

RECONTEXTUALIZATION OF TRADITIONAL CHINESE “RIGHTS”: SOCIO-PHILOSOPHICAL EXAMINATIONS

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Abstract: The concept of rights has gradually emerged as the subject of a particular academic field of study—a complex one, involving three aspects: conceptual approaches, theoretical orientation, and practical development. The study of Chinese “rights”¹ should be involved in the fundamental interrelation of all forms of Chinese human values and social behavior. This study will focus on the ways in which certain naïve, vague and implied consciousness and spontaneous and haphazard actions of Chinese rights have affected the processes of Chinese social changes and human development. A convergence of goals of “rights” means that an essential restructuring of basic research and its cross-cultural comparisons must be developed. The study’s central theme is that questions and analytical modes of “rights” in Chinese human development are rapidly being challenged as a fundamental framework for philosophical criticism, and in its place will appear new research from investigators with interdisciplinary, multi-methodological approaches and analytical examinations. This article attempts to recontextualize traditional Chinese “rights” through socio-philosophical and historical-cultural perspectives.

More and more scholars attempt to recontextualize human rights according to historical-cultural roots, socio-political changes, regional situations and specific fields. H. J. Steiner, P. Alston and R. Goodman discuss international human rights through very wide contextualized socio-political, ethical and cultural conditions (Steiner, Alston and Goodman, 2012, 2). M. N. da Costa wants to “contextualize the human rights discourse, by looking at its emergence and transformation” (Costa, 2012, 270). L. Forman emphasizes contextualizing “the Implications of South African Socioeconomic Rights Jurisprudence for the International Human Right to Health” (Forman, 2009, 62). We may also list other examples. For A. Pittman, the concept of adaptability in “feminist strategy” begins to emerge, and the ways in which global discourses such as “human rights and Islam” are adapted and “contextualized to the local setting is explored” (Pittman, 2010); J. Amador discloses “the challenges of protecting women’s human rights” in Southeast Asia through “contextualizing modernity” (Amador, 2013); T. Cruz tries to provide contextualizing “human rights in the Philippines” (Cruz, 2009); R. Mushkat advocates contextualizing “environmental human rights” (Mushkat, 2009); and J. Edwards addresses contextualizing “language rights” (Edwards, 2003). H. J. Steiner, P. Alston and R. Goodman contribute a very systematic course book which has 1497 pages, and attempt to provide a

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¹Due to the debate, the author will use quotation marks for the word *rights* in Chinese perspective

contextualization of the international human rights movement. They examine the world of contemporary human rights more widely and deeply, including legal norms, political context, moral ideals, humanitarian laws of war, human rights discourse, state interests, international relations and institutions, governmental (state) and nongovernmental (nonstate) actors, and economic development. Further, “the three principal themes of law, politics and morals are interrelated, indeed inseparable, for an understanding of the human rights movement (Steiner, Alston and Goodman, 2012, 2). This article attempts to recontextualize traditional Chinese “rights” through these socio- philosophical and historical-cultural perspectives.

I. Recontroversialization of Chinese “Rights”

Issues of human rights are always debatable and controversial, as T. S. Harrington says: “At the core of the practice of controversializing is an age old political problem: how to get your way—or at least seriously blunt the prerogatives of your opponent—when you enjoy neither strong popular support nor a clear-cut legal basis for instituting your ideological project.... As a result, we now have a population that is largely unable to discern the difference between a core constitutional right and the allegedly ‘competing’ (but in fact intrinsically subordinate) claims of the Right...” (Harrington. 2011). Since scholars began to think about the existence of “rights” in Chinese cultural development, the debate over Chinese traditional human values has bounced between the following two emphases.

I - 1. *The Nihilistic Viewpoint vs. The Positive Viewpoint*

One emphasis involves those who consider “rights” as totally nonexistent from a kind of absolute nihilistic viewpoint, regarding “rights” as “only an outcome of Western culture” As Wm. Theodore de Bary points out: “To many contemporary observers Confucianism and Human rights would seem to be an unlikely combination...” (de Bary, 1998, 1). In Chung-sho Lo’s viewpoint, there was no explicit concept of human rights in East Asian culture before Western political ideas arrived at the end of the nineteenth century. For example, Confucianism laid the foundations of ethics in certain social relations and the mutual obligations inherent in them (Lo, 2001, 187). According to H. Rosemont, Jr., clearly the concept of rights, and of human beings as autonomous, freely choosing right-bearing individuals, is identified with one major culture - Western civilization (Rosemont, 1991, 60). J. Ching finds “two opposing interpretations” for the topic of human rights and Chinese culture and both of them concur that human rights are not historically a Chinese concept, but rather a Western import: one introduces human rights into China as an unnecessary cultural intrusion and society quite self-sufficient in its own pursuit of humane values and social harmony; the other maintains that Chinese civilization has nurtured for a millennia a brutal political culture which has only commanded passive obedience without permitting the development of any real idea of civil rights and liberties (Ching, 1998, 70). Irene Bloom agrees that lately in China and the West there have been those who, for different reasons, have voiced the concern that “human rights” is a Western idea without relevance to or resonance in Chinese tradition (Bloom, 1998, 95). Randall

Peerenboom suggests that those contemporary advocates of Confucianism must respond to the challenge of rights; in particular to the charges that Confucianism not only failed to develop a theory of rights but that it is in some fundamental sense incompatible with rights (Peerenboom, 1998, 247).

Conversely, at the other emphasis are those who stress the notion of "rights" has affected Chinese human development through its own way. Among those holding this view, D. W. Y. Kwok strongly concludes that the literature on human rights in traditional Chinese civilization is multitudinous and already highly sophisticated (Kwok, 1998, 83). For Kenneth K. Inada, it is incorrect to assume that the concept of human rights is readily identifiable in all societies of the world. The concept may perhaps be clear and distinct in legal quarters, but in actual practice it suffers greatly from lack of clarity and gray areas due to impositions by different cultures. This is especially true in Asia, where the two great civilizations of India and China have spawned such outstanding systems as Hinduism, Buddhism, Jainism, Confucianism, Daoism, and Chinese Buddhism (Inada, 1990, 91). Yang Fenggang attempts an analysis of the ideas of responsibility and rights in the Chinese tradition. For this reason, he divides into "two: the ancient traditions: Confucianism, Buddhism, and Daoism; and the modern traditions: revolution and enlightenment" (Yang, 1991, 209).

A truly profound and concise dialogue on human rights between China and the West began in October 1998, when the first international symposium was held in Beijing. Entitled "World Human Rights Toward the 21st Century", this meeting of more than one hundred scholars was initiated and sponsored by the China Society for Human Rights Studies and the United Nations Association of China. Significantly, one of the presentations at the symposium discussed the historic roots of the Chinese concepts of human rights. In this discussion, Wan Exiang and Yang Chengming pointed out that Chinese people had been aware of human rights since the Spring-Autumn Period (770 BC-476 BC), while the systematic ideas on human rights were only recently formulated. András Csuka asks this question: "The idea of human rights in ancient China was inherently present, which explains why the term itself is not present in traditional Chinese culture" (Csuka, 2011). In his book, S. Angle begins with "a historical sketch that clarifies the scope of Chinese right discourse" (Angle, 2002, 5). M. Svensson advocates that in view of today's highly charged political debates on human rights, "it is instructive to take a historical approach and study how human rights have been discussed and debated de facto since the concept was introduced in China at the turn of the twentieth century" (Svensson, 2002, 2). X. Wu suggests that the sources of China's human rights discourse have deep roots, both theoretical and practical, in Marxism and Leninism. Within the parameters of Marxism-Leninism, much can be understood about China's changing human rights discourse. The Chinese discussion about international human rights is not only a matter of contingent policy, it also finds a very solid and coherent foundation in a series of traditional Chinese understandings on the essential values of society, on the relationship between the State and the individual, between the international community and the State, and between international and domestic law. In this regards, Wu's discussion focuses on "the content and characteristics of China's international stance on human rights from a historic perspective" (Wu, 2002, 336).

In Xian Kailin's consideration, Confucius was the first philosopher in Chinese history to advocate the emancipation of human thought. He freed Chinese minds from the theological concerns which had prevailed since the Shang Dynasty (C. 1600-1100 B.C.), and established Confucianism with an ancient simple Chinese humanism at its core. He considers Confucian theories as "being highly representative of ancient Chinese thoughts on human rights."² Tom Zwart, Director of the Netherlands Human Rights Research School, points out that not only the mode of human rights based on the values of the West deserves respect and cherishing, "but the mode developed by the countries of Asia and Africa based on their own cultures and traditions should also be acknowledged" (*Ibid*). Elisabeth Steiner, a judge at the European Court of Human Rights, remarked "the Chinese concepts of human rights have been nurtured in the rule of rites (*li*) in Chinese," while the European concepts were established when the rule of law came into play. Since Confucius' era, Chinese culture has emphasized social harmony. She also suggests that "the issue of human rights to some extent belongs to the realm of history and culture" (*Ibid*). Pierre Bercis, President of the New Human Rights Association in France, indicates that cultural heritage is the unique and priceless identity provided by all nations to human beings; "We cannot and have not the right to impose on others our outlook on human rights. Each nation should determine its own outlook on human rights according to its tradition" (*Ibid*). The human rights concept held by each country reflects its own traditions, culture, ideology and political system. Therefore, "it's no surprise to find that remarkable differences exist between the Chinese and European conceptions of human rights" (*Ibid*).

I - 2. *The East-West Dialogue on Human Rights*

As a result, these two emphases might lead to a different understanding of Chinese civilization—its spirituality, value system, and actual socio-political mechanism. The study of "rights" in the Chinese context has probably faced more difficulties in limiting its concern to conceptualization and theorization of "rights" than the other analytic terms in socio-political philosophy. We must trace its intellectual origins and concerns to the literatures and documents which may imply certain possible consciousness of "rights" in the history of Chinese political and legal thought. In recent years, more and more scholars have endeavored to build a positive dialogue on human rights between Western and Eastern cultures. The most leading among them is Wm. Theodore de Bary. In 1994, he called for more conferences on human rights with a comparative Confucian-Western perspective. He hoped to promote a non-confrontational, multicultural dialogue on the basic value issues underlying human rights concepts and practices. Some possible topics to be discussed included: 1) Confucian concepts of self, person, and the individual in relation to state and society and self-discipline as the key to governance; 2) "Rights" protected in Confucian ritual and Chinese law, the relation between rights, responsibilities, and duties; and 3)

²Quoted from Li, Guowen. 2010. "China's Human Rights Cause Based on Traditional Chinese Culture," *Beijing Review*, Vol.59 No.12 December, 2010.r 210

Human rights in the perspective of Confucian concepts of social justice (de Bary, 1998, xvii-xviii). Later, to advance future dialogue, de Bary proposed discussion points: 1) Confucian values and discourse for centuries have concerned many of the same issues that have occupied Western human rights thinkers (though in a somewhat different language); 2) Thinking about human rights is a relatively recent development and has diverse roots in the West; 3) It is significant that several East Asian countries have not found their Confucian past an obstacle to the acceptance of Western-style constitutions and guarantees of human rights; 4) Although Confucianism has had a great emphasis on social and communitarian values, the respect for the dignity of the self and person has been central from its inception; 5) In the long-term evolution of Confucian thinking there is an increasing consciousness of the need for law in the constitutional and due process senses; 6) Individual rights, social duties, or communitarian needs should be mutually implicated and equally necessary; 7) There are two questions which cannot be in equal measure today for the East and the West. The first is whether human rights could be effective in the absence of a civil political infrastructure. The second question considers whether the various social and economic problems that confront us today do not demand new human rights conceptions and practices, with a humane concern extending beyond the human being to the earth and all forms of life (Ibid, 24-25). Many Western and Eastern scholars believe that a significant compatibility should exist between Confucianism and human rights.

Jeremy T. Paltiel emphasizes that even though Confucian Chinese values and Western liberal values are different, they are not mutually exclusive; "To view cultures in dichotomous terms exaggerates these differences and destroys points of tangency. Intercultural encounters can recognize common attributes of humanity" (Paltiel, 1998, 270-271). Sumner B. Twiss describes his goal "to develop a constructive framework for intercultural human rights dialogue and to illustrate its utility with respect to the Confucian tradition." To realize this goal, he offers a sketch of how human rights under his revised understanding can fit within the Confucian tradition. First, he outlines his general understanding of those parameters of Confucian tradition which may have a particular bearing on human rights. Second, he mentions the historical contribution of Confucian tradition to the *Universal Declaration of Human Rights*. Third, he proposes all three generations of human rights can be compatible with Confucian moral and political thought. Fourth, he suggests it is fully open to the Confucian tradition to justify on its own terms, to its own participants, its agreement to participate in human rights consensus at the international level. Finally, he proposes that the two-level approach permits us to chart interactions in the future between the Confucian tradition and the international human rights community (Twiss, 1998, 27). Tu Weiming³ asserts that Confucian

³Jeremy T. Paltiel says, "...by and large they (Chinese intellectuals) seem to reject Professor Tu Weiming's efforts to revive Confucianism with new meaning for the contemporary age." See Paltiel's "Confucianism Contestated: Human Rights and the Chinese Tradition in Contemporary Chinese Political Discourse," *Confucianism and Human Rights*, p. 270.

“core values” are not only compatible with the implementation of human rights but they can enhance the universal appeal of human rights, which includes the perception of the person as a center of relationships rather than simply as the isolated individual. This is an idea of society as a community of trust rather than merely a system of adversarial relationships, and the belief that human beings are duty-bound to respect their family, society, and nation. According to Tu, the danger of using Confucian values as a cover for authoritarian practices must be fully explored. Many of those values, however, such as duty, harmony, consensus, network, ritual, trust, and sympathy, need not be a threat to rights-consciousness at all. Clearly, Confucian values, as richly textured ideas of human flourishing, can serve as a source of inspiration for representing human rights as the common language of humanity. The challenge is how to fruitfully introduce a Confucian perspective on evolving human rights discourse without diffusing the focused energy of the national and international instruments that have been promoting political rights, with telling effectiveness, in some selected areas of the world (Tu, 1998, 287-305). Commenting on Tu Weiming’s arguments, Joshua Cohen positively emphasizes that Confucian humanism offers an account of the reason for supporting basic human rights. Yet this account operates from within an ethical outlook dominated by notions of persons as embedded in social relations and subject to the obligations associated with those relationships, rather than depending on a Westernized liberal conception of persons (Cohen, 1996, 8).

Chung-ying Cheng puts forward an argument for “transforming Confucian virtues into human rights.” In his view, the rights of man have never occupied a prominent place in Chinese thinking, because the Chinese and Western conceptions of the rise of government differ. However, this is not because there is nothing like human rights in the Chinese tradition. For example, the natural right to change a government for the well being of the people was conceived by Mencius. It was based on his view of human nature as an embodiment of the Mandate of Heaven from which people are entitled to claim what is originally intended for them by Heaven. The Confucian social duty of mutual respect and mutual help between friends may be a native source for an ethics of equal human rights with Chinese characteristics. For this reason, even in Confucianism, there is this dimension of human rights. Besides, many other Confucian virtues are compatible with human rights, such as the Confucian aspiration to secure a proper place in society according to one’s ability and merit (Cheng, 1998, 144-151). Albert H Y Chen claims that history produces tradition, and tradition shapes people’s thinking and behavior. The rationality, morality, values and aspirations of human beings are embedded in the particular cultural tradition in which they find themselves. There are probably no absolute and objective standards with regard to rational thinking and moral judgment that are completely independent of tradition. There exists no “view from nowhere,” no tradition-free ground, from which we can think and reason in a humanly meaningful way. This is the insight contributed by contemporary philosophers like MacIntyre and Gadamer. If this is true, then the question arises as to what modern human rights are, and how they may be evaluated, from the point of view of the Chinese cultural tradition. “When we turn to the Chinese tradition, we can, as in the case of the West, find both elements that have affinities

with, or can contribute to, the modern conception of human rights, as well as elements that contradict that conception" (Chen, 2000).

II. Reconceptualization of Chinese "Rights"

Since the discussion of rights is an important concern for political philosophers, it is necessary for us to delineate this concept analytically and critically. P. Hayden tries to conceptualize human rights through a more philosophical way. In his view, the philosophy of human rights brings together an extensive collection of classical and contemporary writings on the topic of human rights, including genocide, ethnic cleansing, minority cultures, gay and lesbian rights, and the environment, providing an exceptionally comprehensive introduction. The author wants to base his discussion of human rights on the sources written by the great thinkers and effectively selects original reading materials from: 1) classical authors such as Plato, Aristotle, Cicero, Aquinas, Grotius; 2) modern authors such as Hobbes, Locke, Rousseau, Burke, Paine, Wollstonecraft, Kant, Bentham, Marx, and Mill; 3) contemporary authors such as Hart, Cranston, Feinberg, Pogge, Nussbaum, Rorty, and Derrida; 4) non-Western authors such as Confucius, Mo Tzu, The Buddha, The Dalai Lama, Kwasi Wiredu, Abdullahi, and Ahmed An-Na'im. In the second part of his book, Hayden deals with contemporary issues such as "universalism and realism," "minority cultures and group rights," "ethnic cleansing and humanitarian intervention," "women's rights," "gay and lesbian rights," and "human rights and the environment" (Hayden, 2001). J. Mahoney discloses "significant challenges of human rights" indeed to humankind. For him, it is necessary to examine the conceptualization and justification of human rights. He tries to deal with the major objections to human rights such as the risks of rights inflation, the encouragement of egoism, societal conflict, Western imperialism, and cultural relativism, and addresses that human rights logically culminate in an ethical cosmopolitanism to reflect the moral unity of the human race. According to him, the timely, universal, and empowering three human rights, "have inspired and shaped this study which is aimed at examining, and commending, their challenges today (Mahoney, 2007, VIII). S. M. Liao and A. Etinson attempt to conceptualize human rights through a new perspective. For them, according to one longstanding account, "the Naturalistic Conception of human rights," human rights are those that we have simply in virtue of being human. In recent years, however, a new and purportedly alternative conception of human rights has become increasingly popular. This is so-called Political Conception of human rights, the proponents of which include John Rawls, Charles Beitz, and Joseph Raz (Liao & Etinson, 2012, 327-352).

II - 1. *An Etymological Perspective of Chinese "Rights"*

Are there any Chinese terms conceptually compatible with "rights"? In ancient Chinese documents or classical Chinese literature, there is no special term which corresponds precisely to the Western word "rights." In modern Chinese, the term

rights is translated into the Chinese word *quanli* 權利, originally formed by the two Chinese characters *quan* 權 and *li* 利.⁴ The first, *quan* 權, means power, authority, sovereignty, mastery, supremacy, influence, competence, function, force or jurisdiction. The second, *li* 利, means interest, benefit, advantage, profit, welfare, or utility. In Irene Bloom's opinion, although *quanli* was not part of Mencian vocabulary, nevertheless in a deeper sense many of his concerns seem related to that of Westerners'. These Mencian concerns include: his sense of common humanity, his discovery of a moral potential common to all human beings, his devotion to the idea of "nobility," his concern with the responsibilities rulers have for the well-being of the people, his insistence on the limits of power—with what rulers should decline to do out of respect and compassion for the people (Bloom, 1998, 94). The contemporary Chinese dictionary defines the holder of *quanli* as a natural person (or citizen) or legal person (or organization) who exercises the powers belonging to himself/herself and enjoys the interests according to the law. For our inquiry, in addition to *quanli*, we may find some other Chinese characters or words which correspond or relate to the Western term "rights" in the ancient or classic Chinese vocabulary. For example, *yao* 要, *qiu* 求, and *xu* 需 mean claims, demands, needs, requirements, or declarations; *zheng* 正 as an adjective means just, legitimate, proper, fair, appropriate, righteous, reasonable, lawful, or equitable; *que* and *ding* mean asserting, affirming, confirming, defining, determining, delimiting, setting, fixing, establishing, or forming; *bao* 保 and *hu* 護 mean to protect, to ensure, to guarantee, to safeguard, to defend, to preserve, or to maintain; *pei* 賠 and *chang* 償 mean compensation; *you* 有 and *ju* 據 mean to own or to possess. Mencius discussed "you" in a moral and also a legal sense: "Indeed, to call everyone who takes what is not properly possessed (*you*) by him a robber, is pushing a point of resemblance to the utmost, and insisting on the most refined idea of righteousness" (*The Work of Mencius: Wanzhang II*). Indeed, this kind of reconceptualization can actually help us to characterize our own study. In attempting to spell out the essential conceptualizations of the Chinese concept of rights, we may use the following three basic standards for any proper, just and fair human behavior or activity according to the Chinese traditional value system: 1) *Heqing* 合情. "*He* 合" means according to, conforming to, being in line with, tallying with or square with; but *qing* means human nature, environment, social conditions, actual situations, common good, compassion or sympathy. 2) *Heli* 合理. "*Li* 理" means reasons, truth, logic, principles, theories, moral standards, rational decisions, intellectual approaches or the real ways of the world. 3) *Hefa* 合法. "*Fa* 法" can be defined as laws, rules, commands or social

⁴In Chinese, the English spelling "li" can be represented by several different Chinese characters with the same pronunciation--all of which have certain important philosophical meanings: 1) one character "li" can be defined as "principles," "rules," "laws," "propriety," "rites," or "rituals," etc.; 2) another character "li" can be interpreted as "reason," "logic," "truth," "idea," "argument," "intellect," "understanding" or "universal spiritual power"; and 3) the third character "li" means "interests," "benefits," "advantages," "profits," "welfare" or "utility."

political orders, but as Julia Ching says, the concept of law (*fa*) is understood differently in the Chinese cultural context, such as those customs which became a penal code.

II - 2. *Five Analytical Modes of Chinese “Rights”*

Rights can be considered an explanatory variable, a reference parameter, a conceptual framework, or an analytical mode, which will be examined on its possible grounds and according to its characteristics—the objects, the subjects, the motivations, the sources, and the extent. There are differences as well as similarities between Eastern and Western human cultural developments. Chinese “rights” can even be found through certain “universal” conditions. For most scholars: 1) “rights” should be a kind of claim, demand, justification, protestation, declaration, assertion, affirmation, pretension, title, license, perquisite, or appanage; 2) “rights” should be just, fair, appropriate, proper, lawful, impartial, reasonable, legitimate, or equitable; 3) “rights” should be moral, legal, or political; 4) “rights” should be applied or exercised by a holder; 5) “rights” should be based on human nature, a value system, spirituality, a legal system or a traditional culture; and 6) “rights” should be conditional for something, such as power, interest, benefit, advantage, welfare, privilege, prerogatives, enjoyment, unity, happiness, title or reputations, and so on. The author will adopt these six viewpoints in examining the what, why, how, and who questions regarding “rights” in traditional Chinese culture. For inquiry purposes, “rights” will be discussed and examined according to five analytical modes or theoretical assumptions and explanatory variables as follows.

The first is the “*Rights to*” Mode: *the Possible Objects of Rights*. This mode is about direct objects and their realization, actualization, or materialization. First, it shows us a *Being Status* (Right-To-Be-Something), such as the right “to be a congressman,” “to be a professor,” “to be a pilot,” “to be a voter,” or “to be an employee,” etc. Second, it shows us a *Doing Status* (Right-To-Do-Something), such as the right “to educate or to be educated,” “to run a business,” “to speak,” “to participate in politics,” “to immigrate,” “to make an association,” “to know something,” “to avoid danger,” or “to initiate a lawsuit,” etc. Third, it shows us a *Having Status* (Right-To-Have-Something), such as the right “to own property,” “to own a gun,” “to hold a religious belief,” “to work under good conditions,” or “to have a fair salary,” etc.⁵ In general; the object of a right can be a material thing, human behavior, or spiritual value. For instance, R. A. Epstein’s examination focuses on two conceptions of animals: “as objects and as subjects”. It examines the historical rules that comprised the law of animals, and which set the backdrop for the modern reforms, and explores the moral status of animals and their relationship to women, children, and slaves, under the traditional synthesis of legal rights (Epstein, 2005,

⁵Those types are little different from Alan R. White’s. For him, one’s right may be 1) a right to do something, 2) a right to have something done to one, 3) a right to be in a certain state, 4) a right to feel something, 5) a right to take a certain attitude. See Alan R. White’s book, *Rights*, Oxford: Clarendon Press, 1984, pp. 13-15.

143). The object of a right is set forth by different cultures, social systems, and historical periods. For instance, in a slave-owning system, the slaves are not the subjects, but the objects of a right. In a feudalistic system, certain people, such as serfs, are semi-subjects as well as semi-objects of a right. But in the modern social system, all people are equal and cannot be treated as an object of a right at any time and in any place.⁶ In the traditional Chinese social system, a part of the population, such as “*jianmin*” (servants), was a form of semi-object of a right.

The second is the “*Rights by*” *Mode: the Possible Subjects of Rights*. This mode is about those holders, owners or inheritors who practice and realize the rights. Karen Zivi argues that Mill embraces a conception of the socially constituted subject who is both disciplined by and enabled by rights (Zivi, 2006, 49). According to Jacques Rancière, “The actual subject of these Rights of Man became Human Rights” (Rancière, 2004). Amartya Sen considers human rights as “primarily ethical demands,” which relate to the “significance of the freedoms that form the subject matter of these rights” (Sen, 2004, 333). From today’s point of view, so-called subjects can be divided into three groups which have a capacity for rights: a) any natural person or individual—such as citizens, minorities, females, disabled persons, parents, children, employees, patients, workers, consumers or criminals; b) any legal person or organization—such as nations, races, governments, institutions, businesses, classes, interest groups or religious groups; and c) any animals.⁷ A subject of rights must have the capacity for rights. A subject of rights is also determined by different cultures, social systems, and historical periods. For example, in a slave-owning society, only masters and freemen are subjects of rights. In a feudal society landlords have full capacity for rights, but peasants have only a very limited capacity. In the modern society, every person must be a subject of right. In the traditional Chinese social system, there were seven possible subjects of right—but with a difference of degree (we will discuss this later).

The third is the “*Rights of*” *Mode: the Possible Extent or Content of Rights*. This mode is about topologies, classifications, categories, or some form of range, field or domain for the rights. Generally speaking, rights can be divided into three basic types: natural rights (fundamental rights, universal rights or human rights), legal rights (including political rights, economic rights, and religious rights in a broader sense), and moral rights. Natural rights are a form of “rights” defined and recognized through human nature, a social ideal or internal need. From today’s point of view, the concept of “natural rights” can be replaced by another one—“human rights” or “fundamental

⁶According to Marxism, in a modern capitalist system, because of commercialization of the labor force, even workers become some kind of “commodity,” actually a kind of “object of rights.” Therefore, there can be no real equal rights in a capitalistic society.

⁷Some very radical viewpoints broaden “the holder of rights” to any kind of life form, such as plants and other organisms, and even to any lifeless forms and whole-nature beings. For example, C.D. Stone argues that we should extend legal rights to forests, oceans, rivers and other natural objects. See his article “Should Trees Have Standing?—Toward Legal Rights for Natural Objects,” *Southern California Law Review*, 45, 1972.

rights.” The term “human rights” has not been adopted with a precise definition or with absolute agreement. For most Western scholars, so-called “human rights” should apply to all human beings at any time and place, and to anything, regardless of kinship, race, class, gender, property, religion, occupation, ideology, talent, merit, age, physical condition, socio-political system, or other background and commitments. Generally speaking, human rights cannot be waived, changed or transferred. Moral rights are a form of rights defined and recognized through a value system, an ethical framework, human conscience, social responsibility or public opinion (Gastil, 1976, 231-240). Legal rights are a form of rights defined and recognized by an external authority, sovereignty, or state law. The theory of natural rights has been one of the most important socio-political concepts for human development. This theory asserts that men are created equal, and governments derive their just powers from the consent of the governed. There have been diverse debates about “natural rights.” For example, Rousseau criticized Hobbes’ and Locke’s points of view. For Rousseau, indeed every man has a natural right to preserve himself and to act in accordance with this right. Civil society has no natural ground to issue a command which contradicts natural rights. But all civil societies issue such commands; natural rights cannot be their legitimization. Man is naturally free, and civil society takes his freedom away from him; he is dependent on the law, and the law is made in favor of the rich—or at least in its origin was meant to favor them. For Bentham, human happiness could not be determined by reference to an objective good or to natural rights such as those proclaimed in the American *Declaration of Independence-1776* or in the French *Declaration of the Rights of Man and Citizen-1789*, because natural rights were based on selfish interests however well or ill-disguised.⁸ A classical formulation of “natural rights” is presented as follows:

Seeing any men are by nature those sons of Adam, and from him have legitimately derived a natural propriety, right, and freedom, therefore England and all other nations, and all particular persons in every nation, notwithstanding the difference of laws and governments, ranks and degrees, right to be alike free and estate in their natural liberties, and to enjoy the just rights and prerogative of mankind whereunto they are heirs apparent; and thus the commoners by right, are equal with the lords. For by natural birth all men are equally and alike born to like propriety, liberty, and freedom; and as we are delivered of God by the hand of nature into this world, every one with a natural innate freedom, and propriety, even so are we to live, everyone equally and alike to enjoy his birthright and privilege.⁹

⁸Rousseau’s *The Discourse on the Origin and Foundations of Inequality Among Men*; see also “Anarchical Fallacies,” *Being an Examination of the Declarations of Rights Issued During the French Revolution*, in *Works*, Vol. II, pp. 484-534.

⁹Thomas Edwards, *Gangraena*, part III, p. 17. Edwards refers to Richard Overton’s Remonstrance (1646). See *Tracts on Liberty in the Puritan Revolution, 1638-1647*, ed. by W. Haller, Vol. III, p. 351.

Obviously, in ancient China, there existed some moral claims (rights) for social responsibility, life style, and modes of behavior. There had also been some legal claims (rights), such as equality in initiating a lawsuit. Some great Chinese thinkers advocated certain claims corresponding to so-called natural right—for example, the claims for life, liberty, equality, resistance to oppression, property, beneficence, survival, subsistence, security, self-protection, interactive duties, and happiness.

The fourth is the *“Rights for” Mode: the Possible Motivation of Rights*. This mode is about a certain form of intention, direction, and purpose for rights. Different holders of rights have different motivations. Politically, those motivations could be for liberty, equality, individuality, legality, security, safety, survival, democracy, development, enjoyment, or happiness. Economically speaking, they could be for interest, benefit, profit, advantage, beneficence, or compensation. In Chinese traditional culture, different holders or subjects of rights had different motivations.

The fifth is the *“Rights from” Mode: the Possible Origin of Rights*. This mode is about the root sources or causes for rights. The idea of rights might come from human nature; cultural tradition, and value systems; historical process and social progress, spiritual and material needs, revolutions and mass movements, organized and institutionalized activities; and most important, individuals’ claims, interests and advantages. Undoubtedly, at least some of the sources of rights also appear throughout Chinese history.

III. The Rehumanization of Chinese “Rights”

Unlike Chinese Daoism, according to the Confucian worldview, Chinese ethics must be based on a type of *anthropocentrism* which regards humans as the central and most important beings in the universe. It must be emphasized, with reference to all of the above definitions and modes to the theory of rights, that “rights” from the Chinese perspective are inspired and derived from a completely different source and by a completely independent path—that being traditional Chinese anthropocentrism.¹⁰ In the Western sense, “rights” have three basic preconditions: the human being as the center of the earth, individuals as the starting point, and the social contract as a secured guaranty. Perhaps it is superfluous to note that these features may, or may not, be unified. Normally, so-called anthropocentrism emphasizes that humans, as the central concern, must judge all things. Anthropocentric ethics regards humans as the ethical subjects of any rights. An important issue is “who or what” may count as a moral subject. In deontological anthropocentrism, only humans have ethical duties and rights. For instance, as Noel Preston claims, anthropocentric approaches determine the right, the good or the fitting for environmental questions in terms of

¹⁰Tu Weiming refuses to use the concept “anthropocentrism.” He says: “The full meaning of humanity is anthropocosmic rather than anthropocentric.” See his “Human Rights as a Confucian Moral discourse,” *Confucianism and Human Rights*, p. 302. For me, the important issue is how to define this term.

their impact on human beings. “On an anthropocentric approach, the claim that pollution of the environment is to be avoided could be justified by invoking the human rights to clean air and water” (Preston, 2007, 182). Surely nowadays, anthropocentrism is a very negative term, as Rob Boddice claims: “Anthropocentrism is a charge of human chauvinism and an acknowledgement of human ontological boundaries. Anthropocentrism has provided order and structure to humans’ understanding of the world, while unavoidably expressing the limits of that understanding” (Boddice, 2011). However, it is more creative to examine the six possible ways of analyzing the issue of “rights” from the perspective of so-called Chinese anthropocentrism (synonymous with humanism). It did not come from a single, unique, or pure philosophical source; actually, it was unified by Confucianism (later Neo-Confucianism), Legalism, Taoism, Moism, and other Chinese cultural or spiritual roots (even Buddhism). In order to avoid ambiguity, we may use humanism instead of anthropocentrism, as M. Juergensmeyer advocates: “...humanist philosophies such as Confucianism, which do not share a belief in divine law and do not exalt faithfulness to a higher law as a manifestation of divine will” (Juergensmeyer, 2005, 70).

What is humanity? Confucius and Mencius interpreted and explained it in different terms and within different contexts. The first is *airen* 愛仁 [love all human beings] (*Analects*: 12:22); the second is *kejifuli* 克己復禮 [disciplining oneself and restoring rites] (*Ibid.*, 5: 12); the third is *jisuobuyu wushiuren* 己所不欲, 勿施於人 [do not do to others what we would not want others to do to us] (*Ibid.*, 5:11, 12:2); the fourth is *tianrenheyi* 天人合一 (the unity of heaven and humanity); the fifth is *renzheng* 仁政 [rule by humaneness] (*Mencius: Tianwengong*). Tu Weiming believes that the Confucian perception of human self-development, based upon the dignity of the person, is a series of concentric circles: self, family, community, society, nation, world, and cosmos (Tu, 1998, 302). For Louis Henkin human rights are rooted in a conception of human dignity which determines and defines rights, requiring that they be recognized and realized. Confucian teachings encouraged civility and inspired humane concern and mutual respect (Henkin, 1998, 309). From Tu’s and Henkin’s views, we may find the same source—“human dignity” for both Confucian humaneness and Western rights. What is traditional Chinese anthropocentrism? We may characterize it as follows: a) Human beings, their powers and their affairs are more significant than divine beings. b) There should be some conflicts and interactions between different kinds of human beings, such as in the five basic social relationships. c) Balance, equilibrium, and harmony among human beings are the most important social purposes, tasks, and ideals. d) For this reason, some necessary social norms, principles, rules, laws, orders, systems, values, and moral standards must be formed, organized, and institutionalized. e) Good rulers should take care of the interests of the people and bestow some benefits to them through rule by virtue and the principles of justice. f) Governments or authority figures also must be strict,

as well as fair in giving out rewards and punishments, offering “the carrot and the stick” judiciously. The most important principle of Confucius for an individual person to become self-realized as a ideal human being in the social life is *ren* 人 (humanity or humaneness), from which all socio-political norms and moral standards are derived. If this “basic line” was implemented thoroughly and completely, the various human needs, claims, interests, dignity, and self-esteem could be recognized, guaranteed, and fulfilled.

III - 1. *Ideological Sources of Chinese "Rights" Consciousness*

To borrow some concepts from the Western value system, the initial picture in the Chinese perspective of rights is an enormous multiplicity of spiritual sources, namely the influence and effects of five sources—individualism, liberalism, egalitarianism, legalism, and democratism through integration, combination, and unification. While everyone asserts these five sources to be interdependent and interactive, and attempts to build connecting bridges across the various boundaries, clearly the effort of constructing certain specializations among them should also be necessary and workable. In a sense, the above five sources have also been functional in Chinese human development, but all of them worked in very passive, negative, naïve, or subordinate ways. Having placed the issue under examination, the main question is: how are we to draw the dividing lines between: 1) negative individualism vs. positive universalism; 2) passive liberalism vs. active conservatism; 3) naïve egalitarianism vs. refined discriminativism; 4) subordinate legalism vs. dominate moralism; and 5) implied democratism vs. overall despotism?

The first is “negative individualism vs. positive universalism”. With reference to this point, the performance of so-called individualism may be contrasted with the overall performance of positive universalism. Louis Henkin argues that in Chinese tradition the individual was not central, and no concept of individual rights existed in the sense known in the United States. The individual's participation in society was not voluntary, and the legitimacy of government did not depend upon his consent or the consent of all people. Individuals were not equal, and society was not egalitarian but hierarchical (Henkin, 1986). In Tao Julia's opinion, the notion of individual rights is commonly contrasted with non-Western conceptions of the collective good to show not only that the Western conception of rights is culturally peculiar to the West but also that it is morally inferior in privileging individual self-interest over the common good (Tao, 1990). But, according to A. J. Nathan's point of view, Chinese philosophy still assigned a great role to individuals; however, this was a political individualism of a very different kind from that which comes to mind in the modern West (Nathan, 1986, 138). For Hsieh Yu-Wei, Confucianism “regarded individuals as roots, and communities as leaves—individuals as foundations and communities as roots” (Hsieh, 1968, 280). In the words of Derk Bodde, “Confucian individualism” means the individual must develop his creative potential so that he can fulfill “that particular role which is his within the social nexus” (Bodde, 1966, 66). On one hand, for the Chinese ruling classes, the Great Unity, the Great Entirety, the Great Integrity, the Great Centrality, and the Great Universality had been their most important social

ideals; as a result, dehumanization, deindividualization, and depersonalization were a basic characteristic of Chinese social life.¹¹ On the other hand, for the Chinese masses, decentralization, deunification, and deuniversalization were also important characteristics of Chinese social life. There have been sharp conflicts between the hypocritical moral sermon, such as "to show loyalty for one's country," and "actual and realistic immoral practice," such as "Human beings die in pursuit of wealth, and birds die in pursuit of food," or "Unless a man looks out for himself, heaven and earth will destroy him."

The second is "passive liberalism vs. active conservatism". Accordingly, emphasis should be placed on the inquiry into the conflicts between the institutionalized ruling mechanism and loose or unorganized anarchical disobedience. In principle, some great Chinese thinkers, such as Zhuangzi, advocated absolute and unlimited spiritual freedom, and attempted to withdraw themselves from politics and social activities, or adopted an unconventional and unrestrained life style.¹² According to Yu Fen, Confucianism, Daoism, and Buddhism all have their own perspective on human freedom (Yu, 1998, 154). For many scholars, the anti-majoritarian function is the primary function of rights. In Chinese culture, this anti-majoritarianism also has been popularized for many intellectuals and ordinary people. In practice—as the Chinese saying goes, "the mountain is high, the emperor is far away"—the people who either belonged to the lowest class or to higher class often wanted to cast off the yoke of social control to pursue their own needs and interests.

The third is "naive egalitarianism vs. refined discriminativism". This demarcation between two extremes at the level of their respective conceptual frameworks will be helpful in understanding the paradoxical gap between the social ideal and reality. Equality has been one of the most important social ideals in Chinese human development. *Datongshijie 大同世界 (The Great Universal Harmony and Perfection in the World)* has been a final dreamland for many honest, upright and fair-minded ancient intellectuals.¹³ Throughout the Chinese history of thought, many great thinkers had advocated some kind of equality. Donald Munro suggests that Confucius and Mencius demonstrate a belief in natural equality along with a moral perspective that entails evaluative inequality (Munro, 1969). More significantly, Mencius deepened the egalitarian theme. He assumes that human nature is good, and one can find norms of behavior in one's own heart which implies that human beings are morally equal. Ideally, for him, everyone could become a Yao 堯 or Shun 舜 (*Mengzi*

¹¹ Sun Yat-sen figuratively described Chinese people as "a sheet of loose sand." For him, negative individualism was a serious barrier for Chinese social progress.

¹² For example, many ancient scholars or poets such as Li Bai (Li Po) and Tao Yuanming adopted a kind of independent thinking, a personal attitude toward life and characteristic style of literary and artistic creation.

¹³ Some scholars think that "egalitarianism" or "equalitarianism" has been the leading characteristic of Chinese peasant mentality, such as "to share weal and woe." There was a very famous slogan: "to share out equality without regarding the rich and the power, to live together without regarding the noble and the ignoble."

Zhengyi: Jinxinxia). In other words, the potential for moral development was the same for all. Wejen Chang points out that Mencius attempted to solve a conundrum: the idea of human equality seems to be in conflict with the fact that in any society some have to rule while others are to be ruled (Chang, 1998, 124). Confucius created a private school, and struggled for classless education and selection of officials based on equality, because “In education there should be no class distinctions” (*Analects* 15:38). The master also says: “By nature close together; through practice set apart” (Ibid. 17:2). This statement seemed to aptly express a modern sense of human equality and relatedness—one that allows for both similarities and differences (Bloom, 1998, 96). Following Confucian thought, later imperial governments (Sui and Tang Dynasties) created the “*keju* 科舉” system—to hold open examinations to the public to select officials by equal opportunity and free competition. Although this system had both advantages and disadvantages, it was much better than the selection of officials by lineage, inheritance, or family, political, economic, religious, and other backgrounds.¹⁴ Objectively speaking, Confucius’ and Mencius’ affirmations of human equality are not direct human rights thinking, but they can be considered a potential source of the implied human rights consciousness. For Laozi (580-500 BC) and his Daoism, any conflicts, struggles, or fights were based on some inequality, in other words, harmony must be based on equality.¹⁵ Following Laozi, Zhuangzi (355-275 BC) held, “There should be no inequality among natural things from the view of Dao” (*Zhuang Zi: Qiushui*). Daoism wanted to claim “equal survivorship.” For Mozi (468-390 BC), there should be no inequalities among nations and human beings in this world. He emphasized *jianai* 兼愛—universal love based on equality; *shangxian* 尚賢—selection of officials by their capacities based on equality; *feigong* 非攻—non-offensive, and *shangtong* 尚同—harmony based on equality.¹⁶ Guanzi (?-645 BC), an important Legalist, stressed classless equality for the law and equality before awards and punishments.¹⁷ Legalists Zi Chan 子產 (?-522 BC), Shang Yang 商鞅 (390-338 BC), and Han Fei 韓非(280-233 BC) also emphasized equality before the law.

The fourth is “subordinate legalism vs. dominate moralism”. Chinese Legalism actually had a very strong influence on the Chinese political and legal system. In fact, all Chinese political theory and practice had been a mixture of Confucianism, Legalism, and Daoism. Generally speaking, Confucianism was a leading ideology or value system; Legalism, a system of high-handed measures or coercive methods and artifices; and Daoism, a thought pattern or mode of thinking. There are two famous slogans used in Confucian ethics and Legalism: “The penal code is invalid for literati and officialdom”; and “If a prince breaks the law, then he must be also punished by

¹⁴See *Tangshu: Xuanjuzhi (Annals of Examination of Tang History)*.

¹⁵Lao Zi, *Dao De Jing (The Way and Its Power)*.

¹⁶*Book of Mo Zi*, “Fayi,” “Jianai,” “Shangxian” and “Shangtong.”

¹⁷*Book of Guan Zi*, “Zhongling” and “Jincang.”

the penal code.”¹⁸ This raises the question: What are the distinctions, the relationships, and the interactions between Chinese Legalism and moralism. Jeremy T. Paltiel believes that China has never known the significance of rights discourse within the context of a legal discourse that privileges legal texts and constrains the exercise of authority by reference to these issues (Paltiel, 1998, 271). According to Andrew J. Nathan, Chinese thinking regarding law was shaped by two ancient schools, Legalism and Confucianism. Both schools accepted the ruler's right to formulate law. The Legalists viewed this right as unconstrained by any higher moral order. They held that the ruler could and should create any laws necessary to strengthen his state, and that harsh laws worked better than soft ones. Confucians argued that, to be effective, the law must comply with the moral order inherent in society. The laws and the ruler must be fair and just and must encourage the virtues of filial piety, loyalty, and social compassion. This Confucian view was parallel in a broad sense to the Western concept of natural law in that it believed in a moral order independent of the laws of the state (Nathan, 1986, 127). In Chuang-ying Cheng's arguments, Confucian moralism implicitly defined the sense of human rights in terms of the self in relation to virtues, rather than a sense of free-standing (Cheng, 1998, 145). In a sense, for Chinese Legalism, the implied sense of “human rights” was implicitly defined in terms of political control in relation to punishments, because a society must keep a balance between differing individual interests. For example, one must be punished for stealing someone else's property. Cheng characterizes the transformation of Confucian virtues into modern human rights considerations as follows: 1) One's internal ability and the external needs of other people; 2) A duty of the self to the community and a duty of community to the self; 3) The duty consciousness of virtues and an expectation of the public utility; 4) The virtuous action of an individual and of any other individuals; and 5) The public interests and the private interests of ruler (Cheng, 1998, 148-149). Peerenboom compares the rites (*li*) with rights through both the moral and legal perspectives. For him, there are similarities and differences as well as interactions between Confucian rites and Western rights. Both of rites and rights are “claims,” but the former are moral claims while the latter seem to be legal claims. “Rites” can complement rights by providing a moral dimension to interpersonal actions, suggesting additional possibilities above and beyond the legal relations defined by rights (Peerenboom, 1998, 248-251). Normally, “rites” are “moral duties” or “social responsibilities.” However, if “rites” are “claims,” they can also be treated as a form of “rights”—“moral rights.”

In general, Chinese Legalism emphasizes: 1) Rule by person with the emperor's law; 2) Strict material or physical rewards and punishments; 3) Powerful political and military forces; 4) Theory of corrupt human nature; 5) Tactical social control; 6) Realistic attitude towards material interests; 7) Defined criteria to the public; 8) General “equality” before the emperor's laws; and 9) Applying limitation,

¹⁸“*Bao Gong*” (Bao Zheng 999-1062 A.D.) is a house word in China. In a widely known story, Bao Gong, an idealistic Legalist official, sentences a “*Fu-Ma*” (son-in-law of the emperor) to death in the Song dynasty.

centralization, and intimidation to “*xiaoren*” 小人 (mean man). On the contrary, Chinese moralism, such as Zhu Xi’s theory, emphasizes: 1) Rule by person with Confucian virtue; 2) Spiritual or ideological advice and encouragement; 3) Educational or ethical teaching and persuasion; 4) Theory of virtuous human nature; 5) Strategic social control; 6) Critical, even nihilistic attitude towards material interests; 7) Flexible criteria for individuals; 8) Special treatment before law; and 9) Demanding self-perfection, self-purification, and self-realization for “*junzi*” 君子 (superior man). In Chinese history, the rulers always applied both Legalism and moralism for social control.

The fifth is “implied democratism vs. overall despotism”. There was an implied or passive democratism and constitutionalism¹⁹ in pre-modern China, as seen in “the system for selecting officials” and “the system for remonstrating with the emperor.” Since the Ming dynasty (1368-1644), some enlightenment thinkers and Confucian reformers, such as Huang Zongxi 黄宗羲 (1610-1695), Wang Fuzhi 王夫之 (1619-1692), Gu Yanwu 顾炎武 (1613-1682), Li Yong 李颀 (1627-1705), Tang Zhen 唐甄 (1630-1704), and Yan Yuan 颜元 (1635-1704), harbored certain democratic ideas. For example, they attempted to substitute *tianxiazhifa* 天下之法 (law by all people) for *yijiazhifa* 一家之法 (law only by the emperor).²⁰ Accordingly, Huang Zongxi as well as Gu Yanwu and other thinkers had made progress in their critique of dynastic rule; they emphasized the political participation of the common people and addressed renewed interest in broad constitutional issues (Hou 1957: vol. 392). Huang even put forward a systemic constitutional plan for a balancing of powers, because he found that Confucian values and Legalist systems were entwined and also coexisted to some degree by the tension with one another. As de Bary states: “Individually impressive as were these heroic of Confucian ministers, they were more the exception than the rule, and while they testify to moral culture compatible with human rights sentiments, something more was needed. That ‘something more’ as perceived by Huang Zongxi in the seventeenth century was what might be called a civil society protective of political freedom and public discussion at the Chinese court” (de Bary 1998: 16-18).

III - 2. *The Holders of “Rights”—Traditional Socio-Cultural Circles*

We may acknowledge theoretical assumptions concerning the possible existence of holders of rights in Chinese history. In ancient China, the entire society could be divided into the following seven basic cultural circles.

The first is the “rights” and the “*tianzi* 天子 Cultural Circle.” *Tianzi* means the Son of Heaven—the Chinese emperor. The emperor was the unique and ultimate human ruler. He and his entire imperial and royal family (including the nobility)

¹⁹See Max Weber’s discussion on “Chinese passive democratization,” *Economy and Society*, pp. 985-986.

²⁰Later, Gong Zizhen, Weiyuan, Lin Zixu, Hong Xiuquan, Kang Youwei, Yan Fu, Sun Yat-Sen and many other thinkers advocated the democratic ideal, and pushed forward Chinese human development.

formed a supreme cultural circle. Chinese emperors claimed to be the sole representative of Heaven and the only direct administrator of its mandates. They truly believed they held divine right, divine appointment, and divine arrangement according to traditional political theology (a methodically and religiously formulated political theory). Therefore, absolute obedience and blind loyalty must be the main duty and obligation of the governed. From this divine legitimacy, Chinese rulers emphasized a kind of hereditary right to transfer political power from one generation to the next. On one hand, *tianzi* advocated that Heaven bestowed divine rights upon them; on the other hand, only they could bestow the limited right to the subjects and the people by their will. There are some similarities and differences between the divine right doctrine of Chinese emperors and that of European kings. Similarities included the belief their “divine rights” served as an instrument or spiritual weapon of propaganda for ruling society, and both were based upon the belief that dynasty or monarchy was a divinely ordained institution. Differences included the Chinese belief that emperors were responsible to an impersonal heaven, while European kings were accountable to a personal God. In the Chinese view, Heaven could withdraw the divine right from bad emperors, and people also had the “right” to change rulers and to end imperial inheritance. The people were not required to observe absolute obedience to a bad ruler. But in the European view, obedience was due to the ‘office’ of king, irrespective of who occupied the office or how he had acquired his rank. The law of primogeniture required complete obedience be given to the person of the king as well as to his legitimate heirs (Figgis 1922).

The second is the “rights” and the “*Shidafu* 士大夫 Cultural Circle.” *Shidaifu* means literati and officialdom—the whole scholarly bureaucratic mechanism. Max Weber examined Chinese imperial administration in his theoretical formulation of bureaucracy. Accordingly, the Chinese traditional administrative system constituted a pattern somewhat closer to the bureaucratic ideal type. The higher officials in imperial China were “literati”: products of an intensive education in religion, ethical tradition, literature, and art. Selection and recruitment were carried out in large part through an extremely rigorous system of written examinations. The Chinese imperial administration system also emphasized the literary rather than the legal and the ethical rather than the scientific. Although Chinese society is one of humanity's highest achievements, it did not develop significantly from the imperial period to the modern, a rational-scientific model that provides the framework for the ideal-typical formulation of bureaucracy.²¹ In a sense, *shidaifu* represented the mainstream of Chinese traditional culture. Generally, all the members of this circle were educated and selected by the imperial examination system. *Shidaifu*, as a main part of the giant state apparatus, were bestowed legitimate power from the emperors in order to control society. *Shidaifu* had a twofold personality: they were subjects before the emperors and rulers before the people. For their interests, *shidaifu* attempted to have claims or rights as follows: 1) claims or rights for rewards and punishment in the official career-

²¹See Max Weber's *The Theory of Social and Economic Organization, Economy and Society and The Religion of China: Confucianism and Taoism*.

--so-called *shitu*; 2) claims or rights for participating in decision making--so-called *mouzheng*; 3) claims or rights for giving advices or suggestions, even warnings, to the emperor—so-called *shangjian*; 4) the claims or rights for writing books to expound a doctrine; 5) the claims or rights for forming their own characteristic style of philosophy and literature.

The third is the “rights” and the “*xiangshen* 鄉紳 Cultural Circle.” *Xiangshen* means country gentry and squires, such as landlords, local despots (tyrants), elders or leaders of patriarchal clans, owners of big manors, heads of villages and small towns, and heads of the neighborhoods. *Xiangshen* were the main representatives of local culture and possessed certain properties, reputations, titles, elevated birthright and social standards, and local powers. *Xiangshen* attempted to hold the basic claims or rights for local moral orders, local or clan interests, benefits, advantages, or natural resources.²² In general, *Xiangshen* emphasized certain moral claims or moral rights to normalize, define and regulate local residents' conduct.

The fourth is the “rights” and the “*shumin* 庶民 Cultural Circle.” *Shumin* means the populace and the multitude or the freemen and common people, such as peasants, businessmen (traders and peddlers), petty townspeople (philistines), servants, physical workers and villains. *Shumin* were the majority of the ancient Chinese population. *Shumin* had the claims or rights for passive equality, survivorship, existence and *Shenyuan* (to initiate lawsuits against others).²³

The fifth is the “rights” and the “*jianghu* 江湖 Cultural Circle.” *Jianghu* literally means rivers and lakes, and actually means vagrants and itinerants--the persons who were living an unsettled life, wandering from place to place—such as chevaliers, charlatans, entertainers, martial arts players, mountebanks, quacks, beggars and temporary workers. Basically, *jianghu* attempted to have claims or rights for passive or negative freedom.²⁴

The sixth is the “rights” and the “*zaofan* 造反 Cultural Circle.” *Zaofan* means rebellion, uprising, or insurrection, such as revolting peasants,²⁵ insurrectionary armies, rioting groups, the rebelling masses, anarchists, robbers, bandits, brigands, sinister gang members²⁶ and other criminals. The *zaofan* circle attempted to have the claims or rights for survivorship and existence through overthrowing rulers and

²²Unlike the British gentry, which was the class between the nobility and yeomanry, the “*xiangshen*” was the class between the “*shidaifu*” and “*shumin*.”

²³In a sense, “*shumin*” was similar to “yeomanry” in the British history. The “*shumin*,” who were members of a class below the “*xiangshen*,” possessed small estates or had the professional skills to run a small business, or work for a limited salary.

²⁴The “*jianghu*” circle has provided some of the most attractive source material in traditional Chinese literature.

²⁵Some Chinese scholars even argue that the “*zaofan*” —peasant uprising—has been the true dynamic of Chinese historical progress. Indeed, the peasant uprising has been at least one of the major reasons for dynastic transformation.

²⁶Chinese secret society or underworld gang. For instance, “*qingbang*” and “*hongbang*” have had a significant influence on social life.

changing social orders with the mentality of anti-authority, anti-tradition, and even anti-society.

The seventh is the “rights” and the “*huidaomen* 會道門 Cultural Circle.” *Huidaomen* means sectarians and superstitious persons, such as professional Buddhists, Daoists, folk religious believers, cult or shrine members, minority groups, martial arts organizations, and other superstitious sects and secret societies. *Huidaomen* attempted to have claims or rights for religious or superstitious propaganda, and organizational expanding and development.²⁷

Logically, there was a very fundamental and profound conflict of rights within the above seven cultural circles. For John Rawls, the conflict of rights might be avoided by well-drafted rights and through the workings of the institutional processes of a well-ordered society. Rey Martin thinks the issue addressed in the “conflict of rights” is crucial to Rawls’ overall theory of justice (Martin 1985). In Chinese history, if the conflict of rights was reduced, lightened and diminished, then social harmony, balance or equilibrium would appear, and *vice versa*.

III - 3. “Right” as Combination of Vague Consciousness and Spontaneous Behavior

Due to its different natures, qualities, and functions, the concept of rights can be divided into two kinds of antithetical categories—“hard” and “soft.” This division may help us understand the issue of rights in Chinese cultural tradition. So-called hard rights are defined, formalized, recognized, substantive, actualized, and inalienable, but so-called soft rights are undefined, unformalized, unrecognized, nominal, potential, and alienable. Traditional Chinese “rights” can be considered “soft” ones. In Chinese traditional culture, the notion of “rights” was only a combination of “naïve, vague, or implied consciousness” and “spontaneous or blind behavior.” As Chung-ying Cheng considers, Chinese culture has had a sense of human rights implicitly defined in terms of the self in relation to virtues (Cheng 1998: 145). Like Westerners, ancient Chinese people had certain moral, legal, or socio-political claims, demands, protestations, and declarations for their own interests. Unlike Westerners, ancient Chinese people did not build any clear and obvious concepts or theories of “rights,” nor did they launch any significant struggles for “rights.” “Rights” in traditional Chinese culture appears only in a passive, implied, subordinate, intuitive, irrational, and bestowed way.

Despite the long and obvious arguments and interactions between moralism and Legalism, it is fair to declare that the function of *wangfa* 王法 (the imperial law) has never been properly examined or analyzed; at least not to the extent that a reasonable conclusion emerged.²⁸ An additional consideration of this study pursues a causative

²⁷Unlike the church in Europe’s Middle Ages, Chinese religious institutions have never been a dominant social power; yet they have had the most influence on Chinese social spirituality and value systems. In my opinion, “*wu*”--witchcraft or sorcery--was one of the most original Chinese cultural sources or roots.

²⁸“*Falu*” is the Chinese translation of the Western term “law.” “*fa*” means legality, general legal system and the whole statute code. “*lu*” means the concrete provisions, clauses or articles

inquiry into why this is so, to disclose certain factual processes, as well as to suggest possible pioneering and productive exploration of rights within the traditional Chinese legal system. Three particular causes stand out which may be advanced for the failure of Chinese political philosophers to respond to the function of *wangfa*. The first is a prejudice which considered Confucian moralism as the only official ideology and the sum and essence of socio-political entities in the Chinese historical process. The second is a misunderstanding from which the rule by will or person was considered the government's only practice in ancient Chinese social control. The third is a distorted view that the criminal lawsuit was considered the only lawsuit in ancient Chinese legal action. In more than two thousand years, there were many codified and written laws in China.²⁹ The ancients constructed a highly institutionalized legal system. According to Philip M. Chen, there were four striking characteristics of the Chinese law tradition. First, more than twenty-one hundred years ago China was a bureaucratic state that had already begun to use law as an instrument for maintaining social order. Second, even the well-organized legal system had relative insignificance in the life of the country, due in large part to the Confucian values and heritage that put law in a secondary, undesirable position. Also, because of China's vastness and the difficulty in communication, in practice, law did not reach below the country government. Third, corruption, irregularity, and other unattractive features were prominent in the administration of justice under the formal legal system. Fourth, there was no adversary system by which an individual could defend himself against charges made by the state. (Chen 1973, 7-8) We try to trace the significant advancement of a probable important contribution to ancient Chinese civilization and its legalized human interests—the protection of life, property, and dignity. We will not focus on the hypotheses generated to interpret or explain theories of rights, but rather on the factual practice of relevant legalized claims and needs.

Conclusion

There is a vast accumulation of ancient legal literature in Chinese cultural development. Originally, such literature was designed to meet the rulers' political needs; but now it provides a tremendous source for our in-depth analysis of "rights". Broadly speaking, the history of Chinese legal literature is a history of changing times, interests, norms, actual practices, conceptual frameworks, thought patterns, and

of law and other specific degrees, rules, precedents, regulations, discipline and restraints. "Wang" is emperor or imperial power. "*wangfa*" can be translated "imperial law or legality." Another popular term in the Chinese legal system was "*xing* or *hsing*," which means "punishment" or "penal code."

²⁹The earliest systematic written law was *Fajing* (The Book of Law) by Li Kui (?-395 BC). The most profound long-run impact on legality in Chinese history emerged in *Tangluushuyi* (*Tang Code*, 737 AD), which was much earlier than *Constitution Criminals Carolina* (1532 AD). Later, *Songxingtong* (*The Complete Books of Song Dynasty Penal Law*), *Damingluu* (*The Great Ming Code*) and *Daqingluuli* (*The Great Qing Code*) were all complete and systematic, and had a very important influence on the ancient Chinese legal system.

intellectual styles. Different stages of the conscious legal process can be distinguished from the practical legal process. Such antinomies as those between the theoretical and the practical, the active and the passive, and the substantive and the nominal should be clarified by objective and serious examination.

Whether such examination is "justified" and "reasonable" or not is not as significant as the fact that the problematic nature of "rights" exists; and socio-political philosophy does not have a simple solution already worked out. Most of what I have discussed may be summarized in a few brief propositions. "Rights" in Chinese historical perspectives can be viewed, not as a logically conceptualized, analyzed, rationalized, and theorized thought, or a completely legalized, systematized, and institutionalized human behavior of critical importance in its own demand, but as two phrases in our hypotheses concerning "rights": "vague consciousness" and "spontaneous behavior." There is a need for systematic inquiry into the ways "vague consciousness" of rights affected "spontaneous behavior" of "rights," and *vice versa*. But a satisfactory and in-depth literature review has not yet been developed. However, a better answer might be added: "Rights" in a Chinese historical perspective that need study by political philosophers are enormously complicated and not easily observed. What has preceded is a beginning sketch of a project designed to provide possible approaches for discussion of "rights" in traditional China on a sounder methodological basis. In order to realize the theoretical formulation, a conceptual and analytical destination appropriate for reasoning and explaining "rights" should be reconstructed in ways which point to the strategies appropriate for establishing a more complete literature of discourse in this area.

For this purpose, five standard forms of academic tasks for the Chinese "rights" researchers might be suggested: 1) to have more case studies within the Chinese historical process; 2) to have more comparative studies between Western and Chinese cultural value systems; 3) to have more theoretical modes or assumptions built up from sufficient data of Chinese historical documents and literature; 4) to have more interdisciplinary studies involved in various fields, such as political, economical, legal, moral, literary, sociological, anthropological, psychological, and many other socio-cultural or academic fields; and 5) to have more analytical critiques of all of the existing frameworks for evaluation of Chinese political and legal thought. Actually, the five above-mentioned tasks relate to one another, and each of them can be considered an integral part of the whole. If these tasks could be pursued in a more satisfactory manner, our research would contribute creatively to increase a substantive understanding of "rights" at a much higher level. Obviously, the progress that can be made in this direction is limited and not immediately productive. It is naive to imagine that we can find a kind of panacea for dealing with all that hitherto has been puzzling about the problem of Chinese "rights." However, our inquiring efforts should stimulate and legitimize further work.

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