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Research Report

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SWP Comment

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Xi Jinping Thought on the Rule of Law

New Substance in the Conflict of Systems with China

Moritz Rudolf

In its first “Plan on Building the Rule of Law in China (2020–2025)”, the leadership in Beijing has set out its vision for a coherent and genuinely Chinese legal system. The focus here is on the term “socialist rule of law with Chinese characteristics”. It should “basically take shape” by 2035. Marxist-Leninist legal concepts remain fundamental. The aim is to use the law as a political instrument to make the state more efficient and to reduce the arbitrariness of how the law is applied for the majority of the population, among other things, with the help of advanced technology. In some areas, for example on procedural issues, Beijing continues to draw inspiration from the West in establishing its Chinese “rule of law”. However, the party-state leadership rejects an independent judiciary and the principle of separation of powers as “erroneous western thought”. Beijing is explicitly interested in propagating China’s conception of law and legal practice internationally, establishing new legal standards and enforcing its interests through the law. Berlin and Brussels should, therefore, pay special attention to the Chinese leadership’s concept of the law. In-depth knowledge on this topic will be imperative in order to grasp the strategic implications of China’s legal policy, to better understand the logic of their actions and respond appropriately.

At the 4th plenary session of the 13th National People’s Congress (NPC), the term “Xi Jinping Thought on the Rule of Law” appeared six times in the annual work report by Li Zhanshu, Chairman of the NPC Standing Committee. The Chinese leadership had been promoting the term “socialist law with Chinese characteristics” for several months. That the Central Committee of the Communist Party of China (CPC) has now adopted its own five-year plan to establish the rule of law in China illustrates the new quality of these efforts and how strategically embedded they have now become. The Xi

administration has understood that law is an important lever in achieving greater international influence. This plan represents the most concrete expression of Xi Jinping’s vision of how the law should be interpreted and applied in China and in the international context.

Defining the Terms

The terms “socialist rule of law with Chinese characteristics” and “Xi Jinping Thought on the Rule of Law” are key to



understanding China's current judicial reforms. But they require explanation.

The Chinese leadership always adds "with Chinese characteristics" to point out the special connection between the political fields and China's circumstances, such as in the formulation, "Human rights with Chinese characteristics". According to Article 1 of the Chinese Constitution, "the defining feature of socialism with Chinese characteristics is the leadership of the CPC". The term "socialist law with Chinese characteristics" ties in with this. The CPC's leadership is propagated as the most fundamental guarantee of the rule of law in the People's Republic of China (PRC). According to Marxist legal tradition, Beijing sees law primarily as an instrument of the CPC. After the communist revolution, the law was subjected to "the People", and only the CPC has the legitimacy to interpret their will. Consequently, it is not appropriate to translate the Chinese term "Fǎzhì" (法治), which was officially introduced in 1997 by the then President Jiang Zemin, as rule of law in Western discourse. The CPC does not accept the intrinsic value of the law. The translation "rule by law" is more appropriate. The suffix "with Chinese characteristics" underlines Beijing's intention to create its own Chinese legal system that also draws on traditional Chinese legal concepts. To what extent this goes beyond mere rhetoric is disputed. Nevertheless, the CPC's behaviour derives on the one hand from China's legalistic tradition, which demands the strict application of rules by a strong centralised state. On the other hand, it is not only rule by law that should apply. The population and party cadres are also expected to cultivate moral and virtuous behaviour which resembles the teachings of Confucius. Xi Jinping regularly invokes key aspects of Confucianism when they serve the interests of the CPC.

A much more concrete aspect of the Chinese rule of law is the inclusion of advanced technology. For one thing, it is comprehensively regulated by laws. While in Europe digitalisation is discussed primarily in terms of its general effects on

personal rights, in China it is mostly about regulating the private sector and Internet companies, in particular. For the CPC, the issue of fundamental rights, such as the right to informational self-determination, is irrelevant. In addition, the party relies on advanced technology in the search for justice, for example in digitalised court proceedings and via Internet Courts.

"Xi Jinping Thought on the Rule of Law" is another term that the CPC is promoting in China's discourse on the rule of law. There are a number of these abstract "Xi-deologies" such as "Xi Jinping Thought on Diplomacy". The most important of these is "Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era", which was added to the Preamble of the PRC's Constitution in 2018. This doctrine includes 14 agenda items which outline the political direction of the Xi administration. In the five-year plan, "Xi Jinping Thought on the Rule of Law" is summarised as follows: Strengthening the CPC's centralised and unified leadership, "scientific legislation", strict law enforcement, fair trials, a law-abiding population.

Xi Jinping's Judicial Reforms – More Power for the Party, Less Everyday Arbitrariness

The plan to establish the rule of law in China is the latest chapter in a series of judicial reforms launched by President Xi in 2012. Xi's predecessor Hu Jintao created incentives for corruption within the PRC with his doctrine of the "harmonious society". In order to maintain social harmony, legal disputes were widely resolved through face-saving mediation. This risked encouraging the rise of informal justice. Bribery-prone party cadres in the "Political and Legal Affairs Commissions" played a key role as mediators in legal findings. As a result, corruption became rampant as many tried to influence the mediation mechanism.

Xi's policy was initially shaped by measures to consolidate his power, which were focussed on a massive anti-corruption cam-

paign. Judicial reform promoted mechanisms to strengthen the local judiciary over local party cadres, for example through the establishment of Circuit Courts of the Supreme People's Court and measures to professionalise judges.

In 2014, the 18th Central Committee of the CPC formulated its vision of building a “socialist rule of law with Chinese characteristics” and “law-based governance”. This made it clear that the aims of the judicial reform were to strengthen the CPC over the state and to professionalise the running of the state. In 2018, the constitution was amended significantly. Accordingly, the revised Article 1 constitutionalised party leadership in China for the first time since the short-lived constitutions of 1975 and 1978.

There has also been a clear trend since President Xi came to power: the state is becoming more efficient, especially when it comes to applying the law, and everyday arbitrariness is decreasing, especially at the local level. But this has nothing to do with establishing the rule of law as it is understood in Western countries because the party remains above the state and controls itself. The party decides what is part of the state legal system and what is “sensitive”. Sensitive matters are defined by the CPC and assessed outside the law and are therefore not under the control of the state judiciary.

Since Xi took office, the CPC's influence over the state has increased. The area of application of rules that previously only applied within the party is increasingly being expanded to include matters that were formerly assigned to the state. This applies in part to environmental protection, for example, or matters of national security. The share of documents that the State Council and the CPC adopt jointly has also increased, such as a number relating to the Belt and Road Initiative (BRI). These documents are generally treated as party rules, but are increasingly cited as a legal basis in the legislative process. The CPC is also increasingly exerting its influence on the application of the law. In the National Security Law of 2015, for example, the CPC's National

Security Commission was granted state authority – the first time since the Cultural Revolution that a party organisation has been allowed to do so. Numerous state and party organisations were merged during structural reforms in 2018. In sensitive areas (related to security policy), it was the party that benefited most from these reforms, at the expense of the state.

In the past few years, however, there have been considerable efficiency gains in resolving non-sensitive legal disputes – those faced by the majority of the Chinese population. They have primarily been achieved with faster and more clearly defined processes in civil and criminal proceedings. For most Chinese people, this means less arbitrariness.

Furthermore, the Chinese leadership is not interested in adopting the West's core requirements for the rule of law. Instead, judicial reform is more about pragmatically adopting from the West what can be embedded in the Chinese context of one-party rule. This applies above all to civil law, questions of jurisdiction and improving processes. In the past, the President of the Supreme People's Court pointed out that Western “aberrations”, such as the separation of powers and an independent judiciary, were out of the question in the PRC.

China's First Five-Year Plan on Establishing the Rule of Law (2020–2025)

The internal dimension

On 10 January 2021, the CPC Central Committee adopted China's first five-year plan on establishing the rule of law. This was preceded by a speech in November 2020 by President Xi during the first “central conference on work related to overall law-based governance”. In that speech he called for a coordinated approach to promoting “socialist law with Chinese characteristics”.

This plan underlines the Chinese leadership's understanding of the law as a political instrument. The document states that

rule through law is to help the state gain strength and prosperity. It states that the promotion of rule through law is necessary in order to ensure the resurgence of the PRC in the long term and to realise the so-called “Chinese Dream” of once again becoming a world power. To this end, the document contains the following guiding principles:

- maintaining the centralised and unified leadership of the CPC as the most fundamental guarantee of the rule of law in China,
- prioritising the interests of the people in establishing the rule of law,
- promoting law as an integral part of the CPC, the Chinese state and Chinese society; adhering to a combination of rule of law and rule of virtue,
- taking account of national circumstances in establishing the rule of law.

The Chinese leadership also defined general goals in the plan. By 2025, it aims to:

- further develop the institutional framework for the rule of law in China,
- establish a more complete socialist legal system with Chinese characteristics (in which the constitution plays a central role), a more solid governance system with clear administrative responsibilities defined by law and a more efficient judicial system,
- make progress on the formation of a “rule of law society” and
- improve the application of internal party regulations.

By 2035, it aims to:

- have basically completed a state, a government and a society under the rule of law,
- have basically formed a socialist rule of law system with Chinese characteristics,
- fully guarantee the people’s right to equal participation and equal development and
- modernise the national governance system and governance capabilities.

The five-year plan sets out how the actions of the state and the CPC are to be

formalised in order to reduce arbitrariness in the PRC and secure the rule of the CPC. It is the first publicly available official document laying down the principles, contents and procedures of a constitutional review by the NPC Standing Committee. This, however, has nothing to do with the separation of powers, as the NPC formally controls itself. Nevertheless, the constitution as it stands has become increasingly important for state action.

In addition, all people’s congresses are to be given more power in the legislative process, for instance increasing the frequency with which their standing committees meet and by requiring them to consider legislation at every plenary session. More laws are to be passed and fewer administrative regulations enacted. This is important because people’s congresses usually play a subordinate role in the Chinese legislative process.

There is to be more legislation, especially on information technology, for example by regulating the digital economy, Internet finance, artificial intelligence, big data, the “social credit system” and cloud computing. Above all, there is to be greater protection of intellectual property in China’s digital space. In line with Xi Jinping’s vision to build a “smart state under the rule of law” and to promote the “digitalisation, networkisation and intelligentisation of the rule of law in China”, these technologies are also to be used in applying the law, for example in virtual court proceedings or through the social credit system.

Beijing also aims to use the plan to harmonise laws at the central and local levels. It will lay down clear competences for state action. It is also the first public document calling for the enactment of a unified Chinese Administrative Procedure Law. The law enforcement system is also to be made more efficient, mainly by clearly defining the different competencies among the law enforcement authorities. Also on the agenda is the improvement of criminal procedural law, for example with regard to the admission of evidence. There are to be standardised, legally codified control mechanisms and rules of jurisdiction for state actors

(administrative and judicial bodies, supervisory and law enforcement authorities, courts, public prosecutor's office) at various levels (provinces, cities, counties and townships). The document also promises to strengthen the rights of the parties to the proceedings, for instance through a system for recording accountability of interrogation cases by judicial personnel.

It also calls for the judiciary to be professionalised. A new generation of "revolutionary regularised, specialised, and professional" legal teams is to be formed, who are not only loyal to the party, the state, the people and the law, but also act virtuously. Supporting the CPC is a prerequisite for working in the judiciary.

The entire Chinese population is to be taught the meaning of "socialist rule of law with Chinese characteristics" and of "Xi Jinping Thought on the Rule of Law". Within the CPC, these issues are to play a key role in the party schools. But they are also to become an integral part of the curricula at schools and universities.

Beijing is also planning to strengthen the party's internal regulations and establish an internal party legal system. China's rulers are aiming for national laws and internal party regulations to be complementary, mutually reinforcing and mutually guaranteed.

International dimension

One chapter of the plan is devoted to the outside world. It concerns the "preservation of national sovereignty, security and developmental interests" through the law. It contains explanations of the principle of "one country, two systems". A "high degree of autonomy" is to be guaranteed to Hong Kong and Macau. Interventions by "foreign forces" should be opposed and prevented. Communications and legal exchanges in jurisprudence and legal circles are to be supported with Taiwan. With the help of the law, steps are to be taken towards peaceful reunification and against aspirations of independence. This is fuelling speculation about a Taiwan-specific "anti-secession law". Beijing also wants more cooperation

on law enforcement and bilateral legal assistance between the mainland, Hong Kong, Macau and Taiwan. This chapter also sets out the goal of strengthening the regulatory framework of the People's Liberation Army (PLA) in order to cement the absolute rule of the CPC over the PLA.

Section 25 of the plan reveals the international dimensions of China's endeavours, which are:

- expanding Chinese international law expertise,
- the conception of an international law theory on "socialist rule of law with Chinese characteristics",
- active participation in the formulation of international rules in order to establish a "fair" and "reasonable" international legal system,
- promoting the Chinese concept of the "rule of law" internationally,
- establishing a mechanism to identify laws from other states with extraterritorial effect,
- more protection for the rights of Chinese nationals and legal entities abroad,
- promoting international legal cooperation within the framework of the BRI, for example by creating international commercial courts,
- establishing new mechanisms for international arbitration,
- cooperation between arbitration tribunals from China and from BRI countries,
- strengthening bilateral and multilateral dialogue on the rule of law and exchange programmes, especially within the framework of the BRI,
- promoting China's institutional judicial assistance system and mechanism and expanding international cooperation of judicial assistance in the field of extradition and repatriation of criminal suspects and transfer of sentenced persons,
- international law enforcement cooperating in the fight against violent terrorism, ethnic separatism, religious extremism, drug trafficking and transnational crime,
- strengthening international cooperation in the fight against corruption and in the detection and return of stolen goods.

The final chapter points to the central role of the CPC in establishing a “rule of law with Chinese characteristics”. Party leadership is to be further anchored in law, and a theory about the rule of law with Chinese characteristics to be developed. This is to contain aspects of the “excellent traditional Chinese legal culture” without further details being specified. All departments of the CPC in all provinces are instructed to fully implement the spirit and requirements of the plan and create implementation plans that take into account local circumstances.

Assessment

The document summarises Beijing’s strategic efforts to establish its own Chinese version of the “rule of law” as a coherent future-proof model. Primarily, it is about making the state more efficient and shoring up the absolute dominance of the CPC. These aspirations could outlast Xi Jinping’s presidency and become a legacy of his policies. One example would be establishing a formalised mechanism for determining leadership succession.

Where it serves one-party rule, the document draws on Western aspects of the rule of law, especially when it comes to regulating civil law matters, jurisdiction and procedural matters. Nevertheless, the five-year plan bears no resemblance to the Western understanding of the rule of law. Its objective is for the law to better control state actions, but without limiting the power of the party in any way. Instead, the law is to become a more efficient instrument of rule for the party.

China could create a mechanism that reduces arbitrariness for the majority of its population and creates a degree of legal certainty with the aid of advanced technology to determine, apply and enforce the law. Millions of Chinese are already using apps (e.g. WeChat or the China Mobile Micro Court) to file lawsuits or submit motions for evidence, without corrupt party cadres at the local level being able to exert

influence. Beijing is promoting the use of digital technology as an alternative to the separation of powers, since they are allegedly objective and not corruptible. The CPC’s view is that, in an authoritarian context, digital tools can produce the same effect as a functioning separation of powers, without questioning one-party rule. The political will to further develop the use of advanced technology in law should not be underestimated. Despite there still being significant obstacles to implementation, some approaches to an objective, albeit dystopian “Chinese” way of determining the law already exist. These include the social credit system. It allows people’s behaviour to be converted into a points system. Minus points awarded for sanctioned behaviour may have direct legal consequences, such as fines or restrictions.

Viewed objectively, the Chinese approach to integrating digital technology into the judicial process is also avant-garde. During the COVID-19 pandemic, many Chinese courts went online overnight. From a functional point of view, it certainly makes sense to learn lessons from the Chinese judiciary’s affinity for technology – where the knowledge gained can be integrated into the democratic system. The CPC is trying to provide authoritarian answers to questions arising from globalisation and to embed these endeavours in its concept of the rule of law. It remains to be seen, whether China’s vision will be attractive to third countries. At least when it comes to increasing the efficiency of state action and reducing arbitrariness through technology, it seems plausible. China is trying to achieve precisely this goal with its digital Silk Road.

One can assume that Chinese negotiators, diplomats and entrepreneurs will soon be making arguments that include the phrase “Chinese rule of law”. In future, Beijing’s use of the law as an instrument to enforce political interests will become increasingly efficient as lawyers become better trained in its use.

For political decision-makers in Germany and Europe, it is first important to take seriously the fact that the Chinese leader-

ship is developing its own, fundamentally different “rule-of-law” concept and promoting it internationally. More translation and contextualisation of the terms being used by Beijing is essential. Without a historical and political classification of the phrases translated strategically into English by the CPC, such as “rule of law”, it is impossible to adequately understand Chinese behaviour and respond to it appropriately. It might result in false expectations and political costs, such as misinterpretations of mutual obligations.

In addition to expertise and legal knowledge about China, specific knowledge of socialist legal concepts is also helpful. Furthermore, it is necessary to tap into the knowledge of Chinese legal concepts that exists in universities and bring it into the mainstream. This knowledge should be included in discussions about functional political decisions and in intergovernmental negotiations with China in a bilateral and multilateral framework.

Political decision-makers in Germany and Europe should prepare specifically for Chinese argumentation patterns and scenarios. The following aspects are particularly affected:

The rights of foreigners and foreign companies in China: there is a legal grey area in to which it is increasingly easy to fall as a foreigner, especially because China attaches great importance to national security. As a result, legal certainty in China is suffering, as evidenced by the recent sanctions against EU citizens and institutions. Anyone “associated” with sanctioned institutions or persons is prohibited from “doing business” in China. The terms “associated” and “doing business” are not explained in detail. The wording of the sanctions against British persons and organisations, for example, is much clearer. At the same time, however, there is more legal certainty for foreigners and foreign companies in “non-sensitive” areas.

International treaties: it is essential to set effective incentives and to introduce effective control mechanisms in international agreements with China, due to

the Chinese leadership’s understanding of the law as a tool. Otherwise, a contractual agreement such as the comprehensive agreement on investment between the EU and China (CAI) from December 2020 is worth little more than the paper it’s written on. In such cases, the actual negotiations only start after the contract has been signed.

Chinese core interests: the core interests of the PRC include Beijing’s interpretation of the “one country, two systems” principle regarding Taiwan or Hong Kong, the Chinese leadership’s view of its territorial integrity, for example with regard to the South China Sea and the border conflicts with India and Japan, as well as internal affairs and especially human rights issues regarding Tibet or Xinjiang. China will be better prepared to defend these interests based on its own understanding of the law. Europe can expect to encounter more headwinds here. Beijing is also forging strategic alliances and using United Nations organisations as a mouthpiece, such as the UN Human Rights Council.

Extra-territorial dimension: international law enforcement cooperation is the area Beijing is pushing hardest when it comes to international legal partnerships. This could have serious consequences for Europeans in countries that have concluded mutual legal assistance or law enforcement agreements with Beijing. They may even be extradited to China.

International discourse power regarding the concept of the rule of law: Beijing will increasingly promote its own definition of the rule of law internationally. For the CPC leadership, it is a matter of questioning established definitions and then countering them with Chinese terms. The Chinese side argues that the existing international legal system reflects the balance of power from the period immediately after the Second World War. Beijing is calling for a general overhaul of the world order because the international power structure has changed fundamentally.

For German and European decision-makers, this development means that the rule of law should continue to be promoted

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in third countries, such as those in the Indo-Pacific region. In its policy guidelines for the Indo-Pacific region, the federal government explicitly promises to promote the rule of law in the region. In addition, the rule of law would be an important component of an effective transatlantic China strategy.

Despite difficult bilateral relations, in a dialogue with China on the rule of law, procedural issues would be an area in which an objective discussion still appears possible. One example would be digitalisation in civil proceedings.

Glossary

法治中国建设规划 (Fǎzhì zhōngguó jiànshè guīhuà) – Plan on Building the rule of law in China

中国特色社会主义法治 (Zhōngguó tèsè shèhuì zhǔyì fǎzhì) – Socialist rule of law with Chinese characteristics

习近平法治思想 (Xíjìnpíng fǎzhì sīxiǎng) – Xi Jinping Thought on the rule of law

中国特色 (Zhōngguó tèsè) – with Chinese characteristics

法治 (Fǎzhì) – Rule of law

法制 (Fǎzhì) – Legal system

习近平新时代中国特色社会主义思想 (Xíjìnpíng xīn shídài zhōngguó tèsè shèhuì zhǔyì sīxiǎng) – Xi Jinping thought on socialism with Chinese characteristics for a new era

科学立法 (Kēxué lìfǎ) – Scientific legislation

和谐社会 (Héxié shèhuì) – Harmonious society

智慧法治 (Zhìhuì fǎzhì) – Smart rule of law

依法治国 (Yīfǎ zhìguó) – Law-based governance

优秀传统文化法律文化 (Yōuxiù chuántǒng fǎlù wénhuà) – Excellent traditional Chinese legal culture

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