

## WHY CHINA NEEDS FREEDOM OF SPEECH: ECONOMIC REFORM AND THE RULE OF LAW

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*The rhetoric of the Chinese Communist Party (CPC) under Xi Jinping embraces both a market-based consumer economy and the rule of law. The two are clearly intertwined as the rule of law underpins credible capital accumulation for ordinary citizens. Legal scholars have argued that judicial independence is a prerequisite for the rule of law, but have not yet clearly shown that freedom of expression underpins the former. Despite rhetorical promotion of the rule of law, the Chinese government continues to undermine this nebulous concept by criminalizing certain forms of political expression and censoring others. This essay describes how Chinese economic reforms since the Deng Xiaoping era have been successful only because of political reforms that were implemented in tandem. Without a greater degree of freedom of expression, the CPC will continue to undermine the rule of law and the economic reforms its rhetoric supports.*

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Political economy as a field recognizes not only purely economic forces, but also political institutions as central factors in the economic success of a nation. Modernization theory predicts that as a nation develops economically through liberalization and privatization, democratization must follow as a middle class emerges and demands political power.<sup>1</sup> China is now the second largest economy in the world—it demands that the world treat it as a market economy and yet it remains politically authoritarian. This paradox is essential for understanding China under Xi Jinping and the economic reforms meant to bring about the so-called Chinese Dream.

China's importance to the global economy no doubt outweighs its political importance to the international community. It is no wonder then that the history of the People's Republic of China (PRC) and the Communist Party of China (CPC) is most often described as a series of economic reforms,

while the accompanying political reforms are downplayed. Rather than recognize the admittedly limited and staggered political reforms, the spotlight has been planted firmly on the economic side.<sup>2</sup>

This is problematic not only for historians but also for policymakers and analysts today. By minimizing the importance of political reforms in explaining the success of economic policy changes since the late 1970s, scholars have given credence to the idea that economic reform can occur in a political vacuum. This paper will lay out how at each stage of China's economic development reforms to its political structure have been instrumental in allowing economic policies to achieve their intended effects of increasing GDP and standard of living. Moreover, under Xi, the stated policy of the CPC is for China to reform in favor of even more

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<sup>1</sup> See Ronald Inglehart and Christian Welzel, "Development and Democracy: What We Know about Modernization Today," *Foreign Affairs* (1999): 33-41; Zehra F. Arat, "Democracy and Economic Development: Modernization Theory Revisited," *Comparative Politics* 21 (1988): 21-36.

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<sup>2</sup> Gabriella Montinola, et al., "Federalism, Chinese Style: The Political Basis for Economic Success," *World Politics*, 48 (1996): 50-81; Thomas Heberer and Gunter Schubert, "Political Reform and Regime Legitimacy in Contemporary China," *ASIEN* 99 (2006): 9-28.

marketization of the economy.<sup>3</sup> Central to this agenda is a strengthening of the rule of law in China, which, in the stated view of the CPC, is essential for continued development.<sup>4</sup>

Establishing how political reforms work hand in hand with economic reforms is essential to understanding how China can move forward with its coming transition from a state investment-driven economy to a market consumption-based model. Since Deng Xiaoping's opening up and reform era, China has been able to grow at an incredible pace through staggered privatization, foreign direct investment and a financial system that is still beholden to centrally planned economic directives, pushing for massive infrastructure, heavy industry and export-oriented manufacturing. Yet, the economic reforms that will allow China to become a developed, consumer economy involve not only an increased trust in liberal economic forces, but also a strengthening of the rule of law.

While the CPC leadership has already demonstrated its trust in market forces to a degree, its faith in the rule of law stands on shakier ground.<sup>5</sup> The rule of law is a basic requirement for a consumer, knowledge-based economy as basic protection against the arbitrary seizure of property.<sup>6</sup> Western

observers, like the Harvard Business Review, argue that freedom of information is required for a modern technology-based economy but fail to give a convincing causal explanation. Instead, vague connections are drawn between innovation and free-flowing collaborative processes, especially among the most educated sectors of society.<sup>7</sup> Legal scholars have put forward that judicial independence is a prerequisite for the rule of law, but have not clearly stated that freedom of expression underpins the former.<sup>8</sup>

This paper will argue that freedom of speech is a prerequisite for the establishment of the rule of law as judicial independence is not possible in its absence. Freedom of speech not only allows for creative minds to work without fear of upsetting arbitrary censors, it also functions as a foundation for eliminating the opacity of the criminal and civil justice system. While legal scholars have attempted to operationalize judicial independence by analyzing judge salaries, terms, hiring and firing procedures, they have primarily ignored freedom of expression for all court actors, including judges, as a variable that influences judicial independence.<sup>9</sup> If plaintiffs, defendants and the government alike are not free to bring forth lawsuits and expose any and all evidence pertaining to a potential case—because their capacity to express freely legitimate concerns is withheld by the government—judges will not be able to arrive at fair legal decisions that form the

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<sup>3</sup> Arthur R. Kroeber, "Xi Jinping's Ambitious Agenda for Economic Reform in China," *Brookings Institution*, November 27, 2013, accessed February 1, 2017, <https://www.brookings.edu/opinions/xi-jinpings-ambitious-agenda-for-economic-reform-in-china/>; "China Focus: CPC, overseas parties arrive at consensus on global economic governance," *People's Daily*, October 16, 2016, accessed February 1, 2017, <http://en.people.cn/n3/2016/1016/c90000-9127796.html>

<sup>4</sup> Jacques deLisle, "The Rule of Law with Xi-Era Characteristics: Law for Economic Reform, Anticorruption, and Illiberal Politics," *Asia Policy* 20 (2015): 23-29.

<sup>5</sup> Nancy Tang, Keith Hand, Eva Pils, Taisu Zhang, and Thomas Kellogg, "China's 'Rule by Law' Takes an Ugly Turn," *Foreign Policy*, July 14, 2015, accessed February 1, 2017, <http://foreignpolicy.com/2015/07/14/chinas-rule-by-law-takes-an-ugly-turn-rights-lawyers-crackdown-xi-jinping/>; Carrie Gracie, "Rule of Law in China, a Country which Locks Up Its Lawyers," July 13, 2015, accessed February 1, 2017, <http://www.bbc.com/news/world-asia-china-33502955>.

<sup>6</sup> See Robert A. Dahl. *A Preface to Economic Democracy*. (Los Angeles: University of California Press, 1985); Paul Gerwitz, "What China Means by 'Rule of Law,'" *New York Times*, October 19, 2015, accessed

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February 1, 2017,

[https://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html?\\_r=0](https://www.nytimes.com/2014/10/20/opinion/what-china-means-by-rule-of-law.html?_r=0); William Fairbairn, "An Examination of Judicial Independence in China," *Journal of Financial Crime*, 23 (2016): 819-832. <sup>7</sup> Greg Austin, "Can China Innovate Without Freedom of Information," *The Globalist* October 2, 2014, accessed February 1, 2017, <http://www.theglobalist.com/can-china-innovate-without-freedom-of-information/>; Regina M. Abrami, William C. Kirby, and F. Warren McFarlan, "Why China Can't Innovate," *Harvard Business Review*, March 2014, accessed February 1, 2017, <https://hbr.org/2014/03/why-china-cant-innovate>

<sup>8</sup> Fairbairn, "Judicial Independence in China."

<sup>9</sup> James Melton and Tom Ginsburg, "Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence," *Journal of Law and Courts* 2 (2014): 187-217; Ryan E. Carlin, "Rule of Law Profiles in Contemporary Politics," *The Annual Conference of the American Political Science Association*, Washington, DC, September 2-5, 2010.

basis of judicial independence and, therefore, the rule of law. Without the right to freedom of expression, the legitimacy of law enforcement decreases as allegations of corruption, public disturbance and other crimes are employed to clamp down on political dissent. Without the rule of law firmly established, the kind of small groups of entrepreneurial innovators that drive modern knowledge-based economies will be less willing to take the chance of investing time and effort into projects in a political and legal climate that is opaque. At the same time, everyday business owners and consumers will also fear that their accumulation of wealth and goods is only as secure as their good standing in the eyes of the censors. Singapore has consistently been put forward as an alternative model in which market growth has been possible despite, and from some perspectives, because of, a lack of freedom of expression, yet a clear insistence upon at least some form of the rule of law.<sup>10</sup> However, what is often referred to as a “thin” rule of law, as exists in Singapore, is focused primarily on ensuring legal stability for foreign investors. Thio Li-ann states that Singapore has “clear investment laws, [a] skilled labor force and [secures] the protection of property rights,” which is all meant for the benefit of foreign investor confidence.<sup>11</sup> Gordon Silverstein argues that “Singapore made clear to investors that what they valued was safe and protected, and that their investments were secure.”<sup>12</sup>

This level of the rule of law could already be argued to exist in China. If the rule of law merely serves to ensure that foreign investors are able to securely invest and trade in a state which has no desire, nor justification, for political rights, only property rights, China already abides by the rule of law. While Singapore is clearly an economic success story, it is not the free-market dream of Ayn Rand enthusiasts, but instead an economy defined by

direct state ownership and intervention. Similarly, China, too, is an economic success with a court system that is sufficiently rules-based so as to ensure that apolitical multinational corporations enjoy secure property rights. However, if the CPC is serious about continued economic reform that will allow it to become a true consumer-based, information economy, securing the property rights of foreigners will not be sufficient. In order for Chinese citizens to have similar security in their own property rights, which encourages the risk-taking and innovation required for an economy based on internal, natural growth, rather than government infrastructure and export-oriented foreign direct investment projects, a deeper rule of law based on true judicial independence underpinned by freedom of expression will be necessary. These reforms to the political economy of China do not need to come immediately, nor should freedom of expression ever represent an absolute, but China has already shown in its recent past that for economic reforms to have success, they must be accompanied by political reforms. Chinese economic reforms have always come hand in hand with political reforms and both have been introduced piecemeal over many years. This has allowed the CPC to not only test the efficacy of new policies but also ensure it retains control over both positive and negative outcomes. Unfortunately, under Xi Jinping, China is attempting to move towards a new normal of slower growth and greater consumption, while at the same time the rule of law remains chronically undermined by a lack of respect for the right to freedom of expression, as enshrined in Article 35 of the Constitution of the PRC. The CPC should learn from its history that political structure reform has always worked in tandem with economic liberalization. Decreasing censorship and other forms of political suppression does not mean the end of one-party rule in China if pursued over time and with the understanding that more open political institutions and greater judicial independence would allow for greater state legitimacy and stable economic growth.

### **A brief history of China’s political economy**

China’s history since the establishment of the PRC can be broken down into three clearly distinct eras.

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<sup>10</sup> Li-ann Thio, “*Lex Rex or Rex Lex? Competing Conceptions of the Rule of Law in Singapore*,” *Pacific Basin Law Journal* 20 (2002): 1-76.

<sup>11</sup> *Ibid.*

<sup>12</sup> Gordon Silverstein, “Singapore: The Exception that Proves Rules Matter,” in Tom Ginsburg and Tamir Moustaafa, eds. *Rule by Law* (Cambridge: Cambridge University Press, 2008): 73-100.

First is the Mao Zedong era of a Soviet-style centrally planned economy, a cult of personality and an authoritarian political regime focused on the mobilization of the masses for political ends. Deng Xiaoping's reform era allowed for market forces to play a restricted role in the allocation of resources, while politically introducing collective leadership and decentralization. The third era began with Deng's death. This period has been marked by ever-greater economic liberalization and integration into the world economy, with a continuation of collective leadership and political structure reform (*zhengzhi tizhi gaige*), including village-level elections.<sup>13</sup>

The political economy of the three eras can be understood through the phrases "the two whatevers", "the four modernizations", and "harmonious society." The first relates to the view that the Chinese people and government would follow whatever policy choice and whatever instructions on that choice made by Mao Zedong.<sup>14</sup> Reform of any kind was only possible with Mao's death in 1976.

Under Deng Xiaoping, China embarked on a reform agenda most noted for its economic consequences, but equally unorthodox in the level of political autonomy allowed. Rather than following a centrally organized economic formula for the entire nation, Deng emphasized the four modernizations of agriculture, industry, national defense and science and technology through a professionalization of the cadres and greater local autonomy.<sup>15</sup> Under Mao, all policy, instruction and information came from above, but under Deng power began to spread on a more horizontal basis. Cadres were expected to not only be experts in communist ideology, but also economics and engineering based on Western teachings. Local governments were allowed to

pursue their own economic policies to an extent unimaginable under Mao.<sup>16</sup>

The reform era effected immense economic transformation, yet the political transformation was also dramatic. More intellectually informed cadres could argue for economic policies on a local level to drive the Chinese economy towards the type of growth epitomized by the four modernizations. Certainly, the political structure reforms in this era were limited to a relatively small group of elite CPC members. Nevertheless, the transition from a Stalinist one-person dictatorship towards a collective technocratic authoritarian dictatorship represented real change in the political system. Under the post-Deng leadership these developments have been pushed even further in tandem with economic reforms. Under Jiang Zemin entrepreneurs were welcomed as members of the CPC in an effort to incorporate their potential political power into the party as well as encouraging further economic liberalization within the CPC's political structure.<sup>17</sup> Jiang also allowed for direct local village elections.<sup>18</sup> These political transformations occurred at the same time as China prepared to become a member of the WTO in 2001. Hu Jintao furthered these political structure reforms with the "Harmonious Society" policies, intended to decrease social pressures created by economic reforms, such as rising income inequality and regional disparities.<sup>19</sup> In the new millennium China has seen strong growth in light manufacturing, and become a central node in the global trading economy. At the same time its political structure has become more nuanced with multiple centers of political power. Both top-down and bottom-up pressures have forced the state to become more accountable to the interests of rural and urban citizens.

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<sup>13</sup> Thomas Heberer and Gunter Schubert, "Political Reform and Regime Legitimacy in Contemporary China," *ASIEN* 99 (2006): 9-28.

<sup>14</sup> Kang Ouyang, "Contemporary development of Marxist philosophy in China," *Socialism and Democracy* 15 (2001), 85-96.

<sup>15</sup> Ignatius Wibowo and Lye Liang Fook, "China's Central Party School: a unique institution adapting to changes," in *The Chinese Communist Party in Reform*, edited by Kjeld Erik Brodsgaard and Zheng Yongnian (Abingdon: Routledge, 2006), 139-156.

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<sup>16</sup> Chenggang Xu, "The Fundamental Institutions of China's Reforms and Development," *Journal of Economic Literature* 49 (2011): 1076-1151.

<sup>17</sup> Heberer, "Political Reform," 9-28.

<sup>18</sup> Lianjiang Li, "The Empowering Effect of Village Elections in China," *Asian Survey* 43 (2003): 648-662.

<sup>19</sup> Juzhong Zhuang, "Inclusive Growth toward a Harmonious Society in the People's Republic of China: Policy Implications," *Asian Development Review* 25 (2008): 22-33.

China's astounding economic transformation from a backwards Stalinist planned economy, to a mixed market economic powerhouse is the result of numerous factors. However, without political reforms to allow power diffusion through vertical and horizontal channels, the economic policies designed to bring about this rapid growth would have been less effective. Without professionally trained cadres and the political leeway to formulate policies that worked on a local level to reach the centrally designed goals, Deng's opening up to international markets would certainly have played out differently. Without the cooptation of the new upwardly mobile entrepreneurial class by the CPC, modern China's political elite would look very different. Lastly, local-level political control over villages and related political openings since Deng's death has allowed the CPC to have an ear on the ground to gather information on grievances and arbitrate disputes between the populace and local governments, which improves its capacity to redistribute wealth and maintain political legitimacy.

### **A knowledge-based consumer economy: the Chinese Dream?**

China is currently the second largest economy in the world, yet economists and the CPC leadership itself are concerned that economic reforms have allowed it to develop modern infrastructure, a large manufacturing base and bring hundreds of millions out of poverty, but have so far failed to ensure that China will not escape the middle-income trap. Economists are in general agreement that China is already moving more towards a consumer economy, but is still far too dependent on infrastructure and politicized state-owned enterprises (SOEs).<sup>20</sup>

This is at least partially the result of an understandable reaction to the 2008 financial crisis. The nation embarked on the largest stimulus plan worldwide, but rather than focusing on new ways in which to move past capital accrual and towards

a more sustainable consumption model, the fiscal stimulus plan piled on more debt to SOEs as they were forced to spend lavishly on political pet projects, rather than on economically productive investments.<sup>21</sup> While the stimulus was effective in that GDP growth targets continued to be met, more recently China's growth rate has decreased. Xi Jinping has explained this slower growth as a "new normal", naturally arising from the nation's transition towards a consumer economy.<sup>22</sup>

A consumer economy means that the domestic consumption of products—both imported and domestically produced—accounts for the vast majority of economic activity in a country. Rather than massive infrastructure projects, which cannot last indefinitely, or export-oriented manufacturing, which can dry up in a recession, a consumer economy is defined by complex knowledge and service industries and diverse retail and leisure activities that lessen the impact of boom and bust cycles. Consumer economies are generally more stable in the long-term than export-driven economies although they do not often grow at the breakneck speed to which China has become accustomed.

Does the Chinese Dream mean a Western-style consumer economy? Not necessarily. Xi has stated that, "realizing the nation's great rejuvenation is the greatest dream of the nation."<sup>23</sup> The Chinese Dream is a wide-ranging term used primarily as political rhetoric, but like previous slogans associated with Chinese leaders, it also represents at least a direction of change across all aspects of the society. Economic reform towards greater market efficiency, trade liberalization and growth is clearly part of the China Dream. Its counterpart is Xi's stated desire to increase the rule of law in China through anti-

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<sup>20</sup> Andong Zhu and David M. Kotz, "The Dependence of China's Economic Growth on Exports and Investment," *Review of Radical Political Economics*, 43 (2011): 9-32; Yilmaz Akyuz, "Export Dependence and Sustainability of Growth in China." *China & World Economy*, 19 (2011): 1-23.

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<sup>21</sup> Yongheng Deng, et al, "China's Pseudo-monetary Policy," *Review of Finance* (2015) 19(1): 55-93.

<sup>22</sup> "Xi Says China Must Adapt to 'New Normal' of Slower Growth," *Bloomberg News*, May 12, 2014, accessed February 1, 2017,

<http://www.bloomberg.com/news/articles/2014-05-11/xi-says-china-must-adapt-to-new-normal-of-slower-growth>

<sup>23</sup> "Xinhua Insight: Xi's worldwide diplomacy benefits China, the world," *Xinhuanet*, January 5, 2016, accessed February 1, 2017,

[http://news.xinhuanet.com/english/2016-01/05/c\\_134980392.htm](http://news.xinhuanet.com/english/2016-01/05/c_134980392.htm)

corruption and other public campaigns. The hope is to sacrifice a few tigers and flies in order to win over the trust of the people, while at the same time a greater openness and the marketization of SOEs would increase the efficiency of protected sectors, resulting in improved and more sustainable growth. However, this paper has argued that these economic reforms in and of themselves will not lead to the consumer economy that embodies the most successful modern economies, barring a few exceptions like the more stable oil states and Singapore's city-state interventionist model. Throughout the history of the PRC the economic and political systems have had a symbiotic relationship. It is apparent that the leadership of the CPC recognizes that further economic reform will require the rule of law—not simply further trust in market forces—yet they have increased the power of the state to censor and control political expression. Freedom of speech is not absolute in any nation, as no serious legal scholar argues, however, without some level of freedom of expression, a state may arbitrarily arrest and appropriate property based on political oppression rather than criminality.<sup>24</sup> Without freedom of expression anyone in China can fall victim to political censorship that runs counter to the constitutional protection in Article 35. More directly related to the arguments of legal scholars, judicial independence cannot exist without the freedom to build and bring cases to court and have judges freely rule on them. Without freedom of expression, criminal and civil court proceedings can be easily politicized further undermining the rule of law. Opacity in what can be said and done without upsetting the censors along with the opacity inherent in a judicial system that does not respect freedom of expression are clearly barriers to a society based on the rule of law rather than rule by law.

Xi intends for the rule of law to lead to decreased corruption and increased respect for the institutional pillars of the CPC, bolstering its legitimacy. While this represents a positive direction conceptually, the

rule of law is constantly undermined as the state uses censorship and other methods to suppress any political expression deemed to undermine its authority. In order for the economic liberalization reforms to hold up, the rule of law must also stand on firmer ground and this is difficult to imagine if political expression remains criminalized under many circumstances.

The PRC's post-Mao history is full of gradual reformers who made drastic society-wide changes, but managed them over time so as to not upset the balance. Perhaps Xi is another moderate reformer who may be able to begin to transition China away from the development model it has followed to date through measured reforms. However, if China is destined to become a modern consumer economy, changes at the margins will not be sufficient. A larger swath of society must be able to trust in the legal system as a legitimate and unbiased arbiter in disputes. The knowledge-based modern economy relies on consistency in legal proceedings and the protection of property rights or, in other words, the rule of law. Xi's stated desire to increase the rule of law runs completely counter to recent actions that reiterated the CPC's control over media and the continued use of an army of paid Internet censors. The economic reforms Xi has proposed make sense within the context of the PRC's gradual economic liberalization since the late 1970s. The CPC leadership should also keep in mind that no successful economic reform has ever occurred in a political vacuum in the nation's history. In order for China to truly achieve its dream, respect for the right to freedom of expression must also gradually increase in order to ensure the rule of law necessary as a basis for a modern consumer economy.

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<sup>24</sup> Rachel Kleinfeld Belton, "Competing Definitions of the Rule of Law: Implications for Practitioners," *Carnegie Papers: Rule of Law Series* 55 (2005).