

# “GUANXI!”—“GESUNDHEIT!” AN ALTERNATIVE VIEW ON THE “RULE OF LAW” PANACEA IN CHINA

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## INTRODUCTION

### I. LOST IN TRANSLATION PART 1: SCOURGE—ANTIDOTE MENTALITY

There is really no doubt now that we live in a globalized world.<sup>1</sup> While this reality represents something of a triumph for the globalizers, it also presents problems for them.<sup>2</sup> Foremost among these problems is law-making for this global world.

Regardless of any homogenizing influences this new ultra-connectedness may have on human society, the world is still composed of diverse nations and governments. Yet, the new global commerce of products and ideas, as well as supra-governmental organizations from the “G-7”<sup>3</sup> to the newest “BRIC Conference”<sup>4</sup> have created the need for a common framework of governance where diverse polities intersect.<sup>5</sup> This process tends to be dominated by the West, which has ever evangelized its economic gospel while installing its hierarchical laws and legal system as outpost fortresses in foreign lands. As a result, international legal development, fueled by Western foreign investment, has incorporated little or nothing of native systems, let alone allowed for their survival. Moreover, since the end of World War II, the path of international legal reform has

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1. See generally TOM FRIEDMAN, *THE WORLD IS FLAT* (2006) (describing the globalized world).

2. Volker Behr, *Development of a New Legal System in the People’s Republic of China*, 67 *LA. L. REV.* 1161, 1174 (2007) (explaining that “there seem to be specific obstacles to globalization. . . . [D]ue to law’s national imbedding and to the ideas of sovereignty and territoriality, law traditionally—at least until recently—was among the least global of social phenomena.”) (citation omitted).

3. The “G-7,” composed of the seven leading economic powers, convenes annually.

4. Brazil, Russia, India, and China are some of the fastest developing economies and together compose “BRIC.” The first BRIC conference met in June 2009, in Yekaterinburg, Russia. *News Analysis: BRIC Makes Formal Debut with First Summit Meeting*, XINHUA NEWS AGENCY (June 14, 2009), [http://news.xinhuanet.com/english/2009-06/14/content\\_11541582.htm](http://news.xinhuanet.com/english/2009-06/14/content_11541582.htm).

5. Teemu Ruskola, *Law Without Law, or is “Chinese Law” an Oxymoron?*, 11 *WM. & MARY BILL RTS. J.* 655, 657 (2002). This need is also evident in the adoption of the United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, 19 *I.L.M.* 668 (1986), and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 7 *I.L.M.* 1042 (1987).

narrowed due to Anglo-American dominance in finance and international trade.<sup>6</sup>

Of the most visible and important shifts during globalization, Western interaction with China in the last half-century can fairly be characterized as focused more on cultural dissemination than cultural sensitivity. In the case of China, cultural dissemination has increasingly involved the transmission of legal rules and legal language into China's newest legal institutions.<sup>7</sup> A byproduct of this legal transmission has been the one-to-one translation of terms between Anglo-European and Chinese legal lexicon into a system of "standard equivalents." This system lacks the kind of nuance appropriate for cultural translation, yet has been the basis for an expedient exchange of legal concepts and models.

This cultural disconnect, aggravated by the lack of linguistic common ground, has in part been responsible for stalling Chinese legal reforms. Western reforms of Chinese law do not reliably parallel or operate on the same rule of law principles as Western law. And, the cultural gap arguably explains the predicament of American scholars of Chinese Law—not to mention American business people—frustrated by the sluggishness with which China has institutionalized the rule of law in this period of post-Mao reform.<sup>8</sup> This sense of frustration pervades Anglo-American discussions of Chinese legal development in cooperation with Western interests. It is highly apparent in the discussions in which the term "*guanxi*" (kuan-hsi) is used—particularly where *guanxi* is used as a signifier of corruption and lawlessness.

In China, where law has historically been neither divine nor primary, other social institutions work in its place. *Guanxi* is one—and probably the most significant—of these alternative institutions. *Guanxi* is a uniquely Chinese system of social relationships. *Guanxi* is an untranslatable—and immutable—phenomenon of Chinese life. It is therefore necessarily a fundamental ally or perennial enemy to establishing the rule of law in China. Western frustration with *guanxi* arises out of the mistranslation of *guanxi* and misunderstanding of law's place in Chinese culture.<sup>9</sup> While a

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6. See Behr, *supra* note 2, at 1173 (explaining the steps China had to take in economic–legal reform to join the World Trade Organization).

7. STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 102, 122–26 (1999).

8. See Boye Lafayette de Mente, *The Character of a Culture Resides in Its Language*, JAPAN TIMES, Feb. 25, 2009, <http://search.japantimes.co.jp/cgi-bin/ek20090225a1.html>.

9. Gary G. Hamilton, *Civilizations and the Organization of Economics*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 183, 199 (N. Smelser and R. Swedberg eds., 1994) (predicting the rise of "East Asian capitalism" and discussing the "'embedded' in networks of normative social relationships," using the term "stunned," rather than "frustrated," to describe the Western reaction to the *guanxi*

full analysis of *guanxi* is beyond the scope of this article,<sup>10</sup> the discussion below will attempt to explain *guanxi*'s basic concept, setting it in relief against Chinese perceptions of “law.” The perspective will shift Westward to explore why rule of law advocates might come to a better understanding of *guanxi* by refraining from attempts to translate it. It will conclude by asserting that the rule of law offers no panacea to China's legal challenges and that balance, not hegemony, may be the key to survival in the coming era of Chinese global influence.

## II. LOST IN TRANSLATION PART 2: THE GUANXI PROBLEM

First let us begin with the foundation for understanding Chinese legal culture: language. Until very recently, all but an honored few knew Chinese law and its legal system through reports and guides which translated legal terms and systems into their supposed English equivalents. These translations were conducted by scholars who gained limited access to Chinese legal practices, usually through business interactions and usually in large centers of commerce. These legal translations were meant to be practical, not thorough, and were certainly not undertaken in the vein of anthropological studies. Their aim was efficiency. Out of this work came a body of common terms Westerners could adopt and use to interact with Chinese counterparts.

This system of legal “standard equivalents” on which Westerners—as foreign investors—have relied has outlived its usefulness. During the period of Chinese legal reform, this lexicon is arguably a liability to rule of law projects. This one-to-one collection of analogies fosters misunderstanding about China's law.<sup>11</sup> Moreover, it perpetuates Western narcissism by

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phenomenon). “Western businessmen have been so stunned by competition from them that they have tried, with mixed success, to imitate their organizational structure. . . .” *Id.* This may have been more apropos at the time. With the pervasiveness of *guanxi* in business literature and marketing outreach, the present tone seems to be one of ongoing frustration rather than surprise.

10. For a full treatment of the history and cultural underpinnings of *guanxi*—still viewed as the authoritative survey—see generally MAYFAIR MEI-HUI YANG, *GIFTS, FAVORS, AND BANQUETS: THE ART OF SOCIAL RELATIONSHIPS IN CHINA* (1994). For a collection of current scholarship, see generally SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF *GUANXI* (Thomas Gold et al. eds., 2002) [hereinafter SOCIAL CONNECTIONS IN CHINA]. For a case example of *guanxi* in foreign investment in China, ROBERT BUDERI & GREGORY T. HUANG, *GUANXI (THE ART OF RELATIONSHIPS): MICROSOFT, CHINA, AND BILL GATES' PLAN TO WIN THE ROAD AHEAD* (2006) provides a revealing story about Microsoft's journey establishing a China headquarters.

11. This Paper responds to Professor Jerome Cohen's call to end the one-to-one translation (or translation by standard equivalents) of Chinese legal terms in favor of adapting the terms and concepts themselves into Western legal lexicon. Jerome A. Cohen, Adjunct Senior Fellow on Asian Studies, Council on Foreign Relations, *Lost in Translation: Is a Chinese 'Judge' a Judge?*, Vermont Law School Waterman Lecture (Oct. 16, 2008) (DVD of lecture available by request from Vermont Law School Cornell Library) [hereinafter

glossing over essential distinctions between social ordering in Chinese and Western society. A lexicon of English “standard equivalents” for Chinese legal concepts is no longer adequate for conducting business in China or for influencing the development of the rule of law more generally.

To illustrate, take the example of the word *faguan* (fah-guan) with its English “standard equivalent,” “judge.”<sup>12</sup> In Chinese, *faguan* literally means “legal official” or “adjudicative official.” The term used is important because, as noted Chinese scholar Jerome Cohen instructs, “the word we choose inevitably influences immediately our mental constructs.”<sup>13</sup> For Westerners, particularly Americans, that word—judge—conjures up an iconic image of a person in black robes, cloistered off from legislators and outside influences. It is also imbued with cultural and religious historical references from King Solomon to Justice Earl Warren.<sup>14</sup>

But in China, a judge is not conceived of in these terms. *Faguan* has many different literal meanings (e.g., administrative judge, adjudicator, and arbitrator). Even where a *faguan* does closely resemble a Western district court judge, he or she will have different legal methods than a Western judge for presiding over and deciding a case. Finally, the *faguan* does not belong to a judiciary that has the same structure or codes as a judicial system in the West. Therefore, as Cohen has urged, *faguan* should not be translated “judge,” but should stay “*faguan*,” and Westerners should do the work of understanding the complexity of the *faguan* role in Chinese law.

The focus on *faguan* as not very judge-like is intimately connected with the effort of Cohen and others to establish the rule of law in China.<sup>15</sup> Recent calls for judicial reform posit that judicial independence under an American-styled legal system will buttress the construction of a rule-of-law-based legal system.<sup>16</sup> This approach is indeed wise in theory but it does

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Cohen lecture]. Vermont Law School, which provided the occasion for Cohen’s lecture, runs a program sponsored by USAID, specifically to implement a rule of law curriculum in coordination with SunYat-Sen University in Guangzhou, China. *US-China Partnership for Environmental Law*, VERMONT LAW SCHOOL, [http://www.vermontlaw.edu/Academics/Environmental\\_Law\\_Center/Institutes\\_and\\_Initiatives/US-China\\_Partnership\\_for\\_Environmental\\_Law/Overview.htm](http://www.vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/US-China_Partnership_for_Environmental_Law/Overview.htm) (last visited Feb. 13, 2011).

12. This example is taken directly from Professor Cohen’s lecture, *supra* note 11.

13. *Id.*

14. Incidentally, Professor Cohen clerked for Justice Earl Warren in 1955.

15. Cohen’s project as a Senior Fellow at the Council on Foreign Relations is the Winston Lord Roundtable on Asia, the Rule of Law, and U.S. Foreign Policy. *Winston Lord Roundtable on Asia, the Rule of Law, and U.S. Foreign Policy*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/projects/world/winston-lord-roundtable-on-asia-the-rule-of-law-and-us-foreign-policy/pr163> (last visited Mar. 1, 2011). Professor Cohen has been working in this area since the 1960s, when he was employed first on behalf of the United States in creating the Open China policy, then as a private attorney assisting with foreign investment programs. He is intimately experienced with the emergence of the modern legal system in China and with the frustrations therein.

16. Known in academic circles as the judicialization thesis, this is the theory that development

not address one of the primary impediments to achieving this goal: the Chinese institution of *guanxi*.

Cohen has variously called *guanxi* “a kind of interference,” “part of the social fabric,” and more bluntly, “corruption.”<sup>17</sup> He sees *guanxi* as a network of personal relations that is generally more influential than laws and rules<sup>18</sup>—something to be “eradicat[ed]” in legal reform, and “corrosive” to building a credible legal system.<sup>19</sup> Discussing the development of the legal system in China, Cohen laments the interference of *guanxi* in the judicial process. He sees *guanxi* as antithetical to an independent judiciary which Westerners understand as necessary to maintain the integrity of the law.<sup>20</sup>

In these statements Cohen breaks his own rule, translating *guanxi* by analogy. By choosing this simplistic “standard equivalent” translation of *guanxi* to mean essentially *corruption*, he neatly fits *guanxi* into its analogous place in the law: as its antithesis. If Cohen and others seeking to implement a robust legal system in China intend to take on Cohen’s challenge of non-translation, then *guanxi* must have the same treatment as legal terms such as *faguan*.

### III. CHINA’S *GUANXI* CULTURE

#### *A. Standard Equivalent Translations of Guanxi*

*Guanxi*, even more than *faguan*, is a term that defies translation, though apparently not attempts to do so. *Guanxi* is variously translated or understood as connections, relationships, loyalty, rapport, “the favor bank,” a social network, the “old boys network,” mutual understanding, mutual respect, social baggage, corruption, and as an epithet against individuals or against exclusively Chinese social connections.<sup>21</sup> The one consistent feature of the term is its inconsistent translation through “standard equivalents.”

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of a robust judiciary will place a check on overpoliticized or corrupt administrative action or legislative malfeasance. John K. M. Ohnesorge, *The Rule of Law*, 3 ANN. REV. L. & SOC. SCI. 99, 109 (2007).

17. Cohen lecture, *supra* note 11.

18. *Id.* (“You have the problem of *guanxi*,—relationships—that always seem to outrank law as a criterion for an outcome.”).

19. Jerome A. Cohen, Op-Ed., *A Just Legal System*, N.Y. TIMES, Dec 11, 2007, <http://www.nytimes.com/2007/12/11/opinion/11iht-edcohen.1.8690524.html>.

20. *Id.*

21. These translations appeared in a May 2009 Google search for articles relating to “*guanxi*” and “*guanxiwang*.” Some of them are discussed below.

Literally, *guanxi* “means ‘relation’ or ‘relationship,’ as a noun, and ‘relate to’ as a verb.”<sup>22</sup> The word in Chinese is a combination of the character *guan*, meaning door or passageway (for instance as used in *hai guan*: customs), and *xi*, meaning social association (implying a formal hierarchical organization of relationships (*xi* also means department)).<sup>23</sup> *Guanxiwang* is a person’s *guanxi* network.<sup>24</sup> The most common “standard equivalent” used for *guanxi* is “relationship” or “special relationship.” This is sometimes further explained as a relationship of obligation. More casually, *guanxi* is referred to in the Western popular press as “connections” or “personal connections.” The distinction here is important, though nuanced.

Business *guanxi* has been offered as a special case of *guanxi*.<sup>25</sup> It is in this context that the description of *guanxi* as “personal connections” has become prevalent. The connotation is usually negative. In 1989, a letter to the editor in the aftermath of the Tiananmen Square Massacre cited *guanxi* as an element of Chinese social structure against which the students were reacting.<sup>26</sup> In the 1990s, the *New York Times* leading columnists all acknowledged the *guanxi* phenomenon in American relations with China. Nicholas Kristof noted that *guanxi* or “connections . . . [were] more important than rules,” and determinative “in getting bank loans, electricity, running water and tax waivers.”<sup>27</sup> Essentially, he whittled *guanxi* down to “know[ing]” people.<sup>28</sup> Thomas Friedman also used “connections.”<sup>29</sup> In 1998, the late William Safire featured *guanxi*, again as “connections,” in his weekly column, *On Language*.<sup>30</sup> He asserted that *guanxi* “often goes beyond ‘personal connections’ to describe a form of extreme networking;” citing to others, he likened it to “‘cronyism and pork-barrelling,’” used

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22. SOCIAL CONNECTIONS IN CHINA, *supra* note 10, at 6 (citing J. Bruce Jacobs, *A Preliminary Model of Particularistic Ties in Chinese Political Alliances: KanCh’ing and Kuanhsi in a Rural Taiwanese Township*, 78 CHINA Q. 237, 242 (1979)).

23. Yadong Luo, *Guanxi: Principles, Philosophies, and Implications*, 16 HUM. SYS. MGMT. 43, 44 (1997).

24. SOCIAL CONNECTIONS IN CHINA, *supra* note 10, at 6.

25. Ying Fan, *Guanxi’s Consequences: Personal Gains at Social Cost*, 38 J. BUS. ETHICS 371, 374 (2002).

26. Thomas R. Atkinson, Letter to the Editor, *Trading Partners Should Put Pressure on China*, N.Y. TIMES, July 18, 1989, at A20.

27. Nicholas D. Kristof, *China Applauds as Its Officials Plunge Into Profit*, N.Y. TIMES, Apr. 6, 1993, at A6, available at <http://www.nytimes.com/1993/04/06/world/china-applauds-as-its-officials-plunge-into-profit.html> (“Guanxi are often more important than rules.”).

28. *See id.*

29. Thomas Friedman, *Foreign Affairs: China Syndrome*, N.Y. TIMES, Jan. 8, 1995.

30. William Safire, *On Language: Crony Capitalism*, N.Y. TIMES, Feb. 1, 1998, § 6, at 16.

“[i]n place of good management.”<sup>31</sup> Others follow this course, calling it “connections that sometimes spill over into corruption.”<sup>32</sup>

The complaint that *guanxi* is corrupting Chinese legal and economic development is intimately tied with the politics of globalization.<sup>33</sup> In the years running up to the Beijing Olympics, there was a shift of focus from development of commercial law to public law in China. This shift, though lagging slightly behind rights movements in the West, coincided with the crescendo of the global human rights discourse.<sup>34</sup> This shift brought a more concentrated attention to efforts establishing rule of law in China. In 2005, a BBC columnist echoed the American press by defining *guanxi* as “connections” but adding that *guanxi* is a necessary element of the power elite, power to skirt the law or flaunt it, even in criminal matters.<sup>35</sup> It is this crossover to *guanxi* in public law that Jerome Cohen condemned as particularly detrimental and corrupting in Chinese legal culture.

### B. Nuanced Translations of Guanxi

It bears repeating that *guanxi* cannot be translated into English. And, as is true of most occidental–oriental translation, defining *guanxi* as the opposite of what is familiar to Anglo-American culture is not useful to understanding. First, *guanxi* is not merely a word but a signal for an entire system. *Guanxi* constitutes an individual’s “local moral world.”<sup>36</sup> As well, it enables *guanxiwang*, a multilayer network of networks.<sup>37</sup> In short, it signifies a whole cultural phenomenon that only operates because everyone within the system shares the same or similar world view: of the primacy of social order, of the interdependence of everyone within the society, of the benefit of having a system that way, and of the relative inferiority of all other forms of ordering (including reason and law).

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31. *Id.* (internal citation omitted)

32. Tom Redburn, *Economic View; Asian Values, Trumped By the New Economy*, N.Y. TIMES, Apr. 2, 2000, § 3.

33. Fan, *supra* note 25, at 378 (asserting that *guanxi* has a detrimental influence on China’s foreign investment economy). Teemu Ruskola asserts that the rule of law versus rule of man dichotomy is used to fuel political favor for Western domination of developing nations. Ruskola, *supra* note 5, at 657–58.

34. DEBORAH CAO, CHINESE LAW: A LANGUAGE PERSPECTIVE 76–85 (2004).

35. Rupert Wingfield Hayes, *China’s Modern Power House*, BBC NEWS, Oct. 1, 2005, [http://news.bbc.co.uk/1/hi/programmes/from\\_our\\_own\\_correspondent/4298284.stm](http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/4298284.stm).

36. LUBMAN, *supra* note 7, at 114 (quoting Yunxiang Yan, *The Culture of Guanxi in a North China Village*, 35 CHINA J. 1, 22 (1996)).

37. *Id.* (describing *guanxi* as a “web of family, kin, and communal relationships . . . based not on instrumental conduct but on . . . ‘human feelings’”) (internal citation omitted).

Among scholars of *guanxi*, there is general agreement that the concept is “more nuanced than the crass exchange of favors and bribery with which it is often confused in the West.”<sup>38</sup> This is not to take *guanxi* entirely out of the economic sphere, where it surely has influence if not dominance. But its fundamentals are based in much more basic forms of relationship cultivation related to family, marriage, and friendship.

The “relationship” element of *guanxi* is commonly explained in terms of “particularistic ties.”<sup>39</sup> The ties referred to here reference family, common experience (such as the Long March), ethnic heritage, similar native place, or business.<sup>40</sup> Most scholars parsing out the relational requirements of *guanxi* use words such as “mutual respect and trust,”<sup>41</sup> and “deep personal ties.”<sup>42</sup> There is disagreement about whether a *guanxi* relationship must have an affective component, *renqing*. In the urban context, that quality of *guanxi* seems to be missing, but seems to be universally observed by those studying *guanxi* in rural settings.<sup>43</sup> Common to the relational quality is commonality in past experience or present objectives and goals—frequently both. This last quality is, in part, the basis for the operation of *guanxi* on *created* relationships, enabling “business *guanxi*.”<sup>44</sup>

Once the relationship exists, it must be ritually cultivated in order to achieve *guanxi*.<sup>45</sup> *Guanxi* may be based implicitly on mutual interest or need, or *guanxi* may be based on a common objective or goal. The parameters of the common objective may be specific and time limited, or vague. For example, *guanxi* within a family may be based on mutual emotional and survival needs.<sup>46</sup> Community *guanxi* may have more utility,

38. *Id.*

39. SOCIAL CONNECTIONS IN CHINA, *supra* note 10, at 6.

40. Kwang-kou Hwang, *Face and Favor: The Chinese Power Game*, 92 AM J. SOC. 944, 952 (1987).

41. BUDERI & HUANG, *supra* note 10, at 6–7.

42. Some writers have employed terms implying exclusive behavior, such as a good “old boys network,” Joe Nocera, *Talking Business: China Needs Old Boys with M.B.A.’s*, N.Y. TIMES, Apr. 19, 2008, at C1, and “clubs,” Matthias Schramm & Markus Taube, *The Institutional Economics of Legal Institutions, Guanxi and Corruption in the PR China*, in FIGHTING CORRUPTION IN ASIA: CAUSES, EFFECTS AND REMEDIES 271, 278 (John Kidd & Frank-Jürgen Richter eds., 2003) [hereinafter *Guanxi and Corruption*].

43. SOCIAL CONNECTIONS IN CHINA, *supra* note 10, at 8. *See also* Hwang, *supra* note 40, at 964–66; LUBMAN, *supra* note 7 (questioning whether *guanxi* without *renqing* can be *guanxi* at all).

44. *See* discussion of Fan, *infra* notes 62–71 and accompanying text.

45. Fan, *supra* note 25, at 372; SOCIAL CONNECTIONS IN CHINA, *supra* note 10, at 6. However, to reiterate Lubman’s point, production is not necessarily a simple process of mutual favor or gift exchange. LUBMAN, *supra* note 7, at 114. *See* reference to Ying Fan below on process, *infra* notes 62–71 and accompanying text; *see also* Duran Bell, *Guanxi: A Nesting of Groups*, 41 CURRENT ANTHROPOLOGY 132 (2000).

46. *See* *Guanxi and Corruption*, *supra* note 42, at 278; Fan, *supra* note 25, at 373.



such as fair attribution or access to scarce resources.<sup>47</sup> The existence of this mutual interest may be the reason for initiating *guanxi* rituals,<sup>48</sup> or the *guanxi* parties may have intuitively “invested” in *guanxi* rituals previous to the need, knowing that needs would arise.<sup>49</sup> Cultivating *guanxi* involves such activities as having a meal together or gift-giving.<sup>50</sup> Once *guanxi* is recognized, the two parties can incur debt and expect that it will be repaid sometime in the future. Importantly, there is no time limit on repayment.<sup>51</sup>

The personal *guanxi* network also serves the larger community. Two economic theorists have suggested persuasively that *guanxi* investments serve as a contract-enforcing and stabilizing force in places such as rural villages where law neither fits the needs nor is applied in a way that is effective.<sup>52</sup> According to this view, *guanxi* is a cost-lowering mechanism for transforming high-risk exchanges into self-implementing contracts.<sup>53</sup> In the transitional economy of post-Mao China, such a stabilizing force makes sense for much of Chinese society where emerging justice systems are neither qualified nor equipped to handle contract litigation.<sup>54</sup> *Guanxi*’s relative economic importance to those not among the urban elite is buttressed by data on the investment Chinese put into their *guanxi* networks—in one study, 10 to 20% of disposable income.<sup>55</sup> *Guanxi* is therefore the mechanism in which economic actors have already substantially invested, making them more likely to rely on *guanxi* rather than spend additional resources on an alternative system such as litigation.<sup>56</sup>

Alternatively, *guanxi* can be understood as an ongoing expression of need and assistance between individuals in a tribute system.<sup>57</sup> Bell asserts

47. Hwang, *supra* note 40, at 957; Fan *supra* note 25, at 377–78.

48. Fan, *supra* note 25, at 372.

49. *Id.*

50. *Id.* at 372; Lee C. Simmons & James M. Munch, *Is Relationship Marketing Culturally Bound: A Look at Guanxi in China*, 23 *ADVANCES IN CONSUMER RESEARCH* 92, 93 (1996), available at <http://www.acrwebsite.org/volumes/display.asp?id=7922> (original pagination unavailable online).

51. Hwang, *supra* note 40, at 963. This is a key feature differentiating *guanxi* from corruption. *SOCIAL CONNECTIONS IN CHINA*, *supra* note 10, at 7.

52. Matthias Schramm & Markus Taube, *Private ordering of corrupt transactions: The case of the Chinese guanxi networks and their challenge by a formal legal system*, in *THE NEW INSTITUTIONAL ECONOMICS OF CORRUPTION* 181, 185 (Johann Graf Lambsdorff et al. eds., 2005).

53. *Guanxi and Corruption*, *supra* note 42, at 283.

54. *Id.* at 288–89.

55. Yunxiang Yan, *The Culture of Guanxi in a North China Village*, 35 *CHINA J.* 1, 11 (1996). To put this in perspective, giving 10% of taxable income in the United States is considered highly generous charitable giving. The Center on Charitable Giving at Indiana University reported that on average, Americans give 2.6% of their income. The Center on Philanthropy at Indiana University, *Quick Facts about Charitable Giving*, CTR. ON PHILANTHROPY PANEL STUDY, 2 (2008), <http://www.philanthropy.iupui.edu/Research/Quick%20facts%20about%20charitable%20giving%20from%20the.pdf>.

56. *Guanxi and Corruption*, *supra* note 42, at 284.

57. Bell, *supra* note 45, at 134–35.

that Western study of *guanxi* has been misdirected by ignorance of the variety of social exchange mechanisms beyond equitable dyadic exchanges.<sup>58</sup> The dowry relationship that arises in inter-village marriages classically illustrates this alternative view of *guanxi*. The ritually orchestrated and maintained marriage relationships require a substantial investment between unequal parties—in this case, families of different status from villages of different status (as determined by resources).<sup>59</sup> The result is an ongoing obligation between the families and, by extension, the villagers. Here, the *guanxi* benefits and obligations last the life of the bride's and groom's immediate families and obligate villagers from the more advantaged village to the most basic kinds of mutual assistance, including food and housing aid.<sup>60</sup> Should the less-advantaged village have the means and the opportunity, it is likewise obliged to provide assistance. In this system, where the reciprocal benefit far surpasses the initial transaction value, the distribution of *guanxi* through traditional marriage is removed altogether from the realm of economic exchange.<sup>61</sup>

### C. Guanxi as Other

Returning to the operation of *guanxi* within the business context, *guanxi*'s usefulness to rural villagers does not explain its role in the new economy. While scholars such as Lubman have suggested *guanxi* may not exist in the market context,<sup>62</sup> this sense of *guanxi* leading to corruption is legitimate and shared among some Chinese.<sup>63</sup> Ying Fan offers a thorough examination of *guanxi* as corrupt “connections” and so is worth further discussion before considering other theories. Fan discusses *guanxi* as what has now become “institutionalized corruption” and asserts that it is nearly universally condemned in China as a “cancer.”<sup>64</sup> Fan divides *guanxi* into several groups: family *guanxi*, helper *guanxi*, and two forms of business *guanxi*—business-to-business and business-to-government (“B2G”).<sup>65</sup> Fan focuses on B2G *guanxi* as the prevalent corrupting influence preventing

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58. *Id.* at 133.

59. *Id.* at 134.

60. *See id.* at 134–36 (discussing benefits and obligations of *guanxi*).

61. *Id.*

62. LUBMAN, *supra* note 7, at 114.

63. Fan, *supra* note 25, at 377. However, not all Chinese condemn *guanxi*. A recent *China Daily* article noted the wild popularity of the TV show, *Lurk*, which preaches the importance of *guanxi* to success. Liu Wei, *Life is a Battlefield*, CHINA DAILY, Apr. 23, 2009, [http://www.chinadaily.com.cn/china/2009-04/23/content\\_7707665.htm](http://www.chinadaily.com.cn/china/2009-04/23/content_7707665.htm).

64. Fan, *supra* note 25, at 377.

65. *Id.* at 372, 374.

rule of law from taking hold.<sup>66</sup> Fan isolates B2G *guanxi* as unethical behavior that should be rooted out in favor of fair market forces.<sup>67</sup> B2G is categorically “tactical, opportunistic and unstable.”<sup>68</sup> His methodical definition describes *guanxi* production as consisting of a dynamic multi-path process of social interactions used to fulfill a (usually intangible) need of one of the members in exchange for satisfaction of the debt through future obligations.<sup>69</sup> This description emphasizes, consistent with other’s views, that: first, *guanxi* is not a dyadic exchange; and second, *guanxi* can only be established when there is a “need for something to be done.”<sup>70</sup>

Fan does not acknowledge any value in *guanxi* systems and agrees with the viewpoint expressed by Cohen that recent legal reforms have had no effect on *guanxi* corruption.<sup>71</sup> His acid test for judging the ethical worthiness of a *guanxi* transaction is “whether there are victims as a result of such a deal” and social loss to the whole society.<sup>72</sup> However, this definition subsumes all of *guanxi* into corrupt *guanxi*. And, there are compelling arguments that any hope of gaining a more thorough understanding of *guanxi* has been swallowed by this misconception. Lubman and others have questioned whether *guanxi* can still exist at all in the instrumentalist relationships generated in a market-based economy.<sup>73</sup>

*Guanxi* is not quid pro quo, bribery, or corruption. Notions such as “unethical behavior” are, of course, relative to the rules and taboos of every society. Western capitalist society, for example, tends to value the leveling function of the “free market,” whether pertaining to ideas or to exchanges. Western morality likewise encourages viewing all actors as equal before the law. Therefore, a mechanism limiting exchange of goods or services to *guanxi* insiders may seem unethical or at least unfair.<sup>74</sup>

*Guanxi* does discriminate between insiders and outsiders unequally. However, *guanxi* can be easily distinguished from illegal granting of advantage. Corrupt transactions add to the cost of the transaction by exacting a payment that has no value outside of the transaction.<sup>75</sup> The payer

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66. *Id.* at 376–77.

67. *Id.* at 375–76.

68. *Id.* at 372–74.

69. *Id.* at 371–72.

70. *Id.* at 372.

71. *Id.* at 377.

72. *Id.* at 376.

73. LUBMAN, *supra* note 7, at 114; Hwang, *supra* note 40, at 950–53.

74. See *Guanxi and Corruption*, *supra* note 42, at 281 (noting that this is the basis for some objections by organizations, such as the World Bank, to *guanxi* behavior).

75. *Id.* at 283.

puts himself at the mercy of the receiver who is only concerned with private advantage.

To be sure, some transactions in the Chinese economic system exploit the existence of *guanxi* networks—they operate within the *guanxi* network, but are undertaken solely for private advantage. Thus, the conflation of *guanxi* networks with corruption rings arises from the likelihood that *guanxi* networks operate as a railway on which corrupt transactions can be coordinated.<sup>76</sup>

Rejecting the standard equivalent translations as well as the idea of *guanxi* as the mechanism of corrupt behavior in Chinese government, one must acknowledge the basis for this misunderstanding. The dominant field of study for *guanxi* has been in business development and commercial law.<sup>77</sup> This makes sense in two respects: first, that the primary interaction between the West and post-Mao China—and thus the context for *guanxi* encounters—involved commercial trade relationships; and second, that these encounters have led to the Western understanding of *guanxi* as a process of “exchange” or trade. However, *guanxi* does not fit neatly into the commercial model of exchange transactions. Nor does it fit a quid pro quo model in the legal or illegal sense. Finally, the rituals of *guanxi* production are much more involved than traditional business networking.

*Guanxi* is uniquely Chinese. *Guanxi* describes a social phenomenon in China, much like networking connections in the rest of the world. *Guanxi* has similar characteristics to personal networks found elsewhere, such as loyalty, common history of the parties, and its ability to facilitate introductions among people for the direct benefit of one party or another. However, *guanxi* differs significantly in its influence and intensity from personal networks in other cultures.<sup>78</sup> For one thing, *guanxi* requires no affirmative action by a party in order for it to attach or be created. One has *guanxi* in most cases by one’s very existence in relation to others. And all parties acknowledge *guanxi* existence between them. In fact, it takes an affirmative act to disown the *guanxi* that automatically exists. Secondly, *guanxi* exists not only for the benefit of the people in the network, it is tied to the benefit of society and the natural harmony of the social order. These

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76. *Id.* at 284.

77. *E.g.*, Barbara Krug & Laszlo Polos, *Entrepreneurs, Enterprises, and Evolution: The Case of China*, presented at the Annual Meeting of the International Society for New Institutional Economics, Tubingen, Sept. 2000; Luo, *supra* note 23, at 43; Simmons & Munch, *supra* note 50, at 92; BUDERI & HUANG, *supra* note 10, at 92.

78. Interview with Jiaru Hou, Assistant Professor of Law at China University of Political Science, Beijing, China, and Vermont Law School visiting scholar 2008–2009 (April 2009) (notes on file with the author).

characteristics of *guanxi* networks are supportive of enduring Confucian ideals in the Chinese worldview discussed in the next Part.

#### IV. WEST–EAST: RULE OF LAW VS. *GUANXI*?

Unfortunately, the predominant way Westerners have historically understood Asia is through the monocle of Orientalism.<sup>79</sup> The result is often not a deeper understanding of Asian—particularly Chinese—culture, but a more rigid sense that everything Chinese is essentially *not Western*.<sup>80</sup> This is apparently the situation with *guanxi*—at least for rule of law advocates. The question to consider is: where does *guanxi* fit against the backdrop of law in China? Is it an irritant against the rule of law? Is it necessarily a system in opposition to the continuing development of law in China? Of globalization? Or, is the treatment of *guanxi* another in a series of efforts by the West to delegitimize the Chinese Communist Party, erecting distinctions between otherwise similar systems of government? These questions will necessarily be considered in brief.<sup>81</sup>

##### *A. Development of Chinese Law: Confucian Characteristics and a German Footnote*<sup>82</sup>

The barriers to instituting Western-style rule of law in China are inherently connected to opposing Western and Chinese views of the individual, society, and law. Rule of law is essentially a Western construct.<sup>83</sup> The rule of law is intimately tied to the Western capitalist worldview.<sup>84</sup> *Guanxi* is likewise a product of Chinese worldview. Its roots lie in Confucianism, a philosophy that established the Chinese connection between social ordering and virtue. Confucian philosophy and its progeny inform not only Chinese moral life but also a legal sense that has endured in

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79. EDWARD SAID, *ORIENTALISM* 325 (1978). Said asks, “How does one *represent* other cultures? . . . Is the notion of a distinct culture (or race, or religion, or civilization) a useful one, or does it always get involved either in self-congratulation (when one discusses one’s own) or hostility and aggression (when one discusses the ‘other’)?” *Id.* To Said, Orientalism was a *manifestation of exoticized* Western aggression operating to serve Western expansionism. *Id.* at 204.

80. See Ruskola, *supra* note 5, at 660, 667 (introducing the Orientalism-equals-non-Western paradigm and asserting the view that “if the rule of law means ‘not the rule of men,’ then any would-be Chinese law is an oxymoron”) (citing DAVID L. HALL & ROGER T. AMES, *THE DEMOCRACY OF THE DEAD: DEWEY, CONFUCIUS, AND THE HOPE FOR DEMOCRACY IN CHINA* 216 (1999)).

81. See *supra* note 10, particularly SOCIAL CONNECTIONS IN CHINA, for sources considering these questions more fully.

82. See *infra* note 100 and related text.

83. CAO, *supra* note 34, at 40.

84. Hamilton, *supra* note 9, at 190 (discussing the influential economic theory of Max Weber which linked capitalist market economies, merit, and protestant theology).

China for almost 2,500 years—most importantly the practical and fallible nature of law made by man. Confucianism also permeates the Chinese language—heavily influencing the Chinese creation and use of law. From a Confucian perspective, Chinese language is contextualist and flexible.<sup>85</sup> Compared to English with its relative aspect and tenses,<sup>86</sup> Chinese language is vague. As a consequence of this “linguistic uncertainty,” Chinese law is imprecise, in stark contrast to English language and laws.<sup>87</sup> Thus, while China has lived for 5,000 years under the “rule of man” rather than the rule of law, it has done so with a healthy disrespect for the authority of such a legal system.

Historically, at least since the Han period,<sup>88</sup> law (*fa*) was viewed as emerging out of social rightness—what is fitting for the masses.

What is fitting for the many is what accords with the minds of men. Herein is the essence of good government . . . Law is not something sent down by Heaven, nor is it something engendered by Earth. It springs from the midst of men themselves, and by being brought back [to men] it corrects itself.<sup>89</sup>

Thus, Chinese law was subject to error and correction by other men in contrast with Western law, which was traditionally viewed as having divine origins.

The Chinese ability to find error in the law is consistent with early distrust of law by Confucius as well as with the lingering sentiment today that even were law applied strictly, it would still be distrusted because it would not honor the original intent of the private law of relationship and obligation.<sup>90</sup> Throughout Chinese legal history, this has promoted administration of laws that incorporated sensitivity to the sentiment of the people involved, looking to the law only after the personal aspects and reason had been observed.<sup>91</sup>

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85. CAO, *supra* note 34, at 94–95.

86. *E.g.*, first person, “I,” second person, “you,” and third person, “he, she, it,” as subjects and objects are not routinely employed in Chinese. Similarly, past, present, and future tenses are not used. Thus, “you owe me five dollars” cannot be distinguished from “I owe you” or “you did owe me” or “he will owe you.” For more on linguistic uncertainty see *supra* Part III.B.

87. CAO, *supra* note 34, at 96.

88. See JOHN W. HEAD & YANPING WANG, LAW CODES IN DYNASTIC CHINA: A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING 62 (2005) (describing how Confucianism replaced Legalism as the dominant legal ideology during the Han period).

89. DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA 14–15 (1967) (citations omitted).

90. YING LUN SO & ANTHONY WALKER, EXPLAINING *GUANXI*: THE CHINESE BUSINESS NETWORK 113 (2006).

91. HEAD & WANG, *supra* note 88, at 102–03 (citing BODDE & MORRIS, *supra* note 89, at 3–6).

Confucius’s contribution to the law (at the time, the *Zhou li*) was first to shift the reach of the law to apply to the social relations of all, each as required by their status.<sup>92</sup> Second, he made *li* the primary force in government, subordinating the positive law to exemplary behavior. Third, he created the notion of a natural connection between education and ethics, and between ethics and politics, which justified the ruling elite. The *li*, which served as the foundation to Confucian thought, were not explicit rules but a collection of models of exemplary conduct transmitted in literary form to be emulated according to one’s social status.

Status in the social order was key to social harmony in Confucian philosophy. Cooperation of the masses would flourish when each understood their role within the whole and when those roles were carried out according to the models of *li*. Confucius, in emphasizing *li* as the means of good governance, also raised the status of education—that is to say the transmission of *li*—in promoting good governance. Those who could govern must be the most virtuous and ethical. As a result, ministers of government in the bureaucracy were also the embodiment of Confucian ideals, seen as infallible.<sup>93</sup> The effect on the development was profound.

Confucianism was not the only seminal philosophy. Dynasties following the Confucian era created Legalism, a positive legal system that emphasized central control over citizens through codified law and discipline. Confucian ideals survived Legalism, and some say emerged in an altered but strengthened form, much as an alloyed metal gains resilience when mixed and tempered by another ore.<sup>94</sup>

What survived was a government—embodied for most of Chinese history in the emperor—with exclusive control of the law, determining and instructing the bureaucracy whether and when to use it. The rationale for this is unknown, but scholars note the need for a simple law that distant magistrates could understand and apply.<sup>95</sup> Codified law was employed only for matters between the state and the people, rather than for use *between* citizens. This made the law a vertical mechanism of ordering.

[T]he official law always operated in a vertical direction from the state upon the individual, rather than on a horizontal plane directly between two individuals. If a dispute involved two individuals, individual A did not bring a suit directly against individual B. Rather he lodged his complaint with the authorities,

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92. *Id.*

93. *Id.* at 235–36.

94. *Id.* at 232.

95. *Id.* at 235.

who then decided whether or not to prosecute individual B. No private legal profession existed to help individuals plead their cases. . . .<sup>96</sup>

However, this limited disposition meant that the law continued to be distrusted by the masses as clouded in secrecy and as overly bureaucratic.<sup>97</sup> The limited application also meant that for the great majority of interpersonal interactions, the law was irrelevant.<sup>98</sup> Instead, a network of extra-legal institutions, including the family, professional guilds, and the aristocratic structure of local communities maintained order outside of the legal codes.

Confucian culture has been little impacted by cultural invasions or the Cultural Revolution. Communism ostensibly sought to remove the influence of Confucian elitism, but failed, in part because the Party used the existing bureaucratic apparatus to construct its government. Confucianism formed the basis for the bureaucracy, and thus strongly influenced education and social ordering—it could not be eradicated.<sup>99</sup> Outward Confucian practice and ideals have diminished in contemporary China, and bureaucrats no longer take the legendary Confucian exams. But until the recent capitalist economy emerged, Confucianism lived on in a strong bureaucracy.

The underlying faith in the bureaucracy is a remnant of the past reality that bureaucrats were taken to be worthy of trust and respect because they embodied the Confucian ideals of *li*. The notion of self-improvement embodied in *li* also fits with the new Chinese capitalism. An additional reality is that though the Party tried to inculcate loyalty to the Party in place of Confucian traditions of ancestor worship and family loyalty and other practices with religious overtones, the fact was that Communism had nothing to offer to replace Confucian spiritual traditions. Thus, Confucian philosophy, not law, continues to serve as a cultural and spiritual backbone of the Party State and the Chinese people today.

When the recent era of legal reforms began in the early 1980s, the massive reordering of the legislative code was undertaken.<sup>100</sup> The

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96. *Id.* at 236 (quoting BODDE & MORRIS, *supra* note 89, at 4).

97. *Id.* at 237.

98. *Id.* at 103.

99. Interview with Jiaru Hou, *supra* note 78.

100. The German footnote is this. During reforms, the Party decided after much study to keep the German civil law model it adopted in the early 20th century. See J. CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 49–51 (1999) (discussing Chinese legal reforms of the 1980s). The German Civil Code was first integrated into Chinese legal reforms about 1910, but abandoned with the fall of the empire. Yin-Ching Chen, *Civil Law Development: China and Taiwan*, 2 STAN.



Communist Party adopted the Soviet legal system in the 1950s. Essentially, during this period of purging intellectuals, including lawyers and judges, to establish totalitarian grip on society, China was a lawless state.<sup>101</sup> With the softening of the Communist regime and with legal reform in mind, the Party returned to the German influenced Qing code in 1982 and modeled the new civil code, the General Principles of Civil Law, enacted in 1985, after the German civil code.<sup>102</sup>

*B. A Foreign Framework for Development: Western Rule of Law*

In contrast to the skepticism of law in China, law and the legal system hold a nearly divine status in the West. Law and “rule of law” are not identical, however. Law is that which already exists in the political, social, and cultural life of citizens. It is the rules but also the absence of any need for rules<sup>103</sup> because of the stability obtained in society from years of minute adjustment in the actions and practices of persons in society. The rule of law on the other hand is an applied system often constituted specifically to renew or mobilize support for legal institutions.<sup>104</sup> The rule of law idea is “that statutory meaning should be relatively predictable and accessible to the citizenry and should be neutrally applied to everyone.”<sup>105</sup> Beyond this, few agree.

Semantics is at the heart of this Article: the defining language foreign investors and rule of law lawyers use about *guanxi*. It is fair to expect a similar examination of how the same actors frame the rule of law. Many authors have sacrificed hours and pages in an attempt to find consensus or

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J. E. ASIAN AFF. 8, 9 (2002), available at <http://www.stanford.edu/group/sjeaa/journal2/china1.pdf>. As a result of the German legal influence described above, China adopted a German cure for its legal maladies. Now its usefulness and fitness are coming into question. This fact is worthy of a mention to mark the slightly disjunctive reality where the United States, a common-law state, drives projects seeking to strengthen the rule of law in the context of a legal system built on the Chinese interpretation of European civil law.

101. Chen, *supra* note 100, at 9.

102. *Id.*

103. Lawrence Friedman, *Lawyers in Cross-Cultural Perspective*, in 3 *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* 1, 17–19 (Richard L. Abel & Philip S.C. Lewis eds., 1989).

104. Susan S. Silbey, *After Legal Consciousness*, 1 *ANN. REV. L. SOC. SCI.* 323, 328 (2005).

105. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 220 (2d ed. 2006).

explain the lack of one surrounding the rule of law.<sup>106</sup> Their only common conclusion is that there is “no agreed definition of the Rule of Law.”<sup>107</sup>

Most basic definitions stress a government bound by substantive rules whose “meaning should be relatively predictable and accessible to the citizenry” and “neutrally applied to everyone.”<sup>108</sup> Other than this positivist view of law’s role, international foreign investors have also emphasized that where the rule of law is established, it protects property rights and enforces contractual agreements.<sup>109</sup>

For some, rule of law describes not only substantive rules but also how they are applied to achieve their power and authority. To this end, rule of law defines the procedures governing a state’s authority to enforce legal conduct or restrict liberty. Not all scholars agree that this includes a right to appear and be heard before a judge in a well-functioning judiciary of independent deciding officers who produce a decision based on logical application of the rules. Human rights advocates go further, defining rule of law to include the social goods often provided by modern governments, such as welfare assistance, healthcare, education, infrastructure, and national support of the arts and sciences.<sup>110</sup> The World Bank and the International Monetary Fund have adopted various concepts above, making fertile soil for cultivating rule of law projects in conjunction with foreign investment in developing countries, including China.<sup>111</sup>

A system without rule of law is not lawless, though. The mere fact of a state’s existence requires some form of law in its social structure. However, those laws are fraught with cultural norms and social allegiances that disadvantage foreign investors. To level the playing field, operating according to the “rule of law” was one of the criteria set by international foreign investors for “borrowing” countries, espousing the vision of a formal set of enacted rules.<sup>112</sup> Rule of law projects accompanying foreign investment set out to transform (or “develop”) a state’s legal system into a legitimate, stable, autonomous, and enforceable government of laws by regularizing the

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106. Robert Gordon provides a list of recent attempts, while Joseph Raz some time ago provided a radical alternative. Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 441–42 (2010); JOSEPH RAZ, *The Rule of Law and its Virtue*, in THE AUTHORITY OF LAW 210, 224 (1979) (“[R]ule of law is designed to minimize the danger created by the law itself[,] . . . [t]he evil . . . which could only have been caused by the law itself.”).

107. Ohnesorge, *supra* note 16, at 101; Gordon, *supra* note 105, at 441.

108. ESKRIDGE, *supra* note 105, at 220.

109. Gordon, *supra* note 105, at 442.

110. *Id.* at 442–43.

111. *Id.* at 442.

112. *Id.* at 441; Behr, *supra* note 2, at 1161 (“[E]conomic development demanded an adequate legal system.”).

uses of law.<sup>113</sup> Without dismissing the great variety of these projects, the general idea is to eliminate the existing legal system’s cultural and social quirks. What remains is a sanitized law to be applied without regard to the parties involved. However, such a goal is neither possible nor desirable because it threatens to undermine the social stability provided by the indigenous social system.

Law’s legitimacy comes from the balance it strikes between its formal legal rationality and the continued social stability of the society to which it is applied.<sup>114</sup> Thus, the limits of a two-dimensional rule of law become apparent when applied in a four-dimensional world.<sup>115</sup> First, rule of law is limited by the extent to which it does not account for actual human conditions, that is, by which the law does not reflect the world that it governs.<sup>116</sup> Second, it is limited by the extent to which its guardians, lawyers and judges, are willing to enforce it.<sup>117</sup>

Two recent cases in China illustrate these dimensions. One case was an international sensation, well covered in the Asian and European press. The other received coverage in the Economist, but got little mention elsewhere. First is the unfortunate Rio Tinto trial.<sup>118</sup> In July 2009, China announced an investigation of executives at mining company, Rio Tinto.<sup>119</sup> The arrests included Rio Tinto executive, Australian Stern Hu, who had taken a hard line with Party officials just days before on iron ore export prices.<sup>120</sup> Within a week, three other executives were arrested and charged with bribery and stealing commercial secrets, crimes carrying life sentences. Hu, the Australian, was sentenced to ten years in prison and subject to confiscation of all of his assets.<sup>121</sup> Rio Tinto had no choice but to dismiss Hu in order to save

113. Gordon, *supra* note 105, at 457–58.

114. Christopher Tomlins, *How Autonomous is Law?*, 3 ANN. REV. L. SOC. SCI. 45, 49 (2007).

115. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 22 (1910).

116. *Id.* at 22, 25.

117. *See id.* at 36 (stating that lawyers need “to make the law in action conform to the law in the books” so that it can be better applied).

118. The Rio Tinto ordeal was closely reported by the BBC and The Telegraph (UK). Malcom Moore & Bonnie Malkin, *Rio Tinto Four Jailed in China*, TELEGRAPH, Mar. 29, 2010, <http://www.telegraph.co.uk/finance/china-business/7534432/Rio-Tinto-four-jailed-in-China.html>; *Four Rio Tinto Executives Jailed*, BBC NEWS, Mar. 29, 2010, <http://news.bbc.co.uk/2/hi/business/8592226.stm> [hereinafter *Rio Tinto Executives Jailed*]. The New York Times reported comprehensively on the verdict. David Barboza, *China Sentences Rio Tinto Employees in Bribe Case*, N.Y. TIMES, Mar. 29, 2010, [http://www.nytimes.com/2010/03/30/business/global/30riotinto.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2010/03/30/business/global/30riotinto.html?_r=1&pagewanted=all).

119. *Rio 'surprise' at bribery claims*, BBC NEWS, July 10, 2010, <http://news.bbc.co.uk/2/hi/business/8143561.stm>.

120. *Rio Tinto Executives Jailed*, *supra* note 117.

121. The verdict itself was not published by the Shanghai Number One Intermediate People’s Court, but The Wall Street Journal provided notes of James T. Areddy and Bai Lin, its reporters attending the verdict. James T. Areddy & Bai Lin, *Court Stenographer at Rio Tinto Verdict*, WALL ST. J., Mar. 29,

its relationship with China.<sup>122</sup> The post-mortem on this case was that the Party officials involved in the iron ore deal were pushed too hard and retaliated by force. Much expressed in the press was concern by other foreign investors that their safety as well as their business interests were at risk.<sup>123</sup> In this case, where proceedings were closed and the rule of law rejected, Chinese officials rejected the rule of law because it did not serve their corrupt purposes. They had no intention of keeping the playing field level. The point was to maintain Chinese superiority in foreign trade of iron ore. And it worked.

The second case illustrates a very different side of how social order is maintained “on the ground.” In Shanxi Province, a fast developing inland settlement within reach of Beijing, a Communist Party Secretary, Li Shing, ruled the village of Xiashuixi, mafia style.<sup>124</sup> He used thugs and his brothers to enforce his total domination over people and property, routinely invading and confiscating land he wanted. Those who resisted were beaten or imprisoned and tortured on his command. As *The Economist* reported, this behavior by officials in villages is rampant. In 2008, two villagers, an anonymous farmer who had lost his land to Li and an eighteen-year-old boy whose family had been victims of Li, conspired to kill him. Zhang Xiping found the Party boss alone in the village school and apparently stabbed him through the heart with a knife the farmer had provided. Zhang confessed and faced the death penalty.

Zhang’s brother then mounted a “10,000-name defense” for a presidential pardon, collecting 21,000 signatures in support of Zhang’s virtue. The defense was that Zhang’s actions were not condemnable but rather virtuous because they resulted in ridding China of an evil official—a practice used in imperial times. Zhang’s fate did not appear in the press, but *The Economist* reported that the same strategy was successfully applied to seek acquittal for a similar crime in June 2009. An acquittal in this case would require the judge to reject formal rules and decide based on cultural and social allegiances. In a relatively small village such as Lishi, maintaining judicial independence for the sake of distantly-enacted laws would strike at both the legitimacy of those laws and at the very notion of justice.

The Rio Tinto case received attention in the Western press during the year of the arrest and trial, with updates monthly if not more often. The

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2010, <http://blogs.wsj.com/chinarealtime/2010/03/29/court-stenographer-at-rio-tinto-verdict/>.

122. *Rio Tinto Executives Jailed*, *supra* note 117.

123. *Rio Tinto employees 'to face trial' in China*, BBC NEWS, Feb. 10, 2010, <http://news.bbc.co.uk/2/hi/business/8508028.stm>.

124. What follows here is a retelling relying on the *Economist* article as the single source of this information. *A Murder in China*, *ECONOMIST*, Aug. 20, 2009, <http://www.economist.com/node/14259091>.

Zhang Xiping case barely raised an article. This curiosity is at least interesting if not informative, but it certainly speaks to the observation that society tolerates legal formalism only where it does not matter very much.<sup>125</sup>

For the time being, Zhang Xiping’s fate matters less to the West than Rio Tinto’s. There are likely few Westerners subject to land grabs in Lishi village. On the other hand, there are scores of Western businesses navigating joint ventures with the Chinese government. Conversely, Zhang Xiping’s fate is a more critical matter to Beijing than Rio Tinto’s. If the Chinese appeals court determines that executing Zhang will provoke civil unrest, it will defer to the feelings of the people. After all, courts were explicitly instructed to do so by the Chinese Supreme Court in March 2008, a notion colloquially known as the “Mass Line” approach.<sup>126</sup> The Rio Tinto affair does not involve the masses and thus does not present a similar threat because the Party regards foreign investors as its own instruments of economic growth.<sup>127</sup> One of these cases involves true *guanxi*. The other, simply corruption.

### C. Cultural Complications: Linguistics, Legal Culture, and Judicialization

This Article has so far examined historical Chinese legal concepts and the general framework of rule of law involved in foreign development as well as providing two examples where Chinese courts have rejected rule of law in their judgments. This section will consider other factors intervening in rule of law solutions to China’s legal “malaise.” Even in the face of corruption, strict enforcement of the law as written would not be sufficient because of the entirely different use and construction of language in China. Law in a Western-styled system is derived from several sources: constitutions, statutes, and some level of judicial review. Since the 1990s, the trend of rule of law projects has focused on building judicial capacity through incentivizing an independent judiciary. Judicial interpretation fills the interstices left by broad constitutional principles or contentious legislative compromise, making the law practical for those who must abide by it. Despite the recent political shift

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125. Gordon, *supra* note 105, at 458–59.

126. *Plain-spoken Man of the “Mass Line,”* CHINA DAILY, Mar. 17, 2008. The mass line approach is not new. It was a byword of the Maoist era. *Comrade Mao Zedong’s Historical Role and Mao Zedong Thought*, RESOLUTION ON CERTAIN QUESTIONS IN THE HISTORY OF OUR PARTY SINCE THE FOUNDING OF THE PEOPLE’S REPUBLIC OF CHINA (abridged) (*Adopted by the Sixth Plenary Session of the Eleventh Central Committee of the Communist Party of China on June 27, 1981*), at ¶ 30(2), <http://english.cpc.people.com.cn/66095/4471924.html>. However, it was considered revived in 2005. *Xinhua News Agency, Wu Bangguo: Chairman of NPC Standing Committee*, Mar. 16, 2008, <http://english.peopledaily.com.cn/90002/93244/93297/6374354.html>.

127. *The Panda Has Two Faces*, ECONOMIST, Mar. 31, 2010.

away from judicial lawmaking, the Constitution and even rules are made with precisely this judicial function in mind.

Interpretation is the role of judges. It is a judge's job to know the law, to collect the facts and to draw legal conclusions by analogy. In this way judges become both the protectors and the arbiters of meaning.<sup>128</sup> To interpret the meaning of a statute, one can try to discern the specific intent of the legislature, or where new problems make it impossible or inapplicable, the purpose of the law. Where an interpreter must resort to the latter, however, and "the inquiry becomes steadily more abstracted from specific intent, . . . not only does its democratic legitimacy fade, but the inquiry becomes less determinate and perhaps more driven by" extra-legislative values and choices.<sup>129</sup> This puts statutory interpretation at odds with the rule of law.

Applying laws uniformly to all citizens is a primitive perspective on the role of judges and is so limited that it would practically obviate the need for judges at all. But judges are needed because the legislature cannot anticipate every eventuality to which the law will apply.<sup>130</sup> Judges, through narrow application of law to facts, can stabilize and refine the law through an iterative process. This prudent and long purification of the law contrasts with the predictable administration of a bureaucracy. This is the struggle of a Western judge to make the legal process normative, shaving off the hard edges of the law so that it reflects the society in which it exists.

The gap between Chinese legal constructs and Anglo-American constructs is widened by the fact of the primacy of the judicial system in the common law tradition and the relatively low status of legislation versus the overwhelming dominance of legislative law in the Chinese system. This gap between law as written and the law in practice in China "may be seen as a function of China's legal culture: the lack of respect for and the low status of law; and a willingness to set aside the law whenever it is in one's interest to do so, often in the name of finding flexible ways around rules."<sup>131</sup> However, it can also be seen as a function of the complex relationship between law and language in a culture where the legal language has developed primarily by translation between languages that come from extremely divergent cultural sources.<sup>132</sup>

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128. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

129. *ESKRIDGE*, *supra* note 105, at 222.

130. *D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp.*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) (recognizing, in the context of federal common law, the "futility of attempting all-complete statutory codes" if judges are impotent to develop law).

131. *CAO*, *supra* note 34, at 45–46.

132. *Id.* at 169.

From the American point of view, “Chinese law suffers from excessive generality and vagueness.”<sup>133</sup> Indeed, language in Chinese law is performative and imprecise, usually lacking tense or aspect. The Chinese language, itself an extension of the tenets and qualities of Confucianism, is heavily dependant on context.<sup>134</sup> Viewed from the Confucian perspective, this allows language and its referents to be flexible to the needs of the speaker.<sup>135</sup> However, in cases where context is missing or in dispute, misunderstanding inevitably ensues. This can be illustrated with the following phrase:

“*Shinian banian, Zhongguo de wenti dou jiejue le*”

*Literal translation:* “Ten year eight year, China’s problem all solved.”

*Meaning:* “China’s problem will all be solved.”

*English:* “In eight or ten years’ time, China’s problems will all have been solved.”<sup>136</sup>

Cao notes that there are no Chinese equivalent words to express the words in the English translation of this quote.<sup>137</sup> Similarly, other legal phrases such as “[s]hould have known” cannot be expressed in Chinese but rely entirely on context.<sup>138</sup> In the early translations of legal language between Chinese and English, words and concepts frequently had to be created just to facilitate communication.<sup>139</sup> For example, contracting terms were created to enable foreign investment and trade.

Because law is linguistically based, it is subject to the same translation problems that words are subject to (*i.e.*, the law will be affected by the influences of culture and social norms and worldview).<sup>140</sup> “Legal language is distinctive because it presupposes the existence of a legal system and presupposes particular rules of law, against the background of which legal language obtains its meaningfulness and particular meaning . . . .”<sup>141</sup> Further complicating translation and transmission is the inherent relationship of legal consciousness with the law underlying it. Where law has developed in a reciprocal relationship to society—such as in a constitutional democracy—legal culture and law become inseparable and indistinguishable. The

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133. *Id.* at 94.

134. *See id.* (detailing the importance of context in legal disputes).

135. *Id.* at 99.

136. *Id.*

137. *Id.* at 99–100.

138. *Id.* at 100.

139. Cohen lecture, *supra* note 11.

140. CAO, *supra* note 34, at 169.

141. *Id.* at 173.

converse—where positive law is applied over social culture—makes for an awkward tension between the two.

Legal culture also reflects the epistemology of the society in which it is formed.<sup>142</sup> In the West, not only is the *law* descriptive of social norms, that is, coming into existence after the norms are already in practice, but *legal culture* is an outgrowth of this descriptive phenomenon. Legal culture arises from the customs, opinions, and ways of thinking about and acting within the law.<sup>143</sup> Legal culture everywhere is local. It reveals how well the law—when it is applied—fits social norms.<sup>144</sup> Legal culture also reflects and forms our worldview, which in turn colors our language. Our worldview is shaped in part by our “horizon”—our range of vision allowing us to transcend our local discourse and systems, enabling us to see them as relative.<sup>145</sup>

To set this premise about legal culture and legal epistemology in context, China engaged in law building in the post-Maoist period, heavily borrowing from European and North American laws.<sup>146</sup> When it did so, it imported the Western belief system as embodied in its laws, which, operating in the context of local norms, set the groundwork for a new legal culture, not a copy of the Western legal culture. Apart from the elite business environment—arguably dominated by the Western negotiation parties rather than the law—there was no social context in which the imported legal culture fit.

Thus, it is not surprising that China’s “legislative system continues to fall short of the minimal standards of a thin rule of law” as understood by (or intended by) Americans and other Westerners.<sup>147</sup> As a result, it is generally agreed by legal scholars, domestic and foreign, that China’s laws and legal system overall cannot be said to be effective.<sup>148</sup> A Western rule of law advocate or businessperson is understandably anxious when faced with a system where the written law’s interpretation depends entirely on the individual Chinese judge hearing the case.

From a Western point of view, imprecise laws are extremely undesirable. Imprecise laws arise from an abuse of power, while an honest law is a law that states clearly what is expected and sets the social norms.<sup>149</sup> Furthermore, the enforcement of social norms is an inherently rational process full of the markings of an advanced civilization. In the West, the notion of immutable

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142. Pittman B. Potter, *Guanxi and the P.R.C. Legal System: From Contradiction to Complementarity*, in *SOCIAL CONNECTIONS IN CHINA*, *supra* note 10, at 181–82.

143. *Id.* at 181.

144. *Id.* at 182.

145. CAO, *supra* note 34, at 175.

146. Potter, *supra* note 141, at 181.

147. CAO, *supra* note 34, at 148.

148. *Id.*

149. *See supra* note 107 and accompanying text.



covenants and codification is as old as Moses<sup>150</sup> (older if you count Hamurabi).<sup>151</sup> These covenants of biblical times imply a promise of care by ruling leaders to their people—a promise that the people will not be forsaken and that they will be fairly rewarded for their obedience to a commonly understood law. This ancient notion of law informs the Western worldview that law is divinely handed down from God and is divine in itself. “Natural law” implies an immutable world order set in motion by God.<sup>152</sup> Natural law and divine law are the models for Western law and Western hierarchy.<sup>153</sup> Finally, the modern Western institutions of capitalism—the corporations, banks, regulatory agencies, and markets—are based on rational individuals organized toward sequential activities based on expansion and improvement under a common set of laws.

#### CONCLUSION: HARNESSING THE TAO OF *GUANXI*

Western scholars and practitioners alike are grappling with the questions surrounding legal development in China and the extent to which Chinese law should resemble Western law. The Western worldview of divinely-given power and law pervades the American mission to establish rule of law beyond its borders.<sup>154</sup> But this mission, like its predecessor, the American mission to spread democracy, is less about a sincere desire to share the benefits of a pluralistic representative democracy and more about the desire to ensure that other nations can operate adequately in a capitalist economy.<sup>155</sup>

To be sure, at the individual level, there are plenty of noble souls for whom establishing rule of law in developing nations is a meaningful humanitarian endeavor. But it is unlikely that any two people could agree on what the goal of “establishing rule of law” means without entirely referencing the American (or at least another Anglo-European) legal system or without speaking in negatives, *i.e.*, defining it by what it is not. That is because the term “rule of law” has been rendered meaningless.

George Orwell addressed this phenomenon in his seminal essay, *Politics and the English Language*.<sup>156</sup> He noted in 1946, before the Marshall Plan—a major post-war rule of law project, itself—or its equivalent in Asia had even

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150. See Exodus 19:23 (King James).

151. BODDE & MORRIS, *supra* note 89, at 9.

152. The Declaration of Independence was justified on the need of the people “to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them.” THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776).

153. Hamilton, *supra* note 9, at 192.

154. *Id.* at 197; Ruskola, *supra* note 5, at 657.

155. Behr, *supra* note 2, at 1173.

156. GEORGE ORWELL, *Politics and the English Language*, in ALL ART IS PROPAGANDA 270 (2008).

been conceived, much less begun, that words such as “democracy, socialism, [and] freedom . . . have each of them several different meanings which cannot be reconciled with one another.”<sup>157</sup> But rather than fostering a scholarly effort toward common understanding, political interests dishonestly exploit this confusion to their advantage.

In the case of a word like democracy, not only is there no agreed definition, but the attempt to make one is resisted from all sides. It is almost universally felt that when we [Westerners] call a country democratic we are praising it: consequently the defenders of every kind of régime claim that it is a democracy, and fear that they might have to stop using that word if it were tied down to any one meaning.<sup>158</sup>

A survey of recent political rhetoric would reveal that political powers have similarly co-opted the term “rule of law” today. Teemu Ruskola has recently put it this way: “Like ‘human rights,’ to which even human rights violators pay lip service, rhetorically the rule of law is just the kind of ‘unqualified human good’ to which no sane person would object.”<sup>159</sup> However, rule of law is an abstract notion, not even a clear concept. It is popularly held to be technical and neutral.<sup>160</sup> While it is held out as separate from American-style democracy and capitalism, it seems intimately tied to both, depending on who is speaking. “In China, for example, the state’s keenness for the rule of law seems often driven by a desire for foreign investment and the construction of (limited) markets.”<sup>161</sup>

The truth is that rule of law reform is intimately tied to the politics of “globalization.” That is, rule of law efforts are an effort by the West to address the hope and anxiety associated with the ever-increasing interdependence between nations. Globalization, once entirely tied to the spread of capitalist economies, transformed in the “Internet Age.” No longer do corporate interests control the exchange of information and goods between cultures. The Internet has enabled a communication free-for-all, which means not only positive exchange, enabling transmission of socio-political ideas, cultural masterworks, and the emergence of micro-economies, but also free

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157. *Id.* at 276 (emphasis omitted).

158. *Id.* (emphasis omitted).

159. Ruskola, *supra* note 5, at 658 (citing Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. INT’L L. 517, 526 (2001) and Morton Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 565 (1977)).

160. *Id.*

161. *Id.* (citing PITMAN B. POTTER, FOREIGN BUSINESS LAW IN CHINA: PAST PROGRESS AND FUTURE CHALLENGES 5, 35 (1995))

exchange of politically subversive ideas, child pornography, malware, and the use of surveillance by anyone.<sup>162</sup> The hope of this recent transformation is tied to the potential prosperity offered by shared resources, knowledge, and interdependencies. The anxiety arises from the corresponding vulnerability this brings to others’ *political* behavior.

As the United States becomes more interdependent with China, it becomes more vulnerable to Chinese politics. In this sense, politics is not simply the behavior associated with running the government. Politics refers to the shared norms that constitute the state in the first place.<sup>163</sup> These shared norms are the result of ancient compromises that determined the boundaries of nations,<sup>164</sup> in other words, what distinguishes friends from enemies. Politics in this sense is worldview.<sup>165</sup>

At the moment, globalization anxiety surrounds the question of whose worldview will survive. The rule of law effort is unquestionably an attempt to ensure that the Western worldview will prevail. American rule of law advocates are right to be anxious, though. Given the resilience of the Chinese culture and its 5,000 year history, it is much more likely that Chinese ways will completely subsume Western ones

Perhaps, a way to increase influence of rule of law principles on Chinese legal ways can be learned from the Tao. In Taoism, an ancient philosophy with its roots in China, success is attained not by resisting inward forces or forcing oneself or one’s own sense of order on the world, but by finding harmony through flexibility and receptiveness.<sup>166</sup> Instead of insisting on the defeat of *guanxi* and institution of the rule of law, the Americans and other Western-minded people advocating for the rule of law (or something like it) may be able to best share its benefits by first being more receptive to the Tao of *guanxi*.

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162. This concern recently became headline news when Google’s China division revealed evidence of Chinese spying and data mining of the private data of known human rights activists who had Google e-mail accounts. Tania Branigan, *Accounts Invaded, Computers Infected – Human Rights Activists Tell of Cyber Attacks: Authorities Blamed for Hacking into Gmail Users: Phishing Scams and Malware Used as Weapons*, GUARDIAN (UK), Jan. 15, 2010, § Guardian International Pages, at 26.

163. MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 35–38 (2003).

164. *See id.* at 36 (explaining the emergence of shared norms from the start of nation states).

165. Hamilton, *supra* note 9, at 184, 197–99.

166. Chapter 4.2 of the I-Ching reads: “We should blunt our sharp points, and unravel the complications of things; we should attemper our brightness, and bring ourselves into agreement with the obscurity of others. How pure and still the Tào is, as if it would ever so continue!” CHUANG-TSE, *TÀO TE CHING* [The Texts of Taoism] 50 (F. Max Müller ed. 2003) (James Legge trans. Oxford Univ. Press 1891), available at <http://www.sacred-texts.com/tao/sbe39/index.htm>.