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Contextualizing Environmental Human Rights: A Relativist Perspective

RODA MUSHKAT*

INTRODUCTION

The global environment continues to deteriorate, a phenomenon which manifests itself in virtually every sphere featuring interaction between man and nature. The full scale of this deterioration may not be fully apparent because of the long time lag between the emergence of environmental problems and their recognition. The extent of damage, actual and potential, to the physical habitat inevitably varies from one segment of the system to another, but it is considered to be serious overall and is deemed to be verging on the critical in certain physical domains, although an element of value judgement is doubtless involved in such assessments. Where the disruption caused/to be caused is most acute, global warming being an obvious case in point, one may legitimately conjure up scenarios depicting uncontrolled escalation, inadequate coping mechanisms, and widespread social dislocation.[1]

The consequences of man's abuse of nature have by no means gone unnoticed. They have been acknowledged and incorporated into the policy agenda at the global, regional, national, and subnational level. The law has played a vital role in the process, both through domestic and international channels. Nevertheless, the problems persist – indeed, they proliferate and assume more unpalatable forms. Institutional responses are seldom commensurate with challenges confronting communities and environmental degradation is perhaps no exception to the norm. Ineffective scanning apparatuses, political fragmentation, and slow organiza-

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1. *See* U.N. ENV'T PROGRAM, GLOBAL ENVIRONMENTAL OUTLOOK 3: PAST, PRESENT AND FUTURE PERSPECTIVES (Earthscan Publications 2002).

tional adaptation tend to impede progress across the entire strategy spectrum. However, the environment may have fared particularly poorly in this respect, exacting a potentially heavy toll on mankind and the physical habitat it occupies.[2]

The gap between perceived needs and prevailing conditions has triggered a quest for radical initiatives to shrink it. Underlying them are fundamental shifts in the way the human relationship with nature is conceptualized, or in the supporting theoretical (including the meta-theoretical component) façade. The analytical breakthroughs and innovative policy designs have emanated from a variety of academic disciplines and have increasingly crossed traditional professional boundaries. Scholars in the field of international environmental law have not observed these developments with a sense of passive detachment. While not necessarily inclined to embrace broad multidisciplinary perspectives, they have markedly stretched their theoretical horizons and have actively participated in the search for significantly more robust problem-solving frameworks.[3]

The sweeping proposals that have originated from this source have generally been predicated on the assumption that the present, loosely structured international order, which is to a considerable degree the product of negotiated outcomes between largely autonomous (albeit clearly not equal) sovereign entities, is not conducive to ecological preservation. The corollary is that this inherently fragile configuration ought to give way to one genuinely global in nature and geared toward fulfilling the goals of sustainable development in an equitable, transparent, and accountable fashion. Such reasoning has culminated in suggestions to dramatically reshape the international institutional architecture. The

2. JOSEPH F.C. DIMENTO, THE GLOBAL ENVIRONMENT AND INTERNATIONAL LAW (University of Texas Press 2003); PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (Cambridge University Press 2003); REGINA S. AXELROD, THE GLOBAL ENVIRONMENT: INSTITUTIONS, LAW, AND POLICY (CQ Press 2004) (1999).

3. *See supra* note 2; PRUE TAYLOR, AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW: RESPONDING TO CHALLENGES OF CLIMATE CHANGE (Routledge 1998); KLAUS BOSSELMANN, WHEN TWO WORLDS COLLIDE: SOCIETY AND ECOLOGY 175-79 (Stephen Picard ed., RSVP Publishing Company Limited 1995); ENVIRONMENTAL JUSTICE AND MARKET MECHANISMS: KEY CHALLENGES FOR ENVIRONMENTAL LAW AND POLICY *passim* (Klaus Bosselmann & Benjamin J. Richardson eds., Kluwer Law International Ltd. 1999); DUNCAN FRENCH, INTERNATIONAL LAW AND POLICY OF SUSTAINABLE DEVELOPMENT (University of Manchester Press 2005); ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER (Benjamin J. Richardson & Stepan Wood eds., Hart Publishing 2006); MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE: PERSPECTIVES FROM SCIENCE, SOCIOLOGY AND THE LAW (Gerd Winter ed., Cambridge University Press 2006).

fostering of cosmopolitan/cosmopolitical (planetary in the extreme version) democracy is one example. While the realization of this vision does not presuppose the dismantling of the nation state, it requires the imposition of new limits on the exercise of sovereign power through the formation of an extra layer of democratic governance at the global (including regional) level. Citizenship would have to be extended accordingly.[4]

The idea of an International Court for the Environment is another, more concrete, illustration of the desire to go to great lengths to restore ecological harmony. This is not an entirely new notion, but it has been materially recycled and enhanced in recent years. The court is not envisioned as a stand-alone body but one that embodies the globalist spirit and is an integral part of a global authority for the environment, with parallel administrative and juridical arms. Moreover, although the proponents of the concept duly acknowledge the vital role played by arbitration in such matters, and even recognize the need for institutionalizing it further (e.g., via an International Board of Arbitration for the Environment), they contemplate an institution performing full-fledged adjudication functions, enjoying efficacy beyond the specific parties to the dispute (i.e., *erga omnes*), and profoundly engaged in the creation of both evolutionary and innovative jurisprudence.[5]

Equally far-reaching have been the arguments in favor of extending human rights principles into the environmental realm. This is tantamount to advancing normative claims about the biosphere by employing human rights logic and enshrining them in institutionally viable legal instruments. The upshot is a "human right to an adequate environment" firmly embedded in a strategically coherent and well-functioning administrative and judicial

4. *See* COSMOPOLITAN DEMOCRACY: AN AGENDA FOR A NEW WORLD ORDER (Daniele Archibugi & David Held eds., Polity Press 1995); DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE (Polity Press 1995); DEMOCRACY AND GREEN POLITICAL THOUGHT: SUSTAINABILITY, RIGHTS, AND CITIZENSHIP (Brian Doherty & Marius de Geus eds., Routledge 1996); Janna Thompson, *Planetary Citizenship: the Definition and Defense of an Ideal*, *in* GOVERNING FOR THE ENVIRONMENT: GLOBAL PROBLEMS, ETHICS, AND DEMOCRACY 135-46 (Brendan Gleeson & Nicholas Low eds., Palgrave 2001); Daniele Archibugi, *The Politics of Cosmopolitical Democracy*, *in* GOVERNING FOR THE ENVIRONMENT: GLOBAL PROBLEMS, ETHICS, AND DEMOCRACY 186-210 (Brendan Gleeson & Nicholas Low eds., Palgrave 2001); NICHOLAS LOW & BRENDAN GLEESON, JUSTICE, SOCIETY, AND NATURE: AN EXPLORATION OF POLITICAL ECOLOGY (Routledge 1998); ANDREW DOBSON, CITIZENSHIP AND THE ENVIRONMENT (Oxford University Press 2003).

5. *See* Amedo Postiglione, *An International Court of the Environment*, *in* GOVERNING FOR THE ENVIRONMENT, *supra* note 4, at 211-21.

fabric that stretches beyond national boundaries. The concept of environmental human rights is inextricably linked with that of environmental justice for it is almost invariably contended in such contexts that all human beings ought to enjoy the opportunity to lead environmentally sustainable lives or, to express it differently, that an equitable distribution of environmental goods should be achieved in normatively sound political settings.[6]

A degree of discord may be observed between those who focus on environmental human rights in the narrow sense of the term and those who seek to promote the broader idea of ecological rights. This stems from the intellectual tension, real or apparent, between the anthropocentric and ecocentric philosophical perspectives. The former conceives the environment, whether explicitly or implicitly, as a mere good which serves to satisfy human needs and possesses no intrinsic value in itself. By implication, environmental rights are akin in all respects to other rights which reflect morally justified individual demands. The ecological viewpoint posits that the environment is a condition of all life on earth. It follows that limitations on individual human freedom may be required in order to protect nature, which encompasses the human species.[7]

This exploration of new paths to environmental sustainability has been a distinctly Northcentric/Westcentric affair. Scholars from the Southern/Eastern hemisphere (excluding Australasia, which does not fit neatly into the category) have not participated on a meaningful scale in the enterprise. Nor have the experiences of countries/societies in that part of the globe featured in any significant form in the assessment of the policy prescriptions generated in the course of the inquiries undertaken. This may partly reflect the fact that there is no critical mass of researchers engaged in the study of international environmental law in Africa, Asia, and Latin America. However, that may not be an entirely satisfactory explanation as ethicists with deep roots in non-Northern/Western civilizations have long grappled with complex issues pertaining to the relationship between man and nature. By the same token, countries/societies located in the Southern/Eastern hemisphere have had to confront serious ecological challenges and

6. *See* TAYLOR, *supra* note 3; Klaus Bosselmann, *Human Rights and the Environment: Redefining Fundamental Principles*, *in* GOVERNING FOR THE ENVIRONMENT, *supra* note 4, at 118-34.

7. *See supra* note 6.

their responses to the hazards facing them should not be overlooked.

It is thus reasonable to infer that the geographical bias apparently manifesting itself in what perhaps qualifies as the most avant-garde work in the field of international environmental law is mainly attributable to the implicit assumption that the formidable problems encountered by humankind in this exceptionally difficult domain ought to be addressed as uniformly as possible within a largely universal framework. That may well be a legitimate aspiration, but given the high degree of cultural and institutional diversity witnessed around the globe, a credible case can be made for broadening the analytical approach by juxtaposing reformist schemes emanating from Northern/Western circles with realities prevailing elsewhere. The aim of this paper is to make a modest contribution in that direction by injecting a diluted relativist element into the evaluation of proposals to entrench environmental human rights. The experience of China is invoked for this purpose and the more ambitious concept of ecological rights is relegated to the periphery because the conclusions drawn may be extended beyond the specific area highlighted here.

THE RIGHTS IMPERATIVE

The analytical efforts to boldly recast the normative and policy discourse concerning the relationship between man and nature are not entirely new. The idea of elevating environmental rights to a higher juridical level by coupling them with their human rights counterparts has periodically surfaced in the international law literature for the past three decades or so. The process has markedly accelerated, however, following the publication of a set of essays compiled by Boyle and Anderson in the mid-1990's.[8] More recently, two books have been produced on the subject, one by Hancock[9] and one by Hayward.[10] They stand out for their

8. ALAN E. BOYLE & MICHAEL R. ANDERSON, HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Clarendon Press 1996); *see also* INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES (Alan E. Boyle & David Freestone eds., Oxford University Press 1999); ROMINA PICOLOTTI & JORGE D. TAILLANT, LINKING HUMAN RIGHTS AND THE ENVIRONMENT (University of Arizona Press 2003); INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PRINCIPLES AND PRACTICE (Nico Schrijver & Friedel Weiss eds., Nijhoff 2004); LINDA A. MALONE & SCOTT PASTERNACK, DEFENDING THE ENVIRONMENT: CIVIL SOCIETY STRATEGIES TO ENFORCE INTERNATIONAL ENVIRONMENTAL LAW (Island Press 2006) (2004).

9. JOHN HANCOCK, ENVIRONMENTAL HUMAN RIGHTS: POWER, ETHICS, AND LAW (Ashgate 2003).

scope and the intensity of the arguments employed. These treatises are likely to serve as a frame of reference in future work on environmental human rights.

Hancock proceeds along an extended path which consists of interconnected philosophical, sociological, and legal elements. He embarks on his unambiguously critical journey by exposing the apparent failings of the dominant economic rationality paradigm and issuing a plea for its marginalization through a widespread adoption, in a Kuhnian fashion (whereby emerging scientific constructs overwhelm entrenched ones),[11] of an ecologically friendly variant. Economic rationality is portrayed as a value system geared toward single-mindedly maximizing allocative efficiency via market channels, seeking dominance over nature, fixated on output expansion, and inevitably breeding normatively dubious practices such as discounting. Its inherent anthropocentric bent notwithstanding, economic rationality is even said to fall distinctly short of properly acknowledging the intrinsic value of human life.[12]

Epistemological paradigms do not operate in a social vacuum. Rather, they are shaped and sustained by cultural impulses.[13] Economic rationality is no exception and thus cannot legitimately aspire to a universal status (an observation which, unfortunately for its critics, may be extended to competing alternatives, including the ecological vision). Like other dominant epistemological paradigms, it is the product of clearly-defined social power relations prevailing in specific geographical/ historical settings. Within this structurally-oriented framework (as distinct from an agent-centered one, where individuals enjoy the discretion to design sociopolitical systems free of exogenous constraints), external forces impose substantial limits on autonomous action by supposedly independent agents.[14]

The economic rationality paradigm, according to Hancock, has its roots in the capitalist form of social organization. In such an environment, powerful interests that reflect this structural configuration exercise strong influence over the crystallization of

10. Tim Hayward, Constitutional Environmental Rights (Oxford University Press 2005).

11. *See generally* Thomas S. Kuhn, The Structure of Scientific Revolutions (University of Chicago Press 1962).

12. Hancock, *supra* note 9, at 15-33.

13. *See* Michel Foucault & Paul Rabinow, Ethics: Subjectivity and the Truth (Paul Rabinow ed., Robert Hurley et al. trans, New Press 1997) (1994).

14. Hancock, *supra* note 9, at 36-53.

culture, flow of ideas emanating from that source, the political strategies embodying them, and public program implementation. There are virtually no cracks in this robust façade, which displays formidable resilience in the face of countervailing pressures. The Gramscian concept of hegemony, implying uniformity of fundamental interests and consistent effectiveness of multi-party action across a wide array of complex issues, is employed to underline the sturdiness of the system and its self-sustaining nature.[15]

Resistance to the forces underpinning economic rationality and disrupting ecological balance is selectively offered by agents but to no avail. Another Gramscian concept, *transformismo*, is invoked for purposes of elucidation. The corollary is that the capitalist power center resorts to co-optation of non-mainstream elements in order to emasculate potential pockets of opposition and forestall the emergence of alternative forms of social organization. Fringe groups campaigning for environmental sustainability are thus, metaphorically, having their wings clipped by being absorbed into the political establishment. In return for gaining access to the apex of power, they abandon the most radical components of their strategic agendas and settle for the comforts of the institutional status quo. However, this is not entirely consistent with the assertion that one may discern a trend toward the constitutional and international recognition of environmental rights, which, again metaphorically speaking, cannot be the product of immaculate conception.[16]

To shield the biosphere from the severe damage inflicted upon it by the dominant epistemological paradigm and the highly skewed hegemonic social structure in which it is embedded, Hancock suggests that human right status be explicitly accorded to two ecologically vital legal prescriptions: for an environment free from toxic pollution and for the collective ownership of natural resources. The term "explicitly" should be highlighted in this context. The reason lies in the fact that the pursuit of this lofty objective does not hinge, at the conceptual level, on a significant adjustment in the underlying juridical architecture. In reality, the non-fulfillment of those two requirements amounts in many respects to an infringement of existing human rights. The shift in that direction, hence, basically entails a mere acknowledgment of

15. *Id.*
16. *Id.*

ineffectively mapped linkages rather than the design of a completely new blueprint.[17]

The courts increasingly view toxic pollution as a source of public nuisance. The implication, arguably, is that the emission of poisonous substances amounts to a contravention of human rights provisions pertaining to arbitrary interference with a person's privacy, home, or correspondence. Judges also have recently been inclined to characterize toxic pollution as risk, displaying greater willingness to confront its deleterious effects. Hancock emphatically claims that all relevant criteria (identifiable actors, fault, moral culpability, undermining of other party interests, and violation of her rights)[18] for classifying toxic pollution as harm are readily met, a decidedly stronger proposition, which goes a long way toward dispelling any uncertainty regarding the apparent connection to human rights covenants.[19]

The desire to imbue the collective ownership of natural resources with greater legal authority reflects a belief that the existing rules governing the ownership of natural resources, anchored in the capitalist form of social organization, are ecologically unsound. The recourse to the term collective does not necessarily suggest that Hancock favors state ownership because this is merely one antidote to what he perceives as the current malaise. His principal concern is to avert resource depletion through viable non-private/communal/public ownership structures[20] conducive to a responsible management of pervasive market failure due to the often-encountered problem of joint consumption of goods, coupled with the impossibility of excluding non-contributing parties from benefits obtained by agents who make tangible sacrifices to achieve their consumption/ production objectives (resulting in environmentally challenging phenomena such as common pool resources, free goods, open access goods, and public goods).[21]

Hancock considers the collective ownership of natural resources to be consistent with the spirit and the letter of human rights treaties. Indeed, he contends that the latter invariably grant possession to groups rather than individuals. The right to self-determination, in particular, has collective connotations and

17. *Id.* at 107-56.

18. *See* JOEL FEINBERG, HARM TO OTHERS (Oxford University Press 1984).

19. HANCOCK, *supra* note 9, at 107-36.

20. *See generally* ELINOR OSTROM, GOVERNING THE COMMONS (Cambridge University Press 1990).

21. HANCOCK, *supra* note 9, at 137-54.

cannot be realized without the collective ownership of natural resources. A similar logic can be extended to the right not to be exposed to hunger, given evidence that capitalist-style land ownership has at times played a palpable role in creating conditions that have led to large-scale starvation.[22] Complex analytical footwork is involved here as the illustrations offered are typically selective, but the endeavor is not altogether unproductive because the author places firmly, albeit controversially, the human rights credentials of the collective ownership of natural resources on the international legal agenda.

If the argument that normative blueprints cannot be divorced from their social context is valid, the fulfillment of this ambitious ecological vision is presumably contingent on far-reaching structural transformation. Hancock thus advocates a shift from capitalism in its conventional form to a new variant of social organization aptly categorized as liberalism. The latter rests on a political foundation featuring equality in individual power, rights, and duties. It also embodies the Mill principle that it is not merely permissible for society to prevent a person from undertaking activities which cause harm to others (emission of toxic pollution and overexploitation of natural resources being notable examples), but that there is a *prima facie* case for criminalizing such activities and penalizing the transgressor.[23]

The elaborate edifice constructed by Hancock is not without flaws. The economic rationality paradigm is subjected to a distinctly reductionist treatment. The allocative efficiency framework is misrepresented. Microeconomics is stripped of several of its key dimensions (e.g., equity, freedom, transparency, and accountability). Capitalism is assumed to be in a state of static, as distinct from dynamic, equilibrium and its considerable heterogeneity is not recognized. Capitalist ills are addressed from a narrow and one-sided perspective. The author refers extensively to like-minded philosophers and critics, yet he largely eschews the empirical social sciences and related academic disciplines. He finds little inspiration in insights provided by students of economic development, comparative economic systems, industrial economics, public economics, political development, comparative politics, public policy, and political sociology. The liberal order

22. *Id.*
23. *Id.* at 109-16.

sought as an alternative to capitalist excesses is vaguely outlined and lacks solid institutional underpinnings.

However, a book may have serious shortcomings and yet qualify as a very important scholarly landmark. Hancock demonstrates far more effectively than any other writer that international environmental law cannot be explored in isolation. Its evolution is driven and constrained by powerful external forces that need to be carefully dissected. Absent an explicit acknowledgement of such complex linkages, attempts at ecological problem description, explanation, evaluation, and subsequent prescription are likely to prove to be unproductive. The case for grounding environmental rights, where appropriate, in existing human rights is also, on the whole, cogently made. The arguments are not invariably compelling, but they are articulated in a comprehensive and coherent manner. The author offers an intriguing model which commands close attention and requires thorough examination.

The Hayward book is a more focused, less contentious, yet equally thought-provoking exploration of cutting-edge legal issues concerning the relationship between man and nature. He sets out in pursuit of his analytical goals by sifting through various formulations of environmental rights that are found in relevant authoritative sources. A number of permutations are considered (geared toward the attainment of ecological equilibrium or balance, sustainable development, development of the person, aesthetic enhancement, etc.) but eventually, preference is expressed for the Brundtland definition of a right to an environment adequate for health and well-being. Hayward acknowledges that this does not necessarily qualify as an all-embracing formulation, yet he convincingly argues that it is a workable one and merely anthropocentric in the weak sense of the term (i.e., it does not marginalize nonhuman interests, even though, other things being equal, they are not deemed to be entirely on par with their human counterparts).[24]

The next, more challenging, step consists of a painstaking attempt to establish that the right to an adequate environment (for health and well-being) enjoys the status of a genuine human right. Two opposing theoretical perspectives are juxtaposed for this purpose. One postulates that human rights are rights humans hold by virtue of being human, or that they are essentially moral

24. HAYWARD, *supra* note 10, at 26-61.

rights. The other claims that there are and can be no legitimate wellsprings of moral norms located outside the domain of actual social conventions and institutions within which concrete standards of ethical conduct have emerged over the course of history. Hence, the potential distinction between rhetorical rights and those of the real variety. The latter extend beyond the realm of pure morality or natural law and become embedded in specific institutional practices which carry a binding force.[25]

The first of these two perspectives is closely associated with the influential work of Pogge, a political philosopher who differentiates between moral human rights and legal ones and asserts that the former do not derive their authority from the latter.[26] His account incorporates an institutional element and is thus broader than purely interactional approaches which squarely place morality and human rights in the sphere of interpersonal relations.[27] Nevertheless, Pogge rejects the notion that juridication is a necessary, or even sufficient, condition for the fulfillment of the principles embodied in human rights. Where those principles can be upheld through alternative institutional practices, juridication is by definition not called for.

This stance contrasts with that of Habermas, another prominent political philosopher for whom the dichotomy between moral and legal human rights is inoperative.[28] After all, interpersonal obligations possessing moral attributes do not inevitably attain the status of rights (as distinct from being ethically sound) in that the latter typically require a deeper justification, or a second source of normativity, due to the limitations they impose on individual freedoms.[29] Unlike the former, according to Habermas, human rights are Janus-faced, embracing simultaneously morality and the law. They are constructions, rather than moral truths to be discovered, and as such have an inherently juridical character, which entails a conceptual orientation toward a positive enactment by legislative bodies.

Hayward finds this position more compelling and proceeds to endeavor to demonstrate that the right to an adequate environ-

25. *Id.*

26. *See* THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS (Polity Press 2002).

27. *See* D.D. RAPHAEL, POLITICAL THEORY AND THE RIGHTS OF MAN (Indiana University Press 2002) (1967).

28. *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (Polity Press 1997) (1996).

29. *See* JEREMY WALDRON, THEORIES OF RIGHTS (Oxford University Press 1984).

ment satisfies both the moral and institutional/legal criteria commonly employed in assessing the genuineness of human rights.[30] In terms of the moral yardsticks, he aims to establish that environmental harms pose a serious threat to vital human interests on a scale that is comparable to, or at times even greater than, that seen in the case of many well-entrenched human rights.[31] Hayward also seeks to show that the right to an adequate environment qualifies as a truly universal right in the sense that the interests it is designed to protect are common to all humans. Again, it is said to fare as well in this respect, possibly better, than several long-existing human rights.[32]

The legal hurdle is potentially crossed by identifying a series of authoritative international documents lending substance to the idea of environmental human rights, starting with the 1972 Stockholm Declaration adopted at the UN Conference on the Human Environment. Although this particular instrument was a legally non-binding statement, an observation which applies to some of those that have subsequently followed, it encapsulated the emerging consensus regarding the human rights underpinnings of environmental protection. The 1987 Brundtland Report has provided further impetus to this process of status enhancement, and the views to which it has given rise have been incorporated in a host of constitutional and international vehicles (e.g., the 1989 UN Convention on the Rights of the Child and the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters). Hayward concedes that progress has been uneven, with setbacks along the way (e.g., the 1992 Rio Conference on Environment and Development, to all intents and purposes a successor to the Stockholm Declaration, eschewed the terminology of rights), but he asserts that, on balance, there is sufficient evidence to suggest that environmental human rights are crystallizing in international law.[33]

Having constructed an apparently sound analytical basis for infusing environmental protection with human rights content, Hayward moves on to grapple with the principal item on his challenging agenda: to impress upon his readers the logic and importance of constitutionalizing the right to an adequate environment.

30. *See* RAPHAEL, *supra* note 27.

31. *See* James W. Nickel, *The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification*, 18 YALE J. INT'L L. 281, 281-295 (1993).

32. HAYWARD, *supra* note 10, at 47-54.

33. HAYWARD, *supra* note 10, at 47-54.

The conceptual road he travels to this end features an argument that there is no justification for drawing a meaningful distinction between this specific right and those which form the core set included as fundamental rights in virtually every modern constitution (i.e., the right to life, freedom from torture, freedom from arbitrary arrest and detention, the right to be presumed innocent, the right to privacy, freedom of movement, the right to property, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, and the right to participate in government).[34]

A counterclaim might conceivably be put forward that certain human rights, firmly anchored in lofty ethical principles and by no means lacking international legal recognition, are not denied constitutional standing but are accorded lower status, and consequently lesser binding force, than those comprising the core. For constitutional purposes, this category is classified as social rights, in order to differentiate them from their fundamental counterparts. In theory, the right to an adequate environment could be placed in the lower-level set, for it displays a number of broadly similar characteristics. Be that as it may, Hayward contends that pursuing this angle would not be fruitful since fundamental and social rights are not mutually exclusive and the whole distinction is of dubious value.[35]

Another argument potentially detracting from the thesis is that environmental rights are best expressed as procedural entitlements rather than as substantive edicts directed at securing an adequate environment. If this line of reasoning is valid, environmental rights are effectively reduced to participatory rights which formally empower citizens to demand access to information pertaining to the environment, to provide an input into relevant decision-making processes, and seek appropriate redress through judicial channels. Hayward rejects this notion on the grounds that participatory rights, or the procedures through which they are realized, assume determinate substantive commitments on the part of the state. The corollary is that procedural and substantive environmental rights stand or fall together and, to reiterate, he

34. HAYWARD, *supra* note 10, at 62-92; *see also* PROMOTING HUMAN RIGHTS THROUGH THE BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES (Philip Alston ed., Oxford University Press 2000).

35. HAYWARD, *supra* note 10, at 62-92.

harbors no doubts about their fundamental constitutional credentials.[36]

Establishing such credentials is merely part of the challenge. An ecologically enlightened constitutional blueprint is no guarantee of strict implementation and enforcement. The potential difficulties encountered in this context stem from the problems inherent in converting a principle, however noble, into a dependable legal vehicle that citizens can employ in concrete judicial settings. It is not necessarily a straightforward undertaking to make an environmental right justiciable, or to present an admissible case on its basis. Even where this hurdle can be overcome, the peculiar nature of environmental issues may render a successful outcome a low-probability event. While acknowledging such concerns, Hayward does not consider the misgivings offered on that score to be sufficient to abandon his mission, provided the right steps are taken to avert mismanagement (e.g., improving citizens' access to justice, furnishing the courts with the requisite constitutional and organizational competence, and establishing specialist environmental courts, if circumstances so dictate).[37]

To complicate matters, implementation and enforcement have an international dimension. Unfortunately, at this point, Hayward's bold and illuminating journey reaches a destination akin in some respects to a *cul de sac*. On the one hand, he assumes, implicitly at least, that there is a single ethical code comfortably shared by humankind, cultural barriers notwithstanding. This common moral fabric presumably underpins the human rights superstructure, including the emerging environmental component, which is being painstakingly constructed in order to forge a more enlightened political regime across the globe. On the other hand, he cannot escape the reality of a world deeply fragmented along socio-economic lines. Implementation and enforcement, and often underlying values, are a different proposition when ideas confront practice in countries on the global periphery (as currently perceived), particularly those in the early stages of development. Given such tension, Hayward finds it convenient to largely confine his thesis to mature democracies (mostly ones of a European vintage), but attempts not to altogether surrender claims to universal validity by offering lip service to the need for less affluent countries to address ecological threats head-on, despite the strains the

36. *Id.*

37. HAYWARD, *supra* note 10, at 93-128.

process is bound to trigger. From a utilitarian perspective, he also sees no reason for them to oppose the constitutionalization of environmental rights in industrialized societies.[38]

The belated recognition of cultural diversity is a welcome shift in a powerful argument that evolves in an overly linear fashion. Even in mature democracies, intellectual predispositions and institutional dynamics at times follow divergent patterns (not always consistent with ecocentric/ biocentric/ deep ecology values). Elsewhere, relative deprivation, resource scarcity, traditional influences, and transitional pressures may combine to create a complex mosaic that must be carefully examined in an effort to distill the relevant lessons and embrace the task of progressive environmental design from a broader perspective. This does not imply a jettisoning of universalism in favor of relativism, but an incorporation of elements derived from the latter into ecological diagnosis, prognosis, and prescription.

RELATIVISM REVISITED

Proponents of environmental human rights go to great lengths to demonstrate that the preservation of the biosphere possesses moral and legal underpinnings equal to those of the protections granted through institutionally better entrenched *human* rights. The impression inadvertently conveyed is that outside the ecological domain norms have crystallized to a point whereby they are no longer seriously challenged and that friction encountered in the course of implementation/enforcement is not an impediment to an effective functioning of the much-vaunted human rights regime. This is not an entirely accurate portrayal of developments in the field for, although the environmental movement cannot claim the international legal and constitutional achievements of its human rights counterpart, the latter continues to confront headwinds stemming from the plurality of socio-economic experiences and political interests in the global arena.

The prevailing circumstances are selectively reflected in human rights discourse, which at times assumes a 'center-versus-periphery' character. The center is more inclined to embrace the existing human rights framework and adhere to it. The periphery is less favorably disposed toward the system and has fewer misgivings about deviating from the spirit which it embodies. This should not be invariably attributed to opportunistic motives, or

38. HAYWARD, *supra* note 10, at 185-215.

even socio-economic inertia, because the human rights regime is apparently not devoid of dualistic attributes that may partly account for the ambivalence. After all, given the historical backdrop, its evolution has inevitably been shaped by cultural impulses originating at the center. These impulses have been marginally adjusted through a process of negotiations on a wider international basis, yet Western/Northern influences have remained the dominant force from conception to implementation and enforcement.[39]

In light of such dualistic propensities, or perceived inequities, political and intellectual elites at the periphery have tended to tread unevenly on the human rights front. The realities of Western/Northern hegemony, coupled with a deep-rooted sense of inefficacy, have often prompted them to adopt a critical attitude and engage in various forms of resistance. This has not always manifested itself constructively due to the lingering residue of antagonism fueled by a long period of dependency and the fragility of post-colonial domestic institutions. There have thus been very limited efforts to articulate indigenous ideas and undertake productive bridge-building activities vis-à-vis the center. As a result, the dualistic quality of the human rights framework has not materially diminished.[40]

The picture is not uniformly bifurcated. Notably, some scholars have consistently endeavored to narrow the gap between the center and periphery by seeking ways to promote internal cultural re-appraisal and cross-cultural dialogue. The purpose of the former is to enhance the understanding of the culture-specific assumptions underlying competing human rights perspectives. The latter is expected to build on this foundation by fostering exchanges conducive to viable normative synthesis. Those involved in the quest for greater consensus acknowledge the real or apparent cultural insufficiency of certain human rights principles, but

39. *See* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi A. An-Na'im ed., Philadelphia: University of Pennsylvania Press, 1992); HUMAN RIGHTS AND GLOBAL DIVERSITY (Peter Jones & Simon Caney eds., Cass 2001); HUMAN RIGHTS: CONCEPTS, CONTESTS, AND CONTINGENCIES (Austin Sarat & Thomas R. Kearns eds., University of Michigan Press 2001); CHRIS BROWN, SOVEREIGNTY, RIGHTS, AND JUSTICE: INTERNATIONAL POLITICAL THEORY TODAY 187-211 (Cambridge 2002); CULTURAL TRANSFORMATION AND HUMAN RIGHTS IN AFRICA (Abdullahi A. An-Na'im ed., Zed Press 2002); HUMAN RIGHTS AND DIVERSITY: AREA STUDIES REVISITED (David P. Forsythe & Patrice C. McMahon eds., University of Nebraska Press 2003).

40. *See supra* note 39.

they proceed from the position that the current system is basically sound and that it is not entirely oblivious to conceptions of human rights advanced at the periphery (which are often skewed toward the community rather than the individual). In that vein, no radical overhaul is called for, as the two-step strategy advocated, amounting to retroactive legitimization, may restore harmony through internal/mutual learning and modest reformulations and revisions of established human rights standards.[41]

This approach is marked by an acceptance of ethnocentricity, albeit of the enlightened variety. The thesis adopted is that, in its progressive manifestations, an appreciation of one's own group's uniqueness is likely to inspire respect for the uniqueness of other groups. Enlightened ethnocentricity hence recognizes the right of others to be different, whether as individuals within the same society or members of another society. In sociological vernacular, such a theoretical/policy orientation is generally identified with cultural relativism, or the reaffirmation of the equal validity of diverse patterns of life. Its enlightened status notwithstanding, this particular viewpoint is not unambiguously embraced at the center, however, and it tends to be interpreted in a one-sided fashion at the periphery, where the inclination is to emphasize local cultural context and minimize the relevance of the external (i.e. global/Western/Northern) dimension.[42]

Critics at the center retort that cultural relativism renders moral judgement void and thereby impedes action against injustice. Even those who stop short of such absolutist observations assert that the idea of human rights is anchored in modern conceptions of fairness in organized societies rather than in anthropologically-rooted consensus regarding the desires, needs, and values of human beings. The corollary is that Western/Northern notions of social justice, while not universal in origin, ought to be assessed on their merit and, if appropriate, should be considered universally applicable. There may well be an inherent tension between human/ individual and collective rights, since the latter give precedence to collective entities (family, community, nation, etc.), but it does not necessarily follow that a dilution of the former is the logical outcome.[43]

For the most part, such arguments fail to reverberate at the periphery. Eastern/ Southern relativists dismiss charges of nihil-

41. *See supra* note 39.
42. *See supra* note 39.
43. *See supra* note 39.

ism on grounds of absolutist overstatement. They are also reluctant to embrace values portrayed as universal but apparently underpinned by exclusive ethnocentricity. Morality to them may be all-embracing, in the sense that no culture can escape it, yet determining its content and supplying criteria for normative judgement should not be the prerogative of one group or another. In accordance with the spirit of cultural relativism, it is equally vital to maintain that shared moral values be authentic rather than imposed from outside. And, as matters stand, the existing least common denominator may not be sufficiently broad to accommodate all essential human rights.[44]

Indeed, cultural relativists have not confined themselves to mere containment but have proceeded to construct an elaborate analytical façade. It now possesses a number of distinct dimensions such as ethical relativism, epistemological relativism, historical relativism, and linguistic relativism. Each of these branches, in turn, can be further subdivided into finer categories. For example, ethical relativism, a particularly active stream, consists of descriptive relativism, metaethical relativism, and normative relativism. The forces of divergence are counterbalanced by influences fostering convergence, yet this rich mosaic clearly attests to the lingering power of cultural relativism and the depths of sentiment (as distinct from just entrenched interests) that sustain it.[45]

Demographically formidable, economically resurgent, physically vast, and politically confident, Asia has spearheaded the challenge to universalist visions of human rights. Members of the intellectual establishment and prominent officials in the region have consistently underlined the particularistic nature of the principles espoused by the center by portraying them as the product of a specific genre of political thought originating in the Enlightenment (i.e., in the modern West/North). During that period, rights had evolved from being perceived as grounded in natural law bestowed by a divine lawgiver to assuming a democratic, egalitarian, individual, rational, secular, and (most importantly in this context) supposedly universal character.[46]

44. *See supra* note 39.

45. *See* Roda Mushkat, *Culture and International Law: Universalism v. Relativism*, 6 SING. J. INT'L COMP. L. 1028, 1028-42 (2002).

46. *See* BROWN, *supra* note 39, at 187-211; HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA PACIFIC (James T.H. Tang, ed., Pinter 1995); THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanna R. Bauer & Daniel A. Bell, eds., Cambridge University Press 1999); DANIEL BELL, EAST MEETS WEST: HUMAN RIGHTS AND DEMOC-

Asian relativists view this ambitious normative framework as geographically located and historically bound. They assert that, since it is rooted in a particular cultural tradition (Western/Northern liberalism, in all its elaborate forms), it cannot by definition be promoted as all-embracing or, to express it differently, it fails on its own terms. To restate the point more emphatically, while claiming universal validity, the framework is circumscribed by a highly specific type of rationality. While advocating egalitarianism, it deems other schools of thought and social practices unequal (in fact, explicitly inferior); while extolling the virtues of freedom, it effectively seeks to suppress alternative voices, notably those of the non-liberal variety.[47]

Unlike in other parts of the periphery, the Asian posture vis-à-vis human rights standards emanating from the center is marked by offensive muscle-flexing rather than merely defensive containment. An unambiguously harsh critique of the West/North is offered by some of the region's most visible spokespersons focusing on its seeming exploitation of human rights issues in the pursuit of an interventionist/neo-imperialist agenda, the rugged individualism spawned by its liberal democratic ethos, and the sense of moral vacuum engendered by its lack of an ethically-inspired collective purpose. The selectively messianic orientation leads to aggressive policies across borders and the adversarial/individualistic culture that has supplanted the feudal/patrimonial order fosters conflict in both the institutional and private domains.[48]

In the same vein, it is argued that, given its rich heritage and socio-economic resilience, Asia may legitimately claim to be able to furnish an alternative, perhaps even superior, mode of governance to the one promulgated at the center. This model draws on a variety of sources, including Confucianism, interpretations of Islam enjoying currency in the region, and specific national/subnational traditions whose influence continues to linger. It is a tip of a larger iceberg, consisting of a set of Asian values which permeate every aspect of life. The model places authority and order above democracy and individual freedom, duties above rights, eco-

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RACY IN EAST ASIA (Princeton University Press 2000); ANTHONY J. LANGLOIS, THE POLITICS OF JUSTICE AND HUMAN RIGHTS: SOUTHEAST ASIA AND UNIVERSALIST THEORY (Cambridge University Press 2001); DANIEL BELL, BEYOND DEMOCRACY: POLITICAL THINKING FOR AN EAST ASIA CONTEXT 52-83 (Princeton University Press 2006).

47. *See supra* note 46.

48. *See supra* note 46.

nomic and social advancement above civil and political maturation, and the sovereign state above its citizens (or, for that matter, any external parties). Power, it should be noted, is not exercised in a neutral fashion, as in the West/North, but in a morally correct manner and in order to realize an ethically appealing vision. The government thus takes the form of a paternalistic trusteeship (or soft authoritarianism), whereby people entrust their welfare to the power-holders who exercise independent judgement in the public interest.[49]

Committed universalists are not ruffled by such spirited onslaughts, even when the pressure is exerted by high-profile presidents/prime ministers (notably those of Indonesia, Malaysia, and Singapore at one juncture or another). They contend that Asian elites conveniently distort realities on both sides of the ideological fence. Western/Northern liberalism is not devoid of a collective spirit and Asian values do not consign individualism to moral oblivion. By the same token, the former is not at all insensitive to developmental needs which are accorded considerable importance, albeit on a non-exclusive basis (i.e., economic and social rights coexist with civil and political ones, coalescing into a system whose different parts reinforce each other). Nor is its thrust inconsistent with the effective discharge of sovereign functions.[50]

Moreover, pretensions notwithstanding, there is no single set of Asian values and the region's elites are opportunistically singling out those that serve their purposes, wrongly equating the state with the community in the process. The particular tenets they choose to elevate are not necessarily supported by other segments of the population. Indeed, Asian societies are fragmented rather than merely diverse. Horizontal (inter-group) and vertical (elite-mass) conflicts abound. It is thus disingenuous to juxtapose the region's putative harmony with the apparent fissures witnessed at the liberal center. If the Asian super order is in fact underpinned by solid consensus, it may be appropriate to query why the states in the region, including relatively affluent ones, have to resort regularly and on a large scale to coercive measures in their efforts to achieve national cohesion and political stability.[51]

Unfortunately, this equally spirited counterattack, while not without foundation, does not do full justice to the Asian values

49. *See supra* note 46.
50. *See supra* note 46.
51. *See supra* note 46.

stance. The multi-faceted nature of this complex phenomenon is oversimplified because, in an adversarial climate, intellectual energy is directed almost exclusively toward vocal groups affiliated with the official establishment. It is true that Asian relativists may blur the distinction between state and community, but global universalists may overlook key cultural dimensions of the elite-mass dichotomy. A more comprehensive examination of the region's social scene reveals that, at the grassroots, there is no dearth of coherent value sets which inspire constructions of human rights that are scarcely consistent with those prevailing in the West/North, and yet do not display the opportunistic edge of official establishment ideologies.[52]

A close encounter with authentic Asian realities thus serves to poignantly underline the geographically and historically contingent character of human rights. It prompts the observer to acknowledge that they constitute intellectual frameworks developed by one pivotal culture emerging from its own philosophical milieu and are not necessarily applicable in a mechanical fashion to other cultures. Indeed, the possibility that the latter may act as a source of valuable constructs should not be lightly dismissed. This does not imply that relativism in its unqualified form may be proffered as a full-fledged alternative to classical universalism. Rather, the corollary is that the two schools of thought cannot evolve in isolation and that progress toward a culturally viable human rights regime hinges on a genuine dialogue and mutual learning. Analytical devices proposed by legal scholars, such as conversationalism and incompletely theorized agreements, may facilitate productive interaction in this domain.[53]

The intellectual and political tension between universalism and relativism manifests itself in the environmental arena, where the two competing approaches vie for conceptual and strategic advantage with considerable intensity. Proponents of the former put forth sophisticated ethical and practical arguments couched in

52. *See supra* note 46.

53. *See* HABERMAS, *supra* note 28; Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733, 1733-72 (1995); SIMONE CHAMBERS, REASONABLE DEMOCRACY: JURGEN HABERMAUS AND THE POLITICS OF DISCOURSE (Cornell University Press 1996); DELIBERATE DEMOCRACY: ESSAYS ON REASON AND POLITICS (James Bohman & William Regh, eds., MIT Press 1997); DELIBERATIVE DEMOCRACY (Jon Elster, ed., Cambridge University Press 1998); AMY GUTMAN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (Belknap Press 1998); FRANK FISCHER, REFRAMING PUBLIC POLICY: DISCURSIVE POLITICS AND DELIBERATIVE PRACTICES (Oxford University Press 2003).

terms of global ethics, human stewardship of nature, intergenerational and intragenerational equity, common concern for mankind, human rights logic, implicit/explicit international agreement/consensus, and sheer necessity. Those who react to such claims by adopting a relativist position follow an equally subtle path, invoking notions of equity and justice, differential treatment in international law, cultural legacy, institutional capacity, and human constraints.[54]

As matters stand, the forces of convergence may be proving somewhat stronger than those fostering divergence. This reflects the shift in a more democratic direction in Asia since the 1997/98 financial crisis, growing affluence seen in the region, socio-economic transformation (rise of the middle class and emergence of the service economy), value realignment, and increasing concerns about relentless environmental degradation. However, the gap between ecological universalism and its relativist counterpart remains substantial. It can be narrowed further but not bridged entirely because, again, meaningful uniformity and genuine diversity cannot be wholly reconciled. Although no radical conclusions need to be drawn, the corollary inevitably is that environmental enlightenment and protection should not be pursued in an exclusively top-down fashion but be sought in parallel by means of bottom-up strategies geared toward building an understanding of complex realities and a viable ecological order through the examination of ground-level developments in different cultural settings.[55] From this perspective, the Chinese experience, distinctly problematic in that context, may provide some lessons for scholars and policy makers engaged in efforts to promote environmental human rights.

HISTORICAL INSIGHTS

During the post-1978 reform era, Chinese society has been in a state of profound transition, inexorably opening to the outside world and consistently shedding its hard authoritarian features. Nevertheless, despite occasional manifestations of an unadulterated liberal spirit (expressing themselves in prominent dissident statements employing analogies from physics to assert that there is a single form of democracy invariably encompassing inviolable

54. *See* RODA MUSHKAT, INTERNATIONAL ENVIRONMENTAL LAW AND ASIAN VALUES: LEGAL NORMS AND CULTURAL INFLUENCES 25-31 (University of British Columbia Press 2004).

55. *Id*. at 16-31, 39-85, 127-130.

freedoms),[56] incorporating the China element into the global human rights framework continues to pose a significant challenge. The country is a participant in the system, but hardly an earnest one, and its actions and official utterances at times border on defiance/ resistance.[57]

More importantly, from a relativist standpoint, the largely intact core of the evolving and progressively less monolithic Chinese culture does not readily harmonize with the Western/Northern liberal ethos underpinning the existing human rights regime. Notably, this core is rooted in the assumption that individuals obtain satisfaction mostly through their membership in an elaborate network of social relationships, rather than principally in an entirely autonomous fashion or in a manner involving themselves and a higher authority on an exclusive basis. The social relationships are governed by a set of reciprocal but unequal expectations, such as those between ruler and subject, that the parties are morally bound to fulfill.[58]

This cultural legacy impinged on government functioning and legal practices throughout the imperial era (221 B.C.-A.D. 1912). Rather than being viewed as a state in the formal sense of the term, the political institutions of the empire were essentially regarded, at least in principle, as an extended family. Within that culturally-shaped structure, the ruler, as a parent-like figure, had fiduciary duties to insure the physical and spiritual well-being of his subjects who, in turn, were to display loyalty and industry. The law, which was to be resorted to only if more desirable instruments of social control proved inadequate, dovetailed with the family model by providing for differential punishments for hierarchically distinct social relationships. As befits a family, there was no effective recourse against a ruler failing, in the face of moral suasion, to discharge his obligations.[59]

The painful encounter with post-Enlightenment Europe brought into focus divergent conceptions of humanity and social order. The humiliation suffered at the hands of foreign powers/ "hairy barbarians" as a result of the defeat in the Opium War

56. *See* William P. Alford, *Making a Goddess of Democracy from Loose Sand: Thoughts on Human Rights in the People's Republic of China*, *in* HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA PACIFIC (James T.H. Tang, ed., Pinter 1995).

57. *See* RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? (Oxford University Press 2007).

58. *See supra* note 56, at 69-73.

59. *Id.*

(1839-1843), and the ensuing imposition of a system of extraterritoriality, shocked the intellectual elite into searching for new ways to restore China's independence and vigor. This effort initially centered on military means and technological sophistication, but ultimately attention shifted to political and legal vitality. Ideas borrowed from foreign sources, notably those inspired by principles of representative government and equality before the law, were tentatively floated and selectively transformed into programmatic blueprints.[60]

However, such endeavors had a salient instrumental dimension in that they were driven by the perception that democracy and the rule of law, rather than merely military prowess and technological ascendancy, played a crucial part in propelling the West/North to a position of international dominance and that Chinese strategies to redress the balance would have to be recalibrated accordingly. The notions of representative government and equality before the law were never stretched to their logical conclusion and the culturally-resilient collective and hierarchical elements kept on asserting themselves. Even the much-vaunted pro-democracy movement, which burst onto the political scene in the late 1980's and was brutally suppressed by the regime, did not carry the human rights torch in a determined fashion and exhibited some traditional orientations.[61]

Present-day China appears to be steadily evolving toward an institutional configuration portrayed as "authoritarian pluralism." This is an intricate system within whose confines political life remains under the unchallenged control of a deeply-entrenched single-party apparatus. Strict limits are placed on liberty (albeit with certain circumstantial variations) and national security organs monitor socio-political trends closely. Yet, at the same time, a civil society is allowed to function apart from the state. The various segments of this body exercise a modicum of autonomy and are thus able to reflect diverse interests. By the same token, the economy is mixed, with the market playing an increasingly pivotal role.[62]

60. *Id.*

61. *Id.*

62. The analysis in the following three paragraphs was further explored in a previously published article co-authored with Miron Mushkat, citiations are included. Miron Mushkat & Roda Mushkat, *Economic Growth, Democracy, the Rule of Law, and China's Future*, 29 FORDHAM INT'L L.J. 229, 244 (2005).

A key feature of this fluid institutional dynamics is a shift from an uninhibited political center with transformative dispositions toward an inhibited one with accommodative policies. The former constitutes the essence of a totalitarian state seeking to morally purify the inner lives of its citizens. The latter serves as a pillar of an authoritarian regime to which Chinese people have long been exposed. It existed in Taiwan before, in markedly different circumstances (seriously limiting the scope for cultural extrapolation), the democratization of the last two decades and throughout China during many centuries of the imperial era.[63]

The inhibited center is organizationally incapable of effectively directing the activities of citizens. They regard it as promulgating a fundamentally correct doctrine, which it cannot implement successfully. It thus enjoys a degree of fragmentary legitimacy and operates in an ideologically eclectic manner. The ambiguities and contradictions which this peculiar pattern spawns notwithstanding, it results in a reasonable measure of stability because of severe restrictions on what would normally qualify as free political activity. As matters stand, there is no evidence to suggest that the Chinese ruling elite are pursuing a strategic agenda whose ultimate aim is to convert the inhibited center into a subordinate one, that is, an institution guided by the freely expressed will of the people/voters.[64]

Analogous influences manifest themselves in the legal domain. It is apparent that China is undergoing a transition from a system based on the rule of man to one displaying some semblance to the rule of law. Be that as it may, the emerging legal structure is akin in many respects to a variant based on rule *by* law rather than rule *of* law. Although progress is doubtless being observed on the legal front, the actual reach of the law does not extend very far. After all, the Communist Party continues to function at variance with the constitution, other relevant legal documents, and basic rule-of-law principles. Similarly, the government persists with steps impeding civil society and political dissidents are commonly denied their legal rights.[65]

This authoritarian institutional milieu, while no longer burdened by its previously hard attributes, scarcely provides a favorable backdrop for contemplating, let alone, engineering, a profound social transformation bound to culminate in the develop-

63. *Id.* at 243-44.
64. *Id.* at 244.
65. *Id.* at 250-54.

ment of the kind of liberal order that Hancock deems essential for fulfilling his progressive ecological vision. Chinese political realities underline the geographically and historically narrow range of a philosophically ambitious enterprise which seeks to refashion the global political architecture by offering a standard critique of modern capitalism and leaving untouched large swathes of the geographical and historical terrain. As an idealistic statement this is potentially acceptable, but the programmatic content of the course charted is simply inadequate.

Hayward does not set such demanding institutional requirements. The realization of his environmental human rights blueprint is not explicitly predicated on deep shifts in the socioeconomic fabric. He nevertheless implies that an ecological leap forward may not be possible in other than mature democratic settings. A two-pronged strategy is thus recommended: an implementation of an aggressive pro-environment agenda through constitutional channels in the Western/Northern hemisphere (effectively Europe) and an adoption of a more constructive ecological stance elsewhere. However, the suggestions for industrializing countries, including those commonly singled out for their international prominence (Brazil, Russia, India, and China; i.e., members of the hypothetical 'BRIC club'), are distinctly general in nature.

Davis has stepped into the analytical void by putting forth the notion of constitutional indigenization. He places an equally strong emphasis on constitutional action/reinforcement but, unlike Hayward, firmly believes that the dichotomy between mature democracies and ones resting on more fragile foundations/authoritarian regimes should not be accorded undue importance. The overarching goal is to promote liberal democracy within a vibrant constitutional framework and, at least at the theoretical level, no special allowances need to be made for countries that opt to operate in a less enlightened fashion. Constitutional indigenization arguably furnishes a path toward this end because it aspires to embed the principles of representative government and equality before the law in local (i.e., culturally diverse) institutions.[66]

The assumption is that the essence of human rights as currently conceived can be grasped across the geographical spectrum, if local cultural influences are allowed to come into play in an appropriate manner. Evidence in support of this claim is adduced by

66. Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998).

drawing attention to Asian countries, notably Japan, which over a long period of time have dismantled their authoritarian institutions and have embraced liberal democracy and constitutionalism (with "Asian characteristics").[67] However, this illuminating blending of descriptive and normative contentions does not amount to a viable plan of action. The structural changes advocated may be desirable and ultimately feasible, but they provide no concrete basis for guiding China (an emerging superpower and a source of ecological hazards on a global scale) in the coveted direction.

Soft authoritarianism and rule by law render the pursuit of environmental human rights a highly challenging undertaking, albeit not necessarily an unproductive one. While this is a low-probability scenario, a government disinclined to share power widely and subject itself to elaborate legal constraints might conceivably display marked ecological consciousness. By the same token, although this too is an unlikely prospect, a society long accustomed to functioning within a tight collective and hierarchical straightjacket could potentially exhibit a similar orientation. It thus behoves scholars engaged in a quest for robust legal means to protect the biosphere to examine dimensions of Chinese culture specifically related to the environment.

In this respect, a perusal of relevant historical and philosophical surveys might initially suggest that the picture is more palatable than one would be disposed to assume on the basis of current attitudes and practices. Indeed, there is an extensive academic literature highlighting the ecologically progressive features of Confucianism, Taoism, Legalism (the local variant), and Buddhism. At times, the impression conveyed is that, for the most part, China has evolved in an environmentally far less threatening cultural milieu than countries whose populace has embraced the monotheistic faiths (Judaism, Christianity, and Islam) and other civilizations that previously flourished in the West/North (the Greeks and Romans were particularly known for their pronounced anthropocentric beliefs).[68]

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67. *Id.*

68. *See* CHARLES O. HUCKER, CHINA'S IMPERIAL PAST: AN INTRODUCTION TO CHINESE HISTORY AND CULTURE *passim* (Stanford University Press 1975); RICHARD L. EDMONDS, PATTERNS OF CHINA'S LOST HARMONY: A SURVEY OF THE COUNTRY'S ENVIRONMENTAL DEGRADATION AND PROTECTION 22-41 (Routledge 1994); Yu-shi Mao, *Evolution of Environmental Ethics: A Chinese Perspective, in* ETHICS AND ENVIRONMENTAL POLICY: THEORY MEETS PRACTICE 42-57 (1994); RICHARD G. BOTZLER & SUSAN J. ARMSTRONG, ENVIRONMENTAL ETHICS: DIVERGENCE AND CONVERGENCE 284-96 (McGraw-Hill 2003); SEDIMENTS OF TIME: ENVIRONMENT AND SOCIETY IN CHINESE HISTORY

If this portrayal is read selectively, a tentative analogy might be drawn with the cultural propensities of Native Americans (or, for that matter, indigenous people in general), who are commonly assumed to have endeavored to forge a perfectly harmonious relationship with nature (an apparently romanticized view categorically rejected by some anthropologists/social historians).[69] The attitudinal patterns depicted most vividly point to a profound appreciation of the intrinsic value of the non-human parts of the universe manifesting itself in a multifaceted fashion that would not be inconsistent with avant-garde forms of present-day ecocentrism (albeit along lines varying over time; e.g., actively in Confucian thought but passively in its Taoist counterpart).[70]

However, an exploration of the fringes in the substantial scholarly work on the subject leads to a more problematic conclusion. A generous interpretation of pertinent trends would suggest that an originally enlightened belief system had undergone a subsequent corrosion due to a confluence of exogenous pressures and endogenous manipulation (by misguided and self-centered elites/rulers). Such reasoning would not be regarded as aberrant in this context as an analogous approach is adopted by historians who differentiate between (morally unalloyed) Confucianism and (morally flawed) Neo-Confucianism.[71] A less sympathetic construction would indicate that strong anthropocentric elements (predominantly, a Confucian desire to achieve mastery over nature) were a constant factor in Chinese culture and that they have simply become increasingly salient over time.[72]

A careful dissection of the body of historical materials available lends credence to the latter position. In fact, it seems that the sound ecological principles espoused by culture shapers in the early eras had always been confined to the social periphery and

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passim (Mark Elvin & Liu Ts'ui-jung eds., Cambridge University Press 1998); CONFUCIANISM AND ECOLOGY: THE INTERRELATION OF HEAVEN, EARTH, AND HUMANS *passim* (Mary E. Tucker & John H. Berthrong eds., Harvard University Press 1998); MARK ELVIN, THE RETREAT OF THE ELEPHANTS: AN ENVIRONMENTAL HISTORY OF CHINA (Yale University Press 2004).

69. BOTZLER & ARMSTRONG, *supra* note 68 (surveying divergent views).

70. *See* HUCKER, *supra* note 68, at 69-95; CONFUCIANISM AND ECOLOGY: THE INTERRELATION OF HEAVEN, EARTH, AND HUMANS, *supra* note 68.

71. *See* Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values, supra* note 66; Tucker & Berthrong, CONFUCIANISM AND ECOLOGY: THE INTERRELATION OF HEAVEN, EARTH, AND HUMANS, *supra* note 68; HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES *passim* (Michael C. Davis ed., Oxford University Press 1995).

72. *See* Elvin & Tsui-jung Liu, *supra* note 68, at 9-18, 454-71.

had exerted a limited impact on daily lifestyles and government policies. Moreover, as Elvin has pointed out, the tenets advanced had largely been the product of lagged responses to physically disruptive episodes rather than proactive ethical reflection. Specifically, "[t]he restraint preached by the archaic environmental wisdom found in certain Chinese classical texts is both familiar and in all likelihood commonly misunderstood: it was probably not a symptom of any ancient harmony but, rather, of a rational reaction to an incipient but already visible ecological crisis."[73]

Evidence that such philosophical musings made distinctly modest inroads into the overall culture can be derived from surveys conducted in recent years (i.e., a period characterized by relative political openness and tolerance by Chinese historical standards). The data understandably leave something to be desired in terms of quality and scope. They nevertheless paint a picture that is unambiguous on the whole and marked by few inconsistencies. There is sufficient empirical basis to infer that at the grassroots level environmental degradation is not regarded as a pressing issue, the problem is accorded a low priority (in general and vis-à-vis economic development in particular), familiarity with ecological matters is inadequate (in both rural and urban areas), willingness to engage directly or indirectly in corrective action is weak, and commitment to any remedial vision is tenuous.[74]

The exogenous pressures and endogenous manipulation briefly referred to earlier merit additional consideration for they shed further light on the analytical schemes put forth by contemporary proponents of environmental human rights (especially Hancock). A factor that looms large in the historical literature is the endless quest for power by the state, or the elites/rulers controlling or aspiring to control it, which time and again resulted in a material transformation of the natural habitat for the purposes of warfare. The 248 years of the Warring States period, during which 590 large-scale military conflicts were recorded, vividly exemplify this phenomenon in that they featured an uncomfortably

73. Mark Elvin, *The Environmental Legacy of Imperial China*, 156 CHINA QUARTERLY 733, 738-39 (1998).

74. *See* ENVIRONMENTAL AWARENESS IN DEVELOPING COUNTRIES: THE CASES OF CHINA AND THAILAND 46-168 (Sigeki Nisihira et al. eds., Institute of Developing Economies, 1997); Yoke-shiu F. Lee, *Public Environmental Consciousness in China: Early Empirical Evidence, in* CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 35-65 (Kristen A. Day ed., M.E. Sharpe 2005).

close relationship between the intensity of military campaigns and severe ecological disruption.[75]

Paradoxically, post-war political realignment and physical reconstruction tended to aggravate, rather than ameliorate, environmental conditions. The victorious parties normally proceeded to consolidate power and restore legitimacy by embarking on large-scale projects with seriously adverse ecological consequences. The ambitious designs implemented by the first emperor of the Qin dynasty were typical in this respect. He is lauded by scholars for successfully uniting six autonomous political entities and establishing the first centralized state in Chinese history. The task was facilitated by building a vast network of massive canals and irrigation systems, which enhanced communication across large territorial spaces and contributed to prosperity/stability. However, these efforts proved very costly in that they placed an enormous burden on the biosphere (as well as the many people affected and the social system).[76]

Imperial desire to boost the size of the population was another element in this environmentally questionable strategic paradigm. The underlying assumption was that the greater the number of subjects the ruler has command over, the greater his economic/military capabilities. From a top-down perspective, people were viewed as a source of agricultural labor, tax paying units, and army recruits, or as a valuable resource which could be employed as a quantitatively significant factor in aiding imperial entrenchment at home and in sustaining expansion beyond state borders. Uncontrolled population growth (without due regard to constraints such as the amount of land available) thus emerged as a perennial environmental challenge. The Ming dynasty, whose policies resulted in a near doubling of the population over two centuries or so and hence widespread ecological devastation (deforestation, flooding, soil erosion, and so forth), provides a poignant illustration of the decidedly negative impact on the biosphere of narrowly-focused strategies consistently pursued in an unfettered fashion by state authorities.[77]

75. *See* HUCKER, *supra* note 68, at 21-47; Mark Elvin, *The Environmental Legacy of Imperial China*, *supra* note 73; Elvin & Tsui-jung Liu, *supra* note 68, at 86-114.

76. *See* QU GEPING & LI JINCHANG, POPULATION AND THE ENVIRONMENT IN CHINA 17 (Robert Boardman ed., Jiang Baozhong & Gu Ran trans., Lynn Rienner Publishers 1994).

77. *See id.* at 24-25.

China's rulers were also traditionally disinclined to methodically engage in institution building in general and in the environmental domain in particular. Rather, throughout the imperial era and beyond (including Mao Zedong's reign), they displayed a strong preference for relying on moral suasion/personal authority. Ecological regulations were seldom promulgated in a systematic fashion and there were virtually no serious attempts to codify environmental laws. Ecological management mostly took the form of periodic campaigns, featuring mass mobilization to furnish support for large-scale infrastructure projects, which wreaked havoc on the biosphere. The Qing dynasty was an exception to the historical norm, but its efforts to build viable legal institutions fizzled out following its demise.[78]

CONTEMPORARY INSIGHTS

This modus operandi was stretched to extraordinary extremes by Mao Zedong, whose relentless pursuit of perpetual revolution inflicted unthinkable damage on the socio-economic façade and the environment. His single-handedly instigated campaigns, such as the anti-rightist drive and the Cultural Revolution, aimed at eradicating pockets of revolutionary lethargy, and insatiable quest for communist utopia, culminating in the Great Leap Forward, left China's institutions and its ecosystem in shambles.[79] Limited resistance had traditionally been offered to such arbitrary and harmful patterns of state action because of cultural and political influences (Confucian-style deference, impediments to scientific rationalism, and Marxist-Leninist dogma), rather than merely due to immense power imbalances and unsparing use of coercive means.[80]

As matters stand, reform era dynamics does not necessarily constitute a sharp break from the traditional model of state

78. *See* Helen Dunstan, *Official Thinking on Environmental Issues and the State's Environmental Roles in Eighteenth-Century China, in* SEDIMENTS OF TIME: ENVIRONMENT AND SOCIETY IN CHINESE HISTORY 585-614 (1998); CIVIL LAW IN QING AND REPUBLICAN CHINA *passim* (Kathryn Bernhardt & Philip C. C. Huang eds., Stanford University Press 1999).

79. MANAGING THE CHINESE ENVIRONMENT *passim* (Richard L. Edmonds ed., Oxford University Press 2000); JUDITH SHAPIRO, MAO'S WAR AGAINST NATURE: POLITICS AND THE ENVIRONMENT IN REVOLUTIONARY CHINA *passim* (Cambridge University Press 2001); ELIZABETH C. ECONOMY, THE RIVER RUNS BLACK: THE ENVIRONMENTAL CHALLENGE TO CHINA'S FUTURE 47-55 (Cornell University Press 2004); *see* Day, *supra* note 74.

80. *See* Alford, *supra* note 56; 2 JOSEPH NEEDHAM, SCIENCE AND CIVILIZATION IN CHINA *passim* (Cambridge University Press 1956).

[over]drive and containment. Broad similarities may be discerned with periods of post-conflict (principally of a military character in the distant past, but of a socio-political nature in recent decades) consolidation and reconstruction. The strategic emphasis has notably shifted from class struggle and ideological purification toward national reconciliation and enhancement of production/ improvement in the standard of living. Concrete steps have been taken, at times involving complex maneuvers and substantial pressures, to reduce elite fragmentation, heighten policy consensus, routinize decision-making procedures, increase organizational effectiveness, stabilize grassroots sentiment, rebuild the physical infrastructure, and revitalize the economy.[81]

However, such potentially complementary and mutually-reinforcing goals have been pursued in an unsynchronized and uneven fashion. Preservation of Communist Party rule and economic growth has been accorded foremost priority and other goals have been relegated to the periphery and implemented in a haphazard manner. Expansion of the economy has been pursued in a particularly relentless and single-minded style, crowding out the remaining parts of the reform agenda. The concerted effort directed toward this end and determination displayed in the process have reflected the belief that rising prosperity tends to keep core strata of society content and foster a climate supportive of fundamental reconstruction.[82] Specifically, it helps to achieve an objective that, according to Hirschman, has often eluded reformers – namely, turning a complex game that is inherently redistributive into one in which everyone wins, or at least no one is worse off than before the shift in the status quo.[83]

The building of socio-political infrastructure has been a decidedly more muted affair. In fact, China has lagged the Soviet Union in granting institutions, as distinct from (warring) person-

81. *See* KENNETH LIEBERTHAL & MICHEL OKSENBERG, POLICY MAKING IN CHINA: LEADERS, STRUCTURES, AND PROCESSES (Princeton University Press 1988); KENNETH G. LIEBERTHAL & DAVID M. LAMPTON, BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA (University of California Press 1992); SUSAN L. SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA (University of California Press 1993); JUNE TEUFEL DREYER, CHINA'S POLITICAL SYSTEM: MODERNIZATION AND TRADITION (Pearson Longman 2006); KENNETH G. LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM (W. W. Norton 2004); TONY SAICH, GOVERNANCE AND POLITICS OF CHINA (Palgrave Macmillan 2004).

82. *See* SHIRK, *supra* note 81, at 3-22; LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM, *supra* note 81, at 245-72.

83. ALBERT O. HIRSCHMAN, THE STRATEGY OF ECONOMIC DEVELOPMENT 11-24 (Yale University Press 1958).

alities, the authority to set strategy. It was, after all, a newer and less prominent member of the communist fraternity. Its evolution from a personalized rule to an institutionalized one was impeded by Mao's use of mass campaigns to prevent the routinization of the revolution. The authority of the Soviet Central Committee to choose party leaders was established definitely in 1957. By contrast, its Chinese equivalent had to share power with party elders who did not hold any official posts throughout the last two decades of the 20th century and possibly beyond.[84]

As Lee, Mann, Pei, and Shirk suggest in their recent and illuminating work, economic reform may be akin to Pandora's box, unleashing powerful centrifugal forces which promote affluence, and hence serve as an insurance policy, but which the ruling elite struggles to control. Propelling the economy inexorably forward is thus both an imperative and a risky strategy. Party leaders walk the proverbial tightrope by pushing hard on the economic accelerator while at the same time proceeding at a snail's pace on the socio-political front. The upshot is that massive resources are channeled toward physical reconstruction (as well as national security), yet the institutions which sustain this vast undertaking remain in their embryonic stage, detracting from the effectiveness of the enterprise and rendering it a precariously delicate balancing act.[85]

The imbalance between a runaway economy and a stagnant socio-political system/policy apparatus is merely one of several marring the strategic landscape. Notably, the education, health, and welfare sectors are grossly underdeveloped, starved of funds, and lacking innovative impetus. The economic engine itself operates on an uneven keel. A policy of 'unbalanced growth' is pursued with an unrestrained devotion. Robust output expansion takes

84. *See* LIEBERTHAL & OKSENBERG, *supra* note 81, at 35-62; Kenneth G. Lieberthal, *Introduction: The "Fragmented Authoritarianism" Model and its Limitations, in* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1-30 (1992); Carol Lee Hamrin, *The Party Leadership System, in* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 95-124 (Lieberthal & Lampton eds., University of California Press 1992); SHIRK, *supra* note 81, at 3-22; DREYER, *supra* note 81, at 107-40; LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM, *supra* note 81, at 59-122; SAICH, *supra* note 81, at 25-56.

85. MINXIN PEI, CHINA'S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY (Harvard University Press 2006); JOHN LEE, WILL CHINA FAIL? THE LIMITS AND CONTRADICTIONS OF MARKET SOCIALISM (Centre for Independent Studies 2007); JAMES MANN, THE CHINA FANTASY: HOW OUR LEADERS EXPLAIN AWAY CHINESE REPRESSION (Viking 2007); SUSAN L. SHIRK, CHINA: FRAGILE SUPERPOWER (Oxford Uniersity Press 2007).

precedence over price stability. Exports, foreign capital inflows, and fixed asset investment are unceasingly stimulated, but domestic consumption is to all intents and purposes suppressed. Some provinces boom, others languish. The economy is highly prone to overheating and periodically needs to be subjected to "cooling-off therapy."[86]

The predicament facing the ruling elite, deliberate choices made in the course of strategy formulation, a legacy of societal mismanagement, and fragility of public institutions account for such imbalances. The problem is compounded by vertical fragmentation which undermines policy coordination. This is largely a product of Mao's onslaughts on the central bureaucracy. In two key mass campaigns, the Great Leap Forward and the Cultural Revolution, the founder of the People's Republic sought to accelerate economic growth in the face of stubborn opposition from status quo-oriented officials in Beijing. He embraced a tactic of 'playing to the provinces,' or mobilizing provincial support as a counterweight to the center. Mao appealed to leaders at the subnational level by delegating power to them and by coopting them into top decision-making bodies.[87]

During each of the campaigns, the macro and microeconomic management apparatus was significantly flattened, and authority and instruments of power were dramatically shifted from the capital to the provinces. The Cultural Revolution was marked by an almost total collapse of the traditional state organs in the wake of sending down a substantial number of central government bureaucrats to the countryside for the purpose of revitalizing their fading ideological beliefs through hard manual work. In the aftermath of campaigns, both of which were ultimately deemed to be

86. *See* DREYER, *supra* note 81, at 219-64; SAICH, *supra* note 81, at 268-304; CHINA'S REGIONAL DEVELOPMENT *passim* (David S.G. Goodman ed., Routledge 1989); SOCIAL CHANGE AND SOCIAL POLICY IN CONTEMPORARY CHINA *passim* (Linda Wong & Stewart MacPherson eds., Ahgate 1995); WANG SHAOGUANG & HU ANGANG, THE POLITICAL ECONOMY OF UNEVEN DEVELOPMENT: THE CASE OF CHINA *passim* (M.E. Sharpe 1999); YEHUA DENNIS WEI, REGIONAL DEVELOPMENT IN CHINA: STATES, GLOBALIZATION, AND INEQUIALITY *passim* (Routledge 2000); GORDON G. CHANG, THE COMING COLLAPSE OF CHINA *passim* (Random House 2001); JOHN B. STARR, UNDERSTANDING CHINA: A GUIDE TO CHINA'S ECONOMY, HISTORY, AND POLITICAL STRUCTURE *passim* (Hill & Wang 1997); SOCIAL POLICY REFORM IN CHINA: VIEWS FROM HOME AND ABROAD *passim* (Catherine Jones Finer ed., Ashgate Publishing 2003); JOE STUDWELL, THE CHINA DREAM: THE ELUSIVE QUEST FOR THE LAST GREAT UNTAPPED MARKET ON EARTH *passim* (Profile Books 2003).

87. SHIRK, *supra* note 81, at 149-96; DREYER, *supra* note 81, at 81-106; LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM, *supra* note 81, at 59-122; SAICH, *supra* note 81, at 25-56.

an unmitigated failure, Beijing reclaimed some but not all of the controls it previously surrendered.[88]

Indeed, Mao's successor as paramount leader, Deng Xiaoping, was partly inspired by his predecessor's historical example, even though he was driven by a fundamentally different strategic vision. Deng consistently promoted market reform by playing to the provinces in a broadly similar fashion, an option which, for instance, was not available to the centrally-constrained Gorbachev in generally equivalent circumstances. Under his tutelage, local officials became the quantitatively dominant bloc in the Central Committee during the reform era, and a radical decentralization of the fiscal system (a crucial source of political power) was carried out at the early stages of the post-1978 restructuring process.[89]

Underdeveloped socio-political institutions and vertical fragmentation have impeded effective management across the strategy spectrum throughout the reform era, rather than merely the years spanning Mao's cataclysmic policy experiments. The transformation of the economy and its Asian Tiger-like performance in the past three decades is often portrayed as a "miracle." If so, "official wisdom" may have not been the sole, or even decisive, factor responsible for this outcome. Some critical steps seemingly taken to revive the ossified structure, particularly during the early stages of dismantling barriers to rapid expansion of production, may have been the result of poorly thought-out measures put in place (in some respects, Mao-style) by a single leader, or a coterie of politically influential figures, which somehow ('miraculously,' to paraphrase mainstream commentators) did not cause serious social rupture. The economic dynamism witnessed in the past three

88. DREYER, *supra* note 81, at 107-40; LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM, *supra* note 81, at 59-122; SAICH, *supra* note 81, at 25-179.

89. LIEBERTHAL & OKSENBERG, *supra* note 81, at 13-168, 339-90; Susan L. Shirk, *The Chinese Political System and the Political Strategy of Economic Reform*, *in* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 82-86 (Kenneth G. Lieberthal & David M. Lampton eds., University of California Press 1992); Paul E. Schroeder, *Territorial Actors and Competitors for Power: The Case of Hubei and Wuhan, in* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 283-307 (1992); Andrew G. Walder, *Local Bargaining Relationships and Urban Industrial Finance, in* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 308-33 (1992); SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA, *supra* note 81, at 149-96; DREYER, *supra* note 81, at 107-140; LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM *supra* note 81, at 123-242; SAICH, *supra* note 81, at 57-90, 155-79.

decades may reflect to a greater extent successful private initiative than enlightened public guidance.[90]

A number of pivotal decision rules have been introduced by senior party leaders in order to counter erratic actions and atomization of the organizational apparatus, as well as to further rationalize and stabilize strategy formulation procedures. Delegation by consensus is a notable example. The Communist Party thus delegates to the State Council the authority to undertake specific policy commitments. Key members of the latter, in turn, delegate to their subordinates the authority to make decisions if the agents agree. If the agents are capable of reaching a consensus, the decision is automatically ratified by the higher level. If the agents fail to agree, the principals step in to provide direction. Alternatively, the issue is temporarily shelved or abandoned altogether. Delegation by consensus is expected to be practised throughout the party-state institutional network.[91]

Another procedural norm which currently needs to be closely adhered to by policy makers is incrementalism. The pace of reform ought to be moderate and socio-economic change should be pursued in a piecemeal fashion. Radical transformation of the entire system and the major components thereof is to be avoided. Sequencing of far-reaching departures from the status quo, preferably methodical in nature, is also favored because it minimizes the risks of costly blunders, and renders a backlash from potentially disaffected constituencies a less likely prospect.[92] Such decision rules seem to have taken a firmer hold under the premiership of Zhu Rongji (1998-2003) and have become increasingly entrenched since the retirement (in 2004) of President Jiang Zemin, Deng

90. *See* CHANG, *supra* note 86, at 144-65; STUDWELL, *supra* note 86, at 219-44; JIANRONG HUANG, THE DYNAMICS OF CHINA'S REJUVENATION 21-40, 75-82 (Palgrave Macmillan 2004).

91. *See* LIEBERTHAL & OKSENBERG, *supra* note 81, at 135-168; Lieberthal, *Introduction: The "Fragmented Authoritarianism" Model and its Limitations, supra* note 84; David L. Lampton, *A Plum for a Peach: Bargaining, Interest, and Bureaucratic Politics in China*, *in* BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST - MAO CHINA 33, 33-58 (Kenneth G. Lieberthal & David M. Lampton eds., University of California Press 1992); Shirk, *The Chinese Political System and the Political Strategy of Economic Reform, supra* note 89, at 68-81; SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA, *supra* note 81, at 116-28, 245-79; LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM, *supra* note 81, at 171-242; SAICH, *supra* note 81, at 121-79; JINGLIAN WU, UNDERSTANDING AND INTERPRETING CHINESE ECONOMIC REFORM 44-67 (Thomson South-Western 2005).

92. *See* SHIRK, THE POLITICAL LOGIC OF ECONOMIC REFORM IN CHINA, *supra* note 81, at 129-45; LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM, *supra* note 81, at 245-72; SAICH, *supra* note 81, at 233-67; WU, *supra* note 91, at 57-74.

Xiaoping's successor.[93] In this case, persistent economic liberalization and procedural (as well as substantive) rationality may therefore be intertwined.

The overall patterns outlined above have plainly manifested themselves in the environmental domain. The economy has loomed large on the government agenda and has expanded by leaps and bounds, whereas the ecosystem has for the most part remained in the strategic shadows and has suffered marked deterioration. Institutional capabilities to offset the imbalances have been slow to develop, high-quality remedial programs have been few and far between, and policy coherence has been distinctly low. The biosphere has borne the consequences, as evidenced by a plethora of potentially intractable problems such as large-scale desertification, rapidly dwindling forest resources, serious flooding, excessive population growth, and worrisome water scarcity.[94]

The pre-reform era leadership cannot be absolved of heavy responsibility for this state of affairs. From an analytical perspective, it is appropriate in this context to examine the period since the Communist Revolution in its entirety, treating respectively the Mao-dominated (other than very briefly) and subsequent phases as the equivalent of the recurring conflict-driven and post-conflict historical episodes. Mao's grand vision for China as a great power ushered in shortly following the founding of the People's Republic the typical cycle of ill-thought-out mobilization of resources to wage war, ambitious schemes geared toward economic aggrandizement, and questionable plans to boost the size of the population. The impact on the environment of this familiar strategic-mix was unambiguously severe.[95]

In 1958, Mao's unshakeable belief in man's capacity to freely reshape the material world and his desire to transform China into a leading player in the global arena prompted him to launch the Great Leap forward, a colossal mass-mobilization campaign to catapult the country into the advanced stages of communism and overtake the most prosperous capitalist nations. Mammoth land reclamation projects were undertaken to stimulate grain produc-

93. *See* WILLY WO-LAP LAM, THE ERA OF JIANG ZEMIN (Prentice Hall 1999); LAURENCE J. BRAHM, ZHU RONGJI AND THE TRANSFORMATION OF MODERN CHINA (John Wiley & Sons 2002); WILLY WO-LAP LAM, CHINESE POLITICS IN THE HU JINTAO ERA: NEW LEADERS, NEW CHALLENGES (M.E. Sharpe 2006).

94. *See* EDMONDS, PATTERNS OF CHINA'S LOST HARMONY A SURVEY OF THE COUNTRY'S ENVIRONMENTAL DEGRADATION AND PROTECTION, *supra* note 68, at 22-41; SHAPIRO, *supra* note 79; ECONOMY, *supra* note 79, at 47-55.

95. *See supra* note 94.

tion, laying waste to forests, lakes, rivers, and wetlands. Vast investment in agricultural infrastructure ensued in a haphazard fashion (many of the dams, irrigation facilities, and reservoirs constructed at substantial economic and human cost soon disintegrated), leading to forced migration on a painfully large scale. The effort directed toward manufacturing iron and steel in backyard furnaces, in order to surpass the United States, resulted in huge stockpiles of useless metal and escalating pollution levels.[96]

Bureaucratic endeavors to address the widespread devastation wrought by this ill-thought social experiment barely assumed concrete form before, merely five years after it was brought to an abrupt end in 1961, Mao launched an even more ambitious campaign to purge the party and state apparatuses of 'capitalists roaders' pursuing 'bourgeois'-style agendas, empower the masses, create bottom-up power structures, and rekindle fading ideological fervor. The Cultural Revolution saw a renewed preoccupation with grain production to the serious detriment of animal husbandry, fisheries, and forestry. Industrial production objectives were couched in exclusively quantitative terms with no attention paid to appropriate technologies. Energy and raw materials were treated as non-scarce goods. Environmental (as well as labor) regulations were summarily rescinded, giving rise to sharp increases in air and water pollution along with significant loss of biodiversity. The apprehensive 'third front' policy, featuring a shift of manufacturing facilities from coastal regions vulnerable to foreign attacks to remote inland areas, greatly compounded the problem (since factories located near caves were spewing toxic discharge in the surrounding mountains).[97]

Mao's China – and, for that matter, its Republican predecessor – inherited from previous regimes a highly rudimentary institutional infrastructure to address ecological challenges. Throughout the country's history, the responsibility for managing the complex relationship between man and nature had not been vested in effective organizational vehicles but in a loose network of individual officials consisting primarily of the emperor or equivalent (enjoying a virtually unlimited "mandate from heaven") and a coterie of regional administrators. Environmental protection thus had heavily depended on personal leanings of a

96. *See supra* note 94.
97. *See supra* note 94.

handful of strategically-placed and practically unconstrained players.[98]

The inherent flaws of this individualistic system of ecological governance were aggravated by a weak tradition of codification and enforcement of environmental laws, coupled with a preference for ad hoc campaign-style mass mobilizations. A mixture of Confucian ideals and Legalist principles underpinned the authority of local magistrates to balance competing interests on a case-by-case basis without reference to a set of codified laws. This, in turn, enhanced the scope for discretionary action on the part of the emperor, or emperor-like ruler, and local officials, for whom ecological preservation generally was a low priority item. Institutions dedicated to the enforcement of codified law never evolved beyond the embryonic stage and rampant corruption undermined their operational efficiency. Mao's harsh onslaught on the vestiges of perceived bureaucratic power led to a total collapse of this fragile organizational façade.[99]

The reform era has witnessed a dramatic economic revival, seemingly against all odds, as a combination of top-down initiatives and bottom-up entrepreneurial vigor (the perhaps more crucial role played by the latter in the modernization process is not always duly acknowledged) has unleashed a wave of business activities that have propelled the initially moribund economy relentlessly forward for three decades. Growing affluence, coupled with a shift from hard to soft authoritarianism, has also resulted in a marked de-escalation of social tensions, although large-scale rural-urban migration has been accompanied by the emergence of new type of strains in the household sector. By contrast, socioeconomic liberalization has brought no tangible relief on the environmental front.

Near double-digit, or often faster, output expansion has substantially boosted demand for resources such as energy, land, and water. An insatiable appetite for energy by industry, a problem exacerbated by an excessive reliance on coal to satisfy it, has driven up air pollution in cities to levels rarely observed in other countries. This is a principal source of pulmonary and respiratory diseases. Another by-product (i.e., in addition to ultra particu-

98. *See* HUCKER, *supra* note 68, at 48-68, 149-69, 303-28; Mark Elvin, *The Environmental Legacy of Imperial China*, *supra* note 73, at 413-53; Dunstan, *supra* note 78, at 585-614; ELVIN, THE RETREAT OF THE ELEPHANTS: AN ENVIRONMENTAL HISTORY OF CHINA *supra* note 68, at 86-114; ECONOMY, *supra* note 79, at 27-57.

99. *See supra* note 98.

lates) is acid rain, again the magnitudes defy comparison, which does not merely damage human health but has a deleterious effect on supporting parts of the ecosystem as well (crippling forests, damaging cropland, destroying wildlife, eroding buildings, and poisoning fish throughout China).[100]

Reform-inspired demand, within a loose regulatory framework, has wreaked havoc on the country's forests. An inexorable quest for timber has lifted logging to unsustainable highs in a physical setting where centuries of pressures originating in the agricultural and military domains had already reduced per capita forest reserves to painfully low levels, rendering this segment of the environment ill-equipped to cope with the extra burden. The losses suffered by grasslands have been broadly similar. In that case, the ravage caused has largely stemmed from persistent efforts to boost grain production, featuring a conversion to irrigated crop cultivation (which brings about severe degradation). Further harm has been the consequence of intensive grazing methods, new techniques for growing fodder and forage, and privatization of herds and grazing land.[101]

Shrinking water supply and deteriorating water quality has proved to be an equally acute challenge. Demand for the resource from agricultural, industrial, and residential users has grown by leaps and bounds, measures to dampen it have been half-hearted, supply-side initiatives have fallen short of need, and recurring droughts have accelerated the process of depletion. Escalating water pollution has greatly worsened the picture and periodically-

100. *See* EDMONDS, *supra* note 68, at 158-192; ECONOMY, *supra* note 79, at 59-90; Vaclav Smil, *China's Energy Resource Uses: Continuity and Change*, *in* MANAGING THE CHINESE ENVIRONMENT 211, 211-27 (Richard Louis Edmonds ed., Oxford University Press 2000); Edward B. Vermeer, *Industrial Pollution in China and Remedial Policies, in Managing the Chinese Environment, in* MANAGING THE CHINESE ENVIRONMENT 228, 228-61 (Richard Louis Edmonds ed., Oxford University Press 2000); Cythia W. Cann, Michael C. Cann, & Shanguan Gao, *China's Road to Sustainable Development: An Overview*, *in* CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 3, 3-34 (Kristen A. Day ed., M.E. Sharpe 2005); Frank Wang & Hongfei Li, *Environmental Implications of China's Energy Demands*, *in* CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 180, 180-200 (Kristen A. Day ed., M.E. Sharpe 2005).

101. *See* EDMONDS, *supra* note 68, at 1-22, 42-157; ECONOMY, *supra* note 79, at 59-90; Cann et al., *supra* note 100, at 3-34; Robert F. Ash & Richard L. Edmonds, *China's Land Resources, Environment, and Agricultural Production*, *in* MANAGING THE CHINESE ENVIRONMENT 112, 112-55 (Richard Louis Edmonds ed., Oxford University Press 2000); James Harkness, *Recent Trends in Forestry and Conservation of Biodiversity in China*, *in* MANAGING THE CHINESE ENVIRONMENT 187, 187-210 (Richard Louis Edmonds ed., Oxford University Press 2000).

conducted vast cleanup campaigns have failed to arrest the trend. The increase in the amount of industrial and municipal wastewater discharge has easily offset the impact of any normally mild or occasionally decisive steps taken to address the problem.[102]

The difficulties confronting the Chinese authorities on the ecological front should not be underestimated. The mushrooming small-size township and village enterprises, which have underpinned reform-era economic dynamism, have been an elusive target for monitoring and regulatory purposes. And, from an environmental perspective, they probably require even closer attention than their much larger state-owned counterparts (which can hardly be portrayed as ecologically responsible). By the same token, an aggressive pursuit of foreign investment and trade opportunities has turned China into a destination of choice for some of the world's least environmentally-friendly industries and has provided an impetus for the development of an enormous market for the resource-intensive segment of the country's manufacturing sector (though on the positive side of the ledger, multinationals have been a vital source of technologies conducive to ecological progress). Foreign participation on a significant scale in the domestic economy (including by post-1997 Hong Kong, which has proved susceptible to bouts of instability) has undoubtedly complicated the task facing policy makers with respect to the environment.[103]

Be that as it may, one should not attribute the muted bureaucratic response to far-reaching ecological degradation to such factors alone. After all, following centuries-long neglect, the reform-era leadership has proceeded to tackle decisively unbridled population growth. The strategies employed have not been entirely successful (financial independence of farmers, the product of economic liberalization, has increasingly enabled them to turn a blind eye to the penalties/restrictions imposed and implementation in provinces heavily populated by ethnic minorities has been snail-like) and the means relied upon have been controversial. Nevertheless, from a quantitative perspective, the results achieved, starting with a high and rapidly expanding base, and in

102. *See* EDMONDS, PATTERNS OF CHINA'S LOST HARMONY: A SURVEY OF THE COUNTRY'S ENVIRONMENTAL DEGRADATION AND PROTECTION, *supra* note 68, at 1-22, 42-157; ECONOMY, *supra* note 79, at 59-90; Cann et al., *supra* note 100, at 3-34; James E. Nickum, *Is China Living on the Water's Margin?*, *in* MANAGING THE CHINESE ENVIRONMENT 156, 156-74 (Richard Louis Edmonds ed., Oxford University Press 2000).

103. *See supra* note 102.

a relatively short period of time, certainly qualify as meaningful.[104]

The reform-era leadership has not necessarily been oblivious to the formidable environmental challenge confronting the country. One notes a tendency among critics of Asian/Chinese ecological practices to conceptualize the issue in absolute all-or-nothing terms. There is, in fact, evidence to suggest that environmental consciousness has risen meaningfully at the elite level throughout the region, even in areas where standards of living are comparatively low and combating economic deprivation is an overarching strategic concern. The problem, in China and elsewhere, lies in the relative value accorded to ecological preservation within the overall policy framework (where characteristically manifestations of myopic orientation and tunnel vision are not altogether absent), inadequate institutional architecture, ineffective management, and uneven implementation.[105]

Tentative steps to formally place the environment on the governmental/political agenda were taken by Premier Zhou Enlai, apparently Mao Zedong's pragmatic alter ego, as the Cultural Revolution was entering its final stages. These steps were substantially augmented as soon as the reformers emerged as the dominant party faction in the late 1970's. Wholesale constitutional, statutory, regulatory, and organizational adjustments were promptly introduced with a view to preserving the ecosystem. This elaborate and multifaceted process featured several complementary top-down initiatives, including status enhancement for the National Environmental Protection Bureau and granting of additional resources and greater powers to the embattled agency (perhaps more noteworthy, in the Chinese context, was the appointment of a highly versatile official as its first chief administrator), and culminated in 1989 in the formal promulgation by the Standing Committee of the National People's Congress (NPC) of an Environmental Protection Law geared toward radically improving ecological governance and unflinchingly fighting against pollution in all its forms.[106]

104. *See* THE CHANGING POPULATION OF CHINA (Peng Xizhe & Zhigang Guo eds., Blackwell Publishers 2000); SUSAN GREENHALGH & EDWIN A. WINKLER, GOVERNING CHINA'S POPULATION: FROM LENINIST TO NEOLIBERAL BIOPOLITICS (Stanford University Press 2005).

105. MUSHKAT, INTERNATIONAL ENVIRONMENTAL LAW AND ASIAN VALUES: LEGAL NORMS AND CULTURAL INFLUENCES *supra* note 54, at 39-85, 127-30.

106. *See* QU & LI, *supra* note 76; LESTER ROSS & MITCHELL A. SILK, ENVIRONMENTAL LAW AND POLICY IN THE PEOPLE'S REPUBLIC OF CHINA (Quorum Books 1987); Les-

The flurry of constructive activity during the initial decade of the post-Mao era generated cautious optimism in domestic policy circles. However, serious concerns – indeed, a sense of an inevitable (albeit not imminent) crisis – soon resurfaced.[107] It has become abundantly clear that problem recognition, while assuming an increasingly sophisticated form in the 1990's and beyond (with the 1992 Conference on Environment and Development [UNCED] in Rio de Janeiro serving as a possible turning point in the learning process), should not be equated with steadfast execution. The realities on the ground have not shifted in a positive direction in the following two decades. On the contrary, as indicated earlier, the picture has continued to deteriorate at an alarming pace.

Official ecological concerns have intensified, rather than diminished, during this period. By the same token, bureaucratic problem recognition has deepened, rather than receded. There has also been a growing willingness to bring the critical issues involved into the open, both at home and in foreign forums. Perhaps more importantly, the flurry of activity directed at alleviating environmental strains has not subsided. Numerous new and less opaque laws and administrative regulations have been introduced. The judicial system has been placed on a somewhat firmer footing and the courts have begun to selectively display greater independence (as well as a sense of urgency). The National Protection Bureau/Agency (NEPA) has been transformed into the State Environmental Protection Administration (SEPA) and granted ministerial status. Its organizational foundations have been rein-

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ter Ross & Mitchell A. Silk, *Post-Mao China and Environmental Protection: The Effects of Legal and Politico-Economic Reforms*, 4 UCLA PAC. BASIN L.J. 63, 63-89 (1985); LESTER ROSS, ENVIRONMENTAL POLICY IN CHINA (Indiana University Press 1988); Lester Ross, *The Politics of Environmental Policy in the People's Republic of China*, 20 POL'Y STUD. J. 628, 628-42 (1992); Bryan Bachner, *Regulating Pollution in the People's Republic of China: An Analysis of the Enforcement of Environmental Law*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 373, 373-408 (1996); Bryan Bachner & Xi Wang, *Environmental Law*, *in* INTRODUCTION TO CHINESE LAW 523, 523-39 (Chenguang Wang & Xianchu Zhang eds., Sweet & Maxwell 1997); Richard Lotspeich & Aimin Chen, *Environmental Protection in the People's Republic of China*, 6 J. OF CONTEMP. CHINA 33, 33-59 (1997); Abigail Jahiel, *The Organization of Environmental Protection in China*, 156 CHINA Q. 757, 757-87 (1998); Michael Palmer, *Environmental Regulation in the People's Republic of China: The Face of Domestic Law*, 156 CHINA Q. 788, 788-808 (1988); Lin Feng, *Law on Environmental Protection*, *in* CHINESE L. 557, 557-90 (Guiguo Wang & John Mo eds., Kluwer Law International 1999); XIAOYING MA & LEONARD ORTOLANO, ENVIRONMENTAL REGULATION IN CHINA: INSTITUTIONS, ENFORCEMENT, AND COMPLIANCE 13-53 (Rowman & Littlefield Publishers, Inc. 2000).

107. *See* Wenhui Hou, *The Environmental Crisis in China and the Case for Environmental History Studies*, 14 ENVTL. HIST. REV. 151, 151-58 (1990); Smil, *supra* note 100, at 211-27.

forced and the Environmental Protection and Natural Resources Committee (EPNRC) of the NPC has started to flex its feeble muscles under the leadership of a prominent administrator cum politician.[108]

However, as matters stand, the legal system has not evolved to a point whereby it is capable of underpinning broadly, consistently, and firmly strategies designed to restore ecological harmony. From the top of the organizational pyramid to its bottom, the fragile structure remains exposed to hard-blowing and shifting political winds. Law making is a laborious process and the end product leaves much to be desired in terms of coherence. Legislative planning is a rather narrow exercise inspired by inputs from a limited number of relevant parties and thus not reaping the full benefits commonly derived from widespread participation. There are abnormally long time lags between the promulgation of laws and their conversion into instruments requiring compliance. The judiciary is a marginally less submissive body than in the past, but it does not enjoy meaningful autonomy and continues to function in an erratic manner (e.g., without substantial precedents to guide those presiding over cases). The judicial skill shortfall has not really been addressed in earnest.[109]

Such flaws in the governance façade notwithstanding, the crux of the matter apparently lies elsewhere. The overall environ-

108. *See* Bachner & Wang, *supra* note 106, at 523-39; Lotspeich & Chen, *supra* note 106, at 33-59; Jahiel, *supra* note 106, at 757-87; Feng, *Law on Environmental Protection, supra* note 106, at 557-90; Palmer, *supra* note 106, at 788-808; MA & ORTOLANO, *supra* note 106, at 13-53; ECONOMY, *supra* note 79, at 91-128; William P. Alford & Benjamin L. Liebman, *Clean Air Clean Processes? The Struggle Over Air Pollution Law in the People's Republic of China*, 52 HASTINGS L.J. 703, 703-48 (2001); Song Ying, *The Chinese Environmental Lawmaking Framework*, 1 CHINESE JIL 225, 225-33 (2002); Xi Wang, *China*, *in* ENVIRONMENTAL LAW AND ENFORCEMENT IN THE ASIA-PACIFIC RIM 95, 95-136 (Terri Mottershead ed., Sweet & Maxwell Asia 2002); Richard J. Ferris Jr. & Hongjun Zhang, *Reaching out to the Rule of Law: China's Continuing Efforts to Develop an Effective Environmental Law Regime*, 11 WM. & MARY BILL RTS. J. 569, 569-602 (2003); Stefanie Beyer, *Environmental Law and Policy in the People's Republic of China*, 5 CHINESE J. INT'L L. 185, 185-211 (2006); Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVT'L L. 195, 195-225 (2006-2007).

109. *See supra* note 108; John Copeland Nagle, *The Missing Chinese Environmental Law Statutory Cases*, 5 N.Y.U. ENVTL. L.J. 517, 517-55 (1996); Eric W. Orts, *Environmental Law with Chinese Characteristics*, 11 WM. & MARY BILL RTS. J. 545, 545-67 (2003); Susan J. Martens, *Public Participation with Chinese Characteristics: Citizen Consumers in China's Environmental Management*, 15 ENVTL POLS. 211-30 (2006), *reprinted in*, ENVTL. GOVERNANCE IN CHINA 63, 63- 82 (Neil T. Carter & Arthur P.J. Mol eds., Routledge 2007); *see also* ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 131-63 (Butterworths Asia 1998).

mental protection architecture is skewed in favor of goals which are more in tune with the short/medium-term interests of the regime (solid economic expansion serves best the immediate objectives of the party/ruling elite). The multi-level institutional design that is a key feature of the blueprint, and closely reflects those goals, is a source of powerful centrifugal pressures that impede progress on the ecological front. At the apex of the organizational pyramid, SEPA may have been catapulted into ministerial rank, but it is dwarfed by formidable pro-growth constituencies (it does not even qualify as the 'first among equal' parties engaged in environmental policy making). The strategy of unbalanced development still shapes realities on the ground, personal imperatives override institutional constraints, and the campaign mentality is not abating.[110]

The multi-level factor manifests itself in the highly decentralized nature of the organizational structure. Basic principles are formulated at the center and general guidelines emanate from there. Top officials also initiate mass campaigns to address critical problems of national significance. Beyond that, authority is mostly devolved to provincial and local administrators who are beholden and hence responsive to politicians/bureaucrats who operate at the regional level or below and the entrenched interest groups with whom the latter are aligned. In this fluid setting, the center simply lacks the necessary capabilities to promote remedial measures, monitor conduct, and enforce standards in an ongoing fashion. An institutional configuration that has proved instrumental in revitalizing the economy has clearly failed to produce equally salutary effects in the ecological domain.[111]

This pattern does not dovetail with predictions rooted in conventional economic theory. On that basis, given effective choice, one would expect utility-maximizing households, and adversely impacted enterprises, to vote with their feet and move from areas where environmental conditions are poor, and corruption presumably rampant, to parts of the country where the quality of life is

110. *See* MA & ORTOLANO, *supra* note 106, at 1-12, 77-131; ECONOMY, *supra* note 79, at 91-128; Arthur P.J. Mol & Neil T. Carter, *China's Environmental Governance in Transition*, 15 ENVTL. POLS. 149-70 (2006), *reprinted in*, ENVTL. GOVERNANCE IN CHINA 1, 1-22 (Neil T. Carter & Arthur P.J. Mol eds., Routledge 2007); Han Shi & Lei Zhang, *China's Environmental Governance of Rapid Industrialization*, 15 ENVTL. POLS. 271-92 (2006), *reprinted in*, ENVTL. GOV. IN CHINA 123, 123-44 (Neil T. Carter & Arthur P.J. Mol eds., Routledge 2007).

111. *See supra* note 10; Kenneth G. Lieberthal, *China's Governing System and its Impact on Environmental Policy Implementation*, CHINA ENVTL. SERIES (1997).

better, and public service delivery is not subject to corrosive influences on such a scale. These types of migratory flows have been observed in large and diversified federal states.[112] They may emerge as an element in the Chinese socio-economic landscape in the distant future and thus circumscribe the room for maneuver of politicians/bureaucrats who are incentivized to follow an ecologically harmful path. At the current juncture, there is no evidence to suggest that the preferences of households, and selective enterprises, markedly diverge from those of such actors and the choice available to would-be exit seekers is limited. Further, because of prevailing constraints, internal migration decisions are far more complex than in other federal/polycentric milieus.[113]

The center has endeavored to contain the centrifugal pressures originating from subnational sources, displaying increasing, reform-style, rationality in the process. Consistent with the paradigm shift witnessed in the regulatory domain over the past three decades or so,[114] it has progressively opted to bypass the malfunctioning state administrative machinery and pockets of provincial/local resistance in favor of civil society players (notably the media and non-governmental organizations) and market-based steering mechanisms.[115] Interestingly, this has not been the product of en-

112. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditure*, 64 J. OF POL. ECON. 416, 416-24 (1956); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 1-31 (1995).

113. *E.g.,* DELIA DAVIN, INTERNAL MIGRATION IN CONTEMPORARY CHINA 4-19 (St. Martin's Press 1999) (discussing the historical complexities of internal migration restrictions in China).

114. *See, e.g.,* BARRY M. MITNICK, THE POLITICAL ECONOMY OF REGULATION CREATING, DESIGNING, AND REMOVING REGULATORY FORMS (Columbia University Press, 1980) (discussing generally the paradigm shift in the regulatory domain over the last 3 decades); *see also* ROBERT BALDWIN & MARTIN CAVE, UNDERSTANDING REGULATION THEORY, STRATEGY, AND PRACTICE (Oxford University Press 1999); ATLE MIDTTUN & EIRIK SVINDLAND, APPROACHES AND DILEMMAS IN ECONOMIC REGULATION POLITICS, ECONOMICS AND DYNAMICS (Palgrave 2001); CONTROLLING MODERN GOVERNMENT VARIETY, COMMONALITY AND CHANGE (Christopher Hood, et al. eds., Edward Elgar Publishing Limited 2004); BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION (Cambridge University Press 2007).

115. *See* MA & ORTOLANO, *supra* note 106, at 13-76; ECONOMY, *supra* note 79, at 129-74; Martens, *supra* note 109, at 63-82; Mol & Carter, *supra* note 110, at 1-22; Shi & Zhang, *supra* note 110, at 123-44; Eric Zusman & Jennifer L. Turner, *Beyond the Bureaucracy: Changing China's Policymaking Environment*, *in* CHINA'S ENVIRONMENT & THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 121, 121-49 (Kristen A. Day ed., M.E. Sharpe 2005); Richard D. Morgenstern, et al., *Emissions Trading to Improve Air Quality in an Industrial City in the People's Republic of China*, *in* CHINA'S ENVIRONMENT & THE CHALLENGE OF SUSTAINABLE DEV. 150, 150-79 (Kristen A. Day ed., M.E. Sharpe 2005); Elizabeth Knup, *Environmental NGOs in China: An Overview*, CHINA

tirely passive accommodation in that the center has actively, albeit not indiscriminately, facilitated entry into the strategic arena of elements not associated with the normally tightly-controlled political establishment. That in itself may not lead to dramatic improvement in environmental performance, yet it may arguably be viewed as a major step forward in this particular cultural/developmental/institutional context.

EVALUATION

An examination of the Chinese experience in the ecological sphere lends strong support to Hancock's assertion that the study of environmental law, both the descriptive and prescriptive facets, ought to be firmly grounded in social theory reflecting, where appropriate, long-standing historical trends. In this pivotal case, as outlined here, it is abundantly clear that there are broad recurring patterns which, unless thoroughly explored and properly incorporated into the analytical framework, may prevent legal researchers from providing adequate enlightenment and effective direction. By putting forth a comprehensive proposal for significantly enhancing the status of environmental rights whose intellectual parameters extend well beyond traditional international law, and even jurisprudence/philosophy, deeply into the realm of the social sciences, Hancock may have made a vital contribution to the evolution of legal scholarship focused on the global ecosystem.

However, a dissection of Chinese politico-economic dynamics suggests that the specific theoretical perspective adopted is not sufficiently robust to sustain claims of wide, let alone universal, relevance/validity. The fit between the analytical hypotheses formulated (in fact, contentions advanced) and the social realities portrayed in this paper does not seem to be close. The general prescriptions offered, an observation that applies to Hayward's more tightly packaged recommendations as well, also fall well short of addressing challenges confronting authorities in a highly

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ENVIRONMENTAL SERIES 9, 9-15 (1997); Peter Ho, *Greening Without Conflict? Environmentalism, NGOs and Civil Society in China*, 32 DEV. AND CHANGE 893, 893-921 (2001); Ann Brettell, *Environmental Non-Governmental Organizations in the People's Republic of China: Innocents in a Co-opted Environmental Movement?*, 6 J. OF PACIFIC ASIA 27, 27-56 (2000); Jolene Lin Shuwen, *Assessing the Dragon's Choice: The Use of Market-Based Instruments in Chinese Environmental Policy*, 16 GEO. INT'L ENVTL. L. REV. 617, 617-55 (2004); Elizabeth Economy, *Environmental Governance: the Emerging Economic Dimension*, 15 ENVTL. POLS. 171-189 (2006); Phillip Stalley & Dongning Yang, *An Emerging Environmental Movement in China?*, 186 THE CHINA Q. 333-56 (2006).

fragmented and inadequately institutionalized setting. Given the strong emphasis in contemporary policy literature and practice (loosely reflected in the international environmental principle of "common but differentiated responsibility") of carefully matching normative designs and contexts,[116] that is a feature which considerably detracts from the effectiveness of the ambitious legal scheme propounded.

The theoretical framework underpinning Hancock's advocacy of environmental human rights essentially consists of two concepts/variables: form, or rather capitalist form, of social organization (the exogenous/ independent variable) and ecological degradation (the endogenous/ dependent variable). One-way causal influences run from the former to the latter, although in the long term the relationship may turn into one of a reciprocal nature because capitalist environmental excesses apparently contain the seeds of their own destruction. The economic rationality paradigm, class hegemony, agent autonomy or lack thereof, and co-optation are other concepts/variables that loom large in the analytical discourse, but are merely manifestations of a particular form of social organization rather than intervening variables in the strict sense of the word.[117]

Hancock's liberal critique of capitalist ecological transgressions has an unmistakably traditional-style Marxist dimension.[118] The power exercised, whether directly or via proxy, by the social class controlling investments, labor, and production is to all intents and purposes limitless (hence hegemony). Sources of resistance are summarily removed and swiftly transformed into conforming entities (hence lack of agent autonomy and co-optation). Decision calculus, along the entire organizational chain, is anchored in materialistic logic of the anthropocentric variety (hence the distortions engendered by economic rationality). The approach is traditional in its orientation because it does not incor-

116. RAUL P. LEJANO, FRAMEWORKS FOR POLICY ANALYSIS MERGING TEXT AND CONTEXT (Routledge 2006).

117. *See* DAVID W. BRITT, A CONCEPTUAL INTRODUCTION TO MODELING: QUALITATIVE AND QUANTITATIVE PERSPECTIVES (Lawrence Erlbaum Associates, Publishers 1997) (providing an illuminating discussion of concepts, variables, theory construction and building); DAVID A. DE VAUS, RESEARCH DESIGN IN SOCIAL RESEARCH (Sage Publications 2001).

118. RALPH MILIBAND, THE STATE IN CAPITALIST SOCIETY (Basic Books 1969) (highlighting these Marxist similarities); G. WILLIAM DOMHOFF, THE HIGHER CIRCLES (Random House, 1970); ERIC O. WRIGHT, CLASS, CRISIS AND THE STATE (NLB 1978) (discussing works highlighting the similarities between Hancock's liberal critique of capitalist ecological transgressions and Marxism).

porate assumptions underlying structural or functionalist Marxism. The latter perspective is of a more recent vintage and it provides a broader basis for examining the interplay between social forces and the environment. It focuses in a flexible fashion on the role played by the state, and politics in general, in safeguarding and reproducing the capitalist social order rather than on the class structure underpinning it.[119]

While the structural/functionalist variant offers greater scope for analytical exploration than its traditional counterpart, neither theoretical framework can readily accommodate within its narrow confines the intricate contours of centuries-long Chinese ecological history. The country has been in a perpetual state of flux, shedding one form of social organization after another, constantly reinventing itself politically and economically, always tinkering with its tenuous institutional façade. However, the tumultuous transformations witnessed have had very modest impact on the environment. The delicate man-nature equation has been virtually static, sinking periodically further into negative territory in the wake of more-reckless-than-usual elite/governmental practices. Interestingly, perhaps the most wanton exploitation of the ecosystem was seen at the height of communist rule, prompting a prominent historian to title her book *Mao's War against Nature*.[120]

The pattern observed in China may not be the exception to the norm. Researchers focusing on pre-reform Eastern Europe and Soviet Union have also noted comparatively high levels of environmental degradation. They have attributed this phenomenon to the absence of enforceable property rights under socialism, limited wealth accumulation (ecological improvement is viewed as a superior good, the demand for which increases as affluence rises), and substantial defense spending (which provides a powerful stimulus to heavy industry in general and military industry in particular, setting the stage for the emergence of a sprawling and entrenched military-industrial complex).[121] The theory is in its

119. Classical examinations of critical social issues in this vein include: JAMES O'CONNOR, THE FISCAL CRISIS OF THE STATE (St. Martin's Press 1973); SAMUEL BOWLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA (Basic Books 1976); IAN GOUGH, THE POLITICAL ECONOMY OF THE WELFARE STATE (The Macmillan Press Ltd. 1979).

120. *See* SHAPIRO, *supra* note 79.

121. *See* JOAN DEBARDELEBEN, THE ENVIRONMENT AND MARXISM-LENINISM: THE SOVIET AND EAST GERMAN EXPERIENCE 45-60 (Westview Press 1985); Benjamin Zycher, *Environmental Degradation Under East European State Socialism*, in UNCER-

embryonic phase, but it lends support to the conclusion that environmental decay is not the product of capitalist excesses alone but a problem that confronts humankind in a variety of social settings. To infer otherwise would have the unfortunate implication that no resources should be channeled to combat ecological hazards in countries where capitalism does not constitute the mainstay of the economic system.

As to hegemony, ruthless elite domination has been a salient characteristic of the Chinese political order over the centuries. However, it would evidently be inappropriate to view this as a manifestation of Marxist-style influences rooted in a rigid class structure reflecting a particular mode of economic production/social control. By the same token, elite domination should not be equated with elite cohesion for rampant factionalism has resulted in a high degree of political fragmentation, detracting from the ability of power holders to shape developments on the ground. Moreover, tight reign by an ensconced elite has been a variable rather than a constant in that there have been endless cycles of centralization and decentralization.[122] During phases marked by a shift of authority from the center to the periphery, grassroots initiative has not been greatly circumscribed.

The notion of persistent agent co-optation, or chronic lack of autonomy, is equally difficult to reconcile with Chinese historical realities. A system which is in a perpetual state of flux is by definition inherently unstable and susceptible to shocks, both of the endogenous and exogenous type. Imperial China had witnessed the rise and fall of several dynasties, a nascent republican edifice had crumbled in the face of a communist onslaught, and socialist utopia has given way to a mixed-economy that is moving, steadily if not inexorably, in a capitalist direction. This attests to the potential for agent-induced change, at least in certain circumstances.[123] In the climate currently prevailing, environmental

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TAINTY AND ECONOMIC EVOLUTION: ESSAYS IN HONOR OF ARMEN A. ALCHIAN 143-51 (John R. Lott, Jr. ed., Routledge 1997).

122. CHI'EN MU, TRADITIONAL GOVERNMENT IN IMPERIAL CHINA: A CRITICAL ANALYSIS (Chinese University Press 1982) (providing a vivid illustration); RAY HUANG, CHINA: A MACRO HISTORY (Sharpe 1988).

123. *See* STEPHEN HAGGARD & ROBERT R. KAUFMAN, THE POLITICAL ECONOMY OF DEMOCRATIC TRANSITIONS *passim* (Princeton University Press 1995) (providing survey of mainstream, i.e. positivist, social science literature on agent-induced macro-level change).

protests are common and not entirely ineffective.[124] As noted previously, civil society is also providing some input into environmental management, not without selective government blessing.

The economic rationality paradigm and the unpalatable ecological scenarios which it seemingly conjures up have been shrouded in much controversy. This analytical construct is enthusiastically embraced in certain academic and policy circles and categorically rejected in others. An interesting trend that appears to be emerging is to eschew polarization and to endeavor to synthesize the vision embodied in the utility-maximizing *Homo economicus* model of human behavior and that grounded in the environmental limit discourse/duty based approach (seeking to draw its inspiration from *Homo moralis*).[125] It is a moot point whether such intellectual subtleties, which otherwise have considerable practical ramifications, are entirely relevant in the present Chinese developmental/ ecological context.

Behaviorally-oriented social scientists are less concerned with the normative underpinnings of the economic rationality paradigm, or the rational-comprehensive model of decision making, than with its explanatory power. They argue that the prevalence of internal and external constraints prevents individuals and collective entities (particularly public organizations) from following a strictly rational path. Some substitute bounded rationality for its comprehensive counterpart in their work.[126] Others display even greater skepticism and claim that human decision making is an incremental affair, featuring plodding, stepwise movement (from an established base, rather than in an innovative fashion) or "muddling through."[127] The merits of hybrid-like models, blending more rational and less rational elements (e.g., mixed scanning)[128] are also highlighted but, at the agnostic end of the rationality-irrationality spectrum, it is contended that decision

124. *See* Ho, supra note 115; ECONOMY, *supra* note 79, at 129-75; Zusman & Turner, *supra* note 115; Martens, *supra* note 109; Mol & Carter, *supra* note 110; Ha & Zhang, *supra* note 110; Stalley & Yang, *supra* note 115; CHINESE SOCIETY: CHANGE, CONFLICT, AND RESISTANCE (Elizabeth J. Perry & Mark Seldon, eds., Routledge 2000).

125. *E.g.,* William Konchak & Unai Pascual, *Converging Economic Paradigms for a Constructive Environmental Policy Discourse*, 9 ENVTL. SCI. & POL'Y 10, 10-21 (2006).

126. *See* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR (Macmillan 1957).

127. *See* Charles E. Lindblom, *The Science of "Muddling Through,"* 19 PUB. ADMIN. REV. 78, 78-88 (1959); DAVID BRAYBROOKE & CHARLES E. LINDBLOM, A STRATEGY OF DECISION 61-79 (Free Press 1963).

128. *See* Amitai Etzioni, *Mixed Screening: A "Third" Approach to Decision Making*, 27 PUB. ADMIN. REV. 385, 385-92 (1967).

making, at least in public organizations, is such an incoherent exercise that policy evolution is not fundamentally different from the accumulation of rubbish in a garbage can (the "garbage can" analogy).[129]

If the economic rationality paradigm emphatically prescribes but does not adequately describe, or is merely an ideal model not firmly anchored in institutional reality, its empirical assessment is inevitably fraught with considerable difficulties. After all, how can one productively examine the practical consequences of a normative framework that apparently does not guide organizational behavior? This conundrum need not be explored here. Suffice it to say that, for the most part, policy formulation in China in general, and in the environmental domain in particular, has apparently followed a pattern encapsulated in the garbage can model. As pointed out earlier, over the past three decades, as economic liberalization has entered a more mature stage, there has been a discernible shift toward incrementalism and traces of rational thinking have begun to manifest themselves in organizational settings, an observation applicable to the public sector. On the whole, in this specific context and at this specific juncture, that seems to be a positive development, although the final verdict must be withheld as the new ecological initiatives have been described in detail yet not thoroughly analyzed[130] and the entire strategic configuration remains typically fluid.

China's severe environmental problems can hardly be attributed to a rigid adherence to the economic rationality paradigm. A review of its distinctly poor ecological record exposes far greater deficiencies on the government than the (nascent) market side. Fundamental institutional inadequacies at both ends of the public-private continuum have been highlighted in the social science literature. Originally, close attention was accorded to market failure and potential public sector remedies thereto. In recent years, interest has gravitated toward government failure and mechanisms to address it.[131] Such "failure" (which includes regulatory

129. *See* JAMES G. MARCH & JOHAN P. OLSEN, Ambiguity and Choice in Organizations 24-37 (Universitetsforlaget 1976).

130. *See generally* Richard Lotspeich, *Comparative Environmental Policy: Market-Type Instruments in Industrialized Countries*, 26 POL'Y STUD. J. 85, 85-104 (1998) (providing an example for what may be required in terms of analytical insight).

131. *See* CHARLES WOLF, JR., MARKETS OR GOVERNMENT: CHOOSING BETWEEN IMPERFECT ALTERNATIVES 17-29, 36-55, 62-85 (MIT Press 1989) (1988); MARTIN JANICKE, STATE FAILURE: THE IMPOTENCE OF POLITICS IN INDUSTRIAL SOCIETY (Polity Press 1990).

malfunctioning) is assumed to be a universal phenomenon reflecting innate organizational characteristics. It is not unreasonable to conclude that the Chinese variant has been a particularly pernicious malaise, engendering symptoms (e.g., bureaucratic incoherence and personalism) seldom witnessed on such a scale elsewhere and aggravating market failure in the process.

Hancock compellingly argues that theoretical enlightenment must precede policy prescription. Attempting to reconfigure a social system without coming to grips with its inner workings is an intellectually risky undertaking. Issuing a reminder to this effect to international legal scholars focusing on environmental issues is appropriate because of the tendency on their part to proceed promptly from description to recommendations, largely bypassing the conceptual phase. However, the rigidly structured cluster of variables (capitalist social order, class hegemony, agent subservience/co-optation, economic rationality paradigm) that Hancock invokes for this purpose is too restrictive to be deemed widely relevant/valid. The crucially important Chinese experience suggests that additional analytical perspectives should be summoned to underpin the policy/legal engineering effort.

In this case, given the high degree of institutional fragmentation and resilience of parochial interests, group models of politics and their public choice counterparts may provide a more effective theoretical framework for identifying and removing impediments to progress on the environmental front. The former are premised on the assumption that political activity essentially consists of competition between groups over policy-related issues. The modus operandi of these entities does not necessarily reflect a specific form of social organization (capitalism or its alternatives) and the relationship between them is assessed empirically rather than defined a priori. Groups may thus feature prominently in socialist politics (even in a yet unrealized liberal social order) and they may, for all intents and purposes, compete as equal rather than achieve total domination (substantial influence in a certain policy area is another possible outcome).[132]

132. *See* Bruce B. De Mesquita, David Neuman & Alvin Rabushka, FORECASTING POLITICAL EVENTS: THE FUTURE OF HONG KONG 11-49 (Yale University Press 1998) (1985) (intriguing application of group models of politics in Chinese context); BRUCE B. DE MESQUITA, DAVID NEUMAN & ALVIN RABUSHKA, RED FLAG OVER HONG KONG 35-47 (Chatham House 1998) (1996); *see also* JING HUANG, FACTIONALISM IN CHINESE COMMUNIST POLITICS 1-21 (Cambridge University Press 2000) (1994).

Public choice theorists contend that actors in the political arena, both on the demand side (e.g., voters) and the supply side (e.g., executive office-holders, legislators, and bureaucrats) are primarily motivated by self-interest rather than lofty ideals. Indeed, they often pursue their individual objectives to the detriment of collective well-being. In the regulatory domain, this stance is adopted by proponents of the private interest model put forth by members of the Chicago school of economics who question the validity of propositions underlying approaches predicated on the notion of public interest-driven officials.[133] Such theoretical perspectives are slowly (compared with their more familiar group counterparts) making inroads into the field of Chinese policy studies, particularly at the subnational level, and generating useful insights.[134]

Several factors combine to undermine ecological governance in China. As shown in this paper, the proliferation of largely autonomous and opportunity-seeking groups within and without the bureaucracy is by far the most important. The problem manifests itself throughout the organizational pyramid, but the symptoms become particularly acute as one moves from the administrative center to the provincial/local periphery. The malaise plaguing the system cannot be earnestly addressed unless it is conceptualized in such terms. The issue is one of state capacity to effect change. It is accorded scant attention in the environmental studies litera-

133. *See* MITNICK, *supra* note 114, at 79-240; BALDWIN & CAVE, *supra* note 114, at 18-33; *see* Alfred Haid, *The Chicago School of Regulatory Theory*, *in* MIDTTUN & SVINDLAND, *supra* note 114, at 74-78; MORGAN & YEUNG, *supra* note 114, at 16-78; CHRISTOPHER HOOD, ECONOMIC POLICY REVERSALS 19-56 (Open University Press 1994); S. Peltzman, *The Economic Theory of Regulation after a Decade of Deregulation*, *in* A READER ON REGULATION 92-130 (Robert Baldwin, Colin Scott & Christopher Hood eds., Oxford University Press 1998).

134. *See generally* GEORGE T. CRANE, THE POLITICAL ECONOMY OF CHINA'S SPECIAL ECONOMIC ZONES (Sharpe 1990); THE POLITICAL ECONOMY OF REFORM IN POST-MAO CHINA (Elizabeth J. Perry & Christine Wong eds., Harvard University Press 1985); JULIA KWONG, THE POLITICAL ECONOMY OF CORRUPTION IN CHINA (Sharpe 1997); JIANRONG HUANG, THE APPLICABILITY OF POLICY-MAKING THEORIES IN POST-MAO CHINA (Ashgate 1999); THE POLITICAL ECONOMY OF CHINA'S PROVINCES: COMPETITIVE AND COMPARATIVE ADVANTAGES (Hans Hendrischke & Feng Chongyi eds., Routledge 1999); THOMAS P. BERNSTEIN & XIAOBO LU, TAXATION WITHOUT REPRESENTATION IN CONTEMPORARY RURAL CHINA (Cambridge University Press 2003); ANDREW HALL WEDEMAN, FROM MAO TO MARKET: RENT SEEKING, LOCAL PROTECTIONISM, AND MARKETIZATION IN CHINA (Cambridge University Press 2003); HUI FENG, THE POLITICS OF CHINA'S ACCESSION TO THE WORLD TRADE ORGANIZATION: THE DRAGON GOES GLOBAL (Routledge 2006); Miron Mushkat & Roda Mushkat, *The Political Economy of Sovereignty Revisited: A Re-Examination of the Public Choice in Light of China's Accession to the World Trade Organization* 7 ASPER REV. INT'L BUS. & TRADE L. 115, 115-49 (2007).

ture[135] and is generally overlooked by legal researchers immersed in traditional-style inquiries. However, the subject looms large on the agenda of scholars in related fields and their findings have a bearing on the debate regarding the critical steps that need to be taken in order to revitalize ecological management in the country.[136]

The prevailing view is that state capacity is distinctly weak in China. Periodically and selectively, the party/government apparatus displays unqualified willingness to confront serious problems in the face of stubborn resistance from vested interests, define the challenge unambiguously in such circumstances, mobilize resources on a scale commensurate with requirements, and pursue its strategies in a determined fashion on a sustainable basis. Efforts to stabilize the size of the population, while highly controversial and not entirely successful, apparently fall into this category.[137] Another well-known example is the great lengths to which the administrative center was prepared to go in order to reassert its tenuous authority in the battle against the severe acute respiratory syndrome (SARS). Again, the tactics employed were at times questionable and it would be inappropriate to portray the performance as a bureaucratic tour de force. Neverthe-

135. *See* Jonathan Schwartz, *The Impact of State Capacity on Enforcement of Environmental Policies: The Case of China*, 12 J. ENV'T & DEV. 50, 50-81 (2003) (providing a notable exception to the norm); *see also* Liu Yu et al. *The Politics and Ethics of Going Green in China: Air Pollution in Benxi City and Wetland Preservation in the Sanjiang Plain*, *in* FORGING ENVIRONMENTALISM: JUSTICE, LIVELIHOOD, AND CONTESTED ENVIRONMENTS 31, 31-101 (Joanne Bauer ed., M.E. Sharpe 2006).

136. *See* VIVIENNE SHUE, THE REACH OF THE STATE: SKETCHES OF THE CHINESE BODY POLITIC (Stanford University Press 1988); STATE POWER AND SOCIAL FORCES: DOMINATION AND TRANSFORMATION IN THE THIRD WORLD (Joel S. Migdal et al. eds., Cambridge University Press 1994); WANG SHAOGUANG & HU ANGANG, THE CHINESE ECONOMY IN CRISIS: STATE CAPACITY AND TAX REFORM (Sharpe 2001); Wang Shaoguang, *The Problem of State Weakness*, 14 J. DEMOCRACY 36, 36-42 (2003); Dali L. Yang, *Population Control and State Coercion in China*, 14 J. DEMOCRACY 43, 43-50 (2003); HOLDING CHINA TOGETHER: DIVERSITY AND NATIONAL INTEGRATION IN THE POST-DENG ERA, 193-201 (Barry J. Naughton & Dali L. Yang eds., Cambridge University Press 2004); Wang Shaoguang, *Regulating Death at Coalmines: Changing Mode of Governance in China*, 15 J. CONTEMP. P.R.C. 1, 1-30 (2006); Tim Wright, *State Capacity in Contemporary China: Closing the Pits and Reducing Coal Production,* 16 J. CONTEMP. P.R.C. 173, 173-94 (2007); Jonathan Schwartz & Gregory Evans, *Causes of Effective Policy Implementation: China's Public Response to SARS*, 16 J. CONTEMP. P.R.C. 195, 195-213 (2007).

137. *See* Peng & Guo, *supra* note 104; GREENHAUGH & WINKLER, *supra* note 104; Yanzhong Huang & Dali L. Yang, *Population Control and State Coercion in China*, *in* HOLDING CHINA TOGETHER: DIVERSITY AND NATIONAL INTEGRATION IN THE POST-DENG ERA 193, 193-225 (Barry M. Naughton & Dali L. Yang eds., Cambridge University Press 2004).

less, the episode serves to illustrate that, at certain junctures and when certain conditions materialize, concerted and effective state action may eventuate.[138]

Such consistently steadfast responses are considered to be an exception to the norm. There is no evidence to indicate that they are commonly observed in the ecological domain. To arrest current trends in this sphere, top priority must be accorded for the foreseeable future to restoring relevant state capacity. Promoting environmental human rights via international legal channels (as Hancock proposes) or constitutional ones (as Hayward recommends) is not likely to have a tangible impact on the institutional dynamics, given prevailing constraints and regime orientations. Indeed, one of the suggestions put forth, to grant the collective ownership of natural resources human right status may have to be recalibrated in light of the Chinese political record. Private land ownership may have been a source of ecological disruptions, but they have paled in comparison with the disastrous consequences of Mao-inspired campaigns to eradicate it.[139] Reform-era de-collectivization initiatives, while by no means environmentally costless, have been a relatively mild affair.[140]

If feeble state capacity is the major impediment to ecological improvement and the imperative to revitalize it overshadows other exigencies, administrative law, broadly defined,[141] may be a more potent (and politically less provocative) instrument for inducing institutional change in the medium term. Above all, there is a need to reinforce the environmental protection machinery and meaningfully immunize it against powerful opportunistic pressures/widespread rent seeking. This calls for expertise in organizational design, but legal insights may also prove useful. The work of Majone is particularly illuminating in this respect for he has effectively blended microeconomic concepts and legal principles in an attempt to identify institutional mechanisms capable of

138. *See* Shwartz & Evans, *supra* note 136.

139. JASPER BECKER, HUNGRY GHOSTS: MAO'S SECRET FAMINE (Free Press 1998).

140. *See* Peter Ho, *China's Rangelands Under Stress: A Comparative Study of Pasture Commons in the Ningxia Hui Autonomous Region*, 31 DEV. & CHANGE 385, 385-412 (2000); Peter Ho, *Rangeland Degradation in China Revisited?*, 37 J. DEV. STUDIES 99, 99-132 (2001); Tony Banks, *Property Rights and the Environment in Pastoral China: Evidence from the Field*, 32 DEV. & CHANGE 717, 717-40 (2001); Tony Banks et al., *Community-Based Grassland Management in Western China: Rationale, Pilot Experience, and Policy Implications*, 23 MOUNTAIN RES. & DEV. 132, 132-40 (2003).

141. *See generally* ALFRED C. AMAN, THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM (New York University Press 2004).

enhancing the independence of regulators within a credible principal-agent framework potentially palatable to soft authoritarians.[142] Following this analytical path in some crucial non-Western/Northern settings may turn out to be a more productive strategy than unhesitatingly embracing grand international legal/constitutional blueprints.

The choice of regulatory instrument also ought to loom larger on the reform agenda and should be more comprehensively addressed by those involved in shaping it. This observation applies to civil society input as well. Certain regulatory instruments (e.g., incentive-based systems, market-harnessing controls, disclosure, rights and liabilities, and public compensation/social insurance schemes) are inherently less burdensome for capacity-constrained states than others (e.g., command & control and direct action) and they are less susceptible to capture/distortion by vested interests to boot. China is already moving in this direction, but the effort is spearheaded by economists with modest contribution (almost exclusively descriptive in nature) by lawyers. The former tend to assume that regulatory instruments are value-free and not subject to institutional influences. Awareness of the intricate relationship between instrument and context should enable legal scholars to play a constructive role in ecological planning.

Capacity-constrained states need to seek partners outside the public sector in order to enhance their environmental management capabilities. Civil society is ideally positioned to offer effective cooperation, if it can maintain a significant measure of independence. This obviously is a double-edged sword for authoritarian regimes because environmental NGOs, key actors in the civil society sector, are often at the forefront of the struggle for democratic reform.[143] Nevertheless, there is a growing realization in China that NGOs simply have to be brought into the ecological decision-making process and that it is preferable to pursue this objective in an orderly rather than disruptive fashion.[144] Again,

142. *See* Giandomenico Majone, *Non-Majoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach*, 157 J. INST'L & THEORETICAL ECON. 57, 57-78 (2001).

143. *See* ASIA'S ENVIRONMENTAL MOVEMENTS: COMPARATIVE PERSPECTIVES (Yok-Shiu F. Lee & Alvin Y. So eds., Sharpe 1999); *see also* David J. Frank, Wesley Longhofer & Evan Schofer, *World Society, NGOs and Environmental Policy Reform in Asia*, 48 INT'L J. COMP. SOC. 275, 275-95 (2007).

144. *See generally* ELIZABETH KNUP, ENVIRONMENTAL NGOS IN CHINA: AN OVERVIEW (Woodrow Wilson Center 1997); Ann Brettell, *Environmental Non-Governmental Organizations in the People's Republic of China: Innocents in a Co-opted Environmen-*

there is scope for lawyers to tangibly contribute in this respect because of their substantive and procedural expertise (the latter dimension is particularly relevant), but thus far they have not earnestly tackled this challenge.

CONCLUSION

The deterioration in global environmental conditions continues unabated, albeit with marked variations over space and time. The dangers posed by global warming in particular are apparently escalating at an exponential pace, but the hazards manifest themselves across the entire ecological spectrum. *An Inconvenient Truth*, Al Gore's award-winning documentary film, and the more restrained *Stern Review on the Economics of Climate Change*[145] recently produced by the British Government have been instrumental in highlighting graphically, although not uncontroversially, the grave threats potentially confronting the biosphere. Policy responses, both domestic and international, are believed not to have been commensurate with those threats, as evidenced by the snail-like progress on the Kyoto Protocol front.

Academic researchers have endeavored to fill key gaps in the problem-solving architecture by putting forth radical ideas for a wholesale realignment of global strategies and institutions for coping with the looming dangers. The legal profession has been a vital source of such initiatives acting as a platform for a wide range of innovative proposals, including ones to bring full parity between the status of environmental rights and that of the juridically more elevated human rights. Proposals of this nature are not altogether new, but the latest wave has been characterized by

tal Movement?, 6 J. PAC. ASIA 27, 27-56 (2000); ELIZABETH J. PERRY & MARK SELDEN, CHINESE SOCIETY: CHANGE, CONFLICT AND RESISTANCE (Routledge 2003); Peter Ho, *Greening Without Conflict: Environmentalism, NGOs and Civil Society in China* 32 DEV. & CHANGE 893, 893-921 (2001); ECONOMY, *supra* note 79; Eric Zusman & Jennifer L. Turner, *Beyond the Bureaucracy: Changing China's Policymaking Environment*, *in* CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 121 (Kristin A. Day, ed., Sharpe 2005); Susan Martens, *Public Participation with Chinese Characteristics: Citizen Consumers in China's Environmental Management*, 15 ENVTL. POL. 211, 211-30 (2006); Arthur P.J. Mol & Neil T. Carter, *China's Environmental Governance in Transition*, 15 ENVTL. POL. 149, 149-70 (2006); Ha Shi & Lei Zhang, *China's Environmental Governance of Rapid Industrialization*, 15 ENVTL. POL. 149, 149-70 (2006); Phillip Stalley & Dongning Yang, *An Emerging Environmental Movement in China*, 168 P.R.C. Q. 333, 333-56 (2006).

145. NICHOLAS STERN, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW (Cambridge University Press 2007).

substantial philosophical and theoretical deepening. The proposals have also become increasingly detailed and wide in scope.

The recommendations offered may be assessed from a variety of perspectives. For example, it has been argued that the quest for ecological harmony may be impeded rather than advanced if couched in human rights terms.[146] A different analytical path leads to the examination of the theoretical underpinnings of the recommendations and their possible effectiveness as a universal tool to address practical problems in concrete settings. The evaluation undertaken in this paper suggests that the theoretical foundations are not sufficiently robust to support the policy façade erected. Universal claims of situational relevance, whether explicit or implicit, also cannot be readily sustained. Analysts can shrink their geographical horizons, as one of the authors (Hayward) whose seminal study is scrutinized here ultimately opts to do, and retreat into European territory or some other narrow segment of the international system. However, excluding very large and ecologically most problematic countries (such as China) from the strategic equation is not a viable proposition. A genuinely universal policy framework, and one of a multi-layered variety, will not emerge without further socio-legal exploration of Eastern/Southern realities.

146. *See* Kerry Woods, *What Does the Language of Human Rights Bring to Campaigns for Environmental Justice?*, 15 ENVTL. POL. 572, 572-91 (2006).