

Security First? Patterns and Lessons from China's Use of Law To Address National Security Threats

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The ubiquitous, if often disregarded, exhortation on countless construction sites across China reads *anquan diyi*. It means “safety first,” but also can be accurately translated as “security first.” The slogan and its imperfect implementation aptly capture much about China’s legal response to ostensible or potential existential threats to the nation and its impact on legal protections for citizens’ rights and limits on state power.

Most of the long running debate over whether national security and other crises justify departing from ordinary laws and legal orders has focused on constitutional democracies with robust rules of law. Assessments of Asian cases are only a limited exception, with many focusing on India, Hong Kong, and other places with liberal legal systems.¹ Illiberal and undemocratic polities, including China, have received relatively little attention.² In some respects, this pattern is easily understood. By any measure, China remains an authoritarian state.

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1. Felicity Hammond, *Terrorism's Next Victim? Judicial Review of the Malaysian Internal Security Act 1960*, 8 ASIAN-PAC. L. & POL'Y J. 270 (2007); Hualing Fu et al., *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny*, 36 HONG KONG L. J. 216 (2006); Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism and Security Laws in India*, 20 COLUM. J. ASIAN L. 93 (2006); Kent Roach, *National Security, Multiculturalism and Muslim Minorities*, 2 SING. J. LEGAL STUD. 405 (2006); Chris Gagné, *POTA: Lessons Learned from India's Anti-Terror Act*, 25 THIRD WORLD L.J. 261 (2005); C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT'L L. & POL'Y 195 (2005); H. L. Fu & Richard Cullen, *National Security Law in Hong Kong: Quo Vadis: A Study of Article 23 of the Basic Law of Hong Kong*, 19 UCLA PAC. BASIN L.J. 185 (2002); Carole J. Petersen, *National Security Offences and Civil Liberties in Hong Kong: A Critique of the Government's "Consultation" on Article 23 of the Basic Law*, 32 HONG KONG L. J. 457 (2002).

2. This article, primarily portions of the third and fourth sections other than those dealing with anti-terrorism and national security laws, draws from the author's chapter in a recent volume that is an exception to this rule. See Jacques deLisle, *States of Exception in an Exceptional State: Emergency Powers Law in China*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 342 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2010); see also Axel Dreher et al., *Does Terrorism Threaten Human Rights? Evidence from Penal Data*, 53 J.L. & ECON. 65 (2010); S. H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 THIRD WORLD L. J. 161 (2005); Abdul HaSeeb Ansari, *Terrorism, National Integrity and Human Rights: A Critical Appraisal*, 3 MALAYAN L.J. 205 (2002); Kelly A. Thomas, *Falun Gong: An Analysis of China's National Security Concerns*, 10 PAC. RIM L. & POL'Y J. 471 (2001); RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES 207-234 (Tom Ginsburg & Tamir Moustaafa eds., 2008).

Compared to liberal constitutional democracies, the Chinese regime is much less fettered by legal constraints on government power and offers its citizens far weaker legal rights against the state even in ordinary times and absent extraordinary threats. The Chinese legal-political order remains vestigially Leninist in its views of the authority of the Communist Party, the state, and law. This perspective sees law in limited, instrumental terms and is averse to vigorous legal constraints on state power, especially in times of perceived or purported dire peril. The contemporary Chinese approach to questions that arise in the context of real or imagined crises may also reflect legacies of the relatively distant past. Although developments in culturally and ethnically Chinese Taiwan, traditionally Confucian Korea, and elsewhere in the region, caution against political-cultural determinism, the grand Chinese tradition accepted few in-principle limits on the state's reach and few notions of non-derogable rights of subjects.

These features might seem to make China an uninteresting case, relatively immune to the wrenching and divisive conflicts that elsewhere often surround national security-based departures from ordinary, preexisting laws and legal institutions. But that would be too hasty a conclusion. China's legal approach to national security threats, and emergency situations in general, is more complex and subtle and thus richer in implications for comparative law and for understanding transnational legal influence. China presents more than a simple picture of a relatively impervious, authoritarian, quasi-Leninist, non-Western, weak rule-of-law regime might suggest. China faces, or at least claims to face, nontraditional security threats that are broadly similar to those that have prompted controversial legal changes in liberal constitutional democracies. Given China's sheer scale and international importance, its legal reaction to any major issue is a substantial part of the worldwide response. China's discussion, adoption, and use of legal means to address identified dangers – especially terrorism – have invoked concerns familiar from post-9/11 developments elsewhere and have engaged international legal norms, including ones that emerged in the wake of 9/11 and others that predated and survived it. The Chinese example thus does, or at least should, matter to those engaged in debates over whether anti-terrorism-driven and national security-related changes in liberal democratic constitutional legal systems and related international legal standards are dangerous for the rule of law, ineffective at enhancing security, or necessary to protect imperiled orders from mortal enemies.

This article discusses the patterns and potential lessons that emerge from a study of China's legal response to terrorism and other threats or perceived threats to order and security. Part I examines the laws that China has enacted to address national security threats, looking first at the legal framework that existed in China before 9/11 and then at laws enacted after 9/11. Part II explores the Chinese leadership's rationales for the approaches taken and suggests four explanations for Chinese legal arguments and actions. Part III assesses what China's legal approach to terrorism and

other threats to security and order reveals about the potential of law in China to constrain the state and protect citizens' rights. Part IV examines the impact of international and foreign norms and actions on China's rulers. Part V proposes two sets of lessons that the Chinese case may teach.

I. THREATS, CHINESE LAW, AND A PUZZLE

Like their counterparts in other countries, Chinese authorities have identified threats that they argue are profound and warrant strong or extraordinary legal measures. Since near the end of the 1980s, the dangers they have invoked as reasons for adopting special threat-targeting laws or authorizing measures that derogate from ordinary legal rules sometimes echo and other times depart from ones heard in the post-9/11 period in liberal democratic constitutional regimes. They include activities that authorities claim imperil national security, political stability, social order or the regime's capacity to rule and maintain its hold on power such as: organized political dissent or opposition like the mass protests at Tiananmen Square and in Tibet in 1989; public health crises or natural disasters, such as the Severe Acute Respiratory Syndrome (SARS) episode in 2003 and the Sichuan earthquake in 2008; ethnic unrest among Muslim Uighurs in Xinjiang and Tibetans in Tibet and adjacent provinces since around 2000, officially characterized as "separatist"; and "terrorism," which has figured much more prominently since 9/11, especially in connection with Xinjiang Uighurs and, to a lesser degree, Tibetans.

China has adopted a variety of legal means to address these diverse problems. Legal means fall primarily into three categories: ordinary criminal and quasi-criminal laws that apply both to dire or ostensibly dire threats to national security and domestic order and to more ordinary criminal behavior; more focused provisions that target the specific types of nontraditional security threats that truly or purportedly have been alarming to the regime, such as terrorist acts, separatism, and sedition; and laws that authorize, under conditions of especially serious threats, a more wholesale departure from the usual legal rules, including those that protect citizens' rights and restrict the state's powers. This last category includes rarely used but high profile laws that authorize martial law, states of emergency, or other legal states of exception. Although most of these laws have little to do with distinctively post-9/11 concerns and many predate 2000, some of them have been enacted – and more of them deployed – with much reference to the purportedly qualitatively new challenges and altered international norms of the post-9/11 era.

There is no simple relationship between the legal mechanisms that Chinese authorities have employed and the categories of threats they identify to justify them. The responses to the Tiananmen Square and Tibet protests and their aftermath in 1989 ranged from non-criminal administrative punishments to prosecutions for ordinary crimes to the only

declaration of martial law in the history of the People's Republic. The 2003 SARS crisis brought everything from stern pronouncements that those whose actions threatened to sow panic or undermine state responses would be prosecuted under preexisting criminal statutes to a post-crisis constitutional amendment and drafting of implementing legislation to broaden "state of emergency" powers beyond those available under the prior regime for martial law. So too, the eruptions of unrest in Xinjiang later in the decade prompted prosecutions under ordinary criminal statutes proscribing violent acts, prosecutions under more specific provisions addressing terrorist, seditious, and separatist acts, and renewed consideration of special emergency powers laws for the paramilitary police (the organization primarily responsible for quelling the unrest), as well as potentially sweeping anti-terrorism legislation.³

As this brief inventory suggests, Chinese authorities sometimes have turned to special laws targeting specific types of threats or authorizing extraordinary powers to confront crises, but the regime also has relied on its copious powers to address perceived or proclaimed perils without exceptional laws. A repertoire of broadly defined proscriptions and severe penalties – including, for many offenses, the death penalty – was available for addressing activities that, in the view of police, prosecutors and their state and party superiors, threatened national security or domestic order, including some activities undertaken abroad.⁴ There are provisions regarding economic crimes, including crimes that disrupt financial or enterprise administration or constitute financial fraud. There are also provisions dealing with crimes relating to disruption of public order, including those that impede state functionaries in the performance of their duties, cause social disorder, or put public health at risk. Finally, there are various serious offenses against persons or property, including murder, assault, arson, and other forms of destruction of property. Other Chinese laws prohibit and punish illegal or unauthorized organizations. These laws have been useful to quash threatening, dissident, or otherwise disfavored groups. Such groups include chapters of the banned religious group Falun Gong; autonomous, often pro-democracy civil society organizations that sprang up among students and workers amid the 1989 Tiananmen

3. See generally CARLOS WING-HUNG LO, CHINA'S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA 271-322 (1996) (discussing Tiananmen Square protests of 1989); deLisle, *States of Exception*, *supra* note 2 (discussing Tiananmen Square, the Severe Acute Respiratory Syndrome (SARS) pandemic that originated in China in 2003, and emergency powers); AMNESTY INTERNATIONAL, JUSTICE, JUSTICE: THE JULY 2009 PROTESTS IN XINJIANG, CHINA (2010), available at <http://www.amnestyusa.org/countries/china/asa170272010en.pdf>. These developments are discussed more fully in this article.

4. See Criminal Law of the People's Republic of China, arts. 6, 8-10 (concerning extraterritorial reach), part II, ch. III, §§3-5; ch. V, ch. VI, §§1, 5 (1997, as revised through 2010); Cai Dingjian, *China's Major Reform in Criminal Law*, 11 COLUM. J. ASIAN L. 213 (1997); Ian Dobinson, *The Criminal Law of the People's Republic of China (1997): Real Change or Rhetoric?* 11 PAC. RIM L. & POL'Y J. 1 (2002).

movement and among varied segments of society in more recent years; and ethnically or religiously based groups among Tibetans and Uighurs. Under highly discretionary standards, state authorities have denied these groups recognition and registration.⁵

A. *China's National Security Legal Framework Before 9/11*

Laws that focus more specifically on threats to national security and political order and the particular means for creating and implementing those threats have long been on the books in China. China's Criminal Law contains a chapter on crimes concerning national defense that prohibits acts that compromise military preparedness or efficacy and provide information to the enemy. More significantly in the present context, since 1997, China's Criminal Law has included a capacious and vague category of crimes against state or national security.

The key provisions in the current law superseded the more politically charged, flexible, and controversial "counterrevolutionary crime" of the first reform-era Criminal Law. Adopted in 1979, this law still bore legacies from the Maoist era. There has been much debate about whether the shift from counterrevolutionary crime to crimes against state security was more than cosmetic or marginally "depoliticizing."⁶

Under the revised law, the offenses (for which "counterrevolutionary" or similar intent is no longer required) include acts that undermine the sovereignty, territorial integrity, or security of the nation (in collusion with foreign actors), split the nation or destroy its unity, subvert state power, or undermine the socialist system. Embedded in its distinctive Chinese communist terminology are crimes that elsewhere would be labeled secession and sedition. Other provisions prohibit armed rebellion, riot, and espionage. The crimes amounting to subversion and sedition (and some other crimes as well) have been left largely undefined in principal sources of China's Criminal Law, leaving authorities with wide and much-criticized discretion, particularly in dealing with perceived political opponents of the regime. Incitement to undertake proscribed activities, providing funding

5. See Jacques deLisle, *Who's Afraid of Falun Gong?*, FOREIGN POLICY RESEARCH INSTITUTE E-NOTES, Aug. 5, 1999, available at <http://www.fpri.org/enotes/19990805.delisle.delisle.afraidfalungong.html> (discussing China's crackdown on the Falun Gong group). See generally Ge Yunsong, *On the Establishment of Social Organization Under Chinese Law*, 2 INT'L J. NON-PROFIT L. (2000), available at http://www.icnl.org/knowledge/ijnl/vol2iss3/art_2.htm (discussing registration issues and difficulties for organizations). The Uighur and Tibetan cases are discussed more fully below.

6. See HUMAN RIGHTS IN CHINA & HUMAN RIGHTS WATCH/ASIA, CHINA: WHOSE SECURITY? "STATE SECURITY" IN CHINA'S NEW CRIMINAL CODE 7-14 (1997) (providing a brief account of this debate); see also *supra* note 4.

for them, and furthering them through rumor mongering or defamation, are also offenses with vague or malleable definitions.⁷

Organizing, leading, or participating in terrorist organizations is outlawed under the Criminal Law. Several articles address common terrorist tactics such as hijacking, hostage-taking, bombing, attacks on military forces, sabotage of public infrastructure, and the illegal acquisition, distribution, and use of weapons and other dangerous instrumentalities.⁸ “Terrorism” itself, however, remains an imprecise term in Chinese law. With the long-running process of adopting an anti-terrorism law still incomplete, there remains no formal high-level statutory definition. Chinese authorities and official media often use the term broadly, loosely, and with little reference to legal sources in explaining actions taken or the need to take action against targeted groups, especially among Xinjiang Uighurs and sometimes Tibetans.

The Criminal Law authorizes extraterritorial reach and targets foreign activities considered crimes against state security. A separate State Security Law prohibits undertaking such activities in conspiracy with foreigners. These proscriptions are significant in light of the frequent charge by Chinese authorities that alleged dissidents, “separatists,” “terrorists,” and religious extremists operate in collusion with outside forces.⁹ In a provision that resonates with post-9/11 fears elsewhere, the 1997 revision of China’s Criminal Law increased sanctions for the established offenses of endangering state security, national sovereignty, or territorial integrity when they are conducted in conspiracy with foreigners. Notably, if usually unsuccessfully, Chinese authorities also have called for extradition – or, failing that, foreign states’ repudiation – of Chinese operating abroad in purported support or direction of secessionists, terrorists, or extremists in China.¹⁰

The Criminal Law also prohibits and punishes crimes proscribed by international treaties, including, in principle, several general international anti-terrorism pacts and some terrorism-related regional accords to which China is a party. The Chinese view is that treaty obligations should be

7. Criminal Law, arts. 102-113, *supra* note 4; *see also supra* notes 4, 6.

8. Criminal Law, arts. 114-130.

9. *Lawmaker Yang Yunzhong Says China Needs Anti-Terrorism Law*, XINHUA NEWS AGENCY, Mar. 2, 2002 (quoting a deputy to the National People’s Congress who declared in 2002 that China needed an anti-terrorism law to fight “separatists, international terrorists and religious extremists” who threatened China’s “sovereignty and territorial integrity”). Other examples of such charges are discussed below.

10. *See, e.g.*, Shirley A. Kan, *U.S.-China Counterterrorism Cooperation: Issues for U.S. Policy* (Cong. Res. Serv.), July 15, 2010, at 12 (discussing Cambodia’s decision to hand over twenty Uighurs to China on terrorism charges over U.S. objections); Craig S. Smith, *Asylum Plea by Chinese Sect’s Leader Perplexes the U.S.*, N.Y. TIMES, July 31, 2000, at A03; Henry Chu, *New York-Based Leader of Banned Group Targeted by China for Arrest*, L.A. TIMES, July 30, 1999, at 4.

brought into domestic law through legislation, and many treaty provisions have been implemented through preexisting or new legislation.¹¹

Other laws interact with and reinforce the Criminal Law. Adopted in 1993, largely in response to the events of 1989, the State Security Law primarily targets actions undertaken by or in collusion with foreigners that endanger state security through espionage, corruption, sabotage, or through seditious or separatist plots. Rules interpreting the legislation specifically include organizing, planning, or carrying out terrorist activities. These provisions closely parallel articles in the Criminal Law itself. The State Secrets Law and allied provisions in the Criminal Law similarly target the unlawful acquisition and dissemination of a notoriously opaque and broad category of "state secrets." The State Secrets Law has been a favorite weapon against dissidents and regime opponents of many stripes. It has underpinned prosecution for possessing or distributing information that has seemed innocuous, or had not been clearly classified as secret, such as reports on the occurrence of ethnic or political unrest. Still other laws offer additional, similarly spirited tools. For example, laws regulating the Internet prohibit dissemination of materials that promote terrorism or otherwise incite criminal activities or threats to state security.¹²

In addition to extensive and flexible definitions of prohibited activities in substantive laws, Chinese procedural law imposes few and weak fetters on the authorities. Mid-1990s reforms to the Criminal Procedure Law promised to add new protections to low baselines in the 1979 Criminal Procedure Law that had been modest in theory and weaker in practice. These included: earlier and broader access to defense counsel (who nonetheless still face significant impediments and harassment); a clear allocation of the burden of proof to the prosecution (which nonetheless continues to prevail in an overwhelming majority of cases); and lessened reliance on confessions (which are acknowledged to come too often through coercion even though they are no longer a legally sufficient basis for conviction).

Even on paper, the limits on police and prosecutors have remained feeble by rule of law standards. In addition to the extensive investigative

11. Criminal Law, art. 9; Xue Hanqin & Jin Qian, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299 (2009); Permanent Mission of the People's Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, Speeches on International Conferences, *China and Anti-International Terrorism* (Apr. 19, 2004), available at <http://www.china-un.ch/eng/gjhyfy/hflygz/t85685.htm>.

12. State Security Law of the People's Republic of China, art. 4 (1993); Criminal Law, arts. 111, 282-287, 398; Law on Protecting State Secrets of the People's Republic of China (1989, 2010); Hualing Fu & Richard Cullen, *National Security Law in China*, 34 COLUM. J. TRANSNAT'L L. 449 (1996); Congressional-Executive Commission on China, Virtual Academy, *Silencing Critics by Exploiting National Security and State Secrets Laws* (2006), <http://www.cecc.gov/pages/virtualAcad/exp/expsecurity.php>; Richard Cullen & Pinky D. W. Choy, *The Internet in China*, 13 COLUM. J. ASIAN L. 99 (1999).

and detention powers wielded by Chinese police, Ministry of State Security officers have special powers over targets suspected of committing offenses against state security. The paramilitary People's Armed Police also exercise special powers when called in to address unrest. It is widely acknowledged that process-based restraints on state authorities' powers are weaker in politically charged cases and contexts.¹³

Chinese authorities have other legal weapons that allow them to bypass the not-so-constraining strictures of the ordinary criminal process. They use these against dissidents, separatists, and others identified as threatening the state and social order. For example, those who have committed crimes or engaged in non-criminal but still disfavored behavior can be subjected to up to three years of de facto imprisonment under the administrative sanction of "reeducation through labor."¹⁴

In adjudicating criminal cases and in exercising their power to review non-criminal administrative sanctions in politically sensitive contexts, Chinese courts do not play the same roles that their counterparts in constitutional democracies are – or at least were – expected to play in constraining the state. Formally, courts in China are subordinate to legislative organs. They lack powers of constitutional review and most of the powers of judicial review found in laws of the United States, Europe, and much of East Asia. In practice, their independence from other branches of the state and the Chinese Communist Party is often significantly weaker than formal rules and institutions promise. This lack of autonomy is much more of an issue in politically sensitive cases – a category that in Chinese thinking and practice includes cases that involve activities and organizations alleged to threaten national security or unity, imperil domestic order, or undertake terrorism.¹⁵

As some of these limits to judicial roles suggest, constitutional and other legal rights do little to limit the state's power to address perceived threats. Under the Constitution of the PRC, citizens' enjoyment of civil and political rights is contingent on their willingness not to exercise rights in ways that "infringe upon the interests of the state, society, and the collective." Those rights come with correlative duties to "safeguard" the unity, security, and interests of the nation and to refrain from acts that are "detrimental" to national security or the national interest. The Constitution,

13. Criminal Procedure Law of the People's Republic of China (1996); Xia Jinwen, *New Developments in Chinese Criminal Procedure Law* 7 ANN. SURV. INT'L & COMP. L. 1 (2001); Jerome A. Cohen, *The Plight of China's Criminal Defense Lawyers*, 33 HONG KONG L.J. 231 (2003); *China Amends Law To Make Life Easier for Lawyers*, XINHUA NEWS AGENCY, Oct. 28, 2007; HUMAN RIGHTS IN CHINA, EMPTY PROMISES: HUMAN RIGHTS PROTECTIONS AND CHINA'S CRIMINAL PROCEDURE LAW IN PRACTICE (2001), available at <http://www.hrichina.org/public/contents/article?revision%5fid=47506&item%5fid=3435>.

14. See *supra* notes 4, 12; Fu Hualing, *Re-education Through Labor in Historical Perspective*, 184 CHINA Q. 811 (2005).

15. See generally JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION (Randall Peerenboom ed., 2009).

in its preamble, enshrines support for the existing political order, including leadership by the Chinese Communist Party and fidelity to official ideology, as obligatory cardinal principles. Key relevant statutes echo and elaborate the point with, for example, the State Security Law and State Secrets Law imposing on all citizens duties to safeguard the security of the state and state secrets. The individual rights that the Constitution lists are even in principle generally not enforceable absent implementing legislation.¹⁶ Constitutional rights-based limits on the regime's capacity and discretion in responding to perceived or purported threats to national security or domestic order are, thus, weak even in theory and largely subordinate to citizens' obligations to refrain from activities with even fairly modest potential or likelihood of contributing to such threats.

The Constitution formally allows state authorities still greater latitude when they face especially grave challenges. In addition to the ordinary laws and practices that give the state a formidable arsenal of formal authority and much de facto power to evade relatively weak legal constraints, China has undertaken an extensive, constitutionally grounded lawmaking project to confer further powers in situations that pose dire threats to state security and order. China adopted its 1982 Constitution shortly after the post-Mao reform-era leadership consolidated its hold on power. That charter is still in effect, with relatively limited amendments. It originally included an article on "martial law" or "state of siege" (*jiuyan*) that authorized the legislature (in the form of the Standing Committee of the National People's Congress) and the executive (in the form of the Premier) to declare martial law under conditions the Constitution does not specify.¹⁷ This provision was the legal basis invoked in 1989 to suspend ordinary liberties and use military force to suppress the student-led pro-democracy Tiananmen Square demonstrations and the ethnic sectarian unrest in Lhasa, Tibet.

Official accounts depicted these movements as severe threats influenced by outside forces bent on undermining the state. These characterizations are akin to those offered to support post-9/11 suspensions of legal constraints on state actions in the United States and other liberal constitutionalist states.¹⁸ After China's 1989 declarations of martial law prompted condemnation abroad and criticism at home, China adopted a Law on Martial Law in 1996. That law articulated substantive

16. Constitution of the People's Republic of China, pmbl, arts. 51-54 (1982, as amended through 2004); State Security Law, art. 3; State Secrets Law, art. 3; *see also* Shen Kui, *Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's "First Constitutional Case,"* 12 PAC. RIM L. & POL'Y J. 199 (2003).

17. Constitution of the People's Republic of China, arts. 67, 89 (1982).

18. *See, e.g.,* Chen Xitong, *Report on Checking the Turmoil and Quelling the Counterrevolutionary Rebellion*, BEIJING REV., July 17-23, 1989; Shi Wei, *Why Impose Martial Law in Beijing?* BEIJING REV., June 26-July 2, 1989, at 24-25; Daniel Southerland, *300 Tibetans Said Arrested After Rioting*, WASH. POST, Mar. 31, 1989, at A17.

preconditions for declaring martial law, including “turmoil, riot or disturbance” where “emergency measures” are necessary to “preserve social order and protect people’s lives and property.” The law also set forth special powers and departures from ordinary law, including use of force, displacement of ordinary civil and criminal laws, and limits to citizens’ constitutional and other legal rights.¹⁹

B. Legal Changes Adopted After 9/11

After 9/11, China revised its laws relating to national security and emergency powers to address perceived or at least asserted deficiencies. By the early 2000s, its martial law framework appeared to focus on too narrow a range of threats. Foreign invasion and domestic political tumult were no longer the only dangers the law must address. International terrorism had become immediately relevant for Chinese authorities in the aftermath of sporadic incidents attributed to Uighur separatist groups, who shared religious, ethnic, and, purportedly, organizational ties to Central Asian Muslim radicals. Public health crises like the SARS epidemic of 2003 and its deleterious effect on China’s international reputation due to the regime’s problematic response to it widened the range of dangers that seem to require a wider and more comprehensive emergency powers law. So too did natural disasters like the Tangshan earthquake at the twilight of the Mao era and the Sichuan earthquake in 2008.

In 2004, China introduced a constitutional amendment that replaced “martial law” with “state of emergency” (*jinji zhuangtai*). China also considered (but did not pass) a State of Emergency Law that would have implemented the sparse constitutional amendment, and passed instead a more modest Emergency / Sudden Incident (*tufa shijian*) Response Law. In the wake of the Sichuan earthquake and unrest in Tibet and Xinjiang near the end of the decade, China renewed consideration of a more full-fledged state of emergency law.²⁰

China adopted other terrorism-targeting legal changes after 9/11. In December 2001, it amended the Criminal Law to: increase punishments for the preexisting offense of organizing, leading, or participating in a terrorist organization; criminalize funding of terrorist organizations and terrorists; add terrorist crimes to the list of offenses for which broadly related financial activities carry criminal sanctions; and create new offenses of

19. Martial Law of the People’s Republic of China (1996) (especially arts. 2, 5, 13-28).

20. Constitution of the People’s Republic of China, arts. 67, 89 (1982, as amended in 2004); see, e.g., Meng Na, *China’s First Emergency Law in Pipeline*, XINHUA NEWS AGENCY, Jan. 6, 2004; Sun Yanxin & Li Xuanliang, *Legal Experts Praise Constitutional Amendment on State of Emergency*, XINHUA NEWS AGENCY, Mar. 8, 2004; Qin Xudong, *Quake Propels the Improvement of Emergency Laws*, CAIJING [FINANCE], May 29, 2008.

making and disseminating pathogens, and poisonous and radioactive materials – some of terrorists' weapons of choice.²¹

In 2006, China adopted an Anti-Money Laundering Law (partly tracking amendments to the Criminal Law) and subsequent regulations, portraying these as tools in the fight against terrorism. In 2009, China again invoked counterterrorism aims when it adopted a new law regarding the People's Armed Police (PAP), the paramilitary force that played the principal role in putting down the unrest in Xinjiang and Tibet branded as "terrorist" by PRC official sources.²²

The 2009 PAP Law echoed the former Law on Martial Law, which focused on use of the People's Liberation Army. The PAP Law provided authority to handle situations of "rebellion, riots, large-scale serious criminal violence, terrorist attacks" and other situations imperiling social order. It also gave the PAP much more power and latitude in detention and investigation when deployed on missions by the proper authorities.²³ If and when it is enacted, the long-percolating and, after unrest in Tibet and Xinjiang, again much-mooted Anti-Terrorism Law is likely to include emergency powers-like elements, such as special state authority or relaxation of ordinary legal requirements and restraints.²⁴

The creation and use of this three-tiered structure of ordinary, specialized, and emergency powers laws present something of a paradox in China. Laws more specifically targeting threats to state security and order and laws sanctioning emergency powers or other extraordinary powers would seem to be superfluous. The state and the Party already seem to possess ample authority and flexibility to act even in the absence of crisis. There appears to be little need to craft laws to expand the regime's power and discretion when confronting severe, or allegedly severe, dangers.²⁵ A

21. Criminal Law, arts. 114, 115, 120, 125, 127, 191, 291(1) (as amended 2001); Anti-Money Laundering Law of the People's Republic of China (2006); *China Amends Criminal Law for Combating Terrorism*, XINHUA NEWS AGENCY, Dec. 24, 2001.

22. The People's Bank of China, *Anti-Money Laundering and Combating Terrorist Financing*, in ANNUAL REPORT OF 2007, http://www.pbc.gov.cn/publish/english/987/1929/19291/19291_.html; Michael Wines, *Chinese Law Governing A Police Force Is Approved*, N.Y. TIMES, Aug. 28, 2009, at A6; *China Greenlights Armed Police To Handle Terrorist Attacks, Riots with New Law*, XINHUA NEWS AGENCY, Aug. 27, 2009.

23. Law of the People's Armed Police Force of the People's Republic of China (2009); Yan Hao & Fu Shuangqi, *Revised Draft Law Authorizes Armed Police Force New Tasks*, XINHUA NEWS AGENCY, Aug. 24, 2009; Wines, *supra* note 22; *China Greenlights Armed Police*, *supra* note 22.

24. *Experts: China Should Enact Law on Anti-Terrorism*, PEOPLE'S DAILY, July 20, 2009; *Anti-Terrorism Law Urged After Urumqi Riots: Expert*, XINHUA NEWS AGENCY, July 21, 2009.

25. See AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: CHINA'S ANTI-TERRORISM LEGISLATION AND REPRESSION IN THE XINJIANG UIGHUR AUTONOMOUS REGION (Mar. 22, 2002), available at <http://www.amnesty.org/en/library/info/ASA17/010/2002> (providing an early post-9/11 expression of concern about China's use of emergency powers in connection with Chinese authorities' handling of Uighur dissidents – who include groups

permanent de facto state of emergency would seem to exist. Nonetheless, Chinese lawmakers, officials, commentators, and influential scholars have spent much time and energy crafting the content and trying to shape the interpretation and application of laws addressing particular types of ostensibly acute threats and laws governing exceptional states.

II. AUTHORITARIAN RATIONALES

This overview of the legal – and extralegal – methods available to Chinese authorities initially sharpens, rather than answers, the question of why such a regime would adopt special, threat-focused and crisis-contingent laws to deploy in conjunction with more ordinary laws and practices that themselves seem to give the authorities great power and latitude. A partial answer emerges if we look at the question from the perspective of China’s rulers, asking what is in it for them. For the regime, four types of benefits potentially follow from this combining of ordinary laws with specialized laws that target particular categories of threats and exceptional laws that formally authorize the state to wield extraordinary powers to cope with purported national security threats and other crises.

A. *Support State Capacity To Respond to Threats to Order and Security*

One perceived benefit is that laws that proscribe and punish threatening behavior, or that go farther and authorize departures from the ordinary legal order, promise to confer, augment, or at least affirm state power. This is true even under China’s authoritarian conditions. That power is especially valued when facing real or imagined severe threats.²⁶ Ordinary criminal laws concerning violent or destructive behavior generally have this feature, and China’s laws have been no exception. The utility of these laws has been evident in China’s authorities’ extensive reliance on laws that ban killing, violent assault, property destruction, and violent demonstrations to address instances and aspects of what they have identified as serious dangers to national security and domestic order, ranging from the Tiananmen Square demonstrators to SARS rumor-mongers to Uighur demonstrators and rioters.

Examples from the unrest in Xinjiang in 2009 illustrate the pattern. Many were charged with murder, robbery, arson, violent attacks, and smashing, looting, and burning of property. These charges resulted in numerous convictions, including ones that led to capital punishment. Some of the prosecutions relating to unrest in Xinjiang occurred in the context of a late 2009 “strike hard campaign” – a recurring anti-crime tactic that entails directives to devote extra resources and zeal to enforcing ordinary

often accused of terrorism by Chinese authorities).

26. See generally deLisle, *supra* note 2, at 356-363 (discussing this point and citing additional sources).

criminal laws against an identified, ostensibly especially dangerous target for a limited time. As if to underscore the ordinary criminal law nature of the resulting sanctions, it was announced that PAP troops who helped quell the unrest would be given jobs with the local police upon leaving PAP service.

The 2009 measures echoed earlier tactics. Uighurs convicted for involvement in an attack on a Kashgar police station and Tibetans involved in violent protests during the run-up to the 2008 Beijing Olympics faced the death penalty for intentional homicide, starting fatal fires, and weapons charges. In 2001 (and earlier) “strike hard campaigns,” focusing on Xinjiang “separatist” and “terrorist” forces in the context of national anti-crime drives, brought numerous long prison terms and death sentences on weapons, murder, and robbery charges.²⁷

The use of such relatively quotidian law has not been accompanied by elaborate case-specific explanations of features enhancing state power or formally legitimizing it. Yet, looming in the background has been this unremarkable, perhaps universal, point that China's lawmakers and leaders have appreciated. The opening sections of the Criminal Law reflect the point. They state that the Criminal Law's task is to create criminal punishments that can be used to combat criminal actions and protect national security, the existing political system, social and economic order, property, and citizens' rights. The Criminal Procedure Law similarly articulates key functions that are akin to those set forth in the substantive Criminal Law.²⁸

Official and orthodox arguments for special laws have more strongly emphasized the argument concerning law's ability to provide power to state authorities. Post-9/11 discussions of anti-terrorism and related law proceeded in this vein. Enhancement of state capacity to deal with new perils was a key aim articulated in the late 2001 revisions to the Criminal Law. The amendments themselves declared that their purpose was to provide new means to crack down on terrorist crimes and to protect state security, public order, and the citizenry's rights and interests. The Supreme People's Procuracy (China's central prosecutor's office) interpreted the 2001 Criminal Law amendments as a mandate to bring prosecutors' “full

27. *Xinjiang Arrests Approved for “7-5” Incident First 83 Suspects*, Zhongguo Xinwenwang, Aug. 5, 2009; *Six Sentenced to Death over Xinjiang Riot*, XINHUA NEWS AGENCY, Oct. 12, 2009; *Five Sentenced to Death for Murder in Urumqi Plot*, XINHUA NEWS AGENCY, Dec. 3, 2009; Minnie Chen, *Job Security for Urumqi Soldiers*, S. CHINA MORNING POST, Nov. 26, 2009, at 5; AMNESTY INTERNATIONAL, *supra* note 3, at 21-27; Kan, *supra* note 10, at 12; Ai Guo, *Uygurs Executed for Killing Police*, S. CHINA MORNING POST, Apr. 10, 2009, at 4; AMNESTY INTERNATIONAL, *supra* note 25, at 10, 20-22; Chien-peng Chung, *Confronting Terrorism and Other Evils in China: All Quiet on the Western Front?* 4 CHINA AND EURASIA F. Q. 75, 76, 79 (2006).

28. Criminal Law, art. 2; Criminal Procedure Law, art. 2.

powers” to bear in fighting against terrorism.²⁹ The unrest in Xinjiang in 2009 was described by officials and “legal experts” as having “the characteristics of a typical terrorist attack” and showing the need for a special counterterrorism law to create “more effective” legislation to supersede the insufficient legal authority provided under various other laws.

Chinese authorities have used laws prohibiting activities that undermine state security, organizing or participating in a terrorist organization (in some cases, the East Turkistan Islamic Movement), and in separatist movements as among the key tools to deal with Uighurs after the 2009 unrest and after Olympics-linked and earlier incidents of violence. A Xinjiang high court official described such prosecutions as the state striking “a major blow” to violent separatists and religious extremists. The same pattern has occurred on a smaller scale in Tibet.³⁰ Adopted in the aftermath of unrest in Xinjiang and Tibet, the August 2009 PAP law authorized the paramilitary force to commandeer property, to question and detain suspects, and to use force in responding to a list of dangers including terrorist attacks.

Notably, the authorities have invoked anti-terrorism laws and broader anti-terrorism arguments to support actions against long-standing targets of repression that stretch well beyond conventional categories of terrorists, including Falun Gong and pro-democracy dissidents.³¹

More thoroughly extraordinary laws, including those authorizing martial law, the “state of emergency” amendment to the Constitution and laws to implement the amendment, were also explained in terms that stressed their state capacity-enhancing qualities. Official statements referred to such laws’ roles in ensuring that all state and social resources

29. Amendment of the Criminal Law of the People’s Republic of China (III) (2001); Supreme People’s Procuracy, Notice on Resolutely Carrying Out and Implementing the Third Amendment of the Criminal Procedure Law of the People’s Republic of China (2002). See generally Zhao Bing-zhi & Wang Xiu-mei, *Countermeasures Against Terrorism Through Criminal Justice in China*, First World Conference of Penal Law Papers (2007), available at www.penal.org/IMG/Guadalajara-Zhao.pdf.

30. *China Should Enact Law on Anti-Terrorism*, supra note 24; *Anti-Terrorism Law Urged after Urumqi Riot*, supra note 24 (quoting Xinjiang Legislative Affairs Commission director, Bo Xiao, and academic expert, Gu Liyun); Alexa Olesen, *China Sentences Uighur Writer to 15 Years in Jail*, Assoc. Press, July 23, 2010; *China Executes Two Uighurs on Terror Charges: Report*, Agence France Presse, July 12, 2008; Bill Savadore, *Uygurs Sentenced to Death over Terrorism*, S. CHINA MORNING POST, Nov. 12, 2007, at 7; *Xinjiang Steps Up Fight Against Terrorism*, XINHUA NEWS AGENCY, Jan. 24, 2010 (quoting court official); *Xinjiang Courts Handle Rising Security Cases*, CHINA DAILY, Jan. 16, 2010, at 4; Erik Eckholm, *China Court Rejects Appeal of Tibetan Monk Sentenced to Death for Separatism*, N.Y. TIMES, Jan. 27, 2003, at A4; *Tibet Autonomous Region Chairman: Unconvicted “3-14” Incident Arrestees Already Released*, Zhongguo Xinwenwang, Mar. 6, 2009.

31. See, e.g., Willy Wo-Lap Lam, *Terrorism Fight Used To Target China Secessionists*, Oct. 23, 2001, <http://archives.cnn.com/2001/WORLD/asiapcf/east/10/23/willy.china.split/index.html>; Andrea J. Worden, “A Fair Game”? *Of Law and Politics in China, and the “Sensitive” Case of Democracy Activist Yang Jianli*, 40 GEO. J. INT’L L. 447, 466 (2009).

would be deployed to address dire threats, in part by allowing the removal of impediments that might be posed by ordinary civil and criminal laws, state institutions, and citizens' rights to liberty and property. Amid Tiananmen period martial law and the response to SARS, state authorities cast directives authorizing or employing exceptional powers, and imposing unusually severe and otherwise lawless restrictions on citizens as essential to give state authorities the necessary powers to handle crises imperiling stability.

Emergency powers laws, and broadly kindred changes to more ordinary laws, have also been touted as remedies for problems of decentralization and fragmentation of authority that were identified as serious flaws in the system's response to then-recent crises. In regard to the Tiananmen Square crisis, official media asserted that protestors had made use of "failings in the work of the party and government." In regard to the SARS crisis, central authorities worried that local authorities had taken matters into their own hands, leading to under-reaction, overreaction, and the specter of balkanization. The unrest in Tibet and Xinjiang led to revisions of the then-draft PAP Law to drop a power-decentralizing provision that would have allowed county-level officials to decide whether to mobilize paramilitary units.³²

Chinese discussions of anti-terrorism law are consistent with these broader patterns. PRC sources have explicitly invoked anti-terrorism as a motive behind laws adopted or contemplated after 9/11, authorizing increased powers for the state, including the PAP Law and the draft Anti-Terrorism Law. PRC officials have emphasized the importance of a coordinated, centralized, national approach to terrorism. They joined post-9/11 legal changes with the creation of a National Anti-Terrorism Coordination Group led by Party General Secretary and President Hu Jintao and with moves to create special structures to manage and respond to terrorist attacks and to educate and mobilize the masses for anti-terrorism efforts. Engaging global audiences and concerns, they have carefully cast a centralized national PRC strategy as part of an international cooperative approach in which national governments address transnational threats through each state's own national laws and other means.³³

Although China attributes terrorism to a variety of opponents of the regime, terrorism and alleged terrorism remain overwhelmingly associated with secessionism in the perspective of Chinese officials. Anti-

32. Shi, *supra* note 18; Jacques deLisle, *SARS, Greater China, and the Pathologies of Globalization and Transition*, 47 *ORBIS* 587, 595-600 (2003); Yan & Fu, *supra* note 23.

33. See, e.g., Embassy of the People's Republic of China in the Republic of Estonia, *China's Position Paper on Counter-Terrorism* (May 20, 2004), available at <http://ee.china-embassy.org/eng/ztlm/fdkbzy/t112725.htm>; Pan Guang, *China's Anti-Terror Strategy and China's Role in Global Anti-Terror Cooperation*, 2 *ASIA EUR. J.* 523, 527-529 (2004); Jason Kelly, *Anti-Terrorism with Chinese Characteristics: Peace Missions 2007 in Context*, 7 *CHINA BRIEF* (2007).

secessionism, especially in China, entails strengthening central control, partly through means embodied or supported in law. As the response to and aftermath of the incidents in Tibet in 1989 and Tibet and Xinjiang in 2008-2009 reconfirmed, the PRC's predominant legal response to minority communal pressure for autonomy or independence – especially when such pressure has led to unrest – has not been quasi-federalist accommodation but, rather, the assertion of central authority. This proclivity is all the more pronounced where provincial or local authorities might be seen as bungling the handling of, or failing to head off, a serious incident of ethno-nationalist or sectarian unrest.

These general conceptions of making and using law to address threats, especially severe threats, are deeply embedded in contemporary China. They are consistent with Leninist notions of legality that have lingered throughout China's reform-era legal development. This Leninist view is that law is but one tool – potentially an especially useful one, but not one that has a principled claim to special stature – within a larger toolkit that gives a powerful party-state the capacity to maintain order, control society, and effect change.³⁴

B. Protect Policy Goals To Maintain Order and Sustain Economic Growth

A second potential benefit China's rulers seem to expect to realize by combining ordinary laws, laws more specifically addressing perceived or purported serious threats, and laws authorizing crisis-based departures from the ordinary legal regime, is the advancement, or preservation, of substantive policy goals that have defined the Chinese regime's agenda throughout the post-Mao reform era.³⁵ In addition to sustaining party-state authority, the leadership's core set of goals includes maintaining social and political order and promoting economic growth.

On paper and in application, the ordinary laws and the more threat-specific laws (including those targeting terrorist acts and crimes against state security) that have been used against political dissidents and against such restive or separatist groups as those in Xinjiang or Tibet have this feature. The actions they proscribe include ones that threaten social and political order or economic growth. Many examples may be found in the Criminal Law.

The Criminal Law's stated purposes include to safeguard property, maintain social and economic order, and promote the smooth progress of

34. See, e.g., *Traps, Gaps and Law: Prospects and Challenges for China's Reforms*, in *IS CHINA TRAPPED IN TRANSITION? IMPLICATIONS FOR FUTURE REFORMS* (Randall Peerenboom ed., 2007); cf. PITMAN B. POTTER, *FROM LENINIST DISCIPLINE TO SOCIALIST LEGALISM: PENG ZHEN ON LAW AND POLITICAL AUTHORITY IN THE PRC* (2003); cf. PHILIP SELZNICK, *THE ORGANIZATIONAL WEAPON: A STUDY OF BOLSHEVIK STRATEGY AND TACTICS* (1952).

35. See generally deLisle, *supra* note 2, at 364-370.

socialist construction. Numerous provisions scattered throughout the substantive chapters address crimes of endangering public security, including riots, destruction of infrastructure or factories, and other units of economic production. Other provisions cover crimes of disrupting social order management, including obstructing state authorities, undertaking protests and other mass gatherings that disrupt production, social order or government functioning, and organizing criminal organizations. The law also criminalizes undermining the socialist market economic order such as by money laundering and various forms of fraud, and violent destruction of property.³⁶ As noted earlier, many of these provisions have been among those relied upon to convict and punish those participating in unrest in China over many years. Official and orthodox characterizations of the targets of these laws have cast them as threats to core reform-era policy aims that, by the regime's account, were crucial to stifle.

Here again, post-9/11 PRC discourse about ethnic unrest and anti-terrorism law illustrates a long-standing pattern. The late 2001 anti-terrorism amendments to the Criminal Law were explained as serving to protect property and maintain public order. China's Supreme People's Procuracy, a prominent national defense journal, the government's official position paper on counterterrorism, media discussions of the need to adopt special laws to address unrest (often described as terrorist in nature) in Tibet and Xinjiang, and other official sources have stressed the social harm caused by terrorism and listed protection of social stability and wealth as central aims of anti-terrorism efforts.³⁷ The 2009 PAP Law's stated purposes included maintaining social stability and addressing the PAP's roles in protecting security and participating in economic construction.³⁸ Reflecting back on the summer of 2009, the Minister of Public Security characterized the unrest as the actions of "law-breakers" who "aimed to undermine the current stability" that was "the guarantee and precondition of Xinjiang's development." So too, the president of Xinjiang's top court opined that "striking hard" at the forces that were the "cause of the deadly riot" was necessary because it would secure "the foundation of Xinjiang's economic development."³⁹

36. Criminal Law, art. 2, part II, chs. III, V, VI.

37. Amendment of the Criminal Law of the People's Republic of China (III) (2001); Supreme People's Procuracy, *supra* note 29; Position Paper on Counter-Terrorism, *supra* note 33; Kelly, *supra* note 2; Permanent Mission of the People's Republic of China to the U.N., *Foreign Ministry Spokesman Qin Gang's Regular Press Conference on 20 April 2006*, www.fmprc.gov.cn/ce/ceun/eng/fyrth/t247790.htm; AMNESTY INTERNATIONAL, *supra* note 25; Yan & Fu, *supra* note 23.

38. People's Armed Police Law, arts. 1-2.

39. Cheng Zhiliang et al., *Police Chief Stresses Stability as Situation in Urumqi Comes Under Control*, XINHUA NEWS AGENCY, Sept. 4, 2009; *Xinjiang Courts Handle Rising Security Cases*, *supra* note 30.

The same types of considerations have long loomed large in arguments for granting and exercising emergency or quasi-emergency powers to address what China's rulers have portrayed as major crises, including: the resort to martial law to end the "turmoil" that endangered state and society in the Tiananmen Demonstrations and Tibetan unrest in 1989; the Law on Martial Law, which authorized calling out the troops when "emergency measures" were needed to "preserve social order and protect people's lives and property" amid severe "disturbance"; and the adoption of SARS-related legal proscriptions on false reporting, rumor-mongering, and some types of travel.

All of these crises were characterized as threatening stability and order, and they underpinned successful arguments for a constitutional amendment in 2004 to expand the definition of states of emergency to cover nontraditional threats. The drafters of the 2007 Emergency Response Law described it as helping the state fulfill its principal task of preserving the lives and security of the people in situations of great peril. The PAP Law responded to unrest in Xinjiang and Tibet in 2008-2009 and echoed features of the earlier Law on Martial Law. Official and quasi-official explanations of the use of martial law in 1989, the need for stern legal and policy measures to respond to SARS, and the reasons for an Emergency Response Law, all also stressed what such legal measures did or could do to prevent disruption of production.⁴⁰

The appeal of such laws runs deep for the Chinese regime. Ordinary laws, threat-specific laws, and laws concerning emergency authority to address crises that threaten social and political stability and economic growth fit within a broader, fundamental agenda of "law and development" or, more precisely, law in the service of development with Chinese characteristics.⁴¹ Legitimacy and security for the reform-era PRC regime has rested most heavily on two pillars that are seen as mutually dependent and mutually reinforcing: providing order and generating economic growth. Providing order is a key issue for all governments, but it was especially pressing and important for reform-era China after the chaos of the late Mao era that brought much social violence and near civil war. Generating economic growth is a common focus, especially in developing countries, and the reform-era Chinese leadership has made it especially central.

40. Shi, *supra* note 18; deLisle, *SARS*, *supra* note 3, at 594-604; Law on Martial Law, arts. 2, 5, 17-18; Emergency Response Law of the People's Republic of China, arts. 1, 3, 49-52 (2007).

41. See generally Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists vs. Skeptics*, 56 AM. J. COMP. L. 895 (2008); Jacques deLisle, *Chasing the God of Wealth while Evading the Goddess of Democracy: Development, Democracy and Law in Reform-Era China*, in DEVELOPMENT AND DEMOCRACY: NEW PERSPECTIVES ON AN OLD DEBATE 252-293 (Sunder Ramaswamy & Jeffrey W. Cason eds., 2003).

C. Preserve and Exploit Legality in Addressing Threats

A third result that Chinese leaders seem intent on realizing from their specific legal response to national security threats is a legal framework enhancing state power to respond to emergencies. Using law to frame powers that allow departures from ordinary legal structures or that, within ordinary legal structures, strike a balance strongly in favor of the state and against citizens' rights or individual interests, may be less damaging to the project of strengthening legality than would be the case if the regime relied exclusively or predominantly on extralegal or law-disregarding means to address ostensibly serious challenges. To the extent that relatively ordinary criminal laws can be deployed to address such threats (without so stretching the definitions of offenses or so truncating procedures that the law-preserving effect is eviscerated), those ordinary laws are the most desirable means from this legality-preserving perspective. Resort to specialized laws aimed at more specific security threats often will seem more politicized, *ad hoc*, and responsive to the crisis of the moment, and is a second-best approach. Turning to laws that authorize states of emergency or other conditions warranting more wholesale departures from the normal laws and legal system is a more problematic, but still infra-legal, alternative.

As Western legal debates attest, there is much room for disagreement about whether rule-of-law values are ultimately better served by infra-legal or extralegal strategies for augmenting state power, discretion, and emergency powers to address severe national security or other threats. The argument for the infra-legal approach is at least plausible in liberal democratic constitutionalist orders. In the Chinese context, the argument for keeping such exceptions within legal frames may be in some respects more compelling, even if the argument does not ultimately constrain the state. In China, even such backhanded compliments to law and minimal formal deference to legality may give modest support to a legal order that remains by the standards of liberal democratic constitutionalism comparatively weak and vulnerable to marginalization as a regulator of political affairs and party-state power.

A fourth result that China's rulers seek from their legal response to national security threats is closely entwined with the third, just discussed. Relying where possible on ordinary law to embody expansive state power, to set forth citizens' limited rights, and to address significant security threats, and resorting, in more exceptional dire circumstances, to special laws authorizing expanded state powers and lessened rights for citizens, may allow the regime to tap into the emergent legitimacy of law in China.⁴² The regime can benefit from an ability to assert, with some credibility, that it remains true to principles of legality even as it deploys harsh sanctions or

42. See generally deLisle, *supra* note 2, at 345-356, 370-375 (discussing legality and the emergent legitimacy of law in China).

arrogates extraordinary powers in politically charged contexts. This can reduce resistance among constituencies that might otherwise be more skeptical of expansive or exceptional uses of state power. Where the regime uses legal forms and can plausibly claim to observe largely positivist legal requirements and norms, it may defang some critics and deflect some opposition, at least where the criticism or opposition comes from the growing elites and social sectors that favor greater reliance on, and respect for, legal rules. Much of the content of relevant Chinese laws, the official and quasi-official Chinese explanations and defenses of those laws and their use, and reactions and arguments from Chinese advocates of relatively liberal legalism are consistent with the idea that this pair of “legalist reasons” motivates the regime’s legal approaches to emergencies and lesser threats to national security and internal order.

Some of the regime’s behavior shows the real or apparent solicitude for legal forms that is essential if the regime is to reap these types of gains. Chinese authorities have relied heavily on garden-variety criminal prohibitions (and informal sanctions that fall in the shadow of such laws) as a preferred means for defeating those whom they blame for posing potentially fatal challenges to the state. To some degree since the Tiananmen Square protest in 1989, and especially since the major rewriting of the Criminal Law in 1997, and through the unrest in Tibet and Xinjiang more than a decade later, much of the reform-era Chinese regime’s approach has been characterized by a combination of highly political rhetoric condemning fomenters of turmoil, sedition, separatism, religious extremism, and terrorism, and accounts of legal responses that often stress punishment for comparatively ordinary offenses such as murder, assault, arson, property destruction, or transgressions of relatively long-standing provisions in the Criminal Law prohibiting disruption of public order, assault of police or other public authorities, or undermining state national security through relatively specific, violent acts. As noted above, recent prominent examples of this pattern include the legal-political response to 2008-2009 unrest in Xinjiang and Tibet.

The otherwise odd juxtaposition of dark characterizations of grave danger with responses that stress application of comparatively mundane laws becomes more intelligible if we understand it as meant to convey legality-preservation (or apparent legality-preservation) and legal-legitimacy-tapping agendas. If purportedly system-threatening evil-doers are handled largely through ordinary or relatively ordinary legal means, the state’s reaction should not cast doubt on broader regime commitments to building, relying upon, and respecting legality. So too, such reliance on relatively ordinary and established laws – not on-the-fly and politicized responses – enables the authorities and official sources to claim that they are doing nothing so different from what any regime would do to address violent or destructive actions. Whether or not it is ultimately persuasive, the regime maintains that what it is doing is what even a regime with an indisputably robust rule of a law does (regardless of political motivation) to

put down efforts to topple the government, break apart the nation, and instigate riots, for example.

Although the post-Tiananmen Square reliance on the then-existing “counterrevolutionary crime” provisions for some (but by no means all) of the targeted participants in the “turmoil” is a partial exception, this response has been the general pattern. Elements date back to the very early years of the reform era. Expressions can be found in official and orthodox accounts of the prosecution of China’s then most prominent dissident, Democracy Wall activist Wei Jingsheng. Although Wei’s court was limited to laws that predated the adoption of the first comparatively “politicized” comprehensive Criminal Law, accounts of the process emphasized that Wei was convicted largely on sedition-like and espionage-like state secrets charges. These accounts argued that no country’s laws tolerate conspiracies to topple the government or give complete free rein to those who seek to incite revolution. They asserted that China’s courts convicted Wei under laws already on the books proscribing the acts he undertook and not merely the thoughts he held.⁴³

The pattern has been more developed and pronounced in more recent cases of the regime’s reaction to dire threats by adopting special laws or undertaking or contemplating formal departures from the ordinary legal order. In these settings, advocates and defenders of the regime’s approach strike positivist themes that resonate with the twin concerns of preserving legality and drawing upon law’s legitimacy. Post-9/11 developments in anti-terrorism-related laws and the response to unrest in Xinjiang provide recent examples.

Official and quasi-official accounts of prosecutions of accused terrorists and separatists in Xinjiang since the mid-2000s repeat familiar types of claims, which have equally familiarly been disputed by human rights watchdogs: that defendants were convicted for offenses defined by China’s substantive criminal law, and through procedures mandated by China’s criminal procedure laws including open trials, representation by counsel and other rights.⁴⁴ Taking a different but equally legality-invoking tack, state media accounts argue that China “as a country where the rule of law prevails” could not “tolerate civil and societal order being trampled” by the

43. See generally WEI JINGSHENG, *THE COURAGE TO STAND ALONE* (1997).

44. See the discussion above concerning the list of specific substantive offenses charged. *Chinese Police Firmly Crack Down on All Terrorist Organizations According to Law*, PEOPLE’S DAILY, Jan. 9, 2007 (in Chinese), available at <http://military.people.com.cn/GB/1076/52984/5263978.html> (citing Criminal Law, State Security Law); Josephine Ma, ‘Open’ Trials for Suspected Xinjiang Terrorists, S. CHINA MORNING POST, Mar. 2, 2007; *Convicted Xinjiang Terrorist Sentenced to Life in Prison*, XINHUA NEWS AGENCY, Apr. 19, 2007; *China Charges 20 Suspects Involved in Xinjiang Riot*, XINHUA NEWS AGENCY, Nov. 9, 2009; Human Rights Watch, *China: Xinjiang Trials Deny Justice*, Oct. 15, 2009, available at <http://www.hrw.org/en/news/2009/10/15/china-xinjiang-trials-deny-justice>.

violent separatists in Xinjiang. These accounts insist that the method of crackdown on the 2009 unrest reflected the party's and state's commitment to both "social stability" and "the socialist legal system."⁴⁵

An emphasis on claiming positivist legality also was evident in the title of the early post-9/11 joint directive from the Supreme People's Court, Supreme People's Procuracy, and Ministry of Public Security, "Notice on Strictly Combating Terrorist Activities in Accordance with the Law." The 2001 anti-terrorism-centered amendments to the Criminal Law were routinely characterized as designed to fill legal lacunae in existing foundations for fighting terrorism. The implementing directive from the Supreme People's Procuracy directed officials to strictly follow the new legislative provisions and apply the policy reflected in the legislation. The President of the Supreme People's Court echoed the point, arguing that death sentences should be implemented for crimes involving terrorism, specifically when the law so mandates. China's official Position Paper on Counter-Terrorism stressed the need to take measures to combat terrorism, and material support for terrorism, through actions "in conformity" or "in accordance" with national laws.⁴⁶

Officials at the Foreign Ministry argued that a general provision concerning treaties in China's pre-2001 Criminal Law might serve to bring into Chinese law adequate bases for criminal jurisdiction over offenses – specifically including "terrorist bombing" and "terrorist financing" – covered by treaties to which China was a party. Security officials cited treaty provisions as grounds for actions taken against Xinjiang separatists.⁴⁷ The PAP Law of 2009, adopted against the backdrop of unrest and what official sources dubbed "terrorism" in Xinjiang, was characterized by officials as providing a "clearer legal basis" for action and embodying the "doctrine and policy" of governing the country by law. A few months earlier, Xinjiang had adopted local regulations addressing online activities and some types of political assemblies. These created new legal grounds for suppressing means that had proven useful for those joining in the 2009 unrest. Several years after 9/11, official media and orthodox legal scholars characterized China as actively establishing a more elaborate legal framework to support anti-terrorist efforts. This included China's undertaking to draft – through orthodox and ordinary, valid legislative means – a separate Anti-Terrorism Law. Such sources noted that this

45. *Separatists' Modus Operandi*, CHINA DAILY, July 10, 2009; *Urumqi Riot Handled Decisively, Properly*, CHINA DAILY, July 10, 2009.

46. Supreme People's Court, Supreme People's Procuracy and Ministry of Public Security, Notice on Strictly Combating Terrorist Activities in Accordance with the Law (2001); Christopher Bodeen, *China's Chief Justice Urges Death Sentences*, THE STAR, Apr. 12, 2008; Position Paper, *supra* note 33.

47. Xue Hanqin, Jin Qian, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299 (2009); *Chinese Police Firmly Crack Down*, *supra* note 44.

agenda of legislative improvement had been made more urgent by “growing” terrorist threats.⁴⁸

Much the same pattern had unfolded, with greater political drama, during the SARS crisis earlier in the decade. Official sources claimed and perhaps reasonably believed that the crisis endangered order and security. Yet authorities went to great lengths to argue that draconian restrictions on information dissemination, rumor-mongering, and travel, and harsh punishments for transgressions, were adopted as legal measures through proper legal means. On this account, these steps made use of powers that were already in law on the books. In some cases, these laws were underscored by timely re-publication. In some cases, the legal standards were clarified – or, critics said, expanded – by decrees that were cast as mere interpretations or applications of pre-existing criminal and infectious disease laws. Alternately, the new state-empowering laws were described as powers that appropriate lawmaking organs had granted by proper means, including amendments to a law on the control of epidemic diseases and new regulations on responding to public health emergencies generally and SARS specifically.

Official and quasi-official sources strove to avoid the taint of retroactivity. They stressed that tough measures (particularly those targeting rumor-mongering and disease-spreading) were necessary to protect the established legal rights of other citizens. After the crisis, influential post mortems attributed weaknesses in the state's response to the insufficient implementation and understanding of relevant existing laws on the part of local governments and citizens, and inadequacies in the laws themselves in providing legal frameworks for appropriate responses.

A similar positivist theme runs through the discussion, and rare deployment, of emergency powers. Chinese leaders worked remarkably hard to assert and defend the legality of their use of martial law to handle the protests at Tiananmen Square and the unrest in Tibet in 1989. They meticulously explained that the martial law declarations reached only portions of provincial units and thus did not require the legislature's approval. They claimed that martial law in 1989 had a constitutional foundation that early post-revolutionary military rule had lacked. Official statements and decrees defended specific martial law measures, including those suspending citizens' rights, depicting them as authorized by valid initial declarations of martial law. They also stressed the criminality of the actions targeted by martial law. Chinese leaders did all this comparatively early in the reform era. And they did it even when faced with what they saw as a severe threat to order and challenge to their power from mass

48. *China Greenlights Armed Police*, *supra* note 22; AMNESTY INTERNATIONAL, JUSTICE, JUSTICE, *supra* note 3, at 25-27; Zhu Zhe, *Experts: China's Anti-Terrorism Law on Cards*, CHINA DAILY, May 31, 2007; *China Should Enact Law on Anti-Terrorism*, *supra* note 24.

action in the heart of the capital and in a region with a long-disgruntled ethnic minority with international strategic importance.

After the crisis, the emphasis on positivist legality persisted. The national legislature approved prior martial law actions and, several years later, adopted the Law on Martial Law. That legislation was said to implement the constitutional provision allowing martial law, to provide more specific legal rules authorizing, and limiting, the use of exceptional powers, and to establish a clearer legal basis for any future uses of martial law.⁴⁹

The 2004 “state of emergency” amendment was adopted amid critical assessments of the response to SARS, and a sense that the martial law framework was too narrow a legal basis for addressing nontraditional security threats including terrorism. The adoption of this constitutional amendment reflected an apparent appreciation of the importance of seeking positivist legitimacy for exceptional powers, minimizing damage to the broader legal order, and exploiting the emergent legitimacy of law. Again, the official view appears to have been that it was important to give constitutional status to a broadened notion of exceptional states warranting extraordinary state powers and citizen obligations (with correlative reductions in citizens’ rights). Some pressed for a comprehensive State of Emergency Law to implement the constitutional provision, concluding that anything less would leave too many legal gaps. They lost the argument to those who advocated a more modest Emergency Response Law, which, according to its proponents, would provide a legal means to address the threats that were most likely to occur and therefore would make better use of China’s limited law-drafting capacity.

Those debates reignited in the wake of the 2008 Sichuan earthquake and other crises. Some official and unofficial, though influential, voices said that shortcomings in the state’s response showed the need to address flaws in the then-new Emergency Response Law, which was widely invoked as a basis for state actions taken in response to the earthquake. These analyses argued that the response to the earthquake also made clear the need to make sure that local authorities did a better job in following the law fully and effectively. Similar concerns echoed anew in the aftermath of ethnic strife in Xinjiang in 2007-2009. Worries that the existing framework of laws was inadequate to address such problems fed into the promulgation of the PAP Law and reinvigorated calls for a comprehensive Anti-Terrorism Law with some emergency powers provisions.⁵⁰

These two explanations as to law’s appeal to China’s authoritarian rulers – preserving a broader legalization project and tapping law’s rising social legitimacy – may seem somewhat abstract, and they may seem farfetched in the Chinese context. Nonetheless, they should not be discounted. For a leadership that has invested much politically and

49. Law on Martial Law, arts. 1-3, 7-8, 12-29, 31.

50. See generally *Anti-Terrorism Law Urged After Urumqi Riot*, *supra* note 24.

materially in a multi-decade law-building project, the turn to law has itself become a secondary source of legitimacy, and is to be protected from avoidable and unnecessary harms.⁵¹ This is all the more true given that the Chinese leadership's reform-era effort to build a reputation for legality is meant for foreign as well as internal audiences.⁵² While winning favor and acceptance internationally do not reliably trump domestic issues for China's leaders, and may be fading as China becomes more powerful,⁵³ such concerns do matter. And China's image abroad can be especially affected by the perceived lawfulness or lawlessness of Chinese authorities' dealings with political dissidents and restive minority groups. Such dealings have significant human rights and rule-of-law implications and accordingly attract significant scrutiny abroad in circles where legal legitimacy counts relatively much.⁵⁴ Although prospects for silencing international criticism or persuading foreign critics are exceedingly dim, there is still value for the regime in measures that counter some charges, blunt the broader indictment, or muddy the waters.

So too, the nascent legitimacy of law in China is partly a consequence of the reform-era Chinese leadership's rule-of-law or rule-by-law rhetoric and its encouragement of the emergence of legal institutions, legally trained elites, and popular legal knowledge. China's top leaders have close advisors who advocate greater legality. Some with legal training are among the top elite's own ranks. Legal intellectuals, lawyers, and judges are important elements in the broader elite. They are audible in key public policy debates, including those concerning emergency powers. Popular "rights consciousness" includes a significant element of legal rights consciousness. Assertions of legal rights figure prominently in demands made on the state (whether for action or protection) by middle class citizens, expropriated peasants, unpaid workers, and victims of abuse by state authorities.⁵⁵

51. See generally Jacques deLisle, *Legalization Without Democratization in China under Hu Jintao*, in CHINA'S CHANGING POLITICAL LANDSCAPE: PROSPECTS FOR DEMOCRACY 185 (Cheng Li ed., 2008).

52. See *infra* Section IV.

53. See generally Jacques deLisle, *Soft Power in a Hard Place: China, Taiwan, Cross-Strait Relations and U.S. Policy*, 54 ORBIS 493 (2010).

54. Prominent sources describing how Chinese authorities have responded to political dissent include reports by Amnesty International, Human Rights Watch, and ad hoc groups concerning Democracy Wall activity in 1979, Tiananmen Square in 1989, and incidents in Tibet and Xinjiang during the post-2000 decade. Other sources are the annual U.S. State Department reports on human rights conditions in China and the work of the Congressional-Executive Commission on China. The focus on foreign audiences is also reflected in the Chinese official statements and position papers on anti-terrorism, defenses of the uses of coercion and criminal law against Tibetans, Uighurs, and political dissidents and other issues that address other states, the United Nations, and other topics.

55. See generally deLisle, *Legalization without Democratization*, *supra* note 51; Keith J. Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident* COLUM. J.

The scarce efforts, sometimes strained arguments, and contentious debates over laws governing states of emergency and responses to threats are much more intelligible if we accept the following premise: those favoring, or opposing, relatively unconstrained state power believe that putting their policy preferences in legal form is of great importance. From their perspective, putting such policy preferences in legal form is important because it can significantly affect state behavior and capacity, as well as the achievement of major policy goals, public support or acquiescence, and the wellbeing of a still-new and emerging system of legality that is (albeit in different ways to different constituencies) valuable and valued.

III. A SILVER LINING – OR COLD COMFORT – IN CHINA’S RESPONSES?

For those who favor liberal rights for Chinese citizens and limitations on state power, China’s legal responses to security threats seem to counsel despair. China’s combination of capacious, flexible, and evadable ordinary laws, and (still more) state power friendly special laws and emergency powers laws promises the Chinese party-state formidable capacity to act. This also promises that the party-state will face little hindrance from the constraints that other, more ordinary elements of Chinese law ostensibly impose and that rule-of-law norms arguably require. This conclusion seems clearer still given the apparent limits to the Chinese regime’s ability to bind itself to the mast: orthodox ideology and past practice make it more difficult for PRC authorities to commit themselves credibly to respect – in what are by definition extreme or purportedly extreme circumstances – formal legal restrictions on state power. Moreover, those restrictions are but loose ones imposed under ordinary laws, or the still-looser ones contemplated by emergency powers laws that authorize extraordinary measures to cope with exceptional threats. In liberal democratic constitutional regimes, the compromised or degraded, state-power-limiting features of post-9/11 national security law and emergency powers law may offer cold comfort. They have not been fully overridden or completely discarded in liberal democratic constitutional regimes. Even this modest consolation might be significantly less available in the case of China. In effect, Chinese authorities seem to have written themselves a blank check, and any law-based pledges not to tap the full range of their assets to defeat ostensibly mortal perils would not persuade relevant audiences at home or abroad.

This reading may prove to be too dire or at least too simple, however.⁵⁶ There are hopeful signs in China’s legal responses to purportedly severe threats to national security and public order and the legal discourse

TRANSNAT’L L. 114 (2006); Eva Pils, *Land Disputes, Rights Assertion and Social Unrest in China* 19 COLUM. J. ASIAN L. 235 (2005); Kevin J. O’Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China* in ENGAGING THE LAW IN CHINA (Neil J. Diamant, Stanley B. Lubman & Kevin J. O’Brien eds., 2005).

56. See generally deLisle, *supra* note 2, at 375-388.

concerning emergency powers. These signs are somewhat speculative, surely fragile, and partly corollaries to the features that make reliance on law appealing to China's authoritarian rulers. But, they do suggest some positive prospects for legal restraints on state power and for protection of citizens' rights, even in times of crisis.

One prospect is that China's laws on emergency powers, and the ordinary laws from which they authorize departure, establish substantive and procedural requirements that could limit or deny legal legitimacy to nonconforming uses of such powers. This possibility is relatively likely to draw support from central authorities, who clearly worry about regime stability and popular acceptance. It is especially likely to appeal in contexts where some of the worst abuses occur: panicked local officials reacting in undisciplined, lawless ways to situations that challenge their authority or threaten to spiral beyond their control – something that occurred, or seemed imminent in the context of SARS, earthquakes, and communal unrest in restive Tibet and Xinjiang.

Concern about the problems of local officials' overreach, under-regulation, or disregard for law⁵⁷ appeared in the prescriptions for legal reform drawn from the SARS experience, ensuing debates surrounding emergency response and state of emergency legislation, critiques of shortcomings in state responses and in the then-new laws on handling natural disasters and social unrest. It surfaced again in the public explanations of the need to limit local governments' authority under the PAP Law. Such laws tellingly contemplate legal sanctions for wayward state agents who unlawfully infringe citizens' rights.

Broad worries about the problems of overreaching state actors seem to be reflected in the Law on Martial Law and the Emergency Response Law as well. These laws provide that exceptional measures are to be limited to specific conditions and commensurate to the scope of the danger. Relatively liberal commentators apparently sought to exploit these apprehensions in arguing for construing special powers-authorizing legal provisions narrowly. In a similar vein, deputies to the national legislature argued, successfully, that only acts of sabotage, including terrorism, that cause or are likely to cause harm should be deemed to constitute threats to national security under the State Security Law.⁵⁸

Here, law's potential constraining effect remains far from fully realized. Its limitation is amply reflected in widespread reports of continuing abuses of police power and the lack of judicial due process accorded high-profile dissidents and alleged separatists whose cases are considered at the highest political level. It appears as well in the striking lack of invocation of full

57. See Wines, *supra* note 22 (characterizing this aspect of the PAP Law as perhaps the most important provision in the law and as meant to "prevent the misuse of the armed police by local governments, to prevent the deaths of innocent people").

58. Fu & Cullen, *supra* note 12.

formal emergency powers to address circumstances that, on official accounts at least, would seem to qualify for formal resorts to extraordinary power and did lead to de facto arrogation of such powers by state agents. Examples range from the allegedly separatist uprisings and ethnic mass violence in Tibet and Xinjiang to earthquakes in Wenchuan, Sichuan and Yushu, Qinghai, to SARS and societal and local governmental reaction to SARS.

Moreover, the significant anti-terrorism and other related legal changes since 9/11 have not generated a very vigorous public discussion about limiting the legal definitions of “separatism,” “terrorism,” and “religious fundamentalist extremism” (often referred to as the “three evil forces”). More precise and narrow definitions would limit the reach of severe sanctions attached to such offenses and the use of special powers contemplated under the emergency response laws, the PAP Law, or an eventual Anti-Terrorism Law. The question may not yet be fully ripe in Chinese law and policy discourse. There has been much rhetoric about the seriousness of the terrorist threat to China.⁵⁹ But China has not faced terrorist acts or plots that rise to the level of the terrorist attacks in the United States and elsewhere that have shaped post-9/11 developments in much of the rest of the world. And terrorism – by most definitions – has not played a central role in the emergencies that Chinese leaders have invoked to justify full-fledged or seriously contemplated uses of emergency and other exceptional powers in China.

A second prospect is that putting into legal form the state’s quite-expansive ordinary powers and the special authorizations – and correlative restrictions – of still-wider emergency powers entails at least an oblique or grudging acknowledgement that law has a proper role to play in regulating state action even in perilous circumstances. It opens the door to efforts (including from outside the regime) to subject the assertion and exercise of those powers to specifically and distinctively legal critiques. State behavior can be publicly assessed not just for its conformity to policy pledges, fundamental fairness, good governance, or instrumental rationality, but also for its adherence to legal requirements and, indeed, legal requirements that the state itself has endorsed.

Although this too has not yet become a powerful means for constraining the state, it does appear to have some potential. The reform-era leadership’s strong rhetorical and non-trivial substantive commitment to legality has been so extensive that it has at least created political space for this type of argument. Such arguments have a significant constituency in China, thanks in part to the regime’s investment and acquiescence in the emergence of a legally trained and legally minded segment of the intellectual and professional elite, the rise of some of members of that elite

59. *China To Draft Anti-Terrorism Law*, XINHUA NEWS AGENCY, June 16, 2005; Pat Mooney, *Analysts Dispute Uygur Ties with Terrorists*, S. CHINA MORNING POST, Sept. 5, 2006.

to positions of political influence, and the development of at least a modest level of legal consciousness and receptivity to law- and rights-based arguments among the broader Chinese populace.

This perspective has fueled debates over the laws proscribing and punishing behavior that the regime sees as threatening and over laws concerning emergency powers or exceptional authority. Chinese critics charged in 1989 that the declaration of martial law in Beijing had to be issued by the Standing Committee of the National People's Congress, and not the Premier, because it covered the entire urban area (although not the full formal territory) of Beijing (a provincial-level unit). They also argued that the members of the top legislative bodies must exercise their constitutional power and responsibility to cancel martial law and remove the Premier. Prominent criticisms of the response to SARS suggested that the flaws included a troubling and erroneous view that extraordinary conditions, without more, justified disregarding ordinary legal rules.

The Law on Martial Law and the Emergency Response Law responded to these types of concerns by mandating protection for citizens' legitimate rights and legal accountability for officials who violated them. Legal academics, who played significant roles in the debates that shaped the Emergency Response Law, argued that enhanced legal restrictions on state authority were necessary to reflect citizens' increased "awareness of autonomy." They maintained that emergency powers law necessarily draws a line around individual rights that the state cannot transgress, and that a state of emergency law's proper goals included minimizing adverse impacts on citizens' rights. Such perspectives could become more entrenched and widespread among China's rulers and those ruled. They might spread beyond their marginal role of addressing extreme departures from ordinary law under the relatively special conditions of the most severe perceived crises, such as Tiananmen Square and SARS, and laws drafted in immediate and urgent reaction to troubled responses to such crises. If so, their logic of restraint would extend *a fortiori* to support more vigorous legal limits to state power generally. But this remains, for now, a fairly large "if."

Chinese debates over anti-terrorism and national security law (narrowly defined) have grappled with these themes only sporadically or obliquely. Such arguments and critiques have been notably subdued in the context of addressing unrest in Xinjiang and the related adoption of the PAP Law. In part, this may be because the focus has been not the possible use of special laws and state power against "ordinary" Chinese (who have been principally affected by other natural and manmade crises and state responses to them) but, rather, their use against foreign terrorist groups and ethnic separatists. Those among minority nationalities branded as secessionists garner relatively little sympathy among China's overwhelmingly Han population because Han Chinese have been victims

(as well as perpetrators) of the communal violence that has rocked once-predominantly Muslim and Tibetan areas in China's Far West.⁶⁰

A third positive prospect is that China's laws can contribute to checking the state in a common law-like, if legally informal, way. This is true to the extent that the state does limit its encroachments on citizens' legal rights, liberties, and autonomy interests, and to the extent that discussions about such restraints occur with reference to laws purportedly governing uses of state power in response to serious threats to public order or national security. China, of course, is not a common law system and the state-restraining force of law of any type remains problematic and limited. Still, in China's legal system, with its constrained courts and lack of constitutional or other robust judicial review, law's meaning depends heavily on non-judicial state and social practice. Seemingly paradoxically, the very limits to formal and, especially, court-centered legal checks on state power mean that common law-like arguments emphasizing precedent and analogy (albeit not of a narrowly legal type) can be comparatively important political tools.

Such common law-style arguments to cabin state power can be derived from the very justifications that authorities have offered for adopting and using special threat-targeting laws and laws authorizing exceptional powers. There are at least potential foundations for restraint, or arguments for restraint, in the regime's eschewal of full-throated claims of a need for the most extreme assertions of state power except in a very few situations that arguably posed mortal threats and, more relevantly, were declared by the leadership to do so. It becomes harder to assert that the most extraordinary state powers legitimately can be deployed promiscuously if the types of challenges that the regime has claimed warrant such measures have generally not gone beyond a handful of instances that the authorities have portrayed as mortal perils. The regime characterized the Tiananmen movement as an effort to topple the government and the most severe challenge since the Cultural Revolution. It cast SARS as a toxic combination of public health dangers and ensuing panic-driven threats to social order, economic production, and foreign relations. Official and orthodox discourse offers additional support for resisting open-ended readings of emergency powers and other exceptional measures. Examples include acknowledgment that a lack of sufficiently clear and limiting criteria for special powers was a possible flaw that eroded legitimacy in the response to SARS, and moves to distinguish the severe turmoil that warrants martial law under the Law on Martial Law, or deployment of paramilitary forces under the PAP Law, from lesser threats.⁶¹

60. See, e.g., Ng Tze-wei, *Bloodshed and Tears: Clashes Between Uyghurs and Han Chinese*, S. CHINA MORNING POST MAG., Jan. 17, 2010, at 10 (recounting Han residents' criticism of government for failing to be more assertive in preventing Uighur unrest in 2009).

61. deLisle, *supra* note 2, at 379-382.

On this score too, prospects appear no better than mixed. On one hand, the regime's apparent comfort with relying on ordinary laws – and tolerated transgressions of the weak restraints imposed by Chinese constitutional law, criminal law, criminal procedure law, and so on – are bad signs for those who would advocate greater state restraint by drawing distinctions between the behavior so targeted and the handful of prior, ostensibly more severe threats that justified special state powers. In this respect, it is telling that the sharp response to ethnic unrest in Xinjiang has mostly relied on relatively ordinary laws and has stopped short of the use of, or even serious flirtation with, formally exceptional powers that marked the Tiananmen Incident and post-SARS post-mortems on apparent systemic inability to cope with a range of crises.

On the other hand, and despite the state's primary reliance on formally non-exceptional legal means, official and orthodox sources strikingly and perhaps tellingly have portrayed the 2007-2009 unrest among Tibetans and Uighurs as the product of violent, foreign-backed separatist movements bent on destroying China's territorial integrity and national sovereignty. These are the types of threats that would be seen in many systems – and are seen in China – as meriting extraordinary and relatively unconstrained response from the state. Beijing even has alleged links between accused Uighur separatists and al Qaeda – the sockdolager of post-9/11 arguments for departures from ordinary legal rights and rules.⁶² Such assertions show how easily international terrorism can be cast as an existential threat no less serious – and a good deal more amorphous and open-ended – than the ostensibly life-and-death challenges that have triggered the most serious uses of especially harsh measures and formally exceptional powers by Chinese authorities in recent decades. And such assertions further suggest possible recognition by the Chinese regime that perhaps nothing less will provide an argument that is satisfactory, at home or abroad, to defend the measures the leadership deems necessary or useful to address the perceived threats in the PRC's far northwest.

IV. INTERNATIONAL AND FOREIGN INFLUENCES

For the PRC, external factors, including the specter of international terrorism, have not had the transformative impact that they had in the United States and other nations in the West, Asia, and the Middle East that have been, or that see themselves as likely to be, targets of transnational terrorist attacks. So far, China's policies and roles in the world have not

62. *Separatists' Modus Operandi*, *supra* note 45 (mentioning the allegation in state media that foreign-based World Uyghur Congress was the "mastermind" behind Xinjiang violence); Information Office, State Council, People's Republic of China, 'East Turkistan' Terrorist Forces Cannot Get Away with Impunity, Jan. 21, 2002, available at <http://www.china-un.org/eng/zt/fk/t28938.htm> (alleging foreign backing, including from al Qaeda).

drawn the attention and ire of significant international terrorist groups. China's still-limited presence abroad and political and social control at home does not give such groups a wealth of easy targets. Chinese territory, resources, and financial institutions generally have not been employed in support of attacks elsewhere. As with so much else in China, making and using law to address the most severe perceived dangers to security, the state, and stability have been preoccupied, instead, with domestic concerns.

All of this may be beginning to change as China emerges as the world's second most powerful state. Its investments and economic presence abroad may breed resentment and create opportunities for hostile acts outside China against Chinese interests. Its expanding foreign policy agenda and occasional far-flung military deployments (as in the U.N.-backed effort to address piracy near Somalia) may increase frictions with groups that have spawned terrorist acts against the United States and others. Even the seemingly innocuous partial marketization and globalization of China's largely state-owned financial institutions carry risks, as is illustrated by lawsuits alleging that the Bank of China is liable for harms arising from a terrorist attack in Israel because the bank failed to prevent the terrorists from using accounts held at the bank to finance their scheme.⁶³

For now, however, internal dissent and separatism are far more significant problems in the eyes of China's leadership. They are much more central worries in China than in the West and most developed states (and many less developed states) today. Simply, Tiananmen Square, SARS, Tibet, Xinjiang Uighurs, and alienated or unbalanced citizens in the heartland are the concerns that have driven China to adopt legal changes that provide expansive state powers to prevent damage to national security and domestic order. China's rulers are not preoccupied with al Qaeda, suspicious international airline passengers, radicalized immigrants from South and Central Asia, terrorism-funding through international money transfers, and weapons of mass destruction and operatives that can slip through porous borders and into open societies. Moreover, significant aspects of the international response to terrorism produce wariness in China. Troops from the United States and its allies in Afghanistan, for example, raise alarms in China about the implications for China's strategic interests. The U.S.-led foreign presence chafes against long-standing (if recently eroding) anti-interventionist and pro-state-sovereignty norms in Chinese foreign policy and Chinese approaches to international law.

Although China's ambitious reform-era project of legal development has borrowed extensively from external and especially Western sources, alien laws and legal models have had less impact in political (and state security) fields than in economic ones.⁶⁴ On issues suffused, or even tinged,

63. See, e.g., *Elmaliach v. Bank of China* Civ. No. 09-2130 (PGG) (S.D.N.Y. 2010); cf. *Bank of China Overseas Branches Abide by Local Laws*, XINHUA NEWS AGENCY, Sept. 2, 2008.

64. Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal*

with politics (a category that clearly includes matters that Chinese authorities deem to threaten the security of the state), foreign ideas and ideals often have arrived as bases for criticizing China or seeking to transform China in ways that could threaten the existing authoritarian order. Chinese sources have routinely derided such international norm-backed pressure as an attempt by the United States and other nations to foster the "peaceful evolution" of the PRC into a system more to their liking.⁶⁵ Recently, the influence of foreign legal models may have begun to decline more broadly. Chinese skepticism toward outsiders' models and prescriptions seemingly has risen in tandem with China's economic accomplishments (including its weathering of the global economic crisis in 2008-2010), geopolitical clout, foreign policy self-confidence, and more nuanced assessment of its own interests. To be sure, China has in place much law that accords with the anti-terrorism agenda of Security Council Resolution 1373, other post-9/11 international initiatives, and major anti-terrorism accords. But China appears to have adopted laws that target terrorism and ancillary and supporting activities, and impose only loose procedural constraints on state authorities, with relatively little special regard for international resolutions and norms. Indeed, much of the Chinese framework was put in place before 9/11.

Nonetheless, international contexts and foreign comparisons have been significant in China's discussion and development of legal responses to what China has claimed are severe threats. Beijing has invoked international terrorism to defend its laws and actions focusing on national security and domestic stability. Official Chinese sources have routinely touted the PRC's adherence to nearly a dozen major international anti-terrorism-related conventions on matters ranging from aircraft hijacking and bombings to suppression of financing for terrorism. They point to new and preexisting Chinese domestic laws' conformity to those treaties, China's support for Security Council Resolution 1373, and China's acceptance of the mandates contained therein to adopt conforming domestic laws. They cite China's entry into cooperative international arrangements with its neighbors (including the members of the Shanghai Cooperation Organization, which has adopted its own multilateral anti-terrorism

Models, and Legal Change in the Post-Communist World and Beyond, 20 U. PA. J. INT'L ECON. L. 179 (1999).

65. Foreign official and NGO assessments and critiques of particular Chinese uses of force or the criminal process against alleged threats to state or national security are often phrased in terms of international human rights standards and face Chinese criticism for their demands, even if implicit, that China change to conform to foreign norms. Examples of such critiques include the annual U.S. State Department Human Rights Reports and *Amnesty International, Justice, Justice*, *supra* note 3. See also Verna Yu, *Warning Police Will 'Strike Hard at Hostile Forces'*, S. CHINA MORNING POST, Dec. 29, 2009, at 4 (quoting vice minister of public security's denunciation, in response to foreign critiques of China's handling of separatists, terrorists, dissidents and Falun Gong, of "ploys by Western anti-China forces seeking to Westernize and split" China).

accords), with the United States and others, including the Association of Southeast Asian Nations and the Asia-Pacific Economic Cooperation, to combat terrorism through means that include the adoption and implementation of special anti-terrorist laws and measures at the national level.⁶⁶

Asserting before foreign audiences that China's domestic enemies or targets of repression are terrorists – and, indeed, international terrorists – is a PRC tactic of long standing, but it became newly prominent, specific, and potent after 9/11. PRC sources have branded Uighur and Tibetan groups that participated in uprisings since the early 2000s as terrorists. By doing so, they have sought, with some success, to lump them with groups whose actions foreign governments and international bodies have deemed appropriate causes for legal changes that reduce or bypass ordinary limits on state power. In 2008, PRC sources strove to tie an alleged attack by Uighur militants on a paramilitary police station in remote Kashgar to the broader international security concern at that moment: the then-upcoming Beijing Olympics. Two years later, this strategy of asserting a common risk shared by China and its frequent critics gained a boost when three members of a pro-Uighur separatist group were arrested for bomb plots in Europe.⁶⁷ This line of argument went further still when PRC authorities and official spokesmen asserted that dissident Muslim groups in Xinjiang had cross-border ties to international terrorism, including al Qaeda.⁶⁸ In part based on the alleged al Qaeda links, the PRC pressed strongly and successfully after 9/11 to have the East Turkistan Islamic Movement labeled a terrorist organization by the United Nations and the United States. The PRC unilaterally formally so labeled several other Uighur groups. Such moves have been controversial. Especially abroad, they have fueled disputes about whether some of the targeted groups are terrorist, still active, distinct from one another, or ever existed.⁶⁹

66. See, e.g., Xue & Jin, *supra* note 11; Liu Zhenmin, Statement at the Sixth Committee of the 62nd Session of the U.N. General Assembly on Item 108 “Measures to Eliminate International Terrorism,” available at www.fmprc.gov.cn/ce/ceun/eng/smhwj/2007/t373009.htm; China's Position Paper on Counter-Terrorism, *supra* note 33; *Chinese Police Firmly Crack Down on All Terrorist Organizations*, *supra* note 44; Zhu Shanshan & Peng Pu, *Police Bust Terror Cell*, GLOBAL TIMES, June 25, 2010; Chen Qiang & Hu Qian, *Chinese Practice in International Law: 2001*, 1 CHINESE J. INT'L L. 328 (2002); U.S.-China Joint Statement (Hu-Obama Summit) Nov. 17, 2009, available at <http://www.whitehouse.gov/the-press-office/us-china-joint-statement>; Joint Statement of the People's Republic of China and the Islamic Republic of Afghanistan, available at <http://jm.chineseembassy.org/eng/xw/t259673.htm>; Kan, *supra* note 10.

67. Andrew Jacobs, *Ambush in China Raises Concerns as Olympics Near*, N.Y. TIMES, Aug. 5, 2008; Edward Wong, *Chinese Separatists Tied to Norway Bomb Plot*, N.Y. TIMES, July 9, 2010.

68. State Council Information Office, *'East Turkistan' Forces Cannot Get Away with Impunity*, *supra* note 62; Matthew Forney, *One Nation – Divided*, TIME, Mar. 28, 2002.

69. Kan, *supra* note 10, at 5-11; Chen & Hu, *supra* note 66; Philip P. Pan, *In China's West, Ethnic Strife Becomes "Terrorism"*, WASH. POST, July 15, 2002, at A12; Joe McDonald, *China Targets Xinjiang Rebels for bin Laden Links*, WASH. TIMES, Jan. 22, 2002,

Internationally, this tactic promised benefits for Chinese authorities. Legal changes that the United States and others have defended as necessary means for fighting terrorism and preserving national security, as well as anti-terrorism excesses committed by the United State, or transgressions of international and domestic legal limits that the United States has condoned have created significant “glass house” problems for some hitherto hearty foreign government criticisms of China. Such developments have undermined the force of foreign condemnations of China’s illiberal or repressive laws and actions. This has given China more room to claim that its laws and actions are justified by exigencies comparable to those faced in the post-9/11 West and elsewhere.⁷⁰ As quasi-official and sympathetic PRC commentators put it in the context of debates over China’s emergency powers legislation, all countries have such laws, and China need be no exception. Chinese sources have even portrayed China’s adoption of anti-terrorism and emergency powers laws as examples of legal learning from abroad.⁷¹

More broadly, China’s official positions on international terrorism have helped it to portray itself as a cooperative, normal state at a moment when neighboring states, the United States, and others are wary of an increasingly powerful China that they fear may be disruptive to the international order. And long-standing Chinese rhetoric about the importance of international cooperation and the more recent (but pre-9/11) “new security concept” (a foreign policy doctrine that stresses interstate coordination and recognizes the importance of “non-traditional” or non-”hard power” factors in national security) have been deployed to bolster the case that China behaves benignly and collaboratively in international anti-terrorism efforts.

Of more immediate practical consequence, the U.S. quest for Chinese support (or at least acquiescence, which is indispensable in the Security Council, and important in many other contexts) has increased China’s leverage in the bilateral relationship and the international system. Although causation is difficult to prove and many factors have been in play, increased

at A13; “*East Turkistan*” a Concept Forged by the Deceit of Separatists, Not History, CHINA DAILY, July 13, 2009; Chien-peng Chung, *China’s “War on Terror:” September 11 and Uighur Separatism*, FOREIGN AFF. July/Aug. 2002, at 8; AMNESTY INTERNATIONAL, *supra* note 3.

70. See, e.g., *Double Standards of West Exposed*, CHINA DAILY, July 15, 2009; Information Office of the State Council of the PRC, *Human Rights Record of the United States 2009*, available at http://www.chinadaily.com.cn/china/2010-03/12/content_9582821.htm; Edward Cody, *Beijing Hits Back at U.S. for Raising Rights Concerns; In Rebuttal of State Dept. Report, China Points to Iraq, Guantanamo Abuse Cases*, WASH. POST, Mar. 9, 2007; Preeti Bhattacharji, *Uighurs and China’s Xinjiang Region*, Council on Foreign Relations, July 6, 2009, available at http://www.cfr.org/publication/16870/uighurs_and_china_xinjiang_region.html.

71. deLisle, *supra* note 2, at 373; Ray Cheung, *A Further Step Along the Road to Transparency: Analysts Welcome the Move To Accept Foreign Help on Internal Security Matters*, S. CHINA MORNING POST, Dec. 16, 2003.

U.S. need or desire for China's help on terrorism (along with other security issues and economic issues) is widely and plausibly credited with producing a softening of U.S. criticisms of China's human rights and criminal justice records.⁷²

The narrative of anti-terrorism as global justification for extraordinary state powers and exceptional legal responses also seems to play reasonably well for the Chinese regime at home. Many among China's majority Han population – including many among the otherwise relatively liberal and cosmopolitan groups – do not share their Western counterparts' sympathy for Tibetan and Uighur demands for independence, autonomy, or human rights. The Chinese regime's ability to portray the more activist or radical elements among these groups as terrorists and foreign-backed secessionists likely helps tap into and reinforce popular support or tolerance for draconian legal – and extralegal – methods.⁷³ More broadly, the CCP-led PRC has rooted its legitimacy partly in longstanding popular and cultural fear of chaos and the regime's singular ability to keep such chaos at bay (whether the threat comes from ethnic separatists, political dissidents, foreign enemies or more mundane domestic sources), sometimes by illiberal, repressive, and violent means that the regime has claimed to be necessary.

On the other hand, playing the terrorism card and insisting that China's legal responses to purportedly serious menaces are consistent with post-9/11 global standards and foreign practices entail an oblique acknowledgement of – and perhaps an attempt to parry – a more liberal or pro-rights dimension of the impact that foreign and international standards might have on China. While laws targeting terrorism or other threats, emergency powers laws, and the weakness of international law in constraining nations, have been primarily a source of distress for proponents of vibrant civil liberties in much of the world, Chinese reformers and advocates of greater legal protection for citizens' rights have pointed to features of foreign and international laws to push back against some of the measures contemplated by Chinese lawmakers or embedded in PRC laws. Such voices in Chinese debates over emergency powers have embraced foreign examples and international norms to press their view of what China's special laws should contain. They have argued that, even in times of crisis and declared emergencies, PRC laws should impose the restrictions on state power set forth in the principal instruments of the

72. See, e.g., U.S. Department of State, Country Reports on Terrorism 2008 – China (Apr. 30, 2009); Kan, *supra* note 10 (presenting partly critical but mixed account of China's anti-terrorism actions); Chung, *supra* note 27, at 80-84 (arguing that foreign responses to Chinese treatment of ethnic minorities, including in context of alleged terrorism, often reflect the state of relations between China and foreign countries).

73. For one typical example, see *Evidence Shows Rebiya Kadeer Behind Xinjiang Riot*, XINHUA NEWS AGENCY, July 8, 2009 (blaming exiled Uighur leader for violence, assimilating separatist Uighur agenda to that of Dalai Lama, and their attempts to gain international influence to advance their aims).

international human rights legal regime, including the International Covenant of Civil and Political Rights (ICCPR). They have argued that the emergency powers provision in the Constitution is the domestic implementation of the article in the ICCPR that permits strictly limited derogations of human rights during states of emergency. They have invoked as an appropriate template for emergency laws (and other laws) some of the fundamental limits to state power, even in times of crisis or emergency, found in “modern rule of law states.”⁷⁴

China's post-9/11 invocation of the global anti-terrorism agenda has echoed these arguments. One commentator noted, for example, the problem of distinguishing between national liberation movements in colonized or oppressed areas, which Chinese law should not regard as terrorism (despite such movements' occasional use of terrorist means), and the terrorism that Chinese law properly should target with special measures. Therein lay both a normative claim that embraced standards rooted in international human rights law (including the rights of peoples to self-determination) and a clever Chinese political argument. The latter evoked an ideological trope from the Mao era (support for those throwing off the colonial yoke and other forms of repression) to oppose expansive definitions of the range of threats that warrant especially harsh sanctions and weak limits on the state, particularly in contexts that arguably bore a similarity (albeit one not fully articulated) to contemporary Tibet and Xinjiang. Another commentator argued that, while China and other states may adopt laws to punish and prevent terrorism, even those who have committed criminal acts of terrorism must still enjoy the protections accorded by international human rights and humanitarian law. Others have asserted more broadly that international human rights law and Security Council resolutions must guide and constrain the adoption of anti-terrorism provisions in China's criminal law.⁷⁵

Here, Chinese foreign policy considerations may offer relatively liberal and pro-legality positions some accidental help. The PRC's concern about avowedly anti-terrorist uses of force by the United States near China's borders and Beijing's diplomatic agenda to criticize U.S. human rights shortcomings exposed in Washington's “war on terror,” have led the Chinese regime to open the door a bit wider for those who might invoke international legal norms to criticize China's laws and behavior. Although primarily targeting U.S. military actions and rights abuses, official PRC

74. deLisle, *supra* note 2, at 373, 385-387; Mo Jihong, *The Constitutional Law of the People's Republic of China and Its Development*, 23 COLUM. J. ASIAN L. 137, 169 (2009).

75. Huang Yao, *On the Issues of National Liberation Movements in International Anti-Terrorism Law*, ZHONGSHAN DAXUE XUEBAO (SHEHUI KEXUE BAN) [SUN YAT-SEN UNIVERSITY JOURNAL (SOCIAL SCIENCES VOLUME)] no. 8, 172 (2008); Zhu Wenqi, *Anti-Terrorism and International Humanitarian Law*, HUADONG ZHENGFA DAXUE XUEBAO [EAST CHINA UNIVERSITY OF POLITICS AND LAW JOURNAL] no. 1, 126 (2007); Zhao & Wang, *supra* note 29.

assertions that “counter-terrorism should be pursued on the basis of international law and norms” and should be pursued through cooperative means led by the Security Council (and thus follow its legalistic templates) cannot be reliably limited to the non-Chinese behavior at which they were directed. They can give the regime’s critics at home and abroad more latitude to invoke such international laws and norms as legitimate standards for assessing China’s record and agenda.⁷⁶

V. LESSONS FROM THE CHINESE CASE

The recent Chinese experience with making and using law to address threats to national security and public order, other crises, and emergencies, suggests two ambiguous pairs of lessons. The first pair concerns relatively academic issues of comparative law. For exceptionalists, pluralists, or parochialists, the Chinese case may demonstrate the limited range of what might seem to be ubiquitous legal phenomena. The post-9/11 terrorism-fueled fears and the legal responses that have so controversially changed law in the United States, in much of the rest of the world, and in the international system seem to have had relatively modest impact in a powerful state that is home to nearly one-fifth of the world’s people. The moves – and the debates about moves – to limit citizens’ legal rights or reduce limits on the state’s power in the face of purported threats to security and order or looming crises, look very different in China than they do elsewhere, especially in the United States and other liberal constitutional democracies. The sense of a wrenching choice between citizen rights and robust legality, on one hand, and state security and system survival, on the other, is a good deal more muted in China. Compared to the United States and kindred systems, China suggests a weaker case for seeing formal legal change as the appropriate focus of debate, given the much weaker assumption (whatever its accuracy in either setting) in China that the laws adopted will reliably and predictably shape exceptional uses of state power.

For those of a more universalistic bent in comparative law, the Chinese case may say something very different. Chinese lawmakers, political authorities, and advisers have been grappling with problems and dilemmas that at least broadly resemble those that have faced their counterparts in the United States, Europe, and other countries. Chinese emergency powers law, Chinese laws addressing terrorism and national security, and ordinary Chinese laws that can be useful and have been used against ostensible threats to security, stability, and order – and debates about such laws – include much that at least loosely parallels anti-terrorism legal changes adopted, and disputed, elsewhere in the aftermath of 9/11. In spite (or perhaps because) of all China’s differences from liberal constitutional

76. *China Says War on Terror Must Respect UN, International Laws*, XINHUA NEWS AGENCY, Sept. 14, 2002; *Anti-Terrorist Fight Must Be Based on International Law-SCO Leaders*, INTERFAX NEWS AGENCY, May 29, 2003.

democracies, the Chinese experience suggests an internationally shared *problematik*, and a common, limited – and often problematic – array of legal responses. Although far from an instance of legal transplantation, post-9/11 developments in Chinese emergency powers law, anti-terrorism law, and related fields show that China has not been entirely insulated from developments in international law responding to 9/11, or foreign examples of similar laws and legal responses to similar problems. Such external laws, norms, and practices have served as rhetorical fodder and, for some, genuine benchmarks in Chinese arguments aimed at domestic elite and popular audiences and international ones as well.

A second pair of lessons is of more immediately practical importance, but at least equally ambiguous. On one hand, the Chinese case appears to be a cautionary tale that confirms one strand in a liberal-legalist critique of the embrace of special laws and suspensions of ordinary legal orders to tackle purportedly mortal dangers. However one assesses the gravity of the various regime-identified threats to the state and order in China, the regime's self-portrayal is far from triumphant, despite its having put in place laws that impose few constraints on the state and provide few protections of individual liberties. Although China has enacted constitutional amendments and laws granting emergency powers (and discussed several additional laws in the same vein), Chinese authorities have never invoked the full powers of states of emergency or declared a full-fledged state of emergency, with the exception of their resort to the constitution's martial law provision in 1989. They have relied to some extent on lesser extraordinary measures (including emergency response plans mandated by laws that also authorize more radical emergency powers) and relatively narrow threat-responsive amendments (including some targeting terrorism and supporting activities). And they have resorted more commonly to ordinary criminal laws and *de facto* powers that overreach formal legal ones.

Yet, official claims that state security and public order face dire threats recur. Whether the special laws are in the end relatively valueless despite their apparent and purported utility or whether they are potentially effective but lie less than fully deployed because of the costs and criticisms a more widespread use would entail, it seems clear that such special legal weapons – like the regime's wider arsenal of more mundane legal measures – have not bought peace in the battle against the identified mortal enemies.

At least for liberal-legalist critics of post-9/11 developments elsewhere, the PRC's foray into legal regimes to respond to national security and other serious threats thus suggests a paraphrase of an aphorism from (or at least attributed to) one of the framers of the U.S. Constitution. Benjamin Franklin famously (and at least reputedly) cautioned, "Those who would give up Essential Liberty to purchase a little Temporary Safety deserve

neither Liberty nor Safety.”⁷⁷ (As with translations of the Chinese term *anquan*, quotations or misquotations of Franklin use “safety” and “security” interchangeably.)

On the other hand, the discourse over emergency powers law and legal responses to terrorism and other security threats in contemporary China does contain hopeful elements for those who despair at the consequences for legality and liberty of post-9/11 developments in liberal constitutional democracies. Even in the seemingly inhospitable terrain of the PRC legal system, the debates over emergency powers law and broader state security law reveal some sense among Chinese authorities that legal rights matter (hence the need to provide for their suspension or alteration). The debates also indicate a sense that citizens’ legal rights might warrant protection because they can be useful to the Party and the state, and that engaging international legal norms is, to some degree at least, necessary and acceptable. This Chinese discourse also revealed a cadre of Chinese participants who have developed a sophisticated appreciation and appetite for pro-rights legal norms familiar in, and partly borrowed from, the West and other international sources. To be sure, Chinese advocates of relatively liberal notions of legality and rights face an uphill battle and have had only modest impact on China’s development of law to address real, imagined, or concocted emergencies, crises, and dangers. Their accomplishments thus far are a small step. But, in the words of Lao-tzu – the Taoist thinker generally regarded as no friend of expansive and intrusive state power – even a journey of one thousand *li* must begin with a single step.⁷⁸

77. Pennsylvania Assembly, Reply to the Governor, Nov. 11, 1755. The statement became the motto of the *Historical Review of Pennsylvania*.

78. Lao-tzu, TAO-TEH CHING (James Legge trans., 1891, 2008) ch. 64.