

COMMENT

A CULTURE OF HUMAN RIGHTS IN EAST ASIA:
DECONSTRUCTING “ASIAN VALUES” CLAIMS*Uyen P. Le**

ABSTRACT

During the Arab Spring, the Chinese government instigated a series of harsh crackdowns on the exercise of free speech, a human right, to crush any budding protests. To justify its human rights violations, the People’s Republic of China (PRC) has persistently raised the theory of cultural relativism, asserting that Asian cultures do not support all the rights articulated in the Universal Declaration of Human Rights. Various scholars have written extensively on rights in Asian cultural paradigms, but this article focuses particularly on the diverging representations of Asian values advanced by different political regimes since the creation of the Universal Declaration.

Culture and politics are often intricately entwined. In some ways, political posturing may be the true impetus behind the PRC’s cultural relativism argument. This Comment points out the contrary positions taken by the PRC and its predecessor, Republic of China (RoC), on universal human rights, although both regimes share the same cultural roots. To further dissociate politics from culture, this Comment compares the PRC’s position against two societies, one that is culturally similar (Japan) and one that is politically similar (the former Soviet Union). Although culturally similar, Japan’s position on human rights diverges in many ways from that of the PRC. On the other hand, the PRC’s stance on cultural relativism replicates that of the former Soviet Union. Given the inconsistent support for a purported theory on “Asian values” despite cultural ties, one can conclude that the PRC’s justifications for cultural relativism depend heavily on its political philosophy, rather than shared cultural values.

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INTRODUCTION

The 2008 Olympic Games illuminated the People's Republic of China (PRC) on the international stage.¹ The Olympics showcased the PRC's ability to outmatch other developing countries in athletic talent and technical extravagance—and yet also, to outmatch other countries in refusing to acknowledge continuing violations of human rights. The synchronized, well-choreographed display of youthful faces that greeted world leaders unfortunately masked deeper layers of state policies perpetuating human rights abuses.

The unprecedented opposition to the PRC's stance on human rights both domestically and internationally was not surprising. Leading up to the Olympics, non-governmental organizations (NGOs) around the world documented further repression of opposition and silencing of dissenting opinions by the PRC government.² Heads of states faced pressure to boycott

¹ "PRC" describes the current Communist regime. "Republic of China (RoC)" describes the post-WII pre-Communist era republic. After 1949, the Republic of China became the People's Republic of China, which replaced the old regime at the United Nations in 1971. This article uses the terms "PRC" and "RoC" when specifically discussing regime-related documents or official positions. The terms "China" or "Chinese" are used herein to refer to Chinese society, culture, and people.

² See, e.g., HUMAN RIGHTS WATCH, CHINA'S FORBIDDEN ZONE: SHUTTING THE MEDIA OUT OF TIBET AND OTHER "SENSITIVE" STORIES (2008), available at <http://www.hrw.org/reports/2008/china0708/china0708webwcover.pdf> (reporting on China's shutting out the media from reporting about political repression in Tibet and other volatile areas); *Olympics 'worsening China rights,'* BBC NEWS, Apr. 2, 2008, <http://news.bbc.co.uk/2/hi/7325754.stm>; Qiao Long & Chakmo Tso, *Tibetan Monks Confined During Games,* RADIO FREE ASIA, Aug. 13, 2008, <http://www.rfa.org/english/news/tibet/Tibetan-Confined-08132008165849.html> (Luisetta Mudie trans.) (noting that the Chinese authorities placed curfews on Buddhist monasteries during the Olympics and confined and forbade monks from traveling to Beijing); *Reporters Without Borders Wrote to IOC Jacques Rogge,* REPORTERS WITHOUT BORDERS, July 17, 2007, <http://en.rsf.org/reporters-without-borders-wrote-to-17-07-2007,22971>.

the Olympics in protest of the PRC's human rights abuse record.³ Activists staged demonstrations around the world.

Yet the Olympics came and went, along with the wave of opposition to the PRC and its policies. Nonetheless, the event initiated a more critical look at the PRC's policy toward its own citizens and its authorities' understanding of the rights enumerated in the United Nations (UN) Universal Declaration of Human Rights.⁴ Even though the Universal Declaration is not binding on signatory states, the rights promulgated in its text and subsequent human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), provide a baseline standard for measuring a country's duties to its citizens. Since 1993, however, the PRC has defended itself against Western criticism of its human rights record in the promulgation of a cultural relativist approach to human rights.

Cultural relativism is grounded in the idea that an individual's belief and activities should be understood in the terms or context of his or her own culture.⁵ This cultural argument endeavors to re-contextualize the perspectives and frameworks through which we examine human rights. When applied to the human rights context, cultural relativism can be employed to oppose the cross-cultural foundation of the Universal Declaration and posit instead that human rights must be determined with regard to the specific culture and community to which the individual belongs.⁶

³ Preeti Bhattacharji & Carin Zissis, *Olympic Pressure on China*, COUNCIL ON FOREIGN RELATIONS, June 17, 2008, <http://www.cfr.org/china/olympic-pressure-china/p13270> (noting that prominent leaders, including German Chancellor Angela Merkel and British Prime Minister Gordon Brown, have stated that they will not be attending the games' opening ceremony).

⁴ See generally Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948) [hereinafter Universal Declaration] (including the right to life, liberty, effective remedy, public hearing, nationality, expression, religion; as well as the right to be free from torture, arbitrary arrest, and interference with privacy).

⁵ American Anthropological Association Executive Board, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 539-43 (1947) [hereinafter *Statement on Human Rights*] (discussing the term "cultural relativism"). The Executive Board of the American Anthropological Association submitted this Statement to the United Nations Commission on Human Rights during the drafting process of the Universal Declaration of Human Rights. Melville Herskovits, the drafter of the Statement, stressed the relevance of cultural relativism in the Statement on Human Rights by noting that "[t]he problem is thus to formulate a statement of human rights that will do more than phrase respect for the individual as individual. It must also take into full account the individual as a member of a social group of which he is part, whose sanctioned modes of life shape his behavior, and with whose fate his own is thus inextricably bound." *Id.* at 539.

⁶ *Id.* at 539.

This Comment seeks to examine the PRC's cultural opposition to the rights enumerated in the Universal Declaration. Specifically, this Comment takes a closer look at the rights enumerated in the International Covenant on Civil and Political Rights (ICCPR), which the PRC opposes, whereas the PRC has no reservations to the treaty regarding social and economic rights.⁷

Part I begins first with China's history before and after the creation of the Universal Declaration, squaring both the PRC and greater Chinese civil society's perception of rights with those underlying the Universal Declaration. Part II sets out the facts of China's political and cultural background and its historical relationship with the development of universal human rights. Part III examines the international human rights movement and particular human rights instruments at issue. Finally, this Comment reconciles values celebrated throughout Chinese cultural traditions and philosophy with values constituting "Western-formulated"⁸ human rights and concludes that a basic review of China's own rich human rights history and traditions undermine the PRC's cultural relativism argument as a purely political defense parading behind a "cultural" mask.

I. HUMAN RIGHTS IN CHINA BEFORE AND AFTER 1949

After the 1989 Tiananmen Square protest, the PRC's human rights abuses reached the forefront of international concern, becoming a hot topic for both political manipulation and genuine human rights activism. Major issues of concern were (and still continue to be) repressions of freedom of speech, freedom of religion, freedom from discrimination, freedom from torture, and other political rights.⁹ The PRC has consistently justified its

⁷ International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, 21 U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, at 52 (1966) [hereinafter ICCPR] (specifying rights in Articles, such as: Article 6, right to life, liberty, and property; Article 7, right against torture or inhuman treatment; Article 8, right against slavery; Article 18, right against arbitrary or unlawful detention; Article 18, right to freedom of thought, conscience, and religion; Article 19, freedom of expression; and various others).

⁸ *See generally* MICHELINE ISHAY, *THE HISTORY OF HUMAN RIGHTS FROM ANCIENT TIMES TO THE GLOBALIZATION ERA 64-74* (2004) (noting that the modern conceptualization of human rights originated from America and Europe).

⁹ *See* Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(C) of the Annex To Human Rights Council Resolution 5/1: People's Republic of China (including Hong Kong and Macao Special Administrative Regions (HKSAR) and (MSAR)), 4th Sess., Feb. 2-13, 2009, U.N. Doc. A/HRC/WG.6/4/CHN/3, at 3-11 (Jan. 5, 2009) (summarizing concerns such as an estimated 5000 – 6000 individual executions in 2007, several hundred missing Tibetans taking part in the March 2008 protests in the Tibet Autonomous Region (TAR), lack of transparency in investigation, illegal detention centers run by local governments and institutions, torture and ill-treatment, forced labor, persecution of human rights defenders, preventing attorneys from taking on cases, heightened censorship of information, and missing dissidents). *See generally* Rep. of the Working Group

position by attacking the universality of the rights formulated in the Universal Declaration, specifically civil and political rights. Evaluating the PRC's cultural relativism argument must begin with a brief summary of the cultural relativism argument: first, the history of the PRC's objection to the concept of universal human rights and the government's official position on human rights; and second, China's broader cultural and political background.

A. The PRC's Stance Toward a Culturally-Based Understanding of Human Rights and the "Asian Values" Movement

Two important documents summarize the values of PRC's cultural relativist argument: the PRC's 1991 White Paper and the 1993 Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, also known as the Bangkok Declaration.¹⁰ The first two subsections describe these documents and each of the cultural relativism arguments made therein. To fully explain the values asserted in these documents, the last subsection explores the philosophical foundation underlying those values.

1. The PRC's Conceptualization of Human Rights in the 1991 White Paper

Despite the Republic of China's (RoC) role in the drafting the Universal Declaration in 1948,¹¹ the PRC's new ruling Communist Party officially

on the Universal Periodic Review – China, Human Rights Council, Rep. on its 11th Sess., Oct. 5, 2009, U.N. Doc. A/HRC/11/25 (Oct. 5, 2009) (recommending various steps China can take to improve its responses to its human rights obligations during its periodic review); Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Civil and Political Rights, Including the Question of Torture and Detention*, Comm'n on Human Rights, U.N. Doc. E/CN.4/2006/6/Add.6 (Mar. 10, 2006) (by Manfred Nowak) (raising the issue of frequent use of torture and intimidation to suppress political rights).

¹⁰ See generally World Conference on Human Rights, Mar. 29-Apr. 2, 1993, *Report of the Regional Meeting for Asia of the World Conference on Human Rights*, U.N. Doc. A/Conf.157/ASRM/8 (Apr. 7, 1993) [hereinafter Bangkok Declaration] (declaring Asian states' commitment to human rights and reaffirming the principles of respect for national sovereignty, territorial integrity, and non-interference in the internal affairs of states); INFORMATION OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, WHITE PAPER: HUMAN RIGHTS IN CHINA (1991), available at <http://www.china.org.cn/e-white/7/index.htm> [hereinafter WHITE PAPER] (presenting a brief account of China's basic position on human rights and its current practices).

¹¹ Rep. of the Drafting Committee to the Comm'n on Human Rights, 2d sess., May 3-21, 1948, U.N. Doc. E/CN.4/95 (May 21, 1948) (noting that Dr. T.Y. Wu represented the Republic of China as one of the eight members of the Drafting Committee); Rep. of the Drafting Committee to the Comm'n on Human Rights, 1st sess., June 9-25, 1947, U.N. Doc. E/CN.4/21 (July 1, 1947) (noting that Dr. P.C. Chang represented the Republic of China as one of the eight members of the Drafting Committee).

voiced its culturally based opposition to the Universal Declaration and its Western counterparts in the state's official White Paper in 1991.¹² The White Paper's introduction paid tribute to universal human rights contained in the Universal Declaration, but it still essentially affirmed the values of cultural relativism and state sovereignty over civil and political rights. In affirming the values of cultural relativism, the White Paper specifically proposed, "the right to subsistence is the most important of all human rights, without which the other rights are out of the question."¹³

Logically then, the White Paper stressed the right of national independence, without which "there would be no guarantee for the people's lives" — in other words, no right of subsistence.¹⁴ The right to subsistence as the most important human right is the crux of the cultural relativism argument, allowing state sovereignty to supersede political and civil rights. The White Paper continued to emphasize that citizens "exercising their [civil and political] freedoms and rights . . . may not infringe upon the interests of the state, of society or of the collective."¹⁵ By asserting the right of subsistence and the right of national independence, the PRC was able to justify the suppression of an individual's political and civil rights in order to protect the state's interest or the collective's subsistence.

On the eve of the Vienna Human Rights Conference in 1993, the White Paper's emphasis on national independence as the precondition of the right of subsistence turned even more state-centric.¹⁶ One of the authors of the White Paper, Liu Fenzhi of the Chinese State Council, replaced the concept of "national independence" with "state sovereignty" in his article in the *Renmin ribao* newspaper on May 31, 1993.¹⁷ Liu clarified several differences in the White Paper with regard to Western and Eastern perspectives on human rights.

First, the PRC asserted that human rights standards differed according to economic, historical, and cultural backgrounds, as distinguished from the

¹² WHITE PAPER, *supra* note 10, at Preface ("Owing to tremendous differences in historical background, social system, cultural tradition and economic development, countries differ in their understanding and practice of human rights."). The pre-Communist Republic of China took part in the drafting of the Universal Declaration in 1948. After 1949, the Republic of China became the People's Republic of China, which replaced the old regime at the U.N. in 1971.

¹³ WHITE PAPER, *supra* note 10, art. 1, ¶ 1 (discussing the right to subsistence as the foremost human right which the Chinese people have long fought for).

¹⁴ *Id.* art. 1, ¶ 2.

¹⁵ *Id.* art. 2, ¶ 15.

¹⁶ ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS 159 (Bert Lockwood ed., 1999).

¹⁷ *Id.*

universal, cross-cultural standard adopted by Western states.¹⁸ The PRC maintained that the sovereign state takes responsibility for human rights protection as contrasted with the concept that human rights are transnational.¹⁹ The PRC thus argued that the protection of rights must be based on the surrounding social conditions and constraints of domestic law.

Additionally, the PRC emphasized the importance of collective rights over individual rights. The PRC saw the right to development as a collective right and a precondition for other rights; as such, it required developed states to assist developing states.²⁰ Furthermore, the PRC characterized the West as extending the UN's human rights protection and peacekeeping duties with the ulterior motive of interfering in other states' internal affairs.²¹ Ultimately, the PRC indicated that the UN's true responsibilities lay in monitoring of wide-scale abuse of minorities' rights, colonialism, hegemonism, racism, foreign aggression, and occupation.²² The PRC contended that the rights articulated in the Universal Declaration represented mainly Western values, and therefore did not account for these differences.

2. The Bangkok Declaration and Formulation of "Asian Values"

In 1993, two years after the PRC published its White Paper, representatives of "Asian" governments from the Middle East to Southeast Asia gathered in Bangkok, Thailand, to draft the Bangkok Declaration.²³ The Bangkok Declaration formulated the concept of "Asian values" and launched the cultural relativism debate globally.²⁴ Many of the Asian states maintained that the West's universal concept of human rights is only a

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² KENT, *supra* note 16 at 160 (citing "ZHONGGUO DI REN QUAN ZHUANG QUANG" BAI PI SHU WEN TI JIE DA 349-54 (Xu Jianyi ed., 1992) (discussing the statement of Liu Fenzhi from the Chinese State Council clarifying China's position on the White Paper)).

²³ Participating states included Bahrain, Bangladesh, Bhutan, Brunei Darussalam, China, Cyprus, Democratic People's Republic of Korea, Fiji, India, Indonesia, Iran, Iraq, Japan, Kiribati, Kuwait, Lao People's Democratic Republic, Malaysia, Maldives, Mongolia, Myanmar, Nepal, Oman, Pakistan, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Sri Lanka, Syrian Arab Republic, Thailand, United Arab Emirates, and Vietnam.

²⁴ Bangkok Declaration, *supra* note 10, art. 8 (noting that "while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds").

reflection of Western culture and values which cannot be superimposed onto Asian traditions.²⁵

The Bangkok Declaration reformulated the foundation of human rights to privilege the state over the individual. It placed heavy emphasis on the state, asserting that states have the right to “determine their political systems, control and freely utilize their resources, and freely pursue their economic, social and cultural development.”²⁶ Additionally, the Bangkok Declaration declared that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”²⁷ The Bangkok Declaration also further emphasized the need for respect for national sovereignty and territorial integrity, and it perpetuated the preference for non-interference in internal affairs of states.²⁸

The Bangkok Declaration thus formalized the political concept of “Asian values,” which presumably consists of common traits of the various cultures across the Asian continent. Under this theory, “Asian” cultures value family over the individual, harmony over conflict, discipline and deference to authority over individual expression, and social welfare over freedom.²⁹ The PRC’s position explicitly stated in its White Paper is almost identical to the values entrenched in the Bangkok Declaration. The Asian values formulated in the White Paper and the Bangkok Declaration similarly entail four major claims.³⁰

The first of these four Asian values claims asserts that rights are culture-based. The PRC’s White Paper declared that human rights practice and understanding are not universal, “owing to tremendous differences in historical background, social system, cultural tradition and economic development.”³¹ Similarly, state governments participating in the Bangkok Declaration agreed that human rights “must be considered in the context of a

²⁵ See Bilahari Kausikan, *Asia's Different Standard*, 92 FOREIGN POL’Y 24, 24-41 (1993) (stating that international human rights advocates ignore cultural differences and seek to impose “individualistic ethos of the West” on the “collective seeking” East and Southeast Asia).

²⁶ Bangkok Declaration, *supra* note 10, art. 1, ¶ 6.

²⁷ *Id.* art. 1, ¶ 8.

²⁸ *Id.* art. 1, ¶ 5.

²⁹ Lynda S. Bell et al., *Introduction: Culture and Human Rights*, in NEGOTIATING CULTURE AND HUMAN RIGHTS 8 (Lynda S. Bell et al. eds., 2001).

³⁰ Xiaorong Li, “Asian Values” and the Universality of Human Rights in *Philosophical Dimension of Public Policy*, in PHILOSOPHICAL DIMENSIONS OF PUBLIC POLICY 172-73, (Verna V. Gehring & William A. Glaston eds., 2002); see AMARTYA SEN, HUMAN RIGHTS AND ASIAN VALUES (1997).

³¹ WHITE PAPER, *supra* note 10, at Preface.

dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional peculiarities and various historical, cultural, and religious backgrounds.”³²

Second, the concept of Asian values emphasizes the rights of the community over those of the individual, drawing from Confucian³³ cultural philosophy and social norms. One such Confucian virtue is to ensure social harmony, order, and stability in the family, community, and state.³⁴ According to this theory, “human rights” as defined by Western values are individualistic by nature and would inevitably lead to the social destruction of “Asia’s cultural values.”³⁵

The third “Asian value” is the belief that social and economic rights take precedence over civil and political rights. In opposing the emphasis Western states place on civil and political rights, the Asian values approach focuses on social and economic rights as fundamental rights, the absence of which prevents the achievement of political and civil rights. The PRC clearly supported such a position in its White Paper by declaring that the foremost human right for the Chinese people is the right to subsistence. The White Paper noted that the “people’s right to subsistence will still be threatened in the event of a social turmoil or other disasters,” and therefore, that the PRC government’s most urgent task is to maintain national stability.³⁶

The fourth “Asian value” asserts that human rights are subsumed under the right to national sovereignty. In both the Bangkok Declaration and the White Paper, Asian governments called for respect for national sovereignty and non-interference in domestic affairs. In its White Paper, for example, the PRC stated “the issue of human rights falls by and large within the sovereignty of each country.”³⁷ This position, however, effectively works to shield a state’s domestic human rights abuses from international criticism.

The Bangkok Declaration’s conceptualization of Asian values met its primary opposition when Asian NGOs refused to acknowledge the legitimacy of “Asian values” in the human rights debate. During the Vienna World Conference of 1993, approximately 240 delegates representing more than 110 NGOs from twenty-six countries across the Asia-Pacific region found common ground with the more Western characterization of the universality of human rights and expressed their unequivocal support for the

³² Bangkok Declaration, *supra* note 10, art. I, ¶ 8.

³³ Li, *supra* note 30, at 174.

³⁴ *Id.* at 175.

³⁵ *Id.* at 175.

³⁶ WHITE PAPER, *supra* note 10, art. I, ¶ 15.

³⁷ *Id.* at Preface.

universality and indivisibility of human rights.³⁸ Specifically, the NGOs' Declaration recognized and emphasized that "human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty."³⁹

3. Chinese Philosophies Implicated in the Human Rights Debate

In order to evaluate the merits of "Asian values" and the 1991 White Paper, the concept of human rights must be examined through the richness of Chinese cultural history and philosophy. This section briefly lays out the potential sources influencing the cultural relativism argument. It focuses mainly on Confucianism (rather than Buddhism, Daoism, or Legalism), because the PRC has disproportionately employed Confucianism as a primary socio-cultural rationale to justify its emphasis on state authority over individuals' rights.⁴⁰

The Confucian tradition stretches from antiquity to the present day, enduring through different dynasties with differing interpretations.⁴¹ The philosophy stresses the interaction between the self and the community, as well as harmony between humans and the external world, which includes the

³⁸ World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 1, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (stating that "the universal nature of these rights and freedoms is beyond question"); OUR VOICE: BANGKOK NGO DECLARATION ON HUMAN RIGHTS: REPORTS OF THE ASIA PACIFIC NGO CONFERENCE ON HUMAN RIGHTS AND NGOS' STATEMENT TO THE ASIA REGIONAL MEETING 5 (Asian Cultural Forum on Development 1993) [hereinafter NGOS' DECLARATION] (declaring that "those cultural practices which derogate from universally accepted human rights... must not be tolerated"); see also KENT, *supra* note 16, at 172-73 (citing Liu Baopu & Xiao Qiang, *The Poor Relations Push Their Way in at the Door: NGOS at the Vienna Human Rights Conference*, [Fall 1993] CHINA RTS. FORUM 17).

³⁹ NGOS' DECLARATION, *supra* note 38, at 5.

⁴⁰ See Michael C. Davis, *Chinese Perspectives on Human Rights*, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 3, 12-16 (Michael Davis ed., 1995); Charles C. Helwig, *Rights, Civil Liberties, and Democracy Across Cultures*, in HANDBOOK OF MORAL DEVELOPMENT 185, 189 (Melanie Killen & Judith Smetana eds., 2006); James C. Hsiung, *A Re-appraisal of Abrahamic Values and Neorealist IR Theory: From A Confucian-Asian Perspective*, in CHINA AND INTERNATIONAL RELATIONS: THE CHINESE VIEW AND THE CONTRIBUTION OF WANG GUNGWU 22 (Zheng Yongnian ed., 2010).

⁴¹ Confucius, also known as K'ung-tzu, was a Chinese thinker and philosopher who lived from 551 B.C. to 479 B.C. His teachings' influence remains widespread throughout Chinese, Korean, Japanese, and Vietnamese cultures and traditions. Confucius's teaching became known as Confucian philosophy, which emphasizes governmental morality, correctness of social relationship, justice, and sincerity, mostly through rites and rituals. His teachings are compiled in a collection of works called the Analects of Confucius. See generally *Confucius*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/confucius/> (last visited May 16, 2012) (providing background on the life and philosophy of Confucius).

family, the community, and the state.⁴² Confucius's teachings focus on the concept of kindness (*ren*) as a universal virtue that anyone can practice and possess. Before Confucius, *ren* was a virtue that only those of high birth could possess.⁴³ However, Confucius maintained that all members of society, regardless of class or status, had the innate potential to develop the four virtues of benevolence, righteousness, propriety, and discernment.⁴⁴ Nevertheless, Confucius believed that individuals might not have equal opportunity to achieve these virtues on their own. As society progressed, paths for individuals to gain these virtues developed through traditional rituals and social norms established through the successful experiences of those who sought virtue in the past. These social norms, such as filial piety and absolute respect for the elderly, sometimes seem fixed and forced, but the foundation of these norms is still grounded on acting with kindness toward other human beings.⁴⁵

Authoritarian regimes extended the teaching of kindness into politics, where they mistakenly perceived or deliberately used it in support of their own agendas. Confucius stressed that society should be hierarchical in nature — rulers must govern benevolently, and subjects must return this benevolence with obedience. Focusing on this relationship, Confucius maintained that within any hierarchical relationship, subordinates have a duty to advise their superiors against wrongdoing.⁴⁶ Confucius's students expanded this concept of civic duties further, recognizing that all people are equal and, therefore, leaders must treat all subjects with respect. Confucian philosophy imposed great obligations on the ruling class; this interpretation of Confucian *ren*, as similarly understood by the RoC, directly challenges the PRC's post-1949 assertions that human rights are incompatible with Confucianism.

⁴² Tu Weiming, *Joining East and West: A Confucian Perspective on Human Rights*, 20 HARV. INT'L REV. 44, 48-49 (1998).

⁴³ Julia Ching, *Human Rights: A Valid Chinese Concept?*, in CONFUCIANISM AND HUMAN RIGHTS 71 (Theodore de Bary & Tu Weiming eds., 1998).

⁴⁴ Sumner B. Twiss, *A Constructive Framework for Discussing Confucianism and Human Rights*, in CONFUCIANISM AND HUMAN RIGHTS 41 (Theodore de Bary & Tu Weiming eds., 1998).

⁴⁵ Craig Williams, *International Human Rights and Confucianism*, 7 ASIA-PAC. J. ON HUM. RTS. & L. 38, 48-50 (2006) (citing Irene Bloom, *Mencius and Human Rights*, in CONFUCIANISM AND HUMAN RIGHTS 98 (Theodore de Bary & Tu Weiming eds., 1998)).

⁴⁶ *Id.* at 49-50 (citing Wejen Chang, *The Confucian Theory of Norms and Human Rights*, in CONFUCIANISM AND HUMAN RIGHTS 120 (Theodore de Bary & Tu Weiming eds., 1998)).

B. The Republic of China's Support For Universal Human Rights Prior to 1949

Prior to 1949, the RoC was deeply engaged in the international universal human rights discourse. Its delegates played important roles in voicing cultural support for the universality of human rights during two crucial events: the drafting of the Universal Declaration of Human Rights, and the United Nations Educational, Scientific and Cultural Organization's (UNESCO) philosophical human rights symposium.⁴⁷ Both events sought to find rights universal to all peoples.

1. Drafting the Universal Declaration of Human Rights

The drafting process of the Universal Declaration is an event critical to determining the merits of the PRC's cultural relativism argument. Chang Peng-Chun, the RoC's delegate, took part in the drafting process, along with delegates from the Soviet Union, the United Kingdom, France, Australia, Belgium, Byelorussia (Belarus), Chile, Egypt, India, Iran, Lebanon, Panama, Philippines, the Ukraine, the United States, Uruguay, and Yugoslavia. Chang's contributions to the drafting process and the subsequent discussions indicated that the major cultural values and differences — particularly those of the Chinese — were researched, debated, incorporated, and subsequently affirmed as compatible with the rights explicitly listed in the Universal Declaration.⁴⁸

Chang contributed the concept of “two-man mindedness” to the discussion, which he described as “a sympathetic attitude of regarding all one's fellow men as having the same desires, and therefore the same rights, as one would like to enjoy oneself.”⁴⁹ Chang went on to prevail in pushing for a significant structural change to the final version of the Universal Declaration. He argued that the provision on duties and limitation of rights must be placed after all the rights were listed.⁵⁰ Although Chang believed

⁴⁷ MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 72-78 (2001).

⁴⁸ *Id.* at 32-33, 146-148. *See generally id.* (summarizing Chang's contribution throughout the drafting of the Universal Declaration).

⁴⁹ *Id.* at 75-76 (citing Chung-Shu Lo, *Human Rights in the Chinese Tradition, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 186, 187 (UNESCO & Allan Wingate eds., 1949)).

⁵⁰ *Id.* at 178 (discussing the Universal Declaration's two introductory articles as setting the tone for the entire declaration: “Article 1. All human beings are born free and equal in dignity and rights . . . Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration ;” also noting that Delegate Cassin proposed having the current Article 29 on the duties and limitations of rights as the third article in sequence before the declaration of rights, but was met with Chang's opposition).

that rights and duties coexisted, by adamantly insisting that rights be listed first, he indicated his view that rights originated first and must be therefore be established first before imposing limitations.⁵¹

Chang also advocated and continuously reminded other delegates of the universal nature of the proposed rights.⁵² He even acknowledged and asserted that his country “comprised a large proportion of humanity, and its people had ideals and traditions different from those of the Christian West.”⁵³ However, Chang refrained from proposing ideals from the Chinese tradition that were not universally applicable, such as decorum and propriety.⁵⁴ By doing so, he implied that the rights proposed in the Universal Declaration were rights that cannot be subject to limitation through differences in culture.⁵⁵

2. The Universal Declaration of Human Rights Third Committee

In addition to Chang’s contributions to the Universal Declaration, the drafting process included a diverse group of viewpoints and cultural backgrounds. The draft moved on to the Third Session of the UN General Assembly for consideration, also known as the “Third Committee.”⁵⁶ The draft was subject to debate by delegates from Europe, North America, six Asian countries (China, India, Pakistan, Burma, the Philippines, and Siam), and four African countries (Ethiopia, Egypt, Liberia, and South Africa). The representatives came from various religious backgrounds, including Islamic countries (such as Afghanistan, Egypt, Iran, Iraq, Pakistan, Saudi Arabia, Syria, Turkey, and Yemen) and countries with strong Buddhist traditions (including China, Burma, and Siam).

⁵¹ See Universal Declaration, *supra* note 4, art. 29, ¶¶ 1-2 (“Everyone has duties to the community in which alone the free and full development of his personality is possible. . . . In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”).

⁵² GLENDON, *supra* note 47, at 146.

⁵³ *Id.* at 146.

⁵⁴ *Id.*

⁵⁵ See *id.*

⁵⁶ *Universal Declaration of Human Rights: Considerations by the General Assembly At Its Third Session, 1948* Y.B. 524, 526 available at <http://www.udhr.org/history/yearbook.htm#B> (discussing the Third Session of the United Nations General Assembly at its 142nd meeting held on Sept. 24, 1948, which considered the draft of the Universal Declaration at its 88th to 105th, 107th to 116th, 119th to 134th, 137th to 167th, and 174th to 179th meetings, totaling eight-one meetings) [hereinafter Third Committee]; Rep. of the Third Comm., Draft International Declaration of Human Rights, U.N. Doc. A/777, Dec. 7, 1948.

The composition of the Third Committee guaranteed that the discussion of human rights was dynamic and deliberate, not single-sided. The extent of deliberation even surprised the first Chairwoman of the Commission on Human Rights which drafted the Universal Declaration, former U.S. First Lady Eleanor Roosevelt. According to one writer, she was quite:

{...}dismayed to find that the members of that large group seemed determined to debate “every single word of that draft declaration over and over again.” There was hardly any issue that the human rights commissioners had not thoroughly considered, yet the third committee, she complained, was treating each article “exactly as though it was all an entirely new idea and nobody had ever looked at it before.”⁵⁷

The Third Committee spent a total of eighty-one meetings deliberating every article of the proposed draft of the Universal Declaration.⁵⁸ With so many representatives from various backgrounds, consensus could only be achieved if the rights proposed were core values that all could agree upon.

3. UNESCO Research on the Philosophical Principles of the Rights of Man

During the same period from 1947 to 1949, while the UN Human Rights Commission was drafting the Universal Declaration, UNESCO established a Symposium and a Committee of Experts on the Philosophical Principles of the Rights of Man. The Symposium’s purpose was to explore theoretical issues raised by claiming universality of human rights.⁵⁹ Various thinkers and experts came together for discussion.⁶⁰ Here, Chinese participants once again reconciled Chinese tradition with the concept of universal human rights. The RoC’s delegate to the UNESCO Symposium, Lo Chung-Shu, acknowledged that the term “rights” had not formally

⁵⁷ GLENDON, *supra* note 47, at 143 (citing JOSEPH LASH, *ELEANOR: THE YEARS ALONE* 78 (1972); ELEANOR ROOSEVELT, *ON MY OWN* 85 (1958)).

⁵⁸ Third Committee, *supra* note 56, at 526.

⁵⁹ See Jacques Maritain, *Introduction, in* HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 1 (UNESCO & Allan Wingate eds., 1949), available at <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>.

⁶⁰ Rep. of the first Meeting of the Comm. of Experts Convened by UNESCO on the Philosophical Principles of the Rights of Man, U.N. Educational, Scientific & Cultural Organization, June 26-July 2, 1947, UNESCO Doc. Phil./8 (Jul. 31, 1947), available at http://unesdoc.unesco.org/Ulis/cgi-bin/ulis.pl?catno=124346&set=4E4F2D75_0_63&gp=0&lin=1&ll=1 (noting that experts contributing to the UNESCO Symposium came from Czechoslovakia, Australia, the Netherlands, the United Kingdom, the United States, Belgium, Italy, India, China, France, Spain, Sweden, Canada, Denmark, Hungary, South Africa, and Germany).

existed in historical China until it was imported from the West.⁶¹ He maintained, however, that the absence of the word did “not mean that the Chinese never claimed human rights or enjoyed the basic rights of man.”⁶²

Lo stressed that the idea of human rights appeared very early on in Chinese history. First, he advanced that Chinese people understood that the ruler has a duty to care for the people’s interests; looking to Confucianism, Lo maintained that governments must work according to the will of the people: “the Will of the People is even considered to be the Will of Heaven.”⁶³ This tradition holds that people are of primary importance, the state is of lesser importance, and that the sovereign is of least importance.⁶⁴

Second, Lo reiterated that “Heaven bestowed the right” to revolt and overthrow the government upon the people.⁶⁵ If a ruler violates his duty to the people in this analysis, his subjects have the right to revolt and dethrone him.⁶⁶ According to Lo, this right to revolt was established early on in Chinese history. Furthermore, he noted that, as Chinese history demonstrated, the word “revolution” was not regarded as dangerous, “but as a word to which high ideals are attached.”⁶⁷

Even though Lo recognized that the Chinese society as a whole does not generally claim individual rights, he acknowledged that the cultivation of a sympathetic attitude toward one’s fellow citizens as equal to oneself implicitly preserved individual rights.⁶⁸ Lo proposed three types of rights that he considered universally applicable to all, including to the Chinese people: the right to live, the right to self-expression, and the right to

⁶¹ *Id.* Lo Chung-Shu was a member of the Committee of Experts Convened by UNESCO on the Philosophical Principle of the Rights of Man from June 26 to July 2, 1947. He was a consultant to UNESCO and a professor at West-China University before he was elected to the Committee.

⁶² Chung-Shu Lo, *Human Rights in the Chinese Tradition*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 185 (UNESCO & Allan Wingate eds., 1949), available at <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>.

⁶³ *Id.* at 186. This concept, popularly known as the Mandate of Heaven, was attributed in written records to the Duke of Zhou, whom many believed to be the author of the idea. The Mandate of Heaven later became a significant concept in the teaching of Mencius. CHARLES HOLCOMBE, A HISTORY OF EAST ASIA: FROM THE ORIGINS OF CIVILIZATION TO THE TWENTY FIRST CENTURY 32-34 (2011).

⁶⁴ Lo, *supra* note 62, at 186 (quoting Mencius (372-289 B.C.), arguably the most famous Confucian after Confucius and one of the principal interpreters of Confucianism; he expanded Confucianism into the political sphere and emphasized the significance of the common citizen in relation to the state).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 185-86.

⁶⁸ *Id.* at 187.

enjoyment.⁶⁹ The right to self-expression implies that each individual has “the fullest degree of self-expression” (free speech), and such freedom is the prerequisite for the right to self-determination enjoyed by national groups. The right to enjoyment includes aesthetic, intellectual, cultural, and religious engagements.⁷⁰ These three types of rights were later codified in a flourishing network of international law and institutions protecting human rights today.⁷¹ However, these rights were recognized in international human rights law before their official recognition in the Universal Declaration of 1947 by an unlikely source — a country from Far East Asia.

II. INTERNATIONAL HUMAN RIGHTS LAW

According to Fernand de Varennes, the former Director at the Asia-Pacific Centre for Human Rights, the first attempt to incorporate legal protection of an individual’s rights into international agreements came from an Asian country — Japan — rather than from a Western state.⁷² In 1919, Japan unsuccessfully attempted to incorporate an amendment in the League of Nations covenant recognizing basic protection of citizens of member states from racial and religious discrimination.⁷³ This attempt indicated that individuals’ rights were recognized (by some commonly defined characteristics, such as race and religion) as an international matter, rather than a purely domestic issue.⁷⁴

International human rights law is a relatively new field which began with earnest endorsement by the UN member states. After the League of Nations failed to prove effective with the outbreak of World War II, the Great Powers came together to form the UN and along with it, the Commission on Human Rights and the Universal Declaration of Human Rights.⁷⁵ The PRC has treated the three principal human rights instruments — the two covenants implementing the Universal Declaration and the Women’s Convention — inconsistently. Examining the PRC’s positions on

⁶⁹ *Id.* at 187-89.

⁷⁰ *Id.* at 188-89.

⁷¹ These rights are protected under international conventions such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Human Rights Convention, and the African Charter on Human and People’s Rights.

⁷² FERNAND DE VARENNE, ASIA-PACIFIC HUMAN RIGHTS DOCUMENTS AND RESOURCES 2 (2000). Fernand de Varennes is an internationally recognized scholar in international law, human rights, and minority and ethnic conflicts. He has been advising numerous international organizations including the U.N. Working Group on the Rights of Minorities, UNESCO and the Organization for Security and Co-operation in Europe’s High Commissioner on National Minorities.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ STANLEY MEISLER, UNITED NATIONS: A HISTORY 1-2 (2d ed. 2011).

these bodies of rights provides insight into the merits of its cultural relativism argument.

A. The Universal Declaration of Human Rights

The UN General Assembly adopted the Universal Declaration of Human Rights on December 10, 1948 as an aspirational declaration calling upon all member states to recognize a set of rights as universal human rights.⁷⁶ The Preamble proclaims the Universal Declaration to be a common standard for all UN member states with respect to protecting their citizens, and the body of the Universal Declaration consists of twenty-eight articles enumerating both civil-political and social-economic rights.

However, the rights recognized by the Universal Declaration are not without limitations. Article 29 states that limitations of rights can be determined by law in situations where the exercise thereof infringes on the public order and general welfare.⁷⁷ As a safeguard, Article 30 qualifies the limitations in Article 29, stating that nothing in the declaration “may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms” in Articles 1 to 28.⁷⁸

Even though the Universal Declaration is not a legally binding document, it has been widely recognized as having paved the way for the adoption of more than seventy human rights treaties. It has served as a model for numerous human rights norms in national constitutions and legislation; the UN Charter and national and international courts have recognized the Universal Declaration as an authority on the protection of human rights.⁷⁹

B. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

Two covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR), codified the rights enumerated in the Universal Declaration. The ICCPR legally binds its parties to respect and protect the individual’s civil and political rights, including the right to life, freedom of

⁷⁶ Universal Declaration, *supra* note 4, pmbl.

⁷⁷ *Id.* art. 29.

⁷⁸ *Id.*

⁷⁹ Antonio A. C. Trindade, *Universal Declaration of Human Rights: Introduction*, AUDIOVISUAL LIBRARY OF INT’L L., http://untreaty.un.org/cod/avl/pdf/ha/udhr/udhr_e.pdf (last visited Dec. 2, 2009).

religion, freedom of speech and assembly, due process, and fair trial.⁸⁰ The ICCPR is a multilateral treaty which the UN General Assembly adopted on December 16, 1966,⁸¹ the covenant entered into force in March 23, 1976. As of October 2009, the ICCPR had 165 state parties. China signed the ICCPR on October 5, 1998, but as of 2012, has yet to ratify the covenant.

The ICESCR legally commits party states to grant economic, social, and cultural rights to individuals, including the right to sufficient wages, the right to equal opportunity for advancement, the right to strike, and the right to primary education.⁸² The UN General Assembly adopted the ICESCR on December 16, 1966, and the covenant entered into force on January 3, 1976. As of December 2009, the ICESCR had 160 state parties. China signed the ICESCR on October 27, 1997, and ratified it on March 27, 2001.

C. The Convention on the Elimination of All Forms of Discrimination Against Women

Another human rights instrument relevant to the China's cultural relativism defense is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁸³ CEDAW proclaims that "all human beings are born free and equal in dignity and rights" and that "everyone is [equally] entitled to all the rights and freedoms" enumerated in the Universal Declaration and enforced by the ICCPR and ICESCR, regardless of gender.⁸⁴ The UN General Assembly adopted CEDAW on December 18, 1979, with 186 state parties signatory, to date. China signed CEDAW on July 17, 1980 and ratified it on November 4, 1980.

CEDAW and other instruments discussed above reflect similar human rights principles, yet they received disparaging support from the PRC. The following section attempts to tease out the discrepancies to examine the sincerity of the government's cultural relativism argument in the context of CEDAW, the ICCPR and ICESCR.

III. ANALYSIS

The main goal of this Comment is to elucidate the true force — whether it is culture or politics — behind the PRC's cultural relativism argument.

⁸⁰ ICCPR, *supra* note 7.

⁸¹ *Id.*

⁸² International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N.GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, at 50-51 (Dec. 16, 1966), [hereinafter ICESCR].

⁸³ Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess. Supp. No. 46, U.N. Doc. A/34/46, at 194 (Dec. 18, 1979) [hereinafter CEDAW].

⁸⁴ *Id.* pmb1., ¶¶ 1-3.

China's cultural and intellectual environment before the adoption of the Universal Declaration provides sufficient evidence to support the assertion that a broad conceptualization of individuals' human rights was actually an integral part of the country's history up until 1949. Second, an examination of the difference between the pre-1949 RoC's support for universal human rights and post-1949 PRC's opposition to same concept raises doubt that cultural values are the impetus behind the cultural relativism argument. Adoption of a different political philosophy after 1949 forced the PRC to use the cultural relativism defense to protect its authoritarian Communist regime.

This section will examine three questions. First, what positions have the RoC and communist PRC taken in relation to the cultural relativism argument? Second, must the Confucian-based cultures of both China and Japan result in identical adverse reactions toward the universalism of human rights? Third, did communist China and the former Soviet Union maintain consistent arguments based on communist philosophy as distinguished from local cultural traditions?

A. *China's Culture and Intellectual Environment Before and After the Universal Declaration and Existing Concepts Similar to Universal Human Rights*

A basic exploration of Chinese Confucian philosophy and the vibrant history of intellectual discussions prior to 1949 indicate that concepts sharing strong traits with universal human rights emerged and welcomed in the consciousness of historical Chinese society.

1. Western Human Rights Reflected in Chinese Confucian Philosophy

As stated in the White Paper, the PRC continues to maintain that consideration must be given to the differing views of human rights held by countries with different political, economic, and social systems, as well as different religious and cultural backgrounds.⁸⁵ Because the PRC employs Confucian values as the base for its cultural relativism argument, it is necessary to examine Confucianism for a lack of individual civil and political rights. Contrary to the PRC's asserted arguments, Confucianism's teachings actually complement the rights enunciated in the Universal Declaration and ICCPR.

As Chang Peng-Chun and Lo Chung-Shu contended, a careful analysis demonstrates that Confucian writings and fundamental teachings are harmonious with the concept of human rights among Western countries. Chang and Lo both maintained that Confucianism has a strong humanistic

⁸⁵ WHITE PAPER, *supra* note 10, art. X.

component, an implicit recognition that others have rights equal to one's own, which equates to the more explicit concept of an individual's claim to human rights.⁸⁶ With regard to politics, the great Confucian philosopher Mencius reaffirmed that Confucius's theory of benevolence required a "humane government in which the leader gives the example of personal integrity and selfless devotion to the people."⁸⁷ In turn, the government's subjects should obey. If the ruler violates his duty to the people, the people then must rise up against such wrongdoing.⁸⁸

Upon first exposure, Confucian teaching may seem anything but harmonious. On one hand, Confucianism encourages active citizenship through criticism of the government, freedom of speech, resistance to authority, and individualism. On the other hand, it also recognizes harmony through obedience, the collective, and non-democracy.⁸⁹ Authoritarian states such as China have selectively utilized the latter concept of harmony to advocate that human rights must give way to the state's interest.⁹⁰ However, these two varying Confucian concepts cannot be separated and advanced in isolation. Their applicability is conditioned upon the benign or oppressive nature of the ruler.

Additionally, the theory of benevolence has found contemporary equivalents in recent attempts to reconcile Confucianism with the civil and political human rights by scholars Du Gangjian and Song Gang.⁹¹ They argue that human rights find its counterparts in four Confucian doctrinal paths: benevolence (*ren dao*), justice (*yi dao*), government (*zheng dao*), and tolerance (*shu dao*).⁹² These Confucian paths correspond respectively to four contemporary international principles: human rights, tolerance, resistance, and neo-constitutionalism.⁹³

⁸⁶ See, e.g., GLENDON, *supra* note 47, at 75-76; Chung-Shu Lo, *Human Rights in the Chinese Tradition*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 186, 187 (UNESCO & Allan Wingate eds., 1949).

⁸⁷ Williams, *supra* note 45, at 49 (citing Bloom, *supra* note 45, at 101).

⁸⁸ *Id.*

⁸⁹ Davis, *supra* note 40, at 13.

⁹⁰ WHITE PAPER, *supra* note 10, art. II (stating that "citizens may not infringe upon the interests of the state, of society or of the collective").

⁹¹ Du Gangjian & Song Gang, *Relating Human Rights To Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence*, in HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES 35 (Michael Davis ed., 1995).

⁹² *Id.* at 35.

⁹³ *Id.* Neo-constitutionalism, or contemporary constitutional law, labels the different forms and modalities which constitutionalism has been given with regard to contemporary legal systems where fundamental rights have been expressly stated in the constitution and where legal devices to secure their implementation or legal protection have been adopted. See generally Luis Roberto Barroso, *The Americanization of Constitutional Law and Its*

The first principle -- and according to Du and Song, the ideology behind human rights -- holds human dignity as the fundamental building block of the social and political community. Similarly, Confucian benevolence requires that everyone treat each other as siblings, with reverence and respect. Typically such behaviors manifest in filial piety, fraternal submission, respect, tolerance, and modesty. Benevolence, however, does not imply an individual must lose personal dignity in respecting others; rather, benevolence requires an individual to recognize that all people implicitly possess equal rights and that each person has the capacity to be virtuous.⁹⁴

Du and Song find that the second necessary foundation of human rights is tolerance. Confucius's path of tolerance stresses that a person must not do to others what that person would not want done to himself. This idea was often directed at rulers as a means to discourage them from oppressing their own people.⁹⁵ The path of tolerance also includes the freedom of speech. According to Confucian teachings, each person has the ability to speak his or her mind; speech, expression, and even silence should be protected, analogous to the civil and political rights to freedom of speech and conscience.⁹⁶

Third, Du and Song identify the concept of resistance as comparable to the Confucian path of justice. The path of justice provides leaders and citizens with guidance in the political sphere and encourages resistance against injustice.⁹⁷ The path of justice also advocates righteousness, noncooperation with non-benevolent rulers and resistance against tyranny and despotism.⁹⁸

Last, Du and Song's concept of neo-constitutionalism favors traditional liberalism, which focuses on the protection of individual rights against state interference.⁹⁹ Similarly, the Confucian path of government is mainly concerned with restricting the power of rulers through morale code and extensive learning, so that rulers may make the best decisions for their subjects. Du and Song note that the extensive learning can be provided by multi-party competition, which reflects public opinion better than a one-party dictatorship; therefore, they reason, the path of government logically prefers multi-party systems to prevent government interference.¹⁰⁰

Paradoxes: Constitutional Theory and Constitutional Jurisdiction in the Contemporary World, 16 ILSA J. INT'L & COMP. L. 579, 584-96 (2010).

⁹⁴ Du & Song, *supra* note 91, at 38-39.

⁹⁵ *Id.* at 43.

⁹⁶ *Id.* at 43-44.

⁹⁷ *Id.* at 45.

⁹⁸ *Id.* at 47-48.

⁹⁹ *Id.* at 50.

¹⁰⁰ *Id.* at 53.

According to Chang, the RoC delegate to the Universal Declaration drafting commission, if authoritarianism implies both a general submission of the people to the government and authorities' ability to exercise power with little or no respect for the public opinion or basic rights of the individual, then Confucianism advocates just the opposite.¹⁰¹ Confucius himself was a dissident. He encouraged criticism of the government and demanded proper treatment of dissidents. He also insisted that "repression, exclusion, and suppression of dissidents and their ideas reflect despotism and ruthless tyranny."¹⁰²

Because Confucianism's four paths in the theory of benevolence can be seen through the lens of those values that underlie the foundation of individual civil and political human rights, I would argue that it is doubtful that these values are so different that the universality of human rights must be rejected based on Chinese philosophy.

2. Western Concepts of Universal Human Rights Emerged in China Before 1949

As Chang and Lo clarified, the RoC's position on the universality of human rights was not the only visible support from the Chinese people prior to 1949. The Western concept of universal human rights was generally assumed to have formed in China during the 1890s. This concept existed as the belief that heaven endowed humans with life, that all human beings are equal, and that all humans have the right to autonomy.¹⁰³ Translated works by European thinkers on human rights circulated widely in Chinese society by 1900.¹⁰⁴ Chinese newspapers engaged the public in extensive discussion of the French and American revolutions and of the freedoms of thought, speech, publication, religious belief, privacy and other rights stipulated in Western constitutions.¹⁰⁵

¹⁰¹ Michael C. Davis, *Constitutionalism and Asian Values*, 11 HARV. HUM. RTS. J. 109, 115 (citing Wejen Chang, *The Individual and the Authorities in Traditional Chinese Legal Thought* 1(1995), (paper presented for the Constitutionalism and China Workshop, Columbia University, Feb. 24, 1995) (on file with the *Harvard Human Rights Journal*).

¹⁰² Du & Song, *supra* note 91, at 43.

¹⁰³ See MARINA SVENSSON, *THE CHINESE CONCEPTION OF HUMAN RIGHTS* 89 (1996).

¹⁰⁴ *Id.* at 90-91 (discussing the philosophical works of Rousseau and Montesquieu, frequently credited with the idea of Western human rights in influential Chinese publications during the early 1900s).

¹⁰⁵ *Id.* at 91-93 (noting that Chinese publications translated and commented on the French and American Revolutions and documents about rights, including the American Declaration of Independence and the French Declaration on the Rights of Man, and these publications stressed the principles that government is created by the people; the government has the duty to protect people's rights; and that the people retain the natural right to revolution to change the political system to protect their rights).

The circulation and cultural exchange vis-a-vis Western conceptualizations of rights resulted in numerous debates on the nature of rights in China. A 1907 article in the newspaper *Fazheng Xuebao* recognized different perceptions of rights, including natural rights, rights given by law, rights as liberties, rights as interests, and rights as power.¹⁰⁶ In particular, the article noted that the idea of natural rights, which argues that people were born with certain rights, was an influential ideal of the past; the article itself evidences the fact that the idea of inherent human rights received recognition in China in the early 1900s.¹⁰⁷

The substance of discussions prior to 1949 provided further evidence that the Chinese valued universal political and civil rights. The relationship of individual rights against the state manifested through the belief that each person “is born and wants to protect and promote his rights, therefore he has to join with others [. . .]; this is achieved through the so-called social contract [. . .], which is the origin of the establishment of the country.”¹⁰⁸ Similar to Western discussions on the relationship between the state and the individual, Chinese scholars maintained that it was the state’s duty to protect the people’s rights, because people tend to violate rights of others.¹⁰⁹

A majority of the writings from this period recognized Mencius’s assertion that “human rights [. . .] are likewise given by heaven.”¹¹⁰ These rights developed into the right to freedom of the person and as the right to participate in affairs of the state.¹¹¹ Thus, because human rights are inherent, all human beings enjoy equal rights.¹¹² Under Mencian Confucianism, as it was discussed then, human rights could not be infringed upon by rulers, officials, parents, or anyone else. His theory postulates that all people are born equal regardless of socio-economic class or gender.¹¹³

These interpretations of rights by Chinese authors were strikingly similar to those proposed by Lo at the 1947 UNESCO Symposium. Lo

¹⁰⁶ *Id.* at 103-04.

¹⁰⁷ *Id.* at 108 (citing Hubei Student’s Organization, *A Call to My Fellow Students*, 5 HUBEI XUESHENG JIE 2, 2(1903)).

¹⁰⁸ *Id.* at 106 (citations omitted).

¹⁰⁹ *Id.* at 107 (noting that this idea resembles the social contract theory of Hobbes, Locke, and Rousseau).

¹¹⁰ *Id.* at 108.

¹¹¹ *Id.* at 108-09 (citations omitted).

¹¹² In the RoC, various authors recognized the equality of human rights. For example, in 1903, the article “On Rights” explicitly stated that all human beings enjoy natural rights and that people were said to be equal with respect to rights. Zou Rong, a revolutionary writer, advocated the idea that all human beings, whether male or female, are free and equal at birth. Wang Jingwei believed that people are equal by nature and treating people’s right differently would violate the principle of justice. *Id.* at 108-09.

¹¹³ *Id.*

asserted that the people's will is as powerful as that of heaven, and rulers are subject to the people's will.¹¹⁴ In this sense, because the people's will is stronger than that of rulers within these popular understandings of Confucian philosophy, some rights to autonomy and to exercise one's will must remain with the individual. Only some power is given up to the rulers.

As early as the 1900s, China already had engaged in intellectual exploration of human rights, rights inherent in the individual, equal rights, and civil and political freedoms. The body of debate regarding political rights, rights to engage in political affairs, freedom of speech and expression, and freedom of revolt leads to the conclusion that civil and political rights were popularly thought of as inherent to each individual. The Chang-Lo conceptualization of universal human rights is, in this way, consistent with the intellectual history of the time.

B. Post-1949 Weakening of the PRC's Cultural Relativism Argument

After the PRC engaged in the cultural relativism debate and specified its position, more recent events undermined the PRC's position. First, the Bangkok NGOs Declaration's firm position on universality of human rights undercut the purported impact of culture on the human rights argument. Second, the PRC's enthusiastic support for CEDAW contradicted its position that culture should determine human rights.

1. International Opposition to "Asian Values" Undermining the PRC's Position on Cultural Relativism

Because the Bangkok Declaration essentially repeated the PRC's opposition to the universality of human rights, the NGOs' Declaration undermined the PRC's cultural relativism argument when it opposed the Bangkok Declaration's "Asian values" in favor of the universality of human rights.¹¹⁵ In the NGOs' Declaration, the Asian NGOs confirmed that the human rights violations in their countries were not the result of cultural differences, but rather of the specific political interests of the ruling elites in their states. These human rights groups reiterated that the "pretext for constraining the channels of freedom of expression is often internal or national security and law and order; this is a façade for authoritarianism and for the suppression of democratic aspirations and institutions."¹¹⁶ Despite

¹¹⁴ Lo, *supra* note 62, at 186.

¹¹⁵ See sources cited *supra* notes 30-31.

¹¹⁶ NGOS' DECLARATION, *supra* note 38, at 8.

sharing cultural identities with their Asian states of origin, the NGOs insisted on the universality and indivisibility of human rights.¹¹⁷

Similarly, all the Chinese human rights NGOs based outside of China issued a joint statement in mutual support of universal human rights, in opposition to the PRC government. These NGOs declared:

We reaffirm our belief in the universality and indivisibility of human rights. No government should be allowed to use the pretext of specific cultural, historical or national situations to deny international standards. Likewise, civil and political rights and economic and social rights are interdependent and mutually supportive. No government can arbitrarily emphasize one group of rights to the detriment of the other.¹¹⁸

Thus, both the Asian NGOs, as a collective, as well as the Chinese NGOs officially proclaimed that the values announced in the White Paper and the Bangkok Declaration were neither general “Asian values” nor specifically “Chinese values.”

As demonstrated by the clash between the Chinese government and Chinese international NGOs, the concept of Chinese values (or more generally, Asian values) was more driven by head of states or governments rather than civil societies on the ground. Furthermore, the completely opposing views expressed by the Chinese government and Chinese NGOs on cultural relativism and the unprecedented response from Asian NGOs against the Bangkok Declaration confirms that cultural relativism cannot be employed as a viable argument against universal human rights in other Asian countries, not just China.

2. Contradictory Notions: The PRC’s Support for Women’s Rights

The PRC’s cultural relativism argument was further weakened by its official proclamation that women’s rights are universal human rights. This stance on women’s rights was evident in the PRC’s ratification of CEDAW in 1980 and reaffirmation of its commitment by hosting the UN’s Fourth

¹¹⁷ *But see* KENT, *supra* note 16, at 175 (citation omitted) (describing one PRC NGO as having “a political agenda”). One NGO from the PRC, the China Society for Human Rights Studies, was described by other NGOs as GANGOs (government-appointed NGOs). The NGO’s activities were criticized by Human Rights in China’s Xiao Giang for its political agenda. The China Society for Human Rights Studies was created in 1993, the same year that the NGO conference took place, and was led by Li Yuanchao, a high-level member of the Chinese Communist Youth League.

¹¹⁸ KENT, *supra* note 16, at 180.

World Conference on Women in Beijing in 1995.¹¹⁹ The Chinese government reaffirmed its commitment to the equal rights, inherent human dignity of women and men, and other purposes and principles enshrined in the Charter of the United Nations, the Universal Declaration of Human Rights, and other international human rights instruments.¹²⁰ The government declared its commitment to ensuring equal enjoyment of “all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people.”¹²¹

The World Conference on Women viewed and affirmed women’s rights “as indivisible, universal, and inalienable human rights.”¹²² This recognition of women’s rights as including those rights enumerated in the Universal Declaration and the ICCPR stands in direct conflict with the PRC’s cultural relativism argument.¹²³ Under patriarchal Confucian ideology, women are expected to remain in the home, to withdraw from engaging in politics, and to abide by the “three obediences.”¹²⁴ As children, they must obey their fathers; when married, they must obey their husbands; and as a widow, they must obey their eldest sons.¹²⁵

The traditional view of women’s roles clashes with the rights guaranteed in the Universal Declaration. The three obediences clearly subjects women to men’s authority, violating the “equality” inherent in human rights. Traditional withdrawal from political activities prevents women from exercising their civil and political rights. In 1971, the late

¹¹⁹ See Jiang Zemin, President of the People’s Republic of China, Address at Welcoming Ceremony for the Fourth World Conference on Women (Sep. 4, 1995).

¹²⁰ Rep. of the Fourth World Conference on Women, 50th sess, Sep. 4-15, 1995, U.N. Doc. A/CONF.177/20/Rev.1, at 1, ¶¶ 1, 8 (Sept. 15, 1995) [hereinafter Beijing Women Conference].

¹²¹ *Id.* at 4, ¶ 32.

¹²² *Id.* at 1, ¶ 2.

¹²³ World Conference on Human Rights, G.A. Res. 48/121, U.N. GAOR, 48th Sess. Supp. No. 49, U.N. Doc. A/48/49, at 240-41 (Dec. 20, 1993).

¹²⁴ VERMIER CHIU, MARRIAGE LAWS AND CUSTOMS OF CHINA 20 (1966). See generally Zhang Mingqi, *The Four Books for Women: Ancient Chinese Texts for the Education of Women*, 2 B.C. ASIAN REV. 174-84 (Gary Arbuckle & Rosemary Haddon trans., 1988) (stating that according to “the three obediences,” women have no exclusive power of control, but rather live according to the principle of the “three submissions:” “while not yet married, she submits to her father; when married, she submits to her husband; when the husband is dead, she submits to her son”).

¹²⁵ ELISABETH CROLL, CHANGING IDENTITIES OF CHINESE WOMEN: RHETORIC, EXPERIENCE AND SELF-PERCEPTION IN TWENTIETH-CENTURY CHINA 13 (1995) (discussing the instructional text for Chinese girls that catalogued the ideal qualities of women).

Premier Zhou Enlai even acknowledged that the old custom continued to greatly hinder the realization of women's rights in the PRC.¹²⁶

If the PRC adamantly maintains that human rights and values are culture-dependent, it would follow from this argument that women's restricted social roles and lack of rights should remain the status quo. Logic then dictates that the universality of women's rights should be considered invalid for the cultural relativism argument to be consistent. Conversely, in order for women's rights to be universal, repressive traditional cultural norms would have to be placed on the other side of the proverbial scale, to great extent.

C. Comparing Culturally and Politically Similar States

Parts I and II of this article only survey a small selection of events and facts; yet together they form a complex socio-cultural and political background that ultimately provides support to the concept of universal human rights in China. This section will tease out the similarities and differences between China's pre and post-1949 cultural and political tendencies. Examining the PRC's argument in a wider context reveals that the argument resembles more of a political defense than a genuine support of cultural relativism. Chinese history prior to 1949 establishes that the concept of individual, political, and civil human rights existed in the RoC through manifestations of similar values.¹²⁷

If the idea of inherent individual political rights is in fact embedded in Chinese history or philosophy, then the PRC's cultural dependence defense against universal political rights must be based on other political motives. By way of comparative analysis, the first section will examine two societies rooted in Confucian philosophy and traditions, China and Japan, and determine if both Confucian societies must necessarily reject the universality of human rights. The second section will examine two communist countries, the PRC and the former Soviet Union, and determine whether both political regimes reject the universality of human rights.

1. Japan and China: Confucian Cultures With Divergent Approaches Toward Universal Human Rights

The argument that Chinese culture is not suited to adopt universal civil and political human rights would be undercut by facts indicating that countries of similar cultural background can do so. Japan's history with

¹²⁶ Paul D. McKenzie, *China and the Women's Convention: Prospects for the Implementation of an International Norm*, 7 CHINA L. REP. 21, 23 (1991-1993) (quoting Audrey Topping, *Returning to Changing China*, NAT'L GEOGRAPHIC, Dec. 1971, at 833).

¹²⁷ See discussion *supra* Part III.A.2.

conceptualizing human rights serves as an instructive comparison to China when culture is held constant. Contemporary China and Japan share deep cultural traditions yet diverge in their adoption of universal human rights. Japanese society adopted Confucianism from China in the sixth century and remains heavily influenced by Confucian philosophy.¹²⁸ Japan and China are both historically great economic and political powers on the Asian continent, and both have had their fair share of experience with authoritarian regimes. Both countries were also exposed to Western influence during the late 1800s. The two countries drifted apart in the human rights discourse after World War II, when China adopted Marxism and Japan adopted a more liberal and democratic constitution.¹²⁹

To examine Japan's adoption of universal human rights, this section will focus on the period from the 1860s to 1940s, and in particular, on the drafting of the Japanese Constitution.¹³⁰ The language of rights emerged and became popularized throughout Japan during the early 1860s.¹³¹ During the Meiji period (1868–1912), several notable speakers addressed the concept of individual rights within the Confucianism construct. Tsuda Mamichi, Fukuzawa Yukichi, and Ueki Emori endeavored to merge the Western concept of rights with the Confucian idea of responsibility.¹³² Tsuda, an intellectual and the first legal scholar of the Meiji period, maintained that people have fundamental rights in relation to the nation and can exercise them.¹³³

¹²⁸ See BYRON EARHART, *JAPANESE RELIGION: UNITY AND DIVERSITY* 52-53 (4th ed. 2004); BYRON EARHART, *RELIGION IN THE JAPANESE EXPERIENCE: SOURCES AND INTERPRETATIONS* 103 (2d ed. 1997).

¹²⁹ Davis, *supra* note 101, at 42.

¹³⁰ See generally KYOKO INOUE, *MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING* (1991) (giving a comprehensive history of the drafting process of the Japanese Constitution during the late 1940s). This paper will not discuss whether the United States forcefully imposed the ideas of individuals' rights during its drafting of the new Japanese Constitution of 1947, since this paper does not focus on the new Constitution as primary evidence of Japanese adoption of human rights.

¹³¹ See generally 1 KLAUS SCHLICHTMANN, *JAPAN IN THE WORLD: SHIDEHARA KIJÜRŌ, PACIFISM, AND THE ABOLITION OF WAR* 34-40 (2009) (giving a brief history of the language of individual rights and its popularity in Japan during the 1860s to 1880s).

¹³² INOUE, *supra* note 130, at 57. Tsuda Mamichi was one of the first Japanese to study Western law and was also the most active intellectual leaders of the Meiji era. Fukuzawa Yukichi was one of the most prominent men during the Meiji period. His writing promoted self-reliance in both the individuals and the state. He supported a limited form of government while retained elements of Confucianism. He founded Japan's most prestigious private university, Keio University, and devoted most of his life to prepare the Japanese society for modern life. Ueki Emori was one of the most radical thinkers of the Popular Rights Movement and spent most of his life promoting the political freedom, individual rights, and representative government. *Id.* at 62-63.

¹³³ *Id.* at 62-63.

Blending Confucian and Western philosophies, Tsuda's fundamental rights included freedom of thought, freedom of speech and writing, and the right to petition the government.¹³⁴ Similarly, political theorist Fukuzawa contended that the government should have only a limited role as the representative of the people and should only act based on the people's wishes.¹³⁵ Ueki, a Japanese revolutionary democrat, proposed that people possess the right to revolt against the government if the government fails to protect the people's rights and liberties as mandated by the Constitution.¹³⁶ Ueki's draft constitution of 1881 explicitly listed thirty-five rights and liberties, among them the right to overthrow the government if it violated the constitution and the right to install a new government.¹³⁷

Japan's official recognition of human rights dates back to the Meiji Constitution of 1889.¹³⁸ Although the Meiji Constitution retained some of the traditional relationships between the Emperor and his citizens, Japanese families, and individuals within the social hierarchy, it also formulated basic fundamental freedoms of thought, expression, and religion.¹³⁹ During the same period, sixty-eight additional private proposals for the Constitution contained a wide range of debates, all focusing on the planting the seeds of individual human rights.¹⁴⁰

Several proposals even attempted at a parliamentary government.¹⁴¹ Left Board legislator Miyajima Seiichiro's 1872 Proposal for Drafting a Constitution (*Rikkokukengi*) stressed the importance of drafting a constitution that explicitly spelled out the rights and duties of the people vis-à-vis the government.¹⁴² Another opinion on constitutional government

¹³⁴ *Id.* at 58.

¹³⁵ *Id.* at 62.

¹³⁶ *Id.* at 63.

¹³⁷ *See id.*

¹³⁸ *The Constitution of the Empire of Japan (Meiji Kenpo)*, NAT'L DIET LIBRARY: BIRTH OF THE CONSTITUTION OF JAPAN, <http://www.ndl.go.jp/constitution/e/etc/c02.html> (last visited Nov. 10, 2009) (Ito Miyoji trans.).

¹³⁹ *See* Junko Torii, *International Human Rights Law and the Japanese Law Concerning the Family Relations*, in *JAPAN AND INTERNATIONAL LAW, PAST, PRESENT AND FUTURE* 260-61 (Japanese Ass'n of Int'l L. & Nisuke Ando eds., 1999).

¹⁴⁰ KOSEKI SHOICHI, *THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION* 26 (Ray A. Moore trans., 1997).

¹⁴¹ Between 1879 and 1881, activists of the Freedom and Popular Rights Movement, a democratic movement, submitted a quarter of a million signatures for the establishment of a constitutional parliamentary government and accordingly submitted their proposal. ANDREW GORDON, *A MODERN HISTORY OF JAPAN: FROM TOKUGAWA TIMES TO THE PRESENT* 81 (2003); David L. Howell, *Visions of the Future in Meiji Japan*, in *HISTORICAL PERSPECTIVES ON CONTEMPORARY EAST ASIA* 85, 102 (Merle Goldman & Andrew Gordon eds., 2000).

¹⁴² *Proposal for Drafting a Constitution*, NAT'L DIET LIBRARY: MODERN JAPAN IN ARCHIVES, <http://www.ndl.go.jp/modern/e/cha1/description05.html> (last visited Dec. 2, 2010).

advocated the establishment of a national law based on the concept of joint rule by sovereign and the people.¹⁴³ Japan's first political party, the Public Party of Patriots (*Aikoku Koto*), submitted a petition arguing for the establishment of a popularly elected assembly, criticizing the authoritarian government, and advocating the creation of a platform focusing on the protection of human rights.¹⁴⁴

This Comment will not discuss the new Japanese Constitution of 1947 at length, since members of the U.S. Army wrote that draft. However, the events leading up to the final draft support the conclusion that the rights guaranteed in the Constitution are more than merely a result of U.S. imposition.¹⁴⁵ First, the draft of the Constitution espoused the same set of ideas that produced the Universal Declaration of Human Rights.¹⁴⁶ A public opinion poll following the draft's publication indicated that eighty-five percent of the Japanese public supported the newly proposed Constitution and, thus, supported human rights values.¹⁴⁷

Secondly, Japan's various political parties, including the center-right progressive and liberal parties, expressed their approval of the first official draft's respect for basic individual rights. The Liberal Party noted that the draft coincided with the principles the party had published in its own revised

¹⁴³ Okubo Toshimichi, *Opinion on Constitutional Government*, NAT'L DIET LIBRARY: MODERN JAPAN IN ARCHIVES, <http://www.ndl.go.jp/modern/e/cha1/description08.html>.

¹⁴⁴ *White Paper for the Establishment of Popularly Elected Assembly*, NAT'L DIET LIBRARY: MODERN JAPAN IN ARCHIVES, <http://www.ndl.go.jp/modern/e/cha1/description09.html> (last visited Dec. 2, 2009) (noting that in 1874, Japan's first political party, the Aikoku Koto, submitted their "Petition for the Establishment of a Popularly Elected Assembly" to the Left Board, which criticized the authoritarian government and argued for the early establishment of a popularly elected assembly as a forum for public debate).

¹⁴⁵ IAN NEARY, HUMAN RIGHTS IN JAPAN, SOUTH KOREA AND TAIWAN 18 (2002) (acknowledging that under the command of the General MacArthur, the occupying (1945-52) U.S. Army had a mandate to revise the Japanese Constitution; however, because the Japanese people were not involved in the adoption of the Constitution, some argue that the fundamental human rights guaranteed in the new Constitution were a product of "cultural imperialism").

¹⁴⁶ MEIJI UNIVERSITY, *Draft Constitution of Japan 1946*, http://www.isc.meiji.ac.jp/~sumwel_h/Arc-Laws/DraftConstitution1946.htm (last visited Dec. 10, 2009) (noting that Chapter III, articles 10-30 of the draft pertains to individual rights: Chapter III article 9 states that "[t]he people of Japan are entitled to the enjoyment without interference of all fundamental human rights;" article 10 states that "[t]he fundamental human rights by this Constitution guaranteed to the people of Japan result from the age-old struggle of man to be free..."); Universal Declaration, *supra* note 4, arts. 1, 3, 4, 8, 13, 16-23, 26. Articles 12 of the Draft Constitution correlates with Article 3 of the Universal Declaration; Article 14 with Article 1; Article 15 with Article 8; Article 14 with Article 21; Article 16 with Article 8; Article 17 with Article 4; Article 18 and 19 with Article 18; Article 20 with Articles 19 and 20; Article 21 with Articles 23 and 13; Article 23 with Article 16; Article 24 with Articles 22 and 26; Article 25 with Article 23; and Article 27 with Article 17 respectively.

¹⁴⁷ NEARY, *supra* note 145, at 19.

draft constitution.¹⁴⁸ Furthermore, the groups introduced several proposals that were even more radical than the official draft. The Communist and Socialist Parties expressed their disappointment that the draft did not go even further to implement democratic ideas.¹⁴⁹

Japanese's success in embracing individual universal rights as defined in the Universal Declaration suggests that Confucian-based Asian traditions are not necessarily incompatible with the idea of individual and universal rights. Even prior to 1900, the Japanese already discussed civil and political rights as well as the limitations of the state. During this time, the RoC behaved in a manner similar to Japan by engaging in the global human rights discussion. Perhaps if the RoC had remained intact, it would have adopted universal human rights in many ways similar to Japan.

2. The Soviet Union and Communist China: Political Ideological Opposition to Universal Human Rights

Culture could not have caused Japan and the PRC's division on the universality of human rights, since both societies were admittedly heavily influenced by Confucian philosophy. Despite the cultural overtones, the PRC's cultural relativism argument more closely resembles the position taken by another communist state, the former Soviet Union. This resemblance raises a strong suspicion of a politically motivated defense as opposed to genuine support of cultural relativism. A comparison between the perceptions of universal human rights in the former Soviet Union and in modern-day Russia sheds light on the similarity between the former Soviet position on human rights and the PRC's cultural relativism argument.

Before 1949, the RoC and the Soviet Union did not share the same political ideology. Only the Soviet Union supported socialist values. These values, based on Marxist-Leninist philosophy, were almost identical to those later expressed in the White Paper and the Bangkok Declaration. The Soviet conception of rights in the pre-Gorbachev era reflected three main principles: "first, that the state is the sole source of human rights [. . .]; second, the needs of individuals must always be secondary to those of the state and the collective; and third, that economic and social rights enjoy a higher degree of protection than civil and political rights."¹⁵⁰ These socialist values emerged during the drafting of the Universal Declaration.

The Soviet Union's interpretations of the universality of human rights varied markedly from that of the RoC during the drafting process. The Soviet Union continuously raised opposition during the drafting of Articles

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Bill Bowring, *Human Rights in Russia: Discourse of Emancipation or Only a Mirage?*, in *HUMAN RIGHTS IN EASTERN EUROPE* 89 (Istvan S. Pogany ed., 1995).

18 through 21, which protect the freedom of religion, opinion, expression, communication, assembly, association, and engagement in political discourse. In keeping with Marxist theory empowering the collective over the individual, the Soviet delegate persistently added qualifications — such as “in accordance with the law of the State” or “except as determined by national legislation” — to every enumerated civil and political right.¹⁵¹ The proposed qualifications created a limitation clause for curbing an individual right when the right infringed on the interest of the public and state.¹⁵² The Soviet Union’s attempt to qualify these rights were usually defeated by Chang Peng-Chun, the RoC representative, who pointed to the broader, more general limitation language already embedded in Articles 29 and 30.¹⁵³

After the Communist Party took control of China in 1949, the new regime’s stance regarding the universality of human rights changed to match almost perfectly with that of the Soviet Union. The PRC’s position was stated clearly in its White Paper of 1991, a sudden reversal from Lo Chung-Shu’s support for the human rights during the drafting of the Universal Declaration. The PRC argued in its White Paper — as did the Soviet Union — that collective rights supersede those of the individual, that human rights must yield to state sovereignty, and that social economic rights take precedence over civil political rights. Thus, it appears that communist values constituted the more apparent force behind the cultural relativism argument.

Following the Soviet Union’s collapse in 1991, the new Russian Federation rejected the three Marxist-Leninist principles of the Soviet era. The draft for the new Russian Constitution at first did not even contain any reference to social or economic rights.¹⁵⁴ The 1993 Russian Constitution was expressly modeled after Western and universal human rights as enumerated in the Universal Declaration. The Constitution expressly acknowledged the universality of human rights by proclaiming that “the multinational people of the Russian Federation . . . [hereby establish] human rights and freedoms, civil peace and accord.”¹⁵⁵

¹⁵¹ GLENDON, *supra* note 47, at 113.

¹⁵² Universal Declaration, *supra* note 4, art. 29 (“(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.”).

¹⁵³ GLENDON, *supra* note 47, at 184.

¹⁵⁴ Rein Müllerson, *Perspectives On Human Rights And Democracy In The Former Soviet Republics*, in *HUMAN RIGHTS IN EASTERN EUROPE* 60 (Istvan Pogany ed., 1995).

¹⁵⁵ KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] Preamble (Russ.), available at <http://www.constitution.ru/en/10003000-01.htm> [hereinafter RUSSIAN CONST.].

Thirty-five articles in the new Russian Constitution pertain to specific human rights.¹⁵⁶ Of these, the two most crucial are Articles 2 and 17. Article 2 states that rights and freedoms of men are “the supreme value” and that the state has an obligation to protect, recognize, and observe these rights and freedoms.¹⁵⁷ Article 2 does not subordinate these supreme human rights to the interest of the state or the collective, as the former Soviet Union did. Article 17 provides that fundamental human rights and freedoms are inalienable as universally recognized in the principles and norms of international law and according to the present Constitution.¹⁵⁸ Article 17 explicitly recognizes the universality of human rights established by international law and the Universal Declaration, whereas the former Soviet Union held that rights are uniquely recognized by the particular state.¹⁵⁹

Unlike the draft however, the Russian Constitution does mention economic rights. However, the Russian Constitution’s structure of Chapter II on the Rights and Freedom of Man and Citizen impliedly demonstrates the importance of civil and political rights over social and economic rights, in contrast to the former Soviet Union position. The rights listed start first with the right to life,¹⁶⁰ the right to privacy,¹⁶¹ and the right of conscience, speech and association.¹⁶² Social and economic rights are then enumerated from Article 37 to Article 44. Both the substance and the structure of the Russian Constitution indicate that human rights are universal, supreme, and not preconditioned on the interests of the collective or the state.

Russia and China’s immediate reversals in position on universal human rights upon changes in communism’s influence in those countries makes one thing clear: changes in political ideology directly induced changes in diplomatic presentations on perceptions of human rights and their universality. Thus, the PRC’s cultural argument reveals itself as a façade for its true political motive. One commentator agreed that “it has become clear for practically everybody. . . that references to the supreme interests of the collective, be it a state, society or party, [are] simply used to keep in power

¹⁵⁶ *Id.* arts.17-64; *see also* Bowring, *supra* note 150, at 91 (noting that fourteen of these articles contained civil and political rights, some are even more advanced than the European Convention. For example, Article 24 prohibits against disseminating information about a person’s private life; Article 25 prohibits entering dwellings without consent; Article 26 provides the right to determine one’s own nationality).

¹⁵⁷ RUSSIAN CONST. art. 2.

¹⁵⁸ *Id.* art. 17.

¹⁵⁹ Bowring, *supra* note 150, at 89.

¹⁶⁰ RUSSIAN CONST. art. 20.

¹⁶¹ *Id.* arts. 23-25.

¹⁶² *Id.* arts. 28-31.

the communist elite.”¹⁶³ The ruling class manipulates collectivist ideas to justify keeping the general population subordinated to the party’s interests.¹⁶⁴

IV. CONCLUSION

This Comment has evaluated the merits of China’s cultural relativism argument against universal civil and political human rights as enumerated in the Universal Declaration and the ICCPR. Ultimately, this analysis finds that it is the PRC government’s political philosophy —rather than any norm embedded in Chinese cultural tradition — that motivates the PRC’s opposition to the universality of human rights. Allowing its citizens the civil and political rights as enumerated in the Universal Declaration could threaten state interests and national sovereignty. For example, permitting broad freedom of speech could lead to dissent and political activism that might threaten the current regime’s hold on power. Examination of China’s intellectual discussion before 1949, its Confucian tradition, and its recent support for CEDAW proves that the idea of individuals’ universal human rights existed previously in Chinese culture and tradition, both implicitly and explicitly. Furthermore, comparative analysis with countries that share similar cultural (Japan) and similar political foundations (the Soviet Union) leads to the conclusion that changes in political regimes impact broad changes in policy regarding adoption of the universal human rights standard.

Such a conclusion is only specific to China’s cultural relativism argument and does not speak to the merits of the cultural relativism debate as a whole. The dialogue must continue to reach better consensus regarding what rights should be recognized as fundamental. Culture is a fluid concept, and is indeed constantly in flux, continually changing as people and society change. Certain rights can be dispensable in one century, but fundamental in the next. However, one main concern remains—those states that persistently utilize legitimate and theoretically important issues to mask the political motives of a ruling party or political elite and the drive to engage in self-perpetuating politics. The international human rights community must continue to engage in interdisciplinary discourse to peel away these various masks and bring to light real human rights abuses and oppression—particularly in those contexts where the political arguments made in

¹⁶³ REIN MULLERSON, HUMAN RIGHTS DIPLOMACY 84-85 (1997) (citing MILOVAN ĐILAS, THE NEW CLASS: AN ANALYSIS OF THE COMMUNIST SYSTEM (Praeger: 1965)). Milovan Đilas was a Yugoslavian Communist politician, theorist, and author. He was one of the best-known and most determined critics of the Communist system from the perspective of Marxist ideology.

¹⁶⁴ *Id.* at 85.

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opposition serve to perpetuate the practical politics and hegemonic power of the state.