

The New Tyranny of Rule by Virtue

Normalising alternatives to law as the legitimate basis of power

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[EURICS fellow, Spring 2022]

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In your forthcoming book, you argue that the Chinese Communist Party has turned away not from having laws and legal institutions but from the liberal conceptions of law. What conception is now predominantly shaping China's legal-political order?

Around 2010, the Chinese Communist Party realised it could neither go forward – continue to promote the liberal rule of law principles of the post-Mao reform era – nor go back to the rejection of the very idea of law that had characterised the Mao era. It realised that it would have to change direction, re-conceptualising law as part of its neo-totalitarian governance model.

First, we need to understand why the Chinese Communist Party ever turned *toward* liberal principles of law, such as the idea of 'ruling the country in accordance with law,' written into the new 1982 Constitution. Mao had left China in political disarray and significant economic and social challenges following the decade-long Cultural Revolution. Deng Xiaoping revitalised the law to get the economy back on track and re-establish political control. The reformers experimented with classical liberal economic ideas to boost the economy, introducing laws that re-enabled once-banned private economic activity – contract, property, economic enterprise. To re-establish damaged political authority, the leadership introduced rules that held a promise of order and security to a population that had experienced much chaos. Yet the Party never abandoned the Party-State's founding principles, including the idea of party leadership and 'People's Democratic dictatorship.' This blinded it to one of law's powers: its empowering potential for citizens deciding to take the law and its rights safeguards seriously.

In the reform era, some important laws were introduced to check party-state power. Even when attempts to ensure adherence to these laws failed, they provided a standard of criticism whenever the authorities violated legal rights. China's emergent civil society made increasingly vocal use of these standards. From the early 2000s, this unforeseen consequence of legal revival began to be seen as an unacceptable threat to party supremacy. As a result, the Party turned towards a conception of law meant to render it compatible with autocracy.

The ideas of law and legality that are now being propagated remind many of neither Mao nor Hayek but of Carl Schmitt. For Nazi Germany's foremost legal philosopher, law was important yet always subordinated to political decisions by a sovereign 'controlling the state of exception.' Law is politics, and politics is ultimately about vanquishing one's enemies by whatever means required. This way of thinking takes us back to the idea of a 'People's Democratic dictatorship' with its rigid distinction between friends and enemies, but it gives a much more significant role to the tools of legal governance than envisaged under Marxism or Maoism. This authoritarian idea of law suits the Party better, even though it is ultimately incoherent, because it normalises the practice of combining law and lawlessness, as one of Schmitt's earliest critics, Ernst Fraenkel, would put it.

What does this authoritarian conception of law, emphasising the supremacy of the political decision-maker over the legal process, imply for the fundamental rights written into the Chinese legal system?

These fundamental rights guarantees, such as article 37 of the Constitution safeguarding the liberty of person, have not been removed, and some procedures intended to protect them continue to exist (for example, in the criminal process).

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nor family or friends could reach them. This makes it much easier to torture the suspect, who is entirely in the hands of their jailers. Many human rights lawyers have gone through this experience themselves. By introducing such a special procedure, the legal reform reduced protections introduced since the 1980s (even though these protections, too, were never fully respected).

If this seemed bad enough, in 2018, the Party-State introduced a further law on 'state supervision,' which created a mechanism even further removed from the procedural rights and safeguards available under the criminal procedure law. It wrote into law a long-standing practice criticised as unconstitutional, unlawful, and a state crime. As there was no

legal basis for this practice, one could have expected it to be gradually phased out. But the Party-State is now effectively signalling to its citizens that forcibly disappearing certain kinds of suspects or targets is lawful. These rules violate the constitution and international human rights law. Unfortunately, this argument will not stop the practice because the institutions of the law, particularly the courts, are far too weak to enforce such protective norms. The Party-State rejects the idea that law controls power. Instead, it asserts a conception of law at the service of the Party's fight against China's enemies and treats it as a dispositive subject to being suspended at will.

The normalisation of systematic human rights violations in the name of national security is also happening in liberal democracies. Following the terror attacks of 2015, France introduced emergency measures limiting certain legal protections, which became part of the law. We can observe similar trends in the UK and so on, can't we?

That is true - certain authoritarian practices are being used in liberal democracies. However, a crucial difference between these countries and autocracies like China is that in a democracy, it generally remains possible to criticise such measures and rely on an independent judiciary to raise the question of their constitutionality or to challenge any measures violating human rights. In China, such avenues to challenge state power are severely curtailed, if not simply unavailable. Challenges to the constitutionality of a law, for example, may theoretically be launched, but in fact, all institutions supposedly responsible for upholding the constitution are controlled by the Party. Worse, any expression of criticism of the Party-State reliant on human rights and related principles may attract 'legal' sanctions, such as prosecution for a crime of subversion.

Your question remains extremely important because our liberal democracies are at significant risk from within. As would-be autocrats, many populists participating in the democratic political process tend to resent legal institutions curtailing their powers. This is why Timothy Snyder reminded us after the Trump election that to defend democracy, we must protect the institutions that sustain it, including separation of powers and judicial independence. More widely, we must reflect critically on the idea of 'states of exception' and the flawed argument about the primacy of the political over law, or sovereignty over rights, advanced in the 1920s and 30s by Carl Schmitt.

With the introduction of a social credit system, are the Chinese authorities trying to implement a rule of "trust" that would replace the rule of law?

Social credit programmes express the Party's ambition to 'lead on everything' (*lingdao yiqie*). Thus far, they have only been rolled out in some locations and do not at this point represent a nationwide scheme. As launched by the Party

in 2015, the basic idea is that every citizen will be subject to constant monitoring and appraisal of their conduct, be it in terms of whether they pay their taxes or whether they make critical comments on social media. This appraisal of individual trustworthiness is computed as merits and demerits. It feeds into decisions about what the citizen in question will be allowed to do: for example, whether they will be allowed to apply for a passport and travel abroad. It may, directly or indirectly, also affect their family and social environment, for example, if one's own 'social credit' is linked to whether one's children may go to a particular university.

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As Chen Yongxi, Yu-Jie Chen and others have pointed out, such a comprehensive assessment undercuts the rule of law-based approaches to governance favoured in the reform era. Citizens can incur sanctions for unspecified supposed infractions, and they can be punished without legal basis or effective legal recourse. It is a programme for totalitarian governance 2.0. The social credit system and related mechanisms attempt to institutionalise and normalise alternatives to law as the legitimate basis for the exercise of state power. Under Xi Jinping, the Party has been propagating the idea of 'combining legal governance with moral governance.' This means that the Party-State arrogates a moral mission to guide its citizens, a mandate of ruling 'by virtue' that is claimed to exist alongside its mission to govern by laws. The substance of the virtues to be inculcated is, of course, entirely determined by the Party under this model, which purports to justify the use of extra-legal state violence for "moral education". Above all, it demands loyalty to the Party as a foremost virtue of Chinese citizens while conveniently leaving the content of morality otherwise largely unspecified.

As a justification strategy, this is perfidious in three ways. Firstly, it allows the Party to cast itself as a custodian of the 5000-year-old Chinese moral tradition, frequently invoked as a set of ideas lending respectability to autocracy. Secondly, it blurs the distinctions between coercion and persuasion and thus legitimates state-centred violence for 'educational' rule-by-virtue purposes. Thirdly, it avoids admitting that 'rule by virtue' renders it impossible ever to realise the rule of law, which was once arguably the ultimate goal of the Chinese legal reform process. Thus, the quintessentially liberal notion of limiting public power by reference to rational and universal principles is replaced by an antiliberal assertion of the state's power as the romanticised protector of 'the People,'

conceived as a homogeneous entity. Apart from the social credit system, which remains very much a work in progress, we can already observe this in Xinjiang, where the Party-State strenuously insists that it is merely educating and supporting the region's 'backward' and 'politically wayward' populace by sending hundreds of thousands of citizens to camps for 'voluntary' training (they are collectively suspected of being susceptible to 'extremism' because of their ethnoreligious identity). The Xinjiang internment camps, established for the purpose of 'education and transformation,' officially involve no coercion. It is an example of 'combining rule by law with rule by virtue' - which explains propaganda messages displaying happy Uighurs duly expressing their sense of gratitude to the Party for rescuing them from 'extremism.' Obscenely false as they are, these messages have an important ideological function. Of course, 'moral' justification strategies are not new, but what makes them especially dangerous now is that they can be combined with an unprecedented capacity for technological surveillance, monitoring, and control in circumvention of the rules of law.

China is a leader in the global shift toward deepened and technologically smarter dictatorship. With the development of artificial intelligence and its use by the Party-State, is there still a reason for human rights activists to hope?

First, it is essential to remember that without these new information and communication technologies, China's emergent civil society could not have developed and networked to the extent it did in the early years of the current century. During my field research, I could observe daily how human rights lawyers' ability to communicate remotely transformed their work. Even as they kept failing in court cases, seeing their clients wrongfully convicted or unable to defend themselves against the violation of their rights by the Party-State, and even as they, themselves, became victims of state persecution, the Internet and the social media gave them new channels to voice their complaints. By 2014, for example, if a rights advocate were forcibly disappeared in some remote rural backwater, that news would travel across the country almost in real-time. Advocacy actions would be organised in a matter of hours. Even if these actions only resulted in further arrests and enforced disappearances, they could rile the authorities, as communication could easily be dispersed and cross-national borders.

Smart authoritarianism, technologically sophisticated surveillance and control techniques are a 'top-down' response to this type of smart advocacy and 'bottom-up' communication. These technologies lower the political cost of repression because they allow the Party-State to rely on less physical, violent and visible, and in that sense, 'softer' tools of control. They are also in some ways more preventative and reactive, for example, when filtering technology is used to prevent certain messages from reaching their intended recipients. This form of censorship is effective, discreet and very flexible – it does not even require the Party-State to cre-

ate and be bound by explicit censorship norms. Additionally, in line with the idea of ‘rule by virtue,’ the authorities can use smart techniques to ensure that messages of ‘virtuous’ loyalty to the Party are inserted into social media discourses. Of course, neither the traditional nor the newer and more innovative forms of censorship, control, and manipulation can entirely eradicate critical expression or suppress resistance. Still, from the authorities’ perspective, this may be an advantage because, along with the great diversity of communications, it may help maintain an illusion of freedom.

Are attempts of the Party-State to control thought, not only speech, effective? Do the authorities honestly believe they can succeed at “thought reformation”?

‘Thought reformation’ (*sixiang gaizao*) is a stated aim of many of the Party-State’s most intrusive governance practices. The true goal of these techniques is not necessarily to change the target person’s innermost thinking but rather to break their ability to resist. The point is more the corruption of thought than thought ‘reform.’ Resistance starts with independent thinking. Destroying an individual’s sense of intellectual and moral autonomy, its sense of agency is the most effective way of realising totalitarian control. This is also why ‘thought reformation’ programmes rely heavily on inhuman treatment and torture. It attempts to crush the spirit of resistance to prevent any significant critical political expression.

In Xi Jinping’s ‘New Era,’ tolerance for even minor expressions of independent thought has been dramatically reduced. Organising minuscule challenges to Party-State control is seen as deeply suspicious and can trigger viciously repressive responses. For instance, civil society groups demanding better protection of socio-economic rights used to be tolerated up to a point. Today, the very fact that such

groups operate independently is perceived as a problem. Their activities are seen as just as ‘threatening’ as those persecuted in the slightly more permissive reform era.

Take, for example, the ‘New Citizen Movement,’ initiated at the beginning of the Xi era by experienced legal advocates, including Xu Zhiyong. Its campaigns against corruption and for better protection of migrant children’s rights to education were deliberately close to the stated aims of the Party-State. Its tactics included such innocuous activities as gathering for a meal (*jucan*) at the same time in different locations across China. But the very fact that its promoters organised these activities to foster a spirit of independent civic-mindedness ensured that the movement was swiftly and brutally suppressed. In all likelihood, it fuelled the further repressive campaigns of the Xi era, including the so-called ‘709’ crackdown on lawyers. As several of the victims of this crackdown have told me, their ‘treatment’ at the hands of the Party-State included various methods directly aiming to reduce their ability to think and act independently: not only forms of physical torture such as beatings and stress positions but also, for example, forced drugging to make the victim compliant (sometimes with televised ‘confessions’ of wrongdoing, in the context of their carefully rehearsed and enacted criminal trials).

In all these contexts, we can easily see the connection between the educational theory of ‘rule by virtue’ and the practices of rule by fear.

Interview and edits by Aurélie Louchart

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