

Xi Jinping Thought on Rule of What

- A content analysis of Xi Jinping Thought on Rule of Law

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Abstract

In 2012, Xi Jinping launched a major legal reform in China. 10 years on “Xi Jinping Thought on Rule of Law” is a well-established and widely used term. This thesis systematically investigates the nature of this legal doctrine through the lenses of rule of law and rule by law. Furthermore, it discusses the feasibility of using Western legal doctrines in non-Western contexts. The data used for the analysis is the book *On Persistence in Comprehensively Governing the Country According to the Law* (论坚持全面依法治国), which was published in 2020 by the Institute of Party History and Literature of the Central Committee of the Chinese Communist Party. It contains 54 texts and speeches on the subject of law, by Xi Jinping.

The thesis concludes that Xi Jinping Thought on Rule of Law entails elements of procedural rule of law and rule by law. The continued leadership of the CCP is paramount and framed as essential for China’s further development. Furthermore, the thesis identifies a conceptual catch-22 mechanism, which the CCP uses as a source of legitimacy for its continued governance.

Keywords: Xi Jinping Thought on Rule of Law, China, Law, Rule of Law, Rule by Law, CCP,

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1 Introduction

In recent years there has been a surge in legal reform in China. After Xi Jinping assumed power in 2012, he launched a legal reform program based on the doctrine of “Xi Jinping Thought on Rule of Law”. Xi’s thoughts on rule of law have been heavily promoted in the last 10 years and is a cornerstone of his Chinese Dream (中国梦) project (Rudolf, 2021) (Garrick, Bennet, 2018, p. 101-102). Today, rule of law is a universally used phrase and holds a close to unanimous support in the world (Tamanaha, 2003, p. 2). Democracies, dictatorships, and hybrid-states, all endorse rule of law as a way of legitimizing their rule (Tamanaha, 2003, p. 3-4).

The question of the nature of legal doctrine and legal discourse in China is widely debated. Some scholars argue that there is a strong heritage from Chinese imperial law that still shapes the perception of rule of law today (Teon, 2016). They usually base their arguments on the Confucian notion that a legitimate rule entail two dimensions of law, namely the rule of law (依法治国) and the rule of virtue (德治) (Garrick, Bennet, 2018, p. 101). Statements like: “reform of the judicial system and strengthened rule of law awareness among all our people while also enhancing their moral integrity”, made by Xi seems to provide evidence for this case (Garrick, Bennet, 2018, p. 102).

This thesis aims to uncover the key features of the legal doctrine of Xi Jinping Thought on Rule of Law through content analysis. Furthermore, it explores the possibility and appropriateness of approaching a non-Western legal doctrine with the Western legal concepts of rule of law and rule by law. There are scholars who argue that Chinese legal doctrine is still shaped by Confucian notions. This thesis investigates and discusses if there are evidence of such non-Western features, and if so, to what extent this causes implications when trying to perceive Chinese legal doctrine through Western lenses of rule of law and rule by law.

In 2020 the Institute of Party History and Literature of the Central Committee of the Chinese Communist Party published a book titled *On Persistence in Comprehensively Governing the*

Country According to the Law (论坚持全面依法治国). It contains 54 speeches and articles by Xi Jinping on the theme of law and constitutes the body of data for this thesis.

The data was analyzed using the method of content analysis and was coded using both inductive and deductive codes. The frequency and overlapping of codes were used as a guiding mechanism towards key areas, which was examined more closely.

In this thesis I argue that there are evidence of an inadequacy in perceiving Xi Jinping Thought on Rule of Law from a substantive rule of law lens. However, there are evidence of a conceptual endorsement of procedural rule of law, a theory which overlaps with the conceptualization of rule by law. Furthermore, there are evidence of a paramount priority given to the continued leadership of the CCP over China, with the implementation of procedural rule of law as the main tool of facilitation. The continued leadership of the CCP conceptually draws on legitimacy granted by the people, but its validity constitutes a catch-22 phenomenon, which complicates criticism of the conceptualization.

1.1 Research Demarcation and Research Questions

As to keep the thesis within a reasonable scope, delimitations were made to limit the theories used in the comparative content analysis to rule of law and rule by law. These were then contrasted and compared to Xi Jinping Thought on Rule of Law.

The intention of the thesis is not to investigate the true nature of legal practices in China. Instead, the aim is to uncover the content of the legal theory of Xi Jinping Thought on Rule of Law, as it is laid out in the book *On Persistence in Comprehensively Governing the Country According to the Law*.

The data is clearly delimited, as it has been selected by the Institute of Party History and Literature of the Central Committee of the Chinese Communist Party. It is therefore arguably an expression of the main features of Xi Jinping Thought on Rule of Law that the institution wants to convey to the public. The main research question and the sub questions are as follows:

- 1) How do the speeches and articles in *On Persistence in Comprehensively Governing the Country According to the Law* refer to and construct Xi Jinping thought on rule of law?
- 2) Is Xi Jinping Thought on Rule of Law as a concept consistent with rule of law or rule by law?

1.2 Academic contribution

How China decides to organize its legal structures has consequences far beyond its own borders, as China's influence in the world is growing. Trying to understand where China's legal system is heading gives us valuable insight in how to understand Chinese society and its developments.

It is therefore importance to study the latest publications regarding legal doctrines and practices in China, as to keep up with the latest developments.

This thesis offers a broad and systematic examination of Xi Jinping thought on rule of law. The data being examined has been delimited and selected by a branch of the very same organization that is promoting Xi Jinping Thought on Rule of Law. Thus, arguably constituting an official declaration of intent in the area of legal reform and doctrine. The thesis contributes to the field of Asian Studies by identifying key features and trends through the systematic method of comparative content analysis. This allows for other scholars to narrow their scope when making further enquiry on the topic, as key areas of importance are already indicated by this thesis.

1.3 Disposition

The thesis is divided into eight chapters. The first chapter introduces the topic, formulates the research questions, and delimits the data. The second chapter is the literature review, which goes through literature on contemporary and historical legal theory in China. The third chapter introduces the theoretical foundations of rule of law and rule by law. Furthermore, it discusses the appropriateness of Western legal theories in a Chinese context, as well as setting the inductive codes for the analysis. The fourth chapter lays out the methodology, the data and its limits, research design and ethical considerations. This chapter also operationalizes the inductive codes. The fifth chapter presents the empirical findings in a table with the frequency and overlapping of codes. It also presents the deductive codes found in the data. The sixth chapter consists of the analysis of the data. This chapter also entails conceptualizations of Xi Jinping Thought on Rule of Law. The seventh chapter consists of a discussion about the findings of the thesis. Lastly the eight chapter concludes the findings of the thesis.

2 Literature review

There has been previous scholarship done on terms such as “socialist rule of law”, “the construction of a socialist rule-of-law state”, “governing the country according to law” (*yifa zhiguo*), and “government administration in accordance with the law” (*yifa xingzheng*). These terms have been frequently used in legal discourse over the last 10 years, as part of a wider legal reform under Xi’s tenure. Despite scholarly efforts to explain and lay out what “socialist rule of law” entails, there is no clear consensus on the term, else than that the CCP is seemingly supreme in its position as the leader of the country (Garrick, Guo, 2020, p. 1). The main area of differing viewpoints and discussion among legal scholars is on the relationship between the CCP and Chinese law. Many legal scholars point to the tension and irreconcilability of socialist rule of law with a liberal (substantive) perception of rule of law, as the Party and the judicial branch of state power would need to be (at least conceptually) separated (Garrick, Guo, 2020, p. 1-2).

2.1 Socialist rule of law in a historical perspective

In the wake of the Cultural Revolution, which saw the close to complete collapse of the legal system in favor of lawlessness and arbitrary class struggle, China embarked upon its development of “socialist rule of law”. Scholars such as Ruiping Ye argues that China has since passed through two distinct phases of legal development and is currently living though a third phase (Ye, 2021, p. 1861, 1880).

The first phase saw the foundation of the basic principle of “governing the country according to the law” (依法治国) in the late 1970s and 1980s. During this first phase a basic legal system was constructed and implemented, based on rule of law principles, such as “supremacy of law, equality before the law, and judicial independence” (Ye, 2021, p. 1861-62). In addition, there

were serious discussion and reform to separate judicial power from the executive and legislative branches of power. This path of legal reform was however abandoned in 1989, and the four cardinal principles of ruling the country was reinstated. Namely, socialism, proletariat dictatorship, the leadership of the Party, Marxism, Leninism, and Maoism (Ye, 2021, p. 1866-67).

The second phase of the development of socialist rule of law took place in the 1990s and 2000s. This phase is characterized by increased codification of laws and efforts to subordinate the exercise of administrative power to the law. Interestingly, the CCP was exempted from this attempt to codify and discipline power under the laws, and consequently constituted a non-legal entity within the governance structure of China (Ye, 2021, p. 1861). The ruler (in this case the CCP) as an extralegal entity imposing legal limitations on the bureaucracy is not a new idea but was rather the rule in late imperial China. With one of only two existing legal codes, dedicated to regulating conduct of bureaucracy and officials (Ye, 2021, p. 1869-70).

The 2010s and up until today, has seen an increased maturity of the Chinese legal system. The focus has shifted towards establishing a principle of “rule with legitimacy”, which is governance in a manner that is legal and not arbitrary. As put by Ye: “Party control of state affairs increasingly moved from unwritten convention or practice to being authorized by legislation”. The rule of the CCP is thus increasingly integrated in the legal structure, and draws legitimacy from it (Ye, 2021, p. 1861). The realm of legality has also been expanded to encompass political suppression and influence. In the Maoist era, criticism or spoofing of revolutionary leaders was suppressed by deploying government officials and work units in a non-legal manner. During Xi’s tenure this has been moved in under the courts, which deploys legal measures to uphold and extol the “revolutionary lore”. This “lore” is one of the mechanisms on which the CCP relies to legitimize their leadership of China (Garrick, Guo, 2020, p. 2).

2.2 Rule of law and rule of virtue

Rule of virtue is a Confucian legal concept which originates from imperial China. In contrast to authority and coercive measures (enforcement of laws) which defines rule of law, rule of virtue relies on persuasion and guidance to regulate human conduct. It aims to improve and instill a certain morale in the minds of the public. In China, the rule of virtue is historically perceived as one of two doctrines which guides the governance of a country. Rule of law (legalism) and rule of virtue are in a symbiosis, aiding and strengthening each other. In the Chinese imperial era, rule of virtue was manifested by the promotion of Confucian values. However, today it is manifested by the promotion of “communist in spirit” values. The doctrine of rule of virtue is however applicable with any sets of values, but the values always emanate from the ruler, in a top-down fashion (Ye, 2021, p. 1870-1872).

3 Theoretical foundations

This thesis rests on an ontological foundation of constructivism. This ontological position assumes that all social phenomena are in a constant and unescapable process of revision. They are constantly constructed, broken down, and restructured, as social actors are constantly renegotiating the terms. The researcher is therefore bound in a role as an agent in this social negotiating process (Bryman, 2015, p. 30-31).

The understanding of Xi Jinping thought on rule of law is constructed in this environment of revision and the idea of the researcher as an agent who acts, negotiates, and interprets the reality around him/her. The understanding is therefore not a definite, but rather the researcher's notion and interpretation of reality, which builds through interactions between social agents. Perceptions of law and legal doctrine could therefore be "colored" or "influenced" by previous contact with the subject (Bryman, 2015, p. 31)

3.1 Rule of law from a historical perspective

The origins of rule of law are to a large extent unknown and contested. Aristoteles touched upon the subject already in his *Politics*, where he reflected on the potential need for mechanisms of restraint for incumbent rulers. Although, his focus was primarily on the conflict between the divine right of the ruler to rule, and the risk of unrestrained power resulting in tyranny (Stewart, 2004, p. 192-196). These ideas of the possible need for laws to govern a city-state grew out seminal discussions between Aristotle and Plato, who were both concerned with the issue of unrestrained power. The discussions were not only limited to the issue of unrestrained power of the ruler, but also that of the "demos", the people. Nowadays referred to as the tyranny of the majority, or in Marxist literature, as the dictatorship of the proletariat (May, Winchester, 2018, p. 136-137) (Tamanaha, 2003, p. 13).

Magna Charta, written in the year of 1215 in England, is often described as the document that brought rule of law into the Middle Ages. It is an agreement that was struck between the king, the nobility, and the church, to regulate conduct in conflict. It entails rights, such as access to swift justice and protection from arbitrary and illegal imprisonment (May, Winchester, 2018, p. 139-140). The document expresses the concerns of the nobility and the risk for abuse of power by the king, vis-à-vis them. It is contended whether this document was intended as an exclusive privilege of the nobility and the church, or if it was intended to extend to commoners as well. Whichever it may have been, some of the basic ideas of rule of law were arguably expressed and to a certain extent enforced in this document (May, Winchester, 2018, p 139- 140).

In England in the seventeenth and eighteenth century, the ancient model of *potestas sub lege* (power subjected to law) started to decline in significance. The ruler was still to exercise power according to the law, but the notion of individual rights grew significantly stronger during this time (May, Winchester, 2018, p. 142). The notion of individual rights was driven to a large extent by the breakthrough of natural law philosophy, which argued that all individuals are born with some unalienable rights. This was also paired with the notion of individual rights, inherent in English law since at least Magna Charta. The promotion of rule of law was a convenient way to combine these two trends into a coherent legal framework (May, Winchester, 2018, p. 142).

Natural law philosophy did not have the same breakthrough in continental Europe as it did in the UK and US. The French Revolution in 1789 did have some effects on the development of rule of law but did not change the notion of the absolutism of the sovereign. Instead, the absolute and unlimited power, whose main outcome is the law, merely (at least in theory) briefly changed from the king to the people (May, Winchester, 2018, p. 145).

On the other side of the Atlantic during the same time, the founding fathers of the United States of America, inspired by the breakthrough of natural law philosophy, grappled with the problem of reconciling the power of a sovereign with the liberty of its subjects. To solve this dilemma, they designed a constitutional system, which placed a constitution (the Bill of Rights) above ordinary statutes. As well as implementing the possibility of legal review and possibility of annulment, would a passed law be deemed to infringe on the rights guaranteed by the constitution. This design was implemented to solve the “Kantian dilemma” (see further under heading below) in three steps. Firstly, by endorsing the notion of people’s full sovereignty and constituent power. Secondly, by adopting the constitution as the dominant guidance of all

political order. Thirdly, by introducing the possibility of denouncing any discrepancy between norms and constitution, through the opening for judicial review (May, Winchester, 2018, p. 146-147).

3.2 Rule of law and rule by law on a legal spectrum

Rule of law and rule by law are not each other’s opposites, but rather co-exists on a spectrum of legal theory, which can be conceptualized as below.

Lawlessness	Arbitrary Rule	Rule by Law	Rule of Law	Rule of Good Law
Anarchy and chaos	Capricious use of power	Law as tool of government, may be deployed for repressive ends	Law is pre-eminent; checks abuses of power	Comprehensive social philosophy, drawn from conceptions of human rights, democracy, economic justice, <i>etc.</i>

(Thio, 2012, p. 271)

Rule of law and rule by law, constitutes ordered organization of human conduct and social life, as they both entails elements of legalism and constraint (Sempill, 2020, p. 512-513). This is in stark contrast to the lawlessness on the far-left end of the conceptualization above. The using of laws as a method of regulating human conduct (for whatever end) puts rule of law and rule by law on the same end of the spectrum. However, the conceptualization of “Rule of Good Law”, constitutes ideals and values features in liberal democracies, and is thus heavier on values than the formalist rule of law conceptualization to its left (Hang Ng, 2019, p. 793-796).

3.3 Contemporary Rule of Law

There are quite a few contemporary legal theorists specialized in the concept of rule of law. There are two main schools of thought on rule of law, formalist (sometimes referred to as “procedural” or “thin” rule of law) and substantive (sometimes referred to as “thick” rule of law). The formalist school argues that rule of law should be seen merely as a function, or practical facilitation. The substantive school on the other hand, argues that rule of law should be seen as something deeper - that the content of law matters (May, Winchester, 2018, p. 34). What the law should entail to be considered to constitute a legal system based on the principle of rule of law is widely debated in the thick school of thought. However, there have been attempts to sum it up as “social, economic, educational, and cultural conditions under which man’s legitimate aspirations and dignity may be realized.” (Tamanaha, 2003, p. 6-9).

3.4 Thin Theory on Rule of Law

Thin theory focuses on the more formal and procedural aspects of rule of law, the so called “formal legality” (May, Winchester, 2018, p. 21). There is a minimalistic school of thought, represented by researchers like Fuller and Finnis, who have conceptualized the key traits of rule of law as in the table below (May, Winchester, 2018, p. 28).

Fuller	Finnis
<ul style="list-style-type: none"> ● Generality of law ● Promulgation ● No retroactive laws ● Clarity of laws ● No contradictions in the laws ● Laws do not require the impossible ● Relative constancy of laws through time ● Congruence between official action and declared rule 	<ul style="list-style-type: none"> ● Rules are prospective ● Rules are possible to comply with ● Rules are promulgated ● Rules are clear ● Rules are coherent with one another ● Rules are sufficiently stable ● The making of decrees is limited ● Officials are responsible and accountable for compliance with the rules

Note: Adapted from Møller and Skaaning (2014, 15).

(May, Winchester, 2018, p. 28)

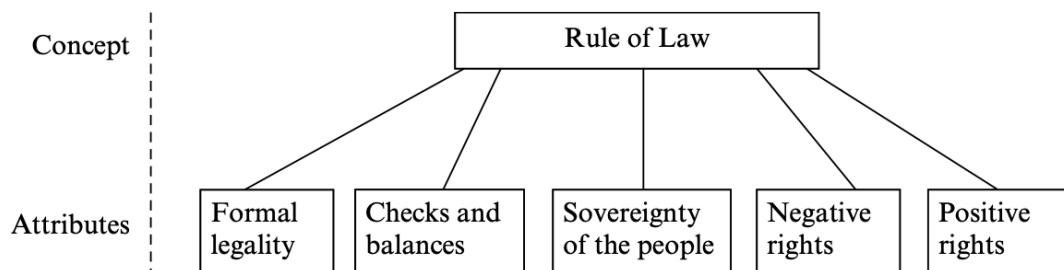
Fuller’s and Finnis’ conceptualizations are to a large extent concordant and covers the core concepts of generality, prospectively, clarity, certainty, and laws being consistently applied. These are what would be considered the criteria of “formal legality”, around which there is a

great consensus among researchers (May, Winchester, 2018, p. 21, 29). Scholars like Max Weber have also argued that this formal legality is even a prerequisite for the development of a capitalist economy, as the predictability of laws enables for more precise risk calculation, which is necessary for this mode of economic activity (May, Winchester, 2018, p. 185-186). This would come with the implication that all capitalist countries would have some degree of formal legality, and the development of the capitalist economy in any country would be coupled with the development of formal legality.

Thin theory on rule of law has sometimes been criticized for legitimizing authoritarian regimes. Rule of law is a universally used phrase and holds an unanimity support in the world (Tamanaha, 2004, p. 2). Democracies, dictatorships, and hybrid-states, all endorse rule of law as a way of legitimizing their rule, as it is widely considered as a notion for “good” governance (Tamanaha, 2004, p. 3-4) (May, Winchester, 2018, p. 50). However, not all authoritarian regimes qualify for the thin definition of rule of law. Nazi Germany did for example never meet all of Fuller’s criteria and can therefore not be considered to have been governed under the rule of law (May, Winchester, 2018, p. 50). Singapore on the other hand, is widely considered to be governed under the rule of law despite having a non-democratic regime. This is however only valid if a thin definition of rule of law is applied (Thio, 2012, p. 269-270).

3.5 Thick theory on Rule of Law

The minimalistic approach of formal legality is sometimes criticized for omitting other components that arguably constitutes rule of law, as seen in the thick conceptualization below.



(May, Winchester, 2018, p. 21)

This chart broadens the picture of what constitutes the attributes of rule of law.

Checks and balances

Some scholars argue that the foremost purpose and most important feature of rule of law is its ability to place constraints on the ruler and his/her officials. This thicker concept of rule of law entails three mechanisms that put (to varying degrees) constraints on the ruler. Firstly, the ruler can't change the rules (laws) solely at his/her discretion (examples being Magna Charta or the notion of Divine law). Secondly, the notion of mutual obligations, e.g. *pacta sunt servanda*, but arguably also represented in Confucian thought (through the concept of reciprocity and mutual responsibilities). Thirdly, formalization of routine conduct when exercising power (Tamanaha, 2003, p. 11-15). This argumentation spurs new life into the almost 2 millennial old discussion of Aristotle and Plato and their concerns about restraining the ruler or the "demos", as mentioned earlier (Stewart, 2004, p. 192-196) (May, Winchester, 2018, p. 136-137). Checks and balances are often expressed as separation of powers through constitutionalism, and the division of legislative, executive, and judicial branches of government (May, Winchester, 2018, p. 145).

Sovereignty of the people

This term describes the necessity of legitimacy when enacting laws. The source of legitimate governance through legal procedures is typically framed as public "consent" or "will". There is often a democratic norm that this source of legitimacy can only materialize through democratic processes. (May, Winchester, 2018, p. 22).

Positive rights

The notion of positive rights imposes upon the state an obligation to act in the interest of the common good. It serves as a countermeasure to prevent elites from turning the state into a self-serving vehicle which benefits the interests of the few, on the expense of the many. The state should be acting in the interest of its citizens, rather than the interests of individuals in the elites. This is commonly framed as a mechanism to generate public good, usually in the form of material goods or public services (May, Winchester, 2018, p. 38).

Negative rights

With its origins in ancient Greece, negative rights are the rights under which individuals enjoy certain liberties vis-à-vis each other and the state. These could for example be freedom of speech or freedom of movement. In contrast to positive rights, they do not impose any obligations on

others, but rather constitutes a right to inaction from others vis-à-vis yourself (May, Winchester, 2018, p. 22, 142).

3.5.1 The Kantian dilemma and criticism on thick theory

Schumpeter argued in his influential book *Kapitalismus, Sozialismus und Demokratie* from 1942, that the sovereignty of the people (“consent” or “will” of the people) stands in opposition to liberal (specifically negative) rights. If the sovereignty of the people is limited by either negative rights or checks and balances, then the sovereignty is limited in direct correspondence with the reach of the negative rights and the checks and balances (May, Winchester, 2018, p. 26-27). Friedrich von Hayek also argued that the positive rights (social equality, rights to welfare, etc.) can’t be reconciled with formal legality, as the discretionary power is placed with state institutions (May, Winchester, 2018, p. 22). These seemingly impossible reconciliation of some of the components that constitutes a thick theory on rule of law was also noted by philosopher Immanuel Kant (May, Winchester, 2018, p. 144-145). He described the dilemma as:

”[M]an is an animal and if he lives among others of his kind he has need of a Master [...] to break his self-will, and compel him to obey a Will that is universally valid, and in relation to which everyone may be free [...]. But this master is an animal too, and also requires a master”

- Kant, 1784

Kant argued for a separation of legal validity and the power of the state. Thus, making the source of legitimacy for legal validity independent from the state. By separating and subjugating the state to law (the principle of *potestats sub lege*) he argued for the establishment of the “right constitution” which arguably would balance the seemingly unreconciliatory elements of thick theory on rule of law, thus solving the Kantian dilemma. This is what is today known as the system of constitutionalism (May, Winchester, 2018, p. 145).

3.6 Rule by law

The main difference between rule of law and rule by law (sometimes referred to as “rule by men”), is often characterized as “power that manifests itself as raw command rather than as reason” (Gowder, 2018, p. 334). This is the absence of a “sensitivity of rulers to the principles already held by the citizens” - which is a key characteristic of (good) rule of law (Sadurski, 2019, p. 379) (Sempill, 2020, p. 517). The law is considered to follow “reason” if it is relatively aligned with public sentiments but considered mere “power” if coercion is needed due to public aversion or resistance to the law (Sadurski, 2019, p. 379-382).

The absence of a “sensitivity of rulers” to public sentiments, enables for states governed under a rule by law-system, to coerce its citizens to work to aid the ambitions of the state or elites, rather than personal ambitions (Sadurski, 2019, p. 381). However, not all ambitions of the state deviates from the ambitions of the individual. State ambitions like security concerns, might be accepted as legitimate aims for citizens to work for, with little or no coercion needed, as state security can translate into personal security. The level of coercion needed for a collective action for a states’ ambition varies with the public’s perceived legitimacy of the ambition (Sadurski, 2019, p. 379-382). Friedrich von Hayek phrased this key notion as

“Whether [a person] is free or not does not depend on the range of choice but on whether he can expect to shape his course of action in accordance with his present intentions, or whether somebody else has power so manipulate the conditions as to make him act according to that person’s will rather than his own”

- Hayek, 1960 (p. 13)

This statement lay bare the key characteristics of rule by law, which is that of the law as a tool of the elites for coercion of the public, rather than a system under which a person can strive in accordance with their own will within a legal framework (Sadurski, 2019, p. 379).

Not all coercion is illegitimate or an expression of rule by law, as rule of law also prescribes coercion as a method of governance. As put forth by Arthur Ripstein: “the fundamental question

of punishment is not whether the criminal already accepts the punishment, but whether it is justified anyway. To suppose that coercion is illegitimate unless the wrongdoer accepts the standard by which he or she is judged is to give up on the idea of fair terms of interaction...” (Sadurski, 2019, p. 381). There is consequently a division between “good” and “bad” law, where bad law is framed as the method of rulers to govern in accordance with their preferences, and that the law serves as a way of facilitating and disguising these preferences behind a veil of “impersonal law”. The implications are that it enables for authoritarian regimes to separate the laws from the lawmakers. By “de-personifying” the law, the lawmakers cause “epistemological confusion” regarding the origins of the law. This is due to a perceived objectivity (or “impersonality”) of laws, which consequently makes it difficult to cast blame when being subjected to “bad law” (Sadurski, 2019, p. 378) (Thio, 2012, p. 270).

3.7 The Differences Between Rule of Law and Rule by Law

The main difference between a thin theory on rule of law and the rule by law is to what end the law serves. Rule by law can entail all the elements of a thin theory on rule of law, but it is used for coercion. In the words of Aristotle:

“Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.”

- **Aristotle, in Politics**

Contemporary scholars do not perceive rule by law (“man rule”) to be “wild” in the same sense as Aristotle. Unlike Aristotle and Plato, contemporary scholarship makes a distinction between unrestrained (and consequently arbitrary) power, and coercive power wielded under the laws (potestas sub lege). To govern in accordance with rule of law is not only to exercise state power under the laws, but also to align the laws in accordance with a higher good. For Aristotle the magistrate should be the “servant to the law”, as the law is perceived to reflect a higher ideal. Rule of law still entails this notion that the content of the law matters. Thus, the distinction is

made between good law (a legal framework within which individuals can strive for their own ambitions) and bad law (which impose a ruler's will through a legal framework) (Sempill, 2020, p. 521-522).

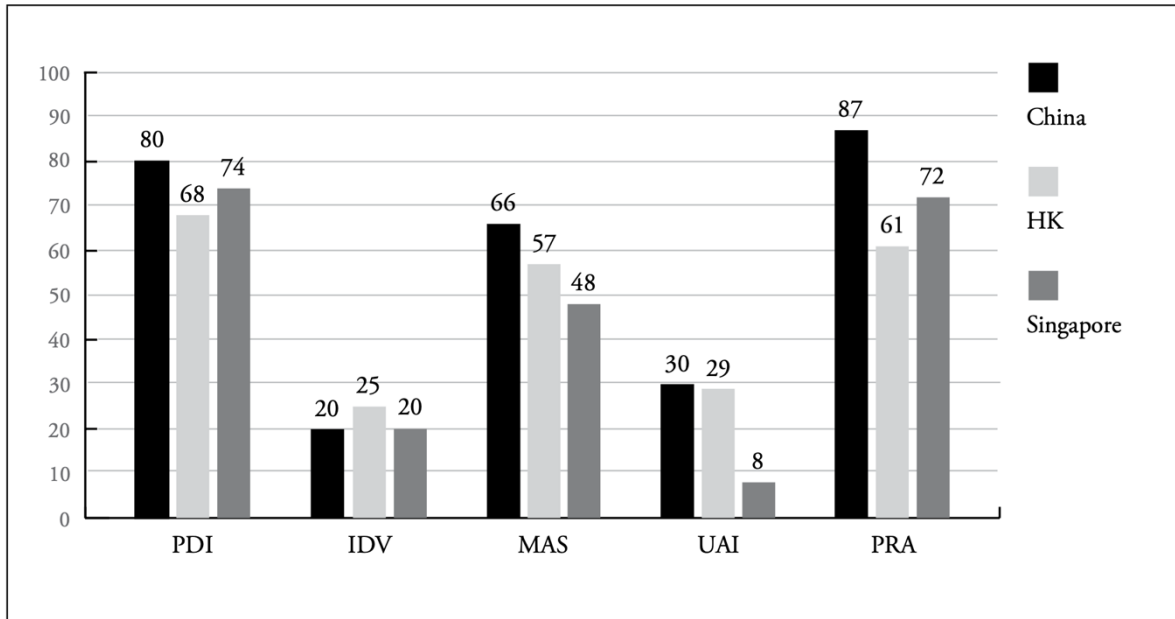
Rule of law and rule by law are both perceived to constitute systems of stable organization, in opposition to disorganization. This puts them in contrast to conceptualizations like Hobbes' and Locke's "nature state", as well as concepts of tyranny put forth by Aristotle (Sempill, 2020, p. 512-513). This arguably also cause them to be harder to distinguish and categorize in a binary fashion.

3.1 Applicability of rule of law in a Chinese context

As put forth under the headline of Rule of law from a historical perspective, rule of law is an ideal model for legal governance that has been produced and developed in the West. Therefore, it stands to question whether this Western concept as applicable to a Chinese context.

There are cultural analysis studies which have found strong positive correlation (statistically significant at the 99 % level) between "the cultural dimension for individualism and protections for individual freedoms" (Thomas, 2014, p. 140). A study by Thomas uses 5 factors to compare "Chinese culture", represented by China, Hong Kong and Singapore, with the culture in the UK. Below is the bar chart representing the "Chinese culture", with 5 factors. Power Distance Index (PDI), Individualism (IDV), Masculinity (MAS), Uncertainty Avoidance (UAI), Pragmatism (PRA) (Thomas, 2014, p. 131-134).

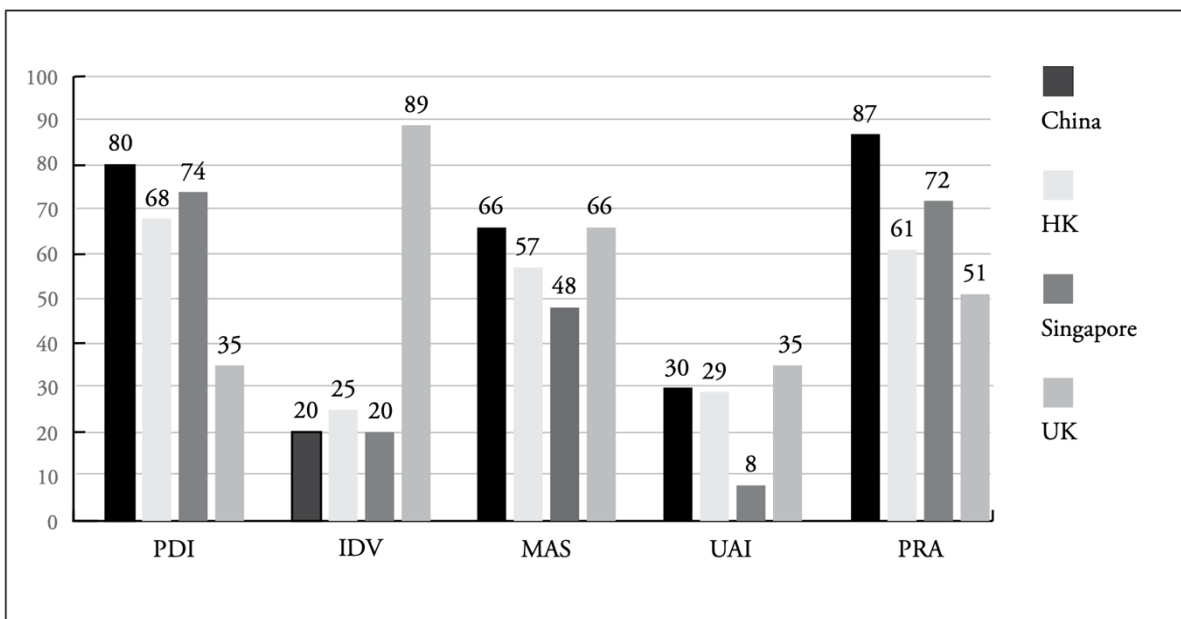
Cultural Dimensions for China, Hong Kong and Singapore



(Thomas, 2014, p. 134)

There is a relative coherence in distribution for China, Hong Kong and Singapore, with the exception of Singapore's deviation in regard to uncertainty avoidance. Below is the distribution when the UK is added.

Culture Dimensions for China, Hong Kong, Singapore and the United Kingdom

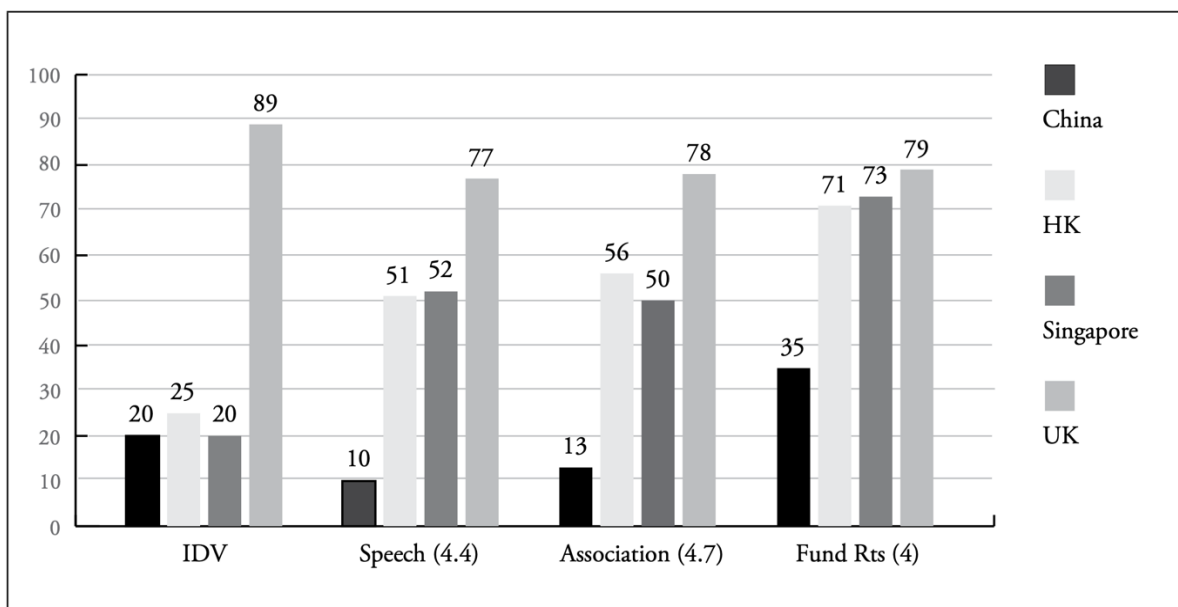


(Thomas, 2014, p. 136).

The UK is not deviating significantly on MAS (Masculinity), PRA (Pragmatism) or UAI (Uncertainty Avoidance) compared to the “Chinese culture” jurisdictions. There is however some deviation for PDI (Power Distance Index), and most notably a great deviation in IDV (Individualism), which shows a difference between 69 to 64 points on a 100-point scale (Thomas, 2014, p. 136).

Thomas argues that this deviation in IDV have implication on the development and emphasize put on negative rights (Thomas, 2014, p. 138).

Individual Rights and Cultural Individualism



(Thomas, 2014, p. 139)

Even if Singapore and Hong Kong scores much higher than China in most of the factors they score “below the average for the high income group and below the average for the Asian region” to which they both belong. (Thomas, 2014, p. 140). This, argues Thomas, indicates a cultural bias for how negative rights are perceived.

This could arguably also apply to on how rule of law is perceived. The correlation between negative rights and the sovereignty of the people, as noted by scholars such as Schumpeter,

would arguably skew a Western understanding of rule of law within the “Chinese culture”. The relatively weak negative rights would (at least theoretically) allow for a stronger expression of sovereignty of the people (May, Winchester, 2018, p. 26-27).

This conclusion puts into serious question if rule of law, a theoretical model derived from western legal systems by western scholars, is applicable for drawing any conclusions on the workings of judicial systems in a “Chinese culture” environment. This thesis makes use of Western models to analyze legal doctrine and theory in a non-western country. Although this approach could be considered a limitation, it could arguably also be used to reveal deviations and differences from Western models. If these deviations are further studied and incorporated in future models and theories on rule of law, it could bring advancements to the field.

This limitation is also recognized by other scholars who argue that “The more substantive a conception of the 'rule of law', the more open it is to controversy” (Thio, 2012, p. 272).

Scholars such as Rachel Sieder, Javier Couso and Alexandra Huneus have also criticized what they perceive as a North American and European bias in current rule of law theory. They are criticizing a process they are referring to as the “judicialization of politics”. Instead, they argue, should the concept of legal institutions be widened to include actors, which in the euro-centric matrix would be considered to operate outside the realm of law (May, Winchester, 2018, p. 66-67). This approach would open up for an inclusion of arguably extrajudicial actors, such as the CCP, in an analysis. However, this thesis uses Western models to identify similarities and differences in the non-western Xi Jinping though on rule of law. The Western biases, and how it is different from the conceptualizations present in the data, is what is being studied.

There are also other scholars such as Kwai Hang Ng, who points out the widespread use of rule of law among legal scholars, as a tool to evaluate the state of legal affairs. However, he also argues that the rule of law concept being applied needs to be formalistic conceptualizations if the scholar wishes to refrain from passing moral judgement. As more substantive theories on rule of law often are intimately connected and intertwined with the values of liberal democracy (Hang Ng, 2019, p. 793-796).

4 Methodology

The focus of this thesis is to uncover the main characteristics of Xi Jinping thought on rule of law, and how those characteristics fit into ideal types of rule of law and rule by law.

4.1 Research Design and Operationalization

Content analysis was used as the primary method for processing the data. As put by Holsti: “Content analysis is any technique for making inferences by objectively and systematically identifying specified characteristics of messages.” (Bryman, 2016, p. 284). The use of content analysis, which aims to systematically identify specified characteristics, is particularly suitable for this thesis. Discourse analysis was also considered but ultimately rejected, as the focus of the thesis is on the prevalence of existing legal theories, and not the discourse on Xi Jinping Thought on Rule of Law.

The research design is both inductive and deductive. It's deductive in the sense that a fundamental set of codes are already set by the theories on rule of law (both thin and thick theory) and rule by law, as they are laid out in the Theoretical foundation section of this thesis. Rule of law and rule by law are debated terms among legal scholars, and while distinct terms, they occasionally overlap as they exhibit some shared features. Since the data are speeches and articles by Xi Jinping, and the aim of the thesis is its content, the decision was made to widen the coding as much as possible by using both formalistic and substantive interpretations of rule of law. This approach comes with the risk of ending up with a too many and detailed codes, which might overwhelm the researcher in regard to the time needed go through and code the data. Therefore, the consideration was made to code the data, to a large extent, page by page. The codes are therefore overlapping on a page-to-page basis. As to reduce the risk of consuming too much time coding too much in detail in the relatively large body of data (283 pages).

The wide approach would also allow for other scholars (regardless of their position regarding rule of law) to place Xi Jinping thought on a scale ranging from formalist to substantive rule of law, as the content itself is laid out. They can choose to focus more or less on the sections which covers the areas which would constitute more substantive criteria.

Deductive method:

The codes for rule of law and rule by law were operationalized as follows:

Formal legality:

Based on Fuller and Finnis' conceptualizations, which states that laws should be general, prospective, clear, certain, and consistently applied. The code was applied when any of Fuller and Finnis' criteria was present in the text.

Checks and balances:

This code was applied when an effective (independent) restraining mechanism was present in the text. That power should be exercised under the confinements of law was not considered as checks and balances, but instead coded as formal legality, as it constitutes a framework rather than a constraining mechanism per se.

Sovereignty of the people:

The basis of laws must emanate from the will of the people. This code was applied when the idea of the will of the people as legitimacy-giving to the laws were present. The code does not take into consideration if the process is democratic or not.

Negative rights

Rights that do not impose obligations on others. Examples being freedom of speech, or freedom of movement. The code was generously applied, and generic statements on improving people's rights were coded as negative rights.

Positive rights

This was coded when there were expressions of improving people's material conditions. Positive rights were also generously applied with generic statements on raising living standards and improve welfare services being coded.

Rule by law

Based on the conceptualization in the literature review, rule by law was coded when there was an apparent understanding of the law as a tool to achieve ambitions, rather than a framework within which individuals can realize their personal ambitions.

Inductive method

The inductive codes are presented in the analysis section.

Post coding

The coding and the overlapping between codes was used as guidance to identify key themes and features of Xi Jinping Thought on Rule of Law. Instances of codes with high frequency and/or overlapping with other codes were identified as key areas of further inquiry. The prevalent ideas in those key areas were analyzed and conceptualized by lifting out key quotes and apply and compare those to the ideal models of rule of law and rule by law, as they are laid out in the Theoretical foundation section. These sections with overlapping codes were created using Nvivo's export tool which enables the researcher to export coded text, in accordance with selected codes.

4.2 The data

The data consists of the newly published book *On Persistence in Comprehensively Governing the Country According to the Law* (论坚持全面依法治国), which contains 54 texts and speeches by Xi Jinping, solely dedicated to the subject of rule of law, dated between December 4th, 2012 and November 16th, 2020. The book was published in late 2020 by the Institute of Party History and Literature of the Central Committee of the Chinese Communist Party.

The original book is 283 pages long and in Chinese. However, since it's a collection of texts and speeches that have been independently published/held, spanning almost 8 years, much of the content is officially translated into English versions that are freely available online. The sections of the books that was not available in English was translated using machine translation from a scanned copy of the book that was acquired. This was done in the interest of time. Samples of the

machine-translated data was checked by a native Chinese speaker to verify that the English translations were concordant with the Chinese original.

The sections of the book where the official translations were available were more finely coded (about 20 % smaller units were coded in each instance of coding) compared to the sections which were machine translated. This was done to limit the margin of error, that might arise from machine translation.

4.2.1 Limitations of the Data

When conducting enquiry on data produced by official government actors, it is important to acknowledge some of the limitations of that data. Scholars like Atkinson and Coffey have argued that official documents should be “viewed as a distinct level of ‘reality’ in their own right” (Bryman, 2016, p. 560). They argue that official documents are not expressing the underlying ideas or realities of the state. Instead, the official documents are expressions of the realities and wills of the officials who write them. Every official document is designed and nudged to serve a purpose that is decoupled from the “will of the state”, and therefore constitutes a separate entity (Bryman, 2016, p. 560-561).

However, other scholars like, for example Holsti, have argued that a systematic analysis can uncover the “characteristics of messages”, and consequently regarded official documents as expressions of state interests, as they are designed by state authorities (Bryman, 2016, p. 284). The division seems to exist between the belief that official documents are expressions of the state’s interest, and the belief that it is the expression of individual state officials. Regardless of if one chose to approach the documents from a macro or micro perspective, the data can still tell us something about either the state, or the officials that constitutes the state.

The state of China is also not monolithic, but consists of a whole range of departments and other actors who forms an intricate web of rivalries and alliances, as they are pursuing their respective interests within the state apparatus. It is therefore important to keep in mind that the data might represent the interest of a specific clique within the state and not the state as a whole (Heimer, Thøgersen, 2006, p. 274-275). It could for example be the interest of a certain institutional level

or section of the state, a faction within the Communist Party, or a certain high-ranking official and his aids.

4.3 Ethical Considerations

4.3.1 Legitimizing Non-Democratic States

There is an ethical risk of using material that is published by official institutions of states, and especially one-party states like China. The material might be manipulated and altered to align with the interests of different political actors. In this particular case the implication might be that the analysis of the material might produce false or biased results.

Perhaps has the elites of the Chinese state an interest to present themselves as dedicated to reform their country by adopting rule of law. It might also be that powerful individuals within the state are pursuing their interests and channels that through the state apparatus. However, that doesn't necessarily mean that they really intend, or are able to carry out the reforms as they are publicly promoted and expressed. In that case, scholar risks legitimizing and blurring the state of affairs, by involuntary promoting false or biased scientific results, which serves the interest of political actors and not science. The researcher should be careful not to legitimize the agendas of (most importantly non-democratic) states. However, if a researcher were to abstain from engaging with official documents the quantity of data would diminish, resulting in other issues and difficulties in the research process. It is therefore important that any researcher who engage with government produced material is careful, as to not become a mouthpiece for any regime.

5 Empirical findings

Below are the empirical findings in the data. The most frequent overlapping codes are marked in red. The second most common overlaps are marked in blue. There is a very clear pattern of high frequency of formal legality and the CCP.

	A : Checks and balances	B : Deficien cies	C : For mal legal ity	D : Histori cal referen ces	E : Negat ive rights	F : Posit ive right s	G : Raisin g educat ion levels on law	H : Ru le by la w	I : CC P	J : Nationalism/Parti cularism	K : Sociali sm	L : Rul e of virtue	N : Sovreig nity of the people
1 : Checks and balances	21	4	20	1	3	2	6	3	13	1	4	2	6
2 : Deficiencies	4	56	48	12	5	7	30	16	39	9	8	9	10
3 : Formal legality	20	48	262	37	42	34	81	72	158	50	61	40	71
4 : Historical references	1	12	37	67	8	5	13	26	51	26	24	11	24
5 : Negative rights	3	5	42	8	46	28	11	18	28	15	13	6	24
6 : Positive rights	2	7	34	5	28	39	9	16	28	14	13	9	23
7 : Raising education levels on law	6	30	81	13	11	9	95	23	66	20	16	20	20
8 : Rule by law	3	16	72	26	18	16	23	120	102	48	50	12	49
9 : CCP	13	39	158	51	28	28	66	102	235	72	80	29	84
10 : Nationalism/Particularism	1	9	50	26	15	14	20	48	72	96	64	9	31
11 : Socialism	4	8	61	24	13	13	16	50	80	64	100	12	38
12 : Rule of virtue	2	9	40	11	6	9	20	12	29	9	12	55	9
14 : Sovereignty of the people	6	10	71	24	24	23	20	49	84	31	38	9	107

The data is quite repetitive with sections that are almost identical, while also entailing sections that stand out for their irreconcilability with the main body of data, as will be demonstrated in the analysis section.

The total instances of coding is as indicated in the ranking below, which ranges from the most coded at the top to the least coded in the bottom. The total amount of sections coded are 370.

1	Formal legality (262)
2	CCP (235)
3	Rule by law (120)
4	Sovereignty of the people (107)
5	Socialism (100)
6	Particularism/nationalism (96)
7	Raising education levels on law (95)
8	Historical references (67)
9	Deficiencies (56)
10	Rule of virtue (55)
11	Negative rights (46)
12	Positive rights (39)
13	Checks and balances (21)

6 Analysis

The analysis is guided by the empirical findings where the apparent centrality of formal legality and the CCP will be considered and investigated in relation to the other codes. The inductive approach to the data rendered new codes in addition to the codes given by the theory in the deductive approach. These codes were as follows:

Socialism, CCP, particularism/nationalism, raising education levels on law, historical references, deficiencies, rule of virtue, and separation of powers.

All the quotes are, unless otherwise stated, from the book *On Persistence in Comprehensively Governing the Country According to the Law*, which constitutes the data for the thesis.

6.1.1 Formal legality

One of the more overwhelming impressions of the data is the heavy focus on formal legality. Out of 370 sections of coding, 252 were coded with formal legality. The overarching focus is the adherence to law and the law as a tool to regulate human conduct. Many of the criterion in Fuller's and Finnis' conceptualizations of procedural rule of law are expressed in the data (May, Winchester, 2018, p. 28). The quote below indicates the ambition to systematizes the legal framework and to carry out reform within a legal framework:

“We must improve legislative planning, highlight legislative priorities, adhere to both legislation, reform, and abolition, raise the level of scientific and democratized legislation, and improve the pertinence, timeliness, and systematisms of laws. It is necessary to improve the legislative work mechanisms and procedures, expand the orderly participation of the public, and fully listen to opinions from all quarters, so that the law can accurately

reflect the requirements of economic and social development, better coordinate interests, and give play to the leading role of legislation.”

The notion of public participation in the legislative process in the quote above indicates an inclination towards a more substantive rule of law-principle. The role of rule of law is seemingly perceived as a tool to balance different interests and promote economic and social developments. It is not only a method of facilitation, as the formalistic theory would give at hand.

6.1.2 The CCP

The Chinese Communist Party, hereby referred to as the “CCP”, or the “Party”, is the second most frequent code in the data set, with 235 instances of coding. With statements like, “[t]he Party’s leadership is the fundamental guarantee for advancing the comprehensive rule of law.”, the CCP is portrayed as the leader of the country and is conceptualized as an entity which expresses the “fundamental will of the people”, through its policies. The Chinese state on the other hand, is perceived as the facilitator of the implementation of the Party’s policies through law enactment and enforcement.

“Our party's policies and the state’s laws are both reflections of the fundamental will of the people and are essentially the same. The Party's policy is the forerunner and the guide of national laws, the basis for legislation and an important guide for law enforcement and justice. We must excel at making the party's propositions into the will of the state through legal procedures, enacting laws, ensuring the effective implementation of party policies through laws, and ensuring that the party plays a central role in the overall situation and as coordinator of all parties.”

CCP is often overlappingly coded with formal legality and rule by law. The ambitions of the Party are often openly expressed, and the implementation of formal legality is framed as the reform that will realize the ambitions of the Party. The whole process draws on the legitimacy of expressing the collective will of the Chinese people.

The most frequent ambition expressed by the CCP is the position of the Party as the leader of the country. The implementation of a “socialist rule of law” is intimately linked with the Party’s leadership of China and is impossible to achieve without it. As expressed below:

“The Party's leadership is the fundamental guarantee of the socialist rule of law, and adherence to the Party's leadership is the fundamental feature and political advantage of our country's socialist judicial system.”

This quote portrays the Party as being essential for the implementation of “socialist rule of law”. This indicates that the CCP seemingly perceive themselves as a separate part of the legal system, and not just as an entity which operates within the legal confinements of the law.

6.1.3 Rule by law

Rule by law and the CCP has a very high overlapping (102 out of 120 instances of coding rule of law overlapped with the CCP). As laid out in the theoretical foundations section, rule by law was coded when there was an ambition expressed which did not necessarily serve to enhance the realization of individual goals. The continued leadership of the CCP was the most common ambition expressed, and framed not only as beneficial to the country, but a necessity. The ambition for “national rejuvenation” is another ambition expressed in the data, with the continued leadership of the CCP, also being a necessity to achieve that.

6.1.4 Checks and balances

Checks and balances as operationalized in the method section, are very sparsely mentioned in the data. As discussed in the theoretical foundation section, separation of powers are often an important feature of checks and balances. There are some exceptions where checks and balances and separation of powers are discussed. Most notably is this quote:

“In order to optimize the allocation of judicial powers, the Plenary Session decided to promote the implementation of the pilot system reform of the separation of judicial power and execution power, unify the penalty execution system, explore the separation of judicial

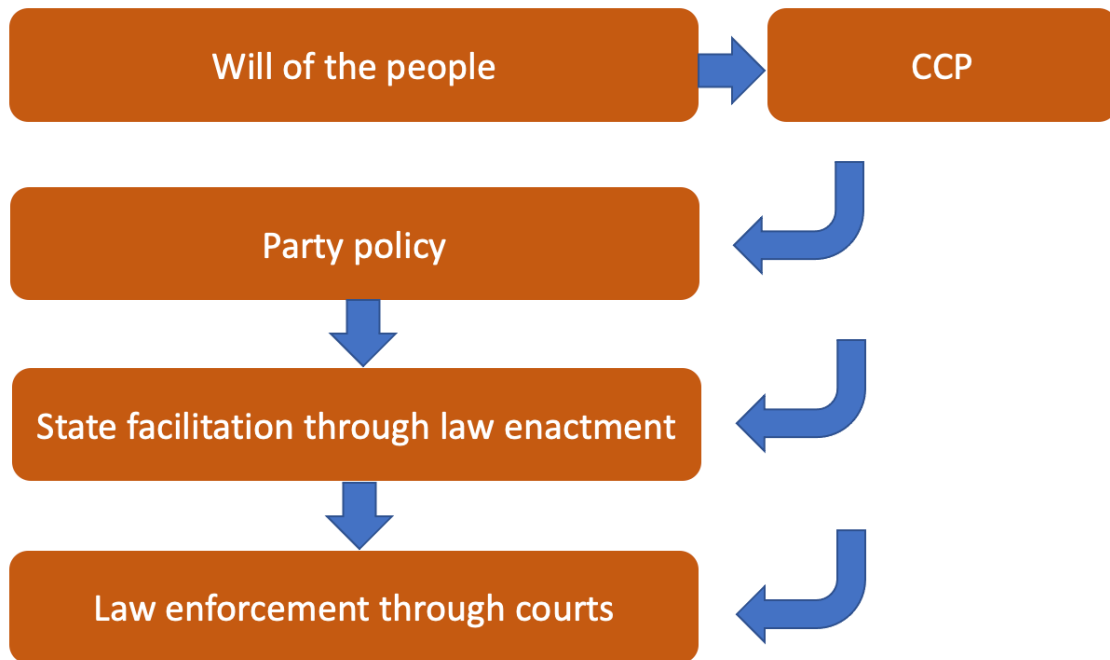
administrative affairs, management power and judicial power of courts and procuratorates”.

This indicates a willingness to experiment with a concrete system of separation of powers, but arguably also exposes the state of current affairs. When promoting a pilot system to “explore” the separation of powers, it arguably implicitly expresses that the current system, which is the target of the reform, is the very thing the reform tries to remedy – fusion of powers. There would not be a need for reform if the objective of the reform was already realized.

Separation of powers and the CCP are frequently mentioned together, only being surpassed by separation of powers and formal legality (arguably because separation of powers requires formal legality, as the mechanism which divides powers). A typical conceptualization is such as in the quote below:

“We must ensure that the Party plays its proper role as the core in exercising overall leadership, coordinate the efforts of all, uphold the rule of law as the fundamental strategy, guarantee administration in accordance with the law, turn the Party's views into the will of the state through legal procedures, train candidates recommended by Party organizations to become leaders of agencies of state power, exercises the Party's leadership over the country and society through the agencies of state power, and supports the agencies of state power along with the administrative, judicial and procuratorial bodies to carry out their work separately, yet concertedly, in accordance with the Constitution and laws.”

This statement can be conceptualized as in the schematic below.



CCP is conceptualized to be actively, but differently, involved in every step of the legal process except in the formation of will of the people. Instead, the CCP claims to only express that will, which seemingly serves as a source of legitimatization for governance. This is usually phrased as “the people as the masters of the country” (49 times). In Xi Jinping Thought on Rule of Law, the CCP directly expresses the will of the people through party policies, which is then implemented by state organs. These state organs are to be filled with officials who has been recommended by the Party. The judicial and executive powers should be “separated but coordinated”, and within the confinements of the law.

6.1.5 Sovereignty of the people

“Comrade Hu Jintao said: "Whether the political and legal work is done well, ultimately depends on whether the people are satisfied or not.”

“The future of a political party or government is determined by whether it enjoys public support. We must be resolute in preventing and combatting the practices the people oppose and resent.”

The notion of a need for the “sensitivity of rulers to the principles already held by the citizens”, or “reason”, is evident in the two quotes above. This is a key feature which separates rule of law and rule by law (Sadurski, 2019, p. 379) (Sempill, 2020, p. 517). Rule of law is sensitive to sentiments held by the citizens, whereby rule by law is not. There seem to be a parallel to “reason” in the quote above, which acknowledge the separation of law and public satisfaction. Although satisfaction and will are not entirely interchangeable, people are arguably satisfied when their wills are accommodated. This indicates a shift in agency from the Party to the private citizen, as the private citizen becomes the evaluator of the imposed laws. Thus, it deviates from the doctrine of the people’s will and the will of the Party as being practically one, perfectly aligned.

6.1.6 Socialism

Socialism is one of the inductive codes. Although frequently coded, it is not defined or elaborated on in a single section of the data. Instead, it is seemingly used as a linguistic feature rather than carrying any substantial meaning. It is added to phrases like “socialist” rule of law, “socialism” with Chinese characteristics and “socialist” democracy.

6.1.7 Deficiencies

Deficiencies is one of the inductive codes. One notable phenomenon in the data is the acknowledgements and discussions about various deficiencies in the current Chinese legal system. Deficiencies and formal legality are the most common codes that occurs together (out of the total 56 instances of coding for deficiencies, 48 are together with formal legality). Looking at the sections of overlapping codes, the deficiencies are mostly regarding corrupt officials who do not exercise the powers of their offices within the confinements of law.

“While fully affirming our achievements, we should also be aware of our shortcomings: The oversight mechanisms and pertinent systems to ensure the implementation of the Constitution are not yet complete; laws are not properly observed or strictly enforced, and lawbreakers are not properly prosecuted by some local regions and government agencies.”

This statement acknowledges the deficiencies of formal legality in the current situation. Notably is the “are not yet complete” in the quote above, which gives the impression that the development of formal legality is perceived as a progressive process towards an ideal state (of formal legality), with gradual implementation. This is further enhanced by the quote below:

“[E]specially the painful lessons of the serious damage to the legal system during the “Cultural Revolution”

This clear departure, at least in discourse, from the arbitrary and unpredictable legal practice in the last decade of Maoist China, was noted by scholars already in the 1980s (Baum, 1989, p. 69-70). Interestingly the framing of the Cultural revolution in the quote seems to be that it was an interruption on a predetermined trajectory towards rule of law. This indicates that the strive to govern China according to laws started well before the launch of Xi Jinping Thought on Rule of Law, which rather seem to constitute the latest developments of a long-term strategy. However, the framing at the time of the Cultural Revolution was that there was a predetermined trajectory towards abandoning any ideas of a formalized legal system (which was considered bourgeoisie), in favor of class struggle and arbitrary wielding of power by the CCP (Baum, 1989, p. 69-70).

Scholars such as Richard Baum has argued that the lack of pluralism of legal systems in imperial China (Legalism and Confucianism dominated in periods but rarely coexisted as major legal schools) have had the implications that the historically fragmented Chinese society has struggled to balance between the two legal poles. Instead of having elements of both legalism (rule of/by law) and rule of virtue (Confucian law theory), the emperors have historically opted between the two, while relatively successfully suppressing the other (Baum, 1989, p. 71-72). Notable is that Xi Jinping Thought on Rule of Law argues for the necessity of integrating rule of virtue into rule of/by law, which seem to refute Baum’s claim that there can only be one dominant legal doctrine at a time.

Another common feature of deficiencies are corruption and non-compliance of laws by officials and Party members.

“Some Party members and officials still think that the country is under the rule by man. They think that they are the ones in charge and believe that conducting affairs in accordance with the law is overly complicated and unnecessarily restricting. Convinced that they should have the final say in everything, they are totally oblivious to the existence of the law and are bent on overriding it with their authority at every turn.”

This overlaps with legal formality, as the outspoken ambition seems to be to enforce compliance to the law amongst officials and party members.

6.1.8 Historical references

The most striking feature of historical references in the data is the high overlapping with the CCP. Out of 67 instances of coding historical references, 51 are overlappingly coded as CCP. The main theme in the overlapping sections is the historical success of the CCP, however while also acknowledging the failures of the Cultural Revolution.

“During the "Cultural Revolution", the democratic legal system was severely damaged, and the party, the country, and the people paid a heavy price for it. After going through this serious setback, we have deeply realized that the rule of law is an indispensable and important means of governing the country.”

The failure of the Cultural Revolution is the only point of criticism of Party history present in the data. There is also a renewed notion of historical continuity as described in the quote below:

“China’s first systematically compiled code of written laws appeared as early as the Spring and Autumn and Warring States periods (770-221 BC). In the years from the Han Dynasty (206 BC-AD 220) to the Tang Dynasty (618-907), China succeeded in establishing what was essentially a fully developed set of written laws. The legal system of ancient China embodied a huge wealth of knowledge and wisdom, allowing it to occupy a unique place

among the major legal systems of the world. We need to take note of the successes and failures of China’s ancient legal traditions; identify, extract, and promote the very finest elements of China’s traditional legal culture; and selectively integrate these elements into our present initiatives.”

This expresses a pragmatic vision of drawing from lessons of the past, and an attempt to distinguish China’s legal system from other major legal systems. This is a major break from Maoist thoughts on the necessity to distance the society from its historical roots. Campaigns such as the one against “The Four Olds” (old ideology, old culture, old customs, and old habits) during the Cultural Revolution, served to separate the Chinese society from its historical passed, including its legal tradition (Lu, 1999, p. 494). The quote below instead seems to indicate a contemporary desire to separate and distinguish the Chinese legal system from Western features, rather than historical Chinese features.

“The facts have proven that self-improvement movements without penetrating social impact, reformistic practices under different names, old-style peasant wars, democratic revolutions led by bourgeois-revolutionaries, and various other schemes that copied Western political systems were neither able to fulfill the historic tasks of saving China from subjugation and combating imperialism and feudalism, nor able to stabilize it politically or socially. It also goes without saying that they were unable to provide the institutional guarantees necessary for China to bring about national prosperity and public well-being.”

The quote rejects “Western political systems” as ways of achieving “national prosperity” and “public well-being”. This statement gives the expression of a particularistic view on political systems (see further under next headline), and interestingly mentions a “institutional guarantee”. This echoes a former quote in the analysis:

“The Party's leadership is the fundamental guarantee of the socialist rule of law, and adherence to the Party's leadership is the fundamental feature and political advantage of our country's socialist judicial system.”

The “institutional guarantee”, which is the only way of achieving “national prosperity” and “public well-being”, is the CCP.

6.1.9 Chinese particularism/nationalism:

“It is not feasible for China to copy the political systems of other countries, since those systems are not suited to our national conditions. Any such attempts would at best lead to poor imitation and might even ruin the country’s future. The most reliable and effective systems for a country are always the ones that take root in and draw nourishment from their own soil.”

This quote is a powerful message of Chinese particularism. The idea of particularism is rooted in a notion that ideas which arise in a particular part of the world is only applicable in that very same part. This arguably constitutes a rejection of “western ideas”, such as theories on rule of law and rule by law. It also seemingly rejects the wider notion of universalism (Zhao, Yang, 2009, p. 122). However, there are also indications of indigenization, which describes the process of adapting universalistic ideas to local conditions (Zhao, Yang, 2009, p. 126). These are expressed in the quote below:

“Undoubtedly, we need to draw on the achievements of other political civilizations, [...] whose model can we copy? And who is qualified to throw their weight around and tell us what to do? In this rich and varied world, we should uphold inclusiveness, learn from the strengths of others with an open mind, and digest and absorb what we learn through an objective mindset so that we can turn it into our own strength rather than just blindly copying others.”

This willingness to draw from “the strengths of others”, contrasts with the statement “[a]ny such attempts would at best lead to poor imitation and might even ruin the country’s future”. This cast doubts over if Xi Jinping Thought on Rule of Law is particularistic or indigenous in its approach to ideas. There are however positive references to Western philosophers such as Rousseau and Marx.

6.1 Will of the people and separation of powers

In Xi Jinping Thought on Rule of Law the state should align itself with the will of the people. This is conceptually achieved through the CCP. The Party's policies are the pure expression of the will of the people, and the policies are the tools used to relay the will of the people to the state organs. The state organs are then responsible for the implementation of policies (and in extension the "will of the people"). The CCP keeps its alignment and responsiveness to the will of the people through "people's supervision", "legal supervision" and "intra-party supervision". Xi lays out this concept by drawing from Leninist thought on supervision of state and party organs, as cited below:

"Lenin emphasized that it is necessary to improve the status, specifications, and authority of the supervisory organs, and establish a supervisory system including intra-Party supervision, people's supervision, and legal supervision, so as to prevent public officials from becoming "separated from the masses, standing above the masses, and enjoying privileges."

"The people" are named as one of the 3 supervisory systems which oversees state and Party power. Drawing on the literature on the Kantian Dilemma (May, Winchester, 2018, p. 144-145), which is so vigorously captured in the quote by Immanuel Kant:

"[M]an is an animal and if he lives among others of his kind he has need of a Master [...] to break his self-will, and compel him to obey a Will that is universally valid, and in relation to which everyone may be free [...]. But this master is an animal too, and also requires a master"

- Kant, 1784

We can note the absence of a master to control the master within Xi Jinping Thought on Rule of Law. The CCP is supervised by the people through "people's supervision", whilst at the same time being the sole interpreter and expressor of the people's will. This implies that the Party is both the organizer of the supervision (the subject) as well as the object of supervision. The need for supervision over state power and institutional arrangements is however stressed with quotes such as below:

“We must guarantee public supervision over the exercise of power to ensure transparency, and confine power to an institutional cage. We must work to simultaneously "cage the tigers and the flies"”

This expresses a desire to impose formal legality on state power, even if the restraining mechanism might be lacking due to the apparent fusion of judicial, executive, and legislative powers.

Drawing on Kant, there would need to be a constitution to place the “master” under the legal confinement of constitutionalism (May, Winchester, 2018, p. 145). This could arguably be the “legal supervision” that Xi refers to in his reference to Lenin. However, there are no mentions of a “fundamental law”, as put by Kant. But instead, there are expressions of a generic desire for legal supervision. This notion is however clarified:

“Supervisory organs at all levels must, under the leadership of the Party, take the Constitution as the fundamental criterion, and fulfill their statutory duties of supervising the full coverage of public officials exercising public power.”

Here it’s stated that all supervision should be conducted “under the leadership of the Party”, thus removing the uncertainty of who manages and oversees the “people's supervision”, “legal supervision” and “intra-party supervision”.

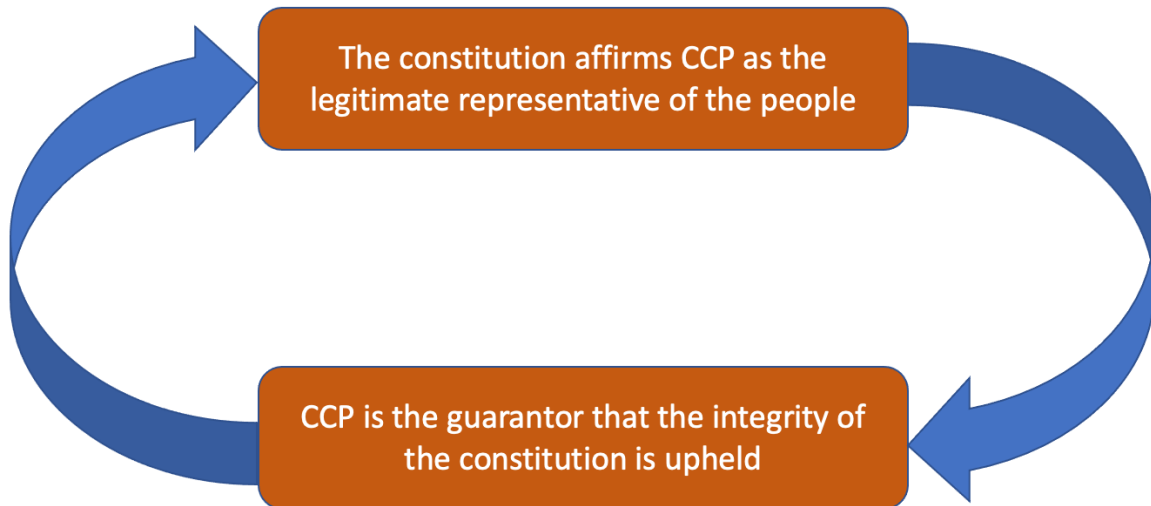
6.2 The Constitution

The constitution of China would be the constrainer of power in a constitutional system with separation of powers. The word “Constitution” is in the top 10 most frequently used words in the data and thus arguably a centerpiece of socialist rule of law with Chinese characteristics.

“[T]he authority of the common will of the CCP and the people; that safeguard the inviolability of the Constitution and law means safeguarding the inviolability of the common will of the CCP and the people; and that guaranteeing of enforcement of the

Constitution and law means guaranteeing the realization of the common will of the CCP and the people.”

This statement suggests that the leadership and legitimacy of the CCP is enshrined in the Chinese Constitution, which it also upholds. This can be conceptualized as below:



This results in a catch-22, where the same entity both grants the legitimacy and confirms it.

6.2.1 Negative and positive freedoms

These two codes often appear together and not separated.

“If the Constitution is disregarded, weakened or even sabotaged, the people’s rights and freedoms cannot be guaranteed, and the cause of the Party and the state will suffer.”

If the constitution, which upholds CCP’s position as the leader of the country, is not upheld. The consequences are that that people’s rights and freedoms can’t be guaranteed. This makes the claim that only the CCP is able to secure rights and freedoms for the people. The claim follows

the main trend of the centrality and dependency of the CCP in Xi Jinping Thought on Rule of Law.

“We must ensure that all citizens enjoy extensive rights in accordance with the law, that their right of the person and property and basic political rights are inviolable, and that their economic, cultural and social rights are exercised.”

The quote above is a typical example of the generic statements in regard to negative and positive rights. Rights and freedoms are not concretized or elaborated upon, but rather seem to be terms used to signal good governance. This shares similarities with the use of the phrase “rule of law” as a way to signaling good governance (Tamanaha, 2003, p. 3-4). To take the quote above, there are no specifications on what constitutes “cultural rights”, but rather it seems to be a signaling phrase.

6.3 Rule of virtue

Rule of virtue is a phrase that is used in some sections of the data while being completely absent in others. However, while the term itself is absent in some parts of the material, there are parts where the same type of ideas are implicitly expressed, although not as “rule of virtue”. Some scholars argue that there is still a strong heritage from Chinese imperial law that shapes the perception of rule of law today (Teon, 2016). They usually base their arguments on the Confucian notion that a legitimate rule entails two dimensions of law, namely the rule of law (依法治国) and the rule of virtue (德治). (Garrick, Bennet, 2018, p. 101). This Confucian notion of legitimate rule is apparent in the quote below:

“[I]n running our country and society, we need to lay emphasis on both the rule of law and the rule of virtue, ensuring both the role of law in regulating behavior and the role of ethics in shaping the mind, so that law and virtue promote and enhance each other, and rule of law and rule of virtue complement each other.”

There seem to be a distinction between conduct and ethics, with a notion of the need for alignment between the two.

“To ensure the role of ethics in shaping the mind, we must nurture the rule of law with ethics and strengthen the role ethics play in fostering a culture of rule of law. No matter how many laws we make, or how good those laws are, people will only genuinely abide by them once they have become ingrained in their subconscious. As the saying goes, "A person without shame knows no limits." Without the nutrition that virtue provides, the culture of rule of law will have nothing to sustain itself, and we will lack a solid social foundation on which to enforce our laws.”

The quote expresses the notion that effective law enforcement in itself is not enough to achieve the socialist rule of law with Chinese characteristics. Instead, the citizens are not only expected to abide by the laws, but also to agree with the laws. Consequently, the state is not only responsible for enacting laws, which are to a varying degree accepted by the majority of the population, but also to actively foster a public embracance of the sentiments on which the laws are based.

This fostering of public sentiments through the rule of virtue, seem to fall onto a state actor to perform, even with the state conceptually being perfectly aligned with the will of people through the Party’s policies. If the purpose is to foster people to appreciate the enacted laws, then there is an implicit claim that the laws are virtuously superior to the virtues (“sentiments”, in the words of Sadurski) held by the people. That would pose two irreconcilable principles, as the state can’t both be more virtuous than the people, and at the same time being perfectly aligned with the virtues of the people.

The CCP and rule of virtue is frequently coded overlappingly.

”Leading cadres at all levels must take the lead in handling affairs according to the law, take the lead in abiding by the law, always have a reverence for the Constitution and laws, firmly establish the concept that the legal red lines cannot be touched, and the legal bottom lines cannot be crossed, and not to exercise power that should not be exercised by them according to the law.”

As the quote above indicates, it is sometimes difficult to distinguish between leading by virtue and following the law. As mentioned beforehand, there is a distinction between regulating behavior in accordance with the law, and to believe in the morale (or virtue) of the law. It is however clarified who is responsible for ruling by virtue, as indicated below:

“If you don’t understand this rule, you are not a qualified leader. If leading cadres do not obey the law, how can the masses obey the law?”

This quote interestingly seems to point out the CCP as the entity which holds the role of leading the country by virtue. The CCP is disconnected and extolled from the masses, as party cadres are expected to set the example and lead the masses. The notion of separation between the Party and the masses, based on virtuousness is further enhanced by the following quote:

“The Constitution of the CCP and other Party regulations ask more of Party members than ordinary laws do. Party members are not only required to strictly abide by state laws and regulations, but are also required to strictly observe the Constitution and regulations of the Party.”

This contradicts the notion of the Party as perfectly aligned with the will of the people. Or implicitly states that the people don’t know what they want unless guided by the Party.

6.3.1 Raising education levels on law

Raising education levels on law is one of the codes generated from the inductive approach. It is coded 95 times, which makes it one of the more common codes.

The overarching theme, as the name indicates, is the raising of overall education levels on law.

“It is necessary to carry out publicity and education on the legal system, promote the spirit of socialist rule of law in the whole society, disseminate legal knowledge, cultivate legal awareness, and form a good atmosphere in the whole society in which the constitution is supreme and the law is honored.”

If the purpose is to raise the education levels of a “socialist rule of law” system, it could arguably be deemed as a rule by law feature, as the purpose of education could be to nudge public sentiments towards embracing ambitions held by the CCP. This is however only valid if “socialist rule of law” lacks “sensitivity of rulers to the principles already held by the citizens” (Sadurski, 2019, p. 379) (Sempill, 2020, p. 517) (Gowder, 2018, p. 334).

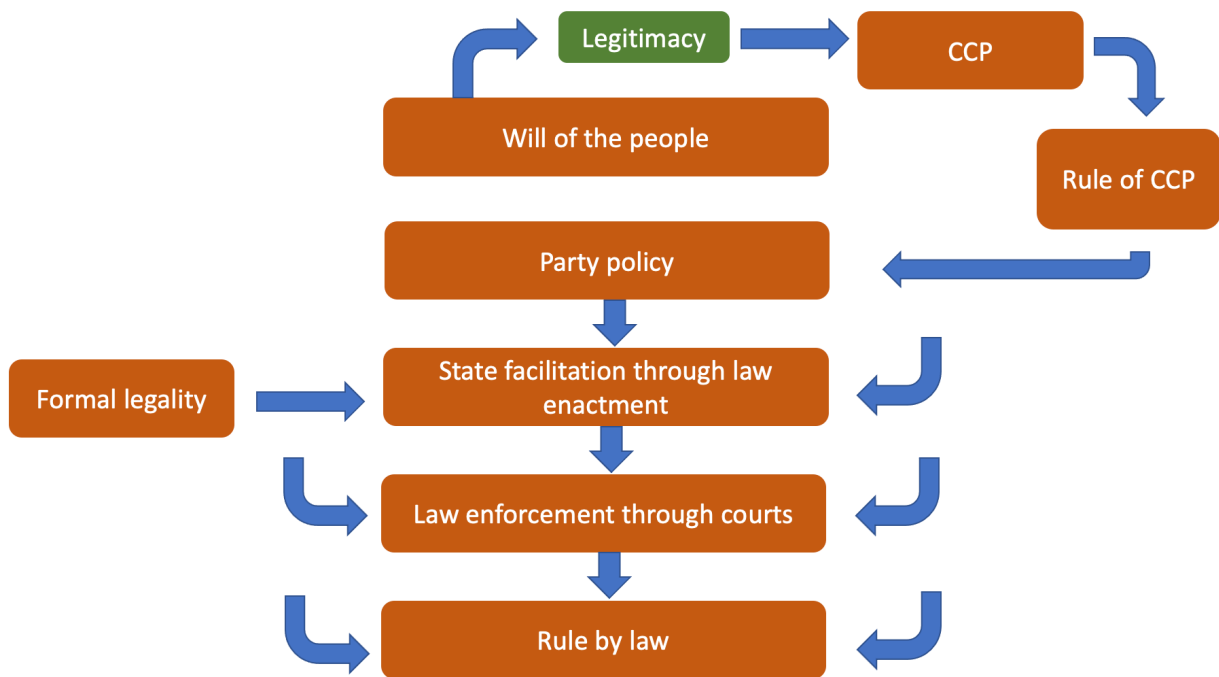
It could arguably also be considered as a feature of rule of law, if the effort to raise education levels are made in the interest of raising the quality of the judicial process. However, it should in that case apply much more heavily to legal professionals, as to not risk being coercion of the public. There is seemingly also an interesting parallel to rule by virtue, as indicated in the quote below:

“It is necessary to adhere to the combination of legal education and the practice of the rule of law.”

This stresses the combination of enforcing conduct in accordance with legal prescriptions, as well as an educational element. Noteworthy is the apparent insufficiency in just adhering to the laws. This arguably shares features with the notion of rule by virtue. And just as with virtue, the education would have to originate from a more knowledgeable or “virtuous” source, such as the CCP for example, which exercises its “leadership” over the country. This opens up for the question of in whose interest the raising of education levels on law will be carried out in. Would it be in the interest of the ruler (rule by law) or in the interest of the people (rule of law).

6.4 Overarching conceptualization:

Xi Jinping thought on rule of law can be conceptualized as below.



The source of legitimacy is the will of the people, which is articulated by the CCP through party policy. The policies are then passed on to state authorities for implementation, through legal measures. By reforming the governance system to be law-based, the aim is seemingly to increase the efficiency of implementation of party policies. The courts, guided by law, are responsible for enforcing the law. As noted before, the state and courts should be filled with officials who has been "recommended" by the CCP, thus giving the Party the possibility of input at all levels. Since the will of the people is solely expressed by the CCP through party policy, there is no possibility of confirming the validity of the claimed representation of the people. Consequently, the enacted laws must be regarded as emanating from the CCP rather than the people, as there is a lack of independently confirmed connection between the will of the people and party policy. Thus, making the case for rule by law.

7 Discussion

The data presented in this thesis is quite sprawling and sometimes incohesive. It stands to question whether the data can be used to read out the ideological content of Xi Jinping thought on rule of law. I would argue that the main contribution of this thesis is perhaps not the conceptualizations, although they arguably capture some of the latent ideas, but rather the pointing out of areas that seem to be of great importance for the framing of Xi Jinping thought on rule of law. However, the aim of the thesis is to contrast and investigate how well Xi Jinping thought on rule of law fit into either rule of law or rule by law.

Rule by law's most defining character is the absence of "reason", or the absence of "sensitivity of rulers to the principles already held by the citizens" (Sadurski, 2019, p. 379) (Sempill, 2020, p. 517) (Gowder, 2018, p. 334). The leadership of the CCP is one of the main features in the data. Ash Center for Democratic Governance and Innovation (at Harvard University) released an independent report in 2020 on the approval ratings of the CCP among the Chinese population. The report found strong approval ratings of above 90 %, and a significant increase of approval since 2003 (Cunningham, Saich, Turiel, 2020). This arguably indicates the existence of a "sensitivity of rulers to the principles already held by the citizens". However, the report also concluded that the "citizen perceptions of governmental performance respond most to real, measurable changes in individuals' material well-being" (Cunningham, Saich, Turiel, 2020, p. 14). The increased approval ratings due to increased material well-being does not necessarily have to translate into an approval of laws (especially those outside of the economic realm). Instead, it might be a bargain between the CCP (which delivers economic growth) and the Chinese public (which accepts the CCP's monopoly on political power).

It is also unclear how well rule of law and rule by law fits into a Chinese context. As noted in the literature review, the extrajudicial (although to a decreasing extent) position of the CCP in the governance of China, is also viewable from a historical legal position. It can arguably be perceived through the lens of rule by law, or a lens of historical legal system of imperial China. This could be conceptualized as follows: where the emperor/empress once upheld divine order through his/her extrajudicial rule, the CCP today upholds social harmony and order through their

(partially) extrajudicial rule. Both positions are arguably fruitful in approaching legal doctrine in contemporary China. However, rule of law and rule by law theories are to a large extent universalistic, while legal theories of imperial China are particularistic. It can in this case add a deeper understanding of contemporary Chinese legal doctrine if applied in conjunction with more universalistic theories on rule of law and rule by law.

8 Conclusion

The continued leadership of the CCP through legal-based governance is the main theme in the data, and the CCP is framed as the only entity which is able to guarantee further improvements in the lives of ordinary Chinese people.

Xi Jinping Thought on Rule of Law has a clear focus on formal legality in accordance with a procedural (thin) theory on rule of law. This places it within the formalistic understanding of rule of law, or in the realm of rule by law, as many of the other criterion for substantive rule of law are relatively disregarded.

Xi Jinping Thought on Rule of Law show many features of rule by law. The perceived role of the CCP as the expressor of people's will, the CCP as the guardian of the constitution (which bestows the CCP with the legitimacy to express the people's will), as well as its extolled position as the leader of all supervision of state affairs, conceptually leads to a catch-22-situation. This makes it difficult to discern rule of law from rule by law from the theoretical conceptualizations of Xi Jinping Thought on Rule of Law. However, the apparent lack of separation of powers, a key feature of rule of law, strongly indicates the prevalence of the latter – rule by law.

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