The Rule of Law: China's Skepticism and the Rule of People

PAT K. CHEW*

I. INTRODUCTION

A. *Western Assumptions of the Goodness of the Rule of Law*

When the West advises other countries on nation-building, it frequently signals the importance of the "rule of law" in the developing country's emerging political structure.[1] Contemporary and historical examples abound.

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* Professor of Law and Associate Dean of Research, University of Pittsburgh School of Law. I would like to thank the following organizations and programs who provided recent professional opportunities this past year for me to present and further explore the rule of law and the rule of people: the Ohio State Journal on Dispute Resolution 2004 Symposium; "Law and Management in Cross-Cultural Context" Executive Forum 2004 Carnegie Bosch Institute at Carnegie Mellon University; the University of Pittsburgh Kabak Conference on International Conflict Resolution; and the Law-at-Sea Program Summer of 2003 of the Institute of Shipboard Education of the University of Pittsburgh.

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[1] The concept of the "rule of law" has been the focus of much scholarly attention. *See generally* RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); SYSTEMS OF JUSTICE IN TRANSITION: CENTRAL EUROPEAN EXPERIENCES SINCE 1989 (Jiri Priban et al. eds., 2003);

Multinational corporations, national and international security experts, and human rights advocates all promote the rule of law.[2] American lawyers' fascination with the rule of law is illustrated in recent publications of the International Law and Practice Section of the American Bar Association. In a special issue on the topic, there is a roll-call review on developments on the rule of law in various countries, including Iraq, Uzbekistan, and Belarus.[3] In another issue, Chinese policymakers are instructed on what China needs to do to conform to rule of law requirements of the World Trade Organization.[4]

JEAN ALLAIN, A CENTURY OF INTERNATIONAL ADJUDICATION: THE RULE OF LAW AND ITS LIMITS (2000); William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723; Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781–819 (1989). For our purposes here, I begin with the common understanding that a country with a rule of law is one with a formal legal system (statutes, codes, and cases) in major subject areas such as property, commercial transactions, and criminal law. I acknowledge, however, that there are varied definitions including those that require certain elements or values.

More recently, the rule of law in China also has been a topic of increasing scholarly attention. *See generally* THE LIMITS OF THE RULE OF LAW IN CHINA (Karen G. Turner et al. eds., 2000) [hereinafter TURNER]; Lan Cao, Symposium, *The "Rule of Law" in China*, 11 WM. & MARY BILL RTS. J. 539 (2003); Norman Kutcher, *To Speak the Unspeakable: AIDS, Culture, and the Rule of Law in China*, 30 SYRACUSE J. INT'L L. & COM. 271 (2003); Shanan L. Guinn, China and the Rule of Law: All Is Not Lost However, All is Not Gained (2004) (unpublished student paper draft, on file with the author).

[2] Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2276–80 (2003) (describing an explosion in rule of law promotion by these groups, particularly post-September 11, 2001).

[3] Phillip James Walker, *Rule of Law: Iraq, Failed States, and the Law of Occupation*, INT'L L. NEWS, Winter 2004, at 1, 8–10.

[4] *Rule of Law Issues in China's Accession to the WTO*, INT'L L. NEWS, Winter 2003, at 4. In very directive language, the leadership of the China Law Committee of the Section indicated several goals that China should have regarding its development of the rule of law:

(1) an autonomous legal and judicial infrastructure;
(2) increases in the quality and quantity of China's law schools and lawyers;
(3) improved regulatory transparency via fair notice and hearing, public promulgation of legislation, and availability of legal information;
(4) observance of legal mechanisms respecting human rights;
(5) an improved legal culture;
(6) regularity in the legal process, uniform application of rules, and principled appellate review and oversight;
(7) removal of links between local courts and local government, and the creation of top-down management of courts, from the Supreme People's Court down;
(8) tightening of time gaps between promulgation of law and release of regulations; and

Western governments also advocate the rule of law. President Clinton and his administration, for instance, announced a "China Rule of Law Initiative" in 1997–1998.[5] Currently, President Bush and his administration repeatedly call for a rule of law in Iraq and Afghanistan.

The West's implicit cultural assumption is that the rule of law is an inherently positive goal.[6] This conclusion is based on an interrelated string of inferences. The rule of law is supposed to bring order and predictability to how a country functions. This order and predictability means that government and business operations are more transparent. Transparency promotes commerce in general, including foreign trade transactions and investment, which in the aggregate contributes to overall economic development. In addition, the West assumes that the rule of law is a predicate for the basic protection of human and civil rights. Given all of these positive associations, it is not surprising that the West sees the rule of law as "good" and a critical part of the infrastructure of emerging and transitioning countries.[7]

By default, the West's implicit cultural assumption is that the absence of the rule of law is negative and inherently undesirable. This default situation is often considered synonymous with a society governed by the "rule of

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(9) restriction of legislative drafting to legislatures, not administrative departments.

Id. at 4.

[5] *See* Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S. Sponsored "Rule of Law" Reform Projects in the People's Republic of China*, 18 UCLA PAC. BASIN L.J. 64, 68–72 (2000) (citing numerous government announcements by the President and Secretary of State Madeline Albright that describe political and substantive goals of this Initiative).

[6] This Western endorsement of the rule of law has historic roots. It can be traced to the philosopher Aristotle who argued that "law must be granted greater authority than the will of any individual." Karen G. Turner, *Introduction: The Problem of Paradigms, in* TURNER, *supra* note 1, at 5. *See also* ALLAIN, *supra* note 1, at 3–6; *see generally* DAVID VANDRUNEN, LAW & CUSTOM: THE THOUGHT OF THOMAS AQUINAS AND THE FUTURE OF THE COMMON LAW (2003).

[7] The validity of these positive associations has generally not been tested. An exception is an empirical study of Hong Kong legal events and the stock market by Emily Johnson Barton, *Pricing Judicial Independence: An Empirical Study of Post-1997 Court of Final Appeal Decisions in Hong Kong*, 43 HARV. INT'L L.J. 361 (2002). She explores the "Rule of Law Hypothesis" that "the establishment of the rule of law in the short term may be a central factor in yielding long-term benefits such as economic growth and stability." *Id.* at 362 (footnote omitted). In particular, she finds that there is a positive though not always consistent relationship between legal events associated with judicial independence (and hence a presumed strengthening of the rule of law) and the stock market's response. *Id.* at 397–403.

people" or sometimes more narrowly termed "the rule of man."[8] In contrast to the situation described in the prior paragraph, a country without the rule of law is presumed to be uncertain and chaotic in its government and business functioning. Without formal legal rules, the West believes that how society operates is not transparent. This opaqueness in how things get done discourages trade, including foreign investment, which in turn makes overall economic development more difficult.[9] Instead of predictable legal rules, the fear is that the void will be filled with unpredictable and arbitrary human indiscretions. Furthermore, the West believes that the absence of the rule of law makes the basic protection of human and civil rights problematic.[10]

B. *Alternative Cultural Perspective on the Rule of Law*

The Western view of the rule of law is not the only model. Alternative cultural assumptions about the rule of law exist.[11] In particular, this Article

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[8] *See* Stephenson, *supra* note 5, at 76–77.

[9] *E.g.*, Dexter Roberts, *Cheated in China?*, BUS. WK., Oct. 6, 1997, at 142 (raising the possibility that foreign investment in China will shrink if the rule of law is not more manifest). *But see* James V. Feinerman, *The Rule of Law Imposed from Outside: China's Foreign-Oriented Legal Regime Since 1978*, *in* TURNER, *supra* note 1, at 304–05 (proposing that "over-reliance on promulgating formal law may have diverted attention from necessary economic changes and, at the same time, created misimpressions about the rapidity and extent of economic and legal change that has actually occurred.").

[10] Professor Brooks questions the assumption that a rule of law necessarily brings order, a decrease in violence and subsequent protection of human rights. Brooks, *supra* note 2, at 2301. Drawing from her personal experiences working in Kosovo in 1999 and 2000, she describes the irrelevance of law in many situations:

> More important . . . the law struck many Kosovars as neither moral nor legitimate. In a society in which many people (by no means all, but enough) took seriously the idea that revenge was not only excusable put perhaps even morally required, attempts to clamp down on ethnically motivated revenge crimes and ensure equal treatment for Albanians and Serbs struck many as unjust: Why, after all, should the international community permit the Serbs to escape the consequences of what many Kosovars saw as their (collectively) evil actions? When the process for selecting law and deciding how to reform legal institutions was so arbitrary, high-handed, and confused, the basic criteria for legitimacy were unmet. Little wonder, then, that efforts to create the rule of law in Kosovo have been so disappointing, in ways that should give pause to those optimistic about the ongoing efforts in Afghanistan and Iraq.

Id. at 2298–99 (footnote omitted).

[11] As described by Professor Brooks:

> The rule of law is not something that exists "beyond culture" and that can somehow be added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law is a

draws on China's historical and contemporary perspective on the rule of law. In contrast to the Western view, China historically and contemporaneously views the rule of law with skepticism.[12]

As this Article explores in Part II, China has for many years analyzed the comparative merits of legal formalism (rule of law) and of cultural norms (rule of people). The Chinese have traditionally framed this issue as a debate between two schools of thought: the Legalists and the Confucians. China's own history and its observations of the West's experience with the rule of law further inform its perennial struggle between these two approaches. Moreover, China's skepticism of the rule of law continues today. Part III of this article studies two contemporary situations: the protection (or lack of protection) of intellectual property and disputes over the use of land. Both situations offer a window into how the rule of law and the rule of people co-exist and often conflict. In Part IV, the implications of the analysis in Parts II and III are discussed. In particular, the uneasy relationship between the rule of law and the rule of people, prompted both by China's skepticism of the rule of law and by China's comfort with the rule of people is explored. This Article considers the difference between the existence of formal Chinese laws and the actual recognition and enforcement (or more accurately the lack of recognition and enforcement) of the laws; the parallel systems of a rule of law and a rule of people; and finally, the varied forms of the rule of law from which China might base its economic and social order.

By studying Chinese skepticism of the rule of law, this article reflects on whether the implicit positive associations with the rule of law are merited. Furthermore, China is a particularly appropriate country on which to focus. China is a developing country, located in Asia, with a socialist economic and political system that is transitioning to a more market-oriented environment. By studying China, therefore, one can also cautiously extrapolate some of what is learned to other developing countries', other Asian countries', and

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> culture, yet the human-rights-law and foreign policy communities know very little—and manifest little curiosity—about the complex processes by which cultures are created and changed.

Id. at 2285 (footnote omitted).

The importance of putting legal issues in a realistic cultural context is increasingly being recognized. *See generally* Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599 (2000) (describing the difficulty of transporting American concepts of corporate law into China without acknowledging the function of the Chinese kinship unit as a basis for organizing and operating businesses).

[12] Turner, *supra* note 6, at 4–5.

other transitioning socialist societies' perceptions of the rule of law.[13] China also has the world's fastest growing economy and is a leader in attracting direct foreign investment.[14] Many American and other multinational companies have decided that the Chinese market and doing business in China is essential to their future business strategy.[15] China's perspective on the rule of law, therefore, has enormous practical importance to foreign investors and their governments.

II. PERENNIAL HISTORICAL DEBATE

Chinese skepticism of the rule of law has deep roots in Chinese social and political theory. Instability and changes in political power particularly create opportunities for the Chinese to consider how and whether to reframe the government and the social order.[16]

A. *Legalists v. Confucians*

This perennial issue has traditionally been framed as a long-standing debate between two fundamentally different approaches.[17] The first is the Legalist approach traditionally termed *fazhi* (more recently termed *yifazhiquo*)[18]—what the West would label as the rule of law. The second is a

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[13] Russia, for instance, is both a developing country and one with a socialist/communist history. Others have noted Russia's evolving perceptions regarding the rule of law. *See, e.g.*, Harold J. Berman, *Rule of Law and Law-Based State, in* TOWARD THE RULE OF LAW IN RUSSIA? 204 (Donald Barry ed., 1992); Martin Buzak, The Khodorkovsky Affair: Russia's Cultural Outlook Toward the Oligarchs and the Rule of Law, 4–5 (Dec. 5, 2003) (unpublished student paper, on file with author).

[14] Cao, *supra* note 1, at 539–40.

[15] *See id.* at 540.

[16] Legal historians, for example, have studied the dialectic evolution of Chinese laws. *See generally* CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES (Jerome Alan Cohen ed., 1970); JEROME ALAN COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA (1968); GEOFFREY MACCORMACK, THE SPIRIT OF TRADITIONAL CHINESE LAW (1996); GEOFFREY MACCORMACK, TRADITIONAL CHINESE PENAL LAW (1990).

[17] *Compare* Turner, *supra* note 6, at 3–19, *and* Jonathan K. Ocko, *Using the Past to Make a Case for the Rule of Law, in* TURNER, *supra* note 1, at 65–87, *with* Jack L. Dull, *Epilogue: The Deep Roots of Resistance to Law Codes and Lawyers in China, in* TURNER, *supra* note 1, at 325–30. *See also* Urs Martin Lauchli, *Cross-Cultural Negotiations, With a Special Focus on ADR with the Chinese*, 26 WM. MITCHELL L. REV. 1045, 1058–64 (2000).

[18] Stephenson, *supra* note 5, at 76. Some Chinese prefer the term *yifazhiguo*, meaning "a country ruled according to law" or "rule by law." *Id.* By crafting a new term,

Confucian approach—what the West has sometimes labeled as a rule of man but is more accurately translated as the rule of people from the Chinese word *renzhi*.[19]

The first recorded debate between the Legalists and Confucians is the story of Zi Chan, dating from 536 B.C.[20] Zi Chan, the prime minister of the state of Zheng, ordered that criminal laws be inscribed and prominently displayed. He intended this as "a dramatic gesture to demonstrate the permanence of the law and to assure the people that the law would be applied strictly according to its letter, free of government manipulation."[21] This dramatic and public gesture, however, provoked social and political controversy over whether this Legalist approach to government was appropriate.[22]

This debate, first occurring over two thousand years ago and repeated many times over in China, emphasizes the following arguments and counterarguments: The Legalists refer to the laws as *fa*, defined as the positivist and formal statutes and codes of the government. Legalists argue that rulers should rely on these laws meticulously; rulers should not rely on their intellect, intuition, or arbitrary preferences. Just as craftspeople rely on their professional tools, such as their compass or their square, rulers should rely on the measurements and solutions dictated by the laws.[23] By doing so, governing would be easier and the results would be predictable and uniform. Order is achieved by these predetermined rules and external systems.

The Confucians, on the other hand, argue that the rulers' paramount guides should be social and cultural norms.[24] These rules of proper conduct, called *li*, should be the basis for governing: "Li is the vehicle of government. . . . When li is dishonored, government is lost."[25] Thus, if there is a conflict, *fa* would have the lowest priority and *li*, as the moral standard,

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the Chinese have more freedom in the interpretation of the concept rather than being constrained by the more traditional term *fazhi* (*fa* defined as "law") which may have historical associations with the West. *Id. See also* Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China, in* TURNER, *supra* note 1, at 20, 24–25 (discussing the political nuances of this terminology).

[19] Wejen Chang, *Foreword* to TURNER, *supra* note 1, at vii (translating *ren* as "man").

[20] *Id.*; Dull, *supra* note 17, at 328.

[21] Chang, *supra* note 19, at vii.

[22] *Id.*

[23] *Id.* at viii.

[24] *See* CHEN JIANPAN, CONFUCIUS AS A TEACHER 266–71 (1990) [hereinafter CHEN]; *see generally* QU CHUNLI, THE LIFE OF CONFUCIUS (1996).

[25] CHEN, *supra* note 24, at 270 (quoting from Confucian teachings).

would have the highest priority. These cultural norms and moral imperatives have ancient roots and so would be the most widely accepted and authoritative.[26] Furthermore, rulers exercising their discretion in the interests of the community are far more important than protecting the interests of any individual's needs. Rulers also can reinforce a long-standing system of hierarchical relationships between individuals, thus furthering the order and harmony achieved through a socially understood balance between internal forces and these relationships.

> That the ruler order and the subject obey, the father be kind and the son dutiful, the elder brother loving and the younger respectful, the husband be harmonious and the wife gentle, the mother-in-law be kind and the daughter-in-law obedient; these are things in *Li*. That the ruler in ordering order nothing against the right, and the subject obey with[out] any duplicity; that the father be kind and at the same time be able to teach, and the son be filial and at the same time be able to learn; the elder brother, while loving, be friendly, and the young docile, while respectful; that the husband be righteous, while harmonious, and the wife correct, while gentle; that the mother-in-law be condescending, while kind, and the daughter-in-law be winning, while obedient; these are excellent things in *Li*.[27]

Confucians further posit that *fa* is flawed in fundamental ways.[28] Laws are inevitably incomplete and rigid. They must be constantly reviewed and analyzed. The uniformity that is valued by the Legalists is not important; in fact, uniformity can be viewed as unworthy since a particularistic approach that is tailored to unique circumstances better serves societal needs. A strict rule of law also is evidence that rulers cannot rule effectively by utilizing moral norms. Hence, laws are analogous to an external and physical force. Deference to the laws indicates that the rulers are weak in political power and the people are weak in character. As described by Confucius:

> If the people be led by laws, and uniformity sought to be given them by punishments, they will try to avoid the punishment, but have no sense of shame. If they be led by virtue, and uniformity sought to be given them by *Li*, they will have the sense of shame and moreover will become good.[29]

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[26] *Id.* at 266–75.

[27] *Id.* at 268–69.

[28] *Id.* at 271.

[29] *Id.* at 271. *See also* Glenn R. Butterton, *Pirates, Dragons, and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, *in* THE CONFLICT & CULTURE READER 261, 263 (Pat K. Chew ed., 2001) [hereinafter CHEW].

Legalists counter these Confucian positions with a practical concern: How do you restrain the abuses of rulers whose main intent is maximizing their own political power? After all, Legalists note, rulers have "100 battles a day" in which decisions must be made and rulers' political indiscretion could lead to improprieties.[30] Confucians recognize this paramount challenge, acknowledging that there is a risk of fallible humans wanting to gain unlimited power. Confucians, however, propose that moral education and indoctrination of rulers and people are the correct paths. Strengthening internal character is the answer; resorting to formal laws when faced with complex and important questions is inappropriate.[31]

B. *Other Strands Supporting Skepticism*

1. *Chinese Experiences of the "Rule of Law"*

The debate between the rule of law and the rule of people is fueled by more than theoretical discussions of the relative merits and risks of each approach. Chinese history is studded with experiments with the legalistic approach that left distaste for a rule of law. The legalistic approach of the Qing dynasty (1644–1911), for instance, had many harsh aspects.[32] Under the penal codes, the most serious crimes, called the "great evils," were punishable by extreme forms of execution.[33] These great evils included politically egregious activities such as treason, rebellion, and insurrection and therefore may have merited such extreme punishments. However, they also included activities that were less egregious, such as disloyalty, lack of filial piety, or great lack of respect that would not appear commensurate with such harsh punishments. In addition, under the principle of collective responsibility, the criminal's family also was subject to punishment by exile, enslavement, or castration. Rulers during the Qing Imperial period also used

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[30] Chang, *supra* note 19, at x.

[31] *Id.* at ix.

[32] *See* JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 123–28 (2d ed. 1999); Joanna Waley-Cohen, *Collective Responsibility in Qing Criminal Law*, *in* TURNER, *supra* note 1, at 112–31; R. Kent Guy, *Rule of Man and the Rule of Law in China: Punishing Provincial Governors During the Qing*, *in* TURNER, *supra* note 1, at 88–111.

[33] The most severe punishment was "slow slicing with exposure of the severed head," followed by decapitation. Waley-Cohen, *supra* note 32, at 118–19.

the laws as institutionally sanctioned tools for coercing their subjects to succumb to their political control and to remove their political enemies.[34]

Chinese historians also cite foreign powers' use of "rules of law" to legitimize the exploitation of a weak imperial government during the 1800s and early 1900s.[35] In 1840, Emperor Dao Guang attempted to rid China of Britain's opium trade and the societal problems that it created with a ban on the trade. British traders promoted the sale and use of opium in China because the opium could be used in exchange for desirable Chinese teas and silks. In response to the imperial ban, the British initiated the Opium Wars against China. After losing the War, the Chinese were forced to sign the Treaty of Nanking, which "legally" ceded Hong Kong to Great Britain and forced the opening of Chinese ports to foreign powers for the next 100 years. The Treaty of Nanking was only the first of a series of "unequal treaties" between China and other Western powers.[36] As described by Bai Shouyi:

> Before the war, China had been an independent feudal country with the Qing court exercising full sovereign rights without outside interference. After the Qing rulers submitted to the British on August 29, 1842 by signing the unequal Treaty of Nanking, China turned step by step into a semi-colonial and semi-feudal country dominated—with the help of the Qing regime—by foreign power.[37]

2. *Questioning Western Experiences with the "Rule of Law"*

The Chinese also have observed the West's own experience with the rule of law. The Chinese question whether the rule of law has been an effective tool for political stability, economic development, and the protection of human and civil rights. The Chinese (and Western scholars) can point to tragic historical examples of Western countries with formalized legal systems that did not prevent or even sanction what was essentially genocide and massive human rights violations.[38]

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[34] *See, e.g., id.*; Guy, *supra* note 32, at 88 (describing the disciplining of Chinese provincial governors and how this process served the political needs and illustrated the absolute power of the emperor).

[35] JONATHAN SPENCE & ANNPING CHIN, THE CHINESE CENTURY: A PHOTOGRAPHIC HISTORY 129, 158–59 (1996); YANG ZHAO ET AL., AN OUTLINE HISTORY OF CHINA [ZHONGGUO TONGSHI GANGYAO] 431–48 (Bai Shouyi ed., 1982) [hereinafter BAI].

[36] BAI, *supra* note 35, at 435–36.

[37] *Id.* at 431.

[38] *See* Brooks, *supra* note 2, at 2306–11.

Vivian Curran, for instance, argues that reliance on law and legal theory to prevent human rights violations is overrated and dangerous.[39] She explores how judiciaries in many nations have used the laws to enable governments to violate their citizens' civil rights.[40] Professor Curran offers a specific example from Nazi Germany where the judiciary used their interpretive discretion to essentially legitimize discrimination and persecution.

> The first article of German Civil Code defined the human being as acquiring basic legal capacity ("*Rechtsfähigkeit*") by virtue of having been born. Hitler had not repealed the Civil Code, so Nazi legal scholars showed judges a way to deprive Jews of their Article I legal capacity despite the Civil Code's continued legal effectiveness. They did this by analogizing Jews to the dead, reasoning that all laws had to be read in accordance with the guiding spirit of the nation's law (*Recht*); namely, the racial principles of blood and race. Accordingly, only members of the allegedly racially pure German Volk were deemed to be living for purposes of qualifying for legal benefits. As Hitler already had decreed that Jews were barred irremediably by reason of race and blood from belonging to the German Volk, the scholars reasoned that by analogy Jews should be deemed disqualified from a legal capacity conveyed by virtue of birth.[41]

Thus, she concludes, it is the "values of the individual and institutional actors that will determine whether law is a force for or against humanity at any given moment in history."[42]

C. *Prevailing Approach*

For most of Chinese history, the question appears to be who has won this perennial debate between the rule of law and the rule of people. The clear tendency has been for a preference towards the rule of people. Chinese society and government have opted repeatedly for moral guidance and cultural norms to trump over the rigidity of formal laws.[43]

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[39] Vivian Grosswald Curran, *Racism's Past and Law's Future*, 8 VT. L. REV. 683 (2004).

[40] As she describes: "Law's performance generally has been dismal: the judiciaries of nation after nation throughout time have enabled governments to discriminate against, persecute, and even massacre portions of populations." *Id.* at 685.

[41] *Id.* at 710.

[42] *Id.* at 687.

[43] *See* Guy, *supra* note 32, at 106–07.

After the Communist Revolution, for instance, the Chinese government advocated a socialist and communist political philosophy.[44] Particularly since the 1978 reform movements, the government has emphasized economic development while adhering to socialist political ideology.[45] In implementing these economic and political agendas, it has persistently exercised considerable discretion regarding government laws and policies.[46] In doing so, it often defers to cultural and social norms over literal and technical interpretations of more formal government regulations. The Chinese government also has consistently demonstrated that political goals that facilitate communitarian Communist principles take primacy over the legal protection of individuals.[47]

III. CONTEMPORARY ANGST

Chinese skepticism of the rule of law and China's struggle between the rule of law and the rule of people continues today.[48] This Article focuses on two illustrative situations. One of these situations, intellectual property protection, is of high interest to foreign investors and international businesspeople. The second situation also contrasts the rule of law and the rule of people, but does so in the context of domestic land use disputes. For each situation, note how conflicts would be dealt with under a strict interpretation of the rule of law, and then compare that approach with the reality of cultural norms under the rule of the people.

A. *Intellectual Property Protections*

China welcomes and needs foreign investment, but it has always clearly communicated its preferred terms for accepting foreign investment.[49] Among

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[44] STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 174 (1999).

[45] *Id.*

[46] *Id.*

[47] *See, e.g., id.* at 178–79 (stating that ownership in China is a severable right and Chinese law does not address specific rights and duties under the law).

[48] For discussions on China's evolving current legal system, see, *e.g.*, LUBMAN, *supra* note 45; DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA: IN A NUTSHELL 61–66 (2003); Michael E. Burke IV et al., *China Law*, 36 INT'L L. 815, 815–16 (2002); LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA 52–53 (Jan Michiel Otto et al. eds., 2000).

[49] For general discussions of direct foreign investments in China, see, *e.g.*, BUSINESS TRANSACTIONS WITH CHINA, JAPAN, AND SOUTH KOREA §§ 1.01–5.04 (Parvis Saney & Hans Smit eds., 1983) [hereinafter BUSINESS TRANSACTIONS]; and DANIEL C.K. CHOW, A

its key priorities are maintaining government and Chinese Communist Party control over foreign investment, foreign companies ultimately transferring management and other operations to local control, and foreign companies transferring technology and know-how to the foreign investment enterprise such as a Sino-foreign joint venture.[50]

Given Chinese pressure for foreign investors to transfer and share their proprietary knowledge, foreign investors have been understandably concerned that Chinese laws provide inadequate protection against piracy and counterfeiting. Responding in part to these international demands, the Chinese government has passed numerous laws prohibiting the disclosure of proprietary information.[51] In addition, there is a range of multilateral and bilateral treaties, which include some form of intellectual property protection.[52] While there are still some gaps in the regulatory framework, there is an emerging, voluminous system of intellectual property-related laws. At least on its face, these laws appear to address many of the major concerns of foreign investors.

In practice, however, there is widespread disclosure of the proprietary information of foreign investors.[53] To foreign investors' chagrin, the People's Republic of China (P.R.C.) appears to be the center of the world's most serious counterfeiting and commercial piracy problems.[54] Not only are these

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PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 98–113 (2002).

[50] Jerome Alan Cohen, *Negotiating Complex Contracts with China*, *in* BUSINESS TRANSACTIONS, *supra* note 49, § 2.02, at 2-9 to 2-12.

[51] Professor Yu describes how the U.S.'s bullying of China with a series of economic threats, trade wars, non-renewal of Most Favored Nation status, and opposition to China's entry into the WTO eventually led to China's signing of intellectual property agreements in 1992, 1995, and 1996. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 133 (2000). He suggests, however, that these bullying tactics may have been misguided because it set up an ineffective bilateral policy of badgering, bickering and posturing. *Id.* at 133–37. *See also* DELI YANG, INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA (2003); LEGAL RULES OF TECHNOLOGY TRANSFER IN ASIA (Christopher Heath & Kung-Chung Liu eds., 2002); Feinerman, *in* TURNER, *supra* note 9, at 304.

[52] Yu, *supra* note 51, at 256.

[53] *See, e.g.*, Yu, *supra* note 51, at 133. See also CHOW, *supra* note 49, at 5–9; Anna M. Han, *Technology Licensing to China: The Influence of Culture*, 19 HASTINGS INT'L & COMP. L. REV. 629, 635–36 (1996); Tara Kalagher Giunta & Lily H. Shang, *Ownership of Information in a Global Economy*, 27 GEO. WASH. J. INT'L L. & ECON. 327, 351–52 (1993–94); Brent T. Yonehara, Comment, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws*, 12 J. ART & ENT. L. 63, 66–68 (2002); Brooks, *supra* note 2, at 2302.

[54] *See generally* Yonehara, *supra* note 53, at 66–68.

problems occurring in China, but China apparently is also the seedbed of much global piracy.[55]

The New Balance story illustrates the unpredictability and risks of investment in China.[56] This Boston athletic shoe company has been moving its production to China since the early 1990s.[57] Today, between 60 and 70% of its global output is manufactured there.[58] New Balance also wanted to tap the China consumer market.[59] In 1995, it selected Mr. Horace Chang, a long-time Taiwanese supplier, to be its official sales partner and distributor in China.[60] Chang immersed himself in the China market.[61] To boost sales, he persuaded New Balance to promote its lower-priced "classic" model.[62] Shortly after, the classic shoes began showing up in Chinese stores for as little as $20, even though the shoe ordinarily retailed for about $60.[63] In 2000, New Balance executives asked Chang to alter his strategy because they thought it could harm the company's image as a high-end technologically advanced shoemaker.[64] Chang was puzzled and offended that the company did not applaud his sales success and ambition.[65] He continued to follow his strategy, and subsequently, discounted shoes from Chang started showing up in Japan and other Asian countries.[66]

Enraged, New Balance terminated Chang's distribution agreement, and presumably stopped any further authorized manufacturing or distribution of New Balance shoes.[67] Chang did not understand why he was being punished when he had quadrupled sales in China.[68] Subsequently, and to New Balance's dismay, Chang's discounted shoes then started showing up in Europe, Australia, and Taiwan.[69]

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[55] *See, e.g., id.* at 78–83.

[56] *See* Gabriel Kahn, *Factory Fight: A Sneaker Maker Says China Partner Became its Rival—New Balance, Other Brands Claim Suppliers Flood Market with Extra Goods—Setback From a Local Judge*, WALL ST. J., Dec. 19, 2002, at A1, A8.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

New Balance turned to the Chinese legal system and China's intellectual property enforcement agency, the State Administration for Industry and Commerce (AIC).[70] It filed suit against Chang's companies.[71] The company was heartened by the AIC's acknowledgment that Chang was violating Chinese intellectual property laws and the Chinese court's agreement to hold the evidence including the unsold shoes until the trial's outcome.[72] The judge, however, ultimately decided against New Balance.[73] It concluded that the original distribution agreement permitted Chang to make and sell the shoes until 2003; the court did not recognize New Balance's termination of the agreement.[74]

The New Balance lawyer said the company was "naive" about the China environment and in its relationship with Chang.[75] The company claims that it spent millions of dollars in legal fees, that its sales and brand image had been damaged by its former licensee, and that Chang continued to use New Balance know-how and technology to manufacture and distribute its shoes even though he was not authorized to do so.[76] Furthermore, its strategy to become the number two U.S. shoe manufacturer in China, after Nike, had been notably stalled.[77]

What explains the disparity between technical legal rules (the rule of law) and what actually happens in practice (the rule of people)? While the answer is complex, it appears that cultural and political factors play a significant role. Recalling the American approach to intellectual property helps put the Chinese approach in context. U.S. intellectual property laws are premised on certain assumptions about what motivates individuals to be creative and entrepreneurial.[78] Our belief is that individuals are more likely to invent if they are rewarded with an exclusive right to the use of the invention.[79] Others then pay the inventor for the privilege of using the invention through some royalty arrangement, thus providing the creator with a monetary reward.[80] This individual right of exclusivity and the resulting

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[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] JANICE MUELLER, AN INTRODUCTION TO PATENT LAW 18, 23–26 (2003) (describing these premises in the context of U.S. patent laws).
[79] *Id.*
[80] *Id.*

rewards presumably motivates individuals, prompted by their self-interest, to engage in innovative activities.[81]

In contrast to this American perspective, traditional Chinese culture emphasizes the collective societal interest.[82] Individual rights are minimized.[83] The emphasis instead is on creating benefits and minimizing harms to the family and the community.[84] Chinese cultural norms are contrary to notions of exclusivity.[85] A socialist philosophy and state-control led economy also conveniently reinforces this notion of the "greater good."[86]

In addition, China has a culture of copying and sharing created works.[87] Traditionally, the creator does not have the right to own or monopolize her or his work.[88] Authors and artists, much esteemed in Chinese society, want their work to be copied.[89] The highest form of flattery was to admire the writings, art, or other creative work so much that one would want to imitate and recreate it.[90] This "borrowing" of the work was viewed as a great tribute.[91] Once again, socialist philosophy is consistent with the concept of sharing one's work for societal benefits.

American investors who have negotiated what they consider adequate intellectual property protections in joint venture agreements have often been frustrated by the relative ineffectiveness of the contract terms.[92] Again, cultural factors play a role. The contract may prohibit employees of the Chinese joint-venture partner from disclosing the American partner's proprietary information to 'third parties.' The Chinese, however, may define a 'third party' differently than American business practices. In China's collectivist, socialist, relationship-oriented society, the notion of outsider status may be quite narrow. For instance, cultural traditions would likely indicate that family members, 'extended-family' members, close friends,

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[81] *Id.*

[82] *See* WILLIAM ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 10 (1995).

[83] *Id.* at 10–12.

[84] *Id.* at 11–12.

[85] *See id.* at 12.

[86] *See id.*; Yonehara, *supra* note 53, at 74–75.

[87] Yonehara, *supra* note 53, at 74–78; *see generally* ALFORD, *supra* note 82.

[88] *See* Yonehara, *supra* note 53, at 76.

[89] *Id.* at 78–79.

[90] *Id.* at 79.

[91] *See id.* at 78–79.

[92] *See* R. Randle Edwards, *The Future of U.S.–China Trade and Investment—The Legal and Economic Climate*, *in* BUSINESS TRANSACTIONS, *supra* note 49, § 1.04, at 1–10.

party members, and state-affiliated companies and their representatives are not outsiders, and hence, would not be considered as 'third parties.'

B. *Land Use Disputes*

Chinese sociologist Zhang Jing also illustrates the prevalence of cultural norms over legal values with her fascinating study of current land use disputes in China.[93] After analyzing numerous conflicts between farmers or between farmers and the government in various Chinese provinces, Professor Zhang proposes two possible approaches for resolving their disputes: the "interest politics" model and the "legal equilibrium" model.[94] Her interest politics model, as summarized below, appears to be another expression of what I have described above as the rule of people, while the legal equilibrium model is analogous to the rule of law.[95] Consistent with our thesis, Zhang also posits that the interest politics model better predicts the outcome of domestic land use disputes than the legal equilibrium model.[96]

The Interest Politics Model has the following characteristics[97]:

1. Rules are endlessly negotiated. Rules are created and change continuously through a process of agreement and acquiescence.
2. Parties determine what is legitimate and who will be influential in resolving the dispute.
3. The rules have mass appeal because they are influenced by the ideas of the majority.
4. Individuals who have access to information are powerful because they are in a position to interpret events and shape decisions.

In contrast, the Legal Equilibrium Model has the attributes listed below[98]:

1. Basic negotiation principles are externally determined as part of the political and legislative process. The parties cannot

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[93] Zhang Jing, The Uncertainty of Land Use Rules: An Interpretive Framework, Presentation at the University of Pittsburgh Department of Political Science Lecture (2004) and at the International Symposium on Law and Society 1, 9 (Oct. 11–12, 2002) (unpublished paper, University of Pittsburgh) (on file with author) [hereinafter Zhang]. *See also* Phyllis L. Chang, *Deciding Disputes: Factors that Guide Chinese Courts in the Adjudication of Rural Responsibility Contract Disputes*, *in* CONTRACT, GUANZI, AND DISPUTE RESOLUTION IN CHINA 129–30 (Tahirih V. Lee ed., 1997).

[94] Zhang, *supra* note 93, at 8–10.

[95] *Id.*

[96] *Id.* at 9.

[97] *Id.* at 10.

[98] *Id.*

arbitrarily change these principles. Furthermore, these principles are mandatory and subject to legal enforcement.

2. Those administering the dispute resolution process have little latitude in defining their roles or making decisions. Their role is merely to communicate and apply the set rules. The parties' positions are judged according to legal principles, not according to the parties' power.
3. Rules are established and are relatively stable. They must be interpreted by "specialist legal authorities" and are not subject to arbitrary alterations or the non-legal interests of the parties.

In explaining how the interest politics model actually operates in land use disputes,[99] Zhang describes how different forces vie for power and control, each trying to satisfy their interests.[100] In particular, she identifies four important interactive forces: 1) state regulators and state policies, 2) local cadre, 3) peasants acting collectively, and 4) the agreements between the parties including a sense of justice in the agreements' interpretation.[101] The dispute resolution process used in the interest politics model is not intended to be rational, law-based, or efficiency-oriented; rather, the process is characterized as a competitive struggle between forces which are malleable enough to accommodate their interests.[102] In any given dispute, the interests may be satisfied differently, depending on which groups prove to be the most powerful or influential.[103] The way one dispute is resolved is not necessarily predictive of how others will be resolved.[104] Each dispute has its own interest politics depending on the issues and the relative strengths and weaknesses of the different forces.[105]

In one case, for example, the state issued a new policy of land redistribution in a county where the main source of residents' income came from farming chestnut trees.[106] The cadres and the households in each village also had negotiated contracts.[107] In some of the villages in the country, the

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[99] Disputes studied include those dealing with sand management in Inner Mongolia, distribution of orchard lands in Hebei province, commercial land acquisition in Zhejiang province, and the reclamation of land by peasants in Hebei province. Zhang, *supra* note 93, at 4–6.

[100] *Id.* at 4.

[101] *Id.* at 4–6.

[102] *Id.* at 9.

[103] *Id.* at 8.

[104] *Id.* at 9.

[105] *Id.*

[106] *Id.* at 5.

[107] *Id.*

farmers complied with the new policy in full.[108] Other villages "fine-tuned" the policy.[109] For example, in one village the cadres of the county commission on laws, noting the community controversy over the new policy, called a meeting of the Communist Party members and representatives of each household.[110] The group could not come to a "unified conclusion."[111] The cadres then asked each household to send a representative to vote.[112] Eighty-five percent voted against the redistribution of the land, and consequently, the cadres decided not to proceed with the new policy.[113]

Zhang further explains:

> Though the decision-making power of grass-roots cadres is critical, it has to be adapted to the level of support . . . . When there is tremendous public will, the collective will may change the decisions of either the state or the village cadres. The pressure of the collective will may also influence agreements by parties concerned. If it is generally accepted by villagers, the individual contract may proceed; if not, it has to be changed. . . . The implementation of rules . . . largely depends on whether they are acquiesced to by those involved.[114]

The legal equilibrium model is not used because the people do not view it as legitimate or relevant to their disputes.[115] The ordinary person is not involved in and does not believe there is a way for them to have meaningful input into legislation.[116] Rather, law-making is done by an elite group of politicians.[117] In addition, property laws are viewed as flawed.[118] They are perceived as unclear and insufficient, so people do not recognize legal documents and rules and do not consider them credible.[119]

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[108] *Id.*
[109] *Id.*
[110] *Id.* at 7.
[111] *Id.*
[112] *Id.*at 7.
[113] *Id.*
[114] *Id.* at 8.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*at 8.

IV. IMPLICATIONS

Given Chinese skepticism of the rule of law and the disparity in practice between the rule of law and the rule of people, what conclusory observations can we make?

A. *"Laws" and the Reality of Law*

Since the Chinese Communist Party began introducing economic reforms and attracting direct foreign investment in 1978, the West has carefully followed the emerging legal regulatory structure.[120] American politicians, businesspeople, and academics have repeatedly questioned whether there were sufficient laws on the subjects most important to them.[121] China has responded with literally hundreds of laws.[122] While not necessarily as comprehensive as Western investors would like, the volumes of statutes and regulations certainly represent a significant legislative effort.[123]

As we have explored above, however, a discrepancy between what a literal reading of the laws might indicate and the effective meaning of the laws exists. Given the continued pervasiveness of the rule of people and complementary governmental and judicial discretion, it is not always clear which laws will be recognized and enforced and how laws will be interpreted. Thus, while China can now point to an elaborate legal framework, there continues to be a disconnection between the formal laws and the oftentimes reality of legal opaqueness.

B. *Parallel Systems*

As our discussion substantiates, both a rule of law and a rule of people exist in China today. While Chinese intellectual property laws provide for protection of intellectual property, the pervasive disclosure of propriety information continues. While a legal regime provides principles for resolving conflict in land use, interests created by cultural, social, and economic factors dictate more predictably the outcome of land use disputes. Both the rule of law and the rule of people are operating in parallel in a transitioning and sometimes uneasy relationship. As pragmatists, Western investors and foreign policy strategists should be aware of and informed about these parallel systems. Furthermore, cultural anthropologists suggest that we

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[120] *See* Cohen, *supra* note 50, § 2.02, at 2-9 to 2-12.
[121] Edwards, *supra* note 92, § 1.04, at 1–10.
[122] Feinerman, *supra* note 9, at 309.
[123] Cohen, *supra* note 50, § 2.02, at 2-9 to 2-12.

suspend our own cultural approach and biases and instead attempt to understand this Chinese approach as the norm.[124] Rather than holding the U.S. approach as the familiar standard by which we evaluate the Chinese system, we should try to evaluate the Chinese system by more objective standards or from Chinese standards.

Margaret Woo, for instance, explores how *fazhi* and *renzhi* play out in judicial decision-making in China.[125] Noting that judicial discretion is an integral part of the Chinese legal system, Professor Woo explains three types of discretion evident today.[126] First, there is "fact-based" discretion, which allows judges to consider the specific facts of the case and tailor a result that is reasonable and appropriate for these particular parties and their circumstances.[127] This discretion takes priority over rigid adherence to legal technicalities.[128] Second, there is "self-interested" discretion, where judges resolve disputes in ways that serve their own economic or relational interests.[129] This form of discretion, sometimes associated with *guanxi an* (cases resolved through personal relations) and *renqing an* (cases resolved by "doing a favor") introduces the possibility of judicial corruption.[130] Finally, there is "ideological discretion" where judges interpret legal principles in ways that are consistent with political ideology.[131] The 1982 Chinese Constitution supports this type of judicial discretion by providing that all legal work be guided by the four fundamental principles: "adherence to the socialist order, to the people's democratic dictatorship, to the leadership of the Communist Party, to Marxist-Leninist-Mao Zedong Thought."[132] All three types of discretion are opportunities for the rule of people to influence judicial-legal outcomes.[133]

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[124] *See, e.g.*, Kevin Avruch & Peter W. Black, *Conflict Resolution in Intercultural Settings: Problems and Prospects*, *in* CHEW, *supra* note 29, at 8–14; John Paul Lederach, *Preparing for Peace: Conflict Transformation Across Cultures*, *in* CHEW, *supra* note 29, at 18–22.

[125] Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, *in* TURNER, *supra* note 1, at 163, 165–72.

[126] *Id.* at 166.

[127] *Id.* at 167.

[128] *Id.*

[129] *Id.* at 169.

[130] *Id.*

[131] *Id.* at 170.

[132] *Id.* (quoting XIANFA [Constitution] preamble (1982)).

[133] *See id.* at 167.

C. *Many Forms of the Rule of Law*

As the Chinese have recognized, the "rule of law" is only an abstraction that is neither necessarily bad nor necessarily good; neither necessarily immoral nor necessarily moral.[134] As Chinese philosopher Xunxi admonished the effect of a rule of law, it depends in part on the individuals who are in position to enforce and interpret it:

> Laws cannot stand alone . . . for when they are implemented by the right person they survive, but if neglected they disappear . . . . Law is essential for order, but the superior [person] is the source of law. So when there is a superior [person], even incomplete laws can extend everywhere. But when there is no [superior] person, even comprehensive laws cannot apply to all situations or be flexible enough to respond to change.[135]

The effect of the rule of law also depends on its substantive terms and its policy objectives.[136] While an ethnocentric West may assume that every rule of law necessarily provides for the same civil rights and economic ideologies that underlie the legal framework of Western countries, that assumption is myopic. Instead, there are innumerable forms of the rule of law, each of which reflects the politics, economy, religions, and cultures of the individuals and institutions that created and control the legal regime. In a country like China, where the legal infrastructure is still emerging, the rule of law may more accurately represent aspirational rather than currently viable legal principles. It also may represent a transitional set of statutes and rules, which will evolve as the country's economic, political, and societal systems mature.

For now, as Professor Woo explains, judges and politicians may interpret the rule of law in ways that facilitate the P.R.C.'s current political and economic agenda.[137] In addition, China has consistently drafted and interpreted laws in ways that maximize the government's control and assures that it will have substantial flexibility in using the laws as tools to satisfy its needs.[138]

As Randall Peerenboom suggests, China faces the threshold question of whether to have a rule of law, and presuming so, the critical challenge is

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[134] Guy, *supra* note 32, at 88.
[135] Turner, *supra* note 6, at 3 (quoting Xunzi, d. ca. 210 B.C.).
[136] Guy, *supra* note 32, at 88; Woo, *supra* note 125, at 170–71, 75–77.
[137] Woo, *supra* note 125, at 170–71.
[138] *See id.*; *see also* Guy, *supra* note 32, at 88–89.

selecting a model for its rule of law.[139] He contrasts the Western conception of the rule of law with that envisioned by Chinese leader Jiang Zemin. The Western model is labeled the "liberal democratic version of [the] rule of law."[140]

> [This model] incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights.[141]

According to Professor Peerenboom, Jiang Zemin and other central leaders, on the other hand, propose a "[s]tate-centered socialist rule of law."[142]

> [This model endorses] a [s]tate-centered socialist rule of law defined by, inter alia, a socialist form of economy (which in today's China means an increasingly market-based economy but one in which public ownership still plays a somewhat larger role than in other market economies); a non-democratic system in which the (Chinese Communist) Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights over individual rights, and subsistence as the basic right rather than civil and political rights.[143]

While these two models offer the greatest contrast, hybrid models are also a possibility.[144]

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[139] *See* Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 472–76, 486–509 (2002).

[140] *Id.* at 472.

[141] *Id.*

[142] *Id.* at 475.

[143] *Id.* at 475–76.

[144] As Professor Peerenboom explains:

> [T]here is some support for a democratic but non-liberal (New Confucian) Communitarian variant built on market capitalism. This form favors a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus a communitarian or collectivist interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals.
>
> Another variant is a Neo-Authoritarian or Soft Authoritarian form of rule of law that, like the Communitarian version, rejects a liberal interpretation of rights,

V. CONCLUSION

The West is enamored with the concept of the rule of law and believes that it is integral to nation-building. China has a different cultural perspective; it is skeptical of the rule of law. For generations, China has debated the merits and flaws of relying on formal laws versus adhering instead to a rule of people as articulated by Confucian principles and cultural norms. This debate continues today, as illustrated in how China deals with intellectual property disputes and with land use disputes.

There is a range of implications of China's skepticism of a rule of law and its inclinations toward a rule of people. This helps explain why the existence of a formal law is not the same thing as the widespread recognition or meaningful enforcement of that law. Conflicts in international transactions or in purely domestic relationships are as likely, and often more likely, to be resolved by the rule of people than by legal technicalities. This discussion also points out that a rule of law is not monolithic. The West's model of the rule may be substantively and ideologically distinguished from a Chinese model of the rule of law.

As in other times in China's history, Chinese society is currently facing a period of economic, social, political, and legal evolution. This Article explores how China has historically debated and contemporaneously debates the primacy of a rule of law (that relies on a legalistic approach) versus a rule of people (that adheres to cultural norms and governmental discretion). It is not clear how China will resolve its current debate. This Article concludes by introducing various possibilities depicted in the matrix below. Introducing this matrix hopefully facilitates thought, while not presuming the outcome.

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but unlike its Communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-Authoritarians permit democracy only at lower levels of government or not at all.

Id. at 476.

Matrix on Chinese Alternatives

	A rule of people that values a rule of law	A rule of people that rejects a rule of law
A rule of law that mirrors the rule of people	Alternative 4	Alternative 2
A rule of law that rejects a rule of people	Alternative 3	Alternative 1

In Alternative 1, society rejects a legalistic approach. At the same time, the legal system rejects cultural norms. Under this alternative, the rule of law (advocating a legalistic approach) and the rule of people (giving primacy to cultural norms) would predictably conflict. People would not recognize, follow, or consider credible the rule of law, and the law would discount societal values. As this article explains, in some ways, this describes the current situation where there is a disconnect between a rule of law and a rule of people.

In Alternative 2, society rejects a legalistic approach, even though the legal system mirrors cultural norms. This alternative may describe a transitional environment, when the legal system has incorporated societal values, but society has not yet accepted a legalistic approach.

In Alternative 3, society values a legalistic approach, even though the legal system does not take into account or even rejects cultural norms. This is an unlikely alternative, given China's historical skepticism of the rule of law.

In Alternative 4, society values a legalistic approach, while the legal system mirrors cultural norms. This would appear to be the most optimal alternative for effective nation-building. A rule of law and a rule of people would co-exist, but be in sync; both cultural norms and legal rules would facilitate societal functioning. This alternative, however, is not premised on any particular model of the rule of law or a rule of people. Thus, a Chinese rule of law may be based on liberal democratic principles or instead on more socialist ideology. Hence, as the West promotes the rule of law in China, China's affirmative response to its urging may be different than the West anticipates.