Duality and China's Struggle for Legal Autonomy

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In a powerful speech to celebrate the 40th anniversary of China's reform and opening-up policy, Xi Jinping declared: "We must resolutely reform what should and can be changed, and we must resolutely not reform what shouldn't and can't be changed" (*gai gai de, neng gai de, women jianjue gai; bu gai gai de, bu neng gai de, jianjue bu gai* 该改的，能改的，我们坚决改；不该改的，不能改的，坚决不改). (1)

Xi's speech captures and explains the dilemma in which, on one hand, China has initiated the most repressive campaign against political dissidents, real or perceived, as show-cased in the continuous crackdown on lawyers, journalists, religious believers, and civil society activists, among others; and, on the other, has jump-started the most systematic and structural legal reform, unprecedented since Chinese reform started 40 years ago. Xi's speech also reflects the duality of Chinese reform: sustaining and strengthening the political system with the leadership of the CCP at the core and liberalising the economic and social system.

China continues to face and struggle with a dilemma similar to that observed by Roberto Unger four decades ago: economic development demands certainty and rule-based governance, but political control necessitates flexibility and political expediency (Unger 1976). Politically, China has turned decisively toward an illiberal and anti-liberal order, with further concentration of political power reflecting the true nature of a well-disciplined and well-ordered Party-state, as Lenin originally designed. Socially and economically, vibrancy has continued in the private sector and semi-autonomous social spheres; both under the guiding hands of the Party, of course. Yet, despite the recent overreach of the Party-state and attempts to restrain the private sector and narrow social space, China's semi-autonomous social and economic spheres remain resilient. While the mighty Party continues to shape and direct those semi-autonomous spheres, it has shown a degree of deference to profit-driven market logic and the spontaneous order of society.

Dual state theory, which unfortunately originated in, and was based on, the political practice of Nazi Germany, has been used to conceptualise authoritarian legality and guide our understanding of China's political and legal development (Fraenkel 2010; Schmitt 2005). There is a prerogative state in which authoritarian leaders rule hands-on according to political expedience, but leave conventional matters to regular legal rules. In the Chinese case, the duality in the political economy makes a dual legal system. As neo-authoritarianism advances, the Party moves to the front stage and becomes hands-on in managing important affairs, crowding out legal rules and institutions. It has expanded and solidified a prerogative state to solve politically sensitive matters through substantively extra-legal methods. Media governance is, except for a limited range of private law issues, entirely in the hands of the Party to be handled politically, leaving the state little role to play (Lei 2018; Stockmann 2013). Since the end of 2018, in the name of restructuring Party-state organs, religious and ethnic affairs and a few other subject matters have been effectively wrestled away from the hands of the state. In regulating the media, religion, and ethnic affairs, the law is now silent, and the irrelevance of law over the mass internment in Xinjiang offers a perfect example of an exceptional state at work. The newly created exceptional items are added to a long list of sensitive matters over which law and legal institutions have little control, ranging from collective/mass disputes, terrorism, and national security, to major corruption (Pils 2019).

In the shadow of, but largely parallel to, the extra-legal regime, there is a normal legal system, less politicised, reform-oriented, and semi-autonomous, which continues to evolve toward maturity and grow in institutionalisation and sophistication by offering rules-based solutions to a wide range of social conflicts. Private law in post-Mao China has prospered, growing in form and substance toward a global converging path. In solving ordinary cases relating to the bread and butter issues of ordinary people, the court operates in a large realm of freedom within the parameters set by the Party while factoring political considerations into the exercising of judicial discretion. Among others, He Xin's research on courts in general and divorce litigation in particular (He and Lin 2017a, 2017b) offers illuminating examples of this point. Even the police, the traditional arm of Party repression, are showing more deference to a trial-centric legal process (Guo's article in this issue; see also Nesossi and Trevaskes 2018; Lewis 2011).

How to explain the co-existence of two parallel and potentially opposite norms, institutional designs, and practices? For the Party-state, the prerogative state is necessary for the maintenance of order and stability in the normal state, and without the extra-legal power of the Party in the background, and increasingly in the forefront, any legal normalcy that people desire and the market demands will collapse. There has always a siege mentality in China's Party-state, and it has been gaining new momentum in recent years. Indeed, the Party's *de facto* sovereign power is used to keep its challengers, real or imagined, at bay, thus maintaining China's political stability, protected from the threat of internal and external instability.

For its critics, the Party creates and sustains a normal legal system for legitimacy, governance, and economic growth. While there may be little, if any, moral commitment to rule of law, in particular the use of law to curb arbitrary power, a well-functioning legal system renders credibility to the otherwise undemocratic and more than occasionally repressive system. Ironically, China's success in achieving a higher degree of rule by law legitimises the Party-state that is intrinsically hostile to it. The common ground

1. "Xi Jinping: President Warns other Nations not to 'Dictate' to China," *The Guardian*, 18 December 2018, https://www.theguardian.com/world/2018/dec/18/xi-jinping-says-china-is-builder-of-peace-as-he-tries-to-shore-up-confidence (accessed on 4 March 2019).

between the Party and its critics is that the normal legal system in China is not autonomous, and it exists largely, if not principally, to serve a particular instrumental value. If law is simply another tool that the Party uses to govern, the duality is a superficial distinction without theoretical difference, and is bound to collapse for lack of theoretical support.

In the field of Chinese legal studies, there is the methodological tension between research focusing on mainstream legal practices and that focusing on China's exceptionalism. Like the proverbial elephant that was touched by a blind man, Chinese law, reflecting Chinese political and socio-economic realities, takes different shapes. It is highly compartmentalised, and depending on where it is touched, one finds expanding gaps where law is largely irrelevant; legal traps where a thin legal veil tries to cover political repression; and legal practices of varying levels of institutionalisation but largely compatible with counterparts in any mature legal system. Focusing on the stability imperative and the resulting repressive and preventative measures, one sees a clear authoritarian revival and an enhanced Chinese exceptionalism (Minzner 2018; Biddulph 2016); but by shifting attention to routine legal practices and institutional building, one sees commonalities, compatibilities, and convergences of Chinese law in a global context (Liebman 2015; Zhang 2012). This Introduction puts forward the argument that while the Party has been expanding and consolidating an exceptional or prerogative state in China, it has also recognised, and to a significant degree offered protection to, a normal legal system, full of Chinese characteristics, of course. While private law is subject to political control, it has also maintained a high degree of autonomy, which is necessary and indispensable in the current social and economic context. A symbiotic relationship thus exists between the normalcy and its exception, with each depending on the other for its existence. Articles in this special issue encourage an academic dialogue between research on the exceptional state of affairs and that on routine legal practices.

The resurgence of the prerogative state

The metaphor of "turning from law," coined by Minzner (2011), well captures the decline of the normal legal system and the rise of a Party-dominated, politicised regime of extra-law. There are different ways to conceptualise a dual state, and it is tempting to refer to Walter Bagehot's division between dignified institutions and efficient institutions in the English Constitution to explain the Party and law's relevance to each other in China (Bagehot 1963). For Bagehot, the English constitutional order operates on two layers. In the shallow layer, "dignified" institutions such as the monarchy and the House of Lords perform ceremonial functions and capture public attention and imagination, creating legitimacy for the regime (*ibid.*: 61). In a deeper layer, "efficient" institutions, composed of modern state organs such as the Cabinet and the House of Commons, exert real political control (*ibid.*: 66-9). In the English case, the dignified institutions create a degree of legitimacy and are also able to hide the exercise of real power from public purview. The dignified and efficient institutions work seamlessly in forming a "dual government" structure that offers both effective and legitimate governance (*ibid.*: 263).

Seen from Bagehot's perspective, one may be tempted to argue that law in China serves ceremonial functions to create public confidence in the Party's ability to adapt and change, and through legal discourses and rituals, to divert the people's critical attention away from the Party that wields real power in the shadows. This is, of course, not to say that law is a mere puppet of the Party to be used to cover up and legitimise the Party, or that the Party is entirely invisible to the critical gaze. The salient point is that the dignified institutions, i.e., legal institutions in China, interact with the Party organs, the Chinese equivalent to the efficient institutions, in a dynamic and occasionally contradictory relationship to produce legitimate and effective governance. Law is not mere window dressing: legal institutions make, and are seen to have made, significant decisions, with the Party surfacing from time to time from the deeper structure to assert open and direct control.

Under Bagehot's framework, the CCP would be bound to act as a normal majority party in the Westminster system, wielding political power through a parliamentary system. But the CCP does not always hide behind dignified institutions and is far less patient than its English counterpart with ruling mainly, if not exclusively, from the shadows of efficient institutions. The CCP has always ruled directly, hands-on, in some key policy areas, to the exclusion of the dignified institutions. In other words, the dignified institutions in China, if they may be referred to as such at all, don't always enjoy dignity.

If Bagehot's conceptualisation can be used to envisage a deep state scenario, where law occupies a shallow horizontal plain and Party rules operate at a deeper structural level, the dual state theory, from a Fraenkelian and Schmittian perspective, envisages horizontal compartmentalisation – a design that allows the Party to silence law, crowd legal institutions, and govern exclusively on its own in some fields, with or without some legal trappings.

Legality, even a thin conception, ties the hands of autocrats, with the result that those autocrats may find it necessary to rule directly and extra-legally (Wang 2015). In some specific areas, which include state security but go far beyond national security, in a prerogative state ordinary legal rules are shoved aside, legal institutions are displaced, and rule of law is openly trumped by political considerations in practice if not in name.

The boundary between what is prerogative and what is normal is intentionally obscured, and sovereignty decides when and where one ends and the other starts. Every contention is potentially political and falls within the jurisdiction of the prerogative state. The Party, following this two-state conceptualisation, is hands-on in countering certain political threats, and in so doing excludes, or at least significantly marginalises, legal rules. That duality is nothing new to China, of course. Schmitt as a theorist may have been introduced to China late, but his core conceptualisation of sovereignty, the enemy, and the distinction between normal and prerogative states resonates with the Maoist theory of contradiction and legal duality. That particular dualism relied on the classification of the people and their enemies, and an institutional design of democracy and dictatorship that handled contradictions among the people, on the one hand, and contradictions between the people and their enemies on the other (Brady 1982; Clarke and Feinerman 1995).

As the enemy and people distinction, and the related rhetoric, faded largely into the background, Chinese reform gathered momentum. But that rhetoric didn't disappear and has surfaced powerfully with the emergence of periodic crises such as the 1989 bloodshed in Tiananmen Square; the 1999 suppression of the Falun Gong movement; and the 2009 *de facto* martial law imposed in Xinjiang. Each political crisis generates its Schmittian moment in China, accumulating over the decades to fortify an exception state, and it has become crystallised and institutionalised under Xi's leadership (Fu and Zhu 2018; Pils 2019). In comparison with the dualism of the Maoist decades, where a legal order was largely absent, the new duality manifests itself as a division of labour between the political sphere directly

dominated by the Party and a legal sphere with a degree of autonomy operating in the long shadow of the Party. Articles in this Special Issue touch on the prerogative state: Lin's chapter questions the new leftist constitutional theory that elevates the Party to the commanding height of sovereignty, with overriding constitutional authority over the state; he also critically examines the dual state theory as it is applied in the Chinese case (Jiang 2014; Li 2015), questioning its explanatory power when the Party has moved decisively to the front stage, as the example of the State Supervision Commission shows.

The enemy looms large in an authoritarian state, and as mentioned earlier, a politicised, repressive system is often set up side-by-side with the ordinary criminal justice system to pre-empt and punish political, religious, and ethnic dissent (Bakken 2005; Fu 2012). That system, mentioned above, was partially legalised in the 2012 reforms to the Criminal Procedure Law (CPL) (*Zhonghua renmin gongheguo xingshi susongfa* 中华人民共和国刑事诉讼法) and targeted mainly major corruption (through the Party's disciplinary machinery, now fused with the State Supervision Commission, described in Feng Lin's article in this issue); labour activists such as Zhen Feiyang (Franceschini and Lin's article in this issue); and human rights lawyers (Liu, Hsu, and Halliday's article in this issue). Through repressive measures, the Party-state has been colonising the already limited social space and sending signals that it may be aiming at total, if not totalitarian, control.

Another development is the further extension of Party control over State-owned enterprises (SOEs) (Leutert 2018), and to a lesser degree over private and foreign enterprises (Zhang's article in this issue). As Zhang argues, while the Party had always used its political power to wrestle market institutions, the Xi government has been most concerned that control over the economic sectors, the SOEs in particular, may be slipping from its control. The Party prescribes the toughest medicine to cure what it perceives to be market failure – imposing and re-imposing direct Party control over decision-making within the enterprises. The scheme is still unfolding, and it remains to be seen, as Zhang notes, whether Party's politics will tame or destroy the market.

In this increasingly Schmittian world, how should China's rule of law project be assessed? With the Party's political power expanding exponentially, is there a higher degree of autonomy in private law in China? Given that China's well-known duality in economic growth takes place side-by-side with political restriction, the intention may be to quarantine political crackdowns in public law zones and leave private law breathing room to facilitate market transactions. After all, is autonomy of private law ever possible in the Schmittian conceptualisation of the dual state, and will the fragile autonomy of private law in China be able to survive the sustained assault of the prerogative state?

Authoritarian legality within the dual state context

The Chinese authoritarian regime has been qualified by many adjectives, ranging from consultative, transparent, responsive, and participatory, to competitive, all used to characterise a hybrid regime with softened authoritarian edges in the political system (Levitsky and Way 2010). Under Xi's leadership, the authoritarian system has increasingly become legalistic and characterised by reference and adherence to formal rules and procedures. That process is often referred to as legalism or authoritarian legality – defined as "a willingness to both operate in accordance with the written law and to strengthen the institutions charged with its enforcement" (Zhang and Ginsburg 2018: 3). The sense of legalism or legality permeates the entire Party structure, and to quote Zhang and Ginsburg again: "Even if China is deepening its dictatorship, it is nonetheless doing so through harnessing the organisational and legitimising capacities of law, rather than circumventing it" (*ibid.*). Even China's most repressive and most powerful institutions are wrapping their exceptional power in a thin veil of legality (Fu 2017). The Party-state has discovered the empowering aspect of legality, and has rushed to put it into action under Xi.

Using law to empower the Party-state in general and the repressive arm of the Party-state in particular is a new endeavour. It was not until 2012, when the CPL was further amended, that the Party-state found the confidence and resolve to formally and openly legalise extraordinarily repressive measures. While repressive powers abounded in China, they were rarely legalised in much of the legal reform era. After all, laws in authoritarian states have the symbolic function to declare what to aspire to in a future Utopia (Ginsburg and Simpser 2014). Law must "be useful" (*haoyong* 好用) and also "look good" (*haokan* 好看), and in the Chinese case, a "good-looking" law demonstrates sincerity, generates good will, and brings credibility to the Party for its aspirations (Gallagher 2017; Solomon 2015).

But over the decades, an incremental change has taken place. Law's symbolic function is in steady decline and its instrumental value is sharply increasing. Take the police power to detain, for example. The police have the power to detain suspects for 30 days. But the 30-day detention rule could not satisfy the time needed to interrogate suspects in sensitive cases – political dissidents, for instance. To hold them longer, the security police had to distort the residential surveillance provisions (*linshi juzhu* 监视居住), a community supervision mechanism designed mainly for minor offence suspects, to detain political and religious offenders for up to six months.

This open distortion caused much legal controversy, and in 2012 the CPL was further amended. The NPC created a power of "designated residential surveillance" (*zhiding linshi juzhu* 指定监视居住) for three types of offences: terrorism, national security, and major corruption, thus legalising the extra-legal practices.

The psychological barriers to not passing repressive laws were removed. The practical benefits of a legally empowered dictatorship are easy to see. It was under Xi that China passed repressive legislation that earlier generations of leaders were reluctant to promulgate because it wasn't "good looking." It takes a powerful leader with resolve to achieve that agenda, and under Xi, the Chinese NPC and its Standing Committee passed a series of security-related laws, on instructions from the Party, that were not put on the legislative agenda by the NPC itself. The end of constitutional term-limits and the creation of a Supervision Commission that is legally placed under tight Party control were other examples of authoritarian legalism.

Lin Feng's essay discusses the fusion between Party rules and state laws, focusing on two dimensions of China's authoritarian legality. One is the massive effort to formalise Party regulations and rules to create a parallel normative order under the Party. Following the example of the state in cleaning up the legislative field in the post-Legislative Law era, the Party in the Xi era launched a campaign to tidy up Party rules to make them more "law-like" in both making and implementing Party rules. Indeed, as Lin notes, Party rules have become topical research that is well-funded, institutionalised, and hotly pursued. Second is the preparatory work, at both the rhetorical and practical levels, to elevate Party rules to the status of state law and treat them as such. Within less than five years, the position that

Party law is part of China's rule of law has evolved from heresy to mainstream viewpoint, and the successful fusion of the Party and the state in the State Supervision Commission has showcased Xi's neo-authoritarian legality at work.

China's increasing micro-management of Hong Kong offers another case study of authoritarian legality as a governance tool.[2] Through what Han Zhu refers to as "aggressive legality," China has effectively used legal instruments provided for in the Basic Law to neutralise political resistance and to stifle independent voices in Hong Kong. Through the handing down of legislative interpretations and promulgating decisions, the central authorities have been able to maximise control over Hong Kong while at the same time maintaining a high degree of legality and credibility through legality, at the cost of Hong Kong's liberal legal order.

Duality and the semi-autonomy of private law

To what degree can a normal legal system, in the Fraenkelian sense, exist and survive the assault of the expansive and assertive prerogative state? If the boundary between the norm and exception cannot be effectively policed, the enterprise of a dual state will collapse. Strong evidence exists to show that repressive measures of the exceptional state cannot be effectively sealed off, and they leak to the other side, creating contamination in the normal system. Repressive measures against the Falun Gong spiritual movement and underground Christian churches necessarily create a chilling impact on all religious practices (Yang 2005; Wang 2017); the prosecution of human rights lawyers has placed the entire legal profession, bar associations, law firms, and individual lawyers alike, on notice (Fu 2018; Fu and Zhu 2018; Pils 2018); and as the Xinjiang internment case shows, exceptional measures that were initially limited to terrorists can spread quickly and be used against society as a whole. How strong is a normal legal system in resisting the overreaching of the exceptional state? If the repressive arm and the legal arm are merely different tools at the disposal of the Party in extending its control, then what is the point of seeing them as a duality? There are good reasons to doubt whether China has a normal legal system as the term is understood.

My response is that there is a duality in the Chinese legal system, and after 40 years of legal reform, there is a private law system that has become professionalised, institutionalised, and semi-autonomous. Parallel to a highly politicised and highly unpredictable prerogative system, there is a normal legal system in operation, offering a high degree of predictability and certainty for the parties using it.

China has an entirely different political environment to that of the Weimar Republic, from which the dual state theory of Carl Schmitt was developed. The Party has been firmly in charge since 1949, and China does not have pluralistic forces from within to challenge the sovereignty of the Party. The context of a collapsing Weimar Republic in which Schmitt developed his total, if not totalitarian, state was entirely different. Chinese sovereignty is not up for grabs, and the Party is comfortably in charge. China has evolved away, in its typical zigzag fashion, from a total/totalitarian state towards controlled pluralism and managed autonomy in the social and economic sectors. The Chinese Communists were building a normal legal system on authoritarian grounds. That legal system is necessarily shallow in its roots and fragile in its existence, but the soil for its growth is there.

For 40 years, China has had a vibrant private sector in which individuals have repeatedly traded and interacted with each other with a high degree of freedom and autonomy. A large body of private law has been created to facilitate and regulate social and economic activities. While lagging behind social and economic changes, and sometimes poorly designed and frequently ill-implemented, those legal rules have been well accepted and have gradually become routine social practices, forming part of a spontaneous order. Contract responsibilities, tortious liabilities, and private property are well-accepted, taken-for-granted norms and have become indispensable in guiding social interactions and economic transactions, forming the normative foundation for economic exchanges and social interaction, and offering institutionalised mechanisms for dispute resolution.

The autonomy is determined by the nature of private law, which transcends regime type once it is in operation. Ernest Weinrib refers to it as corrective justice, void of external collective purpose. Unlike issues of distributive justice that require the state to balance conflicting interests and make a value judgment as to the criteria for assigning resources, corrective justice issues, according to Weinrib, do not require the determination of an external collective purpose (Weinrib 2012: 210-2). For contract law, since the contract must be made freely and must be enforced – or else there would be no transaction and no market – private law must allow each party to pursue his/her own goals and protect the equal standing of the parties. It therefore often only concerns the immediate link between the parties with no external collective purpose (*ibid.*: 212-3). Private law cannot be separate from the interactions it regulates (*ibid.*: 204-6).

Once a market economy takes off, actors with free will participate in market transactions, expecting and demanding legal enforcement of contracts and protection of private property as an essential aspect of the market. Society also becomes plural, and conflicts multiply, all requiring a legal system that is perceived as fair, predictable, and authoritative. As Franceschini and Lin's article illustrates, there is a strong demand for rights and fairness among workers (Lee 2007; Ngai 2016). If the existing law and legal design are perceived to be narrow, ineffective, or otherwise not credible to meet the demand of ever-increasing rights awareness, workers, with the assistance of labour NGOs, will bypass existing legal institutions and bring their grievances for extra-legal resolution (Fu and Distelhorst 2018). In accepting the existing political system, as the authors hint, the only viable resolution for labour disputes in China is to re-design the existing labour legal system to legalise workers' right to fair and effective bargaining in formulating their labour contracts. Liu, Hsu, and Halliday's article also makes a similar argument: liberal-oriented lawyers use law, as either a shield or a sword, in their struggle to protect basic legal rights and freedoms within China's authoritarian political framework, but the legal systems' failure to meet that elementary legal demand is likely to lead to an escalation of legal contention and politicisation of rights.

Professionalism also matters in maintaining private law autonomy in China. A legal system has its own institutional characteristics and prospers only when it pursues its unique institutional objectives. Proceduralism, professionalism, and rule-based decision-making are the comparative advantage of courts in competing with other political institutions, which legal institutions work to establish. Reflecting and reinforcing a vibrant private social and economic sector, legal actors, including those in an authoritarian state, would be incentivised to make its private law autonomous and effective so as to safeguard their own institutional interests and reinforce their professional identity. Over the past 40 years, the growth in Chinese

2. See, for instance, *China Perspectives* 2018/3 special feature "Twenty Years After: Hong Kong's Changes and Challenges under China's Rule."

contract law, tort law, marriage law, and company law – including legal rules, procedures, and institutionalised practices – offers ample evidence to support a general autonomy thesis, according to which the courts demonstrate their ability to absorb and internalise political commands, and factor in political concerns through the exercise of legal discretion. In the Chinese case, while private law operates within an authoritarian political system, and receives and submits to occasional political intrusion, it is based on certain social and economic practices that develop their own rules and structure and maintain their autonomy and integrity.

The autonomy of private law does not mean that is isolated from society and politics. First, being autonomous does not mean that private law is detached from social reality and non-political; it does not prevent private law from engaging in social justice and public interest (Weinrib 2012). Public interest law, based on private law rights, such as consumer protection or gender equality, while having been subjected to government restrictions, has survived authoritarian repression and remains alive. Feminists and labour activists have been struggling persistently for equality rights for decades, based on the civil law right to personality. After continuous litigation, media mobilisation, and political lobbying by both state and civil society actors, the SPC has finally created a new cause of action for equal employment and sexual harassment,[3] paving the way for another likely round of socio-legal mobilisation for equality rights, gender equality in particular, in China.

Second, autonomy is, of course, a relative term, and under the leadership of the Party, which is often regarded as both absolute and omnipresent, private law is consistently subjected to the political imperatives imposed on the legal system. Therefore, there is a large body of legal norms, properly made, public, and self-referencing, to govern social and economic activities, but the Party can always intrude and damage its integrity. The Hero and Martyr Provision (*Zhonghua renmin gongheguo yingxiong lieshi baohufa* 中华人民共和国英雄烈士保护法), suddenly inserted into the Chinese Civil Law (Article 185) to offer blanket legal protection of the right to reputation to anyone who had been officially named a revolutionary hero or martyr, and subsequent legislation to offer comprehensive protection,[4] is regarded as a significant modification to the equality doctrine in civil law, and a political intrusion into an otherwise cohesive civil law regime (Pils 2019). Chinese legal reform has rich and thick procedures and rules of evidence, creating a prototype of proceduralism to follow in bread-and-butter cases. Yet, once disputes become collective, presenting a threat – real or imagined – to public order and social stability, they mutate into cases of great political concern, and the courts, under political pressure, immediately put legal procedures aside and elevate an ordinary type of case for extraordinary treatment. China has been designing a company structure to improve its corporate governance, desperately trying to learn "best practices" from both civil and common law jurisdictions. Yet, the sudden requirement to set up a built-in Party leadership that fuses political and executive decisions, paralleling the political system, risks undermining the already fragile corporate structure, as Zhang's article in this issue and other studies amply demonstrate.

Can law re-shape the Chinese Leviathan?

Even in sensitive areas of public law, such as judicial review in general and judicial control over interrogational torture in particular, legal doctrines and institutions have been in steady development to empower judicial control over the government, including the police. Indeed, while constitutionalism has become a taboo topic, and scholars have moved away from hard-core constitutional questions, a vibrant discussion is on-going to explore the possibility of implementing constitutional rights in ordinary legislation. But can the normal legal system create an impact in shaping exceptional, repressive law?

Having accepted the possibility of a semi-autonomous sphere for private law to provide corrective justice, is it possible to go one step further to develop a distributive impact? Can private law moderate centralised power and soften its authoritarian edge? There has been a long-standing expectation/wishful thinking, among human rights lawyers and liberal leaning reformers in particular, that law reform will have a liberalising and emancipatory impact on the authoritarian system. That hope had been dashed over the past five years due to a renewed assault on liberal ideas and further entrenchment of authoritarian rule. But given my analysis on the autonomy of private law and resilience of a normal legal system and the large context of duality, do we have to give up on the law's potential to engender change?

While the repressive system leaks into and adversely affects the integrity of the normal system, as mentioned above, there is also evidence of a positive influence in the other direction. It is well known that the legal procedures in anti-corruption investigations have had a certain impact in offering the Party a model for redesigning its powerful, extra-legal, disciplinary mechanisms (Fu 2017). The Party learns from the legal system how to make rules, implement rules, and take rules and procedures seriously. Criminal defence lawyers apply aggressive strategies developed in defending regular cases to exceptional cases, major corruption cases in particular, posing a major inconvenience, if not a challenge, to the Party's secretive detention regime. When judicial activism creates an impact by preventing interrogation torture in ordinary criminal cases, the impact is highly likely to be felt by those who may resort to torture in those extraordinary cases. The trial-centric system that the Party is promoting is likely to have some impact on controlling some of the excesses of the exceptional regime.

Two articles in this Special Issue offer some evidence of law's liberalising potential to limit state power. Guo Zhiyuan's article deals with two aspects of the criminal justice system that have direct bearing on the dual state: interrogation torture and judicial control of torture. The former relates to what is often perceived to be at the core of an authoritarian regime, where torture is sanctioned to force public confessions; and the latter to a core liberal institution designed to allow the court to control the repressive arm of the regime. Guo's article confronts the questions: How big a problem has interrogation torture been in China? How effective has the newly designed exclusionary rule been, and could be, in reining in interrogation torture? Indirectly, her article touches on the core question: What is the political function of the judiciary in holding the government to legal accountability?

Likewise, the article by Cui, Cheng, and Wiesner uses judicial review of government actions, with a focus on doctrinal and institutional changes, as an indicator to measure the governments' attitude towards the rule of law. As the authors point out, those changes have the potential to further empower the courts and to motivate judges when deciding lawsuits against the government, potentially sending out a political message that the court has a more activist and forceful role to play than before in holding the gov-

3. Notice of the Supreme People's Court on Adding Causes of Action in Civil Cases (Zui gao renmin fayuan guanyu zengjia minshi anjian anyou de tongzhi, 最高人民法院关于增加民事案件案由的通知), http://www.law-lib.com/law/law_view.asp?id=637239 (accessed on 1 March 2019).

4. Law of the People's Republic of China on the Protection of Heroes and Martyrs (Zhonghua renmin gongheguo yingxiong lieshi baohufa, 中华人民共和国英雄烈士保护法), http://www.npc.gov.cn/npc/xinwen/2018-04/27/content_2053965.htm (accessed on 1 March 2019).

ernment legally accountable. Again, as Guo's article implies, the Cui, Cheng, and Wiesner article also rests effective judicial review on the availability of a strong political view to support a particular mechanism that actually bites.

No doubt there has been a prerogative state operating in China, either entirely outside the legal system or with a thin legal veil barely covering political expedience. It has become more visible, expansive, and assertive under Xi's rule. Crackdowns on political and religious dissent, reinforcement of censorship, and the highly politicised anti-corruption and anti-mafia campaigns are all powerful examples of an expanding prerogative state. Occupying a politically commanding height, the state proceeds, dangerously, to erode the fuzzy and vulnerable line between the prerogative and normal state and expand indefinitely, threatening to engulf the normal system.

But there is an emerging normal state, with the private law at the core to institutionalise semi-autonomy. Against a repressive political system and a narrowing public law space, private law proves to be resilient. But the semi-autonomous space of private law is a fragile one: it was created by the Party-state for a highly instrumental purpose; it has shallow roots in the Chinese eco-system; and it has been under periodical siege by a suspicious political system. It is the demands from the autonomous social and economic sectors that makes a semi-autonomous private law indispensable. Chinese contract law is an integral part of the market transaction, just as marriage law is embedded in the Chinese family. Private law, as fragile and vulnerable as it is in China, reflects and regulates spontaneous order, and the Party has to show a high degree of deference to, and offer protection for, that order to remain credible and authoritative. On their own, legal institutions have become pivotal points in solving China's private disputes.

Semi-independent of a repressive state of exception, private law in authoritarian China continues to command some respect and maintains a degree of credibility because, while operating in a politicised parameters, it guides people's behaviour, provides some certainty in an area of great social and economic transition, and offers a forum for dispute resolution. It is an integral part of social and economic reform. On occasion, it becomes a useful mechanism to discipline lower-ranking bureaucracies and their functionaries into compliance with rules. The entire legal system is undoubtedly placed under the firm leadership of the Party, but in routine social and economic affairs, the latter mainly sets an elastic parameter in which normal institutions operate with relative autonomy.

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