

# China's Five Year Plan For The Construction of a Rule Of Law (2020-2025)

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**Abstract:** On 10th January 2021, the People's Republic of China's (PRC) enacted its first 5-year plan for the construction of a rule of law. Amongst its embellished statements of principle, the plan's objective is to shape a 'Chinese socialist rule of law' by 2025, and achieve a fully formed version of by 2035. The official document carrying these policy goals is equally ambitious, and is the first of its kind in two respects. It is the first publically available document stating the principles, contents and procedures of a constitutional review by the all-powerful Standing Committee of the National People's Congress. It is also the first public document calling for the enactment of a unified Chinese Administrative Law. The plan also reveals a deep commitment to "accelerate the construction of a legal system applicable outside the jurisdiction of our country." This is both a significant development in contemporary Chinese globalism, and largely under-reported and under-explored by the West. Thus, the document is of paramount importance to understanding the Communist Party of China's (CCP) future plans for both the domestic Chinese legal system, and future legal engagement with the rules-based international order. This article will offer a critical appraisal of the CCP's plan, analysing its domestic and international implications. With a focus on Hong Kong, Macau, Taiwan, and the 'Belt and Road Initiative', this analysis concludes that the CCP's plan for the rule of law signals a new consolidation of both legal justification for political ambition, and unbridled Chinese exceptionalism.

**Keywords:** China, Rule of law, International Relations, Security, CCP.

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On 10th January 2021, the People's Republic of China's (PRC) enacted its first 5-year plan for the construction of a rule of law.<sup>1</sup> Amongst its embellished statements of principle, the plan's objective is to shape a 'Chinese socialist rule of law' by 2025, and achieve a fully formed version of it by 2035. The official document carrying these policy goals is equally ambitious, and is the first of its kind in two respects. It is the first publically available document stating the principles, contents, and procedures of a constitutional review by the all-powerful Standing Committee of the National People's Congress.<sup>2</sup> It is also the first public document calling for the enactment

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1 "China's Five-Year Rule of Law Plan: Implications for Hong Kong and Beyond," Australian Institute for International Affairs: Australian Outlook, accessed January 12, 2022, <https://www.internationalaffairs.org.au/australianoutlook/china-five-year-rule-law-plan-implications-hong-kong-beyond/>

2 The NPC is the PRC's national legislature. Its Standing Committee is the Congress' permanent voting organ and has a greater say in legislative and constitutional deliberations. Also note that the Supreme

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of a unified Chinese Administrative Law.

The plan also reveals a deep commitment to “accelerate the construction of a legal system applicable outside the jurisdiction of our country.”<sup>3</sup> This is both a significant development in contemporary Chinese globalism, and largely under-reported and under-explored by the West. Thus, the document is of paramount importance to understanding the Communist Party of China’s (CCP) future plans for both the domestic Chinese legal system, and future legal engagement with the rules-based international order.

This article will offer a critical appraisal of the CCP’s plan, analysing its domestic and international implications. With a focus on Hong Kong, Macau, Taiwan, and the ‘Belt and Road Initiative’, this analysis concludes that the CCP’s plan for the rule of law signals a new consolidation of both legal justification for political ambition, and unbridled Chinese exceptionalism.

## Background

The document outlining the 5-year plan states the CCP’s intention to “provide a powerful legal guarantee for the comprehensive construction of a modern socialist country and the realisation of the Chinese dream of the great rejuvenation of the Chinese nation.”<sup>4</sup> The phraseology ‘Chinese dream’ and ‘national rejuvenation’ are hallmarks of the Xi Jinping administration.<sup>5</sup> They emphasize the need to restore China to its rightful place as a leader on the world stage, overcoming both colonial powers and the historical label of “the sick man of Asia.”

The ‘Chinese dream’ is to be achieved by a “socialist rule of law with Chinese characteristics”, the latter a concept mentioned 13 times in the 17-page document. The guiding ideology of this legal system include: Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory, and Xi Jinping Thought.<sup>6</sup> The practical implications of these influences can be found in Article 1 of the Hong Kong Constitution, which provides: “the defining feature of socialism with Chinese characteristics is the leadership of the CCP”.<sup>7</sup> Meanwhile the party’s political supremacy is enshrined in the preamble of the PRC’s constitution, and is reiterated in the 5-year rule of law plan, which states: “[T]o build a rule of law in China, we must always regard the party’s leadership as the most

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People’s Court in Beijing reports to the NPC.

3 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*. <https://www.chinalawtranslate.com/en/%E6%B3%95%E6%B2%BB%E4%B8%AD%E5%9B%BD%E5%BB%BA%E8%AE%BE%E8%A7%84%E5%88%92%EF%BC%882020-2025%E5%B9%B4%EF%BC%89/>.

4 Ibid.

5 Graham Allison, ‘What Xi Jinping Wants,’ *The Atlantic*, June 1 2017, <https://www.theatlantic.com/international/archive/2017/05/what-china-wants/528561/>. The Economist Briefing, ‘Chasing the Chinese Dream,’ *The Economist*, May 4 2013, <https://www.economist.com/briefing/2013/05/04/chasing-the-chinese-dream>.

6 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

7 Hong Kong Constitutional and Mainland Affairs Bureau, 2021, *Hong Kong Basic Law Article 1*, <https://www.basiclaw.gov.hk/en/constitution/chapter1.html>.

fundamental guarantee of the socialist rule of law.”<sup>8</sup> Furthermore, the 2019 annual work report of Supreme People’s Court president Zhou Qiang emphasized that judges should conform to CCP ideology and uphold the party’s “absolute leadership” of the courts.<sup>9</sup>

To most rule of law scholars, such language suggests a *rule by man*, the monarchical antithesis of a *rule of law*. Unsurprisingly, the CCP’s centralised governance is beset by widespread corruption,<sup>10</sup> and arbitrary judicial decision-making. One estimate put the costs of corruption at 3% of the GDP.<sup>11</sup> Costs to the party’s political legitimacy are much higher. Thus, perceptions are crucial for the CCP. Economic and social stability can be found in a perceived rule of law – hence Xi Jinping’s formalised “legalistic” process of abolishing term limits (compared to the more crass Russian model of circumventing term limits). As there is no separation of powers in China, with the CCP enjoying total political control, the so-called effort to build a rule of law is in fact an attempt to legitimise the ‘*rule by law*’ for and by the state apparatus. It is fundamentally an appropriation. As the 5-year plan states: “[W]hoever enforces the law will popularise the law.”<sup>12</sup> Thus, the PRC’s *rule by law* will engineer a feedback loop of legitimacy and continued centralised governance by the CCP until at least 2035.

The plan is further predicated upon Xi Jinping Thought on the rule of law, which states: “[T]he practice of the rule of law in China and abroad shows that there is no rule of law beyond politics. Western countries claim the rule of law as ‘political neutrality’ and the judiciary as ‘judges belong to no party’, which is nothing more than a set of self-deception.”<sup>13</sup> In the eyes of the CCP, both Western constitutionalism and its rule of law amount to nothing more than a “rhetorical trap.”<sup>14</sup> This was seen with the infamous Document 9’s seven taboos, allegedly approved by President Xi. The first and foremost taboo is “Western constitutional democracy”, with the separation of powers and “independent judiciaries specifically denounced as “capitalist class concepts”<sup>15</sup> Hence, why the PRC’s judicial agencies are coordinated by the ‘*Political-legal Committee*’ of

8 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*. Also see: Moritz Rudolf, Xi Jinping Thought on the Rule of Law: New Substance in the Conflict of Systems with China,’ *Stiftung Wissenschaft und Politik*, April 22 2021, <https://www.swp-berlin.org/10.18449/2021C28/>.

9 Freedom House Index, ‘Freedom in the World 2021: China,’ *Freedom House*, 2021, <https://freedomhouse.org/country/china/freedom-world/2021>.

10 The doctrine of a “harmonious society” encouraged the informal resolution of legal disputes, which incentivised the bribery of officials.

11 Minxin Pei, ‘Corruption Threatens China’s Future,’ *Carnegie Endowment for International Peace*, October 9 2007, <https://carnegieendowment.org/publications/index.cfm?fa=view&id=19628>.

12 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

13 Fu Zitang & Cui Bo, ‘The Practical Requirements of Xi Jinping Thought on the Rule of Law,’ *Southwest University of Political Science & Law*, December 15 2021, <https://www.swupl.edu.cn/docs/2021-06/20210603102132500505.pdf>.

14 Ibid; Charlotte Gao, ‘Xi: China Must Never Adopt Constitutionalism, Separation of Powers, or Judicial Independence,’ *The Diplomat*, February 19, 2019, <https://thediplomat.com/2019/02/xi-china-must-never-adopt-constitutionalism-separation-of-powers-or-judicial-independence/>.

15 Peter Hartcher, *Red Zone: China’s Challenge and Australia’s Future*, (Black Inc, 24 May 2021) 157.

the CCP.

As a result, the PRC's legal infrastructure allows for superior courts to order a retrial for cases decided in inferior courts, even when the parties have not appealed. Coupled with the fact that the PRC constitution states that courts are responsible to the People's Congress, superior courts are conduits for the legislative branch. "Natural justice" and an independent judiciary are anathema to the CCP, evinced by a total absence of any reference to such matters in the rule of law plan.

This can also be seen with the total lack of reference to rule of law documents adopted at an international level, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, or any other international treaty. The plan's silence on such matters sends a clear signal of further future challenges to the legitimacy and "jurisdiction" of international legal institutions; when it suits the PRC.

### Domestic Implications

To its credit, the CCP's rule of law plan contemplates various improvements to the PRC's domestic legal system and its operations. These include the creation of new 'specialist' courts with enhanced legal supervision,<sup>16</sup> and improved civil retrial procedures, specifically through strengthened filing and review systems.<sup>17</sup> Other improvements include prison reform,<sup>18</sup> child protection,<sup>19</sup> and better handling of public interest litigation.<sup>20</sup> The plan also vows to implement pre-employment training for the judiciary, with improved professional ethical standards and codes of conduct.<sup>21</sup> Other improvements include the adoption of international legal standards for commercial law,<sup>22</sup> and the recent introduction of punitive damages for infringement of intellectual property rights – elevating the PRC's standard of protection to levels of the EU and the US.<sup>23</sup> President Xi Jinping has also expressed intention to promote the extraterritorial application of intellectual-property laws.

The document also expresses an intention to propagate a norm of transparency; to "persist in taking openness as the normal and non-openness as the exception."<sup>24</sup> Such efforts to institutionalise open government have been labelled "one of the most significant

16 Which include specialist courts for intellectual property, finance, internet, and maritime affairs; China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

17 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

18 Ibid.

19 Ibid.

20 Ibid; the PRC's model of public interest litigation is a curious hybrid, given there is no independent judiciary.

21 Ibid.

22 Martin Kwan, 'China's Rule of Law Development: The Increasing Emphasis on Internationalisation of Legal Standards and the Horizontal Rule of Law', *International Law and Politics Online* 53, no. 51 (2021): 57.

23 Ibid, 60.

24 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

Chinese legal reforms of the last 40 years,”<sup>25</sup> and there has been some progress. For example, state agencies may be sued for failure to perform statutory obligations, including failing to disclose certain information.<sup>26</sup>

The PRC is also moving towards a system with something resembling a doctrine of precedent (the common law’s *stare decisis*), with the Supreme People’s Court requiring all courts to “establish a system for search of similar cases and relevant cases, to ensure a uniform judgement standard for similar cases, and the uniform application of law.”<sup>27</sup> This is a marked difference to the PRC’s previous encouragement of judges to “mediate peace between litigants rather than just apply the law.”<sup>28</sup> As a result, the recent litigation explosion in the PRC<sup>29</sup> evinces<sup>30</sup> This is a drastic transition for a legal system that was only borne in 1978.

It should also be noted that the plan evinces an intention to “strengthen multilateral and bilateral dialogues on the rule of law and promote exchanges on the rule of law with foreign countries.”<sup>31</sup> If authentic, such an openness to international dialogue on the rule of law is a victory for reason and an important step towards a healthy legal marketplace of ideas.

Unfortunately, the CCP’s rule of law plan goes astray in its commitment to “strengthen judicial protection of human rights.”<sup>32</sup> Despite this objective, the PRC maintains capital punishment continuing to execute the most criminals per year, and the continued mass arrests of lawyers,<sup>33</sup> judges,<sup>34</sup> constitutional scholars.<sup>35</sup> In addition, there are reports of up to 3 million ethnic Uyghurs being detained in Xinjiang<sup>36</sup> – the largest incarceration since World War II. Such detention is aided by the lack of a presumption of innocence, burdens

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25 Jamie P. Horsley, September 2009, *Party Leadership and Rule of Law in the Xi Jinping Era: What does an Ascendant Chinese Communist Party mean for China’s Legal Development?* (page 4), <https://www.brookings.edu/research/party-leadership-and-rule-of-law-in-the-xi-jinping-era/>.

26 Ibid.

27 Martin Kwan, ‘China’s Rule of Law Development: The Increasing Emphasis on Internationalisation of Legal Standards and the Horizontal Rule of Law’, *International Law and Politics Online* 53, no. 51 (2021): 60.

28 Ling Li, ‘Chinese Characteristics of the “Socialist Rule of Law”’: Will the Fourth Plenum Cure the Problems of the Chinese Judicial System?’ *Asia Policy* 20, no. 1 (2015): 20.

29 Guodong Du, Meng Yu, ‘Chinese Courts Facing Litigation Explosion,’ *China Justice Observer*, 19 February 2019, <https://www.chinajusticeobserver.com/a/chinese-courts-facing-litigation-explosion>.

30 Young Nam Cho, ‘Law Disseminating Campaign in China: The Origin of Chinese ‘Rule of Law’ Policy,’ *Journal of International and Area Studies* 21, no. 2 (2014): 27.

31 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

32 Ibid.

33 William Nee, ‘China’s 709 Crackdown Is Still Going On’, *The Diplomat* 9 July 2021, <https://thediplomat.com/2021/07/chinas-709-crackdown-is-still-going-on/>.

34 Guo Rui, ‘Corruption in China: ex-judges and prosecutors caught breaking rules on conflicts of interest’ *South China Morning Post*, 5 September 2021, <https://www.scmp.com/news/china/politics/article/3147592/corruption-china-ex-judges-and-prosecutors-caught-breaking>.

35 Peter Hartcher, *Red Zone: China’s Challenge and Australia’s Future*, (Black Inc, 24 May 2021) 109.

36 Phil Stewart, ‘China putting minority Muslims in ‘concentration camps,’ U.S. says,’ *Reuters*, May 4 2019, <https://www.reuters.com/article/us-usa-china-concentrationcamps/china-putting-minority-muslims-in-concentration-camps-us-says-idUSKCN1S925K>.

of proof, and the ability for suspects of corruption to be tried in absentia.<sup>37</sup> Furthermore, legal licences remain revocable if lawyers engage in political dissent,<sup>38</sup> and lawyers can (and have been) tried for perjury when speaking out against treatment of their clients.

This is particularly devastating given that forced confessions and torture by state officials are regularly reported,<sup>39</sup> undoubtedly contributing to the 99.965% conviction rate in 2019, down from 2018's 99.969% conviction rate.<sup>40</sup> Furthermore, when it comes to legal practitioners, lawyers swear the following oath of allegiance to the CCP:

*'I swear to faithfully fulfil the sacred mission of legal workers in socialism with Chinese characteristics. I swear my loyalty to the motherland, to the people, to uphold the leadership of the Communist Party of China and the socialist system, and to protect the dignity of the Constitution and laws.'*<sup>41</sup>

Its political overtones are far stronger when compared to the previous oath which simply read: 'I swear to protect the sanctity of the law and the Constitution of the People's Republic of China, follow lawyers' professional ethics, and protect my clients' rights by law.' Ethics and a client-centric commitment have been discarded for 'socialism with Chinese characteristics.'

Despite the plan's guarantee that "rights of citizens, legal persons, and other organisations shall not be restricted or deprived of legal reasons and...legal procedures,"<sup>42</sup> courts continue to exercise exclusive authority in their determination of guilt or innocence – with defence counsel labelled a "mere formality."<sup>43</sup> Rather contradictorily, the plan attaches significant importance to the implementation and promotion of the constitution,<sup>44</sup> which specifically outlaws arbitrary detention, amongst other legal commitments to human

37 Laney Zhang, 'China' Criminal Procedure Law Amended to Allow Criminal Trials in Absentia in Corruption Cases,' *Library of Congress*, January 10 2019, <https://www.loc.gov/item/global-legal-monitor/2019-01-10/china-criminal-procedure-law-amended-to-allow-criminal-trials-in-absentia-in-corruption-cases/>.

38 The Associated Press, 'China Strips License of Lawyer for Hong Kong Activist,' *The Asahi Shimbun*, January 18 2021, <https://www.asahi.com/ajw/articles/14116054>.

39 Freedom House Index, 'Freedom in the World 2021: China,' *Freedom House*, 2021, <https://freedomhouse.org/country/china/freedom-world/2021>.

40 CJO Staff Contributors Team, 'What is the Conviction Rate in China? – China Law in One Minute', *China Justice Observer*, November 16 2020, <https://www.chinajusticeobserver.com/a/what-is-the-conviction-rate-in-china>.

41 "China Makes Lawyers Swear Oath of Loyalty or Face Sanctions." *Federal Government Documents and Publications*, 2018, Federal Government Documents and Publications, 2018-12-04.

42 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

43 H. L. Fu, "Criminal Defence in China: The Possible Impact of the 1996 Criminal Procedural Law Reform," *China Quarterly* 1998, no. 153 (March 1998): 32.

44 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

rights.<sup>45</sup> Yet the practice of arbitrary detention is widespread and continues unabated,<sup>46</sup> with Chinese judges prohibited from citing the Constitution as a source of law.<sup>47</sup>

These disparities between official CCP legal protections and the CCP's arbitrary governance fails to provide the social and economic security that one normally associates with a legitimate rule of law. As President points out: "for leading officials, the issue of respect for the law must first be resolved. Only when they respect the rule of law in their hearts can they behave in compliance with the law."<sup>48</sup> The CCP risks engendering widespread disillusionment among its citizenry by promulgating a lofty document that provides significant legal protections on paper but which, in practice, are not likely to be realized.

### Rule of Law Index/Global Standing

The CCP's 'instrumentalist' approach to conceptions of justice is reflected in the PRC's declining rule of law legitimacy on an international scale. Freedom House's annual report 'Freedom in the World', dropped the PRC to a score of 9/100 from 2020's 10/100.<sup>49</sup> The Economist Intelligence Unit puts the PRC at 2.27/10, ranking 151st out of 167 states surveyed (Pro-Beijing media outlet China Daily instructed the Economist to "have a rethink").<sup>50</sup> Meanwhile the World Justice Project Rule of Law Index ranked the PRC at 0.48/1.00, down four places from 2020.<sup>51</sup>

With regards to the media, a core component of an effective rule of law, the organisation Reporters Without Borders '2021 World Press Freedom Index' placed the PRC fourth to last out of 180 countries analysed. It is no surprise that last year, Transparency International's 'Corruption Perception Index' scored the PRC as 42/100, 78<sup>th</sup> out of 180 countries. Such low international standing completely undermines the plans intention to "promote publicity of the rule of law in foreign countries, and tell the story of the rule of

45 China. The Office of the Chargé d' Affaires of the People's Republic of China in the Republic of Lithuania, *Human Rights in China*. <https://www.fmprc.gov.cn/ce/celt/eng/zt/zfbps/t125236.htm>; Jianwen Zhao, Qian Sun, Renwen Liu, Huawei Liu, Yiming Wang. 2021. "The Rule of Law in Human Rights: For the Purpose of Safeguarding Human Dignity." In *The Chinese Path of Rule of Law Construction*, edited by He Tian, Yanbin Lv, 164. China Social Sciences Press.

46 The Australian Federal Government has issued travel advice, warning Australians they may face "arbitrary detention" if the go mainland China, see: Stephen Dziedzic. 'Australians at risk of arbitrary arrest in China, DFAT travel advice warns,' *Australian Broadcasting Corporation*, 7 July 2020, <https://www.abc.net.au/news/2020-07-07/dfat-changes-travel-advice-for-australians-in-china/12431134>.

47 Thomas E. Kellogg, 'Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China,' *International Journal of Constitutional Law* 215, no. 221 (2009).

48 Fu Zitang & Cui Bo, 'The Practical Requirements of Xi Jinping Thought on the Rule of Law,' *Southwest University of Political Science & Law*, December 15 2021, <https://www.swupl.edu.cn/docs/2021-06/20210603102132500505.pdf>.

49 Freedom House Index, 'Freedom in the World 2021: China,' *Freedom House*, 2021, <https://freedomhouse.org/country/china/freedom-world/2021>

50 Ho Lok-Sang, "Ideologically based EIU Democracy Index needs a rethink", *China Daily*, 9 February 2021, <https://www.chinadaily.com.cn/a/202102/09/WS6021f84ba31024ad0baa848d.html>

51 World Justice Project, 'WJP Rule of Law Index: China', *World Justice Project*, 2020, <https://worldjusticeproject.org/rule-of-law-index/country/2020/China/>.

law in China.”<sup>52</sup>

## International Implications

In addition to the domestic changes, the rule of law plan also holds significant international implications concerning the CCP’s engagement with the rules based international order. This can be seen through two key areas (or horns) of CCP activity on an international scale. Firstly, the tightening of the PRC’s legal control of Special Administrative Regions – specifically Hong Kong, Macau and Taiwan. And secondly, the promulgation of China’s Belt and Road Initiative, and the handling of its accompanied legal disputes through the China International Commercial Court. Upon analysis, both policy realms reveal a newfound confidence and determination to the CCP’s geopolitical ambitions – a large shift from the Deng Xiaoping’s insular caution to international legal engagement.

## Hong Kong

One key area of priority for the plan is the governance and regulation of Hong Kong. The document expressly seeks to “promote the reunification of the motherland...adhere to the rule of law in Hong Kong...and uphold the Constitution and Basic Law.”<sup>53</sup> It also further highlights the CCP’s intention to “prevent and oppose the interference of external forces in Hong Kong...and maintain the long-term prosperity and stability of Hong Kong.”<sup>54</sup>

This strategically ambiguous phraseology marks the continuation and evolution of the CCP’s existential war on political dissent. It also carries many judicial hallmarks of the party’s conception of a rule of law, including arbitrary denial of bail, trials without juries, and a closed public gallery for cases involving “state secrets or public order.”<sup>55</sup> Furthermore, the legislative spearhead of the CCP’s political activities in Hong Kong – the National Security Law (NSL), now carries a maximum sentence of life in prison. The criminalisation of secession, subversion and collusion with “foreign forces” evinces long held policy suspicions that the CCP sees international law as a realm for legal warfare.

The CCP’s rule of law plan also ominously states intention to “strengthen law enforcement cooperation and judicial assistance between mainland and Hong Kong... to jointly crack down on cross-border illegal and criminal activities.”<sup>56</sup> Under the NSL, the CCP can choose specific judges to handle politically sensitive cases, and have the cases heard on the mainland. With serious backlogs in the Hong Kong courts due to the arrests of over 10,000 citizens during the 2019 pro-democracy protests; we can expect to see the CCP utilise its legal infrastructure (in accordance with the plan) to implement its

52 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

53 Ibid.

54 Ibid.

55 BBC, ‘Hong Kong: How life has changed under China’s national security law’, *BBC*, 30 June 2021, <https://www.bbc.com/news/world-asia-china-57649442>.

56 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.



political rule. In fact, the Director of the Office for Safeguarding National Security has explicitly stated that Hong Kong's judicial system should "reflect the will and interests of the Chinese nation."<sup>57</sup>

As seen with Hong Kong, the CCP's conception of a rule of law is instrumental to the evolution of the party's political maintenance. This can be seen on a material basis under the NSL whereby "any acts or activities" that the CCP considers to endanger the PRC's national security, may be criminalised. In June 2020, it became a criminal offence to insult the national anthem of the PRC, and earlier this year Hong Kong police made their first arrest under the law. The crime? A 40-year-old man booing the PRC's national anthem at a shopping centre during the Olympics.<sup>58</sup>

Furthermore, key judicial figures in Hong Kong are being targeted under Beijing's new rule of law. Paul Harris, Chair of the Hong Kong Bar Association, has been repeatedly lambasted by Chinese officials, state media and Hong Kong's leader Carrie Lam – for representing attendees of the 2019 pro-democracy protests.<sup>59</sup> The South China Morning Post labelled his position of chairmanship a "poisoned chalice."<sup>60</sup> Meanwhile, Barrister Martin Lee, considered Hong Kong's "father of democracy," was arrested under the NSL and has stopped granting interviews to media organisations.<sup>61</sup>

Such orchestrated attacks upon the incumbent common law system has been, and will continue to be economically costly for all involved. The Heritage Foundation's 27<sup>th</sup> edition of the Index of Economic Freedom no longer lists Hong Kong as a separate and autonomous legal system from the PRC,<sup>62</sup> bringing down its ranking of the freest economy in the world since 1995 – to 107<sup>th</sup> out of 178 countries examined.

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57 Helen Davidson, 'Hong Kong court should reflect China's will, says official', *The Guardian*, 30 June 2021, <https://www.theguardian.com/world/2021/jun/30/hong-kong-legal-system-should-reflect-china-will-says-official>.

58 HKFP Fast News, 'Olympic celebration sees Hong Kong police make first arrest under controversial national anthem law', *Hong Kong Free Press*, 31 July 2021, <https://hongkongfp.com/2021/07/31/olympic-celebration-sees-hong-kong-police-make-first-arrest-under-controversial-national-anthem-law/>.

59 Helen Davidson, 'Beijing calls Hong Kong bar association chief an 'anti-China politician'', *The Guardian*, 27 April 2021, <https://www.theguardian.com/world/2021/apr/27/beijing-calls-hong-kong-bar-association-chief-an-anti-china-politician>.

60 Chris Lau, Jeffie Lam, 'Does Hong Kong's Bar Association need to ditch chairman Paul Harris to reset ties with Beijing? Or is the job a poisoned chalice?' *South China Morning Post*, 28 April 2021, <https://www.scmp.com/news/hong-kong/politics/article/3131333/does-hong-kongs-bar-association-need-ditch-chairman-paul>.

61 John Lyons, 'The Rise and Fall of Martin Lee and His Dream of a Democratic Hong Kong', *The Wall Street Journal*, 15 November 2020, <https://www.wsj.com/articles/martin-lee-democracy-hong-kong-china-crackdown-11605460019>.

62 Candice Chau, 'Hong Kong axed from economic freedom index after years at top spot, now ranked 107<sup>th</sup> as part of China', *Hong Kong Free Press*, 4 March 2021, <https://hongkongfp.com/2021/03/04/hong-kong-axed-from-economic-freedom-index-after-years-at-top-spot-now-ranked-107th-as-part-of-china/>.

## Macau

The CCP's increased political manoeuvres under the umbrella of the rule of law can also be seen with recent developments in Macau. Despite being a separate jurisdiction, Macau's Portuguese-based civil system is now subordinate to the CCP's "socialist rule of law with Chinese characteristics." The Standing Committee of the National People's Congress can now override Macau law<sup>63</sup> and has done so recently this year, with a ban of 21 political candidates for the September legislative elections.<sup>64</sup> Some of these candidates had served as legislators for decades. This is in direct contravention to the plan's commitment for "Macau people administering Macau, and a high degree of autonomy."<sup>65</sup>

This new crackdown is part of a shifting paradigm for the CCP's engagement with administrative regions governed under 'one-country, two systems,' as expressly stated in the rule of law plan. On a ground level, this has materialised in the form of strains upon Macau's separation of powers doctrine, with the legislative branch interfering with the judiciary. The President of the Macau Lawyers Association Jorge Neto Valente spoke out that "magistrates have the obligation to uphold the law, nothing more, even if against a government point of view. An individual that is subservient to the state is not a magistrate."<sup>66</sup>

A similar sentiment was recently echoed by Hong Kong's former Chief Justice Geoffrey Ma; "primary among the duties owed in the public interest is the support of the rule of law...the rule of law is not a political concept."<sup>67</sup> Amidst the long march of the CCP's rule of law, the views of Jorge Valente and Geoffrey Ma that "justice is not an abstraction," are fast becoming outdated.

## Taiwan

Another key priority for the PRC's rule of law plan is the "re-unification" of Taiwan with the motherland, or in other words – the continuation of the Chinese Civil War. The plan seeks to "use the rule of law to defend the One-China principle, resolutely oppose 'Taiwan independence,' and resolutely safeguard national sovereignty, and developmental

63 Castellucci, Ignazio (2012). "Legal Hybridity in Hong Kong and Macau". *Journal of Contemporary China*. 57 (4): 675.

64 Helen Davidson, 'China bans pro-democracy candidates in Macau elections', *The Guardian*, 13 July 2021, <https://www.theguardian.com/world/2021/jul/13/china-bans-pro-democracy-candidates-in-macau-elections>.

65 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

66 Nelson Moura, 'Judges should not be subservient to the state – Macau Lawyers Association President', *Macau News Agency*, 20 October 2021, <https://www.macaubusiness.com/judges-should-not-be-subservient-to-the-state-macau-lawyers-association-president/>.

67 James Pomfret, Greg Torode, 'EXCLUSIVE Hong Kong's former chief judge says upholding rule of law not political', *Reuters*, 26 August 2021, <https://www.reuters.com/world/asia-pacific/exclusive-hong-kongs-former-chief-judge-says-upholding-rule-law-not-political-2021-08-25/>.

interests.”<sup>68</sup>

As seen with Hong Kong and Macau, the PRC’s ‘weaponization’ of the rule of law into state sanctioned “legal warfare”<sup>69</sup> provides the basis for increased intervention in Taiwanese affairs such as countering the United States ‘Taiwan Relations Act.’ The plan’s intention to “protect the well-being of Taiwan compatriots”<sup>70</sup> could see the CCP incite civil unrest in Taiwan for the purpose of intervention, a Pacific version of the events in Ukraine.

Equal to its fervent protection of ‘Taiwanese compatriots,’ the CCP criminalises pro-independence activity. China’s Taiwan Affairs Office has stated that supporters of Taiwanese independence are criminally liable for life, and such individuals are now banned from entering the mainland, Hong Kong and Macau. They will also not be allowed to cooperate with entities or people from the mainland, nor will their companies or entities who fund them be allowed to profit from the mainland. This may or may not relate to the plan’s outlandish support for “exchanges between legal science and legal circles.”<sup>71</sup>

It should be noted that whenever the document mentions Hong Kong and Macau, they are always partnered together – most likely due to their status as Special Administrative Regions. However, the documents differentiation between such regions and Taiwan elicits an important distinction in CCP policy. We can expect to see new and further ‘legally-based’ action against Taiwan, and a continued military build-up across the strait, in keeping with the plan’s intention to “accelerate the urgent need for reforms, prepare for war...officers and soldiers await key legislative projects.”<sup>72</sup>

One potential key legislative project, advocated by pro-Beijing academics,<sup>73</sup> is a National Security Law for Taiwan (based off the NSL in Hong Kong), fanning the flames of a rumoured ‘national unification law.’ However, any such legislation would not provide anything new to the geopolitical situation. Article 8 of the PRC’s Anti-Secession Law provides the legal basis for military action against Taiwan in the event that peaceful ‘re-unification’ is not possible.<sup>74</sup> The CCP’s legal framework is once again couched in strategic ambiguity as to when it can be decided that such a course of action is impossible.

With the plans dual development of “in-depth promotion of the rule of law and strict rule of the army,” the CCP is closely following Mao Zedong’s adage; “every communist

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68 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

69 In 2003, China’s Central Military Commission promulgated the ‘Three Warfares: public opinion warfare, psychological warfare and legal warfare’.

70 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

71 Ibid.

72 Ibid.

73 John Feng, ‘Chinese Scholar Calls for Beijing to Draft ‘Taiwan National Security Law’, *Newsweek*, 12 November 2020, <https://www.newsweek.com/chinese-scholar-calls-beijing-draft-taiwan-national-security-law-1554020>.

74 Note, this has significant international support, including from: Russia, Belarus, Uzbekistan, Azerbaijan, Cuba, Venezuela, Dominica, Indonesia, Cambodia, Nepal, Syria, Pakistan, North Korea, Iraq, Ethiopia, Serbia & Montenegro.

must grasp the truth, political power grows out of the barrel of a gun.”<sup>75</sup> The day is fast approaching where the CCP will need to choose between its ideological roots, or its rule of law plans’ commitment to “actively participate in the formulation of international rules and promote the formation of fair and reasonable international rule system.”<sup>76</sup> The latter is not likely, given that Xi Jinping has on numerous occasions expressed fear that the PRC has become too distant from its revolutionary roots, and that officials and citizens alike are losing faith in the party.<sup>77</sup>

### **The Rule of Law Plan and the Belt and Road Initiative**

As seen with Hong Kong, Macau, and Taiwan, the plan provides a window into the CCP’s unbridled politicisation of all legal frameworks. The plan also reveals a deep commitment to “accelerate the construction of a legal system applicable outside the jurisdiction of our country.”<sup>78</sup> This is a significant development in contemporary Chinese exceptionalism.

Attempts to bring about this vision are tightly linked with the development of the multi-trillion dollar ‘Belt and Road Initiative’ (BRI). The plan states the PRC’s focus on “promoting international cooperation in the joint construction of the ‘Belt and Road’, promotes the construction and improvement of international commercial courts.”<sup>79</sup> For the PRC’s alternate international legal system to gain traction, it requires institutional legitimacy. The China International Commercial Court (CICC) may provide this.

In 2018, the Supreme People’s Court created two CICC’s in Shenzhen and Xi’an, corresponding with the maritime “road” and overland “belt” of the BRI. The CCP’s globalist aspirations are captured in a 2019 Supreme Court Opinion, where it was advocated for the CICC to attract and encourage parties to have their matters heard in the CICC despite an absence of jurisdictional nexus.<sup>80</sup>

Operationally, there are some benefits to having a matter heard before the CICC. These include: publically available practice notes, an international expert committee of legal and economic advisors,<sup>81</sup> and the ability for remote hearings. The CICC has also created the ability to submit documentary evidence in English without a Mandarin translation (if

75 Mao Zedong ‘Quotations from Chairman Mao Tse-Tung’ (Peking: Foreign Language Press, 1972), 61.

76 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

77 Chris Buckley, ‘To Steer China’s Future, Xi is Rewriting Its Past’, *The New York Times*, 7 November 2021, <https://www.nytimes.com/2021/11/07/world/asia/china-xi-jinping.html>.

78 China. NPC Standing Committee. 2021. *Plan on Building the Rule of Law in China (2020-2025)*.

79 Ibid.

80 Opinions of the Supreme People’s Court Regarding Further Providing Judicial Services and Guarantees by the People’s Courts for the Belt and Road Initiative, No. 29 [2019] of the Supreme People’s Court, effective as of 9 December 2019, paragraph 26. See also, Press Release of the Supreme Court, dated 27 December 2019.

81 China, The Supreme People’s Court, 2018, *The Decision on Appointment of the First Group of Members for the International Commercial Expert Committee*, <http://cicc.court.gov.cn/html/1/219/235/245/index.html>.

both parties agree). There is also the distinguishing feature from standard CCP courts of allowing dissenting opinions by judges,<sup>82</sup> an institutional admission of the importance of transparency when it comes to legal process.

There are however negatives to the CICC, under a “socialist rule of law with Chinese characteristics.” Foreign judges are not allowed to be appointed, and only lawyers that have a license to practice in China can represent parties in the CICC. Furthermore, it has been criticised as an “insurance policy” for state owned enterprises and BRI adventurism.<sup>83</sup> This will prove one of the biggest challenges for the CCP – setting aside its “realpolitik” cynicism towards conceptions of justice in the arbitration of disputes between its personnel, and international parties. There are the added disadvantages of a lack of case law, and that CICC rulings don’t enjoy a ‘perceived’ attempt at implementing justice.

As a result, the CICC currently falls short of international standards of other commercial courts like the Singapore International Commercial Court and the Qatar International Court. However, with 139 countries as signatories to the BRI (42 out of 54 African countries) – accounting for 40% of global GDP,<sup>84</sup> the CICC’s case docket will expand and fulfil its role in the CCP’s ‘legal’ internationalism.

With regards to the current phase of the CICC’s development, we can expect a ‘Westernisation’ and dilution of its “socialist rule of law with Chinese characteristics” as the court seeks to poach/convert members *from* the international community, and advance its image. The next phase of the CICC and BRI will be the implementation of ‘governing law clauses’ that funnel dispute resolution and arbitration to the PRC and its CCP controlled courts.

## Conclusion

An analysis of the PRC’s rule of law plan evinces serious structural limitations to the PRC’s efforts of establishing an internationally respected legal system. Without a strong separation of powers, ‘law based governance’ can never be anything more than ‘law by CCP.’ Thus, a rule of law may not be the PRC’s goal at all, rather a foundational grid of justification for manifesting domestic and international political ambition.

Unfortunately, upon analysing the CCP’s legal efforts in Hong Kong, Macau, and Taiwan; these regions will serve as canaries in legal coalmines for the international community

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82 Article 5 of Provisions of the Supreme People’s Court on Several Issues Regarding the Establishment of the International Commercial Court, Fa Shi [2018] 11, effective as of 1 July 2018.

83 Lance Ang, ‘International Commercial Courts and the Interplay Between Realism and Institutionalism: A Look at China and Singapore’, *Harvard International Law Journal*, 14 November 2019, <https://harvardilj.org/2020/03/international-commercial-courts-and-the-interplay-between-realism-and-institutionalism-a-look-at-china-and-singapore/>.

84 David Sacks, ‘Countries in China’s Belt and Road Initiative: Who’s In and Who’s Out’, *Council on Foreign Relations*, 24 March 2021, <https://www.cfr.org/blog/countries-chinas-belt-and-road-initiative-whos-and-whos-out>.

–warnings of a fast deterioration in institutional health. As we can see domestically, the internal legal culture of the CCP considers it unable to conceptually abide by a rules-based international order. Moving forward we can expect to see increased legal activity in relation to the Islamic Emirate of Afghanistan and the CCP’s self-professed status of a ‘near-artic state.’ Readers will do well to remember President Xi’s words, “east, west, south, north and centre; the party leads everything.”

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