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**Article:**

Subedi, SP (2015) China's Approach to Human Rights and the UN Human Rights Agenda. Chinese Journal of International Law, 14 (3). pp. 437-464. ISSN: 1540-1650

<https://doi.org/10.1093/chinesejil/jmv037>

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# China's Approach to Human Rights and the UN Human Rights Agenda

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## Abstract

There is an apprehension in the democratic world about the possible impact of the economic rise of China on the UN human rights agenda. Although Communist China has embraced capitalism by liberalising its economy, by joining the WTO and by recognising private entrepreneurship and the right to private property, it has not been an enthusiastic partner when it comes to promoting and protecting human rights. China has supported the idea of the so-called 'Asian values' or cultural and political relativism as well as promoting the idea of a 'China Model of Democracy' which seeks to support economic growth at the expense of civil and political rights. This article examines China's approach to human rights both within and outside of the UN and whether China's rise as a major economic power poses a threat or offers an opportunity to the international human rights system led by the UN. In doing so, it considers how China is changing in terms of its approach to the rule of law, democracy and human rights and why it needs to become a willing and enthusiastic player within the UN system to promote and protect human rights.

## Introduction

1. There is an apprehension in the democratic world about the possible impact of the economic rise of China on the UN human rights agenda. There is a concern expressed in certain quarters that the economic rise of China may result in an eventual restructuring of the global political order and institutions in favour of China, a Communist State. In this vein, a great deal has been written about the possible impact on the rest of the world of the economic rise of China.<sup>1</sup> Since the Bolshevik Revolution in Russia in 1917, Communism has

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<sup>1</sup> See generally, Jonathan Fenby, *Will China Dominate the 21<sup>st</sup> Century?* (Polity Press 2014);

posed a number of challenges to the international legal order in general and to human rights in particular. The Soviet Union and the members of the Warsaw Pact did as much as possible to undermine and neutralise the UN human rights agenda right from the inception of the UN in 1945 until the collapse of Communism in Europe in 1989/1990.

2. The Soviet Union was one of the seven States which did not endorse the Universal Declaration of Human Rights in 1948. Consequently, a number of compromises had to be reached between the democratic countries and the Communist countries during the drafting of many international human rights instruments and the development of the UN human rights machinery. The conclusion of two international covenants – one on civil and political rights and another one on economic, social and cultural rights – rather than one single international bill of rights or covenant, and the omission of the right to property, a fundamental human right and a major pillar of democracy and a liberal economic system, in the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights are some examples of such compromises. It is also true that two covenants rather than one was adopted because of the lack of enthusiasm on the part of the U.S and other Western countries to regard economic, social and cultural rights as important as civil and political rights. It was quite ironic that an international covenant dealing with human rights left out a major economic right, that is, the right to property, from the list of rights that it sought to protect. This could also be one of the reasons why the right to property was not included in the European Convention on Human Rights adopted in 1950. It was only when Protocol I to the Convention was adopted, which entered into force in 1954, that the right to property was recognized.

3. Although Communist China has embraced capitalism by liberalising its economy, by joining the WTO and by recognising private entrepreneurship and the right to private property, it has not been an enthusiastic partner when it comes to promoting and protecting human rights. For instance, in spite of assuring the international community on several occasions that it will ratify the 1966 Covenant on Civil and Political Rights, it has not yet done so. China has supported the idea of the so-called ‘Asian values’ or cultural and political relativism as well as promoting the idea of a ‘China Model of Democracy’ which seeks to support economic growth at the expense of civil and political

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David Shambaugh, *China Goes Global: The Partial Power* (Oxford University Press 2013); Timothy Beardson, *Stumbling Giant: The Threat to China's Future* (Yale University Press 2013); Martin Jacques, *When China Rules the World: The Rise of the Middle Kingdom and the End of the Western World* (Allen Lane 2009).

rights. Therefore, many commentators have expressed their apprehension that the rapid economic rise of China and its corresponding political power may encourage China to wield its power in international affairs in general, and within the UN system in particular, and that it may pose a challenge to the UN human rights agenda.

4. It is in this context that this article aims to examine China's approach to human rights both within and outside of the UN and whether China's rise as a major economic power poses a threat or offers an opportunity to the international human rights system led by the UN. In doing so, it will consider how China is changing in terms of its approach to the rule of law, democracy and human rights and why it needs to become a willing and enthusiastic player within the UN system to promote and protect human rights.

### **China's approach to human rights**

5. It should be stated at the very outset that contrary to perceptions in certain quarters that China opposes or will oppose an ideology or political system championed by the West, including the UN human rights agenda, there are no indications that China will do so. Since China experienced oppressive regimes and foreign subjugation prior to and after the Communist Revolution in 1949, the concept of civil and political rights has been alien to China until recently. Of course at the height of Chinese civilisation in the distant past the Chinese culture was an advanced culture of great vitality which has had regard for humanism and pursued harmony of mankind. The Chinese of the time lived a peaceful, prosperous and harmonious life and embraced the teachings of Buddha, the enlightened, which included tolerance and equality of mankind. However, during the intervening period Chinese society experienced political, mental and economic oppression and the basic feature of this culture was autocracy, which had little regard for notions of human rights and the protection of human dignity and personal liberty. Consequently, the core elements of humanism and human rights were lost in China for a long time. Therefore, when it comes to democracy, the rule of law and human rights, China is still in a defensive position and is likely to remain so for some time to come. Rather, the indications are that China will work with the system and within the system, see the benefit in it, but will try to mould it to suit its political and economic needs. The political leaders of China are still too busy managing their own internal affairs rather than being in a position to challenge the international human rights agenda.

### **China's plea to the UN to take its 'national realities' into account**

6. China stated in its national report for Universal Periodic Review by the Human Rights Council in 2008 that it “respects the principle of the universality of human rights and considers that all countries have an obligation to adopt measures continuously to promote and protect human rights in accordance with the purposes and principles of the Charter of the United Nations and the relevant provisions of international human rights instruments, and in the light of their national realities.”<sup>2</sup> A similar language was used by China in submitting its National Report to the UPR by the UN Human Rights Council. Thus, the only qualifying notion in China's support for the universality of human rights was that when implementing human rights the “national realities” had to be taken into account. China did not explicitly invoke Communism or socialism to escape from its human rights obligations. Rather, it placed emphasis on its status as a developing country with a history of subjugation. Although China did not spell out what these “national realities” were, the Chinese report went on to state that, “Given differences in political systems, levels of development and historical and cultural backgrounds, it is natural for countries to have different views on the question of human rights. It is therefore important that countries engage in dialogue and cooperation based on equality and mutual respect in their common endeavour to promote and protect human rights.”<sup>3</sup> The reference to ‘political systems’ was couched in general and vague terms so that it could encompass reference to Communist or Socialist system of governance. China went on to state that democracy and the rule of law were being improved in the country rather than rejecting these as ‘Western concepts.’

7. Indeed, China stated that over the three decades of reform and opening up, the country had enacted nearly 250 laws relating to the protection of human rights. The thrust of the Chinese message was not an arrogant one, as is often made out in the populist Western media, but a positive one designed to plead to the international community to be patient with the process of reform underway within the country. By saying that China was a developing country, the Chinese report was seeking to justify slow progress in improving human rights. The report was candid enough in admitting the shortcomings in the Chinese system and outlined the difficulties and challenges facing the

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<sup>2</sup> National Report of China to the Human Rights Council as part of the UPR: A/HRC/WG.6/4/CHN/1 of 10 November 2008, 5.

<sup>3</sup> Ibid 6.

country.

8. The plea made by China was that it was a developing country and the economic growth that the country had managed to make had taken millions of people out of poverty and the international community had to recognize this. Further, the claim was that even if the country had not advanced enough in terms of human rights protection and promotion, it was the first country in the world to meet the poverty reduction target set by the UN Millennium Development Goals.<sup>4</sup> China had signed the 1966 International Covenant on Civil and Political Rights in 1998 and said that “the relevant departments are carrying out necessary legislative, judiciary and administrative reforms to create the conditions for the early ratification of the ICCPR.”<sup>5</sup> However, a long time has gone by since that pledge was made and the Covenant has still not been ratified. The challenge for the country would be to lift the barriers that remain to ratification of the Covenant.

### **The ‘progress’ reports on human rights**

9. The Chinese government gives the impression of being keen to demonstrate to the outside world and to its own population that it is committed to improving the situation of human rights rather than rejecting the notion of human rights as a Western concept *per se*. For instance, in May 2014 the State Council, the cabinet which oversees China’s government machine, issued a white paper, the “Progress in China’s Human Rights in 2013”, outlining the achievements made in improving civil liberties and other rights.<sup>6</sup> The progress report begins, quite typically for China, with the progress made in realising the right to development and proceeds to outline the achievements in realising the right to social security, the right to a clean and healthy environment, etc.<sup>7</sup>

10. However, it does also cover the progress made in realising ‘Democratic Rights’, ‘Rights to Freedom of Speech’ and ‘Rights of the Person’. Once again, the emphasis was on the need to bear in mind “China’s prevailing conditions and reality” as a developing country. The report goes on to outline

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<sup>4</sup> Ibid 8-9.

<sup>5</sup> Ibid 7.

<sup>6</sup> “Progress in China’s Human Rights in 2013”, Information Office of the State Council, The People’s Republic of China, May 2014, Beijing.

<sup>7</sup> <http://www.scio.gov.cn/zfbps/ndhf/2014/Document/1373161/1373161.htm>. Another ‘Progress Report’ was issued in 2014 with similar content and tone. <http://www.scio.gov.cn/zfbps/32832/Document/1437483/1437483.htm>

in detail the progress made in lifting people out of poverty and enabling them to participate in the economic development of the country and benefit from it. With regard to the civil and political rights, the report does not speak of a representative democracy or reform at the central level, but a consultative one and at local level in the following words:

China has continuously constitutionalized consultative democracy, and promoted the sound development of grassroots democracy. Chinese citizens now have diversified ways to realize their democratic rights according to law and in an orderly manner, and the country's political life has become more democratic.

China has further upgraded its governance system and capacity. The exercise of power is more procedure-based, government work is more transparent, and public freedom of speech is better ensured.<sup>8</sup>

11. The following observations speak of China's approach to human rights, China's plea to the outside world to understand the realities in a vast developing country and the emphasis that the Chinese State Council wishes to place on human rights:

The pursuit of the improvement of human rights never ends, for there is always room for better human rights conditions. China's progress in its human rights undertaking is there for everybody to see, and every unbiased and reasonable observer can draw a fair conclusion. At the same time, China is still a large developing country, with conspicuous problems of unbalanced, uncoordinated and unsustainable development. Therefore, greater efforts are needed to bring higher standards to human rights protection.<sup>9</sup>

12. It is clear from the report that the Chinese model of democracy is a bottom-up rather than a top-down one in which community-level democracy is an important means of directly exercising democratic rights. The report makes it clear that what China has is a socialist consultative democracy as an important form of ensuring the people's democratic rights. Therefore, it is community-level democracy that is being advanced in an orderly manner rather than reform at the central level of governance which is tightly controlled by the

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<sup>8</sup> Ibid. .

<sup>9</sup> Ibid.

Communist Party.

### **The 'China Model of Democracy' and human rights**

13. There seems to be a struggle taking place within the heart of the Chinese establishment with regard to the nature and direction that political, judicial and legal reform should take.<sup>10</sup> While much of the intelligentsia, including academics and lawyers, and a sizeable section of the ruling political elite seem to favour rapid reform towards advancing the rule of law, democracy and human rights as understood in the West, some hardliners both within and outside of the Communist Party seem to be advocating for a modified single-party rule by calling it a 'China Model of Democracy' underpinned by economic growth and limited civil and political rights. Accordingly, the pro-government intelligentsia has been encouraged to sell to the people of China, and to other people with authoritarian tendencies in developing countries, the idea of the so-called 'China Model', which advocates humane and benevolent but relatively authoritarian governance.

14. Although the Chinese Communist Party leaders themselves have started to speak of the need for political reform and a move towards democracy, the indications are that the reform will begin by allowing Communist Party members to elect their leaders rather the current system of anointing them by the top people within the party. Since who gets to the echelon of the party and who becomes a member of the party seems to be tightly controlled, the election to top level male-dominated party positions is likely to be no more than window-dressing. For instance, until recently, no woman had reached the Politburo's standing committee, the party's highest decision-making body. There was only one woman in the 24-strong Politburo

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<sup>10</sup> See generally, Guoguang Wu and Helen Lansdowne (eds.), *Zhao Ziyang and China's Political Future* (Routledge, Abingdon, 2008); Edward Friedman and Barrett L. McCormick eds., *What If China Doesn't Democratize? Implications for War and Peace* (Armonk, NY: M.E. Sharpe, 2000); Nicholas R. Lardy, *Integrating China into the Global Economy* (Brookings Institution Press 2002); Bill Gertz, *The China Threat: How the People's Republic Targets America* (Regnery 2000); Gordon G. Chang, *The Coming Collapse of China* (Random House 2001); David S.G. Goodman and Gerald Segal (eds), *China Deconstructs: Politics, Trade and Regionalism* (Routledge 1994); Richard Baum, *Burying Mao: Chinese Politics in the Age of Deng Xiaoping* (Princeton University Press 1994); Merle Goldman and Roderick MacFarquhar (eds), *The Paradox of China's Post-Mao Reforms* (Harvard University Press 1999); Maurice Meisner, *The Deng Xiaoping Era: An Inquiry into the Fate of Chinese Socialism, 1978-1994* (Hill & Wang 1996); Minxin Pei, *China's Trapped Transition: The Limits of Developmental Autocracy* (Harvard U Press 2006); Thomas Bernstein and Xiaobo Lu, *Taxation without Representation in Contemporary Rural China*



until not long ago, albeit the situation has improved in the recent past.<sup>11</sup> It does not seem easy to join the Communist party either. Applicants need the backing of existing members and have to undergo exhaustive checks and examination by their local party branch. In 2011, out of the 22 million people who applied only 3 million were accepted.<sup>12</sup>

15. There are already local elections taking place to elect party leaders at the local level and that may be extended gradually to the regional and ultimately national level. This is what the Chinese leaders seem to mean by political reform in China. In spite of pressure from members of the judiciary for independence, Chinese political leaders do not appear to be talking about the separation of powers or the checks and balances between the three organs of the State or the independence of the judiciary (according to one commentator, currently the courts and prosecutors are in effect part of the Communist party structure)<sup>13</sup> or universal adult franchise to elect the people's representative in parliament or to elect the executive head of the nation. Having said this, a judicial reform movement seems to be currently underway in China.

16. That is one reason why, by citing their long ancient history, the subjugation of China by foreign powers in modern times, and the role played by the Communist party to rebuild the nation and to bring about economic prosperity through economic liberalisation, the Communist Party leaders seem intent on maintaining the one-party system but allowing elections within the party itself for leadership positions.

17. These nominal elections may claim to be of the 'Chinese style of democracy' in order to hold the country together and lead the economic growth but are in effect a form of 'controlled', 'limited' or 'guided' democracy. This is what the 'so-called Xi manifesto' adopted by the Chinese Communist Party's Central Committee, under the leadership of China's new President Xi Jinping, in November 2013 seems to indicate.<sup>14</sup> It appears to be about slow and

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(Cambridge University Press 2003).

<sup>11</sup> See Angus Foster, 'How to get to the top of China's Communist Party' in <http://www.bbc.co.uk/news/magazine-19876372> (accessed 20 November 2012).

<sup>12</sup> Ibid.

<sup>13</sup> A Professor of Chinese Law and of Chinese origin at Erasmus University, Rotterdam, Yuwen Li, writes that there is no strong separation of powers in China and "these powers are all under the unchallengeable leadership of the Communist Party", She goes on to add that "the Preamble of the Constitution reinforces the leadership of the Communist Party in all state affairs, including most importantly judicial affairs." Yuwen Li, 'Judicial Independence in China: An Attainable Principle?' Inaugural Lecture, Erasmus University Rotterdam (Eleven International Publishing, The Hague, 2013), 7 and 14 respectively.

<sup>14</sup> A detailed report of the decisions or guidelines of the Chinese Communist Party's Central

controlled reform of the Chinese political system and the creation of a more equitable society whilst protecting the Communist Party's monopoly on power. This 'Chinese style of democracy' will allow the leaders of the Communist party to sell the idea to the people that they are a great and distinct nation that does not have to copy or follow the Western style of democracy which in their opinion is about electing parliament or the president of the country by the people. What the Chinese leaders seem to be intent on promoting is a narrow or mechanical or procedural application of the Western style of democracy.

#### Socialist rule of law with Chinese Characteristics

18. Chinese leaders seem to say, even if it is for public posturing, that they wish to promote the rule of law, but do not seem to have a clear idea as to how to proceed since a wholesale subscription to the rule of law, as we know it, will mean the Communist party gradually losing its monopoly on power. Therefore, they keep coming up with new slogans. Like Deng Xiaoping's invention of the term 'socialist market economy', the new leaders of China seem to be trumpeting a new slogan: 'Socialist rule of law with Chinese Characteristics'. Indeed, the second national report of China to the Universal Periodic Review in 2013 outlines in Section C (paras 4 and 5) under the heading 'the concept and theoretical system of human rights under socialism with Chinese characteristics' what is meant by 'human rights with Chinese Characteristics'.<sup>15</sup>

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Committee was published in *The Financial Times* (London), 16 November 2013, 6.

- <sup>15</sup> See the National Report of China to the second UPR of the UN Human Rights Council: A/HRC/WG.6/1/CHN of 5 August 2013. Paragraphs 4 and 5 of this report read as follows: 4. China respects the principle of universality of human rights, and is of the view that all countries have a duty to take measures, commensurate with their national conditions, continuously to promote and protect human rights in accordance with the purposes and principles of the Charter of the United Nations and the basic spirit of the Universal Declaration of Human Rights and the relevant international human rights instruments. The international community should accord equal attention to the achievement of civil and political rights, economic, social and cultural rights, and the right to development; it should also promote the coordinated development of individual and collective human rights. China is committed to carrying out exchanges and cooperation on human rights with all countries, and to promoting the resolution of human rights issues in a fair, objective and non-selective manner by the international community.
5. The Chinese Government is working to explore paths for human rights development, establishing a robust system of human rights safeguards, and continuously enriching the theory of human rights, all within the framework of socialism with Chinese characteristics. It strongly advocates a scientific outlook on development, emphasizes "putting people first", and takes the furtherance and protection of the right to subsistence and the right to development as first principles. It coordinates and promotes the safeguarding of civil, political, social, and cultural rights as well as the rights of special groups, develops a broader, fuller and sounder people's democracy, and comprehensively promotes the coordinated development of rights of all kinds. It fosters a fairer and more harmonious society, and

As described by Sceats and Breslin, attempts such as this seems to be designed to put “civil and political rights to one side while trying to manage the economy and maintain political stability to generate rapid economic growth”.<sup>16</sup>

19. Of course, China can give whatever name it wants to its system of governance or the reform agenda and it does not have to make a wholesale subscription to the Western concept of democracy either, as there is no Western style of democracy as such. Different Western countries have a different form of democracy and different styles of electing their representatives or their government. While the British have a Westminster system of government led by the prime minister under a collegiate and collective responsibility of the cabinet to parliament, the Americans have a presidential system of government. The French have a mixed system and the Swiss have a system of direct democracy with rotating and collective leadership at the top.

20. There are procedural choices to be made; the Chinese do not have to follow any of the procedural practices of any of the Western countries, they could devise their own system just as the Swiss have done. This could very well be the ‘Socialist rule of law with Chinese characteristics’ as long as it embraces not only the Western notion of the rule of law only for its names sake but also the values championed by the UN and the UN human rights treaties. Since in the name of the ‘socialist market economy’ China has made a wholesale subscription to western capitalism by joining the WTO and liberalising its economy, it can do the same and make a wholesale subscription to the principles of the rule of law in the name of the ‘Socialist rule of law with Chinese characteristics’. After all, many democracies in the developing world have devised their own systems to adapt the Western values of rule of law and democracy to their own local or national conditions.

21. What a prominent Chinese scholar had to say about the nature of international law also applies to democracy: “despite frequent references in and out of China to ‘Chinese international law’, there is no such thing as ‘Chinese international law’ any more than there is such a thing as ‘Chinese mathematics’; there can only be a Chinese theory and practice of international law.”<sup>17</sup> At the

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works to ensure that every citizen enjoys a life of ever-greater dignity, freedom and well-being.” See also ‘Rule of law in China: China with legal characteristics’ *The Economist* (London), 1<sup>st</sup> November 2014, p.18.

<sup>16</sup> Sonya Sceats with Shaun Breslin, *China and the International Human Rights System* (Chatham House, London, October 2012) 39. See also, Jacqueline Smith (ed.), *Human Rights: Chinese and Dutch Perspectives* (Martinus Nijhoff, The Hague, 1996).

<sup>17</sup> Li Zhaojie, ‘Legacy of Modern Chinese History: Its Relevance to the Chinese perspective of the Contemporary International Legal Order’, 5 *Singapore Journal of International and*

core of Western democratic ideals are values based on individual autonomy, dignity, and liberty which have now become the core values of the international human rights system flowing from the Universal Declaration of Human Rights and other core international human rights treaties. Democracy is about dialogue between the government and its people; it is about the opportunity for the people to participate in a debate on issues of national importance; it is about people's right to change governments by non-violent means; and it is about holding governments to account for their actions. If this can be achieved by any means or names, that will be no problem for the people of China or the international community.

### **Reform process dominated by an apprehension towards human rights**

22. While remaining within the framework of 'Chinese Model of Democracy' and 'the Rule of Law with Chinese Characteristics', the Government of China seems to be pushing ahead with a programme of some political, legal and judicial reform. A great deal of intellectual debate seems to be underway in China as to the future course of action it should take on matters of internal governance and the conduct of its foreign policy. The 25<sup>th</sup> anniversary of the infamous Tiananmen Square events in June 2014, which shook the Chinese system to the core, has rekindled the debate on the future system of governance in China. While the argument of those supporting the suppression of the student-led campaign for democracy in 1989 is that the crushing of the campaign was to stop China from meeting the fate that met the Soviet Union by imploding on itself, and to allow for stability for economic growth and reduction of poverty, those at the other end of the spectrum have argued that the suppression of the campaign was a regressive move for China pushing its future back by many decades.

23. In terms of democratisation, China is today where many other Asian countries were 50-60 years ago. The tone and content of the speech by Xi Jinping demonstrates that the Chinese Communist party leaders are still seeking to rest on the laurels of the 1949 Communist revolution led by Mao Zedong. China was reborn or reunited by the Communist party after going through a humiliating experience since the Opium Wars of the early 1840s. The Chinese had seen their armies defeated time and again on their own soil by foreigners from the West and from Japan, and they had been subjected to humiliating treaties. The Chinese think that they became the masters of their own destiny

due to the struggle led by the Communist party and give the impression that they are still deeply suspicious of anything that is 'Western'.

24. Further, China is not as homogenous a society as it is made out to be, and not as peaceful internally as we are often led to believe. It has its human rights problems not only due to the centralised power structure dominated by the Communist Party but also due to the situation in Tibet and in other predominantly Muslim-populated provinces bordering the central Asian republics and pro-democracy provinces such as Hong Kong. China is a vast country with a raft of problems. Violent protests have been taking place in several provinces against land-grabbing, corruption, environmental degradation and other administrative malpractices at a local level against government and communist party officials.<sup>18</sup> For these and other reasons, Chinese leaders seem to be apprehensive about wholesale subscription to human rights and democracy.

### **III. The need for China to embrace human rights**

#### **1. To fill the legal and moral void**

25. China is an ancient nation, but when it comes to democracy, human rights and the rule of law it is young. It is not only due to Communist rule that China has had no tradition of the rule of law or the concept of rights; China was lacking in Western style democratic traditions even before the Communist Revolution in 1949. The norms of Confucian morality and hierarchy dominated life in China prior to its Revolution.<sup>19</sup> China did have a legal code in place prior to the Revolution, but, according to a Chinese historian, it "was nearly all public law, referring to procedures, marriage, inheritance, and other matters relative to and important in government administration."<sup>20</sup> In the words of Lubman, codified law "reinforced the hierarchical social order expressed in Confucianism."<sup>21</sup> Whatever legal infrastructure China had prior to the Revolution was destroyed in the Revolution's aftermath and especially during

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<sup>18</sup> Martin Patience, 'Amnesty: China forced evictions in 'significant rise'', BBC News: China, 11 October 2012: <http://www.bbc.co.uk/news/world-asia-china-19894292> (accessed 17 July 2014).

<sup>19</sup> See generally, Stanley B. Lubman (ed.), *The Evolution of Law Reform in China: An Uncertain Path* (Edward Elgar Publishing 2012).

<sup>20</sup> John King Fairbank and Merle Goldman, *China, A New History* (Harvard University Press 1998), 183, as quoted in Lubman, (n19), xviii.

<sup>21</sup> Lubman (n19), xviii.

the Cultural Revolution. Under Communism “justice had become politicised as a tool to reshape society and suppress class enemies.”<sup>22</sup> As Lubman writes, in the aftermath of the Communist Revolution.

26. Law itself became a target. In 1952 and 1953, a nationwide campaign to ‘reform law’ purged most of the considerable number of law-trained judges and clerks who had previously worked for the overthrown KMT [Kuomintang] regime, replacing them with politically reliable cadres. The campaign stressed the role of law as an instrument of class warfare, and criticised the purged judges for their unwillingness to wage such warfare against enemies of the people. Legal procedures were denounced as reactionary.<sup>23</sup>

27. What is more, the Communist Party Committees had political-legal departments which oversaw the work of the judiciary, including police, procuracy and courts, and made sure that they followed the Party’s line. The state went further during the Cultural Revolution and “rendered previously politicised legal institutions totally irrelevant. The formal criminal process, which had already been emptied of whatever content it once possessed years earlier, disappeared.”<sup>24</sup> According to Lubman, the impact of the Cultural Revolution was so serious that by 1970 in some places the army directly supervised the police, the courts and the procuracy, and some police functions had been distributed to new activist organizations.<sup>25</sup>

28. The Communist revolution and especially the cultural revolution of the 1960s taught or rather forced people to jettison religious values too and with that went out of the window the provision of moral education informed by religious values. The Communist ideals and the message from the Red Book were supposed to fill the void created. But lately much of the Communist ideals, especially economic ones, have also been jettisoned by the government itself. A sizeable number of people seem to be growing up confused with the values to which they are supposed to be adhering. Consequently, the only value most of them seem to be pursuing is the creation of wealth and enjoyment of materialistic satisfactions.<sup>26</sup>

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<sup>22</sup> Ibid. xxi.

<sup>23</sup> Ibid. xxii.

<sup>24</sup> Ibid. xxv.

<sup>25</sup> Ibid.

<sup>26</sup> See for example, Karen Chan, ‘Social comparison, imitation of celebrity models and materialism amongst Chinese youth’, (2007) 27(5) *International Journal of Advertising*, 799-826; Peter Hayes Grees, Stanley Rosen (eds), *State and Society in 21st Century China: Crisis, Contention and Legitimation*, (Taylor and Francis 2004); Gita Kochhar, ‘Chinese Youth: Rise of a New Culture’, *China Daily*, 14 June 2011,

29. The observation of the present author during his two academic visits to China and his interaction with a good number of people involving not only academics and students but also ordinary men and women in the street was that China was going through a crisis of moral and ethical dimensions – a void of sorts was being created. This crisis of moral void could be filled by the human rights values promoted by the UN and the human values of Confucian teaching. As Lubman states, “[i]n the absence of a unifying ideology, some Chinese are absorbed in competition for wealth and status, often vividly evidenced by conspicuous consumption of luxury goods. Others have sought religion to [give] meaning to their lives”.<sup>27</sup>

30. A Chinese journalist goes further and states that: “[A] 30-year transition marked by love songs, sinology, and consumerism has shaken faith, belief and credibility in China.”<sup>28</sup> Therefore, the Chinese society needs to promote a culture of human rights as a social yardstick and more so than many other societies which have not gone through as much political upheaval as China has in recent times. This state of affairs in contemporary China contrasts starkly with the situation in Western societies which are influenced by Christian teachings and other Asian societies influenced by Hindu and Buddhist religious values. Of course, both Buddhist and Confucian values run deep in the traditional Chinese psyche and the revival of both of them has begun in different forms, but the youth of today would need more concrete and modern norms of conduct to guide their lives, and this could be done by promoting human rights.

31. Of course, Western society is also identified with individualism and materialism and there is moral decay creeping into Western society also,<sup>29</sup> but the decision by the majority of the people in the West seems to be largely influenced directly or indirectly and knowingly or unknowingly by Christian values or by a sense of right and wrong that is informed by Christian teachings. The same is the case in much of South and Southeast Asia which have a Hindu or Buddhist heritage whose values are founded on tolerance, non-violence,

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[http://www.chinadaily.com.cn/opinion/2011-06/14/content\\_12692011.htm](http://www.chinadaily.com.cn/opinion/2011-06/14/content_12692011.htm)  
(accessed 04 November 2014).

<sup>27</sup> Lubman, (n19), xxxvi.

<sup>28</sup> Zhu Dake, ‘Culture’s Long March from Revolution to Crisis’, Caixin (21 June 2010), <http://english.caixin.cn/2010-06-21/100153285.html>, as quoted in Lubman (n19), xxxvi.

<sup>29</sup> See for example, Craig M. Gay, *Cash values : money and the erosion of meaning in today's society*, (W.B. Eerdmans 2004); Erik Ringmar, *Surviving capitalism: how we learned to live with the market and remained almost human* (Anthem Press 2005).

universalism and respect for the dignity of the individual. For instance, what the present author observed during his term of office as the UN Special Rapporteur for human rights in Cambodia was that however autocratic the government in Phnom Penh may be it knew its limits and did not go beyond those limits against its political opponents.

32. The degree of civility and gentility that exists on the part of the people both in power and in opposition in countries such as Thailand and Cambodia seems to be informed and influenced by their Hindu and Buddhist heritage. Only one recent dark part of history of Cambodia that remains unfathomable to the present author is the brutality and murder that was committed during the Khmer Rouge period in a country which is predominantly Buddhist – a religion which is based on the principle of non-violence in the broadest sense possible. Otherwise, people, both in power and in opposition, in much of South and Southeast Asia have a habit of adhering to certain moral and ethical values derived from the Buddhist and Hindu heritage which are consonant to and consistent with modern notions of human rights. Although, there seems to be a revival of religion, whether Buddhist or Christian or otherwise, taking place in China, the youth brought up with communist values that criticised religion will take a long time to embrace religious values.<sup>30</sup> It can be hoped that the revival of interest in religious values and Confucianism would fill the moral and ethical gap created by the Cultural Revolution and ultimately create conditions conducive to respecting for human rights.<sup>31</sup>

## **2. To address the demand for change**

33. With the rise in economic prosperity, there is a rapidly growing middle class in China and this class is already demanding freedom, and the demand will grow stronger in due course for human rights and a share in power through democratic means. The liberalisation of economic trade and the lifting of barriers to global markets have in turn paved the way for a more liberal approach to government and governance. This is what happened in South Korea and Singapore and seems to be happening in today's China. That is one reason why the leaders of China have started to make promises to move towards democracy and the people will ask them to deliver on their promises.

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<sup>30</sup> Arthur Waldron, 'Religious Revivals in Communist China', *ORBIS*, Vol.42, No.2 (Spring 1998), pp. 325-334.

<sup>31</sup> For an introduction to the Cultural Revolution of China, see Richard Curt Kraus, *The Cultural Revolution: A Very Short Introduction* (Oxford University Press 2012).



As stated by Mahbubani, “The emerging urban elite now see protecting their individual rights as a number one priority.”<sup>32</sup> They want predictability of their life-style and of the environment around them and security of their property and that is what the law or rather the rule of law provides.

34. China has already joined the capitalist project led by the WTO and it is only a matter of time before the population will want to join the ‘club’ of liberal democracies. WTO membership is not only about economic growth and promotion and expansion of international trade, it is also about increasing and ensuring transparency, accountability and market discipline within the domestic market and this process has to be founded on the principles of the rule of law. In other words, as Mahbubani says, “no modern economy can function without effective rule of law. If China, for example, cannot provide the same property rights enjoyed by other modern societies that fact alone will eventually stifle China’s economic development.”<sup>33</sup>

35. What the present author observed during his two academic visits to China – once in 2007 and another in 2011 - was that people were already largely free to live, work, travel, buy, sell, trade and even worship whomever and wherever they wanted. What was lacking was political freedom. If we buy the idea advanced by Adam Smith and Amartya Sen, the freedom to carry out economic activities will eventually bring about political freedom too. Citing Adam Smith, Sen argues that “freedom of exchange and transaction is itself part and parcel of the basic liberties that people have reason to value.”<sup>34</sup> If we accept the view of Sen, the rapid economic development that China has witnessed in the recent past should ultimately enable the people in China to enjoy other freedoms: “Development can be seen ... as a process of expanding the real freedoms that people enjoy.”<sup>35</sup> His notion of development is broader than just economic growth and he sees freedom as the principal ends of development. Therefore, in the context of economic development, the future of human rights should be an optimistic one in countries such as China.

### **3. To make constitutional rights meaningful**

36. Various provisions of the 1982 Constitution of China include provisions

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<sup>32</sup> Kishore Mahbubani, *The New Asian Hemisphere: The Irresistible Shift of Global Power to the East* (Public Affairs 2008), 88.

<sup>33</sup> *Ibid.*, 138.

<sup>34</sup> Amartya Sen, *Development as Freedom* (Oxford University Press 1999), 6.

<sup>35</sup> *Ibid.*, 3.

relating to people's rights. For instance, Article 35 of the Constitution states that citizens "enjoy freedom of speech, press, assembly, association, procession and demonstration." However, as Zhang states, "none of these freedoms are institutionally protected in practice." Having said this he goes on to say that "one cannot gainsay the obvious fact that ordinary Chinese enjoy infinitely more free speech today than they did during the 'dark ages' of the 1950s and 1960s when one could be executed for blasphemy against the 'supreme leader' ..., even if the sin was committed in one's private home."<sup>36</sup> This may be one reason why Mahbubani says that the change that is taking place and the pace with which China is "implementing Western-style rule of law since the 1982 constitution is nothing short of astounding. This is particularly so in terms of laws that curb the abuse of State power over the individual."<sup>37</sup> Jacques is equally positive about the transformation taking place within China.<sup>38</sup>

37. Making reference to the 1991 white paper published by the Chinese State Council, 'The Situation of Human Rights in China', the first formal acknowledgement of the concept of human rights by the Chinese government, Mahbubani goes on to say that: "In the 9,429 laws it passed between 1991 and 1997, the Chinese government paid specific attention to the legal rights of citizens."<sup>39</sup> When Hu Jintao succeeded President Jiang Zemin in 2003 he was keen to be seen to be promoting human rights and reform. Accordingly, the amendments made to the Constitution in 2004 formally recognised 'human rights' in Article 33 stating that: "The state respects and protects human rights." It was thus, for the first time since the Communist Revolution in 1949, that human rights entered the lexicon of the Chinese Constitution, a notion that used to be ridiculed as a 'bourgeois sentiment' by Communist leaders.<sup>40</sup>

38. According to Zhang, since its "experiment with 'reform and opening' in 1978, China has made a 'great leap forward' on the road toward rule of law. In the span of three decades and while recovering from the trauma of the Cultural Revolution, the National People's Congress (NPC) and its Standing Committee (NPCSC) have made 236 laws; the State Council has issued some 690 administrative regulations; and local authorities have made over 8,600 local

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<sup>36</sup> Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Hart Publishing 2012), 225.

<sup>37</sup> Mahbubani (above n.33), 87.

<sup>38</sup> Martin Jacques, 'The myopic Western view of China's rise', *The Financial Times* (London) 25 October 2014, p.11.

<sup>39</sup> Mahbubani (n32), 87 (footnote omitted).

<sup>40</sup> Qianfan (n36), 57.

regulations.”<sup>41</sup> As a result of these reforms, the people in China can potentially enjoy a much higher degree of personal freedom in China today than they could 10 or 20 years ago.

39. People can also talk about politics and other matters of State, provided that they do not mount an organised challenge to the established authority of the Communist Party.<sup>42</sup> For instance, Professor Zhang was bold (by Chinese standards since the work of Chinese scholars seems to be monitored by the party and the government) to conclude his book *The Constitution of China: A Contextual Analysis* with the following statement: ‘the constitutional consciousness of the general populace has risen continuously since 1978, the vast majority remains politically passive under a regime that effectively discourages political participation and makes elections into meaningless performances.’<sup>43</sup> He goes on to say that this dormant majority has yet to learn the necessity of stepping out and doing something for the political future of the country. ‘To make their country a new republic, the Chinese people need to transform themselves from subjects of a despotic regime – whether under an emperor or a monopolistic ruling party – into citizens with a republican spirit.’<sup>44</sup>

#### **4. To allow an assertive judiciary to move towards judicial independence**

40. The judiciary itself appears to be getting more assertive and keen to protect its independence. It was earlier in 2013 that the Supreme People’s Court allegedly sent a letter to a top Chinese leader stating that the courts needed more independence from the executive branch of the government and apparently from the Communist Party too. It appears to have heralded the beginning of a remarkable shift in official attitudes towards the judicial system. The letter may have prompted the adoption of a resolution by the Central Committee of the Communist Party in November 2013 declaring a number of reforms of the criminal justice system, including ending false confessions obtained by torture and reducing the number of crimes punishable by death,

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<sup>41</sup> Ibid., 171.

<sup>42</sup> See generally, Suisheng Zhao (ed.), *China and Democracy, the Prospect for a Democratic China* (Routledge 2000).

<sup>43</sup> Qianfan, (n36) 264.

<sup>44</sup> Ibid.

and calling upon police, prosecutors and judges to “protect human rights”.<sup>45</sup> It also seems to have led to the Ministry of Public Security issuing a warning against torturing suspects in June 2013.

41. Actually, it was in 2012 that China had embarked on a major revision of the Criminal Procedure Law and the letter seems to have acted as a catalyst for reforms that were already, in part being considered. China also published the first ever White Paper on Judicial Reform and issued its second National Human Rights Action Plan (2012-2015) in 2012.<sup>46</sup> Thus, the Chinese criminal justice system appears to be structurally moving towards a freer and fairer system, the judiciary seems to be gaining ground in asserting independence and conforming to the principles of the rule of law, and the country is making progress in moving towards implementing certain human rights.

### **5. To support and sustain economic growth**

42. China has liberalised the economy for persons, both natural and juridical, freely to do business within China and abroad. It is the economic boom that China has experienced for the past several decades that seems to have sustained the Communist Party and if that boom is not maintained the control of the party or its political monopoly is likely to be challenged. The rule of law provides the framework and an environment in which business can flourish. Individuals and business organisations would like to be assured that the government of the day will not expropriate their profits or their businesses at will, and should such expropriation take place that they will have recourse to an independent judiciary for legal remedy.<sup>47</sup> They would also like to have the certainty and predictability that they would be able to enforce contracts with other individuals and companies, have their intellectual property rights protected, and be assured that in the event of a breach of contract or other property rights they can obtain effective redress not only against other

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<sup>45</sup> ‘Judicial reform: Court Orders’, in *The Economist* (London), 7 December 2013, 66, quoting a report published in *Southern Metropolis Daily*, a Guangdong-based newspaper.

<sup>46</sup> See Foreign & Commonwealth Office, ‘Human Rights and Democracy: The 2012 Foreign & Commonwealth Office Report (London, April 2013), 137.

<sup>47</sup> See generally, R. Dolzer and C. Schreuer, *Principles of international investment law* (Oxford University Press, 2012); C. McLachlan et al., *International investment arbitration: substantive principles*. (Oxford University Press, 2007); S. Montt, *State liability in investment treaty arbitration: global constitutional and administrative law in the BIT generation*. (Hart Publishing, Oxford, 2011); P. Muchlinski et al., *The Oxford handbook of international investment law* (Oxford University Press, 2008); Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing 2012).

individuals and companies, but also against the State.

#### **IV. The future for human rights in China**

43. China is a huge country with enormous internal problems. The Chinese rulers have traditionally been occupied with the maintenance of an orderly society within the country itself and have thus had not much time to focus on foreign policy matters. That is why the Chinese did not colonise other countries even during the height of its imperial power; the policy of China at the time towards some neighbouring countries was to require them to accept Chinese supremacy and send annual tributes as a mark of recognition and respect of Chinese rulers as the grantees of the time. The rulers of China were mostly too busy managing the internal affairs of their vast nation. The situation is no different for the leaders of contemporary China. The Party itself is facing a multitude of challenges at the same time as trying to hold on to its monopoly on power. In the words of Lubman, the Party “must reconcile its promotion of socialism with its tolerance of consumerism and its fostering of crude nationalism even as it seeks to project ‘soft power’ internationally.”<sup>48</sup>

44. It is a country with an ancient civilisation and is moving towards modernisation both in terms of its infrastructure for development and thought process. But history shows that the Chinese take a long term view of things and do not rush into decisions. The Chinese have already been holding local level elections. They are learning democracy from both books and practice. Therefore, whilst it may take time for China to embrace democracy and support human rights in the conduct of its foreign policy, China is moving and will have to move towards embracing democracy and human rights, albeit not necessarily a ‘Western style of democracy’ or a ‘Western agenda of human rights’ but the global conception of human rights and universal human rights promoted by the UN.

45. The Chinese would know that they have done well not by inventing their own system of economic governance but by embracing Western capitalism with open arms and by jettisoning the Marxist economic ideology and Mao Zedong thought. The reason why the Communist party leaders keep repeating that they do not wish to embrace a Western style of democracy is that they do not wish to relinquish their monopoly of power. However, the UN human rights agenda is no longer a Western agenda. It now is a truly global agenda, developed and nurtured by both the developed and developing

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<sup>48</sup> Lubman, (n19), xxxv.

countries and the Chinese leaders know this. Therefore, the UN system of human rights and the ideals promoted by the UN, an organisation perceived as relatively neutral and in which China has a major stake as a major power and a permanent member of the Security Council, makes it easier for the Chinese leaders that they were conforming to the UN standards or to the wishes of the international community than to the wishes of the Western countries. The UN could be a face saving mechanism for China. Indeed, China has already ratified a total of 26 international human rights treaties adopted under the auspices of the UN.

46. Chinese society is changing. There are both challenges and opportunities ahead for China's political future that will impact upon the freedoms of its people.<sup>49</sup> All the indications are that China will ultimately move in the direction of democracy, although the form that this democracy takes may differ from Western approaches.<sup>50</sup> Thanks to economic liberalisation China is now part of the global village. The interaction that the Chinese are having with the outside world through social media and their travel as tourists to Western countries is bringing them closer to international values including democracy and human rights. When the Chinese see how people in other countries, especially the Western or other democratic developing countries, are enjoying their rights and the opportunity to elect their government, the Chinese will want some of those for themselves or understand what is possible in China. A large number of Chinese students are studying at Western universities and enjoying their freedoms.<sup>51</sup> Gradually, these students are likely to demand change and democracy in China when they return home.

47. China is already a far freer society than it was 20 years ago. Although the student-led revolution for political reform was crushed in Tiananmen Square in June 1989, a silent revolution is underway within Chinese society. The experience of the present author during his two academic visits to China

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<sup>49</sup> Zheng Yongnian, 'Where does the Chinese Communist Party go from here? Challenges and Opportunities', (2012) 10(2) *China: An International Journal*, 84.

<sup>50</sup> Yang Yao, 'A Chinese Way of Democracy?' (2010), 8 (2) *China: an International Journal*, 330.

<sup>51</sup> Shiron Chen, 'Chinese overseas students 'hit record high' BBC News, 18 April 2011, <http://www.bbc.co.uk/news/world-asia-pacific-13114577> (accessed 17 July 2014). China was the top non-EU sending country of students to UK universities in 2010-2011 and 2011-12 (for which statistics are available at the time of writing), although given the size of the country, this may not be surprising, International student statistics: UK Higher Education, UK Council for International Student Affairs, <http://www.ukcisa.org.uk/Info-for-universities-colleges--schools/Policy-research--statistics/Research--statistics/International-students-in-UK-HE/#Top-non-EU-sending-countries> (accessed 17 July 2014).

was that people are now participating in a range of debates on national and international political affairs. The impression that the present author received from his interaction with Chinese scholars within the Asian Society of International Law, in which the Chinese are actively participating, is that most academics and students in the fields of international law and international relations accept the idea of the universality of human rights and legitimacy of international law and wish to see democracy, rule of law and human rights promoted in China. Interactions of Chinese scholars with scholars from outside of the country through such learned associations are bringing Chinese scholars closer to mainstream international law and human rights.

48. As summarised by Sceats and Breslin, many of these Chinese scholars “consider that its growing global power [largely economic power] entails a responsibility to contribute to global governance, and some would like to see it becoming a more active and constructive participant within the UN’s human rights machinery.”<sup>52</sup> Indeed, such voices of reason advanced by intellectuals are likely to have a significant impact on the direction that China takes in international affairs. As stated by a prominent Chinese dissident, Ai Weiwei,<sup>53</sup> China’s growth cannot last without freedom and the Communist Party leaders would know this.

49. The time will come when it becomes difficult for Chinese Communist Party leaders to resist pressure for change and reform and that time will be when the push by the liberal-minded elite from within the system for reform and the popular demand for it meet.<sup>54</sup> People seem to be more assertive. For instance, in January 2013 a group of 50 journalists signed an open letter protesting the interference by the Chinese authorities in the editorial decisions of a Chinese newspaper, *Southern Weekend*, a liberal paper, and these journalists were supported by many Chinese academics and activities concerned about the freedom of speech in China.<sup>55</sup> Indeed, Chinese Communist Party leaders will increasingly face a dilemma as China prospers. Responding to calls for greater freedom of speech and other freedoms is likely to remove some

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<sup>52</sup> Sonya Sceats with Shaun Breslin, *China and the International Human Rights System* (Chatham House 2012) 56.

<sup>53</sup> Ai Weiwei, ‘China’ growth cannot last without freedom’, *The Times* (London), 17 December 2012, 20.

<sup>54</sup> The pressure for reform was building from within the system during the 18<sup>th</sup> Communist Party Conference in Beijing in November 2012, see Jamil Anderlini, ‘Pressure builds on ruling party for political reform’ in *The Financial Times* (London), 8 November 2012, 11.

<sup>55</sup> Leo Lewis, ‘New freedom of speech battle erupts as China’s censors try to crack down’, *The Times* (London), 5 January 2013, 39.

vital pillars of the Communist Party's power, but ignoring such calls could result in an escalation of such protests.

50. The experience in other countries have evinced that where there is a strong rule of law, there is likely to be less corruption. One way or the other, the only way forward for China is to embrace the rule of law and this will in turn entail respect for human rights. This does not mean that it will have to embrace a Western model of democracy. It could develop its own model. Indeed, Chinese scholars such as Hei Weifang warn against naive imitation of the English or American legal systems.<sup>56</sup> As put beautifully by Ferguson, "We may imagine Oriental gardens in England and English gardens in the Orient. But there are limits to what transplantation can achieve."<sup>57</sup>

51. In this rapidly changing world neither the American nor the English model set the benchmark for all. However, the core of any Chinese model of governance will have to contain core human rights values championed by the UN and China has committed itself to doing so. China would do well by following the international benchmark set by the international human rights treaties and the valuable jurisprudence developed by the human rights treaty bodies. As stated by a Chinese lawyer, "China's political stability may depend on its ability to develop the rule of law in a system where it barely exists."<sup>58</sup> Another Chinese scholar, Zhang Yansheng, Secretary-General of the Academic Committee for National Development and Reform, argued that "we should shift towards reform based on rules and law ... if such reform does not take off, China will run into big trouble, big problems."<sup>59</sup> Indeed, it has been proven throughout history again and again that inequitable, unstable and unrepresentative States are by nature the basis of disorder and conflict.<sup>60</sup> Without embracing the rule of law, whether it is called Western or not, the economic growth of China is unlikely to sustain since the rule of law is the foundation of any civilised society. Of course, the Chinese seem to be concered

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<sup>56</sup> As cited in Niall Ferguson in his Reith Lectures entitled 'The landscape of the law' for the BBC Radio 4 and the BBC World Service on 3 July 2012. Available at <http://www.bbc.co.uk/programmes/b01jmxrx/features/transcript> (accessed 25 August 2012).

<sup>57</sup> Ibid.

<sup>58</sup> Chen Guangcheng, as quoted by Ferguson, *ibid.*

<sup>59</sup> Ibid.

<sup>60</sup> F. Fukuyama, *State Building: Governance and World Order in the Twenty-First Century* (Profile Books 2004); S. Patrick, "'Failed" States and Global Security: Empirical Questions and Policy Dilemmas', (2007) 9(4) *International Studies Review*, 644; R. I. Rotberg (ed.), *When States Fail: Causes and Consequences* (Princeton University Press 2004); Stefan Wolff, 'The regional dimensions of state failure', (2011) 37, *Review of International Studies*, 951.



that complete freedom may result in possible balkanization of the country and it may meet the fate that the former Soviet Union or Yugoslavia met or in the return to the pre-Communist Revolution situation in which various 'war lords' were running their dicta in the country. However, the growing middle class in China seems to be getting mature and appears to be having a sensible debate as to the future form of government for China. If the process of judicial and other political reform currently underway is accelerated in China the country is likely witness an orderly transition to a greater respect for human rights.

## **V. Opportunities for the UN system of human rights**

52. China is changing, adapting and moving gradually towards democracy and this is where the UN human rights machinery can assist. But for this the UN system itself should be well equipped. The Chinese rulers seem to know that change is inevitable and they thus have shown that they would want to preside over an orderly transition to democracy rather than wait for chaos to ensue if the growing middle classes and the intelligentsia are not satisfied with the move towards democracy.

53. The justification for the Communist party rule in China is based on the following factors: the need to increase economic prosperity, the need to hold together a massive nation through an authoritarian rule of one party, and the need to rejuvenate the country from the humiliating past of being colonised and suppressed.<sup>61</sup> However, Chinese opposition is not to human rights and democracy as such but to the manner in which the Western countries have dealt with each in the past and how they have pursued their current policies. It is the strong psyche of victimhood that seems to manifest itself in China's attempt to reassert itself.

54. The inner instincts or the traits of the Chinese people are not amenable to Communism. It was a system imposed on the Chinese people in 1949 and was alien to the masses. But they went along with it because the Chinese Communist party in general and its leaders in particular were regarded as nation builders and restorers of the pride of the Chinese nation. Now the younger and increasingly prosperous Chinese population is leaning towards the idea that it is the democratic future of the country that will earn and sustain the pride of the Chinese nation. The economic might alone will not make it

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<sup>61</sup> Fu Ying, 'The past of a foreign country is an unfamiliar world' *The Financial Times* (London), 26 August 2014, 11 (Fu Ying chaired the Foreign Affairs Committee of China's National People's Congress).

possible for China to provide global leadership in the longer term if it does not become a democracy itself. Therefore, reform and change is coming in China. The current process of reform in China can be perceived by many as frustratingly slow, and the Communist Party leaders will delay it as long as possible, but change and reform is inevitable in China.

55. The present author was once told by a Chinese scholar that since 1.3 billion Chinese have 2.6 billion ideas about how to govern the country, chaos may ensue in China if the Communist Party does not control power. However, the Communist Party is unlikely to be able to control power if it does not introduce serious political reform. The power base of the Communist Party has been the economic boom and people have been willing to go along with this since it has brought about higher standards of living for many, but when that economic boom slows down, which it eventually will (and arguably, already has), people will start asking questions. Disputes, whether related to land rights or environmental degradation, have started to increase in China. If the judiciary is not made independent and able to command the trust of the people, or is not perceived to be independent, people may resort to violence as seen in many other transitional societies.

56. For an orderly transition in China, the judiciary will have to be made independent and the media will have to be made freer. This can be done only if the process is accompanied by human rights and the rule of law. Therefore, the only way to govern a big nation like China will be through democracy. There have been recent attempts made by some judges to assert the independence of the judiciary, as noted above with reference to a letter sent by the Supreme People's Court to a top Chinese leader with the information that courts were not working quite as they should, that they were being interfered with and prevented from dispensing justice independently.<sup>62</sup>

57. The Chinese apprehension towards human rights is also influenced by issues within Tibet, Inner Mongolia, Hong Kong and Muslim-dominated provinces such as Xinjiang. But the Chinese would also realise that these issues are unlikely to go away. Rather, the opening up of China, globalisation of its economy and the opportunities offered to people belonging to all ethnic groups by advances in science and technology, may exacerbate the problems in such regions if China pursues the path of oppression rather than reform. Therefore, whether it is reforming China's criminal justice system, controlling corruption, strengthening the rule of law or widening the process of democratic reform, China stands to gain from the good practice of other countries by engaging

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<sup>62</sup> 'Judicial Reform: Court Orders', *The Economist* (London), 7<sup>th</sup> December 2013, 66.

itself in dialogue with them within the UN Human Rights Council or by engaging with special procedures mandate holders and human rights treaty bodies, which is what China seems to be doing. On this basis, China is not going to become a challenge to the UN human rights system or to Western values. Rather, the country offers an opportunity for the West and the UN human rights system to help shape its policy towards democracy, rule of law and human rights.

58. While the Long March led by Mao-Tse Tung brought Communist rule to China in the middle of the last century, the march by the ordinary people in China today towards democracy, rule of law and human rights, dubbed as ‘peaceful evolution’, looks unstoppable. People are getting organised outside of the communist party structure and forming their own NGOs to deliver services to people and to defend their rights. The role civil society organisations played centuries ago in introducing, sustaining and strengthening democracy in Western countries such as Britain and France is being replicated in contemporary China. The Economist reported in April 2014 that that some 500,000 NGOs had been registered in China and a further 1.5 million-odd were operating without being registered and the number was growing rapidly.<sup>63</sup> Rather than trying to outlaw or suppress these NGOs, the Communist government seems to be coming around to accept their existence and willing to register them. What the Economist observed in this regard is interesting:

Determined to avoid the fate of the Soviet Union, [Communist] party leaders strive to hold China together. But the country is no longer a socialist paradise where the party dictates and the masses toil. A bourgeois class of perhaps 300m people has emerged – and they have their own views on the sort of place China should become. At the same time, the party has retreated from most people’s daily lives, no longer even pretending to provide cradle-to-grave benefits.<sup>64</sup>

59. Consequently, it seems to be the NGOs that are seeking to fill the moral and ethical gap and they are likely to grow in number and influence with the increase in people’s expectations particularly as the old state and party apparatus seems incapable of coping with the needs and demands of its people.

60. As stated by Zhang, China is already “massively introducing Western jurisprudence and legal practices that help to fill the void left by the relentless

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<sup>63</sup> ‘China’s future: Enter the Chinese NGOs’, The Economist (London), 12 April 2014, 8.

<sup>64</sup> Ibid.

destructions of the Cultural Revolution.”<sup>65</sup> Thus, there is an opportunity for the UN to introduce human rights law and jurisprudence developed by the UN treaty bodies to the Chinese legal and constitutional system. Although China is an ancient nation, the notions of democracy, rule of law and human rights are new to China. It will take time for these concepts to take roots in the society. From this perspective, China is a less developed country than many other developing countries and it will need assistance from the international community to traverse a daunting transition as it embarks upon the process of legal and judicial reform, a daunting task for such a country with a massive population. China seems to be in the process of carrying out judicial reform at a scale not seen in the country in the past.<sup>66</sup> For obvious political reasons, the Chinese would find it easier to learn and receive help from the UN rather than from a Western country in this process.

61. The challenge ahead for the UN human rights system is how to assist those countries in transition in accelerating the process of the democratisation of their society. Greater respect for human rights should lead to an orderly transition and avoid chaos such as those witnessed in countries such as the former Soviet Union, Egypt, Libya and Tunisia. For this, the UN human rights system itself will have to be more robust to ensure compliance with international human rights standards by all. The more robust the UN system the more it can assist countries such as China in making a more swift and orderly transition.

62. A more prosperous China may mount a challenge to the political hegemony of the West, but not to the human rights agenda promoted by the UN. People are already speaking of ‘Pax Sinica’,<sup>67</sup> but the current indications are that the Chinese ambition would be geared to forming new political, security and economic alliances similar to NATO or other regional organisations with like-minded States rather than to challenge the values that the UN stands for, including human rights. The establishment of the Shanghai Co-operation Organisation (SCO) of six countries – China, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Uzbekistan - is an example. These countries may very well be joined by India, Iran, and Pakistan.

63. Challenging the perceived Western hegemony is one thing, but challenging the UN and its human rights agenda is quite another. Instead,

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<sup>65</sup> Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Hart Publishing 2012), 65.

<sup>66</sup> ‘Rule of law: Realigning justice’, *The Economist* (London), 16 August 2014, 45.

<sup>67</sup> ‘Banyan: Pax Sinica’ *The Economist* (London), 20 September 2014, 68.

owing to the pressure coming from within China, it will have no option but to embrace the international human rights agenda and in doing so may well seek to reshape the agenda. It is a matter of time and priorities. While much of the Western world has today declared by and large human rights and democracy as a number one priority at least in public pronouncements, environmental protection as number two and economic development as number three priority, China's priorities have ranked in reverse order thus far, that is, economic development first, environmental protection second and human rights third.

64. Western civilisation and its prosperity was built around human freedom in which people are free to do what they like as individuals, provided that they operate within the bounds of behaviour defined and prescribed by the States. The culture of democracy and human rights has long produced, and continues to produce, self-governing individuals who exhibit a remarkable drive for technological mastery and a faith in the utility of economic growth. This has enabled people to become creative, innovative and focus single-mindedly on their mission and objectives. Therefore, human rights, individual freedom and personal liberty have become a priority in the West.

65. China or any aspiring nation will realise this virtue and will eventually let the people enjoy their freedom in the pursuit of their happiness and success. The UN human rights system is a broad church which has a place within it for non-Western ideologies too. China has adopted a pragmatic approach to democracy and human rights. Thus, China's model of implementing human rights could be accommodated within the current UN human rights system. China will resent Western countries acting as the sole world policemen for human rights, but it will gradually embrace human rights and use the UN system of human rights to its advantage rather than oppose it. Therefore, the challenge for the UN and the international community is to encourage and support China to accelerate the process of democratisation of the country. If China is able to accelerate the process of political reform within the country, it will be natural to see China working with Western States and other democracies on human rights issues.<sup>68</sup> This cooperation within the UN in general and in other fields of international relations, which Sienho Yee argues is and should be part of the process of peaceful 'co-progressiveness' to achieve the ultimate objectives of the international community founded on the principles of the Charter of the UN in general and the Five Principles of Peaceful Co-existence or Pancha Sheela in particular.<sup>69</sup> Implying that China is unlikely to accept the

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<sup>68</sup> See Sonya Sceats with Shaun Breslin, *China and the International Human Rights System* (Chatham House, 2012), see in particular, 'Summary Points'.

<sup>69</sup> Sienho Yee, 'The International Law of Co-progressiveness: The Descriptive Observation,

western style of democracy, he argues that “the law of development or prosperity should not be the law that governs international relations generally; the international law of co-progressiveness should be.” Accordingly, “law must reflect not only the general spirit of society, but more importantly, the good part of that spirit,” meaning that the Western countries should accommodate the Chinese spirit of cooperation in international relations, including the promotion and protection of human rights, and the values that underpin the Chinese society.<sup>70</sup>

## VI. Conclusions

66. The rise in China’s economic prosperity will not pose a threat to democracy and human rights. Rather, it will require greater freedom and stronger rule of law. While the Government may challenge the Western political hegemony, the people in China will come closer to embracing democracy and human rights. China’s political elite may wish for the demise of Western political domination but via its continued economic liberalisation it will gradually embrace Western concept of democracy, human rights and the rule of law. In other words, it will be down with the West, long live Western values - so far as China’s future is concerned. The Chinese delegations to the UN human rights fora do not oppose human rights values but make a plea that its current status as a developing country and its consequential national realities should be taken into account when judging China’s record of human rights. As China becomes a more prosperous nation, that plea will become increasingly redundant.

67. People within the top ranks of China’s leadership seem to be aware of this inevitability and appear to be working towards a gradual reform leading ultimately towards democracy. Since democracy is a value system rather than a mere system of governance these Chinese leaders are likely to push for a Chinese version of democracy rather than the American, British or French versions. There are some stark differences in values within the legal and political systems of the West itself. The Anglo-Saxon values which place a great deal of emphasis on individual autonomy are slightly different to the Continental mind-set which accepts the centrality of the State.

68. While countries with Anglo-Saxon traditions such as the UK and the

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the Normative Position and Some Core Principles Towards an International Law of Co-Progressiveness’, 13 Chinese JIL (2014), 485-489.

<sup>70</sup> Ibid., para 12. See for a more detailed earlier version of his article championing the notion of ‘Co-progressiveness’ in international relations, Sienho Yee, ‘Towards an International Law of Co-progressiveness’, in Sienho Yee and Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001), 18–39.

US, accept more liberal values, those with Continental traditions are prepared to compromise certain individual rights in favour of societal values. Thus, China may choose initially to incrementally adopt the Continental Western system and gradually end up embracing the Anglo-Saxon model which has proved to be more successful than its Continental counterpart at least in terms of supporting and sustaining economic growth and enhancing personal liberty.

69. The Chinese Premier Wen Jiabao, while addressing the Rio+20 Conference in Rio in June 2012, stated that “China is a major developing country which is ready to live up to its responsibilities.”<sup>71</sup> Accordingly, China can be expected to meet its *obligations* as well as responsibilities arising out of its membership of the UN and other international human rights treaties. Indeed, China’s election to the UN Human Rights Council in November 2013 requires it to strive towards improving its own record of human rights and its desire to contribute to the promotion and protection of human rights globally.

70. The internal situation of China aside, the talk of political reform and introduction of China’s own style of democracy, however shallow that may be, is likely to be beneficial for the UN international human rights agenda. This is because by professing to be engaged in the process of democratisation within the country, the Chinese will have no option but to support international endeavours to promote democracy, human rights and the rule of law under the leadership of the UN human rights institutions. Thus, if China regresses it will have lost the will and the moral authority to challenge the UN human rights system and if it embarks on the road to democracy, even if it is a half-hearted one, it will have to support the UN system of human rights for the reasons just outlined. Either way, the Chinese will not pose a major challenge to the UN system of human rights.

71. Xi Jinping, the leader of China anointed as the Secretary-General of the Communist Party by the 18<sup>th</sup> National Congress of the Party in November 2012 and appointed later as the President of China, stated at the conclusion of the Congress that the Chinese nation had “made an indelible contribution to the civilisation and advancement of mankind” throughout its history of more than 5,000 years and that it had to “make a greater contribution to mankind” in the future too.<sup>72</sup> The world can hope that that contribution would be to strengthen the rule-based international system, including human rights. “The

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<sup>71</sup> ‘Chinese PM’s Speech at Rio+20’, South Bulletin (published by the South Centre in Geneva), Issue 64 of 6 July 2012, 19.

<sup>72</sup> Xi Jinping’s speech: <http://www.bbc.co.uk/news/world-asia-china-20338586> (accessed on 15 November 2012).

great rejuvenation of the Chinese nation”<sup>73</sup> that he has promised can only come about by ushering the country towards democracy, the rule of law and greater respect for human rights.

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<sup>73</sup> David Pilling, No one is immune to Beijing's “gravity machine”, *The Financial Times* of London, 12 December 2013, 13.