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

Ji Li*

The rule of law, an abstract concept heavily debated among legal scholars and social scientists, has in the past few decades acquired a nearly universal appeal, as democracies, autocracies, and oligarchies all claim to uphold it. The Chinese government, for instance, announced in 2012 a comprehensive plan to advance law-based governance in China and has since undertaken major legal reforms. Repeatedly, Xi and the leaders of the Chinese Communist Party (“CCP”) have pledged to build a “rule of law country.” But when the ruling elites of a one-party authoritarian state allege commitment to the rule of law, what do they really mean? How is it different from the Western concepts of the rule of law, especially the “thick” version of it, that has been closely tied to liberal democratic values? What are the key features of the “rule of law with Chinese characteristics”? And how will it impact the international legal order? Applying a transnational legal ordering framework, this Article attempts some answers. It proceeds in two sections. Section One traces the development of the Chinese legal system and the evolving rule of law debates in China. Unlike prior research on this topic, which has generally treated the sovereign state as the unit of analysis, this section highlights the power dynamics within the Chinese ruling elites and the influence of the international legal community as well as the global rule of law discourse. Section Two reverses the inquiry and explores how China might impact the international legal order. It contends that varying coalitions of Chinese actors populate the interfaces between China and international law across different issue areas and that China’s impacts on the international legal order vary as well. Both sections will also discuss how the ideological remnants have produced three common, entrenched perceptions of law and legal institutions: legal instrumentalism, economic determinism, *

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and linearity of institutional changes, and how these perceptions have modified China’s interactions with international law.

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I. THE EVOLVING RULE OF LAW WITH CHINESE CHARACTERISTICS

The development of the Chinese legal system and the discourse about law and governance have undergone major shifts in the past four decades,1 which have spawned a great deal of insightful research.2 However, much of the accumulated scholarship has adopted a state-centered approach, neglecting interest and normative divisions within the regime3 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, the post-Cultural Revolution China increasingly

1. The focus on elite discourse is not to deny that the Chinese masses may have congruent 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).
5. Chris Alden & Daniel Large, On Becoming a Norms Maker: Chinese Foreign Policy, Norms Evolution...
interacts with the rest of the world, and the interactions have led to domestic realignment of power and facilitated exchanges of ideas. 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 CCP formed an alliance with the Soviet Union and imported its model of legal institutions and legal education. Though the alliance collapsed, the inchoate Chinese legal institutions continued to operate according to the Soviet design, and Soviet-trained teachers dominated Chinese law schools, indoctrinating students with the Marxist and Leninist view of courts as a tool for social ordering and class oppression. The basic institutional structure for socialist rule by law, however, suffered severe damages during the Cultural Revolution (1966-1976), 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.

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. 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,” and were determined to re-establish 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 People’s Republic of China on Arrest and Detention, which provided better legal protection for individual freedom and stipulated more stringent procedural requirements for its deprivation. 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, 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 legal training, 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 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, 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.\textsuperscript{20} Its subsequent integration into the global economy further strengthened the reformers and facilitated the implementation of their policy agenda.\textsuperscript{21} Meanwhile, the official narrative on law shifted from enacting laws and re-establishing basic legal institutions to promoting the “rule of law,”\textsuperscript{22} and considerable efforts were made to professionalize the judiciary and elevate its status.\textsuperscript{23} For instance, the Judges Law of the People’s Republic of China was enacted in 1995 that established merit-based staffing of Chinese courts, which used to recruit from retired military officers without any formal legal training.\textsuperscript{24} Also, as shown in Figures 1 and 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 1 and 2).

\textsuperscript{23} Zhang Wenxian, supra note 2, at 579.
The contemporaneous debates in the legal academy largely continued the liberal trajectory. Growing interactions with international actors socialized Chinese officials, scholars, and practitioners in varying degrees to core liberal norms. 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.” 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 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, galvanizing fierce resistance from the conservative faction. While the national legislature eventually adopted the property law as proposed, Chinese socio-legal scholars have since demonstrated more interest in value-neutral comparisons with


27. Xia Yong (夏勇), 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. China], no. 4, 1999, at 142.

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foreign legal systems, as well as in rediscovering the values of China’s domestic institutions for resolving disputes and delivering substantive justice. Interestingly, as shown in Figure 3, 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. The leadership began to emphasize the role of Chinese courts to construct a “harmonious society.” 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.” During this period, the academic discourse on law and governance also intensified. While the “legally trained elites” continued to favor “more expansive, liberal and state-constraining conceptions of law,” 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 U.S. legal realists and critical legal theorists. 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

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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 COUNTRYSIDE—A STUDY ON THE GRASSROOT-LEVEL JUDICIAL SYSTEM IN CHINA] (China Univ. of Pol. Science and L. Press 2000).
32. Liebman, supra note 2.
36. Gu, supra note 8, at 7–8.
inward for theoretical inspiration.\textsuperscript{37}

After 2012, when Xi Jinping assumed top Party leadership, the CCP embarked on a multi-year campaign to build “socialist rule of law with Chinese characteristics.”\textsuperscript{38} Having managed to consolidate and expand his power to a level comparable to that of Mao,\textsuperscript{39} Xi advocated for a “comprehensive rule of law” (or, in Xi’s words, “containing power in the cage of institutions”)\textsuperscript{40} and constitutional governance.\textsuperscript{41} However, the “rule of law” so propagated deviates from the liberal concept,\textsuperscript{42} as it is “predominantly about fortifying and legitimizing the CCP’s leadership through law over state institutions.”\textsuperscript{43} The campaign aimed to have the Party “lead all rule of law activities including legislation, law enforcement, administration of justice and law observance.”\textsuperscript{44} The CCP supremacy was finally enshrined in the Constitution.\textsuperscript{45} And, the official rhetoric publicly denounced the “erroneous” Western legal models.\textsuperscript{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 a people-centered approach,” and “staying on the path of the socialist rule of law.”\textsuperscript{47} Meanwhile, the official narrative began to integrate the socialist rule of law with “rule by moral virtue.”\textsuperscript{48} Some scholars view this moralistic turn in the official rhetoric as nothing but a revival of traditional Chinese philosophies on governance, i.e., the coexistence of Legalism that emphasizes governance with legal instruments and Confucianism that stresses governance through moral guidance and rites,\textsuperscript{49} repackaged by sleight with esoteric Marxist concepts such as dialectical unity of two terms with conflicting meanings.\textsuperscript{50}

All these attributes of the Chinese legal reform under Xi’s leadership suggest

\begin{itemize}
  \item \textsuperscript{38} Ling Li, \textit{Chinese Characteristics of the “Socialist Rule of Law”: Will the Fourth Plenum Cure the Problems of the Chinese Judicial System?}, 20 ASIA POLY 17 (2015).
  \item \textsuperscript{40} DeLisle, \textit{ supra note 35}.
  \item \textsuperscript{41} Wu Changchang, \textit{Debates on Constitutionalist and the Legacies of the Cultural Revolution}, 227 CHINA Q. 674 (2016).
  \item \textsuperscript{42} DeLisle, \textit{ supra note 35}.
  \item \textsuperscript{43} Trevaskes, \textit{ supra note 22}.
  \item \textsuperscript{44} Id. at 350.
  \item \textsuperscript{45} Ling Li & Wenzhang Zhou, \textit{Governing the “Constitutional Vacuum”—Federalism, Rule of Law, and Politburo Politics in China}, 4 CHINA L. & SOCY REV. 1 (2019); He Li, \textit{ supra note 34}.
  \item \textsuperscript{46} He Li, \textit{ supra note 34}, at 408.
  \item \textsuperscript{48} Trevaskes, \textit{ supra note 22}, at 357–58.
  \item \textsuperscript{49} Ye, \textit{ supra note 2}, at 14.
  \item \textsuperscript{50} Trevaskes, \textit{ supra note 22}, at 361.
\end{itemize}
that China is moving away from the “rule of law” concept defined as imposing legal constraints over powerholders. The power of Xi and his allies, wielded through the CCP decision-making mechanism, is free from any legal restraint, which, as discussed in the introduction, is the hallmark of “rule by law.” In other words, the CCP is increasingly relying on legal institutions to govern, and Xi’s campaign has shown positive effects, as it provides more accessible fora to challenge low-level exercise of power, enhances predictability of published rules, and promotes reason giving. These effects are, for instance, the centralization of the court system to shield judicial decisions from local politics, the creation of individual judge accountability arguably to enhance independent adjudication and reduce shirking and corruption, the mitigation of 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. As a result, arbitrary exercise of power may have 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. 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 2). Meanwhile, cases of significant social, economic, or political consequences continue to be avoided or harmonized. 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.” In short, the “comprehensive

51. Gregory Shaffer & Wayne Sandholtz Introduction at the symposium.
52. Other types of restraints such as factional checks and external pressure, especially from the United States, may modify how Xi exercises his power.
54. Id.
55. See introduction essay by Shaffer and Sandholtz.
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).
rule of law” campaign remains contested in terms of its impacts, with many considering its effects to be “partial,” “uneven,” and “dualist.” That being said, scholars generally agree that the campaign’s ultimate goal is no more than instrumentalist governance by law and regime preservation.

Figure 2: Number of First Instance Administrative Cases in China (1983-2020)

Meanwhile, partially due to the resurrection of personalistic authoritarianism under Xi and the disrupted factional power balance, the space for academic debates shrank considerably. 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 towards normative pluralism. Nonetheless, rule of law debates continued among Chinese scholars who have become well versed in relevant Western literature on law and governance. The liberal voice has been subdued, but

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.
67. He Li, supra note 34, at 421; Qianfan Zhang, supra note 2, at 586.
not extinct. And more scholars have joined in the search for novel alternative theories.

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, hence the widely accepted claim that China has “entered a post-ideological age.” However, basic causal beliefs and worldviews integral to dialectical materialism and historical materialism still offer the most salient cognitive framework for Chinese ruling elites to interpret complex and ambiguous social and political phenomenon such as law’s role in or relationship with governance. Briefly, political institutions, as a category of 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, they have internalized the core ideological remnants, which I argue gives rise 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, be it political oppression, reducing corruption, facilitating an efficient market economy, maintaining social order and stability, sustaining regime legitimacy, enhancing the government’s international reputation, enabling modernization, or symbolizing social and

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Zhongguo” de Daolu Xuanze—cong Falu Diguo dao Duoyuan Zhui 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], Wenhuazongheng (文化纵横) [Beijing Cultural R.], 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.
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.
75. DeLisle, supra note 35, at 79; Head, supra note 37, at 34-35.
78. DeLisle, supra note 35, at 68.
79. Liebman, supra note 2, at 96.
82. Trevaskes, supra note 22, at 353.
cultural progress. Teleologically conceptualized, the rule of law has never acquired the same normative appeal in China as in the West. Additionally, the shared view of economic determinism underlies Chinese government policies and the official narrative about law and governance. The reformers and the 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 the practices during Mao’s era. 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. As will be demonstrated, these ideology-shaped perceptions also modify China’s interactions with the international legal order.

To summarize, this section has offered a nuanced recounting of Chinese legal reform and its evolving rule of law discourse by examining the contestations among China’s ruling elites and the influence of the 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.” And empirical data indicate that in 2012, when Xi became the party secretary, the Chinese rule of law discourse clearly diverged from that of the Western world. All these render it timely and important to analyze China’s actual or potential impacts on the international legal order, which I turn to in the following section.

83. Id. at 353.
85. Chen, supra note 2, at 20.
86. Minzner, supra note 2, at 939.
89. The NGram data may be greatly impacted by government censorship in China. Censorship very likely has been enhanced after 2012, another reason why rule of law discourses in China and in the English-speaking world diverged thereafter.
Figure 3: (top) Google NGram search result by “Rule of Law” from 1949 to 2019: frequency at which the term appeared in English publications during the search period; (bottom) Google Ngram search by various Chinese terms relating to Rule of Law, 1949-2019: frequencies at which the terms appeared in Chinese publications during the search period (i.e., from top to bottom: "Rule of Law"; "Constitutional Governance"; "Rule by Law"; "Rule of Man"; "Rule by Virtue").

II. IMPACTS ON 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 towards both the U.S.-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, and rejected the rules of the game as they were made when China was “absent from the world stage,” others, realizing the necessity and benefits of accommodating the U.S. 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. 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. The Chinese government also has assumed a more prominent role in drafting and amending international agreements and aspired to profoundly reshape the international legal order.

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. Others view China as a manageable threat. By contrast, some scholars emphasize the positive effects of China’s participation in making and reforming international law. Still others have taken an empirical approach, documenting China’s evolving and varying policies regarding international law and international institutions. Still, others consider international law largely irrelevant in the China-driven shift of global geopolitics.

While consensus is lacking, the bulk of the literature features a shared

93. Id. at 86.
96. Id.
101. See, e.g., Kong Qingjiang, Beyond the Love–Hate Approach: International Law and International Institutions and the Rising China, 15 CHINA: AN INT’L J. 41 (2017); Potter, supra note 1; SHAFFER, supra note 94.
methodological approach—treating the sovereign state as the unit of analysis. 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, this Article 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 over-generalizing, 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 less extent, higher income; Chinese government officials, much like their U.S. 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, which enables them to define, interpret, and appropriately carry out interactions with foreign 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 obtained advanced legal education in European and U.S. law schools. After years of intensive socialization, many among these two groups have internalized the core elements of international

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.


105. The general framework consists of key elements of Sinicized Marxism and Confucianism.
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. 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 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. Nonetheless, most Chinese non-state-owned firms have proved highly pragmatic and adaptable in finding efficient solutions to their cross-border business problems.

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 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, U.S. and European NGOs (e.g., Ford Foundation and 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. 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.

A. 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

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


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 in Chinese arbitral tribunals. This demand has spurred 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 non-state 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,” who are mostly U.S. 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 arbitral houses will see their influence grow. Meanwhile, the reform-minded state actors, due to 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 is among the first group that have signed the Singapore Mediation Convention. 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.

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 of the Law of the Sea. Non-state actors were largely absent in this issue area. While multiple state actors historically played a part in the

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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 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 to the fundamental norms on which the liberal international legal order is premised.

B. Fundamental Norms Underlying the International Legal Order

The rest of this Article 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 earlier, Chinese ruling elites share three basic causal beliefs about law and legal institutions: legal instrumentalism, economic determinism, and linearity of institutional changes.¹¹⁷ Because of these perceptions, the Chinese government has approached international law with mainly its instrumental value in mind.¹¹⁸ 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.”¹¹⁹ Government officials were urged to be

¹¹⁵. Id. at 440.
¹¹⁷. See Section I, infra.
¹¹⁸. Creemers, supra note 33.
¹¹⁹. Allison, supra note 92.
“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.” 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. 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 the interests of Chinese outbound investors. 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.

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

120. WILLIAMS, supra note 95.
122. Id. at 210-13.
123. Shaffer & Gao, supra note 98.
124. Potter, supra note 1, at 708-09.
125. Id. at 702; WILLIAMS, supra note 95, at 10.
126. Qin, supra note 21.
127. 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, 3 (2019).
129. Zeng Lingliang (曾令良), Guoji Fazhi yu Zhongguo Fazhi Jianshe (国际法治与国内法治建设) [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. China], no. 10, 2015, at 135; Han Yonghong (韩永红), Guoji Fazhi de Zhongguo Biaoda—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. R.], 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
specific and non-static, 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. 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,” 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. 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. With that ontological postulation, a great deal of the Chinese scholarship on international law has been either thematically critical or substantively doctrinal. Due to the urge to “garner state patronage, which is a prerequisite for funding, publishing, and policy impact,” 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 hegemonic world order and how to expand China’s discourse power in the epistemic community of international law.

in International Rule of Law], Zhongguo Shehui Kexue (中国社会科学) [Soc. Sci. China], no. 10, 2015, at 159, 167; Pan Wei (潘伟), 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 Wenzhao, supra note 2, at 10.
130. Zeng, supra note 128, at 146.
134. Erie, supra note 133.
135. Id. at 64.
136. Id. at 68-69 Yang Zewei (杨泽伟), Gaige Kaifang 30 Nian Lai Zhongguo Guojia 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],
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. Sinicized Marxism now furnishes mainly a set of causal beliefs and worldviews linking the material world with metaphysical institutions such as the international legal order. 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. Hence, Chinese international law scholarship has added marginal theoretical value beyond neo-Marxism, legal realism, and other branches of critical legal theories. A keen observer of Chinese international law scholarship recently lamented the field’s theoretical impoverishment.

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, arguably offers an alternative model (also known as the China model, or the Beijing Consensus) for some states to resist liberal democracy, which might indirectly erode key international legal norms. However, China under Xi’s leadership has been steadily reverting to prototypical authoritarianism and cult politics, and as such the China model, for its lack of long-term stability and resilience, is losing its credibility and persuasive power. The plummeting public opinion toward China

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138. Eric, supra note 133, at 64-65.


140. Eric, supra note 133, at 68.

141. Id. at 66.


144. Weiss, supra note 137, at 95.


146. Düben, supra note 66, at 122-23.

around the world serves as a good illustration.  

In short, Sinicized Marxism, or China exceptionality, has guided Chinese interactions with the international legal community, and, as a result, it has had very limited impact on the international legal order at the fundamental normative level. Of course, the Chinese government has taken proactive measures to shape certain international law discourses, “strengthening its control and influence,” 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 priorities.” The government also implements socialization and training programs to spread its knowledge and norms to Global South states, where it has found “generally positive reception” among the ruling elites. And after the 19th Party Congress in 2017, the CCP has “sent international propaganda delegations abroad to introduce its programmes and opinions.” It is likely that the Chinese government’s “norm entrepreneurship” will continue and be more impactful. 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, rather than a coordinated offense that formulates a


149. 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. China], no. 2, 2012, at 127, 128; He Zhipeng, supra note 133, The Chinese Expression of the International Rule of Law, at 181-82; Song Yanbo (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 Yindui: Jianlun TPP de Zhongguo Lichang (国际经济法治格局的研判: 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. R.], no. 1, 2016, at 43, 50-51.

150. Han, supra note 129, at 182.

151. 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. China], no. 9, 2015, at 128, 129.

152. Potter, supra note 2, at 710.

153. Lina Benabdallah, Contesting the International Order by Integrating it: The Case of China’s Belt and Road Initiative, 40 THIRD WORLD Q. 92 (2019).


155. Yan, supra note 139, at 6.

156. CAI, supra note 100, at 10.

coherent normative alternative. Recent research confirms the lack of zeal for the Chinese government to export its legal institutions absent such threat or criticism. 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.” 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.” 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 dictatorship in the past decade and stringent government censorship add to the challenge of that task.

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., 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 Article, 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,” or propose incremental reforms; in other areas, it will likely embrace the Westphalian principles coalescing around sovereign supremacy.

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159. See, e.g., Matthew S Erie & Do Hai Ha, Law and Development Minus Legal Transplants: The Ersatz of China in Vietnam, 8 ASIAN J. L. & SOC. 372 (2021); Kim, supra note 90.
161. Schweller & Pu, supra note 137, at 54.
162. Erie, supra note 133, at 69.
164. Id.; Weiss & Wallace, supra note 3, at 657.