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Through Culture and its Disciplines:  
Human Rights and the  
Institutionalization of Law in China

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Human Rights and the Institutionalization of Law in China

"In 2002 China continued to commit serious human rights abuses in violation of international human rights instruments and at year's end, a spate of arrests of political dissidents and the imposition of the death sentence on two Tibetans, the continued detentions of Rebiya Kadeer, Wang Youcai, Qin Yongmin and others, and restrictions on religious freedom and repression of some ethnic minorities were particularly troubling."

- "Introduction to Country Reports on Human Rights Practices for 2002" Issued by the United States State Department, March 31, 2003

"The United States has been releasing annually Country Reports on Human Rights Practices, censuring other countries for their human rights situations, but it has turned a blind eye to serious violations of human rights on its own soil. This double standard on human rights issues cannot but meet with strong rejection and opposition worldwide, leaving the United States more and more isolated in the international community."

- "The Human Rights Record of the United States in 2002" Issued by the Information Office of the State Council, PRC, April 3, 2003

## **Introduction**

Tit-for-tat, the issue of human rights is always grist for the mill of diplomacy. No country, not even the United States which has positioned itself as the world's defender of human rights, can claim a record free of violations. There is a perennial gap between practice and ideal. In relative terms, the international community has over the years identified China as a source of chronic and egregious human rights abuses. Beginning in 1978, the regime of Deng Xiaoping initiated an "open door policy" that has since brought unprecedented change in China as the country emerges as a significant player on the world stage. China's participation in international politics has come with both great frustrations and great possibilities. The origin of much of the uncertainty revolving around China's involvement in global politics stems from the absence of the

rule of law in China. This handicap has fettered the relationship of the Chinese government to other nations and its own people. Nowhere is this absence more poignantly felt than in the realm of human rights. China's divergence from internationally-recognized norms of human rights constitutes the most serious impediment to China's political, economic, and social integration with the rest of the world.

The present paper argues that a sustainable and viable rule of law must precede commitment to and preservation of human rights. The problem immediately becomes one of definitions: whose "rule of law"? whose "human rights"? The meanings of these highly-charged phrases are contested along different lines; much of the discrepancy is caused by the different historical and cultural experiences of peoples in regards to "rule of law" and "human rights." Elite international politics is currently polarized between two main interpretations of human rights and the misunderstandings between them have hindered progress. Broadly speaking, one interpretation originates in Europe and North America (which claims its understanding of human rights to be shared by most parts of the world) and the second has been articulated by the nations of East and Southeast Asia. The latter view - as expressed in "Asian values" - constitutes the only serious post-Cold War challenge to global consensus on human rights. While the fractures in the discourse on human rights in international relations remains largely

geopolitical in nature, there is a second type of divergence in opinion regarding human rights and rule of law that is territorial of a different sort. Rather than a geographical division this is a disciplinary one; on the subject of law, political science and anthropology have different theoretical frameworks and methods of inquiry. This paper argues that the analytic lens of anthropology can reconceptualize these issues allowing us to think anew such stumbling blocks to international relations as the universalism/relativism impasse of the human rights debate, the legitimacy and accuracy of "Asian values," and the difficulties China has faced in institutionalizing a rule of law recognized by the international community.

**Part I: Human Rights of and for China  
The Impasse of the Universalism/Relativism Debate**

Although the argument as laid out here assumes the rule of law as a necessary precondition for the florescence of human rights, because many of the conceptual tools deployed in discussions on human rights and rule of law first gained currency in debates on the former, human rights will be considered first followed by the rule of law so that the recasting of the human rights debate in anthropological terms can shed new light on problems concerning the rule of law. First, the premises of the universalism/relativism debate will be considered as it applies to the case of China and then an anthropological analysis of these arguments.

"Ours is the age of rights. Human right is the idea of our time, the only political-moral idea that has received universal acceptance"<sup>1</sup> so begins Louis Henkin's seminal work. Writing as a constitutional lawyer, Henkin argues that individual rights are the province of every human being irrespective of culture or society. Even though the concept of human right was developed out of natural rights theories from Locke to Rousseau to Jefferson, contemporary human rights does not ground itself in the idea of natural law.<sup>2</sup> In their most literal sense, human rights are, according to political scientist and expert on human rights Jack Donnelly, "the rights that one has simply because one is human."<sup>3</sup> However, there exist several kinds of rights, whether political, civil, economic, social, cultural, and so on,

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<sup>1</sup> Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), xvii.

<sup>2</sup> I wish to foreground the idea of natural law for it is pivotal in cross-cultural understandings of law. Henkin's assertion that human rights law, as it now functions, has somehow disarticulated itself from its beginnings in Anglo-American legal theory is a troubling one. He wishes to locate human rights as immanent in a person's being in the world, as part of his or her nature as a person and as a member of a larger society. At the same time, Henkin resorts to positing human rights as deriving from "accepted principles" (2) which introduces a norm that can be contested for its cultural (in this case, Eurocentric) moorings. Henkin wants to distance his exposition of human rights from exactly such criticism. But because he fails to clearly explain how human rights as immanent in human being have become detached from their underpinnings in Anglo-American political theory, his argument suffers from a less than sound foundation. Because the concept of natural law will be mentioned throughout this paper, I offer one definition (from American law) here. *Black's Law Dictionary* defines natural law as: a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his *nature*, meaning by that word his whole mental, moral, and physical constitution. From: Henry Campbell Black, *Black Law's Dictionary* (St. Paul, MN: West Group, 1990), 1026.

<sup>3</sup> Jack Donnelly, "Human Rights and Asian Values: A Defense of 'Western' Universalism," in *The East Asian Challenge for Human Rights*, ed. Joanne R. Bauer and Daniel A. Bell (Cambridge: Cambridge University Press, 1999), 61.

and different societies emphasize certain of these rights over others. Henkin advances that it is the imperative of the international human rights regime to produce a body of laws which are inclusive to meet the needs of all societies. He further claims that the movement largely accomplished this requirement with the *Universal Declaration of Human Rights*, adopted by the United Nations General Assembly in 1948. All member nations have agreed to uphold the declaration and although the document itself does not have the binding power of a treaty, it has "proved to be a giant step in the internationalization of human rights."<sup>4</sup> Others have said that the value of internationalized human rights cannot be reduced to their legal embodiments for universal human rights persist as *social ideas* to provide moral energy to enforce claims to which they give rise.<sup>5</sup>

The alleged inclusivity of the human rights regime, its emphasis on individual as opposed to communitarian rights, and the Western values and ideals expressed in its declarations and covenants - these are all objections raised by the relativist argument. The relativist argument underscores the historically and culturally contingent nature of human rights discourses;

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<sup>4</sup> Henkin, *The Age of Rights*, 19. Although the *Universal Declaration of Human Rights* is non-binding it is important to note that some of its later covenants (e.g., the 1966 *International Human Rights Covenants*) are enforceable under international law. From: Marvin E Frankel, *Out of the Shadows of Night: The Struggle for International Human Rights* (New York: Delacorte Press, 1989) 154. Donnelly, *Human Rights and Asian Values*, 64.

<sup>5</sup> Owen M. Fiss, "Human Rights as Social Ideas, in *Human Rights in Political Transitions: Gettysburg to Bosnia*, eds. Carla Hesse and Robert Post (New York: Zone Books), 266.

human rights, then, become a social construct, a product of a *particular* society at a *particular* moment (in this case, post-World War II Europe). The relativists reject the notion of a unified human subject, of knowable essence; "[t]here can be no essential characteristics of human nature of human rights, which exist outside of discourse, history, context or agency."<sup>6</sup> Furthermore, the relativists align universal human rights with colonialism and imperialism as yet another project of Western hegemony. Human rights become a vanguard of a new cultural imperialism that seeks to override the sovereignty of non-Western countries and supplant indigenous traditions with one that is "internationalized" - a euphemism for "Western."

Discourses on human rights, in political theory and in its referent in "the world of affairs" - diplomacy and international relations - cannot escape the sorts of dichotomies created by proponents of universal human rights and their relativist counterparts, who privilege cultural difference and self-determination. As Richard Wilson writes, there are two issues at stake in the debate: one, what concept of human ontology is to be used and which rights extend from that view of nature; and two, how much significance should be given to the notion of culture in deliberating the normative moral order and to what degree does diversity in justice systems and models of

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<sup>6</sup> Richard A. Wilson, "Human Rights, Culture and Context: An Introduction," in *Human Rights, Culture and Context: Anthropological Perspectives*, ed. Richard A. Wilson (Sterling, VA: Pluto Press, 1997) 4-5.

jurisprudence refute universalisms?<sup>7</sup> The universalists present their conceptualization of human rights, as exemplified in the *Universal Declaration*, as consonant with human nature everywhere whereas the relativists contend that such an approximation of human nature is precisely a product of a certain mode of thinking conditioned by Western culture. The irresistible force (of universal human rights) encounters the unstoppable juggernaut (of cultural relativism). A turn to anthropology for a more nuanced understanding of political culture by taking a closer look at "Asian values" will help redefine the criteria by which the universalist/relativist debate is assessed.

### **An Anthropological Deconstruction: "Asian Values" as Neither Asian nor Values**

The most cogent relativist argument comes from intellectuals and officials in East and Southeast Asia; this is the self-described "Asian values" argument. A relatively new concept in political parlance, "Asian values" comprise a kind of Pan-Asianism that isolates and identifies certain values as axial elements that are shared by Asia at large. These essential cultural elements consist mainly of Neo-Confucian ideas relating to the ethics of good governance and the moral relationships between government and populace. Currently, the primary goal of East and Southeast Asian governments is to

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<sup>7</sup> Wilson, *Human Rights*, 3.

facilitate industrialization and economic growth, nearly at any cost. This translates into a focus on economic and social rights to ensure basic access to means of subsistence during modernization. To effect these goals, East and Southeast Asian governments' national sovereignty is absolute and unfringable; matters of law and punishment remain a domestic concern only. As a corollary, while economic and societal rights are highlighted, the governments curtail political and civil rights, as potential impediments to the implementation of state policy.<sup>8</sup> This combination of Neo-Confucian tradition, emphasizing authoritarian government and collective responsibility, along with the exigencies of development render the governance of these Asian countries incompatible with the values of liberal democracy.<sup>9</sup>

"Asian values" derives from several over-lapping and mutually-generating sources. In the past decade, ex-Prime Ministers Lee Kuan Yew of Singapore and Mohammad Mahathir of Malaysia, and numerous Chinese officials have advocated "Asian values."<sup>10</sup> Although Lee Kuan Yew has been associated by some

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<sup>8</sup> Wm. Theodore De Bary, *Asian Values and Human Rights* (Cambridge, MA: Harvard University Press, 1998) 1-2. Donnelly, *Human Rights and Asian Values*, 69-74.

<sup>9</sup> Inoue Tatsuo, "Liberal Democracy and Asian Orientalism," in *The East Asian Challenge for Human Rights*, eds. Joanne R. Bauer and Daniel A. Bell (Cambridge: Cambridge University Press, 1999) 27-8.

<sup>10</sup> In 1991, Lee Kuan Yew said that Asians have "little doubt that a society with communitarian values where the interests of society take precedence over that of the individual suits them better than the individualism in America." From: Joanne R. Bauer and Daniel A. Bell, "Introduction," In *The East Asian Challenge for Human Rights*, eds. Joanne R. Bauer and Daniel A. Bell (Cambridge: Cambridge University Press, 1999) 6. In 1996, Prime Minister Mahathir told heads of European governments that, "Asian values are universal

with "Asian values," primarily because of his contribution of the "Lee thesis" - a part of the "Asian values" argument - which claims that political and civil rights halt economic prosperity,<sup>11</sup> Chinese support of "Asian values" has been instrumental. Both Lee and Mahathir invoke Confucian ideals in their articulation of "Asian values"; Confucianism as the official ideology of imperial China since the Han dynasty beginning in 202 BC through the fall of the Qing in AD 1911 exerted undeniable influence in political and social life throughout East Asia.

While non-Chinese advocates of "Asian values" use traditional Chinese ideology to buttress their claims of cultural difference from the West, at the same time, the Communist Central Party is a central participant in the expression of "Asian values." Scholars have identified the Chinese government's official human rights doctrine as a paramount underlying motive in much of the "Asian values" argument.<sup>12</sup> An examination of the 1991 *White Paper on Human Rights in China*, which presented the official Chinese view of human rights, demonstrates the way in which the Chinese government gave substance to "Asian values" without resorting to

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values. European values are European values." From: Samuel P. Huntington, *The Clash of Civilizations*, (New York: Simon & Schuster, 1996) 104. Chinese support for "Asian values" takes a less explicit, but I argue, much more pervasive form.

<sup>11</sup> Amartya Sen, "Human Rights and Economic Achievements," in *The East Asian Challenge for Human Rights*, eds. Joanne R. Bauer and Daniel A. Bell (Cambridge: Cambridge University Press, 1999) 91.

<sup>12</sup> See, for example: Tatsuo, *Liberal Democracy*, 34.

the combative language of Singapore's Lee or Malaysia's Mahathir. After the events of the Democracy Movement in 1989, the world's collective gaze centered on the Chinese government and the now apparent divide between its rhetoric and the reality of the human rights situation in the country. Along with sponsoring a number of academic research projects, the Chinese government issued the *White Paper* to address concerns about its current policies and future direction in regards to human rights. While the *White Paper* endorses the accomplishments of the international human rights movement, support of the human rights regime is qualified by a relativist allusion to cultural difference and specifically China's own response to human rights. After recounting the oppression the people of China suffered under the "three great mountains" of imperialism, feudalism, and bureaucrat-capitalism, the *White Paper* affirms the milestone of the establishment of the People's Republic. While the practice of human rights remains important, "the evolution of the situation in regard to human rights is circumscribed by the historical, social, economic and cultural conditions of various nations, and involves a process of historical development." Moreover, China has devised its own viewpoints on the human rights issue. Chinese human rights are characterized by three traits:

First, extensiveness. It is not a minority of the people or part of a class or social stratum but the entire Chinese citizenry who constitutes the subject enjoying human rights. The human rights enjoyed by the Chinese citizenry encompass an extensive scope,

including not only survival, personal, and political rights, but also economic, cultural, and social rights. The state pays full attention to safeguarding both individual and collective rights. Second, equality. China has adopted the socialist system after abolishing the system of exploitation and eliminating the exploiting classes. The Chinese citizenry enjoys all civic rights equally irrespective of money and property status as well as of nationality, race, sex, occupation, family background, religion, level of education, and duration of residence. Third, authenticity. The state provides guarantees in terms of system, laws, and material means for the realization of human rights. The various civic rights prescribed in the Constitution and other state laws are in accord with what people enjoy in real life.<sup>13</sup>

Because it appropriates the language of the human rights regime and recasts it in a mold unique to Chinese culture (e.g., individual *and* collective rights, equality through socialism, etc.), the *White Paper* is a foundational text of relativizing "Asian values."

Moreover, the *White Paper* served as model for what has become the quintessential document of "Asian values": the *Bangkok Declaration*. The United Nations World Conference on Human Rights, held from 14-25 June 1993 in Vienna, brought together representatives of 171 states to present to the international community a common plan for strengthening human rights work around the globe. It culminated 45 years of review and assessment of the aspirations and goals set forth by the *Universal Declaration*. The World Conference further marked the beginning of a recommitment in the effort to further implement the body of human rights instruments founded with the *Universal Declaration*. In preparation for the World Conference, three key

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<sup>13</sup> Information Office of the State Council, "White Paper on Human Rights in China (1991)," In *The Chinese Human Rights Reader*, eds. Stephen C. Angle and Marina Svensson (Armonk, NY: M.E. Sharpe, 2001) 356-357.

regional meetings were held in Tunis, San José, and Bangkok to produce declarations detailing specific concerns of the African, Latin American, and Asian regions, respectively.<sup>14</sup> The regional meeting in Bangkok provided newly confident Asian regimes with a forum to grapple with human rights issues and, by so doing, leave their mark on a process they thought of as regulated by Western interests.<sup>15</sup> The resulting document, the *Bangkok Declaration*, uses what Inoue Tatsuo calls "the balanced approach," a rhetoric of euphemisms and calculated deference to UN ideals.<sup>16</sup> Article 8 of the *Declaration* typifies this balanced approach; it reads: "[The signatories] recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural, and religious backgrounds."<sup>17</sup> As with the *White Paper*, the *Bangkok Declaration* asserts an essential difference between the conceptions of human rights shared by Asian countries and those of the original architects of the international human rights regime. This brief "documentary genealogy" shows that "Asian

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<sup>14</sup> Office of the High Commissioner for Human Rights, *World Conference on Human Rights* [<http://193.194.138.190/html/menu5/wchr.htm>] (United Nations General Assembly [cited April 13 2003]).

<sup>15</sup> Liu Hanqiu, "Vienna Conference Statement (1993)," in *The Chinese Human Rights Reader*, eds. Stephen C. Angle and Marina Svensson (Armonk, NY: M.E. Sharpe, 2001), 390.

<sup>16</sup> Tatsuo, *Liberal Democracy and Asian Orientalism*, 34.

<sup>17</sup> Office of the High Commissioner for Human Rights, *World Conference on Human Rights: Report of the Regional Meeting for Asia of the World Conference on Human Rights* [<http://193.194.138.190/html/menu5/wcbangk.htm>] (United Nations General Assembly [cited April 13, 2003]).

values" presently constitutes the main relativist critique of universal human rights and does so by arguing that Asian nations share a culture - whether traditions or contemporary responses to the challenges of modernization - that differentiate them from the West and changes the terms by which the machinery of the human rights regime affect their domestic affairs.

Because anthropologists take as their subject of study cultural difference, the cultural dissent operating on various levels in relativism, in general, and "Asian values," in particular, presents the anthropologist with a sort of analytic widow onto the legal terrain of the universalism/relativism debate. Social-cultural anthropologists Sally Engle Merry and Richard Wilson, on both sides of the Atlantic, have written about the stereotype of anthropologists (largely stemming from misinterpretations of the 1947 statement of the Executive Board of the American Anthropological Association raising concerns about the *Universal Declaration of Human Rights*) as "cultural absolutists," mouthpieces for extreme cultural relativism and tolerance for even socially and bodily harmful cultural practices (e.g., female genital mutilation, torture, dismemberment as corporal punishment, etc.).<sup>18</sup> Far from being the case, as Merry goes on to argue, the anthropological position in 1947 and now is "not the defense of all cultural

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<sup>18</sup> Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, *Political and Legal Anthropology Review*. 26(1) May 2003: 55-6. Wilson, *Human Rights*, 2-3.

practices but a more nuanced recognition that tolerance of difference [is] one of several important ethical considerations . . . ."<sup>19</sup> In her discussion on women's rights, Merry demonstrates how the problem between human rights lawyers, on the side of universalism, and anthropologists, placed in the camp of relativism, lies mainly in an outdated conception of culture held by legal professionals. Law conceives of cultures as unitary, discreet, monochromatic, and bounded units whose interaction produces friction - or worse - "clashes." Culture is seen largely as bound to the past and is equated with tradition. Obstacles to rights are often located by human rights lawyers in the domain of beliefs and values within a hermetically sealed culture. Paradoxically, the end result is often the co-optation of this understanding of culture by political elites, in the guise of preservationists of cultural tradition, who then deploy law to protect their interests against women.<sup>20</sup>

As Merry argues in relation to law, political science also essentializes culture. For example, Henkin lauds the international human rights movement as a "Zeitgeist," a word which derives from an obsolete (yet popular) conception of

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<sup>19</sup> Merry, *Human Rights*, 57.

<sup>20</sup> Merry, *Human Rights*, 66. For a lawyer's response to Merry's critique of the essentialization of culture by international human rights lawyers that largely concurs with and builds upon Merry's argument, see: Madhavi Sunder, *(Un)disciplined*, *Political and Legal Anthropology Review*. 26(1) May 2003: 77-85. Sunder provides the insight on the expropriation of law (and its understanding of culture) by political elites to continue regimes of oppression.

culture deriving from German romanticism. As a result, certain dominant strands of legal and political theory (through a mobilization of such conceptual weaponry as human rights, democratization, civil society, popular participation) posit modernity against culture. Although politics is the study of power no matter where it resides, too often culture, from the vantage of political science, is presumed to be 'powerful' only as far as it is a source of tradition-bound oppressiveness. Rather, anthropologists eschew a stagnant and static view of culture; instead of regarding culture as a uniform, anthropologists seek to consider its many flows that cross borders, localities, nationalities, ethnicities, ideologies, and so on. Consequently, cultures are dynamic, synergistic, and *continuously internally contested*.

This comparison elucidates some of the key conceptual differences between political scientists and legal scholars, on the one hand, and anthropologists, on the other. The differences in methods of approaching culture are important to keep in mind in returning to the appraisal of "Asian values." Globalization theory à la Appadurai holds that nation-states are under siege in their efforts to constantly produce identity and locality - "a structure of feeling, a property of social life, and an ideology of situated community" - in this current era of global capitalism, electronic media, and diasporic

subjectivities.<sup>21</sup> In this light, China's defense of "Asian values" marks such an attempt to produce and reproduce some essence of "the local" vis-à-vis the interpenetration of universal human rights. Human rights, in this sense, ride on a wave of the global trade and market economies with which China needs to engage if it wishes to modernize on par with the (post)industrial nations of the West. Appadurai views this "rupture," and the subsequent questioning of identity, as one between tradition and modernity.<sup>22</sup> With China developing at a rate and on a scale never before seen in the world, proponents of universal human rights contend that these conditions of industrialization are exactly parallel with those that necessitated the introduction of human rights in western nations a generation or two earlier. Therefore, China, too, should adopt these strategies to cope with the social, economic, and political disruptions that accompany modernization. Whereas universalists emphasize the "modernity" side of the rupture, relativists give more weight to tradition, or more specifically, culture-as-tradition.

"Asian values," however, which is the most articulated expression of relativism, commits the error it attributes to universalism; "Asian values" essentializes culture and uses it against what is perceived as a western modernity. Although

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<sup>21</sup> Arjun Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis: University of Minnesota Press, 1996) 189.

<sup>22</sup> Appadurai, *Modernity*, 3.

there are many ways to deconstruct the fallacious reasoning of "Asian values;" three interrelated approaches will be considered here: the misappropriation of Confucianism by "Asian values," its self-Orientalization, and finally its co-optation of culture as conceived by the practitioners of international human rights and political theory.

First, in its efforts to cultivate a political culture that valorizes authoritarian government, the current regime has misapplied Confucian doctrine of good governance. In his insightful *Asian Values and Human Rights* (1998), Chinese intellectual historian, William Theodore de Bary explains that the Chinese Communist Party, at the reigns of "Asian values" discourse, which alleges to protect and further Confucian communitarian ideals, actually directly militates against them. In his analysis, de Bary makes the important distinction (to which we will return later) between ideas and their practice. He says, ". . . the weakness of many discussions of China, Confucianism, and human rights, is that they tend to operate purely on the conceptual level - attempting to compare or contrast values in the abstract, rather than seeing how they have been observed and experienced in time, in a developing historical process."<sup>23</sup> This is an important insight and differentiates his discussion on human rights in China from many others; at the same time, his treatment of Confucianism and

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<sup>23</sup> De Bary, *Asian Values*, 22.

authoritarian governments elides much of the imperial Chinese invocation of Confucianism for exactly the purpose of authoritarian control. Emperors such as Wudi of the Han Dynasty (141-87 BC) who established Confucianism as the state ideology had very little trouble equating it with authoritarianism. However, de Bary convincingly traces out elements of "the communal" in early Chinese society to demonstrate that they existed outside of and in opposition to the central power. After reviewing the social implications of such communities as schools and community compacts, he concludes, "[c]ommunitarianism cannot be claimed for the state, as it is today, in the name of Confucius."<sup>24</sup> Thus, the emphasis by the Chinese government on community rights, in the name of tradition, seems misguided.

The second approach to the deconstruction of "Asian values" begins where the first left off. If Confucianism as one of - if not the - most influential strands of intellectual thought constituting Chinese tradition did not subvert the individual beneath the collective, then where do the authors of "Asian values" obtain this idea? An answer lies paradoxically in their acceptance of the representation of the "Orient" created by western writers. In his landmark text *Orientalism* (1978), Edward Said purports to show the ways in which academics and literati of the West projected onto Asian countries a

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<sup>24</sup> De Bary, *Asian Values*, 88.

representation that subjected the Orient as the Other of the West. This discourse galvanized, legitimated, and reproduced the moral, political, and economic imperative of imperialism. The effect was to create a body of knowledge that homogenized and exoticized Asia as a monolithic entity whose values were dissonant with that of the Enlightened West.<sup>25</sup> Although, as has been shown in the critical literature on *Orientalism*, Said's thesis itself commits several generalizations, the idea of the Orientalizing project has certain merit in considering the efficacy of "Asian values." "Asian values" is the very distillation of Orientalism: a representation of "Asia" as one unit which is internally composed of a constitutive set of criteria in the form of beliefs (i.e., community, tradition, cohesiveness, harmony among others). Except, instead of western colonialists representing Asians, now it is the Asian advocates of "Asian values" who have ingested, internalized, and now regurgitate that very representation. Inoue Tatsuo writes

Orientalist dualism is disguised as an empirical generalization, but in fact it is a transcendental scheme for interpreting data that justifies the observer in disregarding any counterexample as meaningless anomaly and thus blinds him or her to the internal diversity and dynamic potential. It is an epistemological device for guaranteeing Western hegemony over Asia.<sup>26</sup>

China, of course, *is* internally diverse and dynamic. China cannot be reduced to one ideology (Confucianism), one nationality (Han), one economic mode of production ("socialist

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<sup>25</sup> Edward W. Said, *Orientalism* (New York: Vintage Books, 1978).

<sup>26</sup> Tatsuo, *Liberal Democracy*, 39.

capitalism") and so on. The spokespeople of "Asian values" do themselves violence by portraying "Asia" as such.

Finally, we can see linkages between the discourse of human rights practitioners and political theorists and the discourse of "Asian values." As Merry and Sunder illustrate in their debate, culture is often seen as a barrier to progress. Culture, as synonymous with customs, traditions, and ancient practices, is opposed to emancipated thought itself and specifically human rights. While academics and lawyers might cultivate these ideas, political elites are receptive to them and use them advantageously. Merry is quick to show that it is more the ivory tower academic and international lawyer working in the polished halls of a European or American metropolis, and not activists and ethnographers on the ground, who produce these ideas.<sup>27</sup> The effect, then, is a sort of feedback loop by which the legal and political theoreticians and political elite produce and consume each others' rhetoric. Meanwhile, it is the people left out of the loop - whose interests are not expressed in either essentialized notions of culture or monolithic "Asian values" who go left unheard.

To conclude this discussion of human rights and "Asian values" in China, we can see that "Asian values" falls short in its relativist critique of universal human rights. In arguing that there is no unified subject and human rights are an import

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<sup>27</sup> See: Merry, *Human Rights Law* 68 and Sunder *(Un)Disciplined* 79.

of the imperial West, "Asian values" presents a homogenous mass of "Asians" which is itself a relic of Orientalism, a discourse produced by western colonialists. "Asian values" deconstructs itself. "Asian values" as articulated is not a sufficient rebuttal of universal human rights, but this is not to say that there is not an argument against the vision put forth by the international human rights regime. In fact, as has been shown, the legal and political theorists of the human rights regime continue to misapprehend the complexity, efficacy, and viability of cultures. Still, China remains at odds with the idea of human rights as put forth by the international community. To begin to speculate as to the directions Chinese policy will take on the issue of human rights, we must broaden our discussion beyond human rights to the rule of law in order to develop a working picture of China's attitude toward law for as Franz Michael has said, the "[r]ule of law is the very foundation of human rights."<sup>28</sup>

**Part II: Toward a Rule of Law 'with Chinese Characteristics'  
The Rule of Law as Precondition for Human Rights**

The question today on the minds of academics, policy experts, potential investors and businesspeople, and students of law is: will China develop a sustainable rule of law? Whether for international trade or public interest law, the emergence of

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<sup>28</sup> Ronald C. Keith, *China's Struggle for the Rule of Law* (New York: St. Martin's Press), 8.

an internationally recognized rule of law in China has profound implications. To frame the question as an object of analysis, it is useful to adopt the heuristic of globalization theory: the dialectic between "modernity" and "tradition." To briefly recapitulate the arguments of the human rights debate, the universalists stress the grappling of the nation-state with the demands of development and industrialization as the main determinant of the form political and social institutions take vis-à-vis modernity. Because the conditions and stresses of modernization are common across the globe, the response will similarly be uniform. The relativists, on the other hand, posit traditional culture as obfuscating cross-cultural conformity. The unique nature of each society elicits equally unique responses. To forecast the assertions below, neither modernity nor tradition presage the future of China; instead, China's singular engagement with modernity, informed in part by its own legal traditions, comprises the dialectic from which emerges a rule of law "with Chinese characteristics." What follows is an analysis of the factors which affect the development of modern Chinese law from the perspective of political scientists. As a result of the methodology of political science in conducting cross-cultural analysis, this perspective more often than not takes the form of *analogic* reasoning and consequently locates gaps and absences in traditional as well as contemporary Chinese law. This overview will be followed by an

anthropologically-informed analysis of Chinese ways of seeing and practicing law which seeks to foster what could be called *dialogic* reasoning.

### **The Denigration of Law in China: Views From Political Science**

To trace the trajectory of a possible emergent rule of law, political scientists have considered, in general terms, two analytical terrains: first, the impact of traditional (dynastic, imperial) Chinese law on the development of modern law and, second, the two sometimes-competing, sometimes-complimentary sources of law in the twentieth-century. This division of scholarship on Chinese law is admittedly arbitrary; these are not discreet dimensions of inquiry but they overlap considerably. However, these discussions more often than not work on the basis of analogies from West to East. That is, in the classic comparative method, correlations are sought between specified components of Anglo-American legal systems and their corresponding Chinese counterparts. And, often, the Chinese legal system is found wanting. While there is some disagreement in their synopses on emergent rule of law in China, it is important to examine the comparative method of political scientists as it is through the logic of this standpoint that politics are practiced by their counterparts in the world of affairs.

Many discussions on Chinese law in the literature of political science begin with China's traditional law. In such

analyses, the first question asked is often "what impact, if any, does traditional law have on the formation of a viable rule of law in China today that meets the criteria of the international community."<sup>29</sup> The second question invariably follows, "does China have a 'legal tradition'?" Drawing upon the works of legal historians, scholars of political science locate a recognizable beginning of law in China during the Warring States period (403-221 BC) during the dissolution of the Eastern Zhou. It was at this time that men of learning began to discuss new strategies of statecraft in what has been called the "hundred schools of thought contended." It is with 'the hundred schools' that the political philosophies of Confucianism and Legalism attained the depth and breadth which are now accorded to them. These schools of thought, and the debate between them, largely determined Chinese attitudes towards the role of law in society; Burton Watson, the translator of the *Shih chi*, the dynastic history of the Han Empire, writes, "most of the history of the following two thousand years of Chinese political

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<sup>29</sup> John Borneman offers a standard definition of "the rule of law" as ideal type by listing seven common criteria: "1) separation of powers within a state, in particular the separation of the executive from the judicial branch; 2) legality, implying that (a) the people's representatives adopt the law, (b) statutes find general application, and (c) the legislature itself is bound by the legislation; 3) sovereignty of statute law; 4) the prohibition of excesses of state authority, or a principle of proportionality of crime to punishment; 5) an independent judiciary; 6) ban on retroactive legislation in order to foster predictability and legal certainty; 7) trust in the lack of arbitrariness in the law's application." He continues, "Although these principles provoke resistance everywhere, in no contemporary culture are they totally foreign." From: John Borneman, "Responsibility after Military Intervention: What is Regime Change?" *Political and Legal Anthropology Review* 26(1), May 2003: 36-7.

philosophy is concerned with the struggle between the exponents of these two rival theories of rule."<sup>30</sup>

First, we will address Confucianism followed by its Legalist critique. Confucius (traditional dates, 551 to 479 BC) lived in a period of dynastic decline and endemic warfare that would result in the Warring States. He saw around him, exemplified in the rulers, the degradation of traditional values as men forsook familial obligations, ancestor worship, and filial piety for self-aggrandizement, territory, and power. Confucius viewed this moral decline as a crisis of civilization<sup>31</sup> and sought his philosopher-king. While Confucius never found the morally superior ruler, a century later, such would-be rulers welcomed scholars to their courts, men like Confucius's successor, the populist and humanist Mencius (c. 370 to c. 300 BC) and Xunzi (c. 310 to c. 220 BC) who grounded his conception of human worth and government, to a degree greater than Mencius or even Confucius, in visible realities. These philosophical descendants of Confucius elaborated on the principles of human action and their relation to the phenomenal and incorporeal worlds which Confucius had developed. Key among these concepts is *ren*, which de Bary translates as "humaneness,"<sup>32</sup> Hsiao as

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<sup>30</sup> Ssu-ma, Ch'ien. *Records of the Grand Historian of China Vol. 1*. Translated by Burton Watson. 2 vols. Vol. 1: Early Years of the Han Dynasty 209 to 141 BC (New York: Columbia University Press, 1961) 313.

<sup>31</sup> Wm. Theodore and Irene Bloom De Bary, ed., *Sources of Chinese Tradition*, vol. 1 (New York: Columbia University Press, 1999), 42.

<sup>32</sup> De Bary, *Sources*, 43.

"benevolence,"<sup>33</sup> and Schwartz as "social virtue."<sup>34</sup> The Confucian king was justified in his rule by his possession of this essential ethicopolitical quality. It was the moral imperative of the ruler to foster *ren* within the population. This inner morality was mirrored by the *dao* which provided the normative social, political, and moral order that regulated all life. A third Confucian concept is that of *li* ("rites") which harmonizes the internal *ren* of the ruler, as head of state, with the natural order of the *dao*.

The goal of the Legalist reformers was not to revive the ancient rites but instead to formalize clear, public laws that would apply to all members of society, including the ruler.<sup>35</sup> They propounded institutional structures rather than the moral worth of the king as the vehicle for effective government.<sup>36</sup> They concentrated far less on the abstractions of spiritualisms like the *dao* as exhibited by other schools; instead, they directed all their energies to pragmatics, principally through authoritarian rule. Legalism attained prominence with the short-lived Qin Empire (221-206 BC) that was the first state to unify China under one ruler - mainly through its adherence to strict laws and yet it was the very harshness of Qin laws that

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<sup>33</sup> Kung-chuan Hsiao, *A History of Chinese Political Thought*, trans. F. W. Mote (Princeton: Princeton University Press, 1979), 103.

<sup>34</sup> Benjamin I. Schwartz, *The World of Thought in Ancient China* (Cambridge: Belknap Press of Harvard University Press, 1985), 75.

<sup>35</sup> Karen Turner, "Sage Kings and Laws in the Chinese and Greek Traditions," in *Heritage of China: Contemporary Perspectives on Chinese Civilization*, ed. Paul S. Ropp (Berkeley: University of California Press, 1990), 92.

<sup>36</sup> Patricia Buckley Ebrey, *The Cambridge Illustrated History of China* (Cambridge: Cambridge University Press, 1996), 51.

incited rebellion and its eventual collapse. Vital to our present discussion, both Confucianism and Legalism denigrated law; the former viewed law as unnecessary and a characteristic of a morally-debased society while the latter used law solely as an instrument of state power to ensure authoritarian control.<sup>37</sup>

Political science scholarship has taken up the denigration of law in traditional Chinese political philosophy and society. Some analyses emphasize the dichotomy between the rule of man (*renzhi*) and the rule of law (*fazhi*). Karen Turner has written extensively about this crucial opposition of law versus leadership.<sup>38</sup> She has stated that this problem of prioritization has taken on a particular urgency since 1978 with the beginning of legal reform. Similarly, J.J. Spigelman argues that the preference for the rule of man over that of law engenders the rule by law which is itself an artifact of the law-as-instrument mentality of Legalist thought.<sup>39</sup>

Work by Hyung I. Kim makes the comparison to Western legal traditions explicit; Kim's *Fundamental Legal Concepts of China and the West: A Comparative Study* (1981) best exemplifies the

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<sup>37</sup> See, for example: Hsiao, *A History of Chinese Political Thought*, 418.; Turner, "Sage Kings and Laws in the Chinese and Greek Traditions," 89.; Yongping Liu, *Origins of Chinese Law: Penal and Administrative Law in Its Early Development* (Hong Kong: Oxford University Press, 1998), 202.; Randall Peerenboom, "Law and Religion in Early China," in *Religion, Law and Tradition*, ed. Andrew Huxley (New York: RoutledgeCurzon, 2002), 85.

<sup>38</sup> See: Turner, *Sage Kings* and her "Introduction: The Problem of Paradigms" in *The Limits of the Rule of Law in China*. eds. Karen G. Turner, James V. Feinerman, and R. Kent Guy (Seattle: University of Washington, 2000). Interestingly, Turner believes that based upon the country's legal tradition and the policies of the past two decades that China will not soon experience the rule of law.

<sup>39</sup> J.J. Spigelman, *China: Rule of Law or Rule by Law?* [Webpage <http://www.northernlight.com>] (2002 [cited 11/22 2002]).

correlative reasoning deployed by scholars to investigate the rule of law in China. Kim identifies core legal concepts a *posteriori* of the Western canon (primarily, natural law, equity, right and duty) and imposes them on the Chinese tradition to conclude, "such fundamental legal concepts . . . were evident in traditional Chinese thought, and they were the underlying principles of traditional Chinese law."<sup>40</sup> Kim's argument is an exercise in importing "jurisprudential principles," exogenous to China, and systematically mapping them onto the Chinese tradition. There is a sort of violence in this operation; Kim is not oblivious to the dangers of such a method, but nonetheless continues determinately with his project. In addition, to imposing Anglo-American concepts of jurisprudence on what he perceives as the Chinese equivalents, Kim fails to recognize the distinction between ideas and practice, to which de Bary alerted us earlier. One example is provided by his equation of natural law with the Mandate of Heaven. He writes

The concept of natural law is expressed in Chinese thought in such concepts as 'Heaven' (T'ien) . . . And the notions comparable to the natural law concept in the West are expressed in Chinese thought in such ideas as the Mandate of Heaven . . . which was originally a belief in an anthropomorphic God in ancient China, but interpreted later

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<sup>40</sup> Hyung I. Kim, *Fundamental Legal Concepts of China and the West: A Comparative Study* (Port Washington, NY: Kennikat Press, 1981) vii.

as the moral order of Heaven (T'ien Tao) in naturalistic sense.<sup>41</sup>

Not only does he compartmentalize aspects of the Chinese tradition into a certain, predesigned frame, but he does not acknowledge that the Mandate of Heaven described only the relationship between ruler and the source of his ethico-political power; it did not involve the relationship between ruler and ruled and it is this latter relationship to which natural law, in the Western sense, applies.

Ultimately, the consensus view of a Chinese rule of law based upon its past legal institutions is a grim one. With few exceptions,<sup>42</sup> political theorists and policy-makers do not look to China's past for evidence of an indigenous rule of law. Typically, the current status of law in China is seen as deriving from this demeaning of law from tradition; "[t]raditional China held neither law nor lawyers in high esteem" decries the organization Lawyers Committee for Human

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<sup>41</sup> Kim, *Fundamental Concepts*, 25.

<sup>42</sup> See Jonathan K. Ocko (2000) for a counter-argument that Chinese legal tradition offers a more optimistic view for the potential of the institutionalization of the rule of law. From: Jonathan K. Ocko, "Using the Past to Make a Case for the Rule of Law," in *The Limits of the Rule of Law in China*, ed. James V. Feinerman Karen G. Turner, and R. Kent Guy (Seattle: University of Washington, 2000). Also, in that same volume, William Alford presents the idea that the denigration of law in traditional China is due to contemporary scholarship's fascination with the Confucian scholar-official and the sort of rule by moral suasion embodied by Confucians. From: William P. Alford, "Law, Law, What Law?," in *The Limits of the Rule of Law in China*, ed. James V. Feinerman Karen G. Turner, and R. Kent Guy (Seattle: University of Washington, 2000).

Rights.<sup>43</sup> And in his Epilogue to *The Limits of the Rule of Law in China* entitled, "The Deep Roots of Resistance to Law Codes and Lawyers in China," Jack Dull sardonically recounts the murder of "China's first lawyer" Deng Xi (d. 501 BC) who was killed by the chief minister of Zheng after the former authored a code of punishments. Deng's code would later alter the power relationships of the state which troubled the Confucians. So when the Confucian elite cast about for causes of social unrest, Deng's public code (it was written on tripods for all to see) encouraged the people to follow the written laws instead of the rulers, or so they argued. Dull surmises, "Thus, when looking for the root causes of modern China's low opinion of lawyers, the story of Deng Xi should be examined for the source of a deep prejudice, not against laws, but against public laws that could take on a life of their own and be used to challenge the authority of official policies and values."<sup>44</sup>

If traditional China offers no hope for the rule of law, then neither does China of the twentieth-century. The ascension

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<sup>43</sup> Lawyers Committee for Human Rights, *Lawyers in China: Obstacles to Independence and the Defense of Rights* (New York: Lawyers Committee for Human Rights, 1998) 11.

<sup>44</sup> Jack L. Dull, "Epilogue: The Deep Roots of Resistance to Law Codes and Lawyers in China," In *The Limits of the Rule of Law in China*, eds. James V. Feinerman Karen G. Turner, and R. Kent Guy. (Seattle: University of Washington, 2000) 328-329. Of note, Dull's final moral rests upon the assumption that the People's Republic of China is dominated by the same Confucian ideals of 5<sup>th</sup> century BC China. As with the authors of the misnomer "Asian values," China here is reducible to the 'essence' of Confucianism. A theme this present paper seeks to reiterate is that China cannot be melted down to a single ideology, whether (past) Confucianism or (modern) Chinese socialism, nor can it be equated with "ideology" alone; rather, China is a continually contested fusion of ideas and practices, norms and counter-norms, from "tradition" and "modernity," from within and from without.

of Marxist-Leninist communism in 1949 with the Chinese Communist Party did not mark an opportunity for the emergence of the rule of law. Marx viewed law as a tool of the bourgeoisie and as such fosters and sustains class inequities based on private ownership.<sup>45</sup> Mao Zedong, in his reinterpretation of Marxism, would further align law as a tool of class enemies. Mao, instead, would foster rule by man. The Party is the ultimate authority and this attitude towards law remains today.<sup>46</sup> It is this feature of Chinese political life, the Party above the law, more than any other that impedes the emergence of the rule of law in China. Although the different ideologies judge law in their own terms, Marxism-Leninism and Maoism, then, bolster the Legalist (and Confucianist) "statist instrumentalist" view of law: it is a tool to be either discarded or employed to its utmost. In the literature, this conception is consistently juxtaposed to "the [Western] rule of law" as "pluralistic law" in Richard Baum's famous formulation.<sup>47</sup>

Nevertheless, the reign of Deng Xiaoping beginning in 1978 presented a window of opportunity for the rule of law. A pragmatist, Deng realized that an impersonal, objective rule of

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<sup>45</sup> Ronald C. Keith, *China's Struggle for the Rule of Law* (New York: St. Martin's Press, 1994). 10. Against Alford who attributes the denigration of law to primarily Western scholars' infatuation with the anti-legal Confucian scholar-official, Keith writes that Marxism is the impediment to a better understanding of Chinese law. He laments the "a persisting popular assumption that Communist ideology and Marxist-Leninist principles of political organization axiomatically foreclose any genuine development towards a 'rule of law'" (1-2).

<sup>46</sup> Carlos W. H. Lo, "Deng Xiaoping's Ideas on Law: China on the Threshold of a Legal Order," *Asian Survey* 32, no. 7 (1992), 659.

<sup>47</sup> Keith, *China's Struggle*, 7.

law was necessary to facilitate economic stability and development. Accordingly, he sought: legislation, the observance of laws, law breakers to be dealt with accordingly, and strict enforcement beginning with first criminal, civil and economic, and finally administrative law codes. Lo writes, "Deng never concealed the fact that a legal tradition had yet to take root in China . . . What was required, then, was not just a legal education but the socialization of law - nothing less than the forging of a new legal tradition."<sup>48</sup> Ideally, the depoliticization of law would provide procedural and institutional guarantees to safeguard civil and political liberties as well as establish social, economic, educational, and cultural conditions through which individual aspirations could be realized.<sup>49</sup> A comprehensive program of legal reform began in the late 1980s and continues; from 1979 to 1992, the National People's Congress enacted more than 600 laws.<sup>50</sup> China's first Constitution in 1982 requires all governmental organizations to obey the law, but it also affirms the ultimate authority of the CCP.<sup>51</sup> The ideal has gone unmet, however. The Party could not subsume itself to a rule of law and the

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<sup>48</sup> Lo, *Deng Xiaoping*, 656.

<sup>49</sup> Lo, *Deng Xiaoping*, 658.

<sup>50</sup> Minxin Pei, "China's Evolution Toward Soft Authoritarianism," in *What if China Doesn't Democratize?* eds. Edward Friedman and Barrett L. McCormick (Armonk, NY: M.E. Sharpe, 2000), 84.

<sup>51</sup> Stanley B. Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Stanford: Stanford University Press, 1999), 139.

Tiananmen massacre marked the culmination in a return to instrumentalism, with the Party firmly above the law.

In sum, political scientists generally agree that traditional law holds no model for a current rule of law in China; at the same time, it must be observed that in many of these treatments of traditional Chinese law there is an implicit contrast to Anglo-American law. Definitions and concepts cannot easily be placed outside of the Western tradition. The second dimension of investigation into the possibility of the rule of law in China refers to the almost schizophrenic result of the exigencies of centralized political rule, on the one hand, and the pervasive disparagement towards law shared by politicians, scholars, and lay people alike, on the other. As a product of this bifurcation, two sources of law developed in the twentieth-century. The existence of these two models helps explain the difficulties Deng encountered in socializing the Chinese people in a legal culture. At the same time, as part of the subtext of this paper, these dual sources further evidence the penchant for political scientists to conceive of Chinese law in terms of binaries, except now the binary between a China that lacks a rule of law and an unmentioned West that does has been situated within and attributed to modern Chinese legal ontology.

As has previously been noted, the Chinese failed to develop a respect for law or, in other words, a 'legal consciousness' in part because of the belittlement of law as instrument in

traditional and contemporary political philosophies; however, due to the social complexities of governance in the twentieth century, mainly due to China's new role as trade partner with industrial nations, the Chinese government needed a manageable legal system. What emerged is two models which June Teufel Dreyer calls the "jural" and the "societal." The jural model, as exemplified in the judicial system (courts, public trials, rights to defense) concentrates on formalized and codified rules enforced by the judiciary; the societal model focuses on socially approved norms and values. These two models have oscillated, with one assuming predominance for some time, followed by a period accentuating the other, since 1949.<sup>52</sup> Keith calls this the standard Western interpretation.<sup>53</sup> Victor Li adopts a similar dual model which employs an "internal model," stressing education, socialization, informal internalization and indoctrination in state expectations of citizenship and an "external model," based on a formal and written set of rules.<sup>54</sup> The ways in which these models work on the ground falls along similar dichotomized lines. Regarding dispute resolution, the judicial model takes the form of courts which are widely corrupted and therefore disregarded, but according to some studies, are not only gaining in popularity but also endorsing a

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<sup>52</sup> June Teufel Dreyer, *China's Political System: Modernization and Tradition* (USA: Longman, 2000), 163-172.

<sup>53</sup> Keith, *China's Struggle*, 4.

<sup>54</sup> Victor H. Li, "The Evolution and Development of the Chinese Legal System" in *China: Management of a Revolutionary Society* (Stanford: Stanford University Press, 1971), 221.

legal consciousness.<sup>55</sup> The alternative is to have a conflict mediated not by a judge but by Party cadre or neighbors, friends, and family. Forums for this institutionalized paralegal dispute resolution are third-party mediation bodies such as the work units (*danwei*), which are state-sponsored, and Resident Committees, not officially sponsored by the Party but that nevertheless aid government administrative and policing tasks, which operate not on a set of written codes but largely on personal relationships (*guanxi*). These parajudicial bodies for dispute resolution are very active in the day to day lives of Chinese.<sup>56</sup>

In the idea of this two-part model, the indigenous legal tradition is perceived as informal while the formal, judicial model is seen as partially deriving from the West. Formality is often understood as efficacious. The presence of Western law in the development of socialist China is unquestionable; but it is often implied that only the external model can garner a respect of law. In "The Rule of Law Imposed from Outside: China's Foreign-Oriented Legal Regime since 1978," James Feinerman's argument suggests that the Western, external model is the

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<sup>55</sup> See Vivienne Shue's study of Xinji, a small city which she describes as a model of legality. From: Vivienne Shue, "State Sprawl: The Regulatory State and Social Life in a Small Chinese City," in *Urban Spaces in Contemporary China*, eds. Deborah S. Davis, Richard Kraus, Barry Naughton, and Elizabeth J. Perry (Cambridge: Cambridge University Press, 1995), 105-106.

<sup>56</sup> For a sample of the literature regarding dispute resolution and the forums of Resident Committees and *danwei*, see, respectively: James Feinerman, *Dispute Resolution* (Washington, D.C.: Georgetown University, 1993); Benjamin L. Read, "Revitalizing the State's Urban 'Nerve Tips,'" *The China Quarterly*, September 2000 (163): 806-820.; and, Victor Shaw, *Social Control in China: A Study of Chinese Work Units* (Westport, CT: Praeger Publishers: 1996).

understanding of law which can introduce a legal consciousness in the Chinese.<sup>57</sup> As Victor Li and Minxin Pei indicate,<sup>58</sup> China did borrow liberally from Western legal doctrines beginning in 1979. In all these cases though, the formal/external/jural/Western model is perceived as the seed for a Chinese rule of law while the informal/internal/societal/Chinese model is peripheralized and exists as a tradition-oriented backdrop against which imported Western rule of law operates.

In this review of the political science literature on the possibility of rule of law in China, we have seen that the Western perspective cannot easily imagine traditional Chinese law as efficacious in developing notions of respect for law in the population. Since respect for law or legal consciousness is a prerequisite for the rule of law (and the rule of law is a necessary precondition itself for human rights) then traditional and societal legal traditions cannot effect necessary legal reform. Increased importation of Western legal doctrine, as part of China's economic reforms since 1978, is broadly seen as being the sole source of the amelioration of present conditions and as the promise for future adherence to rule of law. The analogic reasoning implicit in these analyses privileges the

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<sup>57</sup> James Feinerman, "The Rule of Law Imposed from Outside: China's Foreign-Oriented Legal Reform," in *The Limits of the Rule of Law in China*, eds. Karen G. Turner, James V. Feinerman, and R. Kent Guy (Seattle: University of Washington, 2000).

<sup>58</sup> See Li, *The Evolution*, 231, and Pei, *China's Evolution*, 84, respectively.

forces of modernity. A too hasty dismissal of traditional notions of law in China, however, cannot fully consider the implications of the dialectical interplay between tradition and modernity. To date, China has not followed the Western<sup>59</sup> trajectory of modernization in the economic sphere. Legal development will be no different and to understand the emergence of the rule of law "with Chinese characteristics" it is paramount to supplement our analytic vantage-point.

### **From Analogic to Dialogic: The Inalienability of Chinese Law**

The analogic mode of comparison, often used by lawyers and political scientists, more often than not ends in an over-privileging of China's reception of pre-formed Western legal concepts and principles which, in turn, tips the scales in favor of "modernity" (in a crude formulation of globalization theory) as the production of local identity through the integration of the modern and the traditional. It is apparent, however, that while China does not share a Western conception and valorization of law, it nevertheless possesses a rich legal history. As has been mentioned above, the Confucian and Legalist philosophies of law and the Qin and Han dynastic codes, but also the Huang-Lao school and even Buddhism as well as the tenth-century Tang and seventeenth- to twentieth-century Qing codes, all have contributed to exceptionally complex and diverse experiments

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<sup>59</sup> The USSR is included as Western in this comparison.

with the advancement of law. It is important to remember that China's first codified legal system under the Qin dynasty (221-206 BC), that was accompanied by a multi-tiered bureaucracy, direct taxation, centralized currency, weights, and measures, and a writing system that was at that time nearly 1,000 years old, was contemporaneous with a Britain that had yet to be settled by the Romans, a France that was dominated by the Celts, and an America that was not even on the map, literally. To say that a predominantly Western-inspired rule of law will take root in China is to neglect this complex legal history. China's move to a rule of law will not take the form of a one-way insertion of Western models, but rather it will take place through gradual exchange, synthesis, and a recombination of elements - indigenous and foreign. Just as China needs to adjust to engage in international relations in the twenty-first century, so too does the international community - and the human rights regime in particular - need to provide a flexible enough framework to include a Chinese legality. The analogic analysis favored by political science posits culture against progress; however, it is the contention here that this exchange will occur through culture. Culture is not flat; it is not something that is inscribed upon. It is instead textured and texturing, responsive and responding in turn.

Legal anthropologists have provided methods of analysis that foreground the process of cultural dialogue rather than

efface it. Bronislaw Malinowski was one of the first anthropologists to write about non-Western legal systems. In his 1926 *Crime and Custom in Savage Society*, an ethnography of the Trobriand Islanders' constant use of and reliance upon binding obligations that function as a kind of law in nearly every aspect of their lives (economic, religious, etc.), Malinowski suggests a very elastic conceptualization of "law." Malinowski warns of the dangers of analogous logic that finds in indigenous society neat parallels of known institutions; these "cannot but be misleading." He continues, "The only correct proceeding is to describe the legal state of affairs in terms of concrete fact."<sup>60</sup> This idea was the focus of the famous mid-century debate between Max Gluckman and Paul Bohannan. Gluckman, the first scholar to study colonial African courts, argued that while Lozi norms were unique to their society, Lozi juridical reasoning relied on "logical principles" shared by all legal systems. Bohannan lambasted Gluckman's conclusions as universalist. He thought that law, like everything else, is part of a culture special to the society in question and "contended that even translating the legal concepts of another society in English terms was a distortion."<sup>61</sup> Although Bohannan deserves credit for his noble motives, he was not living in an

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<sup>60</sup> Bronislaw Malinkowski, *Crime and Custom in Savage Society* (Westport, CT: Greenwood Press, 1984), 19-20.

<sup>61</sup> Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999," *Journal of the Royal Anthropological Institute* 7(1): 95.[<http://library.northernlight.com>]. [cited April 13, 2003].

era that faces the contradictions inherent in the goal of international law to find common ground across cultural difference. Yet perhaps in the present impasse of international human rights law, there is a meeting point between Gluckman and Bohannan. While this sort of excavation of universal "logical principles," or, "jurisprudential principles" to use Hyung Kim's term, commits an injustice to non-Western legal systems, it is possible that laws that are mindful of cultures' encounter with modernity, especially global forms of capitalism, can responsibly and flexibly attune to the hybridized legal neo-traditions that will ensue.

In the spirit of Malinowski, a move to the dialogic mode of analysis through a reconsideration of a central concept of the Chinese legal tradition that has been viewed, unfairly, as an analogue to a Western concept of law can gesture to a different understanding of Chinese law than that which construes it as an "impediment" to universal human rights. Scholars such as Kim have tried to locate a theory of natural law in the Chinese tradition; they have identified the Confucian *li*, *dao*, or the Mandate of Heaven as counterparts to Western natural law theory, but these are forced, inaccurate parallels. Rather, traditional Chinese did not have such a concept of natural law or the law-before-the law that grounded positive law in inherent rights of human nature. In the West, laws were alienated from humanity (as the law-makers); instead, law was associated with divinity

(in the three Abrahamic religions, law was the *deus ex machina* which transmitted divine will), and natural law became these god-granted rights imbued in human nature. In the Chinese tradition, however, law did not become sacred; they remained inalienable. The Chinese never mystified themselves through law. In this sense, the absence of natural law in the Chinese legal tradition is very much a presence. Or, in other words, there are laws but no Law. This fact is crucial in the effort to find a more accurate understanding of "the complex reality of social processes,"<sup>62</sup> that is the mutual constitutiveness between cosmology and socio-political relations. Anthropologist Maurice Godelier explores the alienability or self-mystifying nature of laws in his *Enigma of the Gift* (1996) and the ways in which this very alienability produces society. Based on his fieldwork on the Baruya in Papua New Guinea, Godelier propounds

[o]f course these representations for the Baruya are found in all human societies, including those which attribute the origin of the laws that govern them to the sovereign people rather than to the gods. We are therefore in the presence of a universal phenomenon, of a general mechanism involving more than the unconscious structures of the mind . . . these representations will not be the same, the sacred will have a different nature in accordance with whether the changeless order to which the society ascribes its origins is 'divine' or 'natural.' In the latter case, the 'Law' or laws will be fetishized, and this will take the place of the worship of the father gods and mother goddesses of the human order.<sup>63</sup>

Godelier requires some adjustment. The case of China, with its de-natured sage kings to whom are attributed the origin of laws,

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<sup>62</sup> Annelise Riles, "Representing In-Between: Law, Anthropology, and the Rhetoric of Interdisciplinarity," *University of Illinois Law Review* 1994(3), 615.

<sup>63</sup> Maurice Godelier, *The Enigma of the Gift* (Chicago: The University of Chicago Press, 1999), 124.

would seem to frustrate the universality of law's alienation. Moreover, it would seem that along with political scientists, anthropologists, too are not immune to the siren song of universalism.

It becomes apparent that China presents a unique aberration of the standard formula: society produces law and law produces society. In most cultures, at least according to Godelier, the mystification of the first half (society produces law) enables the second (law produces society). In China's case, however, society's production of law is transparent. Law is not made in Heaven, it is made in China. This understanding of the Chinese phenomenology of law helps explain the traditional instrumentalization of law in its ideologies from Confucius to Mao; the popularity of the "societal" or informal model of law; and the importance of extra-legal mediation and *guanxi*. Lastly, it has implications for the rule of law and dialogue with the internationalized human rights regime. The experience of the Chinese with law does not preclude a rule of law but internationally-recognized legal concepts (i.e., human rights) can be grafted onto existing endogenous understandings, and through this enculturation, made comprehensible to the Chinese phenomenology of law. That is, human rights and Chinese law are not oppositional but complimentary through the dialectical interdigitation of the two.

## **Conclusions and Provocations: The Future of Human Rights in China through the Rule of Law**

The interaction between "traditional" Chinese law and "modern" internationalized human rights will undoubtedly change law in China, at the level of both conceptualization and institutional practice. This dialectic, promised by globalization, however, has been prefigured by an earlier exchange between "traditional China" and "the modern West" which has conflated the two. One of the main contributions of legal anthropology has been the insight that ever since the first studies of indigenous law in the early twentieth-century, indigenous law had already been engaged with colonial law. So the "pure" or "essential" legal tradition (as articulated by "Asian values") has already undergone a hybridization with other legal systems. Since the 1500s, Europeans (Spanish, Portuguese, then Dutch, and finally English) had been trading with southern Chinese ports; the Russians, too, had normalized dealings with the Chinese in the northwest, in Xinjiang, as early as 1689. The Europeans were given special quarters with extra-territorial privileges.<sup>64</sup> The European settlements enjoyed their own legal systems and were not as such subject to Chinese jurisdiction. Through the economic and social interaction of the Westerners

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<sup>64</sup> Ebrey, *Cambridge Illustrated History*, 228, 235.

and Chinese merchants and officials, however, it is quite certain that the Chinese became familiar with Western legal concepts and terminology and vice versa. Furthermore, in the modern era, Victor Li affirms that from the Communist takeover to roughly 1957, there was a definite western influence in Chinese legal institutions.<sup>65</sup> These exchanges and mixings, predated the "arrival" of western or international law in 1978, and blurred the divide between "traditional Chinese" and "modern western" law. This is essentially the idea of "legal pluralism" as developed by legal anthropologists that theorizes law not as a single, unified thing, but as a collage of overlapping practices and norms at the local, national, and transnational level.<sup>66</sup> The Chinese phenomenology of law as inalienable is consonant with these diffusions.

The dialectic is a recurrent process. Most recently, ex-President Jiang Zemin advocated the "rule of law." On November 14, 2002, the 16<sup>th</sup> National Congress adopted a Resolution on the Amendment to the Constitution which reads in part, that a goal of the party is to "rule the country according to law and build a socialist country under the rule of law; and combine the rule of law with rule of virtue."<sup>67</sup> While this statement largely

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<sup>65</sup> Li, *The Evolution*, 226.

<sup>66</sup> Moore, *Certainties Undone*, 11 and Wilson, *Human Rights*, 11. See also, generally: Sally Engle Merry, "Legal Pluralism and Transnational Culture: The Ka Ho'okolokolonui Kanaka Maoli Tribunal, Hawai'i, 1993," in *Human Rights, Culture and Context: Anthropological Perspectives* ed. Richard A. Wilson (Sterling, VA: Pluto Press, 1997).

<sup>67</sup> 16<sup>th</sup> National Congress of the Communist Party of China, 2002. *Full Text of Resolution on Amendment to CPC Constitution*.

falls under the category of 'rhetoric' rather than 'reality' and the Party still remains above the law; it is significant that these ideas have penetrated Chinese legal consciousness, if only rhetorically. In addition to the political discourse, Chinese academics have been debating the rule of law, the rights of citizenship, constitutionalism, and human rights for the past century. For instance, the influential Li Buyun (b. 1933), vice-director of the Human Rights Institute at the Chinese Academy of Social Sciences, along with other academics offer alternatives to a Chinese idea of human rights other than that espoused by the government in the *White Paper*. Although Marxist in orientation, Li Buyun has developed out of Marx a concept of human rights in his idea of "due rights," a ground for human rights independent of the state and yet not derived from western natural law theory. A combination of biological and social natures produce such due rights that concretely exist in practice; legal rights are only justified by referring to these due rights. In a sentiment that faintly echoes that of Jiang Zemin, Li Buyun proposes human rights through a rule of law when he writes, "[t]hanks both to the law's instrumental and moral value, in the current era when human civilization has developed to this high point, we can even say that where there is no law,

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[<http://www.china.org.cn/english/features/48804.htm>] [cited February 22, 2003].

there are no human rights . . . ." <sup>68</sup> Again, there is the fusion of a Chinese "tradition," although, as we have seen, this is a contemporary construction projected backward, and "modernity," another cultural construction, in an interview with Li Hanqiu, renowned historian and member of the Standing Committee of the China Peasants and Workers Democratic Party, who advocates a rule by law and by morality. He says, "[a] wholesale return to ancient concepts is not practical. We should actively establish a socialist ideological and moral system adapted to the development of the socialist market economy, society, science and technology . . . We must integrate the inheritance of the fine tradition with the promotion of the spirit of the times." <sup>69</sup> Refracted through the many facets of traditional law, legal consciousness can foster a respect for human rights. This is the moment of Chinese modernity.

This paper has considered two thematic fields. The first is the emergence of human rights in China through a rule of law recognized by the international community. This gradual process takes the form of the engagement of China's tradition with current globalized vectors of modernization; in truth, China's "tradition" has already engaged with foreign legal systems but will continue to do so as it adopts and adapts Western concepts

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<sup>68</sup> Li Buyun, "Human Rights: Three Existential Forms," in *The Chinese Human Rights Reader* eds. Stephen C. Angle and Marina Svensson (Armonk, NY: M.E. Sharpe, 2001).

<sup>69</sup> Li Jinrong, "Modernizing Country by Law and Morality," CIIC [<http://www.china.org.cn/english/8585.htm>] [cited March 6, 2003].

and institutions in its own terms. The second field moves from analysis to analyst as subject of inquiry and considers the limitations of the political science approach to culture and the rule of law in China. An accommodation between political science and legal anthropology can foster new dialogic and reflexive modes of analysis and move beyond perceived impasses to glean a closer approximation of the paradoxes that characterize political life. Of course, these two fields are interdependent and new inter-disciplinary and international framings of analysis will further the dialogue of the political scientist and anthropologist as well as that of the United States State Department and the Information Office of the State Council.

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