

Control Through the State of Exception: Opposition, Surveillance, and Fragmentation under Chinese Digital Authoritarianism

By Jieren Hu* and Johannes Rossi**

Abstract: To understand the mechanism of social governance employed to facilitate surveillance and exert control over popular contention and organized opposition in the People’s Republic of China by and beyond the law, we introduce the concept of “rightful control”. Based on a theoretical exploration illustrated by typical cases, we examine the impact of the legal and political order constraining opposition in China. We show that the flexible use of information technology in China and its normalization by law enhance social control beyond traditional modes of dispute resolution. While digital technology opens vectors of mobilization for opposition movements, its governance empowers preventive repression, significantly restricting the potential of collective activism. Further, we explore the typology and theory of those state responses to social conflict between legality and the state of exception. The findings provide a theoretical understanding of the legal and political mechanisms of digital authoritarianism and its implications for political opposition in China.

Keywords: State of Exception; Political Opposition; Cyberspace; Authoritarian Legality; China

“Tyran und Märtyrer sind im Barock die Janushäupter des Gekrönten. Sie sind die notwendig extremen Ausprägungen des fürstlichen Wesens. [In the baroque tyrant and martyr are the Janus-heads of the crowned. They are the necessarily extreme incarnations of the princely character.]”¹

* Jieren HU (胡洁人), Ph.D.; Professor, Law School of Hangzhou City University, Hanzghou, People’s Republic of China, Email: besthujieren@hzcu.edu.cn.

** Johannes Rossi, LL.M. (Berlin/Shanghai); Doctoral Researcher, Humboldt University of Berlin, Germany, and China University of Political Science and Law (CUPL), Beijing, People’s Republic of China, Email: johannes.rossi@gmx.de.

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1 *Walter Benjamin*, *Gesammelte Schriften*, Frankfurt am Main 1991, p. 249.

A. Introduction

In the People's Republic of China (PRC) political opposition is heavily restricted.² Where nonetheless popular contention rises, it is to be appeased, repressed – or predicted and prevented ahead of its eruption. Therein the Chinese cyberspace, a datafied, virtual reality of social networks, media, and applications specifically structured and governed under the auspices of the party-state, is contested. Here popular contention simultaneously forms and is engaged. The digital space enmeshing Chinese society serves as a medium for counter-articulation in social conflicts, an early warning system, and a tool of suppression.³ Thus, the social governance of cyberspace is a necessity for the party-state to facilitate surveillance and exert control over popular contention and organized opposition.

Now, how exactly does the party-state govern its cyberspace and simultaneously the articulation of discontent in social conflicts? What characterizes the mechanism of social governance it employs in different types of cases? What are its implications?

To contour a typology of state responses to social conflict in the no-man's-land of the "state of exception" between the public legal order and political fact, seized by authoritarian rule, we use the conceptual term "rightful control"⁴. In the following, we show that the flexible use of information technology in China and its normalization by law enhances social control beyond traditional modes of dispute resolution. Subsequently, we explore the theoretical characteristics of the relationship between authoritarian legality and the state of exception exemplified by typical cases. Drawing from those findings, we explicate the theoretical underpinnings of this mechanism of authoritarian governance in China. We propose that *Walter Benjamin*, prior to *Carl Schmitt*, illuminates the character of this "blend

2 *Han Zhu / Lu Jun*, The Crackdown on Rights-advocacy NGOs in Xi's China: Politicizing the Law and Legalizing the Repression, *Journal of Contemporary China* 31 (2022), pp. 518-538; *Diana Fu / Greg Distelhorst*, Grassroots Participation and Repression under Hu Jintao and Xi Jinping, *The China Journal* 79 (2018), pp. 100-122. Increasingly this also affects Hong Kong (SAR), see *Peter Baehr*, Hong Kong Universities in the Shadow of the National Security Law, *Society* 59 (2022), pp. 225-239; *Stuart Hargreaves*, Hong Kong Surveillance Law: From 9/11 to the NSL, *Verfassungsblog*, 4 April 2022, <https://verfassungsblog.de/os6-hong-kong-surveillance/> (last accessed on 15 October 2024), DOI: 10.17176/20220404-131156-0.

3 See regarding the dual-nature of datafication especially in the case of Hong Kong: *Yao-Tai Li / Katherine Whitworth*, Coordinating and Doxing Data: Hong Kong Protesters' and Government Supporters' Data Strategies in the Age of Datafication, *Social Movement Studies* 23 (2023), pp. 355-372.

4 This mirrors as its counterpart the concept of "rightful resistance" as developed by *Kevin J. O'Brien / Li Lianjiang*, *Rightful Resistance in Rural China*, Cambridge 2006, and *Kevin J. O'Brien*, Rightful resistance, *World Politics* 49 (1996), pp. 31-55. Instead of describing the individual and collective challenge of the legitimacy of political authority "near the boundary of an authorized channel" (p. 33), it conversely theorizes how the party-state attempts to maintain legitimacy and control in the face of popular contention through exercising political power using techniques at the edges of the law, see *Jieren Hu*, *Dispute Resolution and Social Governance in Digital China*, London 2024, pp. 50 ff.

state”, where authoritarian legality and the state of exception are blurred into each other to limit oppositional potential and contentious political mobilization.

B. Technologies of Control and the State of Exception in China

I. *Emerging Conflicts and Authoritarian Legality*

This is a vulnerable world, and crises are precarious situations. Their resolution requires a swiftly acting community, yet in this state of emergency, there is an equal risk of neglecting any limits to executive power. In the face of danger, constitutional rights may be restricted or suspended, and the legal order itself subordinated to the primacy of executive power. A temporary suspension can quickly evolve into a permanent one, effectively institutionalizing the state of exception. Realistically, in an order that is concerned with continuity and stability, the entire legal framework will neither be completely suspended until the restoration of normalcy nor can full adherence to all (constitutional) legal provisions be maintained. During the *état de siège*, while to a certain degree still legally delimited, the legal order is subjected to the necessity of a “kenomatic state, an emptiness of law”⁵. Its nature and (temporal) extent is determined by the sovereign.⁶ For authoritarian regimes, danger looms wherever the political stability of the dictatorship faces an oppositional threat from groups excluded from power.⁷ In the welfare state (“Vorsorgestaats”)⁸ of the risk society⁹, where in the face of vulnerability the state becomes concerned with preparedness and resilience,¹⁰ the concept of the state of exception increasingly transforms into a kind of preventive law of flexible governance. Ordinary (emergency) decree law integrates into the legal order that is supposed to be preserved, without suspending it in the strict sense. The law of the “anticipated state of exception”¹¹ allows for context-appropriate, flexible crisis management without suspending the normativity of the law of normalcy.

5 Giorgio Agamben, *Ausnahmezustand: Homo Sacer II.1*, Frankfurt a.M. 2004, p. 59.

6 Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, Berlin 2021 [1922], p. 13; with a critical account of Schmitt’s concept of the state of exception to be noted: Panajotis Kondylis, *Jurisprudenz, Ausnahmezustand und Entscheidung*, *Der Staat* 34 (1995), p. 357.

7 Milan W. Svobik, *The Politics of Authoritarian Rule*, Cambridge 2012; Yongshun Cai, *Power structure and regime resilience: Contentious politics in China*, *British Journal of Political Science* 38 (2008), pp. 411-432.

8 Ernst Forsthoff, *Rechtsfragen der leistenden Verwaltung*, Stuttgart 1959.

9 Ulrich Beck, *Risikogesellschaft: auf dem Weg in eine andere Moderne*, Frankfurt 1986.

10 See Stephen J. Collier / Andrew Lakoff, *The government of emergency: Vital systems, expertise, and the politics of security*, Princeton 2021.

11 Tristan Barezak, *Der nervöse Staat: Ausnahmezustand und Resilienz des Rechts in der Sicherheitsgesellschaft*, Tübingen 2020, p. 350.

In China, where Schmittian conceptions of sovereignty and decisionism have been well received and highly influential,¹² governance through and beyond executive decrees poses long-term challenges to its authoritarian legality and rule by law. Party-state punishment of corrupt officials due to a moral emergency,¹³ or the promulgation of emergency laws without a normative constitutional restraint on state power,¹⁴ bear witness to the practical application of the state of exception. Particularly when there is no legal containment of the state of exception, a “permanent state of emergency”¹⁵ is capable of eliminating even the last remnants of “normal” legality, a balancing act haunting China’s legal system. More daunting though is the transformation of legality towards the permanence of the state of exception in the preventive state.

Whereas the state of exception and its theoretical implications in (liberal) democracies have received broad scholarly attention,¹⁶ its occurrence in authoritarian systems has been somewhat overlooked – partly because authoritarian regimes, in particular in the PRC under the all-encompassing leadership and absolute authority of the party,¹⁷ were presumed to lack the normative and normalized (democratic and constitutional) legality which ought to be a presupposition of its exception.¹⁸ Certainly, the legal order in China is subject to certain political-executive guidance also in its assumed state of normality, for example, through so-called “red-head documents” (*hongtou wenjian* 红头文件).¹⁹ Nonetheless, the

- 12 *Libin Xie / Haig Patapan*, Schmitt Fever: The use and abuse of Carl Schmitt in contemporary China, *International Journal of Constitutional Law* 18 (2020), pp. 130-146.
- 13 *Shaoying Zhang / Derek McGhee*, State of exception: The examination of anticorruption Practices, in: *Shaoying Zhang / Derek McGhee* (eds.), *China’s Ethical Revolution and Regaining Legitimacy: Reforming the Communist Party through Its Public Servants*, London 2017, pp. 109-134; see also *Johannes Rossi*, Disciplinary Action and Oversight of the Administrative State in the “Institutional Cage”: The Revised Supervision Law of the People’s Republic of China, *German Journal of Chinese Law* 32 (2025), pp. 4-14.
- 14 *Jacques Delisle*, States of exception in an exceptional state: Emergency powers law in China, in: *Victor V. Ramraj / Arun K. Thiruvengadam* (eds.), *Emergency Powers in Asia: Exploring the Limits of Legality*, Cambridge 2010, pp. 342-390.
- 15 *Alan Greene*, *Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis*, Oxford 2018, p. 33.
- 16 Besides, “backsliding democracies” or “electoral authoritarians” point to the fact that the distinction between democratic and authoritarian rule is of gradual nature, see further *Fabio Wolkenstein*, What is democratic backsliding?, *Constellations* 30, no. 3 (2023), pp. 261-275. Likewise, aspects of authoritarian legality creep into systems in transition incrementally.
- 17 *Donald Clarke*, Order and Law in China, *University of Illinois Law Review* 2 (2022), p. 552; *Zhong Zhang*, Ruling the Country without Law: The Insoluble Dilemma of Transforming China into a Law-Governed Country, *Asian Journal of Comparative Law* 17 (2022), pp. 198-221.
- 18 *Qianfan Zhang*, A constitution without constitutionalism? The paths of constitutional development in China, *International Journal of Constitutional Law* 8 (2010), pp. 950-976; *Carl F. Minzner*, China’s turn against law, *The American Journal of Comparative Law* 59 (2011), pp. 935-984.
- 19 *Hu*, note 4, pp. 67 ff.; *Luo Dameng* 罗大蒙, “Hongtou wenjian” *luanxiang*: *biaoxian, yuanyou yu zhili* “红头文件”乱象：表现、缘由与治理 [Illegal “Official Documents”: Phenomena, Reason

rule by law exercised in the PRC amounts to a system of authoritarian legality.²⁰ Exceptions in this system are both a tool for a “rule by fear”²¹ and the management of the “other”.²² In regard to this authoritarian legality, still an understudied theoretical space of how authoritarian governments use the state of exception, not to attain but to maintain control, exists.

In the shadow of the legal-theoretical considerations towering above social conflicts, specifically the areas of privacy, e.g. regarding the issue of compulsory online identification, digital health during and in the aftermath of the COVID-19 pandemic, and the exercise of religious freedom especially by ethnic minorities, are contested. The establishment of Social Credit Systems (SCS) has received extraordinary attention,²³ which could anticipate a potential combination of those fragmented conflicts into one unified system of “dataveillance”²⁴ or hyper enforcement in a “data state”.²⁵ Yet, it is to be noted, that to date no such system exists, and in the current stage of development the SCS is limited to fragmented and partly experimental corporate social credit mechanisms or creditworthiness evaluations (under the *zhengxin* 征信 umbrella), but not a comprehensive and constantly updating social credit score determining an individual’s general place in society.

The aforementioned conflicts and their technological governance of oppositional potential illustrate the interaction between technology and authoritarian legality in China. Regarding real or perceived crises, the state resorts to the state of exception to restore a supposed normalcy. To this end, it (mis-)appropriates technological means with the tendency to expand its emergency powers to the prevention stage and transform its legality.

and Governance], *Sichuan wenli xueyuan xuebao* 四川文理学院学报 [Sichuan University of Arts and Science Journal] 28 (2018), pp. 51-57.

- 20 *Taisu Zhang*, Authoritarianism and Legality, *Asia Pacific Law Review* 32 (2024), pp. 311-321; *Shucheng Wang*, Law as an Instrument: Sources of Chinese Law for Authoritarian Legality, Cambridge 2022; *Susan Whiting*, Authoritarian Legality and State Capitalism in China, *Annual Review of Law and Social Science* 19 (2023), pp. 357-373; *Hualing Fu / Michael Dowdle*, The Concept of Authoritarian Legality: The Chinese Case, in: Weitseng Chen / Hualing Fu (eds.), *Authoritarian Legality in Asia: Formation, Development and Transition*, Cambridge 2020, pp. 63-89; *Hualing Fu*, Duality and China’s struggle for legal autonomy, *China Perspectives* 116 (2019), pp. 3-9; *Mary E. Gallagher*, *Authoritarian legality in China: Law, workers, and the state*, Cambridge 2017; and in clear opposition to *Clarke*: see *Taisu Zhang / Tom Ginsburg*, China’s turn toward law, *Virginia Journal of International Law* 59 (2019), pp. 306-389.
- 21 *Eva Pils*, China’s dual state revival under Xi Jinping, *Fordham International Law Journal* 46 (2023), pp. 339-376.
- 22 *Flora Sapio*, *Sovereign Power and the Law in China*, Leiden 2010.
- 23 Instead of many: *Björn Ahl / Larry Catá Backer / Yongxi Chen*, Law and Social Credit in China: An Introduction, *China Review* 24 (2024), pp. 1-15; *Larry Catá Backer*, China’s Social Credit System, *Current History* 118 (2019), pp. 209-214; and specifically *Marianne von Blomberg / Wessel Reijers*, Who Deserves Credit? Banks for the Virtuous in Rural China, *Journal of Contemporary China* 33 (2023), pp. 955-970.
- 24 *Claire Seungeun Lee*, Datafication, dataveillance, and the social credit system as China’s new normal, *Online Information Review* 43 (2019), pp. 952-970.
- 25 *Anne S. Y. Cheung / Yongxi Chen*, From Datafication to Data State: Making Sense of China’s Social Credit System and Its Implications, *Law & Social Inquiry* 47 (2022), pp. 1137-1171.

II. *Digital Mobilization and Opposition: Conflict and Surveillance in Cyberspace*

In relation to social conflicts and their governance, first discontent and then opposition can form, whose contention is subsequently carried out in distinct spaces. Mobilization in heavily digitized and connected societies, such as China,²⁶ first takes place digitally or online,²⁷ and subsequently, physically discharges in oppositional acts of collective protest, such as the visible eruptions of protest of veterans, investors, or against pandemic measures, from workers and students to the white paper movement.²⁸ Conversely, the state tries to prevent or contain such outbursts of discontent or worse, organized opposition. Traditional means of dispute resolution and stability maintenance, such as grand mediation,²⁹ the *Xinfang* (信访) system,³⁰ flexible governance,³¹ relational repression,³² or service outsourcing,³³ are largely ineffective in defusing online activism. Technological innovation expands the toolkit of governments to mobilize pro-regime support and frame public debate.³⁴ State-Platform governance is “anthropomorphized” and central authority is obscured through “participatory surveillance” in an effort to govern content creators more effectively.³⁵

- 26 *Justyna Jaguścik / Jessica Imbach*, Digital society in China, *Asiatische Studien - Études Asiatiques* 76 (2022), pp. 1-9.
- 27 Over the years a national public sphere has formed online and empowered “netizens”: *Ya-Wen Lei*, *The Contentious Public Sphere: Law, Media, and Authoritarian Rule in China*, Princeton 2018, pp. 129-170; *Ashley Esarey / Xiao Qiang*, Digital Communication and Political Change in China, *International Journal of Communication* 5 (2011), pp. 298-319.
- 28 *Kai Yang*, Beyond Parochial Activism: Cross-Regional Protests and the Changing Landscape of Popular Contention in China, *Journal of Contemporary China* 32 (2023), pp. 280-295.
- 29 *Jieren Hu*, Grand mediation in China: Mechanism and application, *Asian Survey* 51 (2011), pp. 1065-1089; *Jieren Hu / Lingjian Zeng*, Grand mediation mechanism and legitimacy enhancement in contemporary China: The Guang’an model, *Journal of Contemporary China* 24 (2015), pp. 43-63.
- 30 *Carl F. Minzner*, *Xinfang*: An alternative to formal Chinese legal institutions, *Stanford Journal of International Law* 42 (2006), pp. 103-179.
- 31 *Jieren Hu / Tong Wu / Jingyan Fei*, Flexible governance in China: Affective care, petition disputes and regime legitimacy, *Asian Survey* 58 (2018), pp. 679-703.
- 32 *Yanhua Deng / Kevin J. O’Brien*, Relational repression in China: Using social ties to demobilize protesters, *The China Quarterly* 215 (2013), pp. 533-552.
- 33 *Ruoting Zheng / Jieren Hu*, Outsourced lawyers in China: Third party mediator and their selective response in dispute resolution, *China Information* 34 (2020), pp. 1-23; *Lynette H. Ong*, Thugs and outsourcing of state repression in China, *The China Journal* 80 (2018), pp. 1-17.
- 34 *Erica Johnson / Beth Kolko*, E-government and transparency in authoritarian regimes: Comparison of national- and city-level e-government web sites in central Asia, *Digital Icons: Studies in Russian, Eurasian and Central European New Media* 3 (2010), pp. 15-48; *Rory Truex*, Consultative authoritarianism and its limits, *Comparative Political Studies* 50 (2017), pp. 329-361.
- 35 *Zhen Ye / Qian Huang / Tonny Krijnen*, Douyin’s playful platform governance: Platform’s self-regulation and content creators’ participatory surveillance, *International Journal of Cultural Studies* (2024), pp. 1-19.

Digital technology thus can increase the likelihood of demobilization or prevent social mobilization altogether.³⁶

Surveillance is one of the key aspects of information gathering and (preventively) suppressing oppositional movements to maintain control and social stability. Over the last decade, digital surveillance has steadily increased.³⁷ The structural backbone of surveillance in China is still an extensive network of informants and labor-intensive surveillance tactics made possible and run by the party's Leninist organizational form.³⁸ Nonetheless, the adoption of hi-tech surveillance capabilities around 2010 has further strengthened the party-state's capacity to implement preventive repression against potential threats.³⁹ The combination of both labor and tech, prominently in initiatives like the "Grid-Style Management" (*wangge hua guanli* 网格化管理)⁴⁰ and the introduction of "Skynet" (*tian wang* 天网), adds to the effectiveness of Chinese techno-authoritarianism.⁴¹ While citizens see government and technology as civilizing forces, the exposure to digital surveillance has left many dissociating.⁴² Overall, open surveillance tools, such as SCS or those widely used

- 36 *Larry Diamond*, Liberation technology, *Journal of Democracy* 21 (2010), pp. 69-83; *Dragu Tiberiu / Yonatan Lupu*, Digital authoritarianism and the future of human rights, *International Organization* 75 (2021), pp. 991-1017.
- 37 *Xu Xu*, To repress or to co-opt? Authoritarian control in the age of digital surveillance, *American Journal of Political Science* 65 (2021), pp. 309-325; *Fu / Distelhorst*, note 3, pp. 100-122.
- 38 *Minxin Pei*, *The Sentinel State: Surveillance and the Survival of Dictatorship in China*, Cambridge MA / London 2023.
- 39 *Ibid.*; The techno-surveillance system in China nowadays consists of various different programs, from "Golden Shield" [*jindun gongcheng* 金盾工程], "Skynet" [*tian wang* 天网], "Safe Cities" to "Sharp Eyes" [*rui yan gongcheng* 锐眼工程], and most importantly the databases of the "Key population program" (mostly comprised of ex-convicts, maintained by the police for law enforcement purposes), see pp. 168-179, and the "Key Individuals Program" (maintained by local governments), see pp. 43, 162-167. Their legal infrastructure consists of local laws. Under the guidance of the political legal committees, security organs employ a wide range of innovative products, such as smart sensors, facial recognition or artificial intelligence tools to build and administer databases as well as to track subjects. Whereas for example "Skynet" had initially been a mostly urban program, with "Sharp Eyes" hi-tech mass surveillance has been expanding to the countryside as well.
- 40 *Xiaolong Wu / Chen Li / Andy Cao*, Party Corporatism in Urban China: Grid Governance and Resurgent Centralism, *Journal of Contemporary China* 33 (2024), pp. 1037-1052; *Jean C. Mittelstaedt*, The grid management system in contemporary China: Grass-roots governance in social surveillance and service provision, *China Information* 36 (2022), pp. 3-22.
- 41 *Samantha Hoffman*, China's Tech-Enhanced Authoritarianism. *Journal of Democracy* 33 (2022), pp. 76-89.
- 42 *Ariane Ollier-Malaterre*, *Living with Digital Surveillance in China: Citizens' Narratives on Technology, Privacy, and Governance*, London 2023.

during the COVID-19 pandemic,⁴³ are accepted as necessary, beneficial, or convenient.⁴⁴ Thus, dissent often forms only after they become evidently unnecessary or pointless.

III. Preventive Repression: Digital Technology, Legal Normality and Exception

Cyberspace, in its function as a technological sphere of experience and governance, contains an interesting duality. It refers to digitality but also originates from cybernetics, the science of control and regulation of machines, living organisms, and social organizations.⁴⁵ Further, it has a specific geography⁴⁶ and is therein part of a legally structured normality. It is not only the surveillance state that takes place there, but it is a generally normalized information and communication space for commercial transactions, administrative procedures or judicial activity.⁴⁷ It is thus interwoven with all kinds of legal strands, from contract to administrative law, that in turn fosters the adoption of digital technology and furthers legal datafication. Privacy issues permeate the use of this digital space, in particular e.g., in regard to real-name identification on social networks, digital health data, or (“delegated”) online censorship.⁴⁸ Social governance in China flexibly incorporates new technologies into its legal normality. This incentivized use then offers enhanced possibilities for surveillance, and social control beyond traditional, and legal modes of dispute resolution. The growing

- 43 *Elena Sherstoboeva / Valentina Pavlenko*, Trends in East Asian policies on digital surveillance tools during the COVID-19 pandemic, *Journal of Digital Media & Policy* 12 (2021), pp. 47-65.
- 44 *Genia Kostka / Sabrina Habich-Sobiegalla*, In times of crisis: Public perceptions toward COVID-19 contact tracing apps in China, Germany, and the United States, *New Media & Society* 26 (2024), pp. 2256-2294; *Genia Kostka / Léa Steinacker / Miriam Meckel*, Between security and convenience: Facial recognition technology in the eyes of citizens in China, Germany, the United Kingdom, and the United States, *Public Understanding of Science* 30 (2021), pp. 671-690; *Genia Kostka*, China’s social credit systems and public opinion: Explaining high levels of approval, *New Media & Society* 21 (2019), pp. 1565-1593.
- 45 *Norbert Wiener*, *Cybernetics or Control and Communication in the Animal and the Machine*, Cambridge MA 2019 [1948]; and on Cyberspace: *Lance Strate*, *The Varieties of Cyberspace: Problems in Definition and Delimitation*, *Western Journal of Communication* 63 (1999), pp. 382-412.
- 46 Think of the “Great Firewall” (i.e. “Golden Shield”) and for further references, see *Jun Liu*, *Internet Censorship in China: Looking Through the Lens of Categorisation*, *Journal of Current Chinese Affairs* (2024), pp. 1-16, pp. 7-8.
- 47 Everything, from participatory input of complaints or suggestions to the filing of cases in front of courts can be done using only a few multifunctional (chat-)applications. Regarding the digital judiciary, see *Meirong Guo*, *Internet court’s challenges and future in China*, *Computer Law & Security Review* 40 (2021), and *Yang Lin*, *China’s Three Internet Courts*, *Amicus Curiae* 2 (2021), pp. 531-538; and concerning the participatory channels, see *Ge Xin / Jie Huang*, *Making the People’s Voice Heard: Pathways of E-Participative Governance in China*, *Journal of Chinese Governance* (2024), pp. 1-24.
- 48 See *Taiyi Sun / Quansheng Zhao*, *Delegated Censorship: The Dynamic, Layered, and Multistage Information Control Regime in China*, *Politics & Society* 50 (2022), pp. 191-221; *Jean-Pierre Cabestan*, *The state and digital society in China: Big Brother Xi is watching you!*, in: *Ben Hillman / Chien-Wen Kou* (eds.), *Political and Social Control in China: The Consolidation of Single-Party Rule*, Canberra 2024, p. 164 ff.

interest in the rise of “digital authoritarianism” emerges after idealistic views of technology and democracy are shattered at the end of the “end of history” and a consolidation of systemic rivalries between (liberal) democracies and authoritarians.⁴⁹

C. A Typology and Theory of Rightful Control under Authoritarianism

Chinese state responses to social conflict are rooted in the theoretical concept of the no-man’s-land of the “state of exception” between the public legal order and political fact, that is seized by authoritarian rule. As a counterpart to “rightful resistance”⁵⁰, “rightful control” describes means by which the (authoritarian) state exercises political power and control over society through norm- or decision-making.⁵¹ This mechanism legitimizes control through its law-adjacent appearance and appeals to legality, whereby it mirrors the strategy of rightful resisters to turn the law against its sovereign author.

The exercise of “full power”⁵² in China does not depend on the enactment of emergency laws, as state power lies within the party. It is part of an authoritarian legality (“governing the country by law” – *yifa zhiguo* 依法治国), which emphasizes the primacy (or “leadership”) of the party. While the law applies to the party and its members as well and is not suspended per se, exceptional decisions can surpass it, as no normative checks outside of the party-state exist. In line with this, the party-state flexibly governs the aforementioned cases by law, policy, or beyond law and policy by exerting different types of control along two dimensions, creating zones of rightful control (see Figure 1). The analysis of the Chinese case examples elucidates a typology of state control, in which state responses differ regarding their relation to the law and legal normality.

49 See succinctly *James S. Pearson*, *Defining Digital Authoritarianism*, *Philosophy & Technology* 37 (2024), pp. 1-19, p. 2; also *Steven Feldstein*, *The Rise of Digital Repression: How Technology is Reshaping Power, Politics, and Resistance*, New York 2021.

50 *O’Brien*, note 4, pp. 31-55.

51 *Hu*, note 4, p. 50.

52 See on this concept in democracies: *Clinton L. Rossiter*, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, Princeton 1948, p. 5.

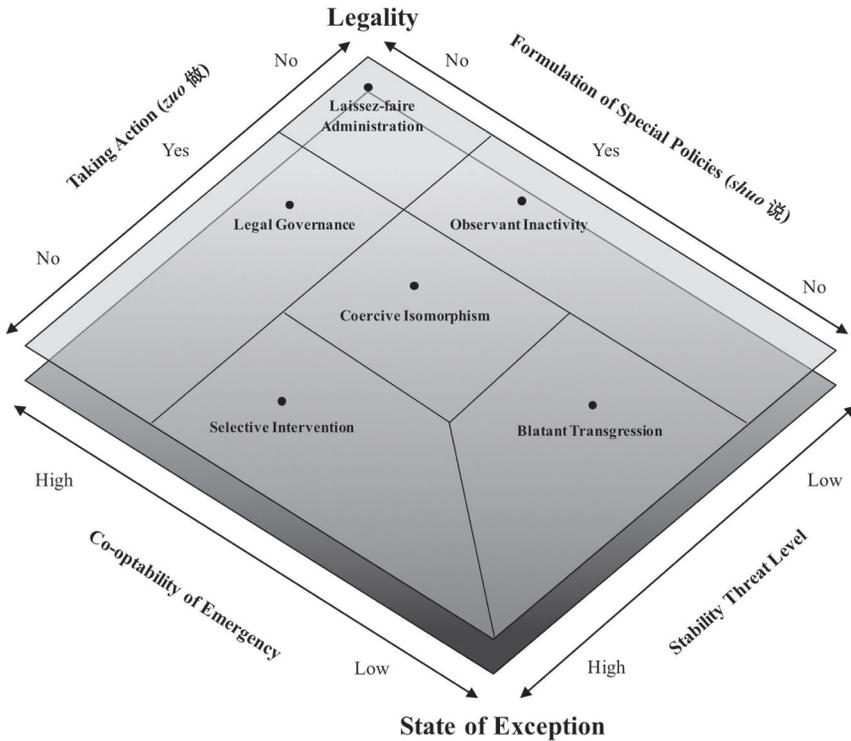


Figure 1: Zones of Rightful Control between Legality and the State of Exception

First, rightful control is, fundamentally, prepared and exercised through the law, where it normalizes and legitimizes certain modes of digital governance and dispute resolution mechanisms through legislation. This encompasses cases, such as the ever-further extension of identification tools prescribed by law, or rules for judicial procedures.

In particular, the points of tension between privacy rights⁵³ and the surveillance state illustrate the dimensions of such developments. For example, particularly relevant to “netizens” and free speech online is the issue of real-name-identification and online personal information control. In July 2024, the Ministry of Public Security and the Cyberspace Administration of China jointly released a draft proposal for measures to establish a

53 It would be misguided to generally brush off any mention of privacy rights in China. In fact, those rights undisputedly exist “in the books” and spark a lively debate – not necessarily in relation to the surveillance state in general but very practical issues of data governance. See also *Rebecca Ong*, Privacy and personal information protection in China’s all-seeing state, *International Journal of Law and Information Technology* 31 (2023), pp. 349-375.

(voluntary) system of online identification tokens, i.e., “network numbers” and “network certificates”.⁵⁴ These government-issued tokens would be linked to official identification documents and could be used by web services for identity verification. Online real-name identification has long been in existence as phone numbers, which are used for signing in virtually everywhere, are linked to IDs. The tokens supposedly add a layer of anonymity in relation to platforms and service providers, because there is no need to share the full real-name information with the providers anymore – nonetheless, the government still retains the ability to trace individual digital conduct. Aside from being a monitoring tool, once authorities deny access to authentication to individuals, they would effectively be barred (or “digitally exiled”) from using the Internet, resulting in a further loss of participation in online speech, access to information, and social life. The tokens could become the cyberspace equivalent of cameras and face recognition in public spaces, used to track and control people’s virtual behavior.⁵⁵

To preventively disperse large-scale conflicts the PRC has introduced various channels of ODR (see Art. 16 *Civil Procedure Law of the People’s Republic of China* as well as the *People’s Court Online Litigation Rules* and the *People’s Court Online Mediation Rules*), with the effect, that courts denied hearing class-action cases, to split up collective litigation and large-scale activism into separate individual and small-scale cases. Without formulating special policies, the state can curb certain kinds of contention through “legal governance”, especially if solutions to the underlying conflicts are relatively easy to coopt.

Second, rightful control can be exercised through policy, where it, for example, promotes the development and use of big data applications.⁵⁶ Mostly, this type refers to the formalized surveillance programs and their integration, which not only secure a more efficient flow of information through the party-state hierarchy and act as a deterrent to grassroots action but its function as a supervision and monitoring tool for local governments over their population simultaneously works as an “accountability” tool for its bureaucracy. Initially, those policy-based information-gathering programs are characterized by an “observant inactivity”.

54 *Guojia wang luo shen fen ren zheng gong gong fu wu guan li ban fa (zheng qiu yi jian gao)* 国家网络身份认证公共服务管理办法（征求意见稿）[National Measures for the Administration of Public Services for Network Identity Authentication (Draft for Solicitation of Comments)], 26 July 2024, https://www.cac.gov.cn/2024-07/26/c_1723675813897965.htm (last accessed on 30 October 2024).

55 It is to be noted though, that most of the capabilities already exist with the contemporary real-name verification system, which would rather be made more centralized and efficient, see also China Law Translate, On Network Codes and Credentials, 31 July 2024, <https://www.chinalawtranslate.com/on-network-codes-and-credentials/> (last accessed on 30 October 2024).

56 For example, the “smart city management system” (*zhahui chengshi guanli xitong* 智慧城管) in cities like Beijing, Shanghai or Hangzhou. Those programs integrate (technological) government capabilities to collect and monitor data in order to enhance decision-making in risk prevention and law enforcement.

Third and most notably, the party-state is able to exercise rightful control beyond law and policy where it deems necessary. Whereas rightful control by law and policy are strategies of prevention, their transgression usually occurs as a containment tactic *ex post facto*, in the acute moment of the threat or crisis. There characteristically, two dimensions determine the relation of state action to the law – saying (*shuo* 说), i.e. the modification or enactment of special (exceptional) law and policy, and doing (*zuo* 做), i.e. taking specific action, which might violate existing law and policy.

For largely un-sensitive, ordinary cases and general (digital) governance, the state utilizes dogmatic law and general policy, to broadly guide the public and administer the country, in a way that could be characterized as “laissez-faire administration”, without neither formulating special policies nor transgressing the legal boundaries (*bu zuo bu shuo* 不做不说). This is the “normal politics” of dynamic authoritarian legality in China.⁵⁷ This party-state conduct according to normalized state law is conditional and is abandoned as soon and insofar as the party identifies risks to its rule. Related to that and equally central is “coercive isomorphism”, where the party-state issues special policies and acts upon them in transgression of state law (*ji zuo you shuo* 既做又说), most prominently the aforementioned “red-head documents” and campaign-style governance (*yundongshi zhili* 运动式治理).⁵⁸ In fact, even though they are of lower legal status than laws and regulations, red-head documents, an icon of party-state executive power, can turn the legal hierarchy on its head where they are used as a direct basis for special administrative measures. In other cases, e.g. in regard to the *Xinfang* system, the state has issued special policies, but only selectively acts upon them in a transgressive manner according to the gravity of the issue, direction, and perceived threat level (*zhi shuo bu zuo* 只说不做).⁵⁹

Contrary to that, and especially in urgent cases with low chances to control oppositional organizing through channels of cooptation, if the state acts without prior formulation of law or policy (*zhi zuo bu shuo* 只做不说), it blatantly transgresses its formalized powers. Local governments for example engaged in the misappropriation of data gathered and digital technology introduced and normalized during the COVID-crisis, such as health codes and tracking records for epidemic prevention, not for the prevention of health risks but to curb social unrest.

57 *Shucheng Wang*, Varieties of Authoritarian Legality, *Asia Pacific Law Review* 32 (2024), pp. 293-310; *Shucheng Wang*, Authoritarian Legality and Legal Instrumentalism in China, *The Chinese Journal of Comparative Law* 10 (2022), pp. 154-162.

58 *Bo Yin / Yu Mou*, Centralized Law Enforcement in Contemporary China: The Campaign to “Sweep Away Black Societies and Eradicate Evil Forces”, *The China Quarterly* 254 (2023), pp. 366-380; see also regarding specialized rectifications (*zhuanxiang zhengzhi* 专项整治): *Susan Trevaskes*, Courts and Criminal Justice in Contemporary China, Lanham 2007, and *Susan Trevaskes*, Policing Serious Crime in China: From “Strike Hard” to “Kill Fewer.”, Abingdon 2010.

59 See also *Christian Göbel*, The Political Logic of Protest Repression in China, *Journal of Contemporary China* 30 (2021), pp. 169-185.

This became especially apparent during the COVID-19 pandemic, where (digital) health emergency measures, formalized in *cordons sanitaires* and other “normative documents”, which encroached on individual rights and freedoms of citizens in mega-cities like Wuhan for months,⁶⁰ laid the groundwork for their transgressive misappropriation. In the early stages, the state implemented laws⁶¹ and emergency regulations in cities⁶² to prevent the spread of the virus. Furthermore, digital technology (prominently through the health code) was integrated into the epidemic control measures. The massive accumulation of data made its misappropriation tempting to those under the pressure of not only containing the virus but also social unrest. Local governments in Henan Province, for example, were found to have used the health codes to target collective activism by freezing local bank accounts of depositors or assigning random risk levels to health codes.⁶³ Also, the implementation of health monitoring programs, from their data requirements to their consequences, in some cases, violated national health emergency or data protection laws. This could range from excessive data collection, missing privacy agreements of apps, to disproportionate and arbitrary quarantine or testing measures without the rights to appeal.⁶⁴

Beyond that, in the shift from suppression to prevention, the restrictions of religious freedom (Art. 36 PRC Constitution) illustrate the systemic implications where normalized technology meets institutionalized (mis-)appropriation. Where religious opposition movements form and threaten social stability or the state, the state’s capabilities in digital tech-

- 60 Philipp Renninger, The “People’s Total War on COVID-19”: Urban Pandemic Management through (Non-)Law in Wuhan, China, *Washington International Law Journal* 30 (2020), pp. 63-115.
- 61 For example: *Zhonghua renmin gongheguo tufa shijian yingduifa* 中华人民共和国突发事件应对法 [Emergency Response Law of the People’s Republic of China], https://www.gov.cn/ziliao/flfg/2007-08/30/content_732593.htm (last accessed on 19 October 2024); *Zhonghua wenmin gongheguo zhuanranbing fangzhi fa* 中华人民共和国传染病防治法 [Law of the People’s Republic of China on the Prevention and Control of Infectious Diseases], http://www.npc.gov.cn/npc/c2/c238/202001/t20200122_304251.html (last accessed on 19 October 2024).
- 62 See *Shanghaishi renda chagweihui guanyu quanli zuohao dangqian xinxing guanzhuang bingdu ganran feiyan yiqing fangkong gongzuo de jue ding* 上海市人大常委会关于全力做好当前新型冠状病毒感染肺炎疫情防控工作的决定 [Decision of the Standing Committee of the Shanghai Municipal People’s Congress on Doing a Good Job in the Prevention and Control of the Current COVID-19 Epidemic], <https://www.shanghai.gov.cn/sjzccs/20210825/1285a041b11b4deb932da3595579ae74.html> (last accessed on 19 October 2024); *Shanghaishi gonggongweisheng yingji guanli tiaoli* 上海市公共卫生应急管理条例 [Shanghai Public Health Emergency Management Regulations], <https://www.shanghai.gov.cn/sjzccs/20210825/103db87cdc834ead8e3f0861d9cf09da.html> (last accessed on 19 October 2024).
- 63 Haiqing Yu / Jesper Willaing Zeuthen, Local Politics in the Age of Automated Decision-Making in China: A Case Study of the Henan Health Code Scandal, *Journal of Contemporary China* 33 (2023), pp. 923-937; Jieren Hu and Xingmei Zhang, Digital governance in China: Dispute settlement and stability maintenance in the digital age, *Journal of Contemporary China* 33 (2024), pp. 561-577.
- 64 For more details on the cases, see Hu, note 4, pp. 80-83.

nology are employed for mass surveillance and social control.⁶⁵ Often adopted in counter-insurgency operations around the world, the collection of biometrical data like Iris Scans and DNA in China arguably took place at the edges or outside of the Police Law (Art. 2), Criminal Procedure Law (Art. 132) as well as Anti-Terrorism Law (Art. 50), and is thus also in violation of Art. 37 PRC Constitution, prohibiting for example, “unlawful search”, because subjects targeted by the security organs are oftentimes neither victims, suspected terrorists, nor criminal suspects.⁶⁶ While there exists a legal framework, the massive data collection and social control exercised in the name of security mostly lacks explicit legal basis⁶⁷, but is used in “sweep the black” (*saohei chue* 扫黑除恶) campaigns against organized crime, which happen to target religious minorities and political activism as well. The repression of opposition here shifts to the preventive stage, far before collective action is to take place and demonstrations or riots can take place.

Whereas the first two types of state responses (as exertion of “rightful control by law and policy”) are based on officially promulgated and disseminated (quasi-)legal documents, the exertion of control beyond both law and even formalized policy (as its purest utilization of the dictatorial moment in the “state of exception”) has serious implications for its legal system and attempts to organize opposition. The types are not always clearly distinguishable but can fluctuate or blend into each other as they are interconnected and build on each other. Law and political power are combined in a hybrid form, constructing authoritarian legality out of the living law within the party.⁶⁸ The deterrence effect resulting from its flexibility and unpredictability is largely successful in curbing collective action and is a

- 65 James Leibold, Surveillance in China’s Xinjiang Region: Ethnic Sorting, Coercion, and Inducement, *Journal of Contemporary China* 29 (2019), pp. 46-60; *The Citizen Lab*, A review on the implications of mass biometric data collection and the use of biometric recognition technologies by public security organs in the Tibet Autonomous Region and Qinghai Province on the fulfillment by the People’s Republic of China of its international human rights obligations and commitments, Submission to the Special Rapporteur on counter-terrorism and human rights, 21 April 2023, <https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/cfis/cfi-gs-impact-ct-measures/subm-global-study-impact-cso-citizen-lab.pdf> (last accessed on 30 October 2024).
- 66 Emile Dirks, Mass Iris Scan Collection in Qinghai 2019-2022, *The Citizen Lab*, 14 December 2022, <https://citizenlab.ca/2022/12/mass-iris-scan-collection-in-qinghai/> (last accessed on 30 October 2024); Emile Dirks, Mass DNA Collection in the Tibet Autonomous Region from 2016-2022, *The Citizen Lab*, 13 September 2022, <https://citizenlab.ca/2022/09/mass-dna-collection-in-the-tibet-autonomous-region/> (last accessed on 30 October 2024); Human Rights Watch, China: Minority Region Collects DNA from Millions – Private Information Gathered by Police, Under Guise of Public Health Program, 13 December 2017, <https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions> (last accessed on 30 October 2024).
- 67 See on the concerns Lao Dongyan, The Hidden Dangers of Facial Recognition Technology, 31 October 2019, <https://www.readingthechinadream.com/lao-dongyan-artificial-intelligence.html> (last accessed on 30 October 2024).
- 68 See Jiang Shigong, Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China, *Modern China* 36 (2010), pp. 12-46.; Jiang Feng, Party Regulations and State Laws in China: A Disappearing Boundary and Growing Tensions, *Chinese Law & Government* 51 (2019), pp. 260-276.

core part of the authoritarian legality in the PRC. Legality is subjected to the political necessities of a party-state that reserves the right to make use of its sovereign authority against its enemies at any time. Simultaneously, this normalization of the exception as a determinant and means of governance is as much of a threat to the carefully constructed authoritarian legality as it is its distinct feature.

D. Effects between Dispute Settlement, Fragmented Opposition and Authoritarian Legal Theory

1. From Legal Fragmentation to Fragmented Opposition

A normalization of a functional state of exception and rightful control, i.e. adopting governance according to necessity not law as an implicit mode of operation by the party-state, which can draw on technology formerly normalized through the “ordinary” legal order, leads, in consequence, to the abandoning of popular contention by the law. When and which type of control the party-state adopts in the face of a specific issue is of course determined by the fundamental goals of socio-political stability and regime legitimacy, but equally depends on the hard facets of technology, i.e. which and to what degree digital technologies have been normalized and are thus available for their (mis-)appropriation. “Flexible”, limited legality is limiting collective activism and organized opposition, which is either legally coopted in various forms of (legal) dispute settlement mechanisms, and thereby depoliticized,⁶⁹ or forced to resort to oppositional tactics like “guerrilla lawyering”,⁷⁰ and “disguised” assisted individual rights claim-making instead of larger collective action.⁷¹ The state creates a discriminatory political and legal opportunity structure, from funding to legal registration requirements, targeting and moderating resisters. Redirecting efforts through state-led programs and offering close partnerships combined with repressive “crackdowns” atomizes broader contentious efforts by pushing for self-censorship and, even though internal cohesion might be strengthened,⁷² diminishing solidarity between different groups. Thus, opposition in China is fragmented both in organizational strategy and scope.

69 *Fengrui Tian / Julia Chuang*, Depoliticizing China’s Grassroots NGOs: State and Civil Society as an Institutional Field of Power, *The China Quarterly* 250 (2022), pp. 509-530.

70 *Yueduan Wang / Ying Xia*, State-Sponsored Activism: How China’s Law Reforms Impact NGO’s Legal Practice, *Law & Social Inquiry* 49 (2024), pp. 451-477. On the perils of lawyering, see also *Yongshun Cai / Songcai Yang*, State Power and Unbalanced Legal Development in China, *Journal of Contemporary China* 14 (2005), pp. 117-134.

71 *Diana Fu*, Disguised Collective Action in China, *Comparative Political Studies* (2016), pp. 1-29.

72 *Jieren Hu / Lanyu Zhang*, Positive Function of Social Conflict: Decoding State-Church Interaction in China, *Chinese Journal of International Review* 5 (2023), p. 2350004-1.

II. Authoritarian Legality and Politics

1. Blurred Transgression and Laboratory Governance

By absorbing the state of exception as its core mechanism, authoritarian legality soaks up theoretical aspects of the state of exception. The Chinese authoritarian formation elevates the sovereignty of the party and with it the exception to its ultimate principle, which finds itself in China's experimentalist governance⁷³ which shares its nature with the understanding of the state of exception as a "laboratory for testing and honing the functional mechanisms and apparatuses of the state of exception as a paradigm of government."⁷⁴ The authoritarian moment here is not so much the absence of the law, but its instrumentalist approach to law in which legality does not depend as much on the distinction between law and non-law. It is not necessary to rely on the construction of a "double-layered constitutional system"⁷⁵ with its temporal derogation of law, as the embrace of (permanent) states of emergency creates an elastic legal space for state action.⁷⁶ In this anomic zone, the juridical order is constantly blurred. The ambiguity opens it to justifications and legitimizations of measures of rightful control. The absence of normative law in fact is not justified as classical dictatorial power, and is not implied to leave a legal void, but rather operates as rightful control at the edges of legality, and feeds on its legitimacy and aesthetics. Echoing the traces of justification in Agamben's brief history of the state of exception,⁷⁷ notions of protracted wars (from "China's war on terrorism"⁷⁸ to the "people's war against COVID"⁷⁹) call for the legality and legitimacy of rightful control in China where the securitized state of emergency enables the surveillance state. Paradoxically, the divergence between law and authoritarian legality is simultaneously not a turn away from law, but its characteristic – authoritarian legality is law under reserve, but likewise the blend of law and the permanent

73 Elizabeth J. Perry, *Blurring the Boundaries of Governance: China's Work Teams in Comparative Perspective*, *Comparative Political Studies* (2024), pp. 1-27, 4; Wenguang Zhang / Ji Lu, Binbin Song / Hongping Lian, *Experimentalist Governance in China: The National Innovation System, 2003-2018*, *Journal of Chinese Governance* 7 (2021), pp. 1-26; Madeleine Martinek, *Experimental Legislation in China between Efficiency and Legality: The Delegated Legislative Power of the Shenzhen Special Economic Zone*, Berlin 2018.

74 Giorgio Agamben, *State of Exception*, Chicago 2005, p. 7.

75 Tom Hickman, *Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism*, *Modern Law Review* 68 (2005), p. 657.

76 See Stephen Humphreys, *Legalizing Lawlessness: On Giorgio Agamben's State of Exception*, *European Journal of International Law* 17 (2006), pp. 678 f.

77 See Agamben, note 74, pp. 15-22.

78 Martin I. Wayne, *Inside China's War on Terrorism*, *Journal of Contemporary China* 18 (2009), pp. 249-261.

79 Jue Jiang, *A Question of Human Rights or Human Left? – The 'People's War against COVID-19' under the 'Gridded Management' System in China*, *Journal of Contemporary China* 31 (2021), pp. 491-504.

state of exception expands and preserves law,⁸⁰ which thus can remain a fix point for rightful resistance, as much as it devalues it by instrumentalizing it as a legitimate façade and normalized and normalizing framework for the adjacent rightful control by and beyond law and policy.

2. Blended Legality and the Impossibility of Politics

Instead of predating and distinguishing the parallel normative and prerogative orders in the dual state, the state of exception has become the rule in the “blend state” – it has become immanent. The prerogative state and the legality of its normative code live inseparable as two sides of one coin. Therein, in fact, Walter Benjamin, prior to Schmitt and Agamben, becomes relevant for the understanding of authoritarian legality. Not the particular emergency and political decision of Schmitt’s political theology that annihilates the law, but the baroque immanence and the resulting contradictions define the issue of law and its transgression in the Chinese party-state. Benjamin writes of the sovereign function of “the restoration of order in the state of emergency: a dictatorship whose utopian goal will always be to replace the unpredictability of historical accident with the iron constitution of the laws of nature.”⁸¹ An ahistorical natural law where “violence that is [...] appropriate to natural goals is thereby also legal.”⁸² The paternalistic, pastoral desire to exclude interruptions,⁸³ the state of exception *as such*, towards a total stabilization within its absolute reign, and the inability to an admission of limits is authoritarian legal theory’s prison – without a place for heterogeneity decision becomes impossible.⁸⁴ Schmitt’s sovereign transcends state and law, Benjamin’s “lord of creatures” remains a creature,⁸⁵ absorbing and bound to its world of creation. Because sovereignty here is absolute but immanent, and without transcendence, there is no externality, the state of exception has become the rule. Like Benjamin’s baroque

80 Albeit in Agamben’s view as a mere “*factio iuris* par excellence which claims to maintain the law in its very suspension’ but produces instead a violence that has ‘shed every relation to law’”, cf. *Stephen Humphreys*, note 76, p. 681, citing *Agamben*, note 74, p. 59.

81 *Walter Benjamin*, *The Origin of German Tragic Drama*, trans. John Osborne, New York 1998, p. 74.

82 *Walter Benjamin*, *Critique of Violence*, in: Marcus Bullock / Michael W. Jennings (eds.), *Walter Benjamin – Selected Writings. Volume 1: 1913-1926*, Cambridge 2004, pp. 236-252, p. 237. And “survival” seems to be the most natural goal.

83 *Xiaoling Zhang / Melissa Shani Brown / David O’Brien*, ‘No CCP, No New China’: Pastoral Power in Official Narratives in China, *The China Quarterly* 235 (2018), pp. 784-803; *Rosalind Cooper*, Pastoral Power and Algorithmic Governmentality, *Theory, Culture & Society* 37 (2020), pp. 29-52.

84 *Samuel Weber*, *Taking Exception to Decision: Walter Benjamin and Carl Schmitt*, *Diacritics* 22 (1992), p. 14.

85 *Benjamin*, note 81, p. 85.

prince, the party-state simply does away with the proper legal distinction.⁸⁶ The sovereign, invested with this unlimited hierarchical power, is yet unable to exclude what is his own function. Without space for opposition politics, all that remains is an administration in a blurred juridico-political system that “transforms itself into a killing machine.”⁸⁷ The disproportion between gathering all power as a “tyrant” and the martyrial inability to arrive at effective decisions devours this order over time.⁸⁸ Consequently, rightful control is the state’s clinging to power in the permanent state of exception that is immanent in its legality and not during its suspension, but its ruin already rests in itself.

The unaccountable limitation of individual rights, for example, by the illegal use of data and technology, may have a negative impact on social governance in the longer term, where the acceptance of, or at least indifference to state measures, decreases. Rightful control can be seen as a constitutive element of the party-state’s juridical normality,⁸⁹ but its sovereign transgression of law and policy threatens the popular acceptance of a carefully constructed authoritarian legality.⁹⁰ So far, the party-state has proven remarkably adaptive in governing popular contention and victorious in suppressing oppositional forces.⁹¹ The articulation of dissatisfaction, under the looming baton of the “blend state”, mostly remains “rights conscious” in the framework of the authoritarian state, and thus protests may emerge, even reinforcing rule where they allow for information and adaptation, but political opposition movements, in the sense of forces for liberalization, democratization, a “bottom-up political transformation”, are unable to form effectively to date.⁹²

86 *Jay-Daniel Mininger*, *The Hermaphrodite Sovereign: Walter Benjamin, Carl Schmitt, and the Permanent State of Exception*, *Baltic Journal of Law & Politics* 3 (2010), p. 149.

87 *Agamben*, note 74, p. 86.

88 *Weber*, note 84, pp. 14 f.

89 Similarly, *Zhang / McGhee*, note 13, p. 115.

90 Some find that information about “repressive potential” – as politically targeted – of certain governance measures reduces their popular support, see *Xu Xu / Genia Kostka / Xun Cao*, *Information Control and Public Support for Social Credit Systems in China*, *The Journal of Politics* 84 (2022), pp. 2230-2245. This would suggest that also experiencing or learning of the instrumental transgression of legality – its repressive turn – lessens citizens’ acceptance, similar to an “informed disenchantment”, see *Mary E. Gallagher*, *Mobilizing the Law in China: “Informed Disenchantment” and the Development of Legal Consciousness*, *Law & Society Review* 40 (2006), pp. 783-816.

91 Cf. D.I.

92 See *Sida Liu / Sitao Li*, *Rights in China: Myths, Abuses, and Politics*, *Annual Review of Sociology* 50 (2024), pp. 737-755; *Yao Li*, *A Zero-Sum Game? Repression and Protest in China*, *Government & Opposition* 54 (2019), pp. 309-335; *Elizabeth J. Perry*, *Popular Protest in China: Playing by the Rules*, in: Joseph Fewsmith (ed.), *China Today, China Tomorrow: Domestic Politics, Economy and Society*, Lanham 2010.

E. Conclusion

This article aims to examine the social governance mechanism employed by the party-state regarding the articulation of discontent in social conflicts, and to structure the state responses to opposition in China. We have laid out a typology of “rightful control” by and beyond law and policy that spans measures characterized as laissez-faire administration, selective intervention, coercive isomorphism, and blatant transgression. The findings provide an understanding of the legal and political mechanisms of digital authoritarianism and its implications for political opposition in China. Technological capabilities acquired and disseminated by the party-state can be legally normalized in ordinary channels for dispute resolution or state measures, while simultaneously offering new avenues for the security apparatus to surveil and control the wider population also beyond (quasi-)legal forms. This produces a variety of state responses to conflicts in the (non-)law superposition. “Rightful control” utilizes information and communication channels, that are opened through (semi-)legal means, firstly, for cooptation and appeasement. Technology disseminated in this way can then also, secondly, be used for surveillance and (preventive) repression. This indicates lessons for changing state-society relations in digital China. Actors will either fall in line through cooptation and appeasement or have to form new strategies for contention in the face of technological social governance. The utilization of vast technological capabilities, the legalization of the surveillance state, but at the same time the instrumental suspension of its (few) legal delimitations, not as an exception but as its legal technique make oppositional collective organizing and action a perilous matter.

Furthermore, the article explored the theoretical characteristics of the relationship of authoritarian legality and the state of exception. Similar to (liberal) democracies, authoritarian regimes may suspend their (authoritarian) legality in times of crisis, but the theoretical underpinnings of the state of exception permeate the legality even during its times of normalcy as a core governance mechanism. Rather than a temporary reversal of legislative and executive power, normal legal norms can also be transgressed whenever the state considers oppositional behavior to be a threat to the state and social stability. However, the more recourse is made to instruments aside from the law, the more the carefully constructed image of an authoritarian legality cracks.

Through the theoretical structuring and exploration exemplified by cases, this article contributes to the understanding of authoritarian control governing contention in China. “Rightful control”, whose analysis through typology was attempted here, significantly expands the tools for justification of the actions of the party-state limiting oppositional potential and contentious politics. Nonetheless, as it feeds off a nucleus of legality, it cannot exclude its mirror image: “Rightful resistance” likewise will remain one channel for potential creative oppositional action of those conscious of their rights.



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