

Normative Readings of the Belt and Road Initiative: Road to New Paradigms: Epilogue

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China is increasingly aware of the role and potential it can have to influence the world development. This has led it to reconsider and develop foreign policies, the Belt and Road Initiative (BRI) being a new flagship of them. The economic tone in China's foreign policy has given it a soft flavor.

China's BRI, which covers both 'the Silk Road Economic Belt' and 'the 21st Century Maritime Silk Road', has in just a few years' time grown to be much more than just an initiative. In addition, it is a work in progress. In a policy paper on the Arctic, the concept of 'the Polar Silk Road' was introduced in January 2018.¹

As discussed by Anastas Vangeli, in 2017 president Xi Jinping's thought won a formal position since it was included in the Chinese constitution which means that China is firmly set to promote this projects as part of its official policy.² Kangle Zhang, in turn, refers to the BRI as part of China's global strategy.³

The Initiative comes first and foremost down to trade agreements and huge infrastructure projects⁴ made possible by Chinese investment abroad.⁵ Even though

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¹China's Arctic Policy. Published by the State Council Information Office of the People's Republic of China. http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm.

² Vangeli, Anastas, Shared Destiny, Sovereignty, State-led Economics, Connectivity and Flexibility, in this volume.

³ Zhang, Kangle, A Tale of Ending Poverty: The new financial institutions and China's global strategy, in this volume.

⁴ Desheng Hu, Jun Ou and Xueyue discuss the environmental aspects of FDI projects in the article On Environmental Responsibility of Chinese Enterprises for Their FDIs in Countries within the One Belt and One Road Initiative, in this volume. Kangle Zhang discusses the financial aspects of the projects, see the article mentioned in fn 3. Shu Zhang discusses the Investor State Arbitration clause in the article Developing China's Investor-State Arbitration Clause: Discussions in the Context of the "Belt and Road" Initiative, in this volume.

⁵ Bath (2016).

the Initiative as such is not aiming to export law, its success will obviously be dependent on legal matters as well.⁶ Economic co-operation needs to be legally regulated, and eventual legal disputes will have to be solved. New legal frameworks will have to be created.

The Visions and Actions document,⁷ which has a formal status, tells about the level ambition of the BRI. The Initiative upholds the famous five Principles of Peaceful Coexistence.⁸ It is harmonious and inclusive, it respects the paths and modes of development chosen by different countries. It follows market operation as it gives the market the decisive role in resource allocation; it will give a primary role to the enterprises instead of governments.

The cooperation priorities themselves are five: policy coordination, facilities connectivity, unimpeded trade, financial integration and people-to-people bond. Even though much of the Initiative concerns economic development, the underlying tone tells that the true purpose goes much beyond that.

BRI is a fluid and flexible Initiative in the sense that it would be difficult to define it conceptually. Zeng Lingliang has described it as a 'new formula of global governance'. The aim of the Initiative is also to contribute to an awareness of a common destiny of people. The people-to-people bond namely aims at creating support; it 'is a project of transnational public feelings and support of the Initiative'.⁹ The role of the cultural level collaboration was extensively discussed above in the article by Guilherme Vasconcelos Vilaça.¹⁰

The current trends in world order and global governance, with the U.S. turning more away from international arrangements, make the BRI both practically and theoretically an interesting approach to societal and economic development. It is an alternative approach, since it does not rely on the Western models (even though, in fact, it of course needs to make use of existing legal tools) and values.¹¹

⁶ Xiao Yongping and Meng Yu discuss the international credibility of Chinese courts in *Some Suggestions for Improving the International Credibility of the Chinese judiciary: A Focus on the OBORI*, in this volume. See also Tommy Yu, *China's "One Belt, One Road Initiative": What's in it for Law firms and lawyers?*, in this volume.

⁷ *Visions and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road*. 2015/03/28, Issued by the National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization. Available on-line.

⁸ On the five principles, see Chi He, *The Belt and Road Initiative as a Global Public Good: Implications for Public International Law*, in this volume.

⁹ Lingliang (2016), p. 527 and 540.

¹⁰ Vilaça, Guilherme Vasconcelos, *Strengthening the Cultural and Normative Foundations of the Belt and Road Initiative: The Colombo Plan, Yan Xuetong and Chinese Ancient Thought*, in this volume.

¹¹ Nicholas Morris on developing a sustainable legal system on the basis of traditional Chinese Philosophy, see his *Developing A Sustainable Legal System for the Belt and Road Initiative*, in this volume.

At least at first sight, the Initiative comes in some sense close to the United Nation's Sustainable Development Goals for the year 2030, adopted in 2015.¹² The Initiative sets goals, but it lets countries, states and peoples to incorporate them and thus find ways to achieve them. The Initiative makes no direct reference to the UN goals, however.

The Initiative is inclusive and open for any country to join. This is also one aspect which renders it different from existing economic or regional forms of collaboration which tend to be predefined in terms of participation and membership.

The BRI has obvious geopolitical connotations. It is a China-driven initiative as China invites States and entire regions to join it. The formulations follow the global governance style and use rather soft tones of popular participation and even give a role to non-state actors, including NGO's, to support the Initiative.

Teemu Ruskola has written about Legal Orientalism, claiming that the Orient has played the role of the "Other" for the US and for the Western legal tradition.¹³ For this reason, it has been so difficult to approach Chinese law, since the westerners have continuously looked at the Orient through their Western lenses.

The BRI is a fresh example of how the Orient pushes itself forward. Through BRI the state actors and others seek to create new models of collaboration which would not be built on traditional Western values. The BRI introduces investment to areas that would not otherwise attract them. It is a state-backed and state-steered initiative, meant to mobilize both public and private actors.

The BRI means that China shares its resources with the New Silk Road countries, but this will happen at the cost of becoming bound in a common destiny. Invisible ties evolve which will increase the significance of Chinese interests in faraway regions. But, in the final instance, we all share the destiny of mankind.¹⁴

The power-balance, or rather power-imbalance, does not have to mean the China should be looked at a new colonizing power. This is, most certainly, the image that China would like to avoid at any cost. But the fact is that interdependencies will follow which will tie entire regions more closely with China's destiny.

President Xi emphasized in a speech given in Astana in 2013 that China does not aim at domination of regions and that it would respect different development paths and domestic and foreign policies pursued independently by every country. At the same time China, both bilaterally and in the Shanghai Cooperation Organization (SCO), seeks partnership to combat terrorism, separatism and extremism as well as drug trafficking and organized transnational crime. This will, says Xi, 'create a favorable environment for promoting economic development and improving the well-

¹² <http://www.un.org/sustainabledevelopment/>.

¹³ Ruskola (2013).

¹⁴ Understandably, the Polar Silk Road and the policy on Arctic, highlights the shared destiny aspects. See, the document referred to in fn 1.

being of the people in this region'.¹⁵ The new institutions, such as the AIIB, are instrumental as well.¹⁶

The SCO, which originally only consisted of China and the four Central Asian states, seems to be an important vehicle to drive the agenda further. The SCO has broadened its influence, and at the same time China is no longer the only dominant power present. SCO's values do not include democracy, and it is rather an authoritarian organization as regards its organizational structure. The SCO is advocating a multipolar world and it aims at preserving the status quo in the region. The struggle against "the three evils", terrorism, separatism and extremism, is directly linked with the aim to combat all destabilizing factors.¹⁷ The implementation of Silk Road Economic Belt might transform the SCO into one of deep economic collaboration, a Silk Road Union which would be based on association between the SCO and the Eurasian Alliance.¹⁸

In terms of values, the SCO is very different from the European Union, for instance. But for both, certain evils matter. In the case of the European Union, now conceived also as an Area of Freedom, Security and Justice, issues of terrorism and cross-border organized crime have meant a large scale of measures agreed on the basis of the articles included in the treaty framework. Combatting security threats may often serve common interests. Also BRI will face the issue that increased economic collaboration will create more cross-border criminality.¹⁹

The creation of the internal market of the European Union has been a project in which the law has played very crucial role. Not just combating international terrorism and cross-border organized crime have been the drivers on the internal security front, but all this has been balanced with an emphasis on human rights, including fair trial, and rule of law; the core values that were set to render this project possible.

Should BRI develop a transnational criminal law for itself, we should be mindful of that transnational criminal law assumes rather than develops rule of law framework.²⁰ Rule of law does not follow automatically.

For a western observer, the crucial issue is, in fact, will it be possible to achieve real development in societies by means of increased trade and investment only, without concerns about the quality of rule of law, or even with a conscious disregard of the rights of the individual.

The Western view has been that by improving the rule of law, the economic prosperity can be increased since this attracts investment and also increases fairness in the distribution of the economic benefits. Anti-corruption measures are important

¹⁵ Jinping (2014), p. 317.

¹⁶ On the financial aspect of AIIB, see Kangle Zhang, above fn 3, in this volume. On the environmental clause of the AIIB, see Brombal, Daniele, Planning for a Sustainable OBOR: An appraisal of the AIIB environmental and social safeguards, in this volume.

¹⁷ Kembayev (2016), pp. 691-699.

¹⁸ *Ibid.*, p. 699.

¹⁹ Sprick et al. (2016).

²⁰ Boister (2012), p. 278.

since the market lives out of trust to the predictability of legal rules, and corruption tends to bend them.

The Belt and Road (BR) concept seems to work the other way round. Investment in infrastructures, such as roads and bridges, introduces new connections which again lead to increased economic activities. The BR repeats in some sense the old Silk Road spirit of trusting in connections. Linking markets with each other is expected to lead to positive outcomes even when the traditional human rights and rule of law will be set aside. Connectivity has been said to be the most revolutionary force of the 21st century.²¹

This is not to say that the rule of law matters would have disappeared, rather the contrary. Improving the Chinese legal system towards a ‘rule of law with Chinese characteristics’ has been one of the core ambitions of China under Xi Jinping. The Chinese discussion concerning what is the Chinese concept of rule of law is vivid, and the nuances are many. China is aiming at building a rule of law system, which will require profound changes, but it seems equally clear, that the Chinese concept of rule of law will continue be different form its Western counterparts.²² The scholarly debates, however, flourish and cover a variety of approaches.²³

The BRI does of course not mean that the Chinese concept of rule of law would become immediately significant for BR participating states, since the (equally Chinese) principle of harmonious co-existence leaves the legal and political systems of those countries out of the legitimate scope of influence of China. The main concern and interest is, surely, to protect the (Chinese) investment legally, and ensure other BR objectives.

I believe it will continue to be important to discuss the significance of BRI for the development of legal culture or cultures, even if many of things are not yet in place. A Non-Western regional legal development seems to be underway, one that places priorities in another order than the West would have done.

This is not necessarily a bad thing. Regional legal cooperation works like this. And there will always be many roads for the legal development to take. But the risk seems obvious that a project of introducing investment and facilitating growth in regions which do not have a good record in governance so far may end up creating less added value than expected to the less well-off people.

An indirect effect of BR, when it really gets running, will be the increased significance of knowing China, of knowing about China’s political and legal developments. Chinese law will become a natural point of reference for all concerned. The people-to-people policies of China will further contribute to this by increasing the individual level contacts and mobility, also including academic exchange.

The times of a Western view at the Orient are long gone. The Orient presents itself against its own premises and on its own right. Law is a public good and legal

²¹ Khanna (2016).

²² See, e.g., Lin (2017).

²³ Seppänen (2014).

developments deserve to be looked at with a critical eye, both from inside and outside. Globalisation and common destiny binds us all together.

We already mentioned about the SCO and the rather authoritarian view about states. Also, as regards the BR, the people-to-people bond seems not to mean any concession as regards democratic participation or introducing of human rights. The emphasis on economic cooperation with a conscious abandonment of human rights may even hide a policy to downgrade the international human rights law since it is being looked at as a Western idea which should therefore be rejected.²⁴

It might, in any case, still be important for the BR participating countries to continue working on issues of public law and legal reform and development beyond or parallel to the project of BR. Good and transparent administration, for instance, is almost inevitable for reaching the goal of better services for the people, not to mention environmental protection. Ending poverty requires impartial and rule-based government. Otherwise the benefits of trade and investment risk ending up in the hands of the local elites.²⁵

Promoting economic development entails a promise. Nothing prevents the individual participating countries still to complement the BR with other development projects which would help them solve such internal problems which hinder economic as well as societal development, including the strengthening of the rule of law and the protection of the rights of the individual.

It might only be logical that, as the BRI does not aim intervene in national politics of other countries, that the participating countries will themselves take responsibility of adjusting to the new models of global governance for the benefit of their people. Labor rights standards might, to give an example, deserve attention.

The construction of the legal frameworks for cooperation under the BRI will require that the Chinese courts will be better served in terms of knowledge about foreign role. Xiao and Yu suggest that China should establish a national centre for discerning foreign law.²⁶ Increasing trust will require opening up, and recognition and enforcement of foreign judgements.

Soft power is fluid, and sometimes it may be difficult to see where it comes from. Anu Bradford has presented the rather interesting argument that the European Union has global power since it is a regulator which is able to introduce legal standards that simply become global standards by the force of global markets. The EU has the advantage of being a market large enough as well as having a regulatory capacity and the willingness to use it. As a results the EU regulations gain significance much beyond European borders. This is the so-called Brussels Effect.²⁷ Bradford discusses a.o. regulation of the use of chemicals, setting standards of environmental protection, and food safety regulation as examples.

²⁴ See the discussion in Ahl (2016).

²⁵ See the discussion by Kangle Zhang, in this volume.

²⁶ See, above, the article mentioned in fn 6, in this volume.

²⁷ Bradford (2012).

Should we accept that thesis, we might say that the BRI will not easily be able to do away with this part of soft European power. But with increased growth of Chinese and Asian markets, the Brussels Effect might be challenged, in the long run: ‘It will be a while before China could replace the EU as a source of de facto global standards.’²⁸ And why should BRI of China seek to do away this soft power, if the system works well?

It is much too early to judge the potential of BRI in terms of transnational legal development. It seems also clear that the BRI consciously seeks new avenues of legal development rather than replicates existing ones. If the BRI develops structures and patterns and communications that deserve to be called transnational law, something qualitatively new will come into being.

Even though European Union law, or US Law, for that matter, will not be models in this work and even though the values informing this legal development will be different, the theoretical tools for analyzing transnational law developed in the West may still be helpful in terms of making sense this new type of transnational law.²⁹ Together with new lines of legal communications across boundaries of legal orders, new things emerge.

²⁸ *Ibid.*, p. 49.

²⁹ See, for instance, various chapters in the book *Transnational Law*. Maduro et al. (2014).

References

- Ahl, B. (2016, August 25). China's New Global Presence and Its Position Towards Public International Law: Obeying, Using or Shaping? In L. Wolff and X. Chao (Eds), *Legal Dimensions of China's Belt and Road Initiative* (pp. 481-505). Hong Kong: Wolters Kluwer. Available at SSRN: <https://ssrn.com/abstract=2830199>.
- Bath, V. (2016, November). 'One Belt, One Road' and Chinese Investment. In: C. Xi and L.-C. Wolff (Eds), *Legal Dimensions of China's Belt and Road Initiative*. , Hong Kong: Wolters Kluwer Hong Kong Limited.
- Boister, N. (2012). *An Introduction to Transnational Criminal Law*. Oxford: OUP.
- Bradford, A. (2012). The Brussels Effect. *Nw. U. L. Rev.* 107 (1), 1-67.
- China's Arctic Policy. The State Council Information Office of the People's Republic of China. http://english.gov.cn/archive/white_paper/2018/01/26/content_281476026660336.htm. <http://www.un.org/sustainabledevelopment/>. Accessed 8 January 2018.
- Kembayev, Z. (2016). Letter to the Editors: Towards a Silk Road Union? *Chinese Journal of International Law*, 691-699.
- Khanna, P. (2016). *Connectography: Mapping the Future of Global Civilization*. New York: Random House.
- Lin, L. (2017). *Building the Rule of Law in China*. Kidlington: Social Science Academic Press / Chandos Publishing.
- Lingliang, Z. (2016). Conceptual Analysis of China's Belt and Road Initiative: A Road towards a Regional Community of Common Destiny. *Chinese Journal of International Law*, 15, 517-541.
- Maduro, M. Tuori, K., Sankari, S. (Eds) (2014). *Transnational Law. Rethinking European Law and Legal Thinking*.
- Ruskola, T. (2013). *Legal Orientalism: China, The United States, and Modern Law*. Cambridge, Massachusetts and London: Harvard University Press.
- Seppänen, S. (2014). Ideological Renewal and Nostalgia in China's 'Avant-Garde' Legal Scholarship. *Washington University Global Studies Law Review*, 13(1). Available at SSRN: <https://ssrn.com/abstract=2653090>.
- Sprick, D. (2016, July 12). *One Belt, One Road: Many Routes for Transnational Crime and Its Suppression in China*. In L. Wolff and X. Chao (Eds), *Legal Dimensions of China's Belt and Road Initiative*. Hong Kong: Wolters Kluwer. Available at SSRN: <https://ssrn.com/abstract=2924453> or <http://dx.doi.org/10.2139/ssrn.2924453>.
- Sydney Law School Research Paper No. 16/98. Available at SSRN: <https://ssrn.com/abstract=2866169>.
- Visions and Actions on Jointly Building Silk Road Economic Belt and 21st Century Maritime Silk Road (2015, March 28). The National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization. Available on-line.
- Xi, J. (2014). *The Governance of China*. Beijing: Foreign Languages Press.