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GLOBAL MARKETS AND THE EVOLUTION OF LAW IN CHINA AND JAPAN

Takao Tanase*

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I. LAW AND CULTURE

In order to establish a solid legal system, China is now attempting to enact various codes and reform the judiciary at a feverish pitch. It has been less than 30 years since China reinstated the Faculty of Law at Beijing University at the end of the Cultural Revolution and began promulgating rules to facilitate a market economy, first addressing designated economic foreign settlements and then gradually expanding the regime to the whole state. Finally, at the 1997 Party Convention, the Chinese government officially affirmed the development of a constitutional state governed by law.¹

Nevertheless, numerous problems still remain. Among businesses advancing into China, faith in Chinese law is low, and many complain that their rights are inadequately enforced in courts.² While the major fault lies in substantive laws that require further enactments and refinements, difficulties also result from the opaqueness of the government rulemaking process and the way in which laws are discretionarily interpreted by government officials.³ In addition, the independence of the judiciary is weak, and local courts in particular allegedly conduct their processes in a blatantly protectionist way to serve local governments, which have authority over judicial personnel issues and budgets.⁴ Demands regarding

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1. Masayuki Kobayashi, *Daijurokukai totaikai no shihoseisaku—hochikokkakensetsu no ayumi* [Justice System Policies of the 16th Party Convention—Towards Establishing a Constitutional State], in *AJIA SHOKOKU NO SHIHOKAIKAKU* [JUSTICE SYSTEM REFORM IN ASIAN NATIONS] 57 (Masayuki Kobayashi & Shinya Imaizumi eds., 2002).

2. A majority of Japanese businesses present in China, 54.5%, listed “problems with the taxation and legal system” as a “difficulty encountered in doing business in China.” *MINISTRY OF ECON., TRADE, AND INDUS., TSUSHO HAKUSHO 2001* [2001 WHITE PAPER ON INT’L TRADE] 33 (2001).

3. Peter H. Come, *Creation and Application of Law in the PRC*, 50 *AM. J. COMP. L.* 369 (2002).

4. See Ken Suzuki, *Chugoku ni okeru shijoka ni yoru shiho no sekishutsu* [The Precipitation of the Judiciary Owing to the Marketization of China], in *SHUJOKEIZAICA NO HOSHAKAIGAKU* [THE LEGAL SOCIOLOGY OF ECONOMIC MARKETIZATION] 239 (Akio Komorita ed., 2001); Masayuki Kobayashi, *Chugoku no shiho kaikaku—jinminhoin kaikaku no*

these issues have been communicated to the Chinese government through diplomatic channels and at meetings of international trade organizations, prompting the government to promise improvements. This is the true meaning of globalization's impact on domestic laws.

As China makes advances in the development of law, contradictions within the socialist political system have begun to surface.⁵ The government's discretionary interpretation of laws and the absence of judicial independence, which cause dissatisfaction amongst foreign enterprises, emanate from the political system. These problems are not simply the result of lapses by governments or courts, however, but are deeply rooted in socialist governance. Law reforms to meet business concerns necessarily contradict the way the Chinese government oversees the state's affairs. Concerning property law reform, for example, a significant debate has recently arisen over creating laws based purely on civil property law principles that exclude political interference. Public protests against abusive exercises of power have also increased, especially in response to the Chinese government's use of eminent domain, in which it forcefully takes farm lands for economic development without granting sufficient compensation. It seems difficult to confine the development of laws to the economic domain and separate human rights and government structures from the agenda of law reform.⁶

Viewed in the light of legal evolution, this is the fascinating process of the establishment of law, a parallel development of the protection of private rights and the guarantee of human rights. Whether it is a peculiar trend in modern neoliberalism or a more fundamental aspect of law, the kind of popular discourse discussed above thus constitutes civil society in China.⁷ The development of law has the functionality to transform the

genjo to kadai [China's Justice System Reforms—The People's Court: The Present State and Issues], in CHUGOKU SHIDOBU NO SENSHUTSU [THE LAUNCH OF CHINESE LEADERSHIP] 37 (Yasuo Onishi ed., 2003).

5. See Nobuyuki Tanaka *Jinmin chotei to hochishugi no sokoku [The Conflict Between People's Mediation and Governance of Law]*, in 1 GENDAI CHUGOKU [MODERN CHINA] 279 (Iwanami Koza ed., 1989) (depicting policy confusion and dilemmas due to the inconsistencies between socialism and the rule of law at the commencement of economic reforms).

6. A related issue is how extensively to address systemic political problems when advocating the development of law. See Masanori Aikyo, *Hoseibishien no jissai to riron [The Theory and Practice of Supporting Development of Law]*, 62 HIKAKU HOGAKU [COMP. LEGAL STUD.] 108–19 (2000); see also KAZUO FURUTA, *KAIHATSU ENJO TO MINSHU SHUGI [DEVELOPMENTAL ASSISTANCE AND DEMOCRATIZATION]* 153 (1998). See also Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC'Y REV. 93 (1998) (analyzing complications resulting from the fact that Vietnam is now receiving support for development of law from the United States, which it fought in order to establish socialism, and that the United States explicitly seeks, in its diplomatic policy, the establishment of a liberal democratic system for supporting developing states).

7. See Fan Yun Tao, *Chuo—chiho kankei o meguru ho to sei ji [The Law and Politics regarding the Relationship between the Central and Local Governments]*, in SHINSO NO CHU-

people's consciousness and reconstruct their relationships with the state in a diffuse manner.

The social changes brought about by the introduction of law are a worthy subject of legal sociology, which pursues the connection between law and society, and modern China provides fascinating research material in this regard. Setting aside, however, the interesting details of an immense society with distinct characteristics, if I ask myself, as a Japanese researcher who does not specialize in Chinese law, what will be learned from the Chinese experience, I find it difficult to extract general meanings from China's evolution of law, at least as it is argued now. Japan already has laws in place suited to a market economy, as well as—despite some criticism—an independent judiciary and governance by law. If we learn from the experiences of other states, the usual course for us in Japan is to condemn our own system after looking to Europe and United States and measuring the gaps between their systems and ours. This is the same with Chinese scholars. When they enact laws and reform their legal institutions, they look to Europe and the United States—and incidentally to Japan as well. If we try to find fresh insights and new developments in law in China, we will thus be disappointed. But is this the only way for non-Western societies like Japan or China to develop law? Even as foreign laws are assimilated, can there not be an evolutionary pattern in which they are absorbed and then manifested into laws with a distinct identity?

This Article tries to answer this question, finding clues in the parallel processes of Chinese legal development and Japanese legal reform. While the development of law presently underway in China resembles Japan's reception of German laws in the Meiji period—in the sense of it being “from scratch”—Japan, which concluded this reception a century ago, is undertaking major law reforms in the present as well. Starting with deregulation and administrative reform, and now extending to justice system reform, Japan is attempting to transform its image as a “society where the law is used sparingly.” It goes without saying that the backdrop to this fresh start is the globalized market.⁸ Although their developmental stages

GOKU SHAKAI [THE DEPTHS OF CHINESE SOCIETY] 158 (Satoshi Amako & Masaharu Ishida eds., 2000) for the assertion that a civic revolution accompanying the rule of law is quietly in progress in the background of the socialist system.

8. Beyond general causes such as increases in productivity and innovations in information technology, factors behind the establishment of a global market include the consistent attempts to promote free trade by developed capitalist states since World War II, the support given to the structural reform of developing states by the World Bank and Japan's Official Development Assistance (ODA), and the ascendancy of Asian states at the end of the Cold War. Kunikazu Karaki, *Sekai keizai—gurobarizeshon to Ajia keizai* [The World Economy—Globalization and the Asian Economy], in GENDAI AJIA NO TOCHI TO KYOSEI [GOVERNANCE

and practical issues differ, both China and Japan are carrying out market-oriented law reforms with the aim of excelling as players in the massive global market. If we view this as evolution of law, we can characterize it as the transfer of law amidst competition between state systems.⁹ Just as the relative merits of corporate structures are connected to their business profitability, a superior legal system will enable societies to display superior performance in the form of economic growth. The global market not only intensifies competition between these societal systems, but it also encourages the international distribution of system information, markedly raising system visibility. Under these conditions, superior law will not result from the wholesale reception of a particular legal system but from cross-border transfers of fragments of legal norms, procedures, and institutions of different systems and the combination of these into a single law—or the adding of their parts to replace an existing law. To borrow a term favored by modern anthropology, the emergence of “creoles,” or the mixture of different species, is occurring in the legal world. Comparative law scholars today note that due to the mutual permeation and fusion of laws, the concept of “legal families” is becoming difficult to accept. This stateless circulation of legal norms is yet another feature of globalism.¹⁰

Of course, even if law is treated as transplantable phenomena cut off from culture and tradition, to be evaluated only by its performance, states will not attain this “culture-free law” in perfect form. Three models predict how culture will continue to affect the evolution of law.

First, and most obviously, culture may deter the reception of law. Despite being transplanted, law does not take root unless a society receives its inherent logic and ideals. Culture, in this model, is labeled as an idiosyncratic, indigenous aspect of the receiving society to be pitted against the law, which is posited as a universal and hence cultureless truth, applicable to all societies. The reception of law requires overcoming indigenous culture and enlightening the people with the spirit of the law. In this vein of culture-law dichotomy, when the reception of law to such depth is problematic and its costs insurmountable, selective importation can compromise the contents of the law. Also pertinent here is the “path dependency” model in economics, which explains system evolution by

AND SYMBIOSIS IN MODERN ASIA] 75 (Kunikazu Karaki et al. eds., 2002) [hereinafter GOVERNANCE AND SYMBIOSIS].

9. “With economic globalization, international competition among nations for institutional reforms has been strengthened.” MINISTRY OF INT’L TRADE AND INDUS., TSUSHO HAKUSHO 2000 [2000 WHITE PAPER ON INT’L TRADE] 182 (2000).

10. See the keynote report by Michiatsu Kaino at an academic symposium on contemporary issues in comparative law. Michiatsu Kaino, *Hoseibi shien to hikaku hogaku no kadai* [Supporting Development of law and Issues in Comparative Law], 62 HIKAKUHO KENKYU [COMP. L.] 61 (2000).

assuming that a system evolves not necessarily to achieve the maximum efficiency possible but to take the restricted path defined by prior conditions. In the case at hand, a society's particular culture is an initial condition for system evolution and is therefore expected to regulate subsequent development.

At the opposite pole is the second model, which contradicts the negative depiction of culture set against law in the first model, instead seeing culture as a positive value that also subsumes law. An extreme, and in that sense, somewhat quixotic argument goes this way: East Asia has a Confucian tradition and has developed "relational rules" that bring harmony and order to society. These rules not only regulate society independently of law but are reflected in the laws constructed upon them.¹¹ Some dare to argue for the possibility of "a common Asian law" built on this tradition, especially in light of the recent formation of regional economic blocs.¹² Moreover, while governments raise "Asian values" in response to human rights diplomacy in international politics, academics point out that within universal human rights concepts there are differences between positions that push strongly for civil liberties and those that emphasize equality and social rights. Some claim that loose cultural blocs are discernible from these differences.¹³ In the background to this debate lies Asian self-confidence from attaining economic growth and its sense of rivalry with the West. There is also an undercurrent of methodological reflection upon the nature of anthropological scholarship, which purports to objectively describe tribal societies. Being conscious of their own enlightened gaze, which was at the core of colonial powers viewing colonial subjects in light of the West's historical universality,¹⁴ researchers

11. See, e.g., Chongko Choi, *Foundations of Law and Justice in East Asia*, 18 COMP. L. 1 (2001).

12. See NOBUYUKI YASUDA, *TONAN AJIA HO [EAST ASIAN LAW]* (2000), written with an awareness of searching for commonality. Yasuda's position is that there is an innate sensibility in Asia that Western legal notions are dissimilar; he finds such "Asian-ness" in "communitarianism" as cultivated in agricultural communities. See Nobuyuki Yasuda, *Ajiateki narumono ni tsuite—Ajia no jinken, kenrigainen rikai no zentei toshite [On Asian-ness: The Prerequisite for Understanding Human Rights and Rights Concepts in Asia]*, 52 HOKUDAI HOGAKU [HOKKAIDO U. L.J.] 605 (2001). See also Ken Suzuki's legal family analysis on China, Ken Suzuki, *Shiron—Higashi Ajiahokei no seiritsu kanosei, [Note—The Possibility of Establishing an East Asian Legal System]*, 53 HOKUDAI HOGAKU [HOKKAIDO U. L.J.] 900 (2002).

13. YASUAKI ONUMA, *JINKEN, KOKKA, BUNMEI [HUMAN RIGHTS, THE STATE, AND CULTURE]* (1998).

14. See Hideo Kubo, *Kindaiho no furontia ni okeru bunkateki tasha ni tsuite no chi—posuto koroniaru hihan no hoshakaigaku [Power/Knowledge of "Cultural Others" on the Frontier of Modern Law—The Legal Sociology of Post Colonial Criticism]* (pts. 1 & 2), 153 HOGAKU RONSO [KYOTO L. REV.] No. 4, 92 (2003), 153 HOGAKU RONSO [KYOTO L. REV.] No. 5, 101 (2003), for a critical appraisal of the continuity in Japan's legal sociology between

began to adopt the interpretative method of understanding a subject from *within* its culture.

This method, interacting with various other modern social theories, has been a major current in academia since World War II, and efforts are being made in research on Chinese legal history to understand China's legal order not as lacking in Western legal concepts but as being an alternative way of constructing order. Culture is therefore not only incorporated into the legal order but also is used as an interpretive framework by the people themselves to make that order comprehensible.¹⁵ Geertz, an anthropologist, asserts that this culture-based law is a universal feature of law, calling it "local knowledge."¹⁶ Considering, however, that modern law is situated within a global competition toward efficient systems, it departs from reality to take this "culture-laden law" as firmly bound by tradition. In fact, a society's tradition has a kaleidoscopic composition that allows for divergent descriptions depending on one's point of view.¹⁷ Culture is also incessantly reimagined and recreated by the people within a changing society. Thus, some argue, the second model, by not seeing this fluidity and negotiability, falls into the same essentialist notion of culture as the first model.¹⁸

With this criticism in mind, we can consider a third model for exploring the way in which culture affects law. This model first evaluates imported laws on their performance, so that only the fittest survive, and then looks into alternative laws constructed with local culture as their

pre-War surveys on agricultural villages in North China in the service of colonial rule and post-War studies of indigenous culture for the sake of enlightenment for modernization.

15. Hiroaki Terada, *Kindaiho chitsujo to Shindai minjiho chitsujo* [*Modern Legal Order and Qing Civil Legal Order*], in *KINDAIHO NO SAITEIRITSU* [THE REORIENTATION OF MODERN LAW] 85 (Mitsuki Ishii et al. eds., 2001). See in particular his view of history: "[T]hese 500 years in both the West and in China was a period of coping with market-like competitions between large numbers of individuals, and with such . . . factors being slightly different, they are taking a somewhat different trajectory." *Id.* at 106.

16. See CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1991).

17. See Mio Kishimoto, *Moraru ekonomi-ron to Chugoku shakai kenkyu* [*Theory of Moral Economy and Research on Chinese Society*], 792 *SHISO* [THOUGHT] 213 (1990). She applied Scott's moral economy theory—which regards the "subsistence and reciprocity norms" peculiar to Asian peasantry as having emerged from unstable agricultural production—to China's agricultural cooperatives and clarified the debates over understanding traditional Chinese order, which have occurred on three opposing axes: utilitarianism versus norm orientation, communitarianism versus self-interest, and universal norms versus situational ethics.

18. Inoue criticizes the arguments for "Asian values," treating them as rigidly opposed to Western values—as only turning Orientalism upside down. The substantive arguments within, however, namely communitarianism and cultural pluralism, should be taken as a challenge to liberalism. See TATSUO INOUE, *FUHEN NO SASEI* [RECREATING UNIVERSALITY], ch. 2 (2003). It is necessary to relativize the "universalism" of liberalism before engaging in this dialogue, even when considering Asian development of law from an Asian perspective.

sustenance. It shares with the second model the notion that all laws, including imported Western laws and the *de facto* market-oriented “global laws” of today, are culture-laden and hence have the character of local knowledge. Thus, by acknowledging that ostensibly universal law derives from unique and local Western/American culture, it creates the opportunity for indigenous laws to serve as candidates for modern laws.

Nevertheless, the challenge to seek universal truth, implied in the first model, continues to constrain the evolution of law. The indigenous law not only must prove its universality through its efficiency in facilitating market transactions but also through its supremacy in enabling good society. Although the latter criterion is vague and open to divergent understandings, it is nonetheless important in explaining the law’s evolution. When people invoke the law and reflect upon it, they inadvertently rely on their own culture to discern the good from the bad. This reflection, reiterated innumerable times, evolves the local law with culture. If a global transmission of ideas and institutional information is added to this process, there emerges a combination of cultural law and universal law. This is the process of legal evolution that the third model, the one to which this Article subscribes, tries to understand.

More concretely, a close examination of legal rationality from the following three angles will assist in analyzing the evolution of law.

The first angle concerns the exclusivity of rights, which is the notion that a right has an exclusive boundary of ownership. The socialist system and traditional customary law in China gave only weak recognition to this concept, especially prior to China’s move toward a market economy and the introduction of modern law. This socialist/traditional legal approach is generally understood as negative baggage that should be removed from the law and, consistent with the first model, a distinct culture that should be overcome. This view fails, however, in that it mistakes legal rhetoric for reality. It is possible to instead discover rationality in the diffusiveness of rights that can also relate to modern law.

The second angle addresses the functionality of extralegal norms. Law reforms tend to be measured by the efficiency gains they produce, a process intensified by competition among systems. This trend has, in recent years, emerged as a focus on informal norms amongst legal and economic scholars.¹⁹ One example is the assertion of economic rationalist explanations for local customs spontaneously generated in business activities. The link between law and such customs, however, is complex

19. Robert C. Ellickson pioneered this trend. ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). See also Noboru Kawahama, *Ho to keizai-gaku no genkai to kanosei* [*The Limits and Possibilities of Law and Economics*], in HO NO RINKAI II [THE CRITICALITY OF LAW II] 209 (Tatsuo Inoue et al. eds., 1999).

and the subject of a variety of contemporary debates. If this economic rationalist view is applied to China's development of law, what issues can it uncover?

The third angle involves the ideological nature of the market-oriented development of law. The foreign enterprises and international financial institutions leading the global market have until now been major actors in instigating China's development of law. Demands from business leaders also initiated Japan's justice system reforms. These leaders want universal and transparent rules of law and an independent judiciary, which acts as the infrastructure of the global market. Yet in light of the issues driving current criticism of globalism, including the environment, social welfare, and the North-South disparity, "universality" may ultimately have political connotations. Thus, the question is, what role does this critical aspect of globalism play in China's development of law?

II. THE DIFFUSIVENESS OF RIGHTS

In China, the protection of ownership rights has pivotal importance in the market economy. It is necessary to motivate individuals to work and produce in a way that maximizes returns and eliminates the moral hazard of transferring losses to others.²⁰ For this protection to be effectual, however, a one-off policy decision to recognize private ownership is insufficient. Kawashima, an influential scholar who studied Japanese legal culture, attested to this in *The Theory of Property Rights Law*. Writing in the 1940s, a half century after the reception of laws in Japan, Kawashima attempted to show that the idealism and absolutism of modern property rights were not well understood by Japanese jurists, and hence the protection of property rights was weak and incomplete in Japan.²¹ We could read this to mean that the jurists varied property rights in practical application to allow them to evolve in a Japanese way. This was not Kawashima's position, however. To Kawashima, it was Japanese culture that prevented the reception of modern law, and he desired the evolution of law through the subjugation of culture.

For Kawashima, modern society was, more than anything, a society in which commodity exchange was universalized and modern law ex-

20. See MASANOBU KATO, SHOYUKEN NO TANJO [THE BIRTH OF PROPERTY RIGHTS] (2001), which analyzes, from a world historical perspective, the existence of a system of private property rights as a motivational mechanism in tune with each society's production system.

21. See KAWASHIMA TAKEYOSHI, SHOYŪKENHŌ NO RIRON [THE THEORY OF PROPERTY RIGHTS LAW] (1949).

isted as the constitutive rules of this market-type transaction. The reciprocal recognition of rights and the disposal of them by free will must be universally recognized as prerequisites for the functioning of the market. The fundamental categories of law, such as legal rights, subjects, and free will, are the direct expressions of this commodity exchange. In Japan, because rice paddy agriculture within village communities had been the dominant mode of production, the modern consciousness was slow to develop. Long after Japan entered its industrial stage, it dragged this premodern consciousness along, preventing the abstraction of modern legal rights from society. The fact that Japanese rights are embedded in the social context gives them an elusive character: People “are entitled to . . . and yet do not have outright rights.”²²

Regarding property law reform, there are active discussions in China on state ownership. Although it lies at the core of socialism and the Chinese constitution extols its supremacy, it has a vague and elusive character with regard to who, in fact, owns what, thereby hindering the development of a healthy market economy.²³ Ultimately, state and local governments must exercise “the ownership by all people.” When they act in the economic realm, the public concern, for which the government has a primary responsibility to care, must of necessity enter and interfere with the autonomous operation of the market. Therefore, some propose clearly designating public companies as the main bodies of ownership rights and strictly limiting their role to managing public assets. Furthermore, with regard to ownership of land by peasants, who are currently in lease contracts with the villages that actually own the land, some argue the land should be propertized to guarantee the recovery of invested capital. On the other hand, there are arguments in favor of continued oversight by the government to guarantee the livelihoods of peasants and maintain restrictions on land transfers.²⁴

Where this debate will finally settle is uncertain, but both arguments ultimately posit modern law as a goal incapable of full implementation due to political realities or social conditions, which make compromises unavoidable from time to time. In this sense, the debate has a structure

22. See, on this argument by Kawashima, TAKAO TANASE, KENRI NO GENSETSU [THE DISCOURSE OF RIGHTS] ch. 1 (2002).

23. Koji Omi & Sun Xian Zhong, *Chugoku bukkenho rippo ni okeru shoyuken mondai* [The Problem of Ownership Rights in the Enactment of China's Property Law], 77 WASEDA HOGAKU [WASEDA L.J.] 1 (2002). Liu Hui Ming, *Chugoku ni okeru fudosanhousei no mondaiten* [Some Issues on Real Estate Law in China], 28 KOKUSAI SHOJI HOMU [J. JAPANESE INST. INT'L BUS. L.] 89 (2000).

24. Liang Hui Xing, a drafter of China's Property Law, says it will “establish the system of usufructuary rights based on the actual situation in China.” Liang Hui Xing, *Chugoku bukkenho seitei ni kansuru jakkan no mondai* [Problems in the Establishment of China's Property Law], 51 HANDAI HOGAKU [OSAKA U. L.J.] 339 (Xu Hui trans., 2001).

similar to Kawashima's diagnosis of the state of Japan during his time. If one assumes, however, that there is an ideal of Western law and the only problem is its gradual attainment, Chinese law is then simply an example of a universalistic evolution towards modern Western law. On the other hand, if one undertakes to discover law inductively from an analysis of actual rights relationships, perhaps a different evolution of law can be discovered.²⁵ In fact, if we look into the actual operations of modern law, we can discern phenomena that defy its idealistic descriptions.

Regarding the absolutism of property rights, society takes restrictions due to public welfare for granted, with current debates focusing instead on how much interference should be permitted. This has been vigorously disputed in Japan with regard to injunctions against public works. In economic policies, the state often carries out interventions to rescue failed businesses in order to preserve financial stability and avert unemployment problems. Under the complex regulation of today's market economy, it is in fact impossible to draw a sharp line between private activities and public responsibility. Furthermore, the livelihood demands of the people concerned are easily politicized and linked to public decisions. This reality is in stark contrast to the way modern legal discourse idealizes and discusses property rights.

Nedelski, an analyst of U.S. constitutional history, raises concerns over the "boundary metaphor" for rights.²⁶ She claims that due to the propertied classes' fear of forcible redistribution of wealth through politics, the U.S. Constitution carefully bounded propertied rights against outside interference. This also resonates within common culture. For example, a popular book on child-rearing opines that it is of foremost importance that parents give children their own possessions to instill in them a sense of themselves as owners. By giving children their own rooms, or if that is not possible, perhaps giving them small boxes with a promise never to look inside them, mothers and fathers will cultivate the concept of privacy in children and encourage their autonomy. Exclusive rights over property simultaneously generate autonomous subjects set apart from others. Nedelski points out the difficulties in this conception of individual property rights: The exclusivity of rights and separateness of subjects make it difficult for people to accommodate the unavoidable

25. Kawamura's research on the criminal justice system is particularly interesting in this regard. He analyzes the precarious attempts being made in China to realize substantive justice and care for victims, which people expect and which exists in contemporary Japan, while guaranteeing the procedural rights of the accused. Arinori Kawamura, *Gendai Chugoku no keiji saiban to dyu-purosesu* [Criminal Cases and Due Process in Modern China], 51 *KOBE HOGAKU ZASSHI* [KOBE L.J.] 65 (2002).

26. Jennifer Nedelski, *Law, Boundaries, and the Bounded Self*, in *LAW AND THE ORDER OF CULTURE* 162 (Robert Post ed., 1991).

conflicts of human relationships and make collective decisions concerning the proper distribution or use of rights.²⁷

Comaroff, an anthropologist, likewise narrates the story of an English missionary teaching the importance of individual ownership to local inhabitants in an African colony.²⁸ The missionary bought a piece of land for almost nothing, fenced it off, and planted and harvested grain in order to show locals how to break free from poverty through ownership and labor. The paradox to which Comaroff draws attention, of course, is that by the time the residents became aware of the significance of the missionary's practices, almost all the fertile land had been transferred to white ownership. What is also fascinating about this episode is that, in the eyes of the white missionary, the practices of the local inhabitants to expose their nakedness or excrete in public were signs of a lack of self-management in the same way as their ignorance of private land ownership. What can be closed off to others is thus the substance of the "self."

The conception of rights held in the West, as exhibited in these examples, is certainly at odds with the actual functions of rights. As mentioned above, it is taken for granted that restrictions of private rights are necessary for the public welfare, with disagreement only over the appropriate scope of the restrictions. In urban space management, for example, residents often form self-governing bodies to exercise quasi-public authority. This is a necessary collective effort to enhance habitability, but it gives rise to difficult adjustment problems concerning the prerogatives of private rights.²⁹ If one includes minority and environmental issues, the problems become even more complex. The rigid conception of rights as exclusivity or of subjects as separateness hampers constructive thinking. Although Japan, in an effort to eliminate excesses in administrative guidance and implement market deregulation, no longer legally obliges large retail stores to consult with local merchants before opening an outlet, demands for such consultations continue. When the exercise of property rights affects the vested interests of others, people customarily expect the rights holders to show concern for the welfare of those others.³⁰ The legal doctrine in Japan of the

27. *Id.*

28. John Comaroff, *The Discourse of Rights in Colonial South Africa: Subjectivity, Sovereignty, Modernity*, in IDENTITIES, POLITICS, AND RIGHTS 193 (Austin Sarat & Thomas R. Kearns eds., 1995).

29. See Sumitaka Harada, *Jo* [Preface], in NIHON NO TOSHIHO I [JAPAN'S URBAN PLANNING LAW I] 1 (Sumitaka Harada ed., 2001); Kiyoshi Hasegawa, *Kenchiku kyotei to chiku keikaku* [Building Agreements and Zone Planning], in NIHON NO TOSHIHO II [JAPAN'S URBAN PLANNING LAW II] 425 (Sumitaka Harada ed., 2001).

30. Young analyzes Japanese administrative guidance, concluding that certain livelihood interests of citizens, while lacking in a definite legal basis, are acknowledged socially as *de facto* rights. Administrative guidance is given in an attempt to protect these interests, and

“abuse of the right to dismiss,” which demands from managers compelling reasons and special considerations before dismissing workers, has developed from Japanese society’s sense of justice. The appropriateness of such doctrines may change and be contested with the passage of time and shifting popular sentiments, yet at the core of these doctrines and social practices restricting rights in consideration of others is a notion of rights and subjects different from that of the West. While rights and subjects in the West are isolated and mutually constructed in a reflective manner, at least in the legal and popular discourse, in Japan, both rights and subjects are unable to close off completely and are seemingly open to connections with other factors. Although it is not an easy task to give clear language and status within legal theory to this diffusiveness of rights, it may be worthwhile to explore such a concept in analyzing the evolution of law in China.

III. THE FUNCTIONALITY OF INFORMAL NORMS

In China’s legal development, a major issue is guaranteeing the autonomy of law. The fact that judicial decisions are under Party guidance or subject to political interference from local government directly conflicts with the rule of law and has been repeatedly criticized. In response to this criticism, various reforms to guarantee the independence of the judiciary are afoot. In Japan, where direct political interference is inconceivable, the independence of the judiciary has long been problematic. Yet China is looking to Japan to inform its current effort to bring professionalism and centralization to its judiciary. How has China absorbed the Japanese experience?

The problem in Japan is thought to be the judicial bureaucracy, in which judges are under the influence of the General Secretariat of the Supreme Court, which has authority over personnel affairs. This bureaucracy, however, is a manifestation of a more fundamental policy of securing the legitimacy of the judiciary by squarely separating it from politics. In addition, the judiciary has honored Japan’s autonomous ordering by refraining from forcing judicial judgments upon society ahead of a mature consensus. Limiting its jurisdiction in this way and maintaining its integrity from potential attacks and interference from politics and social forces are really means of attaining the autonomy of law. From another angle, however, this means that matters that should be regulated by law may be handed over to politics or societal ordering. True auton-

the courts have come to accept such practices. See Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923 (1984).

omy of law, then, is forcefully asserting legal rules and principles in opposition to the will of the majority or to vested interests of society. Legalism, the idea that it is politically and socially correct to achieve resolution or regulation by way of law, corresponds with this notion of autonomy and is implied as a meta-norm in Western law and the ideology of legal professions. The infusion of this idea into society, together with the development of law, will thus transform the public consciousness and make laws take root in society.

The autonomy of law in this stronger sense brings forth the rule of law. Over the last 10 years in Japan, many new laws were enacted in areas where legal regulations had been almost nonexistent, including, for example, protection against child abuse or domestic violence. With new laws and procedures, legal regulations penetrate into enclaves previously beyond the law's reach. Yet this aggressive intervention of law into family matters is not effectively implemented without the mobilization of other non-legal professionals like psychologists and social workers. The purposes of intervention are also broader than just the apprehension of violent offenders or the protection of victims but include the rebuilding of families, for example.³¹ Self-help groups and NGOs in liaison with courts and governmental agencies are providing support networks to enable such rebuilding. Law works on top of this layer of society and does not intrude on its own.

The way in which these autonomous social orderings complement legal regulations is not unique to families, where radically different orderings from the legal are apparent, but also holds true for economic transactions. In economics, however, the legal orderings are generally perceived to be possible and necessary, or even indispensable, for the construction of a robust market; thus, unless autonomous social orderings display relative superiority over legal regulations, or at least match them in efficiency, either they cannot exist or exist merely as irrational traditions that should be overcome by the eventual development of law.

Japanese business practices, which had definite relative supremacy at one time, are now seen as irrational practices that must be overcome. Reformers have instituted a variety of measures aimed at market discipline, including the strengthening of director liability and market regulations of stock prices.³² While such innovations of corporate governance are directly

31. See Ayako Nose, *Jido gyakutai tojisha no kenri yogo to fukushi sa-bisu no kanri* [*The Management of Rights Protection and Welfare Services for Those Involved in Child Abuse*] (pts. 1 & 2), 128 MINPOHO ZASSHI [CIV. L. PERIODICAL] No. 4, at 607 (2003), 128 MINPOHO ZASSHI [CIV. L. PERIODICAL], No. 6, 30 (2003) on advanced efforts in this regard, particularly in the United States.

32. At a time when positive views of Japanese business customs predominated, Ramseyer avoided using Japanese culture to explain the scarcity of hostile takeovers in Japan and

assessed by the market or dictated by reforms of the Commercial Code, the courts sometimes take initiative in indicating new norms for businesses. For example, in 2000 the Osaka District Court in the *Daiwa Bank* case shocked corporate Japan by awarding damages of ¥83 billion (\$775 million), an unprecedented amount, in a derivative suit arising from an employee's fraud.³³ Business leaders expressed indignation over the judges' ignorance of economic reality and their judicial arrogance in imposing self-righteous justice. But setting aside the amount of damages, the principle of director liability shown in the judgment spread rapidly and found acceptance as a new norm. This development broke down the indigenous norms of trade customs, and with new norms emerging, the primary responsibility of regulation shifted from indigenous ordering to legal supervision by the state.³⁴

Company monitoring was, until recently, performed mostly in long-term business relationships and main bank systems, with a heavy emphasis on personal trust and reputation. Yet building a vigorous capital market by strengthening the disclosure system for ordinary investors and levying strict responsibility on directors requires detailed legal regulations and sufficient enforcement personnel, such as lawyers and auditors.³⁵ These requirements are obviously costly, but the transaction costs are necessary to facilitate capital investments that will produce maximum returns. The price of reform will thus be offset by improvements in efficiency and a reduction of conversion costs that will decrease overall production expenses.³⁶

the heavy moral opprobrium with which they are viewed. Instead, he attributed the characteristics to the entrenched vested interests of management, which prevented the market discipline of corporate directors through stock values from leading to inefficient management. See J. Mark Ramseyer, *Takeovers in Japan: Opportunism, Ideology and Corporate Control*, 35 UCLA L. REV. 1 (1987).

33. See Shinsaku Iwahara, *Daiwa ginko daihyo soshō jiken—issin hanketsu to daihyo soshō seido kaisei mondai* [*Daiwa Bank Derivative Suit—The Problems of the First Instance Judgment and Issues in Revising the Derivative Suit*], 1576 SHOJI HOMU [COM. LEGAL AFF.] 4–14 (2000), 1577 SHOJI HOMU [COM. LEGAL AFF.] 4 (2000). See also Mitsui Kondo, *Shohō kaisei to kabunushi daihyo soshō* [*Revision of the Commercial Code and Shareholder Derivative Suits*] 1191 JURISUTO [JURIST] 2 (2000).

34. Milhaupt analyzed the breaking down of the norms that sustained Japanese trade practices and the evolution of a new rule, using corporate governance as a case study. See Curtis Milhaupt, *Creative Norm Destruction: The Evolution of Non-Legal Rules in Japanese Corporate Governance*, 149 U. PENN. L. REV. 2083 (2001).

35. See MASAHIKO AOKI, KEIZAI SHISUTEMU NO SHINKA TO TAGENSEI [THE EVOLUTION AND PLURALISM OF ECONOMIC SYSTEMS] (1995) for an analysis of why the monitoring function of Japan's main bank system declined. Aoki assumes path dependency while taking the position that plurality of equilibrium is possible in the evolution of systems. If read to mean that culture is a given condition that also evolves as environmental conditions change, Aoki's model overlaps with the arguments in this Article.

36. The work that advances this idea is DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990), which assesses systems from the

This is a textbook explanation of Japan's recent development of law within the global market and the efficiency it gained in the interim. But how should we assess the advantages of Japanese trade practices during the 1970s and 1980s, when Japan took pride in its overwhelming economic competitiveness? Discussing culture alone to explain these practices will not provide the answer; it is also necessary to ask why trade customs were conducive to Japanese competitive advantage. This inquiry into Japan's legal evolution will impart further insight into China's development of law.

The following two arguments provide clues to the Japanese experience. The first is Bernstein's argument, based on her observation of the New York Diamond Exchange, that while laws stipulate rights and provide relief measures for their violation, they can by no means provide complete protection.³⁷ The Diamond Exchange has an exclusive membership, conducts transactions through an extremely informal procedure, and even maintains a system of settling disputes by arbitration. This makes sense: While full compensation for breach of contract is legally possible, it is not easy to attain. It is difficult, first of all, to certify losses in the trade in rough diamonds, where market conditions are unstable and prices fluctuate dramatically in accordance with the quality of the processing workmanship. Courts, which take a cautious approach to losses based on supposition, inevitably deliver inadequate compensation. Moreover, court cases, which take an average of three years at first instance, cannot cover secondary damages that arise from nonperformance when a sale has an element of the provision of credit. While these considerations explain why diamond traders avoid courts, such behavior would not exist absent an alternative mechanism to protect rights. In the case of diamond trading, a community of Orthodox Jews secures this mechanism by circulating low-cost, trustworthy information based on personal credit. This is what is known in economics as the "bond of reputation,"³⁸ through which opportunistic behavior in the performance of contracts or resolution of disputes is strongly suppressed to facilitate continued participation in trading.

perspective of transaction costs and problematizes the relationship with economic outcomes. See Hiroshi Matsuo, *Kaihatsu hogaku to hoseibi shien no rironka* [*The Law and Development Study and the Theory of Legal Assistance*], 11 YOKOHAMA KOKUSAI KEIZAI HOGAKU [YOKOHAMA L. REV.] 55 (July 2002) (asserting that North's institutional economics form the theoretical background to development assistance).

37. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (Jan. 1992).

38. Motoshige Ito, *Interfirm Relations and Long-Term Continuous Trading*, in BUSINESS ENTERPRISE IN JAPAN: VIEWS OF LEADING JAPANESE ECONOMISTS 109 (Kenichi Imai & Ryutaro Komiya eds., Ronald Dore & Hugh Wittaker trans., Massachusetts Institute of Technology 1994) (1989).

The second argument concerns relational contracting. Where there is an ongoing trading relationship, the parties must, in general, preserve the expectation of continuity in order to protect their relation-specific investments. Furthermore, to meet the contingencies in this long-term trading, contracts must afford the flexibility to revise provisions as necessary. Although this has previously been discussed,³⁹ the point here is on how smoothly this contract revision occurs. In general, the market regulates contractual agreements while they are negotiated, when parties have the freedom to withdraw. But when the parties discuss revisions after they have entered into the contract, the same freedom of agreement disciplined by the market does not exist. Parties who are bound by the relationship must search for equitable terms. Even if they have mutual interests in continuing the relationship, present disputes or differences in expectations may give rise to a conflict of interest. In fact, the party who has more invested in the relationship has less negotiating power, which gives rise to opportunistic behavior by the other party. This is the major reason why scholars in the United States are generally skeptical about relational contracts.⁴⁰

Conversely, in Japan, contractual customs in accord with the relational contracting paradigm remain popular. This cannot be explained solely on economic rationalist grounds. For these practices to thrive there must be mechanisms which inhere in society and culture to contain opportunism in contractual performance and revisions. On this point, Hara's reinterpretation of Geertz's analysis of the traditional Indonesian economy is informative; from an economics perspective Indonesian traditions have positive functions and were created not for the economy but rather through social customs separate from economic activity.⁴¹ While the economic "formal postulate of rationality" (in other words, an assumption of *homo economicus*) only produces negative interactions, non-economic social customs bring about "reciprocity equilibrium"—the cooperative game in market transactions.⁴² From the perspective of this

39. TAKASHI UCHIDA, *KEIYAKU NO SAISEI* [RESUSCITATION OF CONTRACTS] (1990).

40. See Takao Tanase, *Kankeiteki keiyakuron to hochisujokan* [Relational Contract Theory and Views of Legal Order], in KEIYAKU HORI TO KEIYAKU KANKO [CONTRACTUAL DOCTRINES AND PRACTICES] 1 (Takao Tanase ed., 1999) on the skepticism of U.S. contract law scholars toward relational contracts.

41. See YONOSUKE HARA, *KURIFO-DO GIATSU NO KEIZAIGAKU* [THE ECONOMICS OF CLIFFORD GEERTZ] (1985).

42. The debate between Suchman and Bernstein is interesting in that it indicates the limits of economic analysis and explains the necessity of sociological analysis. See Mark C. Suchman, *Translation Costs: A Comment on Sociology and Economics*, 74 *OR. L. REV.* 257 (1995). See also ROBERT H. FRANK, *PASSIONS WITHIN REASON: THE STRATEGIC ROLE OF THE EMOTIONS* (1988) (demonstrating, using game theory, that the collaboration required for human society cannot be explained by assumptions of rationality alone and that an elucidation of the role of emotion is necessary).

“socially-embedded economy,” the revision of Japanese trade practices is due more to the demise of cultural elements that once supported these practices than to their inherent irrationality. Changes to the Japanese system, then, are less the result of the global market’s demand for efficiency and more reflective of the fact that many of the traditional cultural values supporting the system are no longer seen as viable or no longer appeal to the public’s moral sense.⁴³

Thus, even where the development of market-oriented laws is concerned, dictating in detail the rights and duties of economic entities and striving for reliable enforcement of these obligations do not necessarily lead to attaining efficiency. It is true that in some cases such reforms are clearly necessary due to changes in industrial structure and global trends in international finances. For China, modern laws constitute an infrastructure just as indispensable for accommodating industrialization as the landscape-altering skyscrapers of its cities. The demand for regulation does not necessarily imply the kind of lifeless futuristic world that appears in science fiction novels. Rather, it is rational, even in the economic sense, to create extralegal norms sustained by culture, to construct bonds of reputation, and to suppress opportunistic behavior in the performance and renegotiation of contractual obligations.⁴⁴ In this sense, the connection between legal and extralegal norms will continue to be the subject of close scrutiny during the evolution of law in China.

IV. REFLECTIONS ON MARKET-BASED PRINCIPLES

Criticisms of globalism, as byproducts of the market-oriented development of law, are pertinent to this discussion. This requires consideration of three themes.

The first theme is the relationship between the rule of law and democracy. So far, commentators have analyzed the Chinese development

43. A Japanese news article about a Taiwanese manufacturer stated: “Until the mid-1990s we thought that we had no chance of winning over the group-conscious Japanese, where company employees cooperate closely with one another out of a strong sense of belonging.” The article diagnoses Japan as stuck between the old and the new. On the one hand, the Japanese can no longer create this close teamwork, but on the other, even though individualism is strengthening, Japanese society is unable to create a system to capitalize on individualism. Takashi Suzuki, *Jiritsu mezasu kojīn, gendoryoku* [*Individuals Striving for Autonomy as Driving Force of Economy*], *NIHON KEIZAI SHIMBUN*, Nov. 23, 2001, at 5.

44. Winn analyzes the involvement of traditional economic structures in Taiwan’s economic development, noting that despite the replacement of these structures with modern institutions, distinctively Taiwanese organizational principles will continue to exist within the modern economy. See Jane K. Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 *LAW & SOC’Y. REV.* 193 (1994).

of law mainly in the context of economic development. The rule of law, however, not only guarantees the freedom of economic activities but also serves the important function of protecting the rights of individuals from the improper exercise of state or social authority. Political freedom and the right of democratic participation are also important. In China, demands for these liberties are growing stronger and can no longer be ignored. Yet democracy has many faces and its own complications. With regard to globalization, on one hand there are arguments claiming that economic development is impossible without democracy;⁴⁵ in overseas aid, the realization of democracy is often made a condition or even a purpose of developmental assistance.⁴⁶ On the other hand, because of the cross-border migration of workers and the relaxation of community ties that accompany globalism, ethnic, religious, and cultural conflicts often intensify into violent clashes, which in turn lead to acts of violent oppression. Here, globalism makes the transition to constitutional democracy difficult.

There is also an inherent tension between the rule of law and democracy. The rule of law assumes the autonomy of law and the separation of law from politics. Out of a concern for legitimacy, however, democratic elements are often incorporated into the rule of law through citizen participation in the judiciary or by judges attempting to attune their judgments to public opinion. In this regard, China is ahead of other states in ensuring that judgments recognize and honor popular sentiment. Indeed, the attainment of substantive justice unencumbered by procedural technicalities was a hallmark of justice in traditional China. Now, with the new idea of procedural justice, we see signs of this approach changing, but justice as defined by popular sentiment continues to dictate judgments in accordance with the emphasis in socialist ideology on the welfare of the people. Political scientists may say there are conflicts here between populism and constitutional democracy. In considering these tensions and schisms, the Trinitarian development model of simultaneously attaining the rule of law, democracy, and a market economy must be modified and refined to grasp the evolution of law in China.

The second theme concerns freedom and solidarity. In the European criticism of globalism, there is a discernable trend of reaffirming the

45. AMARTYA SEN, *Jiyu to Keizai Kaihatsu* [Freedom and Economic Development] ch. 6 (Masahiko Ishihara trans., 2000).

46. See YASUTAMI SHIMOMURA, ET AL., *ODA Taiko no Seiji Keizaigaku* [The Political Economy of the Principles of ODA] (1999) (on the debate concerning development assistance). In Japan, the following mild statement appears in one of the four principles of ODA: "Attention should be given to the promotion of democratization, efforts to introduce a market-oriented economy and the guaranteeing of basic human rights and freedoms." *Id.* at 222.

ideal of social democracy amidst the reign of the global market.⁴⁷ States around the world are cutting welfare budgets and reducing taxes and other public levies so that business can meet the challenges of fierce global competition.⁴⁸ But the public does not uniformly support these policies. A comparative survey in 1998⁴⁹ showed that when respondents were asked whether they preferred “a competitive society appraising individual abilities” or “an egalitarian society with little income disparity,” an overwhelming majority (68 percent) in the United States favored a competitive society, with no more than 13 percent in favor of an egalitarian society. In France, however, 50 percent of respondents favored an egalitarian society and 23 percent favored a competitive society. There is a clear division here.

While this is a matter of national policy beyond the immediate technicalities of law, considering that the market-oriented development of law is presently eroding the foundation of the Chinese socialist system and bringing social frictions to the surface, it may be important for China to reaffirm the value of solidarity, along with freedom, in its legal reforms. The conscious efforts of the Chinese people and government along this line may divert China’s evolution of law from its projected trajectory toward assimilating Western law.

The third theme is the discord between sovereignty and international concerns. Although the logic of the free-market economy—“the market stimulates efficient production, hence increasing overall wealth”—is generally used to press global markets forward, there is obviously another viewpoint. Critical perspectives point to the uneven distribution of wealth and deterioration in environment and labor conditions the massive global market causes absent appropriate governance.⁵⁰ Furthermore, even

47. See GUROBARUKA TO SEIJI NO INOBE-SHON [GLOBALIZATION AND POLITICAL INNOVATION] (Ikkuo Takagi et al. eds., 2003). See especially the contributions by Thomas Meyer and Jeff Faux.

48. On Japanese deregulation, see Osamu Watanabe, *Shin jiyushugi senryaku toshite no shiho kaikaku, daigaku kaikaku* [Reform of the Justice System and Universities as a Neo-Liberalist Strategy], 72 HORITSU JIHO [LEGAL TIMES] 10 (2000). For a discussion including Europe, see TOSHIHIRO MATOBA, GENDAI SEITO SHISUTEMU NO HENYO [CHANGE IN THE MODERN POLITICAL PARTY SYSTEM] ch. 5 (2003).

49. *Survey Done by Dentsu Communication Institute, Inc.*, ASAHI SHIMBUN, Sept. 5, 1998.

50. Matsumoto distinguishes globalization and globalism, the latter being predicated on the former and defined as the doctrine of “taking a comprehensive approach to dealing with global problems.” Saburo Matsumoto, *Kokusai seiji—tochi to kyosei no mosaku*, in GOVERNANCE AND SYMBIOSIS, *supra* note 8, at 51. While the idea of global governance emerges from this concept, Beck further emphasizes that “internal trends towards being cosmopolitan” also occur within the nation state and within individuals as a new normative consciousness due to this modern globalism. Ulrich Beck, *Kosumoporitan shakai to sono teki* [Cosmopolitan Society and Its Opponents], in GUROBURUKA TO SHAKAI HENDO [GLOBALISM AND SOCIAL CHANGE] 13 (Mitsuo Ogura & Takamichi Kajita eds., 2002).

developed states that benefit from and advance globalism always have their national interests uppermost in their minds, as when they, from time to time, push vigorously for the protection of their industries and agriculture in response to domestic political pressures. Naturally, various international organizations and diplomatic efforts are attempting to ensure fair competition in the global market. But even the World Bank, a champion of globalism, admits that the development of law is ultimately a problem of the power and authority of the sovereign state and accepts that a state cannot execute painful reforms and carry out efficient economic management without political stability and a competent government bureaucracy.⁵¹ In China's case, excellent economic performance supports the legitimacy of the government's authority.⁵² For the moment, China maintains the good governance it needs to steer the economy and skillfully manage the balance between sovereignty and international concerns.

Yet political awareness within China is changing rapidly.⁵³ As people begin adopting pluralized values amidst prosperity, and as the strains of high economic growth begin to emerge in the form of growing income disparity and restless migrant workers in cities, there will no doubt be objections against the government itself and its intense focus on economic development. Globalism is not a one-dimensional formation of a market on the economic side; it also engenders a free market of ideas and values with cross-border flows of information. This global interaction may create a new civil society in China, one in which people evaluate their own government by global standards.⁵⁴ In contrast to economic interests, which brought more instances of collusion than confrontation between sovereignty and foreign pressures (such as the involvement of multinational corporations with dictatorial governments), social concerns may begin mediating between national sovereignty and international concerns to bring forth a new global community.

51. See Julio Faundez, *Introduction: Legal Technical Assistance, in GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES 1* (Julio Faundez ed., 1997).

52. See Hong Pyo Lee, *Chugoku ni okeru keizai kaikaku to seiji taisei henka no kanosei* [*Economic Reform and Prospects for Democratization in China*], 194 NAGOYA DAIGAKU HOSEI RONSHU [NAGOYA U. J.L. & POL.] 37 (2002).

53. Mori points out that because the diversification of interests has progressed in China since its economic reforms, the future issue for the Chinese government will be to what extent the political system will address and adjust these interests. Kazuko Mōri, *Chugoku wa doko e iku—kindaika e no mitsu no kadai* [*Whither China—Three Issues in Modernization*], in GENDAI CHUGOKU NO KOZO HENDO [STRUCTURAL CHANGES IN MODERN CHINA] 269 (2000).

54. See Hiromichi Imai, *Gendai ni okeru seiji no datsukokkaka to kindai no kokufuku* [*Modern Political De-statization and Conquest of Modernity*], 53 HOKUDAI HOGAKU RONSHU [HOKKAIDO U. L. REV.] 790 (2002). Imai seeks the possibility of a new civil society in Asia amidst the emergence of social movements with a diversity of cross-border alliances and visions.

While the rule of law, the guarantee of freedom, and transnational universal law are inevitable ingredients of legal reform in the global market, I have indicated that some reservations are necessary for these three components. Most of the discourse on China's development of law views it as the implementation of Western law, particularly the very modernist understanding of that law. Yet, informed by modern critical theory, we in modern states view our law in a much more complicated manner. This critical reflection is a direct result of the breadth of tasks that the law today must undertake, which cannot be reduced to the guaranteeing of freedom and human rights through the application of universal law.⁵⁵ When looking at the relationship between economic growth and law in detail, even the achievement of efficiency is not a simple matter, given the transaction costs. If the stability of society becomes yet another goal, even more complications will arise. Furthermore, at times law conspires, consciously or unconsciously, with the dominant order and can give birth to oppression. By bringing a critical perspective to the study of China, we not only grasp more accurately the evolution of Chinese law, but we also learn from it a possible alternative development of law within contemporary global society.

55. Darian-Smith reviews the literature on the evolution of law under contemporary globalism and advocates a closer look at how the new norms of the global market and universal human rights relate to the lives of people. She suggests that oppression, resistance, and the emergence of rival norms deserve careful analysis. See Eve Darian-Smith, *Structural Inequalities in the Global Legal System*, 34 L. & Soc'y REV. 809 (2000).