

# What Virtues and Formalities Can Do for Corporate Social Responsibility and the Rule of Law in China?

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## Abstract

*This article explores sustainability problems in China and foreign interests on the 'rule of law' problems there. The article undertakes an organic process improvement method (Define, Measure, Analyze, Control – 'DMAC') in hope to improve the west's expectations of China and China's own becoming of a rule of law nation. Corruption and environmental problems are of particular interest; China's legal and political reform histories serve as our starting point; synergies between Confucian mercantile philosophy and modern corporate social responsibility principles are the undertones. The article will first **Define** the scope of China's environmental, social, and economic problems; it will **Measure** the effects of these problems by observing the ontological and metaphysical uniqueness of the Chinese notion of 'rule of law' from a historical perspective; the **Analysis** will involve identifying synergies between Confucianism and Corporate Social Responsibility (hereinafter 'CSR'); from these observations, this article will submit to **Controlling** steps. Consequently, this article recognizes the need for 'humanity' and 'formality', in the Chinese sense, to aid one's becoming of a law-biding person in China. The Chinese people will **Control** the laws that matter to them; those laws will evolve to cure the virtues of the people they are to govern.*

**Keywords:** Chinese rule of law, Corporate Social Responsibility (CSR), sustainability, Confucianism, formative free speech.

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What Virtues and Formalities Can Do for Corporate Social Responsibility and the Rule of Law in China?

*The ancients, who wished to spread virtue throughout the world, began with their own States. To govern well their States, they gathered their families. Wishing to unite their families, they cultivated their persons. Wishing to cultivate their persons, they rectified their hearts. To rectify their hearts, they sought to be sincere. To be sincere in their thoughts, they cured their imperfect knowledge through learning. Knowledge lay in the investigation of things.*

*The Great Learning, Confucius<sup>1</sup>*

*We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.*

*Robert M. Cover<sup>2</sup>*

## A. Introduction

We come to a point in our human experience: we have the ability and the responsibility to “make development sustainable – to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>3</sup> China and the United States are two nations in desperate need to start a dialogue<sup>4</sup> in finding new sustainable ways of doing business; cooperation is not to be taken lightly by either side – intentions should be sincere, rational, and

1 古之欲明明德於天下者，先治其國。欲治其國者，先齊其家。欲齊其家者，先修其身。欲修其身者，先正其心。欲正其心者，先誠其意。欲誠其意者，先致其知。致知在格物。(There are variations on the translation of this famous passage; the translation provided here is my own interpretation of the teachings.)

2 R.M. Cover, ‘Foreword: Nomos and Narrative’, *Harvard Law Review*, Vol. 97, No. 4, 1983.

3 World Commission on Environment and Development, *Our Common Future*, Oxford Press, Oxford, 1987, p. 8, available at: <<http://un-documents.net/wced-ocf.htm>>.

4 “Dialogue means **compromise**; respecting each other’s rights. In the spirit of reconciliation there is a real solution to conflict and disagreement. There is no hundred percent winners, no hundred percent losers. That is the practical way, the only way”. Buddhist proverb.

Jin Kong

within the scope of sustainable growth.<sup>5</sup> International norms should be respected; this article will be mindful of the legal indeterminacy and the ontological gap between cultures.<sup>6</sup>

This article takes flight;<sup>7</sup> it explores sustainability generally by a 'DMAC' organic<sup>8</sup> method: the article will first *define* the scope of China's environmental, social, and economic problems; it will *measure* the observable effects through observing ontological and metaphysical uniqueness of the Chinese notion of 'rule of law' from a historical perspective; the *analysis* will involve identifying some observable synergies between Confucianism and CSR; from these observations, this article submits to the *control* steps.

Three facets of sustainability provide backdrop for the discussions here: the social impact of economic growth within China's provincial governance, the environmental impact on the Chinese people under those provincial governances; and the economic synergies to promote sustainable growth in China.<sup>9</sup> These are general topics of reference within the developing doctrine of sustainability encompassing people, planet, and profit; each is a body of knowledge too broad to explore in any detail here.

- 5 The Rio Declaration on Environment and Development (1992) reaffirmed the Stockholm Declaration on Human Environment (1972) and sought to build upon the 1972 principles supplementing environmental stewardship with sustainable thinking. Specifically, the Rio Declaration calls for international cooperation "in good faith and in a spirit of partnership in the fulfillment of the principles [to] the further development of international law in the field of sustainable development". UN Conference on Environment and Development, 3-14 June 1992, A/CONF. 151/26, Vol. I, 1992, available at: <<http://un.org/documents/ga/conf151/aconf15126-1annex1.htm>>.
- 6 E.g., M.C. Modak-Truran, 'A Process Theory of Natural law and the Rule of Law in China', *Penn State International Law Review*, Vol. 25, 2008, p. 607.
- 7 This article presumes that the Chinese modern jurisprudence stands much on a 'process metaphysics . . . maintain[ing] that the final real things of the universe are actual occasions or entities, which are units of process (or processes of becoming) rather than substances (being) in the traditional sense'. *Ibid.*, p. 623; the significance of this is that while a 'process natural law requires a substantive conception of rule of law similar to the usual Western conception because it also includes formal legality, individual rights, and democracy', its very metaphysics fits the heavily Confucian influenced Chinese legal reality. *Id.*, p. 641.
- 8 The presumption of process type metaphysics naturally led to the application of a process improvement method of *Define, Measure, Analysis, and Control* ('DMAC'). It is organic in the sense that it is intended to continuously improve – an act of becoming as opposed to being. See generally M. Williams et al. (Ed.), *Quality Council of Indiana, Certified Six Sigma Black Belt Primer*, Quality Council of Indiana, Terre Haute, IN, 2007.
- 9 "Sustainability science is science, technology, and innovation in support of sustainable development – meeting human needs, reducing hunger and poverty, while maintaining the life support systems of the planet." The people, planet, and profit – sustainability – scope is much more complicated than this article suggests. This article's concern with sustainability is purely a metaphysical one and does not require a substantive undertake of the science behind sustainability. This article only assumes a framework and not the substantive body of knowledge. E.g., R.W. Kates (Ed.), *Center for International Development, Harvard University, Readings in Sustainability Science and Technology – An Introduction to the Key Literatures of Sustainability Science*, CID Working Paper No. 213, 2010, available at: <[www.hks.harvard.edu/var/ezp\\_site/storage/fckeditor/.../213.pdf](http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/.../213.pdf)>.

## I. Define – Pertaining to Sustainability and Rule of Law in China

### 1. China's Sustainability Crisis

Sustainability studies focuses on the triple-bottom-line – people, planet, and profit.<sup>10</sup> Of the three, this article aims to explore the environmental impact and resource scarcity problems, and the economic and social instabilities because of those problems. As China continues to upgrade itself, continues market reforms,<sup>11</sup> and as its middle class and domestic consuming base continues to grow, the United States stands to benefit from a strengthened economic partnership. Yet, economic aggressions and corporate voracity must not surpass the United Nation's call for sustainable transitions and must not outstrip the health welfare and safety of people and planet.

With that in mind, we commence with finding the predictors of our process; we start with the *definition* phase.

#### a. Environmental Problems

Of China's environmental problems, perhaps none is more critical than the scarcity of water. China houses nearly 20% of the world's population,<sup>12</sup> with almost half gathered in cities.<sup>13</sup> It only captures 8% of the world's fresh water supply, making the scarcity a disproportional problem.<sup>14</sup> Much of China's water is also unsuitable for human consumption due to heavy pollution. A 2006 report stated that "28 percent of all 745 monitored river sections reported water quality. . . [are] unsafe for any use . . . , [and] 30 percent of major city drinking water sources . . . [are] unsafe for human consumption . . ."<sup>15</sup> China's efficiency and productivity of water usage is comparably low: its productivity is \$3.60 per cubic meter, "considerably lower than the average of middle-income (\$4.80/m<sup>3</sup>) and

10 *Ibid.*

11 See generally S. Shen & K. Takada, *Analysis: China reshuffle could accelerate capital market reforms*, available at: <<http://reuters.com/article/2011/11/01/us-china-financial-reshuffle-idUSTRE7A00Y620111101>>.

12 The world's population reached seven billion according to the U.N. See *The Washington Post*, 'United Nations marks world population milestone: 7 billion people', available at: <[http://washingtonpost.com/world/asia-pacific/nations-worldwide-honor-various-7-billionth-babies-symbolizing-global-population-milestone/2011/10/31/gIQAe6rGYM\\_story.html](http://washingtonpost.com/world/asia-pacific/nations-worldwide-honor-various-7-billionth-babies-symbolizing-global-population-milestone/2011/10/31/gIQAe6rGYM_story.html)>. According to the CIA fact book, China has approximately 1.34 billion people. See *The World Factbook*, available at: <[www.cia.gov/library/publications/the-world-factbook/geos/ch.html](http://www.cia.gov/library/publications/the-world-factbook/geos/ch.html)> (while no one can be sure the exact proportion of China's population to the world's, it should be noted China's population density is significantly higher than that of U.S. and other developed nations except with respect to India).

13 "The percentage of China's population living in cities rose from 13% to 40.4% between 1950 and 2005. It is predicted to rise to 60.3% by 2030." *Guardian News*, 'Percentage of global population living in cities, by continent', available at: <[www.guardian.co.uk/news/datablog/2009/aug/18/percentage-population-living-cities](http://www.guardian.co.uk/news/datablog/2009/aug/18/percentage-population-living-cities)>.

14 T. Riley, & C. Huiyan, 'Unmasking Chinese Business Enterprises: Using Information Disclosure Laws to Enhance Public Participation in Corporate Environmental Decision Making', *Harvard Environmental Law Review*, Vol. 33, No. 177, 2009, pp. 184-185.

15 The World Bank, World Bank Technical Assistance Program 'China: Promoting a Circular Economy' Policy Note, *Developing a Circular Economy in China: Highlights and Recommendations*, 2009.

Jin Kong

much lower than that of high-income countries (\$35.80/m<sup>3</sup>);<sup>16</sup> its waste treatment rates is a modest “56 percent of urban domestic wastewater and 54 percent of solid waste were treated in 2006 . . . .”<sup>17</sup> More than 600 million people live under water stress.<sup>18</sup> Unsanitary water and scarcity cause a plethora of “diarrheal diseases, hepatitis, cholera, and typhoid”.<sup>19</sup>

China’s air problem is more visible.<sup>20</sup> China is “ranked 128th out of 133 countries in terms of overall air quality, the worst among all Asian-Pacific nations”.<sup>21</sup> A major contributing factor to the air problem is “[l]ow efficiency, high ash, high sulfur coal [that] provides two-thirds of China’s total energy . . . contribut[ing] approximately one billion tons of climate-altering carbon into the atmosphere each year, or 14% of the world’s total carbon emissions”.<sup>22</sup> Acid rain caused by coal burning damages about 30% of China’s crops and buildings.<sup>23</sup> Some of the most populated cities’ air in China is now three times more polluted than that of L.A.<sup>24</sup> According to the World Health Organization, “[p]oor outdoor air quality leads to various respiratory ailments”.<sup>25</sup>

#### b. Social and Economic Issues and the Rule of Law Problem

The egregious environmental problems not only drain China’s economy in terms of process inefficiency and health care costs, they also threaten China’s political

16 *Ibid.*

17 *Ibid.*

18 *The New York Times*, ‘China’s Environmental Crisis’, (interactive map) (2007), available at: <[http://nytimes.com/interactive/2007/08/26/world/asia/20070826\\_CHINA\\_GRAPHIC.html](http://nytimes.com/interactive/2007/08/26/world/asia/20070826_CHINA_GRAPHIC.html)>.

19 Riley & Huiyan, 2009, p. 186. *See also* Organisation for Economic Co-operation and Development (OECD), *Environmental Performance Review of China*, Vol. 7, 2006, available at: <[www.oecd.org/dataoecd/58/23/37657409.pdf](http://www.oecd.org/dataoecd/58/23/37657409.pdf)>.

20 *The New York Times*, ‘China, The World’s Smokestack’, (photo series), (2007), available at: <[www.nytimes.com/packages/html/world/20070826\\_China\\_Overview\\_Feature/index.html](http://www.nytimes.com/packages/html/world/20070826_China_Overview_Feature/index.html)>.

21 Riley & Huiyan, 2009, p. 185 (quoting Yale Ctr. for Env’tl. L. & Pol’y & Ctr. for Int’l Earth Science Info. Network, *Pilot 2006 Environmental Performance Index 52*, available at: <<http://epi.yale.edu/Home>>).

22 *Ibid.* (quoting The World Watch Institute, *State of the World 2006: Special Focus: China and India*, at xv (2006)).

23 *The New York Times*, ‘China’s Environmental Crisis’, (interactive map) (2007), available at: <[www.nytimes.com/interactive/2007/08/26/world/asia/20070826\\_CHINA\\_GRAPHIC.html](http://www.nytimes.com/interactive/2007/08/26/world/asia/20070826_CHINA_GRAPHIC.html)>.

24 To illustrate: Lanzhou, Beijing, and Wuhan, all recorded three times of the number of air particles than Los Angeles in 2005. *See The New York Times*, ‘China’s Environmental Crisis’, (interactive map) (2007), available at: <[www.nytimes.com/interactive/2007/08/26/world/asia/20070826\\_CHINA\\_GRAPHIC.html](http://www.nytimes.com/interactive/2007/08/26/world/asia/20070826_CHINA_GRAPHIC.html)>. The *New York Times*’ interactive map also illustrated land pollution problems in China. The information is not enumerated in this article, however.

25 Riley & Huiyan, 2009, p. 186 (quoting World Health Org., *Environmental Health Country Profile – China 8* (2005), available at: <[www.wpro.who.int/NR/rdonlyres/1BAA5515-9571-4383-BA1D-169BDD4A8C38/0/China\\_EHCP\\_EHDS\\_9jun05.pdf](http://www.wpro.who.int/NR/rdonlyres/1BAA5515-9571-4383-BA1D-169BDD4A8C38/0/China_EHCP_EHDS_9jun05.pdf)>).

confidence in the Chinese Communist Party.<sup>26</sup> Clean up costs and resource shortage continue to put pressure on China's conservative fiscal policies.<sup>27</sup> While the central government is more than willing to promulgate laws to address issues,<sup>28</sup> it is still up to the provincial governments to enact provisions and enforce them.<sup>29</sup> The provincial politicians, either exercising protectionism or preserving their opportunity for promotions within the ranks of the Chinese Communist Party (hereinafter 'CCP'), often disregard national laws and central government rules enacted to protect the environment and human rights.<sup>30</sup> Chinese disclosure laws are notoriously weak and make knowing how the provincial political process works near impossible.<sup>31</sup>

In the interests of GDP progress, however, Chinese provincial authorities often yield to special interests making the "[e]nvironmental protection [laws] . . . [where] the highest levels of bribery and corruption [take place] in the first six months of 2010".<sup>32</sup> According to the World Bank, corruption is a large part of the "institutional failures that result in low resource productivity and severe pollution".<sup>33</sup> These institutional failures are often cited to weak legal institution and lack of government transparency.<sup>34</sup> While we can guess the motives behind China's secrecy, its weak legal institutions are inexplicably inexcusable since China boasts length, breadth and depth in its legal traditions.<sup>35</sup>

It is notable that the Chinese traditionally do not embrace the use of "lawyers, courts, or the law in general to resolve disputes".<sup>36</sup> To blame only govern-

- 26 The 2011 Congressional Report on China noted: "Citizens continued to express their environmental grievances and sometimes protested in the streets, including at a protest against a chemical plant in Dalian city, Liaoning province, involving over 10,000 citizens who 'took a walk' in front of government and Communist Party buildings." Cong.-Exec. Comm'n on China, Annual Report (hereinafter the "Congressional Report"), p. 31 (2011). Other notable protests including one in Fujian against landfill operations, another in Jiangsu province against waste incinerators, and numerous protests in Inner Mongolia and Tibet against mining operations. *Ibid.*
- 27 'In October 2010, a Chinese research institute completed a "Green GDP" report on the economic impacts of environmental pollution in China, which asserts that the economic costs of environmental pollution and ecological damage have risen 74.8 percent over a five-year period from 2004 to 2008, equaling about 3 percent of GDP'. *Congressional Report*, p. 139.
- 28 *E.g.*, the Chinese Clean Production Laws and Circular Economy Laws: Charles R. McElwee, *Environmental Law in China, Mitigating Risk and Ensuring Compliance*, Oxford Press, 2011, pp. 64-65.
- 29 D.J. Goelz, 'China's environmental problems: Is a specialized court the solution?', 18 *Pacific Rim Law & Policy Journal*, 2009, p. 155.
- 30 *Ibid.*, p. 168.
- 31 *E.g.*, T. Riley & H. Cai, 'Unmasking Chinese business enterprises: using information disclosure laws to enhance public participation in corporate environmental decision making', *Harvard Environmental Law Review*, Vol. 33, 2009, p. 177.
- 32 Congressional Report, p. 31.
- 33 The World Bank, 'World Bank Technical Assistance Program "China: Promoting a Circular Economy" Policy Note', *Developing a Circular Economy in China: Highlights and Recommendations*, 2009.
- 34 *See e.g.*, Goelz, 2009, p. 168; W.P. Alford & Y. Shen, 'Limits of the Law in Addressing China's Environmental Dilemma', *Stanford Environmental Law Journal*, Vol. 16, 1997, p. 125; *See* Riley & Cai, 2009, p. 177.
- 35 J.W. Head, *Global Business Law, Principles and Practice of International Commerce and Investment*, (2nd edn), Carolina Academic Press, 2007, pp. 58-59.
- 36 Goelz, 2009, p. 168.

Jin Kong

ment secrecy and weak institution is insufficient. This article observes correlations between modern Chinese legal development and enforcement problems to further define the issues needing our attention.<sup>37</sup>

## II. *The Chinese Legal Institution and Its Moral Challenges*

The Chinese legal institution is a grab bag of philosophical influences. For over 2000 years, Confucianism, Daoism and Legalism heavily influenced and controlled the legal institutions prior to China's modern legal reforms.<sup>38</sup> Unfamiliar to non-natives, modern China retains a holistic and complex practice of old Confucian formalities<sup>39</sup> within the social, political and legal institutions.<sup>40</sup> The Confucian rituals and practices are deeply *encoded*<sup>41</sup> in the Chinese consciousness and cannot be censored as easily as its moral philosophy. During the Cultural Revolution, Confucian teachings were banned due to their 'imperial' ties. Many books were labelled as corrupt thoughts contrary to the Communist ideologies; while one can burn books, but rituals and customs so encoded in a people's conscious-

37 See generally A. Young, *Retracting the Roots and ideals of Confucian Principles of Governance: the Art of Regulating Governance without Legal Rules in Chinese Societies*, (forthcoming), available at <<http://ssrn.com/abstract=1740037>>; see also M. Szto, *Strengthening the Rule of Virtue and Finding Chinese Law in 'Other' Places: Gods, Kin, Guilds, and Gifts*, 2011, available at: <<http://ssrn.com/abstract=1766023>>. E.g. Alford & Shen, 1997, p. 125; Y. Hsing, C.K. Lee (Eds.), *Reclaiming Chinese Society, The New Social Activism*, Routledge, London, 2010.

38 See generally, J.M. Zimmerman, *China Law Deskbook, A Legal Guide for Foreign-Invested Enterprises*, (2nd edn), American Bar Association, US, 2008, pp. 32-36.

39 Most Chinese people believe "[p]roper [Confucian] rituals led not only to prosperity in this lifetime, but also for the life to come. If one honored one's earthly and spiritual superiors, surely one's descendants would follow suit. Therefore, gift giving and feasting, both then and now, are pillars of Chinese social interaction, negotiation and justice. They are the pinnacle of communal abundance, contract formation and dispute resolution." See Szto, 2011, p. 5, available at <<http://ssrn.com/abstract=1766023>>.

40 See generally, *ibid.*

41 "Chinese as a language is highly coded language with pseudo-historical anecdotes and customs not explicit for non-Chinese, as this language is best understood through shared values and customs, and in particular from Confucian doctrines." A. Young, *Retracting the Roots and ideals of Confucian Principles of Governance: the Art of Regulating Governance without Legal Rules in Chinese Societies*, (forthcoming), available at <<http://ssrn.com/abstract=1740037>>.

ness do not perish so easily.<sup>42</sup> The detachment of Confucian moral philosophy from its still practiced rituals and formalities, unfortunately, have elevated modern China's corruption practices and made China into "the world's fastest growing luxury goods market".<sup>43</sup> Professor Young points out, in addition, that empty Confucian formalities exercised in a socialist free market vacuum, turned China into a nation with a severe banquet-drinking problem: official "banquets" or, business negotiation dinners, "account for one third of the nation's dining out expenses" and prices of business deals are sometimes determined by the amount of 'bajiu' one can consume in one setting.<sup>44</sup>

Confronting this complex social and economic problem of corruption and enforcement, Professor Young urges "the study of contemporary rituals and invisible accountability embedded in Chinese law today, and a strengthening of the rule of virtue to avoid excesses".<sup>45</sup> Recognizing the interdependencies between modern need for "rule of law" and entrenched Confucian formalities and influences, Young argues that "[w]ithout exploring ritual and other codes, China's traditional state codes seem incomplete; without exploring contemporary rituals, China's current legal regime likewise is incomplete".<sup>46</sup>

In light of China's sustainability problems and its corrupted contemporary rituals disembodied from its once dominant Confucian philosophies, the Chinese government is trying very hard to balance a uniquely Chinese socialist principles with its even more unique grab bag of ontology. China is perhaps more accepting to international legal standards these days, sometimes even copying word-by-word foreign laws into the Chinese institutions slightly amended only by its own

42 I also wonder if China has a choice here to continue its brute force enforcement methods; or if simply enacting free speech provision in its Constitution is meaningful or enough. To properly enforce law and order and to bring health to the process, the freedom to create must exist; creativity is fundamental to a new sustainable future market. *E.g.*, Sir K. Robinson, (TED Video) 2006, available at: <[www.ted.com/talks/ken\\_robinson\\_says\\_schools\\_kill\\_creativity.html](http://www.ted.com/talks/ken_robinson_says_schools_kill_creativity.html)>;

[O]ur only hope for the future is to adopt a new conception of human ecology, one in which we start to reconstitute our conception of the richness of human capacity. Our education system has mined our minds in the way that we strip-mine the earth, for a particular commodity, and for the future, it won't serve us.

We have to rethink the fundamental principles on which we're educating our children. There was a wonderful quote by Jonas Salk, who said, "If all the insects were to disappear from the earth, within 50 years all life on earth would end. If all human beings disappeared from the earth, within 50 years all forms of life would flourish." And he's right.

. . . We have to be careful now that we use this gift wisely, and that we avert some of the scenarios that we've talked about. And the only way we'll do it is by seeing our creative capacities for the richness they are, and seeing our children for the hope that they are. And our task is to educate their whole being, so they can face this future — by the way, we may not see this future, but they will. And our job is to help them make something of it.

*Id.*

43 Young (forthcoming), available at: <<http://ssrn.com/abstract=1740037>>.

44 *Ibid.* (There are cases where "drinking regularly accompanies negotiations but unfortunately officials have died because of excessive drinking at state functions." *ibid.*)

45 *Ibid.*, p. 3.

46 *Ibid.*

Jin Kong

ideas of a “socialist free market”.<sup>47</sup> All of China’s efforts, so far, and the United States’ expectations, seem somehow incomplete.

## B. *Measure – In Flight, A Very Different Modern Chinese Taxonomy of Social Order*

Regarding Confucian logic, Foucault writes:

A ‘certain Chinese encyclopaedia’ in which it is written that “animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies”.

In the wonderment of this taxonomy, the thing we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*. But what is it impossible to think, and what kind of impossibility are we faced with here?

Professor Young observes: Foucault “exemplify[ies] how certain aspects of Confucian doctrines could be difficult to decipher from Western perspectives”.<sup>48</sup> Although “perplexing”,<sup>49</sup> it “does not mean Chinese society or philosophy is irrational, it is merely different”.<sup>50</sup> Chinese style laws that are often vague, principle-driven, lack the preciseness and clarity of their western counterparts; yet these attributes gives what once was held by Confucian, mixed with Daoist and Buddhists, virtues a distinct advantage to manage a very geographically and culturally diverse kingdom. This article proposes, then, that Chinese laws are not necessarily impractical or ineffective *per se* – as the government lay them out on open papers; but for the reasons western legal critics believe it irrational, these laws are

47 The People’s Republic of China, State Council, *The Socialist Legal System with Chinese Characteristics*, (2011) (hereinafter “State Council whitepaper”), available at: <[www.china.org.cn/government/whitepaper/node\\_7137666.htm](http://www.china.org.cn/government/whitepaper/node_7137666.htm)>.

48 Young, (forthcoming), pp. 2-3, (quoting Michael Foucault, *The Order of Things: An Archaeology of the Human Sciences*, p. xv., Vintage Books, 1994).

49 Mrs. Deborah Fallows, Pew Research Center Senior Researcher, a PhD linguist and author of *Dreaming in Chinese*, recounted in a speaking engagement of her encounter with a young soldier providing security to a bridge in Beijing; the soldier had refused her access to the bridge while other walkers were allowed coming from the opposite direction. Answering an audience question regarding China’s military power, Mrs. Fallows pointed out that an elder woman had successfully shamed the young soldier into allowing Mrs. Fallows to use the bridge; she argued, if a Chinese soldier is so simply overcame by an elderly, then China’s military is of little to fear. I suspect, however, the elderly woman had used her formalistic stature as an “elder” within the context of Confucian virtue-ethics of “*li*” to effectively overpower the situation. This kind of observations, as I came to see, often escapes foreigners.

50 Young, (forthcoming), pp. 2-3.

incomplete to a uniquely Chinese ontology and legal institutions to be functional in Modern Chinese society.

Keeping an open mind, we begin with a brief, and mottled, recap of Chinese Modern history; but we limit ourselves in *measuring* the Chinese legal institutions to Confucianism, which guides much of China's civil discourse, distinguished from Legalism, which relates to criminal punishment wholly concerned with compliance and punishment.

### *I. Formalities and Rituals within the Chinese Modern Legal Institution*

The People's Republic of China announced itself to the world on 1 October 1949; however, it is the 1911 Revolution that marked modern China's conception of "people's right to be masters of the country".<sup>51</sup> It transformed the Chinese consciousness.<sup>52</sup> It liberated the Chinese people from "封建思想"<sup>53</sup> (pronounced feng-jian-si-xiang). Criticisms to China's legal institution, however, often fall isolated to post-1911 legal traditions without due considerations to Confucianism, Legalism, and Daoism as they have integrated into the Chinese society during millennia of emperors.<sup>54</sup> This article does not, however, attempt to integrate them all here; that would be a serious undertaking requiring more pages. It merely purports to integrate at least some of the missing Confucian influence *measuring* China's corruption and enforcement problems relevant to Confucian mercantile philosophy to understand how far China must go to achieve its sustainable goals.<sup>55</sup>

#### *1. Chinese Legalism and Socialist Modern Laws at a Glance*

"China's current legal system reflects a number of influences including . . . Confucianism, Daoism, and Legalism".<sup>56</sup> *Ren* ("仁") and *Li* ("礼") were introduced by

51 State Council whitepaper.

52 *E.g.*, President Hu speaks highly of 1911 Revolution, available at: <[http://news.xinhuanet.com/english2010/china/2011-10/09/c\\_131180598.htm](http://news.xinhuanet.com/english2010/china/2011-10/09/c_131180598.htm)>.

53 封建 ("feng-jian") literal translation would be "building an empire by appointment"; generally it refers to the maintenance of the feudal rule by the old ethics and social codes of inheritances based on the first-born male and relationship building ("guanxi"); it must be noted that this is where Confucianism, in its traditional sense, impedes with women's rights. 思想 is loosely translated as a "system of thinking." See <<http://baike.baidu.com>>. (This Author does not support the Confucian hierarchy of social order at all; this article only attempts to point to where deficiencies have befallen China from its separation with at least some of the Confucian virtues so deeply entrenched in the culture and language. What China is missing is not a complete revocation of 封建, but a systemic process improvement of how 封建 governs people's daily lives. What China can do is acknowledge some of the virtues of old Confucian thinking and take from the values of some western free speech right concepts, merge the two and discover what is right for modern Chinese legal and political reform. But that is entirely this Author's opinion.)

54 See Head, 2007, p. 60.

55 *E.g.*, "[a]s traditional Chinese medicine . . . nourishes holistic health, aspects of traditional Chinese law . . . nourish holistic justice." See Szto, 2011, available at <<http://ssrn.com/abstract=1766023>>.

56 Zimmerman, 2008, p. 31 ("Chinese law was [also] influenced heavily by the political philosophies of Marxism-Leninism and Mao Zedong Thought, and the Soviet legal system." *Ibid.*)

Jin Kong

Confucius somewhere in 500 BCE;<sup>57</sup> Legalism, *Fa* (“法”) “emerged from the writings of Shang Yang (361-338 B.C.) and Han Feizi (280-233 B.C.),”<sup>58</sup> by the Tang dynasty, 600 – 900 AD, “many elements of the *fa* . . . lingered on and were eventually fused with Confucianism”.<sup>59</sup>

Professor Young notes that “one should think of Chinese jurisprudence in terms of the schools of thoughts [and] legal traditions as the source of legal doctrines in China”.<sup>60</sup> Confucianism was the official state doctrine from the Han Dynasty (206 BC-220 AD) through 1911.<sup>61</sup> It formalized a social mediation culture, which the Chinese still prefer today.<sup>62</sup> From its unique analytical framework leading to a completely different sort of taxonomy in its metaphysics, Confucian formalities and rituals, dignified by mediation – “traditional” – legal practice, penetrate deep into the Chinese language and customs: “[t]he Chinese people, . . . do not need to have studied Confucius formally as Confucianism is the grammar and the vocabulary, literally and metaphorically, of Chinese culture and language through which the Chinese live and communicate their life”.<sup>63</sup>

It is this invasive nature of Confucianism that makes the modern Chinese regard laws and the courts differently than westerners; “[t]hroughout its long imperial history, Chinese civilization relied on [Confucian] moral precept and local custom to resolve many problems that other societies have addressed through public, positive law”.<sup>64</sup> These moral precepts are often *encoded* in the language itself. Confucius believed “[l]ead a people by law . . . and they will have no shame, lead a people by virtue and they will order themselves harmoniously”.<sup>65</sup> Lawyers were thus unnecessary in a Confucian world of ideas because “each person was responsible for fostering virtue and harmony”.<sup>66</sup> Today, the Chinese people rather find ways to meet the officials in charge of the political bureau that could remedy their wrongs rather than to employ the courts; “[p]etitioners seeking grievances with officials . . . still far exceeds use of courts”.<sup>67</sup>

Modern Chinese legal reform technically began in 1949; but because of the Great Famine and the Cultural Revolution, progressive modern legal reform did not begin until the last parts of the 1970s. In 1979, Deng Xiaoping engineered

57 See Head, 2007, p. 59.

58 Young (forthcoming), p. 7, available at <<http://ssrn.com/abstract=1740037>>, see generally G. MacCormack, *The Spirit of Traditional Chinese Law*, University of Georgia Press, 1996, pp. 4-5; J. Head and Y. Wang, *Law Codes in Dynastic China: A Synopsis of Chinese Legal History in the Thirty Centuries from Zhou to Qing*, Carolina Academic Press, 2005, pp. 72-76.

59 Young (forthcoming), p. 8.

60 *Ibid.*

61 *Ibid.*, p. 9.

62 Goelz, 2009, p. 168.

63 Young (forthcoming), p. 8. (quoting Deborah Cao, *Chinese Law: A Language Perspective*, Ashgate Publishing, 2004, p. 3). (I have always struggled with American’s *laissez-faire* approach to addressing one another. I get the sense most westerners do not understand how significant is one’s age and dialogue title in a social infrastructure in China.

64 Alford & Shen, 1997, p. 125.

65 *Analects* 2.3.

66 Szto 2011.

67 *Ibid.*, p. 13.

China's "opening to the West", which began China's great transformation and efforts to implement its own sense of rule of law.<sup>68</sup> In 1982, the Constitution of the People's Republic of China was adopted and its language clearly demonstrated the government's goal of fostering a new sense of rule of law.<sup>69</sup>

In the years that followed, Deng is attributed with several key phrases that defined the contours of a new rule by law regime. With Deng's phrases, such as "get rich is good" and "black cat, white cat, as long as it catches mice, it's a good cat", along with the Communist Party's firm control on the propaganda machine and provincial control over the courts, China began to shape decades of laws and policies and attitudes that led China to the boom in the 90s and continued double digit growth into the early 2000s.

## 2. *Confucianism Fractures from Communist China*

Confucianism was the primary "curriculum for government officials" prior to 1911.<sup>70</sup> Modern Chinese legal reform clearly separated from Confucian morals and virtue ethics by way of political upheavals. The Communist founding ideologies and the infamous Cultural Revolution few decades later denounced Confucianism as old imperial poison – "封建思想". Beginning in the early 1900s and through the turbulent times between 1949 and the early 1980s, the Chinese governments neither relied on Confucian social order "[n]or . . . public, positive law [as] a central means for ordering society . . ." <sup>71</sup> Instead, China relied on emperor-like men, Mao and Deng, to lead the country. When the Cultural Revolution finally subsided in the mid-1970s, Deng Xia Peng's "get rich is good" policies promoted capitalist free market reforms (profit alone) and further conflicted with Confucian virtues and removed moral considerations (people and planet) from China's social and legal norms as well as economic development plans. As a result, there is macro deterioration in traditional social order, respect for kinship businesses declined, and authoritarian provincial clans and capitalist greed prospered while primarily maintained by a more and more intrusive CCP.<sup>72</sup>

As more and more foreign investment and technology marched into China, cheap labour made an industrial revolution possible. The manufacturing sector that made the industrial revolution possible "is driven by cost-conscious, savvy foreign investors seeking to transplant 'heavy polluting energy and resource-intensive industries' to China . . . and consequently, where many local governments actively compete for these dirty businesses in 'blind pursuit of quick and

68 See Modak-Truran, 2008, see also J.P. Horsley, 'The Rule of Law in China: Incremental Progress', in C. Fred Bergsten, N. Lardy, B. Gill & D. Mitchell (Eds.), *The Balance Sheet in 2007 and Beyond*, p. 94, 2007.

69 F.A. Xian, 1982, available at: <<http://english.people.cn/constitution/constitution.html>> (last visited 23 December 2007).

70 J.M. Zimmerman, *A Legal Guiden for Foreign-Invested Enterprises*, Vol. 33, (2nd edn), American Bar Association, 2004.

71 Alford & Shen, 1997 (But we see things such as "guanxi" and the art of gift giving persisted.).

72 *The Economist*, "The Long Arm of the State, Where's the party?", p. 43 (Feb. 2012) available at: <[www.economist.com/node/21543575](http://www.economist.com/node/21543575)>. E.g., the State Council whitepaper.

Jin Kong

short-term economic gain without regard to environmental consequences”.<sup>73</sup> With industrialization accelerating, China now faces a more severe corruption problem; with heavy environmental damage already done, and many more human rights violations by both the industries and the CCP, China is on the verge of breaking.<sup>74</sup>

The impact of China’s new economy “combined with a decades-long legacy of pollution, endanger not only the Chinese people, but the future viability of local and trans-boundary natural resources”.<sup>75</sup> China’s pollution and social stability is a global topic. Recognizing the importance of China’s role in international politics, the “international community now actively seeks China’s participation in the ‘global governance system . . .’”<sup>76</sup> Many calls for curbing China’s development apatite; some demand China align its laws with international norms; but measured against China’s need to lift its people out of poverty, much of this talk goes to the wayside. At worst, China throws up defences:

Zheng Bijian, a highly influential domestic and international policy advisor to the Chinese government . . . [recently] characterized China’s continuing economic growth as a ‘peaceful rise’ to power: ‘in contrast to some other emerging powers in modern history, who plundered other countries of their resources through invasion, expansion, or even large-scale wars of aggression, China will acquire the capital, technology, and resources needed for its modernization by peaceful means.’<sup>77</sup>

China recognizes the problems and wishes to avoid being seen as a colonizer (avoiding the ‘reverse Orientalism problem’) in places like Africa and the Middle East; it’s recent emphasis on a “harmonious society”, its renewed interest in Confucius, and its hint of ‘soft power’ and ‘peaceful rise’ strategies all point to one thing: what was once predominantly supplied by Confucianism, now has created a moral vacuum, allowing problems to escalate systemically and spread internationally.

While Confucian ‘*ren*’ and ‘*li*’ institutionalized positive duties among people’s interactions and are subsequently disenfranchised, Chinese Legalism, “*fa*[,] served as a measure of punishment that only encouraged people to evade the law rather than to do what is right”.<sup>78</sup> While “Confucius advocated the use of [*ren* and] *li* as a means to achieve social harmony”, the surviving *fa* helped write many laws and regulations of modern China by an unclear “system of rewards and punish-

73 See Riley & Huiyan, 2009, pp. 184-185.

74 *The Economist*, ‘A Dangerous Year’, p. 21 (Feb. 2012).

75 Riley & Huiyan, 2009, p. 185.

76 S. Sitaraman, ‘Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China’, *Colorado Journal of International Environmental Law and Policy*, Vol. 18, No. 267, 2007, p. 300 (citing J. Schwartz, ‘Environmental NGOs in China: Roles and Limits’, *Pacific Affairs*, Vol. 77, No. 28, 2004, p. 36).

77 Riley & Huiyan, 2009, p.181 (quoting Z. Bijian, *China’s Peaceful Rise: Speeches of Zheng Bijian 1997-2005*, Brookings Inst. Press, 2005, p. 39).

78 Zimmerman, 2008, p. 32.

ment . . . to achieve social order”.<sup>79</sup> The presumption goes, separation of *ren* and *li* from the Chinese legal institutions, and sole reliance on the *fa* doctrines at the modern time, is at the heart of China’s inconsistent legal enforcement problems.

## II. Exhibit A – An Environmental Language Master Frame

Today, China is in a state of confusion between “rule by law” and “rule of law”. The former represents the clarity of Legalism in modern China and its consistent presence in China’s history confronting the ambiguities of Confucianism in language and rituals; the latter represents the idealized western jurisprudence confronting the former without due regard for legal indeterminacy<sup>80</sup> and the ontological gap between China and the United States.

Scholars often strictly contribute China’s compliance and enforcement problem to failure to meet international legal standards, which begs the question what exactly caused these failures.<sup>81</sup> In China, “proper rituals . . . [such as] gift giving and feasting, then and now, are pillars of Chinese social interaction, negotiation and justice. They are the pinnacle of communal abundance, contract formation and dispute resolution”.<sup>82</sup> While environmental claims pursuant rule of law, and litigations in general, are disfavoured, market and industrial process inefficiencies cannot be cured without addressing how deals are made, how corporations see themselves in their Chinese communities, and how sustainable synergies will be leveraged.

China’s leadership has repeatedly called for political reform,<sup>83</sup> but what is more desperately needed is a legal reform to govern China’s political system. Current environmental laws readily enjoy successes with CCP slogans such as “polluters pay”,<sup>84</sup> but they may not be enough to cure China’s crisis. China will need to take a step further in recognizing the depth and breadth of what is missing from its grab bag of philosophies and identify what is applicable in the modern society; if China should have a uniquely Chinese socialist democracy, it should not forgo 2000 years of virtue-ethics that have regulated the people with relative ease and efficiency. To fix China’s problems, and in some respect, the rule of law regime

79 Young (forthcoming), p. 7.

80 See Modak-Truran, 2008, p. 620.

81 (“Donald Clarke has emphasized that Americans often use an ‘Ideal Western Legal Order’ (which the U.S. often fails to live up to) as the criterion for evaluating the actual practices of the Chinese legal system. Clarke notes that “China’s criminal procedure as actually practiced (and as reported by various human rights organizations) is compared with an ideal picture of the American criminal process (and not the picture as reported by various human rights organizations)” and ‘is found wanting’.” Modak-Truran, 2008, p. 612 (quoting D.C. Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?*, in C. Stephen Hsu (Ed.), *Understanding China’s Legal System: Essays in Honor of Jerome A. Cohen*, 2003, pp. 93 and 95-97, 2003).

82 See Szto 2011, p. 5.

83 *The Economist*, ‘Power games, Bo Bo Black Sheep’, (March 17, 2012), available at: <www.economist.com/node/21550325>.

84 ‘Polluter pays’ is an especially well understood concept in the Chinese legal institution, and to some degree extremely effective when employed in courts; I sometimes wonder if there is a positive correlation between the surviving “fa” (punishment laws) and the effectiveness of “polluter pays” in the sense that both requires a undertaking in finding guilt, as opposed to *li* and *ren*’s positive social duties.

Jin Kong

issues, it must dig a little deeper into its roots. China must find ways to fix its ontological imperfections.

One scholar noted a recent civic environmentalism movement successfully creating a language “master-frame” that embeds western concepts of political theories and environmentalism to organize and advance their movement.<sup>85</sup> By chance or by design, the movement stumbled into China’s virtue void; the cleverly *encoded* and lingering Confucian virtues were coalesce with western concepts, and then translated into Chinese, to capture a new sense of use to intent a meaning to incite progress.<sup>86</sup> While some will continue to criticize China for its lack of clarity in its laws, continue to hammer China on its human rights, continue to gripe about provincial protectionism, and continue to misunderstand China’s urgent sustainable needs, this author believes it is more productive to learn from what is effective in promoting positive actions within the political structure by legal means in an increasingly people-ruled China.

With that in mind, we turn to examine the synergy between what is possible with what we know – we conduct our analysis.

## B. Analysis – Synergy Between Confucianism and CSR

Some think of CSR<sup>87</sup> as born out of the 1920s.<sup>88</sup> “[T]he concept of social responsibility began to evolve from simply an individual duty of the businessman conducted after business hours with personal funds to an organizational responsibility pursued along with other goals using corporate resources”.<sup>89</sup> Today, CSR is more than a mere philanthropic afterthought, but a pervasive system of thinking that is gradually building on more open-sourced<sup>90</sup> principles and efficient social competitiveness.

85 See generally Hsing & Lee, 2010, p. 127.

86 Hsing & Lee, 2010, p. 126 (“Chinese environmentalists deliberately speak a new language, though they also invoke official rhetoric as a way of claiming legitimacy. They often mix several ‘master frames’ in their discourse. These include the global frame of sustainable development, the traditional rhetoric of human-nature harmony, and, most recently, the official language of ‘harmonious society’. The new environmental discourse manifests itself as a ‘greenspeak’ . . . [e]xamples include ‘grassroots initiatives,’ ‘community action,’ . . . Yet current Chinese environmentalists have abandoned the former Chinese expressions and adopted new translations instead. The purpose is to displace an old language associated with state mobilization . . . that emphasis entailed mobilizing local communities as constituencies for achieving the goals of the central party-state.”).

87 The subject of CSR is not explored in great detail in this article; rather, CSR provides a relevant reference point for discussion; for a general discussion about the CSR concepts and practices since the 1950s, see generally A.B. Carroll, ‘Oxford Handbook of Corporate Social Responsibility’, in A. Crane, A. McWilliams, D. Matten, J. Moon & D. Siegel (Eds.), *A History of Corporate Social Responsibility*, 2008.

88 R. Hoffman, ‘Corporate social responsibility in the 1920s: an institutional perspective’, *Journal of Management History*, Vol. 13, No. 1, 2007, pp. 55-73.

89 *Ibid.*

90 E.g., H. Rheingold, (TED video) <[www.ted.com/talks/view/lang/en//id/216](http://www.ted.com/talks/view/lang/en//id/216)>; e.g., M. Wheeland, *How eBay Harnesses Users Employees Make Shopping Greener*, (blog) <[www.greenbiz.com/blog/2012/01/30/how-ebay-harnesses-users-employees-make-shopping-greener](http://www.greenbiz.com/blog/2012/01/30/how-ebay-harnesses-users-employees-make-shopping-greener)>.

Today, CSR “essentially requires companies to conduct business beyond compliance with the law and beyond shareholder wealth maximization”.<sup>91</sup> Social pressure and market forces are shaping the contour of CSR with a new host of voluntary<sup>92</sup> initiatives. The United Nation’s Global Compact<sup>93</sup>, International Organization for Standardization (ISO) – Final ISO 26000 Guidance on Social Responsibility<sup>94</sup>, the United Nations Convention on Contracts for the International Sale of Goods (CISG) and various private agreements and self-imposed reporting initiatives, all point to one thing: CSR is not only about punishments of past transgressions (what Chinese would consider as *fa* – 法), but also about voluntary ethical practices, (*ren & li* – 仁 & 礼, a sense of virtue and ethics in commercial activities that China desperately needs and seems to lack in its modern legal institutions).

### I. CSR and Confucian Principles

There is much synergy between Confucian merchant ethics and the emerging CSR principles. Under immense internal and external pressure, CSR has gained an “institutionalized position in the Chinese legal and political system”.<sup>95</sup> One scholar notes that “indigenous ideologies [Confucian-influenced mercantile culture] echo many aspects of modern CSR generally understood in western societies”.<sup>96</sup> Further exploration of using CSR principles to address at least some sustainability problems pitted against China’s “external pushes [and] internal pulls”<sup>97</sup> and “institutional constraints”.<sup>98</sup> The purpose is to reveal synergies between Confucianism and CSR: can both influence the Chinese legal institutions in positive and contributive ways to cure some of China’s pressing problems?

Before turning to that discovery, it is important to disclaim a critical point about invoking Confucianism in this article.

#### 1. Reverse-Orientalism

Professor Lionel Jensen notes that 17<sup>th</sup>-century Jesuit Catholic missionaries created ‘Confucianism’ and it is not until later discourse that Confucianism was used to symbolize the Chinese civilization.<sup>99</sup> Consequently, Professor Jensen argues that Confucianism is what the speaker wants it to mean and ‘why’ invoke Confu-

91 L. Lin, ‘Corporate Social Responsibility in China: Window Dressing or Structural Change?’, 28 *Berkeley Journal of International Law*, Vol. 28, 2010, p. 64.

92 International laws, treaties, customary norms are not discussed here; this article’s primary interest is to explore synergies between voluntary initiatives in the western merchant culture and compare it to Confucian merchant traditions.

93 See the official website of the UN Global Compact, website <[www.unglobalcompact.org](http://www.unglobalcompact.org)>.

94 See the official website of the ISO 26000, <[www.iso.org/iso/iso\\_catalogue/management\\_standards/social\\_responsibility.htm](http://www.iso.org/iso/iso_catalogue/management_standards/social_responsibility.htm)>.

95 See Lin, 2010, p.67.

96 *Ibid.*

97 *Ibid.*, pp. 89-95.

98 *Ibid.*, pp. 95-99.

99 See L.M. Jensen, *Manufacturing Confucianism: Chinese Traditions and Universal Civilization*, Duke University Press, 1998.

Jin Kong

cianism is objectively important.<sup>100</sup> One trending view is that China employs orientalism in its own right in places like Africa and the Middle East ('reverse-orientalism') to 'peacefully' colonize the world; China does not seem to deny – its defences usually bounces the blame to westerners having done it first and even violently.<sup>101</sup> We do not engage the debate here; the objective 'why' question misses the mark about invoking Confucianism – it once held China together under an optimistic and effective social fabric through virtues, formalities, and principles in addition to legal punishments; its principles can now be used to facilitate CSR and modern sustainability goals.

This article answers Professor Jensen's 'why' by a simple wish to use what is available for the better of China's prospects. As for Edward Said's 'Orientalism', (or the 'reverse-orientalism' objection), one notes the fact that China, as a socialist country with a positive duty to its 1.3 billion people, will continue to lift its impoverished people out of poverty – it is the only way for the CCP to ensure China's political and social stability and it is the only way to secure control. China's consumption will grow, demand will grow; what we do now with CSR developments in China's legal and social institutions and its eventual compliance with international norms is in everyone's best interest – only if, however, the international norms are focused on sustainability.<sup>102</sup>

We now turn to the discovery of what some of the synergies are and how they can benefit China in the years to come.

## 2. *Confucianism and Corporate Social Responsibility*

Confucianism along with Daoism, Buddhism and many other 'feudal thinking' ('封建思想')<sup>103</sup> were all deemed inappropriate in early modern China's social and legal history. The term is illusive enough to give those who yield its authority to bend the laws in their ways.<sup>104</sup> Through China's many years of political turmoil it has gotten rid of the good things about an aesthetic and order system of 封建

100 Relevant to the discussion here is Edward Said's book 'Orientalism,' which argued that Europeans' view on the Middle East as incapable of making progress and achieve were in fact justifications for 19th century colonialism. Edward Said, *Orientalism*, (1978). Some scholars takes the view that Confucianism is invoked by China as a reverse-orientalism – arguing that because China's culture is eternal and unchanging, it is now serves its own expansion (colonial) needs. This is a point of contention as well in international human rights and environmental norms: China often argues that because the west had its chance colonizing the world, albeit violently, China is ready to colonize the world "peacefully" and "harmoniously." See Riley & Huiyan, 2009, p. 181 (quoting Z. Bijian, *China's Peaceful Rise: Speeches of Zheng Bijian 1997-2005*, Brookings Inst. Press, 2005, p. 39).

101 Riley & Huiyan, 2009, p. 181.

102 See generally, supra n. 3 & 4.

103 Supra n. 53; e.g., <<http://baike.baidu.com>>.

104 Confucianism is not the only influential philosophy in China labeled as feudal thinking; Daoism and various forms of Buddhism also heavily influence business principles and charity obligations. They too were subject to the systematic banning during the early years of China's reform. For the purpose of this article, Confucianism is a starting point because "封建" – to build by appointing kinsmen to create order, comes from the philosophy. Confucianism' ability to influence the legal institutions of China in the distributed sense, from its people's daily interactions, is very much an underlying assumption of this article.

(China's feudal order) but retained many vices of 封建's ritualism, gender and age preferences, and power distributions<sup>105</sup>, in building its new society. Its only available control is at the roots of its grab bag of ontology and especially with what remains of Confucianism in its languages.<sup>106</sup>

"The ideology of orthodox Confucianism is hostile to profit-making and business".<sup>107</sup> With this influence, Chinese mercantile emerged under the cloak of the ideologies of kinship;<sup>108</sup> where kinship is a basis of business transactions' "legitimacy . . . it also meant that business had inherent social responsibilities".<sup>109</sup>

The modern Chinese (socialist) concept of CSR is one thing on paper, but another in practice; it is "easily confused with the idea of state-owned enterprises as social services and benefits providers (qiye ban shehui) in the traditional Chinese communist economy".<sup>110</sup> While philanthropic ideologies, from Daoism and Buddhism, survive in China's socialist markets, social responsibility, distinctly requiring a Confucian virtue and formal, has not survived as much as it

105 Chinese today often discuss the pros and cons of having a generation of leaders coming up in the Chinese political ranks, who were sons and daughters of old Communist revolutionaries. The "princelings" of the old red revolution still makes an appearance on China's political stage in accordance to 封建 thinking – political clout legitimized to the political power based on their fathers and mothers. One of Mao's grandsons was recently featured as the youngest major general in China's history, yet he is seen as a pudgy and soft bureaucrat famously know for loving pork belly meat. (Mao Zedong, Heir Mao Xinyu elevated to army top brass, Jane Macartney, Beijing, *The Australian*, 25 September 2009, available at <[www.theaustralian.com.au/news/world/mao-zedong-heir-mao-xinyu-elevated-to-army-top-brass/story-e6frg6so-1225779335332](http://www.theaustralian.com.au/news/world/mao-zedong-heir-mao-xinyu-elevated-to-army-top-brass/story-e6frg6so-1225779335332)>).

More recently, Bo Xilian, another famous son of an old untouchable communist, came under light for corruption charges and political pressure. The economist also referenced the influence of such relationship with an old guard of the Long March days. *The Economist*, 'Power games, Bo Bo Black Sheep', (March 17, 2012) available at: <[www.economist.com/node/21550325](http://www.economist.com/node/21550325)>.

106 *E.g.*, Zimmerman, 2008, pp. 32-36; Szto, 2011, p. 5.

107 *See* Lin, 2010, p. 85.

108 *See* T. Ruskola, 'Conceptualizing Corporation and Kinship: Comparative Law and development Theory in a Chinese Perspective', *Stanford Law Review*, Vol. 52, 2000, p. 1599.

109 *Ibid*, p. 85.

110 *Ibid*, p. 86, (企业办社会 – 企业 means corporate, or rising capital; 办社会 is loosely translated as "building society or community").

Jin Kong

should.<sup>111</sup> The problem is especially serious in the State Owned Enterprise (“SOE”) sector.<sup>112</sup> This is the sector that controls much of the essential services in China: water, energy, food, and so on; and these are the places where business efficiency can benefit China the most to address its environmental and social problems.<sup>113</sup>

The natural inclination for western participants is to expect China to “rise” to the western legal standards and have what westerners expect as “rule of law;” that is impractical and to a degree contentious. To avoid “orientalism” (or in China’s case, the “reverse orientalism”) problem, and to see more clearly the synergies between Confucian virtues and formalities and CSR, the *analysis* will have to dig a little deeper into the metaphysics of things – of China’s “becoming” a rule of law nation.

## II. *The Process of “Becoming” a Rule of Law Nation*

In flight,<sup>114</sup> “suppressing the significance of, on the one hand, China’s Chinese-ness or, on the other hand, its Marxism, . . . seriously distort[s] our understanding of Chinese constitutional discursive practice.”<sup>115</sup> To avoid the misunderstanding, it is important to consider Confucianism’s dominate influence on the Chinese social, political, and legal contexts and recognize that it is very much a constitution, albeit a semi-legal one, of the Chinese society in itself.

“Confucius social and political philosophy gives priority to aesthetic over rational ordering”.<sup>116</sup> An *aesthetic* “order is effected by a modelling process in

111 The Legal Daily’s chairman Jia Jingping spoke on the rule of law and market economy in China during the recent Chinese Entrepreneurs Crime Prevention and Control Reporting and Conference. He pointed to the 33 years of reform and gradual opening up to market economy that has created wealth, employment opportunities, and the improved quality of product and services; however, he notes, in pursuit of profits, entrepreneurs have risk the unimaginable by illegal means; many of them are now in jail. According to 2009 data, China’s white-collar crime rate is on the rise. In 2011, majority of the cases involved state-owned enterprise (SOE) managers. The Report found, since 2000, 38% of the white-collar crimes occurred in accounting (with no statistical data on SOEs); 30% are contract frauds and loan frauds; 22% come from illegal businesses, smugglings, and others; 5.2% come from tax evasion; 2.4% from registered capital crimes; and intellectual property only taking up 1%. Also according to the report, the average economic loss per incident in the SOE sector is 33.8 MM Yuan (a little over \$5 MM); and the most loss from criminal acts of one person is 7.9 Billion Yuan. At a time when China’s economy seems to be slowing, this kind of economic loss and rampant corruption problem spells a need for change. See Sina.com, Finance, 报告称腐败国企负责人 2011 年人均贪污 3380 万 (Report Shows Liability Due to Corruption in 2011 Amounts to 338 Million Yuan). <<http://finance.sina.com.cn/china/20120115/132611205931.shtml>>.

112 See *ibid*.

113 Six Sigma here may prove to be somewhat interesting for China since it is a process method and is aimed to improve process efficiency; aside from its power proven in production, it has also been tested in the supply chain as well making it especially lucrative for China to consider. However, Six Sigma is only part of the solution, albeit within the same formal requisites in a process philosophy; See *supra* n. 8.

114 *Supra* n. 7.

115 J.R. Ainsworth, ‘Interpreting Sacred Texts: Preliminary Reflections on Constitutional Discourse in China’, *Hasting Law Journal*, Vol. 43, 1992, p. 298.

116 D.L. Hall & R.T. Ames, *Thinking Through Confucius*, Vol. 135, State U. of N.Y. Press, 1987, p. 158.

which personal cultivation above inspires emulation below”,<sup>117</sup> and in this process, “the participants *become the sociopolitical order* based on the emergent harmony from their voluntary participation”.<sup>118</sup> Its very subjective validation forms a sociopolitical order, which confines the Chinese tradition into a distinctly self-ordering Confucian society.<sup>119</sup>

One important similarity between the Chinese *aesthetic* ontology and Whiteheadian thoughts “concerns the priority of process or becoming over substance or being”,<sup>120</sup> is that while Classical western metaphysics is concerned with substance of things, its assumed axioms in the likes of ‘identity’<sup>121</sup> of things, “[c]onversly, process metaphysics (the philosophy of organism) maintains that the final real things of the universe are actual occasions or entities, which are units of process (or process of becoming) rather than substances (being) in the traditional sense”.<sup>122</sup>

At focus, between China and the United states, between *process* and *being*, are the issues of human rights and environmental problems;<sup>123</sup> all distinctly modern and alien to Confucian influences. With respect to human rights and in light of different metaphysics of the Chinese ontology, Professor Modak-Truran notes, “both Douglas Strum and George Pickering have set forth relational or process perspectives on property rights”.<sup>124</sup> Professor Modak-Truran noted that “Strum replaces the individualistic ontology of ‘classical western liberalism’ with a pro-

117 *Ibid.*, p. 157.

118 Modak-Truran, 2008, p. 620, available at: <<http://ssrn.com/abstract=997755>>.

119 Gandhi had similar thoughts in his ordering of a new Indian society. He searched for satyagraha in his non-violence civil disobediences. As Gandhi saw in such acts, the voluntary acts based on love, not punishment, the transformation is far more effective and powerful. See generally, D. Arnold, *Gandhi, Profiles in Power*, 2001, pp. 57-58. This is also the reason why feminists take most challenge to a traditional Confucian view towards the role of woman; modern China, under the heavy influence of Mao’s “women holds up half of the sky” slogans, has drastically reformed the old Confucian order structure. What China has to do now, is to reconcile with other aspects of the ‘Confucian order.’ The act of reconciliation with these old Confucian orders is more powerful under voluntary means as opposed to punishing regulatory regimes.

120 *Ibid.*, p. 622.

121 “a=a” is an axiom of formal logic and at the foundation of mathematical logic. E. Mendelson, *Introduction to Mathematical Logic*, Wadsworth & Brooks, Belmont, California, 1987.

122 *Ibid.*, p. 623. In this process metaphysics of becoming, the facts of identity (assumed a fundamental axiom of mathematics) are not the focus. (In formal logic, and mathematics, one encounter a basic, fundamental, assumption of identity “a=a”; I’ve always thought this particular thought troubling. Intuition tells me that nothing is identical to itself and change is always happening. In quantum physics, we know our subatomic compositions are never the same from one moment to the next. Intuitively, to me, the axiom a bi-conditional relational statement “a if and only if (iff) a” makes more sense). In the process metaphysics, as well as Confucian, or the Chinese ontology focuses on “a moral relational focus: not a concern to describe how things are in themselves, but how they stand in relations to something else at particular times.” R.T. Ames & H. Rosemont Jr, ‘Introduction: Historical and Textual Background’, in R.T. Ames & H. Rosemont Jr., trans. (Eds.), *The Analects of Confucius: a Philosophical Translation*, Random House, 1998, pp. 1, 23.

123 *Supra* n. 8-35.

124 G.W. Pickering, ‘Property Rights: Another Relational Perspective’, in W. Widick Schroeder & F.I Gamwell (Eds.), *Economic Life: Process Interpretations and Critical Responses*, Vol. 79, Center for the Scientific Study of Religion 1988, D. Sturm, ‘Property: A Relational Perspective’, in Widick Schroeder & Gamwell; *ibid.*, p. 29.

Jin Kong

ness-based ‘communitarian political ontology,’ which ‘is more relational and ecological, even organic, in character’” with a Communitarian perspective.<sup>125</sup> Strum further argues a ‘jurisprudence of solidarity’,<sup>126</sup> as opposed to jurisprudence of individuality, where the “driving passion of law is not so much to protect the individual against trespass as it is to create quality of social interaction conducive to the flourishing of a vibrant community of life across the world”.<sup>127</sup>

The consequence, Strum argues, is that “human rights are of greatest importance as a form of empowerment, enabling people as individuals and in their association, to participate effectively and through political community”.<sup>128</sup> On that notion of empowerment, sustainable developments,<sup>129</sup> which encompass human rights as well as environmental science, in order to be successful in China,<sup>130</sup> ought to merge with a Confucian sense of *aesthetic* society, where communities, individuals, and nations relate to one another according to a game of rituals – where 封建思想 held old China under a game of genders, age, and class, modern rituals are very much in the game of law – a game<sup>131</sup> of languages. If China should recognize this important aspect of its legal institutions, it would recognize that modern rituals should be less about banquets and expensive gifts, and more about exploring the possibilities of sustainability in its already succeeding environmental language master-frame.<sup>132</sup> China must recognize it has to empower all stakeholders to participate in a new moral *discourse* merging the social-legal language of China with customary international norms.<sup>133</sup> It is the only way China can continue its success from the past decades.

### 1. *Participants in a Great Moral Discourse*

It is not necessary to recall all Confucian principles and examine them in detail to devise what suits Modern China well,<sup>134</sup> nor is it feasible to continue to ignore Confucian’s deep and entrenched ontology in the Chinese legal institutions and its social-political spheres. We know the CCP has a strong hold on the pulse of China;<sup>135</sup> and we know Confucian rituals, its philosophy and *aesthetics*, have also

125 Modak-Truran, 2008, p. 636, (quoting D. Sturm, *Solidarity and Suffering: Toward a Politics of Relationality*, 1998, pp. 19-20. See also D. Sturm, ‘The Ideas of Human Rights: A Communitarian Perspective’, *Process Studies*, Vol. 23, No. 4, 1994, p. 238).

126 Strum, 1998, p. 11.

127 *Ibid.*, p. 18.

128 *Ibid.*

129 *Supra* n. 3 & 4.

130 Open to interpretation as to whatever extent one wishes to extend their definition of “China” is a Chinese corporation doing business in Africa or the Middle-East, public or private, part of the definition of “China” in a legal context?

131 P.M.S. Hacker & J. Schulte (Eds.), *Ludwig Wittgenstein, Philosophical Investigations*, Blackwell, 1953.

132 See generally Hsing & Lee, 2010, p. 127.

133 The possibilities here are limitless; from cause marketing to grassroots community projects, these language primers can serve as conduits for practically any sector of the human experience in China. See generally, Hsing & Lee, 2010.

134 That would be a serious undertaking not possible to distill into a single note.

135 *The Economist*, ‘The Long Arm of the State, Where’s the party?’, p. 43 (Feb. 2012) available at: <[www.economist.com/node/21543575](http://www.economist.com/node/21543575)>.

a strong hold on China's social and political undercurrents. It is sensible to expect the grab bag of ideologies of the CCP and Confucian influences ought to be empowered and constitutionally controlled, as opposed to CCP's total ban on all non-party thoughts. China now has a sombre climate of rampant corruption, alcoholism, social unrest and environmental problems because of its ideological neglect.<sup>136</sup> With what Strum gave us and the inescapable closeness between China's socialist market economy and the communitarian principles, what remnants of Confucian influence still exists in Modern China can empower its citizens to become "*participants in [a great] moral discourse*"<sup>137</sup> within the CCP and its continued rule of China as a whole.

What needs to be said is this: CCP ideologies can and should be allowed to achieve an *aesthetic* order, to diversify to a degree to maintain a healthy balance between authoritarian effectiveness and free capital efficiency. A Confucian – 仁 & 礼 – *discourse* could facilitate that diversification allowing a health growth pattern for both China's economic planning and its social and political forbearing.

Franklin Gamwell provided insight into what he called "maximal unity-indiversity"<sup>138</sup> in a transcendentalist argument that "the principle of communicative respect",<sup>139</sup> the "meta-ethical presupposition of every claim to moral validity"<sup>140</sup> resides in the individuals who are "morally bound to treat each other as *potential participants in moral discourse*".<sup>141</sup> Modak-Truran argues that this communicative respect principle is "formative"<sup>142</sup> because it does not address the substantive of moral rights and wrongs, but only encourages and empowers "social practice of argumentation"<sup>143</sup>.

That is what this article attempts to do. This article hopes to empower the Chinese legal institutions with a formative approach; and through a Design For Six Sigma (DFSS)<sup>144</sup> method, this article hopes to *define, measure, analyze, design* and *control* an *aesthetic* way to approach human rights issues, environmental problems, and social and legal enforcement challenges China faces.

Formative approach in mind, we further *analyze* China's "indigenous ideologies"<sup>145</sup> and the possibility of using CSR principles to address at least some sustainability problems pitted against China's "external pushes [and] internal pulls"<sup>146</sup> and "institutional constraints".<sup>147</sup>

136 See generally n. 8-35.

137 F.I. Gamwell, *Democracy on Purpose: Justice and the Reality of God*, 2000a, p. 197.

138 F.I. Gamwell, 'The Purpose of Human Rights', *Process Studies* Vol. 29, No. 2, 2000b, p. 338 reprinted in *Mississippi College Law Review*, Vol. 22, 2003, p. 239.

139 Gamwell, 2000a, p. 223.

140 *Ibid.*

141 *Ibid.*, p. 197.

142 Modak-Truran, 2008, p. 637.

143 *Ibid.*

144 See Williams *et al.*, 2007.

145 See Lin, 2010, p. 67.

146 *Ibid.*, pp. 89-95.

147 *Ibid.*, pp. 95-99.

Jin Kong

## 2. *China and CSR – Resistance From All Sides*

The western sense of CSR was “transported to China in the 1990s mainly through global supply chains”.<sup>148</sup> After a decade of China’s ‘opening up’ and with the accession to the WTO, China took steps to make its CSR policies and initiatives uniquely Chinese. In the process of integrating its own socialist economy with the global community, China now “not only has the power to affect the global market, but it also has to adjust itself to the market”.<sup>149</sup>

As the United States’ and Europe’s consumers gathered awareness of China’s labour and environmental problems, they expressed their “preference for products made in a socially and environmentally responsible manner”<sup>150</sup>; China’s new production infrastructure suddenly found itself having to satisfy their demands – the external push against China’s emerging industries; but as Li-Wen Lin notes, the Chinese government and suppliers initially resistant “enhanced social and environmental standards in global supply chains, particularly with regard to labour protection measures”.<sup>151</sup>

Li-Wen Lin argues that China’s initial resistance to CSR principles is grounded in four primary factors: “protectionism, commercialization, lack of localization, and imbalance of bargaining power”.<sup>152</sup> Methods to evade the CSR mandates include backlash against the foreign CSR standards as ‘extortion’,<sup>153</sup> evading the CSR standards by ‘double-booking’,<sup>154</sup> or creating “indigenous CSR standards to compete against foreign standards”.<sup>155</sup>

Irrespective of the external push against China to implement more CSR standards and upgrade enforcement mechanisms and China’s pushing back, social and environmental problems pose still a serious internal challenge to the legitimacy of the ruling CCP. CCP may have had been able to maintain effective control of China with the old ideological communism, Maoism, and Dengism until recent decades, but “[g]ood performance in improving living quality of the Chinese population is believed to be the most important pillar of the CCP’s political legitimacy [today]”.<sup>156</sup> In response to meet the new performance standard, the CCP has integrated a series of governmental and NGO led efforts to address the problems:

148 *Ibid.*, pp. 89-90 (Li-Wen Lin notes “[t]he anti-sweatshop movement and environmental movement have caused multinational companies to adopt social and environmental standards in selecting their suppliers.” See generally 中共中央关于构建社会主义和谐社会若干重大问题的决定, [Xinhua – The Sixth General Meeting of the Sixteenth Central Commission of the Chinese Communist Party] (resolutions on constructing a socialist harmonious society by the Central Commission of the CCP) (11 October 2006) <[http://news.xinhuanet.com/politics/2006-10/18/content\\_5218639.htm](http://news.xinhuanet.com/politics/2006-10/18/content_5218639.htm)>.

149 *Ibid.*, p. 89.

150 *Ibid.*

151 *Ibid.* See also Lin, 2007, p. 321.

152 See Lin, 2010, p. 90.

153 *Ibid.*

154 *Ibid.*

155 *Ibid.* (China created CSC9000T with its own definitions and standards. See generally *ibid.*, pp. 68-84.)

156 Lin, 2010, p. 93 (referring to Joseph Fewsmith, *China Since Tiananmen: The Politics of Transition*, 2001, p. 9, noting a shift in China’s focus on ideological legitimacy to a more practical performance legitimacy). (emphasis added).

promulgating new cleaner production standards and recycling goals;<sup>157</sup> giving civic organizations and movements degree of deference;<sup>158</sup> shaping enforcement policies and adopting more CSR principles from the west and making it ‘uniquely Chinese’.<sup>159</sup> There is an interesting side effect of this internal pull: while China recognizes CSR principles and eventual enforcement comes to appease the public, it is often foreign companies that are the first to feel the ax.<sup>160</sup> Even more, the Chinese people are still perplexed about just what counts for ‘good performance’; is it purely about wealth as they have seen in the past? Or is it something more: people’s health, welfare and safety?

Aside from external pushes and internal pulls, Li-Wen Lin described political, legal and economic institutional issues.<sup>161</sup>

Politically, although the CCP tolerates NGOs and allows civic environmentalism to flourish, it regulates the activities and approves NGOs with rigor and detail to make sure the NGO agenda plays out in line with the party’s needs.<sup>162</sup> NGOs often only take “non-confrontational tactics (*e.g.*, public education, information dissemination, salon discussions, field trips, and litigation) to advance their agenda”.<sup>163</sup>

Legally, CSR principles may have been incorporated into China’s Company Laws, but “incorporating CSR into law mires CSR in the problems of the Chinese legal system – ambiguity and unpredictability in rules and deficiency in implementation”.<sup>164</sup>

Economically, Li-Wen Lin notes that while consumer choice and purchasing decisions strongly affect the economic interests of corporations, Chinese CSR

157 C.R. McElwee, *Environmental Law in China, Mitigating Risk and Ensuring Compliance*, Oxford Press, 2011, pp. 64-65.

158 Hsing & Lee, 2010, p. 127.

159 See Lin, 2010, pp. 67-74 (Li-Wen Lin undertook an extensive listing of CSR initiatives in China; first noting the 1994 Chinese Company Law – corporate governance, union, and labor rights issues; she then discusses the 2006 Company Law, State-Owned Assets Supervision and Administration Commission of the State Council (SASAC)’s Guide Opinion on the Social Responsibility Implementation for the State-Owned Enterprises Controlled by the Central Government (hereinafter “Guided Opinion”); she then discussed in detail China’s disclosure initiatives, China’s CSC9000T standards – China’s version of ISO14000, and other private-public initiatives; finally concluding how much of China’s new laws and initiatives are western and how much is CSR with “Chinese Characteristics.” *Ibid.*, p. 84.

160 “Chinese media have enthusiastically disclosed and condemned many foreign-based multinational companies . . . [t]he Research Center on Transnational Corporations of the Ministry of Commerce . . . produced a series of reports targeting on CSR performance of foreign companies . . . [and] the Chinese government also helped Chinese workers take actions against foreign companies.” See Lin, 2010, pp. 91-93.

161 See Lin, 2010, pp. 95-99.

162 *Ibid.*, p. 95.

163 *Ibid.*, pp. 95-96.

164 See Lin, 2010, p. 97 (Li-Wen Lin discusses Art. 5 of the 2006 Company Law as an example of the uncertainties in the Chinese legal institution: “whether they are legally binding or simply advisory”; Li-Wen Lin also cited CSR initiatives such as the “Regulation on Environmental Information Disclosure” as uncertain and unpredictable – attributing the incentive as “wait-and-see” attitude. *Ibid.*

Jin Kong

standards are currently limited to the export-oriented sector.<sup>165</sup> Consumer rights are still new in China as well.<sup>166</sup> With the internally vested socially responsible funds aimed at foreign markets, and as China continues to foreclose competitiveness of foreign companies by building ‘domestic champions’, awareness and incentives for CSR is low where it counts.<sup>167</sup>

This article purports a combination of tactics to address the difficulties defined in this section and, in a larger context, the environmental and social problems identified in the *definition* section. Where a foreign invested entity ought to take seriously a process theory of natural law philosophy approach to understanding China’s current legal institutions and the many rule of law problems – noting them not as jurisprudence inferiority, but as having been to a different place coming to customary internal norms;<sup>168</sup> the CCP ought to address, through a formative approach, the missing virtues and formalisms so invasive in its societies and legal institutions but no longer holding prevailing and effective judicial remedy to corruptions and blatant disregard for environmental and social problems.

### *III. Process Theory and a Language Master-Frame of Virtues*

The form of process natural law in language is flexible and culturally sensitive to both China and the United States. To China, it reinvents a lost tradition of formalism and rituals deeply rooted in the Chinese language;<sup>169</sup> to the United States, “process natural law requires a substantive conception of rule of law similar to the usual Western conception because it also includes formal legality, individual rights, and democracy”.<sup>170</sup>

The opportunity, as observed from the Chinese civic environmentalist movement,<sup>171</sup> is to leverage the game of language in a Chinese legal institution *becoming* transparent, consistent, enforceable, and projected for sustainable growth. This opportunistic synergy between Confucianism and CSR rests with the formative approach – granting formative rights to language so pervasive in the Chinese legal institutions, but leaving the substantive rights to the legislatures – both are subservient to the language that gave it the authority and from the people who employ it: “both formative and substantive rights are accountable to the telos of maximizing beauty for their legitimacy. Consequently, the telos of maximizing beauty [through language] and the formative and substantive rights it implies

165 *Ibid.*, pp. 96-97.

166 *Ibid.*

167 Li-Wen Lin argues that where “[t]he marginal role of foreign investors implies that the driving force of SRI [Socially Responsible Investing] in the Chinese securities market should come from within. But . . . indigenous Chinese investors . . . have little awareness about SRI and thus are not a major impetus for CSR.” See Lin, 2010, p. 99.

168 See generally Said, 1978.

169 See generally Deborah Cao, *Chinese Law: A Language Perspective*, Ashgate Publishing, 2004, p. 3, *supra* n. 62.

170 Modak-Truran, 2008, p. 641.

171 Hsing & Lee, 2010, p. 127.

represent objective moral truth that determine the legitimacy of any legal proposition".<sup>172</sup>

China, in its complex communist politics and socialist market democracy, is vested to take up formative rights protection to ensure a "full and free political discourse"<sup>173</sup>; and the protection should only extend as far to ensure formative rights because "[a]ny constitutional provision of substantive rights would, in other words, arrest a full and free political discourse by stipulating that citizens as participants in it explicitly accept some conception of good human association".<sup>174</sup> Formative rights "concerns precisely [with] the question of which conception of the good human association should inform the substantive rights prescribed by law".<sup>175</sup> Substantive rights on the other hand, more closely associated with individual rights in the United States, should remain always a matter to the Chinese sovereign power and its legislatures.<sup>176</sup> Since substantive rights, as implied by the "universal telos of maximizing beauty, . . . is always relative to particular circumstance",<sup>177</sup> a process – of becoming – "conception of the rule of law thus allows for some differences with respect to the interpretation and instantiation of individual rights" between the United States and China.<sup>178</sup>

This formative approach, however, is not an argument for cultural relativism. Renewing an inquiry into Confucian philosophies does not mean invoking Confucius' outdated *aesthetic* order of things based on gender and age.<sup>179</sup> Rather, the issue here is using enough Confucian virtues and formalities to enrich a language master frame from which environmental civic actions seem to take shape and allowing judicial enforcement to rely on an bottom-up approach to employ "intuitions about how . . . rational principles ought to resolve hard cases".<sup>180</sup>

172 See Modak-Truran, 2008, p. 640.

173 Gamwell, 2000a, pp. 212-213.

174 *Ibid.*

175 Modak-Truran, 2008, p. 638, (Gamwell also argues that "the constitution should include formative rights protecting both private and public liberties . . . [and] religious freedom [as a private right] protects the 'freedom of conscience,' and public liberty." *Ibid.*, p. 638, (quoting See Gamwell, 2000a, p. 235).

176 See Gamwell, 2000a, pp. 215-216.

177 See Modak-Truran, 2008, p. 642.

178 *Ibid.* (This is also where China's interest in lifting its impoverished population out of poverty conflicts with the need to curb its growth and limit its environmental impacts to its own lands and lands of others – and often human rights violation follows. Focusing on formative rights as opposed to substantive rights here, and in understanding of human right in general in China, Doug Sturm offers the supplement to Gamwell's thinking by arguing for at least some substantive rights included in China's constitutional protection. Sturm argues that economic and social rights is interdependent with civil and political rights of "participation." D. Sturm, 'Taking Human Rights Seriously: Relationality Relationship and Subjectivity', *Process Studies*, Vol. 33, No. 2, 2004, p. 261. Sturm, in fact, lists "right to participation" as a formative right. *Ibid.*, pp. 251, 254.).

179 See generally Modak-Truran, 2008, pp. 644-645.

180 *Ibid.*, pp. 646-651.

Jin Kong

#### D. *Process Controlled* – CSR and DFSS

The purpose of designing for process improvement – Design For Six Sigma (DFSS) or DMAC – is to create a starting point to begin to address the problems identified and finish with the problems purposely resolved. The *control* stage, or the verification process in the design, is a point where we have to ask: What is our best solution to our problems? How should the solutions tailored with the best practice available? How will the solution work? What factors are important to envisioning the solutions and the life cycle of the design? How is the ongoing operation of the solutions monitored?<sup>181</sup>

In light of China's environmental and social problems, external and internal pulls and pushes, as well as other constraints, this article recommends a formal integration of virtues and formalities into China's various legal and social initiatives; the language master-frame for environmental activism already exists, the solution thus calls for not only disclosure enhancements<sup>182</sup> and specialty courts<sup>183</sup>, but also formative approach to solicit voluntary actions within the meaning of a Chinese legal ontology from within businesses and communities; the solution will have to operate across the political, social, and legal divides, but because it is a formative language approach, it is able to do so; the important factors are the virtues and formalities correspond with CSR principles as the west understands them, but constitutional protection should be afforded to at least partial information disclosure to facilitate confidence in the process and compliance with international norms; and finally the monitoring of the formative language approach must come from the public in general, not just the CCP, or the courts, or NGOs, or administrative bureaucrats – any one group acting alone risk the same corruption and enforcement problems of modern China as it still retains empty rituals and formalities.

The purpose of this article then is to discover a potential *aesthetic* process by which we can begin to understand the Chinese ways by encompassing two aspects of rule of law: the formal and the substantive. Like painting a painting, the form should be carefully chosen for the medium; substance should be free to encompass the artists' identity – China's identity. Where one can expect the most impact is through formative reforms – not the legal kind, but a linguistic and philosophical kind; substantive aspects of rule of law, still needing reform and very much in the focus of current criticisms against China's rule of law, should be left to the discretion of the legislatures, confined only by the Chinese Constitution, the People's Congress, China's capable emerging legal professions, and China's eventual massive consuming class demanding the carrying capacities of our common planet.

Under the formative approach, and perhaps with some basic constitutional procedural guarantees, within a process natural law theory, political obstacles to CSR in China allowing only limited non-confrontational tactics now make fertile

181 See M. Williams *et al.*, 2007.

182 See Riley & Huiyan, 2009, pp. 184-185.

183 Goelz, 2009, p. 168.

grounds for a language based game-shift<sup>184</sup> to occur; where language master-frames are possible, rule of law may be strengthened in practical enforcements within the social context by linguistic primers.

Where internal pulls tug on CSR's enforcement against foreign companies now transformed into opportunities for western companies to develop successful cause marketing campaigns to build good will with a growing consumer base.

Where legal challenges of ambiguity and unpredictability in rules and deficiency in implementation is made a ineffective with a coherent system of virtues and formalities based in Confucian philosophy to ensure, at least to a degree, clarity, consistency, effectiveness, and willing compliance.

Finally, where economically Chinese CSR standards are limited export-oriented sector, language master-frame and better understandings of a natural process theory of rule of law gives consumer more confidence and strengthens consumer rights, awareness and incentive for CSR, and directing funds where it counts.

The methods of designing, or at least enriching, the language master-frame with a focus on Confucian virtues and formalities ought to be carefully systematic and successfully *controlled*. This aligns China's purpose with the natural process theory of law – allowing itself to 'become' a rule of law nation. To do this, China requires careful and *aesthetic* planning of a formative language blueprint capable of encompassing the masses and empowering them to become the participants of a great moral *discourse*. That job, of *controlling* the process itself through words, not just laws alone, ought to be left with artists, linguists, philosophers, and legal experts – NGOs, the CCP, various administrative and political entities, all of whom encapsulated in one context of a language master-frame in search of a great *discourse* of sustainability – all of whom speak a common language.

## E. Conclusion

If language does not flow, then affairs cannot be completed. If affairs are not completed, ritual and music will not flourish. If ritual and music do not flourish, punishments and penalties will miss their mark. When punishments and penalties miss their mark, people lack the wherewithal to control hand and foot.

Confucius, *Analects* (13.3) – *On the Reflection of Names*.

Confucius regards a *ren* (仁), as the key to correct practical interpretation of the *rituals* –*li* (礼). Humanity, *ren*, is a moral insight that guides the attribution of terms in specific circumstances in context; the language thus guides us in rectifying the order of things. Language has always been a key part of classical Chinese thought – it shaped China's discussions of metaphysics, moral psychology, normative and applied ethics and political theory – more importantly in the modern

184 E.g., P.M.S. Hacker & J. Schulte (Eds.), *Ludwig Wittgenstein, Philosophical Investigations*, Blackwell, 1953.

Jin Kong

age, language is at the foundation of rule of law internationally and domestically. Language is where we begin and where we limit our inquiries.

“仁礼誠人, 人必治法, 法修其德, 德治其國” titled my sentiment at the beginning of this article; I did not provide a translation then for a reason unique to demonstrate the difference between “being” and “becoming” – at the beginning one is left with the context to envision opinions about the object of the inquiry; at the end of the inquiry process, with the context explained, the words means more than its mere translations. The act of becoming encompasses the act of acknowledging its translation incomplete and imperfect and pursuing something more to be desired. The job of properly relating the expectations of rule of law with foreign investments in China share similar impulse and can only come from first acknowledging there is real difference ontologically and empirically.

“仁礼誠人, 人必治法, 法修其德, 德治其國” is an apparition for China: if there is humanity and formality to aid one’s becoming of an law-biding person in China, they will *control* the laws that matter to them; those laws will be sure to cure the virtues of its people and it is form those virtues can a nation govern. The fate of capitalist developments in China, in fact, the fate of the CCP, then, is not just in the hands of the corrupt bureaucrats or foreign industries, but in the hands of the people and their objectives – by empowerment them from the old Confucian teachings with language primers, by giving them the tools to stand on virtues and formalities they are accustomed. This is where sustainability sees its viability in China, through its synergies with a uniquely Chinese legal institution so far neglected, through aggressive cause market campaigning, through better incorporating CSR principles and understandings in the Chinese commerce in the global community.

China today is faced with egregious environmental problems and civil unrest due to rapid developments enforced by a completely murky governing system. Its discombobulated legal framework and accelerated growth could take the planet beyond its tipping point; yet China also wields enormous national will power and global influence to remedy our problems.

It cannot do this alone – no hero stands in a vacuum. Still a developing nation, China will need the help and expertise from the United States to implement its attempt to upgrade towards sustainability. Its new Clean Production Laws and the new Circular Economy Laws can only succeed if the laws are enforced with a distinct understanding of the Chinese legal tradition entrenched in the local Chinese communities in forms unique to its own. It also requires a US sense of fairness and transparency to make the market lucrative for businesses. For the foreign businesses hoping to navigate in China for the years to come, viability will not only come from compliance, but also from a willingness to understand and work with the Chinese way. This facilitates the Chinese trust in the global infrastructure and gives foreign investors confidence.

To serve those ends, this article set out in hopes to discover points of investigation through an organic method. The process, it is hoped, will provide some insight to businesses and organizations employing reasonable means to help continuously improve their involvement in the Chinese economy. It is this article’s most sincere belief that both the US and China will work together to balance the

triple bottom-line, People, Planet, Profit, through a common sustainable *discourse*.

Don Clarke maintains, “the best attainable understanding of the Chinese legal system will not be simply the best fitting model plus incompatible observations explained as errors. We must be prepared to apply multiple models and to be alert to the need always to move nimbly among them”.<sup>185</sup> China’s recent emergence onto the global market is nothing new; it enjoyed thousands of years of economical and intellectual development and was once a dominant force in innovation, production, trade, and intellectual pursuits. Did not Columbus once set sail to find China only to have allegedly discovered the world’s super power of today?

After China’s re-emergence as a global power in the post-industrial information age, alongside of the United States, China will play a very large role in global politics and investment trends. The United States and China will likely make profound impacts on our planet’s environment, on our emerging global communities and regional developments, on the economic integration of different styles of free-markets, on security, accountability and peace of those market places. What occurs now marks a page in history not to be ignored. This note serves as a first step for this author, and others, to explore the contour of this emerging dynamic relationship and hopes to establish some nimbleness. This is but the first step to a journey of unimaginable consequences.

185 See Clarke, 2003.