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THE EMERGING CHINESE MODEL OF STATIST HUMAN RIGHTS

RYAN MITCHELL*

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I. INTRODUCTION: COMMON HUMAN VALUES?

Chinese Communist Party General Secretary Xi Jinping commemorated World Human Rights Day 2018, marking the 70th anniversary of the signing of the Universal Declaration of Human Rights (UDHR), by declaring that “the happy life of the people is the greatest human right.”¹ The comment was issued as part of a message to attendees of a symposium held in Beijing to commemorate the

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1. *See Opinion: China’s Human Rights Development Centered on Innovation and Pragmatism*, CGTN (Dec. 13, 2018, 8:12 AM), <https://news.cgtn.com/news/3d3d674e35596a4d31457a6333566d54/index.html> [hereinafter *China’s Human Rights Development*] (stating remarks by China’s President Xi Jinping celebrating human rights development).

UDHR, celebrate China's progress in realizing its aims, and articulate an officially-sanctioned vision of future action.²

The Beijing conference, organized by the China Foundation for Human Rights Development and the China Society for Human Rights Studies (CSHRS), both state-affiliated organizations, featured government officials, academics, and others involved in state sanctioned human rights work.³ One of the highest-ranking officials present was the Vice-Chairman of China's legislature, Qiangba Puncog, an ethnic Tibetan, former governor of Tibet, and current director of the CSHRS.⁴ Qiangba Puncog stated that such events were a good opportunity to transition from a passive posture of accepting rights norms promulgated by Western states to actively promote "Chinese proposals for ensuring human rights . . . and developing human rights together globally for shared prosperity."⁵

In Xi's December 2018 statement commemorating the UDHR, he listed a set of values that "China's people wish to uphold," and which he characterizes as the core elements of China's human rights vision.⁶ These are "the common human values of peace, development, fairness, justice, democracy, and freedom."⁷ These values are ranked in order of importance: as stated by a subsequent state media article republished by SEEKING TRUTH, the official Party ideological journal: "without the right to peace and the right to

2. *Symposium on the 70th Anniversary of the Universal Declaration of Human Rights*, CHINA SOC'Y FOR HUM. RTS. STUD. (Dec. 10, 2018), <http://www.humanrights.cn/html/special/20181212> (noting remarks made by the Chinese president on China's willingness to work with outside countries to develop a robust system of peace and dignity).

3. *Id.*

4. *Id.*

5. *Speech by Qiangba Puncog at the Symposium Commemorating the 70th Anniversary of the Universal Declaration of Human Rights*, CHINA SOC'Y FOR HUM. RTS. STUD. (Dec. 11, 2018), http://www.humanrights.cn/html/2018/2_1211/40928.html.

6. Xinhuanet, *Xi Jinping's Letter to Commemorate the 70th Anniversary of the Universal Declaration of Human Rights*, CHINA HUM. RTS. (Dec. 12, 2018), http://www.humanrights.cn/html/2018/1_1210/40919.html (detailing Xi Jinping's Letter describing China's dedication to upholding human rights).

7. *Symposium on the 70th Anniversary of the Universal Declaration of Human Rights*, *supra* note 2.

development, other human rights cannot even be brought up.”⁸ Meanwhile, the civil and political rights associated with “democracy and freedom” are clearly subordinated both to “development” and to the predominately socio-economic factors associated with the middle two values of “fairness and justice.” Both, remain subordinated to “third generation”⁹ rights of peace and development—now however redefined as “values” and signifying above all preservation of the international status quo regarding state sovereignty as well as a global economic architecture favoring continued growth over projects of redistribution—are now the foundations of China’s proposed post-liberal,¹⁰ but also in important respects post-socialist, future for international human rights.¹¹ The formerly insurgent discourse of a “right to development” has now declined in favor of a view on global political economy that does not challenge, but explicitly seeks to reinforce or co-opt existing structures.

8. See Li Junru, *Xinshidai Zhongguo Gongchandang Renquan Sixiang de Jizhong Tixian* [The Concentrated Embodiment of the Human Rights Thought of the Communist Party of China in the New Era], QIU SHI [SEEKING TRUTH], 6–7 (Jan. 29, 2019), http://www.qstheory.cn/CPC/2019-01/29/c_1124059146.htm (asserting that the people are “the masters of the country” and that promoting human rights is the starting point for further development).

9. See Karel Vasak, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law the Universal Declaration of Human Rights*, UNESCO COURIER, Nov. 1977, at 29–32 (describing the third generation of human rights as the “rights of solidarity”); see also Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 24 NETH. INT’L L. REV. 307, 309 (1982) (explaining how third generation rights were first recognized in 1971 and were largely endorsed and pushed by UNESCO for widespread recognition).

10. On the need for international lawyers as a whole—not only specialists on authoritarian regimes—to consider such a future, see, for example, Tom Ginsburg, *Democracies and International Law: The Trials of Liberalism*, UNIV. OF CAMBRIDGE (Mar. 15, 2019), <https://upload.sms.csx.cam.ac.uk/media/2939251> (discussing the idea that the global rise of authoritarian states or political movements entails the potential for a “post-human rights era”). On the idea that the global rise of authoritarian states or political movements entails the potential for a “post-human rights era,” see Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279, 288–89 (2017) (noting that citizens of mature democracies are becoming less satisfied with their form of government and that the status quo of human rights enforcement has changed).

11. Wuerth, *supra* note 10, at 288–89 (describing changing attitudes towards human rights, in which sovereignty may come to be valued more highly at the expense of human rights).

II. HUMAN RIGHTS AND THE FORMATION OF THE CHINESE PARTY-STATE

There was no ideological monopoly on the imported concept of “human rights” (*renquan* 人权) in early 20th century China.¹² Before the fall of the Qing Dynasty in 1911, *renquan* had been introduced as a subject of intellectual discourse and political debate.¹³ Foreign texts on law and politics, such as the 1789 Déclaration des droits de l’homme et du citoyen,¹⁴ were being translated and published in China alongside more recent debates and interpretations like those of the influential Heidelberg jurist Georg Jellinek¹⁵ and the Japanese scholar Katō Hiroyuki,¹⁶ both of whom viewed the state as the indispensable medium for realization of individual rights.¹⁷ Chinese students and exiled intellectuals encountered such ideas in Japan (primarily) as well as in the West, and they played an important role in the evolving concept of *renquan*.¹⁸ Thought leaders, such as constitutional reformer Liang Qichao, advocated a “rights consciousness” (*quanli yishi* 权利意识) building on these state-centric views as well Jhering’s historicized notion of rights emerging from a culturally-contingent *Rechtsgefühl*.¹⁹

12. Guobin Zhu, *Research on Human Rights in China: A General Survey and an Annotated Bibliography of Selected Chinese-Language Publications*, 8 CHINA L. REP. 157, 159–60 (1999) (describing three different debates on theoretical and practical issues on human rights in Chinese academic articles since the 1980s).

13. Peter Zarrow, *Anti-Despotism and “Rights Talk”: The Intellectual Origins of Modern Human Rights Thinking in the Late Qing*, 34 MOD. CHINA 179, 179–81 (2008) (describing the development of ideas of human rights in Chinese society).

14. *Renquan (Faguo Xianfa zhi Gangling)* [*Human Rights (Outline of the French constitution)*], SHIBAO [TIMES], Apr. 1, 1907, at 1.

15. Georg Jellinek, *Yicong: Renquan Xuanyan Lun* [*Translation Series: On the Declaration of Human Rights*], 13 MIN BAO [PEOPLE’S NEWS], 111 (Bo Yang trans. 1907).

16. See STEPHEN ANGLE, *HUMAN RIGHTS AND CHINESE THOUGHT: A CROSS-CULTURAL INQUIRY* 116–23 (2002) (describing the human rights work of Katō and his contribution to human rights in China).

17. *Id.* (noting that Hiroyuki believed rights to be natural possession of all people).

18. *Id.*

19. See Liang Qichao, *On Rights Consciousness*, 31 CONTEMP. CHINESE THOUGHT 14, 14–22 (1999) (describing the essential points derived from Jhering

The initial reception of “human rights” and of the related concept of “people’s rights” or “civil rights” (*minquan* 民权) in China was thus highly ambivalent.²⁰ Although certainly associated with notions of individual legal protection in the face of arbitrary power, “people’s rights” or “civil rights” were simultaneously tied to the notion of the need for a strong, legislatively-capable state, and culture of legality, to be constructed in order for such rights to be conferred and protected in the first place.²¹ During the decades of political crisis and civil war that China endured between 1912 and 1949, *renquan* discourse became most notably associated with the cadre of liberal intellectuals espousing moderate reformist positions within the Republic of China.²² Among such figures’ efforts, P.C. Chang’s participation in the drafting of the UDHR is emblematic of an approach favoring active participation in international human rights discourse.²³

Meanwhile, both the Chinese Communist Party and influential ultra-conservative elements within the Nationalist Party (Guomindang) cast doubt on the utility of *renquan* as a legal or political concept, sometimes for different reasons.²⁴ For Communist-aligned writers in particular, debunking the utility of moderate reformist calls for human rights was an important aspect of ideological struggle—these writers argued that legally-defined rights were a formalistic distraction from the revolutionary struggle of the proletariat to achieve real emancipation.²⁵ On the other hand, the

as being that attaining and maintaining rights is challenging).

20. See ANGLE, *supra* note 16, at 128–32 (describing the development and acceptance of human rights in China).

21. See *id.* (detailing the development of and connection between democracy and individual rights in China in the 1870s).

22. See Yuan Gang & Zhang Zhixing, *Ping Renquan Pai de Renquan Sixiang*, 12 XUESHU JIE 5, 5–14 (2014).

23. HANS INGVAR ROTH, P.C. CHANG AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 2–3 (2018).

24. On extreme rightist views, see, for example, Xu Youwei, *Cong “Qiantu” Zazhi Kan Deguo Faxisizhuyi zai Zhanqian Zhongguo zhi Yingxiang* [The Influence of German Fascism in Pre-War China as Seen in *Qiantu Magazine*], in JINDAI ZHONGGUO [CONTEMPORARY CHINA] 117 (1999). A discussion of some key leftist critiques is given in ANGLE, *supra* note 16, at 200–04.

25. See ANGLE, *supra* note 16, at 200–04 (discussing the relationship between individual rights and revolutionary ideals).

concept itself was not wholly rejected.²⁶ “Rights” were endorsed in general throughout the civil war as well as after the PRC’s founding in 1949 by Communist authorities, though they were often conceived in political, not judicialized terms.²⁷

During the PRC’s first decade, Chinese Communist authorities grappled with the project of reconciling a progressive position on international law and diplomacy with their government’s ostracized status as a non-UN member.²⁸ The foundation of China’s subsequent foreign policy (still endorsed today) was the concept of the “Five Principles of Peaceful Coexistence” which sought to reinterpret Charter norms on state sovereignty and mutual non-interference as guarantees of existential security for decolonized states.²⁹ The PRC’s posture towards the UDHR reflected these tensions. At times lambasted as an ideological smokescreen for Western hegemony the UDHR was, at the same time, also accorded measured praise for social and economic rights elements it had incorporated as a result of Soviet influence.³⁰ This ambiguity was ultimately resolved in favor of the UDHR’s universality by the time of China’s participation in the Asian–African Conference held at Bandung, Indonesia in 1955.

China, along with other states present at Bandung, signed onto the declaration stating that claims to autonomy by currently or formerly

26. Notable in this regard on the political left was the role of the short-lived Chinese League for Civil Rights (*Zhongguo Minquan Baozhang Tongmeng* 中国民权保障同盟), a grouping of progressive intellectuals.

27. For a discussion of the (limited) connection of China’s overall 20th century constitutional development with “rights,” and its reliance on a political constitutional model, see Albert Chen, *The Discourse of Political Constitutionalism in Contemporary China: Gao Quanxi’s Studies on China’s Political Constitution*, 14 CHINA REV. 183, 184–86 (2014) (providing a discussion of the limited connection of China’s overall 20th century constitutional development with “rights,” and its reliance on a political constitutional model).

28. XUE HANQIN, CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW, 54–55 (2012) (describing the evolution of China’s role in the international community).

29. See, e.g., Wen Jiabao, *Carrying Forward the Five Principles of Peaceful Coexistence in the Promotion of Peace and Development*, 3 CHINESE J. INT’L L. 363, 363–64 (2004) (detailing then-Premier Wen Jiabao’s account of the history and current relevance of the Five Principles).

30. See Susan Waltz, *Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights*, 23 HUM. RTS. Q. 44, 45–46 (2001) (providing an account of the drafting process).

colonized peoples were an embodiment of the principles of human rights contained in the UDHR.³¹ The proposal for inclusion of this reference originated with the atypically liberal and pro-American Lebanese delegate (and UDHR co-drafter) Charles Malik, and it did not reflect a more general concern with “human rights” (especially if defined as individual rights) by China or most other Bandung participants.³² On the other hand, it did signify willingness to reappraise and reinterpret human rights to bring to the fore their (as noted above, already existing) state-supporting connotations.³³ The notion of Third World solidarity allowed the vocabulary of rights, and documents such as the UDHR, to be assimilated to China’s position on the UN Charter itself.³⁴ While by no means free from bourgeois ideology and Western agendas, UDHR nonetheless represented core universal norms—above all those related to state sovereignty, prohibition of aggression, and non-interference—needed to establish international peace and progress for formerly oppressed peoples.³⁵

Taking up this association, various Third World states argued that “the right of self-determination” should be included in ongoing multilateral plans to draft an “International Bill of Rights”—a view supported at the time by leading PRC international law scholars.³⁶ Though the “Bill” eventually culminated in the ideological and legal split between the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social

31. *Final Communiqué of the Asian-African Conference of Bandung*, UNIV. OF LUX. 2–4 (Apr. 24, 1955), https://www.cvce.eu/content/publication/1997/10/13/676237bd-72f7-471f-949a-88b6ae513585/publishable_en.pdf (recognizing the Universal Declaration of Human Rights as a common standard of achievement).

32. SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 107–09 (2010).

33. *Id.*

34. *Id.* (discussing how some people viewed human rights as a potential Third World political vernacular).

35. See generally G.A. Res. 217(III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

36. See Wang Tieya, *Zijuequan shi Baowei Jiben Renquan de Xianjue Tiaojian* [The Right to Self-Determination is a Prerequisite for Defending Basic Human Rights], *RENMIN RIBAO* [PEOPLE’S DAILY], Dec. 17, 1955, at 6 (agreeing that self-determination was essential to promoting world peace).

and Cultural Rights (ICESCR), each began with an article endorsing the right of self-determination and opened for signing in 1966.³⁷ China, still not a UN member state, would not sign either Covenant until three decades later, however, it continuously endorsed the right of self-determination as an international legal norm.³⁸

During the period of high Maoism, from the late 1950s–mid-1970s, domestic official discourse provided very little space for *renquan* given the term's continued bourgeois associations both internationally and domestically.³⁹ Meanwhile, self-determination remained the key “right” that Chinese authorities continued to volubly endorse in both settings.⁴⁰ Despite various post-Bandung diplomatic ruptures, China continued to emphasize its position of solidarity with international anti-colonial struggle.⁴¹ Following its 1971 replacement of the Taiwan-based Chiang Kai-shek regime as the legal representative of “China” in the UN, the PRC volubly advocated a stance within UN organs favoring self-determination and mutual assistance of Third World states, as opposed to “imperialistic” efforts by both the Soviet Union and United States, to determine international norms.⁴² This agenda continued to have an association, if an ambiguous one, with the vocabulary and institutions of international human rights.⁴³ China's most relevant activities in this regard were undertaken via the Economic and Social Council (ECOSOC), in which the Chinese delegate An Zhiyuan

37. See International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

38. See, e.g., Dawa Norbu, *Chinese Communist Views on National Self-Determination, 1922–1956: Origins of China's National Minorities Policy*, 25 INT'L STUD. 317, 326–29 (1988) (describing Mao's line on self-determination).

39. Zhu, *supra* note 12, at 159–60 (detailing differing views on human rights in China).

40. Norbu, *supra* note 38, at 326–29 (describing the importance of self-determination during the period of Maoism).

41. See, e.g., MARINA SVENSSON, *DEBATING HUMAN RIGHTS IN CHINA: A CONCEPTUAL AND POLITICAL HISTORY 200–04* (2002) (describing China's role in drafting the Universal Declaration of Human Rights); see also ANGLE, *supra* note 16, at 200–04 (describing the role of human rights during the revolutionary period in China).

42. SVENSSON, *supra* note 41, at 200–04.

43. *Id.*

marked China's first appearance in a plenary session with an address noting "the great historical trend of [recent] times: countries wanted independence, nations wanted liberation, and the people wanted revolution."⁴⁴

Chinese delegates used ECOSOC to appeal to other developing States, supporting initiatives to expand the body's membership. Open efforts to combat Soviet influence led the delegate Evgeyev Makeev to accuse his Chinese counterpart of using the forum to "incite anti-Soviet hysteria."⁴⁵ However, China's attempts to promote its interpretations of decolonization and self-determination within ECOSOC often addressed more structural issues. In a plenary session of July 6, 1972, for example, representative Wang Jun-sheng expressed his government's view that international development assistance should not be subject to political conditions, instead should be premised on respect for national sovereignty, and that international economic assistance should be provided on more favorable terms to developing states.⁴⁶ In an earlier sub-committee meeting of May 30, 1972, Wang had invoked "the struggles of the peoples of the world against imperialism, colonialism and racism and for the attainment and defense of national independence, national sovereignty and fundamental human rights in accordance with the spirit of the Charter."⁴⁷

In July of the same year, Wang Jun-sheng's fellow delegate Wang Zichuan (no relation) invoked the UN Commission on Human Rights (UNCHR) in a statement supporting Kenyan allegations of human

44. U.N. ESCOR, 52nd Sess., 1810th mtg. at 3, U.N. Doc. E/SR.1810 (Jan. 6, 1972).

45. U.N. ESCOR, 52nd Sess., 1813th mtg. at 28, U.N. Doc. E/SR.1813 (Jan. 7, 1972).

46. Specifically, Wang argued that "[a]ssistance loans should be at a low interest rate or interest-free. Creditor countries should make full allowance for recipient countries' difficulties, extend repayment periods where necessary, and [they should] never force the repayment of debts." U.N. ESCOR, 53rd Sess., 1824th mtg. at 41–42, U.N. Doc. E/SR.1824 (July 6, 1972) [hereinafter ESCOR 53rd Sess., 1824th mtg.] (also stating China's disapproval of political influence being accrued in exchange for aid by a donor country).

47. See SAMUEL KIM, *CHINA, THE UNITED NATIONS, AND WORLD ORDER* 485 (1979) (quoting Wang Jun-sheng as stating that China was ready to work together with countries who upheld peace).

trafficking and forced labor practices in Europe.⁴⁸ Wang's delegation "was ready to support any concrete decisions and measures which might be taken and any appeal addressed to the ILO and to the Commission on Human Rights" in order to "severely punish" the misfeasors.⁴⁹ Despite this apparent theoretical support for the UNCHR as an institution, China did not actually involve itself in the organization—generally considered closely linked with Washington—at this stage. Two years later, Wang Zichuan acknowledged China's ambivalence regarding international human rights instruments and institutions, stating that the UDHR and the two human rights covenants "had been adopted at a time when the People's Republic of China had been deprived of its lawful rights in the United Nations [and that] the Chinese Government had to examine and study the Covenant and reserved the right to comment on [them]."⁵⁰

Throughout this period, China was unwilling to sign onto the individually-focused conceptions of "human rights" being developed and promulgated by Western States, scholars, and activists.⁵¹ However, Beijing still saw no reason to reject the vocabulary of rights tout court, supporting efforts by Third World States to reclaim the concept of a right of self-determination as entailing "economic self-determination," including via statements and voting in support the New International Economic Order (NIEO) project.⁵² Chinese delegate Huang Hua, during the sixth special session of the General Assembly that passed the 1974 NIEO resolutions, tied his country's support for these concepts to "the inalienable right of all countries to equal participation in the solving of world economic problems[,] as well as to a broader struggle against "alien domination and

48. U.N. ESCOR, 53rd Sess., 1834th mtg. at 134, U.N. Doc. E/SR.1834 (July 25, 1972).

49. *Id.*

50. See KIM, *supra* note 47, at 485 (quoting remarks made by Wang Jun-sheng regarding the U.N. human rights conventions).

51. See U.N. ESCOR, 56th Sess., 748th mtg. at 156–57, U.N. Doc. E/AC.7/SR.748 (May 13, 1974) [hereinafter ESCOR 56th Sess., 748th mtg.] (explaining that the Chinese government had to examine and study the Covenant before signing on draft resolution IV).

52. G.A. Res. 3201 (S-VI), ¶¶ 1, 4 (May 1, 1974); G.A. Res. 3281 (XXIX), at 1–2 (Dec. 12, 1974).

occupation, colonialism, racial discrimination, *apartheid* and all forms of neo-colonialism.”⁵³ The Chinese delegation to the sixth special session, which was headed by Deng Xiaoping personally, provided continual support for the NIEO and its component normative documents such as the Charter of Economic Rights and Duties of States.

Towards these same ends, Chinese delegates supported concepts such as states’ permanent sovereignty over natural resources and specific norms such as the two-hundred mile Exclusive Economic Zone (EEZ) developed in the course of drafting discussions on the UN Convention on the Law of the Sea (UNCLOS).⁵⁴ These aspects of economic self-determination were, of course, rights for states, not for individuals.⁵⁵ Chinese official positions on international obligations remained overwhelmingly state-centric.⁵⁶ However, both revolutionary ideology and China’s practical activities abroad supporting “just” struggles against oppressive authorities did suggest that the self-determination norm could be used to delegitimize state governments associated with colonialism, imperialism, racism, or *apartheid*.⁵⁷ A war to overthrow such a regime should not, for example, necessarily be considered a “war of aggression.”⁵⁸ Still, even in such cases, “self-determination” rights remained collective and communal, were associated with all but the most reactionary

53. See U.N. GAOR, 6th Special Sess., 2229th plen. mtg. at 4, U.N. Doc. A/PV.2229 (May 1, 1974) [hereinafter GAOR 2229th plen. mtg.] (noting that the Declaration reflects the demands of the developing world).

54. See *id.* (explaining that the Declaration recognized the widening gap between developing and developed countries).

55. See MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY*, *supra* note 32, at 112 (emphasizing the demands of individual sufficiency outlined in the ICESCR).

56. See *id.* (noting that states were now responsible for global social rights).

57. See Jessica Whyte, *The “Dangerous Concept of the Just War”:* *Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions*, 9 HUMAN. J. 313, 316 (2018) (noting that Chinese delegates also specifically linked China’s refusal to engage diplomatically with racist or *apartheid*-based regimes to its positions on human rights); see also GOAR 2229th plen. mtg., *supra* note 53, at 4 (highlighting the Declaration’s goal of addressing inequalities formed by the old world order).

58. See U.N. GAOR, 6th Comm., 29 Sess., 1475th mtg. at 61–63, U.N. Doc. A/C.6/SR.1475 (Oct. 14, 1974).

states, and did not implicate rights for individuals. Following the ideological transformations of the next decades, however, the proper resolution of the state-individual dichotomy in human rights would become a far thornier problem.

Very soon after Mao's death in 1976, "rights" began to reappear in Chinese domestic political discourse, although the Communist Party maintained an overall non-committal attitude towards the exact form and scope that such rights should encompass. With the implementation of "Reform and Opening Up," Chinese authorities began to explicitly pursue a course of Communist Party-led modernization tied to a gradual convergence with key international norms in the areas of economics, law, and (in a much more restricted and contested sense) politics.⁵⁹ Human rights have played a complex role in processes of change. As a topic of post-1978 Chinese discourse, they encompass legal, political, as well as economic dimensions.⁶⁰ A willingness to employ the concept occasionally in criticisms of foreign regimes was paired with a continued reluctance to allow it to figure heavily in either domestic policy or become a central feature of bilateral or multilateral foreign relations.⁶¹ When faced with a Time Magazine journalist's question about the Carter administration's emphasis on human rights at a January 5, 1979 press conference held in Beijing, Deng Xiaoping responded that "as for the whole issue of human rights raised by the United States, I hope that we can avoid discussing this issue, because each side has their own interpretation."⁶²

In contrast to the preceding Maoist period, however, human rights could now be discussed internally by scholars and others seeking to provide a "Chinese definition" for the concept, if very contentiously

59. See STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 2* (1999) (describing the role of "caged" legal change during this process of reform).

60. See *id.* (emphasizing the struggles of Chinese reformers who were met with a lack of formal legal institutions in the 1950s).

61. See *id.* (noting the development of Chinese legal institutions in the wake of Maoism and hostile institutional environments).

62. Deng Fuzongli Huijian Meiguo Jizhe [*Vice Premier Deng Meets with American Journalists*], RENMIN RIBAO [PEOPLE'S DAILY], Jan. 6, 1979 at 1.

and at risk of transgressing political red lines.⁶³ At the same time that Deng was making such comments, activists and intellectuals participating in the Democracy Wall movement in Beijing were actively calling for “human rights” associated with democratization and civil and political freedoms.⁶⁴ Though it was initially tolerated, the Party’s official line soon turned against this movement, as embodied by, e.g. a March 22 editorial in the BEIJING DAILY entitled *Human Rights Are Not a Slogan of the Proletariat*.⁶⁵ Even as leading figures in this advocacy for a liberalized, individualized conception of human rights were being arrested and intimidated, academics were allowed to continue discussing the concept in a theoretical sense. Discussions on the topic were published in several academic journals, articulating different perspectives.⁶⁶ It had been a mistake, according to the conclusions of a symposium held by Shanghai Normal University, for some to label “human rights” a Western bourgeois concept unsuitable for socialist states.⁶⁷ China still had many “feudal” elements and, unlike the West, had not fully entered the bourgeois stage of historical development when it had its early socialist revolution.⁶⁸ Thus, remnants of feudalism such as arbitrary power of officials and a lack of legal rights accorded to citizens would have to be addressed in order to move through, and eventually surpass the (Western-style) bourgeois forms of law and politics.⁶⁹

Even if suggesting the need for significant legal and political reform, these emerging views did not explicitly challenge China’s Party-state system, and thus remained in line with Deng Xiaoping’s

63. See Carlos Wing-Hung Lo, *Socialist Legal Theory in Deng Xiaoping’s China*, 11 COLUM. J. ASIAN L. 469, 474–75 (1997) (noting how Deng geared law towards a practical approach).

64. See ANGLE, *supra* note 16, at 239–42.

65. *Tupo Renquan Jinqi Lijing Jiannan*, [The Difficult Experience of Breaking Through the Forbidden Zone of Human Rights], SINA.COM (Jan. 4, 2004), <http://news.sina.com.cn/c/2004-01-05/02331503622s.shtml>.

66. See, e.g., Zhen Zhong, *Guonei Baokan guanyu “Renquan” Wenti de Taolun Zongshu* [A Summary of Discussions on “Human Rights” in Domestic Newspapers], 3 SHEHUI KEXUE [SOC. SCI.] 76–78 (1979).

67. *Guanyu “Renquan” Wenti de Taolun* [Discussion on “Human Rights”], 4 SHANGHAI SHIFAN DAXUE XUEBAO (ZHEXUE SHEHUI KEXUE BAN) [SHANGHAI NORMAL UNIV. J. (PHIL. & SOC. SCI. ED.)] 111 (1979).

68. *Id.*

69. *Id.*

Four Cardinal Principles setting limits to the acceptable scope of systemic change in the new era.⁷⁰ However, while generally tolerated, and reflected in various legal reforms including the adoption of the 1982 Constitution, strong arguments that “bourgeois” rights could be fully reconciled with the Party rule at a stage in development towards socialism did not receive official endorsement.⁷¹ As Deng had informed American journalists, the official position was still that China’s definition of human rights was for it to decide.⁷² The most officially endorsed view was that the Western, individualist view of *renquan*, was not one appropriate to socialist states, which instead focused on protecting collective rights and interests.⁷³

This view did not necessarily entail a lack of engagement with the burgeoning international human rights system.⁷⁴ China sent observers to the UNCHR from 1979, and in 1982, just as it was implementing its Reform Era Constitution, it joined as a full member.⁷⁵ This decision to join the UNCHR was however in part motivated by more general diplomatic concerns about ensuring China’s influence and role in the UN more generally.⁷⁶ This is demonstrated in exchanges like that of a March 2, 1979 UNCHR meeting in which the Mongolian delegate used his time on the floor to lambaste both the Pinochet regime in Chile and China’s ongoing support for the Pol Pot regime in Cambodia.⁷⁷ China’s observer attempted to provide a

70. See Lo, *supra* note 63, at 474–75 (noting the Four Cardinal principles, which articulate a defense of Party rule and the basic elements of Communist Party ideology).

71. See *id.* (detailing the aim to search for a “Chinese path”).

72. See *id.* (affirming the importance of the four cardinal principles as well as the role of legal institutions).

73. See LUBMAN, *supra* note 59, at 2 (noting Chinese Party elder Chen Yun’s distrust of market forces).

74. Embassy of China in Nor., *Relations Between China and The UN Human Rights Mechanism* (May 17, 2004), <https://www.mfa.gov.cn/ce/cegv//eng/rq/jblc/t85088.htm> (demonstrating China’s commitment to and participation in the UN’s efforts towards improving human rights).

75. *Id.*

76. See *id.* (noting China’s signature to the memorandum to demonstrate intent to cooperate).

77. See U.N. ESCOR, 35th Sess., 1500th mtg. at 9, U.N. Doc. E/CN.4/SR 1500

response countering this “anti-Chinese propaganda,” but was prevented by the session chairman, who pointed out that observers do not have a right of reply.⁷⁸ Membership in the Commission would, if nothing else, provide China with a greater voice in such situations.

China’s advocacy for the “legitimate” rights of the exiled Khmer Rouge coalition as opposed to the pro-Vietnam government installed following the latter country’s “aggression,” and its linking of this stance with the right of self-determination, figured in further Chinese appearances at the UNCHR.⁷⁹ A similar critique of aggression by competitor socialist regimes was leveled at Soviet aggression in Afghanistan.⁸⁰ Chinese state media favorably cited an unofficial international “tribunal for Afghanistan” by a group of judges whose report included the allegation that Soviet incursions infringing on Afghan self-determination had “violated Article 5 of the UDHR”—a highly innovative position given that Article 5 contains only the UDHR’s provision on torture and cruel, inhumane, or degrading treatment.⁸¹ At the same time, China also continued to link the all-important right of self-determination with condemnation of racist and apartheid regimes at the UN.⁸² Chinese delegates used the UNCHR to express support for placing economic sanctions on South Africa, as reflected in the delegate Gu Yijie’s call for “the United Nations [to] take practical and effective measures, including sanctions, in order to make [South Africa] abandon its racist policies and respect human rights.”⁸³

(Mar. 2, 1979) (recording how China’s observer at the meeting expressed concern over anti-Chinese propaganda).

78. *Id.*

79. See U.N. ESCOR, 37th Sess., 1585th mtg. at 10, U.N. Doc. A/CN.4/SR.1585 (Feb. 6, 1981) (recording the Chinese observer’s statements concerning Vietnam).

80. See “*Afghan Fating*” *Gongbu Dui Su Qin A Panjueshu* [“*Afghan Court*” *Publishes a Verdict on Soviet Aggression Against Afghanistan*], RENMIN RIBAO [PEOPLE’S DAILY], May 6, 1981, at 6 (reporting the verdict by an Afghan court judging the Soviet Union guilty of crimes against international peace).

81. *Id.*

82. See U.N. ESCOR, 37th Sess., 1599th mtg. at 12, U.N. Doc. E/CN.4/SR.1599 (Feb. 17, 1981) (highlighting strong condemnation of apartheid by the General Assembly).

83. See *id.* (reporting Gu Yijie’s condemnation of racist policies in South Africa).

Such advocacy continued with China's joining of the UNCHR as a full member in 1982.⁸⁴ However, the conflicting elements of China's position—pairing strong emphasis on the concept of non-interference with an acknowledgment that some regimes were so beyond the pale as to lose its protection—became increasingly apparent. By the mid-1980s, China was in particular facing increasing criticism for its own ethnic policies in Tibet.⁸⁵ China's efforts to counter such confrontations, while maintaining utility of human rights as a concept broadly supporting the government's ongoing legal reforms and policy of international integration, was reflected in ongoing ambivalence regarding its use in official publications such as the PEOPLE'S DAILY.⁸⁶ The concept would be cited favorably in support of particular struggles, such as the civil rights movement in the United States or condemnations of apartheid, the crime of aggression, etc., however, there were many references centered on criticizing the ease with which it could be manipulated to serve the aims of hostile foreign forces.⁸⁷

84. See *Relations Between China and The UN Human Rights Mechanism*, *supra* note 74 (noting China's commitment to human rights and the UN Charter).

85. See, e.g., Robyn Brentano, Letter to the Editor, N.Y. TIMES, Apr. 15, 1984 at SM114 (expressing disappointment in global leaders failure to assist the Tibetan people in the face of a "continuing policy of oppression" from China, despite three UN resolutions condemning Chinese human rights abuses in Tibet); John Avedon, *Opinion, China and Tibet: Conquest by Cultural Destruction*, WALL ST. J., Aug. 24, 1987, at 23.

86. See, e.g., *Wo Daibiao Zai Lian Da Di San Weiyuanhui Fayan Zhichu Baquanzhuyi Da Guimo Yangzhong Qinfan Renquan* [Our Representative at the Third Committee of the UN General Assembly Stated that Hegemonism Has Grossly Violated Human Rights on a Massive Scale], RENMIN RIBAO [PEOPLE'S DAILY], Oct. 25, 1979, at 6; *Renquan de Lishi he Xianzhuang* [History and Present Situation of Human Rights], RENMIN RIBAO [PEOPLE'S DAILY], Apr. 13, 1982, at 5; *Wo Daibiao Zai Lianheguo Jing She Lishi Hui Di Er Weiyuanhui Fayan Zhongguo Fangdui Liyong Renquan Wenti Gangshe Bieguo Neizheng* [Our Representative at the Second Committee of the UN Economic and Social Council Stated that China Opposes the Use of Human Rights to Interfere in the Internal Affairs of Other Countries], RENMIN RIBAO [PEOPLE'S DAILY], May 24, 1985, at 7.

87. After the US Congress passed the Foreign Relations Authorization Act of 1987 urging the White House to monitor the human rights situation in Tibet and to make this an "important factor" in relations with China, Chinese official statements lambasted the US usage of "human rights" as an instrument designed to undermine China's state sovereignty. Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, §1243, 101 Stat. 1331 (1987); *NPC Condemns US*

Chinese authorities' attempt to shape China's commitment to human rights into a moderate reformism, associated with statist legality and gradual international economic and diplomatic integration without inviting foreign interference or internal dissent against Party rule, was reflected in the human rights agreements that it joined between the years 1980–1988. These included the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1980); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1981); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1988), as well as the Convention on the Suppression and Punishment of the Crime of Apartheid (1983) and the International Convention against Apartheid in Sports (1988).⁸⁸ Out of these treaties, CEDAW, CERD, and CAT each represented a potential challenge to the collective and statist orientation towards rights that the Party sought to maintain, given that each explicitly conferred individual rights and mechanisms for both interstate and individual complaints.⁸⁹ China issued reservations to all of these complaint mechanisms, as it has done in subsequent treaties.⁹⁰

Meddling, BEIJING REV., Jan. 4–10, 1988, at 6–7. The US Senate's resolution of March 1989 condemning China's action in Tibet sparked similar responses. 101 S. Res. 82 (1989); see, e.g., David Holley, *Tibet, Human Rights Are Internal Issues, Official Says U.S. Criticism Sparks Rebuke by China*, L.A. TIMES, Mar. 28, 1989, at 5 (quoting Qian Qichen, Foreign Minister of China's rebuke to the Senate resolution).

88. *Zhongguo Jiaru le Naxie Guoji Renquan Gongyue he Yidingshu [International Human Rights Conventions and Protocols to Which China Has Acceded]*, RENMIN RIBAO [PEOPLE'S DAILY], Mar. 27, 2006 at 9.

89. See Convention on the Elimination of All Forms of Discrimination Against Women, arts. 10–13 (affirming women's rights to non-discrimination in education, employment, and economic and social activities).

90. On China's strategy of reservations and practical limitation of treaty obligations, see Björn Ahl, *Chinese Law and International Treaties*, 39 HONG KONG L.J. 737, 738, 743–44, 751–52 (2009) (noting that the domestic application of treaties can be limited by the State weakening the effectiveness of treaties).

III. POST-MAOIST ENCOUNTERS WITH NEOLIBERAL RIGHTS DISCOURSE

At a December 9, 1988 meeting held in Beijing to commemorate the 40th anniversary of the signing of the UDHR, the highly esteemed Chinese sociologist Fei Xiaotong, acting in his capacity as Vice-Chairman of the Standing Committee of the National People's Congress, expressed in fairly explicit and realistic terms the degree to which Chinese authorities were prepared to endorse the concept of "human rights":

China has always appreciated and supported the efforts of the United Nations to work towards the general advancement of human rights and basic freedoms. We have always sympathized with and supported Asian and African states' just struggles to oppose racial discrimination, demand basic human rights, oppose colonialism, demand national self-determination, and preserve state and territorial unity. . . . We actively support the concept of human rights that has developed [to the extent that it is] suitable to the interests of developing countries' populations, and put forth tireless efforts to promote its further development and full realization.⁹¹

Fei's references to self-determination closely reflect China's actual uses of the vocabulary of rights in the settings of international organizations during the 1970s, and indicate the extent to which, even at the end of the decade, this continued to be the umbrella "right" under which all others were encompassed. However, his references to the "development of the concept of human rights" and its suitability for "developing countries' populations" allude to the increasingly important role that "development" itself was playing during this period in Chinese rights discourse.⁹² Although China during this period signed onto key international human rights instruments and joined the UNCHR, Chinese representatives there, at the UNGA, and in other such venues were much more prone to refer

91. See *Shoudu Beijing Juxing Zuotanhui Jinian "Shijie Renquan Xuanyan" Tongguo Sishi Zhounian* [*The Capital Beijing Held a Symposium to Commemorate the 40th Anniversary of the Adoption of the "Universal Declaration of Human Rights"*], RENMIN RIBAO [PEOPLE'S DAILY], Dec. 9, 1988, at 6 (noting China's advocacy against racial discrimination).

92. *Id.*

to the newly-forming “right to development” (*fazhanquan* 发展权) (if still second to self-determination) than to other specifically enumerated rights.⁹³ In associating themselves with the efforts to articulate a “right to development,” Chinese officials, diplomats, and scholars could cast China’s state-led project of modernization as a typical expression of human rights in the developing world, or even as a human rights pioneer.⁹⁴

At the same time during the early 1980s that China was beginning to engage in other aspects of the UN, it joined in more general discussions of the organization’s role in promoting global development and, specifically, the idea that states had a “right to development.”⁹⁵ This concept had been first articulated in a UN forum by the Senegalese foreign minister Doudou Thiam in a September 23, 1966 GA speech, as part of a call for a new “economic Bandung Conference” for Third World states struggling in the face of systemic disadvantages in international economics structures that had been shaped by the history of colonization.⁹⁶ Over the course of various meetings and conferences in the late 1960s through early 1970s, in the GA as well as in important forums such as the United Nations Conference on Trade and Development (UNCTAD), the rhetoric of development as a right was significant in shaping ongoing plans for the NIEO.⁹⁷ During this period, the notion of a right to development also began to gain traction among both lawyers from the Third World and sympathetic jurists in the Global North.⁹⁸ Karel Vasak, for example, followed the lead of Kéba M’Baye to include the right to development as a paradigmatic example of “third generation” rights that involve both state’s rights

93. See ESCOR 56th Sess., 748th mtg., *supra* note 51, at 156–57.

94. See *Tantao Youquan Renquan de Jige Wenti* [Discussing Issues on Human Rights], RENMIN RIBAO [PEOPLE’S DAILY], Dec. 3, 1988, at 4 (explaining the “modern” view that human rights are both an individual and collective right).

95. See U.N. GAOR, 21st Sess., 1414th plen. mtg. at 27, U.N. Doc. A/PV.1414 (Sept. 23, 1966) (affirming the right to development).

96. *Id.*

97. See Umut Özsu, *In the Interests of Mankind as a Whole: Mohammed Bedjaoui’s New International Economic Order*, 6 HUMAN.: INT’L J. HUM. RTS., HUMANITARIANISM, & DEV. 129, 134 (2015).

98. See generally Kéba M’Baye, *Le Droit Au Développement Comme un Droit de L’Homme*, 5 REVUE DES DROITS DE L’HOMME 505 (1972).

vis-à-vis the international community and their obligations to their own citizens.⁹⁹ The radical challenge to existing political economy posed by the NIEO, was directly associated by leading figures within the movement, with the notion of a right to development—even one construed as a norm of “higher law” in the form of *jus cogens*.¹⁰⁰

Meanwhile, as Daniel Whelan notes in his account of this process, “while the idea of development as a right was gaining some traction, the outcome documents became ever more sterile and devoid of any significant normative language.”¹⁰¹ UNCTAD sessions, and GA discussions aiming to flesh out NIEO proposals (or their subsequent implementation once adopted) soon abandoned the idea of development as a “right” with clear legal obligatory effect.¹⁰² Thus, over the course of China’s engagement with the NIEO project in the 1970s, it did not place significant emphasis upon a “right to development” as it did upon the right of self-determination.

This changed considerably after the formal beginning of China’s Reform Era in 1979, with a rhetorical shift that coincided with both China’s transformation of its domestic approach to development and with the beginning of its activity in the UNCHR. Although as a UNCHR observer between 1979 and 1981, China could only play a limited role in early discussions on formulating development as a human right, it did support such efforts following their initiation by the UNCHR, chaired by M’Baye. This led to a subsequent Secretary-General’s Report seeking to define the right (along with the “right to peace”—another “third generation right”), and in the same year, General Assembly discussions and subsequent passage of a

99. See Margot E. Salomon, *From NIEO to Now and the Unfinishable Story of Economic Justice*, 62 INT’L & COMPAR. L.Q. 31, 52 (2013) (describing the developing State as both a right-holder and duty-bearer).

100. See Özsü, *supra* note 97, at 134 (observing that *jus cogens* norms were the main force underwriting NIEO).

101. See Daniel J. Whelan, “Under the Aegis of Man”: *The Right to Development and the Origins of the New International Economic Order*, 6 HUMAN.: INT’L J. HUM. RTS., HUMANITARIANISM, & DEV. 93, 105 (2015) (noting that a substantial link between development and human rights was never actually forged in the NIEO).

102. See *id.* (highlighting that while the right to development was gaining traction, the final documents for the NIEO were largely devoid of the language).

resolution declaring the existence of the right to development.¹⁰³ During the 1979 GA session discussing the proposed resolution, China's delegate Wang Tie-chen noted that "the concept [of] the right to development fell within the area of human rights[,] and also that "human rights involved not only individual rights and fundamental freedoms but also, primarily, national rights."¹⁰⁴

The Chinese definition of the term "right to development" consistently emphasized the primary role of the state, more so than had the right to self-determination, which in principle permitted boycotting and sanctions of apartheid states or colonial administrations.¹⁰⁵ Development, though, encompassed only one side of the "third generation" dynamic: it was a right of states before the international community, but not necessarily a (legal) obligation of states to their citizens.¹⁰⁶ On the one hand, China's leadership under Deng did indeed premise a great deal of their legitimacy on the idea of a mission, and obligation, to deliver development and modernization to the populace.¹⁰⁷ However, China did not make major efforts to construe this citizen-facing aspect of development as implicated in the scope of the "right."¹⁰⁸

103. See U.N. Secretary-General, *The Emergence of the Right to Development*, ¶ 33, U.N. Doc. E/CN.4/1334 (Jan. 2, 1979) (emphasizing that the right to development is a major right with increasing significance).

104. U.N. GAOR, 34th Sess., 3rd comm. mtg. at 3, U.N. Doc. A/C.3/34/SR.25 (Oct. 23, 1979).

105. See *id.* (highlighting that Third World countries requested due attention be paid to the mass violations of political and economic rights that included the failure to recognize the right to self-determination).

106. See *id.* (noting that the right to development encompassed primarily national rights).

107. See David Shambaugh, *Deng Xiaoping: The Politician*, 135 CHINA Q. 457, 483–84 (1993) (noting how Deng Xiaoping, in outmaneuvering his political opponents, set economic modernization as the principle national goal after years of economic stagnation and campaign politics).

108. See *Chinese Delegate Speaks on Human Rights at Geneva Meeting* (Xinhua News Agency broadcast 5 Feb. 1992, BBC re-broadcast 8 Feb. 1992) (where the Chinese delegation stressed that the right to development is a "collective right, primarily speaking, for the destiny of the state or nation. It is the prerequisite and basis for the development of the individual. . . . The development of the individual depends on the development of a nation or state. Cited in Bonny Ibhawoh, "The Right to Development: The Politics and Polemics of Power and Resistance," *Human Rights Quarterly* 33, no. 1 (February 2011): 76-104, at 94.)

China was at the same time becoming closely involved with the existing UN system for promoting development.¹⁰⁹ It had already participated as an observer at the December 1972 session of UNIDO's Permanent Committee, then was elected as a member of the Industrial Development Board.¹¹⁰ Between 1972-1978, however, while China contributed very modest expertise and funding to some UNIDO projects it was not itself, despite its extreme poverty, a recipient of development assistance.¹¹¹ This changed after 1979, as UNIDO became a key source of development aid for the increase of industrial capacity during the early years of Reform and Opening-Up.¹¹² From a poor state insisting on dispensing revolutionary largesse to others, China became an upwardly-mobile state eager to receive whatever largesse it could from the faucets of global capital. The story of the concept of "development" in China after 1979 is closely bound up with the widespread recognition that China itself was not just a "developing state," but was a state that required *assistance*, whether in the form of international aid programs or private investment, in order to adequately develop.¹¹³

The Reform era brought a final renunciation of the doctrine of self-sufficiency that had been a major feature of Maoist thought, and the invitation of both foreign capital and economic expertise for the purposes of achieving state-set development goals.¹¹⁴ While Mao's China had still insisted on the possibility of "transitioning amidst poverty" to the realization of egalitarian socialist fecundity, Deng-era

109. See ESCOR 53rd Sess., 1824th mtg., *supra* note 46, at 41–42.

110. See MARKING THE 50TH ANNIVERSARY OF UNIDO: LOOKING BACK, MOVING FORWARD, U.N. INDUS. DEV. ORG. 66 (2016), https://www.unido.org/sites/default/files/2017-02/MARKING_50_Years_UNIDO-wrap-up_brochure_0.pdf (stating that as of 2016 there was fifty years of UNIDO-China cooperation).

111. See *id.*

112. See *id.*

113. See ESCOR 53rd Sess., 1824th mtg., *supra* note 46, at 41–42 (reporting that China understood that independence and self-reliance did not mean seclusion and self-sufficiency).

114. For a detailed account of the role of foreign expertise in helping shape Chinese elite views around economic policy, see JULIAN GEWIRTZ, UNLIKELY PARTNERS: CHINESE REFORMERS, WESTERN ECONOMISTS AND THE MAKING OF GLOBAL CHINA (2017) (noting China's broad engagement with Western economists).

China would be one in which the state would “let some people get rich first.”¹¹⁵ What this meant in practice was that China no longer had any meaningful incentives to provide the “right to development,” which it continued to rhetorically invoke, with any meaningful legally-binding character, or to challenge the global structures of inequality with specific proposals like those of the NIEO.¹¹⁶ It was sufficient that the right could serve as a moral and rhetorical imperative to the rich countries of the West to continue providing assistance for Chinese economic growth.¹¹⁷ Meanwhile, this shift paralleled a more general international trend that has been described as a shift in focus from “global inequality” to “global poverty.”¹¹⁸ The NIEO era had centered on developing states’ attempt to achieve agency and equality of status within global political and economic governance. However, the developmental discourse of the 1980s and after was far more focused on poverty as an apolitical problem to be solved by technocratic, growth-oriented policy prescriptions. China’s massive successes in poverty-reduction were, and remain, one of the key “success stories” of this new approach.¹¹⁹

Thus, while enthusiastically supporting measures such as the 1986 General Assembly passage of the UN Declaration on the Right to Development, China did not make efforts to give this right a systemic legal character—and certainly not to endow it with features that place obligations on states themselves as to the *type* of development they pursue in terms of its effect upon their populations.¹²⁰ Having entered a rapidly neo-liberalizing international

115. See Yixiao Zhou & Ligang Song, *Income Inequality in China: Causes and Policy Responses*, 9 CHINA ECON. J. 186, 193 (2016) (highlighting the impact of Deng Xiaoping’s famous quote “let some people get rich first” and its implicit understanding that others would get rich later).

116. See *id.* (illustrating how coastal provinces disproportionately benefited from the opening of trade and investment).

117. See *id.* (noting that trade opened in China in the 1980s).

118. See, e.g., MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY*, *supra* note 32, at 162–67, 191–94 (questioning the utility of human rights considered as doctrinal ends in themselves).

119. See *id.* at 207 (emphasizing the role of the progressive evolution of juristic sensibility as a force for change); see also Zhou & Song, *supra* note 115, at 197 (noting the Chinese governments push for a more harmonious society which includes reforms to combat inequality).

120. See *id.* (highlighting Chinese government initiatives to promote

economic system, China's own economic growth became a key pivot in a global growth logic that, above all, rewarded the very richest, with unprecedented wealth accumulation, and the very poorest, with escape from the situation of utmost desperation.¹²¹ The tremendous increase in China's own Gini coefficient demonstrates the extent to which this global model of unequal development was imprinted on the Chinese economy that served as one of its key engines.¹²²

It is true that, as scholars writing on the concept of the right to development have long suggested “[u]nder the terms of the Declaration on the Right to Development (DRD), it is each person, and not the State per se, that is the central subject of development, and as such the person should be the active participant and beneficiary of the right to development.”¹²³ However, the practical application of the right in China as elsewhere has continued to rely on its conceptualization as a collective right that does not entail any specific commitment to redistribution or inequality-reduction.¹²⁴ The right continued to serve its purposes as a source of legitimacy for China's policies of authoritarianism combined with economic growth, which were necessary at its present historical stage in the long march towards true socialism—while the civil and political rights that liberals insisted were also a necessary feature of this historical progress, they could be regarded as much less important if not outright dispensable.¹²⁵ As a 1988 PEOPLE'S DAILY editorial on “investigating several issues related to human rights” phrased it, “this transformation of the concept of human rights [to include self-determination and development] is not the result of anyone's idle speculation, it is the inevitable and logical result of the development of history.”¹²⁶

development through modernization).

121. *See id.* (identifying that inequality has risen along with the rise in income).

122. *See id.* (emphasizing that the global fundamental cause for income inequality can be found in China during its transition period).

123. Salomon, *supra* note 99, at 50.

124. *See id.* (stating that the DRD focuses on promoting new international economic order based on sovereign equality, interdependence, mutual interest, and co-operation among all states).

125. *See id.*

126. Wang, *supra* note 36.

The 1980s rapprochement between China and international human rights discourse culminated in the crisis of the Tiananmen protest movement in 1989 and the serious international frictions that accompanied its harsh suppression by the Communist Party.¹²⁷ As had been the case with the Democracy Wall movement a decade earlier, liberal and “bourgeois” notions of human rights as primarily individual, civil, and political legal protections against the state were an important feature of political discourse among the protesting population.¹²⁸ At the same time, however, many protestors were also motivated by social and economic concerns, and indeed economic malaise associated with inflation had been one of the key factors leading to general popular discontent before the death of ousted reformer Hu Yaobang acted as the spark for large-scale mobilization.¹²⁹ The severe crackdown that followed also entailed an internal political purge of the Communist Party, with General Secretary Zhao Ziyang placed under house arrest and removed from office in favor of Shanghai Party Secretary Jiang Zemin.¹³⁰

Chinese officials in the winning conservative camp bitterly resisted criticisms over their handling of the political crisis based on human rights.¹³¹ In an unofficial memoir believed to be authored by the Premier Li Peng, for example, the latter writes that “The West is always using economic techniques to pressure us, and to support freedom, human rights, and democracy. But the reality is they don’t want China to become truly strong.”¹³² On the other hand, Deng Xiaoping himself set the tone in terms of continuing the effort to relativize and appropriate, rather than reject, the idiom of human rights for the Communist Party.¹³³ He became particularly apt to juxtapose *renquan* (“human rights”) with *guoquan* (“the rights of the state”).¹³⁴ During an October 1989 meeting with former US President Richard Nixon, Deng remarked that “people support *renquan*, but

127. ANGLE, *supra* note 16, at 116–23.

128. *See id.*

129. *See id.*

130. *See id.*

131. LI PENG, LI PENG “LIUSI RIJI” [LI PENG “JUNE 4TH DIARIES”] 68 (2010).

132. *See id.*

133. *Id.*

134. DENG XIAOPING, DENG XIAOPING WENJI [COLLECTED WORKS OF DENG XIAOPING] 331 (1994).

you should not forget that there is also *guoquan*. We discuss human dignity, but we should not forget that there is also state dignity.”¹³⁵ Deng brought up the same idea the following month in a meeting with the Tanzanian statesman Julius Kambarage Nyerere, saying that “In truth, *guoquan* is far more important than *renquan*.”¹³⁶ Again, in a December meeting with a Japanese economic delegation, he stated that “Some Western countries bring up *renquan* and so on . . . when in fact what they want to do is to harm our *guoquan*.”¹³⁷

In the years immediately after the Tiananmen crisis, while China did not explicitly repudiate any of its existing international human rights commitments, it did on various occasions seek to place increasing emphasis on the idea of a “right to development” as a justification for its idiosyncratic interpretation of *renquan*.¹³⁸ The use of the term increased considerably in internal state media uses, and was also increasingly brought up in diplomatic settings, often as part of a new and curious pairing of “the right to existence and the right to development” (*shengcunquan yu fazhanquan* 生存权与发展权).¹³⁹ This terminology had not been used earlier, but immediately after China’s late 1980s turmoil authorities employed this formula in the attempt to emphasize the foundational character of “state’s rights” for other human rights.¹⁴⁰ This was part of a more general effort during this period to convey the notion that existing human rights frameworks were woefully inadequate to deal with, or pass judgment on, China’s monumental task of economic development and modernization.¹⁴¹

135. *Id.*

136. *Id.* at 345.

137. *Id.* at 348.

138. ANGLE, *supra* note 16, at 116–23.

139. This discourse is reflected in HUANG ZHANSEN ET AL., DANGDAI ZHONGGUO RENQUAN LUN [CONTEMPORARY CHINESE HUMAN RIGHTS] 315 (1993).

140. *Id.* (both the Tiananmen protest movement and also a contemporaneous uprising and crackdown in Tibet, coincided ironically with China’s chairing for the first time of the UNCHR).

141. An account of China’s cautious integration and simultaneous efforts to modify the human rights system during this period (and in the early 21st century) is provided in Rana Siu Inboden & Titus C. Chen, *China’s Response to International Normative Pressure: The Case of Human Rights*, 47 INT’L SPECTATOR 45, 51–52 (2012) (demonstrating that Beijing pressed for eliminating selectivity in human

China's willingness to continue signing onto international rights agreements and engage in relevant discourse was demonstrated by its ratification of the UN Convention on the Rights of the Child in 1992, its hosting of human rights related conferences and meetings throughout the decade, as well as the ongoing output of Chinese academics attempting to reconcile *renquan* with the Chinese system.¹⁴² However, such progress was incremental. It was only after conservative heavyweight Li Peng's Premiership concluded in 1998 that his more liberal successor Zhu Rongji further advanced the progress of China's accession to key international human rights instruments, with the signing of the ICESCR and ICCPR, and ratification of the former (albeit amid continued rejection of critique at the UNCHR).¹⁴³

The years following 1997 were in many ways as epochal a turning point in modern Chinese political development as was mid-1989. Although the formal top position in the Party was held by Jiang Zemin between 1989-2002, giving a veneer of continuity to this entire period, there were major changes from its first half to its second. The 15th National Congress of the Communist Party of China held between September 12 and 18, 1997 (following Deng's death in February), and the appointment of the new state government early the next year marked a significant liberalizing transformation in many respects, including economic—with major changes in the policy framework in order to meet the demands of entry into the WTO.¹⁴⁴ As well as transformation in the domestic legal system, with major improvements to rule of law encompassing revisions to the PRC Constitution to protect private property, improvements to the criminal law and to criminal procedural rights, the signing of the two

right regimes, and pointing out Beijing's complaint that existing resolutions failed to address economic, social, and cultural rights).

142. See Zhu, *supra* note 12, at 159–60.

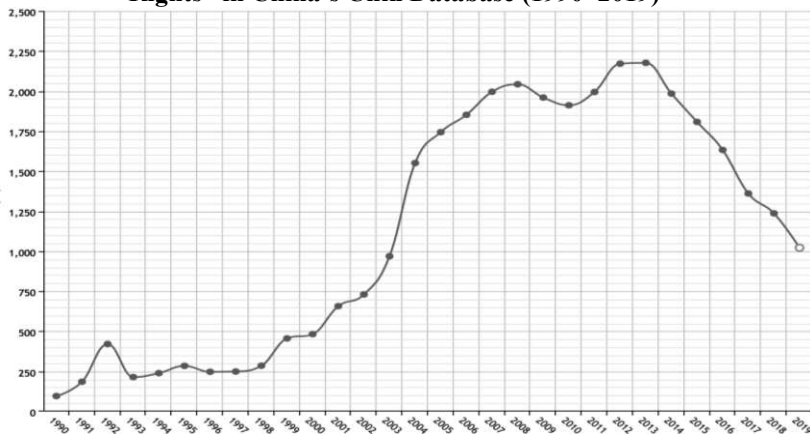
143. See SONYA SCEATS & SHAUN BRESLIN, *CHINA AND THE INTERNATIONAL HUMAN RIGHTS SYSTEM* 5 (2012) (noting that China signed the ICCPR in 1998 and the ICESCR in 1997).

144. See Jeffrey L. Gertler, *What China's WTO Accession Is All About*, in *CHINA AND THE WTO: ACCESSION, POLICY REFORM, AND POVERTY REDUCTION STRATEGIES* 21, 21–27 (Deepak Bhattasali et al. eds., 2004) (identifying the final stages of Chinese accession and the agreements between China and Working Party members).

Covenants, and, with the 16th Party Congress in 2002, the decision to revise the PRC Constitution to explicitly include a commitment to protecting human rights.¹⁴⁵

That amendment, passed in 2003, marked the highest profile commitment to date by the Communist authorities to the idea that human rights, subject to Chinese interpretation, were compatible with Marxism-Leninism and the Chinese system of government.¹⁴⁶ Though accounts of elite politics during this period differ in the details of their interpretations, most agree that a cadre of liberal officials had attained sufficient authority in the Party to help bring about these reforms in the face of continued conservative resistance.¹⁴⁷ Following the increasing state commitment to some form of human rights protection, academic discourse also increasingly focused on debates over the proper definition of human rights. As reflected below, in published academic papers during this period with titles (Figure 1) and/or abstracts (Figure 2) containing references to “human rights”.

Figure 1: Published Academic Papers with Titles Referring to “Human Rights” in China’s Cnki Database (1990–2019)¹⁴⁸



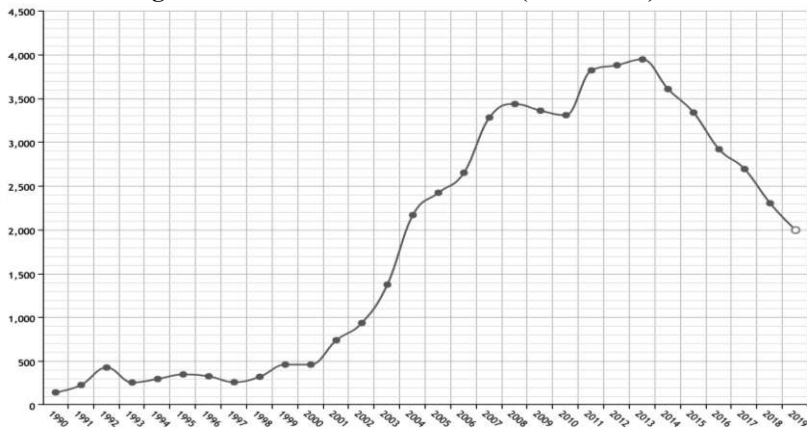
145. See XIANFA art. 33 (1982) (China) (“The state shall respect and protect human rights”).

146. *Id.*

147. See He Li, *Debating China’s Economic Reform: New Leftists vs. Liberals*, 15 J. OF CHINESE POL. SCI. 1, 18–19 (2010) (emphasizing that the New Left’s influence grew during the transition period, contributing to reform).

148. CNKI (China National Knowledge Infrastructure, 中国知网), <https://cnki.net>.

Figure 2: Published Academic Papers with Abstracts Referring to “Human Rights” in China’s Cnki Database (1990–2019)¹⁴⁹



Throughout this renewed process of rapprochement with international human rights, the right to development continued to figure heavily in Chinese accounts of why socialist or developing states might delay focusing on the protection of civil and political rights, or individually conceived social and economic rights. At a UNCHR session in 2000, for example, the right to development was promoted as “an organic component of human rights.”¹⁵⁰ Nonetheless, during the entirety of the Jiang Zemin-era, and for most of the Hu Jintao-Wen Jiabao era that followed, there was no official attempt to provide the right to development with a more concrete definition or to endow it with any genuine legal effect vis-à-vis citizens.¹⁵¹ Meanwhile, China’s economic growth during this period of liberalization and WTO entry spiked sharply—as did its Gini coefficient.¹⁵² In the face of internal disagreement between liberals and conservatives over China’s adoption of global human rights norms as targets of gradual progress and efforts to continue

149. CNKI (China National Knowledge Infrastructure, 中国知网), <https://cnki.net>.

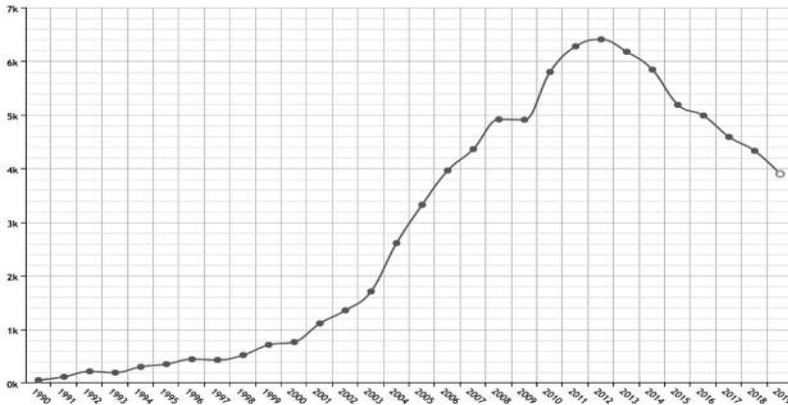
150. *Fazhan Zhong Guojia Huyu Zhongshi Fazhanquan* [Developing Countries Call for Attention to Right to Development], RENMIN RIBAO [PEOPLE’S DAILY], Mar. 30, 2000, at 6.

151. *Id.*

152. See Jin Han et al., *China’s Income Inequality in the Global Context*, 7 PERSP. SCI. 24–29 (2015) (providing an overview and comparison with other jurisdictions).

integrating into the global human rights system while deflecting international criticism over insufficient implementation of rights norms, “the right to development” became (until 2012) an increasingly prominent feature of Chinese state-sanctioned discourse on human rights, as well as comprising a significant portion of overall rights discourse in academic debates.

Figure 3: Published Academic Papers Referring in the Text to the “Right to Development” in China’s Cnki Database (1990–2019)¹⁵³



As it had during the early 1990s, the discursive rise of the right to development during this period was reflected in attempts to relativize existing norms and institutions of international human rights by placing them in China’s context as a developing country.¹⁵⁴ Now though, in addition to state media uses, there was a wealth of both state-sponsored and independent discussion of the “right” in attempts to craft a new narrative for China’s inclusion-with-a-difference into the framework of international human rights.¹⁵⁵ These deployments of the concept occurred against the backdrop of significant oscillations between steps in the direction of a more Western-style model of human rights protection and then retreats in the opposite

153. CNKI (China National Knowledge Infrastructure, 中国知网), <https://cnki.net>.

154. Xu Jingyong, *Gaige de Mubiao Shi Wei le Manzu Nongmin de Shengcunquan yu Fazhanquan* [The Goal of Reform Is to Satisfy Peasants’ Right to Subsistence and Development], 5 FUJIAN LUNTAN (RENWEN SHEHUI KEXUE BAN) [FUJIAN F. (HUMAN. & SOC. SCI. ED.)] 05 (2002), at 21–23.

155. See *supra* Figure 3.

direction of Deng-style statist developmentalism. The period between 1997–2011, much like the period between 1979–1989, overall featured cautious but significant steps in the direction of integration with international human rights institutions and claims to be advancing in the direction of even civil and political human rights norms.¹⁵⁶ Some of these steps, such as the gradual improvement in protections for private property or the attempt to reduce the use of torture against non-political criminal suspects, saw significant success and have continued ever since.¹⁵⁷ Other ventures, such as the aborted attempt by the Supreme People’s Court to establish a judicial review system to enforce constitutional rights, notably beginning with the *Qi Yuling* case centered on social and economic rights including the right to education, were abandoned in the face of continued intra-Party resistance.¹⁵⁸ Similarly, a more general loosening of the environment inside China for activism and legal representation of dissidents, established during the Hu and Wen era, was the subject of a pronounced backlash as early as 2011 which has been escalated in the years since.¹⁵⁹

Although important debates about the ideological direction of the Chinese political system have continued, advocacy for wholesale “liberalization” along Western lines has declined sharply following the brief upsurge of the Hu-Wen years.¹⁶⁰ This is perhaps best

156. Regarding China’s substantial (but tactically restricted) participation in the UNHRC Universal Periodic Review process, see Björn Ahl, *The Rise of China and International Human Rights Law*, 37 HUM. RTS. Q. 637, 637 (2015).

157. *Id.*

158. On the background and final abandonment of the Supreme People’s Court’s doctrine in the *Qi Yuling* case, see Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People’s Court’s Reply to Qi Yuling’s Case*, 43 SUFFOLK UNIV. L. REV. 669, 669 (2009).

159. For an early precursor for later mainstream skepticism of liberal views, see Jiang Shigong, *Xianfa Sifahua de Beilun [Paradoxes in the Discourse of Constitutional Adjudication]*, 2 ZHONGGUO SHEHUI KEXUE [SOC. SCI. CHINA] 1 (2003).

160. A highly critical appraisal of how this general anti-liberal turn relates to law, see Carl F. Minzner, *China’s Turn Against Law*, 59 AM. J. COMP. L. 935, 935–96 (2011); see generally CARL F. MINZNER, *END OF AN ERA: HOW CHINA’S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* (2018). A very different interpretation taking into account other aspects of China’s legal reforms is provided in Taisu Zhang & Tom Ginsburg, *China’s Turn Toward Law*, 59 VA. J. INT’L L. 306.

displayed in terms of China's domestic scholarly debates by the rise of "political constitutionalism," premised on the non-justiciability of constitutional norms, to decisively replace the once-widespread advocacy for a Anglo-American-style constitutional system.¹⁶¹ In terms of international human rights, China's brief Hu-Wen experiment with humanitarian intervention via support for the application of Responsibility to Protect (R2P) doctrine in Libya in 2011's UN Security Council Resolution 1973 was, like its domestic liberalization, soon subject to a pronounced reversal.¹⁶² Following the metamorphosis of the Libya operation into de facto regime change, China has become a consistent opponent of R2P resolutions at the UN Security Council, notably in respect to Syria.¹⁶³ This shift of opinion was connected with a more general wave of anxiety within the Communist Party and its security establishment connected with the Arab Spring phenomenon and concerns about its potential ripple effects in China itself.¹⁶⁴

IV. THE CREATION OF THE "NEW ERA" PARADIGM

As was the case immediately following 1989, the discourse of human rights from 2012 has again become a matter of heightened political sensitivity.¹⁶⁵ In response, authorities have once again seen in the idea of development a way to reconcile China's "progressive" character with a claim for the absolute importance of political stability under Communist Party rule.¹⁶⁶ However, the rhetorical

161. See Sebastian Veg, *The Rise of China's Statist Intellectuals: Law, Sovereignty, and "Repoliticization"*, 82 CHINA J. 23, 25, 36 (2019) (discussing the shift towards political constitutionalism).

162. On China's changing course with respect to R2P, see COURTNEY J. FUNG, CHINA AND INTERVENTION AT THE UN SECURITY COUNCIL: RECONCILING STATUS (2019), at 25–26; Mauro Barelli, *Preventing and Responding to Atrocity Crimes: China, Sovereignty and the Responsibility to Protect*, 23 J. CONFLICT & SEC. L. 173, 194–98 (2018); see also Shi Xiaoxi, *Yi Guojifa Yuanyuan wei Jizhun de "Baohu de Zeren"* [*The "Responsibility to Protect" Based on Sources of International Law*], 12 SHEHUI KEXUE WENZHAI [SOC. SCI. DIG.] 47 (2017).

163. Shi Xiaoxi, *supra* note 162, at 45–48.

164. *Id.*

165. See *supra* Figures 1 and 2.

166. See, e.g., David Kennedy & Joseph E. Stiglitz, LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE

device of a “right to development,” still carrying some nostalgic associations with the attempt at global systemic response to inequality encoded in the NIEO, has now been increasingly replaced by the reframing of development as a “core value”¹⁶⁷ and as a “goal” of state policy—but not necessarily a “right” conferring legal obligations.¹⁶⁸ This is notably reflected in the sharp drop-off of academic references to the right to development throughout the Xi era following a peak in 2012,¹⁶⁹ mirroring an almost identical decline in references to “human rights” overall.¹⁷⁰

This has been reflected in the evolution of approaches which have increasingly focused on redefining development as “peaceful development”; a concept incorporating both domestic and foreign policy dimensions.¹⁷¹ In 2005, China’s State Council Information Office issued a White Paper on “China’s Road of Peaceful Development,”¹⁷² which was followed in 2011 by a White Paper on “China’s Peaceful Development.”¹⁷³ This notion was also a key feature of Hu Jintao’s final address to the National People’s Congress session of March 2012.¹⁷⁴ Notably, the term “community of shared future” (or community of fate) made its first official appearance in the latter two documents, to officially posit the view that political conflicts can be avoided during the process of economic development (because of an inherent corporate unity of some

TWENTY-FIRST CENTURY 25 (2013).

167. It is, however, not included as one of the Xi administration’s “12 socialist core values.” See *Core Socialist Values*, CHINA DAILY (Oct. 12, 2017, 12:13 PM), https://www.chinadaily.com.cn/china/19thcpcnationalcongress/2017-10/12/content_33160115.htm.

168. See *supra* Figures 1 and 2.

169. See *supra* Figure 3.

170. See *supra* Figures 1 and 2.

171. See *China’s Human Rights Development*, *supra* note 1 (quoting China’s President, Xi Jinping, celebrating human rights development).

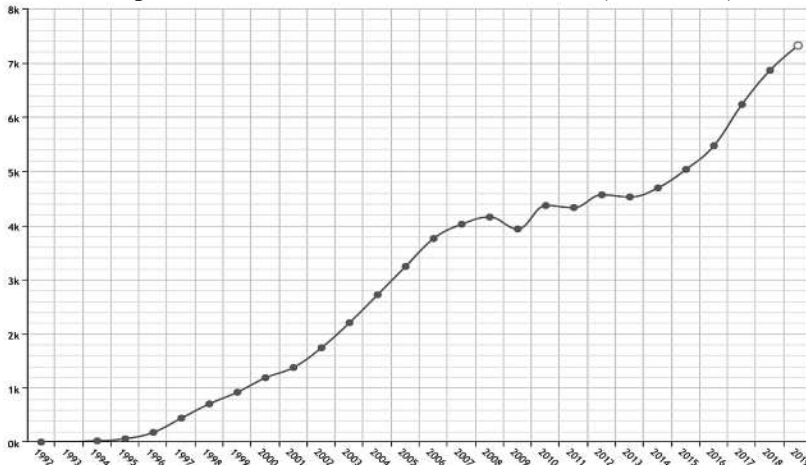
172. *China’s Path to Peaceful Development*, CHINA NET (Dec. 22, 2005), <http://www.scio.gov.cn/zfbps/ndhf/2005/Document/307900/307900.htm>.

173. *China’s Peaceful Development*, STATE COUNCIL CHINA, http://english.www.gov.cn/archive/white_paper/2014/09/09/content_281474986284646.htm.

174. *Report of Hu Jintao to the 18th CPC National Congress*, CHINA INTERNET INFO. CTR. (Nov. 8, 2012), http://www.china.org.cn/china/18th_cpc_congress/2012-11/16/content_27137540.htm.

kind).¹⁷⁵ Relevant to this shift in the concept of development is Chinese authorities' enthusiastic embrace of the Sustainable Development Goals (SDGs) (*ke chixu fazhan mubiao* 可持续发展目标) articulated in the 2030 Agenda.¹⁷⁶ In stark contrast to the “right to development,” the less legalistically conceived idea of SDGs has occupied ever more space in Chinese academic discourse throughout the Xi era as shown below (Figure 4).

Figure 4: Published Academic Papers Referring in the Text to “Sustainable Development Goals” in China’s Cnki Database (1990–2019)¹⁷⁷



The shift from “rights” to state-set “goals” has also occurred in a more general sense. In the most recent shifts of China’s politics in the “New Era” of Xi Jinping since 2012, the most outspoken liberals have been censored or, in the case of prominent activists, prosecuted or disappeared—but so have overly vocal Marxist groups and labor unions.¹⁷⁸ On the other hand, rhetorical commitments to most non-political dimensions of “reform” have continued apace. This has included a focus upon improving protection of human rights as a key

175. *Id.*

176. G.A. Res. 70/1, 1 (Sept. 25, 2015).

177. CNKI (China National Knowledge Infrastructure, 中国知网), <https://cnki.net>.

178. See, e.g. Michael Forsythe and Chris Buckley, China Arrests at Least 3 Workers’ Rights Leaders Amid Rising Unrest, *THE NEW YORK TIMES*, Dec. 5, 2015, <https://www.nytimes.com/2015/12/06/world/asia/china-arrests-at-least-3-workers-rights-leaders-amid-rising-unrest.html>.

facet of the Communist Party's goals for China.¹⁷⁹ However, as noted in the introduction to this article, the Xi administration has taken the unprecedented steps of associating China's "human rights perspective" with a highly specific set of ordered "values."¹⁸⁰

The six-tiered framework of "common human values" that Xi prominently reiterated in his 2018 message commemorating the 70th anniversary of the UDHR was first articulated in 2015.¹⁸¹ The values were first announced in Xi Jinping's landmark speech at the 70th Session of the UN General Assembly on September 28, 2015, entitled "Working Together to Forge a New Partnership of Win-Win Cooperation and Create a Community of Shared Future for Mankind."¹⁸² From that date on, Chinese official media and government organs have promulgated the six values as what is referred to in Chinese politics as a *tifa* (提法), or officially-sanctioned ideological formulation used as a catchall term for sometimes vague or even as-yet undecided policies.¹⁸³ The values comprise the core of the other key concept that framed Xi's 2015 speech to the world, and which gave the address its title: the "Community of Shared Future for Mankind" (*renlei mingyun gongtongti* 人类命运共同体).¹⁸⁴ The following chart below shows appearances in academic papers contained in China's leading academic database, CNKI, of the six character phrase used by Xi in his 2015 GA speech and subsequent statements on human rights. This exact phrase had never appeared before 2015—since then,

179. *Symposium on the 70th Anniversary of the Universal Declaration of Human Rights*, *supra* note 2.

180. *See China's Human Rights Development*, *supra* note 1 (noting Xi's stated commitment to human rights).

181. *Statement at the General Debate of the 70th Session of the UN General Assembly*, DISCUZ! (Sept. 28, 2015), <http://www.en84.com/nonfiction/remarks/201509/00016638.html>.

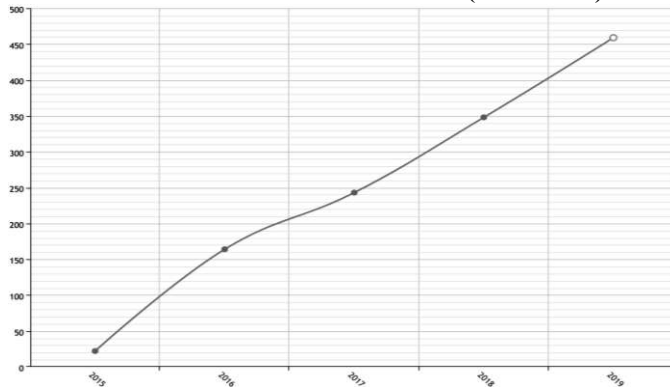
182. *Id.*

183. *See, e.g.,* MICHAEL SCHOENHALS, DOING THINGS WITH WORDS IN CHINESE POLITICS 6-7 (1992); David Shambaugh, *China's Propaganda System: Institutions, Processes and Efficacy*, 57 CHINA J. 25, 25-58, (2017) (discussing the promulgation of the six values).

184. On the "Community of Shared Future," see Ryan Mitchell, *Was the UN Human Rights Council Wrong to Back China's "Shared Future" Resolution?*, EJIL:TALK! (Apr. 10, 2018), <https://www.ejiltalk.org/was-the-un-human-rights-council-wrong-to-back-chinas-shared-future-resolution>.

however, it has been used in hundreds of papers per year, and followed a decidedly upward trend (Figure 5).

Figure 5: Published academic papers referring in the text to the “common human values” of peace, development, fairness, justice, democracy, and freedom in China’s CNKI database (2015–2019)¹⁸⁵



Notably, all of these papers describe the “common human values” as a key feature of the “community of shared future” concept. Chinese officials have also promoted the concept at venues such as meetings of the various UN agencies devoted to “sustainable development,”¹⁸⁶ and via China’s increasingly active role at the Human Rights Council. There, China has secured passage of a 2018 resolution which includes a commitment to China’s “community of shared future,” which was tied to a proposed program of international development assistance aimed at building state capacity as a foundation for human rights progress.¹⁸⁷ The United States voted against China’s initiative,¹⁸⁸ but it otherwise received substantial support and was passed.¹⁸⁹ Without explicitly opposing the concept

185. The first ever references to the concept of “common human values” in official or academic publications were in 2015. CNKI (China National Knowledge Infrastructure, 中国知网), <https://cnki.net>.

186. See, e.g. *Beijing Statement of the Second United Nations Global Sustainable Transport Conference*, UN.ORG, Oct. 16, 2021, https://www.un.org/sites/un2.un.org/files/2021/10/gstc2_beijing_statement_16_oct_2021.pdf.

187. Human Rights Council Res. 37/23, U.N. Doc. A/HRC/RES/37/23, at 2 (Apr. 6, 2018).

188. *Id.*

189. *Id.* at 3.

of development-oriented human rights to that of civil and political rights, China's HRC activities have nonetheless consistently sought to shift attention from the latter to the former. In its three cycles of Universal Periodic Review (UPR), for example, it has emphasized that China is meeting its human rights obligations as best it can via its ongoing development activities.¹⁹⁰ This message is clear in China's official submission of its 2018 state UPR report, which states that "[t]here is no universal road for the development of human rights in the world."¹⁹¹ As an important element in the economic and social development of each country, the cause of human rights must be promoted on the basis of the national conditions and the needs of the people of that country."¹⁹²

Meanwhile, the Chinese delegation at the HRC has also taken initiative in tightening rules for NGO participation in the UPR and in the Council more generally, seeking to reduce the role of civil society groups as human rights monitors.¹⁹³ This has led to occasional frictions on the floor of the Council, including over the notable case of Cao Shunli, a Chinese human rights activist who sought to attend China's 2013 UPR, but was stopped and detained at the Beijing airport, and subsequently died in custody apparently due to lack of adequate medical attention to a preexisting illness.¹⁹⁴ More common, however, are preemptive attempts to prevent accreditation of NGOs as officially-licensed observers and participants in UPR review.¹⁹⁵

The "community of shared future" concept encompasses human rights revisionism following the six-tiered value system, but it also

190. U.N. General Assembly, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21*, ¶ 4 U.N. Doc. A/HRC/WG.6/31/CHN/1 (Aug. 20, 2018).

191. *Id.*

192. *Id.*

193. *Deng Fuzongli Huijian Meiguo Jizhe*, *supra* note 62, at 13–14.

194. *China: UN Experts Renew Calls for Probe into Death of Cao Shunli*, U.N. OFF. HIGH COMM'R FOR HUM. RTS. (Mar. 14, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24331&LangID=E>.

195. HUM. RTS. WATCH, *THE COSTS OF INTERNATIONAL ADVOCACY: CHINA'S INTERFERENCE IN UNITED NATIONS HUMAN RIGHTS MECHANISMS* 30–39 (2017), https://www.hrw.org/sites/default/files/report_pdf/chinaun0917_web.pdf.

spans numerous other aspects of China's foreign policy, and often extends to domestic policy matters in various respects. Particularly notable is its association with China's massive international infrastructure development assistance and capacity-building program, the Belt and Road Initiative (BRI).¹⁹⁶ Indeed, in China's 2018 amendments to the State Constitution, the community of shared future is listed together with a foreign policy disposed towards "respect for sovereignty" and "peaceful development" in the revised Preamble as fundamental aspects of state identity:

The future of China is closely linked to the future of the world. China consistently carries out an independent foreign policy, and adheres to the five principles of mutual respect for sovereignty and territorial integrity, mutual non-aggression, non-interference in each other's internal affairs, equality and mutual benefit, and peaceful coexistence, to the path of peaceful development, and to the reciprocal, win-win, and open strategy in developing diplomatic relations and economic and cultural exchanges with other countries and promoting the building of a community with a shared future for mankind. China consistently opposes imperialism, hegemonism, and colonialism, works to strengthen unity with the people of other countries, supports the oppressed nations and the developing countries in their just struggle to win and preserve national independence and develop their national economies, and strives to safeguard world peace and promote the cause of human progress.¹⁹⁷

The shift in human rights discourse has occurred alongside and in close relation to a more general shift in discourse of public law topics, particularly in the area of constitutional law. Along these

196. For discussions of the "community of shared future for mankind" linking it to human rights, BRI, and other aspects of China's international policy see, for example, Zhiqiang Liu, *Xin Shidao Zhongguo Renquan Huayu Tixi de Biaoda* [Expression of Human Rights Discourse in New Era China], 5 XIBEI ZHENGFA DAXUE XUEBAO [J.N.W.U. POL. SCI. & L.] 14 (2018); Liao Fan, "Renlei Mingyun Gongtongti" de Renquan yu Zhuquan Neihan [Human Rights and Sovereign Connotations of "Community of Shared Future for Mankind"], 58 JILIN DAXUE SHEHUI KEXUE XUEBAO [JILIN U.J. SOC. SCIS. ED.] 25 (2018); Qi Yanping, "Geren Benwei" yu "Lei Benwei" Zhangli Zhong de Renquanguan [Tension Between "Individual-Based" and "Class-Based" Human Rights Concepts], 36 ZHENGFA LUNTAN [TRIB. POL. SCI. & L.] 3 (2018).

197. XIANFA pmbl. (1982).

lines, the deputy director of CPC's Central Publicity Department stated in a 2014 meeting that the state media needed to "establish the noble spirit of our Constitution in all citizens . . . [but also] clearly outline the difference between our Constitution-based governance and Western 'constitutionalism'."¹⁹⁸ Similar statements to this effect have been repeated dozens of times by state authorities and by commentators in state-sanctioned professional or ideological publications.¹⁹⁹ Along with the Xi administration's heavy rhetorical endorsement of the Constitution and promotion of the idea of "ruling the country according to the Constitution" (*yixianzhiguo* 依宪治国).²⁰⁰

Specific steps taken by the Xi administration demonstrate the considerable extents to which it has chosen to emphasize comprehensive legal regulation, and even individual rights, while ensuring that these are developed in accordance with its statist viewpoint. The revision of the Administrative Litigation Law (hereinafter referred to as ALL) in 2014, in particular, marked an important reform that eliminated the longstanding "specific administrative act" requirement.²⁰¹ This meant that the courts would only accept rights infringement cases where a government agency had committed a "specific administrative act," i.e. not a general act of abstract regulation.²⁰² In other words, after 2014, general policies of administration, not only specific acts targeted at a particular plaintiff of each case, could also be challenged in administrative litigation (subject to other standing requirements).²⁰³

The revised ALL also significantly strengthened enforcement by adding requirements for heads of administrative agency defendants,

198. See Luo Shugang et al., *Cause the Constitution to Become Well-Known to All and to Enter People's Hearts*, RENMIN RIBAO [PEOPLE'S DAILY] (Dec. 5, 2014), <http://theory.people.com.cn/n/2014/1205/c40531-26152767.html> (regarding comments on the media's role in promoting the Constitution.).

199. *Id.*

200. *Id.*

201. Cf. JIANFU CHEN, CHINESE LAW: CONTEXT AND DEVELOPMENT 331–32 (2016) (explaining the scope of court jurisdiction to inquire into the legality of specific administrative acts).

202. See *id.* (showing the scope of court jurisdiction was defined narrowly).

203. See *id.* (explaining that in principle, a court was only empowered to inquire into the legality of specific administrative acts).

or appointed representatives, to appear in court and to face penalties for failing to enforce final judgments.²⁰⁴ Several other problems related to the functioning of the administrative law system were also addressed, including expanding the scope of judicial review to include “obvious inappropriateness,” not just the technical illegality, of administrative decisions.²⁰⁵ As well as empowering courts to order specific time limits for administrative authorities to perform their legal obligations; and allowing courts to issue orders for monetary compensation along with other remedial actions (including invalidating an administrative decision).²⁰⁶ With these revisions, the 2014 ALL marks a dramatic step forward for “putting power into a cage of regulations” and disciplining China’s vast bureaucracy.²⁰⁷

The question remains, however, as to who exactly has been put into that cage and who remains outside of it. One year later, the Law on Lawmaking (*Lifa Fa* 立法法) was revised to add a new article, Article 104, that limits judicial interpretation capacity of the SPC and its counterpart in the procuratorial system, the Supreme People’s Procuratorate, requiring that they only produce interpretations of concrete issues rather than abstract or general points of law, and that all interpretations conform to the aims and principles of the law being interpreted.²⁰⁸ While the ALL revision had thus expanded the courts’ powers vis-à-vis administrative agencies of government (i.e. those comprising the “Executive” branch of government under the management of the State Council), the revision to the Law on Lawmaking actually reduced courts’ powers respective to China’s legislature.²⁰⁹ These changes are in essence consistent with the

204. *Id.*; see Li, *supra* note 147.

205. *Cf.* JIANFU CHEN, *supra* note 201, at 332 (explaining the scope of court jurisdiction to inquire into the legality of specific administrative acts).

206. *Id.*

207. See Xi Jinping: *Keep Power Reined Within the Cage of Regulations*, 48 CHINESE L. & GOV. 6, 458 (2016) (pointing out that checks and controls must be strengthened over the exercise of powers).

208. See Shi ge Jingji Xingzheng Dianxing Anli [*Ten Model Cases on Economic and Administrative Litigation*], SUP. PEOPLE’S CT. CHINA NETWORK (Oct. 22, 2015), <http://www.court.gov.cn/zixun-xiangqing-15843.html> (explaining that the administrative trial of the people’s court has effectively played a supervisory role on the one hand, and effectively played a guarantee role on the other hand).

209. Shen Guang, *Revision of China’s Legislation Law: Towards a More Orderly, Fair and Just Legal System*, *Hong Kong Law Journal*, vol. 48, no. 3,

longstanding PRC approach to the power structure within the state, which holds that the National People's Congress is the ultimate embodiment of government authority.²¹⁰

Following Xi Jinping's public endorsement of the Constitution after assuming office in 2012, a form of "public debate" began in which the topic of how China should approach constitutionalism was addressed by various private and state-affiliated media as well as by adherents of a variety of ideological positions. The majority of views expressed moderate endorsement of constitutionalism defined in such a manner consistent with the existing Communist Party governance methods—not extending to judicialized constitutionalism.²¹¹ With some suppression of extreme viewpoints at the margins—i.e. those advocating wholesale Anglo-American style liberal constitutionalism, or those rejecting constitutionalism in the name of a return to Maoist style political mobilization—the intermediate view prevailed and has continued to be emphasized in subsequent official statements.²¹²

This discussion of constitutionalism paralleled the aforementioned earlier discourses on legality and the role of the Constitution that had occurred in the mid-1950s and early 1980s.²¹³ This time, however, there was no awkward fizzling out of constitutional discourse, instead, the government and Party have continued to proclaim, or even intensify, their emphasis upon the Constitution as a source of legitimacy.²¹⁴ Meanwhile, in the academic sphere, the current

2018, pp. 1137-1158: 1145-6.

210. See *The National People's Congress*, NAT'L PEOPLE'S CONG. CHINA, <http://www.npc.gov.cn/englishnpc/c2846/column2.shtml> (last visited Mar. 3, 2022).

211. See Guo Ping, *National Peace: Constitutional Rule Cannot Be Confused With Western "Constitutional Government"*, RENMIN RIBAO [PEOPLE'S DAILY] (Oct. 24, 2014) (stating that adhering to the constitutional governance of the country solves the problem of the ownership and operation of China's national leadership as a stable and orderly modern country); Qiu Shi, *Gonggu dang he renmin tuanjie fendou de gongtong sixiang jichu* [Consolidating the Collective Ideological Foundation of the Unity and Struggle of the Party and People], RENMIN RIBAO [PEOPLE'S DAILY] (Oct. 16, 2013), <http://politics.people.com.cn/n/2014/1024/c70731-25904899.html>.

212. See articles cited *supra* note 211.

213. See Guo Ping, *supra* note 211.

214. Larry Catà Backer, *Toward a Robust Theory of the Chinese Constitutional*

theoretical output regarding constitutionalism has been dominated by key voices espousing a new “Chinese approach” to the construction of a “socialist *Rechtsstaat*.”²¹⁵ In the legal theoretical production of the Xi Jinping era, there has been a decided turn away from Anglo-American models and in favor of this new set of justifications.

The core feature of this new discourse is that legal rights and the processes meant to realize them are characterized not as adhering to individuals, but rather to classes, professions, and other identity groups.²¹⁶ Whereas liberal legality is premised on rights and obligations of, and among, individuals, the basic thrust of illiberal legal thought centers on the legal personality of groups.²¹⁷ At the highest level of abstraction, this means that the law itself is intended to serve as an embodiment of state power.²¹⁸ Some statements that Xi Jinping has made since coming to office suggest a broader effort to include legality as a feature of a stronger centralized state. These include, e.g., his citation of the ancient Chinese Legalist School (*Fa Jia* 法家) philosopher Han Feizi’s statement that “no state is eternally powerful or eternally weak. When those who uphold the law are strong, the state is strong. When they are weak, the state is weak.”²¹⁹ Repeated thousands of times in official government documents and state sanctioned media, and sparking both academic and popular interest, where Xi’s citations of Han Feizi’s philosophy

State: Between Formalism and Legitimacy in Jiang Shigong’s Constitutionalism, Modern China. 2014;40(2):168-195, at 172.

215. See Li Zhanshu, *Quanmian Bawo Zhongguo Tese Shehuizhuyi Jinru Xin Shidai* [Comprehensively Grasp Bringing Socialism with Chinese Characteristics into a New Era], RENMIN RIBAO [PEOPLE’S DAILY] (Nov. 9, 2017); Guohua Sun, “San Ge Zhishang” *Que Yi Bu Ke—Woguo Fazhi Linian de Jidian Lijie*, 1 SHEHUI KEXUE JIKAN 78, 78–79 (2019).

216. Michael McCann & Filiz Kahraman, *On the Interdependence of Liberal and Illiberal/Authoritarian Legal Forms in Racial Capitalist Regimes . . . The Case of the United States*, 17 ANN. REV. SOC. SCI. 483, 484 (2021).

217. See *id.* (explaining how illiberal law is characterized primarily by the denial of core rights status and rights protections).

218. Cf. Zhang & Ginsburg, *supra* note 160, at 1 (showing how Xi Jinping has centralized power harnessing the organizational and legitimizing capacities of law).

219. See Ryan Mitchell, *Is “China’s Machiavelli” Now Its Most Important Political Philosopher?*, DIPLOMAT (Jan. 16, 2015), <https://thediplomat.com/2015/01/is-chin> (quoting Han Feizi).

point to a highly instrumentalized view of law's function, developing the state's capacity to realize policies and enhancing the consistency and stability of centralized rule.²²⁰

While Han Feizi was officially denounced for two millennia as a result of the prevailing Confucian doctrine of the imperial Chinese state, he and the Legalist School of which he is the representative figure, have now been broadly reappropriated as a supplemental source of endogenous "Chinese state theory" in the discourse of legal development.²²¹ Such views are also useful in that they support key aspects of Xi's ongoing, top-down legal construction efforts.²²² Han Feizi, for example, emphasizes the need for strict policing by the central ruler of his many ministers and officials, a point that has been deployed to support the necessity of strict intra-Party discipline and the policing of corruption and misuse of authority.²²³ Moreover, the Legalist emphasis on the power and interests of the state, as opposed to the Confucian focus on "the people" (who are sometimes opposed to the state),²²⁴ supports the idea that law is in essence an outgrowth of a stable, well-functioning bureaucratic order.²²⁵ The interests of the people are embodied in the collective state interest.²²⁶

Another statement of Xi's emblematic of some current directions in rights discourse was his citation of the influential German legal theorist Rudolf von Jhering in an August 24, 2018 speech at the first meeting of the Central Committee on Comprehensively Ruling the

220. See *id.* (explaining how a sentence of Han Feizi's that Xi quoted subsequently appeared thousands of times in official Chinese media); Randall Peerenboom, *What Have We Learned about Law and Development? Describing, Predicting, and Assessing Legal Reforms in China*, 23 MICH. J. INT'L L. 823, 827–28 (2006) (explaining how in the last 20 years, legal reforms, and the establishment of rule of law have taken center stage as part of the new law and development movement).

221. Cf. Zhao Dingxin, *The Confucian-Legalist State: A New Theory of Chinese History*, 122 AM. J. SOCIO. 1004, 1004 (2015) (explaining the Confucian doctrine).

222. See Jacques deLisle, *Xi Jinping's Impact on China's Legal Development: Domestic and International*, ASAN F. (Oct. 15, 2015), <https://theasanforum.org/xi-jinpings-impact-on-chinas-legal-development-domestic-and-international> (showing how reforms limited courts' discretion to reject cases).

223. See *id.* (providing an example of Xi's change in legal construction).

224. *Id.*

225. See *id.* (explaining how Xi is attacking judicial corruption).

226. *Id.*

Country According to Law.²²⁷ Xi notes that “the renowned German jurist Jhering stated that Rome conquered the world three times: First by arms, second by religion, and third by law . . . It was the conquest by law that was most lasting.”²²⁸ Xi’s citation of Jhering reflects a general rise in references to German *Staatsrechtslehre* theorists by Chinese legal scholars and professionals.²²⁹ Both government affiliated legal publications and independent scholars have increasingly revived their interest in the theories of legal development espoused by theorists such as Jhering, Carl von Savigny, Paul Laband, Georg Jellinek, Carl Schmitt, and others who developed theories of the legal state (*Rechtsstaat*, in Chinese *Fazhi Guojia* 法治国家) in the context of imperial and Weimar Germany.²³⁰ In particular, Chinese legal theorists and state officials have endorsed the view that a state’s “constitution” ultimately lies in the combination and interaction of its legal, social, and political institutions, not in a purely legalistic set of objective norms.²³¹

Whereas liberal legality, including liberal constitutionalism, assumes that all actors should be regulated by the same set of neutral legal norms and processes, the illiberal vision of the *Rechtsstaat* that was originally developed in the conservative legal environment of Wilhelmine Germany presumes the opposite: Specific norms will be attached to specific actors, and these will differ based on the organic

227. See Xi Jinping, *Jiaqiang Dang Dui Quanmian Yifa Zhiguo de Lingdao* [Strengthen the Party’s Leadership in Comprehensively Ruling the Country According to Law], QIU SHI [SEEKING TRUTH] (Feb. 18, 2019), <http://dangjian.people.com.cn/n1/2019/0218/c117092-30760361.html>.

228. See *id.* (citing RUDOLF VON JHERING, *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* [THE SPIRIT OF THE ROMAN LAW IN THE VARIOUS STAGES OF ITS DEVELOPMENT] (1852).

229. *Id.*

230. Wang Yong, *Yu Shi Ju Jin Shi Xianfa Fazhan de Biran Guilü* [Adapting to the Times Is a Necessary Rule of Constitutional Development], THEORY.PEOPLE.COM.CN, Mar. 21, 2018, <http://theory.people.com.cn/n1/2018/0321/c40531-29880243.html>.

231. See *id.*; cf. Song Cheng, *Woguo Yixianzhiguo yu Xifang Xianzheng de Benzhi Qubie* [The Fundamental Distinction Between Our Country’s ‘Ruling the Country According to the Constitution’ and Western Constitutional Government], HONGOI WENGAO [RED FLAG] (Feb. 24, 2018), http://www.qstheory.cn/dukan/hqwg/2018-02/24/c_1122443411.htm.

relationships between these actors.²³² In other words, the state and its leadership, for example, will not necessarily be subject to the power of the courts in the form of judicial review. However, they may be expected to make some concessions to the courts as an “estate” that maintains the social order, and may suffer a loss of legitimacy and frustration of their policies if they fail to maintain this relationship.²³³ Illiberal conceptions of the *Rechtsstaat* are “realist” in the sense that they presume that the state, and other social actors, political actors, or institutions (e.g. the press, religious organizations, the legal bar, the judiciary) have both legally-defined and extralegal forms of interaction and power relationships.²³⁴

The illiberal conception of the *Rechtsstaat* thus differs in its fundamental assumptions from the Anglo-American “rule of law” ideal, which assumes that legal rules can be applied in a transparently “reasonable” manner by impartial judges standing outside of the world of political phenomena.²³⁵ Public law theorists in the Anglo-American world have found value in the illiberal *Rechtsstaat*, in part because it avoids these standard assumptions, preferring instead to acknowledge the inherent relationship of law and political realities.²³⁶ “Unlike the *Rechtsstaat*, the liberal rule of law contains no implicit ambition to find a harmonious relationship between law and the state,” because for the latter such harmony—or often, instead, complete identity—is simply assumed.²³⁷ For Chinese scholars faced

232. Martin Loughlin, *In Defense of Staatslehre*, 48 DER STAAT 1, 1 (2009); see Girish Bhat, *Recovering the Historical Rechtsstaat*, 32 REV. CENT. & EASTERN. EUR. L. 65 (2007) (exploring the eighteenth and nineteenth-century origins of the *Rechtsstaat*).

233. Bhat, *supra* note 232, at 77.

234. KONRAD H. JARAUSCH, *STUDENTS, SOCIETY AND POLITICS IN IMPERIAL GERMANY: THE RISE OF ACADEMIC ILLIBERALISM 191* (2014); see generally Erich Hahn, *Rudolf Gneist and the Prussian Rechtsstaat: 1862–78*, 49 J. MOD. HIST. D1361 (1977).

235. DMITRY DEDOV, *RULE OF LAW AND THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (AND RECHTSSTAAT)* 45–59 (James R. Silkenat et al. eds., 2014).

236. *Id.* (“The *Rechtsstaat* means that the law is the structure of the State, not an external limitation to it. . . . Liberty is a consequence not truly a premise of the law. The authority vested in this conservative aristocratic state protected civil liberties as a service offered through the State.”).

237. See N.W. Barber, *The Rechtsstaat and the Rule of Law*, 53 UNIV. TORONTO

with defining a “harmonious relationship between law and the state,” the *Rechtsstaat* tradition has long offered relevant insights.²³⁸

The discourse surrounding the *Rechtsstaat* was often focused on the relationship between the legal system, the state, and society.²³⁹ Unlike liberal constitutionalism, it did not assume a primary focus on the relationship between the state and the individual (although arguments for the importance of this relationship were presented at various times).²⁴⁰ Points of view articulated by theorists of the *Rechtsstaat* ranged from those who sought to argue that the state should be considered as an embodiment of a society’s collective interests (*Gemeininteresse*);²⁴¹ those who argued for an equation of the state and the legal system (resembling but not identical to Anglo-American liberalism);²⁴² those who sought to define the state as a historical embodiment of psychological, political, or economic forces;²⁴³ and various others articulating different positions on the meaning and value of the state.

Historians who have debated the significance of the *Rechtsstaat* ideal in German thought have tried to examine the way that it advocates modernization, social stability, and economic development.²⁴⁴ This is another respect in which the

L.J. 443, 452 (2003) (explaining how the rule of law contains no implicit ambition to find a harmonious relationship between law and the state).

238. Wang Limin, *Lun Qingmo Deguo Fa Dui Zhongguo Jindai Fazhi Xingcheng de Yingxiang* [On the Influence of German Law on Modern Chinese Legal Development During the Late Qing Era], 2 SHANGHAI SHEHUI KEXUE YUAN XUESHU JIKAN [SHANGHAI ACAD. SOC. SCIS. ACAD. Q.] (1996) 132, at 134, 134–35.

239. See Barber, *supra* note 237, at 452.

240. *Id.*

241. See, e.g., GEORG JELLINEK, SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE [SYSTEM OF SUBJECTIVE PUBLIC LAW] 49, 52 (1892).

242. HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS [THE PROBLEM OF SOVEREIGNTY AND THE THEORY OF INTERNATIONAL LAW] 45 (1920).

243. For the former, see Carl Schmitt, *Staatsethik und pluralistischer Staat* [State Ethics and the Pluralist State], 35 KANT-STUDIEN 28 (1930), reprinted in WEIMAR: A JURISPRUDENCE OF CRISIS 300 (Arthur J. Jacobson & Bernhard Schlink eds., 2001); for the latter, see generally HERMANN HELLER, SOVEREIGNTY: A CONTRIBUTION TO THE THEORY OF PUBLIC AND INTERNATIONAL LAW (David Dyzenhaus, ed., 2019).

244. See, e.g., DAVID BLACKBOURN & GEOFF ELEY, THE PECULIARITIES OF

Staatsrechtslehre tradition aligns closely with current Chinese policy goals.²⁴⁵ The detachment of these overriding goals of Reform Era China from their association with liberal political systems has long been a consistent theme of CCP ideology, but this has been intensified since the beginning of the “statist turn” in 2008.²⁴⁶ For present day China, as for 19th century Germany, a key position of the state leadership is that “the interests of the bourgeoisie . . . may be pursued and secured by other than liberal democratic means.”²⁴⁷ Like those who assert that “the [German] Imperial state . . . was actually compatible with the adequate realization of legitimate interests and aspirations of the bourgeoisie,” Xi’s administration asserts that the legitimate interests and aspirations of China’s growing middle class, as well as the exceptional role of the state and Communist Party, are compatible elements of the “China Dream” and of the law used as a means to achieve it.²⁴⁸ The Constitution is described as embodying this organic connection between the aims of individuals seeking to better their own lives and the overall aims of the state.²⁴⁹ Rather than seeking to check state power in the name of individual rights, this order is intended by its theorists to reconcile state and society into an organic whole, pursuing shared aims and leaving little space for dissent.²⁵⁰

GERMAN HISTORY: BOURGEOIS SOCIETY AND POLITICS IN NINETEENTH-CENTURY GERMANY (1984).

245. Duncan Kelly, *Revisiting the Right of Man: Georg Jellinek on Rights and the State*, 22 L. AND HIST. REV. 493, 506 (2004) (explaining Jellinek’s “two-sided” theory of the state, developed out of a broad German tradition of state-legal theory).

246. See Zhang & Ginsburg, *supra* note 160.

247. See BLACKBOURN & ELEY, *supra* note 244.

248. *Id.*; see Wang Yong, *Yu Shi Ju Jin Shi Xianfa Fazhan de Biran Guilü* [*Keeping Up with the Times Is a Necessary Rule of Constitutional Development*], STUDY TIMES (Mar. 21, 2018).

249. XIANFA art. 35, § 1 (1982).

250. Song, *supra* note 231; He Hairen, *Lun Zhongguo Gongchandang Lingdao Fazhijia* [*On the Chinese Communist Party’s Leadership of Juridification*], 34 HEBEI FAXUE [HEBEI LAW] 4 (2016).

V. IMPLICATIONS FOR THE INTERNATIONAL HUMAN RIGHTS SYSTEM

The most important domestic project so far associated with the Xi-era human rights platform was the drive to “eliminate poverty” by 2020.²⁵¹ This initiative, first announced in Xi’s first year in state office in 2013, aimed to achieve the complete elimination of absolute poverty throughout China, and has tasked local officials with creating the conditions on the ground—and the quantitative data—to demonstrate its success.²⁵² China’s efforts in this regard remain highly compatible with the mandate of the UN human rights monitors overseeing global progress towards development defined, in human rights terms, as poverty-reduction—albeit not free from criticism. This was reflected in the 2017 report of the China country visit by Special Rapporteur on Extreme Poverty and Human Rights Philip Alston,²⁵³ who described the 2020 plan as an “impressive and admirable goal,” but critiqued its implementation on several grounds.²⁵⁴ These included its lack of clarity regarding the cut-off point for extreme poverty, which apparently lay below the World Bank’s \$1.90 per day income target; its overwhelming focus on rural poverty to the exclusion of urban areas; its use of averaging in assessing poverty rates; its sustainability in the long term; and the lack of accountability measures in terms of human rights standards generally.²⁵⁵ On the last point, Alston’s report concludes with the

251. Javier C. Hernández, *Xi Jinping Vows No Poverty in China by 2020. That Could Be Hard.*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/world/asia/xi-jinping-poverty-china.html> (showing President Xi Jinping has vowed to fulfill the Communists’ original intent, staking his legacy on an ambitious plan to complete the eradication of rural poverty by 2020).

252. For a critical account of the program’s implementation, see Graeme Smith, *The Campaign Rolls On: Rural Governance in China under Xi Jinping and the War on Poverty*, 16 CHINA: INT’L J. 163, 163–78 (Aug. 2018).

253. See U.N. General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to China, Note by the Secretariat, ¶¶ 19–20, U.N. Doc A/HRC/35/26/Add.2. (Mar. 28, 2017) [hereinafter Report of the Special Rapporteur on Extreme Poverty] (explaining how China’s efforts are compatible with the mandate of the UN human rights monitoring global progress towards development).

254. *Id.*

255. *Id.*

observation that:

While China has done a huge amount to promote economic and social well-being, this has not yet been translated into an approach based on treating economic and social rights as human rights. Most of the relevant rights are not recognized in domestic legislation, domestic institutions do not promote them as such, and existing accountability mechanisms are largely ineffectual.²⁵⁶

The features of Xi's poverty elimination plan that Alston calls into question are illustrative of the genealogy of this effort in a broader history of mobilization or "movement-style" campaigns by which the Communist Party seeks to implement its social policies.²⁵⁷

In contrast to Western-designed development policies that might feature minimal direct state action but extensive involvement of private enterprise and civil society organizations, the key methods for the anti-poverty efforts have included Party-led job-creation policies, relocation of workers, and at times even cash handouts,²⁵⁸ all intended to ensure that targeted (often rural) counties falling below China's poverty line could reach state-set indicators on schedule.²⁵⁹ With the anti-poverty campaign and a set of related policies under the banner of "common prosperity," China's 1979 neoliberal turn has thus been adjusted via modestly successful efforts to halt the country's Gini-coefficient rise since 1979, albeit without a dramatic reversal.²⁶⁰

China's national human rights action plan for 2016–2020 reflected similar characteristics, also embodying the focus on peaceful

256. *Id.* ¶ 78.

257. Kristen Looney, *The Blunt Force of China's Mobilisation Campaigns*, *FIN. TIMES* (Jan. 27, 2021), <https://www.ft.com/content/3223deec-2cb6-45a5-9119-8495728566b5>.

258. This method is not a core element of the campaign but its occasional use where needed to raise local income levels above required levels in time for data collection was indicated to me in a personal interview by an individual familiar with the implementation of the programme in several rural counties.

259. *See, e.g.*, Report of the Special Rapporteur on Extreme Poverty, *supra* note 253, ¶ 13.

260. *See* Ruan Zongze, *Thorough Grasp of Theoretical and Practical Significance of Xi Jinping Thought on Diplomacy*, 81 *CHINA INT'L STUD.* 5, 8 (2020) (elucidating why the ascent of the Gini coefficient has stalled under Xi's leadership).

development as a means to deliver upon China's social and economic rights obligations without converting these into individualized rights with specific accountability or complaint mechanisms.²⁶¹ This has left concrete improvements in the protection of citizens' legal rights as the general target of a much slower and more incremental process. An example of efforts to achieve the latter was the drafting of a new Civil Code that was adopted in 2020.²⁶² The Code has provided meaningful improvements to the civil law for key individual rights such as privacy, protections against sexual harassment and abusive workplace management, etc.²⁶³ However, similar to the poverty reduction campaign, and the overall ethos of "peaceful development" orientated human rights, it establishes only very limited enforceable state obligations or accountability to the general population or to individual citizens.

In sidelining both radical inequality-reduction and any democratic empowerment, Beijing's new approach is thus best viewed not as an idiosyncratic departure from global trends relating to human rights and socio-economic issues such as equality, but rather as emblematic of a general global shifts in the discourse and praxis of development. The SDGs, like China's own common human values, do not contain strong legal rights components or accountability mechanisms. Meanwhile, whereas China's former focus on "self-determination" once had revolutionary implications, and its later discourse of a "right to development" still at least gestured towards tensions with existing economic structures, "peaceful development" is closely bound up with a commitment to thriving within an existing (unequal) international status quo.²⁶⁴

261. See generally STATE COUNCIL INFO. OFF. CHINA, NATIONAL HUMAN RIGHTS ACTION PLAN OF CHINA (2016–2020) (2016).

262. See *China Focus: China Moves on Phase II of Drafting Civil Code*, NPC (Aug. 28, 2018), <http://www.npc.gov.cn/englishnpc/c2763/201808/cc211a6bf9b74353807fbfde0af881a6.shtml>.

263. For discussions of these recent reforms, see, for example, *id.*; Jianfu Chen, *Re-Conceptualising Private Law: The Struggle for Civil Codification in China*, 48 HONG KONG L.J. 258, 259–60 (2018).

264. For further critique of this status quo and its implicit limits for the conceptual field of human rights, see SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 212–20 (2018).

The new official doctrine on “common human values” and human rights, with the rights of “peace” and “development” being paramount, has been presented as a continuation with modifications of previous discourses. As we have seen, the rise of the “right to development” concept globally, initially associated with the movement for a New International Economic Order, was rhetorically supported by PRC diplomats.²⁶⁵ As the Reform-era PRC embraced key aspects of the neoliberal economic system, however, the notion of “development” became ever more closely tied with a focus on GDP growth accompanied by a reduction of absolute poverty—marking a decisive turn away from prior notions of redistribution.²⁶⁶ China’s efforts at “lifting people out of poverty” (*tuopin* 脱贫) are frequently, and often convincingly, associated with global development efforts both for domestic as well as external audiences.²⁶⁷

The human rights-related efforts of the Chinese Communist Party thus form one aspect of a general set of policies and rhetorical platforms regarding the situating of China into global society and institutions, and featuring assertion of a role as an increasingly active protagonist. The most significant of these efforts have consisted primarily in the area of economic and trade policy, with the Belt and Road Initiative (BRI), comprising up to \$4 trillion USD in projects and loans, forming the flagship initiative for Beijing’s new international focus. While BRI can be clearly linked to stated aims of helping to build a more “equal and balanced” global economy that go back more than a decade,²⁶⁸ it also in significant part reiterates strategies of lending and infrastructure assistance that have typified longstanding Western developmental aid models.²⁶⁹ Rather than any

265. See U.N. GAOR, 34th Sess., 24th comm. mtg. at ¶ 44, U.N. Doc. A/C.3/34/SR.25 (Oct. 23, 1979) (expressing support for General Assembly resolution 32/130 and the right to development as a human right).

266. In this sense, China’s transition was emblematic of the evolution of “development” discourse at the global level. See MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD*, *supra* note 264, at 162–65.

267. For a discussion of the “China example” in the context of global development, see *id.* at 207.

268. See *Report of Hu Jintao to the 18th CPC National Congress*, *supra* note 174.

269. See Simon Shen, *How China’s ‘Belt and Road’ Compares to the Marshall*

radical challenge to the existing structures of international development programs, the global sovereign borrowing and lending system, or the coordination of state action on social and economic rights goals, BRI in many ways simply continues existing approaches.²⁷⁰

More broadly, however, Beijing's growing embrace of "human rights" to define and defend its developmentalist policies does indeed imply shifts in the global human rights order, even if its strictly economic dimensions are hardly revolutionary in their implications. At the level of global institutions, the predominance of civil and political rights that has been associated with the mantle of human rights since Washington's Cold War-era embrace of UN mechanisms and the NGO ecosystem may gradually shift in the direction of an alternative model, whose contours remain to be defined. In this respect, some of the most useful points of reference may be the initiatives of other socialist states during the Cold War, when certain regimes, in particular that of East Germany, experimented extensively with rights-related discourse.²⁷¹

During the Cold War, East Berlin had been more willing than Beijing to embrace the notion of "human rights" as a platform supposedly consistent with (and in support of) one-party state socialism.²⁷² While sharply limiting any domestic organizations' efforts to link the cause of human rights with civil or political freedoms, the ruling Social Unity Party of Germany (SED) nonetheless tolerated and at times promoted campaigns oriented

Plan, DIPLOMAT (Feb. 6, 2016), <https://thediplomat.com/2016/02/how-chinas-belt-and-road-compares-to-the-marshall-plan>. *Contra* Wang Wen, Opinion, *Belt and Road Initiative is not 'Marshall Plan'*, CGTN (Apr. 21, 2019), <https://news.cgtn.com/news/3d3d514d7a59544d34457a6333566d54/index.html> (arguing that the Belt and Road Initiative is distinguishable from the Marshall Plan).

270. See Julien Chaisse & Mitsuo Matsushita, *China's 'Belt and Road' Initiative: Mapping the World Trade Normative and Strategic Implications*, 52 J. WORLD TRADE 163, 171, 173 (2018) (demonstrating similar features between BRI and the World Bank).

271. See NED RICHARDSON-LITTLE, *THE HUMAN RIGHTS DICTATORSHIP: SOCIALISM, GLOBAL SOLIDARITY AND REVOLUTION IN EAST GERMANY* 111–15 (2020).

272. *Id.*

towards the realization of specific rights for groups—including those of women, foreign colonial subjects, and sympathetic political prisoners in West Germany and elsewhere—who could be portrayed as oppressed in Western societies. Although human rights organizations, scholarship, and some public activities were allowed to exist throughout the lifetime of the East German state, there were very few cases where those involved in this arena were allowed to present critiques of its own policies.²⁷³

There are signs that Beijing has made a similar decision to put increased emphasis upon the notion of human rights as a significant aspect of its ideological contrast with the West. In February 2022, for example, Xi Jinping devoted a major address at a study session of the Communist Party's ruling Politburo to the notion of human rights and its relevance in China.²⁷⁴ While continuing to put emphasis on the rights of peace and development as he had in earlier addresses, Xi's 2022 comments were significantly more confrontational with respect to drawing a clear line between the Chinese and Western approaches to human rights at a global level. Rather than merely suggesting China would follow its own path, Xi sharply criticized how:

Recently, some Western countries have fallen into dilemmas of bitter political infighting, loss of trust in government, social disorder, and pandemic mismanagement, worsening their political radicalization, wealth inequality, and inter-ethnic tensions, and sparking broad problems of racism, nationalism, and xenophobia. Their human rights problems are very pronounced. And yet . . . these same states claim human rights as their basis for interfering in the internal affairs of others.²⁷⁵

While broadly consistent with the general themes of Beijing's stance since the Deng era, Xi's renewed emphasis on the concept of human rights has now taken a turn potentially more closely

273. *Id.*

274. Xi Jinping, *Jianding Bu Yi Zou Zhongguo Renquan Fazhan Dqolu Geng Hao Tuidong Woguo Renquan Shiye Fazhan* [*Resolutely Follow the Chinese Path of Developing Human Rights and Better Promote the Development of Human Rights Work in China*], SEEKING TRUTH, (Jun. 15, 2022), http://www.qstheory.cn/dukan/qs/2022-06/15/c_1128739416.htm.

275. *Id.*

resembling that of Cold War-era socialist states, such as East Germany, that considered themselves capable of proactively invoking human rights to defend their models of governance. Indeed, in the same address Xi unveiled the slogan of “actively carrying out international human rights struggle” (*jiji kaizhan guoji renquan douzheng* 积极开展国际人权斗争), by means of, *inter alia*, “solidifying global consensus on human rights” and “occupying the summits of the human rights and humanitarian order.”²⁷⁶ In contrast to the more defensive position with regards to Beijing’s interpretation of human rights that had characterized the Reform Era from Deng Xiaoping’s time as leader until the beginning of Xi’s administration, there has now developed a view that the internal crises of the West are so pronounced that this concept, and the political legitimacy associated with it, are fair game in a renewed 21st century contest of ideological blocs.

VI. CONCLUSION: DEVELOPMENT OVER FREEDOM

Over the past decade, China’s commitment to the “third generation” rights of peace and development, especially as reflected in the portmanteau concept of “peaceful development,” has become the consistently-reiterated foundation (or even *Grundnorm*) of its overall view on human rights.²⁷⁷ From 2015, peace and development have capped a six-tiered conception of “common human values” that carry implications not only for human rights, but also for various areas of both foreign and domestic policy.²⁷⁸ A brief flirtation with accommodating Western humanitarian interventionism in 2011 has now been rejected, and China’s longstanding aversion to invasive human rights monitoring has now been paired with efforts to encode this approach as a more general feature of the HRC’s monitoring and review procedures. Deng Xiaoping’s “state rights” paradigm has been given newly concrete meaning in both of these trends under Xi.²⁷⁹

276. *Id.*

277. *See* discussion *supra* Section III.

278. *Id.*

279. *Id.*

At the same time, China has put real momentum and capital behind its attempts to promote “peaceful development” on a global and regional basis, notably through vast allocations of infrastructure development assistance. While international largesse was once associated with anticolonial struggle and the NIEO challenge to international economic structures, however, it is now chiefly associated with a defense of the legitimacy of all existing, recognized governments and with integration into economic institutions (or their supplementation with similar, compatible Chinese alternatives). At the same time, there is a newly intense focus on anti-poverty efforts (at least to the point of preventing relapses into absolute poverty).²⁸⁰ In general, China’s path of peaceful development continues the political logic of Dengist statism and the economic logic of longstanding, growth-oriented policy prescriptions. Efforts to address socio-economic injustice follow a “top-down,” statist approach focused on eliminating absolute poverty indicators, which may face sustainability challenges, and which does not create meaningful individual-level obligations or accountability.

At the individual level, both social and economic rights and civil and political rights are fully relativized to the imperatives of peaceful development. Members of minority ethnic, religious, or political communities, in particular, face systematic rights violations if they can be portrayed as threatening either of the six-tiered paradigm’s two leading pillars.²⁸¹ Although the 1993 Vienna Declaration and Programme of Action and other international instruments have disclaimed the idea of a hierarchy among rights, China’s current approach takes the opposite view. Violations or deferrals of rights of the second or first generations, though they should be avoided in principle, are justified when needed to sustain the foundational values of peace and development, upon which “the happiness of the people” is ultimately based. Following China’s increasingly active role in promoting this paradigm globally, it would behoove scholars of international human rights to closely study its intellectual background and growing influence.

280. See discussion *supra* Section V.

281. See discussion *supra* Section III.