

## POST-WTO CHINA AND INDEPENDENT JUDICIAL REVIEW

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## I. INTRODUCTION

**“Can the Confucian person be transformed into a legal person, and can the Confucian society support it?”<sup>1</sup>**

The accession to the World Trade Organization (WTO) of the People's Republic of China (China) on December 11, 2001, triggered an eclipsing interest in the nomenclature of rule of law.<sup>2</sup> On the brink of modernity, China faces the task of major legal reforms in the hopes of transforming itself into a modern economy and establishing itself as an effective participating member of a global economy where open markets and free trade reign. China's major legislative goals are expressed three fold: “Continuing to revise laws that are not in conformity with China's obligations under the WTO rules; revising laws that are not conducive to enhancing the competitive power of Chinese enterprises in the international market; and improving laws offering protection to domestic enterprises and ensuring industrial safety.”<sup>3</sup> At the forefront of China's on-going legal

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1. Kim Uchang, *Asian Values and Modernity: From Reality to Law*, Korea U., at [http://www.unesco.or.kr/kor/science/project/universal\\_ethics/asianvalues/kim\\_uchang.htm](http://www.unesco.or.kr/kor/science/project/universal_ethics/asianvalues/kim_uchang.htm) (last visited Mar. 26, 2004).

2. Accession of the People's Republic of China, Decision of November 10, 2001, WTO WT/L/32, at 2 (Nov. 23, 2001) [hereinafter *Accession*], available at [http://trade-info.cec.eu.int/doclib/docs/2003/october/tradoc\\_111849.pdf](http://trade-info.cec.eu.int/doclib/docs/2003/october/tradoc_111849.pdf). The Protocol on the Accession of the People's Republic of China was accepted at the Fourth Ministerial Conference of the World Trade Organization in Doha, Qatar on November 10, 2001. *Id.*; Press Release, *WTO Successfully Concludes Negotiations on China's Entry*, WTO Press/243 (Sept. 17, 2001) [hereinafter *China's Entry*], available at [http://www.wto.org/english/news\\_e/pres01\\_e/pr243\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr243_e.htm). The Protocol was accepted by the government of China on November 11, 2001, came into force on December 11, 2001. See *China Officially Joins WTO*, CNN.COM, Nov. 11, 2001, at <http://www.cnn.com/2001/WORLD/asiapcf/central/11/10/china.WTO/>.

3. Wang Baoshu, *China's Accession to the WTO and the Building of a Socialist Market Economic Legal System*, in CHINA: ACCESSION TO THE WTO & ECONOMICS REFORM 331, 338 (Wang Mengkui ed., 2002). “Along with the improvement of China's socialist market economic system, the country's legal system will also be further improved. In essence, a well-established socialist-market legal system is naturally part of a well-established socialist market economic system.” *Id.* Long Yongtu, vice minister, Ministry of Foreign Trade and Economic Cooperation, China states:

Economic globalization is a major trend in the economic development in the world. To merge with the mainstream of the world economy and achieve greater development, China's economy must adapt itself to this trend.

reforms is a tacit globalization imperative of implementing the rule of law.<sup>4</sup>

Despite staggering numbers in trade and affiliate sales, the market access of transnational corporations (TNCs) to Mainland China's consumer market remains a problem and an elemental motivation of TNCs.<sup>5</sup> A problem of TNCs entrance into China's market is that they must employ "barrier-jumping" investments to overcome tariffs and other measures effectively discriminating against foreign traders.<sup>6</sup> It is here that we begin to see the need for the rule of law in China as outlined by the WTO and General Agreement on Tariffs and Trade (GATT).<sup>7</sup> It is a prescription for broad, systemic reforms in the areas of transparency,<sup>8</sup> independent judicial review,<sup>9</sup> and fairness.<sup>10</sup>

China's commitment to the rule of law derives from its acceptance of a key provision in the Protocol on Accession.<sup>11</sup> A

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China's accession to the WTO is being done mainly to be part of the mainstream of the world economy in terms of our economic system and to create conditions for China to take part in economic globalization on a deeper and wider scope.

Long Yongtu, *Negotiations on China's Accession to the WTO and the Market-Oriented Reform*, in CHINA: ACCESSION TO THE WTO AND ECONOMIC REFORM, *supra*, at 32.

4. *Id.* at 32.

5. Zhao Huanxin reports GDP will grow eight percent in 2002. Zhao Huanxin, *GDP to Grow 8 Per Cent in 2002*, CHINA DAILY, NOV. 11, 2002, available at 2002 WL 7171246 (referring to an announcement by Zeng Peiyan, Minister of the State Development Planning Commission, during a press conference at the 16th Party Congress in Beijing). Industrial exports are said to have increased by 16.7 percent per year from 1989 to 2001. *Id.* (referring to an announcement by Li Rongrong, Minister of the State Economics and Trade Commission, during a press conference at the 16th Party Congress in Beijing).

6. Joseph P. Quinlan, *Ties That Bind*, 81 *For. Aff.* 4, 120 (2002).

7. General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS—THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS Vol. 17, 33 I.L.M. 1125, 1167-96 (1994) [hereinafter GATT annex 1B].

8. *See id.* at art. III.

9. *See id.* at art. VI, para. 2 (requiring members to establish "judicial, arbitral or administrative tribunals or procedures" in order to review decisions affecting trade in services).

10. *See id.* at art. VI, para. 1 (requiring members to administer trade in services in a "reasonable, objective and impartial manner").

11. According to the Protocol on the Accession of the People's Republic of China, China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central

WTO Appellate Body Report confirms that a WTO member must establish sound legal mechanisms for implementing its obligations under the WTO Agreement.<sup>12</sup> The implementation of the rule of law is an imperative necessity to both legal reform and economic development.<sup>13</sup> China itself recognizes its obligation and its need to reform its legal system.<sup>14</sup> For China, a well-established, socialist-market economic system requires a well-established, socialist-market legal system.<sup>15</sup>

The view of China from a Western perspective is grounded in Western taxonomies and is in a constant struggle with Sinicism in its insistence to westernize Sinicism. The West must lend more understanding to the jurisprudence that has driven China's legal system over the centuries. The jurisprudence of a nation-state influences the rule of law and mirrors its general culture.<sup>16</sup> Jurisprudence provides an invaluable tool for establishing and evaluating a legal system.<sup>17</sup>

Chinese jurisprudence is a foundational philosophy grounded in antiquity, with Confucianism and Legalism vying

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government as well as local regulations, rules and other measures issued or applied at the sub-national level (collectively referred to as "laws, regulations and other measures") pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights ("TRIPS") or the control of foreign exchange.

Accession, *supra* note 2, at 3.

12. India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, Rep. Of the App. Body, WTO WT/DS50/AB/R, at paras. 57-58 (Dec. 19, 1997), [http://docsonline.wto.org/GEN\\_viewerwindow.asp?D:/DDFDDOCUMENTS/T/WT/DS/50ABR.WPF.HTM](http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDDOCUMENTS/T/WT/DS/50ABR.WPF.HTM).

13. KATHARINA PISTOR & PHILLIP A. WELLONS, ASIAN DEV. BANK, EXECUTIVE SUMMARY: THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1964 16 (1998), available at [http://www.adb.org/Documents/Books/Roleoflaw/Role\\_of\\_Law.pdf](http://www.adb.org/Documents/Books/Roleoflaw/Role_of_Law.pdf).

14. Bashuo, *supra* note 3, at 338.

15. *Id.*

16. See ROBERT L. HAYMAN, JR. & NANCY LEVIT, JURISPRUDENCE: CONTEMPORARY READINGS, PROBLEMS, AND NARRATIVES 5-6 (1995) ("The linguistic definition of *juris prudentia* as 'knowledge of' or 'skill in' law alludes to the enormous scope of its inquiry . . . . Jurisprudence encompasses the study of a legal system's scope, function, methodology, and guiding precepts.")

17. See *id.* The terms jurisprudence, *juris prudentia*, legal history, and legal philosophy, are interchangeable for purposes of this article.

for dominance.<sup>18</sup> An on-going and ageless struggle of competing Chinese philosophical thought persist in modern China, with their influence offering an often neglected dimension to understanding China's legal system. A China in antiquity presents a reality of traditional Chinese philosophy forged into modern Chinese nationalism. Although there are many traditions of Chinese philosophy—Confucianism, Neo-Confucianism, Legalism, Taoism, Ying Yang school, Logicians, Buddhism,<sup>19</sup> and even New Confucians, or third-wave New Confucians<sup>20</sup>—for purposes of this article, a predominating Confucianism is representative of all traditional schools of Chinese philosophical thought. Although differing from each other, the major Asian religions and philosophies share similar concepts about the origins and purpose of power.<sup>21</sup>

Arguably, a China in antiquity reinvents itself as a modern China with Asian values. Modern phraseology indicates an East Asian policy of putting economic reform before the rights of individual citizens.<sup>22</sup> Some argue that these Asian values are the

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18. See David A. Funk, *Traditional Chinese Jurisprudence: Justifying LI and FA*, 17 S.U. L. REV. 1, 45-47 (1990).

19. *Id.* at 46-47.

20. See MICHAEL NYLAN, THE FIVE "CONFUCIAN" CLASSICS n. 335-1 (2001), <http://www.yale.edu/yup.nylan/nylan7notes/pdf>, at 13.

I coin the term "New Confucians" to distinguish the "third-wave New Confucians" (Xin Rujia) from other neoconservatives in China; the New Confucians are but one subset of the larger neoconservative group, which makes ultranationalism the cornerstone of its theories. Neoconservatives point with pride to three aspects of what they regard as traditional Confucianism: (1) the "mainstream culture" of traditional Confucian [=literati?] culture; (2) the rural gentry that supposedly guarded peasant interests; and (3) the examination system that gave some access to those outside the ruling class. Alleging that forty years of political reeducation campaigns have effectively destroyed mainstream culture in the PRC, the neoconservatives propose to promote China's interests through an ultranationalism aimed against the United States. Their most famous publication is the best-seller coauthored by five intellectuals, *China Can Say No*, whose chapter headings include "The Blue Sky must Die", "The Yellow Sky [i.e., China] Must Rule," and "Don't Fear the Declaration, Prepare for War." Cf. the revised Sanzi jing (Three Character Classic) published in 1994.

*Id.*

21. PISTOR & WELLONS, *supra* note 13, at 33.

22. Alice Erh-Soon Tay, "Asian Values" and the Rule of Law, at

new face of authoritarianism; others argue that these Asian values represent no more than a cliché or exercise in political rhetoric, rather than theory in practice.

Assuming the applicability of the rule of law, the question becomes what influence Chinese jurisprudence plays in the construct of a positive discursive model for judicial review. It is a question of whether a legal system rooted in 5,000 or more years of Chinese philosophy, culture, and history can truly embrace the rule of law and positive discursive model for judicial review. This is dependent upon the question “Can the Confucian person be transformed into a legal person, and can the Confucian society support it?”<sup>23</sup>

## II. CONFUCIANISM, ASIAN VALUES, AND PARTICULARISM

### A. *The Method and Need to Study Chinese Jurisprudence*

On traditional Confucianism Sang-Jin Han writes:

For East Asians living in “the Confucian cultural sphere” . . . where the influence of Confucianism has been relatively great—the burning question today is the reconciliation of various “Western” values with traditional Confucian ones in both the public and the private realms of existence . . . . [W]e need to investigate under which conditions the East and the West, despite the many differences between them, can be engaged in an equal and dignified dialogue.<sup>24</sup>

To accomplish this sort of dialogue, the West must commit more resources to the study of Chinese jurisprudence. Lack of resources, training, and translation typically hinder the West in its understanding of Chinese philosophy.<sup>25</sup> Additionally, Arif

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<http://dex1.tsd.unifi.it/jg/en/index.htm?surveys/rol/tay.htm> (last visited Mar. 26, 2004).

23. Uchang, *supra* note 1.

24. Sang-Jin Han, *On the Prospects of Confucian Values Contributing to a Global Shared Ethic: The Case for the Postcolonial Appropriation of an East Asian Tradition*, at [http://www.unesco.or.kr/kor/science\\_s/project/universal\\_ethics/asianvalues/han1.htm](http://www.unesco.or.kr/kor/science_s/project/universal_ethics/asianvalues/han1.htm) (last visited Mar. 26, 2004).

25. See Funk, *supra* note 18, at 5 (citing CHI-CHAO LIANG, HISTORY OF CHINESE

Dirlik notes a proclivity of the West to explore Sinicism, or study Sinology, in terms of its own history and thought.<sup>26</sup> The approach of the West is shrouded in Western ideology, social generalizations, and an unconscious bias—perhaps romantically induced—engendering a persistent proclivity to assimilate a preconceived subordinate Sinic culture. Barry M. Hager writes: “The tendency in the West too often is to pay little tribute to the existence of other legal traditions, largely because [the other legal traditions] do not have the hallmarks of the Rule of Law approach that developed in the West.”<sup>27</sup>

Western jurisprudence is based more on Roman law, than Greek law, because Roman law placed limitations on the arbitrary and discretionary acts of government.<sup>28</sup> The rule of law partly evolved from the influences of the Roman era, but its greatest influence came from intellectual European sixteenth century philosophers—Hobbes, Locke, Rousseau, Montesquieu, and other Enlightenment thinkers. During the Age of Reason (1660-1798), these philosophers expressed the core ideas of the

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POLITICAL THOUGHT DURING THE EARLY TSIN PERIOD (1930) as one of the full treatments in the English language of Chinese general philosophy). A wealth of publications in the English language of Chinese legal philosophy has not been available in past times. *Id.* at 5. See Dr. Karel L. van der Leeuw, *The Study of Chinese Philosophy in the West: A Bibliographic Introduction*, 6 CHINA R. INT’L 2 333-34 (1999) for a discussion on various other causes hindering the West in its understanding of Chinese philosophy. Another limitation is Sinology or the scientific study of China, which began as the study of Chinese language and literature, and then extended itself to other aspects of China. *Id.* at 333. Persons trained in language and history conducted the bulwark of earlier research of history in Chinese studies and general philosophy. *Id.* There is the disproportionate attention given to the ancient periods of China, or antiquity. *Id.* Another contributing factor is romanticism, which focuses on the exotic and mysterious, for example, Zen Buddhism and Taoism. *Id.* at 334. There is probably more Western literature on Zen Buddhism and Taoism than other Chinese philosophies. *Id.*; see also George O. Totten, III, *Introduction to CH’IEN MU, TRADITIONAL GOVERNMENT IN IMPERIAL CHINA A CRITICAL ANALYSIS*, at xiii (Chün-tu Hsüeh & George O. Totten, III trans., 1982) (identifying that a past study of Sinology suffers from a plethora of alternative translations).

26. ARIF DIRLIK, WORKING PAPERS IN ASIAN/PACIFIC STUDIES CULTURE, SOCIETY AND REVOLUTION: A CRITICAL DISCUSSION OF AMERICAN STUDIES OF MODERN CHINESE THOUGHT 3 (1984).

27. BARRY M. HAGER, THE RULE OF LAW: A LEXICON FOR POLICY MAKERS 13 (2000).

28. Bo Li, *What is Rule of Law?*, 1 PERSPECTIVES 5 (Apr. 30, 2000), at [http://www.oycf.org/Perspectives/5\\_043000/what\\_is\\_rule\\_of\\_law.htm](http://www.oycf.org/Perspectives/5_043000/what_is_rule_of_law.htm).

Enlightenment,<sup>29</sup> which posited a focus of ethics directed at the search for a universal principle of law that would be binding for all individuals regardless of their particular circumstances.<sup>30</sup> Thomas Hobbes in *Leviathan* (1651)<sup>31</sup> and Jean-Jacques Rousseau's formulation of the social contract<sup>32</sup> offer prime examples of the philosophical thought that gave birth to the Western rule of law. Hobbes provided a modern foundational basis for Western jurisprudence by asserting the rationality of absolute power, which evolved into the ideal of a democratic share of power.<sup>33</sup> This ideal arguably serves as the foundational ethos for democracy, constitutionalism, the rule of law, and positive discursive models for judicial review.<sup>34</sup> It is a foundational ethos, or constitutional value, reflective of Western culture and values, which is essential to constitutionalism and rule of law.<sup>35</sup>

The role of philosophical thought taken in conjunction with the role of historical accident forges the Western rule of law, which in turn, forges positive discursive models for judicial review. How Chinese jurisprudence influences the implementation of the rule of law remains unanswered. A study of Chinese jurisprudence should lend understanding to China's journey toward the rule of law.

Stephen C. Angle urges the best approach to the study of Confucianism should start from a historical perspective, rather than an ahistorical perspective.<sup>36</sup> First, Angle argues that a

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29. Stephen Zelnick, *Major Themes in The Enlightenment*, at <http://oll.temple.edu/ih/IH52/Enlightenment/EnlightenmentThemes.htm> (last visited Mar. 26, 2004).

30. R.P. Peerenboom, *Confucian Justice: Achieving a Human Society*, 30 INT'L PHIL. Q. 22, 25 (1990).

31. THOMAS HOBBS, *LEVIATHAN OR THE MATTER, FORME & POWER OF A COMMONWEALTH* (Michael Oakeshott ed., A.R. Mowbray & Co. Ltd. 1946) (1651).

32. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Charles Frankel ed., Hafner Press 1947) (1762).

33. See HOBBS, *supra* note 31, at 121-29.

34. See J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L. J. 219, 243 (1995).

35. Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167-69 (1987).

36. See STEPHEN C. ANGLE, *HUMAN RIGHTS AND CHINESE THOUGHT* 19-20 (2002).

historical consciousness in Confucianism may help us to understand why we have not achieved a moral consensus, and where and how to best reach such a consensus.<sup>37</sup> Second, he argues that we will see that “the Chinese rights tradition has rich resources,” which will broaden the range of available Chinese perspectives on rights.<sup>38</sup> Third, he argues that reviewing a Chinese history of rights discourse will give us an appreciation for the wisdom of seeing moral traditions as contingent and rooted in historical particularity.<sup>39</sup>

The previously mentioned arguments for studying Confucianism from a historical perspective are applicable to the study of Chinese jurisprudence. The study of Chinese jurisprudence from a historical perspective may assist the West in understanding the judicial problems now confronting China and in reaching a mutual accord on the problem of implementing the rule of law. Western universalizing cosmopolitanism brings preconceived ideals and taxonomies that impede the sort of Sino-West dialogue envisioned by Sang-Jin Han.<sup>40</sup>

### *B. Ethos of Confucianism and Legalism*

Traditional Chinese jurisprudence deals with various philosophies of proper social behavior and law from about 500 B.C. until significant Western influences in the nineteenth and twentieth centuries.<sup>41</sup> It is from the latter representative period that scholars extract traditional Chinese jurisprudence from a larger general philosophical literature representing the various schools of ancient Chinese philosophy.<sup>42</sup>

The writings on law of Confucianists and Legalists are legal philosophies.<sup>43</sup> Notwithstanding other schools of traditional

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37. *Id.* at 19.

38. *Id.*

39. *Id.* at 19-20.

40. See Han, *supra* note 24 (proposing that fabricated images of less developed countries in East Asia by Westerners create a distorted view of the culture).

41. Funk, *supra* note 18, at 2.

42. *Id.*

43. See *id.* at 2-4 (finding that because Confucianists and Legalists are more direct in their articulation of the law and laws, as opposed to other schools of philosophy, they

Chinese philosophy, such as Taoists, Ying Yang school, Logicians, Chinese Buddhists, the many of the Sung dynasty (960-1279), the many of the Ming dynasty (1368-1644 A.D.), and even Neo-Confucianist, the dominate legal philosophies appear to be Confucianism and Legalism.<sup>44</sup> Although Neo-Confucianism influences general philosophers who directly discuss law, Neo-Confucians have actually little to say about law.<sup>45</sup> An on-going debate between Confucianism and Legalism is a discourse directed to the clash between rule by man and rule by law.<sup>46</sup> Confucianism infuses law with moral qualities, while Legalism, as an antithesis, is a harbor for positive law.<sup>47</sup>

Han Fei Tzu (c. 298-238 B.C.) is a renowned propagator of Legalism, which embodies a radical reliance on centralized power and characterizes Machiavellian principles in controlling and maximizing power.<sup>48</sup> Legalism is mostly distinguishable from Confucianism because of its reliance on law rather than rules of proper behavior, and for controlling a subject people and centralizing power in a ruler.<sup>49</sup> Legalism relies on harsh laws, at least initially, to promote correct behavior.<sup>50</sup>

Traditional Chinese legal philosophy begins with Confucius (551-479 B.C.).<sup>51</sup> The Analects of Confucius are the principle source of Confucianism.<sup>52</sup> The gist of Confucianism, "the orthodoxy of the traditional Chinese state," is the notion that human society expresses itself through a finite number of

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are considered legal philosophies).

44. *See id.* at 4 (stating that philosophies other than Confucianism and Legalism "have little to say about the law").

45. *Id.* at 4.

46. *See id.* at 6-7 (asserting that the lack of justification for the two rules is the principle problem for traditional Chinese jurisprudence).

47. *See id.* at 10, 28 (stating that Confucianism emphasizes moral excellence while Legalism promotes extreme legal positivism).

48. *See id.* at 28, 37 (noting that Han Fei Tzu synthesized the doctrines of the Shang Yang by emphasizing publicly promulgated laws (*fa*), and by providing the actual theoretical basis for Legalism); *see also* NICOLÒ MACHIAVELLI, *THE PRINCE* 28-31 (Ballantyne Press 1883) (1515).

49. Funk, *supra* note 18, at 28.

50. *Id.*

51. *Id.* at 13.

52. *Id.*

hierarchical relationships.<sup>53</sup> These relationships impose certain duties on, and grant certain rights to, the individuals in such relationships.<sup>54</sup> These pre-determined relationships evolve into reciprocal, if not mutual, relationships.<sup>55</sup> Categorizing individuals into such relationships brings about respective assignments to related duties, because the relationships define duties.<sup>56</sup> Confucianism, in essence, teaches that properly defined relationships result in desired behavior on the part of both the individual and society.<sup>57</sup>

Traditional Chinese philosophy continues to exert its influence on modern China. Xuezhi George Guo best describes the transformation of Chinese philosophy to the practical realities of modern China, and writes:

Traditional Chinese political thought fuses idealistic altruist pursuit with functional practicability, which is based on a combination of the values and ethics of Confucian, Daoist, and Legalist traditions. Contemporary Chinese political figures are still influenced by those traditions, even though communist ideology plays an important role in shaping their worldview and guiding their revolutionary practice. The ultimate goal of Chinese politics is to search for not only power and influence but also legitimacy of political rule that requires political leaders to behave correctly according to a moralistic ideology and rule based on benevolence.<sup>58</sup>

In China, Confucianism is persistent and systemic. On

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53. See Lloyd Macauley Richardson, *China, Taken Personally*, POL'Y REV. No. 107 (2001) (reviewing PETER HESSLER, *RIVER TOWN: TWO YEARS ON THE YANGTZE* (2001)), at <http://www.policyreview.org/jun01/richardson.html>.

54. *Id.*

55. *Id.*

56. See *id.* (participating in a relationship automatically creates a duty for the person in the relationship).

57. *Id.*

58. GEORGE XUEZHI GUO, *THE GUANXI (INTERPERSONAL RELATIONS) OF CHINESE COMMUNIST ELITE: THEORY AND PRACTICE* (1999), available at [http://millercenter.virginia.edu/resources/print/dissertation\\_chapters/2001/guoChapter.pdf](http://millercenter.virginia.edu/resources/print/dissertation_chapters/2001/guoChapter.pdf), at 1.

Confucianism Sang-Jin Han writes: "More controversial still is the third topic of the role of Confucianism on culture and morality. The existence and importance of positive cultural-moral, ethical, and aesthetic-resources of action deeply imbedded in East Asian traditions, which may differ significantly from the Western paradigm of rationality cannot be denied."<sup>59</sup>

A China bound to Confucianism, which also has evolved its society and class system, necessitates that the West search for a more thorough understanding of modern Chinese jurisprudence in light of Chinese antiquity. It is a question of whether Confucianism is present in modern China, and if so, whether there is a definable link between Confucianism and modern Chinese nationalism. Lastly, if there is a causal relationship between Confucianism and modern Chinese nationalism, there remains the question of how such a nexus influences the rule of law and positive discursive model for judicial review.

If remnants of antiquity foster vestiges of an authoritarian, bureaucratic version of Confucianism, the analysis takes a turn for the worst. In such instance, the rule of law offers no more than an invasion of Chinese culture and morals. Confucianism is not reflexively authoritarian or statist, however.

The pages of Chinese history hail from a variety of resources and periods, from dynastic to post-Mao. Utsa Patnaik aptly describes the world's image of China. He writes:

Successive images and events flash through the mind: the humiliation of the Triple Intervention by the Western imperialist powers, Beijing students in the May 19 Movement, the 21 demands made by the Japanese, the seizure of Manchuria, the peasant movement in Hunan, the Canton uprising, Chiang Kai-shek's annihilation campaigns against the Communists, the incredible Long March by a band of ill-clad and ill-equipped revolutionary soldiers with only handfuls of millet to sustain them physically but fired by the resolve to survive and wrest victory from retreat, the long guerilla war, land reforms in the liberated areas,

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59. Han, *supra* note 24.

and final victory over the Japanese and the Kuomintang, enabling the initiation of the historic second experiment in the world of an autonomous strategy of building socialism. The consternation in the advanced capitalist world at that time when China “went Communist” and the joy of the majority of the populations in the Third World at the victory can now only be imagined.<sup>60</sup>

Albeit a history predominated by Confucianism, China’s history is one of struggle, civil strife, revolution, isolationism, xenophobia, and proto-nationalism,<sup>61</sup> which arguably justify particularism and historical occurrences of authoritarian, bureaucratic versions of Confucianism.

On the infusion of Western ideas with Eastern culture, Sang-Jin Han refers to the words of Samuel P. Huntington, who writes:

Western ideas of individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, free markets, the separation of church and state, often have little resonance in Islamic, Confucian, Japanese, Hindu, Buddhist or Orthodox cultures. Western efforts to propagate such ideas produce instead a reaction against “human rights imperialism” and a reaffirmation of indigenous values, as can be seen in the support for religious fundamentalism by the younger generation in non-Western cultures. The very notion that there could be a “universal civilization” is a Western idea, directly at odd[s] with the particularism of most Asian societies and their emphasis on what distinguishes one people from another.<sup>62</sup>

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60. Utsa Patnaik, *Experimenting with Market Socialism*, 16 FRONTLINE, No. 21, Oct. 9-22, 1999, at <http://www.flonnet.com/fl1621/16210150.htm>.

61. See J.A.G. ROBERTS, A CONCISE HISTORY OF CHINA 197-98 (1999) (commenting that the Opium Wars fueled the flames of xenophobia and went hand-in-hand with proto-nationalism).

62. Han, *supra* note 24; see also Samuel P. Huntington, *The Clash of Civilizations?*, in THE CLASH OF CIVILIZATION? THE DEBATE, 72 FOREIGN AFF. 22, 40-41 (1993), reprinted in THE NEW SHAPE OF WORLD POLITICS 83-84 (1997).

In modern world reality, globalization and the end of the Cold War caused a shift in the nature of nation-state conflicts from ideological to cultural.<sup>63</sup>

Cultural determinism offers a predictor for cultural values: "Cultural determinism is the conviction that the accumulated knowledge, the organized beliefs, and the way of life prescribed by a culture determines not only all other aspects of human cognition and social behavior but also the dynamics of the culture itself. Such a conviction sees culture as an autonomous cultural system."<sup>64</sup> Cultural determinism plays an important role in understanding our changing world and its wealth in diversity. Cultural determinism posits that cultural values condition all modes of cultural relationships, for example, socioeconomic, political, and legal modes.<sup>65</sup>

China's particularity is a by-product of Chinese philosophy, culture, and history. Confucian values predict foundational ethos or morals,<sup>66</sup> and as a result, institutions in China are reflexive of Confucian values. China's particularity serves as a point of intersection for traditional Confucianism and modern Chinese nationalism. According to Diane Ravitch, particularism in this context is a matter of particularistic multiculturalism, which holds that "no common culture is possible or desirable."<sup>67</sup> In harmony with the history of China and as a certain harbinger of its future, Confucianism serves as a foundational Chinese ethos for culture, morals, and jurisprudence, and prophecies of a

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63. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 19 (1996).

64. Klaus Krippendorff, *A Dictionary of Cybernetics* (Feb. 2, 1986) (unpublished report), available at <http://pespmc1.vub.ac.be/asc/indexASC.html>.

65. *See id.* (noting that a culture's accumulated knowledge, beliefs, and way of life determine all aspects of human cognition, social behavior, and cultural dynamics).

66. *Cf.* Jing Jiang, *Linking East with West: Websites as Public Relations Tool for American and Chinese Banks Operating in a Culturally-Evolving Chinese Society* 7-11 (2002) (unpublished M.A. thesis, Virginia Polytechnic Institute and State University), at <http://scholar.lib.vt.edu/theses/available/etd-07092002-201906/unrestricted/part3.pdf> (detailing the impact of four basic principles of Confucianism on public sentiment toward the banking industry).

67. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 16 (1997) (quoting Diane Ravitch, *Multiculturalism: E Pluribus Plures*, 59 AM. SCHOLAR 337, 340 (1990)).

future of particularistic multiculturalism.

Moreover, a prognostication for China is not one necessarily identifying Confucianism or communitarianism with authoritarianism. The contention of William de Bary and others, even as early as Chen Huanzhang (1888-1931), that communitarianism is not identifiable with authoritarianism remains a difficult contention to refute.<sup>68</sup> Contrarily, Randall Peerenboom antithetically interprets Confucianism as being identifiable with statism.<sup>69</sup> In extending the same argument, he postulates that if there is the rule of law in China, it is a statist rule of law serving as an instrument of the state.<sup>70</sup> This arguably appears as an extension of a biased Western taxonomy foreordaining an interpretation of statist Confucianism. As Michael W. Dowdle notes, “everyone agrees that there is no rule of law in China,” but everyone has a difficult time explaining why.<sup>71</sup>

Admittedly, one witnesses periods of authoritarianism when opportunists—be they private actors, public actors, or governmental entities—employ Confucianism for non-Confucian ends.<sup>72</sup> The reality of an actor or polity employing a rhetorical political Confucianism in pursuit of statist ends is not the same

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68. See WILLIAM THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS A CONFUCIAN COMMUNITARIAN PERSPECTIVE* 146–47 (1998) (contending that instead of communitarianism being identified with an authoritarian state, the state itself rejects the Confucian communitarianism ideology).

69. Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 *BERKELEY J. INT'L L.* 161, 220–21 (2001) [hereinafter *Globalization, Path Dependency and the Limits of Law*].

70. *Id.* at 167.

71. Michael W. Dowdle, *Heretical Laments China and the Fallacies of 'Rule of Law'*, 11 *CULTURAL DYNAMICS* 287, 287 (1999).

72. See NYLAN, *supra* note 20, at n. 327-1, at <http://www.yale.edu/nylan/nylan7notes.pdf>, at 10.

Post-World War II dictators in both South Korea and Vietnam also tried to induce compliance with central government decrees by exploiting traditional respect for Confucian values. Like Chiang, they reduced Confucian teachings to mere slogans intended to serve highly un-Confucian ends. See Koh Byong-ik (1992), p. 64, fn. 42; Tu Wei-ming et al. (1992), chap. 7; and Dennis Duncanson (1993), p. 189.

*Id.*

as validly identifying Confucianism with either authoritarianism or statism.

As de Bary notes, statism originates with the Han dynasty, when Legalists modified a Confucian model to fit the Han State structure so that public interest coincided with the state interest.<sup>73</sup> Further, de Bary notes that Confucianism is not identifiable with statism, because a Confucian point of view looks for a balance between self and society, and Confucianism persists in acting on behalf of the way to reform an imperfect society.<sup>74</sup>

Additionally, the late eminent scholar Qian Mu (1895-1990) found that despite the contributions of the Qin dynasty (221-207 B.C.) in establishing a central administration for the empire, it was during the Han dynasty (206 B.C. to 220 A.D.) that new forms of government achieved permanence and stability.<sup>75</sup> It is for this reason that Han institutions best illustrate patterns of traditional government in China.<sup>76</sup> Moreover, an interpretation of the basic thesis of Qian Mu concerning his views on traditional dynastic government describes traditional government as generally avoiding rule by autocracy and absolutism until the Northern Sun dynasty (960-1127).<sup>77</sup> This latter governmental avoidance of rule by autocracy and absolutism is attributable to Confucianism except when government is under the influence of an overbearing Emperor or powerful court coterie.<sup>78</sup>

There are means to an end, but an end does not always define its means, especially in the case of non-Confucian ends. Confucianism bears no causal relation to authoritarianism or statism because Confucianism is not innately reflexive of either. A China in antiquity provides a fundamental ethos, which is reflexive of a persistent and systemic Confucianism, by virtue of cultural determinism and the nature of Confucianism. Further, Confucianism and particularistic multiculturalism find

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73. DE BARY, *supra* note 68, at 28-29.

74. *See id.*

75. Totten, *supra* note 25, at xiii-xv.

76. *Id.* at xiv.

77. *Id.* at xiii.

78. *Id.*

expression in Chinese nationalism, a by-product of a recovered sovereignty after nearly a century of neo-colonialism and exploitation, and perhaps even in the reality or rhetoric of Asian values.

*C. Asian Values: Reality or Rhetoric*

Confucianism is a strongly entrenched ethnocentric social fact in China. Confucianism transcends political and economic models and serves as substitute for political and economic models, at least rhetorically. In East Asiatic countries, arguably, particularistic multiculturalism serves as a governmental policy finding its expression through rhetorical political Confucianism. In international affairs, there is on-going debate over human rights.<sup>79</sup> In China, a polity under the guise of Confucianism espouses the language of socioeconomic rights, as opposed to civil-political rights, in response to requests for human rights inspections.<sup>80</sup> China defends its prioritization of socioeconomic rights over civil-political rights as a matter of traditional or Asian values.<sup>81</sup>

The debate over a trade-off between economic development and democracy serves as an example of the nexus between Confucianism and particularistic multiculturalism. Some Asian leaders argue that Confucianism is a justification for the successful economic development in East Asian nation-states.<sup>82</sup> The success of the Asian “Tigers” engenders debate about Asian values as a justification for economic success.<sup>83</sup> Prominent

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79. See Xiaorong Li, *A Question of Priorities: Human Rights, Development, and “Asian Values”*, 18 REP. FROM THE INST. FOR PHIL. & PUB. POL. 7 (1998) (addressing the distinction between civil-political and socioeconomic rights and suggesting that the latter be enforced more consistently and forcefully than in the past), available at [http://www.puaf.umd.edu/IPPP/winter98/a\\_question\\_of\\_priorities.htm](http://www.puaf.umd.edu/IPPP/winter98/a_question_of_priorities.htm).

80. *Id.*

81. *Id.*

82. DEEPAK LAL, *RENEWING THE MIRACLE ECONOMICS DEVELOPMENT AND ASIA 1-2* (1999), available at <http://www.ipa.org.au/pubs/Currentissdocs/Clough98.pdf>.

83. See *Id.* at 1 & n.27.

‘The Gang of Four’ was the name given to the four East Asian countries—Korea, Taiwan, Hong Kong and Singapore—by Ian Little in the 1970s. It was popularized by *The Economist* and since then other synonyms—‘Asian Tigers’, ‘Little Dragons’, etc—have proliferated. But Little’s appellation

leaders of East Asian countries tout Asian values to justify their successes while espousing the superiority of Eastern social and political forms to Western ones.<sup>84</sup> Deepak Lal writes:

Rather than succumb to Western classical liberal values, which have produced decadence amongst prosperity in the West, the East, they argue, should stick by its familial and authoritarian cultural and political values as embodied in Confucianism and neo-Confucianism. Thus, in a neat reversal of Max Weber's famous thesis on the role of Protestantism in the rise of Western capitalism, we now have an Eastern 'religion' being touted as the source of East Asia's success.<sup>85</sup>

The birth of the phrase "Asian values" is attributable to several possible sources. One source is a 1995 article in *The Economist*, which reads, "[t]he rise of Japan and the East Asian tigers has caused many people to reinterpret the economic impact of Confucianism."<sup>86</sup> Many East Asiatic governmental leaders generally recognize, if not articulate rhetoric for, a role of Confucianism in economic development and refer to Confucianism in the new phraseology of Asian values.<sup>87</sup> Use of the phrase is also attributable to Lee Kuan Yew, senior minister of Singapore;<sup>88</sup> although he now exhibits trepidation,<sup>89</sup> if not denial, in reference to such assertion. Dr. Mahathir Mohamad, prime minister of Malaysia, is another alleged source of the phrase.<sup>90</sup> On Asian values, Alice Erh-Soon Tay writes:

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pointedly contrasted the policies of 'China's' Gang of Four and these East Asian economic success stories.

*Id.*; see also NYLAN, *supra* note 20, at 334-2, <http://www.yale.edu/yup/nylan/nylan7notes.pdf>, at 12 (postulating a "strong link between Confucian values (principally, an emphasis on education, on thrift, and on communal orientation) and economic success in the era of global capitalism.").

84. LAL, *supra* note 82, at 2.

85. *Id.*

86. *New Fashion For Old Wisdom*, THE ECONOMIST, Jan. 21, 1995, at 38, 39.

87. Tay, *supra* note 22.

88. *Id.*

89. "Recently, Mr. Lee, at an interview with Mr. Chris Patten, last governor of Colonial Hong Kong, backtracked a little: the term "Asian values" he now says, is a mere label, a press." *Id.*

90. *Id.*

For these leaders, the term embodies a system of values which places economic development first and above all else. It asserts the primacy of economic development for their country and implies that such development would be followed by improved standards of living for all; it follows that civil and political rights could be properly postponed until economic development has been achieved, and indeed that the denial of civil and political rights was a necessary measure to ensure economic progress and the benefits that flow from it.<sup>91</sup>

There are also divergent opinions on whether Confucianism helps or hinders economic development.<sup>92</sup> Statistical studies conflict on the question of whether a link between democracy and economic development exists.<sup>93</sup> Some cross-sectional

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91. *Id.*

92. See NYLAN, *supra* note 20, at n. 334-2, at <http://www.yale.edu/yup/nylan/nylan7notes.pdf>, at 12-13.

For Confucianism as the Chinese alternative to the Protestant ethic, see Yü Ying-shih's extensive writings, which trace [sic] the positive influence of Confucian culture on mercantilism back to the Ming and Qing period. Yü's arguments implicitly refute the writings of Max Weber, who found Confucianism a "hindrance to economic development" because Confucius had decried the relentless pursuit of profit as inimical to virtue. On the other hand, in the *Analects* Confucius concedes, "Wealth and rank are what everyone desires." He continues, "If any means of escaping poverty presented itself, I would adopt it, so long as it did not involve wrongdoing." Many prominent American economists and political scientists since the late 1970s have postulated a strong link between Confucian values (principally, an emphasis on education, on thrift, and on communal orientation) and economic success in the era of global capitalism. See, e.g., the writings of Nathan Glazer (1976), Lucien Pye (1985), Hofheinz and Calder (1982), Hung-chao Tai (1989), Ronald Dore (1987), and Ezra Vogel (1991). According to these researchers, a distinctive "Confucian script of parental governance" results in a highly positive view of the state as interventionist coordinator of economic development. For a more skeptical view, see Marion Levy (1992). I incline to the view that China in particular and East Asia in general have become, in the words of Johnson and Ouchi (1993), a "junkyard for Western theories of economic development and political modernization." For general information on spiritual pollution campaigns against ideological imports from the West, see Tu Wei-ming (1987), (1991), cited in Zhongdang Pan et. al. (1994), p. 12; Pang 1988; Su and Wang 1988.

*Id.*

93. LAL, *supra* note 82, at 19-20.

statistical studies find such a relationship.<sup>94</sup> A statistical study by Lal and Hla Myint concludes there is no relationship between the form of government and economic performance.<sup>95</sup> However, Lal does note that the Chinese family serves as the engine of growth in the Sinic world, which he attributes to successes in Hong Kong, Taiwan, and the growth of family-based enterprise in China's non-state sector.<sup>96</sup> Further, Lal contends that it is possible to modernize without Westernizing.<sup>97</sup>

Nevertheless, there is a causal relationship between Confucianism and modern Chinese nationalism, or China's particularistic multiculturalism. Such a nexus makes the rule of law and positive discursive model for judicial review contingent upon a Chinese jurisprudence that is representative of a persistent and systemic Confucianism.

### III. CHINA AND INDEPENDENT JUDICIAL REVIEW

#### A. *The Constitution of the People's Republic of China*

In 1982, China adopted its present constitution, the Constitution of the People's Republic of China (1982 Constitution).<sup>98</sup> The 1982 Constitution has undergone legal reform, specifically four constitutional amendments—mostly economic in nature—on April 12, 1988,<sup>99</sup> March 29, 1993,<sup>100</sup> March 15, 1999,<sup>101</sup> and March 14, 2004.<sup>102</sup>

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94. *Id.* at 19.

95. *Id.* at 19-20.

96. *Id.* at 23-24.

97. *Id.* at 26.

98. XIANFA (1982), <http://www.qis.net/chinalaw/prcon3.htm> (last visited Mar. 26, 2004).

99. On April 12, 1988, the first amendment occurred at the First Session of the Seventh National People's Congress, comprising of two amendments to two articles, both of which address the private sector of the economy and a prohibition on unlawful activities in the use and transfer of land. *Id.* amend. I (1988).

100. Articles 3-11 all address economic reform. *Id.* amend. II (1993).

101. *Id.* amend. III (1999).

102. *Id.* amend. IV (2004). The March 14, 2004 amendment to the 1982 Constitution addresses human and private property rights and incorporates Jiang Zemin's "The Theory of Three Represents" in the preamble. Meng Yan, *Enshrining Human Rights*, CHINA DAILY, Dec. 23, 2003, available at 2003 WL 57561461. While

China's amendments mostly address economic reform, the fourth amendment includes a general provision that addresses human rights and a rule addressing compensation in cases of property expropriation. XIANFA amend. IV, arts. 33(3), 10(3), 13(3) (2004). Relevant portions of the fourth amendment follow:

1 "... along the road of building socialism with Chinese characteristics ..."  
and "... under the guidance of Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory ..."

Revised to: "... along the road of Chinese-style socialism ..." and "... under the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of 'Three Represents' ..."

2 Seventh paragraph of the Preamble: After "... to modernize the industry, agriculture, national defence and science and technology step by step ..."

Is added: "... promote the coordinated development of the material, political and spiritual civilizations ..."

3 The second sentence of the 10th paragraph of the Preamble: "In the long years of revolution and construction, there has been formed under the leadership of the Communist Party of China a broad patriotic united front that is composed of the democratic parties and people's organizations and embraces all socialist working people, all patriots who support socialism, and all patriots who stand for the reunification of the motherland. This united front will continue to be consolidated and developed."

After "... a broad patriotic united front that is composed of the democratic parties and people's organizations and embraces all socialist working people ..." is added "... all builders of socialism ..."

4 Third paragraph of Article 10: "The State may, in the public interest, requisition land for its use in accordance with the law."

Revised to: "The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned."

5 Second paragraph of Article 11: "The State protects the lawful rights and interests of the individual and private sectors of the economy, and exercises guidance, supervision and control over individual and the private sectors of the economy."

Revised to: "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy."

6 Article 13: "The State protects the right of citizens to own lawfully earned income, savings, houses and other lawful property." and "The State protects according to law the right of citizens to inherit private property."

Revised to: "Citizens' lawful private property is inviolable" and "The State, in accordance with law, protects the rights of citizens to private property and to its inheritance" and "The State may, in the public interest and in accordance with law, expropriate or requisition private property for its use and shall make compensation for the private property expropriated or requisitioned."

In considering the amendments, the March 15, 1999 amendment is most noteworthy. Article 13 is a prescription for the rule of law, and adds the following words to Article 5: “[t]he People’s Republic of China governs the country according to law and makes it a socialist country ruled by law.”<sup>103</sup> Additionally, there is an amendment to the preamble, which adds Deng Xiaoping’s theory<sup>104</sup> and the words “developing a socialist market economy,” thereby bestowing constitutional import upon both the theory and words.<sup>105</sup> It has been proposed that Deng Xiaoping’s Four Cardinal Principles require that “China must be made a true rule by law country.”<sup>106</sup>

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8 Article 33 has a third paragraph added: “The State respects and preserves human rights”.

XIANFA amend. IV (2004). The March 14, 2004 amendment is especially noteworthy in terms of Chinese political ideology and culturalism because the amendment “incorporates the theory of ‘Three Represents’ into the Constitution’s preamble as one of the guiding principles of the nation together with the heritage and further development of Marxism, Leninism, Mao Zedong Thought, and Ding Xiaoping Theory.” Yan, *supra*. However, the efficacy of the fourth amendment—which supposedly addresses human rights and property right—arguably will be contingent on the efficacy of Chinese constitutionalism.

103. XIANFA amend. III, art. 13 (1999).

104. Deng Xiaoping, *Upholding Four Cardinal Principles* (Mar. 30, 1979), in *SELECTED WORKS OF DENG XIAOPING (1975-1982)* 166, at 172 (Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin and Stalin Under the Central Committee of the Communist Party of China, trans., 1984). In March of 1979, Deng Xiaoping announced that in order to carry out China’s four modernizations, “we must uphold the four cardinal principles ideologically and politically.” *Id.* “The four principles are: 1. [w]e must keep to the socialist road. 2. We must uphold the dictatorship of the proletariat. 3. We must uphold the leadership of the Communist Party. 4. We must uphold Marxism-Leninism and Mao Zedong Thought.” *Id.* In 1982, the second of the principles changed to upholding the people’s democratic dictatorship. *See id.* at 176-77; *see also* Deng Xiaoping, *Speech at a Forum of the Military Commission of the Central Committee of the CPC* (July 4, 1982), in *SELECTED WORKS OF DENG XIAOPING, supra* at 386, 387 (identifying that the four guarantees cannot be attained all at once and that their realization “must be part of our daily work and struggle.”), *available at* <http://english.peopledaily.com.cn/dengxp/vol2/text/b1580.html>; *see also* Deng Xiaoping, *Combat Economic Crime*, in *SELECTED WORKS OF DENG XIAOPING, supra* at 380, 381 (stating the “process of socialist modernization will be accompanied by toil and struggle . . . in the four essential guarantees of our keeping to the socialist road”), *available at* <http://english.peoplesdaily.com.c/dengxp/vol2/text/b1560.html>.

105. XIANFA amend. III (1999).

106. Ren Zhongyi, *Upholding the Four Cardinal Principles Reconsidered*, NANFANG

The National People's Congress (NPC) of China is the highest organ of state power.<sup>107</sup> It is the national legislature and the supreme organ of state power.<sup>108</sup> The NPC's standing body is the Standing Committee of the National People's Congress (SCNPC).<sup>109</sup> The NPC exercises typical legislative functions such as enacting and amending basic laws, electing Procurator-General, planning for national economy and social development, declaring war, and other powers.<sup>110</sup> However, the powers of the NPC are distinguishable in two respects. The NPC has the power to enforce the Constitution<sup>111</sup> and, through the SCNPC, has the power of judicial review.<sup>112</sup> The NPC meets once a year, which results in its State Councilors and Ministers in charge of ministries or commissions—such as the Ministry of Commerce (MOC)—retaining more powers than expressly delegated to them in the 1982 Constitution.<sup>113</sup>

Comparatively, notwithstanding the legislative hierarchy of the government, the Standing Committee of the State Council wields its power as the executive hierarchy of government; however, in actual practice, the Standing Committee is often subordinated to the Central Finance and Economic Leading Group of the Chinese Communist Party. The Central Finance and Economic Leading Group is comprised of a few party members in charge of all crucial economic issues who exercise their executive authority through a Joint Commission of the Politibureau and State Council.<sup>114</sup> This alignment of power is best described as a governmental agency relationship, with the party—representing the polity—as principal, and government—the NPC and its appointed delegates of power—as agent.<sup>115</sup>

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RIBAO, Apr. 29, 2000, available at <http://www.usembassy-china.org.cn/sandt/fourprinciples.html>.

107. XIANFA art. 57.

108. *Id.*, at arts. 57, 58.

109. *Id.* at art. 57.

110. *Id.* at arts. 62, 67.

111. *Id.* at art. 62(2).

112. *Id.* at arts. 67(1), 67(4).

113. *Id.* at art. 61.

114. SHENG BIN, *THE POLITICAL ECONOMY OF TRADE POLICY IN CHINA*, 28 (Copenhagen Bus. Sch., Working Paper, No. 10/2000, 2000).

115. *Id.*

The 1982 Constitution marginalizes the power of the judiciary. One must read Articles 5, 67(1), 67(4), and 127 in conjunction with the previously discussed constitutional division of governmental power to understand how the judiciary is rendered constitutionally weak and marginalized.<sup>116</sup> The preamble of the 1982 Constitution reads:

This Constitution, in legal form . . . is the fundamental law of the state and has supreme legal authority. The people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.<sup>117</sup>

Further, amended Article 5 reads: "The People's Republic of China governs the country according to law and makes it a socialist country ruled by law."<sup>118</sup> Article 127 of the 1982 Constitution reads: "The Supreme People's Court is the highest judicial organ."<sup>119</sup> Articles 67(1) and (4) are the greatest possible source of violation to the principles of constitutionalism, in that they vest the SCNPC with the power "to interpret the Constitution and supervise its enforcement"<sup>120</sup> and the power "to interpret laws."<sup>121</sup>

A measure of a constitution is constitutionalism because there is a great deal of difference between a constitution—the written article itself—and the principles of constitutionalism.<sup>122</sup> It is a matter of general rules of interpretation that "constitutional values contribute to proper understanding of constitutional provisions."<sup>123</sup> Confucian values arguably provide

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116. XIANFA arts. 5, 67(1), 67(4), 127.

117. *Id.* at pmbl.

118. *Id.* at art. 5 (amended 1999).

119. *Id.* at art. 127.

120. *Id.* at art. 67(1).

121. *Id.* at art. 67(4).

122. ANDRÁS SAJÓ, *LIMITING GOVERNMENT AN INTRODUCTION TO CONSTITUTIONALISM* 1-47 (Central European University Press, 1999).

123. Hiroshi Nishihara, *The Significance of Constitutional Values*, (2001), at <http://www.puk.ac.za/lawper/2001-1/nisiharadoc.doc>.

the needed constitutional value, or fundamental ethos, for constitutionalism. Peerenboom describes Chinese philosophy as possessing a pragmatic, anti-foundational character.<sup>124</sup> He writes “any rights theory justifiable on Chinese terms will almost assuredly be a contingent one”<sup>125</sup> because legal rights in China will necessarily be contingent upon Chinese culture, traditions, and historical and economic conditions.<sup>126</sup> Moreover, the previously mentioned contingencies also share a foundation in Confucianism.<sup>127</sup>

Rule of law is also reflexive of Chinese culture, tradition, historical and economic conditions. In an argument by analogy, Confucianism provides a foundational ethos requisite for constitutionalism, the rule of law, and judicial review. Although a foundational ethos for constitutionalism may arguably flow from Confucian values, the problem of implementing constitutionalism remains. A constitutive process is two fold: it involves the constitutional decision-making process and the implementation of constitutionalism.<sup>128</sup> A core problem for China—and Chinese constitutionalism—is the lack of positive discursive machinery for judicial review.

The 1982 Constitution does not vest the judicial organ of its government with the judicial independence shared by courts in

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124. R. P. Peerenboom, *What's Wrong with Chinese Rights?: Towards a Theory of Rights with Chinese Characteristics*, 6 HARV. HUM. RTS. J. 29, 53 (1993) [hereinafter *What's Wrong with Chinese Rights?*].

125. *Id.*

126. *Id.*

In this respect, Marxism's emphasis on historical materialism coincides with Confucianism's sensitivity to the particular conditions of society, reinforcing the view of rights as contingent. Even some scholars who argue for an expansive theory of human rights based on the commonality (*gongtongxing*) of all people reflect the influence of Marxism in maintaining that rights are a product of the particular historical, economic, and material conditions of a society.

*Id.* n. 108. See, e.g., Li Buyun, *Lun renquan de sanzong cunzai xingtai* (*On Three Forms of Existence of Human Rights*), 65 Faxue Yanjiu (Studies in Law) 11, 13 (1992).

127. *What's Wrong with Chinese Rights?*, *supra* note 124, at 53.

128. Michael C. Davis, *The Emerging Global Scenario and the East Asian Perspective on Human Rights*, at <http://www.daga.org/press/ia/glob/glob05.htm> (last visited Mar. 26, 2004).

the United States,<sup>129</sup> but neither do the constitutions of some Western countries.<sup>130</sup> In Western countries, the responsibility of constitutional interpretation will generally vest with the judicial bodies of its respective countries.<sup>131</sup> In the West, models for constitutional review, or constitutional courts, are models of either a centralized or a decentralized constitutional review.<sup>132</sup> The 1982 Constitution reveals a lack of any real semblance of constitutional authority in its judiciary. Its judicial model subscribes to neither a decentralized nor a centralized constitutional review.<sup>133</sup>

Initially, China's governmental structure bears resemblance to a parliamentary form of government, such as Great Britain. The NPC serves a similar role of legislative supremacy for China.<sup>134</sup> In terms of political, as opposed to legal, control mechanisms for the protection of fundamental rights— Britain, not unlike China—arguably focuses on political, rather than legal, accountability.<sup>135</sup>

There are dissimilarities, however. An electorate determines the legal sovereignty of Parliament, or at least its composition.<sup>136</sup> In the protection of rights, “because ‘Parliament is supreme,’ there exist in the British constitution ‘no guaranteed or absolute rights.’”<sup>137</sup> An enactment is beyond the

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129. Compare XIANFA arts. 62, 67, (giving the NPC the power of judicial review) with U.S. CONST. Art. III, § 1 (establishing an independent judiciary).

130. Peter H. Russell, *Toward a General Theory of Judicial Independence*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 1, 22 (Peter H. Russell and David M. O'Brien eds. 2001) (noting Israel, New Zealand, the United Kingdom, and Sweden do not have constitutionally-granted independent judiciaries).

131. Susan Newman, *Comparing Courts*, WASH. U. SCH. OF L. MAGAZINE, Spring 2002, 8-9 (quoting Donald P Kommers, the Joseph and Elizabeth Robbie Professor of Government and a professor of law at the University of Notre Dame, who notes that Germany provides a model constitution for the world in that its courts have exclusive power to invalidate laws on constitutional grounds), [http://law.wustl.edu/Geninfo/Magazine/Sp2002/03\\_comparing\\_courts.pdf](http://law.wustl.edu/Geninfo/Magazine/Sp2002/03_comparing_courts.pdf).

132. *Id.* at 8.

133. See XIANFA art. 62.

134. See *id.* at art. 57.

135. Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y.U. L. REV. 1, 16 (2001).

136. *Id.* at 13.

137. *Id.* at 16.

control of its judiciary, but the courts assume Parliament legislates for a European, liberal democracy founded on common law principles and approaches such legislation under a presumption that Parliament intends to legislate consistent with such principles.<sup>138</sup>

These interpretive means allow Britain's judiciary to protect a range of fundamental norms, such as access to justice, judicial review, and rights of due process.<sup>139</sup> The courts of Great Britain cannot strike down legislation, but they can, by interpretative means, bring legislation that appears to offend fundamental rights into line.<sup>140</sup> Individual rights in Great Britain, under legislative supremacy, receive protection from both political and legal factions of government.<sup>141</sup> In this context, a modified *ultra vires* doctrine serves as the juridical basis of judicial review.<sup>142</sup> The pivotal role of courts—their interpretative means—and popular sovereignty are contrasting features.

In terms of democracy, judicial review, and constitutionalism, one must also evaluate the role of the Central Committee of the Chinese Communist Party (CCP) in structuring polity and constitutionalism. The CCP represents that it is “an integral body organized under its program and constitution, on the principles of democratic centralism.”<sup>143</sup> John Wong predicts that reforms will result in a weakening of the power base of the polity, the CCP, and eventually culminate in a new constitution that removes the special privileges of the CCP.<sup>144</sup> The result of this would be that “political and institutional changes will hasten the emerging of some kind of democracy in China.”<sup>145</sup> Assuming the latter is true, one can

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138. *Id.*

139. *Id.*

140. *Id.* at 17.

141. *Id.* at 16-18.

142. *Id.* at 16 n.72.

143. People's Daily Online, *The Communist Party of China, Organizational System*, at <http://english.peopledaily.com.cn/data/organs/cpc.html> (last visited Mar. 26, 2004).

144. John Wong, *China's Post-Deng Xiaoping Economy: Problems and Prospects*, (Int'l Univ. of Japan Research Inst., Working Paper No.1, April 1997), <http://www.ij.ac.jp/research/wpap001.cfm>.

145. *Id.*

reasonably prognosticate a Chinese variant of Western democracy. The Third Plenary Session of the Eleventh Central Committee (November 1978-November 1980) (Third Plenum)<sup>146</sup> was the watershed event of the post-Mao era.<sup>147</sup> For the purpose of moving toward a socialist democracy, the Third Plenum mandated direct, popular voting for local electorates to a county-level people's congress<sup>148</sup> by enactment of the Organic Law of Village Committees of China (Organic Law).<sup>149</sup> Although Wong may have contrary intentions, he nonetheless predicts an eventual fulfillment of a recent interpretation of Deng Xiaoping's Four Cardinal Principles, namely that "China must be made a true rule by law country."<sup>150</sup> In contrast—and as evidence of the problems in China with popular sovereignty and constitutionalism—although direct elections are in progress in local villages,<sup>151</sup> the practice of indirect election of deputies to the NPC persists.<sup>152</sup>

Upon further examination of the 1982 Constitution, the weaknesses of the judiciary become more obvious. The sole power to interpret the constitution and laws of China—or legislative interpretive power—is vested with the SCNPC.<sup>153</sup> Further, on March 2000, there was a promulgation of new legislative procedural laws that seek to better define the roles

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146. MICHAEL OKSENBERG & RICHARD BUSCH, *China's Political Evolution, 1992-1982*, in THE CHINA READER: THE REFORM ERA 16, 21 (Orville Schell & David Shambaugh eds., 1999).

147. *Id.* at 16.

148. *Id.*

149. Organic Law of Village Committees of the People's Republic of China (Adopted at the Fifth Session of the Ninth NPC on November 4, 1998) [hereinafter Organic Law].

150. Zhongyi, *supra* note 106; see Wong, *supra* note 144.

151. Yawei Liu, Remarks made at the Roundtable on Village Elections in China, Congressional-Executive Commission on China (July 8, 2002), <http://cartercenter.org/documents/1039.pdf>.

152. China Daily, *Chinese Legislature Adopts Decision on Election* (Apr. 16, 2002) ("The Fifth Session of the Ninth National People's Congress (NPC), China's legislature, adopted Friday morning a decision on the number of deputies electable to the Tenth NPC and matters related to the election."), at <http://app1.chinadaily.com.cn/highlights/party16/elections/416legislature.html>; see also H.L. Fu & Richard Cullen, *National Security Law in Hong Kong: Quo Vadis A Study of Article 23 of the Basic Law of Hong Kong*, 19 UCLA PAC. BASIN L.J. 185, 224 (2002).

153. XIANFA arts. 67(1), 67(4) (1982).

and the procedures of lawmakers and attempt to establish legal hierarchy between the constitution, laws, administrative regulations, and orders at both national and local levels.<sup>154</sup> The State Council has administrative interpretative power, which is the constitutional power to interpret all administrative regulations.<sup>155</sup> Additionally, Ministries and Commissions have administrative interpretative power over departmental rules and regulations.<sup>156</sup>

The constitutional alignment of governmental power places the NPC in greater power over both the Supreme People's Court and State Council Ministries and Commissions.<sup>157</sup> Although the State Council—the highest executive organ—is not subordinate to the NPC in actual practice or power, the Supreme People's Court—the highest judicial organ—is, in constitutional text, practice, and power, subordinate to both the NPC and State Council in judicial interpretative powers.

The Supreme People's Court has judicial interpretative power, but it is a limited, delegated power to interpret laws and regulations of China arising from actual cases, which is not the same power constitutionally vested with the SCNPC to interpret the constitution and laws of China.<sup>158</sup> The distinction between interpreting laws arising from actual cases, as opposed to interpreting a constitution, is a fine one. Two Letters of Reply (Reply) from the Supreme People's Court show this fine line of demarcation. In a 1955 Reply, the Supreme People's Court wrote that it is not appropriate to cite the constitution as a basis for a decision.<sup>159</sup> Further, in a 1986 Reply, the Supreme People's Court writes that courts should not cite opinions or Replies.<sup>160</sup>

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154. Lifa Fa [Law on Legislation] (2002) (passed by the NPC), ch. 1.

155. XIANFA art. 89.

156. *Id.* at arts. 89, 90.

157. *Id.* at arts. 89(16), 92, 67(6).

158. *Id.* at arts. 67(1), 67(4).

159. *See China's Marbury v. Madison? – Direct Application of the Constitution in Litigation* (on file with author) [hereinafter *China's Marbury v. Madison?*] (discussing Songyou Huang, Chief Judge of the First Civil Division of the Supreme People's Court, *Making the Constitution Justiciable and its Significance*, PEOPLE'S COURT DAILY, August 13, 2001, which refers to the 1955 Letter of Reply Concerning the Inappropriateness of Citing Constitution as a Basis for Convictions and Sentencing in Criminal Judgments).

160. *Id.* (discussing Songyou Huang, Chief Judge of the First Civil Division of the

The judiciary has marginalized powers. In its supervisory role over lower judicial bodies, the Supreme People's Court assumes—with origins of constitutional vestige being debatable and tenuous—a power to render general interpretations of laws that are binding on lower judicial bodies in limited circumstances. First, the Supreme People's Court is responsible to both the NPC and the SCNPC.<sup>161</sup> Second, the Supreme People's Court interprets its responsibility,<sup>162</sup> in part pursuant to the constitution and statutes, as “giving judicial explanations of the specific utilization of laws in the judicial process that must be carried out nationwide.”<sup>163</sup> The natural meaning of the words “judicial explanation” is self-limiting in the sense of judicial interpretation and is likewise difficult to elevate to the level of judicial review—the “power of courts to review decisions of another department or level of government.”<sup>164</sup> Further, the words “judicial explanation” fall short of being judicial power, which is “the authority exercised by that department of government which is charged with declaration of what law is and its construction,”<sup>165</sup> because the constitution charges the SCNPC with the power to interpret the constitution and laws of China.<sup>166</sup>

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Supreme People's Court, *Making the Constitution Justiciable and its Significance*, PEOPLE'S COURT DAILY, August 13, 2001, which refers to the 1986 Letter of Reply Concerning How People's Courts Are to Cite Legally Normative Documents When Producing Legal Documents).

161. XIANFA art. 128.

162. China Court, *Judicial System, The Supreme People's Court of the PRC* (May 2002) (“The Supreme People's Court is the highest judicial organ in China and is responsible to the NPC and its Standing Committee”), at <http://en.chinacourt.org/public/detail.php?id=24>.

163. *Id.* “According to the Constitution and statutes, the Supreme People's Court is charged with the three responsibilities: First, trying cases that have the greatest influence in China, hearing appeals of the legal decision of higher courts, and trying cases the Supreme People's Court claims are within its original jurisdiction. Second, supervising the work of local courts and special courts at every level, overruling wrong judgments they might have made, and deciding interrogations and reviewing cases tried by the lower courts. Third, giving judicial explanations of the specific utilization of laws in the judicial process that must be carried out nationwide.” *Id.*

164. BLACK'S LAW DICTIONARY 849 (6th ed. 1990).

165. *Id.*

166. XIANFA arts. 67(1), 67(4) (1982).

Although not using the words “judicial explanation,” Zhai Jianxong contends that China has a history of judicial interpretation dating back to 1954.<sup>167</sup> In support of this claim, Zhai cites the SCNPC 1955 *Decision on Interpretation of Law*, which provides “that those questions connected with specific application of laws and decrees should be interpreted by the Supreme People’s Court.”<sup>168</sup> He contends that this *Decision* resulted in a power of enacting judicial interpretation, which the legislature confirmed by enactment of the 1979 Organic Law of People’s Court of the People’s Republic of China.<sup>169</sup> Finally, Zhai concludes that a resolution adopted by the SCNPC of the fifth NPC at its nineteenth session supports such contention.<sup>170</sup> The resolution reads:

Where an interpretation of questions involving the specific application of laws and decrees in court trials shall be provided by the Supreme People’s Court and; where an interpretation of problems concerning the concrete application of laws and decrees in procuratorial practices shall be prescribed by the Supreme People’s Procuratorate. If there is any difference in principle between them, it should be delivered to the Standing Committee of NPC for interpretation or decision.<sup>171</sup>

An antithetical argument comes from Zhai’s own words when he contends that judicial interpretation refers to interpretations “made by the national supreme judicial authorities on questions relating to specific application of laws in their judicial practices according to the authorization of the NPC.”<sup>172</sup> His statement is a “negative pregnant”<sup>173</sup> in that the

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167. Zhai Jianxong, *Judicial Information of the People’s Republic of China: A Survey*, Law Library Resource Xchange (Oct. 1, 2002), available at <http://www.llrx.com/features/chinajudicial.htm>.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Negative pregnant is

[i]n pleading, a negative implying also an affirmative. Such a form of

words themselves, according to the authorization of the NPC, deny a meaningful power of judicial review. The words “according to the authorization of the NPC”<sup>174</sup> speak to the continuing power of the SCNPC to interpret the constitution and laws of China and are antithetical to a claim of historical judicial interpretation.

The limited powers of judicial interpretation bear little semblance to the judicial activism of courts in the West, especially the United States. Hallmarks of judicial activism are judicial decisions, or interpretations, calling for social engineering, which also occasionally represent intrusions into legislative and executive matters.<sup>175</sup>

The right of abode cases, such as *Ng Siu Tung vs. Director of Immigrations*, provide further insight into judicial activism in China.<sup>176</sup> The Court of Final Appeal (CFA) in Hong Kong attempted to exercise an assumed power of independent judicial review, but on June 26, 1999, succumbed to another superior authority—the SCNPC in Beijing.<sup>177</sup> A background of the case follows:

Many of Hong Kong’s first constitutional test cases

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negative expression as may imply or carry within it an affirmative. A denial in such form as to imply or expression an admission of the substantial fact which apparently is controverted; or a denial which, although in the form of a traverse, really admits the important facts contained in the allegations to which it relates.

BLACK’S LAW DICTIONARY 1032 (6<sup>th</sup> ed. 1990).

174. Jianxong, *supra* note 167.

175. Judicial activism is defined as a

judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor [of] progressive and new social policies which are not always consistent with the restraint expected of appellate judges. It is commonly marked by decisions calling for social engineering and occasionally these decisions represent intrusions into legislative and executive matters.

BLACK’S LAW DICTIONARY 847 (6th ed. 1990).

176. *Ng Siu Tung v. Dir. of Immigrations*, 1 Hong Kong L. Rep. & Dig. 561 (Court of Final Appeal of the Hong Kong Special Administrative Region, Jan, 10, 2002).

177. The Interpretation by the Standing Comm. of the Nat’l People’s Cong. of Arts. 22(4) and 24(2)(3) of the Basic Law of the H.K. Spec. Admin. Region of the P.R.C. (adopted by the Standing Comm. of the 9th Nat’l People’s Cong. at its 10th Sess. on June 26, 1999).

have revolved around the question as to who has the right of abode (permanent residency) in Hong Kong under the Basic Law after reunification on July 1, 1997.

These cases resulted in two Court of Final Appeal (CFA) decisions delivered on January 29, 1999. These decisions set in motion a number of other legal challenges on the issue.

The January 1999 decisions gave the right of abode to two categories of people whose right of abode claims had not previously been recognized. Significantly, that CFA judgment also held that all claimants who arrived in Hong Kong after July 10, 1997, had to make their Right of Abode applications from the Mainland and could be removed from Hong Kong if they entered or remained before their applications had been processed and their status confirmed.

The government requested the State Council to seek an interpretation from the Standing Committee of the National People's Congress (NPCSC) on the true legislative intent of the Basic Law articles in question.

Under the Basic Law, the CFA has the power of final adjudication while the NPCSC has the power of final interpretation of the Basic Law. In keeping with common law tradition and Basic Law provisions, the government did not seek to overturn the effect of the January 29 ruling on the parties to that case.

On June 26, 1999, the NPCSC issued an interpretation of the relevant Basic Law provisions. This interpretation has since been followed by the courts in other cases dealing with the right of abode matter.

The NPCSC's interpretation stated that only children whose parents were Hong Kong permanent residents at the time of their birth were entitled to the right of abode. This is in keeping with international practice. Few countries, if any, allow immigrants to pass on their right of abode to children born elsewhere before they themselves have acquired that right.

The government's decision to seek an interpretation was not without controversy, prompting some to comment that the CFA's authority had been undermined. But in a subsequent right of abode ruling in December 1999, the CFA confirmed that the NPCSC interpretation was both lawful and constitutional. The rule of law and the independence of the judiciary had not been undermined.<sup>178</sup>

In Hong Kong, under the Basic Law—a sort of mini-constitution—the CFA has the power of final adjudication,<sup>179</sup> while the SCNPC has the power of final interpretation of the Basic Law.<sup>180</sup> Despite a provision at Article 84 of the Basic Law allowing the Hong Kong Special Administration Region (HKSAR) to refer to precedents of other common law jurisdictions,<sup>181</sup> the SCNPC and its power of judicial interpretation prevails.<sup>182</sup> In November 2002, China and its SCNPC reiterated and buttressed its position by a decision on the handling of the existing law of Hong Kong.<sup>183</sup>

Moreover, on 6 April 2004, in one of the most important historical events since China resumed sovereignty over Hong

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178. *The Report on the First Five Years of the Hong Kong Special Administrative Region of the People's Republic of China, The Rule of Law*, at [http://www.gov.hk/info/sar5/elaw\\_1.htm](http://www.gov.hk/info/sar5/elaw_1.htm) (July 2002).

179. The Basic Law of the H. K. Spec. Admin. Region of the P.R.C., Art. 82 (adopted at the 3<sup>rd</sup> Sess. Of the 7<sup>th</sup> Nat'l People's Cong. on Apr. 4, 1990) [hereinafter The Basic Law of Hong Kong].

180. *Id.* at art. 17.

181. *Id.* at art. 84 (“The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.”); *see also id.* at art. 8 (“The laws previously in force in Hong Kong, that is, the common law, rule of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”).

182. *See* Ng Siu Tung, 1 Hong Kong Law Reports & Digest at 585 (noting that the precedential value of court judgments is destroyed if displaced by a Standing Committee interpretation).

183. China Court, *Laws and Regulations, Decisions of the Standing Committee of the National People's Congress (SCNPC) on Handling the Existing Law of Hong Kong According to the Provisions of Article 160 of the Basic Law of the Hong Kong Special Administrative Region (HKSAR) of PRC*, <http://en.chinacourt.org/public/detail.php?id=1078> (posted Nov. 5, 2002).

Kong, on 1 July 1997,<sup>184</sup> the SCNPC again exercised its political, constitutional and interpretational powers over Hong Kong, by adopting, “Interpretations of Clause 7 of Annex I and Clause 3 of Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress.”<sup>185</sup>

Wu Bangguo, chairman of the SCNPC and a member of the Standing Committee of the Political Bureau of the Communist Party of China (CPC) Central Committee, at the closing session of the Eighth Meeting of the Tenth NPC Standing Committee, indicated that

“the development of the constitutional system in Hong Kong has a bearing on the implementation of the principle of ‘one country, two systems’ and the Basic Law, relations between the Central Authorities and the Hong Kong SAR, the interests of all Hong Kong people, and the long-term prosperity and stability of Hong Kong.”<sup>186</sup>

In noting that “The Central Government has always given top priority to the development of [a] constitutional system in Hong Kong,” Wu also announced that according to the Constitution and the Basic Law, “the right to interpret the Basic Law belongs to the NPC Standing Committee.”<sup>187</sup> Wu indicated that the current interpretations “have the same power as the Basic Law”<sup>188</sup> and are “necessary and timely . . . to ensure the

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184. See *China’s Entry*, *supra* note 2 (announcing China’s obligation to liberalize its regime as a part of WTO membership and indicating that Hong Kong became a Special Administrative Region of China on 1 July 1997).

185. See *Top Legislature Interprets HK Basic Law*, PEOPLE’S DAILY.COM.CN, April 6, 2004, at [http://english.peopledaily.com.cn/200404/06/eng20040406\\_139598.shtml](http://english.peopledaily.com.cn/200404/06/eng20040406_139598.shtml) (reporting on the new interpretations that amend the methods for selecting a government head and for forming the legislature in Hong Kong); see also *Top Legislature Adopts Interpretations of HK Basic Law*, PEOPLE’S DAILY.COM.CN, April 7, 2004, at [http://english.peopledaily.com.cn/200404/06/eng20040406\\_139603.shtml](http://english.peopledaily.com.cn/200404/06/eng20040406_139603.shtml) (indicating Beijing’s approval of the interpretations).

186. *Interpretations Helpful for Ensuring HK’s Prosperity, Stability: Top Legislator*, PEOPLE’S DAILY.COM.CN, April 6, 2004, at [http://english.peopledaily.com.cn/200404/06/eng20040406\\_139606.shtml](http://english.peopledaily.com.cn/200404/06/eng20040406_139606.shtml).

187. *Id.*

188. *Chairman Lauds New Moves of Congress*, CHINA DAILY, April 7, 2004, at

healthy development of Hong Kong's constitutional system in line with the Basic Law."<sup>189</sup>

Generally, the two clauses interpreted, at Clause 7 of Annex I and Clause 3 of Annex II, respectively, relate to the selection of the Chief Executive of the Hong Kong Special Administration Region (SAR), formation of the Legislative Council, and procedures for voting on bills and motions after 2007.<sup>190</sup> Finally, China condemned the responses of the United States and Great Britain to these interpretations as interfering with Hong Kong's internal affairs.<sup>191</sup>

Additionally, the right of abode cases move one to question the role of case law or legal precedent in China's legal system.<sup>192</sup> If the SCNPC has the power of constitutional interpretation, what becomes of the legal renderings of the People's Supreme Court?

In China, court renderings routinely officially appear in the Gazette of the Supreme People's Court of the People's Republic of China (Gazette),<sup>193</sup> as well as other non-official publications.<sup>194</sup>

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[http://www.chinadaily.com.cn/english/doc/2004-04/07/content\\_321167.htm](http://www.chinadaily.com.cn/english/doc/2004-04/07/content_321167.htm) (indicating that since the new legal interpretations have the same power as the Basic Law, the interpretations "must be abided by and implemented").

189. *Id.*

190. Joseph Li & Xiao Guo, *Basic Law Interpretations 'Timely'*, CHINA DAILY, April 7, 2004, at [http://www.chinadaily.com.cn/english/doc/2004-04/07/content\\_321171.htm](http://www.chinadaily.com.cn/english/doc/2004-04/07/content_321171.htm).

191. See *US Interference in China's Internal Affairs Condemned*, PEOPLE'S DAILY.COM.CN, April 5, 2004, at [http://english.peopledaily.com.cn/200404/05/eng20040405\\_139505.shtml](http://english.peopledaily.com.cn/200404/05/eng20040405_139505.shtml); see *China Opposes British Official's Interference in HK Affairs*, PEOPLE'S DAILY.COM.CN, April 9, 2004, at [http://english.peopledaily.com.cn/200404/09/eng20040409\\_139869.shtml](http://english.peopledaily.com.cn/200404/09/eng20040409_139869.shtml).

192. Precedent is

[a]n adjudged cause or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law. Courts attempt to decide cases on the basis of principles established in prior cases. Prior cases which are close in facts or legal principles to the case under consideration are called precedents. A rule of law established for the first time by a court for a particular type of case and thereafter referred to in deciding similar cases.

BLACK'S LAW DICTIONARY 1176 (6th ed. 1990).

193. Nanping Liu, "Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 J. CHINESE L. 107, 107 (1991) ("The publication of decided cases, beginning in 1985, in the Gazette of the Supreme People's Court of the People's Republic of China . . . has attracted much attention from Western

Nanping Liu provides insight into the past and present reporting of legal renderings and states, as an elemental contention, “that decisions reported in the Gazette may actually carry force as precedents, depending on the comments the Court makes as well as on the sensitivity of the issues involved.”<sup>195</sup>

Liu traces the history of precedents in light of three periods: before 1912, 1912 to 1949, and after 1949 (during the Maoist era).<sup>196</sup> He contends that before 1949, China had a long history of using decided cases as legal precedent.<sup>197</sup> From 1912 to 1949, during the period of the Republic of China, one finds a Western style of legal precedence.<sup>198</sup> Comparatively, Liu opines that the Gazette has a deliberately vague mandate for guidance.<sup>199</sup> He notes the conclusion of scholars on the new publication of law that “these published decisions do not carry . . . the force of precedent. They will be used only as models to help less experienced judges learn methods of legal reasoning.”<sup>200</sup> The earlier observations of Liu may still hold true. He writes:

Publication of the Gazette signals a development and a change in the way the Chinese judicial hierarchy is administered . . . . But it should be recognized that the

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scholars. Some have regarded it as a valuable tool for understanding developments in the Chinese legal system in post-Mao China.”).

194. See, e.g., Jianxiong, *supra* note 167 (“A Complete Collection of Judicial Interpretations of New China: 1949.10 - 1990.6 (China Procuratorial Press, 1990) and its enlarged edition, 1990.6.-1992.6.”).

195. *Id.* at 108.

196. *Id.* at 109-114. Before 1912, and as early as the Western Zhou Dynasty (771 B.C. to the 11th Century), the practice of trying cases by legal precedence without prior enactment of statutes existed. *Id.* at 109-10. The practice of case law precedence existed in dynastic periods subsequent to the Zhou dynasty, for example, *tingxingshi* in the Qin Dynasty (221 B.C.-206 B.C.), *jueshibi* in the Han Dynasty (206 B.C.-220 A.D.), *xuyiqianju* in the Tang Dynasty (618 A.D.-907 A.D.), and *yilicongshi* in the Song Dynasty (960 A.D.-1297 A.D.). *Id.* The terms *jueshibi*, *xuyiqianju* and *yilicongshi* refer to the practice of following previously decided cases. *Id.*

197. *Id.* at 109, 112.

198. *Id.* at 112. Decided cases and interpretations of particular provisions by the court served as legal precedents in the judicial process. *Id.* The Supreme Court had its own reporter called The Collection of Decided Cases of the *Dali Yuan*, and its reported decisions enjoyed a Western style of legal precedence. *Id.*

199. *Id.* at 112, 114.

200. *Id.* at 107 (quoting Tao-tai Hsai & Wendy I. Zeldin, *Recent Legal Developments in the People's Republic of China*, 28 HARV. INT'L L.J. 249, 259 (1987)).

purposes and underlying rationales for following judicial precedents in the Chinese context and the effects such practice may have on the general power structure within and without the written Constitution have not fully unfolded and need to be further explored.<sup>201</sup>

Nonetheless, a discontinuance of the practice of non-transparency and a history of legal precedence offer hope for the rule of law in China.

The laws enacted pursuant to legal reforms also contribute to a weak judiciary. First, only in matters pertaining to commercial and financial laws does China borrow from the principles of Anglo-American common law.<sup>202</sup> In this sense, the Chinese legal system characterizes a bifurcated system of foreign and domestic laws with divergent treatment.<sup>203</sup> Legal reform in China thus far entails an adoption of principles of civil law, common law, and international law—all of which only adds to confusion.<sup>204</sup>

Second, the polity has a problem of laws that operate inconsistently on national and local levels.<sup>205</sup> An illustration of this problem is the implementation of the Organic Law by local polity, creating electoral processes violative of the Basic Law; for example sea elections, two-ticket systems, preliminary voting, three-time selections, and group election systems.<sup>206</sup> The Organic Law provides, “candidates are to be nominated directly by the villagers who have the right to vote in that village”—being sea election.<sup>207</sup> The result is formalization of the electorate processes

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201. *Id.* at 128.

202. *Cf.* Tay, *supra* note 22 (noting that much of China’s commercial and financial legislation is Anglo-American).

203. *See Id.*

204. *See Id.*

205. STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 140 (1999).

206. Organic Law, *supra* note 149.

207. *See* Bai Gang, Abstract, *Village Committee Elections: Process and Challenge* (Governance in Asia Research Ctr., City University of Hong Kong, Occasional Paper Series No. 6, 2002), available at <http://www.cityu.edu.hk/garc/occassional/occ06.html>.

by non-approved methods.<sup>208</sup> Stanley Lubman writes: “As localities increase their control over their own economic resources, their power to broaden their own jurisdiction becomes increasingly problematic for the central government.”<sup>209</sup> This further adds to the problem of implementing a stronger judiciary with constitutional decision-making authority.

The Chinese judiciary remains intact as the weakest organ of government. The People’s Supreme Court and its present realm of judicial power—with or without the 1982 Constitution—lacks the power of genuine substantive social discourse in the sense of constitutionalism. Nevertheless, the reality or rhetoric of Asian values can serve as a plausible justification for the constitutional mandate of a weak and marginalized judiciary. Despite the admonitions of some,<sup>210</sup> China is a non-market economy transitioning to a socialist-market economy.<sup>211</sup> In recent times, economic development often surfaces as a justification for prioritizing socioeconomic rights over civil-political rights.<sup>212</sup> China and other East Asian nation-states, under the umbrella of traditional or Asian values, often place greater significance on socioeconomic rights.<sup>213</sup> In the context of issues concerning human rights, economic development, or independent judicial review in a Confucian society—which is in transition and undergoing major legal reforms and economic development—it is a plausible argument that China’s particularism warrants the patience, understanding, and assistance of the West in effecting both the rule of law and a positive discursive model for judicial review. The crisis in constitutionalism warrants a multilateral approach from the West, as opposed to a unilateral or a hegemonic approach. It is also arguable that present socioeconomic conditions in China, amidst gradual legal reform and economic

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208. *Id.*

209. Lubman, *supra* note 205, at 144.

210. Chen Xiwen, *China’s Entry Into the WTO and the Acceleration of the Improvement of the Socialist Market Economic System*, in CHINA: ACCESSION TO THE WTO AND ECONOMIC REFORM, *supra*, note 3, at 1, 1-2.

211. Tay, *supra* note 22.

212. *See id.*

213. *Id.*

development, justify extra-constitutionalism<sup>214</sup> as there would not be a shock to China's infrastructure by invocation of a liberal constitutional political economy and its coercive proclivities.<sup>215</sup>

### B. Rule of Law in China

There are divergent opinions on the status of the rule of law in China, mostly subscribing to one of several theories that proclaim that the rule of law does not exist in China. Michael W. Dowdle approaches the subject of the rule of law by asking the question, "should there be rule of law in China as we currently conceive of that concept?"<sup>216</sup> Dowdle evaluates the various arguments advancing that there is no real rule of law in China, and resolves that whatever problems attend the rule of law in China, "they are not due to any of the factors rule-of-law analyses like to point to."<sup>217</sup> He contends that "[e]veryone agrees that there is no rule of law in China," but everyone has a difficult time explaining why.<sup>218</sup> Dowdle cites Alford, Hintzen and Peerenboom as representatives of the pool of theorists.<sup>219</sup>

Dowdle rightly concludes that these theorists may expect too

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214. Davis, *supra* note 128.

"Constitutional theorists have come to recognize, however, that constitutional judicial review is not the sole discursive engine for crafting political values and solutions. At moments of crisis, what Stephen Krasner calls punctuated equilibrium, the entire people may be mobilized to civic action. In normal times, the people may be content with representation and constitutional judicial review, while they largely focus on private affairs; while at times of what Bruce Ackerman calls constitutional politics the level of civic action may become extraordinary. Ackerman identifies three republics in American history, before and after the civil war and in the modern regulatory social welfare state initiated in the 1930s by the New Deal. There is evidence of such mobilization in the recent South Korean constitutional politics of reform and in the Japanese politics of resistance to corruption."

*Id.* (citations omitted).

215. John S. Dryzek, *Constitutionalism and its Alternatives* (prepared for presentation on Mar. 27, 2002 at the Social and Political Theory Program Workshop on "Democratic Theory: The Canberra Papers"), at 3, at [http://socopol.anu.edu.au/pdf-files/democracy\\_dryzek.pdf](http://socopol.anu.edu.au/pdf-files/democracy_dryzek.pdf).

216. Dowdle, *supra* note 71, at 288.

217. *Id.* at 287.

218. *Id.*

219. *Id.*

much because the problem does not lie with the legal system per se, but with the state of China's social and constitutional development.<sup>220</sup> Instead of requiring that China immediately adopt a mature legal system, he posits that rule-of-law theories need to lend more consideration to the conditions and needs of a developing society.<sup>221</sup> Dowdle does not intend to suggest that there is rule of law in China.<sup>222</sup> His contention is merely that while most theorists agree that there is no rule of law in China, their justifications or theories advanced in support of their arguments have many fallacies.<sup>223</sup>

A problem with the present legal paradigm of China is that it appears to be at the outer periphery of the rule of law. Notwithstanding vast legal reforms in China, it is still intimated that the goal of the government of China is to achieve rule by law, as opposed to rule of law.<sup>224</sup>

Although the theories on the rule of law in China are many, the writings of Eric W. Orts and Peerenboom are representative of the dominant theorists. Orts makes a distinction between rule by law (as a descriptive, positive, and instrumental view of the relationship) and rule of law (as a prescriptive, normative, and political view of what the relationship should be).<sup>225</sup> In this context, rule by law implies that the law serves as an instrument of government, or as a mere instrument of policy.<sup>226</sup> In contrast to the comparisons offered by Orts, Peerenboom distinguishes between thin and thick theories of rule of law, arguing that "as thick and thin theories serve different purposes, I do not want to privilege thin theories over thick theories by declaring the thin version to be 'the rule of law.'"<sup>227</sup>

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220. *Id.* at 308.

221. *Id.*

222. *Id.* at 287-88.

223. *Id.*

224. James V. Feinerman, *The Rule of Law with Chinese Socialist Characteristics*, 96 *Current History* 278, 280 (1997).

225. Eric W. Orts, *The Rule of Law in China*, 34 *VAND. J. TRANSNAT'L L.* 43, 93-94 (2001).

226. *Id.* at 94.

227. *Globalization, Path Dependency and the Limits of Law*, *supra* note 69, at 264 n.18.

Given the many possible conceptions of rule of law, I avoid reference to "the

In this context, if China's legal system finds itself on the periphery of a thin rule of law, Peerenboom will not declare such a system to be under the rule of law.<sup>228</sup> In the Peerenboom analysis, the thin rule of law possesses the characteristics of a rule-of-law model where the predominate and overriding purpose is to have law serve as a mere instrument of governmental policy—what Orts termed a policy-driven model of rule by law.<sup>229</sup> Regardless of the paradigm employed in assessing rule of law in China, there appears to be a consensus that China and its rule of law remain at the outer periphery of Western rule of law.

In answer to Dowdle's question, there is rule of law in China, but not in the way the West perceives rule of law. The conclusions of Dowdle well address the issues and problems surrounding the many theories advanced regarding the rule of law in China. However, Dowdle in his conclusion omits one important factor—the interplay between economic development and legal reform. The West assumes that the protection of certain values requires a modern legal system—a paradigm that the West itself has invented. What is amiss in Dowdle's conclusion is the role of economic development in securing these values cherished in Western jurisprudence. For developing countries, the prioritization of socioeconomic rights over civil-political rights is arguably justifiable because the citizens will neither enjoy the benefits of the rule of law nor civil-political rights without economic development.<sup>230</sup> Prompting China to expediently implement a modern legal system and immediately place civil-political rights on an equal footing with socioeconomic rights is arguably asking China to put the proverbial cart before

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rule of law," which suggests that there is a single type of rule of law. Alternatively, one could refer to the concept of "the rule of law," for which there are different possible conceptions. The thin theory of rule of law, discussed *infra*, would define the core concept of rule of law, with the various thick theories constituting different conceptions. Yet from the perspective of philosophical pragmatism, how one defines a term depends on one's purposes and the consequences that attach to defining a term in a particular way.

*Id.*

228. *Id.* at 190-92.

229. *Id.* at 190; Orts, *supra* note 225, at 93-94.

230. See Tay, *supra* note 22.

the horse. William Kovacic writes: "There is no assurance that this attempted transformation will succeed in all or most cases, as economic and political turmoil today besets many countries seeking to rely more extensively on market systems."<sup>231</sup> Kovacic is speaking in terms of communist or socialist nations, not unlike China, that have, since the mid 1970s, undertaken market-oriented reform.<sup>232</sup>

In 1960, the Asian Development Bank commissioned a thirty-five-year study examining the role that legal systems played in six Asian economies: China, India, Japan, Republic of Korea, Malaysia, and Taipei.<sup>233</sup> The study concludes:

A key finding of this research project therefore is that law and legal institutions should not be viewed as technical tools that once adopted will produce the desired outcome . . . . This finding cautions against the blind transplantation without due consideration for the relevant economic framework within which they shall operate. It also suggests that law reform projects should be assessed not in isolation, but within a broader context of economic policies.<sup>234</sup>

Before accession to the WTO, China made substantial advances toward modernization that included legal reforms. Since initiating economic reform and an open-door policy some twenty-five years ago, the Chinese economy has experienced high rates of growth.<sup>235</sup> Economic barometers show an average annual growth rate of 9.5% from 1978 to 1995, and double-digit rates for four consecutive years, from 1992 to 1995.<sup>236</sup> Presently, projections from China indicate that China's economy will grow at the rate of 8% in 2004 and Foreign Direct Investment will

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231. William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265, 265 (2001); see also Stephen Fidler, *World Bank Lifts Growth Forecast*, FIN. TIMES, Dec. 8, 1999, at 19 (describing economic vulnerabilities of emerging market economies).

232. *Id.*

233. PISTOR & WELLONS, *supra* note 13, at vi.

234. *Id.* at 19.

235. Wong, *supra* note 144.

236. *Id.*

continue to rapidly grow.<sup>237</sup> “In its latest report on foreign trade, the ministry said China’s gross domestic product (GDP) for next year will be 7 per cent higher than 2003, thanks to efficient domestic policies and the rebound of other major economies around the world.”<sup>238</sup>

The West now stands in critical judgment of China’s progress toward the rule of law, especially the lack of a positive discursive model for judicial review. It is a pre-judgment tainted by Western bias and taxonomies, however. Some critiques<sup>239</sup> ignore the dangers to China’s fragile infrastructure—polity, socioeconomic, and legal—that must be carefully guarded lest China suffer setbacks in its legal reforms and economic development. A need for stability results in a steady yet gradual approach to modernity, which often finds its expression through espousal of Asian values.<sup>240</sup> The rhetoric or reality of Asian values justifies a higher priority for socioeconomic rights instead of civil-political rights during this transitory period.

For China, legal reforms and economic development confront real life dilemmas. They necessitate *realpolitik*, and the expansion-contraction cycle, which is political tightening and political loosening as needed, rather than blind adherence to Western taxonomies and Western prescription for the rule of law.<sup>241</sup> As previously mentioned, Wong intimates that democracy will follow legal reforms.<sup>242</sup> Given the success of reforms to date, it is a reasonable contention that the rule of law and democracy, albeit a Chinese variant, are gaining a foothold in China.

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237. Fu Jing, *Rosy Forecast of Economic Growth*, CHINA DAILY, Nov. 6, 2003, available at 2003 WL 57560665; Lena Lee, *Foreign Investors, Retail Sales Set the Pace in China*, THE ASIAN WALLSTREET JOURNAL, Mar. 26, 2004, at A2, available at 2004 WL 56592469.

238. See Jing, *supra* note 237; see also *China set 7% growth target for 2004*, NEWS GUANGDONG, Dec. 3, 2003, at <http://www.newsgd.com/business/prospective/200312030031.htm> (“However, with 7.7 per cent average growth over the past five years, and 8.5 per cent growth predicted for this year, there is little doubt the target could have been set higher, ranking officials said.”).

239. See, e.g., Kovacic, *supra* note 231.

240. Li, *supra* note 79.

241. OKSENBERG & BUSCH, *supra* note 146, at 3 (referencing editorial remarks by Schell & Shambaugh).

242. Wong, *supra* note 144.

Further, Wong writes, “such drastic political transformation as full democratization for a big and diverse country like China is plainly unrealistic at the present stage: it will simply bring more chaos to China, if the democracy experiments in several Asian countries can serve as a guide.”<sup>243</sup> There is rule of law in China—perhaps at the outer periphery of Western ideal rule of law—but nonetheless it is rule of law. In modern China, 5,000 or more years of Chinese philosophy (particularly Confucianism), culture, and history educed a distinctive legal culture that prophesizes both a distinctive Chinese rule of law and judicial review. There is rule of law in China, but it is a Chinese variant of Western rule of law that continues to evolve.

#### IV. CONCLUSION

##### A. *China and The History of Judicial Review in the West*

Judicial independence presents itself as the noblest concept of Western jurisprudence, which is logical given its Western origins—Roman philosophers, Enlightenment Thinkers during the Age of Reason, *The Case of the College Physicians*, commonly known as *Dr. Bonham’s Case*,<sup>244</sup> and *Marbury v. Madison*.<sup>245</sup> The historicity of Western judicial independence emanates from both philosophical ideals and a fear of oppressive government.<sup>246</sup> The U.S. Constitution bore its roots in the fear of a monarch and the need to limit the exercise of popular democracy, which paralleled a fear of Nazi rule under the Weimar Republic when writers drafted a post-World War II German Constitution.<sup>247</sup>

The historical contingent of England’s “Glorious” Revolution of 1688 resulted in the divergence between the American notion of constitutional supremacy and England’s doctrine of

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243. *Id.*

244. Theodore F. T. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30, 31 (1927).

245. *Marbury v. Madison*, 5 U.S. 137 (1803).

246. Donald P. Kommers, Book Review, 9 E. EUR. CONST. REV. No. 1/2 (2000), at [http://law.nyu.edu/eecr/vol9num\\_onehalf/reviews/limiting.html](http://law.nyu.edu/eecr/vol9num_onehalf/reviews/limiting.html) (reviewing ANDRAS SAJÓ, *LIMITING GOVERNMENT: AN INTRODUCTION TO CONSTITUTIONALISM* (1999)).

247. *Id.*

parliamentary sovereignty.<sup>248</sup> In England, the principle of *Dr. Bonham's Case* fell from grace, while it continued to flourish in the American colonies.<sup>249</sup> The famous words of Lord Coke read:

And it appears in our books, that in many cases the common law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void.<sup>250</sup>

Although not necessarily by grand design, the rule of law established itself as the dominant legal system in America and culminated in the landmark decision of *Marbury v. Madison*.<sup>251</sup>

China's journey to judicial independence ignores the historicity of judicial review in the West. China's journey is fraught with disappointment and misjudgments in timing and strategy. The right of abode cases<sup>252</sup> in Hong Kong are representative of failing efforts to establish judicial independence, especially when such efforts predicate themselves upon the case of *Marbury*—a symbolic threshold for China's bar. China's attempt to emulate this historical decision has been carried out in a void divorced from the reality of a distinctive historicity of Western jurisprudence and in disregard of its own historicity of jurisprudence.

### *B. China's Road to Judicial Review*

The road to judicial independence is inevitable because China proclaims that it is a democratic government. The preamble to the 1982 Constitution states the goal is "to turn China into a socialist country with a high level of culture and democracy."<sup>253</sup> "While speaking highly of China's rapid economic

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248. Lord Irvine, *supra* note 135, at 3.

249. Plucknett, *supra* note 244, at 34, 65.

250. *Id.* (citation missing in original).

251. See *Marbury V. Madison*, 5 U.S. 137, 177 (1803)

252. *Ng Siu Tung v. Dir. of Immigrations*, 1 Hong Kong Law Reports & Digest 561, 577-578 (Court of Final Appeal of the Hong Kong Special Administrative Region, 2002).

253. XIANFA pmbl.

growth, the United Nations' Human Development Report 2002 released on July 24 in Manila said Chinese people have been given greater voice in formulating national reform policies and programs.<sup>254</sup> With local elections, China is building toward a more representative, democratic government.<sup>255</sup> It is difficult to refute that since Deng Xiaoping's reforms of the 1980s, China has presented itself as a socialist-political polity with a capitalist-economic policy.

### C. A Justiciable China Constitution

The July 24, 2001 Reply is arguably an implicit adoption by the Supreme People's Court of the principles of constitutionalism embodied in *Marbury*. The English translation of this Reply reads:

Announcement of the Supreme People's Court. The reply of the Supreme People's Court Concerning Whether Civil Liability Arises When the Constitutionally-Protected Fundamental Right of Citizens to Receive Education Is Violated by Means of Violating Rights in a Person's Name was adopted at the 1,183rd Session of the Judicial Committee of the Supreme People's Court on June 28, 2001. It is hereby promulgated. It shall come into effect as from August 13, 2001. July 24, 2001.

The Reply of the Supreme People's Court Concerning Whether Civil Liability Arises When the Constitutionally-Protected Fundamental Right of Citizens to Receive Education Is Violated by Means of Violating Rights in a Person's Name, To the Shandong Provincial Higher People's Court: We have received your court's Request for Instructions Concerning the Dispute Involving Rights in a Person's Name Between Qi Yuling and Chen Xiaoqi, Chen Kezheng, the Jining Municipality School of Commerce of Shandong

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254. Embassy of the People's Republic of China in the United States of America, *UNDP Report: China Promotes Democracy While Achieving Rapid Growth*, at <http://www.china-embassy.org/eng/zt/wto/t36953.htm> (July 24, 2002).

255. Wong, *supra* note 144.

Province, the Tengzhou Municipality No. 8 High School of Shandong Province and the Tengzhou Municipal Education Commission of Shandong Province. After study, we hold, on the basis of the facts in this case, that Chen Xiaoqi and others have violated the fundamental right to receive education enjoyed by Qi Yuling in accordance with the provisions of the Constitution by means of violating rights in a person's name. This has produced the result of actual damages. Commensurate civil liability arises. Reply is hereby given.<sup>256</sup>

The 2001 Reply and its reliance on the constitution are antithetical to the court's long practice of refusing to rely on the constitution, and it is here the controversy begins.<sup>257</sup> Although the language seems innocuous, its subsequent interpretation caused a stir.<sup>258</sup> The genesis of the controversy is an article written by Huang Songyou, Chief Judge of the First Civil Division of the Supreme People's Court, entitled "Making the Constitution Justiciable and its Significance."<sup>259</sup> Judge Huang analyzes the reasons the Supreme People's Court will not cite directly to the Constitution.<sup>260</sup> A 1955 Reply states that it is not appropriate to cite the Constitution as a basis for decision.<sup>261</sup> A 1986 Reply of the Supreme People's Court also provides that courts should not cite opinions and replies.<sup>262</sup> An interpretation

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256. *China's Marbury v. Madison?*, *supra* note 159 (quoting the Reply of the Supreme People's Court Concerning Whether Civil Liability Arises When the Constitutionally-Protected Fundamental Right of Citizens to Receive Education is Violated by Mean of Violating Rights in a Person's Name, *Fa Shi* [2001] No. 25, adopted at the 1,183rd Session of the Judicial Committee of the Supreme People's Court, June 28, 2001).

257. *Id.* (discussing Huang, *supra*, note 159, which refers to the 2001 Reply of the Supreme People's Court Concerning Whether Civil Liability Arises When the Constitutionally-Protected Fundamental Right of Citizens to Receive Education is Violated by Mean of Violating Rights in a Person's Name).

258. *Id.* (referring to Huang, *supra*, note 159).

259. *Id.* (referring to Huang, *supra*, note 159).

260. *Id.* (referring to Huang, *supra*, note 159).

261. *Id.* (discussing Huang, *supra*, note 159, which refers to the 1955 Letter of Reply Concerning the Inappropriateness of Citing Constitution as a Basis for Convictions and Sentencing in Criminal Judgments).

262. *Id.* (discussing Huang, *supra*, note 159, which refers to the 1986 Letter of

given to the Replies forbids a direct citing of the Constitution.<sup>263</sup> Judge Huang does however note that the 1955 Reply and 1986 Reply are equally subject to an interpretation as recommendations rather than mandates and further distinguishes them on other grounds.<sup>264</sup>

Judge Huang argues that the Reply establishes a precedent for the justiciability of the constitution since the constitution may now enter judicial proceedings just as with any other law or regulation and may serve as a legal basis for judgment.<sup>265</sup> He sees far-reaching implications arising from this Reply.<sup>266</sup> First, the Reply establishes a precedent for court protection of fundamental rights of citizens stipulated in the Constitution.<sup>267</sup> It is in this distinction that Judge Huang argues that the Reply creates a landmark decision in China's legal system.<sup>268</sup> The fundamental rights of citizens, if stipulated in the Constitution, are now subject to protection irrespective of a conversion of such rights under ordinary legal norms.<sup>269</sup> He is addressing the judicial norm of converting fundamental rights into ordinary laws and regulations.<sup>270</sup> Second, Judge Huang argues that the Reply implicitly creates a precedent for justiciability of the Constitution.<sup>271</sup> Third, the Court uses a civil method to redress violations of fundamental rights as opposed to criminal or administrative law remedies.<sup>272</sup>

However, Judge Huang does not contend that this Reply is an express, or even implicit, grant of the power of constitutional review.<sup>273</sup> In this respect, the Reply falls short of the full

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Reply Concerning How People's Courts Are to Cite Legally Normative Documents When Producing Legal Documents).

263. *Id.* (discussing Huang, *supra* note 159).

264. *Id.* (discussing Huang, *supra* note 159).

265. *Id.* (discussing Huang, *supra* note 159).

266. *Id.* (discussing Huang, *supra* note 159).

267. *Id.* (discussing Huang, *supra* note 159).

268. *Id.* (discussing Huang, *supra* note 159).

269. *Id.* (discussing Huang, *supra* note 159).

270. *Id.* (discussing Huang, *supra* note 159).

271. *Id.* (discussing Huang, *supra* note 159).

272. *Id.* (discussing Huang, *supra* note 159).

273. *Id.* (discussing Huang, *supra* note 159).

constitutional measure of *Marbury v. Madison*.<sup>274</sup> Nevertheless, the effort of the China bar in the right of abode cases,<sup>275</sup> taken in conjunction with the previously mentioned Reply of July 24, 2001,<sup>276</sup> prophesizes an optimistic future for judicial independence. Although Judge Huang does not explicitly assert a power of constitutional review emanating from this Reply, he does rightly hail the protection of fundamental rights of citizens as the most salient point.<sup>277</sup> In this context, the Reply is of the stature of landmark constitutionalism because the judiciary is arguably flexing its power of interpretation into the realm of constitutionalizing fundamental rights. Given this Reply, one can draw a correlative argument similar to parliamentary supremacy, when one collimates the interpretative means of courts in Great Britain with an anticipation of similar interpretative means for China's judiciary.<sup>278</sup>

#### D. Constitutional Ethos and *Marbury v. Madison*

China's road to judicial independence evidences a marked proclivity toward reliance on *Marbury*. If judicial independence is to become a reality in China, it must necessarily bear its own distinctive characteristics. Its judiciary must view constitutionalism "not just as a formal state structure, but also as a dynamic process" that is "the crossroads of law and society, culture and history, economics and politics."<sup>279</sup> Lurking somewhere in China's journey to judicial review and the proclivity to emulate *Marbury* is a subconscious notion that constitutionalism is contingent upon Western values and culture. Constitutionalism is subject to many forms and structures.<sup>280</sup> Barry Hager writes: "It becomes an unfair tautology that the absence of a Rule of Law heritage suggests an

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274. *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803).

275. *Ng Siu Tung v. Dir. of Immigrations*, 1 Hong Kong Law Reports & Digest 561, 646 (Court of Final Appeal of the Hong Kong Special Administrative Region, 2002).

276. Huang, *supra* note 159.

277. *Id.*

278. Lord Irvine, *supra* note 135, at 16-17.

279. CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, at xvi (Douglas Greenberg et al. eds., 1993).

280. Hager, *supra* note 27, at 13.

absence of any legal system at all.”<sup>281</sup>

China’s judiciary must look to its own jurisprudential historicity, rather than Western jurisprudence. Modern China enjoys its own unique historicity and attendant historical accidents, all of which justify a China shrouded in a particularism reflective of Confucian values. The answer to China’s journey to judicial review lies not in the theories of the Enlightenment Thinkers. Rather, it lies in the philosophical underpinnings of its own great thinkers who contributed to the creation of a culture where Confucianism is persistent and systemic.

There has always been a historical dimension to Western jurisprudence.<sup>282</sup> The historicity of Western jurisprudence dates back to the twelfth century,<sup>283</sup> while the historicity of Chinese jurisprudence dates back 5,000 years or more. As Harold J. Berman writes:

Ever since the early formation of discrete modern Western legal systems in the twelfth century, it had been taken for granted that a legal system has an ongoing character, a capacity for growth over generations and centuries. This was a uniquely Western belief: that a body of law, a system of law, contains, and should contain, a built-in mechanism for organic change and that it survives, and should survive, by development, by growth . . . . The law was thought to be not merely ongoing; it had a history; it constituted a tradition.<sup>284</sup>

The same holds true for China. A Chinese jurisprudence in antiquity continues to evolve. In modern China, a historical debate between Confucianism and Legalism and an on-going debate between rule by man and rule by law<sup>285</sup> continues to

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281. *Id.*

282. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L. J.* 1651, 1654-55 (1994).

283. *Id.*

284. *Id.*

285. See Funk, *supra* note 18 at 6-7 (asserting that the lack of justifying the two rules is the principle problem for traditional Chinese jurisprudence).

evolve and constitutes a tradition.

Further, constitutionalism is not necessarily contingent upon democracy. Mark Tushnet contends that liberty in the United States would not be less without the Supreme Court having the power of judicial review.<sup>286</sup> On the question of introducing Western democracy to China at its present stage of development, Wong writes:

Liberal detractors would hastily jump to the conclusion that for political reform China must necessarily call for a Western style of democracy. This is clearly unwarranted in the East Asian tradition, which has followed instead the sequence of "development first, democratization later." Furthermore, such drastic political transformation as full democratization for a big and diverse country like China is plainly unrealistic at the present stage: it will simply bring more chaos (*luan*) to China, if the democracy experiments in several Asian countries can serve as a guide. Nor will political democracy necessarily facilitate China's present economic growth and social progress. It is to be remembered that South Korea's industrial take-off took place under a military dictatorship, Taiwan's under martial law, and Hong Kong's under a colonial rule.<sup>287</sup>

Moreover, Orts makes an all-important, yet controversial, claim "that developing the rule of law in China in the normative and political sense may be divorced from a theory of democracy."<sup>288</sup> The Western terms of "democracy, the rule of law, fundamental human rights, markets, economic development, and civil society" are presumed social goods that warrant reconsideration in the promotion of foreign policy.<sup>289</sup> This presumed social goods argument recognizes the difficulty of applying rule of law to distinctively different non-Western

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286. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154 (1999).

287. Wong, *supra* note 144.

288. Orts, *supra* note 225, at 49.

289. *Id.* (quoting William P. Alford, *Exporting "The Pursuit of Happiness"*, 113 HARV. L. REV. 1677, 1682 (2000)).

cultures and implicitly implores the West to employ a less Hobbesian approach to multilateralism.<sup>290</sup>

China's particularity warrants the understanding and assistance of the West in effectuating both the rule of law and a positive discursive model for judicial review. It must however be an understanding that recognizes Chinese jurisprudence in antiquity as being persistent and systemic, as it continues to evolve in modern China amidst gradual legal reforms and economic development.

Chinese philosophy (particularly Confucianism), culture, history, particularism, and nationalism educe a distinctive legal culture that prophesizes both a distinctive Chinese legal system and judicial review. There is rule of law in China, but it is a Chinese variant of rule of law evolving amidst gradual legal reforms and economic development. At some point, the West must develop its viewpoint from a China-centered perspective, which will enable an *emic* understanding of the rule of law in terms of Asian ethos instead of Western culture and morals. In answer to the question "Can the Confucian person be transformed into a legal person and can the Confucian society support it?"<sup>291</sup>—the Confucian person is a legal person and the Confucian society supports it.

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290. *See Id.*

291. Uchang, *supra* note 1.