

THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



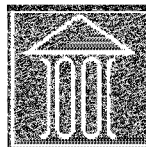
THE PARADOX OF CONFUCIAN DETERMINISM: TRACKING THE ROOT CAUSES OF INTELLECTUAL PROPERTY RIGHTS PROBLEM IN CHINA

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ABSTRACT

This article attempts to track China's intellectual property rights ("IPR") enforcement problem through exploring its fundamental institutional defects that fuels impunity of, or at least fails instilling an ethos hostile to, IPR infringements. By examining China's philosophical and institutional predisposition, this article argues that counterfeiting and piracy are not problems caused by the Confucian ethics, as the conventional wisdom underscores, but rather, among other things, a unique political phenomenon resulting from the systemic dystrophy fundamental to the institutional development. This article concludes that, to a large extent, the IPR enforcement problems in China are attributed to its unique bureaucracy characterized by the collectivist ideology, decentralized responsibilities, the lack of transparencies and the inadequate judiciary.

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INTRODUCTION

The Office of the United States Trade Representative (“USTR”) depicts China as one of the main offenders of intellectual property rights (“IPR”).¹ While China has established a full institution of IPR legislation,² its enforcement procedures are contrastingly fragile. There has been plenteous theoretical literature examining the impact of the standards of the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPs”) on Chinese legislation, while also addressing Chinese IPR enforcement problems.³ One potentially interesting testing ground that this literature does not empirically explore in much depth is how to identify the dominating aspect and focus accurately on the targeted problem. Moreover, one conventional, yet misleading, hypothesis links China’s enforcement problem to Confucian ethics.⁴ This hypothesis follows a mainstream point of view that Confucian values provide a pervasive and unconscious influence on their comprehension of, and commitment to, intellectual property laws.⁵ This argument is illustrated by the phrase “to steal a book is an elegant offence”⁶ (*qie shu bu suan tou*) indicating traditional Chinese culture has no concept that copying is an “offense”

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** Available at www.jmripl.com.

¹ *U.S.: China Has High Rate of Intellectual Property Infringement*, Apr. 29, 2005, <http://www.america.gov/st/washfile-english/2005/April/20050429155355mbzemog0.5231745.html> (last visited Apr. 3, 2007).

² Peter K. Yu, *The Second Coming of Intellectual Property Rights in China*, 11 BENJAMIN N. CARDOZO SCH. OF LAW OCCASIONAL PAPERS IN INTELL. PROP. 6 (2002).

³ *Id.* at 26–27, 31. See also JIANQIANG NIE, *THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 157–58, 161, 163 (2006) (describing China’s enforcement efforts in response to TRIPS requirements and questioning whether China should implement these efforts through its courts).

⁴ WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 19–23 (1995).

⁵ *Id.* at 19–20 (discussing that the Confucian culture militated against copyright protection and did not allow intellectual property protection to take root); see also Yu, *supra* note 2, at 44 (contending that “the culprit behind the Chinese piracy problem is the Confucian beliefs ingrained in the Chinese culture,” which contradicts intellectual property rights and is the real problem behind China’s inadequate protection of intellectual property rights); Alexander C. Chen, *Climbing the Great Wall: A Guide to Intellectual Property Enforcement in the People’s Republic of China*, 25 AIPLA Q.J. 1, 10 (1997) (mentioning that “Confucianism . . . provided [a] strong barrier[] to the idea of ‘intellectual property’ . . .”); Andrew Evans, Note, *Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws*, 31 GA. J. INT’L & COMP. L. 587, 588–90 (2003) (suggesting that Confucian ethics has been a philosophical obstacle to combating Chinese counterfeiting and piracy).

⁶ See ALFORD, *supra* note 4, at 19–23,

and, as a result, advantages from imitation on other's IPR are regarded as legitimate within Confucian culture.

This article attempts to track China's enforcement problem through exploring China's fundamental institutional defects that may fuel impunity of, or at least not instill an ethos hostile to, IPR infringements. By examining China's philosophical and institutional predisposition, this article concludes that counterfeiting and piracy are not problems caused by Confucian ethics, as conventional wisdom underscores, but rather, among other things, a unique political phenomenon resulting from the systemic dystrophy fundamental to the institutional development.

I. CONFUCIUS'S CONFUSION: IS STEALING A BOOK AN ELEGANT OFFENSE?

Confucius can be viewed as a popular international symbol of China, but Confucianism has also been acknowledged as the foundational philosophy of oriental civilization discerned in China, Japan and Korea.⁷ Unlike Western values which advocate individual rights, Confucian ethics emphasizes the virtue of austerity, hard work, teamwork and submission to authority, all of which have contributed to the economic development in the Eastern nations.⁸ In the "Confucianized region," the Confucian heritage has been cherished, nurtured and preserved over the centuries.⁹ In Japan and Korea, in particular, Confucian norms of moral precepts have permeated the intellectual life at large and have played a pivotal role in molding domestic culture as it exists today.¹⁰

In Japan, for instance, the cultural evolution has illustrated a continuing vitality of Confucianism. In Japan, Confucianism tended to be overshadowed by Buddhism in early nineteenth century but soon regained its dominant ethical position.¹¹ In the 1950s and 1960s, Confucianism was perceived as "an obstacle to modernization," but it reconfirmed its status as a "facilitator" in the 1980s.¹² In modern Japan, although not adopted and practiced as a religion, Confucianism has deeply influenced Japanese culture and custom,¹³ and these unique ethical values continue to permeate modern Japanese society and affect Japanese thinking.¹⁴ As noted by professors Edwin Reischauer¹⁵ and Marius Jansen,¹⁶ "[a]lmost no one

⁷ HYUNG KIM, FUNDAMENTAL LEGAL CONCEPTS OF CHINA AND THE WEST: A COMPARATIVE STUDY 15 (1981).

⁸ THE JAPANESE TRAJECTORY: MODERNIZATION AND BEYOND 5 (Gavan McCormack & Yoshio Sugimoto eds., Cambridge Univ. Press 1988).

⁹ Evans, *supra* note 5, at 589.

¹⁰ JAPAN: A COUNTRY STUDY 104 (Ronald E. Dolan & Robert L. Worden eds., 1992) (expressing Japan's intricate involvement with Confucianism); *see also* MARY E. CONNOR, THE KOREAS: A GLOBAL STUDIES HANDBOOK 180 (ABC-CLIO 2002) (expressing the impact of Confucianism on Koreans).

¹¹ EDWIN O. REISCHAUER & MARIUS B. JANSEN, JAPANESE TODAY: CHANGE AND CONTINUITY 203-04 (Harvard Univ. Press 1995).

¹² *See* THE JAPANESE TRAJECTORY, *supra* note 8, at 5.

¹³ JAPAN: A COUNTRY STUDY, *supra* note 10, at 103-04.

¹⁴ REISCHAUER & JANSEN, *supra* note 11, at 204.

¹⁵ *See generally* Emerson Chapin, *Edwin Reischauer, Diplomat and Scholar, Dies at 79*, N.Y. TIMES, Sept. 2, 1990, § 1, at 40. Edwin Reischauer was a leading U.S. educator and noted scholar of the history and culture of Japan, and of East Asia. *Id.* Most of his teaching career was spent at

considers himself a Confucianist today, but in a sense almost all Japanese are.”¹⁷ According to Reischauer and Jansen, while Japan has widely adopted democratic doctrines and embraced liberal values, strong Confucian traits still run deep in Japanese consciousness, and “Confucianism probably exerts more influence on Japanese than does any other of traditional religions or philosophies.”¹⁸ As renowned Japanese economist and professor Michio Morishima¹⁹ has noted, the European view underscores the individual, rather than the organization to which he or she belongs,²⁰ but the “Japanese rule emphasizes the importance of the organization, cooperation and teamwork, rather than the individual.”²¹ Each view delineates a distinct logic shaped by the culture in which it is embedded. The infrastructure of Confucian philosophy, based on the cardinal relationship and hierarchical order, has played a significant role in Japanese economic development²² and contributed substantially to its “economic miracle” subsequent to the Second World War.²³

Like Japan, Korea is another typical Confucian country, and the traditional Confucian social structure is still prevalent in modern Korean society.²⁴ As Mary Connor,²⁵ has pointed out, “nothing has shaped Korean society as much as Confucian philosophy.”²⁶ According to Connor, children in Korea are taught before the age of ten that their lives do not belong to themselves but to their families.²⁷ As professor Dr. Donald Clark²⁸ observes, it is unusual and unacceptable for a young Korean to make

Harvard University, where he became the director of the Harvard-Yenching Institute. *Id.* Professor Reischauer also served as U.S. ambassador to Japan in the 1960s. *Id.*

¹⁶ See generally Wolfgang Saxon, *Marius B. Jansen, 78, Scholar of Japanese History and Culture*, N.Y. TIMES, Dec. 26, 2000, at C6. Marius Berthus Jansen was a world-renown scholar and Emeritus Professor of Japanese History at Princeton University. *Id.*

¹⁷ REISCHAUER & JANSEN, *supra* note 11, at 204.

¹⁸ *Id.*

¹⁹ See generally Michio Morishima, TIMES (London), Aug. 4, 2004, at 27. Michio Morishima was a Japanese economist and emeritus professor of London School of Economics (“LSE”), Sir John Hicks Professor of LSE. *Id.* He was also emeritus professor of Osaka University and a member of the British Academy. *Id.*

²⁰ See MICHIO MORISHIMA, WHY HAS JAPAN ‘SUCCEEDED’? WESTERN TECHNOLOGY AND THE JAPANESE ETHOS (1982) (illustrating the weak reception of liberalism and individualism as an important factor of Japan’s economic achievements).

²¹ David Vaver, *The Future of Intellectual Property Law: Japanese and European Perspectives Compared* 5 (Oxford Intellectual Property Research Centre, Working Paper No. 09/99, 1999), available at <http://www.oiprc.ox.ac.uk/EJWP0999.pdf>.

²² CAROL GLUCK, JAPAN’S MODERN MYTHS, IDEOLOGY IN THE LATE MEIJI PERIOD 258–59, 286 (1985).

²³ MORISHIMA, *supra* note 20, at 19.

²⁴ See Kyu Ho Youm, *Libel Laws and Freedom of the Press: South Korea and Japan Reexamined*, 8 B.U. INT’L L.J. 53, 78 (1990) (using libel laws to demonstrate that Confucian ethics in Korea is still prevailing).

²⁵ See generally The National Peace Corps Association: Mary E. Connor, <http://www.rpcv.org/pages/sitepage.cfm?id=776> (last visited May 11, 2008). Mary Connor teaches AP U.S. History and Asian Studies at Westridge School, Pasadena, California. *Id.* In 2000 she received the Korea Society’s Fellowship in Korean Studies Program to study and travel in Korea. *TKS Events in Review*, KOREA SOC’Y Q., Fall 2000, at 23–24, available at http://www.koreasociety.org/download_document/87_volume_1_number_3.html.

²⁶ MARY E. CONNOR, THE KOREAS: A GLOBAL STUDIES HANDBOOK 180 (ABC-CLIO, Inc. 2002).

²⁷ *Id.*

²⁸ See generally Donald N. Clark, http://www.trinity.edu/departments/int_studies/faculty/dclark.htm (last visited May 11, 2008). Dr. Donald Clark teaches courses on China, Japan, Korea,

a seemingly important decision without taking into account the opinions of his parents.²⁹ In Korea, Confucianism was accepted so eagerly and in so strict a form that the Chinese themselves regarded the Korean adherents as more virtuous than themselves.³⁰ As noted by professor Choong Soon Kim,³¹ Koreans value harmony, social stability, a respect for cultivation, and motivational force, and tend to be obedient in hierarchical orders, which appears to be compatible with dynamic entrepreneurship in Korea.³² As a developing nation, Korea has received a positive commentary based on its accomplishment to retain traditional values while establishing its domestic industries.³³

Apparently, the hypothesis linking IPR violation to Confucian ethics fails to account for the current lower rates of counterfeiting and piracy in Japan and Korea which are equally, if not more, influenced by Confucian values than China. The significant difference is that both Japan and Korea have established stronger IPR regimes because of varying stages of economic development.³⁴ By accumulating sufficient indigenous capabilities with extensive science and technology infrastructures, these countries reached the later stage of technological development where IPR protection became an important element in domestic industrial activities.³⁵

While China shares the Confucian tradition with Japan and Korea, China's unique socialist ideology, administrative decentralization, inadequate judiciary and huge but inefficient bureaucracy have made intellectual property enforcement

and the history of American foreign relations at Trinity University, where he serves as Director of the International Studies Program. *Id.*

²⁹ DONALD N. CLARK, *CULTURE AND CUSTOMS OF KOREA* 32 (Greenwood Press 2000).

³⁰ Pamela A. Newman, *The Confucian Ethic: A System of Ideas in Korea*, at 225–27, available at http://www.koreasociety.org/component/option,com_docman/Itemid,35/task,doc_download/gid,191/; see also DENISE POTRZEBA LETT, *IN PURSUIT OF STATUS: THE MAKING OF SOUTH KOREA'S "NEW" URBAN MIDDLE CLASS* 14 (Harvard University Press 1998).

³¹ See generally Robert V. Kemper, *One Anthropologist, Two Worlds: Three Decades of Reflexive Fieldwork in North American and Asia*, 10 J. ROYAL ANTHROPOLOGICAL INST. 182 (2004) (book review). Choong Soon Kim is professor of anthropology at the University of Tennessee at Martin. *Id.*

³² CHOONG SOON KIM, *THE CULTURE OF KOREAN INDUSTRY: AN ETHNOGRAPHY OF POONGSAN CORPORATION* 57–59 (Univ. of Arizona Press 1992) (demonstrating, through an empirical study of Poongsan Corporation, that cultural traits of the Korean industrial success originate from Confucianism).

³³ Central Intelligence Agency's The World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/ks.html>. After the 1960s, Korea followed the Japanese model and developed into one of the "Four Mini Dragons." Edward A. Olsen, *Japan-South Korea Security Ties*, AIR U. REV., May–June 1981, at 60, available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1981/may-jun/olsen.htm>. Statistics compiled by the Central Intelligence Agency reveal that "[f]our decades ago GDP per capita was comparable with levels in the poorer countries of Africa and Asia." Central Intelligence Agency, *supra*. Today its GDP per capita is fourteen times the level of North Korea, and is "roughly the same as that of Greece and Spain." *Id.*

³⁴ Thomas G. Rawski, *Chinese Industrial Reform: Accomplishments, Prospects, and Implications*, 84 AM. ECON. REV. 271, 272 (1994) (mentioning that IPR enforcement is normally weaker in emerging markets than in developed markets).

³⁵ Linsu, Kim, *Technology Transfer and Intellectual Property Rights: The Korean Experience*, in UNCTAD-ICTSD PROJECT ON IPRS AND SUSTAINABLE DEVELOPMENT, at 1–2 (International Centre for Trade and Sustainable Development, Issue Paper No. 2, 2003) available at http://www.ictsd.org/pubs/ictsd_series/iprs/CS_kim.pdf.

intractable and unpredictable.³⁶ Despite the remarkable economic prosperity, China's political dilemma in its democratization process has provided an institutional account for its weak effectiveness of IPR enforcement. China's communist development trajectory which resulted in a lack of effective institutions had hindered compliance with modern IPR norms.

One notable element worth mentioning is the misunderstanding of Confucian values reflected by the misattributed proposition "To Steal a Book is an Elegant Offense" (*Qie Shu Bu Suan Tou*). This concept was not popularized until 1919 when the popular fiction *Kong Yiji* was published.³⁷ The author, well-known novelist Lu Xun, attempts to exemplify the obsolescence of a pathetic literature and criticize the conservative cultural heritage as a hindrance of social development.³⁸ In Lu Xun's portrayal, Kong Yiji was depicted as a descended scholar who was teased wherever he went.³⁹ He earned a living from copying manuscripts for rich patrons and sometimes stole books to trade for wine.⁴⁰ His act drew on his being caught and beaten.⁴¹ *To Steal a Book Is an Elegant Offense* was his argument when he was taunted.⁴² His tattered spirit is alien to Confucian values. However, he shares the same Chinese surname with Confucius ("Kong"), and this did much to cause and perpetuate confusion in the popular mind. Indeed, the phrase "To Steal a Book Is an Elegant Offense" was unknown to Chinese until Kong Yiji as a fictional character appeared in the early twentieth century and, interestingly, it was unpopular to foreigners until Professor Alford's book made its debut in the mid 1990s.⁴³

II. LORD YE'S FONDNESS OF DRAGONS: DILEMMA OF DEMOCRACY IN CHINA

In ancient China, a county magistrate in Chu Kingdom was called the Lord Ye (*Ye Gong*) who was known widely as a great lover of dragons.⁴⁴ The Lord Ye was so fond of dragons that the dragons were painted or carved on his walls, pillars, beams, furniture, window lattices and ceilings.⁴⁵ The dragon in heaven was moved and descended to earth to visit him.⁴⁶ At this sight, the Lord Ye fled in panic.⁴⁷ This

³⁶ NIE, *supra* note 3, at 243–53 (describing various political and judicial obstacles to efficient and effective enforcement of intellectual property rights in China).

³⁷ LU XUN, *Kong Yiji*, in NA HAN [OUTCRY] (People's Literature Press 1973), *translated in* LU XUN, *DIARY OF A MADMAN AND OTHER STORIES* 42–48 (William A. Lyell trans., 1990). Lu Xun (1881–1936), pseudonym of Zhou Shuren, was a short-story writer, essayist, critic, and literary theorist. JAMES REEVE PUSEY, *LU XUN AND EVOLUTION* (Univ. of Hawaii Press 1998); JON EUGENE VON KOWALLIS, *THE LYRICAL LU XUN: A STUDY OF HIS CLASSICAL-STYLE VERSE* (1996). He is arguably one of the greatest writers of modern China, and is considered a revolutionary pioneer by Chinese Communists. *Id.*

³⁸ *See generally* Xun, *supra* note 37, at 42–48.

³⁹ *Id.* at 43.

⁴⁰ *Id.* at 43–44.

⁴¹ *Id.*

⁴² *Id.* at 44.

⁴³ *Id.* at 42–48.

⁴⁴ *See* Xiao Min, *Jingdian Chengyu Gushi 1: Ye Gong Hao Long* [*Classical Chinese Idioms 1: Lord Ye's Fondness of Dragons*] 1:156 (Northeast Normal Univ. Press 2001).

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ *See id.*

story shows that Lord Ye was not genuinely fond of dragons but merely *images* of dragons—he professed love of what he actually feared (*ye gong hao long*).⁴⁸

Chinese central leaders are in such an ambivalent and self-contradictory position in terms of China's political transition.⁴⁹ China is currently standing at an ideological, social, and political crossroad: the intersection of a splendid economic landscape marred by lagging political reform.⁵⁰ The assumption that the spread of Beatles music and Mercedes Benz cars throughout China is representative of the triumph of Western democracy is only a myth.⁵¹ Chinese leaders maintain that the democracy is not a panacea for China's problems.⁵² Despite pious declarations of good intentions about political reform, the process of democratization seems to have stagnated.⁵³

On the other hand, however, there have been growing concerns that the ongoing economic reform may have opened a Pandora's Box of unintended consequences.⁵⁴ This dilemma has made Chinese leaders solicitous in initiating substantial political reform.⁵⁵ Although the principle of democracy has been introduced into the Constitution,⁵⁶ China likes democracy in the way of Lord Ye: China accepts the fame of democracy but does not embrace the spirit of it. While China has committed itself to a socialist "rule of law" state,⁵⁷ without the spirit of liberal democracy, the "rule of law" in China will unsurprisingly remain problematic. The enormous transformation of the political, social and economic landscape has fundamentally reshaped the beliefs and values of Chinese citizens.⁵⁸ Individual aspirations of the citizens are widespread, but they are released without a corresponding regulation system.

Having been frustrated to bring its political evolution into comprehensive correspondence with its economic growth, the Chinese government runs the risk of precipitating the social instability by means of high pressure.⁵⁹ Against the backdrop of economic transition, the Chinese government has found itself in a precarious

⁴⁸ See *id.*

⁴⁹ See generally Wei-Wei Zhang, *China's Political Transition: Trends and Prospects*, EURASIA BULLETIN, Oct.–Nov. 2003 (discussing China's recent attempts to reform the economy without reforming the political system and the problems caused by such an attempt).

⁵⁰ See *id.* at 11 (discussing that Chinese economic reform may better be described as "great economic reform with lesser political reform").

⁵¹ *Id.* at 12; see also Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 536 (2002) (noting that there are differences in fundamental values between Western democracies and Asian countries).

⁵² See INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., BUILDING OF POLITICAL DEMOCRACY IN CHINA, §1 A CHOICE SUITED TO CHINA'S CONDITIONS, available at [http://english.peopledaily.com.cn/whitepaper/democracy/democracy\(1\).html](http://english.peopledaily.com.cn/whitepaper/democracy/democracy(1).html) (last visited Apr. 5, 2008).

⁵³ See Xianglin Xu, *Yi Zhengzhi Wending Wei Jichu de Zhongguo Jianjin Gaige [China's Political Reform is Preoccupied by Instrumentalism]*, 5 STRATEGY AND MANAGEMENT (2000).

⁵⁴ See Zhang, *supra* note 49, at 12.

⁵⁵ See *id.* at 13 ("Most reformers still believe that political reform should be a gradual, pragmatic and experimental process.").

⁵⁶ *Id.*

⁵⁷ See XIAN FA art. 5, § 1 (2004) (P.R.C.) (stating that the People's Republic of China "practices building a socialist rule of law system").

⁵⁸ MARK BORTHWICK, PACIFIC CENTURY—THE EMERGENCE OF MODERN PACIFIC ASIA 403 (1992).

⁵⁹ *Id.*

position and has to confront the grievous crises derived from the unbalanced economic reform: regional disparities, rampant income gaps,⁶⁰ rising unemployment,⁶¹ widespread official corruption and, arguably the most serious, a collapse of traditional values.⁶² In order to survive the upheaval, people have to contemplate every possible approach they deem workable. Ironically, the money fetishism⁶³ that Karl Marx criticized over a century ago may now have been adopted as the credo of many people who are, or used to be, his faithful disciples.⁶⁴

Apart from the cascading societal and political problems that have reshaped the moral standards of Chinese citizens, China's rigid control over the religion has also contributed to the sprouting and growing of utilitarian impulse. As an entrenched international human right, it is recognized in all the important international human rights treaties and remains the focus of debate in a variety of international human rights bodies.⁶⁵ However, Chinese government has demonstrated a continued reluctance to be flexible in its religious policies and provide minimum guarantee for religious freedom.⁶⁶ As a result, a large percentage of the population, particularly the youth, lacks religious beliefs and the ethical support that those beliefs provide.

Although religion and law are usually viewed as two elements of moral values with distinct social identities, in reality, religious faith and legal order inevitably interact.⁶⁷ Of course while it is too arrogant to assert that morality would be impossible without religious belief, it may be true that, under religious principles, individuals are more inclined to adhere to an ethical code and bind themselves by social, legal or moral tie. The imposition of law by its own force or momentum is tenuous. Without religious belief and faith, there would be no developed multidimensional systems to provide a firm foundation to enable an enduring belief in law and, as such, no self-disciplining consciousness to constrain counterfeiting and piracy.

Another generic reason is the Chinese government's unwillingness to safeguard the freedom of speech. While China has achieved impressive economic prosperity, the central government has endeavored to maintain stringent control over the

⁶⁰ See *Income Gap in China Widens in First Quarter*, CHINA DAILY, June 19, 2005, http://www.chinadaily.com.cn/english/doc/2005-06/19/content_452636.htm (stating China's income gap continued to extend in the first quarter of 2005, with ten percent of its richest people owning 45 percent of the country's wealth, while China's poorest ten percent had only 1.4 percent of the nation's wealth).

⁶¹ See *China Expects Higher Urban Unemployment Rate in 2005*, PEOPLE'S DAILY ONLINE, Mar. 7, 2005, available at http://english.peopledaily.com.cn/200503/06/eng20050306_175774.html (stating 11 million urban residents were awaiting employment).

⁶² ANNE F. THURSTON, MUDDLING TOWARD DEMOCRACY POLITICAL CHANGE IN GRASSROOTS CHINA iii, xiii (1998), available at <http://www.usip.org/pubs/peaceworks/thurst23/thurst23.html>.

⁶³ KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, 81-96 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., The Modern Library 1936) (explaining how money fetishism attributes powers to an alien force that dominates social affairs).

⁶⁴ *Id.*

⁶⁵ LEONARD M. HAMMER, A FOUCAULDIAN APPROACH TO INTERNATIONAL LAW: DESCRIPTIVE THOUGHTS FOR NORMATIVE ISSUES 73 (2007).

⁶⁶ THURSTON, *supra* note 62, at iii, xiii.

⁶⁷ HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 209-20 (1993).

media.⁶⁸ Chinese mass media, which is criticized as the mouthpiece (*houshe*) of the Party, has been squeezed into the mission of issuing propaganda.⁶⁹ A recent example is the proposed national emergency law which has drawn a great deal of attention in China since June 2006.⁷⁰ This proposed law, which has the alleged objective of enhancing disaster responsiveness and ensuring administrative responsibility,⁷¹ includes a media clause that would impose heavy fines on news media reporting without authorization on natural disasters, public health incidents or industrial accidents.⁷² As a consequence, “coin it in silence” (*men sheng fa da cai*), which means making fortunes quietly without being associated with politics, has been a motto for many Chinese in their attempts of livelihood. In this circumstance, unless genuine effort is being taken by the government, it would be naturally assumed that people are well positioned to reap the benefits of piracy as a means of “making fortunes quietly.”

III. A SQUARE PEG IN A ROUND HOLE: INDIVIDUAL RIGHTS PROTECTION UNDER COLLECTIVIST IDEOLOGY?

In contrast to Western notions of property rights, Communism, the unprecedented socialist experiment calling for equality and freedom in the twentieth century,⁷³ substantially influenced cultural perceptions in modern China.⁷⁴ As Robert Weatherley has noted, Karl Marx deemed the individual as a “species being” who exists as an intrinsic part of the society to which he or she was born.⁷⁵ Upon the establishment of the People’s Republic of China (“PRC”) in 1949, China abolished the entire corpus of existing legal regime and began to introduce a new legal system based on the Soviet template.⁷⁶ As a consequence of the ideological predisposition, the mentality of sharing wealth became dominant, and the IPR regime was deeply embedded in the notion that “individual rights are most readily defended as effective

⁶⁸ See CONG.-EXECUTIVE COMMISSION ON CHINA ANN. REP. (2002), available at <http://www.cecc.gov/pages/annualRpt/2002annRptEng.pdf>.

⁶⁹ *Id.*

⁷⁰ *China Mulls Emergency Management Law*, XINHUA NEWS NET, June 24, 2006, available at http://english.gov.cn/2006-06/24/content_318883.htm.

⁷¹ *Id.*

⁷² See Shangwu Sun, *Emergency Response Law ‘Will Ensure Accurate Info,’* CHINA DAILY, July 14, 2006, at 1. Article 57 stipulates that “news media violating certain rules to report the development and handling of emergencies without authorization, or releasing fraudulent reports, will be fined between 50,000 Yuan (USD \$6,250) and 100,000 Yuan (USD \$12,500), if the reports lead to serious consequences.” *Id.*

⁷³ See A DICTIONARY OF MARXIST THOUGHT, 102–05 (Tom Bottomore et al. eds., Harvard University Press 1983) (discussing the different notions of property rights of communist and capitalist societies).

⁷⁴ See Brigitte Binkert, *Why the Current Global Intellectual Property Framework Under TRIPs is Not Working*, 10 INTELL. PROP. L. BULL. 143, 147 (2006).

⁷⁵ ROBERT WEATHERLEY, *THE DISCOURSE OF HUMAN RIGHTS IN CHINA: HISTORICAL AND IDEOLOGICAL PERSPECTIVES* 93, 104 (Palgrave 1999) (examining the relationship between and reconciliation of individual rights and the superiority of collective interests).

⁷⁶ See Geoffrey T. Willard, *An Examination of China’s Emerging Intellectual Property Regime: Historical Underpinnings, The Current System and Prospects for the Future*, 6 IND. INT’L & COMP. L. REV. 372, 417 (1996).

means to state ends.”⁷⁷ Accordingly, China’s IPR protection regime was built upon the foundation that sustains “the balance between collectivist and individualist thought,”⁷⁸ and “the harmony of interests between individuals and the state they belong to.”⁷⁹ In order to maintain a harmonious community, citizens are usually encouraged to consciously, and sometimes unconditionally, give up any rights in favor of the society.⁸⁰ Not surprisingly, collectivist ideology is apt to undermine IPR as a form of individual right.⁸¹

As a result, the transplanted IPR system is like “a square peg in a round hole,” making it “more of a wish list for foreign investors than a realistic and effective system” of global enforcement for IPR.⁸² Although the law has been introduced and implemented, there is an inertial way of thinking among some of China’s leaders to view IPR as a barrier to obtain modern technologies necessary for continued economic development.⁸³ Indeed, it is still a dominant discourse in China that in accepting reluctantly the incompatible standards for the protection of foreign IPR, China, together with other developing countries, are being exploited and dominated.⁸⁴ Ironically, while the American critics depict China as a “land of unethical pirates,” some Chinese see the United States as a “land of money-grabbing monopolists.”⁸⁵

Since the principle of intellectual property contravenes the fundamental beliefs of a collectivist society, implementation of IPR is thus undertaken with reluctance. Although the “door” has been opened for decades, and China has obtained membership of the World Trade Organization (“WTO”), public ownership remains dominant and China is still a Communist country in terms of constitutional ideology.⁸⁶ The negative aspects of the notions have not been rooted away entirely

⁷⁷ WEATHERLEY, *supra* note 75, at 128.

⁷⁸ Robert Bejesky, *Investing in the Dragon: Managing the Patent versus Trade Secret Protection Decision for the Multinational Corporation in China*, 11 TULSA J. COMP. & INT’L L. 437, 446 (2004).

⁷⁹ WEATHERLEY, *supra* note 75, at 95–96, 126–28 (explaining that, in Marxist thinking, individuals are not expected to exercise their rights in a way that fulfils a perceived need to protect themselves from the authority of the state, since the interests of individuals and the state are basically identical).

⁸⁰ WEATHERLEY, *supra* note 75, at 105–06.

⁸¹ Bejesky, *supra* note 78, at 447.

⁸² See Scott J. Palmer, *An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China*, 8 IND. J. GLOBAL LEGAL STUD. 449, 450 (2001).

⁸³ Andrew J. McCall, *Copyright and Trademark Enforcement in China*, 9 TRANSNAT’L LAW 587, 591 (1996).

⁸⁴ *Id.* (mentioning that the developing nations view the importation of intellectual property as a means of the developed nations to dominate and explore the developing world); see also, J. Cheng, *China’s Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT’L L.J. 1941, 1982 (1998) (maintaining that “China shares economic disincentives to the vigorous enforcement of intellectual property rights with many other developing countries”).

⁸⁵ Chen, *supra* note 5, at 8.

⁸⁶ XIAN FA art. 6 (1982) (P.R.C.). According to Article 6 of the Constitution, “the basis of the socialist economic system of the People’s Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. *Id.* The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of ‘from each according to his ability, to each according to his work.’” *Id.* “During the primary stage of socialism, the State adheres to the basic economic system

and still unconsciously influence comprehension and belief of intellectual property law, at least for some of Chinese leaders.

IV. CLAIMS OF PRIVATE RIGHTS UNDER PUBLIC OWNERSHIP

The Private property rights are among the fundamental concepts upon which many Western states are built and IPR was born of a predominantly Western concept of private property rights and benefits.⁸⁷ However, influenced by communist ideology and collectivist mentality, Chinese society has traditionally viewed private rights as individualization, which is considered immoral.⁸⁸ Unlike the constitutions in most developed countries which hold sacred the private rights, the Constitution of China does not explicitly address IPR.⁸⁹ It does, in contrast, place a strong emphasis on the public interest in terms of rights and responsibilities.⁹⁰ In addition, Chinese justice is “geared towards the settlement of specific disputes rather than defining the claims for private rights.”⁹¹ Although Marxist fundamentalism has been loosened by the new “pragmatic” Chinese leadership, the legacy of communitarian thought has a certain amount of inertia. As Weatherley explains, one possibly significant point to be drawn from the Chinese practice of defining rights is the unequivocal rejection of the concept that rights are universal.⁹² In a similar vein, a notable characteristic of China’s legal landscape is “the government’s establishment of the interrelated doctrines of legal equality and political inequality in the context of civil obligations.”⁹³ The comprehension of general private rights is nascent and, as such, the legislation for protecting them is in some senses rudimentary. The lack of rights consciousness illustrates, at least to some extent, how Western legal concepts are incompatible and incommensurable with Chinese traditions and aspirations.⁹⁴

V. OSSIFIED BUREAUCRACY AND DECENTRALIZED RESPONSIBILITIES

Effective enforcement calls for optimal allocation of responsibilities and resources among different authorities to ensure transparency and accountability at various levels. Unfortunately, China’s vertical administrative structure provides

with the public ownership remaining dominant and diverse sectors of the economy developing side by side, and to the distribution system with the distribution according to work remaining dominant and the coexistence of a variety of modes of distribution.” *Id.*

⁸⁷ Eric M. Griffin, *Stop Relying on Uncle Sam!—A Proactive Approach to Copyright Protection in the People’s Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 182 (1998).

⁸⁸ WEATHERLEY, *supra* note 75, at 93.

⁸⁹ Derk Bodde & Clarence Morris, *LAW IN IMPERIAL CHINA* 18–21 (Harvard University Press 1967).

⁹⁰ See XIAN FA arts. 10, § 3, 13 (1982) (P.R.C.). China’s existing Constitution emphasizes the “public interest” in terms of expropriation and requisition of land and private properties. *Id.*

⁹¹ Jill Chiang Fung, *Can Mickey Mouse Prevail in the Court of the Monkey King? Enforcing Foreign Intellectual Property Rights in the People’s Republic of China*, 18 L.A. INT’L & COMP. L.J. 613, 615 (1996).

⁹² WEATHERLEY, *supra* note 75, at 107.

⁹³ Palmer, *supra* note 82, at 454.

⁹⁴ *Id.* at 475–76.

significant scope for overlapping jurisdictions between enforcement institutions, which exhibit a substantial degree of heterogeneity across regions and result in parallel enforcement mechanisms.⁹⁵ A notable challenge in practice falls in the determination as to who asserts jurisdiction over the enforcement, which, in many circumstances, results in continuous bureaucratic turf battles among various national ministries and between central and local government agencies.⁹⁶ For instance, the Ministry of Commerce (“MOFCOM”)—Chinese chief negotiator equivalent to the United States Trade Representative (“USTR”)—acts merely as a coordinator over enforcement agencies and has no direct authorities over domestic enforcement as the USTR does. The result is ineffective enforcement that is the further complicated by a lack of financial resources and the emergence of decentralized administrative bureaucracies.⁹⁷

Having accomplished its mission of promoting a positive result of the WTO negotiations through the domestic bureaucracy, MOFCOM has “exhausted its political capital” and has little goodwill on which it can draw to ensure effective implementation of the result.⁹⁸ Accordingly, it has entered into a new stage of implementing these agreements, and thus it is the turn for other ministries such as the State Administration for Industry and Commerce (“SAIC”) to translate the agreements into action.⁹⁹ However, due to the lack of expertise and because of the departmental protectionism, the later is liable to impede appropriate initiatives and therefore slow down working efficiencies.¹⁰⁰

Thus the Trademark Office still remains under the control of SAIC, rather than being brought within the responsibility of the State Intellectual Property Office,¹⁰¹ which oversees only the patent matters.¹⁰² The Trademark Review and Adjudication Board (“TRAB”),¹⁰³ which should be independent from the Trademark Office, is nevertheless under the control of SAIC.¹⁰⁴ For example, “prior right” or malicious

⁹⁵ Daniel C.K. Chow, *Enforcement Against Counterfeiting in the People's Republic of China*, 20 NW. J. INT'L L. & BUS. 447, 454–55 (2000).

⁹⁶ Daniel C.K. Chow, *Counterfeiting in the People's Republic of China*, 78 Wash. U. L. Q. 1, 32 (2000).

⁹⁷ Jessica C. Wong, *The Challenges Multinational Corporations Face in Protecting Their Well-Known Trademarks in China*, 31 BROOK. J. INT'L L. 937, 965 (2006).

⁹⁸ Mark L. Clifford, *China's Fading Free-Trade Fervor*, BUSINESS WEEK ONLINE, June 5, 2002, available at http://www.businessweek.com/bwdaily/dnflash/jun2002/nf2002065_48_30.htm.

⁹⁹ Jay Sha, *Making the Most of Administrative Actions*, MANAGING INTEL. PROP., Supplement—China IP Focus 2006, available at <http://www.managingip.com/Article.aspx?ArticleID=1321355>.

¹⁰⁰ Clifford, *supra* note 98.

¹⁰¹ See generally SIPO ENGLISH, http://www.sipo.gov.cn/sipo_English/about/basicfacts/overview/200707/t20070723_182116.htm. The Chinese Patent Office was established in 1980 and renamed as the State Intellectual Property Office in 1998. *Id.*

¹⁰² JAY SHA, SUMMARY OF CHANGES OF CHINESE TRADEMARK LAW (Jeekai & Partners 2001).

¹⁰³ See Zhang Qiao, *Introduction of Trademark Review and Adjudication Board, SAIC, China*, in ITALIAN MINISTRY OF PRODUCTION ACTIVITIES, GENERAL DIRECTION FOR DEVELOPMENT, PRODUCTION AND COMPETITIVENESS (2005), available at <http://www.ice.gov.it/convegno/CD%20Cina/pdf/013%20Zhang%20Qiao.pdf>. The TRAB, an administrative organ established by SAIC, is responsible for the review and adjudication of trademarks with respect to the determination of the attribution of the trademark, exercising the right of final adjudication on matters of trademark review and adjudication. *Id.* at 108. A decision of TRAB is, however, subject to judicial review. *Id.* at 109.

¹⁰⁴ *Id.* at 105.

anticipatory registration of marks of fame is stipulated in the Trademark Law (2001)¹⁰⁵ in an effort to prohibit the registration of any mark copying or imitating other prior lawful rights.¹⁰⁶ These “prior rights” are recognized and accepted by some authorities but not by all. The registration of business names, for instance, is managed at different administrative levels and, at a local level, limited to a certain geographical area.¹⁰⁷ The business name registration remains separate and the resistance to recognition of such “prior rights” still exists among local AICs which are in charge of the registration.¹⁰⁸

Similar problems can be seen with regard to copyright. The National Copyright Administration (“NCA”) of China, the State Council’s copyright administrative control department, is responsible for, *inter alia*, the implementation of national copyright laws and international treaties, investigation of infringement cases, administration of external copyright relations and guidance for local authorities.¹⁰⁹ However, the NCA shares a “two in one” administrative system with the General Administration of News and Publication.¹¹⁰ The operation of this dual structure has inevitably led to insufficient resources and expertise of copyright and its arbitrary and incoherent performance. Moreover, some enforcement bodies, such as SAIC and the NCA, have seen cutbacks in staff and resources over the past years in light of the streamlining and restructuring efforts.¹¹¹ For example, as of early 2005, China’s Trademark Office, which had a backlog of 20,000 cases of trademark dispute, was still dealing with complaints filed in 1999.¹¹²

VI. SEEKING TRANSPARENCY IN “CAMERA OBSCURA”

Transparency as a WTO principle had been anticipated to be leverage to promote predictability and significantly alter the image of China’s legal system upon its WTO accession. While China has been implementing systematic reform towards its legal system, this expectation appeared to be over-optimistic. Indeed, despite the necessity of building rule of law-based administration and judiciary, the transparency in both administrative and judicial institutions in China remains

¹⁰⁵ Trademark Law (promulgated by the Standing Comm. Fifth Nat’l People’s Cong., Aug. 23, 1982, effective Mar. 1, 1983), art. 9, *translated in* INTELL. PROP. LAWS & REGS 31 (P.R.C) [hereinafter Trademark Law (P.R.C)].

¹⁰⁶ See Alexis Weissberger, Note, *Is Fame Alone Sufficient to Create Priority Rights: An International Perspective on the Viability of the Famous/Well-Known Marks Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 739, 771 (2006) (discussing recent changes in Chinese trademark law attempting to provide protection for unregistered but well-known foreign marks).

¹⁰⁷ Alisa Cahan, Note, *China’s Protection of Famous and Well-Known Marks: The Impact of China’s Latest Trademark Law Reform on Infringement and Remedies*, 12 CARDOZO J. INT’L & COMP. L. 219, 237–38 (2004).

¹⁰⁸ *Id.*

¹⁰⁹ Andy Y. Sun, *Beijing Court Dismissed Microsoft for Lack of Evidence: Major Software End User Infringement Case in China May Return Later*, 1 ASIAN PAC. L. INST. 2 (2000), *available at* <http://apli.org/ftp/APLIUpdate2.pdf> (explaining that under Article 8 of the Copyright Law, the NCA is the proper agency for copyright issues).

¹¹⁰ Wong, *supra* note 97, at 964.

¹¹¹ Chris Buckley, *Pushed on Patents, China Shoves Back*, INT’L HERALD TRIB., January 14, 2005, at 13, *available at* <http://www.ihl.com/articles/2005/01/13/business/yuan.php>.

¹¹² *Id.*

elusive. For example, the government's legal gazette often fails to provide updated notice of changes in administrative rules and regulations and the public has no steady and direct access to the legal databases.¹¹³ Moreover, the particular nature of China's legal system is largely reflected in what is categorized as internal (*neibu*) provisions and interpretations, which are normally unavailable to the public and which may be in contradiction with published laws and regulations.¹¹⁴

The lack of transparency, to a large extent, can be attributed to the Chinese preference for organizing systems by human relationship rather than regulation.¹¹⁵ Political compromise and consensus are usually reached in "smoke-filled rooms" rather than in a public arena. In a system driven by personal favors characterized by "attaining objectives in camera obscura" (*anxiang caozuo*), transparency becomes symbolic. As a consequence, the enforcement of IPR by relevant agencies has become a major structural problem within the bureaucracy, a system with a high degree of discretion based largely on "back door" political manipulation,¹¹⁶ which provides a raw portrayal of the Chinese bureaucracy. The intention of circumventing the excessive bureaucratic red tape leads to reluctance in addressing the IPR infringements, and many IPR proprietors have to seek assistance without recourse to legal system.¹¹⁷

VII. STRUGGLE OF THE JUDICIARY IN ADHERING TO THE "CORRECT POLITICAL ORIENTATION"

In China, it is part of tradition that infringers can "openly flaunt the law by relying on protection from friends [and relatives] in government."¹¹⁸ Personal networks with influential individuals are usually more important than legal provisions in seeking appropriate remedies.¹¹⁹ Indeed, as the Chinese proverb goes, "having friends in government is key to quenching everything intractable (*chao zhong you ren hao banshi*)."¹²⁰ Although anecdotal, social network (*guanxi*) does play a significant role in shaping a typical Chinese society. When encountered difficult problems, people tend to seek solution through personal relationship rather than legal support, particularly pursuing network as the avenue of first recourse.¹²⁰ The use of such network to influence judicial decision is common in China through which

¹¹³ Brent T. Yonehara, *Enter the Dragon: China's WTO Accession, Film Piracy, and Prospects for Enforcement of Copyright Laws*, 12 DEPAUL-LCA J. ART & ENT. L. 63, 101 (2002).

¹¹⁴ Reiko R. Feaver, *China's Copyright Law and the TRIPs Agreement*, 5 FLA. ST. J. TRANSNAT'L L. & POL'Y 431, 455 (1996).

¹¹⁵ Patrick Hu, *The China 301 on Market Access: A Prelude to GATT Membership?*, 3 MINN. J. GLOBAL TRADE 131, 144 (1994).

¹¹⁶ See Stanley Lubman, *Bird in a Cage: Chinese Law Reform after Twenty Years*, 20 NW. J. INT'L L. & BUS. 383, 390-91 (2000) (discussing the broad discretion granted to Chinese administrative agencies and their potential for arbitrariness).

¹¹⁷ Susan Tiefenbrun, *The Piracy of Intellectual Property in China and the Former Soviet Union and Its Effects upon International Trade: A Comparison*, 46 BUFF. L. REV. 11, 17 (1998).

¹¹⁸ Willard, *supra* note 76, at 430.

¹¹⁹ See Bejesky, *supra* note 78, at 474 (mentioning that "[p]ersonal connections with key individuals in emerging market countries are often more important than the written law").

¹²⁰ *Id.*

certain cases are specifically categorized as “*guanxi* cases,” which are expected to receive differential treatment.¹²¹

Moreover, the judicial system in China is still dependent upon local administration in finance and personnel.¹²² Under “unified leadership of the Party,” a judge in China is *de facto* a governmental official, and it is apparent that most of the judges are more than complacent about the political *status quo*.¹²³ As a consequence, courts are still expected to follow instructions articulated by the Party Committee and the government.¹²⁴ Indeed, there is a slogan which has been given wide publicity within the Chinese judicial system: “keeping firmly to the correct political orientation of the judiciary (*jianchi shenpan gongzuo de zhengzhi fangxiang*).”¹²⁵ Succumbing to pressures from the local government, judges may appear partial to local parties and government.¹²⁶

CONCLUSION

The IPR enforcement problem has its cultural element but cannot be attributable to the Confucian values as the mainstream view presents. The reality of China has, at least to some extent, proves the contrary—the rampant IPR enforcement problem is not due to the existence, but rather, due to the decline of the Confucian values. The IPR enforcement problem is not an actual outcome of Confucian philosophy and “to steal a book” is not an “elegant offence.”

China has committed itself to a socialist “rule of law” state, without the spirit of a liberal democracy. As a consequence, economic reform has not only brought about greater prosperity, but also created grievous crises. In addition, the restriction of religious belief and the tough control over freedom of speech have contributed to the growing of utilitarian impulse. In this context, there is no exaggeration that the counterfeiting and piracy are a natural consequence of a unique set of socioeconomic conditions that have their origin in the development of a dysfunctional institutional regime.

To a large extent, the IPR enforcement problems are attributed to its unique bureaucracy characterized by the collectivist ideology, decentralized responsibilities, the lack of transparencies and the inadequate judiciary. The reasons for the IPR enforcement problem in China are manifold and are interdependent. However, the political aspect, *inter alia*, plays a decisive role. With enigmatic political dilemmas that rival its economic prosperity, the ultimate outcome of IPR enforcement largely

¹²¹ Lubman, *supra* note 116, at 396.

¹²² Palmer, *supra* note 82, at 452; see also J. Cheng, *supra* note 84, at 1992 (discussing the problems of Chinese judicial system due to its “inability to render impartial judgments”).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See, e.g., Xiao Yang, *Kexue Fazhan Fayuan Shiye, Tuoshan Chuli Shi Ge Guanxi (Improving Judiciary Through Coping with Ten Essential Relationships)*, XINHUA NEWS NET, Jan. 5, 2006, available at http://news.xinhuanet.com/politics/2006-01/05/content_4014729.htm. Xiao Yang, the President of Supreme People’s Court, gave emphasis during an interview that the Court must respect the leadership of the Party conscientiously and keep firmly to the correct political orientation. See *id.*

¹²⁶ J. Cheng, *supra* note 84, at 1992–93.

depends on the political will of the Chinese leaders and the level of their attainment in combating political fragmentation. China's formula for success stems, to a great extent, from the highly authoritarian system and its absorbed promotion of coherent institutional reform and rule of law. To carry out such a reform in China's conservative and bureaucratic colossus must be an enormous challenge and the process can be lengthy. However, this is a learning curve for which there is no panacea.