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THE TURN AGAINST LEGAL REFORM

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What will be the future of China's authoritarian political system?

Many predicted that China's rapid development over the past several decades would inevitably lead to gradual liberalization. Economic growth was expected to generate a cascade of changes—first to society, then law, and eventually politics. Events appeared to confirm these projections. As Chinese authorities opened up the economy in the late twentieth century, they also launched sweeping reforms of the nation's legislative and judicial institutions.

The events of the past decade, however, have called these assumptions into question. From 2000 to 2011, per capita GDP in China more than quintupled, skyrocketing from US$949 to $5,445. But one-party rule remains intact under the Chinese Communist Party (CCP), and Chinese authorities have turned against many of the legal reforms that they themselves enacted back in the 1980s and 1990s. Lawyers have come under increased pressure. Political campaigns warning against rule-of-law norms have rippled through the courts. And under new policies making "stability maintenance" (*weiwen*) a top priority, central authorities have massively increased funding for extralegal institutions aimed at channeling, curtailing, and suppressing citizen discontent.

These shifts have choked off institutions for venting dissatisfaction and redressing ills that are key to the CCP's continued resilience as an authoritarian regime. The changes have fueled social unrest, funneling citizen grievances into a rising tide of street protests instead of institutionalized legal or political participation. And they have led to new

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worries at the center regarding the danger posed by individual CCP officials (such as disgraced Chongqing CCP boss Bo Xilai) seizing parts of the *weiwen* apparatus for their own ends. For precisely these reasons, an increasing number of officials, academics, and activists have called on central authorities to revive flagging legal reforms in the wake of the November 2012 leadership succession.

China may indeed be at a tipping point. But it is not clear which way it will tip. Authorities may restart legal reform as part of a comprehensive program of political and institutional transformation. Or they may refuse, risking an escalating spiral of social and political turmoil.[1]

Late Twentieth-Century Reforms

In the 1970s and 1980s, CCP authorities turned their backs on decades of political radicalism and socialist economic policies. They launched extensive legal reforms aimed at building new structures to govern China.

Officials reopened law schools shuttered during the turmoil of the Cultural Revolution (1966–76). They used academic and professional exchanges to aggressively import foreign legal concepts. They issued hundreds of new statutes and regulations, creating a comprehensive framework of civil, commercial, criminal, and administrative law. Authorities promoted court trials, conducted according to these newly promulgated laws, as the preferred venue for resolving ordinary civil or commercial grievances and disputes. In 1989, Chinese authorities even issued an administrative litigation law giving ordinary citizens limited rights to sue state authorities in court.

Reforms continued throughout the 1990s. Authorities professionalized the judiciary, moving away from the practice of staffing courts with former military officers. They removed definitions of lawyers as "state legal workers" and privatized the bar. By the early 2000s, the state-owned law firms of the 1980s had given way to an explosion of private firms, domestic and foreign alike. In 1997, central authorities adopted "rule according to law" (*yifa zhiguo*) as a core Party slogan. Parallel constitutional amendments followed two years later. Legal reform even emerged as a subject in China's foreign relations, with U.S. and Chinese diplomats agreeing to initiate cooperative exchanges on legal reform.

Naturally, Chinese leaders aimed to advance their own interests through these reforms. Ideologically, they wanted an alternative source of legitimacy to Maoist revolutionary principles on which to ground their rule. Practically, they desired new mechanisms to help resolve the mounting social conflicts created by rapid economic development and urbanization. Law, litigation, and courts seemed to be the solution. Administratively, central leaders sought new ways to monitor their local officials and better respond to pervasive principal-agent problems within the bureaucracy. They also wanted to gather better information

on domestic problems facing China. Allowing citizens a limited ability to challenge local officials through court channels, or to offer opinions through legislative ones, promised to help address these concerns.

As Andrew Nathan noted in 2003, these reforms helped to strengthen the internal stability of the Chinese state.[2] They institutionalized CCP rule. They channeled popular discontent (regarding violations of citizens' rights or official abuses of power) into institutions *within* the existing political system, rather than radical underground organizations seeking to overturn the party-state. Legal reforms also played an important role in foreign policy. Rule-of-law discussions with foreign governments, for example, provided a politically more acceptable forum for discussing human rights in advance of China's 2001 entry into the World Trade Organization.

Central reforms emboldened bureaucrats farther down the ladder to push institutional change forward under the rule-of-law banner. By the late 1990s, Chinese legal academia was abuzz with discussions of constitutionalism and constitutional supremacy (*xianfa zhishang*). In 2001, the Supreme People's Court (China's highest judicial body) took the groundbreaking step of authorizing a provincial court to actually apply the (otherwise nonjusticiable) Chinese constitution in an individual case. Some local courts began to push the boundaries of their authority, independently proclaiming the invalidity of local rules and regulations that contradicted national law.[3]

Citizens used the new channels to protect their own interests. Civil and administrative cases multiplied. Farmers employed central authorities' rule-of-law rhetoric to challenge illegal local exactions and land seizures. By the early 2000s, a cadre of public-interest lawyers and legal activists (such as Chen Guangcheng) had emerged. They fused public-interest lawsuits and savvy media strategies to push for deeper reform, with some resounding successes. In 2003, after a migrant named Sun Zhigang died at the hands of city authorities in Guangzhou (Canton), three legal academics mounted a petition to the national legislature challenging the legality and constitutionality of the extrajudicial administrative system used to detain him. At the same time, extensive media coverage generated a public uproar regarding official abuses in Sun's case and similar ones. Remarkably, central authorities yielded—annulling the entire detention system nationwide.[4]

The Counterreaction

Despite the hopeful signs visible nearly a decade ago, officials have turned against their earlier reforms. Some concerns are practical. Late twentieth-century reforms were designed to steer civil and commercial disputes into trials before local courts. But rural China has limited legal resources. Trained judges and licensed lawyers are in short supply.

Courts remain institutionally weak and commonly find it hard to enforce their verdicts. As China entered the twenty-first century, such problems led to violent showdowns between local courts and aggrieved citizens seeking justice, as well as surging numbers of extralegal petitions and protests to higher authorities regarding lower-court decisions.

Other concerns are explicitly political. State media have cautioned that "judicial concepts . . . not in accordance with [Chinese] national sentiment have 'blown into the East from the West.'"[5] Party authorities have warned that some judges have falsely used concepts such as "the supremacy of the law" as an excuse to avoid or oppose CCP leadership in judging cases.[6]

This has generated a backlash. Since the early 2000s, Chinese authorities have shifted citizen disputes away from court trials that are decided according to law. Judges face new pressures to resolve cases through closed-door mediation. Community mediation institutions dating from the era of Chairman Mao Zedong (d. 1976) have been dusted off and revived. New extralegal Party-led "coordination sessions" have been created, under the rubric of mediation, to handle those cases that officials fear are most likely to generate social protest.

In some areas, these efforts have permitted meaningful local experiments that may respond better to rural needs than the formal legal channels emphasized during the late twentieth century. In others, they have become convenient rationales for local authorities to abandon legal norms entirely as they seek to shore up social stability at all costs, whether by suppressing the legitimate grievances of individual petitioners or by caving in to mass complaints with no legal basis, but backed by many angry citizens.

Party authorities have also attempted to rein in politically wayward judges. In 2006, CCP officials launched new campaigns within the court system stressing loyalty to the Party and cautioning against Western rule-of-law norms. In 2008, central authorities installed a CCP functionary with no formal legal experience as head of the Supreme People's Court. There followed the so-called Three Supremes (*sange zhishang*) campaign—an effort to remind judges that CCP policies and "the people's will" are equal to (or above) the constitution. Lest anyone miss the message, both law-school curricula and the national bar examination were amended to include the content of these campaigns as mandatory subjects.

Lawyers have come under increased pressure. Party campaigns have labeled them "socialist legal workers" and pressed for creation of CCP cells within law firms. Loyalty oaths to the Party are now required to obtain a license to practice law. Authorities have escalated harassment and abuse of well-known public-interest lawyers and legal activists by shuttering the organizations of some and subjecting others to imprisonment, house arrest, and periodic disappearance or torture.

In short, CCP leaders are trying to neuter the very rule-of-law pres-

sures that they themselves unleashed in the late twentieth century. They have sought to close down rhetoric (constitutionalism), channels (court trials), and social forces (lawyers) that activists had used to mobilize for greater change. And they have reasserted control over state actors (judges and courts) who might have been tempted to forget the realities of Communist Party control.

Where such concerns are absent, reforms have continued. In the area of criminal justice, for instance, Chinese authorities have developed noncustodial pilot programs for juvenile offenders. The 2012 Criminal Procedure Law creates additional protections for juveniles facing interrogation and trial. With regard to death-penalty cases, Chinese judicial authorities have made efforts to increase transparency and improve judicial review. As a result, foreign experts estimate that the number of executions in China has dropped by roughly half since 2007, to about four thousand in 2011.[7]

Tough central policies have generated a range of perverse effects. Ironically, they have heightened social unrest. Many citizens with environmental or land grievances against local authorities have concluded that the best chance for obtaining redress does not lie within state legal institutions that have been gradually undermined. Instead, they are increasingly resorting to direct (and sometimes violent) collective street actions, seeking to force central officials to intervene and local authorities to cave in. In response, central authorities have greatly increased the funding and influence of domestic-security organs. This has permitted some local governments to devolve into quasi-feudal satrapies in which officials use massive funds (and the politically correct justification of "maintaining social stability") to suppress legitimate citizen complaints, hide their own misdeeds, and enrich themselves through corruption.

Reform on the Rebound or Descent to Disorder?

The fall of rising Party star Bo Xilai in the first half of 2012 dramatically drew attention to these problems. Central leaders voiced concern about the ability of one of their own to amass huge, unchecked personal power and to challenge the low-key collective leadership norms that had prevailed since the beginning of the reform period two decades ago. Liberal scholars and officials used the Bo affair to criticize the CCP's turn against legal reform since the early 2000s.

Over the past year, indications have emerged that the counterreaction against legal reform may have now generated a backlash of its own. Central authorities have moved to downgrade the power of the CCP political-legal apparatus. The new CCP general secretary, Xi Jinping, has begun to revive language regarding law and legal reform that had gone into eclipse in recent years. Top Party leaders have issued new calls for applying rule-of-law principles to the task of upholding social

stability. A new State Council white paper suggests that recent political campaigns in the judiciary may be wound down.

If implemented, such changes might represent a tipping point in Chinese legal reform. Central authorities may have recognized that if China is to solve its pressing problems, it will need meaningful institutions that can place independent checks on official power and provide bottom-up channels for citizen participation.

Like China today, late nineteenth-century Czarist Russia enjoyed decades of economic growth at rates that outpaced those of the United States and European nations, notwithstanding a bureaucratic-authoritarian political system that foreign observers saw as badly outdated.

China today might be on the verge of a complex transition that parallels developments in South Korea and Taiwan during the 1970s and 1980s. In both cases, authoritarian powerholders pursued gradual political reform, opened the institutions of government to increasing levels of external civic pressure, and slowly but successfully shifted to more liberal systems of government. Today, both countries belong securely in the ranks of the world's developed democracies.

But it remains uncertain that China will steer such a hopeful course. The CCP's ruling elite could end up rejecting reform rather than embracing it. If so, China in the twenty-first century might resemble nineteenth-century Russia more than twentieth-century South Korea or Taiwan.

Like China today, late nineteenth-century Czarist Russia enjoyed decades of economic growth at rates that outpaced those of the United States and European nations, notwithstanding a bureaucratic-authoritarian political system that foreign observers saw as badly outdated. As the century drew to a close, speculation ran rampant as to when Russia might surpass Western powers in economic and military might.

Russia also found itself in the throes of massive domestic change. Military humiliation at the hands of Western powers in the first international war of the industrial age (the Crimean War of 1853–56) had exposed Russia's technological inferiority. As a result, the Russian imperial state initiated extensive economic and social reforms. Serfdom was abolished and peasants received more rights. Industrialization reworked the fabric of Russian life, bringing a tide of rural migrants to urban factories. Worker protests over conditions and pay began to erupt with increasing frequency. The new social media of the era—printed periodicals—permitted an educated elite to rapidly disseminate ideas throughout the country, often resorting to allusions or coded language to avoid imperial censors.

Czarist authorities launched sweeping legal reforms as well. They

imported foreign legal institutions including models of legal education; a professional bar; Western-style courts and juries; and civil, commercial, and criminal codes. Excitement was palpable. "The slogans in the air in the 1860s were due process, open court proceedings, trial by jury, and irremovable judges."[8] Officials even established local representative assemblies with limited powers of self-government.

Citizens took eagerly to these new channels. Reformers sought to use local assemblies to gradually push the imperial regime in a more liberal direction. Radical activists took advantage of legal novelties such as open court proceedings and independent judges in order to turn trials into platforms calling for greater political change. In 1878, a young anarchist named Vera Zasulich became an instant media sensation when, after her arrest for trying to assassinate an imperial governor, the trial judge resisted government efforts to tamper with the case; her lawyer managed to turn the public proceedings into an indictment of police brutality; a jury of sympathetic citizens returned a verdict of "not guilty"; and crowds erupted into public demonstrations upon her release.

Such developments caused serious worry among political elites. As in China today, rule-of-law institutions came under increasing suspicion from an authoritarian regime dead set against fundamental political reform—particularly after anarchists assassinated the reformist Czar Alexander II in 1881. Under his successor, Russian authorities launched a two-decade–long rollback of liberal policies. They curtailed public trials, limited the rights of juries, asserted control over bar associations, removed political trials from the regular court system, and drastically reduced the powers of local assemblies.

Beginning in the late 1870s, imperial authorities also built up an extensive police state (one might call it "social-stability maintenance with Russian characteristics"). They increasingly took responsibility for upholding law and order out of the hands of judges and gave it to the police, including the Okhrana (the Czarist secret service). Agents of the latter enjoyed dramatically expanded powers that allowed them to detain and internally exile anyone even suspected of political crimes.

Of course, these measures did not succeed in stamping out all dissent. The existence of private property meant that there were limits on imperial power. Wealthy patrons continued to employ reformist intellectuals, despite state efforts to isolate them. Dissident authors continued to find markets for their works, notwithstanding state efforts to censor them.

The key result of Czarist counterreform in the late nineteenth century was to radicalize society. The imperial turn against law convinced moderates that gradual reform of the regime was impossible. Decades of indiscriminate state repression pushed together liberal constitutionalists, anarchist terrorists, religious nationalists, radical socialists, and ordinary citizens outraged by violations of their rights. And it drove all of them to adopt ever more extreme political positions.

Further, as imperial rule entered its waning years, hard-line policies helped to prevent the emergence of any organized and institutionalized political opposition. Like China today, imperial Russia had no Taiwanese *dangwai* (outside the party) movement, no South Korean opposition political parties, no Polish Solidarity trade union. It crushed any effort to organize these. This produced a surface veneer of political stability. But it also ensured that no coherent force existed to step into the void and pick up the power lying in the streets once the Czarist state finally crumbled. Instead, there was only a chaotic assortment of military strongmen, popular mobs, radicalized intellectuals, and—detraining ominously at the Finland Station—committed underground revolutionaries hardened by decades of repression.

Of course, China is not there . . . yet. Despite increasing domestic unrest, slowing economic growth, and rising tensions with neighbors, central leaders retain a firm grip on the levers of power. And despite the recent official turn against legal reforms, most activists still hope for (and seek) gradual reform of the Chinese state. They do not desire a radical upheaval that would shatter it. They want a soft rather than a hard landing.

But the risk of a hard landing is real. Pressures are building. Open legal and political channels are needed to funnel them in the direction of gradual change. If China does not build these now, it will not simply tip into transition, but rather plummet into cataclysm.

NOTES

1. Some content and language are adapted from Carl Minzner, "China's Turn Against Law," *American Journal of Comparative Law* 59 (Fall 2011): 935–84.

2. Andrew J. Nathan, "China's Changing of the Guard: Authoritarian Resilience," *Journal of Democracy* 14 (January 2003): 13–15.

3. Keith J. Hand, "Understanding China's System for Addressing Legislative Conflicts," *Columbia Journal of Asian Law* (forthcoming 2013).

4. Keith J. Hand, "Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China," *Columbia Journal of Transnational Law* 45, no. 1 (2006): 127–31.

5. Wei Lihua and Jiang Xu, "Sifa shenpan zhong de renmin qinghuai yu qunzhong luxian" [Popular sentiment and the mass line in judicial trial work], *China Court Web*, 22 June 2011, available at *www.chinacourt.org/html/article/201106/22/455318.shtml*.

6. Minzner, "China's Turn Against Law," 947.

7. "Dui Hua Estimates 4,000 Executions in China, Welcomes Open Dialogue," *Dui Hua Website,* 12 December 2011, available at *http://duihua.org/wp/?page_id=3874*.

8. Richard Pipes, *Russia Under the Old Regime* (London: Weidenfeld and Nicolson, 1974), 295.