

Chapter 1

Introduction

1.1 Calls for Rule of Law

When looking into the younger history¹ of China,² many calls are found concerning, in one way or another, the rule of law. The need to further improve the rule of law was expressed not only by foreign entrepreneurs, especially by those from the Western hemisphere, but also by other representatives of the so-called Western civilization (see Sect. 1.1.1). China officially called expressly or in other ways for “rule of law,” too (see Sect. 1.1.2).

1.1.1 Western Calls

Since Deng Xiaoping started the policy of reform and opening up in 1978, several Western institutions have urged China to adhere to the rule of law.

Two prominent policy papers published in 2012 may serve as example. One is the “Business Confidence Survey” initiated and published by the European Chamber of Commerce in China (EUCCC). It shows that the interviewees, European entrepreneurs and companies, consider the “rule of law”³ as the most important among five top drivers for China’s economic performance in the coming years.⁴ The survey shows

The development of the *rule of law* and more transparent policy-making and implementation is rated as the most important driver for future Chinese economic growth.⁵

¹ Starting in 1978.

² P.R. China excluding Hong Kong, Macao, and Taiwan.

³ Followed by domestic consumption, labor costs, unfair competition and monopolies, and the implementation of environmental regulations.

⁴ EUCCC (2012), 28.

⁵ EUCCC (2012), 5.

Shortcomings of the rule of law⁶ in China are one of the reasons for nearly a quarter of respondent companies to consider moving existing investments out of China.⁷

The other important policy paper “China 2030”⁸ has been issued jointly by the World Bank and by the Development Center of the State Council of China (see further Sect. 1.2). It heralds

China’s economic performance over the past 30 years has been remarkable. It is a unique development success story, providing valuable lessons for other countries seeking to emulate this success⁹

But the same authors warn Chinese leaders that to continue the economic progress and

to become a modern, harmonious, and creative high-income society by 2030... China must change its policy and institutional framework.¹⁰

To achieve a sustainable development, the authors of “China 2030” propose six targets for China’s new development strategy, one concerning the “rethinking of the role of the state...in the economy.”¹¹ More precisely, to achieve sustainable growth

the government will need to transform itself into a lean, clean, transparent, and highly efficient modern government that operates under the *rule of law*.¹²

Both papers name the rule of law as a cornerstone for China’s future prospects. Like many other policy papers, they do not come up with a definition of the rule of law. They confine themselves for mentioning constituent elements of it, e.g., legal certainty.¹³ These elements will be analyzed and evaluated from a legal point of view at the respective section of this paper.

1.1.2 Chinese Calls

As shown, the World Bank and one body under State Council of China have jointly expressed their opinion that sustainable economic development requires a “government that operates under the rule of law.” Before that, Chinese leaders themselves have called many times for development of the rule of law as a whole

⁶ Uncertainty and ambiguity of regulations when doing business in China.

⁷ EUCCC (2012), 5, 31.

⁸ The full name of the paper is: China 2030—Building a Modern, Harmonious, and Creative High-Income Society.

⁹ World Bank (2012), vii.

¹⁰ World Bank (2012), viii.

¹¹ World Bank (2012), 18.

¹² World Bank (2012), 18.

¹³ E.g., World Bank (2012), 20.

or of certain elements of it (see Sect. 2.2). Actually, these calls have started soon after the policy of the reform and opening up was begun in 1978. Obviously, the concept of rule of law must have seemed new and strange to many of the Chinese leaders, since it contrasted tremendously with the old system. Thus, statements from that time often do not explicitly refer to the rule of law, but link the concept to other principles like democracy or the legal system as such.

For example on December 13, 1978, Deng Xiaoping stated at the Central Working Conference:

To ensure people's democracy, we must strengthen our legal system. Democracy has to be institutionalized and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes, or whenever the leaders change their views or shift the focus of their attention. The trouble now is that our legal system is incomplete, with many laws yet to be enacted. Very often, what leaders say is taken as the law and anyone who disagrees is called a law-breaker. That kind of law changes whenever a leader's views change.¹⁴

Deng clearly recognized that the execution of power in China had to be disconnected from the personal opinions of its leaders. Leaving aside the discussion on Deng's interpretation of "people's democracy," he obviously calls for supremacy of law thereby referring to one of the core elements of the Western understanding of the rule of law (see Sect. 2.2).

Deng's proclamation has since then been repeated by various Chinese leaders in varying words, such as a government "in accordance with the law," the adherence to "rule of law" or the establishment of a "socialist rule of law" or "rule of law ..." or "legal system with Chinese characteristics."

For instance, Jiang Zemin, one of Deng's successors, stated in 1997 the governance of the *country in accordance with the law* essential for the development of China:

The smooth progress of the undertakings of the Party and the state inevitably requires that there must be laws to go by, that the *laws must be observed* and strictly enforced, and that law-breakers must be prosecuted. We shall strengthen legislation, improve the quality of laws and form a socialist legal system with Chinese characteristics by the year 2010. We must safeguard the dignity of the Constitution and other laws; we must see to it that *all people are equal before the law and that no individuals or organizations have the privilege to overstep it*. All government organs must perform their official duties *according to law*, guarantee in real earnest the citizens' rights and implement the system of responsibility for law enforcement and the system of assessment and examination in this regard.¹⁵

Two years later, in 1999, China formally introduced the rule of law in its Constitution.¹⁶ In order to emphasize that China must not copy any other country's

¹⁴ Deng's speech from December 13, 1978, ch. II par. 9.

¹⁵ Peerenboom in Zhao (2006), 72. See for example, Zemin's Report from September 12, 1997, ch. XI par. 2.

¹⁶ Art. 5 par. 1 Chinese Constitution: "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law."

system or concept of a rule of law, it was introduced as a rule of law with Chinese characteristics. Chinese scholars use historical, cultural, ideological, and political reasons to justify this specification.¹⁷

Under Jiang Zemin's reign, in 2000, China signed an agreement with the UN for cooperation and training on individual rights and rule of law.¹⁸

Also the then Chinese president and successor of Jiang Zemin, Hu Jintao, observed, that:

We must build a system based on the *rule of law* and should not pin our hopes on any particular leader.¹⁹

And in 2012 on the occasion of the 30th anniversary of the Chinese Constitution, the actual president of China, Xi Jinping, also confirmed that:

No organization or individual has the privilege to overstep the Constitution and the law, and any violation of the Constitution and the law must be investigated.²⁰

The most recent policy papers concerning the development of the rule of law in China are the White Papers 2008 and 2011 both issued by the State Council Information Office. In “China’s Efforts and Achievements in Promoting the *Rule of Law*” (White Paper 2008) expressly points to the rule of law is explicitly mentioned:

The development of democracy and the *rule of law* still falls short of the needs of economic and social development;...

Although the paper “The Socialist Legal System with Chinese Characteristics” (White Paper 2011) in particular addresses the legal system, it implicitly refers to certain aspects of the rule of law²¹:

The need for legal system improvements is urgent in order to meet... the new demands and expectations of the people, as well as ... problems facing China’s reform, development and stability.²²

In addition to policy papers and official statements, more and more Chinese citizens, often explicitly demonstrated by a lack of “certainty,” demand conditions, which constitute a rule of law as it is understood in the West (see Sect. 2.3). Many Chinese, not only ordinary citizens but also entrepreneurs, complain about very little “certainty” in their daily life and for their future activities. This uncertainty is

¹⁷ Mo (2010), 38, 64; Wang (2010), 5. Pan (2006), 37.

¹⁸ Eckholm, New York Times, November 21, 2000.

¹⁹ Wang and Cheung, South China Morning Post (March 8, 2003).

²⁰ China Daily (December 4, 2012).

²¹ See in detail Sect. 2.2.

²² China is the worldwide leading country in terms of social inequality. The gap between the rich and the poor in China has reached a very critical scale. A Gini index above 0.4 (which China reached in 2000 already) is deemed to be a danger for social peace. See <http://data.worldbank.org/indicator/SI.POV.GINI> (accessed on 8 Mar 2014). According to newer studies, China reached the value of 0.61 in November 2012. <http://www.dradio.de/dlf/sendungen/essayunddiskurs/2034698/> (accessed on 20 Sept 2014).

often founded in corruption and the weak-binding power of the law. Since many think that they can hardly foresee their personal and commercial future in China, they look for a fortune abroad.²³

To put it with the words of the migrant expert Liang Zai from University at Albany in New York:

There continues to be a lot of uncertainty and risk. ... People wonder what's going to happen two, three years down the road²⁴

or with the words of a Chinese blogger:

A green card is a feeling of safety. The system here isn't stable and you don't know what's going to happen next.²⁵

Chinese official statements link the problem corruption and the lack of legal awareness among officials as to the *socialist rule of law* too, e.g., White Paper 2008:

some government functionaries take bribes and bend the law, abuse their power when executing the law, abuse their authority to override the law, and substitute their words for the law, thus bringing damage to the socialist rule of law;...

China faces various problems, e.g., the lack of lawful implementation of rules in the area of environmental protection, which seriously impacts the daily life in China.²⁶ The problems make reforms pressing.

Because of corruption and weak legal enforcement, without reforming the political system we will never get a blue sky over China.²⁷

1.2 Motivation and Approach of the Analysis

As shown, “the West” and China are demanding the development of the rule of law in China. But what exactly does this mean? What does “the West” want? Do and can especially the editors (World Bank and PRC State Council 2030) of the “China 2030” paper speak the same language? What do “Westerner” and Chinese mean today when they talk about the “rule of law”? What are the reasons to call for more rule of law? And, since the call for more rule of law comes especially from Western entrepreneurs and Western institutions, is China on the way toward their understanding of rule of law?

²³ See NYT-IW November 12, 2012, p. 3. For the big (508,000 in 2010) and steadily rising number of Chinese leaving China every year especially to the USA but also to other 33 developed countries. According to an online survey conducted by the Chinese Web site sina.com, 88 % of the 7,000 respondents would like to emigrate if they had this opportunity. See Strittmatter, SZ November 2, 2012, 3.

²⁴ See NYT-IW November 12, 2012, p. 3.

²⁵ Ibid.

²⁶ E.g., on February 15, 2014, in Beijing fine particulate matter exceeded 500 microgram per cubic meter. This value is 50 times higher than value of 10 microgram per cubic meter set by the World Health Organization as an absolute limit. See Strittmatter, SZ February 26, 2014, 8.

²⁷ WANG Yuesi (atmosphere physicist and member of a working group on reduction of pollution in Beijing) in Strittmatter, SZ January 21, 2013, 8.

The following analysis will try to answer these questions by using the reasoning for and core elements of the rule of law as it is widely understood in the West (see Chap. 2) as a reference. It will then compare the implementation of certain recognized core elements (see Sect. 2.3) in selected Western countries of Europe with the situation in China. As the paper will show, the rule of law is in theory a highly contested concept and many great and comprehensive works have already been done on the origins, ideas, and contents of the rule of law. Moreover, Western and Chinese history and philosophy took their own developments leading to different theories and concepts. Therefore, and based on the existing theoretical groundwork, the author refrains from another comprehensive theoretical description of the rule of law concept but focuses on the implementation of some recognized core elements in the countries of comparison. Thus, the state of development in the different hemispheres can be shown as well as different versions of the rule of law.

1.3 Reference of Comparison

The “Western” understandings and implementation of the rule of law in France, Germany, and the United Kingdom have been chosen as a reference of comparison. In each of these countries, the “rule of law” has been developed out of specific and very different circumstances and conditions.

In *Germany*, the current model of the rule of law (the *Rechtsstaat*) was implemented after World War II. To get the people and the country out of the ashes and to prevent any totalitarian regime, the Western–German Constitution of 1949²⁸ was formulated under the auspices of the Western allied forces, i.e., France, the United Kingdom, and the USA. Their troops and the Russian forces had liberated Germany from the Nazi regime.²⁹ It was their intention to arrange for a clear separation of power in their sphere to prevent any misuse of power, dictatorial governing, and the establishment of another terror regime. The *French* system of the rule of law emerged mainly out of the forceful struggle of the people for liberty and equality, while the development in the *United Kingdom* was less violent: Britons limited the power of the Crown and subjected it to a legal system. The United Kingdom still is a—constitutional—monarchy,³⁰ while France and Germany are republics.

²⁸ Meaning the Constitution of the former “West Germany” (Federal Republic of Germany), which became the Constitution of the whole, reunified present-day Germany in 1990.

²⁹ The Constitution was actually drafted by the members of the so-called *Parlamentarischer Rat* (Parliamentary Council), which reflected the German population. But it was subjected to the approval of the Western allied forces and thus strongly influenced by their views and visions. The former Soviet Union exerted its influence solely in the Russian Sector of postwar Germany, which became the German Democratic Republic in 1949.

³⁰ Unitary parliamentary constitutional monarchy.

Chinese legal development was early influenced by the Continental European law, especially by the German Law (see Sect. 4.2.3.1). France and the United Kingdom are widely considered as pioneering in development of the rule of law. Moreover, by taking the United Kingdom into its sample, the following comparison can include a running common law system, too. As the paper will show, the rule of law in Germany, the *Rechtsstaat*, tends to be more rigid in many core aspects³¹ than its antetypes in France and in the United Kingdom. This is due to the mentioned historical reasons.

The European Union itself does not qualify as a viable reference for the comparisons in this paper. Firstly, its history and legal track record are much shorter than the French or the British. Secondly, although it heavily influences the legal systems of its various member states, the European Union cannot be regarded as one single state with one uniform legal system. Thirdly, the European Union still has limited reach: It can act only, where sovereign states delegate their sovereignty to the Union. This paper will therefore show links between national and supra-national legislation and contemplate impacts of European Union regulations on national legal systems, but it will focus on selected national legal systems.

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³¹ Especially a very strict separation of power (see Sect. 4.1.1) and extensive protection of fundamental rights (see Sect. 4.3.2). For the last-mentioned aspect Tamanaha (2004), 108 states that “the German version of the rule of law, the *Rechtsstaat*, manifests dramatically the tensions between democracy and individual rights”.

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