Human Rights and Democracy with Chinese Characteristics?

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Abstract

Criticism has long been laid about China’s unwillingness to subscribe to international human rights norms, the rule of law and liberal democratic practices. The United Nations and Western States and scholars have argued that human rights and liberal democracy underlain by a Western rule-of-law model are prerequisites to human development and governmental legitimacy. Is authoritarianism in China incompatible with human rights and democracy? Is the rule of law rejected entirely by the state apparatuses in China? Is there really no human rights protection under China’s Constitution and laws? Has China’s approach to international human rights law evolved since its realisation of the roles it may play in shaping international law? What do the Chinese people think or want about China’s political reform vis-à-vis human rights and democratic practices? With China’s rise in the current international order, these questions raise important issues this article addresses.

Keywords: human rights – democracy – rule of law – China

1. Introduction

In addition to apprehension about China’s rise and the likelihood that it will seek to revise the current international legal order through increasing economic, political and military capabilities, criticism has perennially been laid about China’s unwillingness to subscribe to international human rights norms, the rule of law and liberal democratic practices. Harding describes

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China’s political system as a ‘consultative authoritarian regime’ marked by ‘significant departure from the totalitarianism of the past but not yet a fully democratic, or even a quasi-pluralistic, political system… It is increasingly consultative in its recognition of the need to obtain information, advice, and support from key sectors of the population, but still authoritarian in its desire to suppress dissent and maintain ultimate political power in the hands of the party.’1 Deng Xiaoping once declared that ‘without political institutional reform, the achievements of economic institutional reform cannot be secured. Also, economic reform will not be able to continue further.’2 In addition, ‘without democracy, there will be no socialism and socialist modernization.’3 Yet Deng was adamant that China’s ‘modernization needs two prerequisites. One is international peace, and the other is domestic political stability… A crucial condition for China’s progress is political stability’,4 thus his rationalisation of the government’s suppression of dissent on Tiananmen Square in June 1989.5

While China’s market-driven socialism and the increasing wealth of many of its citizens have already generated local demand for political reform, China’s political climate cannot be divorced from the roles of facilitator and agent that the government plays in China’s economic development. Jackson has strongly doubted Western countries’ capacity or willingness to force China to accept their demand for democratisation or improvement of its human rights record, partly because to do so ‘would go against the fundamental commercial interests of such countries. It would be an irresponsible and unrealistic foreign policy. If China ever sets course to become a democracy that will be the determination and decision of the Chinese government, and if it is successful that will be the achievement of the Chinese people.’6

The United Nations Development Programme has maintained that freedom of political participation is as important as literacy and good health.7 In contrast to Gilley’s contention that ‘there is simply no compelling argument that China will be a great exception to the nearly-worldwide movement of social emancipation from “sclerotic authoritarianism”’ that we now call

4 Deng, Deng Xiaoping tongzhi zhongyao jianghua [Important Talks of Comrade Deng Xiaoping] (Beijing: Remin chubanshe, 1988) at 8 and 13.
5 Deng, supra n 2 at 156.
democratization.\textsuperscript{8} Nathan speaks of the ‘disturbing possibility’ that, along with democratisation being possible at some point in future, China’s experience may suggest that ‘authoritarianism is a viable regime from even under conditions of advanced modernization and integration with the global economy.’\textsuperscript{9}

However, is authoritarianism\textsuperscript{10} incompatible with human rights and democracy? Do Western conceptions of human rights and democracy constitute the only viable and proper interpretations to which there are no alternatives? Is the rule of law rejected \textit{in toto} by the State apparatuses in China? Is there really no human rights protection under China’s Constitution and laws? How has China’s approach to international human rights law evolved since its realisation of the roles it may play in shaping international law? Are democratic practices entirely absent in China; if not, in what forms do they manifest? These questions raise interesting and important issues from scholarly, political and legal standpoints that this article addresses.

This article explores how China’s human rights and democratic practices may comply with, diverge from, or in fact contribute to our understanding and the development of international human rights law and democratic governance. First, it discusses the nature of human rights in China, which the People’s Republic of China (PRC) government, as well as the Chinese people, consider should be understood as human rights \textit{with Chinese characteristics}. It then addresses the applicability of a rule-of-law model in China and the place of law in Chinese state apparatuses and society. Many Western States and scholars assume that China does not subscribe to international human rights law and that China is a non-liberal State least likely to be compliant with international norms and principles.\textsuperscript{11} This article examines the extent to


\textsuperscript{10} Many Western scholars confuse authoritarianism with totalitarianism and define it as absence of democracy and meaningfully protected human rights. See Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 \textit{European Journal of International Law} 503 at 514, argues that liberal States constitute simpliciter ‘a world of peace, democracy, and human rights’ and (at 509) that ‘[l]iberal international relations theory applies to \textit{all} states. Totalitarian governments, authoritarian dictatorships, and theocracies can all be depicted as representatives of some subset of actors in domestic and transnational society, even if it is a very small or particularistic slice’ (emphasis in original). An authoritarian dictatorship is a misnomer. An authoritarian government relies on inculcation in its people of certain beliefs, norms and values in order to maintain and exercise control, and not on overt coercion as a dictatorship does. In addition, an authoritarian government may be a democratically elected one, as many Western governments evidence.

\textsuperscript{11} For example, Kent, in \textit{Beyond Compliance: China, International Organizations, and Global Security} (Stanford: Stanford University Press, 2007) at 2, argued that ‘China constitutes a least-likely case of compliance by virtue of its history, cultural traditions, and power. It has historically considered itself to be the “Middle Kingdom”, unconstrained by international society; it lacks a tradition of the rule of law; and it is powerful enough to ignore its international obligations . . . If it is nevertheless reasonably compliant with its international obligations, it helps validate the notion that all states, even non-liberal ones, comply with the norms and rules of the international system.’ It should, of course, be noted that while her strong assertion was placed in the
which human rights protection may in fact be available under China’s Constitution and laws, with workers’ rights, women’s rights, and privacy rights as case studies, and the evolution of China’s approach to international human rights law. Subsequently, this article scrutinises the nature and roles of civil society in China and abroad in the promotion and protection of human rights and the development of democratic practices in China. Finally, it considers how democratic practices, as exemplified by experiences in China, need not necessarily be in the form of periodic elections, and how democracy, contrary to Western perceptions that it is absent in China, may already have been implemented and exercised at sub-national and local levels.

2. Human Rights with Chinese Characteristics?

In Western States, human rights serve as ultimate protection against the state and are relied on also between private persons or companies, and are of an introduction of her book, she had already done substantial work previously on China’s compliance with international law, international organisations and international regimes: Kent, ‘The Limits of Ethics in International Politics: The International Human Rights Regime’ (1992) 16 Asian Studies Review 26; Between Freedom and Subsistence: China and Human Rights (Oxford: Oxford University Press, 1993); ‘China and the International Human Rights Regime: A Case Study of Multilateral Monitoring, 1989–1994’ (1995) 17 Human Rights Quarterly 1; China, the United Nations, and Human Rights: The Limits of Compliance (Philadelphia: University of Pennsylvania Press, 1999); ‘China’s International Socialization: The Role of International Organizations’ (2002) 8 Global Governance 343; ‘Human Rights in Chinese Foreign Relations: Defining and Defending National Interests’ (2002) China Journal 134; ‘China’s Growth Treadmill: Globalization, Human Rights and International Relations’ (2004) 3 Review of International Affairs 524; ‘Influences on National Participation in International Institutions: Liberal v Non-Liberal States’, in Charlesworth, Chiam, Hovell and Williams (eds), The Fluid State: International Law and National Legal Systems (Sydney: Federation Press, 2005) 251. However, in reaching the above conclusion at the introductory stage of her recent book and then using case studies only as ‘an important test of the effectiveness of international organizations and their treaties in achieving compliance with their norms, principles, and rules’ (Beyond Compliance, ibid. at 32), Kent has reduced opportunities for her readers—and herself—to explore the underlying or continuing validity of her previous research and the normative values of China’s approaches to international law. As Katzenstein, ‘Introduction: Alternative Perspectives on National Security’, in Katzenstein (ed.), The Culture of National Security: Norms and Identity in World Politics (New York: Columbia University Press, 1996) 1 at 5, has noted, we ‘use the concept of norm to describe collective expectations for the proper behavior of actors with a given identity. In some situations norms operate like rules that define the identity of an actor, thus having “constitutive effects” that specify what actions will cause relevant others to recognize a particular identity. In other situations norms operate as standards that specify the proper enactment of an already defined identity. In such instances norms have “regulative” effects that specify standards of proper behavior. Norms thus either define (or constitute identities or prescribe or regulate) behavior, or they do both.’ In construing norms as merely defining, constituting, prescribing or regulating identities or behaviours, one neglects that identities, behaviours and, most importantly, norms evolve over time. China’s potential to influence and shape the content of international norms and the direction in which international norms may develop is often overlooked or misunderstood. In fact, China’s rise and its construction of a ‘harmonious world order’ may evidence revival of imperial China’s role as the ‘Middle Kingdom’, the tribute system, and the dichotomy between Chinese and Western approaches to international affairs, including the development of international law.
individualistic nature. In China, communitarian rights and obligations take precedence over individual rights. While not a religion and indeed ‘thoroughly secular,’ Confucianism (except during the Cultural Revolution when adherents were purged, publicly humiliated or killed) as a philosophy of life is pervasive in the moral, social, political and juristic fabrics of society and governance throughout East Asia. Gabrenya and Hwang note that ‘Confucian concepts are employed both in an analytical, abstract, philosophical sense and as a useful heuristic for describing the professed values of Chinese people.’

The institution of family, in particular, is central to Confucianism, with the principle of filial piety controlling all social thoughts and interactions as well as providing moral guidance. Although obedience and deference to authority is expected in other cultures, filial piety ‘surpasses all other ethics in its historical continuity, the proportion of humanity under its governance, and the encompassing and imperative nature of its precepts. The attributes of intergenerational relationships governed by filial piety are structural, enduring, and invariable across situations within Chinese culture.’ Filial piety constitutes ‘a guiding principle governing generational Chinese patterns of socialization, as well as specific rules of intergenerational conduct, applicable throughout the length of one’s life span.’

Not only do filial obligations guide familial interactions, but they also provide and constitute the framework against which authority in all generalities and circumstances is to be understood and observed. Individuals are culturally engrained to regard as their ultimate purpose not serving their own goals and ideals but those of their parents and, above all, the State. As Rosemont observes, ‘[f]or the early Confucians there can be no me in isolation, to be considered abstractly; I am the totality of roles I live in relation to specific others. I do not play or perform these roles; I am these roles. When they have all been specified I have been defined uniquely, fully, and altogether, with no remainder with which to piece together a free, autonomous self.’ It is this difference in the relationship between the individual and the state that has led to mutual miscomprehension and unease between Western States and China and between their peoples.

14 Ho, ‘Filial Piety and its Psychological Consequences’, in Bond, supra n 12 at 155, 155.
15 Ibid.
Of course, a culture does not possess any rights *in se*. As Jones puts it, '[b]eliefs and forms of life are not entities possessed of moral standing to which we might, as a consequence, owe duties.' Some might even question how traditional Confucian norms and values could survive in China after 1949 with a communist ideology operating in tandem. Yet, as Mancall explains:

The survival of elements of the tradition into the contemporary scene has not necessarily brought the Chinese Marxism into a sharp schizophrenic conflict with his own tradition as a Chinese. Quite the contrary, it would appear that, in large areas, the tradition may well reinforce certain Marxist-Leninist assumptions, at least as these assumptions have developed out of an amalgam of Chinese Communist revolutionary experience and Marxist-Leninist revolutionary theory. To take but one brief and general example, the unitary nature of the traditional Chinese state together with the traditional existence of an official ideology – Confucianism – which served as the intellectual basis for the state certainly do not conflict with, and in fact reinforce, the Chinese Communist tendency to see no real or apparent dichotomy between the state and the party, a tendency which evolved directly out of Chinese revolutionary experience. Or another: the traditional hierarchical view of the world order together with the traditional respect due elders may well have contributed to the creation of an intellectual disposition to acquiesce to Stalin's approach to bloc organization, enabling Mao, as a Communist, to accept Stalin's leadership despite his own dissatisfactions with Stalin's leadership in China during the revolutionary struggle.

It must also be noted that in China communism originated from within, unlike in Eastern Europe where it was imposed by the Soviet Union. Many predicted that the demise of communism in the Soviet Union would be followed with a collapse of the communist Party-State in China. China's astonishing economic development in the past two decades, as opposed to almost complete economic breakdown that directly brought about the Soviet Union's end, showed that its communist Party-State is unlikely to be torn down in the near future. Furthermore, as Schwartz suggests, one of the reasons Marxism–Leninism had its appeal to young Chinese was its theory of nationalism, which provided a plausible explanation for China's failure to achieve its rightful place in the world of nations.

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In a survey of 700 Beijing residents in December 1995, more than 95 per cent of the respondents either agreed or strongly agreed with the statement that they ‘would rather live in an orderly society than in a freer society which is prone to disruptions’.\textsuperscript{20} Nathan and Shi found the Chinese to be generally disengaged from their government. In their survey conducted in 1990, 71.6 per cent of the 2,896 respondents considered their local government to have no effect on their daily life, while 71.8 per cent held the same view in respect of their national government.\textsuperscript{21} The authors suggested that the respondents had such apathy towards their local and national governments not so much because they thought that government policy would have little impact on their lives but out of a belief that government officials would not treat them equally given the hierarchical nature of Chinese society.\textsuperscript{22} Together with the enculturation in Confucianism which regards rights as not inherent in being a human but ‘[flowing] from the state in the form of a gratuitous grant that can be subjected to conditions or abrogation by the unilateral decision of the State’,\textsuperscript{23} the economic progress and benefits brought to the Chinese people as a whole (albeit not all of them individually) by China’s increased trade with other States have augmented the general contentment of the Chinese people with the Chinese leadership. External pressures may be stymied by ‘countervailing national norms and value structures that emphasized sovereignty and domestic cohesion more than human rights principles.’\textsuperscript{24} Thus, when seeking to foster the development and protection of human rights in China, one should heed Kent’s caution that ‘[i]n pitting the sovereignty and national prestige of one State against another they may have the counter-productive effect of mobilizing the very citizenry whose human rights are being abused in support of the abusing state.’\textsuperscript{25}

When China and other like-minded States argue for national self-determination as derivative of the principle of State sovereignty and as a basis on which Western discourses of human rights and democracy may not be imposed or transplanted, they are engaging in the same discourses about human rights and democracy as Western States for the normative legitimacy of the discourses and their own preferred modes of governance. In automatically dismissing communitarian notions of rights (and duties) as incompatible with individualism and attendant notions of rights and freedoms, Western States

\textsuperscript{20} Zhong, Chen and Scheb, ‘Political Views from Below: A Survey of Beijing Residents’ (1997) 30 PS: Political Science and Politics 474 at 476. The response rate was 97 per cent.


\textsuperscript{22} Ibid. at 115.


\textsuperscript{25} Kent, ‘A Case Study of Multilateral Monitoring’, supra n 11 at 1.
and scholars are denying the right of other States and their peoples to decide the forms of society in and governance under which they wish to live. Democracy is not necessarily identical to popular sovereignty, and if a people decide that they desire a non-democratic form of governance for their State, it is not merely that non-democratic governance is part of their culture but also that it is accepted by the people as part of their culture, and an ‘appeal to a traditional culture against democracy is still an appeal to a form of populism’. Individualism demands that ‘We should respect their form of government because it is the form that they endorse, even though they do not themselves believe that the legitimacy of their form of government depends upon their own endorsement.’ As Roth explains, in States where communism is subscribed to (by both the state and its people), Western notions of democracy qua elections undermine true and meaningful participation in the political process:

In the Marxist-Leninist view, multi-party competition masks the inalterable structure of power rooted in the concentrated ownership and control of the major means of production, distribution and exchange. In conditions of social stratification, dissent and opposition party activity aimed at challenging the structure of social decisionmaking are effectively marginalized, as a particular social stratum holds de facto control over the major parties, the mass media, the sources of campaign financing, and other channels of influence. Even where politicians espousing change are elected to office, the private sector’s stranglehold over the economy forces efforts at social transformation to yield in the name of preserving the ‘investment climate’. Voters are thus left merely to choose which representatives of private sector interests will administer a public sector of limited scope and autonomy.

Furthermore, popular will may dissipate in the face of a democratically elected government failing its promises and duties to its citizens, while an authoritarian or totalitarian government may continue to be held by its people in esteem. Thus, ‘it cannot be said a priori that coups d’état, emergency rule, or even substantial periods of one-party or coalitional dictatorship violate popular sovereignty.’

26 The notion that communitarianism perforce undermines human rights and freedoms and is subscribed to only in non-liberal States (or perpetuated by their governments in order to legitimate their governance) is also not true, as the example of Ireland shows: see O’Sullivan and Chan, ‘Judicial Review in Ireland and the Relationship between the Irish Constitution and Natural Law’ (2006) 15:2 Nottingham Law Journal 18.
27 Jones, supra n 17 at 210.
28 Ibid. at 211 (emphasis in original).
29 Roth, Governmental Illegitimacy in International Law (Oxford: Oxford University Press, 2000) at 331.
30 Ibid. at 344.
A. The Rule of Law in China: A Hopeless Case?

The United Nations and Western States have sought to foster acceptance by developing States of a rule-of-law model, and the World Bank requires it as a condition of foreign aid, emphasising that ‘[t]he rule of law is a key element of predictability and stability where business risks may be rationally assessed, transaction costs lowered, and governmental arbitrariness reduced.’ An array of problems inheres, however, in transplanting a theory of governance that may not be compatible with a society unwilling to accept it. A rule-of-law model does not by itself guarantee democratic governance or respect for human rights (by the state and among its people). In fact, law has long been used at the hands of despotic or authoritarian governments as a tool to suppress political dissent. As Raz has noted, ‘[i]f rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to beconverted to the rule of law just in order to believe that good should triumph. . . .’

A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. With a culture predicated on communitarian, as opposed to individualistic, norms and values and on resolving differences under the umbrella of social harmony rather than through adversarial litigation, China has been lukewarm in embracing a rule-of-law model in its governance and legal structure. Recent years have nevertheless seen an increasing ambivalence among Chinese State apparatuses and scholars as to the place of law in China. For example, law is seen to be necessary to constrain the executive government and the Party that in a country remains supreme (and subsumes the legislative and judicial branches), and to facilitate economic development. The 1982 Constitution prescribes that government be one of laws and not of men and that law be supreme. Article 41 states that ‘citizens who have suffered losses through infringement of their civil rights by any state organ or functionary

35 Wang, ibid.
36 Articles 5 and 33 1982 Constitution.
have the right to compensation in accordance with law.

Article 51 states that ‘[t]he exercise by PRC citizens of their freedoms and rights may not infringe on the interests of the state, of society, and of the collective, or on the lawful freedoms and rights of other citizens.’ It ought to be noted that restrictions on the exercise of one’s rights or freedoms are not unique in China, as they similarly are contained in human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), and within a democratic State such as Canada in the Canadian Charter of Rights and Freedoms. While China has not ratified the ICCPR, the National People’s Congress in 2004 amended the Constitution by adding a special clause on protection of human rights.

Article 5 of the 1982 Constitution states that ‘[t]he state upholds the uniformity and dignity of the socialist legal system. No law or administrative or local rules and regulations shall contravene the Constitution. All State organs, the armed forces, all political parties and public organisations and all enterprises and undertakings must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organisation or individual may enjoy the privilege of being above the Constitution and the law.’ I argue that the focus of the provision in fact illuminates a rule-of-law model, which requires that the Constitution and laws be the ultimate point of reference in governance, legislative enactments, and individual behaviours. Peerenboom notes that Li Peng’s observance of the constitutionally prescribed two-term limit for premiership and his acceptance of a lower-level position as head of the National People’s Congress, as well as the Party’s withdrawal in 1993 of an amendment to the Constitution that had violated of prescribed procedures, illustrated respect for law that would have been highly unlikely during the Mao era. It is also worth noting that China has resorted to law when intervening in constitutional disputes arising from Hong Kong (even if in doing so it may distort the language of law).

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37 Article 41 1982 Constitution.
38 Article 51 1982 Constitution.
40 1950, 213 UNTS 221, see Articles 8(2), 9(2), 10(2), 11(2), 15(1), 16 and 17.
41 Article 33 of the Canadian Charter of Rights and Freedoms (Part I, Constitution Act 1982, SC 1982, c.79), commonly referred to as the ‘notwithstanding clause’, provides that Parliament or the legislature of a province may derogate from certain express rights provided for in the Charter, and such derogation may continue to subsist upon a new Act of Parliament or a new piece of legislation enacted by a provincial legislature.
42 Article 33(3) 1982 Constitution.
43 Article 5 1982 Constitution.
Dowdle has pointed out, even if bad faith underlies the Party’s claims that it adheres to the rule of law, the fact that such claims are made evidences the normative appeal of a rule-of-law model in China. Dowdle also notes that constitutionalism and the rule of law have increasingly been used in the power wrangling between the National People’s Congress and the Party.

Furthermore, Dowdle cautions against deducing from particular cultural rational value orderings to particular rational value orderings at the individual level, as the collective decision-making process is highly dependent on variable options, information flows, and expectations of repercussions. Scholars of Chinese culture are able to find communitarian and individualistic priorities to co-exist in Chinese society. Moreover, in many settings, formal law, as opposed to informal rules, may not be the best means by which to attain social co-ordination or justice. Although the concept of guanxi, or informal network, suffers a deficit of legitimacy from the standpoint of a rule-of-law model, given its all-encompassing omnipotence in Chinese behaviours, it may serve disciplinary and co-ordinating functions that supplant the transparency, accountability and predictability the rule of law is presumed to provide. As Xue noted in her 2011 Hague Academy of International Law Lectures on contemporary Chinese perspectives of international law, the importance and values of informal network are not confined to China but can be found in all societies. The rule of law is as much about the supremacy of law as an

50 Nathan and Shi, supra n 21 at 117, similarly observe that ‘findings of cultural distinctiveness are equally an [artefact] of the interpretive approach. In this approach, cultural attributes are conceptualized with such specificity or complexity that what is portrayed is by definition unique…. If we were to ask Americans whether they function through kuan-hsi, they would say no, because they would not know what we were talking about. If we were to ask them whether they sometimes get things done through networks or connections, or whether they consider it proper to help a relative or friend under certain circumstances, or whether it is important to cultivate personal relations with people from whom one wishes to get favors, many of them would say yes, perhaps as many in the United States as in China.’ Moore, ‘How Difficult is it to Construct Market Relations? A Commentary on Platteau’ (1994) Journal of Development Studies 818 at 819, notes that ‘it is widely agreed that, even in societies where the rule of law is respected, law plays only a limited role in regulating commercial transactions.’
expression and exercise of a distinct, but by no means unique or perforce desirable or essential, political value. Enforced legality under a rule-of-law model ignores the structural problems China must address in order for development of a sound legal structure to firmly take hold, and conflates itself with an ultimate good. The shortcomings and problems a rule-of-law model presents, particularly in the context of China, meanwhile escape scrutiny, and useful lessons from China’s experience that might enhance a rule-of-law model are overlooked or dismissed. Human agency and human differences in better understanding, co-ordination and co-operation both among States and among individuals are devalued.\(^{51}\)

### B. Domestic Human Rights Protection in China

Before proceeding to explore China’s approach to international human rights law, one must ask: Is human rights protection really non-existent under China’s Constitution and laws?

In Chinese lexicon, citizen as a concept is generally understood to mean ‘the masses’.\(^{52}\) As ‘Confucianism emphasizes that a genuine community is not composed of mutually disinterested egoistic individuals, but is composed of virtuous members thinking of shared goals and values over one’s own’,\(^{53}\) historically the Chinese tended to view the notion of human rights as one stemming from selfishness. The increasing affluence of many Chinese people, especially in cities, and their growing awareness of international human rights norms and Western discourses about liberal democracy have already generated local demand for political reform, including improved protection of their public and private rights, and a say in the elections or selections of their representatives, at least at sub-national and local levels.\(^{54}\)

While I do not suggest that China is a model international citizen when it comes to human rights, human rights are taken seriously in China, by the

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54 As Peerenboom has pointed out, ‘the public has higher expectations of the government. Businesses and a rising middle class expect a government that facilitates economic transactions and a legal system that protects their property rights. Citizens have a greater sense of their rights and are more likely to appeal to law and constitutional principles in making their claims, even if they also rely on appeals to broader normative principles such as [just] government and on social networks and other mechanisms to achieve their ends. In response to public pressure and its own internal development logic, the government has taken steps to enhance the professionalism of civil servants, police, judges, and procurators.’ See ‘Law and Development of Constitutional Democracy in China: Problem or Paradigm?’ (2005–2006) 19 Columbia Journal of Asian Law 185 at 226.
leadership and among the people, in ways that may converge with or diverge from dominant Western interpretations. In turn, China's State behaviours vis-à-vis human rights, including its recognition of human rights and freedoms in its territory, as a microcosm of the symbiosis between China's exercise of sovereignty and the international legal order, should thus be taken seriously. In order to understand and underscore how China's culture, Party-State politics and attitudes to law may affect the depth and extent of human rights protection and development in China that may be enhanced or undermined by a rule-of-law model, I now turn to discuss how workers' rights (which have developed partly as a result of the government's suppression of dissent on Tiananmen Square in June 1989), women's rights (despite the patriarchal nature of Chinese society), and privacy rights (despite China's communitarian culture) have come to be recognised, protected and understood in China.

(i) Workers' rights

Workers' rights, Leary maintains, are a good indicator of the extent to which a State recognises and protects the rights of its citizens, for workers constitute the bedrock of a society. After its large-scale suppression of protests on Tiananmen Square in June 1989, the PRC government was disinclined from suppressing labour protests so long as they remained localised and did not escalate into general strikes. Lee has observed that labour protests in China have since discarded the banner of class struggle and begun to revolve around the rule of law and rights. In China, workers do not enjoy a right to strike, which was removed when the 1982 Constitution was promulgated and was not revived by the 1992 Trade Union Law. Any demonstration or


56 Chen discerns that 'the government is afraid that such incidents thwart one of its paramount goals – social and political stability. But on the other hand, crackdowns against people who make no political claims and only demand a minimum livelihood would place the government in a morally and politically indefensible position. Suppressing these protests would make the government look indifferent to the condition of the working class, and cause even greater resentment among workers. Thus, the government has adopted a policy of conciliation and has emphasized the use of “persuasion” and “education” to resolve the conflicts... defused through the state's effective implementation of modest compensatory measures aimed at temporarily alleviating the economic plight of laid-off workers.' See 'Subsistence Crises, Managerial Corruption and Labour Protests in China' (2000) 44 China Journal 41 at 61-2.


assembly requires prior approval of the local public security bureau, which is rarely granted.\(^5^9\)

However, the passage of a Labour Law in 1994\(^6^0\) marked a crucial change in labour relations in China, in particular through the All-China Federation of Trade Unions. The Law enables arrangements for collective bargaining on the basis of tripartite representation of trade unions, investors and the State bureaucracy. The Law, which governs all employment relationships in China,\(^6^1\) is organised into thirteen chapters with one hundred and seven provisions. Article 3 in Chapter 1 guarantees, \textit{inter alia}, workers’ rights to equality in employment, freedom of employment, labour safety and sanitation protection, and remuneration for work, rest, holidays and leaves of absence. Article 7 guarantees ‘the right to participate in and organise trade unions in accordance with law’,\(^6^2\) and states that trade unions ‘shall represent and safeguard the legitimate rights and interests of labourers, and stage activities independently in accordance with law’.\(^6^3\) Article 8 states that workers shall take part in democratic management through workers’ congress, workers’ representative assembly, or any other forms in accordance with law, or consult with the employer on an equal footing about protection of the legitimate rights and interests of labourers.\(^6^4\) Articles 12 and 13 in Chapter 2 prescribe that the State create and expand employment opportunities and encourage enterprises to do the same, and that gender discrimination in employment be outlawed, with special protection for female and young workers laid down in Chapter 7. The Law pays prominent attention to the role of employment contracts, with Chapter 3 devoted to the nature and requirements of contractual stipulations, including collective agreements. Chapter 4 places emphasis on work conditions, with Article 36 stipulating a maximum of eight work hours a day and forty-four work hours a week, Article 38 guaranteeing one day of rest per week, and Article 44 mandating overtime pay. Articles 48 and 49 in Chapter 5 stipulate minimum wage standards, while Chapter 6 stipulates standards and requirements for labour sanitation and safety. Chapter 8 provides for professional training, whereas Chapter 9 governs requirements of social insurance and welfare treatment. Importantly, Chapter 10 stipulates standards and processes for settlement of labour disputes. Chapter 11 specifies requirements for supervision and inspection of compliance with the Law, and Chapter 12 details the legal consequences for non-compliance. Josephs argues that ‘the Law

\(^{5^9}\) Chen, supra n 56 at 60–1.

\(^{6^0}\) Labour Law of the People’s Republic of China, adopted at the Eighth Meeting of the Standing Committee of the Eighth National People’s Congress on 5 July 1994 and promulgated by Order No 28 of the President of the People’s Republic of China on 5 July 1994, effective as of 1 January 1995.

\(^{6^1}\) Article 2 Labour Law.

\(^{6^2}\) Article 7 Labour Law.

\(^{6^3}\) Ibid.

\(^{6^4}\) Article 8 Labour Law.
appears to acknowledge that the same inequality of bargaining power between employer and employee which prevails in market economies can also exist in a transition economy, and therefore the worker requires added legal protection, including the ability to enforce his rights as a private litigant.\(^{65}\)

Despite enthusiasm about the roles the WTO may play in promoting and protecting human rights, including worker’s rights, in China and generally,\(^{66}\) I have explained elsewhere\(^{67}\) that the WTO is not a suitable forum to help promote or protect human rights, including workers’ rights in China, for its capacity is constrained by its constituting legal framework that is the 1994 Marrakesh Agreement Establishing the WTO which does not confer the WTO, with jurisdiction to deal with matters that fall outside the ambit of the Agreement and its Annexes.\(^{68}\)

The WTO’s lack of jurisdiction to take into account and enforce human rights norms in its dispute settlement and enforcement mechanisms does not absolve its Members from their general and continuing obligation to guarantee and protect international human rights norms including those embodied in other treaties that they have ratified. In light of the jurisdictional limitations of the WTO, it has been suggested that the International Labour Organization (ILO), a specialised agency of the United Nations and a tripartite organisation of governments, employers and union representatives, may be suitable for the development and protection of workers’ rights in China.\(^{69}\) Acknowledging that

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\(^{66}\) In the first preambular paragraph of the Agreement Establishing the World Trade Organization, (1994) 33 ILM 1125, the Contracting Parties state that ‘their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development’. In his report to the 55th session of the United Nations General Assembly, United Nations Secretary-General Kofi Annan stated that ‘[t]he goals and principles of the WTO Agreements and those of human rights do therefore share much in common. Goals of economic growth, increasing living standards, full employment and the optimal use of the world’s resources are conducive to the promotion of human rights, in particular the right to development. Parallels can also be drawn between the principles of fair competition and non-discrimination under trade law and equality and non-discrimination under human rights law. Further, the special and differential treatment offered to developing countries under the WTO rules reflects notions of affirmative action under human rights law.’ See Globalization and its Impact on the Full Enjoyment of All Human Rights: Preliminary Report of the Secretary-General, 55th Session, 31 August 2000, A/55/342 at para 4.


\(^{68}\) Ibid. at 617–20.

the ILO lacks effective enforcement mechanisms.\(^{70}\) Ehrenberg proposes that the ILO and the WTO, with the latter's compulsory dispute settlement and enforcement mechanisms, should be merged such that adherence to international human rights and labour rights and standards may be sought and assured in respect of production of such goods that another WTO Member might import. Believing that such collaboration could be used as a model to demonstrate how cooperation between multilateral organizations can be effectively utilized to effectuate international human rights and labor rights policies, and optimize world public order,\(^{71}\) Ehrenberg provides detailed guidelines as to how such collaboration might proceed.\(^{72}\) In its Singapore Ministerial Declaration,\(^{73}\) the WTO acknowledged the ILO's competence in the field of labour rights and standards and noted its complementariness with the role and functions of the ILO.\(^{74}\)

However, only twenty-one of the one hundred and eight-nine ILO conventions are legally binding on China.\(^{75}\) China's general rejection of international tribunals as a means to settle disputes between States, let alone between a State and its citizens, the effective absence in China of a right of association, and the fact that such a proposed joint enforcement mechanism will require the consent of all contracting parties to both the Marrakesh Agreement and the numerous ILO conventions, render Ehrenberg's project a definite impossibility. Indeed, Trebilcock and Howse warn that 'attachment of economic sanctions to the powers of the ILO may destabilize the organization, causing States to withdraw from membership or to withhold ratification of its Conventions to an even greater extent than is the case at present.'\(^{76}\)

The ILO Declaration on Fundamental Principles and Rights at Work (ILO Declaration)\(^{77}\) states that all Members of the ILO, even if they have not ratified the conventions in question, have an obligation arising from the very fact of

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70 Ibid. at 164.
71 Ibid. at 165.
72 Ibid. at 165–75.
74 The Declaration, ibid. at para 4, states that the WTO '[renews] our commitment to the observance of internationally recognised core labour standards. The International Labour Organization (ILO) is the competent body to set and deal with these standards, and we affirm our support for its work in promoting them. We believe that economic growth and development fostered by increased trade and further trade liberalisation contribute to the promotion of these standards. We reject the use of labour standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question. In this regard, we note that the WTO and the ILO Secretariats will continue their existing collaboration.'
75 For a complete list of ILO Conventions that China ratified as at 7 August 2013, see ILO website at: www.ilo.org/dyn/normlex/en/f?p=3000:11200:0::NO::P11200.COUNTRY.ID:103404 [last accessed 13 August 2013].
membership in the Organisation to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those conventions. On the basis of the Declaration, Petersmann argues that ‘UN membership entails legal obligations to respect core human rights,’ and that the rules and principles that ILO conventions and ‘other modern human rights instruments’ have set out illustrate that certain human rights have reached the status of \textit{erga omnes} obligations of States and international organisations. However, Petersmann fails to address the cardinal principle of international law that the consent of a State must have been obtained before a treaty obligation may be imposed, and membership in an international organisation does not by itself constitute consent to be bound by any treaties or declarations as might be adopted under the framework of the organisation. The Annex to the ILO Declaration specifically states that the Declaration ‘is of a strictly promotional nature.’ Lastly, legal liability cannot be ascribed to Member States of an international organisation whose collective decision violates international law (although it is noteworthy that China has indicated its support for legal liability to be ascribed to Member States individually).

(ii) Women’s rights

A special area of Chinese domestic human rights law has emerged in the past two decades, known as social protection law or social law, designed to protect specific groups of citizens deemed by the State to be socially vulnerable. Reflective of the patriarchal and paternalistic nature of Chinese society, youth, the elderly and women are considered especially socially vulnerable and in need of legal protection. Palmer observes that ‘for the protection of the young we see a strongly controlling framework of rules and policies, seemingly directed at creating the model Chinese socialist citizen. In contrast, in the legal support offered to the elderly, there is a robust and seemingly more

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78 Ibid. at para 2.
80 Ibid. at 617.
81 Ibid.
82 ILO Declaration on Fundamental Principles and Rights at Work and Annex, supra n 77, Annex: Follow-up to the Declaration at para 2.
83 See Higgins, \textit{Report to Institut de droit international}, (1995) 66-I Yearbook of Institut de droit international 375; and Resolution of Institut de droit international on the Legal Consequences for Member States of the Non-Fulfillment [sic] by International Organizations of their Obligations towards Third States, Session of Lisbon, 1 September 1995.
genuine attempt to protect and assist the elderly to deal with difficulties of age discrimination.' Palmer argues that the purpose of legal protection afforded on the basis of age is to preserve ‘a system of gerontocracy’.

Given the inferior positions of women and girls in Chinese society, I wish to focus here on how women’s rights protection has been implemented or stonewalled in China since 1980, when China ratified the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), by exploring the 1992 Law on the Protection of Rights and Interests of Women (Women’s Protection Law) as amended in 2005.

Article 2 of the amended Women’s Protection Law states that ‘[e]quality between men and women is a basic State policy’ and prohibits discrimination, maltreatment, abandonment and physical abuse of women. Article 3 mandates that the State Council and municipal authorities at or above the county level formulate programmes for women’s development. Articles 6 and 7 state that municipal authorities at or above the county level, trade unions and local women’s federations at various levels (with emphasis particularly laid on the All-China Women’s Federation) shall ensure, represent, uphold and strive to

87 Ibid. at 173 n 3.
88 Ibid. at 154–5 for a summary of the positions of women and girls in Chinese society.
89 1979, 12439 UNTS 13, China, however, has not acceded to the Optional Protocol to CEDAW that would enable an individual to submit a complaint to the Committee on the Elimination of Discrimination against Women, which since January 2008 is serviced by the Office of the High Commissioner for Human Rights.
90 Adopted at the Fifth Session of the Seventh National People’s Congress on 3 April 1992, as amended in accordance with Decision on Amending the Law of the People’s Republic of China on the Protection of Rights and Interests of Women adopted at the 17th Meeting of the Standing Committee of the Tenth National People’s Congress on 28 August 2005.
91 Palmer is sceptical about the extent to which the All-China Women’s Federation may be able or willing to enhance the promotion and protection of women’s rights in China. He notes, supra n 85 at 171, that the Federation is ‘a quasi-governmental body’ intended as an intermediary between the Party-State and society, and that it is predominantly the Party-State that receives information. Furthermore, the Federation seeks to act for women collectively in a way that undermines an individual woman’s rights and interests and potentially her complaint about a particular violation of the Law. It does not challenge the Party-State’s understanding and views of the nature and implications of womanhood, a woman’s human agency and her rights and interests. In addition, the Federation defines its role in terms of promoting equality between men and women and not gender equality, thereby maintaining the status quo that men, their positions in society and what and how they do things in public or in private are the standards to which women should adhere. Lastly, as a large, nation-wide representative body, with close links to the Party-State leadership, the Federation tends to operate in a top-down manner. Its endeavours at the grass-roots level and its responsiveness to the local community are limited and its activities and campaigns tend to prioritise the Party-State’s axiomatic goals of economic development rather than women’s welfare: ibid. The Federation also ‘continues to call upon women to contribute more in social, moral and family affairs. From the point of view of the party-state leadership, an
safeguard the rights and interests of women. Article 14 requires that authorities shall ensure that any complaint about a violation of the Law be addressed properly. Article 52 enables a woman to request a relevant government department to remedy a violation of the Law or to commence arbitration or legal proceedings, with legal aid or judicial relief where necessary. However, as adversarial litigation is generally not preferred in China, women are urged to seek recourse to administrative processes or mediations (even though mediations in China are quite evaluative and coercive). Palmer criticises the Law as vague and in want of a clear definition of ‘discrimination against women’. Gender equality in China is valued not for its own sake but for women to fully contribute to China’s ‘socialist modernisation’.

Article 16 seeks to ensure equality of access to educational institutions by stipulating that, except for special subjects (which are not specified or defined), a school may not refuse to enrol women or raise enrolment standards vis-à-vis women on grounds of their gender. Palmer maintains that enhancement of gender equality on matters of education is of great importance as social status in China is heavily dependent upon education.

Articles 22 to 25 guarantee gender equality on matters of employment, pay, promotion and social security, although the position of women, even in cities, has not improved since the early 1990s. Article 26 provides women with special protection during menstrual period, pregnancy, obstetrical period and nursing period; under the same provision, women may not be assigned any work or physical labour unsuitable to women. Article 27 prohibits lowering a female employee’s salary or unilaterally terminating her employment on grounds of her marriage, pregnancy, maternity leave or breast-feeding. Article 28 extends to women ‘social insurance, social relief, social welfare and health care services’. Sexual harassment is now proscribed in China under Article 40, while Article 42 protects a woman’s rights of reputation, honour, privacy and portrait. Given the increasing affluence of the Chinese people and the seemingly endless construction of
properties, a woman’s legal equality on matters of property ownership is a prime concern and is affirmed by Article 30, while Article 32 provides for women equal rights of compensation for land expropriated or requisitioned by the state.

Domestic violence, previously treated as a non-issue, is now prohibited by national legislation. The 1980 Marriage Law as amended in 2001\(^7\) declares that ‘[d]omestic violence shall be prohibited. Maltreatment and desertion of one family member by another shall be prohibited.’\(^8\) Articles 43 to 46 of the amended Marriage Law deal with succour measures and legal liability where domestic violence is a reason. Article 46 of the amended Women’s Protection Law stipulates that ‘[d]omestic violence against women is prohibited. The State takes measures to prevent and stop domestic violence. The departments of public security, civil affairs, judicial administration, etc, as well as urban and rural mass organisations of self-government at the grass-roots level and public organisations shall, within the scope of their respective duties, prevent and stop domestic violence, and provide succour to female victims.’\(^9\) Palmer argues that the enactment of these provisions was not only due to pressure from civil society in China, but also China’s concern that the Committee on the Elimination of Discrimination against Women otherwise might criticise its failure to implement CEDAW.\(^10\)

Related to domestic violence is China’s one-child policy, introduced in 1978 to contain population growth. The policy is inconsistent with Article 16(1)(e) of CEDAW, which states that ‘States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women[, t]he same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.’\(^11\) The policy also contravenes Article 12(1) of CEDAW, which states that ‘States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.’\(^12\) China might argue that its one-child policy is not

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\(^7\) Adopted at the Third Session of the Fifth National People’s Congress on 10 September 1980, as amended in accordance with Decision regarding the Amendment of Marriage Law of the People’s Republic of China adopted at the 21st Session of the Standing Committee of the Ninth National People’s Congress on 28 April 2001.


\(^9\) Article 46 Women’s Protection Law.

\(^10\) Palmer, supra n 85 at 163.

\(^11\) Article 16(1)(e) CEDAW.

\(^12\) Article 12(1) CEDAW.
inconsistent with the provisions as the policy applies equally to men. However, responsibilities for family planning (especially the bearing of a son) are always regarded in Chinese society as those of a woman, with family planning, in particular a woman’s failure to bear a son, often a major cause of domestic violence.\(^{103}\) While Article 51 of the amended Women’s Protection Law provides that women have ‘the freedom not to bear any child’\(^{104}\) the provision ‘rests uneasily with provisions in Article 17 of the Population and Birth Planning Law 2001 which declare that: ‘citizens have the right to reproduction.’\(^{105}\) Palmer argues that a husband may rely on Article 17 to commit marital rape.\(^{106}\)

Last but not least, given the traditional preference for sons, forced abortions and female infanticides are prevalent in China. Such practices are now specifically outlawed, with Article 38 of the amended Women’s Protection Law stating that ‘[w]omen’s right of life and health is inviolable. Drowning, abandoning or cruel infanticide in any manner of female babies is prohibited; discriminating against or maltreating of women who give birth to female babies or women who are sterile is prohibited; cruel treatment causing bodily injury to or death of women by means of superstition or violence is prohibited; maltreating or abandoning women who are ill, disabled and aged is prohibited;’\(^{107}\) Of course, as with all laws, whether such practices will in time diminish or cease depends ultimately on cultural and behavioural changes through education, public appeals and advertising, and other available means.

While the amended Women’s Protection Law serves important purposes, objectives and results, and is a laudable step to enhancing the positions of women and girls in society, in public affairs, in private dealings and at home, one purpose and objective remains amiss: the Law tells people and authorities what to do and what not to do, instead of setting, instigating, and encouraging a foundation upon which individuals’, authorities’, and society’s behaviours and attitudes to women and girls may evolve for the better. Furthermore, the Law in its entire text refers to women almost invariably in the plural sense,\(^{108}\) with the result that a woman or a girl, as an individual human being with

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\(^{104}\) Article 51 Women’s Protection Law.

\(^{105}\) Palmer, supra n 85 at 168.

\(^{106}\) Ibid. Palmer, ibid. at 176 n 50, notes that ‘[t]he issue of marital rape is one of considerable controversy within Chinese legal circles, with the possibility that a husband could be considered to have raped his spouse having been accepted in principle as an offence, but dealt with very conservatively as a matter of judicial practice so that very few prosecutions have actually convicted a husband of the rape of his wife.’

\(^{107}\) Article 38 Women’s Protection Law.

\(^{108}\) Of the fifty-nine substantive Articles in the amended Women’s Protection Law, a woman is referred to in the singular sense only in ten Articles. Girls and female babies are always referred to in the plural sense in all relevant Articles.
her own human agency, dignity and protection from harm, is entirely over-
looked. A husband or his relative accused of a violation of the Law vis-à-vis
his wife or female baby could well argue that a violation of the rights or inter-
est of a woman or a female baby is not in breach of the Law.

(iii) Privacy rights

I conclude my discussion of domestic human rights protection in China with
the issue of privacy rights, given the communitarian nature of Chinese society
and the interplay between privacy rights and workers’ and women’s rights.
Privacy is strongly correlated with how a society is governed. As Wacks dis-
cerns, ‘at the heart of the concern to protect “privacy” lies a conception of the
individual and his or her relationship with society.’

In discussing privacy in China, it is pertinent to note that privacy as a legal
concept is of relatively recent origin in Western States. Although Warren and
Brandeis first formulated the concept in an 1890 Harvard Law Review article,
privacy has still not been recognised as a constitutional right per se in most
Western States, including the United States. In its 2007 ranking of twenty-
seven European Union and nineteen other States, including China as well as
Taiwan, the non-governmental organisation (NGO) Privacy International
ranked China second last on the list with a score of 1.3 out of 5.0 (tied with
Malaysia and Russia), denoting an ‘endemic surveillance society’. Both the
United Kingdom (1.4) and the United States (1.5) fell under the same category.

In Chinese language, the word si (private/privacy) has generally negative conno-
tations (except in the context of family) such as secrecy and selfishness, whereas
gong (public) and guan (official) are used in relation to fairness and justice.
McDougall argues that ‘[t]he emphasis on public service as a personal goal and
on the public good as a national objective by Chinese political figures through-
out the greater part of the twentieth century is partly responsible for the percep-
tion that privacy as a value is foreign to China.’ In Confucian culture, family
is considered a realm separate from the State, within which individuals may
enjoy freedom from public scrutiny—albeit as a family unit and not as

Nevertheless, the excesses of the Red Guards during the Cultural Revolution
and China’s subsequent economic and political reform have resulted in increas-
ing acceptance in society, by the State and among individuals, of the notion
that certain activities should be regarded as entirely personal and free from

around the World.’
112 McDougall, ‘Privacy in Modern China’ (2004) 2 History Compass 1.
113 Ibid. at 2.
scrutiny outside the confines of one’s home. Privacy is now recognised and protected in China as a constitutional and legal right to reputation. Under Article 38 of the 1982 Constitution, ‘[t]he personal dignity of citizens of the People’s Republic of China is inviolable. Insult, libel, false charge or frame-up directed against citizens by any means is prohibited.’ Article 39 guarantees the inviolability of the home and prohibits unlawful search or intrusion. Article 40 provides that ‘[n]o organization or individual may, on any ground, infringe upon the freedom and privacy of citizens’ correspondence except in cases where, to meet the needs of state security or of investigation into criminal offences, public security or procuratorial organs are permitted to censor correspondence in accordance with procedures prescribed by law.’ Article 252 of the Criminal Law of the People’s Republic of China prohibits infringement of a person’s ‘right of communication freedom by hiding, destroying, or illegally opening’ of letters belonging to another, and illegal search or intrusion of another person or his or her home.114 Article 101 of the General Principles of the Civil Law protects a ‘right of reputation’ and states that ‘[t]he personality of citizens shall be protected by law, and the use of insults, libel or other means to damage the reputation of citizens or legal persons shall be prohibited.’115 However, information relating to public affairs or immoral conduct is not protected.116 As the Party-State controls the media and alternative sources of information, the Internet, which in 2006 was used by 123 million Chinese people,117 has raised significant issues relating to privacy protection. According to a Chinese government survey, 23.2 per cent of Internet users and 18.6% of non-users regarded Internet use as very likely to lead to unauthorised disclosure of personal information.118 Meanwhile, perpetrators of domestic violence are increasingly asserting privacy as a pretext to circumvent sanctions. Thus, privacy rights in China have paradoxically helped construct a realm to which women’s lives and voices are relegated as unimportant or irrelevant to (male) society.119

114 Adopted at the Second Session of the Fifth National People’s Congress on 1 July 1979, as amended at the Fifth Session of the Eighth National People’s Congress on 14 March 1997 and promulgated by Order No 83 of the President of the People’s Republic of China on 14 March 1997.

115 Adopted at the Fourth Session of the Sixth National People’s Congress on 12 April 1986 and promulgated by Order No 37 of the President of the People’s Republic of China on 12 April 1986.


118 Ibid. at 159.

C. China’s Approach to International Human Rights Law

The five-phase spiral model developed by constructivist international relations theorists posits a network of domestic and international NGOs, together with United Nations monitoring mechanisms, with the capacity to influence a State’s approach to its identities and short- and long-term State interests and behaviours through socialisation with international human rights norms. The five phases are, namely, a State’s marked deterioration in its human rights record (phase one), NGOs being able to receive information about the State’s human rights violations (phase two), opportunistic concessions from the State (phase three), the State’s recognition of international human rights norms (phase four), and the State’s alignment of its behaviours with international human rights norms (phase five).

While one should be sceptical about such a linear and teleological approach to human rights development that posits as its pinnacle compliance with international human rights norms as interpreted by Western States and scholars, most observers of China’s human rights record would likely argue that China is in the midst of phase three in its socialisation with international human rights norms, with its occasional release of noted political prisoners being the most illuminating (and intentionally so, for Western States and media). However, as Nathan has observed, ‘China has behaved as a realist power, making concessions it perceived as necessary to influence States with which it was interacting and not making them when they were not seen as necessary’. Furthermore, it is important to note that ‘[t]he arbitrariness with which a regime can, in response to political pressure, release an individual who had been sentenced to prison may be just as much a signal of systemic deficiencies as the arbitrariness with which a regime can arrest and imprison an individual.’ The release of a few noted political prisoners necessarily entails that China is under less pressure, at least at the time of such release and surrounding publicity, to abate its human rights violations and that most political prisoners continue to be under house arrest, imprisoned or tortured.

China does not deny the validity of international human rights law; it maintains that it does not commit human rights abuses on a widespread or systemic basis. As Fleay argues, ‘denial is still considered to be part of socialisation as it reflects the fact that at least the State acknowledges that its international reputation has been tarnished, and the human rights concept is not usually rejected outright.’\(^\text{124}\) China maintains that, as a developing State, economic, social and cultural rights must take precedence over civil and political rights. In its 2012 *White Paper on National Human Rights Action Plan of China (2012–2015)*,\(^\text{125}\) China maintained that notwithstanding its economic development, it remained a developing State ‘fraught with problems from unbalanced, uncoordinated and unsustainable development’,\(^\text{126}\) which given its vast territory and the huge disparity in terms of wealth within its populace, particularly between people in cities and those in rural areas, was not an untrue statement. China reiterated its position that it ‘will continue to give priority to the protection of the people’s rights to subsistence and development. It will take proactive measures to ensure and improve the people’s livelihood, spare no efforts to solve the problems of immediate concern to the people, and improve the level of protection of economic, social and cultural rights, so as to ensure that the benefits of development are shared by all members of society.’\(^\text{127}\) China also stated that it ‘endeavours to develop socialist democracy, improve the socialist rule of law, expand the orderly political participation of citizens and [guarantee] people’s civil and political rights in an all-round way.’\(^\text{128}\)

While Western States and scholars may criticise China’s emphasis on economic, social and cultural rights at the expense of civil and political rights, human rights discourses have invariably focused on the latter and relegated the former to lesser significance. In its statement to the World Conference on Human Rights in Vienna in 1993, the United Nations Committee on Economic, Social and Cultural Rights stated:

\[\text{[T]he shocking reality against the background of which this challenge must be seen, is that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate action. In effect, despite the rhetoric, violations of civil and political rights continue to be treated}\]

\(^{124}\) Fleay, supra n 121 at 46.

\(^{125}\) Information Office of the State Council of the People’s Republic of China, June 2012.

\(^{126}\) Ibid. at Introduction.

\(^{127}\) Ibid. at Chapter I Economic, Social and Cultural Rights.

\(^{128}\) Ibid. at Chapter II Civil and Political Rights.
as though they were far more serious, and more patently intolerable, than
massive and direct denials of economic, social and cultural rights.129

Although the eventual 1993 Vienna Declaration and Programme of Action
reaffirmed that ‘[a]ll human rights are universal, indivisible and interdepen-
dent and interrelated,’130 issues relating to realisation of economic, social
and cultural rights are left unaddressed in almost the entire Declaration and
Programme.131

That having been said, there is no evidence that economic, social and cultural
rights and civil and political rights are mutually exclusive or that economic,
social and cultural rights will be realised if civil and political rights are to be
sidelined.132 The European Court of Human Rights in Airey v Ireland133 stated
that even ‘[w]hilst the [European Convention on Human Rights] sets
forth what are essentially civil and political rights, many of them have implica-
tions of a social or economic nature. . . . the mere fact that an interpretation of
the Convention may extend into the sphere of social and economic rights
should not be a decisive factor against such an interpretation; there is no
water-tight division separating that sphere from the field covered by the
Convention.’134 The 2000 Human Development Report explained the close correl-
ations both between human development and human rights and between
economic, social and cultural rights and civil and political rights.135 China’s
handling of the severe acute respiratory syndrome epidemic during 2002–2003
vividly demonstrated the importance of civil and political rights, including free-
dom of the press, in the protection of all human rights, including the right to
health.

para 5.
131 Chapman, ‘A “Violations Approach” for Monitoring the International Covenant on Economic,
132 Illustrating the commensurability between civil and political rights and economic develop-
ment in East Asia where Confucianism is prevalent, Inoue refers to Japan’s post-World War II
democracy (albeit imposed by the United States) and economic development and maintains
that China’s argument that on account of its need for economic development it should not
be held to developed States’ human rights standards is self-defeating in its quest for equal re-
spect on the global stage as it ‘suppresses or rationalizes abominable Western practices past
and present, such as colonialism, slavery, racism, fascism, anticommunist crusades
(McCarthyism, Vietnam War), and so on.’ See ‘Liberal Democracy and Asian Orientalism’, in
Bauer and Bell (eds), The East Asian Challenge for Human Rights (Cambridge: Cambridge
University Press, 1999) 27 at 41. With human rights starting to develop in Western States
only after World War II, the Orientalist argument that China continues to rely on to justify
its human rights record ‘traps the West as well as Asia in a distorted perception of self-
identity’ (at 42), which stereotypes China as inferior to Western States that only serves as
‘an epistemological device for guaranteeing Western hegemony over Asia’ (at 39).
133 A 32 (1979); 2 EHR 305.
134 Ibid. at para 26.
China stresses that human rights are matters within the internal affairs and jurisdiction of a State and that a State is bound by the United Nations Charter and customary international law not to interfere in other States’ internal affairs, a position China has expressed in its voting behaviour and argumentation within the United Nations Security Council.\(^{136}\) In its 1991 *White Paper on Human Rights in China*,\(^ {137}\) China maintained that China is in favour of strengthening international cooperation in the realm of human rights on the basis of mutual understanding and seeking a common ground while reserving differences. However, no country in its effort to realise and protect human rights can take a route that is divorced from its history and its economic, political and cultural realities. . . . It is neither proper nor feasible for any country to judge other countries by the yardstick of its own mode or to impose its own mode on others. Therefore, the purpose of international protection of human rights and related activities should be to promote normal cooperation in the international field of human rights and international harmony, mutual understanding and mutual respect. Consideration should be given to the differing views on human rights held by countries with different political, economic and social systems, as well as different historical, religious and cultural backgrounds. International human rights activities should be carried on in the spirit of seeking common ground while reserving differences, mutual respect, and the promotion of understanding and cooperation.\(^ {138}\)

China’s position was restated in the 1993 Bangkok Declaration on Human Rights.\(^ {139}\) The Bangkok Declaration states, *inter alia*, that Asian States ‘recognise that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds’,\(^ {140}\) and that ‘States have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms, and also recognise


\(^{138}\) Ibid. at Chapter X-Active Participation in International Human Rights Activities.


\(^{140}\) Ibid. at para 8.
that remedies must be sought and provided primarily through such mechanisms and procedures.\textsuperscript{141} In its 2004 \textit{White Paper on Progress in China's Human Rights Cause in 2003},\textsuperscript{142} China stated thus:

China holds that the development of human rights is an important mark of the continuous progress of the civilisation of human society, and an important part of the progressive current of world peace and development. Full realisation of human rights is the common goal of countries throughout the world as well as an important target for China in her efforts to build a moderately prosperous society in an all-round way, as

\textsuperscript{141} Ibid. at para 9. Reference should be had also to paragraph 3, which ‘stresses the urgent need to democratise the United Nations system, eliminate selectivity and improve procedures and mechanisms in order to strengthen international cooperation, based on principles of equality and mutual respect, and ensure a positive, balanced and non-confrontational approach in addressing and realising all aspects of human rights’; paragraph 4, which ‘discourages any attempt to use human rights as a conditionality for extending development assistance’; paragraph 5, which ‘emphasises the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure’; paragraph 6, which ‘reiterates that all countries, large and small, have the right to determine their political systems, control and freely utilise their resources, and freely pursue their economic, social and cultural development’; paragraph 7, which ‘stresses the universality, objectivity and non-selectivity of all human rights and the need to avoid the application of double standards in the implementation of human rights and its politicisation, and that no violation of human rights can be justified’; paragraph 10, which ‘reaffirms the interdependence and indivisibility of economic, social, cultural, civil and political rights, and the need to give equal emphasis to all categories of human rights’; paragraph 17, which ‘reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights, which must be realised through international cooperation, respect for fundamental human rights, the establishment of a monitoring mechanism and the creation of essential international conditions for the realisation of such right’; paragraph 19, which ‘affirms that poverty is one of the major obstacles hindering the full enjoyment of human rights’; paragraph 20, which ‘affirms also the need to develop the right of humankind regarding a clean, safe and healthy environment’; paragraph 22, which ‘reaffirms Asian States’ strong commitment to the promotion and protection of the rights of women through the guarantee of equal participation in the political, social, economic and cultural concerns of society, and the eradication of all forms of discrimination and of gender-based violence against women’; paragraph 23, which ‘recognises the rights of the child to enjoy special protection and to be afforded the opportunities and facilities to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity’; paragraph 24, which indicates Asian States’ embrace of the important role played by national institutions in the genuine and constructive promotion of human rights, and their belief that the conceptualisation and eventual establishment of such institutions are best left for the States to decide’; paragraph 25, which ‘acknowledges the importance of cooperation and dialogue between governments and non-governmental organisations on the basis of shared values as well as mutual respect and understanding in the promotion of human rights, and encourage the non-governmental organisations in consultative status with the Economic and Social Council to contribute positively to this process in accordance with Council resolution 1296 (XLIV)’; paragraph 26, which ‘reiterates the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia’; and paragraph 27, which ‘reiterates further the need to explore ways to generate international cooperation and financial support for education and training in the field of human rights at the national level and for the establishment of national infrastructures to promote and protect human rights if requested by States’.

\textsuperscript{142} Information Office of the State Council of the People’s Republic of China, March 2004.
well as her ‘peaceful rise’ in the world. China will, as always, devote herself to promoting the human rights cause, actively carry out exchanges and cooperation with the international community according to the provisions of the Constitution of China and the need for modernisation of the country, and make her contributions to promoting the healthy development of the international human rights cause.\footnote{Ibid. at Chapter VIII-International Exchanges and Cooperation in Human Rights.}

China has stressed that any intervention by foreign States or the international community in the internal affairs of another State, even amid widespread human rights violations or a humanitarian catastrophe, will simply ‘endanger world peace and security’.\footnote{1991 White Paper on Human Rights in China, supra n 137 at Chapter X Active Participation in International Human Rights Activities. In particular, China stated, ibid., that it ‘has firmly opposed … any country making use of the issue of human rights to sell its own values, ideology, political standards and mode of development, and … any country interfering in the internal affairs of other countries on the pretext of human rights, the internal affairs of developing countries in particular, and so hurting the sovereignty and dignity of many developing countries. Together with other developing countries, China has waged a resolute struggle against all such acts of interference, and upheld justice by speaking out from a sense of fairness. China has always maintained that human rights are essentially matters within the domestic jurisdiction of a country. Respect for each country’s sovereignty and non-interference in internal affairs are universally recognised principles of international law, which are applicable to all fields of international relations, and of course applicable to the field of human rights as well … Using the human rights issue for the political purpose of imposing the ideology of one country on another is no longer a question of human rights, but a manifestation of power politics in the form of interference in the internal affairs of other countries. Such abnormal practice in international human rights activities must be eliminated … Hegemonism and power politics continue to exist and endanger world peace and development. Interference in other countries’ internal affairs and the pushing of power politics on the pretext of human rights are obstructing the realisation of human rights and fundamental freedoms.’}

Nevertheless, China’s approach to international peacekeeping has evolved and on particular occasions has supported peacekeeping operations sanctioned by the Security Council.\footnote{See Chan, supra n 136.} Foreign criticism of Chinese policies, practices, preferences and traditions, particularly without proper understanding of or regard for how the Chinese people view them, merely helps bolster the internal legitimacy of the authoritarian government. International acceptance of a human rights norm does not mean that such acceptance necessarily translates into acceptance in a domestic setting.\footnote{Goertz and Diehl, ‘Toward a Theory of International Norms: Some Conceptual and Measurement Issues’ (1992) 36 Journal of Conflict Resolution 634 at 646.} As Habermas has observed, democratic institutions imposed without domestic support tend to ‘disintegrate without the initiatives of a population accustomed to freedom’.\footnote{Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Cambridge: Polity Press, 1996) at 130 (emphasis in original).}

Finally, China’s substantial investment in States ruled by repressive regimes, with no conditions attached, has been much criticised on human rights
grounds. Critics typically do not acknowledge that China has also invested heavily in Western democratic States such as Australia and Canada whose economies have been tremendously bolstered in recent years, and that democratic States provide aid to repressive regimes often for non-altruistic reasons or resulting in continued repressive rule and unproductive or expanded military expenditures. As will be discussed below, economic development is positively correlated with human rights protection and government efficacy, among others. It is not implausible that the increasing affluence of the Chinese people and their growing awareness of their rights may in time influence the populations currently enduring repressive regimes to become more assertive about their rights and governments.

3. Civil Society and its Implications for Human Rights and Democratic Development in China

Lipset has argued that a strong participatory civil society is more important than elections in fostering a political system or a political culture in which individuals may mediate powers vested in state authorities. Civil society in


China has been a major subject of discussions. As Strand has found, however, civil society in China still retains the essentials of guanxi and seeks supporters from within the State bureaucracy. In addition, NGOs suffer their own democratic deficits in their formation, networking, agenda setting and activism as they are managed, staffed and funded by those who share identical interests and beliefs to the exclusion of dissent. Woods notes that NGOs tend to be assumed to act in an optimal and objective manner:

Yet NGOs are a vast and largely unregulated spectrum of organizations – some legitimate, some self-serving and corrupt. . . . NGOs themselves need to be subjected to standards of accountability and good governance. Accountability, for example, has often meant NGOs working in developing countries being answerable to donors in the industrialized countries. Yet good governance surely requires that these NGOs become accountable to those most affected by their work and on whose behalf they are advancing claims.

While rights assessment, evidence documentation and advocacy by NGOs serve important and laudable purposes, objectives and results, their reasoning and judgments are often coloured by a lack of objectivity and an unwillingness to appreciate that a person’s, a group’s or a society’s practices, policies, preferences, priorities and decision-making processes may be informed by traditions.

and resources other than liberal discourses of human rights or of democracy. Peerenboom observes that reports issued by human rights NGOs generally suffer from a cursory or one-sided presentation of facts, the lack of citation to sources for factual claims, reliance on hearsay evidence and unconfirmed information, and no or little legal analysis, with citations to relevant PRC or international law as rare as a snowman in the tropics. Most reports dismiss summarily the arguments of the government and prosecutors about violations of PRC law, underestimate the complexity of the legal issues involved, and assume an expansive and liberal interpretation of civil and political rights that is often contested as a matter of international law. They rarely attempt to place the individual cases selected within a broader comparative, historical, economic, or political context or include any statistical analysis that would give any indication of the representativeness of the cases.154

Methodological flaws in empirical and theoretical studies have caused critics of the human rights situation in China to assess China by a double standard, not only vis-à-vis developed States but also developing States and other emerging powers such as India. Peerenboom finds that China in fact has managed to do quite well against all indicia of good governance, especially when compared with States with a similar level of economic development and wealth,155 and that economic development is positively correlated with protection of civil, political, economic, social and cultural rights, government efficacy, observance of the rule of law, and measures against corruption.156 Even though China’s Constitution does not contain directly justiciable rights157 and Chinese citizens do not enjoy habeas corpus protection, they may be able to challenge decisions through administrative channels.158

155 Ibid. at 125.
158 Peerenboom, supra n 154 at 88.
On occasions where NGOs refer to international law, they tend to premise their findings on the assumption that China’s practices, policies and decisions violate international law, even if China may not even have ratified the particular human rights treaty that they seek to rely on (such as the ICCPR). China’s refusal or disinclination to ratify a human rights treaty is taken as non-compliance with international human rights norms or indicator of its non-readiness or unwillingness to accept its roles and responsibilities as a major international actor. Such criticism disregards the cardinal principle of treaty law that a State, in its exercise of sovereignty—and perhaps in response to its historical, political, economic and socio-cultural characteristics that are embedded in its populace—is entirely free to decide whether to sign or ratify a treaty and to make reservations when signing or ratifying one. Critics of China’s human rights record also point to its assumed non-compliance with the spirit and letter of the Universal Declaration of Human Rights (UDHR). Crawford argued in 1994 that a customary right to democratic governance could be discerned from the UDHR and the ICCPR, while failing to produce evidence of the general, consistent and widespread State practice accompanied by the requisite *opinio juris*, particularly in Asia that is the largest continent with the largest population, and forgetting that ratification of a treaty alone does not evince such State practice. Superficial reliance on the UDHR and human rights treaties betrays a lack of understanding of their nature and impact. Lauterpacht was particularly sceptical of the UDHR as a document entailing any legal value or significance. In fact, Lauterpacht believed that the UDHR was equally devoid of moral force, given the vagueness and flaws of its provisions and the intended lack of real action on the part of almost all States in implementing the stated rights. Von Bernstorff has argued that ‘[p]ure textualization of human rights in political or legal documents without normative concretization and practical realization leads to a “hypertrophy” of the symbolic dimension of rights. After 1948 practically every new national constitution included a human rights catalogue, many inspired by the Declaration. This textual “façade” can create the illusion of enshrined rights, while obstructing consistent debate about structural impediments for their implementation. ... It serves as a cloak of legitimacy for those who are in a position of power.’ Similarly, excessive and superficial reliance on a State voting on the

160 Ibid. at 121–2.
UDHR (as it was adopted by consensus) and ratifying certain human rights treaties neglects the real possibility that a primary rationale for the State doing so is that it may then be able, through its appearance as a law-supporting international citizen, to forestall criticism of its actual practices of governance and violations of human rights and freedoms within its territory.

Despite the ideology of human rights scholarship and activism and the proliferation of human rights treaties and declarations, human rights are not inherent in a person because of his or her being a human; they are recognised under particular national, historical, political, economic and socio-cultural circumstances at any given time and then, and only then, defined and protected by law, including national constitutions and laws and international law, all of which evolve over time. As Fields and Narr have pointed out, ‘[p]eople may be born with the potential for rights; they may long for them consciously or unconsciously; and they may struggle for them. But human rights are norms and practices which can be achieved only if proper historical circumstances are created.’ The religious, gender, racial and sexual orientation persecutions and equality movements highlight the importance that ‘[i]f people are not aware of the historical and contextual nature of human rights and not aware that human rights become realized only by the struggles of real people experiencing real instances of domination, then human rights are all too easily used as symbolic legitimizers for instruments of that very domination.’

Many human rights scholars and activists presuppose that by shaming a State or a government, its people or the international community would then pressure the State or the government for political reform, or that the government would do so under pressure. As Wachman has noted, shaming of China’s human rights record has not led to improved human rights practices. In fact, Drury and Li have observed, China tends to respond to foreign pressure not with improved human rights practices but with less accommodation, and to positive rhetoric with more favourable concessions. It is a disservice on the part of human rights scholars and activists to the development of national and international human rights law to simplify or distort human rights as something that ought to be taken for granted, with the result that implementation on the ground and negotiations within a State and among States become more difficult to attain satisfactory outcomes and lasting positive impact.

Instead, through persuasion and internalisation of international norms, behavioural changes on the parts of a State and of its people are more likely

165 Ibid. at 5.
166 Wachman, supra n 123 at 260.
167 Ibid. at 262.
to occur and be more durable, and international NGOs have important roles to play in the protection of human rights and the promotion and implementation of democratic practices in many States, including China. Nie argues that criticism about international NGOs seeking to transplant or impose liberal norms on a populace despite its preferences or wishes should be taken seriously, but ‘it is an entirely different matter if people in non-Western societies want to use Western values in their own struggles against injustice and inequality’.

Milwertz and Bu have demonstrated the gains that national and sub-national women’s rights NGOs in China have made through engagement with international NGOs, with its generation and diffusion of knowledge, insights and perspectives on traditional practices and human rights norms, such that in less than a decade women’s rights in China have metamorphosed as human rights and domestic violence transformed from a non-issue to a health concern.

The process has been particularly encouraging as ‘the construction of new knowledge has not been imposed from without as a top-down education process but has instead been shaped by the activists themselves in the context of international interactions’ that have enabled the activists to join ‘a global emancipatory epistemic community’.

4. Implementation of Democratic Practices in China

When discussing democracy in China, the protests on Tiananmen Square in June 1989 spring to mind. To foreign eyes, the student protesters were demanding liberal democracy only to be brutally suppressed. Walder and Gong characterise the protests as representing ‘the emergence of a new species of political protest in the People’s Republic’ that diverged from the kind of worker activism previously seen in the Cultural Revolution ‘where factions of political leaders mobilized their local followers for political combat’.

Goldstone argues that ‘ unlike other confrontations that involved mainly intellectuals, such as the Hundred Flowers Movement, or other events that were in some sense orchestrated by the regime, such as the Cultural Revolution, Tiananmen marked the first time that intellectuals and popular elements acted independently to challenge the regime’.

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170 Milwertz and Bu, supra n 119.
171 Ibid. at 134.
172 Ibid.
174 As quoted in Perry, ‘Shanghai’s Strike Wave of 1957’ (1994) 137 China Quarterly 1 at 3.
A deeper understanding, however, shows that the student protesters on Tiananmen Square, in terms of how they perceived democracy, were in unison with Chinese traditions. Democracy as that which embodies and enshrines a plurality of diverse opinions and participation by all segments of society was not one that the student protesters on Tiananmen Square in 1989 conceived. Esherick and Wasserstrom observed that the student protesters seemed to consider the min (people) in minzhu (democracy) to mean them primarily if not exclusively. Erbaugh and Kraus similarly observed that students protesting in Fujian province at the same time were ‘horrified at the suggestion that truly popular elections would have to include peasants, who would certainly outvote educated people like themselves.’ On Tiananmen Square, as the students spoke of the importance of (their) views, principles and ideals and sought to assert exclusive control over the course and aims of the protests, the workers focused from the beginning on economic issues and ‘displayed an acute sense of alienation not only from the political system but to a considerable extent also from the student leaders and intellectuals.’ The workers’ demands revolved around price stabilisation, employment security, freedom of employment, cessation of gender discrimination in employment, improvement of work conditions, and a right to strike. Throughout the protests, the workers regarded the students as the epitome of the elitist class that oppressed them. Walder and Gong noted that the students went as far as to exclude the workers from Tiananmen Square until military action appeared imminent when the workers were finally allowed onto the Square to protect the students. It was only on the day before the crackdown that the students sought the workers’ collaboration in staging a general strike. Afterwards, the workers received much harsher penalties than did the students, including the death penalty, for taking part in the protests.


177 Walder and Gong, supra n 173 at 23, observed that ‘[t]hese differences, and the students’ growing attraction to the elite’s factional struggle, underlined a sharp class distinction in the politics of dissent: the students understood elite political discourse, were themselves a tiny elite, and many would probably become officials in the future. . . . From the outset of their movement, and continuing well into martial law, the students made a self-conscious effort to maintain their “purity” (chunjiejing). This meant, in practice, that they limited their politics to moral questioning of the authorities, seeking to speak as the conscience of the nation, striving to maintain public order and production, while keeping off to one side any “narrow” economic and group interests that might potentially disrupt their quest.’

178 Ibid. at 15.


180 Walder and Gong, ibid. at 24–5.
Dominant Western discourses of international law and sovereignty, including the question of whether liberal democracy now constitutes a rule or requirement for a State to possess internal and external legitimacy for its exercise of sovereignty, are pregnant with problems and concerns that not only undermine the universality of international law and the stability of the current international legal order, but also neglect the flaws that inhere in Western conceptions of liberal democracy. Li has argued in the context of China that '[i]t is a simple-minded fallacious inference that, since democracy is good, anything that is undemocratic must be bad. An argument can be made that in the United States and throughout the democratic West, healthy society has been threatened precisely by the diminishing of traditional values similar to these undemocratic Confucian values.'

It is, in fact, a misconception that no democratic practices take place in China. While universal suffrage continues to be wanting in China at the national level and contests for higher offices remain a matter not for the masses but a select group of Party officials, an Election Law of the Representatives of the National People’s Congress and the Local People’s Congresses at All Levels was adopted in July 1979, which requires that all representatives at or below the county level be directly elected. An Organic Law of the Village Administration Committees was adopted in November 1998, which provides that self-government in villages should be implemented across the country. Voting has been implemented in every province, with generally high turnout rates and improvements over time in the conduct of elections. The Party has set out policies for village representative assemblies to implement, and implementation is monitored by Party members within the assemblies. Article 97 of the 1982 Constitution provides that ‘[d]eputies to the people’s congresses of provinces, municipalities directly under the Central Government, and cities divided into districts are elected by the people’s congresses at the next lower level; deputies to the people’s congresses of counties, cities not divided into districts, municipal districts, township, and nationality townships

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182 Adopted at the Second Session of the Fifth National People’s Congress on 1 July 1979, as amended for the fifth time in accordance with the Decision on Revising the Election Law of the National People’s Congress and Local People’s Congresses of the People’s Republic of China adopted at the Third Session of the 11th National People’s Congress on 14 March 2010.
183 Article 2 Election Law.
184 Adopted at the Fifth Meeting of the Standing Committee of the Ninth National People’s Congress on 4 November 1998 and promulgated by Order No 9 of the President of the People’s Republic of China on 4 November 1998.
and towns are elected directly by their constituencies. The number of deputies to local people’s congresses at different levels and the manner of their election are prescribed by law. According to Article 99 of the 1982 Constitution:

Local people’s congresses at different levels ensure the observance and implementation of the Constitution, the statutes and the administrative rules and regulations in their respective administrative areas. Within the limits of their authority as prescribed by law, they adopt and issue resolutions and examine and decide on plans for local economic and cultural development and for development of public services. Local people’s congresses at and above the county level examine and approve the plans for economic and social development and the budgets of their respective administrative areas, and examine and approve reports on their implementation. They have the power to alter or annul inappropriate decisions of their own standing committees. The people’s congresses of nationality townships may, within the limits of their authority as prescribed by law, take specific measures suited to the peculiarities of the nationalities concerned.

Importantly, from the standpoints of accountability of officials, electorates’ participatory capacity and inclination, and human agency, Article 101 of the Constitution provides that ‘[a]t their respective levels, local people’s congresses elect, and have the power to recall, governors and deputy governors, or mayors and deputy mayors, or heads and deputy heads of counties, districts, townships and towns. Local people’s congresses at and above the county level elect, and have the power to recall, presidents of people’s courts and chief procurators of people’s procuratorates at the corresponding level.’

It has been found that elections in China tend to generate a synergetic relationship between the electorates and their elected representatives. Such synergy may be created and reinforced by the direct and intimate relationships

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188 Similarly, Article 103 states that ‘[t]he standing committee of a local people’s congress at and above the county level is composed of a chairman, vice-chairmen and members, and is responsible, and reports on its work, to the people’s congress at the corresponding level. The local people’s congress at and above the county level elects, and has the power to recall, anyone on the standing committee of the people’s congress at the corresponding level. No one on the standing committee of a local people’s congress at and above the county level shall hold any post in State administrative, judicial and procuratorial organs.’ Article 104 states that ‘[t]he standing committee of a local people’s congress at and above the county level discusses and decides on major issues in all fields of work in its administrative area; supervises the work of the people’s government, people’s court and people’s procuratorate at the corresponding level; annuls inappropriate decisions and orders of the people’s government at the corresponding level; annuls inappropriate resolutions of the people’s congress at the next lower level; decides on the appointment and removal of functionaries of State organs within its jurisdiction as prescribed by law; and, when the people’s congress at the corresponding level is not in session, recalls individual deputies to the people’s congress at the next higher level and elects individual deputies to fill vacancies in that people’s congress.’
that the electorates and their elected (or nominated) representatives share.

Under Article 111 of the 1982 Constitution:

The residents’ committees and villagers’ committees established among urban and rural residents on the basis of their place of residence are mass organisations of self-management at the grass-roots level. The chairman, vice-chairmen and members of each residents’ or villagers’ committee are elected by the residents. The relationship between the residents’ and villagers’ committees and the grass-roots organs of State power is prescribed by law. The residents’ and villagers’ committees establish committees for people’s mediation, public security, public health and other matters in order to manage public affairs and social services in their areas, mediate civil disputes, help maintain public order and convey residents’ opinions and demands and make suggestions to the people’s government.

Li, Thurston and Xu have shown that elections have an empowering effect on villagers in China. About 86 per cent of the 218 villagers Lin surveyed in Liaoning and Jilin provinces believed that elected officials were likely to be more effective in defending the interests of villagers. Elected representatives in turn tend to believe that they are accountable to their electorates. According to Gao, more than one-third of elected officials from fourteen villages in a Henan township indicated that they would side with villages as opposed to conflicting higher-level directives. He and Lang found that 43 per cent of the 111 surveyed elected village committee directors in Zhejiang province believed that they must be accountable to their electorates, with only 10 per cent indicating that they must be accountable to higher levels of


192 Gao, ‘Woguo xian xiang liangi zhengzhi tizhi gaige de shuguang – Henan sheng Xinmi shi cunjii minzhu zhengzhi zhidu jianshe diaocha’ ['The twilight of the reform of political institutions at county and township levels – An investigating report on the construction of village democracy in Xinmi county, Henan province'], 6 Jingji shehui tizhi bijiao [Comparative Economic and Social Systems], December 1998, 5, as cited in Li, supra n 190 at 1–2.
the State bureaucracy.\textsuperscript{193} The Organic Law of Village Administration Committees affirms that villagers committees shall 'convey the villagers' opinions and demands and make suggestions' to the government.\textsuperscript{194} At a broader level, Manion has noted the capacity of genuine elections to create and sustain congruence between the electorates and elected officials regarding the roles of the state in the economy.\textsuperscript{195} Additionally, village elections help enable citizenship practices to emerge and mature,\textsuperscript{196} and legitimise governance.\textsuperscript{197}

An inevitable consequence of elections is expressions of dissatisfaction on the part of voters with their elected representatives and, ultimately, with the State, which can point to greater levels of accountability and openness of criticism, increased electioneering, or incompetence and corruption. In surveys conducted by Li and Saich, respondents in rural areas ranked their level of satisfaction with their village leadership to be at the lowest as opposed to national, provincial, county and township leaderships. Nevertheless, such dissatisfaction may in fact augment the legitimacy of the elected representatives and the national government, as more people confront corrupt officials, participate in elections, and assert their rights on the basis of law.\textsuperscript{198}

Expressions of dissatisfaction with elected representatives and the State, and the participatory nature of electioneering and elections, have increased discontent about the continuing dominance of Party officials in national politics. In a study by Qi in 1989 that Zheng adopted in his 1994 analysis of whether development and democracy were compatible in China, 54 per cent of 1,721 respondents were proud of the socialist state, and 56 per cent of 1,510 respondents agreed that in China's development should take precedence over basic principles of democratic governance. Significantly, 30 per cent of 1,419 respondents indicated that they had not had their expectations satisfied by the Party's performance. While 56 per cent of 472 respondents were proud to be Party members, only 43 per cent of 1,230 respondents wanted to become one (even though Party membership is a prerequisite to high state and private positions). Whereas 57 per cent of 1,405 respondents were satisfied with the Party's policies and 52 per cent with the Party's social development goals, a paltry 18 per


\textsuperscript{194} Article 2 Organic Law of Village Administration Committees.

\textsuperscript{195} Manion, 'The Electoral Connection in the Chinese Countryside' (1996) 90 \textit{American Political Science Review} 736.


\textsuperscript{198} Kennedy, 'Legitimacy with Chinese Characteristics: "Two Increases, One Reduction"' (2009) 18 \textit{Journal of Contemporary China} 391; and O'Brien, supra n 196.
cent of 1,404 respondents found the Party to play a frontline role for their lives and society. Only 16 per cent of 1,709 respondents found the National People’s Congress to function well, while 23 per cent found its functioning to be poor. A mere 39 per cent of 1,600 respondents shared high expectations of contributions that the National People’s Congress could make to Chinese democracy, while 14 per cent had no expectations at all. About 72 per cent of 1,369 respondents believed that a main reason democratic development had taken a slow pace in China was its political institutions’ intransigence or resistance, and 67 per cent of 1,337 respondents believed that it was necessary to reform the political system. About 75 per cent of 1,391 respondents agreed that democracy needed to be set in place in China.\textsuperscript{199}

Despite, or perhaps due to, the roles and values that elections may play in the implementation and augmentation of democratic governance in China, the Party has not wholeheartedly embraced the contestation that elections necessarily entail, and the low level of support for the Party among the Chinese people certainly would be unlikely to induce the Party to introduce democratic governance in China at a broader, let alone national, level any time soon. It is indisputable that the Party continues to have a dominant role in all State apparatuses.\textsuperscript{200} According to Alford, Cai and Lin, the notion that the Constitution may be utilised to constrain the executive government or the Party has not been successfully put into practice, the Supreme People’s Court has instructed lower courts to not rely on the Constitution, and the task of interpreting the Constitution remains vested in the National People’s Congress through its Standing Committee.\textsuperscript{201} Rather alarmingly, under Article 110 of the Constitution:

Local people’s governments at different levels are responsible, and report on their work, to people’s congresses at the corresponding level. Local people’s governments at and above the county level are responsible, and report on their work, to the standing committee of the people’s congress at the corresponding level when the congress is not in session. Local people’s governments at different levels are responsible, and report on their work, to the State administrative organs at the next higher level. Local people’s governments at different levels throughout the country are State

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administrative organs under the unified leadership of the State Council and are subordinate to it.\textsuperscript{202}

At the local level, while the Organic Law on Local People's Congresses and Local People's Governments as amended in 2004\textsuperscript{203} mandates contested elections,\textsuperscript{204} it allows for an uncontested election where only one candidate is nominated,\textsuperscript{205} with the result that contestation may be controlled by the Party through informal but strong pressure on candidates and their supporters. In 1997, the head of the Party's Central Organisation Department promoted uncontested elections as Party policy, as the Party concluded that contestation was 'not conducive to stability or development, with ill effects impossible to eradicate for years after.'\textsuperscript{206} Shen and Chen found that more than three-fourths of candidates for nine local people's congresses in Jiangxi province were 'partner candidates', who ran with the objective of not winning any votes, including their own.\textsuperscript{207} The Organic Law insists that Party branches

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\item Provisions that vest ultimate control in State apparatuses over elected representatives may be found also in Articles 107 and 108 of the 1982 Constitution. Article 107 states that '[t]he local people's governments at and above the county level, within the limits of their authority as prescribed by law, conduct the administrative work concerning the economy, education, science, culture, public health, physical culture, urban and rural development, finance, civil affairs, public security, nationalities affairs, judicial administration, supervision and family planning in their respective administrative areas; issue decisions and orders; appoint, remove and train administrative functionaries, appraise their work and reward or punish them. People's governments of townships, nationality townships and towns carry out the resolutions of the people's congress at the corresponding level as well as the decisions and orders of the State administrative organs at the next higher level and conduct administrative work in their respective administrative areas. People's governments of provinces and municipalities directly under the Central Government decide on the establishment and geographic division of townships, nationality townships and towns.' Article 108 states that '[t]he local people's governments at and above the county level direct the work of their subordinate departments and of people's governments at lower levels, and have the power to alter or annul inappropriate decisions of their subordinate departments and people's governments at lower levels.'

\item Adopted at the Second Session of the Fifth National People's Congress on 1 July 1979 and promulgated by Order No 1 of the Chairman of the Standing Committee of the National People's Congress on 4 July 1979, effective as of 1 January 1980, as amended for the fourth time in accordance with the Decision on Amending the Organic Law of the Local People's Congresses and Local People's Governments of the People's Republic of China adopted at the 12th Meeting of the Standing Committee of the Tenth National People's Congress on 27 October 2004.


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constitute a village’s ‘leadership core’, and Party secretaries have been found to enjoy much more power than elected committee directors.\textsuperscript{208} In July 2002, the Central Committee and the State Council issued a joint circular endorsing ‘concurrent office-holding by village chiefs and Party secretaries’ and ‘merging the Party branch and the village committee.’\textsuperscript{209} Wang argues that self-government by villagers’ committees has been promoted by the State in order to foster its legitimacy and governability in rural areas, and that democratic movement, including generation of democratic consciousness, need not proceed on a large scale but may flourish first in rural areas and at a local level.\textsuperscript{210} However, instead of relinquishing control over village affairs, the Party-State may use elections and self-government through villagers’ committees to masquerade its continued control over rural politics.\textsuperscript{211}

5. Conclusion

While suppression of human rights and fundamental freedoms, in overt and covert ways, can be found in all States, including liberal States with established constitutional and legal frameworks for human rights protection, criticism about China’s human rights practices and lack of democracy has been most vocal and sustained. While I do not suggest that China has an exemplary human rights record or that the PRC government does not suppress dissent, I argue that such criticism stems partly from Western States and scholars’ apprehension about China’s rise and how China’s economic development, coupled with its political importance and military capabilities, may alter the course of development of human rights norms and liberal democracy they have been aggressively putting forward. China’s economic development in Tibet constitutes in itself a focal point of criticism as to how it undermines traditional Tibetan culture and practices, while China’s traditional culture, practices, norms and values are criticised for impeding the development and protection of human rights and democratisation in China.

A human rights norm has many facets, most important of which are its requirements that the people actually recognise its existence and validity in the light of their culture and that their human agency be respected. While a culture \textit{in se} does not have any rights, a people, be they the majority or a minority

\textsuperscript{208} He, supra n 186; and He, ‘The Theory and Practice of Chinese Grassroots Governance: Five Models’ (2003) 4 \textit{Japanese Journal of Political Science} 293.

\textsuperscript{209} ‘Zhonggong zhongyang bangongting guowuyuan bangongting guanyu jinyibu zuobao cumin weiyuanhui huanjie xuanju gongzuo de tongzhi’ [‘Circular by General Offices of Party Central Committee and State Council on further improving the work of next round village committee elections’], 14 July 2002, as cited in O’Brien and Han, supra n 185 at 373.

\textsuperscript{210} Xu, supra n 189.

\textsuperscript{211} Alpermann, ‘The Post-Election Administration of Chinese Villages’ (July 2001) 46 \textit{China Journal} 45 at 47.
of a State, who adhere to their particular cultural norms and values have a right to enjoy their own culture. The preambles to both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise that ‘the ideal of free human beings…can only be achieved if conditions are created whereby everyone may enjoy his…cultural rights’. Common Article 1 of the two Covenants states that ‘[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development;’ Article 15(1)(a) of the ICESCR, which China ratified in 2001, states that ‘[t]he States Parties to the present Covenant recognise the right of everyone to take part in cultural life’, while Article 15(2) states that ‘[t]he steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture’. The most important component of a human rights norm is that it may be exercised freely. Transplantation of Western ideals and interpretations of human rights and freedoms, including the rule-of-law model, without due understanding of and regard for other States’ and their peoples’ cultures are likely to face opposition not only from States in which such ideals and interpretations are transplanted, but also, and more fundamentally, from peoples forced to disregard their own cultural norms and values.

Human rights protection within a constitutional and legal framework is not a monopoly of liberal States. While China emphasises that many developing States and their peoples may need—or choose—to develop and pursue economic, social and cultural rights even if their civil and political rights may need to take a back seat, and that the understanding, development and implementation of human rights must take into account the particular historical, political, economic, social and cultural characteristics of a State and its people, it has recognised and guaranteed various human rights and freedoms in its territory through its Constitution and laws, including workers’ rights (which have developed partly as a result of the government’s suppression of dissent on Tiananmen Square in June 1989), women’s rights (despite the patriarchal nature of Chinese society), and privacy rights (despite China’s communitarian culture). Instead of a top-down approach to promoting the development of human rights in China and elsewhere, a bottom-up approach may be more preferable and effective—other States, international organisations, and international NGOs should engage with domestic NGOs as well as the government. Through such engagement, all parties may learn from and acquire diverse experiences; awareness of human rights norms may be able to

212 Preamble ICCPR; and Preamble ICESCR 1966, 993 UNTS 3.
213 Article 1 ICCPR; and Article 1 ICESCR.
214 Article 15(1)(a) ICESCR.
215 Article 15(2) ICESCR.
be generated and internalised both by the government and among the Chinese people; their attitudes to traditional norms, values and practices may evolve for the better; and international human rights law may be improved and acquire greater legitimacy.

Finally, China’s economic development, frequently discussed among international policymakers and in the media, has overshadowed its implementation of political reform, with most Western States, scholars (with the exception of a few Western scholars engaged in Chinese studies) and media assuming that China is devoid of any form of democratic practice. In fact, China has adopted laws since 1979 encouraging self-government in villages across the country through villagers’ committees and, at and above county level, through local people’s congresses and local people’s governments. Members of villagers’ committees, local people’s congresses and local people’s governments are elected directly by their constituents who have the power to recall them. Elected representatives are required to convey their constituents’ opinions and demands and make suggestions to the government. The periodic elections and the power to recall have enabled the Chinese people a greater say in affairs central to their lives and local areas, and have helped instil in them a sense of belonging, ownership and agency vis-à-vis their village, local, provincial and, ultimately, national governments. As the Chinese people become increasingly affluent and aware of their rights on the basis of law, it is to be hoped that democratic practices will continue to develop more substantively and at higher levels of government. That having been said, the Party continues to be omnipotent at all levels of governance in China, and direct elections at the national level are unlikely in the foreseeable future.