

Fazhi in China

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In Chinese „rule of law“ is usually referred to as fazhi which literally means “regulating by laws”. It is regarded as the antithesis of renzhi (regulating by men); to postulate fazhi is therefore tantamount to negate the long tradition of renzhi. Still in the beginning of the 1980s fazhi as a value of chinese political culture was not unchallenged. Since 1999 however, the constitution stipulates that China “implements (the principle) to rule the country according to law” (yi fa zhi guo) and “establishes a socialist state regulated by law” (jianshe she-huizhuyi fazhi guojia) Therefore fazhi became first and above all an expression for extensive legislation, i.e. lawmaking by the National People’s Congress and the State Council (central government). Implementation of the newly created legal rules by administrative bodies and the judiciary as well as legal education became further elements of fazhi. Due to a political system with a “leading party” as its nucleus and the refusal of the doctrine of checks and balances (separation of powers) fazhi tends to be instrumental for political ends rather than limiting political power.

I. Preliminary remarks

In 1978, the Chinese leadership pronounced that the establishment of a legal system was necessary both as an instrument and as a guarantee for the intended transformation of the ways of economical and social life (“modernization”). Since then, Chinese leaders have been increasingly confronted with the duality inherent in law: law as an instrument of political power and as an agent for restraining this same power. Legal theory at first propagated the need to overcome “rule by men” (*renzhi*) and to establish instead *fazhi*. In view of growing official appreciation of the value of a stable legal system, discourse was extended more and more to the role of law as a guarantee for political participation, control of political power and protection of human rights.

II. "Fazhi" versus "renzhi": The legal system as an universal standard

Legal theory in post-Mao China established itself in the negation of "rule by men" (*renzhi*), which is considered to be the main cause of the diverse political catastrophes since 1957, and in the support of *fazhi* aiming at the elimination of arbitrariness and decisionmaking solely by individual leaders. The debate on *fazhi* and *renzhi*, which took place in the beginning of the 1980 (Keith 1994: 8 ff.) referred to a pair of concepts which had been formed during antiquity and which reproduce by way of two catchword the positions taken by the advocates of Confucianism (*rujia*) and legalism (*fajia*) during their debates on methods of government and social order in the sixth to the third centuries B.C. The legalists favoured laws as the only efficient means to carry through their ideas of government and reform. The participants in the contemporary debate also looked at *fazhi* as governing by means of State-made legal norms linking to it the concept of the instrumentalism of laws for political ends. Unlike the historical constellation, *fazhi* was now also related to the highest political authority; since 1982 the statute of the Communist Party stipulates that "the Party has to act within the limits of the Constitution and the laws". "By means of laws" (*yi fa*) or "on the basis of laws" (*yi fa*) "to govern the State" aimed now at the establishment of the laws as an universally binding standard without exception.

Due to historical ("feudalistic") and western ("bourgeois") connotations of the *fazhi* concept, there were attempts to avoid it and to use the notion of "legal system" instead. Li Buyun early in 1982 rejected the opinion that because of the expression "legal system" there was no need to use the expression *fazhi* as well. Li differentiated both concepts by pointing out that a legal system, as the totality of legal norms, institutions and procedures, arrives at universal validity only through *fazhi* as "a theory, a principle and method of governing as State" (Li 2006: 108 ff.). Because *fazhi* expresses the idea of subjugating under law even the highest political authority, it cannot be replaced by "legal system" which bears no connotation of a specific "nature" or "quality" of this system. The following elements of *fazhi* were emphasized: (1) The administration of the State is based on a detailed legal system; (2) the main

laws remain continuously in force without regard to a change of political leaders; (3) the government acts according to established norms and procedures, i. e. laws are not mere instruments of government, but aim at limiting the sphere of governmental action; (4) the publication of the laws; (5) a high density of legal norms, i. e. legislation covers all main areas of political, social and economic life; and (6) a legal system of a *fazhi* nature has to possess certain substantial qualities. Concerning this last point the heritage of the European enlightenment was taken into account. Jiang Shilin, co-editor of the "Complete Collection of the Constitution of the World" commented on the principle of *fazhi* as follows: "The principle of *fazhi* as laid down in the constitution of capitalist countries, aims at the institutionalization and legalization of State affairs and at administration according to law. It requires power to be bound by law, rights and freedom of the citizens to be protected by law, the principle *nulla poena sine lege* to be carried through. In realization of this principle, the constitutions of capitalist countries established the following institutions: the constitution as the highest legal norm, limited government, equality before the law, independence of the judiciary, the system of defence of the accused in criminal procedure, etc." (Jiang 1989). This understanding of *fazhi* as derived from "capitalist" constitutions was soon regarded as significant for "socialist" constitutions as well and became widely acknowledged in legal theory. At a conference on "Reform of the Chinese Legal System" in February 1989 Li Buyun pointed out: "One has to take upon oneself the freedom to assume the achievements of the legal culture of the whole of mankind; one has to alter the concept of the instrumental character of law and to accentuate the concept of the fundamental values of law: freedom, democracy, equality and human rights" (Law Institute 1989: 10 f.).

III. The "translation" of *fazhi* in legal and constitutional institutions

The discourse of *fazhi* in general and of the relevant constitutional institutions in particular is affected by different expectations of the governing party on the one and legal theorists on the other side. Whereas the party and parts of legal theorists look at *fazhi* essentially in terms of efficiency, security and predictability ("rule by laws"), the rights protection function of *fazhi* was however not overlooked since the beginning of the

discourse (Li Buyun 2004) and continues to be emphasized. Peerenboom distinguishes several “versions” of the rule of law as they are discussed in Chinese theoretical literature, i. e. “liberal democratic”, “communitarian”, “soft-authoritarian” and “statist socialist” versions, emphasizing respectively civil and political liberties or stability and economic growth (Peerenboom 2004). The “leading sound” is produced by governmental statements presenting *fazhi* in terms of establishing a legal system “with Chinese characteristics” in order to improve administrative efficiency (including the administration of justice), regulating markets and safeguarding human rights (Information Office 2008) “in conjunction with national conditions” (Li, Li 2008, 57 f.). This is assisted by scholarly deliberations suggesting a “consultative rule of law regime” (mainly as an anti-corruption mechanism) while avoiding democratization (Pan 2006) and by many studies focusing on aspects of improvement of administrative work as a consequence of “increased rules and regulations” (Chen 2008).

The “translation” of *fazhi* elements into the legal system demands a long lasting process. At the time being the legal system falls short of meeting basic requirements of *fazhi* as emphasized in the discourse:

1. It does not meet the requirement of generating legal certainty and predictability. Due to lacuna in legislation and especially because of the circumstances the legal practice of many statutory provisions is unclear it is often impossible to know whether one behaves in conformity with the law. There is no system of regular case reporting.
2. The legal system is not in accordance with the requirement of a statutory basis of executive action. Although the National People’s Congress is considered by the Constitution as the “highest organ of state power” it convenes only one three-weeks-session yearly, and even most members of its Standing Committee work not on a fulltime basis. The constitution does still not contain the provision that rights and freedoms may – under certain conditions (as to maintain social order, advance public welfare etc.) – be restricted only by statute law: instead *fazhi* is interpreted to mean rule by “statute laws and administrative regulations”, allowing the executive to curtail individual rights not

only under statute laws, but also under State Council regulations and even decrees of ministries and local governments. As a result, laws enacted by the legislative typically include such provisions as “the promulgation of an enforcement rule is entrusted to (a specific agency)”, and the executive branch enjoys wide discretionary power, empowered to issue any regulations it preferred. The net result is that individual rights are infringed upon whenever it is deemed necessary. Even the limited frame which the Legislation Law of 2000 provides for the principle of reservation of law (*Vorbehalt des Gesetzes*) is not respected in practice, as e. g. the notorious system of “re-education through labour”, which continues to be based on State Council ordinances, demonstrates. The 2004 addition to the constitution according to which “the state respects and guarantees human rights” (art. 33 III) remains largely an expression of intention.

3. The judiciary is not independent from influence of executive (including party) organs, the professional quality of judges is low, the system of a national uniform judicial examination started only in 2002 (Ahl 2006), defense lawyers work under the threat of flexibly formulated criminal law provisions (art. 306), law firms challenging the authorities are shut down under the pretext of having offended against certain administrative rules or having committed tax evasion, free debates of political questions can be prosecuted as a crime of “subverting the state power” (art. 105), there exists only very limited access to the courts for the review of administrative acts (the whole sector of basic rights as provides for in the constitution is excluded), and there is no judicial review of normative acts.

4. The role of the Party is not spelled out clearly in law.

Fazhi as expressed in the current legal system thus neither sufficiently comprise legal certainty nor the protection of human rights. Therefore it is sometimes assumed that the slogan *fazhi* is used as a propaganda tool to enhance the legitimacy of the ruler and to attract the people’s support for the regime. This, however, would be far too short an evaluation of the significance of *fazhi* in contemporary China. This significance cannot

be limited to the manifestation of *fazhi* in the current legal system, it must rather be understood as an ongoing process which has started only recently, a process to which a Chinese author has referred to as “one of the most exciting events in the world today” (Zhang 2002, 14).

IV. Summary

1. “Rule of Law” in relation to China is the question of what means *fazhi*.
2. As reflected in the current legal system *fazhi* mainly functions as an instrument of governmental control.
3. In legal theory *fazhi* matters as a value-based concept aiming at restraining governmental discretion and protecting basic constitutional rights.
4. Expectations in society concerning further developing of *fazhi* are growing fast; the Chinese legal system responds only reluctantly. China needs time, as others needed before, and probably more - considering the fact that Chinese tradition - from Confucianism to Communism - did more to spoil than to prepare the soil for a ready acceptance of *fazhi* as a value by the general populace (Hu 2006).

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