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The Evolving Rule of Law with Chinese Characteristics and Its Impacts on the International Legal Order

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I The Evolving Rule of Law with Chinese Characteristics

The development of the Chinese legal system and discourse on law and governance have in the past four decades undergone major shifts[1] that have spawned a great deal of insightful research.[2] However, much of the accumulated scholarship has adopted a state-centered approach,

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[1] The focus on elite discourse is not to deny that the Chinese masses may have incongruent interests and that the popular narratives of domestic and international legal order may "diverge in certain ways from the official and academic discourses," or to deny that the divergence matters in an increasingly populist political climate. But given the ability of the Chinese government to manipulate public opinion, its effect, if any, would be largely endogenous and better left for future research. Pitman B Potter, *China and the International Legal System: Challenges of Participation*, 191 CHINA Q. 701 (2007).

[2] *See*, *e.g.*, Ruiping Ye, *Shifting Meanings of Fazhi and China's Journey Toward Socialist Rule of Law*, 19 INT'L J. CONST. L. 1859 (2021); Zhang Wenxian (张文显), *Fazhi Yu Guojia Zhili Xiandaihua* (法治与国家治理现代化) [The rule of law and modernization of national governance], ZHONGGUO FAXUE (WEN ZHAI) (中国法学(文摘)) [China Legal Sci. (Dig.)], no. 4, 2014,at 5; Benjamin L. Liebman, *Legal Reform: China's Law-Stability Paradox*, 143 DAEDALUS 96 (2014); Qianfan Zhang, *The Communist Party Leadership and Rule of Law: A Tale of Two Reforms*, 30 J. CONTEMP. CHINA 578 (2021); Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 306 (2019); Albert H.Y. Chen, *China's Long March Towards Rule of Law or China's Turn Against Law?*, 4 CHINESE J. COMP. L. 1 (2016); Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935 (2011); JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 39–75 (2008); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 1–39 (1999); Randall Peerenboom, *The Battle over*

neglecting interest and normative divisions within the regime[3] and underappreciating the influence of China's international context. Authoritarian states are neither monolithic nor static.[4] Shifting dynamics of domestic elite politics change policy priorities and modify the official perceptions and preferences about law and governance, as well as the academic debates. Meanwhile, as in other countries, scholarly debates in China also have direct impacts on the legal reforms and subtle effects on the official narratives about the rule of law.[5] Moreover, post-Cultural Revolution China increasingly interacts with the rest of the world, and the interactions have led to domestic realignment of power and facilitated exchanges of ideas.[6] Thus, the following analytical survey of Chinese legal reform and rule of law discourse incorporates three interwoven aspects: political contestations among Chinese ruling elites, academic debates about law and governance, and China's interactions with the outside world.

Soon after taking power in 1949, the Chinese Communist Party (CCP) formed an alliance with the Soviet Union and imported its model of legal institutions and legal education. Though the alliance collapsed,[7] the inchoate Chinese legal institutions continued to operate according to the Soviet design, and Soviet-trained teachers dominated Chinese law schools,

Legal Reforms in China: Has There Been a Turn Against Law?, 2 CHINESE J. COMP. L. 188 (2014).

[3] The divisions within the authoritarian state have been well documented elsewhere. *See, e.g.*, Jessica Chen Weiss & Jeremy L. Wallace, *Domestic Politics, China's Rise, and the Future of the Liberal International Order*, 75 INT'L ORG. 636, 651 (2021); Andrew Mertha, *"Fragmented Authoritarianism 2.0": Political Pluralization in the Chinese Policy Process*, 200 CHINA Q. 995 (2009); Min Ye, *Fragmentation and Mobilization: Domestic Politics of the Belt and Road in China*, 28 J. CONTEMP. CHINA 696 (2019); KENNETH LIEBERTHAL & MICHEL OKSENBERG, POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES 137–49 (1988).

[4] Weiss & Wallace, *supra* note 3, at 643.

[5] Chris Alden & Daniel Large, *On Becoming a Norms Maker: Chinese Foreign Policy, Norms Evolution and the Challenges of Security in Africa*, 221 CHINA Q. 123 (2015).

[6] Weiss & Wallace, *supra* note 3, at 643.

[7] Cai Dingjian (蔡定剑), *Guanyu Qiansulianfa Dui Zhongguo Fazhi Jianshe de Yingxiang: Jianguo Yilai Faxuejie Zhongda Shijian Yanjiu (22)* (关于前苏联法对中国法制建设的影响: 建国以来法学界重大事件研究 (22)) [On the influence of the laws of the former Soviet Union on the construction of China's legal system: Research on major events in the legal circle since the founding of the People's Republic of China (22)], FAXUE (法学) [Legal Sci. Monthly], no. 5, 1999, at 2; Sun Guangyan (孙光妍) & Yu Yisheng (于逸生), Sulianfa Yingxiang Zhongguo Fazhi Fazhan Jincheng zhi Huigu (苏联法影响中国法制发展进程之回顾) [A Review of the Soviet Influence on the Development of the Legal System in China], FAXUE YANJIU (法学研究) [Chinese J.L.], no. 1, 2003, at 139.

indoctrinating students with the Marxist and Leninist view of courts as a tool for social ordering and class oppression.[8] The basic institutional structure for socialist rule by law, however, suffered severe damages during the Cultural Revolution (1966–76), which paralyzed much of the state apparatus. At the time, all Chinese law schools were shut down, along with any meaningful academic debate about law and governance.[9]

Mao's death in 1976 paved the way for the ascent of Deng Xiaoping and his allies, who ended the "legal nihilism" and ushered in an era of reform.[10] Having personally suffered the chaotic and arbitrary rule of Mao's totalitarian dictatorship, the reformers deemed rule of man to be "very dangerous, not reliable"[11] and were determined to reestablish basic legal institutions. For instance, the first order issued in 1979 by the resurrected Standing Committee of the National People's Congress (SCNPC) amended the Regulations of the People's Republic of China on Arrest and Detention, which provided better legal protection for individual freedom and imposed more stringent procedural requirements for its deprivation.[12] Meanwhile, Chinese courts and procuratorates reclaimed their authority, enforcing a growing number of statutes aimed at preserving political, social, and economic order. This period between the end of the Cultural Revolution and Deng's Southern Tour in 1992 featured pragmatic institutional experiments, policy uncertainties, and intense political debates. While a faction of the ruling elites advocated political reforms that would create a more liberal and democratic state relatively separated from the CCP,[13] the conservative faction strongly opposed the "corrosive influence of bourgeois ideas."[14]

This same period witnessed a sea change in Chinese academic discourse on law, as law schools and departments reopened and law professors were reinstated. While many of them received direct or indirect Soviet-style

[8] Gu Peidong (顾培东), *Dangdai Zhongguo Fazhi Huayu Tixi de Goujian* (当代中国法治话语体系的构建) [Construction of Chinese discourse system of rule of law], Faxue Yanjiu (法学研究) [Chinese J.L.], no. 3, 2012, at 3, 5.

[9] Carl F. Minzner, *The Rise and Fall of Chinese Legal Education*, 36 Fordham Int'l L.J. 334 (2013).

[10] Carlos Wing-Hung Lo, *Socialist Legal Theory in Deng Xiaoping's China*, 11 Colum. J. Asian L. 469 (1997).

[11] Zhang Wenxian, *supra* note 2, at 14.

[12] Zhonghua Renmin Gongheguo Daibu Juliu Tiaoli (中华人民共和国逮捕拘留条例) [Regulations of People's Republic of China on arrest and detention] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 23, 1979, effective Feb. 23, 1979, abolished Mar. 17, 1996), https://pkulaw.com/chl/503.html?tiao=0.

[13] Zhang Wenxian, *supra* note 2, at 582.

[14] Kalpana Misra, *Neo-left and Neo-right in Post-Tiananmen China*, 43 Asian Surv. 717, 720 (2003).

legal training,[15] China's opening-up policy allowed legal scholars access to Western political and legal thought. Having personally suffered the lawless atrocities of the Cultural Revolution, many became highly receptive to core tenets of liberalism and the rule of law.[16] For them, the ultimate objective of legal reform in China should be to achieve legal constraint over state power. In that regard, their voice resonated with a cohort of reformers among the CCP leaders. For instance, Peng Zhen, then chairman of the Legal Committee of SCNPC, insisted that "the law be superior to the Party."[17] The normative tensions among the ruling elites manifest in the drafting and promulgation of the Administrative Litigation Law of the People's Republic of China in 1989, which for the first time in Chinese history codified a rather comprehensive statutory procedure for victims of governmental mistreatment to seek legal remedy,[18] yet at the same time exempted actions taken by the CCP from such challenges.

Deng's Southern Tour in 1992 moved the factional balance decisively in favor of the reformers, who undertook a series of structural reforms.[19] To establish a "Socialist market economy," a wide range of enabling institutions were put in place that embodied major attributes of their Western equivalents. To expedite and consolidate the reform, the pro-market faction negotiated China's entry into the WTO.[20] Its subsequent integration into the global economy further strengthened the reformers and facilitated the implementation of their policy agenda.[21] Meanwhile, the official narrative on law shifted from enacting laws and reestablishing basic legal institutions

[15] *See* Gu, *supra* note 8, at 4–5; William Partlett & Eric C. Ip, *Is Socialist Law Really Dead*, 48 NYU J. Int'l L. & Pol. 463, 465–66 (2015).

[16] Zhang Wenxian, *supra* note 2, at 581; Xie Libin & Haig Patapan, *Schmitt Fever: The Use and Abuse of Carl Schmitt in Contemporary China*, 18 Int'l J. Const. L. 141 (2020).

[17] Zhang Wen, Shen Xinwang Wen & Shu Lin (章文, 申欣旺 & 文舒琳), *Lifa Liu Jin Suiyue* (立法流金岁月) [Golden Times of Legislation], Zhongguo Xinwenzhoukan (中国新闻周刊) [Chinese News Wkly.], no. 2010044 (Nov. 30, 2010).

[18] The General Principles of the Civil Law also contained language that allowed citizens to sue government officials in certain circumstances. Ji Li, *Suing the Leviathan: An Empirical Analysis of the Changing Rate of Administrative Litigation in China*, 10 J. Empirical Legal Stud. 815 (2013).

[19] Ji Li, *A Chinese Model for Tax Reforms in Developing Countries?*, *in* The Beijing Consensus? How China Has Changed the Western Ideas of Law and Economic Development and Global Legal Practices 189 (Weitseng Chen ed., 2017); *see* Misra, *supra* note 14.

[20] Ka Zeng, *Domestic Politics and the US-China WTO Agreement*, 37 Issues & Stud. 105 (2001).

[21] Julia Ya Qin, *The Impact of WTO Accession on China's Legal System*, 2 Sungkyunkwan J. Sci. & Tech. L. 253 (2008).

to promoting the "rule of law,"[22] and considerable efforts were made to professionalize the judiciary and elevate its status.[23] For instance, the Judges Law of the People's Republic of China was enacted in 1995 and established merit-based staffing of Chinese courts, which used to recruit from retired military officers without any formal legal training.[24] Also, as shown in Figures 13.1 and 13.2, the number of civil and administrative lawsuits surged in the first half of this period. However, the official narrative of legal reform no longer contemplated the separation of the CCP from the state organs, including the judiciary. Without major reform of the political–legal structure, Chinese courts, subject to various institutional constraints such as personnel and resource control by local CCP leadership and other government bodies, proved less effective in resolving disputes than expected or portrayed by the reformers. And, the number of civil and administrative cases plateaued in the second half of this period (see Figures 13.1 and 13.2).

The contemporaneous debates in the legal academy largely continued the liberal trajectory.[25] Growing interactions with international actors socialized

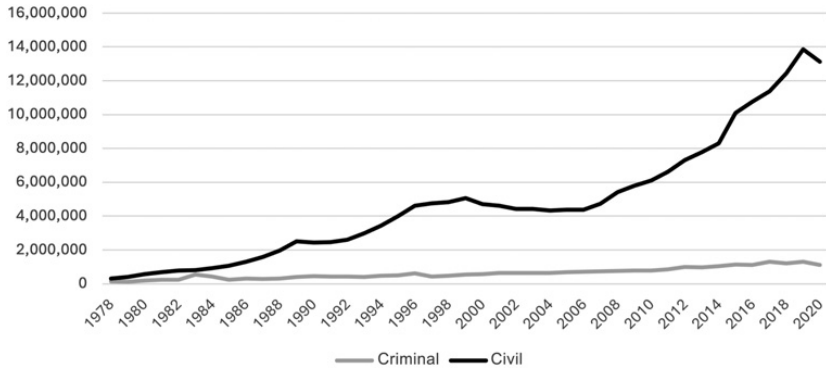

Figure 13.1 Number of first instance civil and criminal cases in China (1978–2020). Source: *China Statistical Yearbook 2021* [Table 24-18], www.stats.gov.cn/tjsj/ndsj/2021/indexch.htm

[22] Susan Trevaskes, *A Law unto Itself: Chinese Communist Party Leadership and Yifa Zhiguo in the Xi Era*, 44 MOD. CHINA 347, 348 (2018).

[23] Zhang Wenxian, *supra* note 2, at 579.

[24] Zhonghua Renmin Gongheguo Faguan Fa (中华人民共和国法官法) [Judges law of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 28, 1995), www.npc.gov.cn/zgrdw/npc/xinwen/2019-04/23/content_2086082.htm.

[25] Yang Jianjun (杨建军), *Zhongguo Fazhi Fazhan: Yibanxing yu Teshuxing zhi Jianrong* (中国法治发展: 一般性与特殊性之兼容) [The development of China's rule of law:

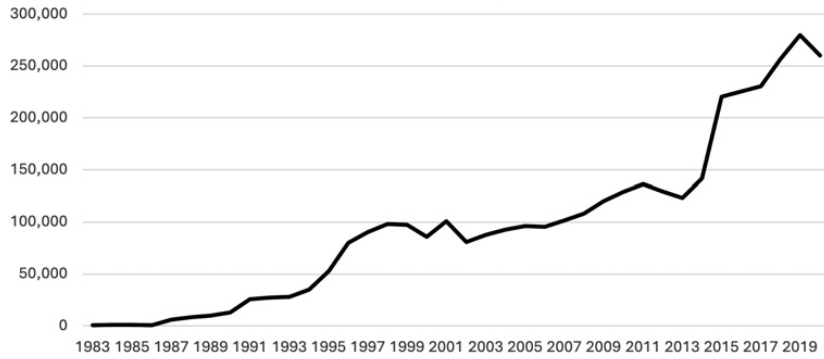

Figure 13.2 Number of first instance administrative cases in China (1983–2020). Source: *China Statistical Yearbook 2021* [Table 24-18], www.stats.gov.cn/tjsj/ndsj/2021/indexch.htm

Chinese officials, scholars, and practitioners in varying degrees to core liberal norms.[26] At one point, Western legal theories so dominated the jurisprudential discourse in China that a prominent legal scholar expressed grave concerns about his colleagues' collective "cultural aphasia."[27] However, this marked shift in discourse and massive institutional transplantation also sparked backlashes. The tensions peaked and triggered nationwide debates in 2005 and 2006 when the reformers' plan to enact a property law based on German law principles was temporarily shelved after a legal scholar trained in the former Yugoslavia published an open letter alleging the protection of private property ownership would undermine the socialist nature of the Chinese political system as enshrined in the Constitution,[28] galvanizing fierce resistance from the conservative faction. While the national legislature eventually adopted the property law as proposed, Chinese socio-legal scholars have since

Compatibility of generality and particularity], Bijiaofa Yanjiu (比较法研究) [Comp. L.], no. 4, 2017, at 155, 170; Libin & Patapan, *supra* note 16, at 139.

[26] Scott Wilson, *Seeking One's Day in Court: Chinese Regime Responsiveness to International Legal Norms on AIDS Carriers' and Pollution Victims' Rights*, 21 J. Contemp. China 863 (2012).

[27] Xia Yong (夏恿), *Fazhi Shi Shenme? Yuanyuan, Guijie yu Jiazhi* (法治是什么? 渊源, 规诫与价值) [What is rule of law? Origin, admonitions and values], Zhongguo Shehui Kexue (中国社会科学) [Soc. Sci. Chi.], no. 4, 1999, at 142.

[28] Andreas Møller Mulvad, *China's Ideological Spectrum: A Two-Dimensional Model of Elite Intellectuals' Visions*, 47 Theory & Soc'y 635 (2018); Joseph Fewsmith, *China in 2007: The Politics of Leadership Transition*, 48 Asian Surv. 82 (2008).

demonstrated more interest in value-neutral comparisons with foreign legal systems,[29] as well as in rediscovering the values of China's domestic institutions for resolving disputes and delivering substantive justice.[30] Interestingly, as shown in Figure 13.3(a), the rule-of-law discourse outside China also reached a turning point around the year 2006. Given how tightly China had been integrated in the global system at the time, the rebalancing of the rule-of-law debate in China might have simply reflected the global trend.

The power dynamics within the Chinese ruling elites tilted further in favor of the conservatives after 2008, when the global financial crisis severely eroded the normative appeal of free market capitalism and its enabling institutions, and the massive stimulus program implemented by the Chinese government to salvage the economy materially empowered the state sector. A systematic "turn against law" ensued.[31] The leadership began to emphasize the role of Chinese courts to construct a "harmonious society."[32] Remarkably, an official without any formal legal training was appointed president of the Supreme People's Court in 2008 and promoted a "Three Supremes" doctrine: "in enforcing the law, judges should take into account first the supremacy of the Party's undertaking, second the supremacy of the popular interest, and only third the supremacy of the law."[33] During this period, the academic discourse on law and governance also intensified.[34] While the "legally trained elites" continued to favor "more expansive, liberal and state-constraining conceptions of law,"[35]

[29] *See, e.g.*, Zheng Chengliang (郑成良) & Zhang Yingxia (张英霞), *Zhongmei Liangguo Sifa Linian de Bijiao* (中美两国司法理念的比较) [Comparative analysis on judicial notion in China and the United States], Fazhi yu Shehui Fazhan (法制与社会发展) [L. & Soc. Dev.], no. 2, 2003, at 3, 9.

[30] Su Li (苏力), *Bianfa, Fazhi Jianshe Jiqi Bentu Ziyuan* (变法, 法治建设及其本土资源) [Reform, rule of law, and its local resources], Zhongwai Faxue (中外法学) [Peking U. L.J.], no. 5, 1995, at 1; Su Li (苏立), Song Fa Xiaxiang: Zhongguo Jiceng Sifa Zhidu Yanjiu (送法下乡: 中国基层司法制度研究) [Sending law to the countryside: A study on the grassroot-level judicial system in China] (2000).

[31] Minzner, *supra* note 2; Benjamin L. Liebman, *A Return to Populist Legality? Historical Legacies and Legal Reform*, *in* Mao's Invisible Hand: The Political Foundations of Adaptive Governance in China 165 (Sebastian Heilmann & Elizabeth J. Perry eds., 2011).

[32] Liebman, *supra* note 2.

[33] Rogier Creemers, *Party Ideology and Chinese Law*, *in* Law and the Party in China: Ideology and Organisation 31 (Rogier Creemers & Susan Trevaskes eds., 2020).

[34] He Li, *Chinese Discourse on Constitutionalism and Its Impact on Reforms*, 22 J. Chinese Pol. Sci. 407, 413 (2017).

[35] Jacques deLisle, *Law in the China Model 2.0: Legality, Developmentalism and Leninism Under Xi Jinping*, 26 J. Contemp. China 68, 82 (2017).

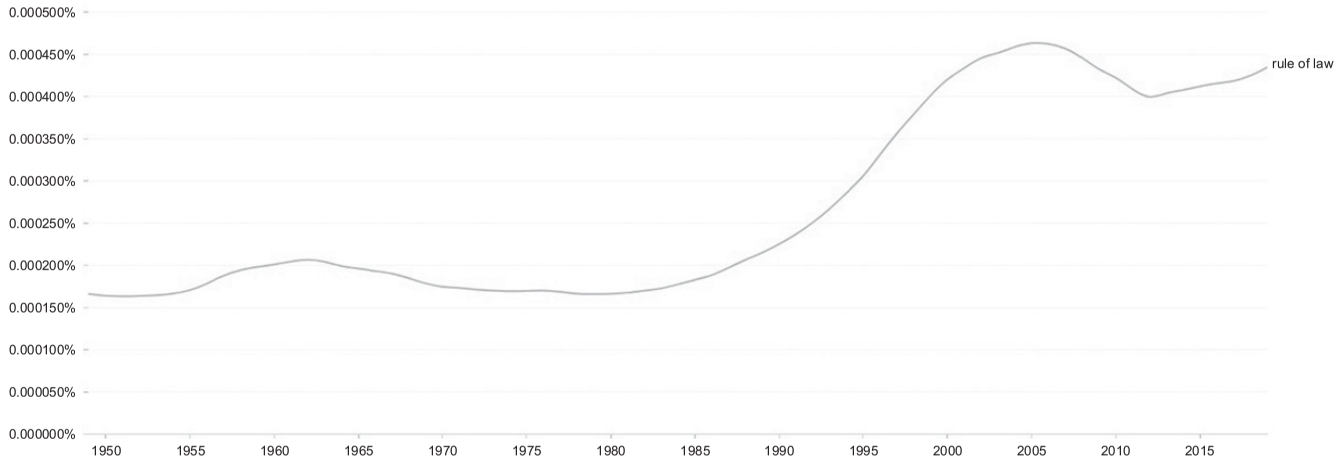

Figure 13.3(a) Google NGram search result by "rule of law" from 1949 to 2019: frequency with which the term appeared in English publications during the search period.

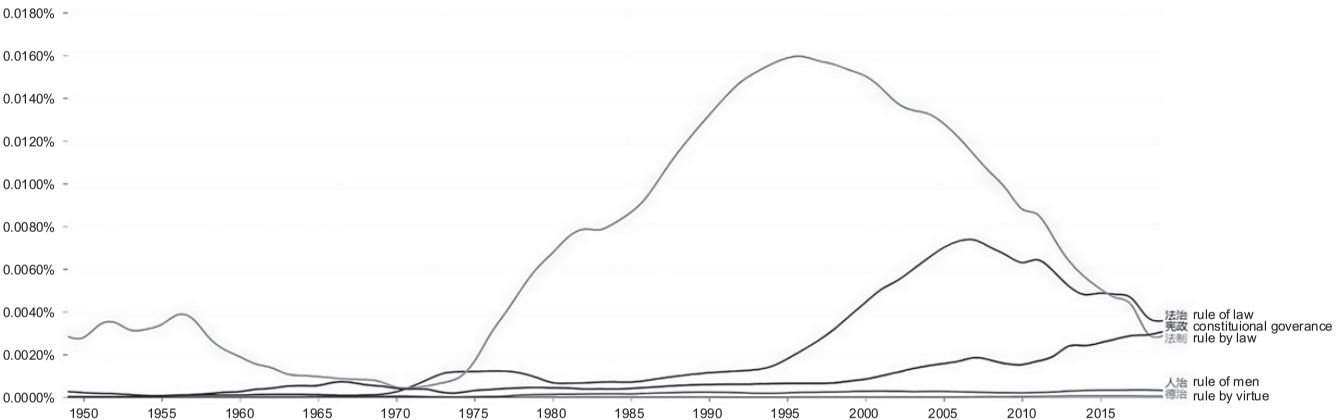

Figure 13.3(b) Google NGram search by various Chinese terms relating to rule of law, 1949–2019: frequencies with which the terms appeared in Chinese publications during the search period.

critiques of the liberal legal order began to enjoy a larger audience. The critiques also became more sophisticated, frequently quoting and referencing works by prominent US legal realists and critical legal theorists.[36] After decades of searching for ideal institutional models elsewhere, first in the Soviet bloc, then the Western world, a growing number of Chinese legal scholars started to look inward for theoretical inspiration.[37]

After 2012, when Xi Jinping assumed top Party leadership, the CCP embarked on a multiyear campaign to build "socialist rule of law with Chinese characteristics."[38] Having managed to consolidate and expand his power to a level comparable to that of Mao,[39] Xi advocated for a "comprehensive rule of law" (or, in Xi's words, "containing power in the cage of institutions"[40]) and constitutional governance.[41] However, the "rule of law" so propagated deviates from the liberal concept,[42] as it is "predominantly about fortifying and legitimizing the CCP's leadership through law over state institutions,"[43] constituting a form of rule by law. The campaign aimed to have the Party "lead all rule of law activities including legislation, law enforcement, administration of justice and law observance."[44] The CCP supremacy was finally enshrined in the Constitution.[45] And the official rhetoric publicly denounced the "erroneous" Western legal models.[46] In 2020, during the first central CCP conference on work related to "overall law-based governance," Xi summarized his thought on the rule of law in "eleven upholds," the top three of which were "upholding CCP leadership," "taking

[36] Gu, *supra* note 8, at 7–8.
[37] He Li, *supra* note 34; Gu, *supra* note 8; Yang, *supra* note 25; John W. Head, *Feeling the Stones When Crossing the River: The Rule of Law in China*, 7 SANTA CLARA J. INT'L L. 25, 69 (2010).
[38] Ling Li, *Chinese Characteristics of the "Socialist Rule of Law": Will the Fourth Plenum Cure the Problems of the Chinese Judicial System?*, 20 ASIA POL'Y 17 (2015).
[39] Susan L Shirk, *China in Xi's "New Era": The Return to Personalistic Rule*, 29 J. DEMOCRACY 22, 24 (2018).
[40] DeLisle, *supra* note 35.
[41] Wu Changchang, *Debates on Constitutionalism and the Legacies of the Cultural Revolution*, 227 CHINA Q. 674 (2016).
[42] DeLisle, *supra* note 35.
[43] Trevaskes, *supra* note 22.
[44] *Id.* at 350.
[45] Ling Li & Wenzhang Zhou, *Governing the "Constitutional Vacuum": Federalism, Rule of Law, and Politburo Politics in China*, 4 CHINA L. & SOC'Y REV. 1 (2019); He Li, *supra* note 34.
[46] He Li, *supra* note 34, at 408.

a people-centered approach," and "staying on the path of the socialist rule of law."[47] Meanwhile, the official narrative began to integrate the socialist rule of law with "rule by moral virtue."[48] Some scholars view this moralistic turn in the official rhetoric as nothing but a revival of traditional Chinese philosophies on governance – that is, the coexistence of legalism, which emphasizes governance with legal instruments, and Confucianism, which stresses governance through moral guidance and rites,[49] repackaged by sleight with esoteric Marxist concepts such as the dialectical unity of two terms with conflicting meanings.[50]

All these attributes of the Chinese legal reform under Xi's leadership suggest that China is moving away from the rule-of-law concept defined as imposing legal constraints over powerholders.[51] The power of Xi and his allies, wielded through the CCP decision-making mechanism, is free from any legal restraint.[52] Nonetheless, the CCP is increasingly relying on legal institutions to govern,[53] and, in the process, Xi's campaign has shown positive effects,[54] as it provides more accessible forums for challenging low-level exercise of power, enhances predictability of published rules, and promotes reason-giving.[55] These effects are, for instance, the centralization of the court system, to shield judicial decisions from local politics;[56] rendering judges individually accountable, arguably to enhance independent adjudication and reduce shirking and corruption;[57] mitigating substantive review for case registration, to enable easier access to justice; and a broadened scope for legal challenges of government malfeasance, to rein in abusive officials.[58] As a result, the arbitrary exercise of power may have

[47] *Xi Focus: Xi Jinping Thought on the Rule of Law Guides Law-Based Governance in China*, XINHUANET (Dec. 10, 2020), www.xinhuanet.com/english/2020-12/10/c_139578646.htm.
[48] Trevaskes, *supra* note 22, at 357–58.
[49] Ye, *supra* note 2, at 14.
[50] Trevaskes, *supra* note 22, at 361.
[51] *See* Chapter 1.
[52] Other types of restraints such as factional checks and external pressure, especially from the United States, may modify how Xi exercises his power.
[53] Taisu Zhang & Tom Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L. 278, 315–16 (2019).
[54] *Id*.
[55] *See* Chapter 1.
[56] Yueduan Wang, *"Detaching" Courts from Local Politics? Assessing the Judicial Centralization Reforms in China*, 246 CHINA Q. 545, 547 (2021).
[57] Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620, 620 (2007).
[58] Zhang & Ginsburg, *supra* note 53, at 306, 309.

abated in certain issue areas that do not pose a threat to the regime. Routine civil cases, for instance, may receive neutral and fair treatment in Chinese courts, especially when the litigants are similarly situated in the power hierarchy.[59] The same is true for lawsuits against local government actors, the number of which surged in 2015, when the case registration reform took effect (see Figure 13.2).

Meanwhile, however, cases of significant social, economic, or political consequences continue to be avoided or "harmonized."[60] For instance, the implementation of the zero-COVID policies has upended the lives of millions of people in China, yet courts have been largely silent. Businesses can be shut down and individuals locked up without minimal due process or any legal remedy. Moreover, the prosecution of activists in China has been growing, often with charges based on the ambiguous crime of "picking quarrels and provoking trouble."[61] In short, the "comprehensive rule of law" campaign remains contested in terms of its impacts,[62] with many considering its effects to be "partial,"[63] "uneven,"[64] or "dualist."[65] That being said, scholars generally agree that the campaign's ultimate goal is no more than instrumentalist governance by law and regime preservation.

In parallel, partially due to the resurrection of personalistic authoritarianism under Xi and the disrupted factional power balance,[66] the space for academic debates shrank considerably.[67] The state tightened its control over views inconsistent with the government's rhetoric, and the escalating geopolitical rivalry with the United States alienated Chinese legal scholars more receptive to liberal values or leaning toward normative pluralism. Nonetheless, rule-of-law debates continued among

[59] Ji Li, *The Power Logic of Justice in China*, 65 AM. J. COMP. L. 95, 95 (2017).
[60] Qianfan Zhang, *supra* note 2, at 593; Ji Li, *supra* note 59, at 21; Xin He, *A Tale of Two Chinese Courts: Economic Development and Contract Enforcement*, 39 J.L. & SOC. 384, 388 (2012); Ying Sun & Hualing Fu, *Of Judge Quota and Judicial Autonomy: An Enduring Professionalization Project in China*, 251 CHINA Q. 866, 867 (2022).
[61] Guo Rui, *"Picking Quarrels and Provoking Trouble": How China's Catch-All Crime Muzzles Dissent*, S. CHINA MORNING POST (Aug. 25, 2021), https://tinyurl.com/mryy97kj.
[62] Wang, *supra* note 56, at 22; Qianfan Zhang, *supra* note 2, at 587.
[63] Chen, *supra* note 2, at 35.
[64] DeLisle, *supra* note 35, at 79.
[65] Qianfan Zhang, *supra* note 2, at 594.
[66] Björn Alexander Düben, *Xi Jinping and the End of Chinese Exceptionalism*, 67 PROBS. POST-COMMUNISM 111, 116 (2020).
[67] He Li, *supra* note 34, at 421; Qianfan Zhang, *supra* note 2, at 586.

Chinese scholars who have become well versed in relevant Western literature on law and governance.[68] The liberal voice has been subdued, but not extinguished.[69] And more scholars have joined in the search for novel alternative theories.[70]

Finally, China's interactions with the outside world also have altered its state ideology. Granted, the components of orthodox Marxism advocating class struggles have lost practical relevance and been largely abandoned,[71] hence the widely accepted claim that China has "entered a post-ideological age."[72] However, basic causal beliefs and worldviews integral to dialectical materialism and historical materialism still offer the most salient cognitive framework for Chinese ruling elites in interpreting complex and ambiguous social and political phenomena such as law's role in, or relationship with, governance.[73] Briefly, political institutions, as a category of the societal superstructure, are determined by the mode of production, and legal institutions are regarded as tools of oppression and regime preservation employed by the ruling class. Because members of the Chinese ruling elites must demonstrate mastery of the state ideology in order to advance in the fiercely competitive political system,[74] they have internalized the core ideological remnants, which, I argue, gives rise

[68] He Zhipeng (何志鹏), *"Liangfa" yu "Shanzhi" he yi Tongyang Zhongyao: Guoji Fazhi Biaozhun de Shensi* ("良法" 与 "善治" 何以同样重要: 国际法治标准的审思) [Why sound law and good governance are equally important: The criteria of international rule of law revisited], Zhejiang Daxue Xuebao (Renwen Shehui Kexueban) (浙江大学学报 (人文社会科学版)) [J. Zhejiang U. (Humanities & Soc. Sci.)], vol. 44, no. 3, 2014, at 131; Yang, *supra* note 26; He Zhipeng (何志鹏), *Guoji Fazhi: Yige Gainian de Jieding* (国际法治: 一个概念的界定) [International rule of law: defining a concept], Zhengfa Luntan: Zhongguo Zhengfa Daxue Xuebao (政法论坛: 中国政法大学学报) [Trib. Pol. Sci. & L.] vol. 27, no. 4, 2009, at 63, 78; Qiang Shigong (强世功), *"Fazhi Zhongguo" de Daolu Xuanze: Cong Falu Diguo dao Duoyuan Zhuyi Fazhi Gongheguo* ("法治中国" 的道路选择: 从法律帝国到多元主义法治共和国) [The path choice of "China with rule of law": From a legal empire to a pluralistic republic with rule of law], Wenhua Zongheng (文化纵横) [Beijing Cultural Rev.], no. 4, 2014, at 38.

[69] He Li, *supra* note 34, at 411; Qianfan Zhang, *supra* note 2, at 583; DeLisle, *supra* note 35, at 82–83.

[70] Samuli Seppänen, *Ideological Renewal and Nostalgia in China's "Avant-Garde" Legal Scholarship*, 13 Wash. U. Glob. Stud. L. Rev. 83, 84 (2014); Zhang Wenxian, *supra* note 2, at 23.

[71] For instance, the dictatorship of the proletariat has been dropped from the official rhetoric. He Li, *supra* note 34, at 421.

[72] Creemers, *supra* note 33, at 31.

[73] *Id.* at 41.

[74] David Shambaugh, *Training China's Political Elite: The Party School System*, 196 China Q. 827 (2008).

to three shared perceptions of law and legal institutions: legal instrumentalism, economic determinism, and linearity of institutional changes.

To be concrete, the Chinese ruling elites have generally perceived law and legal institutions as a means to achieve other objectives,[75] be it political oppression,[76] reducing corruption,[77] facilitating an efficient market economy,[78] maintaining social order and stability,[79] sustaining regime legitimacy,[80] enhancing the government's international reputation,[81] enabling modernization,[82] or symbolizing social and cultural progress.[83] Teleologically conceptualized,[84] the rule of law has never acquired the same normative appeal in China as in the West.[85] Additionally, the shared view of economic determinism underlies Chinese government policies and the official narrative about law and governance. Reformers and conservatives alike contend that the characteristics of economic relations in China necessitate a more professional and independent judiciary or, on the contrary, justify preserving the institutional status quo, or even reverting to Mao-era practices.[86] Moreover, prior studies in China have either concluded, or adopted the assumption, that modes of production determine legal institutions in a linear fashion, so economically developed regions and countries will feature professional and independent courts, whereas developing ones will be characterized by dysfunctional courts and incompetent judges.[87] As will be demonstrated, these ideology-shaped perceptions also modify China's interactions with the international legal order.

To summarize, this first part of the chapter has offered a nuanced recounting of Chinese legal reform and its evolving rule-of-law discourse

[75] DeLisle, *supra* note 35, at 79; Head, *supra* note 37, at 34–35.
[76] Partlett & Ip, *supra* note 15, at 470–71.
[77] Jennifer R. Wilking & Gregory J. Love, *Why the Rule of Law? Experimental Evidence from China*, 41 JUST. SYS. J. 360 (2020).
[78] DeLisle, *supra* note 35, at 68.
[79] Liebman, *supra* note 2, at 96.
[80] Susan H. Whiting, *Authoritarian "Rule of Law" and Regime Legitimacy*, 50 COMP. POL. STUD. 1907 (2017).
[81] Zhang Wenxian, *supra* note 2, at 586.
[82] Trevaskes, *supra* note 22, at 353.
[83] *Id.* at 353.
[84] Ewan Smith, *The Rule of Law Doctrine of the Politburo*, 79 CHINA J. 40 (2018).
[85] Chen, *supra* note 2, at 20.
[86] Minzner, *supra* note 2, at 939.
[87] Yuhua Wang, When Do Authoritarian Rulers Tie Their Hands: The Rise of Limited Rule of Law in Sub-National China (2011) (Ph.D. dissertation, University of Michigan) (on file with University of Michigan Library); Xin He, *supra* note 60, at 395–401.

by examining the contestations among China's ruling elites and the influence of external normative and geopolitical environments. Xi's assumption of CCP leadership ushered in a new era of legal reform marked by greatly tightened CCP control and centralization of judicial power. Meanwhile, the CCP has exhorted Chinese officials and scholars to "vigorously participate in the formulation of international norms[,] ... strengthen [China's] discourse power and influence in international legal affairs[,] ... [and] use legal methods to safeguard [China's] sovereignty, security and development interests."[88] And empirical data indicates that in 2012, when Xi became the party secretary, the Chinese rule-of-law discourse clearly diverged from that of the Western world.[89] All these changes render it timely and important to analyze China's actual or potential impacts on the international legal order.

II Impacts on the International Rule of Law

During the Cultural Revolution, China was largely isolated from the rest of the world, and the ruling elites were deeply skeptical and inimical toward both the US-led Western international order and the Soviet-dominated rules governing relations between states within the Communist bloc.[90] Running an autarky, the Chinese government saw little need for international rules to facilitate cross-border transactions. Moreover, the CCP leaders, steeped in orthodox Marxism, regarded the existing international laws as primarily a hegemonic instrument of oppression.[91] As noted, the post-Cultural Revolution reforms reconnected China with the international community, giving rise to functional needs for international agreements. While some members of the ruling elites continued to view international institutions as favoring the United States and its allies,[92] and rejected the rules of the game as they were made

[88] Quoted in Isaac B. Kardon, *China Can Say "No": Analyzing China's Rejection of the South China Sea Arbitration; Toward a New Era of International Law with Chinese Characteristics*, 13 U. PA. ASIAN L. REV., 1, 2 (2018), https://scholarship.law.upenn.edu/alr/vol13/iss2/1.

[89] The NGram data may be greatly impacted by government censorship in China. Censorship very likely has been enhanced since 2012, which is another reason why rule-of-law discourses in China and in the English-speaking world diverged thereafter.

[90] Youcheer Kim, *Is China Spoiling the Rules-Based Liberal International Order? Examining China's Rising Institutional Power in a Multiplex World Through Competing Theories*, 56 ISSUES & STUD. (2020).

[91] Phil C.W. Chan, *China's Approaches to International Law Since the Opium War*, 27 LEIDEN J. INT'L L. 859, 879 (2014).

[92] Graham Allison, *China vs. America: Managing the Next Clash of Civilizations*, 96 FOREIGN AFFS. 80, 85 (2017).

when China was "absent from the world stage,"[93] others, realizing the necessity and benefits of accommodating the US hegemon, began to socialize with the international legal community. After Deng's Southern Tour, the Chinese government, then dominated by reformers, stepped up its efforts to integrate into the global economy by, among other steps, joining the WTO.[94] Today, China is a party to hundreds of bilateral and multilateral treaties in a broad range of subject-matter areas, such as anti-corruption, arms control, environmental protection, and avoidance of double taxation.[95] The Chinese government also has assumed a more prominent role in drafting and amending international agreements[96] and aspired to profoundly reshape the international legal order.[97]

China's rise and its actual or potential impacts on international law and institutions have stimulated heated debates. Some contend that China's growing influence will have significant, detrimental effects on the liberal international legal order.[98] Others view China as a manageable threat.[99] By contrast, some scholars emphasize the positive effects of China's participation in making and reforming international law.[100] Still others have taken an empirical approach, documenting China's evolving and varying policies regarding international law and international institutions.[101] Still others consider international law largely irrelevant in the China-driven shift of global geopolitics.[102]

[93] *Id.* at 86.

[94] Gregory Shaffer, Emerging Powers and the World Trading System: The Past and Future of International Economic Law 174 (2021).

[95] Robert D. Williams, Brookings Inst., International Law with Chinese Characteristics: Beijing and the "Rules-Based" Global Order 3 (2020).

[96] *Id.*

[97] Kardon, *supra* note 88.

[98] *See* Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 Tex. L. Rev. 279 (2017); Tom Ginsburg, *Authoritarian International Law?*, 114 Am. J. Int'l L. 221 (2020); Timothy Webster, *Retooling Sanctions: China's Challenge to the Liberal International Order*, 23 Chi. J. Int'l L. 178 (2022); Gregory Shaffer & Henry Gao, *A New Chinese Economic Order?*, 23 J. Int'l Econ. L. 607 (2020).

[99] *See, e.g.*, G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, 87 Foreign Affs. 23 (2008).

[100] *See* Congyan Cai, The Rise of China and International Law: Taking Chinese Exceptionalism Seriously (2019); William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 Harv. Int'l L.J. 1 (2015).

[101] *See, e.g.*, Kong Qingjiang, *Beyond the Love–Hate Approach? International Law and International Institutions and the Rising China*, 15 China: Int'l J. 41 (2017); Potter, *supra* note 1; Shaffer, *supra* note 94.

[102] *See* Eric A. Posner & John Yoo, *International Law and the Rise of China*, 7 Chi. J. Int'l L. 1 (2006).

While consensus is lacking, the bulk of the literature features a shared methodological approach – treating the sovereign state as the unit of analysis.[103] Such a simplified conceptualization, commonly adopted by realists in international relations, makes the corresponding analytical model too blunt a tool to explicate the heterogeneity of the interactions between multiple relevant Chinese actors and non-Chinese actors in various international legal fields. Again, applying the analytical frame of transnational legal ordering,[104] this chapter contends that China's impacts are more nuanced and varied, and researchers will gain more insights by penetrating the sovereign facade and focusing on different cohorts of key Chinese international law actors. Given the subject matter of the field, lawyers, legal scholars, and legally trained government officials often play important roles. Moreover, depending on the specific issue area, conservative state actors lacking any formal legal training and two types of organizational actors – business organizations (i.e., domestic and multinational firms) and civil society organizations (e.g., NGOs) – may also occupy the interfaces between China and international law. These Chinese actors differ in their interests, internalized norms, ideologies, and causal beliefs, which shape their interactions with and impacts on international law.

Let me begin with interests. At the risk of overgeneralizing, Chinese lawyers seek higher income and professional status, which are intimately interconnected; Chinese legal scholars desire status and prestige associated with their academic and policy impacts and, to a lesser extent, higher income; Chinese government officials, much like their US counterparts, typically crave power and status and avoid risk; business organizations in China maximize profits, though state-owned firms often prioritize government policy objectives; Chinese civil society organizations, heavily state-dependent and systematically subdued, seek to make issue-specific impacts in areas tolerated by the authoritarian government.

Additionally, embedded in the Chinese institutional context, these actors naturally adopt its dominant normative framework,[105] which enables them to define, interpret, and appropriately carry out interactions with foreign

[103] *See, e.g.*, Cai, *supra* note 100; Simon Chesterman, *Asia's Ambivalence About International Law and Institutions: Past, Present and Futures*, 27 Eur. J. Int'l L. 945 (2016); Posner & Yoo, *supra* note 102.

[104] *See, e.g.*, Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 Ann. Rev. L. & Soc. Sci. 231 (2016); Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181 (1996).

[105] The general framework consists of key elements of Sinicized Marxism and Confucianism.

international law parties. However, the actors may deviate from the default set of schemas and norms because of extensive socialization with outside or subcultural groups. Among these key groups of Chinese actors, lawyers and legal scholars tend to be more socialized in the global legal community. As alluded to earlier, the post-Cultural Revolution Chinese legal ecosystem evolved along with expansive statutory and theoretical transplantation from Western countries, and in the past few decades a growing number of Chinese law students and practitioners have received advanced legal education in European and US law schools. After years of intensive socialization, many among these two groups have internalized the core elements of international legal norms.

The exposure of Chinese government actors to the outside world varies widely. Reformers tend to dominate in some functional areas (e.g., trade, foreign affairs, and finance), where senior government officials are legally trained, globe-trotting career bureaucrats; some have even received degrees from prominent foreign universities.[106] In other state organs (e.g., security and defense), the conservative faction reigns, and the high-ranking officials rarely engage extensively with foreign peers, let alone with members of the international legal community. Thus, their internalized domestic normative framework remains largely intact.

The exponential growth of the Chinese economy in the past few decades has projected numerous Chinese firms onto the global stage for trade and investment, exposing them to different business and societal norms. The extent of their normative adaptation, however, turns on multiple factors, including, among others, the degree of exposure, the importance of the foreign market, and the institutional distance they must traverse.[107] Nonetheless, most Chinese non-state-owned firms have proved highly pragmatic and adaptable in finding efficient solutions to their cross-border business problems.[108]

Along with China's reform and opening-up, civil society organizations with tight, extensive international connections mushroomed from bare existence. Many such organizations are clan-based and historically have

[106] For decades, the Chinese government has been sending officials, mostly from economy-related departments, to US and European universities for training and education.

[107] *See* JI LI, THE CLASH OF CAPITALISMS? CHINESE COMPANIES IN THE UNITED STATES 48–50 (2018).

[108] *See* DEBORAH BRAUTIGAM, THE DRAGON'S GIFT: THE REAL STORY OF CHINA IN AFRICA (2009); Ji Li, *I Came, I Saw, I ... Adapted: An Empirical Study of Chinese Business Expansion in the United States. and Its Legal and Policy Implications*, 36 NW. J. INT'L L. & BUS. 143 (2016).

played a key role in attracting foreign direct investment. In the past three decades, civil society organizations also emerged to push for various legal reforms, and before Xi consolidated his power, US and European NGOs (e.g., the Ford Foundation and the American Bar Foundation) used to fund rule-of-law-themed programs in China, many of which were implemented in close collaboration with China's domestic organizations.[109] In short, before the Chinese government tightened its control over foreign NGOs, they maintained broad and close contacts with social legal organizations in China, immersing them in the global legal community.

1 *Actors, Organizations, and Issue-Specific Norms*

A heterogeneity of interests and normative frameworks guide various groups of Chinese actors populating the interfaces between China and international law. As international legal issues vary, so do the coalitions of the actors. I propose that the varying combinations of interests the actors pursue and norms they have internalized offer a new theoretical angle that helps to explain the variations in China's approaches to, and impacts on, the international legal orders governing different issue areas.

Take international commercial arbitration as an example. In this issue area, a variety of Chinese actors occupy the field, including Chinese firms, lawyers, domestic arbitration commissions, scholars, judges, and reform-minded government officials immersed in international legal norms. For reasons such as cultural affinity and cost concerns, China-based businesses prefer to resolve their international commercial disputes before Chinese arbitral tribunals.[110] This demand has spurred an explosive growth in China's arbitration service market. To maximize revenue, Chinese lawyers and law firms compete fiercely for a larger share of the growing business, as do more than two hundred local arbitration commissions. Market pressure motivates nonstate Chinese actors to adopt international best practices. While the field of international commercial arbitration used to be dominated by a "small cadre of elite arbitrators,"[111] who were mostly

[109] *See* Ronald C Keith, Zhiqui Lin & Huang Lie, *The Making of a Chinese NGO: The Research and Intervention Project on Domestic Violence*, 50 PROBS. POST-COMMUNISM 38 (2003); Chongyi Feng, *The NGO Law in China and Its Impact on Overseas Funded NGOs*, 9 COSMOPOLITAN CIV. SOCIETIES: INTERDISC. J. 96 (2017).

[110] *See* Matthew S Erie & Monika Prusinowska, *The Future of Foreign Arbitration in the People's Republic of China: Current Developments and Challenges Ahead*, 28 ASIA PAC. L. REV. 259 (2020).

[111] ALEC STONE SWEET & FLORIAN GRISEL, The Evolution of International Arbitration: Judicialization, Governance, Legitimacy 45 (2017).

US and European lawyers, the expansion of China-related arbitration business will inevitably give Chinese elite lawyers more voice and influence in the international community. Likewise, Chinese arbitration institutions will see their influence grow. Meanwhile, reform-minded state actors, by virtue of extended socialization in the international legal community, have adopted policies and reforms that reflect a mixture of domestic normative preferences and international norms governing commercial arbitration. For instance, the Chinese government was among the first to sign the Singapore Mediation Convention.[112] Also, the government has created international commercial courts as alternatives to commercial arbitration, and the courts were designed to be one-stop-shops for cross-border dispute resolution, reflecting the instrumentalist view of law commonly shared among the Chinese ruling elites.[113]

By contrast, China's approach toward, and impact on, international law governing territorial disputes is dramatically different, as illustrated by its handling of the South China Sea arbitration with the Philippines government under the United Nations Convention on the Law of the Sea. Nonstate actors were largely absent in this issue area. While multiple state actors historically played a part in the issue area, Xi consolidated the decision-making power and elevated the role of the Chinese military. Thereafter, powerful conservative constituencies in the defense and national security sectors reacted to the arbitration in a way that reflected their internalized normative contempt for judicial dispute resolution. They adopted a position of "Four Nos": "no participation, no acceptance, no recognition and no enforcement."[114] This attitude led to China's attack against both the Permanent Court of Arbitration and its decisions, which were widely regarded as "an overwhelming victory for the Philippines and a heavy defeat for China."[115] Since then, the Chinese government has made repeated efforts to modify the international norm regarding the jurisdiction of international tribunals to adjudicate territorial disputes.

To summarize, the rise of China has certainly brought more actors onto the global legal stage in certain issues areas, especially those pertinent to

[112] *China Signs the United Nations Convention on International Settlement Agreements Resulting from Mediation*, MINISTRY OF COM. (Aug. 8, 2019), https://tinyurl.com/4xxnc9zw.

[113] *See* Weixia Gu, *China's Law and Development: A Case Study of the China International Commercial Court*, 62 HARV. INT'L L.J. 67 (2021).

[114] Feng Zhang, *Assessing China's Response to the South China Sea Arbitration Ruling*, 71 AUSTRALIAN J. INT'L AFFS. 440, 440–41 (2017).

[115] *Id.* at 440.

cross-border commerce and investment. China's growing go-it-alone power also has boosted its capacity to establish new international organizations "in which its political power is more commensurate with its economic power."[116] Moreover, in some issue areas, Chinese actors have been striving to alter the existing international law norms, with varying degrees of success. However, as will be discussed below, China has not mounted any systematic challenge against the fundamental norms on which the liberal international legal order is premised.

2 *Fundamental Norms Underlying the International Legal Order*

The rest of this chapter concentrates on China's impact on the fundamental norms and worldviews undergirding the international legal order, which enable international actors to form their identities, preferences, and objectives and formulate legitimate means to achieve them. As noted in Part I, Chinese ruling elites share three basic causal beliefs about law and legal institutions: legal instrumentalism, economic determinism, and linearity of institutional changes. Because of these perceptions, the Chinese government has approached international law with mainly its instrumental value in mind.[117] Echoing the shared ideological view, Deng, in the late 1980s, remarked that the core values of liberalism were "designed only to safeguard the interests of the strong, rich countries, which take advantage of their strength to bully weak countries, and which pursue hegemony and practice power politics."[118] Government officials were urged to be "adept at using international law as a 'weapon' to defend the interests of our state and maintain national pride," and to "strengthen China's 'discourse power and influence' in international legal affairs."[119] The instrumentalist approach explains the shift in the government's position with regard to investment treaties. When China was a net capital importer, its investment treaties with other countries curtailed foreign investors' recourse.[120] But as soon as the country turned into a net capital exporter, the government negotiated broader investor protection in its bilateral investment treaties to safeguard

[116] James F. Paradise, *The Role of "Parallel Institutions" in China's Growing Participation in Global Economic Governance*, 21 J. Chinese Pol. Sci. 149, 169 (2016).
[117] Creemers, *supra* note 33.
[118] Allison, *supra* note 92.
[119] Williams, *supra* note 95.
[120] Justin Carter, *The Protracted Bargain: Negotiating the Canada–China Foreign Investment Promotion and Protection Agreement*, 47 Can. Y.B. Int'l L. (Annuaire canadien de Droit international) 197, 210–11 (2010).

the interests of Chinese outbound investors.[121] Following the same instrumentalist logic, in issue areas where the Chinese government anticipates to win some and lose some, it has been an active participant. China's engagement with the WTO dispute settlement mechanism serves as a good example.[122]

Of course, the instrumentalism is not narrowly material. Much of China's engagement with international law (e.g., human rights treaties[123]) is driven by concerns about building the regime's legitimacy[124] or intentions to facilitate domestic reforms.[125] Even the Chinese academic discourse on international law stresses the value of safeguarding the core interests of China,[126] including, among others, "maintaining the fundamental institutions, sovereign and territorial integrity, and social and economic stability and development,"[127] or more broadly facilitating China's modernization, improving its international image, and enhancing the welfare of the global community.[128] Because instrumentalism is inherently issue-specific and

[121] *Id.* at 210–13.
[122] Shaffer & Gao, *supra* note 98.
[123] Potter, *supra* note 1, at 708–09.
[124] *Id.* at 702; Williams, *supra* note 95, at 10.
[125] Qin, *supra* note 21.
[126] Li Lin (李林), *Xin Shidai Zhongguo Fazhi Lilun Chuangxin Fazhan de Liu Ge Xiangdu* (新时代中国法治理论创新发展的六个向度) [Six important dimensions in the innovative development of China's rule of law in the new era], Faxue Yanjiu (法学研究) [Chinese J.L.], vol. 41, no. 4, at 3 (2019).
[127] Zeng Lingliang (曾令良), *Zhongguo Guoji Faxue Huayu Tixi de Dangdai Goujian* (中国国际法学话语体系的当代构建) [The contemporary construction of the Chinese discourse system on international law], Zhongguo Shehui Kexue (中国社会科学) [Soc. Sci. Chi.], no. 2, 2011, at 35; Zhao Jun (赵骏), *Quanqiu Zhili Shiye Xia de Guoji Fazhi yu Guonei Fazhi* (全球治理视野下的国际法治与国内法治) [International and domestic rule of law from the perspective of global governance], Zhongguo Shehui Kexue (中国社会科学) [Soc. Sci. Chi.], no. 10, 2014, at 79.
[128] Zeng Lingliang (曾令良), *Guoji Fazhi yu Zhongguo Fazhi Jianshe* (国际法治与中国法治建设) [International rule of law and the development of the rule of law in China], Zhongguo Shehui Kexue (中国社会科学) [Soc. Sci. Chi.], no. 10, 2015, at 135; Han Yonghong (韩永红), *Guojifa Heyi Dedao Zunshou: Guowai Yanjiu Shuping yu Zhongguo Shijiao Fansi* (国际法何以得到遵守: 国外研究述评与中国视角反思) [The compliance theory of international law: Review and reflection], Huanqiu Falv Pinglun (环球法律评论) [Glob. L. Rev.], no. 4, 2014, at 167, 183–84; He Zhipeng (何志鹏), *Guoji Fazhi de Zhongguo Biaoda* (国际法治的中国表达) [China's voice in international rule of law], Zhongguo Shehui Kexue (中国社会科学) [Soc. Sci. Chi.], no. 10, 2015, at 159, 167; Pan Wei (潘维), *Fazhi yu Weilai Zhongguo Zhengti* (法治与未来中国政体) [The rule of law and China's political regime in the future], Zhanlve yu Guanli (战略与管理) [Strategy & Mgmt.], no. 5, 1999, at 30, 36; Zhang Wenxian, *supra* note 2, at 10.

nonstatic, this shared perception undermines any effort to formulate systematic contestation of fundamental international legal norms.

Moreover, economic determinism, rooted in historical materialism, also shapes the international law strategies of the Chinese government. Under this doctrine, major shifts in the international economic order will bring about a new international legal order.[129] In other words, international law will inevitably evolve in China's favor as long as the Chinese economy continues to grow. The causality belief partially explains the willingness of the Chinese government in the early stage of the reform period to accept much of the existing international legal order, "bide its time,"[130] and be content with incremental changes of international law. The shared belief in economic determinism also partially explains the relative passivity of the Chinese ruling elites in proposing comprehensive reforms of the existing international legal order and their demonstrated preferences for incremental changes.

The state ideology has also cast an enormous shadow over Chinese academic debates about international law.[131] Largely in line with the official narrative, Chinese scholars have considered the international legal order as an institutional instrument that embodies and preserves the values and interests of the West.[132] With that ontological postulation, a great deal of the Chinese scholarship on international law has been either thematically critical or substantively doctrinal.[133] Motivated by the need to "garner state patronage, which is a prerequisite for funding, publishing, and policy impact,"[134] many Chinese international law scholars have oriented their research toward policy questions dovetailing with the governmental agenda, such as law's role in preserving the

[129] Zeng, *supra* note 128, at 146.

[130] Gregory Chin & Ramesh Thakur, *Will China Change the Rules of Global Order?*, 33 WASH. Q. 119, 121–22 (2010).

[131] Though Marx and Engels themselves said little about international law. Bill Bowring, *Marxist International Law Methodology?*, in RESEARCH METHODS IN INTERNATIONAL LAW 161 (Rossana Deplano ed., 2021).

[132] He Zhipeng, *The Chinese Expression of the International Rule of Law*, 38 SOC. SCI. IN CHI. 175, 178–79 (2017); He Zhipeng (何志鹏), *Guojifa de Xifang Chuantong yu Zhongguo Guannian* (国际法的西方传统与中国观念) [International law: Western tradition and Chinese concept], FAXUE ZAZHI (法学杂志) [L. Sci. Mag.], no. 2, 2018, at 63; Matthew S. Erie, *China and Comparative International Law: Between Social Science and Critique*, 22 CHI. J. INT'L L. 59, 64 (2021).

[133] Erie, *supra* note 132.

[134] *Id.* at 64.

hegemonic world order and how to expand China's discourse power in the epistemic community of international law.[135]

In sum, China in the near future will have no more than marginal impacts on the fundamental norms underlying the international legal order. For reasons noted above, China has failed to provide a coherent and novel alternative ideology.[136] Sinicized Marxism now furnishes mainly a set of causal beliefs and worldviews linking the material world with metapolitical institutions such as the international legal order.[137] Much of the Chinese academic discourse on international law has been in line with the relevant official narrative and has not yet articulated any alternative model of international legal ordering unmoored from selected concepts and values of ancient Chinese philosophies.[138] Hence, Chinese international law scholarship has added marginal theoretical value beyond neo-Marxism, legal realism, and other branches of critical legal theories.[139] A keen observer of Chinese international law scholarship recently lamented the field's theoretical impoverishment.[140]

Additionally, neo-authoritarianism, a term often used to label the Chinese political system taking shape in the past two decades along with China's rise,[141] arguably offers an alternative model (also known as the

[135] *Id.* at 68–69; Yang Zewei (杨泽伟), *Gaige Kaifang 30 Nian Lai Zhongguo Guoji Faxue Yanjiu de Huigu yu Qianzhan* (改革开放 30 年来中国国际法学研究的回顾与前瞻) [Review and prospect of China's study of international law science in the 30 years of reform and opening], Waijiao Pinglun (Waijiao Xueyuan Xuebao) (外交评论 (外交学院学报)) [Foreign Affs. Rev.], no. 3, 2008, at 74; He Zhipeng (何志鹏), *Zhongguo Guoji Faxue de Shuangwei Zhuliuhua* (中国国际法学的双维主流化) [Two-dimensional mainstreaming of China's international law], Zhengfa Luntan (政法论坛) [Trib. Pol. Sci. & L.], vol. 36, no. 5, 2018, at 173; Zeng, *supra* note 127, at 39; Yang, *supra* note 25.

[136] Jessica Chen Weiss, *A World Safe for Autocracy: China's Rise and the Future of Global Politics*, 98 Foreign Affs. 92 (2019); Randall L. Schweller & Xiaoyu Pu, *After Unipolarity: China's Visions of International Order in an Era of US Decline*, 36 Int'l Sec. 41, 54 (2011).

[137] Erie, *supra* note 132, at 64–65.

[138] Xuetong Yan, *Chinese Values vs. Liberalism: What Ideology Will Shape the International Normative Order?*, 11 Chinese J. Int'l Pol. 1 (2018); He Zhipeng, *The Chinese Expression of the International Rule of Law*, *supra* note 132, at 181–82; Tokujin Matsudaira, *Tianxia, or Another Grossraum? US–China Competition and Paradigm Change in the International Legal Order*, 23 Chi. J. Int'l L. 130 (2022).

[139] Erie, *supra* note 132, at 68.

[140] *Id.* at 66.

[141] Stephan Ortmann & Mark R. Thompson, *Introduction: The "Singapore Model" and China's Neo-authoritarian Dream*, 236 China Q. 930 (2018); Elizabeth J. Perry, *China in 1992: An Experiment in Neo-authoritarianism*, 33 Asian Surv. 12 (1993).

China model, or the Beijing Consensus[142]) for some states to resist liberal democracy,[143] which might indirectly erode key international legal norms.[144] However, China under Xi's leadership has been steadily reverting to prototypical authoritarianism and cult politics,[145] and as such the China model, for its lack of long-term stability and resilience, is losing its credibility and persuasive power.[146] The plummeting public opinion toward China around the world serves as a good illustration.[147]

In short, Sinicized Marxism, or China exceptionalism, has guided Chinese interactions with the international legal community,[148] and, as a result, it has had very limited impact on the international legal order at the fundamental normative level.[149] Of course, the Chinese government has taken proactive measures to shape certain international law discourses, "strengthening its control and influence,"[150] especially those concerning its legitimacy. For instance, for years the government has tried to "articulate and justify new standards for human rights that comport with its own policy

[142] WEITSENG CHEN, THE BEIJING CONSENSUS?: HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT (2017); Scott Kennedy, *The Myth of the Beijing Consensus*, 19 J. CONTEMP. CHINA 461 (2010).

[143] Weiss, *supra* note 136, at 95.

[144] Ginsburg, *supra* note 98, at 259.

[145] Düben, *supra* note 66, at 122–23.

[146] Steve Tsang, *Has Xi Jinping Made China's Political System More Resilient and Enduring?*, 43 THIRD WORLD Q. 225, 237 (2022).

[147] *See* LAURA SILVER, KAT DEVLIN & CHRISTINE HUANG, UNFAVORABLE VIEWS OF CHINA REACH HISTORIC HIGHS IN MANY COUNTRIES (Oct. 2020), https://tinyurl.com/44ess33d.

[148] *See, e.g.*, Gu Zuxue (古祖雪), *Guoji Zaofa: Jiben Yuanze Jiqi dui Guojifa de Yiyi* (国际造法: 基本原则及其对国际法的意义) [International law-making: Basic principles and implications for international law], ZHONGGUO SHEHUI KEXUE (中国社会科学) [Soc. Sci. Chi.], no. 2, 2012, at 127, 128; He Zhipeng, *The Chinese Expression of the International Rule of Law*, *supra* note 132, at 181–82; Song Yunbo (宋云博), *Renlei Mingyun Gongtongti Jiangou xia "Guoji Dezhi" yu "Guoji Fazhi" de Ronghe Hudong* (人类命运共同体建构下 "国际德治" 与 "国际法治" 的融合互动) [On integration and interaction of "international rule of morality" and "international rule of law" under the construction background of community of shared future for mankind], ZHENGFA LUNCONG (政法论丛) [J. Pol. Sci. & L.], no. 6, 2018, at 58, 64; He Zhipeng (何志鹏), Guoji Jingji Fazhi Geju de Yanpan yu Yingdui: Jianlun TPP de Zhongguo Lichang (国际经济法治格局的研判与应对: 兼论 TPP 的中国立场) [Analysis and response to the rule of international economic law: Also on China's standpoint regarding TPP], DANGDAI FAXUE (当代法学) [Contemp. L. Rev.], no. 1, 2016, at 43, 50–51.

[149] Han, *supra* note 128, at 182.

[150] Shi Jingxia (石静霞), *Guoji Maoyi Touzi Guize de Zaigoujian ji Zhongguo de Yinying* (国际贸易投资规则的再构建及中国的因应) [The reconstruction of investment rules in international trade and the Chinese response], ZHONGGUO SHEHUI KEXUE (中国社会科学) [Soc. Sci. Chi.], no. 9, 2015, at 128, 129.

priorities."[151] The government also implements socialization and training programs to spread its knowledge and norms to Global South states,[152] where it has found "generally positive reception" among the ruling elites.[153] And since the 19th Party Congress in 2017, the CCP has "sent international propaganda delegations abroad to introduce its programmes and opinions."[154] It is likely that the Chinese government's "norm entrepreneurship" will continue and be more impactful.[155] Yet, given the way the government has framed its arguments, the efforts appear to be primarily "normative resistance" against international criticism rooted in liberal values,[156] rather than a coordinated offense that formulates a coherent normative alternative.[157] Recent research confirms the lack of zeal for the Chinese government to export its legal institutions absent such threat or criticism.[158] The passive approach to international law renders China underprepared when it faces the pressure to be more engaged, as it lacks "the courage, keenness and self-confidence required to participate in the international rule of law."[159] The diffusion of Chinese norms is limited outside certain subject-matter areas and a number of developing countries sharing similar political structures. In other words, until very recently China sought "a gradual modification of Pax Americana, not a direct challenge to it."[160] Moving beyond that poses a daunting challenge, at the core of which is formulating coherent ontological and epistemological systems (as the foundation of a new international legal order) that are not anchored to China's idiosyncratic social, political attributes. China's reversion to totalitarian

[151] Potter, *supra* note 1, at 710.
[152] Lina Benabdallah, *Contesting the International Order by Integrating it: The Case of China's Belt and Road Initiative*, 40 THIRD WORLD Q. 92 (2019).
[153] Ilaria Carrozza, *Legitimizing China's Growing Engagement in African Security: Change Within Continuity of Official Discourse*, 248 CHINA Q. 1174 (2021).
[154] Yan, *supra* note 138, at 6.
[155] CAI, *supra* note 100, at 10.
[156] Courtney J. Fung, *Rhetorical Adaptation, Normative Resistance and International Order-Making: China's Advancement of the Responsibility to Protect*, 55 COOPERATION & CONFLICT 193 (2020).
[157] Potter, *supra* note 1, at 714; Weiss & Wallace, *supra* note 3; Chih-yu Shih & Chiung-Chiu Huang, *Preaching Self-Responsibility: The Chinese Style of Global Governance*, 22 J. CONTEMP. CHINA 351 (2013).
[158] *See, e.g.*, Matthew S. Erie & Do Hai Ha, *Law and Development Minus Legal Transplants: The Example of China in Vietnam*, 8 ASIAN J.L. & SOC. 372 (2021); Kim, *supra* note 90.
[159] He Zhipeng, *The Chinese Expression of the International Rule of Law*, *supra* note 132, at 176.
[160] Schweller & Pu, *supra* note 136, at 54.

dictatorship in the past decade and stringent government censorship add to the challenge of that task.[161]

To summarize, given its economic expansion and growing geopolitical influence, China will supply more international law actors (e.g., Chinese lawyers acting as international commercial arbitrators and Chinese judges sitting on international tribunals); create, or participate in the creation of, new international organizations and agreements (e.g., the Asian Infrastructure Investment Bank and the Regional Comprehensive Economic Partnership); and push for incremental reforms of existing international organizations. In some issue areas, the Chinese government has engaged in normative interpretation and contestation to serve its interests and policy preferences. Yet, for reasons elaborated in this chapter, China will have a marginal influence on the fundamental norms undergirding the existing international legal order. Put differently, in issue areas concerning trade and investment, China is expected to "champion the established rule and the international order based on it"[162] or propose incremental reforms; in other areas, it will likely embrace the Westphalian principles coalescing around sovereign supremacy.[163]

[161] Erie, *supra* note 132, at 69.
[162] Muthucumaraswamy Sornarajah & Wang Jiangyu, *China, India, and International Law: A Justice Based Vision Between the Romantic and Realist Perceptions*, 9 ASIAN J. INT'L L. 217, 243–44 (2019).
[163] *Id.*; Weiss & Wallace, *supra* note 3, at 657.