A Trojan Horse in China?

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Consider the following scenario. Members of the U.S. government, academic, and nonprofit communities notice that in an important region of the developing world, legal institutions and substantive law appear inadequate. Laws seem opaque, unpredictable, and unfair. Legal institutions are inefficient, inaccessible to ordinary people, and subject to corruption and political interference. These legal deficiencies, it is believed, threaten sustained and equitable economic development, the protection of individual rights, and the possibility for greater democratic political reform. Thus, it seems logical to these U.S. observers that the United States, with its sophisticated laws and legal institutions and its years of experience developing a legal system, could provide useful expertise and assistance in promoting legal reform and development in this region.

The region in question is Latin America (and to a lesser extent Africa and Southeast Asia), and the time is the mid-1960s. Efforts to provide U.S. legal assistance in these countries—efforts that came to be known collectively as the law and development movement—began with great optimism. Yet the movement came to a virtual halt only a decade later, after a crisis of disillusionment not only with the specific projects, but with the whole vision of legal development that sustained them. The

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definitive critique of the law and development movement came from two of its most distinguished practitioners. In a 1974 article, David Trubek and Marc Galanter claimed that the law and development movement was based on a flawed theory of law and society, and a flawed ideal of "liberal legalism."\(^1\) In many ways their criticisms echoed the prescient observations of Lawrence Friedman who noted as early as 1969 that among other failings Americans who went abroad to promote legal reform in developing countries lacked any "careful, thought out, explicit theory of law and society or law and development."\(^2\) A more lengthy critique of the projects in Latin America came from a former Ford Foundation official, James Gardner, who claimed that these programs, though well-intentioned, amounted to "legal imperialism."\(^3\) Under the weight of such intense internal and external criticism, the law and development movement withered. Funding dried up, programs were cancelled, and scholars turned their attention to other issues.\(^4\)

It is important, when reflecting on the failure of the law and development movement, to keep in mind that many did not accept all of the critical arguments leveled against the enterprise. Several leading professionals in the law and development field at the time took issue with Trubek and Galanter's theoretical approach, as well as with their conclusions.\(^5\) More recent scholars have pointed out that ten years was far too little time to declare such a complex endeavor a failure and have suggested that Trubek and Galanter's "self-estrangement" may have had more to do with a homegrown crisis of faith in U.S. institutions than experience in the developing world.\(^6\) Nonetheless, it is undoubtedly true that the law and development movement collapsed in the late 1970s, and that much of this collapse can be traced to the weakness of the theoretical foundations of the enterprise. Even if Trubek and Galanter were too hasty in concluding that the movement was fatally flawed, the lack of a well-thought-out, cogent theory of how and why legal reform programs were supposed to work made the movement especially vulnerable to a crisis of confidence.

Given this history, anyone following the recent U.S. "rule-of-law initiative" to help China reform its laws and legal institutions has reason for concern. The opening paragraph of this chapter might apply equally well to the current rule-of-law initiative, focused on China, as to the previous law and development movement focused on Latin America and Africa. There are, of course, important differences, and I do not mean to suggest that legal reform efforts in China are bound to meet the same fate as those of the first law and development movement. Nevertheless, there are clearly parallels between the two. Therefore, given that weak
theoretical foundations contributed to the failure—or at least the termination—of the earlier movement, it is worth examining more closely the theoretical foundations supporting the current U.S. push to promote the rule of law in China.⁷

**How the “Rule of Law” Got on the U.S.–China Agenda**

Since the late 1990s the rule of law has become a higher profile issue on the U.S.–China governmental agenda. Legal reform in China, however, is hardly a new issue for U.S. academics and nongovernmental organizations (NGOs). The China Legal Education and Exchange Committee (CLEEC), for example, has been in operation since 1984, funded initially by a grant from the Ford Foundation and then with additional assistance from the U.S. Information Agency. The Ford Foundation also sponsors numerous other projects in this field. The Asia Foundation has also been involved in sponsoring legal education programs in China for close to two decades, and recently it has started to initiate other types of legal reform projects as well. In addition, the American Bar Association has undertaken grant-funded legal reform and education projects in China. And these are only the largest and highest-profile NGOs.

Thus, when the Clinton administration announced its China rule-of-law initiative in 1997–1998, the U.S. government was not exactly moving into uncharted territory. It seemed, however, that the administration was staking out a place for greater government involvement and attempting to bring together diverse nongovernmental activities into a common framework, conceived of as promoting the rule of law.⁸ Why did the Clinton administration suddenly start paying so much attention (at least rhetorically) to the rule of law in China? The answer has to do with the politics of U.S.–China policy, especially in the field of human rights.

Following the 1989 Tiananmen Square crackdown, there had been an annual effort in the U.S. Congress to deny most favored nation (MFN) trading status to China unless it improved its human rights record. Over time, the list of issues tied to MFN status expanded to include things such as nuclear and missile nonproliferation, but human rights remained the primary focus. The Clinton administration initially supported linking MFN status to human rights, but soon changed course when it became clear that such a policy was not viable. The threat to revoke MFN status was not credible given the U.S. stake in political and economic relations with China. Furthermore, the linkage between MFN status and human rights, and the yearly battle over MFN renewal, created substantial
political difficulties for the administration and was widely criticized as corrosive to the overall Sino–U.S. relationship.

Therefore, in 1994 the Clinton administration—in keeping with its professed strategy of engagement with China—declared an end to the policy of linking MFN status with China’s human rights performance. It was politically important, however, that the president articulate a constructive human rights strategy concurrently with the decision to delink human rights issues and MFN status, lest the administration be seen as abandoning the goal of promoting human rights in China. Therefore, President Clinton announced several instruments the United States would use to promote human rights in lieu of MFN pressure. Among these was “support for efforts underway in China to promote the rule of law, in particular for efforts to achieve legal reforms aimed at specific human rights abuses.”

Thus, the rule of law began to find its way onto the U.S.–China agenda, at least on the U.S. side, as a component of a broader human rights strategy intended to promote civil society in China. However, despite Clinton’s 1994 announcement that the United States would sponsor programs to promote civil society—and, under that rubric, the rule of law—the proposed programs ran into all sorts of problems because of U.S. laws that prohibit the government from dealing with “gross human rights abusers.” Influential members of Congress believed that the United States should not engage in any cooperative programs with the current Chinese government, and they successfully blocked funding for most of the initiatives that the administration proposed. In the end, the U.S. State Department had to retreat, settling for much more modest programs using development assistance money not covered by the problematic laws.

Nonetheless, interest within the State Department and elsewhere in the government for rule-of-law programs (not only in China, but throughout the world) persisted. In late 1996, the post of special coordinator for global rule of law was created within the State Department, and President Clinton brought Paul Gewirtz, a Yale Law School professor, on board to fill the position. Even though Gewirtz’s portfolio was global, he was, in the words of one outside observer, “bitten by the China bug.” Gewirtz was seen by many as instrumental for getting rule of law more prominently on the agenda for the 1997 summit between President Clinton and Chinese President Jiang Zemin. The Clinton–Jiang summit joint statement, issued on October 29, 1997, prominently mentioned “cooperation in the field of law” as an important way the two countries
could promote their common interests. During President Clinton's June 1998 visit to Beijing, the two sides issued another joint statement, this time making somewhat more specific declarations about the areas for cooperation in the field of law. The two sides announced their intention to cooperate in six specific areas: judicial and lawyer training, legal protection of human rights, administrative law, legal aid for the poor, commercial law and arbitration, and law enforcement. The idea of promoting the rule of law, seemingly dormant since Clinton's 1994 speech, reemerged as a high-profile item on the Sino-U.S. agenda.

This rule-of-law initiative got off to something of a rocky start, encountering the same political obstacles that stymied President Clinton's 1994 interest in Sino-U.S. rule-of-law cooperation: Congressional opposition and U.S. laws regulating the types of programs the State Department can fund. As a result, in the years immediately following the Clinton-Jiang summit and the announcement of the rule-of-law initiative, there was little actual activity in this area other than a few off-the-record discussions between government officials and a conference convening law school deans in Beijing. Moreover, Gewirtz left the government shortly after the second Clinton-Jiang summit, and the global rule-of-law coordinator position remained vacant for more than six months. This lack of progress led some observers to criticize the administration for unveiling the rule-of-law initiative with little or no thought given to program specifics.

More recently, however, U.S.-sponsored rule-of-law projects in China have started to take off. In 2002 and 2003, the State Department's Bureau for Democracy, Human Rights, and Labor has provided nearly $9.1 million in grants to promote democracy in China, with approximately half of this amount going to legal reform programs. The State Department's Bureau for East Asia and Pacific Affairs has also sponsored a number of rule-of-law projects, including a $7 million grant to support Temple University Law School's legal education programs in China, as well as smaller grants administered by the U.S. Embassy in Beijing and by the American Bar Association. The State Department's Bureau for International Narcotics and Law Enforcement Affairs has also gotten involved in promoting rule-of-law reforms in China, appointing a resident legal advisor in Beijing to encourage and assist Chinese officials in reforming the Chinese justice system. In light of this substantial investment in rule-of-law promotion, it is therefore worthwhile to inquire what the goals of such programs are—or should be—and whether they are likely to be realized.
Conflicting Objectives: What Is the Rule of Law?

One of the most fundamental questions one must ask about this or any law and development program concerns what, exactly, is being promoted. The United States has declared that it wants to see China build "the rule of law." But rule of law is a notoriously plastic phrase. Sometimes it is used in an expansive, substantive sense, meant to describe a legal system that effectively protects specific individual rights and promotes specific substantive values. However, many scholars have criticized this use of the term as too broad. As Joseph Raz puts it,

If the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.14

Other scholars stress that the rule of law implies rules that are publicly known and predictable but do not necessarily embody specific substantive principles. Still others stress that the essence of the rule of law is the constraint of government discretion—here the "rule of law" is contrasted with the "rule of man." Thus, the definition of the phrase itself has been the subject of sustained academic debate for at least a century, and probably longer.

The ambiguity of the term is a disadvantage in academic discourse. However, the same ambiguity is an advantage in political discourse, which may go a long way to explaining why rule of law is used as the catchphrase for the China legal assistance projects. One academic China law expert put the point bluntly: "Rule of Law' has no meaning. Everyone uses the phrase because everyone can get behind it and it might make it easier to get funding." Another scholar makes a similar observation on how the phrase is used in the policy discourse: "The 'rule of law' means whatever one wants it to mean. It's an empty vessel that everyone can fill up with their own vision." This ambiguity serves a very clear political purpose, stated explicitly by one State Department official: "The beauty of the 'rule of law' is that it's neutral. No one—the human rights community, the business community, the Chinese leadership—objects to it."

The political usefulness of this ambiguity is evident in how the term is used in official U.S. statements. When she was addressing U.S. business representatives, then-Secretary of State Madeleine Albright stressed
that the rule of law will make China a good place to do business.\textsuperscript{15} When responding to a reporter concerned with China's treatment of political dissidents, she trumpeted the rule-of-law initiative as a program that will address these concerns.\textsuperscript{16} Indeed, in one speech, Albright listed all the virtues of a rule-of-law society. These included effective criminal law enforcement, lack of official corruption, protection of the environment, full political participation by all citizens, protection of individual rights, and peaceful participation in the global economy.\textsuperscript{17} It is easy to see why such an expansive definition is politically advantageous. After all, if the rule of law includes all these things, who could object to promoting it? And if the government has an initiative to promote the rule of law, is not the government addressing all these concerns?

Not everyone in the field is thrilled with the way the U.S. government is using the phrase, however. One scholar finds it "troubling that the rule of law is packaged by the U.S. Chamber of Commerce as a good thing for the sale of U.S. products. This is not really what is traditionally meant by 'rule of law.'"\textsuperscript{18} As Thomas Carothers has warned in the first chapter, rule-of-law promotion, while useful, "will not miraculously eliminate the hard choices between ideals and interests" that have plagued U.S.–China policy. Another academic observer is even more critical, arguing that we need to push beyond "the 'feel good' rhetoric of advocacy of the rule of law" in order to understand the real effects legal reforms are having in China—effects that are not well-understood, and by no means always necessarily desirable.\textsuperscript{19} The U.S. government may be trying to avoid a clash between commercial and human rights interests by stressing the rule of law, but this harmony of interests may prove more rhetorical than real.

Another perhaps more important aspect of the ambiguity of the term concerns divergence in U.S. and Chinese law reform goals. To the U.S. government, rule of law is an attractive term not only because it may allow the U.S. business and human rights communities to rally around a common banner, but also because it is seen as an area in which the Chinese side has an interest. It is generally agreed, however, that the U.S. and Chinese governments have different things in mind when they talk about the rule of law. Indeed, it is not entirely true that the Chinese government is completely comfortable with the phrase. Prior to the 1997 Clinton–Jiang summit, the United States drafted a memorandum of understanding that identified rule-of-law as a potential area of Sino–U.S. cooperation. China strongly objected to the use of the phrase, which it considered politically sensitive. Thus, although the fact sheet released
by the White House detailing the accomplishments of the October 1997 summit lists “promoting the rule of law” as an area where the two sides agreed to cooperate, the official joint statement uses the phrase “cooperation in the field of law” instead. Since then, the Chinese government seems to have become more comfortable using the term rule of law. However, the translation the Chinese government has started using is yifazhiguo, meaning “a country ruled according to law.” This phrase has replaced fazhi, which was the original translation of the nineteenth-century concept of the German Rechtstaat. Although both are translated into English as “rule of law,” the former term lacks the political connotations of the latter. Some have suggested that a more accurate translation of yifazhiguo, the preferred Chinese phrase, would be “rule by law.”

The U.S. government may try to take advantage of the ambiguity of the term in order to “sell” legal reform to the Chinese, but ultimately the State Department conception of the rule of law has a clear substantive and political component. The State Department official who claimed that the beauty of the rule of law is that it is a neutral phrase also stated that to the United States, it means law that conforms to international standards, protects individual rights, and preserves justice. According to this official, rule-of-law traditionally has been, and has been seen at the State Department as, an aspect of U.S. human rights policy. Another State Department official said that the term as used by the department incorporates some substantive legal rights, although these rights need not be identical to those found in the United States. According to this official, rule of law means that all people are subject to and have access to a fair, equitable, transparent, and efficient legal system. Yet another official in the State Department argued instead that the essence of the rule of law was predictability, although this official also claimed that the legal system needed rules seen by the people as substantively right and just in order to be effective. Overall, there appears to be a general sense that the rule of law—that is, the vision of legal development that the United States wants to promote—has a clear and central substantive component related to the protection of individual rights. This belief seems to be shared in the nongovernmental community as well.

This is obviously not the vision of legal reform advocated by the Chinese government, and it is not what Beijing means when it articulates rule of law—or “a country ruled by law”—as a policy goal. The primary Chinese motivation for undertaking legal reform, according to most U.S. observers, is economic. The need to attract foreign investment and integrate with the global economy is cited by experts both in and out of the
U.S. government as an important motive for the Chinese to undertake legal reform. Other possible motives include China's desire not to be perceived as a rogue state, the need to control corruption, and the sense that a more rule-based system would help the central government improve control over the provinces. But the Chinese leadership wants to make sure legal reforms are limited to specific areas and that they remain under the control of the central government. Both U.S. government officials and nongovernmental experts maintain that although China wants legal reform in the commercial sphere, the leadership wants to prevent reforms from seeping into the political sphere and does not want any reforms that would undermine the central leadership's decision-making authority.

This divergence between the fundamental objectives of the two sides in this whole endeavor is the source of the most important strategic problem for the U.S.–China rule-of-law initiative, or indeed for any program that takes the U.S. vision of a substantive rule of law as the objective of Chinese legal reform. Given that Chinese leadership does not share this objective, how should legal reform proceed? It is here that underlying, implicit theories of legal and social change become important. For the U.S.–China rule-of-law initiative to be coherent—that is, for the adopted means to match the envisioned end—law must interact with society and with political institutions in a certain way. Specifically, legal reforms undertaken by the Chinese for commercial purposes must lead to a broader transformation in the legal, and ultimately the political, system. This vision of snowballing legal reform is the cornerstone of the U.S. rule-of-law promotion strategy.

**Trojan Horse of Legal Reform**

Given the divergence of U.S. and Chinese objectives, the United States appears to have adopted what I will call a “Trojan horse” strategy. The U.S. belief seems to be that the Chinese will adopt an initial set of legal reforms and legal education programs in order to achieve economic goals, and that those reforms, once adopted, will take on a life of their own. The growth of legal methods for dealing with commercial disputes will foster a culture of legality that will spread beyond economic transactions to other areas. The logic of controlling administrative discretion and corruption in the name of economics will evolve into stronger legal controls on government discretion at all levels. Because the same judicial institutions and legal profession that handle commercial issues also
handle other types of legal issues, improving training and organization will lead to improvements in all areas, even if the original motive is strictly economic. And the success of legal reforms in the commercial area will strengthen the hand of reformers in China who want to push for legal reforms in other areas. A State Department official described the basic strategy as follows: “Once the Chinese open the door to legal reform, they won’t be able to control it, and legal reform—and the principles of legality, predictability, and judicial independence—will seep into other areas.” According to this official, because the underlying assumption is that the rule of law will spread as time goes on, the U.S. strategy is to “plant seeds in patches of sunlight.” This official went on to draw an analogy to China’s experience with the Internet. The Chinese knew they needed to adopt this new technology for economic reasons. They wanted to control it but ultimately could not. As with the Internet, the argument goes, so too with law.

The Trojan horse approach to Chinese legal reform appears pervasive in the NGO community as well as in the government. An official in one of the major NGOs doing work in this area stated that the organization subscribes to the view that once legal reform is introduced, there will be an inevitable transformation over time, even if the reform is initially introduced for commercial reasons. The interest in promoting complex market transactions, it was asserted, would lead to the protection of individual rights, although such a transformation might take a long time. An official in another U.S. NGO made a similar claim, arguing that the organization’s fundamental view of law reform is that once you start, you will not be able to stop; once the Chinese have a law to cover one thing, they will find they need more laws to cover more things.

The Trojan horse view even affects those who are openly skeptical of the U.S. approach to this Chinese law reform. To take one striking example, an academic working on legal education, who was generally critical of the U.S. rule-of-law initiative, described legal education strategy in the following way:

A lot of the things we do in legal education are not explicit. That’s not to say we bring in a Trojan Horse. But we need to get into institutions first. Once we start up training programs, we can do all sorts of other stuff. The Ministries have no idea what we’re doing—they just think we’re running some neat training program.

Despite the disclaimer, it is hard to imagine a more explicit exposition of the Trojan horse strategy. This interviewee went on to explain
that the idea is to teach Chinese students a more critical approach to law and policy analysis, concluding that training Chinese lawyers in critical thinking "is the most subversive thing we can get to happen. That starts to create subterranean fissures by changing the way people think, understand, and process issues. That's ultimately more effective than standing in Tiananmen Square." Another scholar, also involved with legal education efforts, envisions the appropriate U.S. strategy in similar though less secretive terms, noting that the U.S. government and NGOs have been trying to sell legal reform as a package deal. That is, they have been trying to convince the Chinese side that, in the long term, respect for the rule of law will be undermined if they try to be selective and partial in the areas where they allow legal reform.

In addition to the belief that legal reform, once introduced into China, will spread throughout the system, many on the U.S. side believe there is support for such reform within China. Most U.S. officials concede, however, that China's high-level leadership, although willing to take risks to achieve economic goals, is not enthusiastic about widespread legal reform outside the commercial and low-level administrative spheres. Thus the fundamental approach is still basically a Trojan horse strategy. The Chinese leadership is betting that it will be able to control the scope and extent of legal reform; the U.S. government and NGOs interested in building the rule of law are betting that it will not.

**Problems with the Trojan Horse Strategy**

What are the presumptions about the nature of law and the dynamics of legal reform that give rise to the Trojan horse strategy? It may, of course, be the case that it is less a well-thought-out strategy than a way to rationalize pursuing programs that are, of necessity, limited. But this is too cynical. Most of the people I interviewed in both the State Department and in major NGOs seemed sincere in their belief that limited, modest legal reforms would eventually—perhaps inevitably—lead to more fundamental reforms. The principles behind the strategy therefore ought to be examined more closely to see whether there is a sound basis for this conviction.

The assumption of the strategy is that legal reforms in certain narrow sectors will diffuse throughout the legal and political system, leading to widespread transformation in the direction of the U.S. rule-of-law vision. But the mechanism by which this diffusion will take place is rarely specified explicitly. At least three mechanisms are conceivable, and all
three are evident in the thinking within governmental, academic, and NGO communities.

*Mechanism One: The Interdependent, Unitary Legal System*

Some advocates of the Trojan horse strategy presume that rule of law in one sphere will spread to other spheres, simply because that is the nature of law. Like the Internet, the analogy goes, the “technology” of legal modernization, by its nature, cannot be controlled. Specifically, it is thought that commercial law reform that builds an effectively independent judiciary—one that operates according to transparent, publicly known rules and is staffed by a well-trained bench and bar—will foster similar sorts of changes in those fields of law more closely related to human rights concerns. This, proponents assert, is the nature of law. However, the Chinese government has a strong incentive to limit rule-of-law reforms to the commercial sector and to branches of administrative law that increase central control of the bureaucracy and check abuses by low-level officials. The U.S. strategy implicitly—and sometimes explicitly—presumes that such limitation is impossible.

A theoretical or empirical basis for this belief, however, appears to be lacking. The dynamics of inevitably spreading legal reform are almost always couched in terms of assertions, analogies, or metaphors. I know of no social science research that provides a solid foundation for this hypothesis. Furthermore, there is some empirical evidence that setting up firewalls between sectors of the legal system—as the Chinese wish to do—is indeed possible. Consider the example of courts in authoritarian Spain under Franco, a case analyzed by Jose Toharia.²⁰ Toharia noted that in Spain, political authoritarianism co-existed with a great deal of judicial independence. Indeed, not only did the Spanish judiciary have a great deal of formal independence, but judges tended to be more liberal than the regime and frequently more liberal than the general population. Moreover, corruption and political interference in judges’ activities appeared minimal.

How could a right-wing authoritarian regime tolerate such a liberal, independent judiciary? The simple answer is that, on sensitive issues, the judiciary had no power. The regular courts handled only those cases that were politically innocuous. Politically significant cases were handled by special tribunals—labor courts, military courts, and, most important, the State Security Tribunal—that were closely controlled by the executive. Not only did the Spanish government successfully control those
areas of the law that might threaten its power and policies, but this system helped it economize on resources. After all, monitoring and disciplining the judiciary takes time and money. It was much easier to simply grant the judiciary a relatively high degree of independence in non-threatening areas and to maintain strict control over tribunals that handled sensitive disputes.

The analogy to the Chinese situation should be obvious. There is no particular reason that the Chinese government could not undertake extensive legal and judicial reform in certain areas—such as commercial and low-level administrative law—and maintain close control over politically sensitive issues that touch on matters of political dissent, labor unrest, and so forth. In fact, China already appears to be making efforts to set up institutional firewalls between areas where legal reform is seen as desirable and areas where it is considered suspect. China is developing a separate system of rules for foreign enterprises, and disputes concerning foreign businesses are frequently referred to a commercial arbitration body rather than the Chinese courts. The system does not work perfectly, and weaknesses of domestic Chinese legal institutions still create headaches for foreign investors, but it is hard to see why the basic strategy of keeping different areas of law institutionally separate cannot work in China. If the Franco regime could tolerate and control a judiciary with substantial formal independence, a high degree of autonomy, and relatively liberal political attitudes, then authoritarian China could certainly tolerate much more modest reforms.

A single counter-example does not disprove the prediction that legal reforms intended to improve economic performance will have spillover effects into other areas. And it may be that the types of laws needed for more efficient commercial activity—clear property rights, for example, or transparent administrative procedures related to taxation and regulation—are themselves beneficial for individual rights and well-being. But the Trojan horse strategy that U.S. advocates seem to have in mind presumes that legal reforms will spread throughout the system—that legality will prove, like the Internet, uncontrollable. Yet the Spanish case, and China's own efforts to keep legal issues separate, give us reason to doubt this strong spillover hypothesis. More general empirical research suggests that stable authoritarian regimes are frequently able to adopt systems that effectively protect property and contract rights without more extensive reforms in other parts of the legal system. Therefore, if advocates of the Trojan horse strategy are to make the case that legalism or the rule of law will be able to jump the firewalls set up by the Chinese
government, then the mechanism must be specified much more clearly. As of now, the theory behind this first mechanism is not well developed, and there is no particularly convincing empirical evidence for it either.

**Mechanism Two: Changing China’s “Legal Culture”**

Even if different sections of the legal system can be kept institutionally separate, certain types of legal reform projects might still be able to smuggle in the seeds of a broader transformation in the Chinese legal system. One way this might be done is through programs intended to change China’s “legal culture”—especially the culture of the bench, bar, and other professionals and government officials who work closely with the legal system. This is an explicit goal articulated by people inside and outside of the U.S. government. In this view, the Chinese government recognizes that it needs better-trained judges and lawyers and will therefore allow U.S.-sponsored legal education projects. These education programs, however, have the potential over time to transform the way the Chinese elite thinks about the law. Hence, much of the Trojan horse legal reform strategy stresses legal education and training of judges and lawyers, not only to improve their skills, but to change China’s legal culture.

What exactly is China’s legal culture, and how should it be changed? This is not an easy question to answer, in part because the term is about as clear and precise as the term *rule of law*. And, much as rule of law gets used as shorthand for “a desirable legal system,” legal culture tends to be used as shorthand for “what people think about law,” or sometimes even “those aspects of the legal system we can’t observe or measure.” Indeed, the phrase is so ill-defined that some have questioned whether there is any point in using it at all. Because of the vagueness of the term, I will focus on only one aspect of Chinese legal culture that often comes up in discussions of legal reform: the extent to which Chinese lawyers adopt a “formalistic” or “instrumental” approach to law. This focus is chosen, first, because it seems to capture one of the most important elements considered to be part of China’s legal culture, and second, because the problems in this area illustrate broader difficulties with “changing legal culture” as a mechanism of fostering widespread systemic change.

*Formalism* and *instrumentalism* are terms used to describe the way lawyers and judges think about how laws should be interpreted and applied. The formalistic approach is characterized by relatively mechanical
application of rules and an emphasis on statutory language. The instrumental approach places more stress on thinking about the goals a given law is meant to achieve and the likely real-world consequences of a particular legal decision. These are both ideal types, and no legal practitioner is ever purely formalistic or purely instrumental. But these ideal types do illustrate a potentially important difference in legal culture that is worth considering in the context of Chinese legal reform and the Trojan horse strategy.

The consensus on the U.S. side seems to be that the Chinese approach to law is too formalistic, and that Chinese students tend to approach law with the attitude of wanting to know "the right answer" rather than thinking critically about the issues involved in legal questions. Many of the Americans working in the Chinese legal education field want to encourage members of the Chinese legal community to take a more critical, policy-oriented, instrumental approach to the law. At least one leading academic working on legal education, quoted above, argues that this sort of change in mind-set will prove subversive and could lead to widespread reform throughout the system.

Setting aside for the moment whether such a change in mind-set is even possible, we should consider whether it is desirable. Much of the law and development movement was concerned with changing legal education in Latin America, and some of the most scathing attacks on the movement concerned its attempts to export an allegedly inappropriate U.S. model of legal education. It is worth restating the basic elements of Trubek and Galanter's critique of these legal education projects. According to Trubek and Galanter, U.S. scholars believed that Latin American lawyers should be trained in a more instrumental, less formalistic approach to law. An instrumental perspective, it was believed, "would generate 'legal development,' which would in turn foster a system of governance by universal, purposive rules, and would accordingly contribute to the enhancement of liberty, equality, participation, and rationality." The problem, according to Trubek and Galanter, was that this view neglected the social and political context in which this change in legal culture took place. An expanded and modernized legal profession tended to increase social inequality, because the social elite had greater access to the better-educated and professionalized legal personnel. Furthermore, these conservative elites could make use of better-trained lawyers to block changes that threatened their interests. In addition, the instrumental orientation actually weakened what legal guarantees of individual rights did exist. Formalism can provide a kind
of protection for individuals from abusive government policies; instrumentalism makes it easier for individual "rights" to be circumvented in the name of some state-sponsored developmental goal.\textsuperscript{24}

The point is not that there is something inherently anti-reform about instrumentalism, or that sophisticated, critical thinking about the principles behind law is necessarily pernicious. But there is no reason to presume that these modes of thought are necessarily conducive to reform either. Trubek and Galanter may have overstated the negative aspects of cultivating the instrumental approach to law, but the basic concern is still valid. Social and political realities—especially the material interests of the legal elite and those members of society able to purchase their services—probably have more to do with how laws are interpreted and applied than the particular style of legal reasoning taught in law schools. Legal instrumentalism in the service of conservative groups is no more likely to spread deeper, more progressive reform than strict legal formalism.

Perhaps legal culture does matter, and perhaps changes in legal education do make a difference in legal culture. But there is no strong evidence to suggest that this impact is more than marginal. In any event, there is enough indeterminacy about the relationship between the types of legal culture that can be influenced by legal education that this mechanism for the Trojan horse is problematic at best. Moreover, the criticisms of the first mechanism apply, for the most part, to this second mechanism as well. If the Chinese government is able to cordon off and control politically salient sections of the legal system, then changes in the legal culture of the overall legal community might not have much of an effect on the core human rights issues about which many in the United States are concerned.

In sum, this second mechanism for Trojan horse legal reform rests on three dubious assumptions: first, that it is possible to influence Chinese legal culture; second, that these cultural changes, if possible, would have desirable consequences for broader reform; and third, that a broad change in legal culture, even if generally conducive to greater reform, would be able to affect those sensitive areas of the law over which the Chinese government wants to maintain strict political control.

\textit{Mechanism Three: Building a Constituency for Further Reform}

A third possible mechanism through which partial legal reforms might generate more widespread reform is the development of a public base
of support for reform. The idea is that legal reforms in the economic sphere—especially those that guarantee property and contract rights and those that provide means of redress against government administrators—will make people better off, more secure, and willing and able to push for deeper reforms, not just in the economic realm, but overall. Thus, even if the spread of rule of law is not driven by the internal logic of the legal system, and even if it is not possible to change legal culture in ways that generate broader changes, partial reforms—to the extent that they are successful on their own terms—will create the social and political base for more reform.

The first obvious problem with this view has already been mentioned. Legal reform might well strengthen the position of conservative forces in society that oppose more widespread political, social, and economic reforms. This possibility has been discussed above, in reference to the efforts of the first law and development movement to cultivate a professionalized bench and bar and to promote a more “instrumental” or “realist” adjudicative approach. Second, also as previously discussed, some authoritarian regimes are able to provide relatively secure property and contract rights yet still resist broader political or social reforms. Even putting these problems aside, however, there are reasons to question the assumption that legal reforms in contract, property, and administrative law will necessarily generate widespread public support for further reform.

There are many reasons to question this assumption, but here I will focus on only one. We must consider the fact that greater legalization of economic relationships in China might have undesirable, unintended consequences if such legalization disrupts alternative informal institutions. According to one expert, a fair assessment of current law reform efforts must “try to take account of the ways in which the elaboration of the formal legal system is both by design and unwittingly eroding less formal institutions and customs.”25 This observer notes that such erosion is most apparent in the decline in mediation that has accompanied the rise in litigation. Changing patterns of dispute resolution may lead to a constricting of access for poorer people, especially in rural areas. Such a phenomenon clearly could have negative implications for a theory of spreading reform based on a growing constituency of previously marginalized Chinese. This mechanism for spreading reform assumes that reforms make people become both stronger and more pro-reform. Even if it can be established that the disruption in informal institutions is a temporary problem and that in the long term a shift to more formal,
law-based institutions would make everyone better off, the erosion of informal institutions in the short term can make people politically weaker, more anti-reform, or both.

Again, an example from another part of the world may help illustrate how reforms in formal institutions, if not thought through carefully, can have serious negative consequences on the general population as informal institutions are undermined. This time, the example comes from legal reforms introduced by the British in rural areas around Bombay in the nineteenth century, as described by Rachel Kranton and Anand Swamy.\textsuperscript{26} The British governors of the region observed, correctly, that the rural credit markets were characterized by local moneylenders who were able to charge interest rates in excess of those that could have been charged in a competitive market. They were able to do this because the lenders relied on informal mechanisms to enforce debt repayment, and these mechanisms in turn depended on ties between the lenders and other local elites. As a result, only a small number of lenders could operate in any given village. The British reasoned that effective formal contract enforcement would allow lenders to operate in many more villages, would create a competitive market, and would bring down interest rates for farmers.

The British were right about all of these things. What they did not anticipate was that the introduction of effective formal contract enforcement undermined what was effectively an informal insurance arrangement between lenders and borrowers. When lenders could charge monopolistic interest rates, they had a vested interest in their clientele remaining economically viable. Any given borrower represented a future stream of monopolistic interest rates to the lender, and that stream would disappear if the borrower lost everything and had to become a wage laborer. Why should the creditor kill a goose that lays golden eggs? If a borrower suffered an unexpected disaster—if a cow died, or a field was destroyed by flood, or crop prices collapsed—the lender had an incentive to forgive the debt or postpone repayment. But once effective civil courts created a competitive market in rural credit, creditors had no reason to expect that they would deal with any particular borrower again with any frequency. Therefore, creditors had less incentive to forgive debt or postpone repayment if the borrower suffered a disaster. Although borrowers under the new system were better off in good years, they could lose everything if disaster struck. This problem could be averted if borrowers were able to purchase insurance, but effective insurance markets simply did not exist in that part of India at the time.
Hence, the introduction of effective civil law created a competitive credit market, but it also destroyed the existing informal insurance arrangement without replacing it with any sort of compensating institution. In some villages, these changes—coupled with exogenous economic shocks—led to widespread rioting.

This example may at first seem far removed from Chinese rule-of-law reform. But it is entirely plausible that the Chinese system—lacking as it does both effective formal contract enforcement and widespread formal insurance markets—has evolved informal risk-sharing mechanisms that are closely integrated with the informal contracting structure and that could be disrupted by legal reform. More important, given that the Trojan horse strategy relies on pushing incremental reforms—“planting seeds in patches of sunlight”—and hoping that they will grow exponentially, the type of phenomenon the Bombay case illustrates is important even if the specific problem is not an issue.

In the absence—sometimes even in the presence—of formal legal institutions, complex informal institutions of contract, property, risk-sharing, and dispute resolution can develop. New legal reforms, especially those that prove effective, may disturb or undermine these informal institutions. This may be a good thing, but it may not be. Partial reforms—an inherent part of the Trojan horse strategy—are particularly likely candidates to disrupt an important informal institution without providing an adequate substitute. The above example of increasing litigation and the rising quality of legal professionals potentially undermining mediation and other dispute resolution mechanisms accessible to the rural poor is one example of this kind of problem.

The fact that partial reforms can disrupt existing informal institutions may undermine the third mechanism for the Trojan horse strategy. This mechanism assumes that incremental reforms protect and strengthen the interests and influence of pro-reform groups. But if legal reform undermines the informal institutions that these groups have evolved to protect their interests, this mechanism cannot work. Even worse, if the unintended consequences create especially serious social problems, there may be a backlash against reforms. The point is not that legal reform should never proceed because informal institutions will be disrupted, but that legal reformers ought to proceed with caution. Sometimes incremental reform can be worse than no reform at all. We cannot simply presume that incremental reforms will always lay the groundwork for more extensive changes.
Tensions and Conflicts between Fundamental Goals

These examples suggest that the three most obvious candidate mechanisms for the Trojan horse strategy, while not necessarily wrong, are problematic. At the very least, they need to be thought through much more thoroughly. But even if we could be confident that limited Chinese legal reforms would lead to more widespread evolution toward a rule-of-law system, and that the U.S. government or NGOs could in some way support or influence this process, there are several additional problems to consider.

First, legal reforms that allow citizens to challenge the legality of government action may actually hinder desirable economic reforms. Indeed, the rule of law envisioned by the U.S. government may actually create obstacles to other types of economic reforms it favors. After all, the same means that can be used to check arbitrary government abuses can be used to obstruct dramatic and desirable policy changes. Some scholars believe that the insulation of bureaucrats from politics was an important element of East Asian economic development, and this position would imply a tension between effective economic policy and the rule of law.

Costa Rica provides a concrete example of how rule-of-law reforms can have unintended consequences on economic liberalization. The Costa Rican government created a new chamber of its Supreme Court in the 1980s, with the mandate to review the constitutionality of government actions. The new chamber was created largely in response to declining public opinion of the judiciary. It soon became a popular avenue for groups to challenge government action. In fact, both the court’s popularity and its activism came as a surprise to the government that had created it. Ultimately, the court’s decisions seriously affected—and frequently hindered—the government’s program of neoliberal economic reforms.27

Such a scenario is extremely unlikely in the Chinese case, but it is worth considering in light of the oft-repeated claim that rule-of-law legal reforms and market economy reforms are complements. This may be true. But to the extent that law reform succeeds in giving ordinary people the right to challenge central government decisions—and not merely the low-level decisions of individual bureaucrats—it may make it more difficult for the government to adopt difficult neoliberal market reforms. This may not be a bad thing, of course. But it is important that reform advocates consider these potential consequences, especially if
one subscribes to the (controversial) hypothesis that political elites need a relatively high degree of autonomy to implement painful reforms.

Second, there exist potential tensions between strengthening adjudicative independence and controlling official corruption. Both of these goals come up in discussions of areas where the Chinese legal system needs improvement, although the U.S. side tends to emphasize the former and the Chinese the latter. To the extent that the United States considers both important goals, however, we must consider the difficulties in achieving both of them together. After all, the more adjudicators—be they judges or administrative officials—are subject to political controls, the more likely it is that their decisions will be influenced by political considerations rather than the application of supposedly impartial rules. The fewer controls placed on these adjudicators, the greater the difficulty of ensuring their accountability and checking corruption. Judge Clifford Wallace puts the point succinctly: “Although both judicial independence and judicial accountability are vital for maintaining the rule of law, they sometimes seem to conflict.”28 And a main conclusion of Mauro Cappelletti’s comparative survey of judicial processes in Western countries is the necessity of balancing the “conflicting values, independence and accountability.”29 Both Wallace and Cappelletti conclude that independence and accountability are not mutually exclusive and that they can be balanced effectively given appropriate institutional choices. But the potential conflict is real—something that China rule-of-law reform advocates ought to consider more closely. There are other institutional tensions as well. Richard Messick and Linn Hammergren, for example, suggest that mechanisms to ensure judicial accountability may also create obstacles to judicial efficiency.30 These analyses suggest that advocates of Chinese institutional reform need to think more carefully about these sources of tension. To the extent that reformers are successful in pushing one goal of institutional reform, they may undermine another.

A third issue is the possibility that there may be tensions not only at the level of institutional arrangements but also at the level of fundamental rule-of-law values. Consider, as one example, the tension between the rule-of-law goals of predictability and equity. Clear rules, systematically applied, are the best way to ensure predictability. But rules can never capture all the possible variations in individual cases, and sometimes a mechanical application of rules can lead to results that seem grossly unfair. Thus legal systems throughout history have tried to find ways to balance predictability with equity, making sure that individual
cases are decided in accordance with principles of fairness and justice, even when the formal rules would dictate otherwise. According to one source in the U.S. government, U.S. NGOs do not see a tension between promoting equity and predictability in the Chinese case. The two values, it is argued, are not inconsistent, and the Chinese system is currently in such a state that these sorts of questions are not really relevant, at least not yet. This official has a point. If the current system is both unpredictable and unfair, it may seem like academic hair-splitting to worry about philosophical inconsistencies between the two goals of predictability and fairness. Nevertheless, if the rule-of-law reform strategy is based on the idea that principles adopted for one area of the legal system will spread, it is worth considering the possible tension between different facets of the U.S. rule-of-law vision.

A fourth concern is that U.S. support for rule-of-law reform in China is ultimately counterproductive for true systemic change in China, because these sorts of reforms merely help to legitimize the authoritarian Chinese state. This seems to be the view of some members of the U.S. Congress. State Department officials and NGOs alike express their frustration over congressmen who refuse to support any program that might be seen as helping the Chinese government do anything. But the association of this line of argument with members of Congress who are perceived as narrow minded and short sighted may have blinded some to the kernel of truth in the argument. As one academic observer put it, "One doesn’t need to endorse Jesse Helms to believe that the legitimization issues are real." After all, one of the reasons China would want to talk openly about promoting the rule of law—albeit a reason secondary to attracting foreign investment—is that it may increase the regime's legitimacy. The extent to which it actually would, and whether the net effects for political reform would be positive or negative, is a question that has not been explored systematically. My view is that supporting rule-of-law programs would not contribute substantially to the legitimacy of the Chinese leadership, but this is a conjecture not grounded in any strong theory or evidence. Once we dissociate the legitimization argument from some of its more crude formulations and distasteful proponents, it becomes clear that it is an argument that needs to be taken seriously.

Conclusion

The U.S. government began advocating Chinese rule-of-law reform as an extension of U.S. human rights policy. It wants China to move in the
direction of a substantive vision of the rule of law, one that protects certain basic rights and promotes a certain vision of justice. The Chinese government, however, has a very different idea of what is meant by the rule of law and wants to limit legal reform to those areas that are directly relevant to international economic integration and domestic economic reform. This creates obvious problems for U.S. backers of a legal reform initiative conceived of as an extension of U.S. human rights policy. Therefore, U.S. rule-of-law advocates have adopted what I have called a Trojan horse strategy. The belief is that limited law reforms will lead to more fundamental changes in the Chinese legal and political system, changes that the Chinese central government will not be able to control.

The mechanism by which this widespread change is to take place, however, is usually not specified clearly. Consideration of three possible mechanisms shows that each is problematic. There is no good theoretical reason to believe that legal systems have a kind of fundamental unity of principles and institutions, nor is there convincing empirical evidence that this is the case. Attempts to change China’s legal culture—the way people, especially legal professionals, think about law—may not make much of an impact either. Not only is it difficult to bring about such change, but evidence suggests that the way people think about law itself is less important than social, economic, and political structures. The hope that limited legal reforms will stimulate growing public demand for further reforms may also be misplaced, given that incremental reforms are often disruptive and can generate anti-reform pressure. Moreover, there appear to be tensions between the goals espoused by rule-of-law reform advocates: legally constrained government versus decisive reform, independence versus accountability, predictability versus equity.

These considerations suggest that policy makers need to take a long, hard look at what they hope to achieve by promoting rule of law in China—and how they hope to achieve it. Again, I must stress that this does not mean that the various legal reform projects sponsored or advocated by the U.S. government and NGOs are bad ideas. If the dangers inherent in these sorts of projects can be avoided—and if the initiatives are successful in improving the functioning of Chinese courts, helping China attract foreign investment and engage in world trade, controlling corruption, and reining in abuses of discretion by the administrative bureaucracy—then they can be considered worthwhile even if they do not have any broader effects. I have not attempted to evaluate any of these individual programs; my subjective impression is that many of
them are doing important, useful work. What I want to question is the larger claim that these programs will help promote a broader rule-of-law transformation in China, leading to widespread reforms even against the wishes of the current Chinese leadership. Rule of law made its way onto the U.S. governmental agenda, at least in part, because of this belief. But given the state of existing theory and empirical evidence, such a conviction seems unfounded. I say "unfounded" rather than "false" because we do not have enough evidence to conclude that the Trojan horse view is incorrect. But given the weakness of the theory and evidence behind this element of U.S. rule-of-law rhetoric and strategy, and in light of the sad history of the first law and development movement, there is ample reason to think more rigorously and realistically about the means and ends of law reform—and sooner, rather than later.

Notes

This chapter was adapted from Matthew Stephenson's "A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored "Rule of Law" Reform Projects in the People's Republic of China," originally published in the *UCLA Pacific Basin Law Journal* (Fall 2000).

6. See Tamanaha, "Lessons of Law."
7. In addition to publicly available sources, in this chapter I also draw on a number of interviews I conducted in 1999 with several U.S. State Department officials, NGO officials, and scholarly observers. Interviewees generally preferred to remain confidential and so are identified only by general affiliation (government, academe, NGO) rather than by name or position.
8. This statement should not be taken as implying that the government sought a controlling role, or even that it intended to run a lot of programs directly. According to
one of the State Department officials working directly on the Initiative, none of the
government's activities is intended to supplant existing NGO programs. Rather, the
idea is to help raise the profile of issues, serve as a launching pad for new initiatives,
and work through public-private partnerships. Nevertheless, the public rhetoric sug-
gested a central role for U.S. government involvement.

12. U.S. General Accounting Office (GAO), "Foreign Assistance: U.S. Funding for Dem-
13. See, for example, President Clinton, "Address on China and the National Interest,"
October 24, 1997; Secretary of State Madeleine K. Albright, "Remarks at the National
Judge's College," Beijing, April 30, 1998; and John Shattuck, "Statement before the
House Committee on Appropriations, Subcommittee on Foreign Operations," Wash-
ington, D.C., April 1, 1998.
15. See Secretary of State Madeleine K. Albright, "Remarks to U.S. Business Representa-
16. See interview by Bob Schieffer with Secretary of State Madeleine K. Albright, Face the
17. See Secretary of State Madeleine K. Albright, "Remarks and Q & A session at Dela-
20. See Jose J. Toharia, "Judicial Independence in an Authoritarian Regime: The Case of
21. See Christopher Clague et al., "Property and Contract Rights in Autocracies and De-
22. See Gardner, Legal Imperialism. Even some of those who argue against the critics con-
cur that “what is needed in a developing country—to protect against the dangers of a
purely instrumental view of law—is an established and functioning, formalistic-orien-
ted rule-of-law system” (Tamanaha, "Lessons of Law," 475–6).
24. Ibid., p. 1076; see also Tamanaha, "Lessons of Law."
26. See Rachel E. Kranton and Anand V. Swamy, "The Hazards of Piecemeal Reform:
British Civil Courts and the Credit Market in Colonial India," Journal of Development
27. See Bruce M. Wilson and Roger Handberg, "Opening Pandora's Box: The Unantici-
pated Consequences of Costa Rican Legal Reform," unpublished paper prepared for
the Midwest Political Science Association, Chicago, IL, April 1998, 23–5.
28. J. Clifford Wallace, "Resolving Judicial Corruption While Preserving Judicial Inde-
no. 2 (Spring 1998): 344.
29. Mauro Cappelletti, "Who Watches the Watchmen?" in The Judicial Process in Com-
oparative Perspective, ed. Mauro Cappelletti, Paul J. Kollmer, and Joanne M. Olson (Ox-
in Beyond the Washington Consensus: Institutions Matter, ed. Shahid Javed Burki and