



The evolution of the PRC's legal system:
the building of the rule of law, its
resemblance with the concept of Socialist
Constitutionalism.
Possible mid-term scenarios.

JORGE E. MALENA

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The evolution of the PRC's legal system: the building of the rule of law, its resemblance with the concept of Socialist Constitutionalism. Possible mid-term scenarios¹.

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Jorge E. Malena²

Abstract

In the year 1999 the then president of the Shanghai Academy of Social Sciences Zhang Zhongli put forward a proposal to the National People's Congress (NPC), commending the promulgation of anti-corruption legislation. It was the first proposal of its kind to China's top legislature. At last, in March 2013 the NPC revealed a timetable of anti-corruption legislation. In November 2013 the 3rd Plenum of the 18th Communist Party of China (CPC) Central Committee made the decision to deepen reforms comprehensively and promoting the modernization of the governance system.

Many aspects of the reform are related to the rule of law, and struggling against corruption is the latter's paramount tool. That's perhaps why in 2014 the CPC laid out specific requirements on improving the State's legislation on corruption. The fight against corruption not only will give

Noviembre de 2015), cuyo tema fue: *China's Reform, Opportunities for the World*. El autor participó en el panel 2 "*The new blueprint for China's governance system*".

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the leadership of the People's Republic of China (PRC) a grip on the construction of a clean government, but also boost China's economy, as the rule of law is the hallmark of a market economy.

This paper will aim at probing into the transformations of China's legal system, analysing its evolution from "rule of man" to "building a legal system", to "rule of law" and finally to the "rule of the Constitution". Given the different understanding on the meaning of "rule of law" between the Euro-American vision and the Chinese vision, this study will also intend to explain the concept of "rule of law" according to the CPC view (which, in the Western mindset, could be best understood as "Socialist constitutionalism"). Finally, a few considerations will be presented on the possible outcome of this thrust towards modern governance, presenting three scenarios which span from an optimistic to a pessimistic one, and includes a most likely (neither "emulation of Singapore" nor "disorder", but rather a gradual political evolution).

1. Introduction

Ancient Chinese thinker and statesman Guan Zhong (720-645 BC) put forward the concept of "ruling the nation according to law". However, emperors throughout most of Chinese history regarded themselves as above the law. Nowadays, the People's Republic of China (PRC) advocates the "rule of law" as a means to consolidate the governing system. China is undergoing economic restructuring of its growth model and in Marxism it is the

economic base that determines the superstructure. As reforms in the economic domain are becoming deeper and harder, they demand institutional guarantees that -in the eyes of the CPC- the rule of law can best provide.

The development of China's legal structure can be described as the evolution from the "rule of man" to "building a legal system", to "rule of law" and finally to the "rule of the constitution". This paper (a) will aim at probing into the transformations of China's legal system, analysing its evolution, and (b) will also intend to explain the concept of "rule of law" according to the Communist Party of China (CPC) view which, in the Western mindset, could be best understood as "Socialist constitutionalism"³. Finally, a few considerations will be presented on the possible outcome of this thrust towards modern governance, presenting three scenarios which span from an optimistic to a pessimistic one, and includes a most likely (neither "emulation of Singapore" nor "disorder", but rather a gradual political evolution).

2. The transformations of China's legal system

2.1. From "rule of man" to "building a legal system"

In September 1949, a temporary constitution was born, when the Common Program of the Chinese People's Consultative Conference (CPPCC) was promulgated. On September 20, 1954 at the First Session of the First

³ In the light of the different understanding on the meaning of "rule of law" between the Euro-American vision and the Chinese vision.

National People's Congress (NPC) of the People's Republic of China (PRC), the first Constitution of the PRC was adopted (Roderick, 1993, pp. 27-28 and 50-52).

In the following 24 years, China found several obstacles on her way to create a legal system. In November 1978 at a meeting of the central leadership, Deng Xiaoping suggested that the legal system be boosted for ensuring people's rights. According to Li Buyun, researcher of the Institute of Law at the Chinese Academy of Social Sciences (CASS), "*a new era dawned, one in which the science of law was awakening*" (Hua Zi, 2015, p. 61).

China entered a new stage of mind emancipation, which resulted in breathing new life to the nation's legal framework. Leaving behind the philosophy of "rule of man" and embracing the philosophy of "rule of law" was the paramount topic of debate in legal circles during the late 1970s and early 1980s.

On December 18, 1978, the Third Plenary Session of the 11th Central Committee of the Communist Party of China (CPC) was convened, which marked the starting point of the rule of law in the country's modern history. At the end of the Third Plenary Session, a communiqué emphasized that it was imperative to strengthen the socialist legal system in order to ensure stability, continuity and full authority of the democratic system (Beijing Review, 2009). Therefore, legislative work began to obtain a central place on the agenda of the NPC.

In June 1979, seven laws were formulated or amended in the Second Session of the fifth NPC: the Organic Law,

Electoral Law, Organic Law of the People's Courts, Organic Law of the People's Procurates, Criminal Law, Criminal Procedure Law, and Law on Chinese-Foreign Joint Ventures (O'Brien, 1990, pp. 158-163).

The Fifth Session of the Fifth NPC passed a new constitution on December 4 1982⁴. It was an important milestone in the history of China's adherence to the rule of law and, consequently, its ensuing philosophy started to spread amongst the citizenry for the rest of 1980s and the following decade. Thereafter, a collection of major legislation related to administrative, civil and commercial affairs were passed, e.g. the General Principles of the Civil Law, Administrative Procedure Law, Contract Law, Property Law, etc. (Hua Zi, 2015, p. 62).

2.2. From "building a legal system" to "the rule of law"

Since the 15th CPC National Congress in September 1997, the term "rule of law" has turned up frequently in official documentation, scholarly work and the media. In 1999 Article 5 of the Constitution was thus amended to read "the People's Republic of China governs the country according to law and makes it a socialist country under the rule of law" (National People's Congress Database on Law and Regulations, 1999).

In that same year, the then president of the Shanghai Academy of Social Sciences Zhang Zhongli put forward a proposal to the National People's Congress (NPC),

⁴ After the first constitutional text adopted in 1954, there were two others endorsed in 1975 and 1978 respectively.

commending the promulgation of anti-corruption legislation. It was the first proposal of its kind to China's top legislature. Afterwards, in 2002, the 16th CPC National Congress established the putting into practice of the rule of law as the main target for constructing a moderately prosperous society (Li Long, 2014).

The year 2004 was a turning point for the rule of law in China. "China's legal structure was entering the stage of socialist constitutionalism, which is an advanced stage of the rule of law," said Xu Xianming, former president of China University of Political Science and Law. He believes there are six symbolic events: First, the country's decision to integrate the CPC leadership, the position of the people as masters of the country, and the rule of law in the cause of promoting socialist democracy. Second, the statement that "the State respects and preserves human rights" was included into the Constitution. Third, governing the country according to the law was set as the basic way of exercising power. Fourth, the CPC Central Committee put forward a scientific outlook on development with the focus on people, forming a people-oriented view of law. Fifth, the State Council promulgated the "Outline for Promoting Law-based Administration in an All-round Way", announcing its plan of building the government under the rule of law. Sixth, democracy and the rule of law were set as the first of the six basic characteristics of a socialist harmonious society (Hua Zi, 2015, pp. 62-63).

In 2007, during the commemoration of the 10th anniversary of the rule of law being raised as a fundamental principle of governance in China, several law scholars considered

that the PRC had moved into the phase of socialist constitutionalism. On that occasion, Li Lin, director of the CASS Institute of Law, summarized the 10 years of legal development in China by saying that “*one of its most important achievements was to put forward the concept of “rule of the Constitution”*” (Li Lin, 2009, pp. 5-7).

In 2011, Wu Bangguo, then chairman of the Standing Committee of the NPC, announced that “*a socialist legal system with Chinese characteristics had been formed*”. The 18th CPC National Congress in 2012 defined the rule of law as “the basic way of running the country”, and new principles were outlined for achieving it: to make laws in a scientific way, enforce them strictly, administer justice impartially, ensure that everyone abides by the law, etc. During the Third Plenary Session of the 18th CPC Central Committee, “promoting the rule of law in China” was set as one of the key themes of comprehensively deepening reform (Hu Jintao, 2012).

2.3. From “the rule of law” to “the rule of the Constitution”

The “rule of the Constitution” was again proposed on December 4, 2012. President Xi Jinping, the first president in Chinese history with a PhD in law, said on the 30th anniversary of China’s 1982 Constitution that running the nation by lawful means, first and foremost, ruling the nation according to the Constitution, and governing by law is at the core of governance in accordance with the Constitution (Xinua News Agency, 2012).

In September 2014, President Xi Jinping stressed several times at a ceremony marking the 65th founding

anniversary of the CPPCC and 60th founding anniversary of the NPC that China should be committed to the integration of the CPC's leadership and people's position as masters of the country and the rule of law (China Central Television, 2014).

Mo Jihong, deputy director of the CASS Institute of Law, pointed out that such a shift in the nation's understanding of law is a fundamental transition and, therefore, marks great progress. It indicates a new direction for the CPC Central Committee to comprehensively implement the rule of law, and to improve the party's leadership pattern and governing style based on the Constitution (Hua Zi, 2015, p. 63).

Mo Jihong participated in drafting a decision on major issues concerning comprehensively advancing the rule of law, which was adopted by the Fourth Plenary Session of the 18th CPC Central Committee held from October 20 to 23, 2014. Mo believed that it was of historic significance, for it was the first time in 65 years of the PRC that "the country should be ruled in line with the Constitution" was explicitly put forward in a binding CPC document (Hua Zi, 2015, p. 63).

As struggling against corruption is the rule of law paramount tool, in March 2013 the NPC revealed a timetable of anti-corruption legislation (Hille, 2013). In November 2013 the 3rd Plenum of the 18th Communist Party of China (CPC) Central Committee made the decision to deepen reforms comprehensively and promoting the modernization of the governance system (Editor's note, China Central Television, 2013).

Accordingly, in 2014 the CPC laid out specific requirements on improving the State's legislation on corruption (Chang Junfeng et al, 2015). The fight against corruption not only will give the leadership of the PRC a grip on the construction of a clean government, but also boost China's economy, as the rule of law is the hallmark of a market economy.

On March 3, 2015, the third session of the 12th National Committee of the CPPCC began in Beijing. Major topics discussed were institutionalizing anti-corruption efforts. Two days later, the third session of the 12th NPC took place in Beijing, and lawmakers reviewed a draft amendment of the PRC's Legislation Law. These were important initiatives to deepen reforms and promote the rule of law. In the government work report presented at the latter, Chinese Premier Li Keqiang declared: "We will shed powers to make the government cleaner... our tough stance on corruption is here to stay; our tolerance for corruption is zero" China Today, 2015 pp. 14 y 36).

The past year has witnessed several "tigers" caught in the anti-graft web while more corruption cases have been uncovered at the grass-roots level of the government. These critical anti-corruption measures have improved the governmental work style and enhanced public morale.

3. The concept of "rule of law" according to the CPC

3.1. The extent of Socialist legal transformation

According to Marxism-Leninism each historical epoch has its own legal system, which is in continuous transformation, in order to advance towards the ultimate goal: Communism. The development of socialist Constitutions is closely linked to the development of the State. Accordingly, the Constitution becomes “*the formal register and legal confirmation of socialist conquests during the different stages of historical evolution*”. However, the constitution is not an autonomous entity; it is subordinated to the Party. Therefore, the constitutional norms are “second degree regulations” (Vishinsky, 1961, p. 87).

Italian specialist on Comparative Law Giuseppe de Vergottini identifies three phases to characterize the development of Socialist legal transformation: (a) the revolutionary phase, (b) the revolutionary legality phase, and (c) the socialist legality phase. During the first phase, there is a rejection of the established political norms, because of the demands of the revolutionary goal. In the Chinese case, this phase took place began when the CPC took power and promulgated the Common Program in September 1949, which abolished the KMT normative system.

The second phase is characterized by the implementation of a new legal order based on socialist principles, which lacks formal legality because of political requirements from the State or the ruling Party. In the Chinese experience, it occurred between the approval of the first Constitution of the PRC and the launching of the Anti-rightist campaign (e.g. between 1954 and 1957) (De Vergottini, 1983, pp.

118-119). Even though a legal order was established in which the expression “rule of law” (*fǎzhi*) was often mentioned, it was soon substituted by the term “revolutionary legal system” or “people’s democratic legal system”. This was a result of Mao Zedong’s preference for flexibility in the practice of law, which in turn led to mass campaigns, popular justice and political disorder. The main outcome of this thrust towards revolutionary legality was the Great Proletarian Cultural Revolution (Chen, 2000, pp. 13-54).

The third phase depicts a consolidation of the legal system, so the existing socialist legality encompasses the abundance of the whole set of legal principles and the strict enforcement of law. Thus, the State functions in full compliance with the law it has formulated. De Vergottini warns that despite such work in full compliance with the law might look like the operation of a liberal State, the situation is quite different: the institutions of the CPC and the State are intimately intertwined and sometimes overlapped (De Vergottini, 1983, pp. 120-121).

In China the third phase can be found in late 1978, when the CPC focused on socialist modernization, which needed to rely on a legal system. The legal socialist system had to strengthen so as to resist changes of the Party line and replacement of authorities (Chen, 2008, pp. 85-105). Within this framework, the Communiqué of the Third Plenary Session of the 11th CPC Central Committee stated:

In order to safeguard people's democracy, it is imperative to strengthen the socialist legal system so

that democracy is systematized and written into law in such a way as to ensure the stability, continuity and full authority of this democratic system and these laws; there must be laws for people to follow, these laws must be observed, their enforcement must be strict and law breakers must be dealt with. From now on, legislative work should have an important place on the agenda of the National People's Congress and its Standing Committee. Procuratorial and judicial organizations must maintain their independence as is appropriate; they must faithfully abide by the laws, rules and regulations, serve the people's interests, keep to the facts; guarantee the equality of all people before the people's laws and deny anyone the privilege of being above the law (“Communiqué of the Third Plenary Session of the 11th Central Committee of the Communist Party of China”, Beijing Review, 2009).

3.2. The meaning of “yīfǎ zhìguó” and “shèhuì zhǔyì fǎzhì guó”

In 1996, the CPC General Secretary Jiang Zemin announced the new official policy formulation of “*ruling the country in accordance to the law and establishing a socialist rule-of law state*” (yīfǎ zhìguó, jiànshè shèhuì zhǔyì fǎzhì guó) (Jiang Zemin, 1996, p. 1). One year later, the CPC National Congress adopted the new official policy formulation and in 1999 an amendment to the PRC Constitution was made, which added to Article 5: "The People's Republic of China governs the country according

to law and makes it a socialist country under rule of law”⁵. In most publications distributed in the West (originated in China or elsewhere) the term coined for the new official policy formulation was translated into English as “rule of law”.

In Chinese language, the translation of “*yīfǎ zhìguó*” is “to rule the country in accordance to the law”. This term has caused controversy in Western countries, because it has been widely understood as the supreme authority of the legal order, like in the democratic and liberal philosophy of rule of law. However, the CPC assumes that “to rule the country in accordance to the law” relates to utilizing the law as a governmental tool (rule “by” law), in accordance with socialist legality.

On October 23, 2014 the 18th Central Committee of the CPC issued the Communiqué of its Fourth Plenary Session, which stated:

“Our overall objective in comprehensively advancing the law-based governance of the country is the establishment of a socialist rule of law system⁶ with Chinese characteristics and the building of a socialist rule of law country...

To reach this overall objective, we must adhere to the leadership of the CPC...

The Party's leadership is the most essential feature of socialism with Chinese characteristics and the most

⁵ Vid quotation National People's Congress Database on Law and Regulations (1999).

⁶ The emphasis is mine.

fundamental guarantee for socialist rule of law in China...

The Party's leadership is consistent with socialist rule of law: socialist rule of law must uphold the Party's leadership while the Party's leadership must rely upon socialist rule of law" ("Communiqué of the 4th Plenary Session of the 18th Central Committee of CPC", China.org.cn, 2014).

The above-mentioned objective and means give a clear-cut idea about the significance of "yīfǎ zhìguó" (and the ensuing policy of "jiànshè shèhuì zhǔyì fǎzhì guó") according to the CPC view. In the Western mindset the two concepts are not applicable to the idea of "rule of law". Instead, they could be best understood as "Socialist rule of law" and more technically as "Socialist constitutionalism".

The question here is whether there was misunderstanding on the Chinese side when the term "yīfǎ zhìguó" was translated into foreign languages, or it was the result of the decision to make the world believe that the PRC was on its way to embrace democracy. In between rests the most possible reason, which refers to explaining an indigenous political process using not only a foreign language but also a foreign worldview.

It is an enormous challenge to translate complex political processes between languages that are culturally distant. In Social Sciences, Western theories have expanded so widely that most phenomena (no matter where they occurred) have been explained according to their

concepts, principles and models. In the words of Chang Kwang-chih:

Theories of history have typically been built on the history of Western civilization. In the modern world, Western civilization has undergone the most remarkable expansion in the annals of mankind, quickly enveloping the world, and it has brought with it theories formulated on the basis of its own massive and formidable history to explain the origin and history of all human society (Chang, 1983, p. 128).

In the light of the singular features of the political and legal reform launched by Xi Jinping since the 3rd Plenum of the 18th CPC Central Committee, the evolution of the PRC political process must be best explained by means of (a) translations that clearly describe the main concepts, and/or (b) theories that are built on the Chinese experience. Again, the work of Chang Kwang-Chih is illuminating: *“It is time to consider the possibility that theories of history could be built on the development of other civilizations and that such theories could offer new insights... China itself is one reason why such reconsideration is so timely”* (Chang, 1983, p. 128).

What’s more, preventing the misuse of concepts that are politically sensitive in foreign languages (such as “rule of law” when meaning “socialist constitutionalism”) will help to: (a) be precise in what needs to be expressed (e.g. “the CPC will employ the law as an instrument of government, in accordance with socialist legality”), (b) avoid creating false expectations in the West, and (c) elude criticism from

the West when no signs of liberal democracy are at sight in the PRC.

4. The possible outcome of the thrust towards modern governance

Corruption is a deeply rooted cultural phenomenon in the PRC: the traditional Chinese faith in “*guānxi*” (e.g. “connections” or “relationships”), is the most important factor in explaining the continuity and extent of the problem. Corruption has infected the legal system and law enforcement. The main culprits are more evident and ordinary: one-Party rule and state control of the economy. In a one-Party rule state, there is lack of firm checks and balances, which results in the spread of graft and bribery. And state control of resources generates abundant opportunities for corruption.

For the first time, the PRC President and CPC General Secretary Xi Jinping is speaking about and taking concrete action towards political modernization. Xi Jinping’s policies of transforming the legal system, governing the country according to the law, strengthening socialist constitutionalism, and struggling against corruption are promoting the modernization of China’s governance system.

In addition, Xi Jinping is promoting the modernization of China’s governance system with the conviction to avoid the adoption of Western models. Therefore, the “fifth modernization” is becoming true and seems to be lasting.

Since the thrust towards modern governance led by Xi Jinping is the major change taking place in current China, it's difficult to estimate what path it might take. In a pessimistic scenario, this policy would end in failure after tough opposition within the CPC leadership and the bureaucracy obliges Xi to backtrack. Corruption would probably rise, Xi's authority would be damaged and the economy would destabilize. In a more optimistic scenario, Xi would manage to defeat internal confrontation and move on to expand legal reform. However, such progress in legal reform will not necessarily ensue in a Western-style democratic system⁷. That propitious environment for legal change would rather produce a gradual political evolution, linked to changing the psychology of bureaucrats.

Therefore, the likeliest scenario will be a consequence of constant investigation on public servants, which would make them regard corruption as dangerous (and, perhaps, finally to not even daring to think about it). This, in turn, might gradually switch the omnipotent government of the planned economy era for a service-oriented government (a guiding government under the rule of law that assumes its duties).

The standing of Chinese government is rooted in what is called "authoritarian adaptation": the use of policy reforms to substitute for fundamental institutional change.

⁷ In the words of Elizabeth Economy (2015): "*Xi's reforms could yield a corruption-free, politically cohesive, and economically powerful one-party state with global reach: a Singapore on steroids*".

Accordingly, the key to watch the evolution of governance in the PRC rests in tracking the extent and scope of Socialist constitutionalism.

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