

# LEGAL FUNCTIONS OF THE PRISON SYSTEM AND STATE LEGITIMACY IN COMMUNIST CHINA

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## ABSTRACT

This Article traces changes in the prison system in communist China and examines the relationship between the legal functions of prisons and the legitimation strategies of the state in different economic contexts. This Article finds that economic schemes and legitimation strategies are the two pivotal factors driving the prison system and shaping penal practices. In the early planned economy period, the Chinese government built its legitimacy on the revolutionary ideology to create a communist country, so the legal functions of the Chinese prison system focused on remodeling of prisoners through collective forced labor. Later, in the time of economic reform, legitimacy of the regime stemmed from its economic performance, so the legal function of the Chinese prison system shifted towards profit maximization, focusing all of its efforts on production. As the economic reform developed further, the Chinese government based its legitimacy on legal rules to accomplish its various goals, leading to the codification of the prison system to achieve the goals of scientization and socialization.

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## INTRODUCTION

Since the last decade of the 20th century, legitimacy has become a popular topic within the field of criminal justice and been widely studied through the model of procedural justice, with much attention devoted to its relationship with the police,<sup>1</sup> and some are directed towards prison systems.<sup>2</sup> The results of these studies support the argument that the role of procedural justice explains the variation in people's compliance with the law. This theoretical approach was first popularized by Tom Tyler's seminal book *Why People Obey the Law*<sup>3</sup> and has become a predominant way of studying the importance of legitimacy in criminal justice.<sup>4</sup>

Prior process-based research studies have largely concentrated on the legitimacy of criminal justice itself. There are, however, few studies that look at the state level and inquire about the relationship between criminal justice and the legitimacy of the state. Moreover, of these relatively rare studies, most have focused on Western, democratic, and developed countries, with less scholarly attention being paid to those in non-Western, authoritarian, or developing contexts, such as the People's Republic of China (PRC). Therefore, the aim of this Article is to fill these gaps by providing a comparative analysis of communist China and probing into the relationship between the PRC's legitimacy and prison system on a national scale.

Studies on the prison system in communist China have shown that since the Chinese Communist Party (CCP) took control of China in 1949, profit-seeking has been one of the main purposes of the Chinese prison system.<sup>5</sup> The prison system in communist China was comprised of two major labor camps: labor reform camps and labor reeducation camps. The former was designed for criminal perpetrators with formal decisions adjudicated by the judiciary; the latter was seen as a type of administrative detention, operated by law enforcement agencies without trial to

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1. See, e.g., Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513 (2003); Tom R. Tyler & Jeffery Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008); Jonathan Jackson, Ben Bradford, Mike Hough, Andy Myhill, Paul Quinton & Tom R. Tyler, *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 BRIT. J. CRIMINOLOGY 1051 (2012).

2. See, e.g., RICHARD SPARKS, ANTHONY BOTTOMS & WILL HAY, *PRISONS AND THE PROBLEM OF ORDER* (1996); ALISON LIEBLING & HELEN ARNOLD, *PRISONS AND THEIR MORAL PERFORMANCE: A STUDY OF VALUES, QUALITY, AND PRISON LIFE* (2004); Michael D. Reisig & Gorazd Mesko, *Procedural Justice, Legitimacy, and Prisoner Misconduct*, 15 PSYCHOL., CRIME, & L. 37 (2009); BEN CREWE, *THE PRISONER SOCIETY: POWER, ADAPTATION AND SOCIAL LIFE IN AN ENGLISH PRISON* (2009).

3. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

4. Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 120 (2012).

5. See generally Mao-hong Lin, *Carceral Strategy and the Social Structure in Maoist China*, 38 UCLA PAC. BASIN L.J. 33 (2021).

manage classes of people who were deemed aberrant by the state, such as beggars or prostitutes.<sup>6</sup> The Chinese government implemented forced labor as its major treatment for prison populations and positioned the prison system as a “special state-owned enterprise.”<sup>7</sup> As a result, a close nexus between imprisonment and forced labor has developed and has been the driving force of prison economy in communist China for a long time. In other words, China’s carceral policy could be also viewed as part of the country’s labor policy under different economic schemes. Consequently, regardless of the divergent forms of the Chinese prison system across different time periods, such as the people’s commune under the planned economic scheme in the pre-reform era or the style of contract-responsibility under the socialist market scheme in the reform era, Chinese prison policies are simply different styles of the “prison-labor complex” modulated under distinct societal circumstances in communist China and sensitive to changes in the economic situation.<sup>8</sup>

The above analysis of communist China’s carceral mechanism has told readers about the interactions between the communist state and the prison system and the importance of its economic role in different times. Through the analysis, readers can understand the inception of the prison-labor complex and its derivative types, the development of the labor camps, and the changes made to the prison system under distinct economic schemes.<sup>9</sup> It is still unclear, however, what caused the Chinese prison system to develop in such an unorthodox manner, resulting in the current system. After all, it is not possible for such developments and changes in penal practice to arise out of thin air. They must have happened in a way of social embeddedness where the norms, customs, mores, traditions, and so forth are located;<sup>10</sup> or to be more concrete, there must have been an environment where these developments and changes were supposed to hinge on the laws, polity, judiciary, and bureaucracy.<sup>11</sup> Garland has pointed out that penal practice is always a product out of the deployment of state power, operated through institutions and exerted by state leaders.<sup>12</sup>

To address this understudied aspect of the prison system in communist China, this Article delves into the question about how this authoritarian country acquired its legitimacy and earned people’s trust, through its criminal justice system in different times. This Article will show that economic schemes and legitimation strategies in different

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6. Hualing Fu, *Dissolving Laojiao*, 1 CHINA RTS. F. 54, 54 (2009).

7. Lin, *supra* note 5, at 34.

8. Mao-hong Lin, *Economic Challenges and Prison Renovation in Reform China*, 17 U. PA. ASIAN L. REV. 403, 439 (2022).

9. See generally Lin, *supra* note 5; Lin, *supra* note 8.

10. Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 596 (2000).

11. *Id.* at 597.

12. David Garland, *Penalty and the Penal State*, 51 CRIMINOLOGY 475, 493–94 (2013).

times are the two pivotal factors driving the Chinese prison system and shaping its penal practices. Through a historical analysis of institutional changes in the Chinese prison system, this Article also maps out the route through which the prison system has evolved into its current shape.

This Article is divided into three parts by time period and explores the corresponding type of state legitimacy and legal function in each period. In Part I, this Article explores the time of the planned economy and argues that the Chinese government built its legitimacy on a revolutionary ideology derived from its victory in the civil war against the Chinese Nationalist Party and its efforts to ensure a stable country within a communist design. Ideology and these efforts have caused the prison system in that time to implement thought remodeling of prisoners through collective forced labor. In Part II, this Article explores the later period of economic reform when legitimacy of the regime primarily stemmed from its economic performance, causing the prison system to turn to profit maximization and causing it to put all its energy on prison production. In Part III, this Article looks at the 1990s when economic reform progressed further to argue that the Chinese government based its legitimacy on law to accomplish its goals such as economic performance, technocratic governance, and limited political reform. The prison system was thus transformed into a codified one to achieve the goals of scientization and socialization.

## I. PURSUIT OF COMMUNISM: LATE 1940S TO LATE 1970S

### A. *Governing through Political Ideology*

In Max Weber's works, he argued that human compliance is established on three major bases: habit, affection, and rational calculation of values and goals,<sup>13</sup> and accordingly specified three ideal types of legitimate domination through which sovereign power can be built on: traditional, charismatic, and rational-legal.<sup>14</sup> Recent studies argue that, other than focusing on the basis of human compliance as Weber's taxonomy of legitimate authority has shown, sources of legitimacy can be better understood through the ways a state can justify its dominance: setting up fair laws or regulations and procedures, providing public goods, and the use of shared values, inclusive of traditional, religious, or ideological ones.<sup>15</sup> Therefore, legitimacy can be categorized into three types: (1) legal-procedural, (2) performance-based, and (3) ideological. The legal-procedural legitimacy is supported when laws and regulations are equally binding to all persons and groups concerned through a generally

13. MAX WEBER, *The Nature of Social Action*, in MAX WEBER: SELECTIONS IN TRANSLATION 7, 28 (WG Runciman ed., 1978).

14. MAX WEBER, *The Types of Legitimate Domination*, in ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY, VOLUME 1 212, 215–16 (Guenther Roth & Claus Wittich eds., 1978).

15. DINGXIN ZHAO, *THE CONFUCIAN-LEGALIST STATE: A NEW THEORY OF CHINESE HISTORY*, 38 (2015).

recognized process. The performance-based legitimacy is enjoyed when the people perceive state's actions to be beneficial to them. Finally, the ideological legitimacy is espoused when the foundational value of a state's domination is widely recognized and accepted by the people.

Ideology plays a crucial role in providing the normative foundation for the source of political authority in communist regimes.<sup>16</sup> Specifically, research on China shows that in the pre-reform era, the legitimacy of the CCP regime was built on the revolutionary ideology to build a communist country.<sup>17</sup> In the preamble of its provisional constitution "Common Program of the Chinese People's Political Consultative Conference" promulgated in 1949, the CCP emphasized the importance of the replacement of the fascist country of capitalism and feudalism under the control of the Chinese Nationalist Party with a republican one led by the people of China through democratic dictatorship.<sup>18</sup> The CCP, as the vanguard of the proletariat, was expected to lead the country which was to be dominated by the people and shared by the people through the process of socialization. Mao Zedong, the first chairman of the CCP and the founding father of PRC, thought that the people of China should be comprised of the working class, the peasantry, the urban petty bourgeoisie, and the national bourgeoisie.<sup>19</sup> These classes were to be led by the working class and the CCP and were to be united to form their own state and elect their own government.<sup>20</sup> In turn, these groups would enforce the dictatorship over the landlord class, the bureaucrat-bourgeoisie, and the reactionaries of the Chinese Nationalist Party.<sup>21</sup> Democracy was only to be practiced within the ranks of the people, who enjoyed the rights of freedom of speech, assembly, association and so on.<sup>22</sup> The right to vote would belong only to the people, not to the reactionaries.<sup>23</sup> The combination of these two distinctions, that is, democracy for the people and dictatorship over the reactionaries, was the central idea of "the people's democratic dictatorship."<sup>24</sup>

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16. See generally David Beetham, *Political Legitimacy*, in THE WILEY-BLACKWELL COMPANION TO POLITICAL SOCIOLOGY 120 (Edwin Amenta, Kate Nash, & Alan Scott eds., 2012).

17. Heike Holbig & Bruce Gilley, *Reclaiming Legitimacy in China*, 38 POL. & POL'Y 395, 397 (2010).

18. Zhongguo Renmin Zhengzhi Xieshang Huiyi Gongtong Gangling (中国人民政治协商会议共同纲领) [Common Program of the Chinese People's Political Consultative Conference] (promulgated by the Chinese People's Political Consultative Conference, Sept. 29, 1949).

19. Zedong Mao, *On the People's Democratic Dictatorship*, SELECTED WORKS OF MAO TSE-TUNG, June 30, 1949, [https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4\\_65.htm](https://www.marxists.org/reference/archive/mao/selected-works/volume-4/mswv4_65.htm) [<https://perma.cc/6YVF-TKAD>].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

The people's democratic dictatorship was Mao's version of democratic theory and provided a blueprint for the transitional phase from bureaucratic capitalism to socialism, and finally to communism.<sup>25</sup> During this period of ideological legitimacy, the government considered law to be an ideological tool that could be used to shape society, consolidate its proletarian dictatorship over the country, and finally exterminate the bourgeois class and all other reactionaries.<sup>26</sup> In the early years following the inception of PRC in 1949, the ideological use of legal rules successfully put China under the CCP's command, in compliance with the CCP's ideology of suppressing the original ruling classes, comprised of imperialists, feudalists, bureaucratic capitalists, and compradors, to justify its large-scale crackdowns over those counterrevolutionaries.<sup>27</sup> On the other hand, the instrumental feature of law also meant it could be utilized only when it was needed.<sup>28</sup> Therefore, the vacuums of legal order during the time of Anti-Rightist Movement (1957–1959), Great Leap Forward Movement (1958–1960), and the Cultural Revolution (1966–1976) were not beyond anyone's expectation, because non-legal means were more desirable than legal ones for the authorities during those periods.<sup>29</sup>

Nevertheless, the excessive extra-legal methods exerted during the Anti-Rightist Movement, during conflicts among factions within the CCP, and during the disastrous famine brought on by the Great Leap Forward Movement led to an ebb in the CCP's ruling legitimacy, and later to the disastrous violence across the country during the Cultural Revolution. This violence brought about a devastating influence on the government's legitimacy. The Cultural Revolution was undoubtedly an outright catastrophe for the entire society. It accelerated the decline of Mao's ideology and completely wiped away the legitimacy of the CCP regime. A shift of the CCP regime's legitimacy away from the traditional communist ideology was inevitable under those circumstances.<sup>30</sup> Therefore, right after the death of Mao in 1976 and the termination of the Cultural Revolution in the same year, the high-ranking officials of the CCP soon fostered a transformation to refocus the CCP leadership and ground its legitimacy primarily on economic development.

### B. *Law as Ideology in Prison*

The prison system of labor camps was formally set up in the 1950s, shortly after the end of the civil war between the CCP and the Chinese Nationalist Party.<sup>31</sup> Just after the lengthy warfare of World War II and

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25. H. Arthur Steiner, *The People's Democratic Dictatorship in China*, 3 THE W. POL. Q. 38, 39 (1950).

26. Xingzhong Yu, *Legal Pragmatism in the People's Republic of China*, 3 J. CHINESE L., 29, 40 (1989).

27. *Id.*

28. *Id.* at 41.

29. *Id.*

30. Holbig & Gilley, *supra* note 17, at 397.

31. Lin, *supra* note 5, at 42.

China's civil war, the CCP administration confirmed its sharky ruling legitimacy. As illustrated in the prior Subpart, it was done by promoting a revolutionary ideology to build a communist country based on the people's democratic dictatorship, differential treatment of the people and the enemies of the socialist society, and an end to the warfare, with assurances of an ordinary social life for every citizen.

Similarly, the CCP's plan for legitimacy also impacted its prisons. China's penal labor camp system was rooted in the Soviet Union's experience of gulag scheme, specifically on the principle of punishing and remodeling criminals through forced labor.<sup>32</sup> This scheme was an ideological derivative of Karl Marx's famous quote that physical labor is the best disinfectant for preventing social viruses.<sup>33</sup> However, the CCP administration made some modifications as it adapted the gulag scheme for Chinese society in the postwar period. Labor camps were designed to remodel criminals, address the problem of prison capacity, and prevent criminals from living as parasites.<sup>34</sup> Additionally, the CCP believed that the huge prison population should be exploited in service of the development of the state.<sup>35</sup> Therefore, just like in the Soviet Union, the predecessor who applied the principle of forced labor as punishment in communist settings and enjoyed its economic and punitive functions,<sup>36</sup> China also took advantage of the economic effects through punitive hard labor. As Mao conveyed in the 1951 resolution, penal labor camps were established to combine penalties for bad acts and reform via labor for the prisoners, and to meet the country's development needs.<sup>37</sup>

The guiding principle of "forced labor as punishment" perfectly matched the legitimation basis of the CCP regime. As elucidated in the previous Subpart, the ideology of the people's democratic dictatorship required the state to differentiate between the people and the enemy of the society and to treat them differently. Only the former would be treated democratically and were allowed to enjoy the individual rights while the latter, such as the landlord class, the bureaucratic bourgeoisie, and the reactionaries of the Chinese Nationalist Party, would be governed through autocracy and dictatorship.<sup>38</sup> Those "enemies" were to be separated from the society, sent to penal labor camps, and engaged in forced and hard labor in order to remodel their thought. Thus, the system

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32. KLAUS MÜHLHAHN, *CRIMINAL JUSTICE IN CHINA: A HISTORY* 148 (2009).

33. *Id.* at 150.

34. Guanyu Zuzhi Quanguo Fanren Laodong Gaizao Wenti de Jueyi (关于组织全国犯人劳动改造问题的决议) [Resolution on the Question about Organizing All Criminals to Reform through Labor] (promulgated by the Central Committee of the Communist Party of China, May 15, 1951, effective May 22, 1951) The 3d National Public Security Conference, May 15, 1951 (China).

35. Lin, *supra* note 5, at 43.

36. See generally Michael Ellman, *Soviet Repression Statistics: Some Comments*, 54 EUR.-ASIA STUD. 1151 (2002).

37. See Lin, *supra* note 5 at 43.

38. See discussion *supra* Subpart A.

of labor camps played a vital role in carrying out the ideology of the people's democratic dictatorship in the pre-reform era and served as part of the legitimacy plan of the CCP regime on the ideological side. Moreover, the emphasis on the economic function of labor camps also fulfilled the communist idea that every citizen must work to support their own life in the scheme of planned economy, including those behind bars.

Furthermore, to cultivate a strong sense of loyalty and devotion of prisoners to the CCP and the socialist society the party sought to create, a variety of methods were employed in prisons. Political education was of course critical; cadres were tasked with teaching prisoners about the ideals and principles upon which the CCP was founded.<sup>39</sup> The CCP also sought to foster and mobilize activists within prison population who were able to assist the labor reform and support the leadership of the party. Those active prisoners would form a special group which was viewed as a crucial bridge between cadres and prisoners. They were given certain powers and responsibilities to ensure that they could effectively carry out their duties. The Ministry of Public Security allowed committees of politically active prisoners to be formed in prisons, giving them significant influence over the management of prisoners' food supply and public hygiene under the guidance of cadres.<sup>40</sup> While they did not have the legal authority to order other prisoners around, their suggestions were taken seriously by the cadres and acted upon accordingly.<sup>41</sup> The existence of this special group of politically active prisoners would give incentives to other prisoners to qualify them as activists and demonstrate their political faithfulness to the governance of CCP.<sup>42</sup> As a result, this institution not only consolidated the socialist leadership of the party but also ensured prisoners' obedience to cadres.

Because of the authoritarian governance over the prison system via laws and regulations for the purposes of political control, state development, and thought remodeling, the Chinese carceral system of labor camps during this time could be considered as under the governance through political ideology.

## II. THE REFORM ERA: LATE 1970S TO 1990S

### A. *Governing through Economic Performance*

During Mao's time, the Great Leap Forward movement clearly proved that the top-down model of a planned economy—an economy in which the state runs numerous economic plans for civilians to participate in—was incapable of providing adequate incentives for people to work

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39. See Lin, *supra* note 5, at 52.

40. Guanyu Zuzhi Fanren Jiji Fenzi Weiyuanhui Youguan Wenti de Yijian (关于组织犯人积极分子委员会有关问题的意见) [Opinion on the Relevant Questions of Organizing a Committee of Active Prisoners] (China).

41. *Id.*

42. Lin, *supra* note 5, at 53.

hard.<sup>43</sup> The subsequent dreadful effects brought by the Cultural Revolution pushed the weak Chinese economy to the verge of breakdown.<sup>44</sup> Consequently, the pressures and desires from Chinese people for a secure and stable environment for economic development in the post-Mao era forced the CCP administration to reform and open up the Chinese economy so as to reinvigorate the internal economy and expose China to the external world.<sup>45</sup>

Whilst the economic reform was zealously supported by most of the high-ranking officials of the CCP, the traditional communist mindset still wielded strong influence on some top CCP officials in the 1980s. These officials held firm faith that the communist ideology should still be the basis of the CCP regime's legitimacy.<sup>46</sup> In other words, they were not fully convinced of the performance-based legitimacy. The economic transformation in the early reform era caused some problems before the long process of ideological adaptation has been done.<sup>47</sup> In consequence, when these conservative state officials felt the threats to their power, they usually initiated protective political campaigns to conserve themselves, such as the anti-spiritual pollution campaign in 1983 and the anti-bourgeois liberalization campaign in 1987.<sup>48</sup> Those campaigns, however, never lasted long and had little effect on reform and opening.<sup>49</sup>

Legal instrumentalism retained its strong support during the period of performance-based legitimacy. CCP leaders justified the pivotal transformation of the economic system by concluding in the Sixth Plenary Session of the Eleventh Central Committee of the CCP in 1981 that class struggle was no longer important because the exploiting class has been excluded from China.<sup>50</sup> The instrumental role of law, in the service of economic development, was illustrated by the report of Zhao Ziyang in the Thirteenth National Party Congress of the CCP in 1987. The report emphasized the importance of legal institutions in the primary stage

43. See generally Wei Li & Dennis Tao Yang, *The Great Leap Forward: Anatomy of a Central Planning Disaster*, 113 J. POL. ECON. 840 (2005).

44. XIAO GUOLIANG (萧国亮) & SUI FUMIN (隋福民), *ZHONGHUA RENMIN GHEGUO JINGJISHI, 1949–2010 (中华人民共和国经济史, 1949–2010)* [ECONOMIC HISTORY OF THE PEOPLE'S REPUBLIC OF CHINA, 1949–2010] 170 (2011).

45. See Jinglian Wu & Shitao Fan, *China's Economic Reform: Processes, Issues, and Prospects (1978–2012)*, in *ROUTLEDGE HANDBOOK OF THE CHINESE ECONOMY* 55, 56 (Gregory C. Chow & Dwight H. Perkins eds., 2014).

46. Hongxing Yang & Dingxin Zhao, *Performance Legitimacy, State Autonomy and China's Economic Miracle*, 24 J. CONTEMP. CHINA 64, 74 (2015).

47. See Gunter Schubert, *One-Party Rule and the Question of Legitimacy in Contemporary China: Preliminary Thoughts on Setting Up a New Research Agenda*, 17 J. CONTEMP. CHINA 191, 192 (2008).

48. Yang & Zhao, *supra* note 46, at 74.

49. *Id.*

50. Guanyu Jianguo Yilai Dang de Ruogan Lishi Wenti de Jueyi (关于建国以来党的若干历史问题的决议) [Central Committee of CCP's Resolution on Some Historical Questions of the Party since the Establishment of the Country] (promulgated by the Central Committee of the Communist Party of China, June 27, 1981) (China).

of socialism and touted the need to establish a socialist legal system in preparation for advancing to a socialist democratic society.<sup>51</sup> Thus, the CCP applied the policy that legal instruments were the chief way, supplemented by other types of method, to maintain the social order and improve the country's economic performance.<sup>52</sup>

The opening-up policy allowed overseas tourists from all over the world to visit China, particularly people with the same languages and similar cultures from Taiwan and Hong Kong.<sup>53</sup> Their visitations brought Chinese people new ideas and ways of life. Chinese people were especially stunned by the wealthy life led by their relatives or friends from other parts of the world. They began to doubt the traditional conviction in the primacy of socialism so that the CCP administration, for maintaining its ruling legitimacy, had no choice but to increase its dependence on economic performance.<sup>54</sup>

Nevertheless, the market-oriented reform strategies inevitably brought about inflation which never occurred during the planned economy of the pre-reform era. The expansion of individual freedom also led to critiques of the government's vicious actions during the Cultural Revolution and reflections on what caused the government to do so. Moreover, the economic reform also resulted in the wide range of corruption in the central and local governments as well as wealth disparity. All of these triggered the public grievances and finally resulted in the Tiananmen Square Incident in 1989.<sup>55</sup> The outbreak of Tiananmen Square Incident, together with the collapse of communism across the Eastern Europe and the Soviet Union from 1989 to 1991, gradually undermined the CCP regime's performance-based legitimacy and destabilized its dominance in the late 1980s, causing the CCP to implement new legitimation tactics in the 1990s.<sup>56</sup>

### B. *Law as Performance: Prison in the Market Socialism*

As the previous Subpart shows, when Chinese society marched into the reform era, the major missions of both the government and the public were to improve the national economy and make more profits.

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51. Zhao Ziyang (赵紫阳) *Yanzhe You Zhongguo Tese de Shehui Zhuyi Daolu Qianjin Zai Zhongguo Gongchandang Di Shisan Ci Quanguo Daibiao Dahui Shang de Baogao* (沿着有中国特色的社会主义道路前进—在中国共产党第十三次全国代表大会上的报告) [Advance along the Road of Socialism with Chinese Characteristics: Report Delivered at the 13th National Congress of the Chinese Communist Party] (1987), <http://cpc.people.com.cn/BIG5/64162/64168/64566/65447/4526368.html>.

52. See Yu, *supra* note 26, at 41.

53. Yang & Zhao, *supra* note 46, at 73.

54. *Id.*

55. *Id.* at 75–76.

56. Amnesty International estimates that the Chinese army drove tanks into the Tiananmen Square and killed several hundreds of unarmed civilians on the night of June 3–4, 1989. See *China: 15 Years after Tiananmen, Calls for Justice Continue and the Arrests Go On*, AMNESTY INTERNATIONAL (June 2, 2004), <https://www.amnesty.org/en/documents/asa17/020/2004/en> [<https://perma.cc/5MW6-ENNV>].

The prior legitimization plan of revolutionary ideology faded out and the importance of performance-based legitimacy gradually increased, occupying the dominant position in the CCP's legitimization strategies. An atmosphere of pragmatism permeated throughout the entire society in the reform era and the government needed to "come down to earth" in its policies. The contract-responsibility system, the planned commodity economy, and subsequent market-oriented measures under the banner of market socialism led China to a period of affluence,<sup>57</sup> and the crisis of the CCP regime's legitimacy resulted from the Cultural Revolution was hence averted.<sup>58</sup>

The pursuit of economic output permeating the entire society in the reform era inevitably pierced into the system of penal labor camps. Penal labor camps were transformed into profit-seeking workshops or factories in the form of prison-enterprise combination as the revival of township enterprise and its connection with labor camps under the contract-responsibility system in the late 1970s.<sup>59</sup> The practice of prison enterprise under the contract-responsibility system was officially recognized and even encouraged by the state in its Eighth National Conference of Works of Labor Reform in December 1981.<sup>60</sup> Later in the National Conference of Works of Labor Reform and Labor Reeducation in June 1984, the central government also decided that both prison production and prisoner remodeling should be operated in the contract-responsibility setting.<sup>61</sup> In other words, it became a system of dual contract-responsibility; one was for prison production and the other was for prisoner remodeling, for increasing their efficiency. In the same year, the system of dual contract-responsibility was also applied to the labor reeducation camps.<sup>62</sup>

Since then, the entire prison system consisting of labor reform and labor reeducation camps had been reshaped by the contract-responsibility system. Every labor camp was required to be self-supporting and profit-making. This is a significant difference between the periods of pre-reform and reform. Making profit was not a requirement in the pre-reform era because under the scheme of planned economy, production was the eventual goal and did not need to be transferred into profits through a market mechanism.

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57. See Wu & Fan, *supra* note 45, at 56–58.

58. See Lin, *supra* note 8, at 407–11.

59. *Id.* at 413–17.

60. Dibaci Quanguo Laogai Gongzuo Huiyi Jiyao (第八次全国劳改工作会议纪要) [Summary of the Eighth National Conference of Works of Labor Reform] (promulgated by the Ministry of Justice, Dec. 11, 1981).

61. Guanyu Laojiao Danwei Tuixing Guanjiao Shengchan Shuang Chengbao Zerenzhi de Yijian (关于劳教单位推行管教、生产双承包责任制的意见) [Opinion on Carrying out the Dual Contract-Responsibility System of Reeducation and Production in Labor Reeducation Units] (promulgated by the Ministry of Justice, Apr. 15, 1985).

62. Lin, *supra* note 8, at 413.

Therefore, the Eighth National Conference of Works of Labor Reform which convened in December 1981 can be viewed as a turning point. This conference created a new beginning for the correctional facilities of China. It opened a new door for the prison system by applying the contract-responsibility system to the dilapidated penal labor camps, which were smashed and shut down during the Cultural Revolution, helping it restore from a mass of ashes and debris. After the CCP administration shifted to a contract-responsibility system, the prison system followed suit. Subsequent prison policies such as its financial structure, treatment of incarcerated people, quality of the prison cadres, and management of formerly incarcerated individuals reflected this shift to the contract-responsibility system.<sup>63</sup> The CCP administration expected there would be an improvement in prison production by applying contract-responsibility to it. However, research shows that prison production did make some contribution to the economic development in the 1980s, but not as high as anticipated.<sup>64</sup>

Similar to what had been done before, the instrumental role of law also carried weight actively and served as a supplementary character in the institutional changes of the prison system during this period like in the previous decades. There were still no laws governing the prison system, but scattered provisions about criminal offenses and criminal proceedings were finally codified in 1979.<sup>65</sup> Besides those scatter provisions, the CCP administration focused on implementing administrative rules and governmental policies for their traits of being purposeful, temporal, policy-oriented, and particularized and released numerous resolutions, regulations, plans, measures, provisions, standards, notifications, instructions, opinions, etc.

Consequently, after the issuance of the conclusion of the Eighth National Conference of Works of Labor Reform in December 1981, policies about the prison enterprise, the financial structure of the prison, prison cadres, business administration, and prisoner remodeling tactics were all centered on making the prison system more market-adapted and profitable. This trend matched the performance-based legitimacy during this period. Accordingly, with the focus on prisoner remodeling and more importantly prison production, the prison system during the period could thus be seen as under the governance based on economic performance.

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63. *Id.* at 417–30.

64. See JAMES D. SEYMOUR & RICHARD ANDERSON, *NEW GHOSTS, OLD GHOSTS: PRISONS AND LABOR REFORM CAMPS IN CHINA* 110–111, 210–212 (1998).

65. See *Criminal Law of the People's Republic of China* (1979) and *Criminal Procedure Law of the People's Republic of China* (1979).

### III. AFTER THE REFORM: 1990S TO EARLY 2010S

#### A. *Governing through Legal Instruments*

Confronted with the crisis of its regime during the late 1980s and early 1990s, the CCP applied a series of strategies to regain legitimacy.<sup>66</sup> Those strategies for rebuilding the CCP's legitimacy were finally successful: some studies indicate that the Chinese government has maintained high political trust in its leadership since the early 1990s.<sup>67</sup> Moreover, China ranked 13th out of 72 countries for its increasing public support during the period from the late 1990s to the early 2000s<sup>68</sup> while several democratic countries, including the United States, Japan, and some Western European countries, were facing a falling trend in citizens' confidence in their governments because of a "crisis of democracy."<sup>69</sup>

The efforts of the CCP to restore its legitimacy after the Tiananmen Square crackdown and communism collapse can be understood as an encapsulation of nationalism, economic performance, technocratic governance and limited political reform with a more legally based system.<sup>70</sup> Research further points out that economic growth as the source of legitimacy did make some achievements in the 1980s, but its weakness, such as corruption, social inequality, and unemployment, led to social unrest in the country and created uncertainties to the CCP's governance.<sup>71</sup> Therefore, the CCP needed to pay closer attention to social order and to demonstrate its ability of maintain social stability for the consolidation of its weakening legitimacy.

Even though the legitimation strategy for this period was performed in a mixed style, there was still an order of importance between each components. According to an opinion in July 1992,<sup>72</sup> the CCP leadership highlighted the use of law as instruments for economic performance and social order. This opinion required to augment the works of legal control mainly in two areas.<sup>73</sup> On the one hand, it was necessary to

66. See discussion below.

67. Schubert, *supra* note 47, at 192.

68. See Bruce Gilley, *The Determinants of State Legitimacy: Results for 72 Countries*, 27 INT'L POL. SCI. REV. 47, 63 (2006).

69. Zhengxu Wang, *Political Trust in China: Forms and Causes*, in LEGITIMACY: AMBIGUITIES OF POLITICAL SUCCESS OR FAILURE IN EAST AND SOUTHEAST ASIA 113, 114–15 (Lynn Whyte ed., 2005).

70. Schubert, *supra* note 47, at 192–93.

71. André Laliberté & Marc Lanteigne, *The Issue of Challenges to the Legitimacy of CCP Rule*, in THE CHINESE PARTY-STATE IN THE 21ST CENTURY: ADAPTATION AND THE REINVENTION OF LEGITIMACY 1, 9–11 (André Laliberté & Marc Lanteigne eds., 2008).

72. Zhonggong Zhongyang Guanyu Jiaqiang Zhengfa Gongzuo Genghao Dewei Gaige Kaifang he Jingji Jianshe Fuwu de Yijian (中共中央关于加强政法工作, 更好地为改革开放和经济建设服务的意见) [Opinion of the Politburo of the CCP on Strengthening the Works of Law and Politics for Providing Better Service to the Reform and Opening-Up and Economic Construction] (promulgated by the Politburo of the CCP, July 22, 1992).

73. *Id.*

take advantage of the law and political departments to regulate economic relations, to improve the legal environment for the reform and opening-up policy, and to protect the rights of investors and those who engaged in the economic experiments. On the other, it was also needed to protect the country and society from the invasion of criminal behaviors and to establish a more stable social order in service for the reform and opening-up policy and economic development. In addition, the opinion also emphasized that the consciousness of social democracy, law and the mass line would be advantageous to the social stability.<sup>74</sup>

Facing the widely critiques of the bloody suppression in the Tiananmen Square Incident and the breakdown of communist front across the Eastern Europe and the Soviet Union, Chinese government leaders were trapped in a dilemma: they had to abandon the traditional ultra-leftist ideology, which used to help the CCP build the country, while trying to maintain their power. After a short period of hesitation, Chairman Deng Xiaoping, an ardent supporter of reform and opening-up policy, approved the establishment of development district in Shanghai and stock exchanges in Shanghai and Shenzhen in 1991.<sup>75</sup> That same year, China joined the Asian Pacific Economic Cooperation. Deng began his inspection tour in southern China to call for more support for advanced economic reform in 1992. This tour was successful and pivotal. After the tour, the government pushed the economic reform further by loosening its tight monetary policies, deregulating the price control on most products, encouraging the development of private and foreign enterprises, installing a new tax system, legalizing bankruptcy and sale of state-owned enterprises, and establishing a (socialist) market economy.<sup>76</sup> In addition, lessons from the root causes of Tiananmen Square Incident reminded the government to place “anti-corruption” and “rule of virtue” at the center of the state’s plans for regaining its performance-based legitimacy.<sup>77</sup> Clearly, the communist ideology has been subtly discarded by the CCP after the country widely accepted the economic liberation plans and embraced the market economy.<sup>78</sup>

The economic affluence in the 1990s also led to a friendlier political and social environment for the CCP regime to regain its legitimacy. The Tiananmen Square Incident and the subsequent repression caused many political dissidents either to move out of China or to silence themselves.<sup>79</sup> The Chinese leaders who still held traditional leftist ideology also became voiceless after Deng’s southern China tour in 1992. The replacement of centrally planned economy with a market mechanism led to a shift of public dissatisfaction with the central government to the market itself,

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74. *Id.*

75. *See* Yang & Zhao, *supra* note 46, at 77.

76. *See id.* at 77–80.

77. *Id.* at 75.

78. For the details of the Chinese economic reform in the 1990s, please *see* Lin, *supra* note 8, at 407–11.

79. Yang & Zhao, *supra* note 46, at 79.

causing the social problems to become decentralized and depoliticized.<sup>80</sup> All of this helped the CCP claim that they were the only one capable of assuring social and political stability in China, consequently solidifying their legitimacy.<sup>81</sup> Contrary to the prediction of some Chinese experts and democracy theorists that the authoritarian regime of the CCP would decline and that China government would shift to democracy after the legitimacy crisis during 1989 to 1991, the CCP reclaimed its control of China.<sup>82</sup> Using the strategies to institutionalize the regime's succession politics, meritocracy, structural differentiation and functional specialization in the regime organization, and the enlargement of political participation of ordinary citizens, the CCP reconsolidated its regime after the crisis through the "authoritarian resilience."<sup>83</sup>

The Chinese nationalism has been widely used as a legitimation tactic since the 1990s. As the communist front collapsed, Chinese people's dissatisfaction with the West increased; several anti-Western and anti-Japanese movements were carried out and became common. Studies have showed that to a certain extent, the public disenchantment with the West and Japan, namely the Chinese nationalism, was fostered by the CCP administration and through the official, well-refined narrative that China used to be intruded and abused by the Western countries in the 19th century, cruelly tyrannized by Japan during the Second Sino-Japanese War from 1937 to 1945, and the condescension of the Western countries during the postwar period when in the face of the rising Chinese power.<sup>84</sup> Those humiliations along with the economic liberation, the diversification of personal life and identity, and the ensuing pressures of the uncertainties in education and employment, fostered Chinese patriotism.<sup>85</sup> As strategy, the state also spun its official story since the early 1980s to gloss over the disgraceful past in Mao's era, especially the criminal behaviors of the state itself during the Cultural Revolution.<sup>86</sup> Chinese nationalism thus worked as a state-sponsored, bottom-up popular patriotism and at the same time as a top-down legitimation plan.

As for ideology, the CCP administration has never stopped using its legitimation plans, even in the period of socialist market economy. In a speech to the military cadres on June 9, 1989, five days after the

80. *Id.* at 77–80.

81. Schubert, *supra* note 47, at 193.

82. *Id.*

83. See Andrew J. Nathan, *China's Changing of the Guard: Authoritarian Resilience*, 14 *J. DEMOCRACY* 6, 6–17 (2003).

84. See Yinan He, *History, Chinese Nationalism, and the Emerging Sino-Japanese Conflict*, 16 *J. CONTEMP. CHINA* 1, 9–13 (2007); see also Holbig & Gilley, *supra* note 17, at 402.

85. See Geremie R. Barmé, *To Screw Foreigners Is Patriotic: China's Avant-Garde Nationalists*, 34 *THE CHINA J.* 209 (1995); see also Holbig & Gilley, *supra* note 17, at 401–02.

86. See Edward Friedman, *Raising Sheep on Wolf Milk: The Politics and Dangers of Misremembering the Past in China*, 9 *TOTALITARIAN MOVEMENTS & POL. RELIGIONS* 389, 389–409 (2008).

Tiananmen Square Incident, Deng emphasized that the biggest mistake that has been made over the past ten years was the omission of education of ideological and political thoughts, not only in schools or to young students, but also to the masses as a whole.<sup>87</sup> After the Chinese Nationalist Party lost the Taiwanese presidential campaign in 2000, Deng's successor, Jiang Zemin, put his concept of "Three Represents" into the Constitution of PRC, to strengthen the ideological control over the entire population.<sup>88</sup> Since then, Jiang's Three Represents has been juxtaposed with and considered to have the same importance as Marxism-Leninism, Mao's Thoughts, and Deng's Theory.<sup>89</sup> In addition, the negative effects of the economic reform began to ferment in the late 1990s and the early 2000s. How to maintain the social and political stability at this moment thus emerged as a crucial point for the CCP leadership.<sup>90</sup> Therefore, building a "socialist harmonious society" became the focus of the CCP administration. The term of socialist harmonious society was first used by Hu Jintao, the chairman of the CCP at that time, in the Fourth Plenary Session of the Sixteenth Central Committee of the CCP in September 2004.<sup>91</sup> At the time, building a socialist harmonious society was considered one of the five most crucial strategies used by the CCP to retain control of China.

Later, in October 2006, the Central Committee of the CCP published a resolution to address the questions about how to build a socialist harmonious society.<sup>92</sup> According to the resolution, the insistence on the socialist rule of law and the persistence of socialist democracy were the most comprehensive principles for building a socialist harmonious society among others.<sup>93</sup> The two principles required the CCP to build a socialist rule of law country and to advance the country's economy, politics, culture, and the social life of everyone into law- and rule-based styles so as to promote social justice and fairness.<sup>94</sup> To be specific, under the lead of the CCP, to strengthen the democratic values, it is necessary to improve

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87. See Xiaoping Deng, *June 9 Speech to Martial Law Units*, CHRONOLOGY (June 27, 1989), <http://www.tsquare.tv/chronology/Deng.html> [<https://perma.cc/DUM9-Z2WN>].

88. Three Represents foregrounds the importance of the CCP in the progress of China modernization. Under the idea of Three Represents, the CCP represents the demands for the development of advanced social productive forces, the direction of advanced culture, and the fundamental interests of the greatest majority of the people. See Holbig & Gilley, *supra* note 17, at 406.

89. Holbig & Gilley, *supra* note 17, at 405–06.

90. *Id.* at 407.

91. *Id.*

92. Zhonggong Zhongyang Guanyu Jiangou Shehui Zhuyi Hexie Shehui Ruogan Wenti de Zhongda Jueding (中共中央关于建构社会主义和谐社会若干问题的重大决定) [Significant Resolution from the Central Committee of the CCP on Certain Questions about Building a Socialist Harmonious Society] (promulgated by the Central Committee of the CCP, Oct. 11, 2006).

93. *Id.*

94. *Id.*

the design of National People's Congress, to legislate democratically and scientifically, and to enlarge the scope of public participation in and public surveillance over the political decision-making process. Moreover, socialist rule of law is treated as the foundation of a socialist harmonious society, so human rights protection, a rule-of-law government, and the establishment of a socialist judiciary with public, fair, efficient, and authoritative trial system are necessary components of a socialist harmonious society.<sup>95</sup> Consequently, democratic values and rule of law are both considered by the state as part of the legitimation plan from an ideological perspective.<sup>96</sup>

### B. *The Codification of Prison Apparatus*

The opinion released by the Politburo of the CCP in July 1992 preliminarily laid out some of the measures of prison's institutional development related to its legitimation plan. These measures included plans to draw up laws for labor camps, to grant some preferential policies to the production side of the prison system, and to actively regulate the released population.<sup>97</sup> A month later, the State Council released the white paper "Current Situation of Prisoner Reform in China" in August 1992, which summarized the experience of penal labor camps during the past decades and laid down the blueprint for future development of the Chinese prison system.<sup>98</sup>

Previous government announcements on prison affairs mostly put their focus on the ideology or economic output of the carceral practice. The conclusion of the Eighth National Conference of Labor Reform Works in 1981, for example, attributed the high amount of premature deaths in penal labor camps in the pre-reform era to the wrongful influence of the leftist ideology and blamed the serious ideological flaws for the economic loss of prison production, particularly during the Cultural Revolution.<sup>99</sup> On the contrary, the white paper downplayed the importance of ideology and economic profits in the carceral practice in the past. Instead, it highlighted the significance of legalization, modernization and civilization in the prisoner remodeling works.<sup>100</sup>

The publication of the white paper on prisoners' situation in China was not spontaneous; rather, it was rooted in and echoed a prior white paper "Current Situation of Human Rights in China," which was published also by the State Council in November 1991.<sup>101</sup> Section 4 of

95. *Id.*

96. Schubert, *supra* note 47, at 194–99.

97. *Supra* note 72.

98. Zhongguo Gaizao Zuifan de Zhuangkuang (中国改造罪犯的状况) [Current Situation of Prisoner Reform in China] (promulgated by the State Council, Aug. 1, 1992).

99. *Supra* note 61.

100. *Supra* note 98.

101. Guowuyuan Xinwen Bangongshi (国务院新闻办公室) [State Council Information Office], Zhongguo de Renquan Zhuangkuang (中国的人权状况)

this white paper was about the protection of human rights in the Chinese criminal justice system.<sup>102</sup> Aside from the discussion about arrest, detention, search, evidence collection, prosecution, and adjudication, it also probed into human rights issue regarding the systems of penal labor camps in China.<sup>103</sup> It reaffirmed that prisoner's rights were legally protected and that the state exercised humanitarian, scientific and civilized prison administration; prison labor was not simply a type of punishment but also a humanitarian way to remodeling or reeducate prisoners so that they would reenter the society more smoothly after their release.<sup>104</sup>

In combining the observations on the two white papers mentioned above, one can see that the CCP administration not only expatiated on the situation of the prison system, but also set the primary tones for its future development: legalization, scientization, humanitarianism, and civilization. In the Ministry of Justice's point of view, those objectives could be put together for building a "modern and civilized prison system."<sup>105</sup> The Ministry further defined and created standards for a modern and civilized prison system in September 1995 by emphasizing the importance of a legal apparatus through which the prisoner remodeling process could be operated in a more humanitarian, scientific, and civilized manner.<sup>106</sup> Therefore, the publication of the two white papers in the early 1990s can be viewed as the turning point for the Chinese prison because they set the tone for the future development of the prison system.

This trajectory of prison's institutional development set in the early 1990s was further clarified and solidified in an official opinion from the Ministry of Justice in 2003.<sup>107</sup> The opinion kept the original tasks of legalization and scientization, but combined humanitarianism and civilization into a single goal of socialization.<sup>108</sup> Here socialization means better connecting the prison system with society so that prisoners have an easier transition back into society after being released. Since then, the prison system has been reformed keeping in mind the three spirits of legalization, scientization, and socialization.<sup>109</sup> Moreover, the division of prison

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[Current Situation of Human Rights in China] (1991).

102. *Id.*

103. *Id.*

104. *Id.*

105. Sifabu (司法部) [Ministry of Justice], *Guanyu Chuangjian Xiandaihua Wenming Jianyu de Biaozhun he Shishi Yijian (关于创建现代化文明监狱的标准和实施意见)* [Standards and Opinions on Building a Modern and Civilized Prison System] (1995).

106. *Id.*

107. Sifabu (司法部) [Ministry of Justice], *Guanyu Jinyibu Tuijin Jianyu Gongzuo Fazhihua Kexuehua Shehuihua Jianshe de Yijian (关于进一步推进监狱工作法制化、科学化、社会化建设的意见)* [Opinion on Moving Forward to Advance the Legalization, Scientization, and Socialization of Prison Works] (2003).

108. *Id.*

109. *Id.*

remodeling and prison production beginning in 2003 can also be viewed as part of the prison system's legal renovation.<sup>110</sup>

To complete the prison system's legal renovation, in 1992, the central government prohibited prisons from printing "labor remodeling," "criminal," "offender" and other similar discriminative words and signs on prisoner's apparel.<sup>111</sup> This prohibition was considered as part of the process to build a civilized system.<sup>112</sup> Later in August 1994, the traditional term "labor reform camps" was officially superseded by "prison" in coordination with the forthcoming new Prison Law of PRC.<sup>113</sup> This new Prison Law became effective in December 1994, replacing previous administrative regulations.<sup>114</sup> Far from the lengthy controversy over the priority of prisoner remodeling or prison production, Article 3 of the Prison Law reiterates the principle of two combinations: the combination of penalty and remodeling and the combination of education and labor.<sup>115</sup> Through the two combinations, criminals are expected to be transformed into law-abiding citizens.<sup>116</sup>

The principle of two combinations can be traced back to as early as Mao's era in the 1950s.<sup>117</sup> However, at that time, the two combinations were more ideology-oriented, focusing on the combination of penalty and "thought remodeling" and the combination of labor production and "political education." This emphasis on political ideology matched the CCP's legitimation strategy in the pre-reform era. By changing the name of labor reform camps and modifying the content of the principle of two combinations, the Prison Law changed the traditional understanding of the Chinese carceral apparatus from a simply political point of view, to the idea that it plays a more complicated role in the CCP regime's legitimation plan now and in the future.

In addition to the Prison Law and a few comprehensive instructions, the Ministry of Justice also published a series of administrative instructions for prisoners on their remodeling, education, and behavior throughout the 2000s.<sup>118</sup> These administrative rules have manifested and

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110. Sifabu (司法部) [Ministry of Justice], *Guanyu Jinyibu Shenhua Jianyu Tizhi Gaige Youguan Wenti de Tongzhi* (关于进一步深化监狱体制改革有关问题的通知) [Notification on the Questions about Moving ahead to Deepen the Renovation of the Prison System], 2005). See also Lin, *supra* note 8, at 435–38.

111. Sifabu (司法部) [Ministry of Justice], *Guanyu Jinyibu Jiaqiang Fanren Shenghuo Guanli de Tongzhi* (关于进一步加强犯人生活管理的通知) [Notification on Moving Ahead to Augment the Administration of Lives of Prisoners] 1992).

112. *Id.*

113. Sifabu (司法部) [Ministry of Justice], *Guanyu Tongyi Guiding Jianyu Guanli Jiguan he Jianyu Mingcheng de Tongzhi* (关于统一规定监狱管理机关和监狱名称的通知) [Notification on Unification of the Names of Prison Administration Organizations and Prisons 1994).

114. Prison Law of PRC (effective Dec. 29, 1994).

115. Prison Law of PRC, art. 3 (effective Dec. 29, 1994).

116. *Id.*

117. Lin, *supra* note 5, at 43.

118. E.g., Jianyu Jiaoyu Gaizao Gongzuo Guiding (监狱教育改造工作规定)

substantiated the spirits of legalization, scientization, and socialization in the daily prison practice. Moreover, they required the teams of prison cadres to have more necessary legal knowledge, more specialized training in remodeling techniques, and more skills related to the business administration of prison production.<sup>119</sup> In summary, prison cadres needed to be technocrats in the field of prison affairs. According to a report released in April 2012 from the State Council, which examined the effects of the Prison Law after its enforcement in 1994 and the situation of carceral practice, those prison renovation projects have reached its set objectives and is ready to move ahead and take next steps.<sup>120</sup>

The prison system's legal renovation strategies since the early 1990s were employed in a more intricate way to match the CCP regime's legitimation plan. As mentioned in the prior Subpart, the legitimation plan of the CCP regime during this period was a mix of nationalism, economic performance, technocratic governance, and limited political reform with a more legally based system. There are some matches between the legitimation plan and the prison renovation strategies. Except for nationalism, other components of the legitimation plan can find their parallels in the prison renovation strategies. The organizational restructure to divide prison remodeling and prison production for addressing the economic crisis of the prison system, for example, can be seen as the counterpart of the performance legitimacy. The emphasis on the modernization of prison and the enhancement of cadres' quality and skills can be seen as a derivative of the technocratic legitimacy. The enforcement of Prison Law and other relevant legalization works are part of the macro rational-legal legitimation plan.

By and large, the prison system's legal renovation strategies during this period were still implemented mostly through administrative regulations and government plans. Even though the Prison Law of PRC was finally enforced, we cannot easily argue that legal instrumentalism was abandoned. On the contrary, the Prison Law, together with the numerous administrative regulations, continues to function as a tool to achieve various goals of the government. In other words, law is still treated as an instrument by the state. The codification of prison system works as

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[Provisions on the Works of Prison Education and Reform] (promulgated by the Ministry of Justice, June 13, 2003); *Jianyu Fuxing Renyuan xingwei Guifan* (监狱服刑人员行为规范) [Regulations on the Behavior of Prisoners] (promulgated by the Ministry of Justice, Mar 19, 2004); *Guanyu zai Quanguo Jianyu Laojiao Xitong Kaizhan Wenming Zhifa Shu Xingxiang Huodong de Tongzhi* (关于在全国监狱劳教系统开展文明执法树形象活动的通知) [Statewide Activity of forming an Image of Civilized Law Enforcement in Prisons and Labor Reeducation Units] (promulgated by the Ministry of Justice, July 8, 2004); *Jiaoyu Gaizao Zuifan Gangyao* (教育改造罪犯纲要) [Outline of Educational Reform of Prisoners] (promulgated by the Ministry of Justice, July 4, 2007).

119. *Supra* note 78.

120. *Guowuyuan* (国务院) [State Council], *Guanyu Jianyufa Shishi he Jianyu Gongzuo Qingkuang de Baogao* (关于监狱法实施和监狱工作情况的报告) [Report on the Enforcement of Prison Law and the Situation of Prison Works] (2012).

part of the legal instrumentalism. Why not the rule of law? The State Council asserted in the white paper in 1991 that the human rights were protected in China and strongly touted again in the white paper, “The Legal Construction of China,”<sup>121</sup> in 2008 that China is on the way to a socialist country under the rule of law. Studies have showed, however, the state is still only half the way to a completely rule-of-law country and the legal instrumentalism remains visible in some aspects of the government activities.<sup>122</sup>

Nevertheless, by the accounts of the government, the remaining elements of legal instrumentalism are going through an elimination process in recent years. The Standing Committee of the National People’s Congress, for example, abolished the system of labor reeducation camps in December 2013 because the camps allowed citizens to be detained for several years without a judicial procedure and was hence incompatible with the requirement of rule of law.<sup>123</sup> In addition, the Central Committee of the CCP has been determined to build a country under the rule of law in October 2014,<sup>124</sup> and the Ministry of Justice began a program to make the information about the prison administration more public accessible and to increase the public trust in the prison system in April 2015.<sup>125</sup> But we have to pay attention to that Xi Jinping, the current chairman of the CCP and the president of PRC, has defined the rule of law doctrine in his explanation as administrating a country through laws.<sup>126</sup> This definition reminds us of the long-used legal instrumentalism over the PRC history.

## CONCLUSION

The sources of the CCP’s legitimacy varied in different phases. The legitimization plans of the CCP regime in different periods of time

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121. Zhongguo de Fazhi Jianshe (中国的法治建设) [The Legal Construction of China] (promulgated by the State Council, Feb. 29, 2008).

122. See RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002); Yanyou Yi, *Arrest as Punishment: The Abuse of Arrest in the People’s Republic of China*, 10 PUNISHMENT & Soc’y 9 (2008).

123. Quanguo renmin daibiao dahui changwu weiyuanhui, (全国人民代表大会常务委员会) [Standing Committee of the National People’s Congress], Guanyu Feizhi Laodong Jiaoyang Falv Guiding de Jueding (关于废止劳动教养法律规定的决定) [Decision regarding the Abolition of the Laws and Regulations of Labor Reeducation] 2013).

124. Zhonggong Zhongyang (中共中央) [Central Committee of the Communist Party of China], Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding (关于全面推进依法治国若干重大问题的决定) [Resolution on Some Important Questions about Advancing a Rule -of-Law Country in an All-Round Manner] (2014).

125. Sifabu (司法部) [Ministry of Justice], Guanyu Jinyibu Shenhua Yuwu Gongkai de Yijian (关于进一步深化狱务公开的意见) [Opinion on Moving Forward to Deepen Transparency in the Prison Administration] 2015).

126. Jinping Xi, *Explanation of the Resolution on Certain Questions about Advancing to the State under the Rule of Law in an All-Round Manner*, PEOPLE.CN, Oct. 28, 2014, <http://cpc.people.com.cn/BIG5/n/2014/1028/c64094-25926150.html>.

changed with the transformations in the state's economic system. From the establishment of the PRC in 1949 to the end of the Cultural Revolution in 1976, the CCP's legitimacy was primarily based on the revolutionary ideology, which was derived from its victory in the civil war against the Chinese Nationalist Party and the efforts to ensure a stable country within a communist design. When coming into the era of economic reform which kicked off in the late 1970s, economic performance became the seminal source of the CCP's legitimacy. After the Tiananmen Square Incident in 1989 and the collapse of communism across the Eastern Europe and the Soviet Union from 1989 through 1991, legitimation in a rational-legal approach together with the long-used ideological and performance-based legitimation strategies became the major source for the CCP's governing authority since the 1990s.

By analyzing the development of the prison system in communist China since 1949 through the lens of state legitimacy and economic schemes, the interactions between the state and the carceral mechanism within the context of the state's macroeconomic changes serve as the focal point of this Article. This Article has illustrated that the interactions will to a certain extent reflect the entanglement between economic restructure and the state's legitimation plan in communist China. To be more specific, the changes in the economic structure which connected different periods of time over the PRC history have pushed the state to make policy changes to the prison system's legal functions. When facing critical changes or crises, the CCP made substantial modifications to the economic structure of the country and adopted strategies to develop, regain or restore its legitimacy. These legitimation strategies, together with the economic stasis and dynamics, would support and restrict the prison system's ability to develop rather than allow it to freely evolve.

This Article finds that the changes in the prison system's legal functions can be considered an outcome of the state's economic restructure and as part of the state's legitimation plans in different times. Further, during the process of the institutional shifts, CCP leaders also made contributions to the significant adjustments to the prison system. Mao did so with his ultra-leftist and revolutionary thoughts during the era of planned economy, Deng with his pragmatic economic theory in the age of economic reform, Jiang with his Three Represents and Hu with his goal of socialist harmonious society in the late 1990s and the early 2000s, as well as Xi's idea about rule of law in the 2010s. Those state leaders acted as the most important and active social actors here and demonstrated their autonomy to make their own decisions and influence the development of the prison system. Consequently, just as Garland has said, "social currents may ebb and flow, but they have no penal consequence unless and until they enlist state actors and influence state action."<sup>127</sup> Garland's assertion thoroughly accounts for the correlation between the drastic changes in the economic schemes as well as the prison system in China over the past seventy something years.

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127. Garland, *supra* note 12, at 494.