

PRODUCTION AND GLOBAL DISSEMINATION OF CHINESE  
LEGAL IDEOLOGY: IMPLICATIONS FOR THE STUDY OF  
ILLIBERALISM

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ABSTRACT

*This Article discusses the production and global dissemination of Chinese legal ideology and considers its implications for the study of illiberalism. The leaders and ideologues of the Chinese Communist Party profess an interest in increasing the impact of its social sciences and governance ideology in foreign countries. On its face, this project amounts to an ambitious, even radical, ideological challenge against liberal legal thought. Nevertheless, these attempts can also be seen to highlight various challenges that illiberal regimes face in ideological production and advocacy. First, the domestic priorities of illiberal ideological speech may not support ideological advocacy efforts in foreign contexts. Second, characteristically illiberal argumentative strategies may be less effective in front of foreign audiences than they are domestically. Third, illiberal ideological sensitivities may impair, or make unavailable, certain advocacy strategies, which could be effective in front of foreign audiences. Despite such challenges, Chinese ideological speech has been effective in foreign contexts. Among other things, Chinese ideological advocacy has made it easier for foreign politicians and legal scholars to criticize Western promotion of the rule of law and human rights. To illustrate the possibilities and challenges of Chinese ideological advocacy efforts, this Article situates various arguments about the advantages of Chinese legal thought within the East African context.*

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## I. INTRODUCTION

The leaders and ideologues of the Chinese Communist Party (“CCP” or “the Party”) profess an interest in expanding China’s “international discourse power” (*guoji shang de huayuquan*, 国际上的话语权).<sup>1</sup> While the pursuit of international discourse power is mostly focused on improving China’s ability to participate in international norm-making, an aspect of this project includes strengthening China’s soft power and increasing the impact of its social sciences and governance ideology in foreign countries.<sup>2</sup> As part of this project, the CCP

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<sup>1</sup> Xi Jinping, Xi Jinping zai zhexue shehui kexue gongzuo zuotan hui shang de jianghua (习近平在哲学社会科学工作座谈会上的讲话) [Speech by Xi Jinping at the Symposium on Philosophy and Social Sciences] (May 19, 2016) (transcript available at CPC News, <https://perma.cc/2QAZ-EKXU>). For an English language account of Xi’s statements, see Zhang Jianfeng, *Xi Stresses Philosophy, Social Sciences For Socialist Development, Highlights Chinese Characteristics*, XINHUA (May 17, 2016), [http://news.xinhuanet.com/english/2016-05/17/c\\_135366343.htm](http://news.xinhuanet.com/english/2016-05/17/c_135366343.htm) [<https://perma.cc/BX6G-BBQK>].

<sup>2</sup> See CPC NEWS, *supra* note 1 (regarding the role of social sciences and philosophy in increasing China’s soft power abroad). For a discussion on the effects of Chinese attempts to build discourse power in international law, see Wim Muller, *The Power of Discourse: Doctrinal Implications of China’s Normative Aspirations*,

has developed an idiosyncratic legal ideological framework called “Xi Jinping Thought on the Rule of Law” (*Xi Jinping fazhi sixiang*, 习近平法治思想).<sup>3</sup> Party ideologues describe Xi Jinping Thought on the Rule of Law as “a major theoretical innovation” and “a powerful ideological weapon,” which will “definitely enhance the international discourse power of the Chinese rule of law.”<sup>4</sup> According to Party ideologues, Xi Jinping Thought on the Rule of Law reveals “the vitality and superiority of the socialist rule of law,”<sup>5</sup> and it constitutes an “epoch-making advancement for human civilization under the rule of law.”<sup>6</sup>

This Article discusses the production and global dissemination of Chinese legal ideology and considers its implications for the study of illiberalism.<sup>7</sup> It is easy to understand why specific Chinese legal institutions (for instance, in the field of internet regulation) may seem

HAGUE Y.B. OF INT’L L. / ANNUAIRE DE LA HAYE DE DROIT INTERNATIONAL 43 (2018); Yu-Jie Chen, *China’s Challenge to the International Human Rights Regime*, 51 N.Y.U. J. INT’L L. & POL. 1179 (2019).

<sup>3</sup> For a definition of Xi Jinping Through on the Rule of Law, see XI JINPING FAZHI SIXIANG GAILUN (习近平法治思想概论) [INTRODUCTION TO XI JINPING THOUGHT ON THE RULE OF LAW] 123 (2021) [hereinafter INTRODUCTION TO XI JINPING THOUGHT].

<sup>4</sup> Wang Chen (王晨), *Jianchi yi Xi Jinping fazhi sixiang wei zhidao puxie xin shidai quanmian yifa zhiguo xin pianzhang* (坚持以习近平法治思想为指导谱写新时代全面依法治国新篇章) [Adhering to the Guidance of Xi Jinping’s Thought on the Rule of Law and Writing a New Chapter in the Comprehensive Rule of Law in the New Era], *ZHONGGUO FAXUE* (中国法学) no. 1, at 5-7 (2021).

<sup>5</sup> *Id.* at 6; see also INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 114.

<sup>6</sup> Chen Yixin (陈一新), *Xue shen wu tou Xi Jinping fazhi sixiang, zuo dao “ba ge shenke bawo”, dadao “wu ge chengxiao”* (学深悟透习近平法治思想, 做到 “八个深刻把握”, 达到 “五个成效”) [*Learn and Comprehend Xi Jinping’s Thought on the Rule of Law, Achieve “Eight Profound Grasps”, and Achieve “Five Results”*] *ZHONGGUO CHANG’ANWANG* (中国长安网) (Nov. 18, 2020), [http://www.chinapeace.gov.cn/chinapeace/c100007/2020-11/18/content\\_12415617.shtml](http://www.chinapeace.gov.cn/chinapeace/c100007/2020-11/18/content_12415617.shtml) [<https://perma.cc/GZA6-KA3Q>]; Xia Jinwen, *Xi Jinping fazhi sixiang de xianming tezhi* (习近平法治思想的鲜明特质) [*Distinctive Characteristic of Xi Jinping Thought on the Rule of Law*], *JINGJI RIBAO* (经济日报) (Apr. 2, 2022), [https://www.moj.gov.cn/pub/sfbgw/zwgkztzl/xxxcgcxjpfzxs/fzxs-pljj/202204/t20220402\\_452080.html](https://www.moj.gov.cn/pub/sfbgw/zwgkztzl/xxxcgcxjpfzxs/fzxs-pljj/202204/t20220402_452080.html) [<https://perma.cc/6CY8-7U72>].

<sup>7</sup> The terms “Chinese legal ideology” and “Chinese ideological speech” in this Article refer to the Chinese leadership’s and Party cadres’ political speeches and essays, CCP policy documents and ideological literature, and Chinese government whitepapers. As discussed in Part II below, ideological speech may occur in the ceremonial or deliberative genres of speech. See *infra* notes 69-72 and accompanying text.

relevant to some of China's development partners.<sup>8</sup> China has been a first mover in developing legal approaches to emerging technologies, and these approaches may seem useful to foreign governments.<sup>9</sup> On a higher level of generality, Chinese institutional innovations, and China's approach to law and development, can be studied in terms of China's influence on global development policies.<sup>10</sup> For instance, the global advocacy of the Chinese approach to law and development may be seen to increase the plurality of legal development models.<sup>11</sup> On an even higher level of abstraction, CCP ideologues' recent statements about the epoch-making nature of Chinese legal thought bring up questions about the nature of the Party's "ideological weapon." Does CCP ideology pose a meaningful ideological challenge to "Western capitalist rule of law," as Party ideologues insist, and if so, what does this challenge consist of?<sup>12</sup> Does recent Party ideology help strengthen China's international discourse power in some other way? These questions are pertinent not only to China's development partners and international development agencies, but also to scholars in "Western capitalist" countries, who are increasingly anxious about the rise of illiberal (or, with a slightly different emphasis, "populist" and "authoritarian") challenges against liberal democratic legal institutions.<sup>13</sup>

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<sup>8</sup> See Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT'L L.J. 51, 95-96 (2021) (discussing the potential appeal of PRC-inspired Internet courts outside of China).

<sup>9</sup> Andrew J. Nathan, *China's Challenge*, 26 J. DEMOCRACY 156, 159 (2015).

<sup>10</sup> Erie, *supra* note 8; Samuli Seppänen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?*, 51 VAND. J. OF TRANSNAT'L L. 101 (2018). See also Michael W. Dowdle & Mariana Mota Prado, *Dialogus de Beijing Consensus*, in THE BEIJING CONSENSUS?: HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 15 (Weitseng Chen ed., 2017); Matthew S. Erie & Hai Ha Do, *Law and Development Minus Legal Transplants: The Example of China in Vietnam*, 8 ASIAN J.L. & SOC'Y 1 (2021); Benjamin Liebman, *Authoritarian Justice in China: Is There a "Chinese Model"?*, in THE BEIJING CONSENSUS?: HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 225 (Weitseng Chen ed., 2017); Paul Nantulya, *Strategic Application of the Tao 道 of Soft Power: The Key to Understanding China's Expanding Influence in Africa*, 47 THE AFRICAN REV. 481 (2020); Li Yu, *Global Governance and China's International Discourse Power*, 12 J. WTO & CHINA 80 (2022); INTERNATIONAL GOVERNANCE AND THE RULE OF LAW IN CHINA UNDER THE ONE BELT (Yun Zhao ed., 2018).

<sup>11</sup> Erie, *supra* note 8, at 55-56.

<sup>12</sup> See INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 77, 258.

<sup>13</sup> For this trend, see Aziz Huq, Tom Ginsburg & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U. CHI. L. REV. 239, 245-46 (2018). "Illiberalism" connotes a departure from "liberalism," which may be defined as "the equality of all people—or . . . the equality of all citizens" and as the aspiration to prioritize "the right over the good, ruling out the possibility that a liberal state could

The relevance of the CCP's ideological ambitions to the study of global illiberalism does not depend on classifying the People's Republic of China ("PRC") as an illiberal regime together with European, Latin American, and South Asian illiberal regimes.<sup>14</sup> In comparative scholarship relevance may be found in contrast as much as in similarity. Instead of supporting a global illiberal agenda, CCP ideologues describe Chinese ideology in terms of anti-capitalist, sinicized Marxism (while also criticizing "liberalism").<sup>15</sup> Moreover, there are significant differences between the governance projects of contemporary Chinese leaders and illiberal politicians in Europe, Latin America, and South Asia. Whereas CCP leaders are in the process of recalibrating China's socialist legal system to better respond to the demands of both market economy and political control, many illiberal regimes seek to use existing, but gradually eroding, liberal legal institutions for authoritarian ends.<sup>16</sup> Among other things, comparatists have studied the

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be committed to more types of perfectionism." Mark Tushnet, *The Possibility of Illiberal Constitutionalism?*, 69 FLA. L. REV. 1367, 1368-69 (2017). Chinese texts on Xi Jinping Thought on the Rule of Law sometimes attack Western "liberalism" (*ziyou zhuyi*, 自由主义). See INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 258. "Authoritarianism" connotes a departure from (liberal) democracy and is characterized by political repression and the absence of political pluralism. See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 572 (2018); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 395 (2015); Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1682 (2015). "Populism" has a wide range of meanings. "Populism" can refer to any political activity that seeks to replace elitist policies and political leaders with policies and leaders who are better attuned to the wishes of the ordinary people. In a narrower sense, "populism" refers to anti-pluralist regimes, where a single leader seeks to govern a unified people, sometimes through extra-legal measures. See Mark Tushnet & Bojan Bugarič, *Populism and Constitutionalism: An Essay on Definitions and Their Implications*, 42 CARDOZO L. REV. 2345, 2348-50 (2021).

<sup>14</sup> Making such an association is certainly possible. See Tom Ginsburg, *Asia's Illiberal Governments*, in ROUTLEDGE HANDBOOK OF ILLIBERALISM 713, 718 (András Sajó, Renáta Uitz & Stephen Holmes eds., 2021).

<sup>15</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 6, 258-60. To be sure, foreign audiences may also associate Chinese legal ideology with global illiberal tenets regardless of Chinese self-definitions.

<sup>16</sup> For studies on illiberal takeovers in Eastern Europe, Latin America, and South Asia, see, e.g., Fabio de Sa e Silva, *Law and Illiberalism: A Sociolegal Review and Research Road Map*, ANN. REV. OF L. & SOC. SCI. 5.1 (2022); Helena Alviar García, *The Legal Architecture Of Populism: Exploring Antagonists In Venezuela And Colombia*, in HUMAN RIGHTS IN A TIME OF POPULISM: CHALLENGES AND RESPONSES 81 (Gerald L. Neuman ed., 2020); Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14 L. & ETHICS OF HUM. RTS. 49 (2020); WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019); Scheppele, *supra* note 13. For a comparative study on illiberalism in China and elsewhere in Asia, see Ginsburg, *supra* note 14.

illiberal takeover through the corruption of liberal legal institutions,<sup>17</sup> the abuse of constitutionalism,<sup>18</sup> and “stealth authoritarian” uses of liberal democratic legal institutions for illiberal ends.<sup>19</sup> These terms do not describe the role of political and legal institutions in contemporary China, where no nominally liberal legal institutions exist.<sup>20</sup>

Despite such differences, Chinese ideological advocacy efforts can shed light on the processes through which self-consciously illiberal ideology is produced domestically and disseminated globally. Some comparatists have considered the possibility that illiberalism may comprise substantive arguments about the law, perhaps even constituting a “sophisticated theoretical framework” in its own right.<sup>21</sup> For instance, Kim Lane Scheppele has observed that (illiberal) populism “has become the obsessive focus of many of us academics precisely because . . . [p]opulists expose the vulnerabilities in the theories that our profession has taken for granted.”<sup>22</sup> Similarly, Mark Tushnet and Bojan Bugarič have suggested that populists (who, according to Tushnet and Bugarič’s definition of populism, may be authoritarian) may “have a better understanding of law *as such* . . . than their critics.”<sup>23</sup> Tushnet and Bugarič maintain that this understanding consists of the view that all law is ultimately “instrumental.”<sup>24</sup> Elsewhere Tushnet has attributed the appeal of Asian versions of authoritarian constitutionalism to “pragmatism.”<sup>25</sup> From a pragmatist perspective, “authoritarian constitutionalism might be ‘the best . . . political arrangement’

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<sup>17</sup> Samuel Issacharof, *The Corruption of Popular Sovereignty*, INT’L J. CONST. LAW 1109, 1124 (2020).

<sup>18</sup> David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 195 (2013); Rosalind Dixon & David Landau, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1316 (2020).

<sup>19</sup> SADURSKI, *supra* note 16, at 7; Varol, *supra* note 13.

<sup>20</sup> Donald Clarke, *Order and Law in China*, 2022 U. ILL. L. REV. 541, 555 (2022).

<sup>21</sup> Kim Lane Scheppele, *The Opportunism of Populists and the Defense of Constitutional Liberalism*, 20 GERMAN L.J. 314, 315 (2019). According to Scheppele, “liberalism” assumes that certain “constraining principles (like liberty and equality or separation of powers) must be given priority over the demands of temporary democratic majorities.”

<sup>22</sup> *Id.*

<sup>23</sup> Tushnet & Bugarič, *supra* note 13, at 2350-51, 2393.

<sup>24</sup> *Id.* at 2351. The term “instrumentalism” has been used to describe Chinese approaches to law, where the law is used as an instrument of policy. See STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 131, 300 (1999); RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 23, n.23 (2002).

<sup>25</sup> Tushnet, *Authoritarian Constitutionalism*, *supra* note 13, at 452.

for achieving rapid economic growth—or . . . for maintaining ethnic and religious peace.”<sup>26</sup> Tushnet has also suggested that “illiberal constitutionalism” can be an ideologically appealing system of governance for some audiences.<sup>27</sup> For instance, illiberal constitutionalism may appeal to ethnically defined groups of “first-class citizens,” who reap material and psychological benefits from unequal treatment of citizens in illiberal societies.<sup>28</sup>

Such arguments may seem intellectually sophisticated and, for some audiences, even normatively appealing when they are presented in a dialogue with conventional, but unreflective, descriptions of liberalism, such as the notion that there should be a “strong separation between law, on the one hand, and politics and morality on the other.”<sup>29</sup> Nevertheless, it is far from certain whether illiberal critiques give rise to globally influential illiberal ideological constructs, let alone to “epoch-making advancements” in legal thought.<sup>30</sup> It is one thing to justify an authoritarian takeover of existing liberal legal institutions through the critique of liberal legal thought and another to turn authoritarian practices into globally influential ideological speech.

Chinese attempts to develop globally influential ideological constructs highlight the challenges that illiberal regimes may face in ideological production and advocacy. This Article identifies a number of such challenges. First, Chinese ideological speech often takes on a formulaic or “liturgical” form. In China, the formulaic nature of the

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<sup>26</sup> *Id.* at 452-53. In the description of Chinese law, legal pragmatism has meant: (i) the overemphasis of instrumental aspects of the law; (ii) the conception of law as an outcome of reality; (iii) the assumption that law is a servant of policy; (iv) and the tendency not to take individual rights seriously. See Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L. 29, 39-40 (1989). See, e.g., Eva Pils, *Asking the Tiger for His Skin: Rights Activism in China*, 30 FORDHAM INT'L L.J. 1209, 1213-15 (2006); Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People's Court of China*, 25 COLUM. J. ASIAN L. 1, 11 (2012).

<sup>27</sup> Tushnet, *The Possibility of Illiberal Constitutionalism?*, *supra* note 13, at 1367. Cf. David Landau, *The Myth of the Illiberal Democratic Constitution*, in ROUTLEDGE HANDBOOK OF ILLIBERALISM 425 (2021).

<sup>28</sup> Tushnet conceptualizes “illiberal constitutionalism” as a “dual state,” where some first-class citizens receive full protections of liberal constitutionalism, while second-class citizens receive lesser protections of “thin constitutionalism,” which he summarizes as the non-arbitrary use of power and “some space for civil society and . . . protection to expression.” However, Tushnet does not propose illiberal constitutionalism as a normative ideal and assumes that it is an inherently unstable form of governance. Tushnet, *supra* note 13, at 1370-75.

<sup>29</sup> Tushnet & Bugarič, *supra* note 13, at 2349 (suggesting that the populist understanding of law is more realistic than the assumption that there exists a strong separation between law, politics, and morality).

<sup>30</sup> Chen, *supra* note 6.

Party's ideological speech makes it a readily recognizable genre of political rhetoric, which has its own uses in Chinese society.<sup>31</sup> In the terms of classical rhetorical theory, this genre of speech can be called "ceremonial" (or "epidictic").<sup>32</sup> This form of speech strengthens the common values and bonds between the speaker and their audience, while also establishing political allegiances, hierarchies, and divisions between them.<sup>33</sup> The mastery of this genre of speech is important to Chinese elites (although the social role of this genre of speech has varied over time).<sup>34</sup>

To be sure, "ceremonial speech" is an imperfect typological device. For instance, it is difficult to distinguish ceremonial functions of speech from the two other genres of classical rhetorical theory: the deliberative and the forensic (or judicial).<sup>35</sup> This category also captures poorly the normative role of Party doctrine, which can be set out in political speeches.<sup>36</sup> Nevertheless, the usefulness of this distinction for the study of illiberalism (and, in another context, liberalism) lies in suggesting that, in contrast to deliberative speech, ceremonial speech is not geared towards intellectual persuasion.<sup>37</sup> When the Party's ideological speech is seen as ceremonial, it becomes understandable why such speech does not seek to persuade foreign audiences – or, as a matter of fact, any audiences – about the superiority of Chinese legal thought.<sup>38</sup> It is also useful to make a more fine-tuned distinction between China's domestic and foreign-orientated ceremonial speech.

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<sup>31</sup> See PERRY LINK, *AN ANATOMY OF CHINESE: RHYTHM, METAPHOR, POLITICS* 236 (2013).

<sup>32</sup> See ARISTOTLE, *TOPICS: BOOKS I AND VIII, WITH EXCERPTS FROM RELATED TEXTS 47-48* (J.L. Ackrill & Lindsay Judson eds., Robin Smith trans., 1997); CHAÏM PERELMAN & LUCIE OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 50 (1966). Ceremonial speech is not necessarily formulaic or liturgical. However, in the context of Xi Jinping Thought on the Rule of Law, this typically is the case. See *infra* text accompanying note 66.

<sup>33</sup> PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 50.

<sup>34</sup> See LINK, *supra* note 31, at 236.

<sup>35</sup> PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 21, 496.

<sup>36</sup> Ewan Smith, *On the Informal Rules of the Chinese Communist Party*, 248 *THE CHINA Q.*, SUPPLEMENT S1: THE CCP AT 100: THE PARTY'S NEW LONG MARCH 141, 150 (2021).

<sup>37</sup> PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 49.

<sup>38</sup> This was also the case with earlier Chinese ideological speech, such as the "China Dream" slogan, which was promoted in the mid-2010s. See Carl Gershman, *Chinese Dreams: The Fight for Democratic Pluralism*, 178 *WORLD AFFS.* 48, 49 (2015); Yayoi Kato, *Two Faces of Ideology: Double-Edged Functions of Ideology in the Reform Discourse Under Xi Jinping*, 49 *J. CURRENT CHINESE AFFS.* 137, 139 (2021); Alex L. Wang, *Symbolic Legitimacy and Chinese Environmental Reform*, 48 *ENV'T L.* 699, 706-07 (2018).

This distinction sheds light on the foreign-facing aspects of the CCP's ideological project and the potential pressures for ideological conformity in Chinese foreign policy.

Second, this Article argues that the domestic context of Chinese ideological speech informs the selection of legal theoretical arguments in a way that may not be optimal for China's ideological advocacy efforts in foreign contexts. Some legal theoretical arguments about the superiority of Chinese legal thought are more effective in China than in front of foreign audiences. Other legal theoretical arguments, which could be effective in front of foreign audiences, cannot be advanced abroad – or in China – due to Chinese ideological sensitivities and commercial and foreign policy objectives.

Third, this Article argues that the pressure for ideological conformity in China makes it difficult for CCP ideologues to make use of certain effective strategies of ideological persuasion that could help strengthen its international discourse power. For instance, Chinese legal scholars and government experts may find it difficult to engage in a frank, public dialogue about the advantages and disadvantages of the Chinese party-state, even if such a dialogue could help persuade foreign elites about the benefits of the Chinese model of governance. Some Chinese legal scholars also acknowledge that theoretical innovation in China suffers from systemic weaknesses, which puts these Chinese academics at a disadvantage when compared to scholars in liberal democracies.<sup>39</sup>

The ultimate test for Chinese efforts to establish international discourse power is the foreign reception of Chinese ideological speech. This question is ultimately empirical. Due to the tentative nature of Chinese legal development cooperation and the absence of data, it cannot be answered here. Nevertheless, in order to illustrate the possibilities and potential challenges of Chinese ideological advocacy efforts abroad, this Article situates various arguments about the advantages of Chinese legal thought within the East African context.<sup>40</sup> This

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<sup>39</sup> See, e.g., Wang Ruolei (王若磊), *Bu ceng sheng, he tan si? Zhongguo falixue de siwang ji qi sheng de keneng* (不曾生, 何谈死? 中国法理学的死亡及其生的可能) [*Haven't Been Born, How Can You Talk About Death? The Death of Chinese Jurisprudence and the Possibility of Its Life*], 2016 JINING XUEYUAN XUEBAO (济宁学院学报), no. 4, at 85, 91. I have discussed the challenges of developing a “Chinese” form of jurisprudence elsewhere. See Samuli Seppänen, *Anti-Formalism and the Preordained Birth of Chinese Jurisprudence*, 14 CHINA PERSPS. 31, 31 (2018).

<sup>40</sup> See, e.g., Picho Ali, *Ideological Commitment and the Judiciary*, 36 TRANSITION 47, 47 (1968); Yash P. Ghai, *Notes Towards a Theory of Law and Ideology: Tanzanian Perspectives*, 11 E. AFR. L.J. 143, 143 (1975); Yash P. Ghai & J.P.W.B McAuslan, *Constitutional Proposals for a One Party State in Tanzania*, 1

exercise, which is mostly based on a review of East African legal scholarship, demonstrates the potential dynamics between the advocates of Chinese legal ideology and foreign audiences.<sup>41</sup>

Finally, despite the various challenges that Chinese ideological advocacy faces abroad, this Article also points out that Chinese ideological speech has been effective in foreign contexts. Among other things, Chinese ideological advocacy has made it easier for politicians and legal scholars to criticize Western promotion of the rule of law and human rights.<sup>42</sup> Such critiques are amplified by the material rewards of development cooperation with China, which may further drive home the illiberal argument that substantive justice and economic benefits ought to be prioritized over legal formalities. In the end, the establishment of international discourse power is a multifaceted phenomenon. Ideological speech, and persuasion in particular, is only one aspect of this process.

The rest of this Article proceeds as follows: Part II describes the domestic parameters of Chinese ideological speech. Part III examines various argumentative strategies through which CCP ideologues and Chinese legal scholars seek to enhance China's international discourse power. Part IV situates these strategies within the East African context. Part V describes the implications of this Article's analysis for the study of global illiberalism. Part VI concludes.

## II. PARAMETERS OF CHINESE IDEOLOGICAL SPEECH

The project to advance China's social theoretical "discourse power" was launched by China's President Xi Jinping in 2016 at a symposium on philosophy and social sciences.<sup>43</sup> At the symposium, Xi argued that "every major leap forward in human society . . . is inseparable from transformations in the knowledge and ideological

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E. AFR. L.J. 124, 126 (1965); Makau wa Mutua, *Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya*, 23 HUM. RTS. Q. 96, 96 (2001); Willy Mutunga, *Kenya: A New Constitution: Willy Mutunga on the Culmination of Almost Five Decades of Struggles*, SOCIALIST L. 20, 20 (2013); Issa G. Shivji, *Law's Empire and Empire's Lawlessness: Beyond the Anglo-American Law*, 1 L., SOC. JUST. & GLOB. DEV. J. 1, 2 (2003).

<sup>41</sup> Interviews conducted in November 2019 in Nairobi helped with the selection of these materials.

<sup>42</sup> See Björn Ahl, *The Rise of China and International Human Rights Law*, 37 HUM. RTS. Q. 637, 656-57 (2015); Chen, *supra* note 2, at 1205-06; Tom Ginsburg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221, 255-56 (2020).

<sup>43</sup> Zhang, *supra* note 1. The concept of "discourse power" was first introduced in CCP ideology in 2014, see Muller, *supra* note 2, at 44.

guidance of philosophy and social sciences.”<sup>44</sup> Xi described the necessity of developing Chinese discourse power through historical analogies. Thinkers such as “Paine, Jefferson, Hamilton and others” had been the precursors of the American War on Independence, while Marxism had been foreshadowed by philosophers such as “Kant, Hegel, Feuerbach” and Karl Marx, of course.<sup>45</sup> According to Xi, contemporary Chinese philosophers and social theorists had not been able to formulate original social theoretical insights to support the country’s ongoing political and social rejuvenation.<sup>46</sup> To remedy this situation, Chinese intellectuals had to “redouble their efforts” to develop original social theoretical insights and to enhance China’s “international discourse power.”<sup>47</sup>

The fruits of this labor are now visible in CCP ideology. As mentioned in the Introduction, Party ideologues have developed a theoretical framework called “Xi Jinping Thought on the Rule of Law,” which is the legal part of the gradually emerging “Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era.”<sup>48</sup> Some Party ideologues offer this framework as the solution to China’s lacking social and legal theoretical influence on the global stage. Party ideologues assert that Xi Jinping Thought “profoundly addresses the issues that have emerged in the development of contemporary political civilization.”<sup>49</sup> Xi Jinping Thought on the Rule of Law is “original on the global scale,”<sup>50</sup> and it offers the world “a new form of international relations” and “a solution for global governance.”<sup>51</sup> Moreover, some Party ideologues no longer argue that Chinese-style socialism merely supports China’s current developmental stage,<sup>52</sup> but that it also “contributes . . . a Chinese solution for the mankind’s quest to construct a

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<sup>44</sup> See CPC NEWS, *supra* note 1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See John Garrick & Yan Chang Bennett, “Xi Jinping Thought”: Realisation of the Chinese Dream of National Rejuvenation?, 113 CHINA PERSPS. 99 (2018).

<sup>49</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 63.

<sup>50</sup> Fu Zitang (付子堂) & Cui Bo (崔博), *Xi Jinping fazhi sixiang de shijian yaoqiu* (习近平法治思想的实践要求) [*The Practical Requirements of Xi Jinping Thought on the Rule of Law*], LILUN ZHONGGUO (理论中国) [THEORETICAL CHINA] (Jan. 8, 2021), <http://www.theorychina.org/c/2021-01-08/1327819.shtml> [https://perma.cc/TJF5-Y9H2].

<sup>51</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 66, 69.

<sup>52</sup> See, e.g., SHEHUI ZHUYI FAZHI LINIAN XUEXI WENDA (社会主义法治理念学习问答) [QUESTIONS AND ANSWERS ON THE SOCIALIST RULE OF LAW CONCEPT] [hereinafter QUESTIONS AND ANSWERS] 19 at 16-17, 71-72 (2012).

better social system.”<sup>53</sup> While Chinese scholars also discuss the substantive contributions and potential impact of Xi Jinping Thought on the Rule of Law in more tentative terms, the above statements represent one prominent strand of contemporary Chinese ideological speech.<sup>54</sup>

Within China, the promotion of Xi Jinping Thought on the Rule of Law marks a significant political change.<sup>55</sup> The most obvious change in CCP ideology concerns the emphasis on the leadership of Xi Jinping, which now acts as a unifying theme for Party ideology.<sup>56</sup> Whereas earlier Party literature defined “the socialist rule of law” through a set of diverse concepts (such as the “Three Supremes” doctrine launched by China’s previous president Hu Jintao),<sup>57</sup> “the socialist rule of law” conception is today seen as one aspect of “Xi Jinping Thought on the Rule of Law.”<sup>58</sup>

The personification of the Party’s legal ideology has coincided with the tightening of ideological space in China.<sup>59</sup> Today the Chinese party-state controls Chinese ideological and scholarly speech even

<sup>53</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 114.

<sup>54</sup> For less ambitious statements about Xi Jinping Thought on the Rule of Law, see Zhang Wenxian (张文显), *Xi Jinping fazhi sixiang de lilun tixi* (习近平法治思想的理论体系) [*The Theoretical System of Xi Jinping Thought on the Rule of Law*], QUANGUO ZHIXUE SHEHUI KEXUE GONGZUO BANGONGSHI (全国哲学社会科学工作办公室) [NATIONAL OFFICE FOR PHILOSOPHY AND SOCIAL SCIENCES] (Nov. 1, 2021), <http://www.nopss.gov.cn/n1/2021/0111/c219544-31996155.html> [<https://perma.cc/4FA6-QRCZ>].

<sup>55</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 114.

<sup>56</sup> *Id.*

<sup>57</sup> According to the earlier Party literature, the “Three Supremes” doctrine, promoted by Hu Jintao, was an element of the socialist rule of law conception. ZHONGGONG ZHONGYANG ZHENGFA WEIYUANHUI (中共中央政法委员会) [POLITICAL AND LEGAL COMMITTEE OF THE CENTRAL COMMITTEE OF THE COMMUNIST PARTY OF CHINA], SHEHUI ZHUYI FAZHI LINIAN DUBEN (社会主义法治理念读本) [A READER OF THE SOCIALIST RULE OF LAW] 11-12, 49 (2009) [hereinafter THE SOCIALIST RULE OF LAW CONCEPT—A READER]; SHEHUI ZHUYI FAZHI LINIAN DUBEN — FUDAO BAI WEN (社会主义法治理念读本-辅导百问) [THE READER OF THE SOCIALIST RULE OF LAW - 100 QUESTIONS FOR GUIDANCE] 35-36 (2009) [hereinafter ONE HUNDRED TUTORIAL QUESTIONS] (2012).

<sup>58</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 75. I have discussed the changes in Chinese legal ideology elsewhere. See Samuli Seppänen, *A Global Turn in Chinese Legal Ideology?*, 55 VERFASSUNG UND RECHT IN ÜBERSEE / WORLD COMPAR. L. 287, 292-300 (2022).

<sup>59</sup> Zhidong Hao & Zhengyang Guo, *Professors as Intellectuals in China: Political Roles and Academic Freedom in a Provincial University*, in ACADEMIC FREEDOM UNDER SIEGE: HIGHER EDUCATION IN EAST ASIA, THE U.S. AND AUSTRALIA 81, 88 (Zhidong Hao & Peter Zabielskis eds., 2020); Florence W. Young, *More Stick than Carrot? Xi’s Policy Toward Establishment Intellectuals*, 157 ISSUES & STUD. 1, 17-18 (2021).

more vigorously than during the previous Hu Jintao administration (2002-2012).<sup>60</sup> The Party leaders have expressly prohibited discussion on certain topics, such as the universality of human rights, judicial independence, and constitutionalism (although in reality some of these terms are used in pro-establishment texts).<sup>61</sup> Chinese academics engage increasingly often with the reproduction of orthodox ideological speech, instead of focusing on the deliberative analysis of liberal – and global – legal theory.<sup>62</sup> Some Chinese establishment scholars have noted that the Chinese academic environment is more passive and less conducive for the development of theoretically original scholarship than “Western” legal academia.<sup>63</sup> Xi Jinping himself acknowledged the low quality of the Chinese philosophical and social scientific discourse in his speech at the 2016 symposium (while proposing to eliminate this shortfall through even stricter disciplinary controls in Chinese universities).<sup>64</sup>

While all Chinese legal and political speech is tightly censored, some genres of this speech take on a more formulaic form than others.<sup>65</sup> Texts on Xi Jinping Thought on the Rule of Law, in particular,

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<sup>60</sup> Carl Minzner, *Intelligentsia in the Crosshairs: Xi Jinping's Ideological Rectification of Higher Education in China*, CHINA LEADERSHIP MONITOR (Dec. 1, 2019), <https://www.prclleader.org/carl-minzner> [<https://perma.cc/LAJ4-Q9CR>]; Nick Taber, *How Xi Jinping is Shaping China's Universities*, THE DIPLOMAT (Aug. 10, 2018), <https://thediplomat.com/2018/08/how-xi-jinping-is-shaping-chinas-universities/> [<https://perma.cc/JDW2-AMSH>] (last visited Oct. 22, 2021).

<sup>61</sup> *Document 9*, CHINAFILE (Nov. 8, 2013), <https://www.chinafile.com/document-9-chinafile-translation> [<https://perma.cc/C2L9-JAA2>]; Nectar Gan, *Prominent Chinese University Bans Staff From Criticising Communist Party In Class*, S. CHINA MORNING POST (Jan. 12, 2017), <https://www.scmp.com/news/china/policies-politics/article/2061491/chinese-university-bans-staff-criticising-communist> [<https://perma.cc/RVX6-L49K>]. For references to the universality of human rights in a pro-establishment text, see e.g., Jiang Shigong, *How to Explore the Chinese Path to Constitutionalism? A Response to Larry Cata Backer*, 40 MOD. CHINA 196, 209 (2014). Chinese pro-establishment (or conservative) scholarship supports the country's political status quo through politically orthodox terminology without attempting to reform it. See SEPPÄNEN, *IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA: USEFUL PARADOXES 2* (2016).

<sup>62</sup> See, e.g., Zhang Wenxian (张文显), *Xi Jinping fazhi sixiang de shijian luoji, lilun luoji he lishi luoji* (习近平法治思想的实践逻辑, 理论逻辑和历史逻辑) [*The Practical, Theoretical Historical Logic of Xi Jinping's Rule of Law Thought*], 2021 ZHONGGUO SHEHUI KEXUE (中国社会科学), No. 3, at 4.

<sup>63</sup> Wang, *supra* note 38, at 699.

<sup>64</sup> See CPC NEWS, *supra* note 1.

<sup>65</sup> See e.g., Chen, *supra* note 6; Xi Jinping, *Compilation of Xi Jinping's Expositions on Rule of Law*, 48 CHINESE L. & GOV'T 468, 469 (2016). As mentioned in the Introduction above, not all ceremonial speech needs to be formulaic. See PERELMAN

comprise near-identical statements about the nature and significance of this form of legal thought.<sup>66</sup> As mentioned in the Introduction, these texts can be usefully described as “ceremonial” in contrast to more “deliberative” texts.<sup>67</sup> This distinction describes functions, rather than sources, of speech.<sup>68</sup> Political speeches and the Party’s ideological literature can generally be seen as ceremonial, although some political texts (in particular, classic Marxist writings) can be usefully described as deliberative.<sup>69</sup> Conversely, it may be useful to describe a particular “academic” text as ceremonial, even though it has been published in an otherwise deliberative scholarly forum.<sup>70</sup> It may also be useful to identify different genres of speech in a single text. For instance, a prominent textbook on Xi Jinping Thought on the Rule of Law, produced by Chinese establishment scholars and endorsed by the Chinese government, traverses the boundaries between the ceremonial and the deliberative.<sup>71</sup> The textbook is intended for students and the general reader, and it includes both liturgical ceremonial language and deliberative scholarly language.<sup>72</sup>

The above-described distinctions between different genres of speech may appear overly formulaic, and in many cases, they are difficult (and pointless) to hold up.<sup>73</sup> Nevertheless, in China, the boundaries between the Party’s ideological speech and ordinary language are often clearcut.<sup>74</sup> Producing appropriate ideological speech about, for example, Xi Jinping Thought on the Rule of Law, does not happen organically, but requires careful engagement with appropriate rhetorical forms.<sup>75</sup> Ceremonial speech can make use of various rhetorical

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& OLBRECHTS-TYTECA, *supra* note 32, at 48 (describing classical epideictic speech “as a work of artistic virtuosity”).

<sup>66</sup> *Xi Focus: Xi Jinping Thought on the Rule of Law Guides Law-Based Governance in China*, CHINA DAILY (Dec. 10, 2020), <https://www.chinadaily.com.cn/a/202012/10/WS5fd1c396a31024ad0ba9b10f.html> [<https://perma.cc/73AF-PDP6>] (“Xi Jinping Thought on the Rule of Law marked progress in the system of values with Chinese characteristics, thus contributing Chinese wisdom to the world for advancing the rule of law.”); *see also* Chen, *supra* note 6.

<sup>67</sup> ARISTOTLE, *supra* note 32, at 47-48.

<sup>68</sup> PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 21.

<sup>69</sup> KENNETH BURKE, A RHETORIC OF MOTIVES 101-02 (1969).

<sup>70</sup> *See, e.g.*, Zhang, *supra* note 62.

<sup>71</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3.

<sup>72</sup> *Id.* at 16.

<sup>73</sup> PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 21.

<sup>74</sup> LINK, *supra* note 31, at 234-35.

<sup>75</sup> *Id.* at 274.

tools, such as emotional appeals and deliberative arguments.<sup>76</sup> However, the specific genre of modern Chinese ideological speech avoids emotionally charged language.<sup>77</sup> As the American sinologist Perry Link has observed, Chinese ideological speech is designed to be “colorless and boring.”<sup>78</sup> This genre of speech uses standardized ideological formulations (known in Chinese as *tifa*, 提法), and its lexicon, grammar, and rhythm differ considerably from ordinary Chinese, borrowing more heavily from European languages than ordinary Chinese.<sup>79</sup> Chinese ideological speech remains, by design, on a high level of abstraction.<sup>80</sup> Link observes that abstractions are helpful for the producers of ideological speech in a number of ways: they preserve ambiguity about the speaker’s intentions; lend an aura of scientific objectivity to the speaker’s statements; and allow the speaker to benefit from the cultural association (both in Chinese and in European languages) between high-level abstractions and the high quality of one’s opinions.<sup>81</sup>

The experience of cynicism sometimes associated with ideological speech (in China and elsewhere) emerges from its strategic uses as well as the role of factual statements in this genre of speech. In ceremonial speech, factual statements are meant to be evaluated from a particular political standpoint rather than against commonsense perceptions of the truth.<sup>82</sup> At the same time, factual statements in ceremonial speech operate in a dialectical relationship with commonsense perceptions about the truth. Ceremonial speech may, for instance, reject commonsense perceptions about the truth for a dramatic rhetorical effect.<sup>83</sup> The more implausible an ideological statement appears from the commonsense perspective, the more loudly it speaks for its author’s political loyalties. This may explain the rapid increase of ambitions in Party ideologues’ recent statements on Chinese legal thought.<sup>84</sup>

Texts on Xi Jinping Thought on the Rule of Law typically follow the genre conventions of Chinese ideological speech. Instead of

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<sup>76</sup> PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 51.

<sup>77</sup> LINK, *supra* note 31, at 241.

<sup>78</sup> *Id.* at 241. Link calls Chinese ideological speech alternately “political language,” “official language,” and “officialese.” *Id.* at 234-35.

<sup>79</sup> *Id.* at 244-45, 260, 274.

<sup>80</sup> *Id.* at 246.

<sup>81</sup> *Id.* at 246, 248, 255.

<sup>82</sup> *Id.* at 277.

<sup>83</sup> LINK, *supra* note 31, at 277.

<sup>84</sup> See *supra* notes 3-6 and accompanying text.

engaging in intellectual persuasion through analytic distinctions, comparisons, and arguments about causation, texts on Xi Jinping Thought on the Rule of Law typically provide definitions of key ideological concepts.<sup>85</sup> For instance, Party ideologues define Xi Jinping Thought on the Rule of Law through the “Eleven Upholds,” which according to the Chinese state media, “embody rich implications of Xi Jinping Thought on the Rule of Law.”<sup>86</sup> The style of this genre of speech can be illustrated by the observation that “the rule of law” is mentioned five times in the Eleven Upholds in various contexts: “[s]taying on the path of the socialist rule of law with Chinese characteristics”; “[p]romoting the modernization of China’s governance system and capacity along the path of the rule of law”; “[a]dhering to a system of the socialist rule of law with Chinese characteristics”; “[p]ursuing coordinated progress in law-based governance, law-based exercise of state power, and law-based government administration, and promoting the integrated development of the rule of law for the country, the government and the society”; and “[t]aking a coordinated approach to promoting the rule of law at home and in matters involving foreign parties.”<sup>87</sup>

Despite its non-deliberative nature, ceremonial speech performs an important political and distributional role in domestic Chinese politics. Perry Link has argued that Chinese people tolerate political language and sometimes engage with it because of its social impacts.<sup>88</sup> In abstract terms, this genre of speech strengthens the common values and political bonds between the producers of ceremonial speech and their audience, and it establishes hierarchies and distinctions between them.<sup>89</sup> In concrete terms, the mastery of this genre of speech can be

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<sup>85</sup> PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 214-15, 242, 267.

<sup>86</sup> See CHINA DAILY, *supra* note 66.

<sup>87</sup> *Id.* The other elements of the Eleven Upholds are as follows: “[u]pholding Party leadership on overall law-based governance”; “[t]aking a people-centered approach”; “[a]dhering to Constitution-based governance”; “[e]nsuring sound law-making, strict law enforcement, impartial administration of justice, and the observance of the law by everyone”; “[f]ostering a high-quality team of professionals with both integrity and ability for legal work”; and “[e]nsuring that leading officials at various levels faithfully implement major decisions and plans made by the CPC Central Committee on overall law-based governance.” To be sure, Chinese legal scholars have found the various aspects of the “Eleven Upholds” meaningful. For the discussion in China, see Wang Yi (王轶), *Lun Xi Jinping fazhi sixiang hexin yaoyi de neizai luoji* (论习近平法治思想核心要义的内在逻辑) [*The Internal Logic Regarding Core Essence of Xi Jinping’s Thought on the Rule of Law*], 2021 DIFANG LIFA YANJIU (地方立法研究), No. 6, at 1-2.

<sup>88</sup> LINK, *supra* note 31, at 241.

<sup>89</sup> ARISTOTLE, *supra* note 32, at 47-48.

useful for securing material benefits and for distributing resources.<sup>90</sup> The creation of new ideological concepts in various CCP organs also embraces teamwork and serves to produce and strengthen *esprit de corps* within the Party.<sup>91</sup>

In addition to serving various social functions, ceremonial speech may also describe Party leadership's political aspirations authentically.<sup>92</sup> The Chinese leadership and Party ideologues extol ideals, such as the impartial administration of justice, Party leadership, "the rule of law" (*fazhi*, 法治), and various "core values" of socialism, such as democracy, civility, harmony, freedom, equality, and justice.<sup>93</sup> The mere recital of these terms will not be sufficient for persuading anybody about their importance nor will it inform audiences about the ideal content of these terms. Nevertheless, the frequent repetition of these terms may establish them as abstract policy objectives among Party cadres and ordinary people.<sup>94</sup> Texts on Xi Jinping Thought on the Rule of Law may, therefore, provide a conceptual structure for Party members' ideals and policy objectives more economically than deliberative texts, such as academic articles. The liturgical nature of Party ideology supports this goal.

While the content of Chinese ceremonial speech (exemplified by the "Eleven Upholds") may appear arbitrary, this genre of speech may also reflect substantive policy changes and thereby play a concrete role in policy reform. Recent expositions of Xi Jinping Thought on the Rule of Law retain much of the earlier literature on the socialist rule of law conception from the Hu Jintao era. Xi Jinping Thought on the Rule of Law continues to emphasize the importance of Party

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<sup>90</sup> LINK, *supra* note 31, at 280. See also Frank Pieke, *Party Spirit: Producing a Communist Civil Religion in Contemporary China*, 24 J. ROYAL ANTHROPOLOGICAL INST. 709, 722-23 (2018) (describing the functions of CCP ideology).

<sup>91</sup> Pieke, *supra* note 90, at 710, 722.

<sup>92</sup> Yifan Yang, *Looking Inward: How Does Chinese Public Diplomacy Work at Home?*, 22 BRIT. J. POL. & INT'L RELS. 369, 375-76 (2020) (describing the connection between CCP ideology and the aspirations of the Chinese people).

<sup>93</sup> Xi Jinping, *supra* note 65, at 468, 469, 470; Zhonggong zhongyang (中共中央) [Central Committee of the Communist Party of China], *Fazhi shehui jianshe shishi gangyao (2020-2025 nian)* (法治社会建设实施纲要 (2020—2025年)) [Implementation Outline for the Construction of a Rule of Law Society (2020-2025)] [hereinafter Implementation Outline for the Construction of a Rule of Law Society (2020-2025)], ZHONG GUO ZHENG FU WANG (中国政府网) Section 1 (Dec. 7, 2020), [http://www.gov.cn/zhengce/2020-12/07/content\\_5567791.htm](http://www.gov.cn/zhengce/2020-12/07/content_5567791.htm) [<https://perma.cc/JA3M-FRRN>].

<sup>94</sup> See, e.g., Implementation Outline for the Construction of a Rule of Law Society (2020-2025), *supra* note 93; SLAVOJ ŽIŽEK, THE SUBLIME OBJECT OF IDEOLOGY 113 (2d ed. 2008).

leadership over the judiciary and the legal system.<sup>95</sup> Texts on Xi Jinping Thought on the Rule of Law also maintain their Marxist focus, at times underlining it even more strongly than earlier Party ideology.<sup>96</sup> For instance, the textbook on Xi Jinping Thought on the Rule of Law reasserts the “dialectical logic of politics and the rule of law,” which combines rule-based governance with political decision-making.<sup>97</sup>

However, it is possible to detect a change of tone between the earlier texts on the socialist rule of law conception and the recent texts on Xi Jinping Thought on the Rule of Law (in addition to the obvious emphasis on Xi’s personal leadership).<sup>98</sup> In recent years the Chinese leadership has sought to strengthen the status of formal legal rules and processes in Chinese People’s Courts and Party organs.<sup>99</sup> The increased emphasis on formal legality is apparent in the descriptions of Xi Jinping Thought on Rule of Law.<sup>100</sup> For instance, in contrast to the earlier CCP textbooks on the socialist rule of law conception, the 2021 textbook on Xi Jinping Thought on the Rule of Law does not explicitly attack “legal formalism.”<sup>101</sup> The difference between the older and more recent Party literature is nuanced, but it is nonetheless meaningful in the context of Xi’s overall emphasis on formal legality.<sup>102</sup>

Finally, it may be worth stressing that the reading of Chinese ideological speech as rhetoric does not imply that Chinese, or any other form of ideological speech – including liberal human rights language – is false, inconsequential, or (necessarily) produced in bad faith. The rhetorical perspective may equally well be extended to the study of

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<sup>95</sup> Compare INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 257, with THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 111-17.

<sup>96</sup> Compare THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 14-19, with QUESTIONS AND ANSWERS, *supra* note 52, at 24-27, and INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 6.

<sup>97</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 257.

<sup>98</sup> With the exception of “foreign-related” rule of law work, the “Eleven Upholds” essentially restate the attributes of the earlier socialist rule of law conception. See CHINA DAILY, *supra* note 66.

<sup>99</sup> Taisu Zhang & Tom Ginsburg, *China’s Turn Toward Law*, 59 VA. J. INT’L L. 306, 311 (2019).

<sup>100</sup> For the same observation, see Moritz Rudolf, *Xi Jinping Thought on the Rule of Law*, SWP COMMENT (Apr. 28, 2021), [https://www.swp-berlin.org/publications/products/comments/2021C28\\_Jinping\\_RuleOfLaw.pdf](https://www.swp-berlin.org/publications/products/comments/2021C28_Jinping_RuleOfLaw.pdf) [<https://perma.cc/G84Z-BSKG>].

<sup>101</sup> For critiques of legal formalism in earlier CCP literature, see THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30; QUESTIONS AND ANSWERS, *supra* note 52.

<sup>102</sup> Zhang & Ginsburg, *supra* note 99, at 325.

intellectually ambitious, and earnestly produced, legal scholarship in China and elsewhere. Indeed, all speech, including legal theory and comparative law, can be fruitfully studied as rhetoric.<sup>103</sup> From the rhetorical perspective it appears that the characterizations of theoretical sensibilities both in Chinese ideological speech and in foreign comparative law are presented in a dialogue with arguments about “Western” or liberal legal thought.<sup>104</sup> Studying the uses of these arguments is valuable regardless of whether one agrees with them.

### III. SEARCH FOR CHINESE DISCOURSE POWER

This Article now turns to examine the potential sources of Chinese international discourse power in the field of legal ideology. Here it is helpful to bring Chinese pro-establishment legal scholarship into the analysis. This scholarship sometimes provides reasoned arguments for the comparative advantages of Chinese legal thought.<sup>105</sup> While the scholars cited in this Part should not be conflated with CCP ideologues, the Party has endorsed analogous arguments in some policy documents.<sup>106</sup> Together these sources illustrate arguments that are

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<sup>103</sup> See Thomas Coendet, *Legal Reasoning: Arguments from Comparison*, 102 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 476, 483 (2016); PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 2.

<sup>104</sup> See, e.g., Huang Wenyi (黄文艺), *Zhiyin Zhongguo falixue chuangxin fazhan (Goujian Zhongguo tese zhexue shehui kexue) (指引中国法理学创新发展(构建中国特色哲学社会科学)) [Guiding the Innovative Development of Chinese Jurisprudence (Constructing Philosophy and Social Sciences with Chinese Characteristics)]*, RENMIN RIBAO (人民日报) (June 27, 2022), <http://theory.people.com.cn/n1/2022/0627/c40531-32457120.html> [<https://perma.cc/9EZT-BXRW>].

<sup>105</sup> See, e.g., FENG XIANG (冯象), ZHENGFA BIJI (政法笔记) [NOTES ON POLITICS AND THE LAW] (2017); HUANG ZONGZHI (黄宗智), ZHONGGUO DE XINXING ZHENGYI TIXI: SHIJIAN YU LILUN (中国的新型正义体系：实践与理论) [CHINA'S NEW JUSTICE SYSTEM: PRACTICE AND THEORY] (2016); JIANG SHIGONG (强世功), FAZHI YU ZHILI: GUOJIA ZHUANXING ZHONG DE FALÜ (法制与治理：国家转型中的法律) [LEGAL SYSTEM AND GOVERNANCE: LAW IN A TRANSFORMING STATE] (2003); JIANG SHIGONG (强世功), CHENGFA YU FAZHI: DANGDAI FAZHI DE XINGQI 1976-1981 (惩罚与法治：当代法治的兴起 (1976-1981)) [PUNISHMENT AND THE RULE OF LAW: THE RISE OF CONTEMPORARY RULE OF LAW IN 1976-1981] (2009); ZHU SULI (朱苏力), FAZHI JI QI BENTU ZIYUAN: XIUDINGBAN (法治及其本土资源 (修订版)) [RULE OF LAW AND ITS NATIVE RESOURCES: REVISED EDITION] (Zhongguo zhengfa daxue chubanshe 2010) [hereinafter RULE OF LAW AND ITS NATIVE RESOURCES]; SULI ZHU, SENDING LAW TO THE COUNTRYSIDE (2016); ZHU SULI (朱苏力), ZHIDU SHI RUHE XINGCHENG DE (制度是如何形成的) [HOW ARE SYSTEMS FORMED?] (Beijing daxue chubanshe, 2007).

<sup>106</sup> See THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57; QUESTIONS AND ANSWERS, *supra* note 52. It bears noting that the most obviously “deliberative” CCP texts on socialist rule of law date back to the Hu Jintao era. See also Seppänen, *supra* note 58, at 294-95.

available for Chinese ideological advocacy efforts abroad. Whether these arguments are used in Chinese ideological advocacy efforts, such as Chinese government whitepapers and capacity-building programs, is another matter (as discussed in Part III.C below). Also, it is not implied here that ideological influence emerges from intellectual deliberation alone. For instance, scholars have noted that the Chinese government uses pro-regime commentators to influence audiences through various distractions.<sup>107</sup> Nevertheless, constructing globally persuasive social theoretical and ideological insights is part of China's self-declared project to obtain international discourse power.<sup>108</sup> The following sections discuss this project in the context of: (i) the criticism of Western universalist conceptions about the rule of law, judicial independence, and other aspects of "liberal" legal thought (as understood by Party ideologues and Chinese establishment scholars); (ii) the attempts to produce an ideal image of Chinese legal thought; and (iii) the efforts to establish a new vocabulary for Chinese diplomacy and development cooperation.

#### A. Critiquing Western universalism

Ideological speech constructs its opponents and sets them up for rhetorical attacks. A long-standing strategy in CCP ideology and pro-establishment Chinese legal scholarship has been to carve out space for Chinese political ideology by denying the universal applicability of liberal legal institutions.<sup>109</sup> CCP ideologues and pro-establishment legal scholars argue that it is unnecessary, and perhaps even impossible, for the Chinese government to emulate Western legal models.<sup>110</sup> A CCP textbook on the socialist rule of law, published in 2012, states that "in the world, there has never existed, and can never exist, a

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<sup>107</sup> See Gary King, Jennifer Pan & Margaret E. Roberts, *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument*, 113 AM. POL. SCI. REV. 484, 486 (2017); Stan Hok-Wui Wong & Jiachen Liang, *Attraction or Distraction? Impacts of Pro-regime Social Media Comments on Chinese Netizens*, POL. BEHAV. (2021), <https://doi.org/10.1007/s11109-021-09744-4> [<https://perma.cc/W48K-BE4S>].

<sup>108</sup> XINHUA, *supra* note 1.

<sup>109</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 5.

<sup>110</sup> This theme has been present in CCP ideology since the early years of the PRC. Zhongguo Guoji Sifa Xuehui (中国国际私法学会) [Chinese Society of Private International Law], *Xi Jinping Fazhi Sixiang zhong de guoji fazhiguan* (习近平法治思想中的国际法治观) [*Concept of International Rule of Law in Xi Jinping Thought on the Rule of Law*], WUDA GUOJIFA PINGLUN (武大国际法评论) (2021), <https://www.pkulaw.com> [<https://perma.cc/UEY3-EZ6A>].

standardized or identical rule of law model.”<sup>111</sup> China must, in the textbook authors’ view, stand against Western rule of law ideology, which is being imported to non-Western countries on the back of slogans such as “modernization” and “globalization.”<sup>112</sup> This viewpoint is reproduced in the above-mentioned textbook on Xi Jinping Thought on the Rule of Law, which attacks the conception of “some Western countries . . . that there is only one mode for the rule of law.”<sup>113</sup> According to the textbook authors, universalism has served the interests of Western countries’ “ruling groups and special interests.”<sup>114</sup>

Another version of the critique against universalism holds that abstract concepts, such as “the rule of law” (*fazhi*, 法治) and “judicial independence” (*sifa duli*, 司法独立), take on different meanings in different contexts.<sup>115</sup> Since there are no universally correct definitions for these concepts, the Chinese uses of “the rule of law” and “judicial independence” are as legitimate as Western uses of these concepts.<sup>116</sup> Some Chinese legal scholars have argued that the description of social and economic realities through linguistic abstractions, such as “the rule of law,” is inherently impossible.<sup>117</sup> A term, such as “the rule of law,” cannot account for the infinite complexity of the lived reality in any society.<sup>118</sup> CCP literature generally refrains from such theoretical radicalism (which could equally well be aimed at socialist concepts), instead preferring to describe Marxism as a scientific, universally knowable truth.<sup>119</sup> At the same time, the CCP’s ideological texts sometimes imply that perceptions of the world are subjective. For instance, the textbook on Xi Jinping Thought on the Rule of Law

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<sup>111</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 5.

<sup>112</sup> *Id.*

<sup>113</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 122.

<sup>114</sup> *Id.* at 123.

<sup>115</sup> *Id.* at 122; Zhu Suli, *The Party and the Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 52-53 (Randall Peerenboom ed. 2010).

<sup>116</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 125; Suli, *supra* note 115, at 57.

<sup>117</sup> RULE OF LAW AND ITS NATIVE RESOURCES, *supra* note 105, at 18-20.

<sup>118</sup> *Id.* at 19-20. This argument replicates the theoretically radical critiques of legal transplantation in Western comparative law. See e.g., Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997).

<sup>119</sup> For the universal validity of Chinese-style socialism, see INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 6, 67.

suggests that scientific truths regarding political systems are relative to the observer.<sup>120</sup>

It may seem paradoxical that statements about the global significance of Chinese legal thought affirm the contextual nature of all legal thought. After all, this argumentative strategy seems to apply equally well to Xi Jinping Thought on the Rule of Law as it does to Western legal thought. Nevertheless, the critique of Western universalism allows CCP ideologues and Chinese pro-establishment legal scholars to establish a distinction between Western legal thought and Chinese legal thought. According to this line of reasoning, universalism is a characteristically Western fallacy, which conceals the interests of the Western elites and legitimizes their hegemonic behavior.<sup>121</sup> Chinese legal thought, in contrast, recognizes the contextual, political basis of law, thereby constituting a universally applicable scientific approach to law.<sup>122</sup>

While the critique of universalism is an important rhetorical strategy in the advocacy of Chinese legal thought, the Party's ideological texts also make use of various universalist arguments. The textbook on Xi Jinping Thought on the Rule of Law states that the "socialist rule of law with Chinese characteristics is the only correct way to build a socialist country ruled by law."<sup>123</sup> The textbook also maintains that Xi Jinping Thought on the Rule of Law is "the height of the world history and global thought."<sup>124</sup> The textbook further explains that the international community adheres to "universally recognized basic principles of international relations and uniformly applicable rules," which comprise the principle of sovereign equality and values, such as, "fairness, justice, democracy, and freedom."<sup>125</sup> Moreover, instead of describing "the rule of law" (*fazhi*, 法治) in contextualist terms, the textbook argues that this concept "crystallizes mankind's common wisdom on governance."<sup>126</sup>

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<sup>120</sup> According to the textbook, the scientific nature of a social system depends on whether this system "conforms to the national characteristics of a country, whether it is effective and useful, and whether it is endorsed by the people." *Id.* at 125.

<sup>121</sup> *Id.* at 123. For dialectical reasoning as a rhetorical strategy, see PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 109.

<sup>122</sup> For CCP ideologues' views on Western legal thought, see *id.* at 123, 217. For their views on Chinese legal thought, see *id.* at 261.

<sup>123</sup> *Id.* at 78, 112-13.

<sup>124</sup> *Id.* at 63.

<sup>125</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 71-72, 217.

<sup>126</sup> *Id.* at 9.

### B. *Producing an idealized image of Chinese legal thought*

If Xi Jinping Thought on the Rule of Law is “the height of the world history and global thought,” as Party ideologues insist, the question arises what paradigm-shifting insights this form of legal thought yields.<sup>127</sup> This question cannot be addressed merely by denying the universal applicability of Western legal institutions. The argument made in domestic Chinese ideological speech is that Chinese legal institutions themselves are globally more advanced than other existing legal institutions.<sup>128</sup>

As discussed in the Introduction, illiberalism is sometimes justified through pragmatism (or instrumentalism), which stands opposed to supposedly formalist liberal legal thought.<sup>129</sup> In China as well, one argumentative strategy for establishing the superiority of Chinese legal thought is to associate “Western capitalist” rule of law with supposedly outmoded “formalist” (*xingshi zhuyi*, 形式主义), “positivist” (*shizheng zhuyi*, 实证主义), and “legal dogmatic” (*fatiao zhuyi*, 法条主义) forms of legal thought.<sup>130</sup> CCP ideologues and Chinese pro-establishment scholars’ critique of “positivism” and “formalism” focuses on the untenability of the law-politics distinction.<sup>131</sup> Party ideologues sometimes acknowledge that prominent strands of Western legal scholarship have also critiqued the formalist law-politics distinction.<sup>132</sup> This acknowledgment shifts the focus of criticism from Western legal formalism to the misleading and hypocritical representations of Western law in foreign contexts.<sup>133</sup>

Party ideologues and Chinese legal scholars make use of various anti-formalist accounts of law as a way to describe Chinese legal thought.<sup>134</sup> For instance, some Chinese legal scholars have argued that China’s socialist legal thought is able to penetrate the “essence” (*benzhi*, 本质) of social and legal phenomena better than formalist Western

<sup>127</sup> *Id.* at 63.

<sup>128</sup> *Id.*

<sup>129</sup> Scheppele, *supra* note 21, at 326; Tushnet, *Authoritarian Constitutionalism*, *supra* note 13, at 452-53.

<sup>130</sup> See Huang, *supra* note 104 (referring to “positivist and formalist” Western legal theorists); QUESTIONS AND ANSWERS, *supra* note 52, at 19 (referring to “positivist or formalist” schools of jurisprudence in the West); THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30 (dismissing “legal dogmatism”).

<sup>131</sup> Huang, *supra* note 104; QUESTIONS AND ANSWERS, *supra* note 52, at 19.

<sup>132</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 19.

<sup>133</sup> *Id.*

<sup>134</sup> See Seppänen, *supra* note 39, at 33-35.

legal thought.<sup>135</sup> This adjudicative strategy culminated in the Maoist administration of justice.<sup>136</sup> Even today China's justice system is said to rest on informal, and substantively just, dispute resolution institutions, in contrast to the supposedly formalist Western legal institutions.<sup>137</sup> Arguments about essences may also refer to the ability of a person or an object to exemplify an essence.<sup>138</sup> In CCP ideology, the elusive "Party leadership" of the Chinese judiciary is justified through the Party's ability to represent the essence of the Chinese people.<sup>139</sup> For instance, the textbook on Xi Jinping Thought on the Rule of Law explains that, in contrast to the political parties in the West, and "apart from the interests of the working class and the broadest masses of the people, the Party has no interests of its own."<sup>140</sup>

Party ideologues also advance various pragmatist arguments about the benefits of Chinese legal and political institutions.<sup>141</sup> Party ideologues argue that politically responsive adjudication is both necessary and socially beneficial<sup>142</sup> and that the CCP is uniquely positioned to evaluate political considerations in adjudication.<sup>143</sup> While CCP literature does not describe how exactly Party leadership promotes socially responsive jurisprudence in Chinese people's courts, its overall message is that the Chinese governance system is better able to deliver pragmatist solutions to social problems than Western liberal democracies.<sup>144</sup> The above-mentioned textbook on Xi Jinping Thought on the Rule of Law illustrates the benefits of China's socialist

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<sup>135</sup> RULE OF LAW AND ITS NATIVE RESOURCES, *supra* note 105, at 48. HUANG, *supra* note 105, at 262.

<sup>136</sup> RULE OF LAW AND ITS NATIVE RESOURCES, *supra* note 105, at 49.

<sup>137</sup> HUANG, *supra* note 105, at 262, 266-67.

<sup>138</sup> PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 94-95.

<sup>139</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3.

<sup>140</sup> *Id.* at 81. CCP ideology also comprises the argument that certain popular conceptions about people's interests and the Party's role in society are wrong and need to be corrected. *Id.* at 8, 257.

<sup>141</sup> For pragmatist arguments in rhetorical theory, see PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 266.

<sup>142</sup> See e.g., QUESTIONS AND ANSWERS, *supra* note 52, at 93, 129-30; THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30.

<sup>143</sup> See, e.g., THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30, 109-10 (arguing for the benefits of including social considerations, as mediated by the Party, to judicial decisions); Zhu Suli, *supra* note 115, at 57 (making the argument that "[s]ometimes CCP interference represents and promotes a local population's particular understandings of what justice and fairness demand in the handling of a particular case"). For the transference of value in consequentialist arguments, see also PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 268.

<sup>144</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 93; SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30-31; HUANG, *supra* note 105, at 262.

legal system through its ability to tackle the COVID-19 pandemic.<sup>145</sup> The textbook argues that the socialist rule of law conception provided the Chinese leadership with the tools to adopt legal measures, which resulted in the effective control of the pandemic and demonstrated the “superiority” of the Chinese legal system.<sup>146</sup> The textbook’s argument that China’s system of governance is superior to other systems also relies on a causal argument about the “miracle of rapid economic development and long-term social stability” enabled by this system.<sup>147</sup>

While it is important to take stock of the idealized image of Chinese legal thought in CCP ideology, it is also useful to note which aspects of the Chinese political system are not included in the idealized image of Chinese law. Perhaps most obviously, legal formalist arguments play little role in the construction of the idealized image of Chinese law, despite their increasing prominence in domestic Party ideology.<sup>148</sup> CCP ideologues and pro-establishment Chinese scholars do not seek to distinguish Chinese legal thought (or Xi Jinping Thought on the Rule of Law) from Western legal thought through its technically superior legal norms.<sup>149</sup> For the purposes of global comparison, CCP ideologues and pro-establishment scholars present Chinese legal thought through anti-formalist arguments, emphasizing its ability to grasp social realities beyond formal law.<sup>150</sup>

Moreover, central aspects of the Chinese political system, which could be appealing to authoritarian regimes, are absent from CCP ideologues’ descriptions of Chinese law. For instance, Andrew Nathan, professor of political science at Columbia University, has argued that autocratic governments are interested in China’s “flexible, tailored police practices for controlling political dissidents” and its “shadowy” security organs.<sup>151</sup> There are indications that the Chinese government disseminates information about its repressive legal technologies to foreign countries.<sup>152</sup> Also, descriptions of Xi Jinping Thought on the Rule of Law sometimes define the socialist rule of law conception with reference to security organs, such as the National Supervisory

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<sup>145</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 125.

<sup>146</sup> *Id.* at 68, 125.

<sup>147</sup> *Id.* at 114.

<sup>148</sup> For various legal formalist argumentative strategies, see *e.g.*, Duncan Kennedy, *Legal Formalism*, in 13 ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 8634-38 (Neil J. Smelser & Paul B. Baltes eds., 2001).

<sup>149</sup> QUESTIONS AND ANSWERS, *supra* note 52.

<sup>150</sup> *Id.* at 174-75.

<sup>151</sup> Nathan, *supra* note 9, 159-60.

<sup>152</sup> Erie, *supra* note 8, at 95-96.

Commission, which fuse the Party's extra-legal disciplinary powers with formal state law.<sup>153</sup> Nevertheless, the Party's ideological texts seldom explain how the Party's extra-legal uses of power relate to formal state law.<sup>154</sup> Chinese and foreign legal scholars have attempted to provide such explanations, but the topic makes a scant appearance in Party ideology.<sup>155</sup> In this respect, Party ideologues may be attempting to use ideology in its traditional Marxist sense to mask the nature of the Chinese party-state, which includes routine extra-legal uses of power.<sup>156</sup> As Perry Link has observed, political language in China and elsewhere seeks to prettify issues that might prompt criticism.<sup>157</sup> The need for prettification may also be more structural. As discussed in Part II above, Party ideologues emphasize the need to improve the formal legality of the Chinese judiciary.<sup>158</sup> It would be difficult to conform this project to the acknowledgment that political leaders routinely intervene in the concrete adjudication of cases for political reasons irrespective of formal legal rules – even if such an acknowledgment made information about Chinese law more relevant to foreign illiberal regimes. Similar considerations may apply to other illiberal justifications for the Chinese party-state.<sup>159</sup>

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<sup>153</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 87-88.

<sup>154</sup> *See generally id.*

<sup>155</sup> *See* Clarke, *supra* note 20, at 555 (describing the Chinese “principle of order” through the concept of “stability maintenance,” which differs from the “rule-of-law ideal”); Erie, *supra* note 8, at 67-68 (discussing the “law negative” view of Chinese notions of ordering); Hualing Fu, *Between the Prerogative and the Normative States: The Evolving Power to Detain in China's Political-Legal System*, 16 LAW & ETHICS HUM. RTS. 61, 61-62 (2022) (Ger.) (describing Chinese law and power through the dual-state framework); MARY E. GALLAGHER, *AUTHORITARIAN LEGALITY IN CHINA: LAW, WORKERS, AND THE STATE* 31 (2017) (describing China's authoritarian legality as a means to make bargains with the regime supporters, as a tool to manage principal-agent problems, as a mass mobilization tool, and as a way to exploit and modify social cleavages); CARL MINZNER, *END OF AN ERA: HOW CHINA'S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* 107 (2020) (describing Chinese governance as a move away from institutional governance).

<sup>156</sup> For this conception of ideology, *see generally* KARL MARX, *The German Ideology*, in *THE MARX-ENGELS READER* 146, 188 (Robert C. Tucker ed., 2d ed. 1978).

<sup>157</sup> LINK, *supra* note 31, at 313-15.

<sup>158</sup> *See* text accompanying *supra* notes 99-102.

<sup>159</sup> *See* Tushnet, *The Possibility of Illiberal Constitutionalism?*, *supra* note 13, at 1370-75 (There, Tushnet has singled out ethnic divisions as a potentially appealing feature of illiberalism. China's rule of law conception is not promoted as a means to segregate citizens into unequal groups of people.).

C. *Establishing language for international diplomacy and cooperation*

While domestically focused CCP ideology provides relatively few justifications for the superiority of Chinese legal thought, ideological speech produced for foreign audiences is even less explicit about the substantive advantages of Chinese legal thought. The above-described critiques of universalism and idealized descriptions of Chinese legal thought have appeared rarely in the Chinese government's foreign-facing, English language advocacy materials.<sup>160</sup> For instance, a Chinese government whitepaper on China's international development policies, published in 2021, outlines various activities in "law-based governance" and policy making in China's development cooperation, without identifying or advancing any specific lessons on law and development.<sup>161</sup> Instead of prescribing concrete policies to developing countries, the whitepaper emphasizes the mutually beneficial "win-win" nature of Chinese development cooperation.<sup>162</sup> Another Chinese government whitepaper on China's role in the world, published in 2019, describes the Chinese development model in idiosyncratic terms as "a path of reform and innovation," which is "based on China's actual conditions."<sup>163</sup> At the same time, the whitepaper provides no idiosyncratic definitions for the rule of law.<sup>164</sup>

International development agencies have taken positions on various questions about the role of law in economic and social

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<sup>160</sup> THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA'S INTERNATIONAL DEVELOPMENT COOPERATION IN THE NEW ERA (2021), [http://english.www.gov.cn/archive/whitepaper/202101/10/content\\_WS5ffa6bbbc6d0f72576943922.html](http://english.www.gov.cn/archive/whitepaper/202101/10/content_WS5ffa6bbbc6d0f72576943922.html) [<https://perma.cc/94XC-J8UX>] [hereinafter CHINA'S INTERNATIONAL DEVELOPMENT COOPERATION IN THE NEW ERA]; THE STATE COUNCIL INFORMATION OFFICE OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA AND THE WORLD IN THE NEW ERA (2019), [http://english.www.gov.cn/archive/whitepaper/201909/27/content\\_WS5d8d80f9c6d0bcf8c4c142ef.html](http://english.www.gov.cn/archive/whitepaper/201909/27/content_WS5d8d80f9c6d0bcf8c4c142ef.html) [<https://perma.cc/VZR8-ADFZ>] [hereinafter CHINA AND THE WORLD IN THE NEW ERA].

<sup>161</sup> CHINA'S INTERNATIONAL DEVELOPMENT COOPERATION IN THE NEW ERA, *supra* note 160, § I-II, VI.1, VIII.

<sup>162</sup> *Id.* § 1.2; *see also* Human Rights Council Res. 37/23, "Promoting Mutually Beneficial Cooperation in the Field of Human Rights," U.N. Doc. A/HRC/37/L.36 (Mar. 19, 2018) (sponsored by China).

<sup>163</sup> CHINA AND THE WORLD IN THE NEW ERA, *supra* note 160, § I.4.

<sup>164</sup> *Id.* (This whitepaper states that "China practices the rule of law as a fundamental principle in governing the country." According to this whitepaper, "the rule of law" stands for "law-based governance of the country, law-based exercise of state power and law-based administration in the government.").

development.<sup>165</sup> For instance, the World Bank has discussed a number of questions relating to law and development in its 2017 World Development Report. How can formal laws best incentivize behavior change?<sup>166</sup> How can development policies make use of informal norms?<sup>167</sup> Under what conditions can foreign legal transplants be successful?<sup>168</sup> Should constitutions include social and economic rights?<sup>169</sup> The Chinese government whitepapers on international development policies provide no answers to such questions, beyond asserting that China has made good progress under CCP leadership.<sup>170</sup>

Instead of seeking to convince foreign audiences about specific development policies or governance models, Chinese government whitepapers and other foreign-orientated ideological speech provide Chinese development experts and China's development partners with a common language for conducting diplomacy and engaging in development cooperation.<sup>171</sup> The Chinese government whitepaper *China and the World in the New Era* applauds the CCP for establishing a "moderately prosperous society."<sup>172</sup> The whitepaper warns against blindly copying "the Western model" of development, which has

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<sup>165</sup> See David Kennedy, *The "Rule of Law," Political Choices and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 95 (David M. Trubek & Alvaro Santos eds., 2006); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 *WORLD BANK RSCH. OBSERVER* 1, 9 (1998); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1062, for various approaches to legal development policies.

<sup>166</sup> *WORLD BANK GROUP, WORLD DEVELOPMENT REPORT 2017: GOVERNANCE AND THE LAW* 86 (2017).

<sup>167</sup> *See id.* at 85.

<sup>168</sup> *See id.* at 90.

<sup>169</sup> *Id.* at 94.

<sup>170</sup> *China and the World in the New Era* asserts that "[w]ithout centralized, unified and firm leadership, China would have tended towards division and disintegration and caused widespread chaos beyond its own borders." *CHINA AND THE WORLD IN THE NEW ERA*, *supra* note 160, § I.4. According to the whitepaper, the reasons for the Party's success lie: (i) "in its capacity for self-improvement, and in its firm leadership core, effective theories, strict discipline and improved mechanisms for selecting upright and competent officials, which have ensured that the Party remains stable, progressive and clean"; (ii) "in its strategic planning for the long-term development of the country and its competence in implementing specific policies"; and (iii) "in its open-minded ability to adapt to changing times, carrying forward its own heritage while absorbing the strengths of others, and in its ability to unite, organize and inspire the people." *Id.*

<sup>171</sup> See Yang Jiemian, *Constructing Discourse Power in Major-Country Diplomacy with Chinese Characteristics: Mission and Challenges*, 61 *CHINA INT'L STUDS.* 38, 47-49 (2016).

<sup>172</sup> *CHINA AND THE WORLD IN THE NEW ERA*, *supra* note 160, § I.1.

caused “social unrest, economic crisis, governance paralysis, and even endless civil war.”<sup>173</sup> Despite its critique of the Western development model, the whitepaper’s statements on law and development are abstract and non-confrontational and, therefore, acceptable even to China’s liberal democratic development partners. The whitepaper affirms countries’ “right to choose their own development paths” and praises the “fundamental, overall and long-lasting institutional guarantee[s]” provided by the rule of law concept.<sup>174</sup> In contrast to domestic Chinese language ideological texts, the whitepaper mentions Xi Jinping Thought only once in the context of China’s idiosyncratic development path.<sup>175</sup>

The ideologically accommodating nature of the Chinese government’s foreign-orientated whitepapers conforms to the Chinese government’s foreign policy principles, which emphasize sovereignty and the principle of non-intervention.<sup>176</sup> For instance, China has adopted a defensive approach to the United Nations’ human rights mechanisms, stressing state sovereignty and the consensual nature of human rights obligations.<sup>177</sup> The same theme appears in domestic advocacy materials, which argue that Xi Jinping Thought on the Rule of Law signifies “fairness and justice” (公平正义, *gongping zhengyi*) in international relations.<sup>178</sup> Guided by Xi Jinping Thought, countries will “treat each other as equals . . . without arrogantly instructing other countries and interfering in their internal affairs.”<sup>179</sup>

While useful for the purposes of Chinese foreign policy, the emphasis on the principle of non-intervention and the idiosyncratic nature of each country’s development process sits awkwardly with Party ideologues’ emerging global ambitions. The textbook on Xi Jinping

<sup>173</sup> *Id.* § II.4.

<sup>174</sup> *Id.* § I.4, III.3.

<sup>175</sup> *Id.* § IV.1.

<sup>176</sup> Ankit Panda, *Reflecting on China’s Five Principles, 60 Years Later*, THE DIPLOMAT (June 26, 2014), <https://thediplomat.com/2014/06/reflecting-on-chinas-five-principles-60-years-later/> [<https://perma.cc/H9ZR-WFJB>].

<sup>177</sup> Ahl, *supra* note 42, at 639; Chen, *supra* note 2, at 1197-98, 1205-06. For an example of China’s state-centered approach to human rights, see Human Rights Council Res. 35/21, “The Contribution of Development to the Enjoyment of All Human Rights,” U.N. Doc. A/HRC/RES/35/21 (July 7, 2017) (sponsored by China).

<sup>178</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 69-70.

<sup>179</sup> *Id.* at 71. The PRC has emphasized sovereign equality and the principle of non-intervention since its founding in 1949, as have other developing countries since the decolonization movement. See Samuel S. Kim, *Sovereignty in the Chinese Image of World Order*, in *ESSAYS IN HONOUR OF WANG TIEYA* 425, 428 (Ronald St. John Macdonald ed., 1994).

Thought on the Rule of Law cites approvingly Deng Xiaoping's view that "the socialist system is far better than predatory, self-interested capitalism."<sup>180</sup> The textbook also maintains that Chinese socialism is "superior" compared to other systems of governance.<sup>181</sup> It would be difficult for the Chinese government to require that its development partners reproduce such language even in diplomatic contexts. In contrast to Chinese domestic ceremonial speech, the Chinese government's foreign-orientated ceremonial speech allows China's development partners to express their commitments to Beijing in locally acceptable forms.<sup>182</sup> This language can be described as ceremonial in its function since it aims to strengthen the values and bonds between China and its development partners. This language also has a redistributive role as far as its adoption influences Chinese decisions about investments and development aid.

Not all Chinese diplomatic language stays on an abstract level. China has challenged established (Western) interpretations of international law, especially in the field of human rights.<sup>183</sup> China has also been able to introduce some of its idiosyncratic ideological language into international legal materials.<sup>184</sup> Among other things, the Chinese government has persuaded developing countries to adopt Chinese terminology, such as "harmonious society," in their dealings with the UN human rights mechanism.<sup>185</sup> China successfully fathered a resolution in the UN Human Rights Council, which comprised a term from Xi Jinping Thought ("a community of shared future for human beings").<sup>186</sup> China has also been able to control the use of ceremonial language in its diplomacy with its development partners. A key site

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<sup>180</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 123.

<sup>181</sup> *Id.* at 67.

<sup>182</sup> Georg Strüver, *China's Partnership Diplomacy: International Alignment Based on Interests or Ideology*, 10 CHINESE J. INT'L POL. 31, 39 (2017).

<sup>183</sup> The Chinese government makes use of a stage-based theory of human rights, arguing that civil and political rights should be subject to the right to subsistence and become relevant only at higher stages of development. While China uses the stage-based theory of human rights defensively, without prescribing it to other countries, this theory does present a challenge against the mainstream human rights consensus, which stresses the indivisibility of human rights norms. Ahl, *supra* note 42, at 653, 656-57; Larry Catá Backer, *By Dred Things I am Compelled': China and the Challenge to International Human Rights Law and Policy* 4 (Penn. State L. Rsch. Paper No. 06-2020, 2020); Chen, *supra* note 2, at 1204.

<sup>184</sup> See Chen, *supra* note 2, at 1195; Muller, *supra* note 2, at 45-46.

<sup>185</sup> Ahl, *supra* note 42, at 660. See also Chen, *supra* note 2, at 1198.

<sup>186</sup> Human Rights Council, *supra* note 162, at preamble. This resolution has been seen to prioritize states, rather than individuals or peoples, as the agents of international development. Catá Backer, *supra* note 183, at 9.

for China's development cooperation with African countries, the Forum on China-Africa Cooperation ("FOCAC"), provides an example of such influence. A FOCAC Declaration on China-Africa cooperation from 2021 comprises congratulatory messages to the CCP, which closely follow the conventions of the Chinese domestic ideological speech genre.<sup>187</sup> Such uses of language are a means to demonstrate China's foreign policy power and – using the terminology of Chinese ideological speech – they can also be seen as an example of China's international discourse power.

#### IV. FOREIGN AUDIENCES' POINT OF VIEW: EAST AFRICAN PERSPECTIVES

Chinese diplomats, development experts, and legal scholars will have to present their arguments about the advantages of Chinese legal thought to foreign audiences if they are going to increase the global relevance of Chinese legal ideology. This Part illustrates foreign audiences' potential responses to Chinese ideological advocacy through an excursion into East African legal scholarship. East Africa – as such a varied region – is only one theater for the construction of China's international discourse power, and in some ways, it is unrepresentative of the issues that China faces in other theaters (for instance, in terms of the prevalence of the common law tradition). Moreover, Chinese efforts in ideological advocacy in East Africa are tentative at best.<sup>188</sup> In the absence of better data, this Part seeks to demonstrate the potential dynamics between the advocates of Chinese legal ideology and foreign audiences through a review of East African legal scholarship. Since many relevant arguments in East African legal scholarship date back to the decolonization era, much of the discussion in this Part is historiographic.

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<sup>187</sup> *Dakar Declaration of the Eighth Ministerial Conference of the Forum on China-Africa Cooperation*, MINISTRY OF FOREIGN AFFS. OF THE PEOPLE'S REPUBLIC OF CHINA (Dec. 22, 2021), [https://www.fmprc.gov.cn/mfa\\_eng/wjdt\\_665385/2649\\_665393/202112/t20211203\\_10461779.html](https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/202112/t20211203_10461779.html) [<https://perma.cc/H4P6-R6R4>]. Consider, e.g., the following statement in the Declaration: "Africa warmly congratulates China on the 100th Anniversary of the founding of the Communist Party of China (CPC), commends the remarkable achievements in national development made by the Chinese people of all ethnic groups under the leadership of the CPC, and applauds China's great victory in completing the building of a moderately prosperous society in all respects and eradicating extreme poverty in rural areas by 2020." *Id.* ¶ 12.

<sup>188</sup> *How China's Communist Party Trains Foreign Politicians*, THE ECONOMIST (Dec. 10, 2020), <https://www.economist.com/china/2020/12/10/how-chinas-communist-party-trains-foreign-politicians> [<https://perma.cc/3EGA-WS5B>].

A. *Differences in ideological and legal theoretical landscapes*

The advocacy of Chinese legal thought abroad takes place in front of audiences whose composition, cultural and ideological backgrounds, and rhetorical conventions may differ vastly from Chinese audiences. One obvious difference between the Chinese context and audiences in the global south relates to the influence of colonialism. East African lawyers stress the continued significance of the colonial experience.<sup>189</sup> On the one hand, the imposition of foreign legal institutions into East African colonies introduced “a measure of hostility to the formal legal system.”<sup>190</sup> Such hostility, or at least skepticism, stands in contrast with CCP ideologues’ endorsement of formal (socialist) state law.<sup>191</sup> On the other hand, East African political and legal discourses have been formulated in Western languages both literally and figuratively as a result of the colonial experience. East African lawyers have been deeply engaged with Western legal thought, especially in East African common law jurisdictions, such as Kenya and Tanzania.<sup>192</sup> Stylistically as well, the intellectual patterns of (even anti-Western) African leaders have been “unmistakably a product of the Western system of education.”<sup>193</sup> Chinese legal ideology is culturally and linguistically more distant from the East African legal culture than, say, texts from the common law tradition.

China’s idiosyncratic experience with socialism also sets CCP ideologues apart from their foreign audiences. Socialism, as such, is not a new ideology in the global south or East Africa, in particular. Indeed, Marxism-Leninism was a prominent ideological influence in the newly independent African states in the 1970s and 1980s.<sup>194</sup> A

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<sup>189</sup> Issa G. Shivji, *Law in Independent Africa: Some Reflections on the Role of Legal Ideology*, 46 OHIO ST. L.J. 689, 690 (1985).

<sup>190</sup> Ghai, *supra* note 40, at 172.

<sup>191</sup> For the Chinese approach, see THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 109; QUESTIONS AND ANSWERS, *supra* note 52, at 170.

<sup>192</sup> Yash Ghai, *Law, Development and African Scholarship*, 50 MOD. L. REV. 750, 761 (1987).

<sup>193</sup> Ali Mazrui, *Tanzaphilia*, 31 TRANSITION 20 (1967) (commenting on Tanzania’s president Julius Nyerere). As a concrete manifestation of such similarities, East African speeches made use of Christian metaphors and references to the Western political canon. See Julius K. Nyerere, *The Varied Paths to Socialism*, in UJAMAA: ESSAYS ON SOCIALISM 76-77 (1968); Julius K. Nyerere, *Democracy and the Party System*, in THE POLITICAL AWAKING OF AFRICA (Rupert Emerson & Martin Kilson eds., 1965) (citing Lincoln’s adage that “a house divided against itself cannot stand” in support of the one-party system). See also GUY MARTIN, AFRICAN POLITICAL THOUGHT 90 (2012) (citing Chana’s leader Nkrumah paraphrasing the Bible).

<sup>194</sup> MARTIN, *supra* note 193, at 3.

number of East African countries, including Ethiopia and Tanzania, became socialist one-party states shortly after gaining independence.<sup>195</sup> Even Kenya, East Africa's most liberal state, converted to a one-party state in the 1980s.<sup>196</sup> The Soviet Union and other socialist states provided development aid and military support for socialist African countries in the 1970s and 1980s.<sup>197</sup> China also sent development experts to Africa in the 1960s to advise African countries on rural development policies.<sup>198</sup> Socialist influence convinced some East African legal scholars to examine society through Marxist theories and assign law a peripheral and mostly counterproductive role in social transformation.<sup>199</sup>

Despite this socialist influence, many East African lawyers and political leaders identified the post-colonial legal order closely with its colonial origins. For instance, even at the height of Tanzania's socialist "*ujamaa*" policies in the 1960s and 1970s, Tanzanian courts purported to follow "the common law and its ethos."<sup>200</sup> The same was true of East African legal academia, which maintained close connections with Western academia and scholarship even in Marxist one-party states.<sup>201</sup> Moreover, while socialism and dictatorial governments distanced East African countries from the West, East African authoritarianism did not constitute a radical departure from these countries' colonial past.<sup>202</sup> East African one-party states continued the colonial authoritarian tradition while preserving colonial legal traditions under authoritarian forms of government.<sup>203</sup> In contrast, the establishment of the PRC provided a radical break from China's semi-colonial past.<sup>204</sup>

Most countries in the global south went through a process of political and ideological liberalization in the 1990s, which distanced them even further from Chinese-style socialism. Kenya and Tanzania

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<sup>195</sup> DAVID OTTAWAY & MARINA OTTAWAY, *AFROCOMMUNISM* 130 (1981).

<sup>196</sup> Mutua, *supra* note 40, at 101; Muthomi Thiankolu, *The Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence*, E. AFR. L.J. 122, 125 (2005).

<sup>197</sup> OTTAWAY & OTTAWAY, *supra* note 195, at 33.

<sup>198</sup> *Id.* at 34.

<sup>199</sup> Ghai, *supra* note 192, at 770-71; Shivji, *supra* note 189, at 690.

<sup>200</sup> Ghai, *supra* note 40, at 162.

<sup>201</sup> Ghai, *supra* note 192, at 755.

<sup>202</sup> See J.F. Scotton, *Judicial Independence and Political Expression in East Africa – Two Colonial Legacies*, 6 E. AFR. L.J. 1, 8-10 (1970) (showing how during the colonial era, statutory law and common law principles (such as the doctrine of libel) had enabled British courts to silence the critics of the colonial administration).

<sup>203</sup> Ghai, *supra* note 40, at 170.

<sup>204</sup> Stanley Lubman, *Mao and Meditation: Politics and Dispute Resolution in Communist China*, 55 CAL. L. REV. 1284, 1351 (1967).

transformed to multiparty systems in the early 1990s.<sup>205</sup> Ethiopia likewise put a formal end to Marxism-Leninism in 1991 and adopted a liberal democratic constitution in 1994,<sup>206</sup> although this did not put an end to political authoritarianism.<sup>207</sup> Other countries in the global south went through a similar development in the 1990s, leaving socialist China with only a handful of ideological partners.<sup>208</sup> Political liberalization in East Africa coincided with the introduction of neo-liberal economic policies, which emphasized Western-style property rights and contractual freedoms.<sup>209</sup>

To be sure, political liberalization has been neither uniform nor unidirectional in East Africa. Political elites in some East African countries, such as Ethiopia, continue to advocate and enforce authoritarianism.<sup>210</sup> Yet the contrast between the Chinese and East African ideological landscapes is clear. Political liberalization has created a legal and political discourse in East Africa, which is foreign (and in some ways inhospitable) to the CCP's ideological speech. For instance, East African legal and political discourse is permeated by liberal political thought and human rights language in a way that would be unthinkable in contemporary China. In Kenya, legal scholars may describe the purpose of the constitution as the expansion of "the scope of individual self-fulfillment and the enjoyment of fundamental rights" through the "limitation of government power."<sup>211</sup> Kenyan scholars may also criticize Kenyan courts for failing to give sufficient weight to human rights considerations<sup>212</sup> and for their inadequate

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<sup>205</sup> ROBERT M. MAXON, *EAST AFRICA: AN INTRODUCTORY HISTORY* 279-80, 305 (2009).

<sup>206</sup> PAULOS MILKIAS, *ETHIOPIA* 82-83 (2011).

<sup>207</sup> YOHANNES GEDAMU, *THE POLITICS OF CONTEMPORARY ETHIOPIA: ETHNIC FEDERALISM AND AUTHORITARIAN SURVIVAL* 57 (2021).

<sup>208</sup> See Yash Ghai, *A Journey around Constitutions: Reflections on Contemporary Constitutions*, 122 S. AFR. L.J. 804, 813-14 (2005).

<sup>209</sup> James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 BUFF. HUM. RTS. L. REV. 107, 121 (1998).

<sup>210</sup> Will Jones, Ricardo Soares de Oliveira, & Harry Verhoeven, *Africa's Illiberal State-builders* 7-8 (Refugee Study Center Working Paper Series No. 89).

<sup>211</sup> Oduor Dan Juma, *Constitution Making and Democratization Trends in Africa: The Kenyan Case*, E. AFR. L.J. 21, 29 (2004).

<sup>212</sup> Muthomi Thiankolu, *The Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence*, E. AFR. L.J. 122, 126 (2005); Nancy Baraza, *Supreme Court of Kenya Advisory Opinion on the Two Thirds Gender Principle: A Critique through Dworkin's Constructive Interpretation*, E. AFR. L.J. 150, 158 (2018).

enforcement of rights protections.<sup>213</sup> Legal scholarship comprises a liberal strand also in the more authoritarian East African countries, such as Ethiopia. Ethiopian legal scholars are able to advocate “the progressive realization of the constitutional right of citizens”<sup>214</sup> and assert that “political parties are indispensable in modern representative democracy.”<sup>215</sup>

Yet there appears to be much space for Chinese contributions in East Africa, as suggested by calls for closer “South-South collaboration and collective reflection” in East African jurisprudence.<sup>216</sup> The region’s leftist intellectuals have continued to critically assess “the value-system underlying the Anglo-American law” and “the Western civilization’s claim to universality.”<sup>217</sup> Prominent critiques of neoliberal economic policies, such as the critique of property rights for economic development, seem to be supported by Chinese development expertise.<sup>218</sup> Some critics of neoliberal economic policies envision a strong Asian-style “developmental state,” which is able to guide the development project and be, in line with the idealized image of the Chinese party-state, free of special interests.<sup>219</sup> As is the case with the PRC, the “developmental state” does not need to possess liberal democratic institutions.<sup>220</sup> These critiques, and China’s example in

<sup>213</sup> Carol C. Ngang, *Systems Problem and a Pragmatic Insight into the Right to Development Governance for Africa*, 19 AFR. HUM. RTS. L.J. 365, 393 (2019).

<sup>214</sup> Elias N. Stebek, *The Constitutional Right to Enhanced Livelihood in Ethiopia: Unfulfilled Promises and the Need for New Approaches*, 10 MIZAN L. REV. 126, 176 (2016).

<sup>215</sup> Leake Mekonen Tesfay, *The Right to Political Party Membership in Ethiopia: On the Freedom to Join and Resign*, 11 MIZAN L. REV. 373, 379 (2017).

<sup>216</sup> Mutunga, *supra* note 40, at 22. *See also, e.g.*, Deepak Nayyar, *The Emerging Asian Giants and Economic Development in Africa*, in GOOD GROWTH AND GOVERNANCE IN AFRICA: RETHINKING DEVELOPMENT STRATEGIES GOOD GROWTH AND GOVERNANCE IN AFRICA: RETHINKING DEVELOPMENT STRATEGIES 536 (Akbar Noman ed., 2011); Obiajulu Nnamuchi & Simon Ortuanya, *Human Right to Health in Africa and its Challengers: A Critical Analysis of Millennium Development Goal 8*, 12 AFR. HUM. RTS. L.J. 178, 187 (2012); Stebek, *supra* note 214, at 128.

<sup>217</sup> Shivji, *supra* note 189.

<sup>218</sup> Meles Zenawi, *States and Markets: Neoliberal Limitations and the Case for a Developmental State*, in GOOD GROWTH AND GOVERNANCE IN AFRICA: RETHINKING DEVELOPMENT STRATEGIES GOOD GROWTH AND GOVERNANCE IN AFRICA: RETHINKING DEVELOPMENT STRATEGIES 140 (Akbar Noman ed., 2011).

<sup>219</sup> *Id.* at 168. For the conception that the CCP is free of special interests, *see* INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 81.

<sup>220</sup> Zenawi, *supra* note 218, at 169; Timothy Webster, *China’s Human Rights Footprint in Africa*, 51 COLUM. J. TRANSNATIONAL L. 626, 662-63 (2012).

economic development, help elites to tackle Western critiques about inadequate rights protections.<sup>221</sup>

At the same time, the critique of Western (neo)liberalism in East Africa has given rise to rights-based critiques of both liberalism *and* Chinese-style authoritarianism.<sup>222</sup> Such critiques have coincided with the mainstreaming of participatory and rights-based development policies. Instead of seeing development as the top-down imposition of (neo-liberal or developmental) economic reforms, a branch of development policy today regards economic and social development as a participatory process.<sup>223</sup> In contrast to such approaches, CCP ideology explicitly states that it is the Party – not individual citizens – that is “leading the people forward in implementing the constitution and laws,” as well as “leading legislation, ensuring law enforcement, and taking the lead in abiding by the law.”<sup>224</sup>

### B. *Situating Chinese arguments within the East African context*

Differences between ideological and legal theoretical landscapes influence the persuasiveness of Chinese rhetorical strategies abroad. As discussed in Part III.B above, CCP policy texts and Chinese legal scholarship single out the Chinese commitment to pragmatism, substantive justice, and holistic analysis of legal issues as the globally relevant characteristics of Chinese legal thought.<sup>225</sup> All these rhetorical strategies have been commonplaces in “Western capitalist” law for well over a century, and they have also been present in the East

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<sup>221</sup> Jones, Soares de Oliveira, & Verhoeven, *supra* note 210, at 11.

<sup>222</sup> For instance, Issa Shivji, a Tanzanian Marxist scholar, has described “the rule of law” as a fragile “legitimizing ideology” of liberal democracies, arguing that this ideology does not resonate among ordinary Tanzanians. Issa G. Shivji, *The Rule of Law and Ujamaa in the Ideological Formation of Tanzania*, 4 SOC. & LEGAL STUD. 147, 169 (1995). At the same time, Shivji has challenged political authoritarianism through a critical and creative human rights practice. Shivji argues that certain human rights – in particular, the right to life and the right to self-determination – should be used to combat both imperialism and authoritarianism by allowing people the right to participate in public processes. Issa G. Shivji, *Constructing a New Rights Regime: Promises, Problems and Prospects*, 8 SOC. & LEGAL STUD. 253, 254, 270 (1999).

<sup>223</sup> U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2000: HUMAN RIGHTS AND HUMAN DEVELOPMENT 31 (2000).

<sup>224</sup> Xi Jinping, *supra* note 65, at 474.

<sup>225</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 19; THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30; HUANG, *supra* note 105, at 266-67.

African legal discourse at least since the beginning of the decolonization process.<sup>226</sup>

East African jurists expounded their commitment to substantive justice and their opposition to the (supposed) formalism of Western law already in the 1960s and 1970s, decades before such viewpoints became popular in China.<sup>227</sup> In fact, the development of the entire East African post-colonial jurisprudence has been described as a move towards instrumentalism.<sup>228</sup> Some jurists in the newly independent East African states identified the “formal logical analysis of law” as a major object of resistance to the decolonization movement.<sup>229</sup> For instance, according to a Ugandan government lawyer writing in the late 1960s, the Ugandan judiciary “should be a dynamic and revolutionary institution, and not a body interpreting laws in the exact manner as if the colonial regime [was] still in full control in Uganda.”<sup>230</sup> Similarly, the legal system in the newly independent Tanzania was thought to incline “towards ‘flexibility’ and open ended concepts, and simplicity in procedures.”<sup>231</sup>

As was the case with China in the 2000s and 2010s, prominent post-colonial East African jurists, such as Yash Ghai (a Kenyan legal scholar, who taught in Tanzania and Hong Kong) justified anti-formalism by serving local needs.<sup>232</sup> In post-colonial East Africa, as in China today, the organization of the government, and its legal system, were to be based on “the future needs and aspirations” of the local people, rather than on foreign traditions.<sup>233</sup> The transformation from legal formalism to instrumentalism in East Africa “freed the law from

<sup>226</sup> Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19, 37–38 (David Trubek & Alvaro Santos eds., 2006). See, e.g., Roscoe Pound, *The End of Law as Developed in Juristic Thought*, 30 HARV. L. REV. 201, 211 (1917) (arguing that American law is less formalist than English common law).

<sup>227</sup> Ghai, *infra* note 245, at 8. For contemporaneous Chinese legal thought, see Lubman, *supra* note 204, at 1351.

<sup>228</sup> Ghai, *infra* note 245, at 8. Instrumentalism is an anti-formalist legal theory. According to Ghai, in socialist countries, instrumentalism connoted the adjudication of cases on the basis of the needs of the planned economy. *Id.* at 11.

<sup>229</sup> Ali, *supra* note 40, at 47–49.

<sup>230</sup> *Id.* at 48. Ali’s views may not have reflected mainstream opinions, however. The following issue of the journal *Transition* in which Ali’s article appeared carried five letters disputing Ali’s contentions. See *The Judiciary and Ideological Commitment*, 37 TRANSITION 10 (1968).

<sup>231</sup> Ghai, *supra* note 40, at 186.

<sup>232</sup> Ghai & McAuslan, *supra* note 40, at 127.

<sup>233</sup> *Id.* For Uganda, see Ali, *supra* note 40.

its restraints,”<sup>234</sup> and it enabled judges and the government to pursue their policies freely.<sup>235</sup> Post-colonial East African legal scholarship even supported the one-party system and the notion of strong political leadership.<sup>236</sup>

As described in the previous section, East African states transformed from one-party states to multi-party democracies in the 1990s. Political liberalization has placed the above-described legal theoretical arguments into a new political context. Anti-formalism, for instance, remains a recognizable argumentative strategy in East African legal scholarship, but it has other uses than justifying the obfuscation of the division of powers between the executive and the judiciary. In contrast to the anti-formalist critiques of the 1960s and 1970s (and the more recent CCP literature),<sup>237</sup> prominent East African jurists present anti-formalist arguments in order to encourage the judiciary to fulfill its political role in a liberal democracy<sup>238</sup> and to persuade courts to interpret the law through human rights norms and principles.<sup>239</sup> For instance, Githu Muigai, a prominent Kenyan lawyer who has served as the country’s Attorney General, criticizes Kenya’s “dominant judicial culture” for adhering to “the myth of judicial neutrality and objectivity” when deciding cases “in a sterile and pedantic fashion.”<sup>240</sup> This strategy, Muigai argues, “allows judges to conceal value choices or inarticulate premises in their decisions behind seemingly objective legal forms, and in so doing legitimates purely political decisions.”<sup>241</sup> In contrast to CCP ideologues, the aim of Muigai’s critique is not to legitimize political interventions into the judiciary,<sup>242</sup> but to bolster the legal authority and political role of the Kenyan constitution and the

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<sup>234</sup> Ghai, *infra* note 245, at 8.

<sup>235</sup> *Id.* at 8. See also Henry Bienen, *The Party and the No Party State: Tanganyika and the Soviet Union*, 13 *TRANSITION* 25, 26 (1964).

<sup>236</sup> In an article cowritten with Patrick McAuslan, Ghai objected to the judicial control of the executive on the basis that such control constituted a “government by judges rather than government by Ministers and civil servants.” See Ghai & McAuslan, *supra* note 40, at 142.

<sup>237</sup> See *supra* notes 232-235 and accompanying text.

<sup>238</sup> See Githu Muigai, *Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation*, 1 *E. AFR. L.J.* 1, 15-16 (2004); Muthomi Thiankolu, *The Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence*, 2 *E. AFR. L.J.* 122, 123, 149-50 (2005).

<sup>239</sup> Nancy Baraza, *Supreme Court of Kenya Advisory Opinion on the Two Thirds Gender Principle: A Critique through Dworkin’s Constructive Interpretation*, 2018 *E. AFR. L.J.* 150, 162 (2018).

<sup>240</sup> Muigai, *supra* note 238, at 8-9.

<sup>241</sup> *Id.* at 9.

<sup>242</sup> See text accompanying *supra* notes 141-142.

judiciary.<sup>243</sup> Other Kenyan lawyers have presented similar anti-formalist critiques against the country's executive-friendly judiciary.<sup>244</sup>

In addition to the changing role of anti-formalist arguments, political liberalization has also repurposed legal formalism, which now appears as a necessary corrective to earlier instrumentalism. As Yash Ghai pointed out in 1991, a successful instrumentalist approach to law would have "required skills, habits and attitudes which were in short supply" in post-colonial East African countries.<sup>245</sup> The (partial) rehabilitation of legal formalism is supported by the above-described changes in the global development policies, which nowadays attaches central importance to formal rights and the rule of law.<sup>246</sup> According to the rights-based approaches to development, civil and political rights contribute to the achievement of development goals by increasing governmental accountability and by facilitating free discussion on development objectives.<sup>247</sup> Contemporary development policies also seek to limit arbitrary government action through formal rules in order to facilitate private economic activity.<sup>248</sup> These views have been influential among East African jurists, who are often closely engaged with the international development community.<sup>249</sup> Among other things, East African legal scholars have examined the need for formal rules in various developmental contexts.<sup>250</sup> While the CCP also emphasizes the need for rule-based constraints on government action, in East African legal scholarship the argument has been extended to constraining political leadership.<sup>251</sup>

The similarity between contemporary Chinese arguments about the advantages of Chinese legal thought and the earlier post-colonial

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<sup>243</sup> Muigai, *supra* note 238, at 2.

<sup>244</sup> Thiankolu, *supra* note 238, at 123; Baraza, *supra* note 239, at 158.

<sup>245</sup> Yash P. Ghai, *The Role of Law in the Transition of Societies: The African Experience*, 35 J. AFR. L. 8, 8 (1991).

<sup>246</sup> See UNDP, HUMAN DEVELOPMENT REPORT 2010: THE REAL WEALTH OF NATIONS: PATHWAYS TO HUMAN DEVELOPMENT 20 (2010); WORLD BANK GROUP, *supra* note 166, at 83.

<sup>247</sup> UNDP, *supra* note 246, at 23; WORLD BANK GROUP, *supra* note 166, at 23.

<sup>248</sup> WORLD BANK GROUP, *supra* note 166, at 23.

<sup>249</sup> Sara Dezalay, *Lawyers in Africa: Brokers of the State, Intermediaries of Globalization A Case Study of the "Africa" Bar in Paris*, 25 IND. J. GLOB. LEGAL STUD. 639, 649, 662 (2018).

<sup>250</sup> Muradu Abdo, *Legislative Protection of Property Rights in Ethiopia: An Overview*, 7 MIZAN L. REV. 165, 166 (2013) (arguing for clearly defined property rights in Ethiopia); Ghai, *supra* note 245, at 16 (criticizing the disregard for formal law in East African governance); Mutua, *supra* note 40, at 99 (criticizing the weakening of fundamental rights in Kenya).

<sup>251</sup> Ghai, *supra* note 245, at 16; Mutua, *supra* note 40, at 99-100.

legal discourse in East Africa and elsewhere is a double-edged sword for Chinese ideological advocacy efforts in that region. On the one hand, the similarity helps East African audiences to agree with viewpoints advanced through Chinese ideological advocacy. For instance, some East African jurists who call for “South-South collaboration” also criticize “mechanical jurisprudence,” which is an object of criticism also for CCP ideologues and conservatively minded Chinese legal scholars.<sup>252</sup> Both groups of jurists may find a common tune in their critique of the Western, supposedly formalist, approach to law.<sup>253</sup> The shared critiques of Western legal practices and neoliberal development policies may rehabilitate the Chinese legal and political model in the eyes of some East African lawyers and render them more receptive to Sino-African legal development cooperation.<sup>254</sup>

On the other hand, the experience of similarity may mean that East African audiences will not find Chinese ideological speech, even in its most deliberative form, as persuasive as domestic Chinese audiences.<sup>255</sup> For instance, some East African jurists associate the supposed benefits of Chinese legal thought with development paradigms and political doctrines, which they no longer find ideologically appealing.<sup>256</sup> The critique of legal formalism, in particular, can be associated with the instrumentalist approach to legal thought, which was promoted by the failed authoritarian regimes in East Africa. This association goes against the Chinese attempt to link Chinese pragmatism with globally progressive forms of legal thought. The rehabilitation of formalism in the field of public law could likewise present a challenge against Chinese holistic adjudicative principles, which discount legal processes and rights protections in favor of “political and social effects.”<sup>257</sup>

As described in Part IV.A above, a prominent strand of contemporary development policy regards formal rights and checks on

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<sup>252</sup> For China, see THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 109; QUESTIONS AND ANSWERS, *supra* note 52, at 71, 170; INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 16. For East Africa, see Mutunga, *supra* note 40, at 20, 22.

<sup>253</sup> See QUESTIONS AND ANSWERS, *supra* note 52, at 71-72.

<sup>254</sup> See, e.g., Jones, Soares de Oliveira, & Verhoeven, *supra* note 210, at 19.

<sup>255</sup> Rhetorical theory teaches that the sequencing of arguments affects their persuasiveness. If a particular audience believes that the discussion has moved beyond a certain argument, the experience of familiarity may prove counterproductive for persuasion. PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 242.

<sup>256</sup> See *supra* note 245-246 and accompanying text.

<sup>257</sup> THE SOCIALIST RULE OF LAW CONCEPT—A READER *supra* note 57, at 110; INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 92.

government power as intrinsically valuable development goals.<sup>258</sup> This argument – which is sometimes promoted through the explicit critique of Chinese authoritarianism – deflates the consequentialist argument about the benefits of authoritarian rule.<sup>259</sup> The argument derives its rhetorical effectiveness from the reversal of the means-ends dichotomy, which is implicit in Chinese pragmatism: Why should individual rights protections be devalued as a means to achieving something higher, instead of constituting the higher goals in their own right?<sup>260</sup> The advocates of illiberalism may seek to answer such a question through consequentialist arguments and by pointing out China's economic success, in particular.<sup>261</sup> While such arguments may be countered by yet another set of consequentialist arguments, ultimately the opponents of authoritarian development approaches exclude the Chinese governance model from desirable development outcomes as a matter of definitions.<sup>262</sup>

Yet another factor influencing audiences in East Africa and elsewhere is the legal infrastructure protecting Chinese investments in such countries. In countries where such infrastructure follows neoliberal economic policies – weakening labor protections, for instance – audiences may associate Chinese legal ideology with law reforms supporting neo-economic economic policies.<sup>263</sup> Assurances about the socialist nature of Chinese legal thought may appear particularly cynical in such contexts, regardless of whether the neoliberal law reforms resulted from Chinese lobbying or reflect Chinese legal ideology.<sup>264</sup>

In conclusion, efforts to increase China's international discourse power in the field of social theory and legal ideology face a

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<sup>258</sup> UNDP, *supra* note 246, at 23; WORLD BANK GROUP, *supra* note 166, at 43.

<sup>259</sup> CLAUDE AKE, *DEMOCRACY AND DEVELOPMENT IN AFRICA* 127 (2001) (ebook).

<sup>260</sup> PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 433. This question can be answered by yet another reversal of the means-ends dichotomy: Why should policy objectives, such as providing a better standard of living, be valued less than the enforcement of individual rights?

<sup>261</sup> Jones, Soares de Oliveira, & Verhoeven, *supra* note 210, at 19.

<sup>262</sup> AKE, *supra* note 259, at 127. I have discussed the various argumentative strategies in the promotion of rights-based approaches elsewhere. See Samuli Seppänen, *From Substance to Absence: Argumentative Strategies in the Implementation of the Human Rights-Based Approaches to Development*, N.Y.U. J. INT'L L. & POL. 389 (2017).

<sup>263</sup> KIBROM TEWELDEBIRHAN, *LABOR AFTER THE DEVELOPMENTAL STATE: LAW, STATE, AND CHINESE ENTERPRISES IN THE AFRICAN COPPERBELT* (May 2022) (unpublished S.J.D. dissertation on file with author), at 80-81, 223 (discussing Chinese investments in Zambia).

<sup>264</sup> *Id.* at 267.

challenging context in East Africa. The Chinese government has demonstrably been able to persuade African countries to adopt aspects of Chinese ceremonial speech in diplomatic forums.<sup>265</sup> Before the COVID-19 pandemic, China facilitated conferences and training programs on Chinese law.<sup>266</sup> Although the results of such capacity building programs are hard to quantify, there are some examples of concrete Chinese ideological influence in East Africa. For instance, the Chinese government has supported the establishment of an ideological school in Tanzania.<sup>267</sup> Chinese-style uses of law also appear relevant to the so-called illiberal elites in East Africa, who seek to repurpose legal institutions for authoritarian uses.<sup>268</sup> Nevertheless, as discussed above, there is much skepticism among East African audiences towards the kinds of argumentative moves that Chinese ideological speech comprises. Chinese ideological speech is also disadvantaged by the centrality of human rights speech in East Africa and resistance towards Chinese economic activities in the region.

#### V. IMPLICATIONS FOR THE STUDY OF GLOBAL ILLIBERALISM

On its face, CCP ideologues' attempts to develop an alternative legal theoretical framework amount to an ambitious, even radical, ideological challenge against liberal legal thought. This theoretical construction project appears to coincide with the general global trend towards illiberalism, which is premised on pragmatist (or instrumentalist) arguments about the law; promises about material benefits; and critiques of individual rights, limits on government power, and liberal universalism.<sup>269</sup> Nevertheless, the applicability of the Chinese experience to the construction and international advocacy of illiberal ideology in East Africa, Europe, and other regions is not self-evident. As discussed in the Introduction, the uses of ideological speech in regimes, which are undergoing an authoritarian takeover, differ from the uses of ideological speech in the PRC.<sup>270</sup> Many illiberal

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<sup>265</sup> Dakar Declaration of the Eighth Ministerial Conference of the Forum on China-Africa Cooperation, *supra* note 187.

<sup>266</sup> For conferences and training programs facilitated by China before the COVID-19 pandemic, see Seppänen, *supra* note 10, at 131-35.

<sup>267</sup> *How China's Communist Party Trains Foreign Politicians*, *supra* note 188.

<sup>268</sup> *Id.* at 9, 19.

<sup>269</sup> Stephen Holmes, *The Antiliberal Idea*, in ROUTLEDGE HANDBOOK OF ILLIBERALISM, *supra* note 16, at 4-6; Scheppelle, *supra* note 21, at 315, 326; Tushnet, *Authoritarian Constitutionalism*, *supra* note 13, at 452-53. For definitions of instrumentalism and pragmatism, see *supra* notes 24-26.

<sup>270</sup> See *supra* notes 16-20 and accompanying text.

regimes are in the process of establishing political control domestically and may not see the need for, or the possibility of, forcing their subjects to reproduce uniform ideological rhetoric.<sup>271</sup> Moreover, in contrast to contemporary CCP leaders, an upstart autocrat cannot rely on well-established Party machinery, which operates under the cover of official ideological speech.<sup>272</sup> Emerging autocrats will have to challenge the legal system through explicit uses of language. At the same time, up-and-coming autocrats do not operate against thick sediments of Party ideology, where even the slightest variation to rhetorical forms can have momentous implications.<sup>273</sup> As a consequence, ideological speech in emerging autocracies may appear less liturgic and more deliberative than Chinese ideological speech.<sup>274</sup>

At the same time, studies on political rhetoric have noted the emergence of ritualistic and intellectually unpersuasive rhetoric in authoritarian settings from the British colonial administration in India to the Soviet Union and Eastern European socialist countries.<sup>275</sup> The Chinese experience encourages scholars to study analogous processes in other contexts.<sup>276</sup> The Chinese experience is also helpful for studying the interface between the domestic production of ideological speech and its foreign dissemination. In particular, the Chinese experience suggests that: (a) the domestic priorities of illiberal ideological speech may adversely affect ideological advocacy efforts in foreign contexts; (b) some characteristically illiberal argumentative strategies may be less effective in front of foreign audiences than they are domestically; and (c) illiberal ideological sensitivities may impair, or make unavailable, certain advocacy strategies, which could be effective in front of foreign audiences.

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<sup>271</sup> Whether illiberal societies can stay ideologically diverse is a contentious matter. See Tushnet, *supra* note 13, at 1374.

<sup>272</sup> Ling Li, *The Chinese Communist Party and People's Courts: Judicial Dependence in China*, 64 AM. J. COMP. L. 37, 49-51, 72-74 (2016) (describing judicial independence in Party ideology and the Party's interventions in the judiciary); SCHUCHENG WANG, LAW AS AN INSTRUMENT: SOURCES OF CHINESE LAW FOR AUTHORITARIAN LEGALITY 27-30 (2022) (describing Chinese attempts to increase judicial independence and its impossibility in the Chinese political system).

<sup>273</sup> LINK, *supra* note 31, at 242.

<sup>274</sup> Scheppele, *supra* note 21, at 321.

<sup>275</sup> See LINK, *supra* note 31, at 340-41 (comparing China, the Soviet Union, and Socialist Hungary and Poland); PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 164.

<sup>276</sup> For analogies in speech, see PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 372-73.

*A. Idiosyncratic domestic priorities*

As discussed in Part II, many statements on the global relevance of CCP ideology cannot be interpreted as earnest attempts to promote Chinese legal thought globally. In addition to their liturgical nature, statements about the global relevance of Chinese law have been made in Chinese language documents, which are not distributed abroad and, consequently, cannot be expected to have much influence on foreign audiences.<sup>277</sup> The Chinese government is active in translating and disseminating ideological speech to foreign audiences. Among other things, the Chinese government translates Chinese leadership's key speeches into foreign languages.<sup>278</sup> It may be expected that the foreign language translations of Chinese leadership's speeches are less effective in front of foreign audiences than domestically. Even if such translations were disseminated to relevant foreign audiences, it would be difficult for them to understand the meaning of Chinese ideological speech without specialist expertise in Chinese politics.<sup>279</sup> Whereas the domestic audiences of Chinese political speech are familiar with Chinese political concepts, foreign translations of Chinese political speeches make few attempts to explain such idiosyncratic terms to foreign audiences.<sup>280</sup> This practice suggests that foreign-language translations of Chinese political speeches are at least partly intended for domestic Chinese consumption, perhaps as self-assurances about the global status of Chinese ideology. The act of commending the global relevance of Xi Jinping Thought on the Rule of Law – and the act of translating such praise into foreign languages – demonstrates an author's belief in the Chinese party-state and its current leadership. Foreign audiences' reactions to such praise are irrelevant to this goal.

The domestic focus of the Party's ideological speech and Chinese legal scholarship also influences their argumentative style. As described in Part II above, CCP ideologues and pro-establishment

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<sup>277</sup> See e.g., QUESTIONS AND ANSWERS, *supra* note 52; THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57.

<sup>278</sup> These translations are uploaded onto Chinese government websites and published in China's state-run foreign language media. See e.g., BEIJING REVIEW, <https://www.bjreview.com/> [<https://perma.cc/CE79-SPRS>] (last visited Oct. 28, 2022); XINHUANET, <http://www.xinhuanet.com/english/home.htm> [<https://perma.cc/G5FP-4K3R>] (last visited Oct. 13, 2022).

<sup>279</sup> In contrast to Chinese ideology, relevant East African audiences are familiar with Western ideological speech. See *supra* note 192 and accompanying text.

<sup>280</sup> See e.g., XI JINPING, THE LAW BASED GOVERNANCE OF CHINA, COMPILED BY THE PARTY LITERATURE RESEARCH OFFICE OF THE COMMUNIST PARTY OF CHINA 143 (2017).

Chinese scholars sometimes describe Chinese socialist law in generalizing terms, contrasting the substantively just and pragmatist Chinese law with supposedly formalist and bookish Western “capitalist” law.<sup>281</sup> Juxtaposing the pragmatist, instrumentalist, or otherwise anti-formalist Chinese legal thought with the formalist Western legal thought may be an effective tool domestically for explaining the inevitability and legitimacy of the Party’s political control over the judiciary. This is especially true of those Party members, who have not been legally trained and are unfamiliar with contemporary Western law.<sup>282</sup> The same arguments may be less effective in front of legally trained foreign audiences, such as lawyers in East African common law jurisdictions.

A government or a political party may certainly develop and advance different types of speech for different audiences. Indeed, as discussed in Part III.C above, the Chinese government’s foreign-orientated ceremonial texts are less ideologically ambitious than the Party’s domestic ceremonial speech. Nevertheless, domestic political priorities have arguably made it less rewarding for CCP ideologues and Chinese legal scholars to develop intellectually persuasive arguments for global audiences. Instead, Chinese domestic political priorities have incentivized Chinese legal theorists to insist that Chinese legal thought consists of paradigm-shifting innovations, even if such claims appear implausible abroad – for instance, against postcolonial East African legal scholarship – and consequently do little to enhance China’s international discourse power. In other words, domestic priorities influence Party ideologues’ willingness and ability to adapt their message to foreign audiences.<sup>283</sup>

Such domestic priorities are perhaps most visible in the hagiographic nature of recent CCP ideology. The personification of things, including political ideologies (as was the case with Marxism and Maoism), is a well-established rhetorical strategy, which serves to stabilize the boundaries of an otherwise ill-defined object.<sup>284</sup> Appeals to authorship can also transfer the value associated with the author of an artistic

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<sup>281</sup> See *infra* Part III.B; QUESTIONS AND ANSWERS, *supra* note 52, at 19; THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30; HUANG, *supra* note 105, at 266-67.

<sup>282</sup> For the composition of CCP membership, see BRUCE DICKSON, THE PARTY AND THE PEOPLE: CHINESE POLITICS IN THE 21ST CENTURY 34–35 (2021).

<sup>283</sup> For the adaptation of speech to audiences, see PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 23-26.

<sup>284</sup> *Id.* at 331.

or literary work to the work authored by them.<sup>285</sup> These rhetorical tropes, refreshed in contemporary Chinese ideology, may conceivably serve as a model for the production of ideological speech in illiberal regimes. Nevertheless, in this regard, the domestic priorities of Chinese politics may not conform to the efforts to increase China's international discourse power. In contrast to, say, Karl Marx's scholarship, contemporary Chinese ideological speech is often ceremonial in its ambitions and focused on cementing power relations within the Chinese body politic.<sup>286</sup> In the absence of intellectually persuasive arguments, the clannish nature of contemporary illiberalism means that it is difficult to convince foreign autocrats to adhere to a legal ideology named after a foreign political leader rather than an abstract idea.<sup>287</sup>

### B. *Ineffective argumentative strategies*

As discussed in Part III and Part V.A above, CCP ideology and pro-establishment scholarship draw sharp distinctions between "Chinese" and "Western capitalist" modes of legal thought, associating Western legal systems with "formalist" adherence to logic and characterizing Chinese legal thought through its supposed commitment to "substantive" justice and pragmatism.<sup>288</sup> The Chinese approach fits contextual social realities better than the Western approach,<sup>289</sup> serves the people's needs better than the Western approach,<sup>290</sup> and facilitates pragmatist and informal solutions better than the Western approach.<sup>291</sup>

<sup>285</sup> *Id.* at 98, 300-01 (describing the reception of artistic works).

<sup>286</sup> BURKE, *supra* note 69, at 101 (regarding Marx's scholarship).

<sup>287</sup> See Holmes, *supra* note 269, at 8.

<sup>288</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 19; THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30; HUANG, *supra* note 105, at 266-67.

<sup>289</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 19-20; SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30-31; Huang Wenyi (黄文艺), *Lun Xi Jinping fazhi sixiang de xingcheng fazhan, xianming tese yu zhongda yiyi* (论习近平法治思想的形成发展、鲜明特色与重大意义) [On the Formation and Development of Xi Jinping Thought of the Rule of Law, its Distinctive Characteristics and Significance] 61 HENAN DAXUE XUEBAO (SHEHUI KEXUE BAN) (河南大学学报 (社会科学版)) [JOURNAL OF HENAN UNIVERSITY (SOCIAL SCIENCES)] 15, 24 (2021); SULLI ZHU, SENDING LAW TO THE COUNTRYSIDE, *supra* note 108, at xxxv (describing the Chinese approach to legal transplantation).

<sup>290</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 31-32, 70; SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 73-75.

<sup>291</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 93; SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57, at 30-31; FENG, *supra* note 105, at 9 (describing the judiciary's strategic redefinition of rights). HUANG, *supra* note 105, at 262.

While illiberal regimes may well learn from each other's uses of anti-formalism, anti-formalist arguments also suffer from shortcomings, which reduce their usefulness for the construction of illiberal ideological speech. First, anti-formalism is a dialectical argumentative strategy, which relies on a preceding conception of "formalism." This strategy does not capture the entirety of the Party ideologues' governance project, which also relies on an explicitly "formalist" approach to legal regulation.<sup>292</sup> Even texts on the CCP's internal governance describe CCP's internal regulations as a logically rational system of norms, which include bright-line rules that must be applied faithfully within the Party organization.<sup>293</sup> In the international arena, Chinese uses of anti-formalism are also moderated by China's interest to ensure that foreign states do not interpret their international legal commitments to China in a "pragmatist" or "instrumentalist" manner.<sup>294</sup> The diverse objectives of Chinese ideological speech make it difficult for Party ideologues to produce consistently anti-formalist legal rhetoric (for instance, in line with anti-colonial legal scholars in newly independent East African countries).<sup>295</sup>

Second, as the dialogue between Chinese ideological speech and East African legal theoretical discourse in Part IV.B above demonstrates, specific illiberal argumentative strategies and anti-formalism, in particular, may be less effective in front of foreign audiences than before domestic Chinese audiences. Chinese anti-formalist argumentative strategies rely on (at least) century-old legal theoretical arguments, which are neither Chinese nor particularly illiberal.<sup>296</sup> CCP ideologues themselves have acknowledged that their understanding of the relationships between law and society, and justice and politics, is informed by American "pragmatist jurisprudence, realist jurisprudence, sociological jurisprudence and Critical Legal Studies."<sup>297</sup> The theoretical background of foreign audiences affects the reception of such anti-formalist arguments. As discussed in Part IV.B above, arguments that appear novel and plausible in the Chinese domestic context may

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<sup>292</sup> See *supra* notes 99-102 and accompanying text.

<sup>293</sup> Zhang Xiaojun, *The Historical Track of Internal Regulations of the Communist Party of China Ruled by Law*, 7 CHINA LEGAL SCI. 3, 6 (2019).

<sup>294</sup> For instance, Chinese government whitepapers urge other countries to strengthen the protection of intellectual property rights. See CHINA AND THE WORLD IN THE NEW ERA, *supra* note 160, § II.2.

<sup>295</sup> See *supra* notes 227-231 and accompanying text.

<sup>296</sup> See Kennedy, *supra* note 226, at 37-38; Pound, *supra* note 226, at 224-25.

<sup>297</sup> QUESTIONS AND ANSWERS, *supra* note 52, at 19.

appear dated and unpersuasive in foreign contexts.<sup>298</sup> Even some Chinese legal scholars have argued that the pragmatist nature of Chinese legal thought is a sign of its backward nature rather than proof of its progressiveness.<sup>299</sup>

“Liberal democracies,” including the United States, also produce ceremonial ideological speech, which is unpersuasive for many foreign (and domestic) audiences.<sup>300</sup> Yet by the CCP ideologues’ own admission, liberal democracies have been able to produce a hegemonic form of legal thought, which has been adopted in many developing countries even outside the colonial context.<sup>301</sup> The Party’s ideological speech would need to be adjusted significantly to increase its plausibility in foreign contexts. However, calibrating Party ideology for foreign audiences presents difficulties for the Party ideologues. CCP ideologues could, for instance, emphasize the uniqueness of the Chinese development experience even more strongly than what is already the case.<sup>302</sup> The emphasis on the uniqueness of the Chinese model would, however, dilute the Party ideologues’ argument about the global importance of Chinese legal thought. If Chinese legal thought is suited to the unique Chinese conditions, the question emerges why it should represent a step forward for all mankind.<sup>303</sup> Similarly, while the emphasis on Xi Jinping’s personal leadership is a genuinely unique feature of contemporary Chinese legal thought, this emphasis alone will not make Party ideology relevant to foreign audiences, who are not part of the Chinese body politic. A stronger argument for Party

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<sup>298</sup> Kennedy, *supra* note 226, at 59-61; Ghai, *supra* note 245, at 8; David Kennedy, *Law and Development Economics: Toward a New Alliance*, in LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY 19, 22-24 (David Kennedy & Joseph E. Stiglitz eds., 2013).

<sup>299</sup> JI WEIDONG (季卫东), *FALÜ CHENGXU DE YIYI: DUI ZHONGGUO FAZHI JIANSHE DE LING YI ZHONG SIKAO* (法律程序的意义：对中国法制建设的另一种思考) [SIGNIFICANCE OF THE LEGAL PROCESS: AN ALTERNATIVE APPROACH TO BUILDING THE CHINESE LEGAL SYSTEM] 134-36 (2004); Yu Xingzhong, *Legal Pragmatism in the People’s Republic of China*, 3 J. CHINESE L. 29, 39-40 (1989).

<sup>300</sup> KENNETH WINSTON, *ETHICS IN PUBLIC LIFE: GOOD PRACTITIONERS IN A RISING ASIA* 143-45 (2015).

<sup>301</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 67, 72, 217.

<sup>302</sup> According to the Chinese government’s whitepaper *China and the World in the New Era*, China has not copied “the development model of Western countries, but [instead] blaz[ed] its own path with bold experiments, based on its own conditions.” CHINA AND THE WORLD IN THE NEW ERA, *supra* note 162.

<sup>303</sup> INTRODUCTION TO XI JINPING THOUGHT, *supra* note 3, at 114. See also Michael W. Dowdle & Mariana Mota Prado, *Dialogus de Beijing Consensus*, in THE BEIJING CONSENSUS?: HOW CHINA HAS CHANGED WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT 15, 39 (Weitseng Chen ed., 2017).

ideologues is the suggestion that there exist “alternative” development models in addition to liberal development state-building. This argument has had social effects in the East African context, although it does not set up Chinese legal thought as a development ideal in its own right.<sup>304</sup>

A creative CCP ideologue could perhaps argue that the Chinese party-state facilitates the “organic” and “authentic” flourishing of human relations within the framework of the modern state and its formal law better than liberal legal thought.<sup>305</sup> Drawing on such an argumentative strategy, CCP ideologues could seek to transfer the positive value associated with “authenticity,” and the critique of liberal legal thought and global capitalism, to the Chinese party-state.<sup>306</sup> Nevertheless, China is one of the largest sovereign investors in the world, and it can only awkwardly present itself as the promoter of authentic, non-exploitative human relations in the global south.<sup>307</sup> As discussed in Part IV.B above, (East) African audiences may interpret Chinese legal ideology against Chinese commercial practices in the region.

### C. Ideological sensitivities

Finally, the closely controlled nature of the Chinese legal and political discourse disadvantages CCP ideologues in their attempt to create new, persuasive arguments about the global importance of Chinese legal thought. As discussed in Part II above, the project to establish Chinese international discourse power has coincided with the

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<sup>304</sup> Jones, Soares de Oliveira, & Verhoeven, *supra* note 210, at 3-4.

<sup>305</sup> For the commonplace of authenticity, see PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 440. Some Chinese conservative-minded scholars, such as the historian Wang Hui, have already advanced such arguments. Wang Hui interprets the original Chinese revolutionary project as the organic unity between the leader, the Party, and the state. Despite the increasing dominance of the formal state, Wang Hui believes that the CCP can still at times mobilize the energy of the people in a uniquely socialist way. See Wang Hui, *Jintian, Weishenme Yao Jinian Liening? Xie zai Liening Danchen 150 Zhounian zhi ji* (今天, 为什么要纪念列宁? 写在列宁诞辰 150 周年之际) [*Why Should We Commemorate Lenin Today? Written on Lenin's 150th Anniversary*], WENHUA ZONGHENG (文化纵横) (Apr. 22, 2020), <https://mp.weixin.qq.com/s/5WdKGSbmGeD5Q3D1bCEfOw> [<https://perma.cc/FB3M-B7BQ>].

<sup>306</sup> See e.g., THE SOCIALIST RULE OF LAW CONCEPT—A READER *supra* note 57, at 30, 109-10.

<sup>307</sup> OECD, FDI IN FIGURES 4 (Apr. 2021), <https://www.oecd.org/investment/FDI-in-Figures-April-2021.pdf> [<https://perma.cc/T7QN-J9UY>] (stating that in 2020 China was the fourth largest source of foreign direct investment in the world). See also TEWELDEBIRHAN, *supra* note 266, at 226-27.

tightening of ideological controls within China.<sup>308</sup> The limited space for theoretical innovation and deliberation within China also impedes Chinese communication strategies abroad.<sup>309</sup> In theory, there is much demand in illiberal regimes for nuanced and truthful information about Chinese legal institutions.<sup>310</sup> Nevertheless, Chinese development experts and legal scholars may find it difficult to engage in a frank discussion about the advantages and disadvantages of the Chinese party-state with foreign government officials even in authoritarian countries.<sup>311</sup> A foreigner encountering Party ideology – as English language translations or in a course on Chinese law – will learn little about the mechanics of the Party's concrete influence in the Chinese judiciary. Party ideology also leaves open crucial questions about the benefits of the Chinese party-state model. Could Western-style judicial independence be the best approach for countries where political leaders cannot be entrusted with making socially beneficial decisions?<sup>312</sup> Can the benefits of socially responsive legal thought be better achieved through pragmatist adjudication in independent courts of law rather than through a one-party system?<sup>313</sup> CCP policy texts and Chinese legal scholarship cannot progress far into a deliberative dialogue about such questions without touching on Chinese ideological sensitivities.<sup>314</sup>

As mentioned in Part III.C above, Chinese ideological sensitivities may be interpreted through the traditional Marxist conception of ideology, which maintains that the role of ideology is to mask social realities through ideological illusions (such as liberal and socialist legal doctrines).<sup>315</sup> A list of prohibited topics is a concrete way to build ideological illusions. However, ideological sensitivities also mean that

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<sup>308</sup> It is telling about the new direction that the two most high-profile deliberative texts on the socialist rule of law conception date back to 2009 and 2012, respectively. See THE SOCIALIST RULE OF LAW CONCEPT—A READER, *supra* note 57; QUESTIONS AND ANSWERS, *supra* note 52. See also Rogier Creemers & Susan Trevaskes, *Ideology and Organisation in Chinese Law: Towards a New Paradigm for Legality*, in LAW AND THE PARTY IN XI JINPING'S CHINA 311, 4 (2021); DICKSON, *supra* note 285, at 151.

<sup>309</sup> DICKSON, *supra* note 282, at 161.

<sup>310</sup> Erie has discussed some instances of such demand in Erie, *supra* note 8, at 95-96 (discussing Chinese lawtech).

<sup>311</sup> Gloria Davies, *Making Sense Through Ideology*, in LAW AND THE PARTY IN XI JINPING'S CHINA: IDEOLOGY AND ORGANIZATION 64, 80 (Rogier J. E. H. Creemers & Sue Trevaskes eds., 2021).

<sup>312</sup> See, e.g., WORLD BANK GROUP, *supra* note 166, at 15.

<sup>313</sup> Posner, *supra* note 165, at 7.

<sup>314</sup> See *supra* notes 154-156 and accompanying text.

<sup>315</sup> MARX, *supra* note 156.

CCP ideologues and Chinese legal scholars are unable to make use of all the rhetorical means that could be effective in influencing foreign audiences and increasing China's international discourse power. In contrast to CCP members and other Chinese audiences, foreign audiences are able to publicly question and challenge CCP ideology (although they may be reluctant to do so in diplomatic settings).<sup>316</sup> Persuading such audiences about Party ideology through the means of intellectual deliberation would require considerable tolerance for counterarguments against the Party's orthodox ideology.<sup>317</sup> For instance, a (seemingly) open dialogue between Chinese and foreign jurists would require its interlocutors to consider the possibility that an alternative governance model could benefit China more than its present system. Discussing this possibility even "rhetorically" in Party literature seems difficult in China's current ideological climate.<sup>318</sup> The liturgical repetition of ideological speech would also be less effective abroad than in China because foreign elites cannot be exposed to ideological speech as intensively as China's domestic audiences.

To be sure, as mentioned in the Introduction, the global influence of legal ideologies is not only, or even primarily, a function of the persuasiveness of ideological doctrines. As discussed in Part IV.A above, European legal thought expanded in East Africa through colonial repression. China does not have the will or the capacity to spread its legal ideology through the same means as nineteenth and twentieth century colonial powers, but it has considerable economic resources. Consequently, China's development partners may well be able to find even implausible statements about Chinese legal thought agreeable, as long as the political and material rewards of such a maneuver are sufficiently compelling.<sup>319</sup> As discussed in Part IV above, East African jurists (and prominent Western development experts) supported one-party states in the 1960s and 1970s.<sup>320</sup> Today, liberal-minded

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<sup>316</sup> See *supra* note 187 and accompanying text.

<sup>317</sup> See PERELMAN & OLBRECHTS-TYTECA, *supra* note 32, at 138 (describing a rhetorical strategy where the speaker acknowledges the opponent's arguments only to refute them).

<sup>318</sup> Davies, *supra* note 311, at 92.

<sup>319</sup> Jones, Soares de Oliveira, & Verhoeven, *supra* note 210, at 18-19.

<sup>320</sup> In the 1960s and 1970s, several U.S.-based scholars regarded dictatorial governments, and especially military dictatorships, as useful catalysts for modernization. Edward Shils, an American sociologist, explained in 1962 that "[m]ilitary rule [was] one of several practicable and apparently stable alternatives when parliamentary, democratic regimes falter." In Shils's view "the military [was] capable of playing a constructive part in the provision of some of the elements of a coherent modern, and even democratic, society." Edward Shils, *The Military in the Political*

development experts and legal scholars find reasons to adhere to rights-based development policies, although they too can be described as being internally incoherent and intellectually implausible.<sup>321</sup> CCP leaders and Party ideologues may reasonably conclude that with the right incentives and carefully chosen arguments in place, they will be able to favorably influence foreign elites' conduct through Chinese ideological speech. Such influence does not need to result in a full ideological conversion. Polite curiosity toward Chinese legal and political rhetoric may suffice to create friendly elites within China's development partners and increase China's international discourse power.

## VI. CONCLUSION

This Article has discussed the relevance of Chinese legal ideology in terms of the production and dissemination of illiberal legal ideology. It appears that certain endogenous factors frustrate CCP ideologues' attempts to develop globally influential forms of legal ideology and theory. The increasingly constrained ideological space in China has made it ever more difficult for Party ideologues and Chinese legal scholars to develop legal theoretical innovations and influence foreign audiences. Similar processes may influence the production and dissemination of legal ideology in illiberal regimes more generally. As any legal scholar can attest, it is difficult to come up with globally influential propositions about the law, even under the most favorable circumstances.

These observations are probably not the kind of relevance the Party ideologues have in mind when they seek to promote China's international discourse power. Yet this Article is an example of the type of attention that Chinese ideological speech receives if and when it truly enters the global stage. Party ideologues' claims about Chinese legal theoretical innovations will be debated and ignored, sympathized

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*Development of the New States*, in THE ROLE OF THE MILITARY IN UNDERDEVELOPED COUNTRIES 7, 9, 32 (John Asher Johnson ed., 1962). Lucian W. Pye, an American political scientist and sinologist, believed similarly that "the armies created by colonial administration and by the newly emergent countries [had] been consistently among the most modernized institutions in their societies." Lucian W. Pye, *Armies in the Process of Political Modernization*, in THE ROLE OF THE MILITARY IN UNDERDEVELOPED COUNTRIES 69, 74 (John Asher Johnson ed., 1962).

<sup>321</sup> Seppänen, *supra* note 262, at 439-40. Intellectual implausibility – such as the liberal fiction that society benefits from the individualistic pursuit of self-interest – may be a characteristic of all dominant ideological speech. ŽIŽEK, *supra* note 94, at 30.

with and misunderstood, and adopted and rejected. It remains to be seen how extensively Party ideologues are willing to enter this global discursive space.