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Dec. 15, 2022

Abstract

Ernst Fraenkel's theory of the dual state, as set forth in his book *The Dual State: A Contribution to the Theory of Dictatorship*, has attracted the attention of scholars of Chinese law. This paper argues that, contrary to the views of many of these scholars, the model of the dual state—a Normative State coexisting with a Prerogative State—simply does not fit China unless that model is stretched so far as to be substantially different from the one actually proposed by Fraenkel. First, the Chinese state does not present institutionally the kind of duality observed in dual states. There are, for example, no special courts that can seize jurisdiction over political cases from ordinary courts. There is no need. Second, if there were duality, there is little basis for thinking that the counterpart to the Chinese Prerogative State is a Chinese Normative State of the kind imagined by Fraenkel. Unlike Germany, China has never had the latter kind of state. If there is a counterpart state, it may be a third type not imagined by Fraenkel's model.

Keywords: dual state, authoritarian legality, dictatorship, Chinese law

JEL classification: K10, K40

Is China a Dual State?

Donald Clarke*

Dec. 15, 2022

A concept that has recently been used by some scholars to understand the role of law in the Chinese political system is that of the dual state. By "dual state" I mean the particular relationship between state and law theorized by Ernst Fraenkel and applied by him to Nazi Germany in his *The Dual State*.[1] While the concept has much to offer, however, I ultimately conclude that it should not—at least not without some major adjustments—be applied to China, as doing so will lead to a misunderstanding of the logic of authoritarianism there and the role of law in China's political system.

The Concept of the Dual State

In Fraenkel's model, a dual state is one in which two parallel orders co-exist: the Normative State and the Prerogative State. The former is the realm of law; the latter, the realm of arbitrariness. Legal order and lawlessness co-exist.[2]

It is tempting—but wrong—to think of the normative state as the realm of rule *of* law and the prerogative state as the realm of rule *by* law. The distinction is better stated thus:

> What Fraenkel meant was that legal governance in the technical apparatus of state was structured by an elaborate and systematic set of established legal norms, rules, codes, and procedures. By contrast, legal governance in the "political state" ("politischen Staat") was not systematic, but wanton and senseless.[3]

Thus, it might be better to think of the normative state as the realm of rule by *law*, whereas the prerogative state is the realm of rule by *arbitrary decree*. To sum up in Fraenkel's words:

> The political sphere is a vacuum as far as law is concerned. Of course it contains a certain element of factual order and predictability, but only insofar as there is a certain regularity and predictability in the behavior of officials. There is, however, no legal regulation of the official bodies. The political sphere in the Third Reich is governed neither by objective nor by subjective law, neither by legal guarantees nor jurisdictional qualifications. There are no legal rules governing the political sphere. It is regulated by arbitrary measures (*Massnahmen*),

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[1] Fraenkel 1941.

[2] See Fraenkel 1941: 24.

[3] Meierhenrich 2018: 163.

> in which the dominant officials exercise their discretionary prerogatives. Hence the expression "Prerogative State" (*Massnahmenstaat*).[4]

In addition to its arbitrary nature, two further and related features of the prerogative state are that there are no limits to its jurisdiction, and that it is the prerogative state itself that decides when it will supplant the jurisdiction of the normative state. In other words, the prerogative state and the normative state are not equals; the prerogative state has the jurisdiction to decide jurisdiction. As Meierhenrich succinctly puts it,

> the prerogative state, as an idea, amounts to institutionalized lawlessness. The absence of boundaries is the essence of its nature. The prerogative state is what rulers make of it.[5]

Some concrete examples will help to clarify the relationship between the two states. Fraenkel wrote that "[t]he co-existence of legal and arbitrary actions [is] most impressively demonstrated by the confinement in concentration camps of persons who have been acquitted by the courts[.]"[6] Indeed, defense attorneys in Nazi Germany learned to push for lengthy prison sentences to spare clients the concentration camp to which they would have been sent upon an acquittal or lesser sentence, and some judges would collude in imposing such sentences.[7]

By the same token, it was remarkably a fact that

> [this is] a country in which it is possible that a concentration camp inmate can successfully file his tax complaints. The prerogative state incarcerated him, the technical, normative state reviews his tax complaint as if nothing had happened, as if we all still lived in a Rechtsstaat.[8]

Perhaps the most impressive testament to the life of the normative state is that of Sebastian Haffner, a legal trainee in Berlin in the early years of Nazi rule:

> In the *Kammergericht*, the highest court in Prussia, where I worked as a *Referendar* at that time, the process of law was not changed at all by the fact that the interior minister enacted ridiculous edicts. The newspapers might report that the constitution was in ruins. Here every paragraph of the Civil Code was still valid and was mulled over and analysed as carefully as ever. Which was the true reality? The Chancellor could daily utter the vilest abuse against the Jews; there was none the less still a Jewish *Kammergerichtsrat* (*Kammergericht* judge) and member of our senate who continued to give his astute and careful judgements, and these judgements had the full weight of the law and could set the entire apparatus of the state in motion for their enforcement-even if the highest office-holder of that state daily called their author a "parasite", a "subhuman" or a "plague". . . . . I must admit that I was inclined to

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[4] Fraenkel 1941: 3.

[5] Meierhenrich 2018: 183.

[6] Fraenkel 1941: 39.

[7] See Meierhenrich 2018: 70.

[8] Meierhenrich 2018: 49 (quoting Fraenkel) (German terms omitted).

> view the undisturbed functioning of the law, and indeed the continued normal course of daily life, as a triumph over the Nazis.[9]

The power of the prerogative state to determine its own jurisdiction, and to do so in its characteristically arbitrary manner, is exemplified by a case discussed in *The Dual State* of a formal Nazi policy designating as political, and therefore not suited for the courts, the "moral transgressions" (i.e., homosexuality) of Catholic monks. As Fraenkel writes,

> Neither the offense as such nor the person of a completely inconsequential monk has even the slightest connection with politics. In the Third Reich, sodomy becomes a political offense whenever the political treatment of such offenses is regarded as desirable to the political authorities. The conclusion one must come to is that politics is that which political authorities choose to define as political. . . . [T]here are no matters safe from the intervention of the political authorities who, without any legal guarantees, are free to exercise discretion for political ends.[10]

Not only does the prerogative state have jurisdiction over the political, but it also has the jurisdiction to decide what shall be deemed political.

Crucially, the two states cannot be considered in isolation. The existence and powers of the prerogative state necessarily shape the normative state, which exists at the sufferance of the prerogative state. Fraenkel was not always consistent in his exposition of the relationship between the two. At one point he wrote, "The Normative and the Prerogative States are competitive and not complementary parts of the German Reich."[11] But later in the same book he wrote, I think more clearly:

> The Normative State . . . is by no means identical with a state in which the 'Rule of Law' prevails, i.e., with the Rechtsstaat of the liberal period. The Normative State is a necessary complement to the Prerogative State and can be understood only in that light. Since the Prerogative and Normative States constitute an interdependent whole, consideration of the Normative State alone is not permissible.[12]

The looming presence of the prerogative state infects the processes of the normative state. The latter's personnel, knowing that a matter before them may at any moment be deemed political, may hesitate or in some other way act differently from the way they would were the prerogative state not there. The prerogative state does not constantly exercise its unfettered power; the point is that at any time it *can*, and that "no sphere of life is immune from [its] interventions—neither politics and economics, nor law and society."[13] The relationship between the normative state and the prerogative

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[9] Haffner 2002: 49.

[10] Fraenkel 1941: 42-43.

[11] Fraenkel 1941: 46.

[12] Fraenkel 1941: 71.

[13] Meierhenrich 2018: 237.

state is therefore unstable; the line between them is decided by the prerogative state, an entity that is itself not rule-governed.

At the same time, it is worth noting the paradoxical fact that the Nazi prerogative state was birthed from the body of the normative state. The Enabling Act (*Ermächtigungsgesetz*) of 1933, which authorized the imposition of martial law and the suspension of the separation of powers, was duly passed by the German Diet. The law was used to suspend legality.[14] Nevertheless, the law *was used*, and not simply brushed aside or given only lip service through fantastic and implausible interpretations.

Finally, it is worth noting an important point that is sometimes misunderstood: the normative and prerogative states in single-party dictatorships do not map on to the state and the ruling party respectively. In such dictatorships—certainly in Nazi Germany—it is often pointless to attempt to distinguish the one from the other.[15] To Fraenkel, the important distinction was not the meaningless one between state and party; it was the division that existed within the state (understood to include the party) itself.[16]

Is China a Dual State?

In some ways, China displays the characteristics of a dual state. Certainly there can be no doubt as to the existence of the prerogative state.[17] The institution of *shuanggui* ("double-designation" detention), for example, existed—like the German concentration camps—entirely outside and indeed in violation of China's law, which requires a statute to justify any physical detention. Moreover, as Hualing Fu writes,

> There is . . . an arbitrary policing and criminal justice system, alongside the regularised system, which is periodically superimposed by the CCP on the routine criminal justice process. When that occurs, the criminal justice institutions, police in particular, lose their institutional autonomy, and the institutional mandate gives way to the political imperatives. There is a sudden political takeover of the criminal justice system.[18]

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[14] See Pils 2022.

[15] In the words of Stephen Roberts,

> [E]ven an expert would be driven mad if he tried to untangle the relationships of Party to State.

Roberts 1938: 72.

[16] See Meierhenrich 2018: 162.

[17] I recognize that such a proposition cannot be established merely by declaring there to be "no doubt". This is not, however, the place to make the argument—one that has been made at length by many analysts in many places, whether or not using that particular term—and I will here take it for granted, giving just a few examples.

[18] Fu 2005: 243.

Or consider Xin He's description of how cases come to be designated as sensitive or political—that is, ripe for intervention from the prerogative state—and compare it with the case of the transgressing monks cited by Fraenkel above:

> How do the judges single out cases that are significant and sensitive? The guidelines specified by the [Supreme People's Court], and those of individual courts, are vague and vary across time and region. Some seemingly routine cases can escalate into sensitive cases, and other cases or court-related issues may explode on the internet. In Xinjiang, a local disturbance at a workplace may be taken as serious, while in Guangdong mass incidents over delayed wages are frequent and draw little public attention.[19]

And as Eva Pils writes, the designation of what is sensitive is entirely in the hands of the prerogative state:

> There is a widely shared assumption, captured in the notion of the 'politically sensitive', that a certain realm of the political exists and that within this realm, the ordinary rules of the legal system being constructed must be suspended. Like in the dual state, what counts as political, and who counts as an enemy, is left to the sovereign, defined in political terms: the Party.[20]

But if a prerogative state—or something very much like it—exists, what else is there? There are essentially three possibilities.[21] First, there is nothing else that is essentially different. All we see is variations along a continuum, as we might observe temperature variations in Antarctica. Second, there *is* something else, and it is a normative state along Fraenkelian lines. Third—and this possibility is often overlooked—there is indeed another kind of state on the opposite side of the ever-shifting boundary of the prerogative state, but it is not usefully characterized as a normative state as Fraenkel understood the term.

1. Is there a dual state with a normative state complementing the prerogative state?

I will address the second possibility first, because it is that possibility I want to reject most firmly. It is not patently absurd to think that a normative state exists in China, and some analysts have so found.[22] In at least some areas, the state seems to function in a regular, rule-governed way. Taxes are

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[19] He 2021: 71.

[20] Pils 2019. The list of analysts who have written in a similar vein is long. I will quote just one more here: "Party leadership is visible in its practice of suspending the law . . . when this is deemed necessary." Seppänen 2020: 230.

[21] There are actually well over three possibilities if one imagines the possible existence of tripartite, quadripartite, etc. states, but I am going to stop at dual states.

[22] Jens Meierhenrich, for example, finds that "a dual state is holding sway in China," Meierhenrich 2018: 247, although I find the conclusion curious since China does not seem to meet his own definition of what the normative part of a dual state requires. *See infra* notes 27-32 and accompanying text. Other discussions of China as a dual state include Fu 2019, Fu & Dowdle 2020, Wang 2022, Pils 2022, and Jia 2022. Among the skeptics are Zhang 2021 and Seppänen 2022.

assessed, licenses granted, and birth certificates issued. Courts at least in some cases seem to function in the way we would expect them to function in a normative state.

Yet some key elements of the Fraenkelian normative state are missing in China, and their absence should also shape our understanding of what would otherwise be the complementary (and competing) Chinese prerogative state.

The chief missing feature is a pre-existing legal order of which the normative state is a remnant, with the prerogative state as a kind of new and disruptive external force. Meierhenrich speaks of

> the liminality of law in the mid-1930s, by which I mean the ambiguity and disorientation that characterized defining stages in the legal development of the Third Reich, especially the long and winding consolidation of the dictatorship that took place in the period 1933-1938. Like everyone else in Germany, Nazi jurists stood at the threshold, facing the unknown. To steady themselves, some held on to remnants of the Rechtsstaat of old; others dove straight into the abyss and emerged with genuinely new (if reprehensible) solutions to the problem of legal order.[23]

Fraenkel's normative state was the descendant of an order that preceded the dual state. The prerogative state began small and then grew, increasingly displacing the normative state and increasingly irregular and disruptive. But the normative state's way of functioning remained in some times and in some places, and among some people. It represented the precarious continuation of a previously existing legal culture. As Meierhenrich writes, for a normative state to exist in a dual state,

> legal norms and institutions must have cultural resonance. This will be the case whenever a legal way of doing things is not alien but widespread in a given society. Something resembling a legal culture will usually lurk in the background of authoritarian settings governed by a dual state. What such antecedents ensure is that legal enclaves of the kind Fraenkel theorized under the label of the normative state operate, until their demise or destruction, "on a repeated basis according to relatively fixed patterns of interactions that are valued for their own sake."[24]

Furthermore,

> [t]here is no point to take law seriously as a conceptual variable unless there is a sense that legal consciousness is reasonably well developed in the empirical setting under investigation. If law was never seriously embedded in a given society, it is unlikely that the dual-state concept will be of much use for making sense of the logic of authoritarianism there.[25]

It is this prior embeddedness that is absent in modern China. What was established in China in 1949 looks very much like a prerogative state, but it did not take over from, or impinge upon, a pre-existing *Rechtsstaat*. Neither the Kuomintang in the areas it controlled, nor the imperial government

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[23] Meierhenrich 2018: 124.

[24] Meierhenrich 2018: 246 (internal citations omitted).

[25] Meierhenrich 2018: 247.

before the 1911 revolution, constructed or maintained such a polity. A normative state as theorized by Fraenkel is simply not something that can be constructed within the womb of a prerogative state.[26]

Again, some real-life examples will be helpful. Consider one of the tests proposed by Meierhenrich for identifying a dual state:

> A good rule of thumb for assessing whether the ratio of normative rule to prerogative rule in a given authoritarian regime permits its classification as a dual state is to ask whether the available legal norms and institutions in that polity are sufficiently meaningful for dissenters, insurgents, or other opponents of dictatorship to take them seriously as swords or shields. In full authoritarian regimes, this will not usually be the case. More often than not, law is just a façade, which is why not all law-governed authoritarian regimes should automatically be classified as dual states.[27]

Elsewhere he adds that in a dual state, "[a]lthough the playing field between adversaries is tilted heavily in favor of democracy-resisting forces, a space for legal contestation is preserved."[28]

It is clear that by these criteria, China is not a dual state. Dissenters and opponents of the Party cannot take legal norms and institutions seriously as swords or shields. Denying opponents the legal counsel of their choice[29] and preventing them from calling desired witnesses,[30] the state seems uninterested in maintaining even a façade of fairness in its legal institutions.[31] Indeed, the Chinese government seems to have anticipated these criteria and publicly announced its non-conformity: In February of 2011, responding to a foreign journalist's question about which specific law journalists were being accused of violating, Ministry of Foreign Affairs spokesperson Jiang Yu said, "Don't use the law as a shield. The real problem is that there are people who want to see the world in chaos, and they want to make trouble in China. For people with these kinds of motives, I think no law can protect them."[32]

2. Is there a dual state with a non-normative state complementing the prerogative state?

The third possibility I suggested above is well worth exploring. We can take Fraenkel's notion of the dual state, maintain the idea of a counterpart to the prerogative state—let us call it generically

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[26] Eva Pils notes this reverse chronology—that the Chinese normative state, if it exists, appears after and out of the prerogative state, but she does not find that a bar to applying the concept. See Pils 2019.

[27] Meierhenrich 2018: 246.

[28] Meierhenrich 2018: 246.

[29] See, e;.g., Safeguard Defenders 2021: 14-23.

[30] See, e.g., Yardley & Kahn 2006.

[31] See generally the description of what the authors describe as China's authoritarian legality in Fu & Dowdle 2020.

[32] The full colloquy in English and Chinese, with commentary, is available at https://perma.cc/U9CT-JSSH.

the non-prerogative state (NPS)—but discard as unnecessary the idea that the NPS must look something like the normative state he describes. To view the Chinese NPS as a normative state in Fraenkel's sense means that we have to think that a Maoist NPS, and the Chinese NPS today, had and has legal institutions that function more or less the way German legal institutions did in the Third Reich and before. We have to believe that the Chinese NPS has a similar legal culture. This seems to me too heroic an assumption to accept. Why would we expect the Chinese NPS to look anything like the German NPS under Nazism? They have completely different histories and cultures.

The challenge in this case is to identify some kind of principles of operation that distinguish the Chinese NPS from the prerogative state. It is tempting to suggest something along the following lines: The Chinese NPS is governed by the general principles of order maintenance, including predictability and deference to hierarchy, and those principles include the pursuit of individual justice and the vindication of rights where those goals do not conflict with the higher goals of order maintenance. The prerogative state, by contrast, is the realm of unpredictable and arbitrary interventions in the functioning of the NPS. This model allows for the existence of a dual state without being wedded to the implausible proposition that China ever looked like the pre-Nazi German *Rechtsstaat*, regardless of when one dates the birth of the current prerogative state.

Yet I find this model unsatisfying because the two parts of this revised dual state do not seem to have distinct institutional and human roots. Consider the police in the Third Reich. Before 1936, police in Germany were under provincial authorities. In 1936, however, all police were brought under the centralized aegis of Heinrich Himmler's SS—an entity originating as a Nazi party body.[33] Here is the prerogative state expanding its jurisdiction. Just a year before, the dissident Jewish lawyer Ludwig Bendix "persuaded the local police chief to send a policeman to remove an anti-Semitic sticker affixed to his nameplate at his apartment building[.]"[34] Here is the normative state—admittedly in something of a last gasp, such consideration for Jews already being quite rare at that time.

Yet in China the Party has never felt the need for a separate, supra-legal police force to displace a pre-existing institution. All the institutions are already supra-legal. The Nazis needed the SS because they were working to overpower a pre-existing state structure that couldn't simply be torn down. But the Chinese Communist Party *did* tear down the pre-existing state structure shortly it came into power. As of no later than the end of the Anti-Rightist Campaign in 1959, it is fair to say that there was no significant resistance to the prerogative state and its way of doing things.

The Nazi precedent may tempt one to think that the key is whether or not the special force is Party-run or state-run. But as discussed above, the Party/state distinction is immaterial. The question is whether there is an institutional or human basis for that special force to operate along different principles from the regular police.

[33] See Morris 2020: 5.

[34] Morris 2020: 33.

In China, the most one might point to would be the Central Discipline Inspection Commission (CCDI)—a Party body—and its subnational counterparts. Its system of *shuanggui* detention and investigation operated wholly outside the law and thus was not subject even theoretically to the often theoretical constraints on formal state police forces. But its scope was small, being limited in theory and usually in practice to Party members. Non-Party members did not generally need to fear *shuanggui* detention.

Or take the courts. Although many judges in the regular German court system acquiesced to the new order enthusiastically,[35] others did not. The Nazis created entirely new "courts"—the appropriateness of the term being open to question—to deal with real and perceived enemies: the Special Courts (*Sondergerichte*) in 1933 and the People's Courts (*Volksgerichtshof*) in 1934.[36] We see the same pattern in authoritarian regimes all over the world. In Franco's Spain, regular judges were "fairly independent of the Executive with respect to their selection, training, promotion, assignment, and tenure[,]" but parallel courts were set up "to limit the sphere of action of the ordinary judiciary."[37] In Egypt, "state security and military courts . . . form a parallel legal system with fewer procedural safeguards[.]"[38] Fascist Italy and Portugal had their own special courts in the Tribunale Speciale per la Difesa dello Stato and the Tribunais Plenários respectively.[39]

Yet the PRC—surely no laggard when it comes to authoritarianism—*has no special courts of this kind at all*.[40] Political enemies are prosecuted and sentenced in the same court system as everyone else—or if they are not, they are simply put away without being processed through any court system at all.[41] This is a remarkable difference. The officials who carry out the orders of the prerogative state are the same officials—appointed in the same way, subject to the same set of incentives, situated in the same institutions—that operate the putative NPS.

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[35] See, e.g., Paulson 1994: 331-32 ("Rather than waiting for the introduction of new statutory law, judges and other officials in Nazi Germany simply departed from the language of existing law whenever and wherever that was called for.").

[36] See Gellately 1992: 359-61.

[37] Toharia 1975: 482, 487.

[38] Moustafa 2014: 291.

[39] Magalhães et al. 1996: 144.

[40] One might find arrangements that could be called "special courts" in the first few years of the PRC, but they seem to have gone by the mid-1950s at the latest. In addition, the chaos of the Cultural Revolution saw all kinds of institutions purporting to exercise the power of judgment and punishment, such as the Poor Peasants' Supreme Courts in Guangxi Province. See Zhang 2015: 88. But they did not last and played no important part in the overall system.

[41] The prime example of this is Zhao Ziyang, who lost his position as Party leader after the June 4th massacre in 1989, and was subject to a form of house arrest—unlawful under Chinese law—for the rest of his life, without the benefit of even a sham legal process in a sham court.

In short, while it is certainly possible for individual human beings to experience cognitive dissonance, to act inconsistently in different circumstances, and to display a kind of multiple personality depending on the stimuli, a model founded on large numbers of them doing so in a relatively predictable way is implausible. Instead, a model of a dual state ought to have some grounding in consistent differences between different humans and between different institutions.

3. Is China best understood as a non-dual state?

Almost by default one is left with the first position outlined above: that the dual state model is not a helpful way of understanding China, and that a better model is that of a single Party-state—beset like all human institutions with inconsistencies and contradictions, and like almost all Chinese institutions possessed of significant local variation, but nevertheless a prerogative state unbound in theory or practice by legal restraints.

The absence of special courts is a telltale sign. Liberal democratic states do not use them to prosecute opponents of the government. Dual states, where the normative state has had to yield space to the prerogative state, often do. But when the prerogative state utterly overwhelms the normative state, or when there was no normative state to begin with, there is no need for special courts and therefore we don't see them.

I have argued above that a dual-state model, regardless of how one characterizes the two states, is unconvincing because there is no institutional or human basis for such a duality. It is the same officials, selected in the same way, that we may observe sometimes acting in a law-like way and sometimes in an arbitrary way.

How, then, do we explain what appears to be law-following behavior by agents of the state without resorting to a dual-state theory? Consider Fraenkel's description of the prerogative state quoted earlier:

> The political sphere is a vacuum as far as law is concerned. Of course it contains a certain element of factual order and predictability, but only insofar as there is a certain regularity and predictability in the behavior of officials. There is, however, no legal regulation of the official bodies.[42]

This predictability can look like the protection of legal rights, but in fact need be nothing more than what Tom Ginsburg has labeled the "actuarial" protection of rights: it may be statistically likely that in any given situation, state agents will act in a lawlike way, but it would be a mistake to confuse this statistical probability with a legal motivation.[43] To use Gilbert Ryle's analogy, a wink and a twitch are not the same thing.[44] Moreover, while a cat scratching at the door may be regularly let out, this by no means implies that is has some kind of legal *right* to be let out.

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[42] Fraenkel 1941: 3.

[43] See Ginsburg 2011.

[44] As Ryle writes,

Finally, there is a more intriguing and subtle reason why we may observe law-like behavior—a reason that allows the purposive wink to be interpreted correctly as a wink. From the fact that the principles of law are not sacrosanct in a polity, it does not follow

> that agents could not behave as if they were; that they could not reach legal decisions under the influence of an imaginary rule of law.[45]

How to characterize the operating principles of this authoritarian prerogative state is a separate challenge, but one that need not be addressed here. I have suggested an overarching principle of order maintenance, meaning the suppression of discontent in society and the maintenance of the Party's power in politics. Whether that principle is the best one is, however, beside the point here. The main point here is to endorse Meierhenrich's caveat as applicable to China (even though he does not do so himself):

> If law was never seriously embedded in a given society, it is unlikely that the dual-state-concept will be of much use for making sense of the logic of authoritarianism there.[46]

> At the lowest or the thinnest level of description the two contractions of the eyelids may be exactly alike. From a cinematograph-film of the two faces there might be no telling which contraction, if either, was a wink, or which, if either, were a mere twitch. Yet there remains the immense but unphotographable difference between a twitch and a wink.

Ryle 1968.

[45] Meierhenrich 2018: 188.

[46] Meierhenrich 2018: 247.

References

Fraenkel, Ernst. 1941. *The Dual State: A Contribution to the Theory of Dictatorship*. New York, London: Oxford University Press.

Fu, Hualing. 2005. "Zhou Yongkang and the Recent Police Reform in China." *The Australian and New Zealand Journal of Criminology* 38 (2): 241-53.

———. 2019. "Duality and China's Struggle for Legal Autonomy." *China Perspectives* 2019 (1): 3-9.

Fu, Hualing, and Michael Dowdle. 2020. "The Concept of Authoritarian Legality: The Chinese Case." In *Authoritarian Legality in Asia: Formation, Development and Transition*, eds. Weitseng Chen and Hualing Fu. Cambridge University Press, 63-89.

Gellately, Robert. 1992. "Situating the 'SS-State' in a Social-Historical Context: Recent Histories of the SS, the Police, and the Courts in the Third Reich." *Journal of Modern History* 64 (2): 338-65.

Ginsburg, Tom. 2011. "The 'China Problem' Reconsidered: Property Rights and Economic Development in Northeast Asia." University of Chicago Law School, June 2011. Archived at https://perma.cc/T2NR-3Q3U.

Haffner, Sebastian. 2002. *Defying Hitler: A Memoir*. London: Weidenfeld and Nicolson.

He, Xin. 2021. "Pressures on Chinese Judges under Xi." *The China Journal* (85): 49-74.

Jia, Mark. 2022. "Special Courts, Global China." *Virginia Journal of International Law* 62 (3): 559-621.

Magalhães, Pedro C., Carlo Guarnieri, and Yorgo Kaminis. 1996. "Democratic Consolidation, Judicial Reform, and the Judicialization of Politics in Southern Europe." In *The Changing Role of the State in Southern Europe*, eds. R. Gunther, P. Diamandouros and G. Pasquino. Oxford, UK: Oxford University Press, 138-96.

Meierhenrich, Jens. 2018. *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law*. Oxford, UK: Oxford University Press.

Morris, Douglas G. 2020. *Legal Sabotage: Ernst Fraenkel in Hitler's Germany*. Cambridge, UK: Cambridge University Press.

Moustafa, Tamir. 2014. "Law and Courts in Authoritarian Regimes." *Annual Review of Law and Social Science* 10: 281-99.

Paulson, Stanley L. 1994. "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses." *Law and Philosophy* 13 (3): 313-59.

Pils, Eva. 2019. "The Global Implications of China's Dual State Revival." July 7, 2019. On file with author.

———. 2022. "China's Dual State Revival under Xi Jinping." On file with author.

Roberts, Stephen H. 1938. *The House That Hitler Built*. New York: Harper and Brothers.

Ryle, Gilbert. 1968. “The Thinking of Thoughts: What Is ‘Le Penseur’ Doing?” University of Saskatchewan, University Lecture Series No. 18. Available at http://bit.ly/rylethinking.

Safeguard Defenders. 2021. “Access Denied: China's Legal Blockade.” Archived at https://perma.cc/96P3-PBPB.

Seppänen, Samuli. 2020. “Disorientation for the New Era: Intraparty Regulations and China’s Changing Party-State Relations.” In *Law and the Party in China: Ideology and Organization*, eds. Rogier Creemers and Susan Trevaskes. Cambridge, UK: Cambridge University Press, 214-36.

———. 2022. “Turning the Party State inside Out: CCP Intra-Party Regulations as a Theoretical Challenge.” *The Chinese Journal of Comparative Law* 10 (1): 128-39.

Toharia, José J. 1975. “Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain.” *Law & Society Review* 9 (3): 475-96.

Wang, Shucheng. 2022. *Law as an Instrument: Sources of Chinese Law for Authoritarian Legality*. Cambridge University Press.

Yardley, Jim, and Joseph Kahn. 2006. “China Gives Times Researcher 3 Years.” *New York Times*, Aug. 25, 2006. Archived at https://perma.cc/X2T5-M9ZC.

Zhang, Ning. 2015. “Crimes of Counterrevolution and Politicized Use of the Death Penalty During the Mao Era.” In *The Death Penalty in China: Policy, Practice, and Reform*, eds. Bin Liang and Hong Lu. New York: Columbia University Press, 62-96.

Zhang, Qianfan. 2021. “The Communist Party Leadership and Rule of Law: A Tale of Two Reforms.” *Journal of Contemporary China* 30 (130): 578-95.