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BREAKING THE DEADLOCK: TOWARD A SOCIALIST-CONFUCIANIST CONCEPT OF HUMAN RIGHTS FOR CHINA

David E. Christensen*

INTRODUCTION

Human rights exist to protect human dignity. They are claims in favor of the individual's interest, existing simply because the individual is a human being. Exactly what is it about the nature of a human being that entitles us to these rights? Philosophers proffer various explanations, most seeking to distinguish humans from other animals. They note, for example, humans' upright carriage, ability to reason, capacity to exercise a will and the autonomous nature of people, or, conversely, the social and relational nature of humans. While there is little agreement over the source and content of human rights, their existence is widely recognized the world over by their codification in international law.

Human rights are a relatively new subject of international law. Previously, what a government did within its own sovereign borders was generally of no legitimate concern to any other State. After World War II and the Holocaust, the United Nations was formed with the protection of human rights as one of its primary purposes. Since that time, there has been a growing body of binding international law.

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2. ERNST BLOCH, NATURAL LAW AND HUMAN DIGNITY 186 (Dennis Schmidt trans., 1986). Bloch uses "upright carriage" as a metaphor for human dignity, which provides the ineluctable basis of natural law.


4. IMMANUEL KANT, THE MORAL LAW 95-96 (H.J. Paton ed., 1956); see infra Part II.

5. Ambrose Y.C. King, The Individual and Group in Confucianism: A Relational Perspective, in INDIVIDUALISM AND HOLISM: STUDIES IN CONFUCIAN AND TAOIST VALUES 57 (Donald J. Munro ed., 1985); see infra Part II(B).

6. See infra Part I(A).

7. The concept of sovereignty was, and remains in part, inclusive of territorial and political control, to the general exclusion of outside forces. Island of Palmas (U.S. v. Neth.), 2 R.I.A.A. 829 (1928).

8. See infra Part I(A).
mandating specific standards that each government must meet regarding the treatment of people within its jurisdiction.9

The nature and content of human rights in international law have since been the subject of great debate. On one side, there are the universalists, mainly Western nations, who argue that fundamental human rights are universally applicable in the same fashion in all lands.10 On the other side are the cultural relativists, including China,11 who believe that each nation may adapt human rights standards to suit its own particular culture and level of development. This debate has raged for decades while accomplishing little.

Many universalists believe that human rights are "natural" rights that flow from God or nature.12 They consider the individual to be the basic particle of society, and place primacy on the individual's interests over those of the collective and the state.13 China has rejected the universalist position.14 There is no parallel concept of the independent, "atomistic" individual as a possessor of rights in Chinese culture.15 Instead, Chinese society puts primary emphasis on the collective, to which individual rights are subservient.16 The Chinese State has codified this concept in its Constitution.17 China's socialist leaders believe that natural rights are a fallacy, and deflect international criticism by arguing that human rights are purely an internal issue in China.18 Not surprisingly, little progress has been made in the rights area: China's people still suffer, while its human rights obligations to its people and the international community remain unmet.

This Note offers an alternative perspective on international human rights that seeks to bypass the dead-end universalist-cultural relativist debate, and proposes a concept of human rights that is harmonious with the modern collectivist and socialist Chinese order. Since human rights protect dignity, this study finds the source of human dignity in China in society, not in nature. This analysis opens the door to the development of a meaningful set of guaranteed individual rights for a socialist state and a Confucian order.

9. See infra Part I(A).
10. See infra Part II(A).
13. Id.
14. See infra Part II(B).
15. LUKES, supra note 12, at 45-47.
16. Id.
18. See infra note 122 and accompanying text.
Part I begins with a discussion of the pertinent international law governing human rights, followed by an explanation of the systemic weaknesses in China's political-legal structure that result in violations of that law. It will show how this condition has continued in part through China's adherence to an outdated version of absolute sovereignty as a shield against increasingly intense legitimate international criticism in the human rights realm.

In analyzing the forces engendering such violations, Part II will explore the respective roles of the individual, government, and law in Chinese society. To better understand the Chinese setting, these findings will be juxtaposed against the Western concept of rights and the individual. In answer to the universalist insistence that no new concept of rights is necessary since natural rights apply to all human beings, Part III will explore why Western natural rights philosophy cannot be adopted in China. Part IV proposes a new locus of human dignity and rights in China. Finally, Part V proposes a set of guaranteed rights that promotes both the priorities of government and the maintenance of human dignity.

I. INTERNATIONAL HUMAN RIGHTS LAW AND CHINA

In China, the effects of Confucian collectivism, promoted by imperial bureaucrats and modern socialist philosophy, have combined to reject the primacy of individual rights in favor of the interests of the Party and the State. This low prioritization of human rights has led to violations of international legal standards for the protection of those rights. This Part will survey the law requiring protection of human rights, and outline the structural shortcomings in China that allow ongoing violations of these standards. This will be followed by a discussion of China's defensive application of absolute sovereignty principles, which fosters human rights abuses by turning a deaf State ear to offers of international guidance.

A. International Standards of Human Rights

International law requires the government of China to meet specific standards of protection of human rights. These obligations are created by China's participation in the two oldest instruments governing human rights: the U.N. Charter and the Universal Declaration of Human Rights (Universal Declaration).19 It is debatable whether peremptory norms of international law, or *jus cogens*, impose any ad-
ditional human rights obligations on China.

Treaties among States are a legitimate source of international law, and participation in a treaty creates a binding legal duty on the parties to meet the obligations it delineates. China became a party to the U.N. Charter in 1971 and was an original supporter of the Universal Declaration. In fact, the celebration of the fortieth anniversary of the Universal Declaration was marked by China. The principles contained in the Universal Declaration are generally considered by the international community to be an expression of customary law. China participates in several other human rights conventions, but the rights contained in those treaties, with the exception of the Convention Against Torture, will not be the focus of this discussion. The scope of this Note is limited to a very few basic rights, the adoption of which would not require an alternative political system nor detract from China's modernization efforts. This is not an argument for democracy, it is merely a call for a meaningful guarantee of basic human rights.


The U.N. Charter recognizes the interdependence of peace and the protection of human rights, and repeatedly proclaims the protection of human rights as one of its four primary purposes. The preamble states: "We the peoples of the United Nations, determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . . have resolved to combine our efforts to accomplish these aims . . . ."26 U.N. members are bound to take "joint and separate action in cooperation with the Organization for the achievement"27 of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."28

In 1948 the United Nations passed the Universal Declaration without opposition, other than the abstention of Saudi Arabia, South Africa, and the East Bloc.29 The Universal Declaration's preamble similarly recognizes that the "inherent dignity [and] . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," and establishes that "human rights should be protected by the rule of law."30 In order to fulfill these aspirations, it outlines numerous universal rights, including the right to equality of rights without regard to race, color, sex, language, religion, opinions, national origin, property, birth, or other status;31 the right to life, liberty, and security of one's person;32 the right not to be tortured;33 the right to equality before the law;34 the right to effective remedies before legal tribunals for rights violations;35 freedom from arbitrary arrest, detention, or exile;36 the right to a fair public hearing by an independent judiciary in criminal proceedings37 with a presumption of innocence guiding the proceedings;38 the right to travel and the freedom of residence;39 and the freedom of thought.40

26. U.N. CHARTER pmbl. Other references to the U.N. intent to protect human rights are found in id. arts. 1(3), 13(b), 55, 56, 62, 68, & 76(c).
27. Id. art. 56.
28. Id. art. 55.
30. Universal Declaration, supra note 1, pmbl.
31. Id. art. 2.
32. Id. art. 3.
33. Id. art. 5.
34. Id. art. 7.
35. Id. art. 8.
36. Id. art. 9.
37. Id. art. 10.
38. Id. art. 11.
39. Id. art. 13.
40. Id. art. 18.
expression, and assembly. The Universal Declaration also outlines numerous important economic and social rights. Thus, the U.N. Charter and the Universal Declaration articulate clear legal standards that are binding on China under international law.

B. China Has Fallen Short of International Human Rights Standards

The Chinese government has fallen short of the standards of human rights protection imposed by the U.N. Charter, the Convention Against Torture, and the Universal Declaration. Documentation of human rights violations in China is voluminous, and this Note will not add to that body of work. Instead, this Part will explore some of the structural weaknesses in China's legal and political system that permit, indeed perpetuate, abuses of international human rights standards.

1. Constitutional Shortcomings

The Chinese Constitution includes many of the same rights as the United States Constitution, including the rights to liberty, freedom of speech, press, assembly, petition, and religion. The differences in the two documents lie in their purpose and structure. The Constitution of the People's Republic of China does not serve as a contract between the government and the governed. It does not reserve some powers for the federal and state governments while leaving all the remaining powers vested in the people, to which U.S. citizens are accustomed. The 1982 Constitution is a descriptive document that creates the State, and outlines the form of government the

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41. Id. art. 19.
42. Id. art. 20.
43. Id. arts. 21-29.
45. 1982 Constitution.
46. Id. art. 37.
47. Id. art. 35.
48. Id.
49. Id.
50. Id. art. 41.
51. Id. art. 36.
52. U.S. Const. amend. X.
54. Id. arts. 57-135.
leaders have established or aspire to attain in the future. The State creates citizenship for the people, and grants them civil rights.

A second difference is that the U.S. Constitution is intended to limit the State's incursion into individual rights, while the Chinese counterpart primarily acts to protect State interests from incursion by individual interests. Under the 1982 Constitution, the Party always has the final decision where citizen's rights are concerned, putting to rest any argument that the 1982 Constitution merely balances the interests of the Party, the State, and the people. Accordingly, the interests of the Party and the State supersede the rights of citizens.

Furthermore, in China, rights are granted only in return for performance of certain duties. Because rights are viewed as "the expression of the will of the class in power," human rights are politicized in China. This is consistent with the Marxist conception of law as a class tool. In a capitalist society, law is used to repress the proletariat and uphold bourgeois interests. In a socialist society, law is used to suppress the bourgeois class interests.

Accordingly, rights may be limited for certain people at the whim of the State or Party, whenever their exercise would be interpreted as a threat to the "Four Cardinal Principles" of Chinese society. These Principles provide the structure of the society and the source of its law as an expression of the Party's socialist values. Living up to the Four Cardinal Principles requires adherence to: (1) the pursuit of the socialist road; (2) the maintenance of the proletarian dictatorship; (3) the preservation of the Communist Party's leadership; and (4) adherence to Marxism-Leninism and Mao Zedong thought. As a fundamental

56. 1982 CONSTITUTION arts. 33-56.
57. The 1982 Constitution provides that "[t]he exercise by citizens of . . . their freedoms and rights may not infringe upon the interests of the state, of society and of the collective . . . ." 1982 CONSTITUTION art. 51.
58. Id.
59. The 1982 Constitution states that "[e]very citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law." 1982 CONSTITUTION art. 33.
61. See infra notes 211-16 and accompanying text.
63. The State and Revolution, in 2 V. I. LENIN, SELECTED WORKS IN TWO VOLUMES 292-98 (1952).
64. See generally 1982 CONSTITUTION pmbl.
constitutional principle, no deviation from these tenets is tolerated. However, what is considered to be deviation is open to interpretation by the Party. Thus, Chinese citizens must earn their rights through politically correct thought and behavior.

In China, the fundamental human rights mentioned in the 1982 Constitution are not generally realized because that document is not enforceable against the government. There is no independent court with jurisdiction to settle constitutional questions. Furthermore, while the 1982 Constitution outlines numerous, seemingly expansive rights and freedoms, it lacks procedural protection for transforming the paper rights into everyday reality. In contrast, the U.S. Constitution more fully guarantees human rights protection because it is interpreted and enforced by an independent judiciary guided by precedent. While the 1982 Constitution is expressly the supreme law of the land in China, it is freely interpreted and amended by the Party-controlled legislature, leaving people's rights subject to political winds. Without procedures to effectuate rights or consistent, independent judicial standards by which to check Party and government actions, there can be no genuine guarantee of basic human rights as required by the Universal Declaration. The declaration that the 1982 Constitution is the supreme law of the land is rendered meaningless if that "law" can be altered, interpreted, or left unenforced at the politicians' discretion.

2. Weak Legal System

In order to be stable, human rights must be anchored to the rule of law. China's legal system has not developed due process protections that meet the standards aspired to by the Universal Declaration. In the past, the People's Republic of China has not relied on written legal codes; in fact, it was not until 1979 that China enacted its first compre-

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65. See generally 1982 Constitution.
66. Id. arts. 62 & 67.
67. Although Article 126 of the 1982 Constitution asserts that "[t]he people's courts shall ... exercise judicial power independently and are not subject to interference by administrative organs," Article 128 makes the courts responsible to various levels of the Party.
68. U.S. Const. art. III, §§ 1-2. By using this comparison, this Note does not hold up the United States as a model of complete human rights protections, but the United States has progressed toward guaranteeing equal protection by reducing instances of routine politically motivated violations of human rights.
69. 1982 Constitution art. 62.
70. The Universal Declaration implicitly calls for procedural regularities in its exhortation of equal treatment before the law (art. 7); effective remedy by tribunals (art. 8); prevention of arbitrary arrest or detention (art. 9); fair hearings for criminal charges (art. 10); presumption of innocence (art. 11); and prevention of arbitrary interference in people's privacy or honor (art. 12). Universal Declaration, supra note 1, arts. 7-12.
hensive criminal code. The nation's law has been made by campaigns, directives, and interim regulations that are both informal and frequently impermanent. This type of lawmaking does not lend itself to nationally uniform interpretation or application. It is inherently inconsistent and subject to change without public notice, leaving the masses unapprised of their rights. Procedural law was completely absent prior to the 1980s, and today, where it does exist, it is extremely vague. Often times, this leaves citizens' rights up to the discretion of a police detective or prosecutor, without any mandatory neutral review. Trials do not operate under a presumption of innocence. The judiciary is subject to political control, as it is directly responsible to the Standing Committee of the National People's Congress. Trials are frequently closed to international observation, especially in politically sensitive cases. It is these cases that raise the most concern about fairness and due process and, therefore, should be the last trials closed to scrutiny.

The police have unusually broad discretionary powers. Fundamental rights are frequently left to mediation between the accused and the police, the party, or the collective. The police have general powers to accuse and sentence citizens to labor camps for "reeducation" for up to three years without any judicial review, defense, or legal representation. This legal scheme provides no reliable independent check on law enforcement agencies. All of these characteristics of China's legal system are in violation of the due process standards expressed in the Universal Declaration.

Chinese law itself is frequently vague and open-ended. One particularly troublesome crime is "counterrevolutionary activities." This crime is subject to a broad, nearly all-encompassing definition. Party

74. Li, supra note 72, at 68.
75. See 4 MINZHU YU FAZHI 15 (1979) (arguing for a presumption of innocence); 3 MINZHU YU FAZHI 20-21 (1980) (successfully rebutting the argument for a presumption of innocence).
76. 1982 CONSTITUTION art. 128.
78. Edwards, supra note 73, at 46.
79. Li, supra note 72, at 69.
80. Edwards, supra note 73, at 66 n.43; see also Li, supra note 72, at 68.
81. Universal Declaration, supra note 1, arts. 8-11.
82. 1982 CONSTITUTION art. 28 (indicating that one central task of the State is the suppression of "treasonable and other counter-revolutionary activities."). Articles 90-104 of the Crimi-
control over the judiciary has hindered the development of definitional boundaries on a prosecutor's use of this provision. The Criminal Law Code provides some definition of counterrevolutionary activities, such as considering the use of "feudal superstition" in carrying out counterrevolutionary activities to be a crime. Unfortunately, no definition of "feudal superstition" is provided in the Code. Article 10 defines counterrevolutionary activities as actions that "endanger the sovereignty and territorial integrity of the state, endanger the system of the dictatorship of the proletariat, undermine the socialist revolution and ... undermine social order ... [or] endanger society." A definition of "endangering" or "undermining" is not provided, and is left open to broad interpretation and potential abuse by the police agencies and prosecutors.

3. The Human Rights Regulations

The Chinese Procuratorate has made an attempt at enforcing penalties against government officials who violate human rights. The recently enacted Rights Infringement Regulations provide an avenue for citizens to file a report when their rights have been violated. The report may then be investigated and eventually prosecuted. Zhang Siqing, the deputy procurator general, said that the rules provide the people with a "weapon to protect their legitimate rights and interests bestowed by the constitution." They fall far short of their mark. Examining a few of the provisions in the Regulations demonstrates their weaknesses and reveals the government's lack of a genuine commitment to safeguarding the rights the Regulations claim to protect.

Section II of the Regulations allows reporting the use of torture if a State employee extorts an oral confession by torturing: (1) to vent his
or her anger; (2) many persons or on many occasions; (3) by cruel means, thus causing a bad influence; (4) in a way that results in injustice and erroneous judgment; (5) in a way that wounds or cripples the victim, causing his or her death, insanity, or suicide; or (6) in a way that causes other serious results.\(^9\)

This regulation permits the reporting of torture only in a narrow range of cases. For example, this rule does not apply to torture resulting in a written confession. The police prefer a written confession over an oral confession because the former is far more difficult to deny at a later date. Element (1) requires that the torture be done in anger. Aside from difficulties in proof, this element excepts cases where the official does not get angry — where it is not personal, but only a part of the job. Element (2) allows reporting only if the torturer victimizes many people, or the same suspect is tortured “many” times. The rule does not define what “many occasions” of torture means, but if a precinct rotates the torture duty among many officers, no single officer will come under the scope of this provision. Element (3) allows reporting torture if it is “cruel” and causes a “bad influence.” First, how does one distinguish cruel torture from that which is not cruel? Second, torture is unlikely to influence anyone beyond the victim if it remains unknown. Rather than discouraging torture, this rule encourages secret torture sessions. Furthermore, bad influence is not defined, allowing a great deal of leeway to the police and prosecutors.

Element (4) is troublesome because once a suspect has confessed and is convicted upon that confession, there is very little, if any, chance of the falseness of that confession coming to light. In the Chinese system, a defendant is entitled to an attorney only after he or she has been officially charged and a trial scheduled.\(^9\) This may precede trial by only seven days, giving a defendant’s attorney little opportunity to prepare the case and bring out exculpatory facts.\(^9\) The police will not be inclined to investigate further because they believe that they have the guilty person, based on the confession. Satisfying element (4) would usually require the police themselves to uncover or provide the exonerating evidence, amounting to an admission that they violated the victim’s rights. Needless to say, this is extremely unlikely to occur. It is also reasonable to wonder how a prison or labor camp inmate will be able to muster the facts to prove his or her innocence while incarcerated. Element (5) allows for filing a complaint

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90. Rights Infringement Regulations, supra note 86, sec. II.
92. Id.
only if the torture led to the suspect's wounding, crippling, death, suicide, or insanity. Therefore, there is no per se prohibition against torturing to extort a confession. This does not meet the standards of the Universal Declaration\textsuperscript{93} or the Convention Against Torture.\textsuperscript{94}

Section V of the Regulations relates to unlawful detentions. It allows the reporting of such detentions if a State employee: (1) unlawfully detains an innocent person by abusing his or her powers, thus causing bad influence; (2) unlawfully detains a person and insults, ties up, or beats him or her; (3) unlawfully detains a person on many occasions, or many persons, or for a rather long duration of time; or (4) the unlawful detention causes serious injury, death, suicide, or insanity.\textsuperscript{95}

This section similarly exempts a wide range of circumstances. Element (1) is troublesome because the police power to detain is extremely broad. Police may lawfully detain people for several years without a hearing or judicial review.\textsuperscript{96} Element (1) only prohibits illegal detention of innocent persons, and only when that causes a "bad influence." As with section II, "bad influence" is undefined. Element (2) allows reporting of unlawful forcible detentions where the victim is insulted, tied up, or beaten. This does not prohibit unlawful detentions in solitary confinement or other extreme conditions that can be equally cruel. Element (3) allows reporting where victims are frequently detained unlawfully or for a rather long period of time. Not only is the vague term "rather long" undefined, but, given the police power to detain for extended periods, this could be a very long time indeed. Element (4), which sets out the only per se violation in section V, covers only a narrow range of cases.

Section VI of the Regulations deals with unlawful searches. Searches may be considered human rights violations if an official "abuses his powers to make an unlawful search" and: (1) unlawfully searches the house or person to a "serious degree"; (2) searches unlawfully on many occasions or many houses, thus causing a "very bad influence";\textsuperscript{97} or (3) makes a search that leads to suicide or serious property damage. This section also leaves the door open for a host of rights violations.

The Regulations ultimately contemplate only a very narrow range

\textsuperscript{93} Universal Declaration, supra note 1, art. 5.

\textsuperscript{94} Convention Against Torture, supra note 25, art. 2 (declaring that all torture shall be prohibited, even under exceptional circumstances); art. 4 (stating that torture shall be a criminal offense under the domestic law of all ratifying States); art. 13 (stating that all alleged victims of torture have the right to formally complain).

\textsuperscript{95} Rights Infringement Regulations, supra note 86, sec. V.

\textsuperscript{96} See supra note 80 and accompanying text.

\textsuperscript{97} Rights Infringement Regulations, supra note 86, sec. VI.
of violations as worthy of reporting, and far fewer as worth investigating or prosecuting. While there are general prohibitions against confessions produced by torture and unlawful detentions in the Criminal Code, the Code provides no remedy to the victims when those laws are violated. Such a remedial provision would deter abuses and safeguard the people’s security. The Regulations could perhaps be broadened by analogy in a court, but the common person lacks the training, means, and access to legal advice necessary to make this a feasible tactic.

Because of the absence of genuine safeguards against official abuse of human rights, China has failed to meet, or even approach, the international human rights standards outlined in the Universal Declaration, and ostensibly endorsed by China. The next Part will explore how international pressure to conform to these standards has been rebuffed, allowing human rights violations to continue.

C. International Human Rights Conventions and Sovereignty

China adheres to a theory of absolute sovereignty. This stance is not surprising given the country’s devastating experience with Western and Japanese imperialism in the nineteenth and twentieth centuries, and has direct implications for international human rights law. Under the regime established by the U.N. Charter and the Universal Declaration, member governments’ treatment of individuals is a legitimate concern of international law. While China applies this principle against other States, it does not acknowledge its own obligation. China steadfastly maintains that all international criticism of its human rights violations comprises illegal meddling in its internal affairs.

98. See discussion supra note 89.
100. See supra Part II(A).
102. Ding Yuanhong, then China’s ambassador to the United Nations, summarized China’s view, saying, “The United Nations may serve as an arena for international cooperation in the field of human rights. Yet . . . it has no right to meddle in the internal affairs of its member states.” Envoy Speaks on Noninterference, Human Rights, F.B.I.S. DAILY REPORT CHINA, Nov. 27, 1989, at 1.
Traditionally, a State's sovereignty was absolute and inviolable under international law. A government was free to do as it pleased within its own domestic jurisdiction, limited only by international law and its treaty obligations. Treaties restrain a State's sovereignty when they impose a duty to act, or to refrain from action.103 The State's performance of the newly assumed duty then becomes a legitimate concern of the other contracting States and, sometimes, the entire international community.

In multilateral treaties such as the U.N. Charter and the Convention Against Torture, every State Party is legitimately concerned with all other States Parties' performance of their obligations. It is therefore arguable that, in the realm of fundamental human rights, States have only a limited sovereignty.104 This postulate was evidenced when the Smith Government in Rhodesia unilaterally declared its independence from Great Britain. Contrary to traditional notions of State sovereignty, the international community did not consider this action to be an exercise of national sovereignty, as the Smith Government claimed. Instead, it condemned the Smith Government's actions as a threat to international peace.105 Another example is provided by the United Nation's refusal to recognize Transkei, a territory that South Africa declared to be an independent state in 1976. The United Nations considered it a sham that was intended only to aid apartheid.106 Additionally, widespread international concern and international sanctions against South Africa over apartheid further demonstrate that human rights are a legitimate subject of international concern.107 It is as though, where human rights are concerned, the concept of government sovereignty has been transformed into the people's sovereignty. In each of these cases, the government violated its

103. Louis Henkin has said:

The duty to carry out international obligations is the heart of the international legal system; and that prime duty implies an ancillary duty to cease and desist from a violation. ... [A] breach of an international obligation is a wrong to the particular state or states to which that obligation is due ....

104. For a discussion of traditional and contemporary views of State sovereignty, see Helmut Steinberger, Sovereignty, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 397-418 (Rudolf Bernhardt et al. eds., 1987).


own people's sovereignty just as effectively as if an outside invader had done so.\textsuperscript{108}

However, it is not necessary to argue the case for popular sovereignty in order to make the point that international human rights law turns a government's treatment of its citizens into a legitimate concern of the international community. This principle is contained in the language of the U.N. Charter and the Universal Declaration, both of which China has signed or embraced. The principle of State sovereignty is found in Article 2, paragraph 7 of the U.N. Charter:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. . . .\textsuperscript{109}

This language has been repeatedly interpreted to limit intervention in the internal affairs of a sovereign State.\textsuperscript{110} However, the United Nations also explicitly seeks to promote human rights and fundamental freedoms for all peoples.\textsuperscript{111} The preliminary draft and comments to Article 55 of the U.N. Charter reveal the framers' intention to link international peace with human rights observance.\textsuperscript{112} The dependence of peace on the protection of human rights is also expressly recognized in the preamble to the Universal Declaration.

Several branches of the United Nations have assumed the responsibility of overseeing, investigating, discussing, and making recommendations regarding the human rights situations of its members. Prior to the excesses of the Pinochet regime, the noninterventionist, absolute sovereignty principle ruled in the General Assembly where human rights were concerned.\textsuperscript{113} In 1974 this was reversed when the General Assembly passed a resolution in opposition to the abuses in Chile.\textsuperscript{114} This was the beginning of increasingly vigilant activity by the Human

\textsuperscript{109} U.N. CHARTER art. 2(7).
\textsuperscript{111} See supra note 26 and accompanying text.
\textsuperscript{112} U.N. CHARTER art. 55(c).
\textsuperscript{114} Id. at 490.
Rights Commission.\textsuperscript{115} Progress was bolstered by the Carter Administration's emphasis on singling out individual Member States and make them accountable to the international community for human rights abuses.\textsuperscript{116} All these activities, carried out by the Human Rights Commission, the Third Committee, and the Fourth Committee, are widely supported by the U.N. membership as legitimate functions.

As a member of the General Assembly, the Human Rights Commission, and as a party to numerous human rights treaties, China actively participates in monitoring human rights violations.\textsuperscript{117} By its very participation, China has promoted the development of international human rights law and further legitimised international involvement in this formerly domestic matter.

Contrary to its assumed obligations and international duties arising out of these instruments, China has consistently used the "non-intervention" language in Article 2(7) of the U.N. Charter to deflect criticism and reject guidance from the international community regarding its own human rights condition.\textsuperscript{118} Even if this assertion were valid, such a pledge to cooperate requires, at a minimum, an obligation not to undermine human rights in the way that China's system has done.\textsuperscript{119}

Since 1949, China's foreign policy has adamantly clung to the principle of absolute sovereignty. China's guiding precept of foreign policy is contained in the "Five Principles of Peaceful Coexistence" outlined in the 1954 Sino-Indian Trade Agreement.\textsuperscript{120} Four of the Five Principles relate to the notion of absolute sovereignty.\textsuperscript{121} The official press frequently insists that "no country should attempt to impose its own social system and lifestyle on others from the outside," and that

\textsuperscript{115} By the early 1980s, the U.N. Human Rights Commission had begun monitoring conditions in Poland, Argentina, Kampuchea, Iran, Afghanistan, El Salvador, Sri Lanka, and others. Id.

\textsuperscript{116} Id.


\textsuperscript{118} See, e.g., The History and Reality of Human Rights, F.B.I.S. DAILY REPORT CHINA, Jan. 5, 1990, at 12.


\textsuperscript{120} Agreement on Trade and Intercourse, Apr. 29, 1954, P.R.C.-India, 229 U.N.T.S. 57.

\textsuperscript{121} The Five Principles of Peaceful Coexistence are (1) mutual respect for sovereignty and territorial integrity; (2) mutual nonaggression; (3) mutual noninterference in internal affairs; (4) equality and mutual benefit; and (5) peaceful coexistence. All of these principles except (4) emphasize sovereignty. Id.
human rights are solely an internal matter for China.\textsuperscript{122}

Until joining the United Nations in 1971, China rejected participation in the international community, international jurisprudence, and international law, considering them to be instruments of domination for the imperialist powers.\textsuperscript{123} Finding it necessary in order to develop its economy, China has joined the international community and now accedes to international law, considering it part and parcel of international relations. Acceptance of international scrutiny of its compliance with its international obligations is not only legally mandated, but will ultimately assist China in the development of its socialist legal system while improving foreign relations and trade.

II. EAST IS EAST AND WEST IS WEST: DIFFERENT CONCEPTIONS OF RIGHTS

Many in the West believe that rights are natural to all humans and therefore universally applicable. Many Chinese have a very different conception. This Part will first outline the precepts of Western natural rights to provide a background for exploration of Chinese concepts of the individual, the State, and law. This will set the stage for discarding the old notions of rights and introducing a useful concept of human rights for China.

A. Western Understandings of Rights

Some of the most influential Western philosophies place primacy on the individual as the basic unit of society. This concept can be traced back to the Old and New Testaments, where a direct relation between God and the individual is articulated.\textsuperscript{124} The individual's natural worth under the "sovereign will of God" takes precedence over national or social concerns.\textsuperscript{125} In eighteenth century Europe, Judeo-Christian natural rights theory, originally conceiving of the common good of the religious community, became the theoretical basis for asserting the inviolability of private property rights and personal liberty from intrusions by the government.

For the Enlightenment philosophers of this period, individualism

\textsuperscript{122} See, e.g., Wu Xiongcheng, The International Climate and the June Rebellion, \textit{Beijing Rev.}, Sept. 11-17, 1989, at 13, 15.


\textsuperscript{124} See, e.g., Ezekiel 18:2-4; Matthew 25:40.

\textsuperscript{125} See also Lukes, supra note 12, at 45-46.
encapsulated "the ultimate moral principle of the supreme and intrinsic value, or dignity, of the individual human being . . ."\textsuperscript{126} This principle was at the core of the philosophies of Locke,\textsuperscript{127} Rousseau,\textsuperscript{128} and Thomas Paine,\textsuperscript{129} but was best expressed by Kant:

\[\text{[E]very rational being, } \textit{exists as an end in himself, not merely as a means}\]

\[\text{for arbitrary use by this or that will: he must in all his actions, whether they are directed to himself or to other rational beings, always be viewed at the same time as an end . . . . Persons, therefore, are not merely subjective ends whose existence as an effect of our actions has a value for us: they are objective ends — that is, things whose existence is in itself an end, and indeed an end such that in its place we can put no other end to which they should serve simply as means . . . .}\textsuperscript{130}

This philosophy conceived of people as possessing certain innate attributes as human beings, which attributes provide the basis for a set of rights, or claims, that the government must respect and protect, and gave rise to the concept of "natural rights" based on natural human attributes derived from nature or God. The content of these natural attributes was less certain than the firm belief in their existence. Kant stated that each individual exists as an end in itself,\textsuperscript{131} while various classic individualist theorists found other inalienable human rights such as liberty\textsuperscript{132} and property.\textsuperscript{133}

Natural rights are deemed more fundamental than any other principles found in the positive law. Being founded on innate qualities of human beings, these rights existed prior to any social organization and, therefore, take priority over any societal or political interests. This implies a duty on social organizations to protect human rights. Natural rights found their expression in the U.S. Declaration of Independence, and in the Declaration of Rights proclaimed by the French Constituent Assembly in 1791, which bifurcated the "impresscriptable" natural rights of man and the rights of a citizen of France.\textsuperscript{134} The

\textsuperscript{126.} \textit{Id.} at 45 (emphasis omitted).


\textsuperscript{128.} Rousseau wrote, "Man is too noble a being to serve simply as an instrument for others . . . ." Jean-Jacques Rousseau, \textit{Julie, ou la Nouvelle Heloise}, (1761) V, lettre 2, at 22 (D. Mornet ed., 1925), quoted in \textit{Lukes, supra} note 12, at 49.

\textsuperscript{129.} ELIE HALEVY, \textit{The Growth of Philosophic Radicalism} (1901-4) at 188 (M. Morris trans., 1934); \textit{see also} \textit{Lukes, supra} note 12, at 49.

\textsuperscript{130.} KANT, \textit{supra} note 4, at 95-96.

\textsuperscript{131.} \textit{Id.} at 98-99.

\textsuperscript{132.} JOHN S. MILL, \textit{On Liberty and Considerations on Representative Government} 9-11 (R.B. McCallum ed., 1946)

\textsuperscript{133.} \textit{See, e.g.,} MILTON FRIEDMAN, \textit{Capitalism and Freedom} (1963); FRIEDRICH A. HAYEK, \textit{Individualism and Economic Order} (1948).

\textsuperscript{134.} \textit{Lukes, supra} note 12, at 49.
Universal Declaration places the highest priority on human rights, a priority that transcends the importance of politics and class, by requiring that all citizens be afforded equal and fair treatment by their government.  

B. Confucianism and Individual Rights

Modern Chinese society is the product of two belief systems, Confucianism and socialism. Despite the revolutionary socialist transformation of traditional Chinese government and society, intractable influences remain from thousands of years of Confucian teachings, morals, and traditions. This discussion of Confucianism reveals an absence of individualism and describes a completely relational culture, fostered by an all-powerful emperor who encouraged harmonious relations through respect and morality, and who had little use for the rule of law. Confucianism's imprint has left behind a culture with little respect for human rights and no legal recourse for their violation.

1. Family Relationships Are Fundamental

In China, a person is never considered an isolated entity, but is always a social being. A central thread running through traditional Chinese culture is that the "individual is immersed and melted, dissolved in the collective...[and] simply does not have any independent value of existence of his own, or any rights." The family is the center of Chinese society, the basic economic unit and the most fundamental of all relationships for Chinese people. Unlike families in the United States, the Chinese family typically remains a single unit living under the same roof, even after the sons marry, although daughters leave the fold to move in with their husbands' families. When a child is born, it is born not only to its parents, but to the entire homestead. Older family members are cared for by the group and, ideally, always live with the younger members. This creates large extended families living in close proximity and sharing everyday life. The family is a communal group that cooks, eats, sleeps, and works together. Traditionally, gentry families accumulated wealth by holding land through the generations, creating eco-

135. See Universal Declaration, supra note 1, arts. 2-12.
136. King, supra note 5, at 57.
139. Id. at 42.
140. See id. at 13.
nomic bonds among the family.\textsuperscript{141}

In traditional village society, families also provided the local political leaders. The village was a political group usually composed of several families,\textsuperscript{142} although some villages contained only one lineage. Leaders were drawn from elders of the important lineages in the village.\textsuperscript{143} Disputes and altercations were usually handled within the family or among the disputant families with a mediator, instead of resorting to a court.\textsuperscript{144} Indeed, it was considered a failure to be unable to find a harmonious solution and to end up as adversaries in court.

Ancestor worship was prominent in historical China. A family relationship did not end at death; its form simply changed. Traditionally, there was an ancestral hall where family members would make obeisance to their departed ancestors.\textsuperscript{145} Family temples were often a village centerpiece.\textsuperscript{146} The temples had various income sources and would frequently provide work, food, or shelter to needy villagers.\textsuperscript{147}

Families even formed the backbone of China's ancient local defense systems. The bao jia system of local common defense units was first originated by Guan Zhong, the Prime Minister of the Qi State during the warring states period (270 B.C.).\textsuperscript{148} Bao jia units acted as a local security force, although they had varying responsibilities over the centuries\textsuperscript{149} and survived in name up to the Communist period.\textsuperscript{150} Bao jia units, organized along family lines, show the extent that the family has shaped societal institutions.\textsuperscript{151}

Common ownership of property, common political and security concerns, and blood ties inextricably bound the family unit. Paul Chao conceives of the range of relationships between various family members as warp, and the relationships between the various functions as woof, thus weaving the society together into a "functional, organic structure."\textsuperscript{152}

\begin{enumerate}
\item \textsuperscript{141} Id. at 133.
\item \textsuperscript{142} Id. at 145.
\item \textsuperscript{143} Id. at 152-53.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id. at 148.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Id. at 150-52.
\item \textsuperscript{149} Bao jia units were variously used to “control the whereabouts of the people, particularly prisoners, fugitives and vagrants.” In Tang times they were used to collect taxes. Id. at 151.
\item \textsuperscript{150} B. HSIANG-TUNG, PEASANT LIFE IN CHINA: A FIELD STUDY OF COUNTRY LIFE IN YANGTZE VALLEY 112 (1939).
\item \textsuperscript{151} CHAO, supra note 138, at 152.
\item \textsuperscript{152} Id. at 132.
\end{enumerate}
2. Sources of Chinese Dignity

Whereas in Western philosophy individual dignity is part and parcel of a human being's autonomous nature, China's emphasis on the collective and its lack of individualism raises the question of the locus of human dignity in Chinese culture. The answer begins with relationships, because they are the center of Chinese society. There are five cardinal relationships in the Confucian order: parent and child, ruler and subject, husband and wife, old and young, and friend and friend. The five cardinal relationships do not all involve family members — however, the non-kin relations found in the community are patterned after the family, so the community becomes an ersatz family. The ruler-subject relationship parallels that of a father and son, and friends are as brothers. Thus, community relationships formed a "quasi-kinship bond." Fung Yu-Lan summed this up by saying, "The family system was the ‘social system of China.'"

In the Confucian order, societal harmony is the highest aspiration, and it begins at home. Harmony-inducing social interaction is governed by elaborate rules of morality and behavior. The model Confucian subject strives, through moral growth and education, to attain a "higher moral excellence," "goodness," or "humanity" (ren), thus becoming a "gentleman" or "nobleman" (zhun zi). This nobleman status is not comparable to Western hereditary nobility; it is a high moral and social rank that is available for all to attain. This highlights the Confucian belief that all people are malleable and ultimately perfectable through education and self-cultivation along strictly prescribed lines.

One attains ren by meticulously observing elaborate social and ceremonial rites (li) and by practicing filial piety (xiao). When asked, "What is ren?," Confucius replied, "Curb your ego and submit to

153. King, supra note 5, at 58.
154. Id.
155. Id.
158. Id. at 76.
159. Inculcating and practicing the li shapes the individual into a socially acceptable human being. See Derk Bodde, Essays on Chinese Civilization 179 (Charles Le Blanc & Dorothy Borei eds., 1981).
160. Schwartz, supra note 157, at 77.
161. See id.
li."¹⁶² Thus, "only through the established channels of li can one's inner self-mastery make itself manifest to society and lead within to the higher moral excellence of ren."¹⁶³ After all, it is the family that teaches submission and the exercise of authority, both necessary for a person of ren. This theory led Benjamin Schwartz to conclude that "the family is the first school of virtue and source of those values that makes possible a good society."¹⁶⁴

The li prescribe an individual's behavior in relationships in accordance with the actor's role, status, rank, and age.¹⁶⁵ Their function lies in "teaching human beings to perform their separate roles well, in a society whose harmony is maintained by the fact that every one plays his part as he should within the larger whole."¹⁶⁶ The li are the "cement of the entire normative sociopolitical order,"¹⁶⁷ binding families, communities, and, ultimately, the entire nation. The gravel and sand forming this societal cement are cohesive families, bound together by their moral members practicing the li.

The desire to perform the li is considered to be instinctive to man, but it is not self-actualizing and requires the practice of filial piety.¹⁶⁸ Filial piety defines the tenor of relationships, outlining the required deference, respect, and affection. Practicing filial piety dictates an entire way of life:

A youth at home should observe the doctrine of filial piety, that is, fulfill his duties in the best manner possible to his parents; and, when away from home, should observe the doctrine of fraternal deference, i.e., to fulfill his duties in the best manner to his elders. He should abound in love to all and be attached to the virtuous. When he has leisure, he should employ it in cultural studies.¹⁶⁹

Filial piety is considered a natural sentiment in human beings.¹⁷⁰ It is the basis of the Confucian aspiration "universal love," and thought to be the foundation of all happiness in people's lives. Piety affirms the value of human life and is the most potent force for consolidating all human beings into universal brotherhood.¹⁷¹

A Confucian universal brotherhood can only blossom if it is rooted

¹⁶². Two other common translations are "He who can submit himself to ritual is good," and "self-disciplined and ever turning to li." Id.
¹⁶³. Id.
¹⁶⁴. Id. at 100.
¹⁶⁵. Id. at 68; BODDE, supra note 159, at 179.
¹⁶⁶. SCHWARTZ, supra note 157, at 67.
¹⁶⁷. Id. at 68.
¹⁶⁸. CHAO, supra note 138, at 73.
¹⁶⁹. Chung Yung, Ssu Pu Pei Yao, ch. 18, at 11a-11b, quoted in CHAO, supra note 138, at 73.
¹⁷¹. See CHAO, supra note 138, at 74.
in a foundation of harmony and stability, provided by the moral uprightness of proper family and community interactions. According to Donald Munro, "individuals [in Chinese society] do not possess sentiments, goals, interests, skills, and knowledge prior to or independently of membership in a social organization . . . . [T]hese are formed in society." In tracing the continuity of Confucian values in contemporary socialist China, Wenxiang Gong pointed out that ren stands for the obliteration of the individual, the spirit of sacrifice, self-restraint, lack of privacy, and ideological control. "The meaning of a person's life is defined by his fellow men and by his community," and, in fact, the "individual is insignificant without the community." This is analogous to the individual's relationship to the State and the collective, a relationship that is "constantly likened to that between fish and water." A human being without the fundamental relationships — the family and the ersatz family — is no more than a beast.

By failing to participate in society, a person fails to utilize the intellectual, aesthetic, and spiritual powers that distinguish humans from other animals. It is only by using those capacities to contribute to society, instead of simply fulfilling one's narcissistic wants, that one can be truly human, the type of person society wants to protect. Thus, a Chinese individual acquires humanity (ren), and thereby attains dignity, through moral virtue attained from fostering harmony and stability in the family and community.

3. Remnants of Confucianism

Humans are inextricably a part of their tradition, and the Confucian tradition continues to influence the Chinese conception of rights. The importance of the primary relationships has survived the socialist reorganization of Chinese society. Relational orientation is not unique to Confucianists in China, as Mao has said that all people must "belong to some party, some class, or some nation," and "man participates as a social being in every sphere of the actual life of society." The deep-seated nature of traditional relationships and institutions is demonstrated by the resurgence of some of the traditional market and village structures and other prerevolution relationships

174. Id. at 366.
reappearing since decollectivization and liberalization in the 1980s.\textsuperscript{177} Many of the old traditional patterns and practices, such as ancestor worship, are being taken up by young people who have never previously practiced them.

The \textit{li} have left a legacy that is visible in many aspects of modern China. Wenxiang Gong analogizes the \textit{li} to Mao's Four Articles of Discipline,\textsuperscript{178} intended to guide the Party and the nation. Under the Four Articles, the elite is omnipotent and grants rights to individuals according to a predetermined hierarchy.\textsuperscript{179} This structure is reflected in the 1982 Constitution currently in force.

\section*{C. Government}

The ultimate goal of the Confucian system was order and harmony, the road to which was paved by the \textit{li} and filial piety. The duty of the emperor toward his subjects was to hold all authority, foster moral virtue, and educate by example. It was the duty of the subject \textit{qua} son to show undaunting respect and to cultivate his own morality. The emperor was the father of the kingdom and the head of the Chinese family. Through these principles, a humane ruler could foster universal love and affection throughout the realm.

In the West, social contract theory served to legitimize governments. While there are various justifications for it, the "contract" amounted to the people ceding power to a government, so that it would rule for the benefit of all. Although the extent and form of powers and rights given over to a sovereign varied among social contract theorists, all placed limitations upon the ruling body's power at some point.\textsuperscript{180}

There was no social contract between the people and the government in imperial China. Chinese emperors were legitimized by a mandate from heaven, and theoretically worked towards harmony with the people. They served as the link between the heavens above and the subjects below, and administered heaven's mandate in the best interest of their subjects. When a ruler was overthrown, it was explained sim-
ply that he had lost the mandate through immoral rule — by not acting in the best interest of his subjects. The emperor was the exemplar of humanity to which the masses could aspire, who served the needs of his subjects to create a harmonious atmosphere and maintain heaven's blessing.

The central government's primary moral role of fostering humanity by cultivating the moral growth of its subjects was achieved through formal and informal education. This fosterage role was performed by various levels of government. At the local level, village elders and local scholar-officials educated the villagers that were too poor to attend a Confucian academy, usually by giving sermons on filial piety, chastity, and compassion. Families of means would send a child to an academy to be formally educated in the Confucian classics. After completing that course of study, the student would sit for the grueling imperial examinations in hopes of becoming a government official, the elite of society.181

The emperor, village elders, and scholar-officials served as models for educating the people.182 This practice can be traced back as far as the Han dynasty183 (206 B.C.-220 A.D.), and is still in use today. The use of models brings about a certain standardization and harmony that is consistent with the Chinese view that society is a seamless web, whose strands must all be of the same length in order to fit into a preordained pattern.184 Nonstandard threads weaken and disfigure the web. A nonstandard thread must be repaired or removed in the greater interest of society.

The idea that a nonstandard thread can be repaired reflects the concept that people are changeable and "perfectible" through the development of their social nature by means of fosterage and education.185 This fosterage practice continues today. The Party, as the voice of the proletariat, attempts to elicit certain behavior from and instill certain beliefs in the masses. This is done through education and moral inculcation that aims at cultivating a certain moral and social character. Using models to educate and motivate the masses is a mainstay of the Chinese communists, as exemplified by the propagandistic use of the model Dazhai Brigade, various model students,

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181. For a detailed account of the means and vast extent of social advancement through education in China, see MUNRO, supra note 172, at 93-97.

182. Id.

183. Id. at 136. Confucius said, "When gentlemen deal generously with their own kin, the common people are incited to goodness." CONFUCIUS, supra note 175, bk. 8:2.

184. Edwards, supra note 73, at 41, 44.

185. MUNRO, supra note 172, at 84.
workers, peasants, party members, and in countless other campaigns of appraisal by comparison.\textsuperscript{186}

The fosterage role is best exemplified by the socialist model of the mass line, or democratic centralism, employed by the Party. As Donald Munro points out, this policy emulates the human learning process, wherein a person first produces perceptions of external things, then conceptualizes and theorizes about them, and finally applies the theories in practice. The process is repeated and refined, each time increasing the "truth value" of the theory.\textsuperscript{187} The mass line policy translates this cognitive process into the group setting. The leaders interact with the masses and absorb perceptions from them, then discuss and reflect on what they have learned, resulting in a theory. The theory is returned to the masses to be taught, practiced, and revised. The process is repeated and refined to higher levels of truth. In this role, the leaders act as the masses' brain, performing the conceptualization function. When the theory is returned to the masses, the education produces changes in the people's social nature. Thus, through education, the socialist government continues to play a fostering role.

D. The Legal System

The emphasis on harmony in society did not foster the development of a Western-style, rights-oriented legal system. Confucian antipathy toward law stemmed from the belief that if the people knew exactly what the law was, they would find ways around it to avoid penalties, and ultimately lose their sense of shame.\textsuperscript{188} The political system relied on sincerity, moral virtue, and a spirit of harmony instead of any clearly defined law.\textsuperscript{189} There was a belief that laws made people more litigious and detracted from moral education. The completion of China's earliest known legal codes, between 536 B.C. and 501 B.C., inspired a well-known protest letter from a diplomat of a neighboring state:

Originally, sir, I had hope in you, but now that is all over. Anciently, the early kings conducted their administration by deliberating on matters [as they arose,] they did not put their punishments and penalties [into writing], fearing that this would create a contentiousness among the people which could not be checked. Therefore they used the principle of social rightness (yi) to keep the people in bounds, held them together through their administrative procedures, activated for them the accepted ways of behavior (li), maintained good faith (xin) toward them,

\textsuperscript{186} See, e.g., id. at 138-39.
\textsuperscript{187} Id. at 98-99.
\textsuperscript{188} See CONFUCIUS, supra note 175, bk. 2:3.
\textsuperscript{189} BODDE, supra note 159, at 162.
and presented them with [examples of] benevolence (ren) . . . . But when the people know what the penalties are, they lose their fear of authority and acquire a contentiousness which causes them to make their appeal to the written words [of penal laws], on the chance that this will bring them success [in court cases] . . . . As soon as the people know the grounds on which to conduct disputation, they will reject the [unwritten] accepted ways of behavior (li) and make their appeal to the written word, arguing to the last over the tip of an awl or a knife. Disorderly litigations will multiply and bribery will become current.190

Thus, government by law was rejected in favor of government by virtue.191 The virtues of conciliation, harmony, and obedience resulted in the subordination of individual interests to the interests of the greater society, and restrained the development of a rights-conscious legal system.192

This informal method of conflict resolution largely remains today, carrying forward the traditional conceptions of rights it embodies.193 There was some effort at developing formal codes and procedures in the twentieth century during the Republican era and during the early Communist period,194 but these efforts were cut short when Westernized legal experts were purged in the anti-rightist campaign of the late 1950s. The Communists tried to make law simpler and more accessible to the masses.195 However, that effort was overshadowed by their distrust of the rule of law.196 The “rule of man,” utilizing traditional methods of behavioral control, persuasion, and education by conscientious officials, was preferable to them.197 Nearly all disputes are still settled in “friendly mediation” among the parties, often by neighborhood committees, a police agency, or other official and quasiofficial bodies.198

Recent outbreaks of crime and corruption, however, have convinced Chinese leaders of the need to develop its legal institutions and body of law. In 1979, the first comprehensive criminal and procedure codes were completed.199 There are now schools attempting to fill the

190. Written by a dignitary from Shu Xiang, a neighboring state. Id. at 177-78 (translation).
191. Li, supra note 72, at 13.
192. See Edwards, supra note 73, at 42.
194. Li, supra note 72, at 20.
195. Id. at 31.
196. Id. at 24-25.
197. Id. at 25-26.
198. See id. at 69; Edwards, supra note 73, at 46.
199. See supra note 73 and accompanying text.
severe shortage of judges and to train court personnel,\textsuperscript{200} and there appears to be some effort towards regularizing the legal process. Unfortunately, this ray of hope was shadowed when the predominance of politics over rights was, once again, reaffirmed by the secret trials and other violations of the June 4 Tiananmen Square "counterrevolutionaries" human rights. Such episodes reminded the world how deeply entrenched are the traditional concepts of the State's complete authority and subservience of the individual.

III. NATURAL RIGHTS ARE NOT THE ANSWER

The universalists argue that there is no need for cultural understanding of the basis of human rights; such rights already exist naturally and simply need to be observed. This Part reveals why an argument premised on natural rights theory will fail to be accepted in China.

A. Marxist Critique of Rights

Because China is a Marxist-Leninist state, it is imperative to understand the socialist conception of rights. Marx rejected the notion of natural individual rights and considered them tools of the capitalist class used only to seduce the proletariat and to further bourgeois goals. It is the object of this study to find a place for human rights and law in a socialist State.

Marx’s scattered writings on the subject of rights reveal his conviction against the notion that a just society has an obligation to protect natural human rights. In his \textit{Critique of the Gotha Program} Marx criticized fair distribution and its implicit call for equal rights:

\begin{quote}
I have dealt with \ldots equal right \textup{[and]} fair distribution \ldots in order to \textup{[avoid perversion of]} the realistic outlook, which it cost so much effort to \textup{[instil \textup{[sic]}]} into the Party but which has now taken root in it, by means of ideological nonsense about rights and other trash so common among the democrats and French Socialists.\textsuperscript{201}
\end{quote}

Marx believed that rights were a bourgeois invention for maintaining its own class goals, and, as such, were an ineffective tool for achieving socialism.\textsuperscript{202} Christine Sypnowich suggests that Marx was "condemning not rights per se but the tendency of some revolutionaries to fiddle with capitalist distribution arrangements instead of

\textsuperscript{200} Ren Jianxin Stresses Educating Court Personnel, F.B.I.S. \textsc{Daily Report China}, Aug. 27, 1990, at 18.

\textsuperscript{201} Marx, \textit{supra} note 62, at 531.

\textsuperscript{202} Id. at 530-31.
overthrowing capitalist relations of production."\textsuperscript{203} Marx held that rights were the means utilized by the bourgeoisie to legitimize the capitalist order and he maintained that only a complete eradication of capitalist institutions would truly set the proletariat free.\textsuperscript{204}

The Chinese have adopted the Marxist view that human rights in capitalist society are merely a tool for protecting bourgeois property interests\textsuperscript{205} and their inequalities.\textsuperscript{206} A Chinese writer has summed up the Marxist conception of natural human rights as "surface equality [concealing] an essence of inequality. . . . Under the disguise of equality, they try by every possible means to nullify the rights of the working people, thus ensuring their own privileges."\textsuperscript{207}

Natural law is troublesome for Marxists because of the questionable morality that the law codifies. The problem lies in the "natural lawyer's attempt to offer a moral standard that transcends the different moral situations which may arise in a society,"\textsuperscript{208} as well as those found in various cultures with different historical legacies. Marx believed that morality is formed by historical circumstances, and, therefore, until communism is achieved, there can never be any universal morality transcending time, culture, and historical influences. Marx indicated that "rights can never be higher than the economic structure of society and its cultural development conditioned thereby."\textsuperscript{209}

To a Marxist, the idea of individual rights implies a society wherein each member's purpose is naturally opposed to the interests of others: "a society incurably torn asunder by the clash of private aspirations."\textsuperscript{210}

None of the supposed rights of man . . . go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his interest and acting in accordance with his private caprice . . . . The only bond between men [within the individual rights framework] is natural necessity, need and private interest, the preservation of their property and their egoistic persons.\textsuperscript{211}

\textsuperscript{204} Marx, supra note 62, at 531.
\textsuperscript{205} Marx, On the Jewish Question, in The Marx-Engels Reader, supra note 62, at 62, 43.
\textsuperscript{208} Sypnowich, supra note 203, at 31.
\textsuperscript{209} Marx, supra note 62, at 531.
\textsuperscript{210} Leszek Kolakowski, Marxism and Human Rights, 81 Daedalus, Fall 1983, at 84.
\textsuperscript{211} Marx, supra note 205, at 43.
In this light, rights had a very limited role in socialist society. Marxists saw law as a barrier between the classes built by the bourgeoisie for the purpose of maintaining its domination over the proletariat. Marx viewed capitalist society as being unnaturally divided into the civil society and the State; bourgeoisie and proletariat; private and public. Law protects the private egoistic interests, which are unique to capitalist societies. It is not an expression of the collective morality, but, as a mediator of private disputes, it protects private interests.

In the pre-Communist stage of socialist development, law is a tool of the State in its role as the embodiment of the proletariat. It is a tool for suppressing remaining bourgeois elements in order to safeguard socialist goals. In this society, capitalists will have no rights under the law.

After the socialist revolution removes all traces of capitalist relations, individual and community interests will become as one. The need for law will subside, only to be replaced by "elemental rules of social intercourse," which all will follow without coercion. Furthermore, the theory follows, there would be no need for law to serve its function as the regulator of scarce resources. Under communism, society simply will not need law and it will wither away.

The utopian socialist vision is not without its shortcomings. First of all, this vision is still but an unrecognized aspiration. Contemporary socialist societies have recognized the need for law in their pre-communist stages of development. As Sypnowich points out, this position ignores the possibility of disputes arising between individuals that are not class-based or egoistic. Accordingly, there would be some role for law in a socialist order. After all, if law provides, to some degree, an expression of the moral values of a capitalist society, why, then, can it not do the same for a classless society?

B. Other Critiques of the Natural Rights Solution

Legal positivists agree with the Marxists' rejection of the natural rights picture of a natural universal morality. Positivists argue that law and rights arise only from institutions, and ask what relevance rights could have prior to society, since only social and political strictures can infringe upon them. Positivists insist that rights must be

212. 2 LENIN, supra note 63, at 292-98.
213. Id. at 292-93.
214. Id. at 199, 292.
215. See supra parts II(B)(2)-(3).
216. SYPNOWICH, supra note 203, at 8.
facts that are ascertainable through a rational process, and find no method of determining which rights exist outside of the law. It follows that if law does not allow for a right in society, it cannot exist elsewhere. H.L.A. Hart maintains that “without government and law, men have no rights and can have none.”

Margaret MacDonald asks, “[W]hat kind of rights are unwritten, need never have been enacted, and can be unobserved without penalty?” Jeremy Bentham claimed that only positive law could bestow rights and colorfully phrased his objections to natural rights as follows:

[T]here are no such things as natural rights — no such things as rights anterior to the establishment of government — no such things as natural rights opposed to, in contradistinction to, legal: that the expression is merely figurative; that when used, in the moment you attempt to give it a literal meaning it leads to error, and to that sort of error that leads to mischief — to the extremity of mischief . . . . That which has no existence cannot be destroyed — that which cannot be destroyed cannot require anything to preserve it from destruction. Natural rights is simple nonsense: natural and imprescriptable rights, rhetorical nonsense, — nonsense upon stilts.

Utilitarians like Bentham believed that a natural rights ideology would lead to anarchy. The immutable nature of natural rights could restrict the ability of the government to take measures furthering the general welfare, which is the guiding force for utilitarian public policy and moral decisions. Utilitarianism cannot allow any individual interest, natural or otherwise, to detract from maximization of the public good.

The Communitarian Alasdair MacIntyre agrees with the legal positivists that rights cannot be considered to exist outside of society and can only be found in law. He holds that “the truth is plain there are no such rights, and belief in them is one with the belief in witches and in unicorns,” because every attempt to believe in natural rights has failed for an inability to demonstrate their existence. MacIntyre points out that twentieth century natural rights thinkers appeal to our intuitions to explain natural rights, and reasons that “the introduction of the word ‘intuition’ by a moral philosopher is always a signal that

220. Id.
something has gone badly wrong with an argument. 222 He concludes
that natural rights are a fallacy based on the false conception of the
independent individual as free from subservience to community
authority. 223

Beyond the strong criticisms posed by the positivists, utilitarians,
and communitarians, differing explanations of the content of natural
rights cast further doubt on the theory. The content of “immutable”
natural law has actually undergone significant changes over time, rais-
ing questions about its eternal nature. While natural law was articu-
lated in the New Testament, its use as a political theory is relatively
recent. It made its first concrete appearance in this form in the Decla-
ration of the French Constituent Assembly and the rise of social con-
tract theory. 224 It was during the bourgeois revolutions that natural
rights came to be viewed as the protectors of property, equality, and
freedom. In the twentieth century, the definition of natural rights has
broadened to include a right to social welfare and employment, 225 or a
right to property, 226 or Dworkinian equality and justice in the distrib-
ution of goods. 227 While Dworkin admits that natural rights are not
demonstrable, he says that it does not follow that they can be proven
to be untrue. 228 This may be logically appealing, but it casts a shadow
of doubt over the theory.

C. Past Failures of Natural Rights in China

In the past, Chinese intellectuals have attempted to adapt natural
rights theory to China and failed. 229 Natural rights were first im-
ported into China near the end of the Qing Dynasty by Yan Fu and
Liang Qichao. Yan Fu taught Western ideas, such as suppressing gov-
ernment while exalting the people. 230 After the Hundred Days Re-
form in 1898, Liang’s writings taught that humans had innate rights
endowed by nature, or “heaven.” 231 These ideas became widely ac-
ccepted in intellectual circles, despite — or because of — their frontal
assault on traditional hierarchical structures. There were calls for a

222. Id.
223. Id.
224. See supra note 134 and accompanying text.
225. See, e.g., Universal Declaration, supra note 1, arts. 22, 23 & 25.
226. Id.
228. Id. at 69-70.
229. For a discussion of Chinese natural rights in traditional China, see He, supra note 137, at 8.
230. Id. at 16.
231. Id. at 17.
parliamentary government by leaders such as Sun Yatsen, Huang Xing, and Song Jiaoren, the latter paying for it with his life.\textsuperscript{232} Democracy, as one of the “Three People’s Principles,” was written into the 1913 Provisional Constitution.\textsuperscript{233} While such reforms were written on paper, they were never actually realized in Chinese society. The weight of tradition was simply too heavy to allow the new theory to become Sinicized during its twenty or thirty years of existence, prior to being banished by the one party system of the Nationalist Government (Guomindang).\textsuperscript{234}

Had it been allowed to survive, it is unlikely that China’s flirtation with natural rights theory would have grown to imitate Kantian atomism as it existed in the West. Whenever natural rights have been extolled in China, they have taken on uniquely Chinese features. Kantian theory emphasizes the value of the individual as an independent autonomous entity; humans are considered objective ends in themselves. In China, natural rights theory always supported a collective purpose for the individual. Natural rights and individualism were perceived by Chinese intellectuals as the cornerstone of Western strength, and it was thought that adopting these principles would make China strong and wealthy. The Hundred Days Reform, the May Fourth Movement, and the December Ninth Movement were all occasions where individual natural rights and democratic values were invoked to save the country from the threat of destruction—a collective purpose.\textsuperscript{235} In Kantian terms, this placed the rights-endowed individual in the role of a “means” towards a greater end—national salvation—making individual rights secondary to State interests.

In sum, Western natural rights grew out of the oppression of individuals and were invoked to make the State a means toward the ends of protecting the individual. In China, natural rights were expected to strengthen the individual, who would then provide a means for protecting the State.

Another reason for the failure of natural rights to be absorbed into Chinese culture is the great weight of thousands of years of Confucian collectivism. In the Confucian society, the Five Cardinal Relationships shaped people’s identities.\textsuperscript{236} Individuals took on their identity

\textsuperscript{232} Id. at 18.
\textsuperscript{233} Article 12 stated that “[t]he people have the right to vote and to be candidates for office.” Andrew J. Nathan, Political Rights in Chinese Constitutions, in Human Rights in Contemporary China, supra note 44, at 87.
\textsuperscript{234} He, supra note 137, at 18-20.
\textsuperscript{235} Id. at 20-22.
\textsuperscript{236} See supra notes 153-56 and accompanying text.
in accordance with their relationships to the people around them. Parent-child, husband-wife, ruler-subject, or friend-friend: every relationship had predetermined rules of ritual and filial piety. It was virtuous for the individual to subordinate his or her own personal inclinations and feelings and submit to the demands of filial piety and the *li* in order to enhance harmony and social welfare for everybody.\(^{237}\) This sentiment is expressed in the Chinese proverb “everything under heaven is for the public” (*tian xia wei gong*).

Simply importing foreign ideas into China and writing them down on paper will not impart them to that ancient society. He Zhaowu highlights two examples of how resistant China is to absorbing foreign traditions.\(^{238}\) First, Indian Buddhism was introduced into China during the Eastern Han dynasty, but did not become Sinicized until the Tang dynasty, at least 800 years later. Second, the Jesuits were teaching Western religion and ideology in China for 200 years, from the late-Ming period to the mid-Qing dynasty. Very little of the Jesuit teaching had any significant lasting impact. Comparatively, the idea of natural rights had been in China for less than one hundred years, and was allowed to freely develop for only about thirty years — hardly enough time for a seedling to take root and bloom in such hostile and impenetrable soil. Even given endless time, the weight of Confucian and collectivistic culture would likely prove to be insurmountable.

### IV. SOCIETY-BASED RIGHTS

As we have seen, it is unlikely that natural rights theory would be adopted by the Chinese Communist Party or integrated into the culture. Such a transformation would require a fundamental change in the Chinese self-image and the way they have viewed their society for thousands of years. Furthermore, the Marxists, legal positivists, and communitarians have offered convincing critiques of the theory. However, discarding the source of a right does not invalidate the existence of that right. An alternative source of human rights may be found—one that conforms to Confucian collectivism and socialism.

The object of human rights is to protect the intrinsic value of human beings, or human dignity.\(^{239}\) Various cultures and philosophies define this unique human worth — this humanity — differently. Chinese Confucianism and socialism mutually reject Western conceptions of presocietal “natural” dignity,\(^{240}\) arguing that dignity must be

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237. See supra Part III(B)(2).
238. He, supra note 137, at 20-21.
239. See supra note 1 and accompanying text.
240. See supra Parts III(A) and (B).
rooted in society and be subject to historical development. In Chinese society, human dignity derives from the human capacity to engage in fundamental relationships, the most fundamental relationships being those within the family. Thus, in China dignity is derived from society, and hence is subject to historical forces.

A few examples will demonstrate how human rights, and the dignity they protect, change over time and vary according to social conditions, demonstrating that dignity is a historical subject. Today there is a human right to private property. In tribal and community-oriented feudal systems, land frequently belonged to the community, in the sense that ownership carried with it certain obligations to the collective for its preservation and use. Land ownership was a form of trust. In Western liberal society, property has come to be considered capital, and the right to own and use property freely is a constituent of human dignity. A right to property "presupposes a series of social conventions which render the privatization of resources a seemingly 'natural' thing to do." Human rights have evolved within the Western world as well. The right of freedom has expanded from its original U.S. application to only white males, to include freedom from slavery for blacks. The rights of equality and property have come to mean suffrage and property ownership for women. We are now seeing the evolution of a right to die, a right to economic development, and many others. As new protections of human dignity arise with the creation of new rights, it is apparent that the content of human dignity changes over time, and is not "natural," constant, or eternal.

Two additional aspects of human rights and dignity lend support to the conclusion that they are products of society. First, the act of

241. This Part adapts a scheme for socialist rights to the Chinese situation. See SYPNOWICH, supra note 203.
242. See infra Part III(B).
243. See supra notes 208-09 and accompanying text.
244. The two most significant recent international instruments delineating human rights, the International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360, and the International Convenant on Civil and Political Rights, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, do not include a right to private property due to the objections of socialist nations. However, the 1982 Constitution does include a right to property. 1982 CONSTITUTION art. 13.
245. SYPNOWICH, supra note 203, at 102.
246. Id. (citing Hillel Steiner, Natural Right to the Means of Production, 27 PHIL. Q. (1977)).
247. U.S. CONST amend. XIII.
248. See, e.g., U.S. CONST. amend XIX.
250. See, e.g., Universal Declaration, supra note 1, at 21-29.
asserting a right is an admission of membership in a community. Individuals possess rights only by participation in society, and thus, society engenders the qualities of human dignity. Second, it is only in society that individuals can come to recognize the moral compulsion of rights. Through our membership in the collective we become aware of the need to treat each other with equality and concern, thus recognizing the value of asserting and respecting human rights. There is no reason that a useful doctrine of socialist human rights cannot take shape.

V. THE SOLUTION: GUARANTEED RIGHTS

Guaranteeing human rights is not a luxury, it is a necessity. Contrary to the Chinese leaders' apparent opinion that human rights pose a threat to the central power of the Party and State, such rights are actually ideally suited for China’s current domestic and international condition. As this section will show, guaranteeing human rights will assist in building socialism and a strong State, while helping to improve China's foreign political and trade relations. True protection of human rights, without which there can never be full economic and social development, is essential for preserving the Chinese people's dignity and self-realization. Guaranteeing individuals the opportunity to fulfill their respective capacities is fundamental to the socialist system. It is those human capacities, so stifled by the capitalist relations to production, that socialism seeks to set free. This requires allowing the people to think and express themselves freely, without fear of arbitrary or political reprisal.

A. Freedom of Thought and Expression Enhances Basic Relationships

The primary social unit in Chinese society is the family. The relationships between an individual and the community or the State take on many of the same characteristics as those within the family. For these relationships to develop fully, they must be based on truth. If people are afraid of persecution for stating what they genuinely perceive and feel, there is no basis for learning from facts. Working from a basis of truth is not only essential for policymakers, it is vital for

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252. SYNPNOWICH, supra note 203, at 106-07.
253. See supra notes 136-44 and accompanying text.
strong relations among individuals and between the State and its citizens.

Freedom of expression is necessary for strong family bonds. During the Cultural Revolution of the 1960s and '70s, it became commonplace for overzealous children to turn in their parents and teachers to the Red Guards on charges of being "capitalist roaders." This created an aura of mistrust and apprehension in millions of households, within society's most basic unit: the family. Without respect and filial piety, first learned at home, there was no respect among young people for other societal institutions such as schools and government agencies. Mao's encouragement of tearing down the bonds of filial loyalty and respect, forces that had brought harmony to Chinese society for thousands of years, wreaked political and societal havoc.

The extreme example of the Cultural Revolution is a magnification of the more subtle, but equally destructive, forces that continue to work in the Chinese household today. If family members cannot express their true thoughts, feelings, and desires, they are forced to lie to one another. Lying breeds distrust, disrespect, and even contempt, thereby destroying the basis of respect and authority in the home, without which there is no filial piety. Filial piety provides order and harmony in the home and collective society. Yet this humanizing force — this primary source of dignity — is smothered without freedom to express the truth free from fear of reprisal.

Guaranteed freedom of expression is also necessary for the government to carry out its historical role. Effective utilization of the mass line principle requires gathering the purest possible perceptions from the masses on which to build theories. In the absence of guaranteed freedom of thought and speech, the people are forced to withhold or censor their true perceptions when informing the government. It is self-defeating for the government to restrict these freedoms, while at the same time seeking out truth from the mass line policy. In order for people to freely articulate their thoughts and feelings, they must be free from fear of being prosecuted as a counterrevolutionary.

To create better policy and stronger societal bonds, certain rights such as assembly, free speech, and a free press must be guaranteed. In order to be meaningful, they must be granted equally to all people, enforced by an independent judiciary, and not be subject to suspension by the Party. If China's leaders intend to build socialism by use of the

254. For a groundbreaking sociological study revealing the destructive intrafamily forces unleashed by the Cultural Revolution, see DAVID M. RADDICK, POLITICAL BEHAVIOR OF ADOLESCENTS IN CHINA (1977).

255. See supra note 187 and accompanying text.
mass line, making these rights enforceable against the government by all citizens will assist in this effort.

Currently, all criticism of the socialist State and Party is considered to be a violation of the Five Cardinal Principles in the 1982 Constitution.\textsuperscript{256} Guaranteeing the rights of free expression will thus require a reinterpretation of the 1982 Constitution, yet freedom of expression can now be seen to contribute towards strengthening the State by making the mass line policy far more effective. The family unit will also be strengthened, allowing it to provide stronger guidance, and instilling honest respect for and faith in the collective as a positive force. This can only further harmonize relations within society. Naturally, not all of the opinions voiced will robotically echo the Party line, but they can all be considered constitutionally sound and contributory to socialism by providing truth to policymakers.

B. Strengthening the Basic Relationships Sets the People's Capacities Free

In his \textit{Communist Manifesto} and \textit{Das Kapital}, Marx repeatedly said that the free development of each individual is a requirement for the free development of all people.\textsuperscript{257} Strengthening the basic societal relationships will assist individuals in realizing their full capacities, one of socialism's most important aspirations.

As Wang Ruoshui has pointed out, Marxists divide the development of people's needs into three stages: existence, comfort, and development.\textsuperscript{258} The Chinese experience has borne Marx's theory out on this issue. The first problem for the newly victorious Chinese Communists was to keep their people alive. The government focused on meeting the basic material needs for the masses' continued existence, making sure that people were housed, fed, and healthy. As the means for meeting people's existence became more sophisticated, people's needs were also raised to a higher level. These historical forces drove people into the comfort stage of needs development.\textsuperscript{259} People wanted attractive clothing, tasty food, and comfortable surroundings, not just life-sustaining gruel, simple clothes, and a roof over their heads.\textsuperscript{260}

Beyond simple material enjoyment, human beings crave spiritual

\textsuperscript{256} Discussed \textit{supra} note 121 and accompanying text.

\textsuperscript{257} See, e.g., \textit{The Marx-Engels Reader}, \textit{supra} note 62, at 294, 473.


\textsuperscript{259} \textit{On the Marxist Philosophy of Man}, F.B.I.S. Daily Report China, July 24, 1986, at K1 (part two) [hereinafter Marxist Philosophy Part II].

\textsuperscript{260} Id. at K2.
enjoyment. All people have the natural capacity to increase their level of spiritual development. This is expressed in the development stage of needs, in the individual’s desire to develop himself or herself. Material gain is merely used by humanity, but creativity and spiritual fulfillment develop the very essence of the human being. Wisdom, intelligence, and creativity are, in part, what sets humans apart from the animal kingdom. Developing those faculties drives humans towards fulfilling their human potential — this is self-realization. Marx’s “free development of man” refers to “the complete and free development of man’s potential and man’s realization of himself.”

People naturally seek to develop themselves spiritually. This goes beyond political and economic development and enters the worlds of artistic endeavor, intellectual pursuit, the satisfaction of a job well done, contributions made to one’s fellows, or the simple joys of time spent with one’s family. These are needs unique to humans as social beings whose requirements are various and continuously changing as society develops.

Spiritual development is the pursuit of cultivating humanity. Limiting human pursuits to the economic or ideological spheres, as the Chinese government has done in the past, stifles the people’s spiritual growth and hinders full development for all. According to Marx, allowing the people to fully participate in all that society has to offer—a virtually endless list, including work, education, relationships, culture—is a requirement for each individual’s free development, and thus is the condition for the free development of all. In Communist society, public and personal interests coincide, but one does not replace the other.

Building socialism is not simply an economic endeavor; its ultimate purpose is to satisfy peoples’ needs. People are the primary force of production, driving development and modernization. As history unfolds, the people will modernize themselves, “realizing their own value while making contributions to society,” and will ultimately be set free.

262. Id.
263. See Marxist Philosophy Part II, supra note 259, at K1-2.
264. Id. at K1.
266. Id. at K7. This has been stated by the 3d Plenary Session of the 22d Chinese Communist Party Central Committee. Marxist Philosophy Part II, supra note 259, at K1.
C. What Rights?

In the framework provided by the current Chinese political and legal structure, certain rights must be legally guaranteed in order for the Chinese people to be set free. These basic rights will not necessitate a dramatic alteration of the political system, nor be costly to put into place.

1. Freedom of Thought and Expression

Freedom of thought and expression are not only necessary for individual self-fulfillment and the government’s fosterage role, but should also play a part in China’s electoral process. Providing candidates that are selected without the input of the voters denies the people of a genuine voice in the election process, removing them from actual participation in their own development. If elections are held, the people must be free to genuinely express themselves in these political functions. Such expression will more accurately convey to the Party the sentiments of the masses, as expressed in the ballot, and allow the people to become further self-realized through their genuinely meaningful participation in these community affairs.

2. Due Process

By becoming a party to the various international instruments, China has endorsed and agreed to implement specific rights to safeguard human dignity. We have seen that dignity is derived from participation in the basic relationships with the family and the community. Removing an individual from his or her basic relationships strips that person of his or her dignity and humanity; therefore, before weakening society’s “cornerstone” by removing one of its component parts, all measures must be taken to insure that the person is deserving of such a fate. This cannot be ensured when the zealous policeman and prosecutor also act as the judge and jury.

Due process requires developing concise and meaningful codes. People must be aware of the bounds of the law in order to avoid overstepping them. A law is not meaningful if it can be abrogated by certain elements in society. In order for human dignity to prosper and the people to become self-realized, all elements of society must be free to participate in relationships within the bounds of fair and equal laws. Due process cannot be guaranteed in the shadow of constitutionally mandated inequality of rights.

268. See supra note 19 and accompanying text.
269. See supra notes 66-79 and accompanying text.
This right begins, but does not end, in the judicial sector. Due process requires fair hearings before an impartial tribunal, including the right to defense counsel and the means to prepare and present a defense. Additionally, it dictates that a presumption of innocence guide the proceedings. It is only by these means that the dignity of the Chinese individual can be guaranteed and that he or she can fully develop.

Due process protects the rights of the accused until he or she is determined guilty in a fair and impartial manner; it protects society as well. When an innocent person is convicted, not only does the real guilty party go free, but society is minus one innocent contributor. It also suffers in a less tangible, but more costly fashion: knowledge that there is no recourse to protect against false or erroneous charges instills a quiet chill, indeed a subtle terror, in the public at large. Due process guarantees will reduce the resulting antagonism and fear between the authorities and the citizens, leading to more cooperation and harmony.

3. Procedural Regulations

Procedural regulations are necessary to effectuate the rights spelled out in the 1982 Constitution. To be effective, these rights must be guaranteed equally to all people and enforceable against the government. This is not possible without implementing procedures to enforce violations of these rights in each and every case. China has made a meager regulatory attempt at providing some measure of human rights by promulgating the Human Rights Regulations, which employ a problematic two-tier concept of law and enforcement. The Regulations are the second tier, and determine which violations of the first tier laws, such as the Criminal Code, are worthy of actual enforcement by investigation and prosecution. The better method would be to enforce the values expressed in the first tier laws — the Constitution, the legal codes, and regulations — uniformly and without exception. The present political and legal system, in which rights are highly politicized, does not allow for uniform enforcement of the law or guaranteed protection of rights. Inequality of rights introduces a degree of arbitrariness into the legal system that undermines the rights of everyone.

Equality before the law requires equality between individuals as
well as between citizens and government agencies. Administrative agencies must be guided by procedural regulations that clearly inform the public and the bureaucrats of their respective rights and limitations. The authority to determine when those lines have been transgressed must be exercised by an independent and neutral body. To place it in the hands of the very agency accused of violating those rules reduces enforcement to the point of farce.

The Human Rights Regulations point out that human rights concerns are only raised when a State and its citizens are at odds. Protecting those rights gives the people a voice that is indispensible to the State’s fosterage role. Human rights allow the masses to scrutinize political decisions and to hasten historical development by exceeding the boundaries of Chinese society’s existing realities and practices.

D. International Benefits

On the international plane, bringing China into line with its legal human rights obligations will result in international economic and political benefits. While China has proven to be relatively impervious to international political pressure, it has suffered economically, adding to its people’s burden. Following the events in Tiananmen Square on June 4, 1989, the Western world reacted with strong condemnation and suspended many economic and technology transfer agreements. In July, 1989, the Group of Seven industrialized nations, comprised of the United States, the United Kingdom, Italy, France, Japan, Canada, and Germany, issued a joint declaration condemning the Chinese government’s actions.273 Japan, the World Bank, and the Asian Development Bank suspended various aid and loan programs to China. While most of these restrictions have been softened or lifted in the years since,274 the sanctions were undoubtedly felt in China’s economy and caused a setback to economic modernization.

On the political front, it was only through tough political arm-twisting that China was able to narrowly avert a strong condemnation by the United Nations — a serious embarrassment for a permanent member of the Security Council. The U.N. Human Rights Subcommission on the Prevention of Discrimination and Protection of Minorities passed a resolution that listed China as a serious violator of international human rights law including, inter alia, violations of the


right to life and the right to be free from torture.275 The U.N. Commission on Human Rights narrowly defeated the resolution by a vote of 17 to 15, along East-West lines,276 which prevented the resolution from being sent on to the General Assembly for approval. Those seeking the resolution's approval lost the battle, but may have won the war by placing China on the United Nation's human rights agenda — a significant break from the past practice of ignoring China's human rights condition.277

Guaranteeing human rights will undoubtedly bring relief from the remaining trading restrictions imposed by other nations. While President Bush has been reluctant to be as harsh on China as many in Congress and the U.S. public would have liked, his administration has rewarded the small positive steps China has since taken in the direction of human rights. In particular, the safe passage granted to Fang Lizhi was rewarded with eased trade terms and most favored nation status.278

Additionally, if China wishes to be a Third World leader, it must provide a humane model of governance. The Third World has experienced more than its share of tyrannical rulers and will not follow such a "leader."

E. Positive and Negative Rights

Economic development and guarantees of fundamental human rights are not mutually exclusive; indeed, they may complement each other. However, it is true that rights will be implemented more completely as economic development continues, because human rights historically tend to expand as new technology and resources enable their protection.279

276. Id.
277. See Cohen, supra note 113.
279. SYNOWICH, supra note 203, at 111. It could be argued that improved technology could be used to tighten controls on the population and further restrict rights. In an environment seeking socialist development through the use of guaranteed rights, this is highly unlikely. Legally guaranteed rights will limit the government’s ability to interfere in the people’s exercise of their rights, regardless of the means. Of course, technology will make the government more thorough and efficient, thus increasing its ability to track and communicate throughout the nation. If guided by law, this should not pose a threat to rights. It would be self-defeating to encourage such self-development through law and human rights on the one hand, while stifling it with new technology on the other. In keeping with the goal of self-realization, technology would be provided to the people, allowing them to use all the means available to develop themselves.
China has always emphasized positive rights, such as the right to work, and other economic rights aimed at raising the standard of living. Rights are prioritized in this fashion in order to allow individuals the necessary material comfort needed to fulfill their potential as creative, social and self-determining beings. Humanity's spiritual demands can be met only with a solid material foundation. This underlies China's historical position that human rights can be realized only through economic development.

While the rights argued for here are negative rights, which prevent the State from intervening in certain areas, this does not imply a lower priority for positive economic rights; they can coexist. Since human dignity flows from society through participation in basic relationships, the individual cannot be conceived of as a monad completely independent and free from community intrusion. Just as negative rights such as freedom of speech must be tempered in the interest of other societal goals, so must positive rights be limited in order to protect property interests. Tempering rights, however, requires defined procedures, and the limitations must be made by an independent court. There must be clear lines beyond which no intrusion is acceptable.

CONCLUSION

International law sets clear and binding standards for the Chinese government's treatment of its people. Those standards are found in the U.N. Charter, the Universal Declaration, various human rights treaties, customary law, and, arguably, jus cogens. China has traditionally maintained that human rights issues are purely an internal matter. But the linkage of international peace and human rights protection, along with the commitments made to other nations in multilateral human rights conventions, have made China's human rights matters a legitimate concern of the international community. Furthermore, China has participated in monitoring human rights violations by its longstanding membership on the U.N. Human Rights Commission. This makes China's absolute sovereignty argument vacuous.

China has not lived up to generally accepted international standards of human rights. The 1982 Constitution imposes an unequal system where basic rights are subject to Party manipulation, leaving most of the population unapprised of their rights. The legal system has no effective procedural safeguards that inform people of their

This would engender dramatic personal and collective development, thus strengthening the entire society.

rights and enforce those rights against government agencies and officials. Due process protections are almost completely absent: police have unusually broad powers to detain some suspects for several years without judicial review, and many crimes such as “counterrevolutionary” activities are politicized, allowing arbitrary arrests, detentions, and punishments.

In many nations in the West, the ultimate role of a government is considered to be the protection of individual rights and dignity. No such ideology exists in China, as a result of a Confucian culture which has endured for thousands of years. Confucianism did not engender a rights-oriented legal system or body of law, rather, it left rights up to negotiation among the parties or local authorities. Along with many other Confucianist traditions, this has largely been carried over into modern China. Marxist thought, another powerful influence in modern China, sees little value in individual rights. Accordingly, the Party has created a system that denies rights to those viewed with political disfavor.

The solution lies in finding a source of human rights in society itself. In Chinese culture, dignity is derived from one’s interaction with the society, making it a natural product of society. If dignity and rights are society-based, and thus subject to historical forces, then there must be a place for them in socialist society. Guaranteeing fundamental rights is necessary for full socialist development as well as improving trade and political relations. Providing individuals with the opportunity to fulfill their respective capacities is fundamental to socialism and the people’s self-realization, and strengthening the basic relationships in society will set the people’s capacities free.

Guaranteed due process rights are also required in order to inform people and government agencies of the bounds of the law. A law is not meaningful if it can be arbitrarily transgressed. But, meaningful rights cannot be achieved within a framework of constitutionally mandated inequality of rights. Procedural law must be implemented to give effect to the long listing of rights enumerated in the 1982 Constitution. Regulations must also rein in the broad police powers and force them to perform their jobs without political bias. Due process will also necessitate fair trials conducted under a presumption of innocence. The people must be armed with knowledge of their rights and be backed up by firm legal protections in order to truly have rights.

International trade and political benefits are certain to follow moves to guarantee these basic rights in China. While China has seemed impervious to international pressures, international sanctions following the Tiananmen massacre have undoubtedly taken a toll on
economic modernization and on China's efforts to have secure international political relations.

While this Note calls for guarantees of certain negative rights, it does not suggest rights that would conceivably detract from China's economic development efforts. The costs of implementing due process measures and freedoms of thought and expression would be miniscule.

Guaranteeing human rights in China is necessary to fulfill the government's international and domestic roles. It is necessary for allowing the masses to realize their full potential and thereby attain socialist development. It is necessary in order to gain the economic and political benefits of international acceptance. Given the current construction of a new legal system, the time for this transition has never been more opportune.