

AN INTERVIEW WITH MURRAY SCOT TANNER

# Rule of Law in China: An Essential Component of U.S.-China Relations

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Published: May 17, 2017

*In recent years, China's Communist Party has spoken extensively about ruling the country according to law, but Beijing's progress on this front has been slow, frustrating many observers in China and the United States. NBR spoke with China specialist Murray Scot Tanner to determine where China is headed on rule of law issues and how the rule of law in China affects U.S. interests.*

**China has in recent years spoken at length about “rule of law,” but what does the Chinese Communist Party (CCP) mean when it talks about rule of law or rule by law (*fa zhi*), and how does it differ from American interpretations of rule of law?**

Americans think of rule of law as a system of clear, codified laws that act as an effective check against the arbitrary use of power by a government, including democratically elected governments. It is a system in which average citizens and companies can effectively access a relatively independent judicial system to protect their rights. The rule of law puts great emphasis on proper legal procedure rather than necessarily getting a particular outcome.

I think that when Americans hear the Chinese talk about trying to “rule the country according to law,” we hope that they are moving toward that sort of accessible, effective check on government. But that, unfortunately, is not what the CCP has in mind. China remains a Leninist system of government, and its constitution and laws still

explicitly protect the party's rule over society and its leadership of the legal system.

When the party speaks of “ruling the country *according to law*,” or “rule *by law*,” it doesn't mean the same thing we do, even though it often mistranslates the term *fa zhi*, rule by law, into English as rule of law. The Communist Party is trying to create clear, explicit rules for cases that are not politically sensitive, in which people who are not involved in politics are more likely to get some measure of protection. But in cases when the party perceives concerns about national security, social stability, or ethnic and religious affairs, the legal system is still often vague, secretive, highly arbitrary, and repressive and offers few clear procedural protections for the people it targets.

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### **Can a greater emphasis on rule of law help solve China's problems with domestic governance?**

Since the early 1990s, China has faced persistent and rising levels of social protest. Even Chinese law-enforcement sources make clear that a large percentage of this unrest is traceable to problems of bad governance and the legal system's failure to offer citizens effective avenues for addressing their grievances. For example, a major cause of worker strikes is the failure of firms to pay the wages or social insurance premiums they have legally contracted to pay. A major source of protest among farmers and apartment dwellers has long been the illegal confiscation of farmland or apartments, often by officials who hand the property over to investors in return for large sums of money.

Likewise, enterprises and factories that violate antipollution regulations are a major source of protest. China is unlikely to be able to cope with these sources of unrest unless and until it provides its citizens with accessible, effective legal institutions for redressing these abuses without having to take their protests into the streets.

### **In 2014, some foreign observers were encouraged that, for the first time, the CCP devoted an entire decision of the Central Committee to the question of rule by law. Since then, what changes have you seen in the way the CCP has handled rule of law issues?**

The decision did note many long-standing abuses of legal procedures and protections, such as corruption, arbitrary administrative detention, and tortured or coerced confessions. And like many previous party documents, it called on authorities to fight these. But the bulk of the decision suggests that Xi Jinping's real vision for legal reform is not to create a system that gives citizens more access or control, but rather to create a legal and administrative system in which government

actions have a clearer statutory basis, and which is more centralized, rule-based, efficient, and less predatory. Most importantly, however, that decision repeatedly calls for strengthening and improving the Communist Party's leadership over making and enforcing laws.

The resolution also laid out a lengthy legislative agenda regarding property rights, judicial reform, and national security. What surprised many foreign observers was how quickly the party acted on national security elements of that agenda over the following two to three years. The CCP put forward very harsh draft laws and regulations on counterespionage, counterterrorism, national security, cybersecurity, the management of foreign NGOs, and the regulation of law firms and lawyers. In many cases, these draft laws were quite broadly worded, and potentially subjected a wide array of organizations, persons, and activities to tough legal scrutiny or arbitrary prosecution.

### **In what ways is China's progress on rule of law issues important to U.S. national interests?**

Questions of the rule of law and human rights in China are not separate from many important U.S. interests in national security, diplomacy, or economics. The United States cannot expect to make fundamental progress toward many of its key interests in U.S.-China relations unless there is significant improvement in China's legal system. For example, the members of the American Chamber of Commerce in China, in their 2016 survey, listed "inconsistent interpretations of regulations and unclear laws and enforcement" as their top challenge when doing business in China—supplanting "rising labor costs." They also spotlighted stagnated progress in the protection of intellectual property as a major barrier to necessary innovations.

In the more than one hundred constituent dialogues and programs that fell under the United States and China's Strategic and Economic Dialogue during the past two administrations, probably a quarter to a third of these exchanges related to issues of progress or reform

of China's commercial law, trade, environmental, food safety, law enforcement (including nonproliferation and counterterrorism), and other aspects of its legal system. A more recent example of legal issues in the U.S.-China agenda was President Trump's March 31 executive order on trade deficits with our key trade partners, which stressed the need for the United States to identify the impact of "intellectual property theft, forced technology transfer, denial of worker rights and labor standards."

In addition to these issues, when Chinese courts do not live up to or fairly enforce the rule of law, or Chinese lawyers are intimidated from vigorously making their case on behalf of Chinese and foreign clients, it significantly harms the interests of U.S. firms and others doing business in China.

### **In what areas does the United States hope to see progress?**

In the immediate years ahead, there are four areas where I think it's important for us to look for progress. First of all, we hope to see greater transparency. Over the last 5 to 10 years, while China has made important steps in some areas of legal transparency, in other areas it has actually reversed 25 years of relative progress toward making its legal system more transparent. For example, a lot of the data and information that we have obtained on legal system trends, budgets, and other issues in the late 1990s and early 2000s are no longer available. When China invokes its state security and secrecy laws to prosecute many cases, Chinese criminal procedure laws allow officials to close off proceedings, deny or restrict access by lawyers, and take a number of other actions that decrease transparency.

Second, we would like to see progress toward judicial independence or at least greater professional autonomy, including real autonomy from the political-legal committees controlled by local party officials.

Third, greater clarity is needed in Chinese legislative drafting to make clear the rights that people enjoy under the law, as well as clarify what is and, more importantly, what is not considered criminal behavior.

Fourth, China should provide greater protection for, and end the persecution of, Chinese lawyers who are simply trying to vigorously and faithfully practice their profession and defend their clients' rights and interests.

### **What entities from the United States and international community do you see as helping pursue rule of law in China? Does "naming and shaming" by these entities yield progress?**

Rule of law and human rights NGOs like Human Rights Watch, Amnesty International, Human Rights in China, Freedom House, and Open Society Foundations, as well as the U.S. government's Congressional-Executive Commission on China (CECC) and the U.S.-China Economic and Security Review Commission (USCC), have demonstrated their invaluable range of contributions in the last couple of years.

It is not clear whether China's rule of law and human rights issues occupy the same sustained, focused position that they once did in other sectors of our China studies community. As part of their broader China-related policy work, U.S. think tanks need to provide more sustained discussion of how the United States can best advance these rule of law and related human rights interests as our global position and relations with China change.

The NGOs I mentioned, and the CECC and USCC, provide a large, experienced supply of Chinese-language-capable experts to persistently monitor rule of law trends in China and alert us to areas of concern. These organizations have been critical in monitoring China's detention of human rights lawyers since 2015. They have also played important roles in raising government and public awareness and promoting coalitions, which has helped the United States respond quickly to some of the draft legislation China has passed since 2014 (e.g., the laws on counterterrorism, foreign NGOs, national security, and cybersecurity). Many laws, in both their draft and final forms, have raised issues of real policy concern to the United States. Washington was able to discuss these issues with Beijing in the drafting

phase, and even as their implementation was being worked out. And while we cannot be sure how much specific impact U.S. engagement has had, China did undertake some positive revisions following U.S. engagement.

### What can the U.S. government do to help China strengthen rule of law?

The United States faces new and greater challenges in trying to promote rule of law in China as China's power increases and its reliance on the United States and the U.S. market declines. Still, the breadth of our relationship with China provides a range of contact points through which we can try to promote progress in its legal system. Those points are available to us if we are alert and choose to prioritize making use of them.

A range of proposals have been made on this issue. At one end, the CECC's 2016 Annual Report called for prioritizing rule of law and human rights issues and adopting a whole-of-government, interagency approach throughout the U.S.-China relationship. We can also look for new ways to improve coordination on the rule of law with our European and Asian allies and partners, many of whom share a common interest in making China's legal institutions stronger.

Xi Jinping has now chosen to stake his legitimacy, in part, on the Communist Party's claim that it is ruling China according to law. This may provide an opportunity for the U.S. government to frame policy proposals that promote rule of law as a way for Xi to build on his objectives.

The United States also needs to be cautious in how it responds to China's policy proposals. Chinese officials

and analysts have sometimes tried to interpret agreements with the United States as fitting within their model for the U.S.-China relationship, which they see in part as involving "mutual respect" for each other's "core interests." In particular, they are anxious to cast such respect as an endorsement for China's core interests in defending the current state of the CCP's political, constitutional, and legal system.

Finally, I have always believed that the United States also contributes to strengthening the rule of law in China—and many other countries—by working to live up to its own best standards of protecting the rule of law, an independent judiciary, and the procedural rights of its citizens. My conversations with Chinese colleagues over the years have convinced me that when the United States does this, it can be a significant and much more persuasive role model for progress on rule of law in countries such as China. ♦

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