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Authoritarian Legality and State Capitalism in China

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Abstract

This review addresses three questions surrounding authoritarian legality and state capitalism in China. First, what is legality, and does it exist in China's Leninist single-party state? Scholars who characterize the system as order maintenance find the absence of legality. Those employing dual-state and instrumentalist views of law find partial legality. Scholars promoting the notion of bare legality find complete legality. Second, does authoritarian legality strengthen regime legitimacy? Scholars agree that the state seeks legitimization through its embrace of authoritarian legality. Empirical research tests this claim. Third, is China in transition from plan to market, and what is the role of law in state capitalism? The teleology of the transition paradigm overlooks illiberal underpinnings of property rights and factor markets. Answers to these questions help explain regime resilience, economic growth, economic crisis, and inequality in China. Both the institution of the dual state and the perpetuation of plan elements reinforce state power.

1. INTRODUCTION

Led by a Leninist political party, which reaches from the apex of power to small grids (网格) in both urban communities (社区) and rural villages (村), China presents a hotly debated case of legality under authoritarian rule. In this case, the “party leads everything” by design (Clarke 2022b, p. 552). This article explores the role of law in the underlying structures of the party-state and economy. Legal scholars focusing on the nature of the legal system debate the meaning and applicability of the concept of authoritarian legality. Four perspectives emerge from this review: order maintenance as an alternative paradigm to one based on law; dual state as articulated by Fraenkel [2017 (1941)] and applied to China; instrumentalism associated with rule by law; and bare legality, which privileges the role of law in the people’s democratic dictatorship. Section 2 of this review argues that the dual-state perspective best captures how law can provide for basic order, support economic activity, and even legitimate the regime while simultaneously exercising virtually unconstrained power to repress.

Political economy scholars focus on the nature of property rights and factor markets and debate the extent of transition from plan to market. China’s dual economy (二元经济), embodied in law, enmeshes citizens in separate and unequal urban and rural sectors. Section 3 contrasts economic liberalism as an ideal type—with its focus on free movement of people, secure private property rights, and unfettered markets—with illiberalism, in which property rights are not necessarily private or secure and the state openly intervenes to structure markets for labor, land, and capital. It builds on an emerging literature that highlights the impact of authoritarian legality on high levels of inequality and precarity in the Chinese economy, society, and polity. It argues that the dominant transition paradigm has obscured the role of illiberal law in enacting a dual economic system in which rural and urban workers and land users have fundamentally separate and unequal rights, designed to generate resource rents that accrue to the benefit of the regime.¹ With this shift, the literature departs from the focus on access to justice associated with the transition paradigm. While focusing on structural inequalities of labor and land embedded in law, this article highlights two additional domains as important for future research: (a) evolving governance of public versus private capital and (b) rights to personal data as a new factor of production involving every digitally connected citizen.

2. FOUR PERSPECTIVES ON AUTHORITARIAN LEGALITY

Clarke (2022b) defines any system of legality in terms of rules: the making, enforcement, and following of rules. Importantly, “regulated parties must in principle have the ability to use the behavioral rules to affect the application of coercion to them” (Clarke 2022b, p. 547). In other words, to be legal, rules must hold sway over the changeable interests of the powerful.² Krygier (2021) focuses on “rule of law,” a narrower concept than legality. Krygier (2021, pp. 534–35) identifies the essence of the rule of law in the tempering of power, that is, limiting the “arbitrary exercise of power.” In this endeavor, independent courts play a particularly important role. Nevertheless, for Krygier (2021, p. 533), this ability to limit arbitrariness cannot emerge simply from a checklist of rule-of-law attributes, including rules that are “public, clear, prospective, noncontradictory, possible to perform, reliably administered, etc.” Rather, the whole rule-of-law system, which successfully checks arbitrary power, is greater than the sum of its parts. Indeed, “abuses slip under the

¹ Regime benefits are both institutional, as reflected in sources of fiscal revenue and allocation of expenditures, and personal, as reflected in officials’ wealth acquisition, including through corruption.

² Clarke (2022b, p. 578) distinguishes rights and interests, noting that “rights as they are understood in liberal legal orders are weak or absent in China.”

radar of much conventional rule of law scrutiny, particularly of...the ‘checklist’ kind” (Krygier 2021, p. 545). Liberal rule of law goes even further, placing the realization of individual liberty, private property, and market exchange at its core.

Scholars focusing on the Chinese case disagree about the definition of legality and whether legality can be said to exist in contemporary China. Toward one end of the spectrum, Clarke (2022b) introduces the concept of order maintenance, a system incompatible with legality.³ Related are Cheesman’s (2014) concept of law and order, Krygier’s (2021) notion of illiberal law, and Minzner’s (2011, 2020) account of China’s “turn against law.”⁴ Fu (2019) and Fu & Dowdle (2020), along with Gallagher (2017) and Lee (2007), critically engage the framework of authoritarian legality. At the other end of the spectrum, Zhang & Ginsburg (2019) fully embrace the idea of legality in characterizing the Chinese legal system.

2.1. Order Maintenance

Order maintenance, standing in contradistinction to any system of legality, is an alternative paradigm for characterizing the Chinese system (Clarke 2022b, p. 549). Order maintenance is designed to serve the interests of the Chinese Communist Party (CCP). CCP political-legal committees oversee the system at all levels and hold the “power to dictate specific actions and outcomes” in the interest of party elites. This system integrates roles for the procuracy, public security (police), and judicial administration, rejecting separation of powers. Clarke provides the example of the party secretary of a provincial police force who, as of 2021, served simultaneously as president of the provincial high court. An order maintenance system further rejects judicial independence; courts must uphold the “absolute leadership of the party” (Clarke 2022b, p. 582).

Both within and beyond the courts, Clarke (2022b, p. 563) holds that “concepts of legality and illegality simply do not apply or at least do not aid in understanding.” For instance, although, in principle, petitioning (上访) a government office invokes a state-sanctioned forum for extrajudicial claim-making for redress of wrongs, petitioners who appeal to higher levels are regularly detained in black jails and forcibly repatriated to their home communities, an illegal practice that is widely known and tolerated. Widespread inconsistencies with rules are “features not bugs” in an order maintenance system (Clarke 2022b). Echoing Minzner’s (2011) analysis in “China’s Turn Against Law,” Clarke highlights the ways in which systemic reliance on performance targets for government officials, including within the judiciary, undermine legality. In many cases, in the interest of maintaining stability (维稳) and reducing the incidence of protest and petitioning, lower-court judges issue rulings not on legal merits but in favor of the most disruptive party. “If achieving a higher-priority mandate requires sacrificing a lower-priority mandate—for example, violating a law—that is not only an expected feature of the system; it is a desired feature of the system” (Clarke 2022b, p. 578).

2.2. Dual State

Multiple scholars of the Chinese case engage Fraenkel’s [2017 (1941)] concept of the dual state, encompassing the prerogative state and the normative state, in their analyses of authoritarian legality (Meierhenrich 2018; Pils 2015, 2022).⁵ Whereas Clarke may be read as focusing almost

³Meierhenrich (2018) invokes the debate between Fraenkel [2017 (1941)] and Neumann to critique frameworks that discount the role of law in authoritarian systems.

⁴Hendley (2022) elaborates on interrelationships among these works.

⁵The term normative has two distinct meanings in scholarly context. First, following Fraenkel, the normative state refers to situations in which legal rules hold sway, whereas the prerogative state refers to situations in

exclusively on the prerogative state, Fu & Dowdle (2020, p. 82) emphasize the role of legality in the normative state.⁶ Although the legal system is fragmented, “normal” law is professional and “semiautonomous” and performs the function of dispute resolution based on rules. The party-state relies on this “normal legal system” in part for legitimacy (Fu & Dowdle 2020, pp. 63–64). This perspective identifies law as “a crucial site of contention in pushing back authoritarian over-reach” (Fu & Dowdle 2020, p. 68; see also Meierhenrich 2018, p. 236). At the same time, the authors distinguish a liberal legal order from authoritarian legality. Support structures, including civil society, activist lawyers, and media, play a crucial role in the former, and, although they exist in the latter, they are limited, co-opted, or repressed by the state in expanding zones of exception.⁷ There are tensions in this analysis. As Fu & Dowdle (2020, p. 75) acknowledge, the “difficulty with the dual-state conceptualization is that the line between the normative state and the prerogative state is vague and flexible. . .one knows where the line is only after crossing it.”⁸

Pils (2020) describes this system as “rule by fear,” whereas Sapio (2010) employs Agamben’s concept of bare life to develop a detailed analysis of the state of exception. Rather than focusing on higher-level, politicized threats, Sapio (2010, p. 8) addresses exceptions in everyday spaces, that is, abusive treatment of minor criminals, tolerated by ordinary citizens, as normal management of the “other.” For Sapio, legality itself creates the state of exception. Krygier (2021, p. 547) also invokes Fraenkel’s dual state, with “rule by law for those below” and “untempered power” for those at the top. This conceptualization, in contrast to Clarke’s, recognizes a system of law in the Chinese case. Krygier (2021) describes illiberal law as a system in which arbitrariness is uncontrolled, unpredictable, and “unrespectful.” Power holders face no systematic limits; superiors apply to subordinates rules that are impossible to know, understand, or comply with; and subordinates lack systematic input or mechanisms for appeal.⁹

2.3. Instrumentalism

Moustafa & Ginsburg’s (2008) rule by law offers an instrumental approach, in which the party-state uses law to promote investment and economic growth, exercise social control, supervise its own personnel, and legitimate the regime.¹⁰ Lee (2016) distinguishes between rule of law on the one hand and the Chinese state’s instrumental use of law to achieve policy and political goals on the other. Gallagher (2017) sees authoritarian legality as simultaneously instrumental and real. She observes that “authoritarian legality as an instrumental play for power and political stability is ultimately contradictory; as such, ‘rule of law’ in autocracies is bounded, limited, and unstable” (Gallagher 2017, p. 62). At the same time, authoritarian legality is “more than the instrumental deployment of legalized repression.” Citizens are “active participants of a ‘rights defense

which power holders act with unconstrained coercion. Second, in social science research, normative refers to explicitly value-oriented perspectives on the good society, whereas positive refers to data-driven analyses for description and hypothesis testing.

⁶Clarke (2022a, p. 6), by contrast, points to both norms and institutions in rejecting the application of Fraenkel’s dual state to the Chinese case. He finds a lack of “prior embeddedness” of law in Chinese society and the absence of special courts to try political cases in the contemporary system.

⁷McCann & Kahraman (2021, p. 483) employ Fraenkel’s dual state in a critique of the racialized capitalist legal order in the United States. Their work introduces an implicit debate, beyond the scope of this review, about whether formally democratic and authoritarian regimes belong on a single continuum of “authoritarian legal forms” or are completely distinct regime types.

⁸Meierhenrich (2018, p. 236) describes “life in dual states [as] perched on the precipice between the norm and the exception.”

⁹Krygier (2021, p. 548) is critical of the “confusing paradox suggested by an ‘authoritarian rule of law.’”

¹⁰Cheesman (2014, pp. 104–5) provides a detailed critique of rule-by-law instrumentalism.

movement’...[with] roots in the state’s own recourse to law as a tool of governance...iterative waves of protective legislation encouraged bottom-up attempts at right-protection” (Gallagher 2017, p. 23).

2.4. Bare Legality¹¹

Zhang & Ginsburg (2019, p. 310) depart from the preceding scholarship by identifying a “turn toward law”: “China is deepening its dictatorship...through harnessing the organizational and legitimizing capacities of law.” They identify several notable changes to legal forms that make them more useful as a tool of dictatorship. The first set of changes installs a more administratively professional cadre of judges, while another set of changes appears to empower courts vis-à-vis the government and party apparatuses—with the notable exception of the party’s top leadership itself—in order more effectively to exercise their power. As a result, the judiciary is “a much more effective check against governmental abuse and overreach” (Zhang & Ginsburg 2019, p. 337). They argue that China’s state constitution has become more—not less—important under the Xi Jinping administration and cite as evidence the elimination in 2018 of the constitution’s term limits on the office of president—through formal revision.¹² With the 2018 amendments, the leading role of the CCP now has more explicit sanction in the constitution of the People’s Republic of China. Under Xi’s leadership, the party presents an increasingly public face toward both the international community and nonparty members at home.

Zhang & Ginsburg (2019, p. 312) suggest that political authority is more effective and legitimate when “wielded by a constitutionally sanctioned governmental entity, rather than solely by a party organ.” The 2018 revision of the constitution provides for a new National Supervisory Commission (NSC), which is not accountable to the courts and appears to fuse the former CCP Central Commission for Discipline Inspection (a party organ) with the new NSC (a state organ). The NSC has jurisdiction over “all public employees exercising public power,” including “autonomous mass organizations,”¹³ with its own powers to investigate, surveil, and detain (留置) (Clarke 2022b, p. 566). Whereas Zhang & Ginsburg (2019) see the NSC as an example of legality, Clarke (2022b, p. 567) regards it as an organ that offers “no external appeal,” has “no place for lawyers,” and is “effectively unaccountable.”¹⁴ The party, according to Zhang & Ginsburg (2019, p. 373), “needs a better set of tools.” The authors do not address whether the turn toward law meets these needs, but their assessment suggests that bare legality is an effective tool of dictatorship.

2.5. The Problem of Teleology

Theorists differ in their assessments of the dynamic qualities of authoritarian legality. In contrast to cases of democratic backsliding like Hungary and Poland (de Sa e Silva 2022, Krygier 2020, Laurent & Scheppele 2017), China has experienced more than 70 years of continuous rule by the CCP, one of the longest ruling single parties in the modern era. Scholars debate the nature of legal development in China and whether authoritarian legality holds the prospect of convergence with more liberal, rule-of-law (or even rule-by-law) systems (Nicholson & Biddulph 2008).

¹¹Zhang describes this form as “pure legality” (personal communication).

¹²This begs the question of whether the constitution became important because Xi Jinping used it, or Xi Jinping used the constitution because it was important. For Zhang & Ginsburg, the former appears to be the case.

¹³For example, urban residents’ committees and village committees are “autonomous mass organizations” (Manion 2000, p. 765; Constitution of the People’s Republic of China Article 111).

¹⁴Clarke notes that, formally, it is accountable to the National People’s Congress (NPC).

Clarke (2022b, p. 547) regards interpretations that characterize aspects of China's legal system as immature or aberrant to be misguided. Peerenboom's (2002) claim that China's "immature albeit rapidly developing, legal system. . .is in transition" from rule by law to a thin rule of law is most representative of a kind of teleology that is unfounded in Clarke's view. For Peerenboom (2002), the potential for change comes from the growing awareness and salience of law for Chinese citizens, particularly in the economic realm. Similarly, according to Fu & Dowdle (2020, p. 85), "Ordinary justice in China has improved significantly outside the zone of exception and one might even argue that judging by the courts' adjudication of ordinary civil and commercial cases, China resembles a more mature legal system at least compared with its recent past." This account privileges the role of citizens engaged in legal mobilization, even though civil society leaders are the target of repression (Kellogg 2020). With respect to the zone of exception, "Repressive episodes are recurring events in the post-Mao era, and each generation of communist leaders in China have had repressive moments during their terms and have created their own political enemies" (Fu & Dowdle 2020, p. 70). Thus, repression under the current administration "does not break any new ground." By contrast, Minzner (2020, p. 24) argues that it is precisely the "arrests or lengthy disappearances of key activists," denial of law licenses, and closures of civil society organizations that constitute the "turn against law." Earlier departures from rules-based adjudication to stability-oriented mediation both inside and outside the court system presaged this "turn against law" (Minzner 2011). Section 3 shows how the implicit teleology of the "transition paradigm" shapes scholarly assessments of the nature of factor markets and property rights.

2.6. Normative and Empirical Approaches

Finally, in the literature on authoritarian legality, there is debate over the normativity of the scholarship itself. There is consensus among scholars across disciplines that the party-state seeks to legitimate itself by embracing authoritarian legality (Diamant et al. 2005, Epstein 1994, Fu & Dowdle 2020, Lee 2007, Liebman 2014, Moustafa & Ginsburg 2008, Stockmann & Gallagher 2011, Zhang & Ginsburg 2019). Whiting (2017) employs a quasi-experiment and original panel survey data to provide empirical tests of the relationship between the Chinese state's project of legal construction, measured by public awareness of state-provided legal services, and regime legitimacy, measured by trust in government. Using difference-in-difference, subgroup, and two-stage least-squares analyses, she finds that, by these measures, "state-constructed legal consciousness enhances regime legitimacy" (Whiting 2017, p. 1934). Pils (2020, p. 95) writes of this research that "comments like these stop just short of endorsing 'authoritarian legality' . . . the majority's apparent acceptance of the system is taken to indicate that the system is good, or at least getting better." By contrast, research in the positivist—as opposed to normative—tradition is intended to advance knowledge by showing what is, rather than to articulate a vision of what should be (Cheesman 2014, p. 105). Whiting's (2017) findings would be equally important if the overall relationship between authoritarian legality and regime legitimacy were found to be null or negative. Indeed, Whiting (2017, p. 1927) shows that, for the subset of respondents who actually experienced a dispute (e.g., 14% of a random sample of 638 rural households reported a land dispute), legitimacy as measured by trust in government declines. Jensen & Heller (2003) highlight the importance of empirical analysis not only to build theories explaining the effects of law on social, political, and economic outcomes but also to inform international law-and-development programs.

Krygier (2021, p. 544) emphasizes that illiberal law is "not just a façade"; rather, "law is put to real work" toward "illiberal and authoritarian ends." While Cheesman (2022) associates law and

order with neoliberal government, the following sections explore the “real work” of illiberal law from a political-economy perspective.¹⁵

3. ILLIBERAL UNDERPINNINGS OF PROPERTY RIGHTS AND MARKETS FOR LAND AND LABOR

3.1. Labor

Authoritarian legality plays a crucial role in structuring land and labor markets and in shaping the ability of farmers and workers to use law and courts to defend their rights and assert their interests. Much of the literature has focused on access to justice for aggrieved workers. However, the role of law in segmenting labor markets and perpetuating the divisions embedded in the household registration, or hukou (户口), system is undertheorized in some recent scholarship, even as legality holds important implications for inequality and precarity in China’s socialist state.

The transition paradigm emphasizes the end of the socialist planned economy and the introduction of capitalist market forces to China (Gallagher 2017, Lee 2016). As Gallagher (2017, p. 2) writes, “During the first three decades of China’s reforms, workplace institutions were bifurcated, dividing up workers based on their hukou status. . . China’s central government has now rejected this pattern of urbanization, ostensibly moving toward a development model that is more inclusive, equitable, and sustainable.” However, the transition is partial, leaving structural elements of the plan in place. In particular, the hukou system segments the labor market, entrenching a discriminatory and unequal system embedded in law. Inadequate attention to this feature of the Chinese system reveals the ways in which the transition paradigm may introduce a kind of transition teleology and blind spots in analysis.

Zhu (2003) is one scholar analyzing the legal foundations of structural inequality. Employing the standard of international human rights law, he finds that “the Chinese hukou system is inconsistent with the principle of legality” (Zhu 2003, p. 557). International human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), among others, establish the principle of legality and the standards for freedom of internal movement and residence.¹⁶ International treaties define legality in liberal terms, pointing not only to the specific, narrow criteria of domestic law of the state in question but also to the requirements of a democratic society and legal standards evocative of the thick rule-of-law checklist.

The hukou system was established as a key part of the planned economy, which was designed to extract resources from the rural sector at below-market prices to generate rents controlled by the state in the urban sector. As Zhu (2003, p. 542) notes, the 1954 Constitution of the PRC (Article 90) enshrined freedom of movement.¹⁷ However, in 1958, the Standing Committee of the National People’s Congress (NPC) promulgated the “Regulations on Household Registration,” introducing a legal pillar of the dual economy, which divided the urban (nonagricultural) and rural (agricultural) populations.¹⁸ These regulations, with modifications in practice, remain in force today and determine one’s place of legal permanent residence (Chan 2019, p. 61). Reforms to the hukou system in the post-Mao era have allowed temporary internal migration. Governed by the Ministry of Public Security, internal rural migrants require a “Certificate of Temporary

¹⁵Whiting (2022) offers a critique of neoliberal conceptualizations of China’s party-state.

¹⁶China has signed but not ratified the ICCPR.

¹⁷Freedom of movement was omitted from subsequent constitutions. Zhu (2003, p. 520) notes an unsuccessful 2002 proposal by an NPC delegate to restore it to the constitution.

¹⁸These regulations (条例), passed by the NPC Standing Committee, have the force of law (法律), consistent with the Law on Legislative Procedure (Zhu 2003, p. 543).

Residence” to live and work in a city, and police bear authority to inspect identification cards.¹⁹ Without local, urban hukou, temporary residents are not entitled to the full rights and benefits of urban citizenship. Migrant laborers are “in the city, but not of the city” (Chan 2012, p. 69).

The discriminatory treatment of migrant workers, grounded in the legal distinction between rural and urban, spurred an influential—but unsuccessful—attempt to establish constitutional review through the 2003 case of Sun Zhigang (Aubié & Wang 2016; Dowdle 2012; Hand 2006, 2011; Zhu 2003). Sun was arrested in Guangzhou for carrying neither his ID card nor his Certificate for Temporary Residence and was subject to the Measures for Custody and Repatriation (收容遣送), which “public security bureaus used to enforce China’s residence registration system and to control internal migration from rural to urban areas” (Hand 2011, p. 112). These measures were commonly employed in police sweeps against rural migrants, who would be fined, detained, and sent back to the location of their hukou. However, Sun was beaten to death in detention, and his parents demanded an explanation for his death from various government offices. When they received none, they approached the *Nanfang Dushi Bao* (*Southern Metropolis Daily*), which published an investigative report that went viral.²⁰ Three Peking University law PhDs, Xu Zhiyong, Teng Biao, and Yu Jiang, cited a provision of the Legislation Law to appeal to the Standing Committee of the NPC on the grounds that Custody and Repatriation was unconstitutional. The system of detention relied on State Council regulations, but constitutional provisions mandate that only the NPC can enact measures that deprive people of their freedom (Teng 2013). The activist lawyers received no explicit response, effectively denying the possibility of constitutional review. At the same time, the State Council appeared to respond to the public outcry—what Dowdle (2012) terms popular constitutionalism—by repealing (without explanation) the Measures for Custody and Repatriation. Clarke’s concept of order maintenance conveys skepticism about any notion of constitutionalism in the Chinese case, highlighting the point that the Chinese constitution is not justiciable (Clarke 2022b, p. 571). Nevertheless, the legal effort for constitutional review in the case of Sun’s detention and death is considered the beginning of the rights protection (维权) movement, a major focus of the legal literature on land and labor (Pils 2015).

Pils (2017) portrays Xu Zhiyong’s work on behalf of migrants and others as emblematic of the rise and decline of the rights protection movement over two decades. In 2003, following the appeal for constitutional review in the case of Sun Zhigang, Xu and colleagues founded the Open Constitution Initiative (公民联盟), a rights advocacy organization, which represented victims in cases involving forced eviction, hukou discrimination, and children of migrant workers deprived of education, among other practices constitutive of China’s dual economy. In parallels to crackdowns on nongovernmental organizations in authoritarian regimes around the world (Brechenmacher 2017), foreign funding became a vulnerability, and the Open Constitution Initiative faced legal charges for tax violations, precipitating its closure. The New Citizens’ Movement (新公民运动), subsequently cofounded by Xu and others in 2012, promoted popular, collective rights activism and legal aid support for causes including equal education rights for children of migrant workers. In 2014, after a period of detention for criminal investigation, Xu was tried and sentenced to four years in prison for the crime of gathering a crowd to disrupt public order. The broader 709 crackdown, so named for its start on July 9, 2015, led to the detention of hundreds of rights defense lawyers (Fu 2018). Some targeted lawyers were subjected to residential surveillance in a designated location, a measure available in state security crimes cases, which precludes access to

¹⁹The 2003 Resident Identity Card Law is in principle “an attempt to restrict the power of the police in arbitrary detention” and “specifies the detailed circumstances in which the police have the power to examine ID cards” (Zhu 2003, p. 547).

²⁰The political space to publicize Sun’s case in the media has effectively been closed in the years since.

independent legal counsel (Teng 2019). After his release from prison, Xu continued his advocacy and activism, resulting in charges of subverting state power and a closed trial in 2022.²¹ Pils (2017, p. 151) argues that Xu's fate "calls into question the top-down, incremental reform paradigm long dominant in China law scholarship" but can be interpreted in terms of the dual state. The loss of support structures of the type theorized by Epp (1998) in his study of rights revolutions in democratic regimes further underlines the challenges facing aggrieved parties seeking access to justice in China (Fu & Cullen 2008, 2011).

Thus, a debate has emerged about whether authoritarian legality in the arena of workers' rights has brought about empowerment or precarity. Lee (2016) argues that precarity has increased even in the face of party-state legislation purported to protect workers. Her nuanced position reflects in part change over time in conditions on the ground. In earlier work, Lee (2007) suggests that workers challenge rights violations by employers and labor bureau officials alike using China's illiberal "rule-of-law" regime. Growing rights awareness on the part of workers reveals "dual tendencies" to resolution within the legal system, however imperfect and dissatisfying, on the one hand, or radicalization and protest, on the other (Lee 2007, p. 191). In later work, Lee (2016, p. 317) finds that the "discourse of worker empowerment" has "little empirical support." Gallagher (2017), by contrast, argues that the state empowers workers to mobilize to assert their rights guaranteed in principle by the high standards of the Labor Law.

In political economy terms, rural migrant workers have contributed low-cost labor to the manufacturing, construction, and service sectors, fueling China's export boom in the competitive global market and boosting China's gross domestic product. Rural migrant labor (农民工) refers specifically to workers with rural hukou. "These laborers, though working on urban jobs and residing [in cities], are not considered legally to be urban workers. . . . They are not eligible for regular urban welfare benefits (access to local schools, urban pension plans, public housing, etc.) and other rights that are available to those with urban hukou" (Chan 2010, p. 359). According to Chan (2021, p. 16), 2020 census data show an increase of 156 million floating population in the preceding decade, suggesting that "the social benefits gap in the cities has widened. . . despite pledges to narrow it in the 2014 [hukou reform] plan."

Gallagher (2017, p. 27) argues that labor legislation, beginning with the 1995 Labor Law, represents an "attempt by the state to protect workers and regulate labor markets with standards that are relatively high compared to other developing and developed economies." But as Zhu (2003) emphasizes, low standards for freedom of internal movement and residence create a system of second-class citizenship that fundamentally distorts the labor market.

Lee (2016, p. 320) highlights the "market-driven capitalist" nature of labor dynamics in contemporary China; at the same time, the planned economy is present in the continued bifurcation of rural and urban in the constitution and law. For Lee, labor relations skirt "legality," as indicated by a written labor contract between employer and employee, and embody "vulnerability," as indicated by employer noncompliance with legally required insurance coverage, including old-age, health, and unemployment insurance. However, illegality and vulnerability appear highly correlated with hukou. Reflecting 2014 data, Lee (2016, p. 320) notes that only 38% of migrant workers report having labor contracts, whereas 74% of workers with local hukou report having contracts. Similarly, only 39% of migrant workers have some social insurance coverage, whereas 84% of workers with local hukou have coverage. Lee (2016, p. 321) attributes the "ineffectiveness of Chinese labor law" to the "extreme imbalance of class power," but hukou and class are imbricated in this context. Indeed, Sun Zhigang's case and the media attention it garnered reflect his family's social capital.

²¹ Clarke (2022a, p. 7) argues, contra Fraenkel, that "dissenters. . . cannot take legal norms and institutions seriously as swords or shields."

Sun was a graduate of the Wuhan University of Science and Technology, and after his death, his parents proactively employed the media to publicize his case. This high level of social capital complicates the analysis of class in labor relations. Sun's presumed status as a "second-class" citizen stems from the distinction in Chinese law and practice between rural and urban. In earlier work, Lee (2007, p. 202) portrays law as unifying workers, regardless of hukou, in the "common predicament" of China's illiberal legal system. However, her rich ethnographic evidence highlights the distinction: "We are second-class citizens. . . Migrant workers have no rights at all, because we are not locals" (Lee 2007, p. 198).

The legal division between rural and urban extends across generations through restrictions on the education of migrant children (Friedman 2022, Rozelle & Hell 2020). However, the legal foundations of China's dual society are undertheorized in the literature. Hukou restrictions create separate and unequal education despite the 2009 Education Law, which guarantees the right to compulsory education of school-age children "to enhance the quality of the whole nation." Friedman (2022, p. 66) observes that "migrant children have never been given the right to public education in Beijing (or any other place where they do not have hukou)." Local governments exclude migrant children from local public schools, leaving them to pay for substandard private migrant schools or to live as "left-behind children," apart from their parents, to attend school where their hukou is located.

Although a 2014 State Council Opinion on Hukou Reform merged rural (agricultural) and urban (nonagricultural) household registration and moved toward a more general type of residence permit, the 1958 Hukou Regulations, which have the force of law, have not been repealed. The state has effectively replaced hukou status with a strict hierarchy of urban places, which still limits the ability of rural households to become legal citizens in higher-tier cities where migrant workers are most likely to find jobs and where benefits are significantly better (Chan 2019, Dong & Goodburn 2020). Lee (2016, p. 320) reports that informal—mainly migrant—workers earn only two-thirds the wages of formal employees, "a wage gap that has been found to explain more than half of the overall personal income inequality in urban China." As of 2021, virtually all rural residents participate in rural pension and rural cooperative medical schemes. However, rural welfare benefits remain separate from and unequal to urban welfare benefits, and rural residents continue to experience second-class citizenship (Chen et al. 2021). The "inverted welfare state. . . funnel[s] public resources to the pinnacle of the spatial administrative hierarchy" (Friedman 2022, p. 78). For Friedman, "The implications for educational exclusion and rigidification of the class structure are legion" (p. 78). The inequality and precarity of China's dual society have deep legal foundations. Over the near-half-century characterized as the reform era, neither the transition to "rule of law" nor the transition from plan to market is complete—by design.

3.2. Land

Authoritarian legality similarly plays a major role in structuring land rights, segmenting land markets, and limiting the ability of rural households to use law and courts to defend their claims to land. As with labor, the role of land law in perpetuating patterns of the planned economy is undertheorized in recent scholarship; at the same time, scholars identify incomplete land rights of farm households in China's legal system as a factor in explaining high levels of inequality, dispossession, and protest (Li et al. 2021, Pils 2016, Whiting 2022).

Land law enacts key aspects of the planned economy, even decades after the Chinese system purportedly made the transition from plan to market (World Bank 1996). The Constitution and Land Management Law recognize two distinct types of land in China: rural and urban. Rural land is collectively owned by villages, whereas urban land is owned by the state. Separate and unequal legal regimes govern land-use rights within the rural and urban sectors, respectively. Moreover, the

state holds a statutory monopoly on the conversion of rural to urban land,²² and rural households are not legally entitled to compensation at market value when the state takes their land. Reflecting the legacy of the planned economy, compensation for taking of rural land is legally determined by subsistence or livelihood needs—not market valuation—and the price of providing rural land to the state for urbanization and industrialization is set artificially low, at below-market prices. Thus, in the context of rapid urbanization and industrialization, state sales of land into the primary urban land market are a major source of rents for local officials, a key constituency of the party-state (Ma et al. 2022, Su & Tao 2017, Whiting 2022).

Peng (2018) draws a contrast with the classical liberal tradition to identify the illiberal function of property law in China's socialist party-state. He analyzes constitutional doctrine to argue that it is the state's mission to promote development (industrialization and urbanization) through planning, on behalf of the public, and that state land takings in China are therefore considered to be in the public interest almost by definition.²³ Expropriation decisions are, at root, nonjusticiable (Peng 2018, pp. 253, 263–64). Courts exercise broad discretion in whether to accept administrative litigation over land, and the terms under which rural households subject to land takings can sue the state are restrictive (Mao & Qiao 2021, Pils 2005). Nevertheless, administrative litigation involving land takings appears to have increased over time, as reflected in work by Lieberman et al. (2020). Peng (2018, p. 24) is critical of Western analyses of Chinese takings law, which draw an analogy between the “takings clause” in the US and Chinese constitutions and then find Chinese law to be “ineffective” and “defective” in light of the convergence expected by the transition paradigm. According to Peng (2018), Western scholars assume that a popular notion of public interest, market-based approach to just compensation, and commitment to rule of law—including judicial review—are present in the Chinese legal system and that Chinese takings law should similarly protect *de facto*—if not *de jure*—private property against the grasping hand of the state. By contrast, Peng (2018) shows that Chinese land takings law is illiberal in its design and function.

Although China's property rights are widely regarded as insecure and its rule of law as weak, the country has experienced unprecedented economic growth (Clarke et al. 2008). During the first decade of this century, Chinese cities added the greatest “absolute amount of urban land” of any country in Asia (World Bank 2015, p. 134), putting China at the top of urban expansion globally. Land takings for infrastructure facilitated the construction of a vast national highway system, high-speed rail network, and state-of-the-art port facilities. At the foundation of this mode of development is the illiberal jurisprudence described by Peng (2018).

China presents a puzzle in light of the extensive law-and-development literature, which holds that secure private property rights, enforced by law, are a prerequisite for economic growth (North 1990). Upham (2018) is critical of the second-wave law-and-development movement, what Trubek (1996) refers to as the “project of markets.” Evoking the transition paradigm in its title, “From Plan to Market,” the 1996 World Development Report states, “Property rights are at the heart of the incentive structure of market economies. . . . [F]ully specified property rights reward effort and good judgment, thereby assisting economic growth and wealth creation” (World Bank 1996, pp. 48–49). Upham's critique is based on his assessment that this set of policy prescriptions ignores the complexity of cultures and economies. However, his suggestion that the theory relating secure, legal, private property rights and growth is simply “wrong” is too sweeping.

²²The 2019 revision of the Land Management Law introduces the first small relaxation in the state's complete monopoly over the conversion of rural to urban land, allowing village collectives to sell a limited category of transactable rural collective construction land directly into the urban market.

²³Drafters of the 2019 revision of the Land Management Law, effective in 2020, purport to narrow the scope of takings in the “public interest,” but data are not yet available to evaluate the effect of this claim.

The relevant question is under what conditions North's theory holds. Whiting (2023) examines the state's ability to reassign land rights in the context of revolutionary changes in the technology of production and transportation. She argues that a legal system that facilitates the reassignment of property rights, making certain rights less secure, plays an important and undertheorized role in promoting economic growth in the context of technological change. In particular, the ability to reassign land rights from lower-value to higher-value uses is crucial to transformative development. What the dominant liberal economic perspective misses, according to Whiting, are the challenges in redefining property rights as the mode of economic development changes, for example, as an economy and underlying technology move from agriculture to industry. This transition shapes the nature of demand for and use of land. But those who control land in the old economy may fail to adapt their property use or may resist transferring their property rights for a variety of reasons. Land rights holders in the old economy may lack the skill set to compete or the political power to benefit in the new technological environment. As Coase (1988, p. 14) highlights, transaction costs may impede exchange. Real-world economic actors participating voluntarily in exchange may not respond to the changes in demand for land, leaving a role for the state in reassigning property rights that is more central in theory and practice than recognized by the mainstream literature.

However, within a given mode of production—as within the agricultural sector of the late twentieth century, substantial evidence supports the law-and-development perspective on property rights reform. Implemented throughout China beginning in the late 1970s and early 1980s, the household responsibility system entails the contracting of land owned by the village collective (formerly, the production brigade under the commune) to member households, so that they hold more elements of the bundle of rights over their plots of land.²⁴ Initially, household land contract terms were limited to 1 to 3 years; in 1984, they were extended to 15 years and then, in 1993–1995, renewed for 30 years, a change codified in the 1998 Land Management Law and further elaborated in the 2002 Rural Land Contracting Law. During this period, households enjoyed more security and exercised greater decision making over land use, including cropping, fallowing, and establishing fish ponds and orchards; they gained limited authority to rent their land to others and to derive income from renting out their land. Huang et al. (2008, p. 490) write, “There is little doubt that the changes in incentives resulting from property rights reforms triggered strong growth in both output and productivity” in agriculture. This assessment supports the emphasis on enhancing the property rights exercised by households reflected in the law-and-development literature.

At the rural–urban interface, informal markets in property rights have emerged to challenge the separate and unequal statuses of rural and urban land established in law (Qiao 2017). Minor property rights (小产权) refer to urbanized residential and commercial developments on rural collective land that avoided state land takings and therefore stand in violation of the state monopoly over rural-to-urban land conversion. Minor property rights emerge in various forms, including villages in the city (城中村). These villages in the city perpetuate the divisions of the planned economy in two ways. First, residential buildings on collective land remain in the rural sector, are barred from registration and titling in the urban system, and do not receive the same public goods

²⁴Property rights can be defined as a divisible bundle of rights governing the ownership and control of assets (Alchian & Demsetz 1973). They include the right to make decisions about the use or sale of an asset and the right to control income from the use or sale of an asset. Property rights are more secure to the extent that rights are *de jure* established in formal law and *de facto* exercised in practice. Property rights are considered more complete if the rights holder controls more—rather than fewer—of the sticks in the bundle. Even in systems in which property rights are considered to be secure, a single entity seldom controls all rights to an asset, especially land, which is subject to, e.g., zoning, land-use regulations, and property taxes.

and services that urban communities do. Second, they have become a dominant mode of housing for rural migrants who themselves are not entitled to participate in urban public goods regime because of the household registration system.

At the rural–urban interface, land takings law is illiberal not only in substance, enacting systematically unequal and insecure rights for rural citizens, but also in form, making it difficult for citizens to assert their rights through legal institutions. Rural land takings have been one of the most significant sources of unrest in recent decades, and the state’s use of law and courts to limit and contain the conflict is another major focus of the literature on land (O’Brien & Li 2006, Pils 2005). Law and legal mobilization are part of diverse strategies of “rightful resistance” (O’Brien & Li 2006). Villagers’ legal consciousness and legal mobilization reflect in part the state’s embrace of authoritarian legality and official promotion of legal awareness (普法) through state-run media (Whiting 2017). Based on a representative sample of 1,800 households in 6 counties of rural China, Whiting (2023) reports that 11% of respondents experienced at least one grievance over land in the preceding 10 years and that nearly three-quarters of them took some action to seek redress of their grievances. At the same time, the Chinese state strategically deploys mediation, petitioning, and litigation to deter, atomize, and demobilize aggrieved citizens (Lee & Zhang 2013, p. 1481). Moreover, “the invocation of coercive power is never too far from the realm of possibility” (Lee & Zhang 2013, p. 1491). As established in Section 2, the Chinese state controls legal institutions like courts and petition offices, limiting their role in resisting land grabs even as they help to legitimize state actions.

Scholars also grapple with the normative implications of land takings. Accumulation by dispossession is defined by the use of state power to uproot largely peasant populations, turning land and labor into commodities—a violent process in which they become subject to market forces and the power of state, private, and foreign capital (Harvey 2003). Pils (2016, p. 888) further suggests that, in some cases, takings “have denied evictees dignity, understood as respect for their intrinsic moral worth and moral autonomy, in addition to dispossessing them of their land and homes.” In a parallel to Lee’s (2007) account of migrant laborers’ grievances, Pils finds that the failure of courts to provide redress drives evictees to protest and resistance. Initiatives like the New Citizens’ Movement rally discontented ordinary citizens, including those with grievances over land, to use whatever rights they can claim to defend their interests. The rise and subsequent decline of the rights-protection movement highlight that those who protest risk exiting the normative state and falling subject to the prerogative state.

In their study of inequality in the developing world, Li et al. (2021, p. 134) report that from the late 1980s to approximately 2010, inequality in China increased to moderately high levels by international standards. Whereas elites have been well positioned to benefit from land and real estate transactions, households affected by land expropriation are poorly compensated. Invoking the transition paradigm, Li et al. (2021, p. 149) note, “The incomplete reform of rural land property rights distorts the distribution of income in ways that increase inequality.”

Beyond land and labor as factors of production in state capitalism, the factors of capital and personal data are important subjects for future research. Relevant questions include how governance of public versus private capital and entrepreneurship is evolving, as well as the role of state versus market in assigning and exercising rights to personal data as a new factor of production affecting every digitally connected citizen (Lin & Milhaupt 2021a,b; World Bank 2021; Zang 2022).²⁵

²⁵Emphasizing the role of law in the dual state, Fraenkel [2017 (1941), pp. 186–87] writes, “the field of economics remains the most important domain” for the normative state, which becomes a tool of the regime to govern a large and complex economy. At the same time, the threat of action by the prerogative state is always present, “influenc[ing] the behavior of capitalists and entrepreneurs.”

4. CONCLUSION

The preceding analysis of the literature shows that the party-state enacts a dual state and a dual economy, entrenching systematic, unequal statuses in both political and economic terms. As Thompson (1975) highlights in his analysis of the near-absolutist period of early-eighteenth-century English history, the cases in which the legal system appears to provide justice in accord with legal principles are crucial for the system of authoritarian legality. Sapio (2010) argues that citizens in the normative state feel themselves protected and separate from the other, who is subject to the zone of exception. At the same time, Fu & Dowdle (2020) note that the line between the normative and prerogative state is neither clear nor knowable.

In the economic dimension, land rights and household registration, mutually reinforcing legacies of the planned economy, operate together to entrench duality and inequality. Authoritarian legality enacts and enforces subordination of rural land and labor for the purpose of generating economic rents controlled in part by the state. Urban status, associated with advanced economic development, contributes to performance legitimacy, especially among the privileged urban population.

Three overarching debates emerge from this review of state capitalism and authoritarian legality in China. First, does legality exist in China's Leninist single-party state? Among the four perspectives examined (order maintenance, the dual state, rule-by-law instrumentalism, and bare legality), the dual-state conceptualization of authoritarian legality, encompassing both the normative and the prerogative state, demonstrates the greatest utility for linking theory and evidence. Second, does authoritarian legality strengthen regime legitimacy? There is wide consensus that the authoritarian state invests in the "normal legal system" in part to enhance its legitimacy (Fu & Dowdle 2020). Empirical research demonstrates how state-constructed legal infrastructure and state-inflected legal consciousness are associated with higher levels of popular trust in government, a standard measure of regime legitimacy (Whiting 2017). At the same time, the data show that those aggrieved citizens who seek recourse through the normal legal system tend to lose trust (Whiting 2017). Nevertheless, the dual-state conceptualization of authoritarian legality may help explain the apparent resilience of the regime.

Third, is China in transition from plan to market, and what is law's role in state capitalism? The teleology of the transition paradigm overlooks illiberal legal underpinnings of property rights and markets for labor and land. By statute, regime insiders derive valuable rents from excluding rural migrant labor from the full urban public goods regime and by controlling rural-to-urban land conversion for the urban primary land market. The dual structure of China's political economy contributes to high levels of inequality and unrest, contained in part by the prerogative state. The dual state is multidimensional and mutually reinforcing, politically and economically; at the same time, illiberal law and development generates its own sources of political instability and potential for economic crisis.

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