

Post-WTO China: Quest for Human Right Safeguards in Sexual Harassment Against Working Women

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In assessing China's progress in human rights, sexual harassment of mainland women workers is the most neglected dimension in the struggle for international human rights. Notwithstanding other justifications for lack of a sexual harassment law, China's polity eschews a moral and political responsibility to redress sexual harassment in the workplace, by resort to political rhetoric, rather than implementing effective legal safeguards.

Typical sources of legal safeguards, such as laws, constitutions, and international norms, share a commonality of efficacy being primarily contingent on China's policies of economic development. China's polity prioritizes socioeconomic rights over civil-political rights, by espousing political rhetorical cultural relativism. All of which lends understanding to China's failure to promulgate sexual harassment laws, enforce international norms of human rights, and allow meaningful interpretations of constitutional stipulations of equality. For women in mainland China, a search for legal safeguards against sexual harassment in the workplace finds them without recourse to meaningful international and domestic judicial remedies, while nonjudicial remedies remain without efficacy.

*Do women in China "Hold up half the sky?"*¹

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1. Nancy E. Riley, *Holding up Half the Economy Women Face Uncertainties in a Changing China*, CHINA BUS. REV., Jan. 1, 1996, at 22 (stating that Mao Zedong proclaimed women are equal to men in China, because they "hold up half of the sky").

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I. INTRODUCTION

As a World Trade Organisation (WTO) member,² the People's Republic of China (China) advances toward modernity as watchers gauge China's progress in human rights. In assessing China's progress, sexual harassment of mainland women workers is one of the most neglected dimensions in the struggle for international human rights. Notwithstanding other justifications for lack of a sexual harassment law, its main political body, the Central Committee of the Chinese Communist Party (CCP), and legislature, the National People's Congress (NPC), evade a moral and political responsibility to redress sexual harassment in the workplace, by resorting to political rhetoric, rather than implementing effective judicial remedies.³

Although China's NPC has yet to enact legislation directly addressing sexual harassment in the workplace, there are laws addressing women's rights.⁴ While these laws improve the economic status of women, the need for sexual harassment legislation remains. Domestic laws that indirectly may apply to sexuality in the workplace are vague and general, lacking a legal definition of sexual harassment.⁵

The 1982 Constitution of the People's Republic of China (*Zhonghua Renmin Gonghegou Xianfa*) prohibits gender-based offenses in article 48, calling for equality of women.⁶ However, stipulations of equality are only conceptual, because vesting a right of equality for women is

2. Ministerial Conference, *Accession of the People's Republic of China: Decision of 10 November 2001*, WT/L/432 (Nov. 23, 2001) (entered into force Dec. 11, 2001) [hereinafter *Accession of China to WTO*].

3. Jana S. Eaton, *Gender Issues in Transitional China*, MULTICULTURAL EDUC., Winter 1998, available at <http://www.ucf.k12.pa.us/~jeaton/ChinaWomen.HTML>.

4. See XIANFA [CONST.] art. 48 (1982) (P.R.C.).

5. See *id.*

6. *Id.*

primarily contingent on China's polity, not China's judiciary and Constitution.⁷

International conventions (treaties) also deserve consideration as a source of legal safeguards. International norms of human rights afford women a safeguard from sex-based discrimination as a protected human right. The protection of this human right is within the scope of the 1948 Universal Declaration of Human Rights (UDHR),⁸ the 1966 International Covenant on Civil and Political Rights (ICCPR),⁹ and more specifically, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹⁰ The effectiveness of these conventions, like China's constitutional provisions, hinge on policies adopted by China's polity, not China's judiciary or any Chinese constitutional amendment.¹¹

A related issue is whether post-WTO reforms will result in safeguards for women workers. An additional issue is the safeguard of the social clause created during the Uruguay Round, which culminated in the formation of the WTO.¹² The birth of the social clause illustrates transnational corporations' (TNCs) inclination to exploit labor in developing economies, including women workers.¹³ The latter issue begs the question of what role corporate social responsibility will play in creating safeguards for women.¹⁴

In post-WTO China, the issue of meaningful judicial remedies depends on the amenability of domestic law, constitutionalism, international norms, and accompanying cultural values. The approach of China's polity may be representative of tacit policy seeking to preserve traditional chauvinism reflective of an ontological base in tradition.¹⁵ The

7. Christine M. Bulger, *Fighting Gender Discrimination in the Chinese Workplace*, 20 B.C. THIRD WORLD L.J. 345, 348 (2000).

8. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 183d mtg., at 136-37, U.N. Doc. A/810 (1948) [hereinafter UDHR].

9. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 1496th mtg., Supp. No. 16, at 165, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

10. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 107th mtg., Supp. No. 46, at 381-382, U.N. Doc. A/34/46 (1981) [hereinafter CEDAW].

11. See generally Bulger, *supra* note 7.

12. See Virginia A. Leary, *The WTO and the Social Clause: Post-Singapore*, 8 EUR. J. INT'L L. 1, 118 (1997).

13. See *id.*

14. CHINA-BRITAIN BUS. COUNCIL, CORPORATE SOCIAL RESPONSIBILITY IN CHINA: IS IT ANY OF YOUR BUSINESS?, at <http://www.cbcc.org/ezine/archive/business-guides/guides12.html> (last visited Nov. 9, 2003).

15. See WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE 120 (1999).

struggle of women in modern China serves as a certain barometer in the struggle for human rights in modern China.

II. CHINA'S FIRST SEXUAL HARASSMENT CASE

A. *Ms. Tong's Case*

In China, greater numbers of women privately endure the pain of sexual harassment, as opposed to seeking public redress in a court of law as women in other nations do.¹⁶ In 1998, before China's first sexual harassment case initiated by Ms. Tong, Jana S. Eaton wrote, "[W]omen don't report cases of harassment because it involves such a loss of face: 'The men embarrass women by making a joke out of it.'"¹⁷

Empirical data demonstrates that 84% of single females below the age of 30 suffer some form of sexual harassment.¹⁸ Sixty-seven percent of total offenders are work supervisors, also called unit leaders.¹⁹ As for victims, 77% are twenty-two- to twenty-five-year-old single women; the majority working in civilian or technical jobs.²⁰ In 2002, women comprised 629,400,000²¹ of China's total population of 1,280,700,000.²²

The ancients said that the relationship between the wife and her husband was like that of the minister and his ruler, and so men took precedence over women and men were honorable while women were contemptible. From this every evil theory designed to keep women from having freedom followed Men were to heaven as women were to earth and men were yang while women were yin. An absolute inequality has accordingly formed between men and women. Alas!

Id.; see also Eaton, *supra* note 3.

16. Eaton, *supra* note 3.

17. *Id.* at 3 (quoting Stanley Rosen, Comments at Beijing Normal University (June 10, 1998)).

18. *Zhong Guo Ba Cheng Nu Xing Zao Yu Guo Se Lang Xing Sao Rao Cu Dong Fa Lu Mang Qu* [80% of Chinese Women Have Been Sexually Harassed by Sexual Harassers, and Shakes up a Legally Blind Area], QIANLONG.COM NEWS, May 22, 2002, at <http://news.tom.com/Archive/2002/5/22-61473.html> [hereinafter *80% of Chinese Women Have Been Sexually Harassed*].

19. *Jing Cheng Shou Li Xing Sao Rao An Fu Chu Shui Mian, Nu Hai Ju Zuo Chen Mo Gao Yang* [First Sexual Harassment Case in Beijing Comes to Surface, Girl Refuses to be the Silent Lamb], Chinese Businessman Net—Chinese Businessman Reports, Apr. 4, 2003, at <http://news.tom.com/Archive/1006/2003/4/4-5243.html> [hereinafter *Silent Lamb*].

20. *Id.*

21. POPULATION REFERENCE BUREAU, WOMEN OF OUR WORLD NOTES (2002), <http://www.prb.org/Template.cfm?Section=PRB&template=/Content/ContentGroups/Data> (indicating this data does not include Hong Kong and Macao Special Administrative Regions (SAR)).

22. POPULATION REFERENCE BUREAU, WORLD POPULATION DATA SHEET 9 (2002).

In 1980, women constituted 43.2% of the labor force, and in 1998, 45.2% of the labor force.²³

In China's first sexual harassment case, the plaintiff, Ms. Tong, was unsuccessful because of insufficient evidence and lack of a sexual harassment law.²⁴ In 2001, Ms. Tong worked for Mr. Dai, in Xi'an City, Shaanxi Province, China.²⁵ Ms. Tong alleged that as early as 1994, the company manager inappropriately touched her at work, while offering her a better job.²⁶ Ms. Tong refused his advances, which only aggravated him, and he continued to attempt to seduce her, demanding that she spend a night in a hotel with him.²⁷ After her refusals, the general manager "deliberately set out to make her life difficult, and held back her benefits and bonuses."²⁸ Ms. Tong suffered poor health because of these advances and altercations and collapsed at work on more than one occasion.²⁹ In July 2001, Ms. Tong filed a lawsuit in the Lianhu District People's Court of Xi'an, asking the general manager to apologize to her.³⁰ In December 2001, after a closed session, the court rejected Ms. Tong's claims on the grounds of insufficient evidence.³¹ A subsequent appeal to the Xi'an City Intermediate People's Court also suffered defeat because of insufficient evidence.³²

In China, it is difficult to prove sexual harassment because of vague domestic laws, lack of a sexual harassment law, and lack of adequate constitutional safeguards.³³ Opinions diverge regarding the effectiveness

23. WORLD BANK GROUP, 2000 WORLD DEVELOPMENT INDICATORS: 2.3 LABOR FORCE STRUCTURE 46 (2000), at http://www.worldbank.org/data/wdi2000/pdfs/tab2_3.pdf.

24. *Woman Loses First Case of Sexual Harassment*, CHINA DAILY, Dec. 24, 2001, http://www1.chinadaily.com.cn/en/doc/2001-12/24/content_99244.htm (author's translation):

A woman who accused her boss of touching her up lost the closed trial recently on China's first sexual harassment case According to the ruling handed down by the judge at the Lianhu District People's Court in Xi'an, the capital of Northwest China's Shaanxi Province, the woman—named Tong, in her 30s—could not provide sufficient evidence to support her case.

Id.

25. *Id.*

26. *Id.*; Zheng Ming, *China's First Sexual Harassment Lawsuit*, CHINA TODAY, Mar. 2002, at 18.

27. Ming, *supra* note 26, at 18.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 20.

33. *You Yi Nu Xing Bu Zai Chen Mo, Nan Jing Se Lao Zong Shou Xing Zai Ci Bao Guang* [Another Woman Is Not Silent Any Longer; Nanjing "Pornographic GM" Exposed Again], PEOPLE'S NET, May 2, 2002, at <http://news.tom.com/Archive/1006/2003/5/2-21165.html> [hereinafter *Nanjing Harasser Exposed*]; see also *Silent Lamb*, *supra* note 19 (perceiving sexual

of domestic laws and whether the 1982 Constitution serves as an adequate safeguard against sexual harassment in the workplace.³⁴

In the English language, sexual harassment is defined as “uninvited and unwelcome verbal or physical conduct directed at an employee because of his or her sex.”³⁵ This definition corresponds with the U.S. Equal Employment Opportunity Commission (EEOC) guidelines defining sexual harassment as “unwelcome . . . verbal or physical conduct of a sexual nature. . . . The challenged conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive”³⁶ and that takes place under specific conditions,³⁷ such as a quid pro quo or hostile work environment.³⁸ In 1986, the United States Supreme Court first addressed sexual harassment in *Meritor Savings Bank, FSB v. Vinson*.³⁹ While the Court endorsed the EEOC guidelines, it declined to issue a definitive ruling on employers’ automatic liability.⁴⁰ Other international human rights organizations, including the United Nations, experienced similar problems “in defining human rights to encompass the rights of women.”⁴¹

In the late 1990s, China borrowed the term “sexual harassment” from the West.⁴² However, it was a linguistic borrowing, not a legal

harassment as violating China’s Constitution); *80% of Chinese Women Have Been Sexually Harassed*, *supra* note 18; *Gan Su Ri Bao Guan Yu Xing Sao Rao Wen Ti De Diao Cha* [*Gansu Daily Reports Investigation About Sexual Harassment*], EVERYDAY GANSU—GANSU DAILY, Apr. 18, 2003, at <http://news.tom.com/Archive/1002/2003/4/18-41802.html> [hereinafter *Gansu Daily Reports Investigation*].

34. *Gansu Daily Reports Investigation*, *supra* note 33.

35. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1314 (4th ed. 1999).

36. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, POLICY GUIDELINES ON CURRENT ISSUES OF SEXUAL HARASSMENT (Mar. 19, 1990), <http://www.eeoc.gov/docs/currentissues.html>.

37. Mary P. Rowe, *Dealing with Sexual Harassment*, 59 HARV. BUS. REV. 42, 42 (1998).

38. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (“‘*Quid pro quo*’ and ‘hostile work environment’ do not appear in the statutory text. The terms appeared first in the academic literature, see C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); found their way into decisions of the Courts of Appeals, see, e.g., *Henson v. Dundee*, 682 F.2d 897, 909 (CA11 1982); and were mentioned in this Court’s decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).”).

39. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

40. Michael W. Sculnick, *The Supreme Court 1985-86 EEO Decisions: A Review*, 13 EMP. REL. TODAY 197, 201 (1986).

41. Beverley H. Earle & Gerald A. Madek, *An International Perspective on Sexual Harassment Law*, 12 LAW & INEQ. J. 43, 46-47 (1993).

42. *Shua Liu Mang, You Shui Lai Guan Wo Guo Xing Sao Rao An Tu Xian Fa Lu Kong Bai* [“*Plays the Hoodlum? Who Is Concerned About Our Country’s Sexual Harassment, This Is a Blank in Law*”], QIANLONG.COM NEWS, Nov. 20, 2001, at <http://news.tom.com/Archive/2001/11/20-60520.html> [hereinafter *Plays the Hoodlum*].

borrowing,⁴³ because the Western sexual harassment law did not transplant into Chinese law along with the term.⁴⁴ In Mandarin, China's common language,⁴⁵ *xing sao rao* describes the act of sexual harassment and is a term of recent origin.⁴⁶ The Chinese phrase *shua liu mang* (to play the hoodlum) refers to the natural tendency of making bodily contact or showing body language.⁴⁷ The Western adage associated with sexism and chauvinism that, "boys will be boys" which shows a consideration of the fact that some behaviors are "natural" to men, bears a striking resemblance to "play the hoodlum" (*shua liu mang*).⁴⁸

B. Progeny of Ms. Tong's Case

The progeny of Ms. Tong's case has not been a flood of similar lawsuits; rather, the result has been an increasing awareness of sexism, if not chauvinism.⁴⁹ Ms. Tong's case has only minimally influenced the subsequent level of judicial activity when measured by the number of case filings.⁵⁰ On July 5, 2002, Ms. He, a Wuhan teacher, filed the first sexual harassment case in Hubei Province against her school's office assistant director.⁵¹ On September 29, 2002, Ms. Mei, from the Yunnan Province, filed China's third sexual harassment case against her supervisor.⁵² In April 2003, a twenty-five-year-old, Lei Reman, filed the

43. DANIEL BERKOWITZ ET AL., ECONOMIC DEVELOPMENT, LEGALITY, AND THE TRANSPLANT EFFECT 1-2, Law and Development Paper No. 1 (Working Papers Ctr. for Int'l Dev. at Harvard Univ., CID Working Paper No. 39, Mar. 2000) ("[T]he way in which the modern formal legal order that evolved in some western countries was transplanted into other countries is a more important determinant than the supply of a particular legal code.").

44. *Id.*

45. Mandarin is known as *putonghua* or the common language.

46. LI DEJIN & CHENG MEIZHEN, A PRACTICAL CHINESE GRAMMAR FOR FOREIGNERS 1 (4th ed. 1998); THE NEW CHINESE-ENGLISH DICTIONARY (6th ed. 2002).

47. *Plays the Hoodlum*, *supra* note 42.

48. Earle & Madek, *supra* note 41, at 45.

49. Chairperson Anna Wu, Global Summit Colloquium on Global Diversity: Creating a Level Playing Field for Women 4 (Apr. 25, 2003), at <http://www.eoc.org.hk/TE/speech/030425e.htm>.

50. *Legal Push to Boost Women's Rights*, S.P.R.C. MORNING POST, June 24, 2003, available at 2003 WL 55718091.

51. *Hu Bei Yi Nu Jiao Shi Bu Kan Shang Si Xing Sao Rao Nu Shang Fa Ting Suo Pei Yi Wan Yuan* [A Female Teacher of Wu Han City Recently Filed a Lawsuit in Jiangnan District Court Claiming Ten Thousand Yuan in Damages Because She Cannot Stand Superior's Sexual Harassing Behavior], CHINESE NEWS NET, July 05, 2002, <http://news.tom.com/Archive/1002/2002/7/5-31113.html>.

52. *Shang Si Yan Yu Tiao Dou Dong Shou Dong Jiao Yun Nan Shou Li "Xing Sao Rao" An Kai Shen* [Superior with Language Teases and Touches Everywhere on the Body, Yunnan's First "Sexual Harassment," Case Goes to Trial], CHINA NEWS NET, Sept. 9, 2002, <http://news.tom.com/Archive/1006/1127/2002/9/29-73396.html>.

first sexual harassment case in Beijing against her supervisor.⁵³ Also, in April 2003, a Nanjing saleswoman, with the alias Fei Fei, won a lawsuit alleging sexual harassment against her company's manager.⁵⁴

The low number of case filings may stem from fear of prosecution for defamation. In 1996, a woman complaining to coworkers about sexual harassment by her supervisor suffered prosecution for criminal defamation.⁵⁵ After a guilty finding, she served seven months of a two-year sentence before an appeals court reversed the sentence.⁵⁶ The low number of case filings may also be attributable to a delayed public response. Problems of transparency, access to justice, and quality of legal representation are additional factors possibly frustrating judicial activity.⁵⁷

III. REFORMS BEFORE WTO ACCESSION

A. *China's Human Rights Record*

Since the 1989 Tiananmen Square tragedy, the United States annually presents a resolution to the meeting of the United Nations Human Rights Commission (UNHRC) condemning China's human rights record.⁵⁸ Although not joining the United States in every proposed resolution, the European Union generally concurs with the U.S. assessment of China's human rights record.⁵⁹ In 2000, the EU General Affairs Council in Brussels condemned China for "'marking time' by signing international pacts, while failing to match their commitments with 'tangible progress in the domestic human rights situation.'"⁶⁰ However, China defeats each proposed resolution for censorship with the support of third world countries.⁶¹

53. *First Sex Harassment Case for Beijing Woman Awaits Verdict After an Uphill Battle to Bring Her Grievances to Court*, S.P.R.C. MORNING POST, July 21, 2001, available at 2003 WL 65590476 [hereinafter *First Case for Beijing*].

54. *Nanjing Harasser Exposed*, *supra* note 33.

55. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996, S. REP. NO. 105-10, at 633 (1st Sess. 1997).

56. *Id.*

57. Guo Nei, *Chinese Law Firms to Sharpen Competitiveness*, CHINA DAILY, Sept. 19, 2002, at 2.

58. *EU Sends Human Rights Warning to China*, EUR. REP. Mar. 25, 2000, http://www.findarticles.com/cf_0/m0WXI/2000_March_25/60810928/p1/article.jhtml?term=China+legal&reform [hereinafter *EU Sends Warning*].

59. *U.S. to Join EU in Criticizing China's Human Rights*, WORLD TIBET NETWORK NEWS, Feb. 25, 1996, available at <http://www.tibet.ca/wtnarchive/1996/2/251.html>.

60. *EU Sends Warning*, *supra* note 58.

61. *Id.*

In response to the U.S. position, China issues annually a 15,000 word governmental white paper addressing its progress in human rights.⁶² Since the 1990s, China's Information Office of the State Council annually publishes a human rights report on the United States.⁶³ The 1994 White Paper entitled, *The Situation of Chinese Women*, chapter II, on Equal Legal Status, reads:

The basic principles in China's legislative work concerning women are equal rights for men and women, protection of the special rights and interests of women, and the banning of any discrimination, maltreatment and persecution directed at women. The Constitution of the People's Republic of China clearly stipulates, "Women enjoy equal rights with men in all spheres of life, political, economic, cultural and social, including family life. . . ." In line with the principles established by the Constitution, New China has promulgated over 10 fundamental laws, including the Marriage Law, Electoral Law, Law of Inheritance, Civil Law and Criminal Law. The State Council and various ministries and commissions under it have enacted over 40 administrative decrees and regulations. Local governments have devised more than 80 local regulations and rules. . . . The Law of the People's Republic of China on the Protection of the Rights and Interests of Women promulgated in 1992 provided an effective legal weapon for further enhancing the social status of women and guaranteeing their basic rights and interests.⁶⁴

In 1995, John Shattuck, U.S. Assistant Secretary of State for Democracy, Human Rights and Labor, testified before the House International Relations Subcommittee on International Operations and Human Rights that "[i]n countries such as Burma, China, Cuba, Iran, Iraq, Libya, Nigeria and North Korea, governments continued systematically to deny basic rights to their citizens."⁶⁵ Shattuck cited China's continued violation of international norms and suppression of political dissent as an indication that "economic growth and trade alone can not bring about greater respect for human rights without a willingness by political authorities to abide by these norms."⁶⁶ Comparatively, in the 2000 Country Reports and 2002 Country Reports

62. *Id.*

63. See *US Human Rights Record in 2000*, P.R.C. ST. COUNCIL, Feb. 27, 2001, <http://www3.itu.int/MISSIONS/China/humanrights/usrec2000e.htm>.

64. *Government White Papers: The Situation of Chinese Women*, P.R.C. ST. COUNCIL (1994), <http://www.china.org.cn/e-white/chinesewoman/index.htm>.

65. *Country Reports on Human Rights Practices for 1995: Hearing Before the Subcom. on Int'l Operations and Human Rights of the Comm. on Int'l Relations*, 104th Cong., app. 61 (Mar. 26, 1996) (statement of John H. Shattuck, Assistant Secretary, Bureau of Democracy, Human Rights, and Labor Department of State).

66. *Id.* at 63.

on human rights, the situation in China worsened.⁶⁷ The 2000 Country Report on China states:

The Government's poor human rights record worsened, and it continued to commit numerous serious abuses. . . . The Constitution and laws provide for fundamental human rights; however, these protections often are ignored in practice. . . . The Government does not permit independent domestic nongovernmental organizations (NGO's) to monitor publicly human rights conditions. Violence against women (including coercive family planning practices—which sometimes include forced abortion and forced sterilization); prostitution; discrimination against women; trafficking in women and children; abuse of children; and discrimination against the disabled and minorities are all problems.⁶⁸

In China, there is an ongoing problem of gender-based discrimination, illustrated by cases of sexual harassment.⁶⁹ In some ways, discrimination against women workers represents a setback of earlier achievements under a planned socialist economy, as opposed to the new socialist market economy.⁷⁰ The “gaps in gender inequality . . . are widening as a result of the weakening power of state administrative intervention, the development of the market economy, the looseness of the legislation and the discriminatory nature of some of the regulations themselves.”⁷¹ For women, issues attendant to a new market economy exacerbate gender-based tensions and sexual harassment of women in the workplace.⁷²

B. NPC Legislation and Women's Rights

Before accession to the WTO in December 2001, China introduced a host of legislation directly and indirectly affecting women's rights. A sampling of the various laws are the Criminal Law of the People's

67. See *Country Reports on Human Rights Practices for 2000*, S. REP. NO. 107-32, at 737 (1st Sess. 2001); *Country Reports on Human Rights Practices for 2002*, S. REP. NO. 108-30, at 749 (1st Sess. 2003).

68. *Country Reports on Human Rights Practices for 2000*, S. REP. NO. 107-32, at 737-38 (1st Sess. 2001).

69. Teemu Ruskola, Note, *Law, Sexual Morality, and Gender Equality in Qing and Communist China*, 103 YALE L.J. 2531, 2531-32 (1994) (“The People's Republic of China (PRC) has plenty of laws on the books, yet one need be neither Chinese nor a Sinologist to be aware that those laws are frequently underenforced.”); see also Fang Lee Cooke, *Equal Opportunity? The Role of Legislation and Public Policies in Women's Employment in China*, 16 WOMEN IN MGT. REV. 334, 338 (2001). The impact of two decades of reform on women as a whole may be pointing to their disadvantage in the labor market. *Id.* Direct or indirect gender discrimination widely exists explicitly and/or implicitly throughout the process of employment. *Id.*

70. Cooke, *supra* note 69, at 335.

71. *Id.* at 347.

72. *Id.* at 338.

Republic of China,⁷³ Marriage Law of the People's Republic of China,⁷⁴ Labour Law of the People's Republic of China,⁷⁵ General Principles of Civil Law of the People's Republic of China,⁷⁶ and Law of the People's Republic of China on the Protection of Rights and Interests of Women.⁷⁷ This list is not exhaustive, but merely representative of the vast body of laws enacted that affect women's rights.

Generally, women seeking legal safeguards base their cause of action on one of the following laws: General Principles of Civil Law of the People's Republic of China, Criminal Law of the People's Republic of China, or Law of the People's Republic of China on the Protection of Rights and Interests of Women.⁷⁸ There are several problems with these laws. First, domestic laws only indirectly address sexual harassment, by penalizing insults to dignity and reputation.⁷⁹ Second, the language is vague and general, thus increasing the burden of proof.⁸⁰ Third, domestic laws do not define what constitutes sexual harassment, which further enhances the burden of proof.⁸¹ Fourth, domestic laws do not directly address sexual harassment in the workplace.⁸²

Advocates for women's rights, feminist groups, and NGOs, correctly perceive the importance of an effective sexual harassment law.⁸³ Despite persisting sexual harassment in the workplace, liberal feminists

73. ZHONG HUA REN MIN GONG HE GUO XING FA [CRIMINAL LAW OF THE P.R.C.] (adopted 1979, revised 1997), reprinted in THE CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA (Chin Kim trans., 1982).

74. ZHONG HUA REN MIN GONG HE GUO HUN YIN FA [MARRIAGE LAW OF THE P.R.C.] (adopted 1980, amended 2001), <http://www.chinalaw114.com/englishlaw/shownews.asp?id=362>.

75. ZHONG HUA REN MIN GONG HE GUO LAO DONG FA [LABOUR LAW OF THE P.R.C.] (adopted 1994), reprinted in COMPILATION OF LAWS AND REGULATIONS CONCERNING FOREIGN INVESTMENT IN CHINA (2d ed. 2001).

76. ZHONG HUA REN MIN GONG HE GUO MIN FA TONG ZE [GENERAL PRINCIPLES OF CIVIL LAW OF THE P.R.C.] (adopted 1986), <http://www.chinalaw114.com/englishlaw/shownews.asp?id=348>.

77. ZHONG HUA REN MIN GONG HE GUO FU NU QUAN YI BAO ZHANG FA [LAW OF THE P.R.C. ON THE PROTECTION OF RIGHTS AND INTERESTS OF WOMEN] (approved 1992), available at <http://www.qis.net/chinalaw/lawtran1.htm>.

78. *80% of Chinese Women Have Been Sexually Harassed*, *supra* note 18.

79. *Id.* Beijing University Law School Women's Law Research and Services Center attorney, Liu Donghua, contends that China, at present, does not explicitly sanction sexual harassment, but rather only indirectly sanctions such behavior by laws proscribing insults to dignity and reputation. (Interview on file with author).

80. Bulger, *supra* note 7, at 367-68.

81. *Sexual Harassment Thorny Issue for Lawmakers*, CHINA DAILY (Jul. 1, 2003), at <http://www1.chinadaily.com.cn/en/doc/2003-07/01/content242099.htm>.

82. COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2000, S. REP. NO. 107-32, at 737 (1st Sess. 2001).

83. THE BRITISH COUNCIL, SEXUAL HARASSMENT IN THE WORKPLACE, at <http://www.britishcouncil.org.cn/english/governance/harassment.htm> (last visited Nov. 9, 2003).

do not generally regard the legal system as contributing to the inferior position of women.⁸⁴ These liberal feminists “assume that the law is ultimately rational, impartial, and capable of achieving justice.”⁸⁵ According to traditional liberal feminist theory, the problem for women is bad or inadequate law, not simply the law in general.⁸⁶

IV. REFORMS IN POST-WTO CHINA

A. *Incongruity of Trade and Sexual Harassment*

China's accession to WTO, on December 11, 2001,⁸⁷ triggers an eclipsing interest in rule of law (*fa-zhi*).⁸⁸ The ultimate goal of China's ongoing legal reforms is to become an effective participating member of the global economy, where open market and free trade reign.⁸⁹ China's ongoing legal reforms prepare the nation for participation in the global economy by primarily focusing on enactment of international trade and finance laws.⁹⁰

In terms of cause and effect, China's accession to the WTO has not caused the recent ongoing legal reforms.⁹¹ Reforms commenced in earnest after Deng Xiaoping's famous 1992 southern tour of provinces bordering Hong Kong, rather than pursuant to the protocol on accession.⁹² Deng Xiaoping visited Shenzhen, in Guangdong Province, and declared that China would adopt a socialist market economy, which would serve as the primary catalyst for ongoing economic reforms and modernization.⁹³

However, a review of post-WTO Chinese laws does not evidence change affecting women's rights. In terms of women workers, there is

84. Hilary Charlesworth, *The Hidden Agenda of International Law*, 16 TEMP. INT'L & COMP. L.J. 93, 95 (2002).

85. *Id.*

86. *Id.*

87. *Accession of China to WTO*, *supra* note 2.

88. Hon. Margaret Ng, Address 91st Conference of the Amer. Soc'y of Int'l Law (Apr. 11, 1997) at <http://www.margartng.com/mng2002/02sp/overseasspeeches/91stcasil11apr97.htm>.

89. See WANG BGOSHU, CHINA: ACCESSION TO THE WTO AND ECONOMICS REFORM 338 (Wang Mengkui ed., 2002). China's major legislative goals are expressed threefold: “Continuing to revise laws that are not in conformity with China's obligations under the WTO rules, revising laws that are not conducive to enhancing the competitive power of Chinese enterprises in the international market; and improving laws offering protection to domestic enterprises and ensuring industrial safety.” *Id.* For China, a well-established socialist market economic system requires a well-established socialist market legal system. *Id.*

90. *Id.*

91. Dong An, *China Pays Tribute to Deng and Its SEZs*, E21TIMES, at 1, at <http://english1.e21times.com/ei/p.asp?r=912> (last visited Nov. 10, 2003).

92. *Id.*

93. J.A.G. ROBERTS, A CONCISE HISTORY OF CHINA 299 (1999).

the additional problem of developing countries continuing to oppose any linkage between labor standards and international trade,⁹⁴ with few exceptions.⁹⁵ The WTO accession, therefore, was not a watershed event for women's rights.

B. The Social Clause and Corporate Social Responsibility

The idea of a social clause first appeared in the 1990s.⁹⁶ It came as the product of unions and NGOs emphasizing the effect of globalization on labor exploitation and unfair competition.⁹⁷ In 1995, the Uruguay Round and formation of the WTO concluded.⁹⁸ Afterwards, international trade and foreign direct investment (FDI) experienced a boost, which extended the power of TNCs.⁹⁹ In some developing countries, there are growing concerns with inequalities that spur interests in establishing international minimum labor standards.¹⁰⁰ NGOs and trade unions campaign for inclusion of a social clause within the multilateral WTO framework.¹⁰¹ Clothing industries sourcing their products from developing countries, such as China, are a primary source of interest for implementing a social clause, not international labor standards.¹⁰² The social clause targets workers who are allegedly subject to exploitation.¹⁰³

In December 1996, WTO Ministers openly declared support for seven core International Labor Organization (ILO) conventions.¹⁰⁴ However, the Ministers warned against using these standards to limit the

94. Stephen J. Frenkel, *Globalization, Athletic Footwear Commodity Chains and Employment Relations in China*, 22 *ORG. STUD.* 538 (2001).

95. Seth R. Harris, *Asian Human Rights: Forming a Regional Covenant*, 1 *ASIAN-PAC. L. & POL'Y J.* 17:1, 17:19 (2000), at <http://www.hawaii.edu/aplpj/> (stating that the exception is the Association of Southeast Asian Nations (ASEAN) that discontinued the policy of separating trade and human rights issues).

96. *The Social Clause—A Solution to Forced Labour and Bonded Labour?: Public Hearing Before Comm. on Foreign Affairs, Security and Defence Policy* (June 17-18, 1997) (statement of Mike Dottridge, Director, Anti-Slavery International Before the European Parliament), <http://www.europarl.eu.int/hearings/sc1b/soclause/doc8en.htm>.

97. *Id.*

98. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, 1 *LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND* (1994), 33 *I.L.M.* 1125 (1994); see also GRAHAM DUNKLEY, *THE FREE TRADE ADVENTURE, THE URUGUAY ROUND AND GLOBALISM—A CRITIQUE* 49-42 (1997).

99. DUNKLEY, *supra* note 98, at 45-48.

100. KEITH E. MASKERS, WORLD BANK, *SHOULD CORE LABOR STANDARDS BE IMPOSED THROUGH INT'L TRADE POLICY?* 1 (1997), at <http://www.eldis.org/static/DOC5711.htm>.

101. *Id.*

102. Frenkel, *supra* note 94, at 538.

103. *Id.*

104. Steve Charnovitz, *The International Labour Organization in Its Second Century*, in MAX PLANCK, *Y.B. of UN L.* (2000), <http://www.geocities.com/charnovitz/planck.htm>.

comparative cost advantage of developing countries.¹⁰⁵ In 1998, the ILO adopted a compromise resolution committing all participating nation-states to a set of four fundamental human rights that encompass the seven core labor standards.¹⁰⁶ The fundamental human rights are as follows: right to bargain collectively and freedom of association (Conventions 87 and 98), freedom from forced or compulsory labor (Conventions 29 and 105), freedom from exploitative child labor (Convention 138), and equality of opportunity (Conventions 100 and 111).¹⁰⁷ Although the resolution strengthens monitoring and reports, developing countries continue to oppose any linkage between labor standards and international trade,¹⁰⁸ with a few exceptions.¹⁰⁹ In 2000, the participating nation-states in the Organization for Economic Co-operation and Development (OECD) agreed on a code of practice for TNCs, which included a commitment to the ILO's labor standards and other issues.¹¹⁰

Although the social clause eventually culminated in an international labor standard, its importance suffered relegation to a minor role in negotiations concerning China's accession.¹¹¹ Despite concerns that China's "record of violations of its workers' most basic human rights is already causing grave problems for its trading partners," China, as late as 1999, following repeated requests from trade union and human rights organizations, had not revised its treatment of independent trade unionists.¹¹² In January 2002, Human Rights Watch (HRW) "scored the failure of trade ministers at the World Trade Organisation meeting in Qatar in November to give the protection of labor rights a significant place on the agenda for a new round of global trade negotiations to be launched" in 2002.¹¹³ The same concerns were set forth in the

105. Russ Kleinbach, Sustainable Development and Neo-Liberalism, Presentation at the University Conference, American University in Kyrgyzstan (May 30, 1999), at <http://faculty.philau.edu/kleinbachr/neo-liberalism.htm> ("*Comparative advantage*: It means that countries or regions should specialize in those products and services for which they have a comparative advantage in the global market.").

106. JENNY BATES, PPI, INT'L TRADE & LABOUR STANDARDS 11 (Apr. 1, 2000), at <http://www.ppionline.org/ndol/print.cfm?contented=1152>.

107. *Id.*

108. Frenkel, *supra* note 94, at 538.

109. Harris, *supra* note 95, at 17:19 (arguing ASEAN's recognition of human rights is too narrow and inconsistent with broader, more international norms of human rights).

110. Frenkel, *supra* note 94, at 538.

111. *China Must Abide by Labor Standards: Trade Union Group*, ASIAN ECON. NEWS, Nov. 22, 1999, http://www.findarticles.com/cf_0/m0WDP/1999_Nov_22/57946929/p1/article.jhtml?term=China+legal+reform.

112. *Id.*

113. Jim Lobe, *Watchdog Lambastes Washington's Hypocrisy*, ASIA TIMES ONLINE, Jan. 18, 2002, at <http://www.atimes.com/c-asia/DA18Ag01.html>.

International Confederation of Trade Unions' (ICTU) statement regarding the agenda for the 5th Ministerial Conference of the WTO: "All the while, the impact of China's WTO accession on other developing countries, in terms of continual pressure to reduce core labour standards and, all too often, to increase misery and exploitation (particularly of women workers) often in export processing zones, is continuing to worsen."¹¹⁴

In China, the fate of a social clause type remedy is perhaps now dependent on the growth and direction of corporate governance, or corporate social responsibility. The OECD Principles of Corporate Governance (OECD Principles), on the role of stakeholders in corporate governance, provides, "The corporate governance framework should recognise the rights of stakeholders as established by law and encourage active co-operation between corporations and stakeholders in creating wealth, jobs, and the sustainability of financially sound enterprises."¹¹⁵ An annotation to the OECD Principles reads: "The competitiveness and ultimate success of a corporation is the result of teamwork that embodies contributions from a range of different resource providers including investors, employees, creditors, and suppliers."¹¹⁶ Women workers are an important component of corporate human resources, helping modern corporations foster competitive advantages and successes. Women workers are stakeholders, though not primary stakeholders in the sense of stockholders or a board of directors, thus the OECD Principles are applicable.¹¹⁷ A relevant provision of the OECD Principles states: "The corporate governance framework should assure that the rights of stakeholders that are protected by law are respected. Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights."¹¹⁸ The OECD's Guidelines for Multinational Enterprises, established in 1976, do prohibit discriminatory practices in employment.¹¹⁹

114. INT'L CONFEDERATION OF TRADE UNIONS, STATEMENT ON THE AGENDA FOR THE 5TH MINISTERIAL CONFERENCE OF THE WORLD TRADE ORGANISATION (WTO) (Sept. 10-14, 2003), <http://www.icftu.org/displaydocument.asp?Index=991217396&Language=EN&Printout=>.

115. ORG. FOR ECON. CO-OPERATION AND DEV., OECD PRINCIPLES OF CORPORATE GOVERNANCE 22 (1999) [hereinafter OECD PRINCIPLES].

116. *Id.* at 37.

117. Steven N. Brenner & Earl A. Molander, *Is the Ethics of Business Changing?*, 1 HARV. BUS. REV. 55 (Jan.-Feb. 1977) (describing the priority of stakeholders in descending order as customers, stockholders, employees, local community, society, suppliers, and government).

118. OECD PRINCIPLES, *supra* note 115, at 22.

119. Lance Compa & Tashia Hinchliffe-Darricarrère, *Enforcing International Labor Rights through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT'L L. 663, 670 (1995).

However, there are problems with employing corporate governance as a solution. First, a lack of effective corporate governance mechanisms contributed to the 1997-1998 East Asian financial crisis.¹²⁰ Second, the principles of corporate governance are nonbinding guidelines, as opposed to domestic or international law,¹²¹ and “most, if not all, codes [of conduct] are voluntary and few require any formal and independent verification when used by companies.”¹²² Lack of enforcement power is common to the OECD Principles and the ILO labor standards.¹²³ Although the ILO covers a broader range than the OECD Principles, and provides a more detailed complaint procedure through its Standing Committee on Multinational Enterprises, neither the ILO, nor OECD Principles have sanctions to back up their rules.¹²⁴ Enforcement is normally a matter of persuasion by OECD or ILO officials.¹²⁵ Thirdly, despite the OECD guidelines, there exist diverse domestic and international codes of conduct.¹²⁶ An OECD report identifies 182 codes of conduct, while an ILO report identifies several hundred.¹²⁷ This lack of uniformity in formulating policy and conceptual bases for codes results in diverse terminology for corporate social responsibility, such as CSR, corporate citizenship, corporate sustainability, business ethics, and

120. *Convergence or Surrender on Development? The UN and the Bretton Woods Institutions*, Quaker U.N. Office, N.Y., QUNC Briefing Paper, No. 2/00, at 2-3 (Aug. 2000), <http://www.afsc.org/quno/Resources/Bp200008.htm> [hereinafter QUNC Briefing Paper]; ORG. FOR ECON. CO-OPERATION AND DEV., *CORPORATE GOVERNANCE IN ASIA: A COMPARATIVE PERSPECTIVE* 8 (2001), available at <http://www1.oecd.org/publications/e-book-1401011E.PDF>.

121. Undersecretary of State Alan Larson, *The Role of Governments in Promoting Corporate Citizenship*, Address Before the National Policy Association Conference on the Role of Governments in Promoting Global Corporate Responsibility (June 11, 2001), available at http://www.multinationalguidelines.org/csr/June/2011/20conf/larson_june_11_speech.htm (“Although the guidelines are non-binding, participating governments commit to promote and implement them.”). State Department’s Larson on OECD Corporate Code of Conduct, at http://www.usis.it/file2000_06/alia/a00627718.htm (last visited Nov. 12, 2003).

122. Michael Hopkins, *CSR and Global Business Principles: What a Mess!*, MHC INT’L LTD. (Sept. 2002), http://www.mhcinternational.com/csr_principles.htm.

123. Larson, *supra* note 121.

124. Compa & Hinchliffe-Darricarrere, *supra* note 119, at 671-72.

125. *Id.*

126. Hopkins, *supra* note 122.

127. *Id.* (citing OECD, at www.oecd.org/ech/index_2.htm; MICHAEL URMINSKY, *SELF-REGULATION IN THE WORKPLACE: CODES OF CONDUCT, SOCIAL LABELING AND SOCIALLY RESPONSIBLE INVESTMENT* 1 (Mgmt. and Corporate Citizenship Programe, Working Paper No. 1, 2002).

other terms.¹²⁸ Finally, China is not a nation-state member of the OECD.¹²⁹

In terms of TNCs, corporate social responsibility codes offer a possible source of nonlegal safeguards. The prospects are more suspect in terms of indigenous Chinese management, along with China's private enterprises and state owned enterprises.¹³⁰ Indigenous Chinese corporations probably will not adopt a Chinese corporate social responsibility code resembling an OECD code to serve as a catalyst for social change because of the previously mentioned 1997-1998 East Asian financial crises.¹³¹ China recently announced its intent to formulate a new indigenous theory of management.¹³² One source hails the project as badly needed management theory with Chinese characteristics.¹³³ However, issues of cultural relativism increase the improbability of an indigenous Chinese corporate social responsibility code serving as a nonlegal safeguard for women workers.¹³⁴

128. *Id.* at 5-6 (citing <http://www.mhcinternational.com/glossary.htm> (last visited Nov. 23, 2003)).

129. OECD Member Countries (2003), *available at* http://seed.org/infobycountry10,2646.en_2649_201185_1_1_1_1.00.html (last visited Nov. 23, 2003); *see also* William Witherell, Director for Financial, Fiscal and Enterprise Affairs, Strengthening Market Foundations Through Corporate Governance Reform, OECD at the 28th Annual Conference of the International Organization of Securities Commissions, Seoul, Korea, Oct. 14-17, 2003, *available at* <http://www.oecd.org/dataoecd/15/20/16823062.pdf> (last visited Dec. 28, 2003).

130. CHEN-CHIENHSUN AND SHIH HUI-TZU, INITIAL PUBLIC OFFERING AND CORPORATE GOVERNANCE IN CHINA'S TRANSITIONAL ECONOMY (Nat'l Bureau of Econ. Research, Working Paper No. W9574, 2003), *available at* <http://papers.nber.org/papers/w9574> (last visited Dec. 28, 2003); *see also* CINDY A. SCHIPANI & LIV JUNNAL, CORPORATE GOVERNANCE IN CHINA: THEN AND NOW 13-14 (William Davidson Inst. at the Univ. of Mich. Bus. Sch., Working Paper No. 407, 2001), *available at* <http://eres.bus.umich.edu/docs/workpap-dav/wp407.pdf> (last visited Dec. 28, 2003).

131. QUNC Briefing Paper, *supra* note 120.

132. *China Launches First 'Indigenous' Management Theory*, PEOPLE'S DAILY (Apr. 19, 2003), *available at* http://english.peopledaily.com.cn/200304/19/print20030419_115466.html (author's translation):

Xu, Jialu, Vice-chairman of the Standing Committee of the National People's Congress, said . . . advancement of the theory marks the birth of china's own management theory and the transformation from the experience—based management to the theory-based management of Chinese enterprises. The theory also helps to bridge the gap between imported theories introduced as part of China's MBA education and practical experience. . . . Most entrepreneurs attending the conference showed great interest in the theory. He, Xiaoping, a real estate manager . . . says that quite a number of state-owned companies have been turned into independent entities following the establishment of a market economy. Therefore, management theories with Chinese characteristics are badly needed to help companies survive and succeed in the current competitive environment in China.

Id.

133. *Id.*

134. CHINA-BRITAIN BUS. COUNCIL, *supra* note 14.

V. CULTURAL RELATIVISM AND SEXUAL HARASSMENT

A. *China's Ontological Base in Tradition*

It is difficult to discuss Chinese human rights without considering the dynamics of Chinese culture. For China, culture flows from an ontological base in tradition, Confucianism. Confucianism is representative of all traditional schools of Chinese philosophical thought,¹³⁵ although different in some respects, the major Asian religions and philosophies share similar concepts about the origins and purpose of power.¹³⁶ China's ontological base may be politically motivated.¹³⁷ This traditional foundation of values may contribute to the denial of human rights and women's rights in Chinese society.

Teemu Ruskola compares Confucian values as they effect dynasty law to modern China law.¹³⁸ Ruskola perceives both *Qing* law (*Ch'ing Dynasty 1644-1911*)¹³⁹ and modern Chinese law as aspiring to a Confucian morality of inequality.¹⁴⁰ Ruskola employs the term "aspirationalism" to explain the phenomenon of under-enforced laws and laws purposefully drafted in seemingly vague and general terms.¹⁴¹ However, the analects of Confucius (*Kung Ch'iu, K'ung Fu-tzu, Kung Fu'tse*: 551-479 B.C.), which are the principle source of Confucianism, offer differing interpretations.¹⁴² Some identify Confucianism with statism, while others argue Confucianism is compatible with, and even enhances, Western notions of human rights.¹⁴³

135. David A. Funk, *Traditional Chinese Jurisprudence: Justifying Li and Fa*, 17 *So. U.L. REV.* 1, 44-45 (1990). Chinese schools of philosophical thought include, but are not exclusively, Confucianism, Neo-Confucianism, Legalism, Taoism, the Ying Yang School, Logicism, and Buddhism. See also Michael Nylan, *The Five Confucian Classics*, available at <http://www.yale.edu/yup/Nylan/nylan7notes.html> (last visited Nov. 13, 2003) (discussing the term "new Confucians" in relation to other neoconservatives in China).

136. THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995, at 33 (Katharina Pistor & Philip A. Wellons eds., 1998).

137. Post-World War II dictators in both South Korea and Vietnam also tried to induce compliance with central government decrees by exploiting traditional respect for Confucian values. Like Chiang, they reduced Confucian teachings to mere slogans intended to serve highly un-Confucian ends. See Nylan, *supra* note 135.

138. Ruskola, *supra* note 69, at 2531.

139. CH' IEN MU, *TRADITIONAL GOVERNMENT IN IMPERIAL CHINA: A CRITICAL ANALYSIS* app. (Chün-tu Hsüeh & George O. Totten trans., 1982).

140. Ruskola, *supra* note 69, at 2531.

141. *Id.*

142. See CONFUCIUS, *THE ANALECTS* (D.C. Lau trans., 1979) (1992).

143. Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 *BERKELEY J. INT'L L.* 161, 220-21 (2001); WM. THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* 138-1 (1998).

In modern China, political, socioeconomic, and legal institutions share ontologically Confucian foundational values.¹⁴⁴ In China, rational institutions, which are governmental organizations representing public interest, are associated with Confucianism.¹⁴⁵ The nomenclature of “institution,” unlike in the West, enjoys an intrinsic Confucian value.¹⁴⁶ The Chinese term, *zhi du* (*chih-tu*) translates into the English word of institution.¹⁴⁷ In the West, an institution is an “established practice, law, [or] custom, . . . which is a material and persistent element in the life and culture of an organized social group.”¹⁴⁸ However, the Chinese word for institution, *zhi du*, is not as broad or value-free as its English counterpart.¹⁴⁹ *Zhi du* refers to an institution “which is desirable and possesses an intrinsic value,” which is the English equivalent of a more elevated and value-laden rational institution.¹⁵⁰ Chinese institutions created to serve the public interest possess this morally elevated characteristic.¹⁵¹ China’s tradition base and Confucian values predict foundational morals, and as a result, institutions, such as the polity reflect Confucian values in both a socioeconomic and legal sense.¹⁵² From consideration of personal relationships (*guan xi*) to the inner workings of

144. Kwok-ying Lau, *Jan Patočka: Critical Consciousness and Non-Euro-Centric Philosopher of the Phenomenological Movement*, Research Centre for Phenomenology and Human Sciences (2002), at <http://www.o-p-o.net/essays/LauArticle.pdf>.

Foucault calls it “history of the present” . . . in some others “ontology of the present” . . . ore even “critical ontology of ourselves” On the other hand, this kind of critical understanding does not bear a merely theoretical interest, it also carries within itself practical concerns: through the understanding of the limitation of the present epoch, it paves the way to getting out of its impasse and helps to search for new possibilities for the development of humanity. Foucault even says that critique understood in this sense is the critical attitude itself: “it has to be conceived as an attitude, an *ethos*, a philosophical life in which the critique of what we are is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them.”

Id. (internal citations omitted).

145. MU, *supra* note 139, at 121.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. Cultural determinism offers a predictor for cultural values. Cultural determinism is: The conviction that the accumulated knowledge, the organized beliefs, and the way of life prescribed by a culture determines not only all other aspects of human cognition and social behavior but also the dynamics of the culture itself. Such a conviction sees culture as an autonomous cultural system.

Klaus Krippendorff, A Dictionary of Cybernetics, available at http://pespmc1.vub.ac.be/ASC/CULTUR_DETER.html (last visited Dec. 28, 2003).

China's polity,¹⁵³ in modern China, Confucianism is a persistent and systemic vestige of antiquity.

Confucianism is difficult to refute and in modern times has manifested itself in the nomenclature of Asian values, which China's polity often espouses in defense of issues concerning human rights.¹⁵⁴ China prioritizes socioeconomic rights over civil-political rights, defending this priority as a matter of traditional Asian values.¹⁵⁵ Political rhetorical Asian values, when combined with traditional state sovereignty, produce an impediment to invoking international norms in human rights.¹⁵⁶

In addition, the rhetoric of Asian values hampers attempts to engage in regional dialogues on human rights, as seen in the case of the Asian Human Rights Charter Draft.¹⁵⁷ Seth R. Harris writes: "Although Asian human rights have developed significantly in some respects, Asian states have failed to enforce all the rights supported by the international community. The failure, thus far, to create a regional human rights covenant that protects rights in Asia or its sub-regions has brought international criticism."¹⁵⁸ In May 1998, the Asian Human Rights Commission, with the support of NGOs, created the Asian Human Rights Charter Draft (Charter).¹⁵⁹ The current Charter attempts to raise international standards by extending the principles recognized in other conventions or granting rights not typically recognized by Asian nation-states.¹⁶⁰

B. *Confucianism and Sovereignty*

Asian nation-states view any expansion of international rights and norms as a threat to state sovereignty.¹⁶¹ Positivist models of sovereignty permit Asian nation-states, such as China, to maintain claims of cultural

153. George Xuezhi Guo, *Guanxi* in Chinese Politics (2000) (unpublished dissertation, on file with the University of Virginia), http://millercenter.virginia.edu/resources/print/dissertation_chapters/2001/guo%20Chapter.pdf (last visited Nov. 13, 2003) ("*Guanxi* is a private social network and operates in a situation based on private interactions.").

154. Xiaorong Li, *A Question of Priorities: Human Rights, Development, and "Asian Values,"* 18 PHIL. & PUB. POL'Y 7 (1998).

155. *Id.*

156. *See id.*

157. ASIAN HUMAN RIGHTS COMM'N, TOWARDS AN ASIAN HUMAN RIGHTS CHARTER: THE DRAFT OF THE CHARTER OF ASIAN HUMAN RIGHTS 9 (1994), available at http://www.ahrchk.net/charter/mainfile.php/draft_charter/.

158. Harris, *supra* note 95, at 17:21.

159. *Id.* at 17:2.

160. *Id.* at 17:7-8.

161. *See generally* Li, *supra* note 154, at 7.

relativism, such as traditional Asian values, or ontological Confucianism, because laws are generally inapplicable to a nation-state without the nation-state's consent.¹⁶² Cultural relativism opposes the adoption of Western rights.¹⁶³ Generally, "Asian states invoke the traditional concept of positivist state sovereignty to protect what they claim as rights unique to the region or state. . . . [An] invocation of sovereignty emphasize[s] the schism between 'Western' and 'non-Western' values."¹⁶⁴

VI. CHINESE COURTS AND CONSTITUTIONALISM

A. *Political Economy of Constitutional Transition*

In 1982, China adopted its present Constitution,¹⁶⁵ which has undergone constitutional amendments, consisting mostly of economic reforms.¹⁶⁶ The amendments addressed Deng Xiaoping's theory for modernizing China.¹⁶⁷ In 1992, in the aftermath of the Tiananmen Square tragedy, the Fifth Session of the Fifth National People's Congress (NPC) affirmed Deng Xiaoping's four cardinal principles (*si xiang ji ben yuan ze*),¹⁶⁸ and China adopted a policy of a socialist market economy, signaling the end of price controls and encouraging the development of private enterprise.¹⁶⁹ The NPC added the words, "developing a socialist market economy,"¹⁷⁰ to the preamble of the 1982 Constitution, which

162. U.N. CHARTER art. 2, para. 7 (immunizing state action relating to "matters which are essentially within the domestic jurisdiction of any state").

163. See Harris, *supra* note 95, at 17:13-15.

164. *Id.* at 17:13.

165. XIANFA [CONST.] (1982) (P.R.C.).

166. *Id.* arts. 1, 2, 3-11, 12-17. On April 12, 1988, the first amendment occurred at the First Session of the Seventh National People's Congress (NPC). It comprises two articles, both of which address the private sector of the economy (Article 1) and prohibitions on unlawful activities in the use and transfer of land (Article 2). On March 29, 1993, the First Session of the Eighth NPC amended the constitution a second time. This amendment comprised Articles 3 through 11, all of which address economic reform. On March 15, 1999, the constitution was again subject to amendment by the addition of Articles 12 through 17, which again mostly address economic reform.

167. See *id.*; see also 2 SELECTED WORKS OF DENG XIAOPING (1975-1982) (Bureau for the Compilation and Translation of Works of Marx, Engels, Lenin, and Stalin, trans., 1984) (1983).

168. XIANFA [CONST.] pmb. (1982) (P.R.C.). There is an amendment to the preamble, which adds Deng Xiaoping's theory and the words "developing a socialist market economy," thereby bestowing constitutional import on both the theory and words. *Id.*

169. ROBERTS, *supra* note 93, at 298-99.

170. Speech by Deng Xiaoping, *Upholding Four Cardinal Principles* (Mar. 30, 1979), in 2 SELECTED WORKS OF DENG XIAOPING, *supra* note 167. In March of 1979, Deng Xiaoping's speech announced that in order to carry out China's four modernizations, "we must uphold the four cardinal principles ideologically and politically, which are: [w]e must keep to the social road, [w]e must uphold the dictatorship of the proletariat, [w]e must uphold the leadership of the Communist Party, [and] [w]e must uphold Marxism-Leninism and Mao Zedong Thought." See Speech at a Forum of the Military Commission of the Central Committee of the CPC (July 4,

resulted in the words being elevated to constitutional status.¹⁷¹ The constitutional amendment deserves mention because there are many who deem the amendment as a prescription for social ills that, had they come earlier, could have avoided the tragedy of June 4, 1989.¹⁷² There was a changing of the guard in November 2002, and its new leadership, in rank order, was Hu Jintao, Wu Bangguo, Wen Jiabao, Jia Qinglin, Zeng Qinghong, Huang Ju, Wu Guanzheng, Li Changchun, and Luo Gan.¹⁷³ It is the hope and concern of the new leadership, as they head towards the January election of the Tenth NPC¹⁷⁴ and the March 2003 Tenth NPC,¹⁷⁵ to avoid another Tiananmen Square tragedy.¹⁷⁶ For China's polity, a predominance of economic reform amendments evidences that economic reform is of greater concern than the rights of individual citizens.¹⁷⁷

Within this context, China's polity introduced the world to a Chinese variant of the political rhetoric of Asian values,¹⁷⁸ by defending a prioritization of socioeconomic rights over civil-political rights.¹⁷⁹ Social stability is the preeminent concern of China's polity, and since nation-states have differing levels of stability, there cannot be a universal standard of human rights applicable to all nation-states.¹⁸⁰ In this context, economic reform is the first and foremost concern, rather than the rights of individual citizens.¹⁸¹

1982), at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1580.html>. In 1982, the second of the principles changed to upholding the people's democratic dictatorship. *Id.*; see also Speech at a meeting of the Political Bureau of the Central Committee of the CPC, which discussed the document, "Decision of the Central Committee of the Communist Party of China and the State Council on Combating Serious Economic Crime" (Apr. 10, 1982), at <http://english.peopledaily.com.cn/dengxp/vol2/text/b1560.html>.

171. XIANFA [CONST.] arts. 12-17 (1982) (P.R.C.). Amendments to articles 12-17 of the Constitution mostly address economic reform, however, the March 15, 1999 amendment is noteworthy, because it adds Deng Xiaoping's theory and words to the preamble of the Constitution of the People's Republic of China.

172. ROBERTS, *supra* note 93, at 298-99.

173. Francesco Sisci, *Hu Steps up but Jiang Stays on Top*, ASIA TIMES ONLINE, Nov. 16, 2002, at <http://www.atimes.com/atimes/China/DK16Ad03.html>.

174. *Election of 10th NPC to Be Completed in January*, XINHUA NEWS AGENCY, Mar. 9, 2002, <http://www.china.org.cn/english/archiveen/28406.htm>.

175. *Id.*

176. Sisci, *supra* note 173 ("The party wants to avoid the kind of double leadership that occurred in 1987 between Deng Xiaoping, head of the Military Commission, and Zhao Ziyang, secretary general of the party, which is now regarded as the power struggle that led to the Tiananmen movement in 1989.")

177. ALICE ERH-SOON TAY, JURA GENTIUM: CTR. FOR PHILOSOPHY OF INT'L LAW AND GLOBAL POLITICS, "ASIAN VALUE" AND THE RULE OF LAW, at <http://dex1.tsd.unifi.it/jg/en/surveys/rol/tay.htm> (last visited Nov. 13, 2003).

178. Harris, *supra* note 95, at 17:13-14.

179. Li, *supra* note 154 at 7.

180. Harris, *supra* note 95, at 17:14.

181. ERH-SOON TAY, *supra* note 177.

In the language of transition economics, or economic constitutionalism, reforms that began during Deng Xiaoping's era present a question of whether there is a causal relationship between economic reforms and constitutional order. It is a question of whether reforms directly or indirectly effect constitutionalism. If there is a nexus, then Deng Xiaoping's reforms effect, albeit indirectly, civil-political rights.

Jeffrey Sachs, Wing Thye Woo, and Xiaokai Yang, contend that constitutional order is a product of reforms and institutionalized state opportunism, resulting from Deng Xiaoping's reforms.¹⁸² They deem Deng Xiaoping's regional decentralization as a process continuing Mao's administration decentralization.¹⁸³ In this context, Deng Xiaoping's contributions of regional decentralization and fiscal federalism to economic development are an overstatement. If such contributions constitute no more than an inheritance of the bad aspects of Mao's administration decentralization, then they simply delay the formation of an integrated national market.¹⁸⁴ The authors bolster this contention by highlighting Deng Xiaoping's creation of a dual approach to development.¹⁸⁵ The era shares two fundamentals of Stalin and Mao's socialism, which are the party's monopoly of political power and the dominance of SOEs, all of which results in China's dual approach to development.¹⁸⁶ They state, "The government institutions use their dual positions as regulation makers and enforcers and players in economic arena to pursue state opportunism."¹⁸⁷ Finally, they contend that China's market-oriented reforms are missing constitutional order and rule of law, which implies institutionalized state opportunism, self-dealing of the ruling class, and rampant corruption.¹⁸⁸

In terms of transition economics, China stands as a success story for having avoided a deep recession while transitioning to rapid growth. It is a success story partly attributable, from a political economy point of view, to the decision by China's polity to liberalize prices in 1984 through a dual-track system.¹⁸⁹ The dual-track system benefits transition in other ways. Given the continued enforcement of plan contracts,

182. See JEFFREY SACHS ET AL., *ECONOMIC REFORMS AND CONSTITUTIONAL TRANSITION* 12-15 (Ctr. for Int'l Dev. at Harvard Univ., Working Paper No. 43, Apr. 2000), available at <http://www.inframarginal.com/column/xhyang/yangs-papers/constitution4.htm>.

183. *Id.* at 12.

184. *Id.*

185. *Id.* at 13.

186. *Id.*

187. *Id.*

188. *Id.*

189. GÉRARD ROLAND, *THE POLITICAL ECONOMY OF TRANSITION* 2, 14 (William Davidson, Working Paper No. 413, Dec. 2001), at <http://eres.bus.umich.edu/docs/workpap-dav/wp413.pdf>.

the disorganization effects of price liberalization can be reduced, thereby preventing the output fall otherwise generally observed in transition economies. . . . Finally, one can argue that the dual-track system helped prevent the collapse of existing government structures because government kept a direct control over economic resources without having to depend solely on fiscal revenues to finance essential activities like law enforcement, which are themselves crucial to efficient tax collection and many other purposes.¹⁹⁰

The novelty of China is that its successful economic growth has been gradual, despite extensive, though declining, state SOEs and intervention in the economy.¹⁹¹ However, a recent OECD study indicates that the driving engines of China's growth are losing their dynamism.¹⁹²

Constitutionalism reflects ongoing reform.¹⁹³ It is difficult to refute that "economic transition is part of the transition in constitutional rules," and that, "speed and the time path of the transition are determined by its driving mechanism."¹⁹⁴ However, the contention that reforms result in total absence of constitutional order and rule of law denies the potential for development of constitutionalism and rule of law.¹⁹⁵ The debate on whether in China there is a rule of law or a rule by law, seems resolved by using Peerenboom's thin rule of law analysis to reveal that as a structural minimum, there is a thin version of rule of law.¹⁹⁶

190. *Id.* at 15 (citing GÉRARD ROLAND & THIERRY VERDIER, *TRANSITION AND THE OUTPUT FALL 13* (Ctr. for Econ. Policy Research, Discussion Paper No. 1636, May 1997) (internal citations omitted); GERARD ROLAND & THIERRY VERDIER, *LAW ENFORCEMENT AND TRANSITION* (European Ctr. for Advanced Research in Econ. & Statistics, Working Paper No. 262, May 1999), [at http://eres.bus.umich.edu/docs/workpap-dav/wp262.pdf](http://eres.bus.umich.edu/docs/workpap-dav/wp262.pdf).

191. *See* ROLAND & VERDIER, *LAW ENFORCEMENT AND TRANSITION*, *supra* note 190, at 3.

192. ORG. FOR ECON. CO-OPERATION AND DEV., *CHINA IN THE WORLD ECONOMY, THE DOMESTIC POLICY CHALLENGES* (2002), *available at* <http://www1.oecd.org/publications/e-book/1402041E.PDF>.

193. BARRY M. HAGER, *THE RULE OF LAW: A LEXICON FOR POLICY MAKERS* 13 (1999) (paper distributed by the Mansfield Center for Pacific Affairs at a conference co-sponsored with the Global Forum of Japan in Tokyo in May 1999 on "The Rule of Law and Its Acceptance in Asia.") http://www.mansfieldfdn.org/programs/program_pdfs/lexicon.pdf (last visited Dec. 28, 2003).

194. SACHS ET AL., *supra* note 182, at 15.

195. HAGER, *supra* note 193, at 22.

196. Peerenboom, *supra* note 143, at 171 n.18.

Given the many possible conceptions of Rule of Law, I avoid reference to 'the Rule of Law,' which suggests that there is a single type of Rule of Law. Alternatively, one could refer to the concept of 'the Rule of Law,' for which there are different possible conceptions. The thin theory Rule of Law . . . would define the core concept of Rule of Law, with the various thick theories constituting different conceptions. Yet from the perspective of philosophical pragmatism, how one defines a term depends on one's purposes and the consequences that attach to defining a term in a particular way.

Id.

If a genuine Chinese jurisprudence exists, then the natural evolution of legal systems will influence the constitutional order.¹⁹⁷ It is an issue of whether there is Chinese jurisprudence, and if so, could it develop and evolve similar to Western jurisprudence.¹⁹⁸ Western scholarship and authority aspire that Chinese jurisprudence will develop and evolve into a Western style of jurisprudence.¹⁹⁹ Steve Chan best summarizes a core conflict between Chinese nationalism and supposed Western universalizing cosmopolitanism, stating:

The importance of China has to do with perceptions, especially those regarding the potential that Beijing will become an example, source, or model that contradicts Western liberalism as the reigning paradigm. In an era of supposed universalizing cosmopolitanism, China demonstrates the potency and persistence of nationalism, and embodies an alternative to Western and especially U.S. conceptions of democracy and capitalism. China is a reminder that history is not close to an end and in that sense it issues a cultural, political, and if one will, ideological challenge to those who entertain especially expansive and dialectic visions of world order.²⁰⁰

Finally, there is the question of the direction and path of the growth of Chinese jurisprudence and constitutionalism. Assuming the existence of Chinese jurisprudence, one must necessarily assume that it will experience periods of evolution, development, and growth.²⁰¹ It may grow away from Western “universalizing cosmopolitanism.”²⁰² Fan Gang and Xin Chunying describe the path of development in China as legal change responding in an ad hoc fashion to socioeconomic change.²⁰³ In response to social and economic conditions, the polity implements policy change and the NPC then enacts legislation implementing these changes.²⁰⁴ They contend that a problem with China’s legal system is that the post-enactment of social and economic changes, prompting policy change, have typically gone beyond the scope of the law.²⁰⁵ This then

197. Steve Chan, *Relating to China: Problematic Approaches versus Feasible Emphasis*, 161 *WORLD AFF.* 179, 183 (1999).

198. Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *YALE L.J.* 1651, 1651 (1994).

199. Chan, *supra* note 197, at 184.

200. *Id.* at 179 (internal citations omitted).

201. Berman, *supra* note 198.

202. Chan, *supra* note 197, at 179.

203. FAN GANG & XIN CHUNYING, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT: THE CASE OF CHINA, PATTERNS OF CHANGE IN THE LEGAL SYSTEM AND SOCIO-ECONOMY 11* (Harvard Inst. for Int’l Dev., Development Discussion Paper No. 664, Nov. 1998), available at <http://www.hiid.harvard.edu/pub/pdfs/664.pdf>.

204. *Id.*

205. *Id.*

requires the State Council to implement regulations in response to new challenges.²⁰⁶

China's legal system and constitutionalism are distinctive because of their unique interrelationship, if not subservience, to China's polity, CCP, NPC, and policies of economic development.²⁰⁷ Ongoing legal reforms emphasize defining new international markets and rules of international trade, instead of enhancing civil-political rights.²⁰⁸

B. Equality (Ping Deng) with Chinese Characteristics

The 1982 Constitution does address the plight of women. Article 33 stipulates that all citizens are equal before the law.²⁰⁹ Article 35 guarantees freedom of association.²¹⁰ Article 48 stipulates that women enjoy equal rights with men in all spheres of life, including political, economic, cultural, social, and family.²¹¹ The State must protect the rights and interests of women, apply the principle of equal pay for equal work, and train and select cadres from women.²¹² Likewise, in Article 49, the State must protect marriage, family, and mother and child.²¹³ A problem with these constitutional stipulations is that they are, initially, only notional when one examines constitutionalism in modern China.

Article 33 of the 1982 Constitution holds, "All citizens of the People's Republic of China are equal before the law [*Zhong Hua Ren Min Gong He Guo Gong Min Zai Fa Lu Mian Qian Yi Lu Ping Deng*]."²¹⁴ However, Article 33, and its constitutional proviso of equality (*ping deng*), does not necessarily vest its citizenry with a cognizable legal right of action, in the sense of Western constitutionalism and justiciability. In order for a proviso in the 1982 Constitution to be enforceable in a court of law, the proviso must first be reduced to an ordinary legal norm, which is the judicial process of converting fundamental rights into ordinary

206. *Id.*

207. *Id.*

208. See THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS (E. Thomas Sullivan ed., 1991) (stating that a changing world of international markets and globalization requires rethinking of how laws are defining markets and how this effects international transactions).

209. XIANFA [CONST.] art. 33 (1982) (P.R.C.).

210. *Id.* art. 35.

211. *Id.* art. 48.

212. *Id.* *Contra* REGULATIONS ON THE WORK OF SELECTING AND APPOINTING LEADING PARTY AND GOVERNMENT CADRES arts. 2(2), (4) (1st ed. 2002), <http://www.china.org.cn/english/features/45399.htm> (speaking to "appointment of persons on their merits," and "principle of openness, equality, competition and selection of the best," but it fails to mention women, women's rights, or specifically equality for women).

213. XIANFA [CONST.] art. 49 (1982) (P.R.C.).

214. *Id.* art. 33.

laws and regulations.²¹⁵ It is only then that a constitutional proviso will vest an aggrieved woman suffering sexual harassment with a cognizable legal action pursuant to Article 33 for unequal treatment.²¹⁶

The United States Supreme Court decision of *Lochner v. New York* articulated basic American constitutional principles of personal liberty.²¹⁷ China's antimodel of equality purposely contrasts itself to American constitutional principles.²¹⁸ There are many who advocate that U.S. constitutionalism and its concepts of popular sovereignty, separation of powers, and independent judicial review should serve as a model for world constitutionalism.²¹⁹ The world's written constitutions are comprised mostly of variants reflecting cultural and economic forces.²²⁰ The recent failures of developing nation-states who attempted to adopt a U.S. constitutional model promoting a Western market system support the use of culture-specific constitutions.²²¹ A further justification for constitution writing nation-states to develop variants, or what Heinz Klug refers to as antimodels,²²² of a U.S. constitutional model is empirical evidence that suggests states, not the constitutions, influence social order.²²³

Heinz Klug compares U.S. constitutional notions of due process with India's decision not to have a due process clause, by using India constitution writers' avoidance of adopting a U.S. style due process clause.²²⁴ He writes:

India's constitution-makers specifically rejected the phrase "due process of law" for fear of replicating the American *Lochner*-era jurisprudence, which was understood to have blocked progressive legislative action and thus slowed social change, an outcome antithetical to the goals of social

215. Huang Songyou, *Making the Constitution Justiciable and Its Significance*, PEOPLE'S COURT DAILY, Aug. 13, 2001.

216. *Id.*

217. *Lochner v. New York*, 198 U.S. 45, 46 (1905) (prohibiting arbitrary state interference with the individual's right to personal liberty).

218. Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of the World Constitutionalism,"* 2000 WIS. L. REV. 597, 604-05.

219. *Id.* at 599-601.

220. *Id.*

221. *Id.* Examples of such failures are Russia and British ex-colonies in Africa.

222. *See id.* at 604-12.

223. John S. Dryzek, *Constitutionalism and its Alternatives*, Prepared for Presentation at the Social and Political Theory Program Workshop on "Democratic Theory: The Canberra Papers" (Mar. 27, 2002), at http://socopol.anu.edu.au/pdf-files/democracy_dryzek.pdf.

224. *See Klug, supra* note 218, at 605.

transformation the constitution-makers felt were to be encouraged by India's post-colonial constitution.²²⁵

Although China's Constitution borrows language of equality associated with U.S. constitutionalism, China does not borrow the underlying legal concept of natural law, which serves as a rationale for United States Supreme Court decisions.²²⁶ Because China is in the middle of legal reforms and economic development, it is arguable that China's polity deems a more liberal constitutionalism as a threat to the higher priority socioeconomic rights for its citizenry.

Although China borrows the term "sexual harassment" from the West, in 1998, China's legislature, the NPC, failed to enact a proposed sexual harassment law.²²⁷ One source quotes Chen Guizun, a member of China's NPC, as saying that China needs a law to "tackle both verbal and physical harassment of women at work."²²⁸ In 1999, in the Ninth session of the NPC, although the bill suffered defeat, Chen Guizun and thirty-two other representatives submitted a proposed law entitled, "The People's Republic of China Counter-Sexual Harassment Bill."²²⁹

The failure of China's polity, the CCP, and the NCP to enact sexual harassment legislation results in equality for women and women's rights being just a notional value, as opposed to a constitutional safeguard.²³⁰ The justiciability of Article 33, along with other articles awaiting reduction to legal norms, primarily are contingent on China's CCP and NPC, prevailing socioeconomic factors, and policies of economic development; they are only secondarily contingent on China's judiciary and Constitution.²³¹

A problem of China's judiciary is that the 1982 Constitution grants the judiciary only limited powers of judicial review.²³² The Supreme People's Court has power of judicial interpretation (*sifa jieshi quanli*), but

225. *Id.* at 605-06 (quoting 1 H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA: A CRITICAL COMMENTARY 692-93 (3d ed. 1983)) (internal citations omitted).

226. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45, 64 (1905); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

227. *80% of Chinese Women Have Been Sexually Harassed*, *supra* note 18.

228. *World: Asia-Pacific: China Sex Harassment Law Proposed*, BBC NEWS, July 5 1998, at <http://news.bbc.co.uk/2/hi/asia-pacific/126816.stm>.

229. *80% of Chinese Women Have Been Sexually Harassed*, *supra* note 18.

230. *Sexual Harassment Needs More Attention in China*, PEOPLE'S DAILY (July 25, 2000), available at http://fpeng.peopledaily.com.cn/200007/25/eng20000725_46326.html.

231. *See* Gregory C. Chow, *The Impact of Joining WTO on China's Economic Legal and Political Institutions*, Address Before the International Conference on Greater China and the WTO (Mar. 22-24, 2001).

232. Sylvia Ostry, *China and the WTO: The Transparency Issue*, 3 UCLA J. INT'L L. & FOREIGN AFF. 14 (1998).

it is limited to interpreting laws and regulations of China arising from actual cases.²³³ In contrast, the Standing Committee of the National People's Congress (SCNPC) has a more expansive power to interpret the Constitution and laws of China (*lifa jieshi quanli*).²³⁴ The power of the judiciary to interpret the Constitution has not yet been resolved. China's judiciary repeatedly fails in its attempts to establish an independent judiciary resembling the U.S. constitutionalism described in the landmark decision, *Marbury v. Madison*.²³⁵ For women's rights, it is not only a problem of constitutional provisos lacking any justiciability, but also a judiciary lacking the power to interpret the Constitution.

For women in China, looking to the Constitution as a source of legal accountability may not be the answer, due to the present stage of Chinese constitutionalism.²³⁶ The United States uses legal accountability as a safeguard for human rights. Antithetically, in Western society, one also observes political accountability, as opposed to legal accountability.²³⁷ An example of this is in Great Britain with parliamentary supremacy, which affords adequate political safeguards for human rights, despite the lack of a written constitution and an independent judicial review such as that associated with U.S. constitutionalism.²³⁸ For China, implementing a domestic safeguard by political accountability that resembles parliamentary supremacy, as opposed to constitutional supremacy, is contingent on the willingness of China's polity to embrace taxonomies that are more Western. However, this seems diametrically opposed to a legal system with Chinese characteristics.

233. *The Supreme People's Court*, CHINA TODAY, available at <http://www.chinatoday.com/law/supreme.htm> (last visited Nov. 13, 2003).

234. XIANFA [CONST.] art. 67 (1982) (P.R.C.).

235. *Marbury v. Madison*, 5 U.S. 137, 151 (1803); see, e.g., *Ng Siu Tung v. Director of Immigrations* (Hong Kong's right of abode cases), Court of Final Appeal of the Hong Kong Special Administrative Region, Jan. 10, 2002, FACV No. 1-3 of 2001, available at http://www.hklii.org/hk/eng_jud/HKCFA/2002/20020110_FACV000001_2001.htm (last visited Dec. 28, 2003); see also Songyou, *supra* note 215.

236. INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS, ICFTU-APRO SURVEY ON SEXUAL HARASSMENT IN THE WORKPLACE AND THE ROLE OF TRADE UNIONS IN PREVENTING SEXUAL HARASSMENT (Aug. 2001), at <http://www.icftu-apro.org/aplabour/APLabour071.html> [hereinafter ICFTU-APRO SURVEY ON SEXUAL HARASSMENT].

237. Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America*, 76 N.Y. L. REV. 1, 16 (2001).

238. *Id.*

VII. CHINA'S CONSTITUTION AND TREATIES

A. *International Conventions Safeguarding Women*

The issue of sexual harassment presents a question of China's compliance with international norms of human rights. There are many international agreements directly and indirectly addressing issues pertaining to women's rights.²³⁹

These conventions do not offer real legal assistance to the plight of Chinese women because of the limitations on and from China's polity, judiciary, and Constitution. International conventions are contractual relations between different nation-states, or organizations of nation-states, that create legal rights and obligations between the parties to such agreements.²⁴⁰ However, issues of international jurisdiction and enforceability that are contingent on China's polity, judiciary, and Constitution weaken the effectiveness of international conventions.

Failure to perform an obligation under a convention generally comes under the province of the International Court of Justice (ICJ), which is one of the principal organs of the UN.²⁴¹ The statute of the ICJ, for purposes of standing, limits jurisdiction to disputes between nation-states.²⁴² In particular, Article 36 of the Statute provides that jurisdiction of the ICJ comprises all cases which nation-states refer to it, and "all matters specifically provided for" in treaties or the UN Charter.²⁴³ Moreover, despite an initial acceptance of ICJ jurisdiction, a nation-state may still decline to consent to the ICJ's jurisdiction over a matter that lies within a nation-state's domestic jurisdiction.²⁴⁴ The problem of the ICJ is perhaps better illustrated by Article 38(2) of the Statute of the ICJ, which

239. See The ILO Underground Work (Women) Convention 1935 (No. 45); ILO Equal Remuneration Convention 1951 (No. 100); ILO Employment Policy Convention 1964 (No. 122); ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983 (No. 159); ILO Chemicals Convention 1990 (No. 170); INT'L LABOR ORG., RELEVANT INTERNATIONAL INSTRUMENTS RATIFIED OR ACCEDED TO BY THE PEOPLE'S REPUBLIC OF CHINA, at http://www.ilol.org/public/english/employment/gems/eo/law/china/int_ins.htm; UDHR, *supra* note 8; ICCPR, *supra* note 9; CEDAW, *supra* note 10.

240. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980, and not ratified by the United States), art. 2, (1)(a) [hereinafter Vienna Convention] ("For the purposes of the present convention . . . 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. . .").

241. See International Court of Justice Official Web site, at <http://www.icj-cij.org/>.

242. *Id.*

243. Statute of the International Court of Justice, International Court of Justice Basic Documents, ch. I, art. 36, available at http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_III (last visited Jan. 20, 2004).

244. *Id.*

provides that the ICJ has the power “to decide *ex aequo et bono* (according to what is good and just), if the Parties agree thereto.”²⁴⁵ Although Article 27 of the 1986 Vienna Convention on the Law of Treaties (Vienna Convention) provides that a nation-state cannot invoke domestic or constitutional law as an international justification for failing to perform its obligations under a treaty, a nation-state may still disregard a relevant convention in favor of some other law if the law of a nation-state permits such a result.²⁴⁶ The classic *local remedies rule* in international law provides that a nation-state should have the opportunity to redress an alleged wrong within the framework of its own domestic legal system before having its international responsibility called into question at a higher level.²⁴⁷ The *local remedies rule* protects state sovereignty against excessive infringement from state-to-state claims on behalf of private individuals.²⁴⁸

B. China’s Constitution, Treaties, and Sexual Harassment

The problems of China’s judiciary and constitutionalism effect how China complies with international treaties, specifically CEDAW.²⁴⁹ CEDAW, Part I, Article 1, defines discrimination against women as follows.

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.²⁵⁰

First, Articles 2, 5, 11, and 24 prompt member nation-states to take action to redress problems by language of urgency.²⁵¹ Article 4, section 1, especially, expresses urgency by allowing member nation-states to

245. *Id.* ch. II, art. 38(2).

246. Vienna Convention, *supra* note 240, at 331.

247. Nsongura J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights*, 97 AM. J. INT’L L. 1, 2 (2003) (citing A.A. CANÇADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW: ITS RATIONALE IN THE INTERNATIONAL PROTECTION OF INDIVIDUAL RIGHTS* (1983)).

248. *Id.*

249. CEDAW, *supra* note 10.

250. *Id.* art. 1.

251. *Id.* arts. 2, 5, 11, 24.

employ “temporary special measures aimed at accelerating *de facto* equality between men and women.”²⁵²

Second, Article 2, subsections (a)-(c) and (f), and Article 24, illustrate the problem of China’s judiciary and constitutionalism.²⁵³ China’s NPC and CCP, in terms of constitutionalism, are required by Article 2(a) of CEDAW to embody the principle of the equality of men and women in its constitution and to ensure, through law, the practical realization of this principle.²⁵⁴ Article 2, subsections (b), (c), and (f), and Article 24, require China to enact appropriate legislation for purposes of ensuring the practical realization of this principle.²⁵⁵ Moreover, Article 15 reads: “States Parties shall accord to women equality with men before the law.”²⁵⁶

Because Chinese constitutionalism is not highly developed, compliance with CEDAW remains unlikely. It is tenuous to proclaim, pursuant to Article 2(e) and (f) and Article 24, that China’s polity has taken all appropriate measures, including legislation, to eliminate discrimination against women. Moreover, limited powers of judicial review only exasperate the problem.

Notwithstanding China’s government, the polity, judiciary, and Constitution, there are also external forces undermining the effectiveness of international conventions. International law does not have a special source designed to generate rules acceptable as norms of *jus cogens*. The absence of an international legislature capable of imposing legal rules on the members of the international community is a major obstacle highlighting the tenuous ground for the very existence of international *jus cogens*. There is always the dilemma that ““what might be *jus cogens* for one state would not necessarily be *jus cogens* for another.””²⁵⁷

Limited enforcement powers of the United Nations also undermine the effectiveness of international conventions to aid women’s rights. Although not banned by the Charter, the United Nations considers humanitarian intervention to be an illegal act.²⁵⁸ However, article 41 of the UN Charter does provide for “economic and other kinds of non-military measures for maintaining or restoring international peace and

252. *Id.* art. 4(1).

253. *Id.* art. 2(a)-(c), (f).

254. *Id.* art. 2(a).

255. *Id.* arts. 2(b)-(c), (f), 24.

256. *Id.* art. 15(1).

257. Gennady M. Danilenko, *International Jus Cogens: Issues of Law Making*, 2 EUR. J. INT’L L. 42, 46 (1991).

258. Harris, *supra* note 95, at 17:20 (citing UNCLOT I, at 35).

security.”²⁵⁹ Sanctions, delivered as economic and nonmilitary measures, are recognized as “specific countermeasures to violations of international law.”²⁶⁰ Coercive measures are used “only in connection with international peace and security.”²⁶¹ In this context, there is a disregard for human rights. First, human rights “are not given as a reason for imposing coercive measures.”²⁶² Second, human rights are not considered to impact the living conditions of affected people.²⁶³ In the normative logic of the UN Charter, especially Chapter VII, there is a prioritizing, as opposed to equating, of peace over human rights.²⁶⁴ Alternatively, equating peace and security with human rights could provide the sinews for more effective enforcement of international norms of human rights.²⁶⁵

The same problem exists regionally. In May 1998, the Asian Human Rights Commission, with the support of NGOs, created the Asian Human Rights Charter Draft (Asian Charter), hoping to begin a human rights dialogue focused on expanding the definition of human rights for Asian nation-states.²⁶⁶ A key benefit of the Charter is its strict definition of rights, which the Asian Human Rights Commission hopes will serve as a lobbying point for the people of Asia.²⁶⁷ The Asian Charter expounds:

The problematic application of democratic rule and indigenous rights to Asia epitomizes the difficulties presented by Asian values. Despite regional and international attempts to expand the realm of human rights, the reticence of Asian states in accepting the universality of those rights hinders the evolution of human rights in the region.²⁶⁸

In addition, there are political, economic, and macroeconomic forces negatively affecting international women’s rights, such as September 11, 2001,²⁶⁹ geopolitical changes in world politics,²⁷⁰

259. HANS KÖCHLER, *DEMOCRACY AND THE INTERNATIONAL RULE OF LAW: PROPOSITIONS FOR AN ALTERNATIVE WORLD ORDER* (Selected Papers Published on the Occasion of the Fiftieth Anniversary of the United Nations, 1995).

260. *Id.* at 118.

261. *Id.* at 119.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 150-51.

266. ASIAN HUMAN RIGHTS COMM’N, *supra* note 157.

267. Harris, *supra* note 95, at 17:2-3.

268. *Id.* at 17:9.

269. Patrick Lenain et al., *The Economic Consequences of Terrorism* (Org. for Econ. Co-operation and Dev., Econ. Dep’t, Working Paper No. 334, 2002), available at [http://appli1.oecd.org/olis/2002doc.nsf/linkto/eco-wkp\(2002\)20/\\$FILE/JT00129726.PDF](http://appli1.oecd.org/olis/2002doc.nsf/linkto/eco-wkp(2002)20/$FILE/JT00129726.PDF).

270. Jianwei Wang, *Tough Road Ahead for China’s Foreign Minister*, ASIAN TIMES ONLINE, Apr. 2, 2003, at <http://www.atimes.com/atimes/China/ED02Ad01.html>.

prodemocracy movements, North Korea,²⁷¹ organized labor protests,²⁷² and other external forces that China perceives as a threat to internal security. These threats may affect ongoing legal reforms, economic development, and policy prioritizations. All of the previously mentioned external forces taken independently, or in random combination, act to undermine the effectiveness and enforceability of international human rights norms and conventions.

A legal system with Chinese characteristics stands as a formidable barrier to the effectiveness of international conventions. Effectiveness primarily is contingent on China's polity, the CCP, the NPC, prevailing socioeconomic factors, and policies of economic development, instead of China's judiciary and constitution. The lack of enforcement mechanisms exacerbates problems of enforcing international human right norms.

VIII. CONCLUSION

Ms. Tong's case is a landmark decision because it is China's first sexual harassment case.²⁷³ However, the progeny of Ms. Tong's case is an increasing awareness of sexual harassment, rather than a flood of litigation. Minimal case filings can be attributed to forces within China's judiciary and to the lack of any sexual harassment legislation.²⁷⁴ Comparatively, in Western societies, and even in many Asian nation-states, there are constitutional safeguards and sexual harassment laws. Some of the Asian nation-states that have policies or laws addressing sexual harassment include Korea (Equal Employment Act),²⁷⁵ Japan (Equal Employment Opportunity Law),²⁷⁶ Republic of China (Taiwan) (Penal Provision),²⁷⁷ and other nation-states.²⁷⁸

However, sexual harassment laws may not be a cure-all, because the forces of economics, politics, and culture entwine with both the problem and proposed solution of a sexual harassment law. Despite proscriptions

271. Marc Erikson, *North Korea Becomes China's Bette Noir*, ASIA TIMES ONLINE, Sept. 12, 2003, at <http://www.atimes.com/atimes/China/EI12Ad05.html>.

272. Geoffrey York, *Rising Tide of Labour Protest Has Chinese Leadership Worried*, GLOBE & MAIL, May 12, 2003, <http://globeandmail.com/servlet/ArticleNews/TPStory/LAC/20030512/ULABOXI>.

273. Ming, *supra* note 26.

274. *Nanjing Harasser Exposed*, *supra* note 33.

275. Labour Standards Act (1998) (S. Korea), <http://www.ilo.org/public/english/employment/gems/eo/law/korea/lisa.htm> (last visited Nov. 13, 2003).

276. LAW ON SECURING EQUAL EMPLOYMENT OPPORTUNITY AND TREATMENT BETWEEN MEN AND WOMEN IN EMPLOYMENT (1947) (Japan), <http://www.ilo.org/public/english/employment/gems/eo/law/japan/eol.htm> (last visited Nov. 13, 2003).

277. AMNESTY INT'L, *Taiwan*, in AMNESTY INT'L REP. (2000).

278. ICFTU-APRO SURVEY ON SEXUAL HARASSMENT, *supra* note 236.

in the Constitution and domestic law, sexual harassment persists in the United States.²⁷⁹ For both East and West, the true culprits of sexual harassment are sexism and chauvinism, which are cultural manifestation and not subject to a quick fix.²⁸⁰ Generally, one thinks of cultural divergences in East-West relations, but sexism and chauvinism present a contrary illustration of cultural commonality.²⁸¹ In China, as in the United States, sexual harassment laws at least offer some semblance of judicial remedies. Sexual harassment laws may serve as a catalyst for social change, countering forces of economics, politics, and culture, which seem to attenuate problems of sexual harassment in the workplace, especially amidst ongoing economic reform. The legal transplant of a sexual harassment law largely, albeit indirectly, affects economic development via its impact on legality.²⁸²

Aggrieved women do not have meaningful access to domestic and international justice for sexual harassment due to the failure of China's polity to develop an adequate policy concerning sexual harassment against women in the workplace and prompt the NPC, or the NPC's own failure to take the initiative, to enact sexual harassment legislation.²⁸³ The only viable alternative for China's polity and the NPC is enactment of a sexual harassment law, because discriminatory social norms, like patterns in sexual harassment, cannot persist without government involvement.²⁸⁴ China's entry into the WTO prompts China's polity and the NPC, because of globalization and new global interlegality, to initiate enactment of a sexual harassment law. Otherwise, in China, women workers, who "hold up half the sky,"²⁸⁵ will be without access to meaningful domestic or international judicial remedies, while nonjudicial remedies remain without efficacy.

279. Jean Wegman Burns, *Horizontal Jurisprudence and Sex Discrimination*, 49 HASTINGS L.J. 105, 107 (1997).

280. Ann D. Jordan, *Women's Rights in the People's Republic of China: Patriarchal Wine Poured from a Socialist Bottle*, 8 J. CHINESE L. 47, 98 (1994).

281. *Id.* at 97.

282. BERKOWITZ ET AL., *supra* note 43.

283. Ming, *supra* note 26, at 20.

284. STEVEN J. SCHWAB, EMPLOYMENT DISCRIMINATION 578 (1999), <http://encyclo.findlaw.com/5530book.pdf>.

285. Riley, *supra* note 1.