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Legal Reform in the Xi Jinping Era

Carl Minzner

In the fall of 2014, Chinese Communist Party authorities made legal reform the focus of their annual plenum for the first time. The Fourth Plenum Decision confirmed a shift away from some of the policies of the late Hu Jintao era, but liberal reforms still remain off the table. The top-down vision of legal reform developing under Xi Jinping’s administration may have more in common with current trends in the party disciplinary apparatus or historical ones in the imperial Chinese censorate than it does with Western rule-of-law norms.

This essay attempts to do three things: (1) analyze how and why China’s legal reforms have shifted over the past two decades, (2) outline the direction of reform under Xi, and (3) sketch out the institutional considerations that are likely to steer state efforts in the legal field over the coming years.

The Turn Against Law

In the first decade of the 21st century, Chinese Communist Party authorities turned against many of the legal reform efforts that they themselves had launched in the 1980s and 1990s. Starting around 2005, a new official line began to gradually penetrate China’s judicial and legal organs. Broadly speaking, this position included the following:

- A shift away from late 20th-century efforts to promote judicial professionalism, coupled with a revival of 1950s Maoist-era ideals of judicial populism
- A revived focus on mediation, rather than court trials, as a preferred mechanism for resolving conflicts among citizens as well as between citizens and the state
- A new state narrative depicting the law as cold and unresponsive to citizen needs
- A stress on the courts as an undifferentiated cog within the state organs for stability maintenance (*weiwen*)
- A steady reduction in tolerance for the activities of public interest (*weiquan*) lawyers

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- A new political campaign reiterating party supremacy over the constitution, law, and courts
- The charging of local officials with the priority task of containing citizen disputes, conflicts, and petitions at all costs

Central authorities employed multiple tools to implement these shifts. Some were highly public—for example, the 2008 appointment of a veteran security apparatchik as the new head of the Supreme People’s Court, the 2009 police raid on the Open Constitution Initiative, and the subsequent repression of public interest lawyers such as Xu Zhiyong and Teng Biao. Other tools were less visible. New propaganda campaigns within the courts presented changed depictions of “model” judges to emulate: tireless court officials perhaps lacking in book learning but at ease among the masses, cognizant of parties’ emotions, and able to resolve disputes (often without resort to legal norms) before they blossomed into conflict. Personnel evaluation systems for judges and other officials were tweaked to emphasize mediation rather than adjudication.

In part, this shift was a politicized counter-reaction to the results of earlier reforms. Late 20th-century Chinese authorities had emphasized the role of law, litigation, and court mechanisms for resolving civil and administrative disputes. By the early 21st century, these practices had given rise to a range of actors within both state and society pushing for deeper institutional change. The early 2000s had seen activists such as Xu and Teng fuse court challenges with savvy use of the media to put heavy pressure on both central and local authorities. Within the bureaucracy itself, new voices were beginning to suggest that the law and constitution should be assigned a greater role in governing official actions. The new official line that descended on the legal system in the first decade of the 21st century sought to defang some of these pressures.

Central authorities were also motivated by deep concerns over social unrest. They saw legal reforms channeling disputes into an institutionally weak judiciary lacking the capacity to enforce its own verdicts. They noted with unease a rising tide of citizen petitioners invoking the language of law and rights—not always with merit—to mount increasingly organized challenges to the actions of local officials. And they voiced concerns that a rising cadre of academically trained young judges preferred to sit behind their desks and write opinions on technical legal issues rather than, for example, camp out in muddy fields and engage in tough negotiations to head off imminent mass protests by villagers aggrieved by land seizures

for development projects. Faced with such concerns, revival of Maoist-era populist judging techniques, coupled with a political crackdown in the legal system, made eminent sense to China's leaders.

Legal Reform, Xi-Style

Now Beijing has changed course yet again. Since 2012, many—but not all—of the above elements have been abandoned in central policy statements. This shift is broadly reflected in the 2014 Central Committee plenum decision. It is also expressed in a range of detailed implementation measures that party officials have issued in recent months. In part, the new official line consists of the following elements:

- Assertions of legal and judicial reform as a central priority of Xi's administration
- Attempts to centralize control over the judicial system and limit the influence of local officials
- A return to concepts of judicial professionalism
- Efforts to steer citizen disputes back to the courts
- Revived emphasis on adjudication and trials as the center of court work
- A renewed focus on the distinctions between the roles of judges and other state employees

Central authorities have relied on a range of mechanisms to push these changes. Legal technocrats have once again been placed in charge of China's courts—most notably with the appointment in 2013 of Zhou Qiang as China's top judge, the president of the Supreme People's Court. The current model judge campaign within China's courts now extols a set of values that differ dramatically from those emphasized five years ago. The campaign surrounds the recently deceased vice president of the Shanghai High People's Court and touts his educational credentials, academic publications, professional demeanor, trial experience, and expertise at creating PowerPoint presentations. Authorities are also attempting to alter judicial personnel systems by instructing courts to clean up “unreasonable” performance targets used to evaluate judges.

Additionally, Chinese officials are seeking to centralize control over the judiciary and insulate judges from local influences. In 2013, China launched experimental reforms in six provinces aimed at removing control over court personnel and funding from the hands of local governments

and vesting it instead with provincial authorities. Further moves have followed in the wake of the 2014 Fourth Plenum Decision. The creation of cross-jurisdictional local courts and procuratorates seeks to cut across existing administrative lines of authority and curb the influence of local officials. The establishment of circuit tribunals of the Supreme People's Court in regional centers (Shenzhen and Shenyang being the first two) aims to extend the court's reach and better coordinate the exercise of judicial power in cross-provincial cases. And building on language in the Decision, party officials have ordered local government authorities not to interfere with ongoing court cases, while judges have been instructed to keep records of any violations. Naturally, this is not aimed at disturbing the underlying principle of one-party rule. Party political-legal committees remain intact, and courts are still expected to follow their guidance.

Thus, much remains unchanged. Social stability continues to be a paramount concern. Party disciplinary authorities, rather than legal organs, have taken the lead in the massive anticorruption campaign that Xi has launched to shake up the bureaucracy and topple his rivals. Repressive policies launched over the past decade have not weakened, and in some cases they are strengthening. Beijing has, for example, intensified the crackdown on public-interest lawyers. A new draft law is poised to both curtail the operations of foreign NGOs in China and severely restrict the funding of domestic Chinese organizations and legal activists. Academic discourse in the field of constitutional law has been curtailed, and authorities appear to be moving toward a broader repoliticization of higher education amid new calls for China to resist the infiltration of foreign ideas and pay more attention to its own cultural and historical roots.

Back to the Past?

China's current trajectory is not simply a replay of the 1990s and early 2000s, when the field of legal reform was a strategic gray zone. Then, centrally driven top-down reforms (such as moves to increase the educational level of judges) coexisted with a wide range of experimental reforms by local officials, as well as with bottom-up pressures from activists seeking to employ the language of legal reform to advance their own interests.

That space has now contracted for two reasons. First, since the early 2000s, state authorities have become much less tolerant of broader social activism in the legal arena. Second, the fact that central party authorities under Xi Jinping have put forward their own comprehensive agenda for

legal reform has curtailed the willingness of local authorities to go out on a limb and experiment. When central mandates regarding the law remained relatively vague, as with the broad invocation of *yifa zhiguo* (rule according to law) in the late 1990s, room existed for local officials and citizen activists to interpret exactly what that should mean in practice. Now central authorities have begun to reduce these mandates to a more concrete formulation. There is consequently less room for maneuver, rendering risk-adverse local officials more likely to hew narrowly to the specific contours of central plans.

The direction of judicial reform under Xi also differs in key ways from that of the late Hu Jintao era. Centralization, professionalization, and separation from local interests are the new watchwords of the day. Nor is this limited to the legal system. Similar trends are taking place in the party's internal disciplinary inspection apparatus. Numbers of personnel are expanding, and nomination and selection criteria for disciplinary inspection heads have been altered to strengthen central control and weaken dependence on local party authorities. In addition, central disciplinary authorities are in the process of establishing physical offices in all central party and government bureaus. This latter measure is part of a comprehensive push under Xi to strengthen the disciplinary apparatus—led by his ally Wang Qishan—as a tool to purge the party bureaucracy of graft, as well as curb the power of Xi's rivals.

Both the judicial and disciplinary reforms are efforts to develop vertically integrated systems to circumvent the power of local officials, check the bureaucracy, and address the core principal-agent problem at the heart of Chinese governance. None of this is new. Historically, the imperial Chinese censorate—officials charged with serving as the eyes and ears of the emperor—played precisely this role. Its primary goal was not to provide justice in individual cases but to help central leaders ferret out misbehavior among the ranks of officialdom. Perhaps something paralleling this kind of top-down model of governance—one absent the problematic bottom-up pressures unleashed by late twentieth-century reforms—might resemble the new direction for legal reform in China.

This is not to say that central judicial officials are intentionally attempting to replicate imperial models. To the contrary, recent personnel appointments at the Supreme People's Court have left no doubt that liberal-leaning legal technocrats have been given significant sway in that institution. Rather, the point is simply that in a broader political environment where party officials remain hostile to concepts such as an autonomous bar, independent judiciary, and external checks on party

power, the components of rule-of-law reforms that are most likely to be enacted successfully are the ones that most closely resemble existing party practices. Naturally, these measures themselves will in turn have parallels with earlier historical models.

The new track of Chinese legal reform leaves open many sets of questions. First, will courts be allowed to check other, more powerful institutions such as the police? Allowing courts to rearrange their own internal bureaucratic structures is one thing. But raising the bureaucratic status of judges within the party political-legal apparatus so that they can play a meaningful role in helping central officials realize the goal of curbing police abuses that lead to wrongful convictions is quite another matter. The latter implicates much deeper issues of political organization that have stymied reform efforts for the past two decades.

Second, how will these new efforts at legal reform interact with the omnipresent pressures for social stability? What happens, for example, when a Chinese judge, insulated from local political realities, issues a legally correct decision denying hundreds of laid-off workers the right to receive back wages, resulting in an angry demonstration in front of the local government headquarters? Will the local party secretary be authorized to simply ignore the decision? If so, how will protestors react?

Third, what will the reaction of judges be? Xi's austerity campaign has reduced many of the perks associated with civil service in China, while the anticorruption campaign has increased the risks. This shift has led to a spreading sense of paralysis within the bureaucracy, as officials are simply avoiding tough decisions. Within the courts, new moves to professionalize the system by reducing the number of individuals holding the title of judge have aroused discontent and contributed to a steady exodus of personnel. Can the court system effectively be remodeled without losing institutional cohesion?

At the 2014 plenum, party leaders clearly signaled their intent to rely on the law as a tool to help resolve the pressing problems currently facing China. But over the past two decades, Beijing's insistence on holding legal institutions apart from the institutional issues that matter has limited their ability to evolve into significant players within the state bureaucracy. And regular shifts in the direction of reform have prevented these institutions from sinking deep roots into society at large. As a result, it is unclear whether Xi's strategy will work. 