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SYMPOSIUM: "RULE OF LAW" IN CHINA

INTRODUCTION

Lan Cao*

The Institute of Bill of Rights Law ("IBRL") at the College of William and Mary School of Law and the Reves Center for International Studies at the College of William and Mary organized a conference held at the School of Law on February 22, 2002 entitled "Rule of Law in China." The purpose of the conference was to examine key challenges facing China as it proceeds towards market-based economic development, increased integration with the international economy, and rule of law reform.

Since 1978, China has been transforming its centrally planned economy to an increasingly market-based one, which it calls "socialism with Chinese characteristics." For the most part, market liberalization has made the Chinese economy more productive. In recent years, particularly after China's entry into the World Trade Organization, there is mounting concern over whether the central government can successfully withstand the economic and political shocks that will undoubtedly accompany this crucial transition period. Against this backdrop, the conference explored three core issues that have emerged as a consequence of reforms pursued since 1978: (1) economic progress and sustainable development; (2) individual rights and political development; and (3) Chinese participation in and commitment to international institutions and governance.

I. ECONOMIC GROWTH, SUSTAINABLE DEVELOPMENT, AND THE ENVIRONMENT

The economic objectives of China's modernization program are ambitious. The government has sought to quadruple China's Gross National Product within the last

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two decades to achieve an average annual income of \$1,000 per person by the year 2000.¹ Economic growth during the 1980s reached nearly ten percent a year.² As the largest “developing country” in the world, China’s economic development will undoubtedly have an enormous impact on its own as well as the global environment.

Pollution levels in China’s major cities are already among the highest on earth. Epidemiological studies indicate that the concentration of airborne particulates is two to five times more than the maximum level designated by the World Health Organization as acceptable.³ The World Bank conservatively estimated that, as of the mid-1990s, air and water pollution costs the Chinese \$32.3 billion (U.S.) annually in premature deaths and other health problems.⁴ The government has also pursued environmentally sensitive and controversial projects such as the Three Gorges Project. The construction of a dam across the Yangtze River to generate hydroelectric power will have serious adverse effects on endangered species such as the Yangtze sturgeon, the Yangtze River dolphin, the finless porpoise, and the Yangtze alligator.⁵ The dam will also block the flow of 265 billion gallons of raw sewage as well as other discharges of mercury, arsenic, lead, and cyanide dumped into the river each year.⁶ China has also become the world’s largest producer of coal — it relies on the combustion of coal to supply three-fourths of all primary energy in the country.⁷ This dependence on coal has significant environmental implications because coal burning releases carbon dioxide, one of the greenhouse gases that contributes to global warming. Indeed, Chinese emission of carbon dioxide will likely make it the world’s largest emitter of greenhouse gases in the second decade of the twenty-first century.⁸

Chinese lawmakers have attempted to address these environmental ills. In the past two decades, China has promulgated a large body of environmental law and is currently revising and supplementing these laws before the end of this decade.⁹ This concerted attempt to address environmental problems by turning to public, positive law stands in stark contrast to the Chinese tradition, dating back to the imperial periods, of relying on moral precept and local custom to resolve conflicts

¹ VACLAV SMIL, CHINA’S ENVIRONMENTAL CRISIS 69, 73 (1993).

² *Id.* at 111.

³ Chris P. Nielsen & Michael B. McElroy, *Introduction*, in *ENERGIZING CHINA: RECONCILING ENVIRONMENTAL PROTECTION AND ECONOMIC GROWTH* 11 (Michael B. McElroy et al. eds., 1998).

⁴ TODD M. JOHNSON ET AL., *CLEAR WATER, BLUE SKIES: CHINA’S ENVIRONMENT IN THE NEW CENTURY* 23 (1997).

⁵ Michael A. Gheleta, *Sustaining the Giant Dragon: Rational Use and Protection of China’s Water Resources in the Twenty-First Century*, 9 *COLO. J. INT’L ENVTL. L. & POL’Y* 221, 243 (1998).

⁶ *Id.* at 243.

⁷ SMIL, *supra* note 1, at 117.

⁸ *Id.* at 191.

⁹ William P. Alford & Benjamin L. Liebman, *Clean Air, Clear Processes? The Struggle over Air Pollution Law in the People’s Republic of China*, 52 *HASTINGS L.J.* 703, 704 (2001).

and solve problems. However, the environmental laws already passed suffer from serious doctrinal infirmities and enforcement difficulties that characterize much of contemporary Chinese law generally.

The papers collected in this symposium by Professor Orts and by Mr. Ferris and Mr. Zhang critically evaluate the comprehensive array of laws already in existence designed to address problems such as air pollution, low water quality, and global warming. Some of the issues explored include the broader historical, cultural, institutional, and social factors that may constrain the effectiveness of the laws.

II. POLITICAL DEVELOPMENT, INDIVIDUAL RIGHTS, AND "RULE OF LAW" INITIATIVES

The vision the U.S. government and many nongovernmental organizations ("NGOs") have for change in China is based on a link between economic progress and political reform. The "rule of law" has become a high-profile issue and has received extensive funding from a number of prominent foundations and NGOs. The term "rule of law," however, remains notoriously broad and amorphous, even in the United States.¹⁰

During the Clinton Administration, a special post of "Special Coordinator for Global Rule of Law" within the State Department was created and headed by a professor from Yale Law School, Paul Gewirtz. Indeed, Professor Gewirtz's paper chronicles the initiation and development of this important project. On October 29, 1997, when President Clinton met with Jiang Zemin of China, the Clinton-Jiang Summit Joint Statement included "Cooperation in the Field of Law" to promote U.S.-Chinese common interests.¹¹ When President Clinton visited Beijing in June 1998, another Joint Statement was issued, delineating specific areas for cooperation in the field of law: judicial and lawyer training; human rights protection; the development of administrative law; legal aid for the poor; commercial law and arbitration; and law enforcement.¹²

The term "rule of law" has been used often and in a broad manner by representatives of the U.S. government. Speaking at a conference of U.S. business leaders, then-Secretary of State Madeline Albright stressed that the "rule of law" would make China a good place to do business.¹³ In response to questions by a reporter, the Secretary said that promoting the "rule of law" would also address

¹⁰ Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7 (1997); see also Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989) (noting that the "rule of law" is "deeply ambiguous, a contested concept").

¹¹ 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, 70 (2000).

¹² *Id.* at 71.

¹³ *Id.* at 74; see also Secretary of State Madeline K. Albright, Remarks to U.S. Business Representatives, Sheraton International Club, Beijing (Apr. 30, 1998), available at <http://secretary.state.gov/www/statements/1998/980430.html>.

widespread concern regarding the Chinese government's treatment of political prisoners.¹⁴ In another speech, Secretary Albright listed the following as essential characteristics of the rule of law: effective criminal law enforcement; lack of corruption; protection of the environment; political participation by citizens; protection of individual rights; and peaceful participation in the global community.¹⁵ The George W. Bush Administration has confirmed that it will continue a policy of pressing China to follow "the rule of law."¹⁶

The Chinese, on the other hand, may very well have a wholly different understanding of the term. First, "rule of law" is referred to by the Chinese government as "*fazhi*" and may be translated as "rule *by* law," which implies a legal system that controls the masses and may be manipulated by the ruler for domination and subjugation.¹⁷ The essay by Professor Van Alstyne, in posing the question, "*Whose Rule of Law?*" touches on this distinction, precisely as more and more laws are passed in China, without necessarily resulting in a legal system characterized by a "rule of law" aimed at constraining the ruling elite or majoritarian arbitrariness.

Second, against the country's Confucian heritage, "rule of law" in China might also carry different cultural and historical connotations. While Western concepts of human rights emphasize rights human beings have by virtue of being human, with individuals as "rights bearers," the Confucian tradition draws a distinction between human beings *qua* members of a biological species and humans *qua* social beings. Classical Confucianism thus rejects the assumption that individuals are entitled to certain inalienable rights from birth.

A person is not entitled to political participation because he is born into an exclusive *jen* [human being] class. Rather, he becomes *jen* as a consequence of that personal cultivation and socialization that renders him particular. Being a person is something one does, not something one is; it is an achievement rather than a given.¹⁸

Becoming human is part of a social process, where one joins with others and participates collectively to become human.

The Confucian (and socialist) objective is to emphasize virtue and, through cooperation, the interests of the individual is harmoniously reconciled with that of the state. The individual is viewed in relation to others, and the Confucian self is

¹⁴ Stephenson, *supra* note 11, at 74–75; see also Interview by Bob Schieffer with Secretary of State Madeline K. Albright, *Face the Nation* (CBS television broadcast, Jun. 28, 1998), available at <http://secretary.state.gov/www/statements/1998/980628.html>.

¹⁵ *Id.* at 75; see also Secretary of State Madeline K. Albright, Remarks and Q&A Session at Delaware Theater Company, Wilmington, Delaware (May 19, 1997) available at <http://secretary.state.gov/www/statements/970519a.html>.

¹⁶ Jane Perlez, *Bush Aides Debate Ways to Press China Over Rights*, N.Y. TIMES, Feb. 4, 2001, at 4 (quoting Secretary of State Colin L. Powell).

¹⁷ Karen Turner, *Rule of Law Ideals in Early China?*, 6 J. CHINESE L. 1, 3 (1992) (emphasis added).

¹⁸ DAVID L. HALL & ROBERT T. AMES, THINKING THROUGH CONFUCIUS 139 (1987).

a "relational" entity whose relationship to others must be seen within a context (*i.e.*, father/son, teacher/student, emperor/subject). The idea of an abstract individual with universal rights does not accord with the Confucian world view. Indeed, as Professor Ruskola's paper points out, the Chinese have historically elevated the ideal of the "rule of men," (*ren-zhi*), that is, the ideal of governance by a superior, virtuous authority.

Law *per se* is therefore not wholly significant in this regard. As Confucius prescribed, "Guide them by edicts, keep them in line with punishments, and the common people will stay out of trouble but have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves."¹⁹ Institutionalizing a system of laws to protect individuals with rights because they are human beings is thus not the focus in a Confucian system. Rather, the focus is on inculcating an ethical orientation that will lead to moral excellence and excellence in interpersonal relations (*ren*). Thus, in Confucian China, duties more than rights are emphasized. In Confucian China, a child owes certain filial duties to his or her parents; the parents in turn have a right to be supported in old age. The Chinese Constitution, for example, requires children to support their parents.²⁰ Conflict resolution is less about realizing rights than about achieving compromise. Even in the legal context, as some have observed, "[t]he court's judgment is not phrased in terms of a holding or a directive. Rather, after mediation by the court, the record usually indicates that the parties agreed to a particular resolution."²¹

Such is the general backdrop against which symposium authors discuss the state of the "rule of law" and individual rights in China. To be sure, Confucianism aside, Chinese individuals have stood up to the government. Recall, for example, the image of the sole demonstrator blocking a row of tanks near Tiananmen Square. Interestingly, the Chinese government has enacted an administrative law that grants individuals the right to sue the government.²² Politically motivated lawsuits against the government have proliferated,²³ and increasingly, individuals in China have resorted to the law and the courts, having sued not only other individuals but also government agencies to resolve conflicts. And in 1999, the government itself adopted a constitutional amendment, incorporating the concept of "governing the country according to law."²⁴ A contemporary Chinese slogan even proclaims that

¹⁹ CONFUCIUS: THE ANALECTS 2:3 (D.C. Lau ed., 1979). Citations to the Analects follow the numbering of Lau.

²⁰ XIANFA [Constitution] art. 49 (P.R.C. 1999).

²¹ Roderick W. Macneil, *Contract in China: Law, Practice, and Dispute Resolution*, 38 STAN. L. REV. 303, 333 (1986).

²² See Zhonghua Renmin Gongheguo Xingzheng Susong Fa [Administrative Litigation Law of the PRC] (April 4, 1989), in RENMIN RIBAO, Apr. 10, 1989, at 2, translated in CHINA L. & PRAC., June 5, 1989, at 37-57.

²³ See Sheryl WuDunn, *Chinese Bite Back at Beijing with Lawsuits*, N.Y. TIMES, Sept. 13, 1992, at 9.

²⁴ Xian Chu Zhang, *China Law*, 33 INT'L LAW. 677, 693 (1999). The amendment to Article 5 of the Chinese Constitution states: "The People's Republic of China shall practice

“the market economy is a rule-of-law economy” (*fazhi jingji*).²⁵ In other words, Communist China is attempting to reconcile internal ideological conflicts prompted by its pursuit of a market economy, fusing market reform and efforts towards environmentally sustainable development, for example, with its particular understanding of “rule of law” to create, most definitely, a “rule of law” — but one with Chinese characteristics.

ruling the country according to law, and shall construct a socialist rule-of-law state.” Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L.J. 125, 128 (1999–2000) (quoting the amendment).

²⁵ Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1690 (2000).