorism.¹²⁸ A points system reportedly introduced as part of a massive registration program inherently assumes the inferiority or a heightened threat from Uighurs, Muslims, and certain age groups by automatically deducting points for these characteristics.¹²⁹ As scholars have pointed out, it taps into pre-existing, socially-entrenched Islamophobia.¹³⁰ In addition to the creation of "vocational training centers" where inmates are held against their

125. Joanne Smith Finley, *Securitization, Insecurity and Conflict in Contemporary Xinjiang: Has PRC Counter-Terrorism Evolved into State Terror?* 38 *CENT. ASIAN SURV.* 1, 20 (2019), <https://doi.org/10.1080/02634937.2019.1586348> [<https://perma.cc/T3GV-PLGL>].

126. Michael Martina, *China Jails Seven Students of Uighur Scholar for Separatism*, *REUTERS*, (Dec. 9, 2014) <https://www.reuters.com/article/us-china-rights-xinjiang/china-jails-seven-students-of-uighur-scholar-for-separatism-idUSKBN0JN0A020141209> [<https://perma.cc/Z4MC-MZ4S>].

127. *Xinjiang weiwu'erzu zizhi qu qu jiduanhua tiaoli* (新疆维吾尔自治区去极端化条例) [Xinjiang Autonomous Region De-Extremification Regulation], (enacted Mar. 29, 2017 by the Autonomous Region of Ningxia Local People's Congress Standing Committee), <http://xj.people.com.cn/n2/2017/0330/c186332-29942874.html> [<https://perma.cc/J8TJ-3B3Z>].

128. *See id.*

129. Lucas Niewenhuis, *Re-Education Camps in China's 'No-Rights Zone' for Muslims*, *SUPCHINA* (Aug. 22, 2018), <https://supchina.com/2018/08/22/xinjiang-explainer-chinas-reeducation-camps-for-a-million-muslims> [<https://perma.cc/UV3Q-43AK>] (with further references).

130. *See id.*

will,¹³¹ even as they are claimed to be voluntary participants,¹³² and of “work experience” placements amounting to forced labor upon “graduating” from these camps,¹³³ leaked documents published in May 2022 indicate that a “shoot-to-kill” policy against trainees attempting to escape is in place in at least some of these training centers.¹³⁴ There is also an increasing number of testimonies indicating that—like in other education and transformation contexts, such as the abovementioned measures against Falun Gong members—some inmates are tortured to intimidate and make them comply with orders to demonstrate their “transformation.” It has been argued that on the evidence available to date that these practices amount to crimes against humanity, and some have argued that available evidence already supports a finding of genocide.¹³⁵

The combination of de-humanization of targeted ethno-religious groups (less than normal humans), unlawful mass detentions,¹³⁶ and the collective portrayal of these groups as

131. Samuel Wade, *New Leaks Further Uncover Xinjiang Detentions and Surveillance*, CHINA DIGIT. TIMES, (Nov. 28, 2019), <https://chinadigitaltimes.net/2019/11/new-leaks-uncover-xinjiang-detentions-and-surveillance/> [<https://perma.cc/ZC8D-27K4>].

132. Lily Kuo, *From Denial to Pride: How China Changed Its Language on Xinjiang's Camps*, GUARDIAN (Oct. 22, 2018), <https://www.theguardian.com/world/2018/oct/22/from-denial-to-pride-how-china-changed-its-language-on-xinjiangs-camps> [<https://perma.cc/2ZH6-T86F>].

133. Adrian Zenz, *China's Xinjiang Moves Uighurs from Camps to Forced Labor*, FOREIGN POL'Y (Dec. 11, 2019), <https://foreignpolicy.com/2019/12/11/cotton-china-uyghur-labor-xinjiang-new-slavery/> [<https://perma.cc/779K-XKSP>].

134. John Sudworth, *The Faces from China's Uyghur Detention Camps*, BBC NEWS (May 2022), <https://www.bbc.co.uk/news/extra/85qihtvw6e/the-faces-from-chinas-uyghur-detention-camps> [<https://perma.cc/XLC3-A8N6>].

135. See generally *Break Their Lineage, Break Their Roots*, HUM. RTS. WATCH (Apr. 19, 2021), <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting> [<https://perma.cc/8KHM-HM7X>]; Essex Court Chambers, *International Criminal Responsibility for Crimes Against Humanity Against the Uyghur Population in the XUAR*, (Jan. 26, 2021) (on file with author); *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention*, NEWLINES INST. (Mar. 9, 2021), <https://newlinesinstitute.org/uyghurs/the-uyghur-genocide-an-examination-of-chinas-breaches-of-the-1948-genocide-convention/> [<https://perma.cc/J85G-Y5S3>]; Uyghur Tribunal Judgment (Dec. 9, 2021), <https://uyghurtribunal.com/wp-content/uploads/2022/01/Uyghur-Tribunal-Judgment-9th-Dec-21.pdf> [<https://perma.cc/A3RD-GCC3>].

136. Jeremy Daum, *XJ Education Centers Exist, But Does Their Legal Basis?*, CHINA L. TRANSLATE (Aug. 14, 2018), <https://www.chinalawtranslate.com/xj-education-centers-exist-but-does-their-legal-basis/?lang=en> [<https://perma.cc/A53V-RUX6>]; OHCHR, OHCHR ASSESSMENT OF HUM. RTS. CONCERNS IN THE XINJIAN UYGHUR AUTONOMOUS REGION, PEOPLE'S REPUBLIC OF CHINA 15 (2022),

terrorists or terrorism suspects, against whom the Party-State is waging a “People’s War on Terror” is alarming, especially when considered in context with the resurgence of the Prerogative State more widely. As Bequelin has pointed out, the Party-State benefited from the United States’ rhetoric around its so-called “war on terror,” allowing it to portray these actions as its own version of such a war, purportedly justifying its emergency state responses.¹³⁷

There is an important connection, not only between the Party-State’s war on a number of internal enemies, but also between this war and the systemic legal-political shift under Xi Jinping. Authoritarian legal scholars’ accounts of China’s “new normal” order allows for a better understanding of the connection. The scholarly accounts that seem to endorse Xi’s new normal are unmistakably Schmittian,¹³⁸ but most of them also emphasize that China’s new order is distinctive:

For example, in an influential series of blog posts drawing on his wider scholarly argument, Jiang Shigong has developed a theory of the “Party Rule of Law” which contrasts with the postmodern and populist-democratic *dazhong minzu*—state of Party politics and administrative rule of law in western democracies, such as the United States.¹³⁹ He believes that these systems are being weakened by their principle of separation between the Party and the State (separation of powers in the classic sense is also weakened, but this for Jiang, is not discussed as a problem).¹⁴⁰ According to Jiang, the Chinese system, in contrast, is characterized by a successful, historical merger of Party and State. Compared to the western system, it has greater efficiency, and compared to that of the Soviet Union, it is less rigid and better able to deal with corruption and power abuse. The

<https://www.ohchr.org/sites/default/files/documents/countries/2022-08-31/22-08-31-final-assessment.pdf> [<https://perma.cc/SZ5A-2ZM6>]; OHCHR, Xinjiang Report: China Must Address Grave Human Rights Violations and the World Must Not Turn a Blind Eye, Say UN Experts, UN PRESS RELEASE (Sep. 7, 2022).

137. In the United States, too, these changes were accompanied by an expansion of executive power putting democracy at risk. DAVID RUNCIMAN, *HOW DEMOCRACY ENDS* (2018).

138. Sebastian Veg, *The Rise of China’s Statist Intellectuals: Law, Sovereignty, and ‘Repoliticization’*, 82 *CHINA J.* 23, 27–35 (2019).

139. Larry Catá Backer, *Jiang Shigong 强世功 on “Written and Unwritten Constitutions” and Their Relevance to Chinese Constitutionalism*, 20 *MODERN CHINA*, 119, 122 (2014).

140. *Id.* at 119.

Chinese system has also distanced itself from communism as its (problematic) ideological justification, having transitioned to a justification based on National Rejuvenation. Jiang associates this transition with an integration of modern and traditional Chinese thoughts, and he postulates a new, Chinese natural law based on traditional Chinese conceptions of justice. Quoting Xi Jinping's references to contemporary China as a continuation of the Chinese moral tradition, he argues that this also applies to China's legal governance (*fazhi*) tradition:

"The contemporary Party legal governance state in fact is a heritage and elevation of the tradition of *li* [rites, rituals] and *fa* [law].

Li is an expression of Heaven's natural law; it is a systematic body of rules, a guide to ruling the country and ordering the administration for the education and edification of China's ancient ruling class of scholar-officials [*shidafujieceng*] and noble persons [*junzi*]. This includes both lofty ideals like 'the world is for all' and 'improvement of the self, governance of the country, and pacification of the world' and religious rules like sacrifices to Heaven, Earth, and one's ancestors, it both contains rules similar to today's constitutions and rules similar to today's rules of international law, as well as principles similar to today's private law, [such as those] governing the relations between subject and ruler, father and son, marriage, divorce and the separation of property upon divorce. The *li* emphasises both the significance of education in the rituals and music, and the function of formation through punishment and reward.'

Thus when the 18th Party Congress 4th Plenary Decision emphasises that we must organically 'ruling the country in accordance with virtue' and 'ruling the country in accordance with law', we should reflect on the relationship between Party law and State law, between the Party and the State, and further, the relationship between the Ruling Party and the People's Masses in the light of the ancient Chinese tradition of [combining] *li* and *fa*... In this sense we can regard the Chinese Communist Party as today's gentry class [*shidafu*

jieceng], as a community of faith that surpasses differences of region, class, ethnicity and religion.”¹⁴¹

In a similar vein, another scholar supportive of the new governance trends has argued that the call for “combining” the principles of “ruling the country by law” and “ruling the country by virtue,” expressed in the October 2014 CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Moving Governing the Country According to the Law Forward,¹⁴² is justified by the leading party’s “advanced morality and capabilities (*de neng*), uniquely qualifying it to “guide social progress.”¹⁴³ These claims recall Fraenkel’s account of nationalistic “communal” natural law, the version of natural law (or natural justice) asserted in opposition to universalist rational legality, the *Vernunftrecht* of the Enlightenment, based on an assumption of “relative justices,” and insisting that claims of justice understood in this way transcend rational analysis.¹⁴⁴ In this light, it is hardly surprising that the substance of the traditional rules

141. Jiang Shigong, *Cong xingzheng fazhi guo dao zhengdang fazhi guo* (从行政法治到政党法治) [From Administrative Rule of Law to Party Rule of Law], *AI SIXIANG* (May 28, 2018), <http://www.aisixiang.com/data/110173.html> [https://perma.cc/XU9R-N8QG].

142. CHINA LAW TRANSLATE, *CCP Central Committee Decision Concerning Several Major Issues in Comprehensively Advancing Governance According to Law* (Oct. 28, 2014), <https://www.chinalawtranslate.com/fourth-plenum-decision/> [https://perma.cc/67P7-UQ5C]; see, e.g., CHINA CMTY. PARTY NEWS NETWORK, *Jianchi yi fa zhi guo he yi de zhi guo xiang jiehe tuijin guojia zhili tixi he zhili nengli xiandaihua* (坚持依法治国和以德治国相结合推进国家治理体系和治理能力现代化) [Xi Jinping: Insist on Combining the Rule of Law and the Rule of Virtue to Promote the Modernization of the National Governance System and Governance Capabilities], (Dec. 11, 2016). In oblique ways, the Network’s claim to combine these two narratives relates to debates of the early years of the reform and opening era, when scholars such as Li Buyun advanced their rule of law arguments that China must combine ruling by law with rule by men; Li Buyun, *yi fa zhi guo de mailuo yu fangxiang* (依法治国的脉络与方向) [The Context and Direction of Governing the Country by Law] *CHINA L. Soc’y*, (Oct. 23, 2014), <https://chinalaw.org.cn/portal/article/index/id/21312/cid/278.h> [https://perma.cc/7PTN-VN4M].

143. KE HUAQING, *DANGGUIXUE* (党规学) [A Study of Party Norms], (2018).

144. Loewenstein, an academic contemporary of Fraenkel’s, describes “legalized opportunism” as the essence of dictatorship, which he also equates with “emotional” government. To quote: “Constitutional government signifies the rule of law, which guarantees rationality and calculability of administration while preserving a definite sphere of private law and fundamental rights. Dictatorship, on the other hand, means the substitution for the rule of law of legalized opportunism in the guise of the *raison d’etat*.” Karl Loewenstein, *Militant Democracy and Fundamental Rights, I*, *THE AM. POL. SCI. REV.* 31:417, 418, 23 (1937).

Jiang invokes, and the principle of Party governance, are seen to conflict with the Enlightenment tradition upheld by China's liberals. In a widely noted essay, Xu Zhangrun, criticized, *inter alia*, the return to enemy conceptions,¹⁴⁵ the political leader principle, the political "closure" bringing Opening and Reform to an end, the return to a cold war mentality, and the "full-scale reversion" to "totalitarian politics."¹⁴⁶

The targets of repression, including the 709 human rights defenders, Muslim minorities in Xinjiang, Falun Gong practitioners, and so on, are almost absent from these neo-authoritarian discussions. They are referenced merely as an abstract, "tiny minority," for example in official explanations of 'People's Democratic Dictatorship,' now enshrined in Article 1 of the PRC Constitution: "[D]emocracy and dictatorship appear to be a contradiction in terms, but together they ensure the people's status as masters of the country. A tiny minority is sanctioned in the interests of the great majority, and "dictatorship" serves democracy."¹⁴⁷

The neo-authoritarian turn has occurred not merely at the level of scholarship, which reflects a wider shift in attitude. To those familiar with the rhetoric of Party leadership, the expressions of adherence to the Party are instantly recognizable. They signal an only conditional, and thus fatally weakened commitment to the law. While the security apparatus has always

145. As previously discussed, it does not seem quite correct to regard the current 'enemies of the People' as members of a class in the Marxist sense; the expression "class struggle" can be taken as an easily understood shorthand term.

146. Xu Zhangrun, *Women dangxia de kongju yu qidai* (我们当下的恐惧与期待) [Imminent Fears, Imminent Hopes], BOXUN (July 26, 2018), <http://www.chinanews.co/news/gb/pubvp/2018/07/201807260816.shtml>; Other points Xu makes are evidence of his, in western terms, rather Hayekian, conservative-liberal or libertarian views; they include "anxiety about property" as a first point, as well as an 'intellectual lurch to the left' understood in Chinese terms—i.e. the left as the conservative political force in China—and too many foreign aid donations. See also Geremie R. Barmé, *The True Face of Mount Lu — prologue to 'Xi Jinping's Empire of Tedium'*, CHINA HERITAGE (Jan. 1, 2022), <https://chinaheritage.net/journal/the-true-face-of-mount-lu-prologue-to-xi-jinpings-empire-of-tedium/> [https://perma.cc/2C24-ASK7].

147. Xinhua, *China: Democracy That Works*, CHINA DAILY (Dec. 4, 2021) <https://www.chinadaily.com.cn/a/202112/04/WS61ab0795a310cdd39bc7957e.html> [https://perma.cc/Z9B4-WLU3].

displayed a tendency to put the Party above the law,¹⁴⁸ this stance has now become officially recognized as valid.

A concerned relative of a human rights defender suspect, for example, drew attention to these signals of subservience when describing her experience of meeting her police-appointed defense lawyers.¹⁴⁹ According to her, not only was the law firm office decorated with an overwhelming display of Party symbols and references to the Party but the lawyer also refused to confirm that he would plead innocence on behalf of his client, who was facing subversion charges after peacefully calling for the elimination of the PRC Constitution's Preamble, which endorses the Party leadership principle.¹⁵⁰

"He kept talking about how this and that was *weigui*, 'against the regulations:' he was not concerned with the law, but with 'regulations.' And on the call for constitutional revision, he said something like, how could Yu Wensheng do such a thing, did he not understand *the wider situation (da shiju)*?"¹⁵¹

Although the Party-State has other means to secure any criminal conviction it wishes, the willing compliance of individuals such as this lawyer is as important to the well-functioning of its system as the continued suppression of the voices of lawyers like Yu Wensheng, whose close monitoring amounting to continued detention after his release in 2022 surprised no one.¹⁵² It illustrates how much of Fraenkel's Dual State Fraenkel exists in the minds of the people: people who often cannot be blamed for their reluctant acceptance of "the wider situation," but whose acceptance nevertheless entrenches that situation.¹⁵³

The shift of attitude that can be encountered in the changing rhetoric of daily legal practice, as much as in authoritarian law scholarship and the language of the Party-State, signals a fatally

148 . See Teng Biao, *A Hole to Bury You*, WALL ST. J. (Dec. 27, 2010), <https://www.wsj.com/articles/SB10001424052970203731004576045152244293970> [<https://perma.cc/2C6Z-D2QJ>].

149. Yang Fan, (大抓捕：李和平律师获释 在押期间遭强迫服药) [709 Crackdown: Lawyer Li Heping was forcibly drugged during his incarceration], RADIO FREE ASIA (May 10, 2017) <https://www.rfa.org/mandarin/yataibaodao/renquanfazhi/yf2-05102017104448.html>.

150. *Id.*

151. *Id.*

152. See FRONT LINE DEFENDERS, *supra* note 4.

153. See generally FRAENKEL, *supra* note 8.

weakened commitment to the value of legality and a return to (neo-) totalitarian features.¹⁵⁴ In Dual State terms, this shift creates the perfect conditions for the corrosion of the normative and resurgence of the prerogative state at both domestic and global levels.

V. CHINA'S CONTRIBUTION TO GLOBAL DUAL STATE FORMATION

The international legal order is not a state, but it bears some features of a domestic legal order. It supports the liberally conceived idea of international rule of law, even though “what it would mean in fact to realize the rule of a law on a global scale has never been certain or uncontested.”¹⁵⁵ Especially since the late 1970s, when the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights came into effect, the international rule of law has interacted in important ways with transitioning domestic legal orders and a transnational civil society whose emergence has been key to human rights and rule of law advocacy.¹⁵⁶

The international legal order has been affected by populism and authoritarianism engulfing liberal democracies in crises and entrenched authoritarian systems like China acquiring some neo-totalitarian features.¹⁵⁷ The withdrawal of the United States from the UN Human Rights Council is an example.¹⁵⁸ Kumm et al. note

154. See Jean-Philippe Béja, *Xi Jinping's China: On the Road to Neo-Totalitarianism*, 86 SOC. RSCH: AN INT'L Q. 203 (2019); Klaus Müller, *East European Studies, Neo-totalitarianism and Social Science Theory*, WZB Discussion Paper, No. P 97-004, Wissenschaftszentrum Berlin für Sozialforschung, Berlin.

155. See also Peter Rijpkema, *The Concept of a Global Rule of Law*, 32 TRANSN' LEGAL THEORY 167 (2013); Les Cours du College de France, *Reconstruire l'Ordre Institutionnel International*, Leçon Inaugurale de Samantha Besson, FRANCE CULTURE (Oct. 12, 2021), <https://www.radiofrance.fr/franceculture/podcasts/les-cours-du-college-de-france/reconstruire-l-ordre-institutionnel-international-lecon-inaugurale-de-samantha-besson-1983189> [<https://perma.cc/9UGW-AQQF>]; Carmen E. Pavel, *The International Rule of Law*, CRITICAL REV. OF INT'L SOC. & POL. PHIL. 1 (2019); Julieta Rabanos, *Transnational Rule of Law*, COERCION, AND HUM. ACTION, 47 REVUS (2022).

156. China has ratified the ICESCR and signed but not ratified the ICCPR. Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil and Political Rights*, VAND. J. TRANSNAT'L L. 131, 199 (2020).

157. See Béja, *supra* note 154; Alexander Cooley, *Authoritarianism Goes Global: Countering Democratic Norms*, 26 J. OF DEMOCRACY 49 (2015); Andrew J. Nathan, *The Puzzle of Authoritarian Legitimacy*, 31 J. OF DEMOCRACY 158 (2020).

158. See Maya Finoh, *Five Ways the Trump Administration Has Attacked the U.N. and International Human Rights Bodies*, AM. CIV. LIBERTIES UNION (Sept. 24, 2018),

that the United States and United Kingdom now “play a leading role in the unravelling of the order that they built and supported.”¹⁵⁹ However, important contributions to this unravelling also come from nondemocracies including China.

Bearing the limitations of international rule of law in mind, Dual State theory can be helpful in analyzing these changes and China’s contribution to them so far. Just as at the domestic level, a Dual State analysis requires consideration not only of changes at the level of normative design but also of practices on the ground. On this basis, Dual State theory may help us to analyze current systematic shifts in global governance.

Three considerations may support the claim that China is contributing to Dual State practices at a global level. First, the actions of the repressive Party-State are increasingly producing intended effects beyond China’s territorial borders, sometimes discussed as manifestations of “sharp power.”¹⁶⁰ For example, China has used a variety of tactics, including the silencing of human rights advocates, to obstruct and subvert the functioning of monitoring and accountability mechanisms such as the UN-based Universal Periodic Review process,¹⁶¹ while exposing human rights defenders in exile to continued threats¹⁶² and engaging in the unlawful cross-border abduction of people it wishes to hold for various reasons.¹⁶³ Additionally, it has negotiated extradition agreements with some countries and achieved individual extradition or deportation “successes” in numerous further

<https://www.aclu.org/blog/human-rights/five-ways-trump-administration-has-attacked-un-and-international-human-rights> [<https://perma.cc/5M9T-XK5N>].

159. Mattias Kumm et al., *Editorial: The End of ‘the West’ and the Future of Global Constitutionalism*, 6 GLOB. CONSTITUTIONALISM 1.

160. Christopher Walker, *What Is ‘Sharp Power’?*, 29 J. OF DEMOCRACY 9.

161. Chen Yu-Jie, *The United States, China and the European Union at the UN Human Rights Council: Trilateral Dynamics over International Human Rights Norms, Institutions and Politics*, SSRN ELEC. J. <https://doi.org/10.2139/ssrn.4002891> [<https://perma.cc/G8GE-4DPP>].

162. Steve Gooch & Liz Chao, *No Escape: The Fearful Life of China’s Exiled Dissidents*, AL JAZEERA (Apr. 8, 2018), <https://www.aljazeera.com/indepth/features/escape-fearful-life-china-exiled-dissidents-180408064709748.html> [<https://perma.cc/9HFV-CJFQ>].

163. Zach Dorfman, *The Disappeared*, FOREIGN POL’Y (March 29, 2018), <https://foreignpolicy.com/2018/03/29/the-disappeared-china-renditions-kidnapping/> [<https://perma.cc/7C99-XBH7>].

cases.¹⁶⁴ Extraditions have occurred despite significant human rights concerns now confirmed by the European Court of Human Rights¹⁶⁵. In the case of *Liu v Poland* in October 2022, the Court decided that extradition to China in that case would violate Article 3 ECHR and that Liu’s detention in Poland had violated Article 5 (1) ECHR.¹⁶⁶

Second, transnational dependencies have led to the rise of “authoritarian influencing” and self-censorship in civil society engagement with authoritarian systems. In some cases, as when a publishing house complies with requests to censor its publication, the motivation seems to be purely or largely commercial self-interest.¹⁶⁷ In other cases, it includes concern for partners more vulnerable to the Party-State’s machinery of direct coercion and repression.¹⁶⁸ While this, too, has been referred to as sharp power, it is important to consider that in many cases, actors in liberal democracies are not passive victims, but rather contributors to the problem of transnational repression, even if they are reluctant or act on laudable motives. Although these actors are not agents of the Chinese state, they can become structurally complicit with it.

It is, of course, not only China’s Party-State that engages in transnational interference, repression, and “influencing” activities at a global level. Other states do too.¹⁶⁹ If, in Fraenkel’s terms, there is an emerging transnational prerogative state, it is a pluri-centric one. Its measures (*Massnahmen*) are manifestations of prerogative

164. Thomas S. Eder & Bertram Lang, *The Pitfalls of Law Enforcement Cooperation with China*, *DIPLOMAT* (Jan. 26, 2017), <https://thediplomat.com/2017/01/the-pitfalls-of-law-enforcement-cooperation-with-china/> [<https://perma.cc/5VXE-RGEH>].

165. See generally, *Liu v. Poland*, App. No. 37610/18 ¶ 27 (Oct. 6, 2022), <https://hudoc.echr.coe.int/fre#%22tabview%22:%22document%22,%22itemid%22:%22001-219786%22>] [<https://perma.cc/N2KU-ZK3W>].

166. *Id.* at ¶ 27-28.

167. Tripti Lahiri, *The Two Biggest Threats to Academic Freedom Have Come Together in China*, *QUARTZ* (Sept. 15, 2018), <https://qz.com/1391449/china-quarterlys-tim-pringle-on-academic-freedom-authoritarianism-and-the-commodification-of-education/> [<https://perma.cc/GKQ6-KANK>].

168. Eva Pils, *Complicity in Democratic Engagement with Autocratic Systems*, 14 *ETHICS & GLOB. POLS.* 142, 145–46 (2021).

169. Yana Gorokhovskaia & Isabel Linzer, *Defending Democracy in Exile*, 11, *FREEDOM HOUSE*, (2022) <https://freedomhouse.org/report/transnational-repression> [<https://perma.cc/D3J6-6JQL>]; Robert Alvarez, *Assassins Without Borders*, *INST. POL’Y STUD.* (Oct. 18, 2018), <https://ips-dc.org/assassins-without-borders/> [<https://perma.cc/9Q9C-7UYQ>].

power exercised by different national governments, but with global (transnational) effects.

Third, the liberal international legal order is being corroded through the actions of anti-liberal member states and political leaders intent on undermining or changing its norms and disrupting the well-functioning of its mechanisms.¹⁷⁰ Examples from China include attempts to internationalize the party-state's conception of "human rights" in the December 2017 Beijing Declaration on Human Rights and China's March 2018 motion to have a Resolution on "Win-Win Cooperation" passed by the Human Rights Council.¹⁷¹ These documents do not reject international human rights norms wholesale. But they envision a world in which the realization of human rights goals is left to the "sovereign" decision of nation states. In such a world, human rights violators would be subject neither to the compulsion of international rights norms constraining their powers, nor to the criticisms of transnational civil society. This would be a world without human rights advocacy, "a safe place for autocrats."¹⁷² If accepted as doctrine, total sovereignism would dispose of international law constraints in a way functionally similar to an Enabling Act.¹⁷³

VI. CONCLUSION

The actions, norms, and rhetoric the Chinese Party-State has adopted under Xi Jinping, in the context of its civil society crackdown, its persecution of minorities in Xinjiang, and the tightening of political control, unmistakably bear the marks of the

170. Eva Pils, *Autocratic Challenges to International Human Rights Law: A Chinese Case Study*, 75 *CURRENT LEGAL PROBS.* 189 (2018); Andréa Worden, *China's Win-Win at the UN Human Rights Council: Just Not for Human Rights*, SINOPSIS (May 28, 2020), <https://sinopsis.cz/en/worden-win-win/> [<https://perma.cc/777X-D7AA>].

171. Shoujie nan nan renquan luntan Beijing xuanyan (首届'南南人权论坛'《北京宣言》)[First South-South Human Rights Dialogue "Beijing Declaration"] XINHUA NET (Dec. 8, 2017), http://www.xinhuanet.com/politics/2017-12/08/c_1122081753.htm [<https://perma.cc/5LTB-9MQ7>]; Human Rights Council Res. U.N. Doc. A/37/23 (June 4, 2018); Human Rights Council Res. U.N. Doc. A/46/13 (Mar. 26, 2021).

172. Julian Borger, *China and Russia Accused of Waging 'War on Human Rights' at UN*, *GUARDIAN* (March 27, 2018), http://www.theguardian.com/world/2018/mar/27/china-and-russia-accused-of-waging-war-on-human-rights-at-un?CMP=Share_iOSApp_Other [<https://perma.cc/GAS4-JCL8>]. The author wishes to thank Donald C. Clarke for pointing out that in the absence of accountability mechanisms, this can also be seen as a system of 'rights' without right holders.

173. On sovereignism, see Veg, *supra* note 138.

actions and self-portrayal of a Dual State dictatorship. These findings urge some further conclusions.

First, the theory of the Dual State can help us overcome the misleading language of “authoritarian legality.” So far as the concept of legality captures what is valuable about law, “authoritarian legality” can be taken to claim that authoritarian governance reliant on law is per se valuable, and that pursuit of the ideal of rule of law (*fazhi*) is possible in authoritarian systems. Against this, as shown in this paper Fraenkel compels us to consider how, on the one hand, the Dual State dictatorship he analyzed rejected rule of law through its merely conditional subjection to the law, and its willingness to scorn legality whenever this seemed opportune.¹⁷⁴ On the other hand, Fraenkel offers a systematic, detailed, and case-based analysis of the practices of lawlessness and arbitrariness that characterize the “Prerogative State.”¹⁷⁵ In so doing, he draws attention to the concrete and specific consequences of theoretically sanctioned arbitrariness, which some defenders of authoritarian legality might have us forget. Fraenkel’s theoretical framework can thus be used to assess the shift that has taken place under Xi Jinping.¹⁷⁶ Taken together, this suggests that at best, “authoritarian legality” is to rule of law what populism (or “illiberal democracy”) is to democracy—not the real thing.

Second, Dual State theory allows us to reflect on comparisons between the current Chinese and historical fascist systems, drawn, inter alia, by Chinese scholars on the liberal side. For example, the historian Xu Youyu argues that that the Party-State’s repressive methods in the Xi Era can be compared to 20th century totalitarianism.¹⁷⁷ In light of alarming systematic human rights

174. FRAENKEL, *supra* note 8, at 6.

175. *Id.* at 9.

176. While initially, many observers had argued that Xi was concentrating power only temporarily and that he would probably continue a liberal reform program later on, by 2018 this view was rarely uttered. See Nicholas Kristof, *Looking for a Jump-Start in China*, N.Y. TIMES: OPINION (Jan. 5, 2013), <https://www.nytimes.com/2013/01/06/opinion/sunday/kristof-looking-for-a-jump-start-in-china.html> [<https://perma.cc/5HRX-NZDC>]; see also Arthur R. Kroeber, *Xi Jinping’s Ambitious Agenda for Economic Reform in China*, BROOKINGS (November 17, 2013), <https://www.brookings.edu/opinions/xi-jinpings-ambitious-agenda-for-economic-reform-in-china/> [<https://perma.cc/5U65-U2F9>].

177. See also Tang Qiwei, *Xu Youyu fangtan: Xi Jinping zheng yong ziben zhuyi jiji Zhongguo gongchandang*, (徐友渔访谈：习近平正用资本主义拯救中国共产党) [Xu

violations on a scale not seen since the Anti-Rightist movement, in Cohen's view,¹⁷⁸ these similarities must be further investigated; we cannot assume any system to be immune to the possible descent from bureaucratic de-humanization into genocidal violence, once the first fascistoid steps have been taken. But we also need to bring careful, nuanced, informed analysis to this comparison, rather than leaving it to actors with potentially extraneous political agendas.

Third, Dual State theory may also be useful to the analysis of the global implications of the systemic changes currently taking place in China. Authoritarian resurgence presents a challenge at various levels, including that of international governance norms, mechanisms, and institutions and that of transnational civil society. From the theoreticians of Xi's New Era Party-State and of a global "China solution" (*Zhongguo fang'an*) to governance for a "shared future of humankind," we can learn that it wants to see itself as offering alternative governance ideas. In the wake of Xi Jinping's "Belt and Road Initiative," pro-Party legal scholarship has begun to emphasize the Party's "dual mission" for the rejuvenation of the Chinese nation, as well as the "shared future of humankind."¹⁷⁹ But the Chinese leadership's explicit rejection of rationalist conceptions of law and justice, and its increasingly vigorous attempts to undermine the international human rights system,¹⁸⁰ suggest that the novelty of the Dual State in China would not be good news for the world, if "globalization with Chinese characteristics" extended central features of Chinese party-state governance beyond its territorial borders.

Youyu Interview: Xi Jinping is Using Capitalism to Save the Chinese Communist Party], RADIO FREE ASIA (2017), <https://www.rfa.org/mandarin/duomeiti/tebiejiemu/pov-01022018153504.html>.

178. Jerome A. Cohen, *What Can Be Done Regarding Xinjiang's Mass Detentions?*, JERRY'S BLOG (July 25, 2018), <http://www.jeromecohen.net/jerrys-blog/2018/7/25/what-can-be-done-regarding-xinjiangs-mass-detentions> [<https://perma.cc/JS3D-B3KF>].

179. Tian Feilong, *Xiuxian queli Zhongguo xianfa xin zhixu*(修宪确立中国宪法新秩) [The Constitutional Revision Affirms China's New Legal Order], DW NEWS (Mar. 31, 2018), <http://blog.dwnews.com/post-1013159.html>.

180. Sophie Richardson, *China's Influence on the Global Human Rights System*, HUM. RTS. WATCH (Sept. 14, 2020), <https://www.hrw.org/news/2020/09/14/chinas-influence-global-human-rights-system> [<https://perma.cc/5QXX-DYCU>]; Worden, *supra* note 170.

