

## FPC Briefing: Rule of Law in China: A priority for businesses and Western Governments

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### Introduction

On the eve of China's '4th of May Day' in 2017, President Xi Jinping announced that "the rule by law is our historical mission."<sup>1</sup> It is a sentence which harks back to a centuries-old legal system which many Chinese have regarded with pride. And yet its utterance was only necessary because, even over 30 years after China began its journey towards a capitalist, rules-based economic system, rule of law is still a source of tension in China. Indeed, many Western commentators noted and mocked the phrase 'rule *by* law' as fundamentally missing the point of 'rule *of* law', even if in Mandarin they mean the same thing.

The central argument of this essay is that Western governments and businesses should take seriously rule of law in China and devote their diplomatic and lobbying powers to seek better Chinese legal institutions. Through examining China's legal history and exploring recent interactions between foreign investors and China's legal system, we argue that many historical and current diplomatic tensions between China and the West - including the trade war and disputes around intellectual property rights - are related to China's poor legal infrastructure, which does not meet Western standards of rule of law. Looking to the future, this poses serious problems as China expands its geopolitical visions and looks to export its own values and institutions.

Ultimately, we argue that the rule of law has the potential to be an effective point of diplomatic engagement with China. There is an appetite within China and among foreign investors for change, and Xi Jinping's government should take advantage of the economic and diplomatic opportunities presented by reforming China's legal system. Chapter 1 looks at China's rich legal history and how rule of law has failed to take root in China, giving us the system we see in China today. Chapter 2 looks at contemporary disputes between Western businesses, governments and China, and argues that many of these are closely linked to issues around rule of law. Chapter 3 argues that the rule of law offers an excellent opportunity to engage productively with China and that the opportunity should be seized by Western governments and businesses.

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<sup>1</sup> Xinhua News (2017), '习近平在中国政法大学考察 [Xi Jinping's address at China University of Political Science and Law]', [http://www.xinhuanet.com/politics/2017-05/03/c\\_1120913310.htm](http://www.xinhuanet.com/politics/2017-05/03/c_1120913310.htm)  
Quoted in Chen, George Ge (2017), 'Le Droit, C'est Moi: Xi Jinping's New Rule-By-Law Approach', Oxford Human Rights Hub, <http://ohrh.law.ox.ac.uk/le-droit-cest-moi-xi-jinpings-new-rule-by-law-approach>

## Chapter 1: Background - Rule of Law in China

This chapter will look at the history and development of China's legal infrastructure, arguing that despite its longevity, a lack of impartiality, consistency and transparency was endemic in China's judiciary since its conception. Attempts at reform have often been a tool of political interests rather than in the interests of administering justice. This exposes the Chinese legal system's distinct 'teleology' compared to Western legal systems: the law serves a distinct purpose as a servant to the state machinery, effectively another instrument in the machinery of governing the nation-state. This continues to be an issue, despite China's broad acceptance of a rule-based, free market economy and will pose issues for foreign investors as well as Chinese citizens.

### *What is the 'rule of law'?*

'Rule of law' can be understood as a political-theoretical ideal that can be empirically tested by the presence of certain legal institutions and practices.<sup>2</sup> At heart rule of law is about confidence: that is, the level of certainty individual citizens have that the laws of their land will be enforced effectively and fairly. A state which has complex legal infrastructure but has not won the confidence of its citizens does not have rule of law. Confidence is built through the presence of particular legal infrastructure, including judicial independence (a separation of state and judiciary), decisions are made impartially, with fair hearings and effective implementation of decisions made by judiciaries, and, crucially, the government, head of state and legislature are not above the law. In a country governed by rule of law, the government uses the law to govern society, but remains under the law: presidents can be fined for speeding and queens can be sent to prison for embezzlement.<sup>3</sup> Finally, rule of law is not binary; that is, it is possible to have better and worse rule of law on a spectrum. A country might succeed in having some aspects of rule of law, such as effective law enforcement, but not others, such as judicial independence.

There is historical evidence that non-Western traditions including Islamic jurisprudence,<sup>4</sup> ancient Chinese legalism and Old Testament Judaism<sup>5</sup> all respected the *primacy* of law; that is, the idea that states should be rule-governed and that rules should apply consistently. However, the more specific concept of 'rule of law' as judicial independence, impartiality and fairness is a more recent Western concept, with roots in British pre-Enlightenment political theory. This tradition grew out of Magna Carta, which first enshrined liberties for certain individuals and placed legal limits on the crown.<sup>6</sup> Modern liberal states, such as the USA, were founded on the basis of rule of law as a paramount value, alongside other civil liberties and democratic rights.

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<sup>2</sup> Waldron, Jeremy (2016), 'The Rule of Law', The Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/archives/fall2016/entries/rule-of-law/>, part 1

<sup>3</sup> Ibid., part 4

<sup>4</sup> Hallaq, Wael (2013), 'The Impossible State: Islam, Politics and Modernity's Moral Predicament', Columbia University Press

<sup>5</sup> Levinson, Bernard (2006), 'The First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy', *Cardozo Law Review*, Vol. 27, No. 4.

<sup>6</sup> Waluchow, Wil (2018), 'Constitutionalism', The Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/archives/spr2018/entries/constitutionalism/>; part 4

Over the past century, Western powers have often fought vigorously for rule of law to be applied in former colonies, particularly within the package of ‘human rights, democracy and rule of law’ as a Western alternative to Soviet communism. This has had varying success; some places, such as China’s own Hong Kong, Singapore and South Korea have adopted rule of law principles.<sup>7</sup> However many former colonies and developing countries have struggled with corruption, political instability and enforcement difficulties, despite intentions to develop Western-style rule of law.

Since Western powers created the global trading system we live in today, Western rule of law is the default basis on which open economies are expected to operate. This leads to tensions between domestic legal systems and what Western investors expect, as well as accusations that global trade is rigged in favour of wealthy countries, as a form of 21st Century imperialism. China, unlike many other developing countries, has retained a firmer hold on its legal infrastructure and traded on its own terms. Its size, economic clout and stable political infrastructure have enabled it to at times reject the demands of Western powers and put its own interests first. More recently, it has presented its legal system as not just a barrier to Western FDI, but an intellectual competitor to the West’s rules-based order.

### *China’s rich legal history*

To understand ‘rule by law’ in Xi’s China today, it is helpful to understand the historic role and development of China’s legal system. Despite criticism from the West, China is understandably proud of its historic and rich legal tradition. Ancient China was largely rule-governed, with clear systems in place for arbitration and decision-making. That said, the legal system placed a lot of decision making power in individual state-sanctioned arbiters, rather than juries, transparent trials or appeals systems. The historian Weifang He also notes that the notion of ‘separation of powers’, a key aspect of rule of law, was absent from the start:

‘The most distinctive structural characteristic of the traditional Chinese local government was that there was no arrangement whatsoever for the separation of powers. The county magistrate had comprehensive responsibilities. The three basic governmental functions, namely, the enacting of rules (legislature), the execution of rules (administration), and the resolving of disputes (judiciary), which are taken for granted today, rested entirely with the magistrate alone.’<sup>8</sup>

As He goes on to explain, the traditional Chinese magistrate’s duties effectively combined the roles of ‘judge, prosecutor, police chief, and coroner, comprising everything relating to the administration of justice in its broadest sense, and the failure to carry out any of these duties incurred disciplinary actions and punishments, as defined in the many laws and regulations.’<sup>9</sup>

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<sup>7</sup> See World Justice Project’s ‘Rule of Law Index’ (2017-2018) <http://data.worldjusticeproject.org/>

<sup>8</sup> He, Weifang (2012), ‘In the Name of Justice’, Brookings Institution Press, p12

<sup>9</sup> Ibid. p12

Over the years, China's legal system remained resistant to change, despite pressure from both scholars at home and imperialist traders from the West. In the 19th and early 20th Century, the Chinese legal system suffered from being too highly developed for Chinese officials to see the need for change, since they could point to a long tradition of Chinese legal scholarship as well as the system's efficacy in administering justice for centuries. Yet at the same time, it was not developed enough to satisfy Western businesses or meet Western standards of rule of law. It was only when the British forced consular jurisdiction following the Opium Wars (which meant British citizens in China would be under the British legal system), that some Chinese scholars saw its legal system a source of embarrassment and attempted reform.<sup>10</sup>

However, the fact that the rule of law was introduced as a concept by Western imperialists ensured that it was viewed with suspicion. China's legal system had always been understood as a tool of the state - that is an instrument of government for setting national direction and controlling the population, as well as achieving collective national aims.<sup>11</sup> This is in stark contrast to Western rule of law which is, often explicitly, based around the needs of the individual and a check on state power. In the context, it is unsurprising that the British calling for legal reforms which limited the power of the state looked to many Chinese to be merely imperialist geopolitical maneuvering. In China's history of political thought, Communism, Confucianism and Mencius have all argued that citizens' welfare is of high importance to the government, but none of these views thinks that the state exists primarily for the individual interest, or that the state is subordinate to the individual. Indeed, China's political philosophy has always emphasised duties over rights.<sup>12</sup>

This meant that at the start of the 20th Century, both Nationalist and Communist parties viewed Western rule of law with suspicion, and promised an alternative Chinese system rooted in its unique history. Sun-Yat Sen opposed judicial independence as part of the philosophy of "using the political party to run the state" (yi dang zhi guo).<sup>13</sup> Both parties also aimed to use the legal system to achieve their own political ends; a phenomenon which underlies much of China's legal history. Even instances of legal reform, such as under the Beiyang Government (1912-1928), were motivated by political goals: in this case, to constrain the growing power of the Kuomintang. The Communist government and Mao's 'cultural revolution' took this to the extreme. Xu Qian, a Chinese politician and scholar at the time, said: "Our revolution should be a thorough one and against not only the traitorous government but also its judiciary."<sup>14</sup> The state benefited from citizens' scepticism of the legal system, since this legitimised political control of the legal system. This encouraged a vicious cycle: public mistrust enables political control which reduces judicial independence, lack of independence makes the legal system unreliable and increases mistrust.<sup>15</sup>

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<sup>10</sup> Ibid. p22

<sup>11</sup> Chen (2017)

<sup>12</sup> Qi, Zhou (2005), 'Conflicts over Human Rights between China and the US', *Human Rights Quarterly*, vol. 27, no. 1. [www.jstor.org/stable/20069781](http://www.jstor.org/stable/20069781), pp114-115

<sup>13</sup> He (2012), p33

<sup>14</sup> In He (2012)

<sup>15</sup> Ibid.

### *Rule 'by' law*

China has, of course, undergone significant reform since the 1980s, particularly in terms of opening up its market to international trade and a Western, capitalist rules-based system. This has inevitably been in tandem with legal reform, particularly in the areas of property rights and investor protection. However, two shadows hang over this path towards reform. The first is a shadow from the past: on closer inspection, China's legal system still suffers from being an arm of the state. Its teleology remains still inherently political, rather than based around the rights of the individual or a rule-based constitution, albeit the case that the state's purposes for the legal system have become more market-oriented.

The second is a very recent concern that Xi Jinping's 'socialism with Chinese characteristics' has little interest in continuing the path to reform begun by his predecessors, but will rather lead China's legal system to uncharted territory. This has far-reaching implications: as China expands its geopolitical interests, its legal system may become an intellectual competitor to Western rule of law. The course charted by China's legal system over the next few decades may well write the blueprint for the legal systems of other countries: whether it's regional trading partners on China's 'new Silk Road' or indebted recipients of Chinese investment in East Africa.

The phrase which sums up Xi's alternative jurisprudence is, as many Western commentators have noted, 'rule by law'.<sup>16</sup> This concept flows naturally out of China's legal history. As Chen notes:

'In imperial China, the term "governing the country by law" (rule by law) referred to the law as an instrument to guide and control the population. This is why scholars of Chinese law usually translate the term 法治 to "rule by law" instead of "rule of law." This aspect still dominates under China's current Communist rulers, although the current legal system contains more rules than in the past to protect citizens' rights against the state.'<sup>17</sup>

'Rule *by* law' contains some of the provisions of Western 'rule of law', particularly that the state governance should be rule-based and codified. However, crucial aspects are missing. Chen notes:

'China's traditional view of the law is that it was not evenly applied, as would be demanded under "rule of law" in a Western sense. It typically only applied to ordinary people who had to fear rigorous penalties for trespassing. By contrast, high-ranking government officials had little or no legal accountability.'<sup>18</sup>

Despite technical developments in China's legal infrastructure, the fundamental system suffers from the same problems as in imperial China. This is evidenced most notably in Xi Jinping's administration. As will be explored later in the essay, the state has repeatedly used

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<sup>16</sup> See Waldron (2016), part 4

<sup>17</sup> Chen (2017)

<sup>18</sup> Ibid.

or overridden China's legal infrastructure to favour its own companies, undermine political opponents, abuse human rights and achieve geopolitical and economic goals. Chen argues that Xi's approach to the law can be compared to Louis XIV's statement "l'etat, c'est moi" ("The state, it is me"), but instead "The law, it's me": Xi does not see a demarcation between himself and the legal system; to do so would be to give in to Western dogma and undermine 'socialism with Chinese characteristics'. The law, like monetary policy or the education system, is another state department used to achieve its political (and increasingly ambitious) aims. In this crucial respect, rule of law in China today suffers from the same ailments as it has historically.

This explains why, despite reform, China still ranks 75th out of 113 countries on international rule of law rankings.<sup>19</sup> As will be explored more in this essay, it can also be linked to why, despite China's indisputable economic success, Western investors remain cautious, American presidents start trade wars, and European leaders pick trading partners elsewhere.

### *The changing shape of rule of law in China*

It seems that China is at a crossroads. Its legal infrastructure is now well-developed enough that the government could if it so wished, adopt Western-style rule of law. This would be welcomed by the international community, as well as China's growing middle class. Rebecca Liao argues that China's changing sociology requires a more Westernised, 'individualistic' legal framework. For example, divorce rates in China have increased significantly over the last few decades, particularly among China's wealthier middle class, and citizens will expect a legal system which treats them as individuals with rights - particularly over the property - in settling personal legal cases such as divorce.<sup>20</sup>

As ordinary Chinese citizens engage more with the justice system, especially in non-criminal cases, such as civil and family law, they will be more interested in the process of justice and attentive to how their cases are handled. Liao also believes that the growing capital owning classes in China, who have amassed real estate, stock and savings, will have an interest in ensuring that property rights are upheld in law. Last year, hundreds of homeowners in Shanghai unexpectedly organised a protest in opposition to planning regulation changes which threatened house prices. As 'the Chinese become richer, more of them will face situations where they want to challenge a decision by the state.'<sup>21</sup> These trends, which undoubtedly stem from China's 'opening up' to global markets, put pressure on Beijing to develop a more Western, consumer-oriented legal system which exists for the individual rather than the state.

On the other hand, pessimists point to Xi's blatant disregard for Western rule of law and his 'historical mission' to implement 'socialism with Chinese characteristics'. This is

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<sup>19</sup> World Justice Project's 'Rule of Law Index' (2017-2018) <http://data.worldjusticeproject.org/>

<sup>20</sup> Liao, Rebecca (2017), 'China's Path Toward the Rule of Law', Foreign Affairs (online article) <https://www.foreignaffairs.com/articles/china/2017-03-28/chinas-path-toward-rule-law>

<sup>21</sup> Editorial, The Economist Newspaper, June 2017, <https://www.economist.com/leaders/2017/06/17/chinas-crushing-of-independent-lawyers-is-a-blow-to-rule-of-law>

demonstrated by China's favouritism towards its domestic businesses, which has sparked a number of angry legal disputes with Western firms, such as *Wahaha vs. Danone*, and provided fuel for an ongoing trade war with the US. This will be explored more later in the essay.

There are also political reasons behind Xi's reluctance to embrace rule of law. Glancing over to Taiwan shows the potential role of lawyers in pushing democratic reforms. An Economist editorial argued that:

'Mr Xi worries about the precedent of nearby Taiwan in the 1970s and 1980s when independent lawyers led a movement against its then dictatorship. But such lawyers—fearless of power and dogged in their defence of society's weakest members—are essential if China is to build the rule of law it needs.'<sup>22</sup>

Pessimists also point to Beijing's approach to political autonomy in Hong Kong, where the Communist Party have been accused of barring candidates for election, kidnapping booksellers, outlawing political demonstrations and limiting free expression - all in recent years. Although Hong Kong's legal system remains among the most respected in the world, activists worry about the precedent set by Beijing's intervention in Hong Kong affairs. When Hong Kong was returned to China from British colonial rule in 1997, Hong Kong retained its separate legal and political system. Many hoped that by 2047 when Hong Kong will be fully integrated with China, China's political and legal infrastructure would look a lot like Hong Kong's. However if things continue on their current trajectory, with 'rule by law' as Xi's 'historical mission', it is far more likely that Hong Kong in 2047 will have little distinction, legally speaking, from any other Chinese megacity.

Whatever direction rule of law takes over the next few decades, it will have important ramifications for the rest of the world. Last year Xi set out his grand vision for a 'new Silk Road' in the form of the 'Belt and Road Initiative' (BRI). This year it was revealed that China will not only be exporting its manufactured goods to countries along the Silk Road but also its legal system, as the BRI will demand that countries adopt its own Chinese-based dispute resolution mechanism.<sup>23</sup> At the heart of this is a longstanding Chinese philosophy that the law doesn't exist for the sake of an objective sense of justice or the needs of the individual, but for the state. As Liao argues, the West ought not to sit back just because China's economic reforms have brought 'sophisticated commercial legal infrastructure';<sup>24</sup> the teleology of the law is defined in relation to what the state - in this case, dominated by one individual - considers to be in China's ambitious interests.

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<sup>22</sup> Ibid.

<sup>23</sup> Editorial, The Economist Newspaper, March 2018, <https://www.economist.com/leaders/2018/03/01/how-the-west-got-china-wrong>

<sup>24</sup> Liao (2017)

## Chapter 2: Why rule of law in China matters to Western governments and businesses

On 24 August 2018, diplomats from USA, EU and Japan met for a trilateral forum with the express purpose of challenging the allegedly prejudicial trading practices of unspecified ‘third countries’.<sup>25</sup> The diplomats gathered to condemn “unfair competitive conditions caused by large market-distorting subsidies and state-owned enterprises, forced technology transfer and local content requirements.”<sup>26</sup> Although no single country was picked out for criticism, it was clear that the unusual meeting was designed to coordinate action against one country in particular: China.

From the United States to Germany, governments around the world have begun to vocalise their discontent with China’s mercantilist, protectionist approach. It is not just hawkishness or geopolitical strategy which laid the groundwork for the growing hostilities between the United States and China, although these are undoubtedly factors, but a sense on behalf of a growing number of Americans that the lack of rule of law in China has ensured a rigged playing field where Chinese interests prevail at the expense of all others.

Dartmouth College economist Douglas Irwin, author of *Clashing over Commerce: A History of U.S. Trade Policy* notes that “a lot of economists would hold their fire in terms of attacking Trump for his China actions. I don’t think anyone can really defend the way China has moved in the past few years, violating intellectual property and forced technology transfer.”<sup>27</sup>

This is significant because China currently fails to uniformly uphold the aspects of rule of law which are most important for business. A recent study by the Economist Intelligence Unit and the Bingham Centre for the Rule of Law based on a survey of 301 senior executives of multinational corporations finds that ‘the rule of law is among the top three considerations when multinationals make FDI decisions, together with ‘ease of doing business’ and ‘a stable political environment’.<sup>28</sup> In particular, organisations look for transparency, intellectual property rights, and fair rather than arbitrary or discriminatory treatment. The study found that although opaque decision making tends not to reduce investment in and of itself, discriminatory treatment and the lack of recognition of intellectual property rights are particularly likely to lead to companies not investing.

Chinese ‘rule by law’ currently fails to provide adequate transparency, intellectual property rights or fair treatment. It looks likely that the international trade spat will continue until China rectify this and providing robust rule of law is therefore not only in the interests of Western businesses but also China itself.

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<sup>25</sup> Tom Mitchell, ‘Trade wars: China fears an emerging united front’, *Financial Times*, September 2018, <https://www.ft.com/content/ee361e2e-b283-11e8-8d14-6f049d06439c>

<sup>26</sup> Ibid.

<sup>27</sup> Greg Ip, ‘China started the Trade War, not Trump’, *Wall Street Journal*, March 2018, <https://www.wsj.com/articles/china-started-the-trade-war-not-trump-1521797401>

<sup>28</sup> The Economist Intelligence Unit and the Bingham Centre for the Rule of Law, ‘Corporate Decision making in Foreign Direct Investment’, <https://binghamcentre.biicl.org/projects/corporatedecision>



### *Lack of intellectual property rights and the rule of law*

The most long-standing grievance of international businesses in China is the theft of intellectual property. The lack of intellectual property rights is inextricably tied to the failure of rule of law, as state involvement in the economy combined with state control of the courts have ensured that Chinese nationalist or strategic interests trump intellectual property rights. Rule of law is undermined on multiple fronts: opaque and broadly defined legislation fails to adequately protect intellectual property rights but instead gives the government access to data if it is in the interest of national security; government-controlled courts more or less uniformly rule in favour of Chinese strategic interests; and there large incentives for foreign businesses interested in a future in China not to take appeals to the WTO.

### *Case study: Danone v. Wahaha*

When Danone entered a joint venture agreement with Wahaha, acquiring a 51% stake in 1996, it appeared to be a win-win for everyone. The partnership was initially a good fit, Danone brought the capital and product research while Wahaha had local market knowledge. However, a decade later, and the once-promising partnership had fallen into an acrimonious public dispute as it emerged that Wahaha had started a parallel firm to market almost identical products based on the know-how of Danone.<sup>29</sup> Although this was clearly an example of intellectual property theft, when Wahaha's founder Zong Qinghou took the case to the Chinese courts for arbitration, the Hangzhou Arbitration Commission found that China's Trademark Office had mysteriously never approved the original transfer of the Wahaha trademark to the Wahaha Joint Venture and therefore Danone failed to have their rights protected. One of the most successful foreign joint ventures in China subsequently permanently split in 2009 after legal wrangles in multiple jurisdictions.<sup>30</sup>

The Danone case study exposes the danger that courts beholden to nationalist and state interests, alongside opaque and vague laws, pose to foreign businesses in the case of disputes.<sup>31</sup> Many of the foreign firms that entered China via joint ventures, across a wide range of industries from cars and steel to media and telecoms have received similar treatment.<sup>32</sup> Beyond joint ventures, Apple, Tesla, and Adidas are among the high-profile organisations to have faced a myriad of patent disputes – often being forced to pay huge settlement sums in order to sell their own products or use their own brand. In 2016, Apple was sued by Shenzhen based company Baili on the basis that the iPhone 6 copied the look of its '100C' smartphone, and Apple was ordered to stop selling the iPhone 6 by the local court.<sup>33</sup>

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<sup>29</sup> Financial Times, 'How Danone's China venture turned sour', April 2007, <https://www.ft.com/content/89a31958-e855-11db-b2c3-000b5df10621>

<sup>30</sup> Financial Times, 'Danone to quit joint venture with Wahaha,' September 2009, <https://www.ft.com/content/849e7eda-ad87-11de-bb8a-00144feabdc0>

<sup>31</sup> Jingzhou Tao and Edward Hillier, 'A tale of two companies', China Business Review, May-June 2008, [https://www.jonesday.com/files/publication/6027415e-bc9d-44b2-9e90-f8ef4870150d/presentation/publicationattachment/a602d7dc-b34c-4f3a-8041-fdde482927ac/a\\_tale\\_of\\_two\\_companies.pdf](https://www.jonesday.com/files/publication/6027415e-bc9d-44b2-9e90-f8ef4870150d/presentation/publicationattachment/a602d7dc-b34c-4f3a-8041-fdde482927ac/a_tale_of_two_companies.pdf)

<sup>32</sup> The Economist, 'Wahaha-haha!', April 2007

<sup>33</sup> Quartz, 'After losing iPhone and iPad, Apple's losing its grip on the iPhone 6 design in China', June 2016, <https://qz.com/710245/after-losing-iphone-and-ipad-apples-losing-its-grip-on-the-iphone-6-design-in-china/>; Australian Government, 'Apple's IP problems in China', July 2017, <https://www.ipaustralia.gov.au/tools-resources/case-studies/apples-trade-mark-problems-china>

The failure of the rule of law ensures that the price of appealing intellectual property violations on the international stage is steep. State involvement in the economy combined with state control of the courts ensures that aggrieved foreign companies face retaliation including being accused of espionage, consumer abuse, fraud or investigated for antitrust if they voice complaints at the WTO.<sup>34</sup> In the words of Robert D. Atkinson, founder of the Information Technology and Innovation Foundation, ‘there is no rule of law to constrain Chinese officials from implementing arbitrary and capricious mercantilist policies.’<sup>35</sup> The result is that foreign firms stay silent, reliant only on tit-for-tat government trade disputes to protect their interests. President Trump’s current policies should be seen in this context, as should the decision of the EU to take Chinese intellectual property theft to the World Trade Organisation in June 2018.<sup>36</sup>

International governments and businesses have expressed concerns that recent Chinese policy innovations will worsen, rather than mitigate the issue. The Chinese Cybersecurity Law, introduced in 2017, is viewed to be a major blow, requiring firms to give large amounts of data to the central government. Foreign technology firms fear that government inspectors will demand that they divulge intellectual property in order to retain access to the market. The burdensome regulations imposed by the law are open to abuse, leaving foreign businesses more vulnerable to attack or prosecution when there are conflicts with local firms.<sup>37</sup>

The US-China trade war has been catalysed by the *Made in China 2025* strategy which aims to upgrade the Chinese economy to a high-tech economy by 2025. Much of this process will be innocent and the result of impressive feats of Chinese structural investment, but Western businesses and the US government fear that China’s plan to innovate in AI, robotics and aerospace will only be possible if they continue to insist on forced technology transfers in exchange for access to Chinese markets: a practice facilitated by the weak rule of law.<sup>38</sup>

### *A better way: Hong Kong*

That there might be a ‘better’ way for Chinese-Western business relations is shown through the success of Hong Kong, which carries a privileged position as China’s international financial hub. As China’s only city which practices ‘rule of law’ rather than ‘rule by law’, Hong Kong is the go-to base for businesses trying to access Chinese and East Asian

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<sup>34</sup> Greg Ip, ‘China started the Trade War, not Trump’, *Wall Street Journal*, March 2018

<sup>35</sup> Robert D. Atkinson, Nigel Cory and Stephen J. Ezell, ‘Stopping China’s Mercantilism’, *ITIF*, March 2017, p. 11  
[http://www2.itif.org/2017-stopping-china-mercantilism.pdf?\\_ga=2.90527705.2132600274.1535557912-535787935.1535557912](http://www2.itif.org/2017-stopping-china-mercantilism.pdf?_ga=2.90527705.2132600274.1535557912-535787935.1535557912)

<sup>36</sup> South China Morning Post, ‘China regrets EU’s allegation of intellectual property theft lodged at the World Trade Organisation’, June 2018, <https://www.scmp.com/news/china/diplomacy-defence/article/2149173/china-regrets-eus-allegation-intellectual-property>; To read the United States’ complaint, see Office of the United States Trade Representative, ‘Section 301 investigation fact sheet’, June 2018, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/june/section-301-investigation-fact-sheet>

<sup>37</sup> Daniel Wagner, ‘China’s cybersecurity law is biased and open to abuse’, SCMP, June 2018, <https://www.scmp.com/comment/insight-opinion/china/article/2152347/chinas-cybersecurity-law-biased-and-open-abuse-it-may>; The Diplomat, ‘China’s Cybersecurity Law: What you need to know’, 1 June 2017, <https://thediplomat.com/2017/06/chinas-cybersecurity-law-what-you-need-to-know/>

<sup>38</sup> South China Morning Post, ‘Made in China 2025: Is Beijing’s plan for hi-tech dominance as big a threat as the West thinks?’ September 2018, <https://www.scmp.com/business/china-business/article/2163601/made-china-2025-beijings-plan-hi-tech-dominance-big-threat>

markets. Hong Kong has a separate seat on the WTO and the rule of law underpins the special trading relationship the UK, US and the EU have with the city.

The US government recently stated that Hong Kong's 'strong traditions of rule of law' justify its 'continued special treatment for bilateral agreements' and have made it a 'preferred platform for U.S. businesses'.<sup>39</sup> Hong Kong's robust rule of law ensures that no other city in China is as trustworthy for international investors. Xiaomi's recent flotation on the Hong Kong Stock Exchange shows that it also gives China a unique gateway to the world.<sup>40</sup> It would be in China's best interests both to safeguard the integrity of Hong Kong's system and to learn lessons from its success.

## Conclusion

Hank Greenberg, the former AIG Chairman and a long-time friend of China who knows the vice-president Wang Qishan closely, recently wrote in the *Wall Street Journal* that 'discriminatory treatment of foreigners is embedded in the Chinese bureaucracy — in government policies, in regulatory procedures laden with obstacles and delays, in structural impediments such as turnover in government agencies resulting from forced early retirements, and in the mindset of Chinese officials'.

'This all needs to change,' Mr Greenberg added. 'China cannot expect to continue receiving favourable trade and investment terms in foreign markets when it is unwilling to reciprocate... The US is right to press to level the playing field.'<sup>41</sup>

With even close friends of the Chinese establishment saying that it is time for China to play fair, the importance of the rule of law for China's relationship with the rest of the world has increased significantly. If Western businesses and governments are to continue to give generous treatment to China and aid Chinese development, they must be guaranteed that the courts will give them a fair trial, transparent rules and protect their intellectual property. The brewing trade war is a potential sign of the consequences if this fails to happen, it is in everyone's interests for the rule of law to be a key priority in China.

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<sup>39</sup> US State Department, Hong Kong Policy Act Report, May 2018 <https://www.state.gov/p/eap/rls/reports/2018/282787.htm>

<sup>40</sup> BBC, 'Xiaomi launches \$10 billion Hong Kong stock market listing', May 2018

<sup>41</sup> Hank Greenberg, 'Some friendly advice for China's leaders', *Wall Street Journal*, August 2018, <https://www.wsj.com/articles/some-friendly-advice-for-chinas-leaders-1534890276>

## Chapter 3: Engaging effectively with China

### Intro

The million dollar question for Western policymakers and businesses alike is how to engage productively with the world's newest superpower. Often, these groups have had differing goals and different approaches to diplomacy. While advocacy groups, such as Amnesty International, are vocal about human rights abuses in Tibet, Xinjiang or Hong Kong, businesses tend to be more subtle and pragmatic. Western governments have balanced their discomfort with China's human rights record against their trading interests - often to the annoyance of activists, who consider this to be 'kowtowing', and also to businesses, who worry about unfavourable treatment from China if their governments handle touchy subjects badly.

This chapter explores how Western governments and businesses can draw on lessons from historical human rights diplomacy with China, and argues that rule of law issues provide a potentially more productive point of engagement which unites the interests of activists and businesses. Businesses have the ability to add a level of pragmatism and financial bargaining power to a debate which can easily descend into a clash of worldviews and geopolitical ambitions. Although Western countries are more dependent on China than ever before, this is a two-way relationship: the Chinese economy is inseparable from a global trading system which is, for now, still dominated by Western firms and run by Western rules. However, China's geopolitical behaviour in Africa and along the 'new Silk Road' provides cause for concern and reason to address rule of law in China before it is too late.

### Human rights: a diplomatic trade-off

Chris Patten, the last colonial governor of Hong Kong, describes how in the run-up to Hong Kong's handover back to China, he often felt trapped between pressure from London to do what was in the interests of British trade with China, and do what he believed was in the long-term interests of Hong Kong's free political infrastructure. He believed that this exposed a confusion among Western policymakers about how best to approach China - whether to kowtow or firmly push for one's demands.<sup>42</sup>

That trade-off, between securing trade and advocating Western ideals, sums up much of the West's diplomacy with China ever since it became clear that China's opening up to trade with the West did not necessarily mean signing up to Western values such as democracy and human rights. For example, President Clinton made advocating for free speech and the release of political dissidents a diplomatic priority,<sup>43</sup> but his administration took pressure off China on human rights when they agreed to join the WTO.<sup>44</sup> The same trade-off can be observed today. Just this year, concerns were raised that Britain's ability to criticise China's human rights record would be hampered by the government's desperation to secure a post-

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<sup>42</sup> Patten, Chris (1998), 'East and West', MacMillan, ch.9

<sup>43</sup> Qi (2005), pp108-110

<sup>44</sup> Zhu, Yuchao (2011), 'China and International 'Human Rights Diplomacy'', *China: An International Journal*. 09. 217-245, [https://www.researchgate.net/publication/241892819\\_China\\_and\\_International\\_'Human\\_Rights\\_Diplomacy'](https://www.researchgate.net/publication/241892819_China_and_International_'Human_Rights_Diplomacy'), p233

Brexit trade deal.<sup>45</sup> The argument goes that the more economically dependent Western countries are on China - whether due to debt, imports or FDI - the less free governments will be to lobby China on human rights.

There was hope among Western powers that China liberalising its trade would lead to the adoption of Western rule of law and human rights, and perhaps even democracy. Activists hold onto the rare good news stories - the recent release of Liu Xia from house arrest, or the increasing pressure being exerted in response to the crackdown in Xinjiang, shows that there are moments when China's 'opening-up' process has allowed for a level of pressure and scrutiny which was unprecedented in the Cold War era.<sup>46</sup>

However, unfortunately for rights lobbyists, more often than not increased trade China has created an interdependence which has muzzled, rather than empowered, Western governments. Consider China's purchasing power of aircraft, which creates fierce competition between the USA's Boeing and Europe's Airbus as they bid for contracts, giving both the US government and the EU an incentive not to criticise China too much.<sup>47</sup>

This trade-off exposes a weakness in bilateral human rights diplomacy, but Zhu Yuchao argues that there is limited evidence that multilateral approaches through international organisations, such as the UN, are more successful. In the UN, 'China has always worked with like-minded nations, most of which are developing countries in Asia, Africa and Latin America, to forge a coalitional group to counter Western criticism.'<sup>48</sup> And, of course, China sits on the UN Security Council and is now the world's second largest economy, largest exporter and the largest foreign holder of US debt.

## **Economy and security**

Zhu argues that the Chinese Communist Party (CCP)'s legitimacy in the eyes of the Chinese public hinges on its (thus far successful) provision of economic development and national security.<sup>49</sup> This, rather than conversion to Western ideals, was the reason for opening up to trade in the 1980s<sup>50</sup>, and there is no doubt that the vast majority of Chinese people are today richer, healthier and safer than they were in the chaotic and murderous decades that saw the civil war, WW2 and the Cultural Revolution. Zhu argues that, in China's historical context, many citizens are willing to give up - or at least not actively fight for - Western political rights in exchange for economic prosperity and national security.

But activists should not necessarily be disheartened by the fact that China opened up to Western trade for purely self-interested reasons, rather out of reverence for Western values. The CCP's pragmatism about human rights also implies that, contrary to some of the

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<sup>45</sup> Gowan, Richard (2018), 'Separation anxiety: European influence at the UN after Brexit', European Council on Foreign Relations [https://www.ecfr.eu/publications/summary/separation\\_anxiety\\_european\\_influence\\_at\\_the\\_un\\_after\\_brexit](https://www.ecfr.eu/publications/summary/separation_anxiety_european_influence_at_the_un_after_brexit)

<sup>46</sup> Guardian, 'Liu Xia: Free at last', July 2018, <https://www.theguardian.com/world/2018/jul/15/liu-xia-freedom-hostage-to-china-crackdown>

<sup>47</sup> Zhu (2011)

<sup>48</sup> Ibid., pp230-231

<sup>49</sup> Qi (2005), Zhu (2011), p241

<sup>50</sup> Zhu (2011), p220

accusations levelled against the Chinese state, they are also not in principle opposed to human rights. While Mao considered human rights to be an intrinsically bourgeois construct, a 1996 government White Paper said: ‘China, as a developing country, is restricted by historical and realistic conditions, and the country’s human rights conditions still have room for further improvement.’<sup>51</sup> In other words, the ambition in 1996 was that human rights may well play a part in China’s future - but it would be on China’s own terms, and not pursued at the cost of economic development or security. As Zhu says, ‘China’s objection [to Western human rights] is instrumental, reflecting a concern over potential restriction of the Chinese state,’ rather than principled.<sup>52</sup>

### **Human rights as a domestic matter**

As a result of China’s insistence to do human rights and civil liberties on its own terms, China’s typical response to Western pressure is to tell them to mind their own businesses. A common refrain is that ‘human rights are a domestic matter,’ and as Zhou Qi says, ‘many Chinese think that US human rights policy essentially uses the issue of human rights as an excuse for the United States to intervene in other countries’ domestic affairs and to advance its own strategic goals.’<sup>53</sup>

This is first because China considers pressure from the West to adopt human rights, democracy and rule of law as little more than another way the West tries to achieve its geopolitical interests. As Zhu says, ‘China’s collective perception of international justice and order have been shaped by its own experience with imperialism and foreign intervention since the 19th century.’<sup>54</sup> Zhou Qi says that China fails to understand that Western pressure for human rights is not just ‘realist’ but also ‘idealist’.<sup>55</sup> Their suspicion is understandable, given that the West’s diplomacy with China has not always been motivated by high-minded liberal idealism, but is more often than not a reflection of selfish business interest or security concerns.

The other motivation for rejecting Western demands is more philosophical than geopolitical. China, which has its own, relatively well-developed political theory and legal tradition, sees no reason why it should take a Western view of rights as universal. Zhu calls this a ‘suspicion about the Western-centred universality of human rights’,<sup>56</sup> exposing a cultural relativism which explains more broadly China’s approach to foreign policy. Except in regions which it claims are a part of China, the CCP does not attempt to impose ‘Chinese values’ on other countries. It sees 21st Century human rights activism as no different, at heart, to America’s war on communism in the 20th Century or European imperialism in the 19th Century. In each case, China prefers to be left alone.’

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<sup>51</sup> 1996 Whitepaper in Zhu (2011), p224

<sup>52</sup> Zhu (2011), p222

<sup>53</sup> Qi (2005), p111

<sup>54</sup> Zhu (2011), p221

<sup>55</sup> Qi (2005), p112

<sup>56</sup> Zhu (2011), p221-222

## Rule of law as a more viable diplomatic goal

The question begged by the above discussion is, to what extent will China respond to Western pressure on rule of law in the same way it responds to pressure on human rights? The two concepts are often conflated, and both have been advocated by activists as part of the same package. They are nevertheless distinct concepts, and there are a number of reasons for thinking that China might respond more positively to pragmatic diplomacy on rule of law than it has done on human rights.

### *Economic growth*

One reason is that the rule of law carries with it more obvious economic benefits than granting other human rights. If Zhu is right that today's CCP is primarily motivated, quite pragmatically, by economic development and security, then it is understandable that rights such as freedom of expression or freedom of religion or belief are not high on its priorities. There is plenty of evidence, however, that rule of law is good for economic growth.

Research from the Bingham Centre and the Economist Intelligence Unit, mentioned in the previous section, shows that rule of law, in particular, 'the existence of national laws protecting investor rights, security and property was 'essential' to [multinational companies'] FDI decisions and that they would not invest without it. By contrast, only 9% and 15% of interviewees indicated that the host country's ratification of, respectively, bilateral investment protection treaties and multilateral treaties protecting IP was 'essential'.<sup>57</sup> Meanwhile, human rights concerns were less of a priority for Western investors.

Stable rule of law has also been cited as a significant factor in explaining Hong Kong's economic success. Chris Patten, the last governor of Hong Kong, wrote, 'The law is not a ceremonial hulk. It lives and breathes. Without it, there is no market economy but a jungle economy, everyone for himself or herself, a bracing environment for the brave but not a place where most of us would want to invest much if any of our pension funds. The rule of law underpins prosperity and sustains the most acceptable and profitable way of doing business, which is why, as Mr Lee Kuan Yew [the first Prime Minister of Singapore] has pointed out, so many mainland Chinese companies set up in Hong Kong before the transition.'<sup>58</sup>

Patten goes on to argue that 'Business should also press countries to make good-governance a higher priority in their overseas development and technical-cooperation programmes,<sup>59</sup> and that 'those who wish to attract investment into their developing countries should know the emphasis placed by business on rule of law issues.<sup>60</sup> Individual businesses and macroeconomists agree that rule of law is good for making money: it is seen as the source of Hong Kong and Singapore's success as wealthy Asian cities. The CCP's legitimacy in the eyes of China's growing property-owning classes, as well as its business

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<sup>57</sup> Economist Intelligence Unit and Bingham Centre report (2015), 'Corporate Decision Making in Foreign Direct Investment' [https://www.biccl.org/documents/625\\_d4\\_fdi\\_main\\_report.pdf?showdocument=1](https://www.biccl.org/documents/625_d4_fdi_main_report.pdf?showdocument=1)

<sup>58</sup> Patten (1998), p260

<sup>59</sup> Ibid. p261

<sup>60</sup> Ibid. p261

tycoons, hinges on China's economic record. This provides a pressing reason for the Chinese government to take seriously Western diplomacy on rule of law, where it might have dismissed human rights as a domestic - and therefore non-urgent - matter.

Furthermore, engagement with the global trading system requires acquiescence to a rule-based system which is largely designed by Western ideals. Zhu concludes that 'China must realise that, as an increasing interdependence exists between itself and international society, if its policies and laws do not conform to international standards, its economic reform and opening-up policies could be jeopardised.'<sup>61</sup> Both at home and abroad, Chinese economic agents - companies, consumers, exporters and investors - will expect a level of economic security which can only be guaranteed by effective rule of law.

### *Consumer power*

Secondly, China's growing middle class has an interest in rule of law provision. As discussed in the first chapter, China's legal system requires adaptation to cater to an increasingly individualistic, consumer-based society. Chinese citizens may lack democratic rights, but they increasingly expect consumer rights: ordinary Chinese people are more likely than ever before to buy shares, invest in property, sue a company, divorce their partners, bequeath their wealth and return consumer goods in shops. All of these activities require a legal system that is somewhat based around the needs of the individual, even if China's political system is structured around the needs of the collective. As demonstrated by recent protests around house prices in Shanghai<sup>62</sup> and Peer-to-Peer lending schemes,<sup>63</sup> the Chinese government is likely to face growing public pressure for consumer rights - rather than a concerted campaign for democracy or human rights.

It is not hard to see how rule of law fits into demands for consumer and investor rights. For consumer rights to be meaningful, consumers ultimately need to be able to take legal action against companies. Firms and individuals need to be able to trust the legal system, as well as the official laws, which means stamping out corruption, having clearly defined rights, paramount respect for contracts and equality between individuals before the law. Where services are provided by the state, as many are in China, the state must also be under the law. For example, a woman who slips and severely injures herself on a faulty stairwell in a Guangzhou Metro station will expect compensation, which requires a legal mechanism to arbitrate between the state-owned Metro company and a private citizen. Similarly, Chinese investors - whether they are buying Beijing real estate, Shanghai stock or Shenzhen venture capital - will expect firm systems of property rights, trustworthy dispute settlement mechanisms and the knowledge that they will be treated fairly and impartially. There is no escaping the role of rule of law in a developed economy - and a developed economy in China soon shall be.

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<sup>61</sup> Zhu (2011), p222

<sup>62</sup> Editorial, The Economist Newspaper (June 2017) <https://www.economist.com/leaders/2017/06/17/chinas-crushing-of-independent-lawyers-is-a-blow-to-rule-of-law>

<sup>63</sup> Sweeney, Peter (2018), Reuters (online news source) <https://uk.reuters.com/article/us-china-security-beijing-breakingviews/breakingviews-chinese-peer-lending-protests-set-political-trap-idUKKBN1KS0E7>



### *Chinese values*

Thirdly, it is unclear that China can use its usual rebuttal - that Western countries should stop meddling with China's domestic matters - when it comes to rule of law. This is partly because calls for better legal infrastructure are more obviously grounded in business pragmatism rather than the West imposing its philosophy, but also because while 'human rights' are considered an inextricably 'Western' concept, this is less clear with 'rule of law'. For example, the concept of 'sovereignty', understood as national self-determination, has roots in Western political theory, but this has not prevented the CCP from adopting it as a driving philosophy with unique Chinese characteristics.<sup>64</sup> Equally, state socialism and capitalist trade both have roots in European political theory, but this has not stopped China embracing elements of both theories.

Similarly, rule of law has roots in Western jurisprudence, but that does not imply incompatibility with Chinese values. On the contrary, China has a well-developed legal system, especially compared to those of many developing countries, and has historically been rule-governed. Chinese tradition has a high level of respect for law and order, even if this has taken a different form from Western rule of law.

Once again the comparison of Hong Kong and Singapore to mainland China is apt. While Singapore and Hong Kong rank 13th and 16th respectively in the WJP's rule of law rankings (ahead of the USA and France), China lags behind at 75th. Singapore's democratic infrastructure and human rights record has been questioned, but it scores highly on rule of law, demonstrating that there is no reason to think that countries built on Chinese or Asian values cannot operate alongside decent rule of law. Similarly, Patten says that we should not fall into the trap of thinking that the rule of law is incompatible with Chinese values. He says: 'There are today two wholly Chinese societies that enjoy the rule of law; they are plural and open. They are Taiwan and Hong Kong. If the rule of law can work there, can it really be true that it could not take root in Peking, Shanghai or Tianjin?'

### *Business pragmatism*

One final reason to think that the rule of law diplomacy might be effective is that it draws together everyone's interests, both those of businesses and human rights activists. This means it will not only be radical voices speaking out but also moderate, conservative voices: lawyers, academics and businesspeople. Beijing views political activism with suspicion: all protest is a threat to stability and order and is intrinsically associated with Western-style democracy. It is far more comfortable with businessmen and lawyers. Indeed, a notable successful bilateral diplomatic project was initiated by Canada, which involved sending Canadian lawyers to train Chinese lawyers using Western rule of law principles.<sup>65</sup> The non-confrontational nature of the project, as well as the focus on rule of law rather than human rights, were undoubtedly key to its success.

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<sup>64</sup> Qi (2005)

<sup>65</sup> Zhu (2011), p335

When it comes to talking with China, the business lobby holds more cards - China relies on their investment and increasingly on Western imports. The business lobby also speak their language: businesses who negotiate with China are willing to engage in more give and take. In an ideal world, China would be attentive to local and international activism on human rights; and while a million Uighur are kept in re-education camps and human rights lawyers are being arbitrarily detained, human rights dialogues remain essential. However, rule of law offers an area of mutual interest for both Western investors and the Chinese state, and therefore discussions around rule of law have a higher chance of being productive.

## **Conclusion**

As Chris Patten and other foreign policy experts have pointed out, engaging effectively with China does not have to mean kowtowing to their every demand. But recent history shows that this particular Chinese government, led by President Xi, is particularly hostile to anything that might be construed as Western cultural imperialism. This means that Western pressure on human rights and political freedoms, which are raised both in bilateral relations between Western powers and China and at the UN, are often limited in their effectiveness.

This chapter argued that, while such human rights dialogues remain important, there are good reasons for thinking that the rule of law is a more effective issue on which to engage with China. Importantly, rule of law can be theoretically and practically distinguished from human rights, which are a more toxic point of diplomatic contention for China. Rule of law has more obvious links to China's economic growth, which is core to President Xi's ambitions and legitimacy, and has the interest of foreign business behind it, and not just foreign activists. It is also possible to link rule of law to China's rich legal tradition, in the hope that it might take root in China's existing, relatively well-developed legal infrastructure. Lastly, as China's middle class grows, even more, citizens will come to expect some basic level of protection for consumers, investors and owners of private property.

## Conclusion: The internationalisation of Chinese rule by law

As China becomes one of the world's pre-eminent global powers, President Xi Jinping's government is increasingly intent on ensuring that the international rules-based system works in China's interests. Contrary to predictions at the turn of the century about China's 'opening-up' to Western values and systems, the current Chinese government remains hostile to human rights and is pursuing its own course - 'socialism with Chinese characteristics'. This poses a significant threat to the Western rules-based system of global trade and international relations.

Looking back, this is nothing new. Chapter 1 explored China's rich legal history, concluding that although in many ways the legal system is stable and advanced, it has never met Western standards of rule of law, and despite attempts at reform has always been at the mercy of political interests. This reflects a fundamentally different view of the purpose of the legal system - that it is essentially another arm of the state. Rule *by* law is Xi's stated 'historical mission' - and there is an explicit rejection of anything that looks like Western cultural imperialism.

Chapter 2 looked at what this system means in practice for foreign businesses engaging with China. As demonstrated in the ongoing trade war between China and the US, the *Danone v. Wahaha* case and ongoing disputes around intellectual property rights, there is dissatisfaction with China's behaviour and accusations of an unfair playing field. These issues are inextricably linked to rule of law, and we should not expect them to go away any time soon.

Looking forward, the Belt and Road Initiative illustrates China's ambitions: not only will the initiative boost trade and reliance on China among many central Asian countries, but China is also using the BRI to export its own legal system, establishing two of its own international courts to handle disputes.<sup>66</sup> Similarly, China's behaviour in East Africa, colluding with business and using debt to advance its own geopolitical interests, is worryingly reminiscent of Western mercantilism in the 19th Century. By dangling attractive infrastructure loans in many areas that lack viable alternatives, China has successfully persuaded countries to accept terms that might otherwise be hard to swallow; recent examples include a Chinese debt-financed port in Djibouti, which will soon host Chinese naval vessels.<sup>67</sup>

However, there are reasons to be hopeful. As discussed in Chapter 3, rule of law offers a potentially rewarding opportunity for effective diplomatic engagement with China. Businesses often shy away from challenging China on human rights, and national governments, as well as international organisations, can find that their condemnations and declarations reach deaf ears in Beijing. However rule of law undeniably affects foreign businesses engaging with China, and perhaps more importantly, will increasingly matter to private investors and consumers in China.

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<sup>66</sup> Financial Times, 'China's Belt and Road court to challenge current US-led order', July 2018

<sup>67</sup> Reuters, "Significant" consequences if China takes key port in Djibouti: U.S. general', March 2018

<https://www.reuters.com/article/us-usa-china-djibouti/significant-consequences-if-china-takes-key-port-in-djibouti-u-s-general-idUSKCN1G12V0>

Western powers should, therefore, take seriously the opportunity to encourage and foster a workable legal system in China which meets standards for rule of law. This should not be done at the expense of human rights lobbying, the two issues should be recognised as distinct. China should see it as in its interests to adopt rule of law, both to attract Western business and reassure its increasingly wealthy and individualistic populace. The rewards are potentially very high: increased trust between China and the West, increased trade, a more stable and open legal system which supports China's economy. Equally, the costs of not engaging with rule of law in China are also high: we risk escalating mistrust between China and the West, China developing and exporting its own, unreliable legal system, and yet another obstacle to effective dialogue with China - which ultimately benefits nobody.

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