



EDITORIAL

March 2002

Amidst the geopolitical tremors reshaping the world after the events of September 11, 2001, East Asia remains clouded by uncertainty. Despite pledged reforms by Prime Minister Junichiro Koizumi, Japan struggles, its banks teetering on the brink of financial collapse. The Bush administration's hostility towards North Korea has derailed the so-called "Sunshine" policy of Kim Dae-Jung, heightening tensions in the Korean peninsula. In Southeast Asia, US engagement coincides with the potential for renewed political and economic instability.

Articles in this issue examine the implications of the September 11th attacks on US-China relations, the US-Korea Alliance, and the role of Islam in South East Asia. While recognizing the significance of these recent developments, we reaffirm the richness and breadth of scholarship on East Asia by highlighting articles representing a variety of fields and topics. We have also implemented several qualitative improvements in this issue, primarily in layout design and the new color inserts.

China

Though the events of September 11 may have eclipsed the difficulties facing the US and China earlier in 2001, it is far from evident whether that tragedy will mark a shift in US foreign policy towards the Middle Kingdom. Nonetheless, perhaps as Sigurd Ulland argues in "Ripe for Cooperation: The Sino-American Relationship Since September 11," the events present a possible window of opportunity to promote a more cooperative relationship in security affairs. Qiang Fang deals with a very different tragedy occurring in Shaanxi Province. In "The Case of the Virgin Prostitute: Chinese Media and Legal Reform," Fang examines the Chinese media's role in shaping the evolution of the legal system, though, as he argues, its powers are limited in light of the current political system. Similarly, Yin-ching Chen compares the civil legal systems in China and Taiwan and evaluates possibilities for future cooperation in purely civil matters in "Civil Law Development: China and Taiwan." While 1949 marked a sharp divergence in the evolution of the civil legal system between China and Taiwan, Chen argues that these differences are not so pointed as to prevent such cooperation in drafting a law dealing with cross-strait civil matters, though Taiwan's legal relationship with China makes this process extremely difficult. In a sharp departure from legal and political concerns, Kumar Narayanan examines the role of the ferocious Tibetan guardian deities on the complex parchment of Tibetan religious iconography. Narayanan argues that these guardians are agents of transformation while at the same time undergoing a transformation of their own from demonic to divine. Profound forces are at work in China's transformation, from religion to law, an emboldened domestic media to a military campaign in Afghanistan, and there are few who can predict what China will look like when they run their course.

Japan

The Japan section consists of two pieces – one on the recent economic crisis and the other dealing with technological change and innovation in the wireless telecommunications industry. Mark Poe, Kay Shimizu, and Jeannie Simpson examine the efforts to revise the faltering Japanese economy by scrutinizing the Japanese Commercial Code. Kenji Kushida discusses the development the telecom industry in Japan using three models of innovation. Both essays clearly depict a Japan undergoing rapid change in its economic, political, and societal arenas.

Korea

Over the past year, the Korean peninsula has confronted new challenges. Last year has been one of an adjustment to the hardened policy of the new American administration toward North Korea. This new policy is a marked departure from the previous administration: less than a year and a half after then Secretary of State Albright visited Pyongyang, President Bush, in his State of the Union speech, included North Korea in his now famous “axis of evil.” This policy has angered not only the North but also many in the South, who think confrontation and U.S. insensitivity may be fatal to the “sunshine” policy of reconciliation. Georgi Diankov, in a research paper written specifically for the Journal, “Ambivalences in the South Korean National Security,” explores the difficulties that exist in the alliance between South Korea and the U.S. He uses both theoretical reasoning and empirical evidence to analyze two categories of problems: structural and fundamental. The U.S. is a global superpower and it is natural that it has interests that do not entirely overlap with those of South Korea. However, Diankov argues, the U.S. has both a historical responsibility toward the peninsula and practical interest in choosing engagement and good will over confrontation and harsh rhetoric in its dealing with North Korea. In spite of the military logic that holds together the alliance between South Korea and the U.S., the paper argues that U.S. insensitivity and neglect for South Korean concerns may be ultimately enervating to the alliance and inimical to the long-term goal of peaceful re-unification.

Greater East Asia

Cultural, social, and institutional differences with the West have been common themes in recent events unfolding in Southeast Asia. Already in the news due to a stagnant economy and political instability, the region became a center of attention following the 2001 terrorist attacks on the United States and the subsequent anti-terrorism campaign. Despite predictions that segments of the large Muslim populations would react violently to Western efforts against fellow Muslims in Afghanistan, nations such as Indonesia and Malaysia have remained relatively calm. In an interview conducted by our staff, Mark Mancall, professor of history at Stanford, discusses how Islam in Southeast Asia differs from the form found in the Middle East. Mancall explains how a hybridized, highly Indianized Islam impacts the society and politics of Southeast Asian nations, and how the Muslim and various non-Muslim communities in the region interact with each other. Curtis Renoe’s “Institutionalized ‘Corruption’” focuses on Southeast Asia’s largest nation – Indonesia – and analyzes *Reformasi Hukum*, or reform of its legal system. Renoe argues that the endemic corruption in the system has some of its roots in “indigenous notions of polity and power;” therefore,

Reformasi Hukum cannot be achieved by simply applying “universal” reform principles. In “Burma, ASEAN, and Human Rights,” Mann Bunyanunda discusses the appalling human rights record in a nation starkly at odds with its developing neighbors. He concludes that the Association of Southeast Asian Nations (ASEAN) policy of “constructive engagement” – designed as an alternative to the common Western prescription of sanctions and isolation – has failed to bring about better humanitarian conditions in Burma, but that any improvement will require the continued involvement of Southeast Asian nations as well as the West.

Finally, the editors would like to express our sincere thanks to the untiring efforts of all of our staff as well as our faculty sponsors, the Center for East Asian Studies, the Asia/Pacific Research Center, the Associated Students of Stanford University, and all of those who contributed to making this endeavor possible.

The Editors

News and Themes from East Asia

CHINA

Shi-Chin Lin

The Transformation of the Party

During the 16th Chinese Communist Party (CCP) Congress to be held in autumn of 2002, current president and general secretary Jiang Zemin is expected to hand over the reins of power to his designated successor, Hu Jintao, the current vice-president of the PRC. Hu Jintao is currently acknowledged as the core of the so-called Fourth Generation leadership that will likely oversee the most dramatic changes in the structure of the CCP. In February 2000, the CCP began the public campaign known as the “Three Represents”. By focusing on productivity, culture and the interests of all Chinese people as opposed to just the proletariat, Jiang Zemin and the Central Committee have clearly aligned the CCP along the path towards merging capitalism and communism. The growing power of the entrepreneurial class in China is forcing this reexamination of the party from within as the leadership debates what to do to stay in power in the 21st century.

The focus of the “Three Represents” is that the CCP will become not just the party of the worker, the farmer and the proletariat, but also a party of all the people. This is specifically designed to include the entrepreneurial class and professionals, the people fueling China’s

economic rise. This is a very significant move for the Party, as it sends a strong message that the economic reforms are here to stay. Predictably, this campaign is facing opposition from conservatives and grassroots activists who state that this policy contradicts the Marxist traditions of the CCP. In the early 1980’s, Deng used the concept of thought liberation from old ways to justify his economic liberalization process to the conservatives and it appears likely that Jiang will also use a thought liberation process to justify this next great ideological transformation of the party. He will clear the way for the Fourth Generation, a leadership with high levels of education, younger age and predominantly civilian career paths. The likelihood is that eventual transformation of communism to socialist capitalism will take place under Hu Jintao, who is expected to remain party leader until 2012 and the 18th CCP Congress. Indeed, it has been reported that Hu is very interested in the idea of a social-democratic party concept, so it may very well be that under Hu’s leadership, the CCP may shed its name and priorities and adapt into a Chinese Social Democratic Party, along the lines of similar German and French political parties.

China Enters WTO

After 15 years of negotiations, China officially entered the World Trade Organization in November 2001. This is expected to boost economic reforms that have been made in China as well as open China’s 1.3 billion person market to the global trading system. China’s

entry will mark the beginning of a final push towards a market economy that was begun after Deng Xiaoping took power in 1978. However, this event brings with it problems as well as solutions. According to Vice-Head of the State Statistical Bureau Qiu Xiaohua, the nature and

role of the Chinese government needs to be changed and that the relevant rules and regulations pertaining to market economics must be perfected. Changes such as the abolishment of regulations that run counter to WTO rules and the reduction of government edicts on how the economy should be run are important steps towards the replacement of a command-type economy with a service-oriented economy. All these changes require a major shift in the nature of the Chinese Communist Party, and although this shift may be realized with the current ideological transformation in the party, nothing is certain yet. While a large

portion of the economy is being given free rein in an effort to spur globalization, the central government is still ensuring that the party's prerogatives are not undermined. In areas such as information transfer, the Party is still trying to maintain its control; specifically in terms of foreign television broadcasting, the Party is distributing service through a central state-controlled broadcast platform to ensure the politically-destabilizing material is not published. So while China's accession to the WTO promises benefits, there remain many issues that China itself must resolve before it can reap the rewards of the WTO membership.

JAPAN

Andrew MacDonald

Japanese Economy Sputters

The once world-beating economy of the 1980s that stalled in the 1990s has taken a turn for the worse in the last six months. Record unemployment, falling consumer spending, and an official recession have sent the Japanese economy into a tailspin. Standing in the way of an economic recovery is a massive amount of bad loans in the Japanese financial system and deeply inefficient government backed corporations.

The Japanese government recently revised its fiscal year projections for GDP growth to -0.7% from a predicted 1.7%, officially putting Japan in a recession. A recent study from the Organization for Economic Cooperation and Development predicted that in 2002 Japan would see a growth of -1%, and by 2003 might see a growth of .75%, further adding to the parade of negative reports about the economy. In August, the Nikkei index closed at its lowest levels since 1984, and Japan's trade surplus has fallen sharply.

Driving this poor performance is a large decline in consumer spending, which accounts for 55% of the gross domestic product (GDP). With deflationary prices, consumers are saving money, hedging that prices will continue to drop, which is even more problematic for Japan, given the high rate of saving among Japanese people. This decline in consumer spending is hurting

corporate profits, which has traditionally been alleviated in the past by a focus on the export market. This time, however, the Japanese firms are having serious problems in foreign markets, leading to the recent announcements of major losses at most Japanese firms. With this continued poor performance in many Japanese companies, most firms are turning towards layoffs in numbers that are unheard of in Japan's recent past. The jobless rate, usually around 2.5-3%, has soared to over 5%, with most analysts predicting that it will climb even higher. This raises fears that with the layoffs, consumer-spending levels will drop even further.

Unfortunately for Japan, and despite the best efforts of Prime Minister Junichiro Koizumi, Japanese politicians have shown little appetite for producing the kind of reform necessary to turn the economy around, which would mean dealing with the bad loans and conducting a serious reform of the Japanese government. While Koizumi has made some inroads into his proposed reforms package, the continuing poor performance of the economy has lead many politicians to call for a slowdown in the painful reform process. This means that any chance for a rapid recovery is unlikely and that economic troubles will continue in Japan for the foreseeable future.

Japan Sends Forces to Assist US in Afghanistan

In response to the events of September 11th, the Japanese Diet quickly pushed through a number of measures to assist the United States in its war against terrorism in Afghanistan, including supplying advanced navy ships, allowing Japanese soldiers to help guard American bases, and providing assistance to refugees.

These measures mark a revision of Japan's long-held interpretation of the pacifism clause in the nation's constitution, which limited the Japanese armed forces to very specific and well-defined roles close to the home islands. These revisions, allowing for the deployment of Japanese personnel outside of the immediate region of Japan, is a response to the failure of Japan to provide assistance and troops to the coalition forces during the

Desert Storm operations until the conflict was essentially over.

While retired Rear-Admiral Yoshihiro Sakaue notes, "In practical terms, the Americans can do without the Japanese navy," the move is highly symbolic of an emerging nationalist strain in Japanese politics that worry Japan's neighbors. This recent action is especially troubling given the visit to the Yasukuni war shrine, which honors convicted war criminals from World War II, by Prime Minister Koizumi in August 2001 and the ongoing controversy with South Korea regarding Japanese textbooks that gloss over Japanese crimes in Korea during the early 20th century. However, given the current support most countries are giving the United States, Japan's neighbors are keeping their objections quiet for now.

The Cult of Prime Minister Junichiro Koizumi

Prime Minister Junichiro Koizumi was swept to power last April after the resignation of Yoshiro Mori with a nearly 80% popularity rating inside Japan. Promising wide ranging economic reforms and presenting himself as an approachable and likeable politician, he is easily the most popular post-war Prime Minister Japan has seen. This popularity has translated into an extended political honeymoon and continued support for his economic policy, despite the tough economic times.

His popularity has reached almost cult levels, as was demonstrated when a CD compilation of the Prime Minister's favorite Elvis Presley songs was commissioned, and it sold out stores, selling over 100,000 copies in one month. Later, a Koizumi picture book was offered for sale, chronicling his political life, which has also proven to be a hit. Koizumi appears to be especially popular with middle-aged women, who collect all the Koizumi memorabilia that they can get their hands on. Even in video arcades, one can find machines where the players attempt to win stuffed Koizumi dolls. Political

analysts speculate that his popularity has much to do with his image as a maverick, both with his economic reforms and his aura of approachability, which rare in modern Japanese politics, all this despite pledging during his campaign for Prime Minister that he would introduce economic reforms that would cause economic pain before any recovery began.

However, his once unrivaled popularity levels have fallen back to earth in recent months, and he now has close to a 60% percent approval rating. This, combined with recent frustrations in pushing his economic reforms through the Diet has seen a shift by Koizumi towards nationalism as a means to gain popularity, as his visit to the Yasukuni war shrine and proposals to assist the US in Afghanistan have highlighted. While he has not given up the reforms, they risk being sidelined or scaled back. However, despite these challenges, as long as he is able to maintain his image of a maverick and continues to push through his economic reforms, he will probably continue to be a popular figure to the Japanese public.

KOREA

Albert Suh

Fields of Integration in the Two Koreas Remain Fallow

After a six-month hiatus in diplomatic dialogue, North and South Korea reopened government-level talks in September, once again demonstrating the willingness of the two sides in normalizing inter-Korean relations. The Fifth South-North Ministerial Talks ended with a general agreement in pursuing sustained progress to maintain peace and stability on the peninsula and to promote economic cooperation. However, with fitful cooperation by the North and changing political currents in the South, the future of such talks does not look bright.

Many agreements were made despite complex international developments such as the terrorist attacks on the United States, showing some sign of changing inter-Korean relations since the summit meeting last year between the two. Both parties agreed to arrange more family reunions and implement inter-Korean projects including the re-linking of the Trans-Korean railway (TKR), construction of a highway between Seoul and Sinuju, and a Trans-Siberian Railway (TSR) extension connecting the Koreas through Russia to Europe. These inter-Korean projects have large implications for economic integration. For example, the reconnection of rail and road between the Koreas allows for overland trade and reduces high transportation costs, which have greatly hampered inter-Korean trade. It also promotes the investment of South Korean firms into North Korea, which brings North and South Korea one step closer to the creation of a single economic community. The TSR, on the other hand, can make the Korean Peninsula an international center of trade by

connecting it to the Eurasian continent. The emergence of economic cooperation is not a new concept. A number of joint development projects have been initiated such as the Mt. Geumgang tourism project and tobacco cultivation with South Korea's Tobacco and Ginseng Corporation, which have contributed to loosening tension on the Korean Peninsula and convincing the Korean people that progress toward reconciliation and cooperation is real.

Despite these outwardly positive signs, the North has not been entirely cooperative. But economic integration has been contingent upon political considerations, which have often stunted the improvement of inter-Korean relations. For instance, the North has not begun their share of construction in the TKR, which some experts believe to be a result of reduced South Korean aid to the North. Moreover, the two Koreas stumbled in the high-level talks in November, when the North demanded that South Korean troops be taken off anti-terrorism alert status before resuming the exchange of families, which had been canceled unilaterally by North Korea few days before the scheduled date in mid-October. Unification talks collapsed soon after, and the South Korean officials left the North Korean resort for home with no substantial agreements made. With the falling popularity of South Korea's President Kim Dae-jung and growing public opposition toward concessions to the North, there is not much optimism among experts that negotiations would resume any time soon.

Government Struggles to Overcome Economic Slump

Should the sinking *chaebols* (conglomerates) be bailed out? This question seems to embody a recurring theme in South Korean government discussions on how to put South Korea's economy back into shape. After showing signs of recovery since the Asian financial crisis in 1997, Korea again plunged

into an economic slump in 2000, exacerbated by the bankruptcy of Korea's third-largest automaker Daewoo Motor, now owned by General Motors, in the end of that year. Since then, the government has continued to struggle with the issue of whether or not rescuing such conglomerates is in the best interest of the

country. Recently, the spotlight has been focused on the fate of Hynix Semiconductor, a former electronics arm of Hyundai, which is reported to have heavy debts of more than \$8 billion. Officials at the government-controlled Korea Exchange Bank, the lead creditor of Hynix, have announced that more than \$1 billion in debt to creditors would have to be written off as part of a \$7 billion plan to rescue the company. This “final” bailout package is yet to be implemented, as the government, which has pledged to help Hynix survive, faces opposition from several creditors in complying with the rescue plan. It is still in investigation, first of all, whether this rescue plan is a violation of the bailout agreement with the International Monetary Fund (IMF).

Still wavering in the execution of strict structural reform of its *chaebols*, as displayed in its decision to save Hynix, the Korean government has taken up a rather surprising policy. After preventing conglomerates from expanding their holdings

for nearly four years since the economic crisis, the government will now allow some of *chaebols* to innovate and expand. While the 17 largest *chaebols* will still be bound by the 25 percent rule, the new rules will probably grant total investment freedom to the remaining second tier of conglomerates. But analysts agree that the 17 big groups will still use exceptions and loopholes to take advantage of the new rules. Large *chaebols* will be compelled to invest in companies in fields they already operate in, rescue heavily indebted companies, and buy firms that the government wants privatized. Moreover, conglomerates will have strong incentive to sell off their weak divisions that are saturated with excessive investments, as regulations entail a stripping of shareholder voting rights if certain ownerships in other companies are deemed “not justified” by the end of March. Although the degree to which this policy is effective remains in question, the government finally taking a bold initiative involving risks seems to be an overall positive indication for change.

SOUTHEAST ASIA

Dinyar Patel

ASEAN, China Agree to Create World’s Largest Free Trade Area

During the Seventh Official ASEAN (Association of South East Asian Nations) Summit, held between November 5-6 in Brunei Darussalam, member nations and the People’s Republic of China laid groundwork for forming the world’s largest free trade region. The proposed ASEAN Free Trade Area (AFTA), which will be created within the next ten years, will include the estimated 1.7 billion consumers and \$1.23 trillion worth of international trade in China and the ten ASEAN states - Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. Forming a free trade area with China “will inject confidence into East Asia during this current global economic

slowdown, help to boost trade and investments and boost ASEAN’s economic competitiveness,” commented the association’s assistant director of external relations, S. Pushpanathan. ASEAN is optimistic that China’s recent admission into the World Trade Organization (WTO) will greatly increase international trade in the PRC, and that the free trade agreement will allow positive effects to trickle down to a Southeast Asia that has recently been experiencing very hard economic times. Leaders of member nations also saw the agreement as the first step in creating a larger free trade area: Malaysian Prime Minister Mahathir Mohamad spoke of a future “East Asian Economic Group” that would include Japan and South Korea.

Confronting Radical Islam: Southeast Asia after September 11

The nations of Southeast Asia are home to one-fifth of the world's one billion Muslims. Known for its tradition of moderate Islam, the region has nevertheless become polarized over the incidents of September 11th and the subsequent war in Afghanistan. Response to the American-led anti-terrorism campaign has differed by nation: some Southeast Asian states have seen sudden political changes while others have witnessed stepped-up efforts against their own domestic terrorists.

Indonesia

Angry responses to the war in Afghanistan have threatened to further destabilize this nation that has already been rocked by economic downturns, religious strife, and separatist activity. As the leader of the world's most populous Muslim nation, Indonesian President Megawati Sukarnoputri has had to address a strong public outcry against the American and British airstrikes while maintaining relations with the West. Megawati has strongly condemned the terrorist incidents of September 11th, but she has criticized the airstrikes and has called for a ceasefire in Afghanistan.

Radical Islamic elements, which have grown in number during the post-Suharto years, have made attempts to foment anti-American sentiment amongst Indonesians. The country's supreme Muslim body, the Indonesian Ulema Council, has urged Megawati's government to suspend all diplomatic ties with the United States and the United Kingdom. Habib Rizieq Syihab, the leader of the extremist Islamic Defenders Front (FPI), has warned American and British citizens to leave Indonesia or face sweeps. Furthermore, Indonesia has had to confront the hundreds of foreign Islamic militants residing within its borders, while taking into account its own citizens that have been receiving religious and military training in Egypt, Iran, and Syria.

Despite the efforts of radical Muslims, Indonesia has remained relatively calm so far: protests outside the American Embassy, for example, have rarely numbered above 1000. Many Indonesians, worried that radicals will scare away foreign investment and make the nation's business climate even worse, have applauded police

efforts to crack down on demonstrators in Jakarta. However, Indonesian politicians and analysts have expressed worries that the nation's moderates are not being vocal enough, and are allowing radical Islamic rhetoric to go unchallenged. "It is becoming politically incorrect to oppose militancy," one Western Islam expert told the *Far Eastern Economic Review*. This militant rhetoric, observers fear, might spark strong fundamentalist and anti-Western sentiment amongst young Indonesians who have become dispossessed by Indonesia's worsening economic and social conditions.

Malaysia

The events following September 11th have drastically transformed the political futures of Malaysia's two major parties: Prime Minister Mahathir Mohamad's United Malays National Organization (UMNO) and the opposition Parti Islam Se-Malaysia (Pas). According to *Asiaweek* columnist Karim Raslan, the US-led campaign against terrorism has impacted national politics as much as the sensational trial of former Deputy Prime Minister Anwar Ibrahim.

Despite having a party platform that calls for creating an Islamic state and instituting sharia law, Pas had recently tried to build up popular support by reaching out to non-Muslims and the large ethnic minorities in Malaysia. The party had impressive returns in 1999 elections, after campaigning for broader human rights and democracy, and became the leader of the multireligious and multiethnic Barisan Alternatif (Alternative Front) coalition. However, the American and British campaign in Afghanistan has galvanized Pas's radicals, effectively silencing its moderate wing: party radicals have been especially vocal in denouncing "ill-intent" anti-terrorism plans and have called for jihad against the United States. On October 12, 2001, Pas organized the largest anti-American demonstration in Malaysian history, in which 3000 people protested outside the American embassy and demanded that airstrikes be stopped. Pas's hardline stance has fractured the Barisan Alternatif: the mainly Chinese Democratic Action Party left the coalition in

September, and a major Keadilan Party ideologue quit his post and denounced Pas for supporting the Taliban regime. In subsequent months, Pas has further isolated itself from moderates and minorities, and has seen its prospects for national prominence slip away. Malay academic Farish Noor commented that “the veil has fallen, and Malaysians can at last see the true face of Pas”.

Mahathir and the ruling UMNO have benefited as Pas has lost significant influence due to its radical element. By assuming a moderate position on the anti-terrorism campaign, Mahathir has been able to rescue a political career that had been jeopardized by worsening economic times and Anwar’s questionable 1998 incarceration. His multiethnic and multireligious party has stood in stark contrast to Pas, which is now concentrating only on conservative Muslim Malay voters. Broad support, both at home and abroad, has allowed UMNO to sharply criticize Pas and even jail some of its leaders. Mahathir was quick to condemn the terrorist actions of September 11th, but has voiced criticism over the US-led airstrikes. During the November 2001 Association of Southeast Asian Nations summit, Mahathir’s delegation unsuccessfully tried to get other member nations to sign a declaration opposing further airstrikes. Instead, the prime minister has suggested that the United Nations negotiate a settlement in Afghanistan and set up an international court to try Osama bin Laden and other terrorists.

The Philippines

Terrorist attacks in the United States have caused the Philippines to renew focus on disrupting terrorist networks in the southern reaches of the country and have also raised new issues in Filipino-American relations. Unlike Malaysia and Indonesia, only a small minority of Filipinos – about five percent – are Muslims, and therefore President Gloria Macapagal Arroyo has not had to contend with a large religious-inspired backlash to the Afghanistan campaign.

President Arroyo has firmly supported American-led actions in Afghanistan, and has called for closer cooperation within ASEAN nations in order to fight terrorism. Shortly after September 11th, Arroyo commissioned the govern-

ment to create a list of Filipino terrorist organizations and “neutralize their operations.” The government’s prime target has been the Abu Sayyaf group, which has carried out kidnappings and bombings on the southern island of Mindanao. Arroyo has refused to open negotiations with the terrorist group, stating that it is “a superior strategy to neutralize or even degrade terrorists once and for all rather than to give into them by paying them ransom.” Abu Sayyaf has strong ties to Osama bin Laden, Al Qaeda, and prominent terrorists: bin Laden’s brother-in-law, Mohammed Jamal Khalifa, is believed to have helped fund the group, and convicted terrorist Ramzi Yousef associated with Abu Sayyaf shortly after he masterminded the first World Trade Center bombing in 1993.

The United States has sought to make the Philippines its key anti-terrorism ally in Southeast Asia and has rewarded Arroyo for her vocal support of American-led efforts since September 11th. Because of Abu Sayyaf’s connections to Al Qaeda, the United States has sent 16 anti-terrorist specialists to Manila to aid the Filipino government in its fight against domestic terrorism. During Arroyo’s November 2001 visit to Washington, President Bush offered the Philippines nearly \$100 million in military assistance and \$1 billion in trade subsidies and investments. Arroyo, however, turned down Bush’s offer to station American troops on the islands. The possibility of a renewed US military presence in the archipelago has been a divisive political issue in the Philippines, which saw American troops as a constant reminder of its colonial past before they were finally evicted in 1991. Political opponents have accused Arroyo of using the current anti-terrorism campaign as an excuse to increase US-Philippines military cooperation and reestablish American bases. Analysts are also fearful that any American military presence during the war against terrorism will inflame the Moro Islamic Liberation Front, a separatist Muslim group in the southern islands that signed a peace accord with the Filipino government in 1996. Due to these concerns, Arroyo has had to scrutinize offers of US military assistance in the Philippines’s own war against terrorism. However, in late January she made a controversial decision to temporarily allow over 600 American troops into Mindanao to conduct war games and set up a counter-terrorism training camp.

Civil Law Development:

CHINA AND TAIWAN

— Yin-Ching Chen —

Though the People's Republic of China (PRC) and Taiwan share a common cultural heritage, their political separation since the late nineteenth century has led to divergent paths of development, evident in their distinct civil legal systems. This article examines the historical development of these civil legal systems, compares their similarities and differences, and evaluates the possibilities for future cooperation between PRC and Taiwanese legal systems.

TAIWAN'S CIVIL LEGAL HISTORY

Since the 17th century, successive waves of immigrants have brought the island of Taiwan under Chinese control. During the Qing dynasty, the legal system seldom intervened in civil matters, mainly focusing on public administration and criminal punishments.¹ Extra-legal mediation arranged by kin or community elders served as the main solution for civil disputes.²

Japanese state law became the prime principle for civil matters after Japan gained control of Taiwan following the Sino-Japanese War of 1894-1895. Adopted from European continental codes, Japanese civil code for the first time applied a Western legal system to Taiwanese society.³

With the defeat of Japan in 1945, the

Republic of China took control of Taiwan and formally transferred its seat of power to the island in 1949. The Republican civil code, like the Japanese state law, was adopted from continental European law. A Western legal system has thus continued to influence Taiwanese legal practices; however, the rapid industrialization and commercialization that has taken place since the 1960s has increased the quantity and complexity of civil disputes. Urbanization has dismantled traditional dispute resolution methods such as kin and community mediation, encouraging a greater use of the court system. Taiwanese society has internalized Western-adopted civil code principles, such as exclusive property rights, freedom of contract, autonomy of contract, and gender equality through their continual practice. Though Chinese traditions still play a role in civil matters such as women's right of inheritance, Taiwan has established an industrialized society and a Westernized legal system that greatly differ from those of traditional China.⁴

CHINA'S CIVIL LEGAL HISTORY

Traditional China lacked the concept of a separation of civil and criminal law. The statutes mainly concerned administrative and

¹ Tai-sheng Wang, "Jindai Xifangfa Dui Taiwanren De Yingxiang," (Influence of Western Laws on Taiwanese Civil Society) *Taidah Faxue Luntan* 28, no.3 (1999), 18.

² Philip C. Huang, *Civil Justice in China*, (Stanford: Stanford University Press, 1996), 9.

³ Tai-sheng Wang, *Jindai Xifangfa Dui Taiwanren De Yingxiang*, 18.

⁴ Tai-sheng Wang, *Jindai Xifangfa Dui Taiwanren De Yingxiang*, 25-26.

criminal matters. Civil matters, termed “minor matters” in the Qing code, were supposed to be settled by society itself through extra-legal mechanisms such as kin and community mediation.⁵

Reform of the Chinese legal system began in the late Qing dynasty. The legal reformers of the late Qing drafted a civil code modeled on the German Civil Code of 1900.⁶ The first three books of the Draft Civil Code of the Great Qing—General Principles, Obligation, and Rights Over Things were finished by 1911, shortly before the fall of the dynasty. They were thus never promulgated under the Qing.⁷

Instead of adopting the new civil code drafted in the late Qing, the Republic of China continued to use the civil portions of the Criminal Code of the Great Qing until 1930. The Republican Civil Code, adopted from the late-Qing draft civil code, was finally promulgated in 1930. The code marked a conceptual departure from Chinese tradition, with the individual replacing the family as the basic social unit. It was meant to serve “a capitalist economy organized around contract-makers.”⁸ Nevertheless, the Republican code was hardly implemented and internalized in the vastness of China, due to the chaotic political situation and the brief rule of the Nationalist regime.

After the Chinese Communist Party came to power in 1949, China abandoned Republican legal systems and adopted certain Soviet legal forms in the 1950s. Nationalist legal professionals were purged during the 1957-58 anti-rightist campaign. Law became a tool of Party control under Leninist-Maoist totalitarianism. The primary way to settle civil matters was through politicized mediation.⁹ In sum, China was a lawless state during the Mao years.

Since 1979, the National People’s Congress and its Standing Committee have enacted

and amended a huge number of laws and decisions. The State Council has also promulgated hundreds of new administrative regulations.¹⁰ Legal personnel such as judges, clerks, and lawyers have also multiplied to meet the demand of a dramatically increased caseload.¹¹ In the realm of civil law, the General Principles of Civil Law (GPCL), promulgated and enacted in 1985, now provides the foundation for all laws concerning civil matters. As a continuation of the late-Qing and the Republican civil codes, the GPCL is modeled after the continental-European civil law, especially the German code.

However, the GPLC contains only the first part of general provisions and fails to specify different types and contents of property rights and contracts. Separate laws have been drafted and enacted at different times to govern some civil matters, including the 1981 Economic Contract Law, the 1985 Foreign Economic Contract Law, the 1987 Technology Contract Law, and the 1999 Contract Law. The post-Mao era also has experienced rapid development in family law. The Marriage Law was revised in 1980, accompanied by the reformed Marriage Registration Regulations. The Inheritance Law was promulgated and enacted in 1985, followed by the Adoption Law and Law Safeguarding Women’s Rights in 1992.

A COMPARATIVE PERSPECTIVE

Despite the considerable influence of Western civil and economic laws, the PRC laws still retain several socialist vestiges, such as the sanctity of state ownership and the instrumental view of law.¹² In comparison, Western civil doctrines, including private autonomy, freedom in contract, private ownership, and exclusiveness of property rights, have been more thoroughly

⁵ Philip C. Huang, *Code, Custom, and Legal Practice in China*, (Stanford: Stanford University Press, 2001), 26.

⁶ Huang, *Code, Custom, and Legal Practice*, 2.

⁷ Huang, *Code, Custom, and Legal Practice*, 16.

⁸ Huang, *Code, Custom, and Legal Practice*, 2.

⁹ Stanley Lubman, *Bird in a Cage*, (Stanford: Stanford University Press, 1999), 43.

¹⁰ “The NPC and its Standing Committee enacted about 80 new laws and statutes, and amended and supplemented 58 laws and decisions, while the State Council promulgated about 550 administrative regulations.” Karen G. Turner, James V. Feinerman, and R. Kent Guy, eds., *The Limits of the Rule of Law in China*, (Seattle: University of Washington Press, 2000), 21.

¹¹ Turner, Feinerman, and Guy, *The Limits*, 21.

¹² Turner, Feinerman, and Guy, *The Limits*, 25.

reflected in the Taiwanese civil code.

Taiwan and China also differ with regard to family law. Taiwan places marriage and inheritance matters along with property matters under the civil code, whereas the PRC separates marriage law and inheritance law from the civil code because of their personal characteristics.¹³

The following section examines the differences and similarities between Taiwanese civil code and PRC laws in the four domains of civil matters: property, contract, family, and inheritance with special reference to the General Principles of Civil Law, Economic Contract Law, Foreign Contract Law, Marriage Law, and Inheritance Law.

PROPERTY RIGHTS

Under the section dealing with property rights, one of five sections, the Taiwanese civil code specifies and details property rights, including ownership, mortgages, pledges, superficies, emphyteusis, servitudes praediorum, right of impawn, and right of retention. Because the PRC code arises out of a socialist ideology of state ownership, however, the PRC General Principles of Civil Law does not detail the types and contents of property rights. Nonetheless, the GPCL generally addresses a few quasi-property rights, including: “the rights of neighboring users of land; rights to use and obtain benefits from state-owned land and other natural resources; rights to mine state-owned mineral resources; rights to operate state-owned mineral resources; rights to operate state-owned land under collective responsibility contracts; and rights to operate state enterprises.”¹⁴

The principle of exclusive and unitary property rights, evident in the Taiwanese

civil code due to its German origins, is noticeably absent in PRC legal provisions and practice. In the PRC, the separation of ownership and the right to use, benefit, and possess have been formalized since Deng’s economic reform introduced “the Contract Responsibility System” in 1978.¹⁵ To retain the principle of state-ownership as a symbol of socialism and to transfer state property under more efficient private management at the same time, the PRC employs various forms of contracts and leases. According to a 1993 CCP Central Committee decision, collective-owned rural land can be leased to peasants for thirty years and may be transferred by inheritance.¹⁶ As for urban land, the term of use may be as long as seventy years, in order to encourage long-term investment.¹⁷ The long-term separation of ownership and the right to use, possess, and benefit greatly weakens the exclusiveness of property rights in the PRC.

Provisions relating to “first possession of ownerless property” also reflect the difference between the PRC’s state-ownership and Taiwan’s private-ownership systems.¹⁸ According to Article 79 of the General Principles of Civil Law, “if the owner of a buried or concealed object is unknown, the object shall belong to the state.” In contrast, Article 802 of the Taiwanese civil code articulates that the person who finds and possesses an ownerless property acquires its ownership.

In essence, the socialist principle of state-ownership is strongly upheld in the General Principles of Civil Law of the PRC. As Article 73 states, “state property shall be owned by the whole people. State property is sacred and inviolable, and no organization or individual shall be allowed to seize, encroach upon, privately divide, retain, or destroy it.”¹⁹ The sanctity and inviolability of state ownership is reflected in usucaption, the transferring of own

¹³ Tai-qian Wang, “*Dangqian Liangan Falu Wenti Fenxi*” (Analysis of Contemporary Cross-strait Legal Issues), (Taipei: Wunan, 1997), 84.

¹⁴ Lubman, *Bird*, 179.

¹⁵ Pitman B. Potter, ed., *Domestic Law Reforms in Post-Mao China*, (New York: M.E. Sharp, Inc., 1994), 226.

¹⁶ Anthony Dicks, “The Chinese Legal System: Reforms in the Balance,” *The China Quarterly*, 119 (1989), 556.

¹⁷ Lubman, *Bird*, 184.

¹⁸ Tai-qian Wang, *Dangqian Liangan Falu Wenti Fenxi*, 82.

¹⁹ GPCL, Article 73.

ership from the original owner to the possessor of the object over a period of time, which is inapplicable to state property.

CONTRACTS

Freedom of contract and party autonomy are the main principles for contracts in the Taiwanese civil code. Contracts are usually made voluntarily between two equal private parties without government intervention.

In the PRC, different laws are applied to domestic contracts and contracts involving foreign parties.²⁰ In order to promote foreign trade and investment, the PRC adopted the Foreign Economic Contract Law in 1985, which heavily draws upon “Western notions of freedom of contract and party autonomy.”²¹ Moreover, international treaties and practices are applicable to matters not covered by Chinese law, with the exception of PRC reservation.²²

In the area of domestic contract legislation, the Economic Contract Law (ECL) and dozens of related state administrative and local regulations govern contracts between Chinese legal persons, other economic organizations, self-employed workers or traders, and rural households.²³ Contractual relationships range from individual vs. individual, individual vs. collective, collective vs. collective, collective vs. state, and individual vs. state.

Among the above contractual relationships, those between collectives and individual peasants account for the vast majority of rural contracts. In rural agricultural reform, “chengbao” contracts place state-owned land and means of production under the management of peasant households. In practice, “county governments print standard forms and

distribute them to all households that sign contracts with their teams for responsibility plots. The team distributes the land according to each household’s population, labor power, or both. It then assigns obligations to deliver produce, cash, or both.”²⁴ Since the state and collectives still own the land and major means of production, and since local cadres have the power to allocate responsibilities and resources, peasants hardly enjoy equal status and bargaining power in chengbao contracts. Moreover, the institution of contracts and private sectors is meant to implement state economic policies.²⁵ The government often intervenes in formulating the content of contracts, resulting in a lack of autonomy and freedom in contracts. Although the Economic Contract Law upholds “the principles of equality and mutual benefit” between contractual parties²⁶, the ECL functions more like administrative law than civil law. It takes priority in implementing Party policies, such as ensuring the development of the socialist market economy, safeguarding the social economic order, and promoting socialist modernization. In other words, protecting private contractual rights is not a major concern.²⁷

FAMILY

In marriage just like in property rights, the two codes are quite different, the Taiwanese civil code accepting de facto marriage, while PRC family law accepts de jure marriage. According to the Taiwanese civil code, a valid marriage requires only a public ceremony and more than two witnesses. Registration is not requisite. On the other hand, the PRC Marriage Regulations require registration in order for a marriage to be official.²⁸ In practice, however, many PRC couples avoid registration not only

²⁰ Charles D. Paglee, “Contract Law in China: Drafting a Uniform Contract Law,” 21 Nov. 2001, <http://www.qis.net/chinalaw/prcontract.htm>.

²¹ Potter, *Domestic Law*, 231.

²² GPCL, Article 142.

²³ ECL, Article 2.

²⁴ David Zweig, Kathy Hartford, James Feinerman, and Deng Juanxu, “Law, Contract, and Economic Modernization: Lessons from the Recent Chinese Rural Reforms,” *Stanford Journal of International Law*, 23, no.2 (1987), 331-332.

²⁵ Turner, Feinerman, and Guy, *The Limits*, 22.

²⁶ ECL, Article 5.

²⁷ ECL, Article 1.

²⁸ Marriage Registration Regulations, Articles 9 and 19.

as a result of traditional customs, but also because of the restrictive birth control policy. To avoid such reproduction restrictions, many families intentionally evade marriage registration. Indeed, in certain regions of rural China, as many as 80 percent of “unions” are unregistered.²⁹ Whether to recognize de facto marriage or adhere to the principle of de jure marriage has thus become a dilemma for PRC officials and judges.

The PRC Marriage Law, also influenced by the birth limitation policy, promotes late marriage and late reproduction. In addition, the law raises minimum marriage ages: men cannot marry before 22 years old; women before 20 years of age.³⁰ In comparison, Taiwan’s minimum marriage ages, 18 for men and 16 for women, are considerably lower than those of China.³¹

In divorce, too, the laws differ substantially. The Taiwanese civil code limits causes of judgment divorce by enumeration.³² Most of the causes require one spouse to demonstrate that the other is morally to blame. In contrast, the PRC Marriage Law accepts “no-fault divorce.” Breakup is the only cause of a divorce suit.³³ Nevertheless, in practice, PRC judges tend to maintain marriages rather than end them, and furthermore, encourage the rehabilitation of marriages between divorced couples.³⁴

Differences in legal views of the sexes manifest themselves clearly in the two matrimonial regimes, the set of regulations governing the economic relationship between the parties and their property. While the Taiwanese civil code retains strong paternal char-

acteristics in this area, PRC law upholds the principle of gender equality. Article 1018 of the Taiwanese civil code places joint matrimonial property under the management of the husband. Moreover, the husband has the rights to use, benefit from, and dispose of the wife’s original properties.³⁵ In contrast, the PRC marriage law articulates equal rights to dispose shared properties of the couple.³⁶ The PRC marriage law, though simple, ensures greater gender equality compared to the Taiwanese civil code.³⁷

Nonetheless, in the past decade, Taiwan has launched several amendments of family law to promote gender equality and protect children’s interests.³⁸ The amendments removed Article 1051, which granted custody to the father, and revised Article 1055 to authorize the court to judge for the best interest of the child. The amendments also equalized rights to choose surname and residence between husband and wife.³⁹ Article 987, “date of pending marriage,” which prohibited women to remarry for a period of time after divorce, has also been abolished.

INHERITANCE RIGHTS

The Taiwanese civil code, based on private ownership, defines the object of inheritance with a presumptive provision. All rights and obligations of the deceased, except exclusive personal rights, can be succeeded. On the other hand, the PRC Inheritance Law limits inheritable properties through enumeration.

²⁹ Michael Palmer, “The Re-emergence of Family Law in Post-Mao China: Marriage, Divorce, and Reproduction,”

The China Quarterly, 141 (1995), 119.

³⁰ Marriage Law, Article 5.

³¹ Taiwanese Civil Code, Article 980.

³² Taiwanese Civil Code, Article 1052.

³³ Marriage Law, Article 25.

³⁴ Palmer, “The Re-emergence of Family Law,” 122-3.

³⁵ Taiwanese Civil Code, Articles 1019 and 1020.

³⁶ PRC Marriage Law, Article 3.

³⁷ Guang-qun Fan, “Haixia Liangan Hunyinzhidu Ji Xiangguan Minshicaipan De Xianghuchengren Wentitiantao” (Marriage Systems across the Strait and the Recognition of Civil Court Judgments) in Sueng-ran Ueng, ed., *Liangan Falu Shiyong Zhi Lilun Yu Shiwu* (Theory and Practice of Cross-strait Conflict of Laws), (Taipei: Weilifalu, 1992), 95.

³⁸ Huei-ling Shi, “Lun Woguo Jiatingfa Zhi Fazhan Yu Yanjiu – Yige Jiatingfalushehuixue De Guandian” (Development and Study of Taiwanese Family Law – From the Perspective of the Sociology of Family Law), *Zhengdafxuepinglun*, 63 (2000), 262.

³⁹ Taiwanese Civil Code, Article 1000, 1002.

Article 3 of the PRC Inheritance Law lists inheritable personal properties: (1) income; (2) houses, savings, and articles of everyday use; (3) forest trees; (4) cultural objects, books, and reference materials; (5) means of production lawfully owned by the deceased; (6) property rights pertaining to copyrights and patent rights; and (7) other lawful property. A breakthrough is revealed in the fifth enumeration. Under the socialist system, where most means of production belong to the state, the fifth enumeration exceptionally allows “means of production” to be privately inherited. However, concrete cases remain rare.⁴⁰

COOPERATION BETWEEN TAIWANESE AND PRC CIVIL LAWS

Political separation and ideological conflict have given rise to two legal systems in Taiwan and Mainland China. Whereas Taiwan follows the Western capitalist model, China pursues a mixed system utilizing both socialist principles and a market economy. The two civil societies came into contact in 1987, when the Taiwanese regime for the first time since 1949 allowed its citizens to visit Mainland China. For its part, the PRC enacted “Provisions on Encouraging Investment from Taiwan” in 1988 to attract Taiwanese investment and foster economic reform. According to this provision, the economic laws and regulations governing foreign businesses and investors are applicable to those Taiwanese doing business in China.⁴¹ Principles of Western civil law, such as freedom of contract and autonomy of private law, thus regulate most contracts between people across the Strait.

However, a comprehensive regulation of cross-strait civil matters remains controversial. Since both the People’s Republic of China

and the Republic of China (Taiwan) claim to be the only China, international private law, which governs civil matters between different nations, is inapplicable. At the same time, both regimes claim sovereignty beyond their actual territories, thus avoiding the application of interregional law. Interregional law, such as U.S. interstate law, regulates provincial matters within a country. In the case of the U.S., since all states are under the sovereignty of the central government, conflict among state laws is resolved according to the United States Constitution.⁴² The situation with China and Taiwan is clearly different. A unified supreme power over both regions is absent, whereas the two regimes claim sovereignty on an overlapped jurisdiction. For example, under the One China Principle, Taiwan drafted “Regulation of Cross-Strait Civil Matters”⁴³ in 1988 and promulgated it in 1992. This regulation applies several rules of private international law, but takes the form of domestic law.⁴⁴ The PRC has criticized the regulation for its unilateral bias.⁴⁵

Many scholars across the Strait have proposed that the best solution for the current legal conflict lies in bilateral negotiation.⁴⁶ Using realistic principles while striving to maintain political equilibrium, authorities from both China and Taiwan should work together to draft and enact a special law regulating cross-strait matters. In the arena of civil law, which concerns itself less with politics or sovereignty issues than both administrative law and criminal law, civil relations and private rights should override political and ideological considerations.

CONCLUSION

Due to long-term political separation and ideological antagonism, Taiwan and China

⁴⁰ Ze-jian Wang, “Haixialiangan Renminxucheng De Ruogan Wenti” (Several Issues of Cross-strait Inheritance), in Sueng-ran Ueng, ed., *Liangan Falu Shiyong Zhi Lilun Yu Shiwu*, 114.

⁴¹ Provisions on Encouraging Investment from Taiwan, Article 5.

⁴² Tai-qian Wang, *Dangqian Liangan Falu Wenti Fenxi*, 7.

⁴³ *Liangan Renmin Guanxi Tiaoli*.

⁴⁴ Ueng, *Liangan Falu Shiyong Zhi Lilun Yu Shiwu*, 4.

⁴⁵ Song, Jun, ed., “Taiwan ‘Lianganrenminguanxitaoli’ Pingxi” (Critique of Taiwan’s *Regulation of Cross-Strait Civil Matters*), (Beijing: Zhongguorenmingongan Daxue Chubanshe, 1994).

⁴⁶ See, for example, Tai-qian Wang, *Dangqian Liangan Falu Wenti Fenxi*, 10; Song, Jun, ed., *Taiwan ‘Lianganrenminguanxitaoli’ Pingxi*, 87; and David Wang, “Haixialianganjie Faluwentu Zhi Jiejuemoshi” (Solutions of Cross-strait Legal Problems), in Ueng, *Liangan Falu Shiyong Zhi Lilun Yu Shiwu*, 24-26.

have developed different civil legal systems. While Taiwan has thoroughly adopted a Western and capitalist legal system over the past century, China only began to incorporate Western laws into its socialist system in the 1980s. In the domestic arena, China retains the socialist principle of public ownership, while it leases public property to private parties through myriads of contracts. The separation of ownership and usufruct (rights to possess, use, and benefit) weakens the exclusiveness of property rights. Contracts, which usually involve the government and private parties, lack private autonomy and equilibrium. In contrast, China has adopted most Western legal notions in for-

eign contracts, including contracts with Taiwanese investors. However, this measure is more like a temporary economic policy than a stable and comprehensive regulation. For cross-strait civil matters, international private law is inapplicable due to the One China Principle. Moreover, both the PRC and Taiwan claim sovereignty on the overlapped jurisdiction, thus avoiding the application of interregional law. A feasible solution may lie in bilateral negotiation. With a firm basis in reality, and without touching on issues dealing with national sovereignty, authorities across the Strait should enact a special law to regulate cross-strait civil matters.

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Ripe for Cooperation:

THE SINO-AMERICAN RELATIONSHIP SINCE SEPTEMBER 11

Sigurd E. Ulland

THE MOMENT HAS COME

Since the fall of the Berlin Wall and the collapse of the Soviet threat, predictions of a rival-ridden East Asia with notable absenteeism on the part of the United States came into vogue. Suddenly, the U.S.-Japan security alliance looked like an anachronism propped up only by the ambiguities of the post-Cold War environment. Even though the Soviets no longer aimed missiles from Vladivostock, uncertainty about China loomed large. Thus, the old bilateral alliance stayed put. Meanwhile, apprehension heightened as visions of rivalry among China, Taiwan, Japan, and the Koreas captured the imagination of pundits and politicians. Ballistic weapons in East Asia made U.S. withdrawal from the region seem prudent – and maybe even imminent. Such a development prompted even more conjecture. Would an unstable multipolar system emerge? Would Japan remilitarize, spurring its neighbors into an arms race that would resurrect on a new continent the great power politics of 19th century Europe? And then, quite unpredictably, on September 11 the dice were cast. Terrorist attacks on New York City provided the long awaited catalyst for change in East Asia: the U.S. war on terrorism.

The past three months have refocused the world and brought change to East Asia. Since September 11, prospects of American withdrawal from Asia seem more remote as military forays into Central Asia expand U.S. involvement in the region. Moreover, revisions

made to the function of the Japanese Special Defense Forces (JSDF) heralds a new role for Japan that will probably arouse trepidation from China. Both of these recent developments threaten to upset an already fragile balance of power in East Asia. Nevertheless, a continued, and perhaps even intensified, U.S. presence in Asia mollifies the rising tension.

The American presence in Japan has long been viewed as the “cork in the bottle” – a way to contain Japan from erecting another Co-Prosperity Sphere. Nonetheless, an American presence is not welcomed in all parts. In China’s eyes, the U.S. is an uninvited guest in Central Asia. The ad hoc deployments that occurred after the terrorist attacks on New York City have the potential to activate the rivalry that pundits have claimed would rock East Asia. The intensified U.S. presence is a mixed blessing for China. However, constructing a relationship that encourages multilateralism in the region will mitigate differences arising from perceived intents and actual intents, thereby laying a firm foundation for cooperation within East Asia.

JAPAN ON THE RISE

Japan’s military role has widened considerably since September 11. Most remarkably, Prime Minister Koizumi pledged to send Japan’s Special Defense Forces (JSDF) to aid U.S. military efforts in Afghanistan. The deployment of Japanese forces represents a significant change in Japan’s military role in

East Asia over the past 50 years. Constrained by a constitution that places severe limits on indigenous military capabilities, Japan took shelter under the American security umbrella and let its ally point the guns during the Cold War. However, since the terrorist attacks on the United States, Koizumi has volunteered JSDF to provide rear-guard support for U.S. troops.¹ Japan's newfound military role signals a long-awaited shift toward an equal partnership in the US-Japan security alliance. Since the Gulf crisis of the early 1990s, Japan has been more willing to lend the U.S. military support during international conflicts. After much deliberation, the 1990 Kaifu government stalled in sending JSDF to assist in Desert Storm.² The cautious deliberation that followed, however, produced legislation that enabled the JSDF to participate in UN peacekeeping operations.³ Additional changes worked out during the Clinton-Hashimoto meeting in 1996 portended a more active, robust Japanese military partnership. These changes created an opportunity for Japan to obtain military autonomy and rely less on the United States.

The transition gained momentum after 1996 when new guidelines were drawn up for the U.S.-Japan Security Treaty. As indicated by the 1996 Japan Defense White Paper, U.S.-Japanese cooperation became more assiduous, consisting of joint exercises, shared research and development, and a more defined role for Japan in peacekeeping activities. According to political scientist Yu Bin,

[Revisions to the U.S.-Japan Security Treaty] considerably expand the

Japanese role from "self defense" to that of "joint action" anywhere in Japan's periphery, thus opening the door to a bigger Japanese role in dealing with future regional conflicts.⁴

The 1993-94 North Korean missile crisis and the 1996 Taiwan Strait crisis quickly made it apparent that the United States was the only military power in East Asia adequately equipped to handle such events. Fears of vulnerability in Japan prompted an expansion of the role of the JSDF. The treaty, therefore, repositioned the U.S.-Japan security alliance for a new century fraught by new defense problems in East Asia. From fighting terrorism to containing rogue states, the new JSDF gives Japan a rising profile in the changing East Asian security architecture. Jianwei Wang and Xinbo Wu characterize the transformation in dramatic terms: "Prior to the [new] U.S.-Japan security arrangements, the United States was a 'sword' while Japan remained the 'shield.' The latest round of redefinition, however, has turned Japan into another 'sword.'"⁵ China considers itself the direct target of the new sword.

China's mild reaction to the activation of the JSDF reflects an attempt to show support for the U.S. war against terrorism. Regardless, Chinese compliance belies a deep-seated distrust of the U.S.-Japan partnership. Envisioning Japanese and American soldiers fighting shoulder-to-shoulder sends shivers through Beijing. In the late 1990s, China viewed the treaty as a cover for U.S.-Japanese containment policy in East Asia. Yu Bin underscores this view: "Many in China believe

¹ *The Washington Post*, 28 September 2001, A30.

² In fact, only 20 out of 100 appointed medical volunteers ended up going to the Middle East, and then only for a very brief stint. This failure to contribute manpower during an international crisis reinforced the view of Japan as a constrained partner in military affairs.

³ Kenneth Pyle outlines the five conditions set forth by the Diet for SDF participation in UN peacekeeping operations: (1) the existence of a cease-fire agreement; (2) an acceptance of a Japanese role by parties directly involved in the conflict; (3) a neutral stance by UN force; (4) a withdrawal of the SDF in the event of a collapsed truce; (5) the restriction of SDF fire to self-defense only. Kenneth Pyle, *The Japanese Question* (Washington, D.C.: American Enterprise Press, 1996), 131.

⁴ Yu Bin, "Containment by Stealth: Chinese Views of and Policies Toward America's Alliances with Japan and Korea after the Cold War," (Stanford: Stanford University Asia/Pacific Research Center, September 1999), 18.

⁵ Jianwei Wang and Xinbo Wu, "Against Us or with Us? The Chinese Perspective of America's Alliances with Japan and Korea," (Stanford: Stanford University Asia/Pacific Research Center, May 1998), 32.

that the new treaty is the beginning of 'soft containment' or 'containment by stealth.'⁶ In recent months, Japan has done everything possible to assuage Chinese edginess over containment by giving early notice of Japan's contribution to the U.S. military effort. Koizumi even flew to Beijing to inform Jiang Zemin personally that Japan would assist the United States in Afghanistan. Jiang's response was calm, yet circumspect when he reminded Koizumi to "remember the wariness of other Asian countries."⁷ This mild reaction greatly contrasts with China's tendency toward saber rattling and histrionics. Practically speaking, however, China still lacks both the diplomatic and military clout to prevent Japan from remilitarizing, yet Japan still endeavors to make China feel that its opinion carries weight in the changing tide of East Asian security. Meeting with China prior to releasing the JSDF sends reassuring signals to China that it is not being excluded. Such a gesture, coupled with Koizumi's symbolic visit to a war memorial at the Marco Polo Bridge, will hopefully ease Sino-Japanese relations. Notwithstanding Japan's diplomatic whitewashing, a remilitarized Japan will inevitably stir up unease in China.

The United States must also play a role in easing Chinese fears of a remilitarized Japan. By virtue of its alliance with Japan, the United States intent seems to be exclusion for China. Alliances by their nature aim to benefit those who are in them and exclude those who remain outside of them. The triangular relationship among the United States, China, and Japan has suffered from this pattern. The war on terrorism promises to bring all of the countries together under one banner. Both China and Japan have fought terrorism within their own borders. Shared experience and a common cause should encourage collaboration in critical areas such as intelligence gathering and logistical support. Such efforts will establish a level of trust that, if properly cultivated, could make way for further integrative measures, such as regional

collective security. Directing diplomatic capital toward this end will enhance all three relationships. In handling such multilateral efforts, however, the U.S. must be careful not to steal too much thunder away from its two partners, especially China.

UPSTAGED IN CENTRAL ASIA

The aftermath of September 11 has also yielded promises of cooperation between China and the United States that gloss over the underlying wariness each country harbors about the other's future interests in East Asia. The United States is resolute in maintaining a stronghold over the region. And China may interpret September 11 as its own long-awaited cue to resume dominance in East Asia. From both perspectives, tenuous collaboration is better than unwavering confrontation under any circumstances – and especially the present one. Nevertheless, conflicting interests tarnish the cooperation. How China interprets its purpose in East Asia in light of the recent terrorist attacks will be of central importance to American strategy. In order to ensure peace, the United States must remain aware of China's objectives and forge a policy that blends these objectives with its own goal of maintaining regional stability.

Prior to the U.S. military action in Afghanistan, China attempted to spearhead a separate multilateral effort aimed at fighting terrorism and Islamic extremism in Central Asia. Known as the Shanghai Cooperation Organization, the group members included China, Russia, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan. The United States was conspicuously absent from the roster. This omission was anything but unintended. Given U.S. supremacy in the Asian-Pacific, Central Asia and the fringes of Russia are all that is left for China, and China therefore endeavors to exclude the U.S. from its own developing sphere of dominance. Although Soviet dominance and a hostile Sino-Soviet

⁶ Yu Bin, "Containment by Stealth," 10.

⁷ *New York Times*, 9 October 2001, A7(L).

relationship shut China out from Central Asia in the 20th century, China has a long legacy in Central Asia dating from its glorious imperial past. China has returned full force to regain its stronghold in the region by diversifying its oil interests in the 21st century. Currently, China National Petroleum owns 60% of Kazakh oil giant Aktobemuniaz,⁸ encouraging visions of replacing the legendary Silk Road with oil pipelines into Xinjiang thereby tantalizing Chinese expansionists. By throwing itself into the scramble for Central Asia, the United States will dampen the pace of China's expansion and raise the stakes in the competition for hegemony in East Asia. As a newcomer to Central Asia, the United States will further alter the strategic calculus of the region, thus fomenting Chinese fears of encirclement.

Security expert Zhu Feng cites a Chinese adage to illustrate China's fear of encirclement: "A wolf at the door and a tiger out back." And China has reason to be concerned. The U.S. presence on China's eastern flank stretches from the bases in Korea and Japan down to the island of Taiwan, where the U.S. tacitly supports Taiwanese autonomy. For years these military postures have had Chinese strategists tearing their hair out. Plowing its way into Central Asia through Afghanistan will enable the United States to tighten an imaginary noose around China. Even though American intent is focused on ousting the Taliban, Beijing may perceive this move as part of an overarching strategy aimed at China's containment. In this case, an eagle, rather than a wolf or a tiger, sits at the door, front and back.

The United States has upstaged Chinese efforts to develop a leadership role in the region. Referring to the overshadowed Shanghai Cooperation Organization, Zhu Feng notes: "The role China has been trying to play in the region has been replaced by the United States and the international coalition, which has given China a big

shock." Not only has the United States taken the limelight away from China's newfound role as a multilateral coordinator, it has also made China's allies its own friends. Pakistan has risked tremendous domestic upheaval to demonstrate its support for U.S. military action in Afghanistan, and Russia, a wavering ally of China's and recent partner in the outstripped Central Asian alliance, has gravitated closer to the United States in a series of meetings culminating at President Bush's ranch in Texas.

China found itself upstaged in its bid for a leading role at the APEC Conference in Shanghai last October. By playing host, China positioned itself as leader in Asian institution building. Still more of a talk shop than an international policy-making institution, APEC nevertheless affords China the opportunity to shape the politico-economic order of Asia. China planned to use the conference to dazzle the world with its burgeoning economic progress and modernity; however President Bush stepped in and used the conference as a forum to shore up support for the war on terrorism. In other words, China was upstaged on its own turf.

In spite of the wariness American presence in Central Asia arouses, China has found that U.S. cooperation, rather than opposition, is more in its interests. The tragic events of September 11 compelled nations around the globe to offer condolences and support to the United States. In the case of the Sino-American relationship, this tragedy has opened lines of cooperation that could ease tension between the two states. Henry Chu, a journalist at the LA Times writes: "Many Chinese are relieved that the U.S. has discovered a new enemy, a role they feel China has been unfairly saddled with since the collapse of the Soviet Union."⁹ Redirecting attention toward Muslim extremism and international terrorism gives China and the United States common ground as China faces unrest in the Muslim dominated frontier province of Xinjiang.

⁸ *The Washington Post*, 18 October 2001, A01.

⁹ *Los Angeles Times*, 28 September 2001 A6.

With a U.S. beachhead so close to its border, a wary China clearly prefers for multilateral action in the war against terrorism as a way of restraining the United States. Despite some international support, the United States continues to lead the pack in carrying out the military action against Afghanistan. In the long term, however, this strategy will only work if China is included.

UNDERSTANDING AND WORKING WITH CHINA

Vacillating between the extremes of engagement and containment brings ambiguity to the Sino-American relationship. Both of these approaches originate in the era and homeland of great power politics – 19th century Europe. Political scientists and historians have a habit of assigning the conditions of 19th century Europe to 21st century East Asia in an effort to understand and manage relations with China. Although such comparative exercises hold some predictive power, they often liken apples to oranges. For this reason, the Sino-American relationship should be understood and managed on its own terms rather than as a mirror of 19th century great power politics. Acknowledging Chinese traditions of diplomacy and foreign policy will be crucial for the United States to undertake as it revises its own role in East Asia in the aftermath of September 11.

Viewing China through a comparative lens misconstrues Chinese intentions by dismissing them as similar to the ambitions of revisionist nation-states that existed in different circumstances and operated from different historical experiences. When analyzing geopolitics, experts often use a two-front paradigm to explain US strategy in Europe and Asia. Embedded in this line of thought is the

assumption that the arrangement of nation-states in Asia mirrors the one existing in Europe. The following statement by a Chinese strategist, as quoted by Aaron Friedberg in “Ripe for Rivalry” exemplifies this tendency to hold a mirror up to Europe and see Asia:

We can visualize several different scenarios . . . One is that Germany and [Russia] will move closer together . . . On the one hand, the US might ally with Germany to control Europe. Alternately, the US and Britain might combine to balance Germany’s influence. In Asia, the range of possibilities is similar”¹⁰

Friedberg, building on this view, extrapolates an Asian scenario from the European one to explain the uncertain future of China’s diplomatic alignments:

Substituting Japan for Germany, Korea for Britain, and Asia for Europe, this statement suggests that the Chinese have already begun to consider a wide array of possible relationships, including a continuation of the US-Japan alliance, a new Russo-Japanese entente, and an anti-Japanese grouping consisting of the United States and Korea .¹¹

Drawing comparisons between nation-states assumes that all nation-states exhibit the same behavior patterns and are driven by the same motives. This basic assumption may hold true when examining relationships among European states or states that have been heavily influenced by Europe.¹²

The assumption that the same motives drive all nation-states falls apart

¹⁰ Robert Delfs, “China Sees Danger from Japan, Soviet Union: Two Front Threat,” *Far Eastern Economic Review* 13 December 1990, 28 cited in Aaron Friedberg, “Ripe for Rivalry,” *International Security*, 18, no. 3 (Winter 93/94), 28.

¹¹ Friedberg, “Ripe for Rivalry,” 28.

¹² This assumption bears considerable explanatory power given Japan’s considerable success at transforming itself into an imperial power resembling those of Europe in the late 19th century.

when applied to China. Haughty condescension toward Western ways prevented China from modernizing as Japan did in the late 19th century. Civil wars and Cold War antagonisms prolonged the isolationism. Arguably, China did not even begin to function according to a Western model of statehood until the latter part of the 20th century. China thus enters the 21st century with a domestic institutional structure that is not based on a Western model and with limited experience dealing with other nation-states as equals rather than subordinates.¹³

Assuming these conditions hold, one can aptly predict that China will become a revisionist power like Nazi Germany or the Soviet Union because its *modus vivendi* does not match with the *modus operandi* of the current international system. The comparison errs, however, when it portrays China as the next superpower rival for the United States. Nazi Germany and the

Soviet Union had their eyes set on global domination. In contrast, a rising China threatens regional stability in East Asia. Given its low level of economic development *relative* to the United States, China will not grow from a regional threat into a global threat in the foreseeable future. The comparative exercise between Asia and Europe is therefore not entirely flawed; it simply misconstrues the scale of China's hegemonic ambitions.

Drawing parallels between European countries and China does not

capture the entire picture, but seeing the contrasts does prove useful. The most notable contrast between Asia and Europe is the differing degree of institutionalization that links states within each region. Asia is not as highly institutionalized as Europe. Unlike in Europe, the aftermath of World War II in Asia hardly laid the groundwork for intergovernmental cooperation between former rivaling nation-states. Additionally, America had little diplomatic maneuvering room once China fell under the yoke of Communism.

Moreover, the mainly bilateral approach used by the United States in East Asia did not foster a sense of regionalism in Asia that could counteract the rival-ridden ambitions common to nation-states. The post-war security framework implemented by the United States dampened interstate cooperation rather than promoting it. As a result, national rifts still scar post-war East Asia. This lack of regional unity in East Asia makes it, in the alarmist words of Aaron Friedberg, "ripe for rivalry."¹⁴ It is the Chinese will to power that is seen

as the primary cause of these regional rivalries.

Assuming that China is an expansionary power aiming to gain territory beyond its current continental borders misdirects U.S. strategy in East Asia. Realist theory has been marshaled to analyze Chinese behavior in the 20th and 21st centuries. John Mearsheimer offers a compelling version of realism known as "offensive realism" in his recently published book *The Tragedy of Great Power Politics*. According to this

¹³ In fact, Martin Mayer claims that the Chinese symbols used in the word diplomacy mean "barbarian control." Martin Mayer, *The Diplomats*, (New York: Doubleday & Company, Inc., 1983), 36.

¹⁴ Friedberg, "Ripe for Rivalry," 5-33.

theoretical framework, states maximize their power through aggressive measures (e.g. waging war against other states). Offensive realism brings dynamism into the calculations of states by assuming that states actively seek to become superior to their peers. Relative power among states still matters, but attaining absolute power is the holy grail of this crusade. The balance of power so important in other strains of realist thought is eclipsed by the drive to become a hegemon.¹⁵ The expansionary state, therefore, focuses on gaining enough material power to dominate its peers. Accordingly, extensive military spending and economic growth would classify China as such an expansionary state. Thus, the realist approach sees China as bent on reshaping the world order to suit its *own* hegemonic aspirations.

Certain aspects of this power-hungry characterization of China are convincing, but overall, offensive realism overstates China's ambitions. China has also voiced its own intentions to garner more influence in world affairs,¹⁶ excoriating the United States for being hegemonic in its dealings with other countries. These postures provide fodder for alarmism. Stephen Mosher recently presented such an interpretation in *Hegemon: China's Plan to Dominate Asia and the World*. He writes:

The PRC . . . has . . . the historical grievances of a Weimar Republic, the paranoid nationalism of a revolutionary Islamic state, and the expansionist ambitions of a Soviet Union at the height of its power. As China grows more powerful, and attempts to rectify these grievances and act out those

ambitions, it will cast an ever-lengthening shadow over Asia and the world.¹⁷

John Mearsheimer presents a moderated estimation of China's intentions, yet still emphasizing the nation's global ambitions. He writes:

What makes a future China threat so worrisome is that it might be far more powerful and dangerous than any of the potential hegemonies that the United States confronted in the twentieth century. . . . It is hard to see how the United States could prevent China from becoming a peer competitor. Moreover, China would likely be a more formidable superpower than the United States in the ensuing global competition between them.¹⁸

Both analysts rightly pit China in a competition against the United States. And indeed, the inevitability of such a standoff is highly plausible. But both analysts overstate the extent of the competition. China poses more of a threat to the United States' interests in East Asia than to U.S. global hegemony. Traditionally, China has had regional ambitions rather than global ones; China's worldview at the height of its imperial history was limited to Asia. Practically, China will not be able to spread its influence further than the borders of its ancient empire because it faces the challenge of managing secessionist regions. Handling Tibet, Xinjiang, and Taiwan should keep China occupied restoring a replica of its ancient worldview rather than taking over the rest of the world.

Building a cooperative relationship with China requires an understanding of China's unique worldview. Centuries before Western powers entered East Asia, China based

¹⁵ John Mearsheimer, *The Tragedy of Great Power Politics*, (New York: W.W. Norton & Company, 2001), 22.

¹⁶ The 1998 white paper, *China's National Defense*, openly reveals China's ambitions to lead the world in the 21st century. However, much of this rhetoric does not translate into reality. China is more focused on leading Asia, not the world. Text available at: <http://tiger.uic.edu/~rodrigo/white_paper_98.htm>

¹⁷ Stephen Mosher, *Hegemon: China's Plan to Dominate Asia and the World*, (San Francisco: Encounter Books, 2001), 30.

¹⁸ Mearsheimer, *Tragedy*, 40.

its foreign policy on a Confucian worldview that emphasized harmony and hierarchy. Specific to this notion of the international order was the centrality (both geographic and political) of the Chinese state, *zhongguo*, literally translated “Middle Kingdom.” China saw itself at the center of a harmonious world order in which foreign states paid tribute to the Middle Kingdom by presenting gifts and performing self-subjugating rituals.¹⁹ Foreign dignitaries traveled to Beijing from the steppes of Mongolia and Manchuria, from the kingdoms of Korea, Taiwan, and Annam (present day Vietnam), and from the arid lands of Central Asia to acknowledge the ultimate power of the Middle Kingdom. Tributary states extended from the center without demarcated borders that might otherwise limit the preeminence of the Middle Kingdom. China expected more distant lands to pay tribute, though with less regularity. These outliers lived beyond

the harmonious reach of the Confucian order, giving them lower rank than proximate tributary states. Thus, a hierarchy of states comprised the elaborate tributary system, and China sat at its pinnacle.²⁰ Philosophically, the Confucian order had global reach; practically, it remained confined to Asia.

China’s vaguely delineated, hierarchic system of tributary states brought calamity to China when it dealt with European countries. Instead of gifts and kow-tows, China got opium and unequal treaties. Exploitation by the West followed by a half-century of communist experimentation, which ultimately dispelled the Confucian worldview and escorted China into the system of nation-states. Today, China no longer holds celestial claims over surrounding states and its borders, for the most part, are clearly marked.²¹ Still, China

“THE AFTERMATH OF SEPTEMBER 11...YIELDED PROMISES OF COOPERATION BETWEEN CHINA AND THE UNITED STATES THAT GLOSS OVER THE UNDERLYING WARINESS EACH COUNTRY HARBORS ABOUT THE OTHER’S FUTURE INTERESTS IN EAST ASIA. THE U.S. IS RESOLUTE IN MAINTAINING A STRONGHOLD OVER THE REGION...CHINA MAY INTERPRET SEPTEMBER 11 AS ITS OWN LONG-AWAITED CUE TO RESUME DOMINANCE IN EAST ASIA.”

wants to hem in the autonomous regions of Tibet, Lower Mongolia, and Xinjiang, and bring secessionist Taiwan back under its control. These territorial designs either reflect the tendency for nation-states to have border disputes or expose the remnants of the ancient tributary system still at work in Chinese foreign policy. In either case, it is important to understand the

forces motivating China’s policies.

China’s quest for inner stability arises from a history scarred by civil war and disunity. Irredentism, therefore, is a major pillar of a foreign policy²² that, as China finally finds its place on the world’s stage, will be marked by three objectives: unity, independence, and prosperity.²³ As an

¹⁹ Most noted among these rituals is the kow-tow – kneeling three times and knocking one’s head nine times on the floor. This gesture signified the submission of the outside world to the ultimate authority of the Middle Kingdom.

²⁰ John King Fairbanks, ed., *The Chinese World Order: Traditional China’s Foreign Relations* (Cambridge, MA: Harvard University Press, 1968).

²¹ These borders are subject to dispute. China has waged border wars with Vietnam and India. China also claims several islands in the South China Sea.

²² China considers its relations with Taiwan a matter of domestic policy. Consequently, irredentism would fall under the same classification.

²³ Michel Oksenberg, “China: A Tortuous Path onto the World’s Stage,” in Robert A. Paster, ed., *A Century’s Journey: How the Great Powers Shape the World* (New York: Basic Books, 1999).

ascendant power, China seeks to restore its dominance in the region. Western intrusion destroyed Chinese preeminence 150 years ago. China would like to transfer the balance of power in East Asia back to its own orbit. The United States stands directly in China's way, however, by tacitly supporting Taiwanese autonomy. Favoring Taiwan reminds China of its territorial losses, and U.S. posturing in favor of Taiwan also makes Sino-American relations highly volatile. The United States must carefully position itself in order to stave off conflict.

Unsurprisingly, China aspires to restore the economic abundance that once flourished within its borders. Imperialist exploitation and communist mismanagement brought tremendous economic hardship to China and retarded advanced industrialization, but the past 20 years have witnessed breathtaking strides in economic growth. This prosperity will lend greater credibility to the ruling Communist Party. Increased wealth also reinforces China's foreign policy objectives. Economic opportunity might entice Taiwan back into China's fold, thus finally realizing a long held goal of unification. Greater wealth will, therefore, augment China's bargaining power in international negotiations. Clearly, China's foreign policy objectives constitute China's cause célèbre – the reclamation of dominance in East Asia. Nevertheless, distinctions of scale need to be made. Achieving its

foreign policy objectives should direct China toward *regional* hegemony, but not *global* hegemony.

A recent article by Lieutenant Colonel Soong-Bum Ahn articulates an approach to handling China that lends greater consideration to the Chinese mindset.²⁴ Soong-Bum Ahn questions the assumption that a dominant China will threaten its neighbors and the United States. Ahn argues that perceptions rather than actual intents have governed the relationships between China, Japan, and the United States.

"AHN ARGUES THAT PERCEPTIONS RATHER THAN ACTUAL INTENTS HAVE GOVERNED THE RELATIONSHIPS BETWEEN CHINA, JAPAN, AND THE UNITED STATES. COOPERATION AMONG AT LEAST TWO OF THESE POLES HAS BEEN ROCKY BECAUSE EACH PERCEIVES THE OTHER AS HAVING INTENTIONS INIMICAL TO ITS OWN INTERESTS."

Cooperation among at least two of these poles has been rocky because each perceives the other as having intentions inimical to its own interests. Ahn outlines the stated intentions of China to illustrate what he thinks are China's actual intentions. These intentions are not as jingoistic and provocative as many realist theorists predict. Drawing

upon the history of Chinese military, Ahn writes, "Chinese military action has been defensive or punitive in nature and seldom imperialistic."²⁵ He identifies the Five Principles of Peaceful Coexistence formulated by Prime Minister Zhou Enlai as "based on concepts of noninterference and no stationing of troops outside one's own territory."²⁶ Traditionally, Chinese military forces have been employed to maintain domestic stability and national defense, but not for offensive purposes. Moreover, China has historically been a continental power. Occupying a large part of the Asian land mass, and deeply engaged in trade and foreign investment with

²⁴ Soong-Bum Ahn, "China as Number One," *Current History* 100, no.647 (September 2001)

²⁵ Soong-Bum Ahn, "China as Number One,"

²⁶ Soong-Bum Ahn, "China as Number One,"

its neighbors, it is highly doubtful that China will bite the hands that feed it by attempting to expand into Korea or overseas into Japan.²⁷ China, therefore, does hold the potential to behave in a way that encourages cooperation. It simply needs to exercise sovereignty over its claimed territory, which still includes Taiwan. Handing some of the regional leadership over to China, therefore, will appease its frustration and pave the way to greater cooperation. And perhaps, create a benign regional hegemon rather than a threatening one.

Given Chinese foreign policy goals and the evidence of China's regional hegemonic ambitions, the United States must craft an approach to China that capitalizes on the window of opportunity that the tragedy of September 11 has provided in East Asia. Clearly, China has reason to benefit from the relationship. As observed by Minxin Pei and Catherine Dalpino:

There is . . . [a] . . . tangible benefit for China in joining an international coalition against terrorism. A targeted campaign could reduce China's own vulnerability to terrorism, particularly in Xinjiang province. The separatist movement there has received funding, weapons and training from Afghanistan, so the eradication of the terrorists' networks inside Afghanistan would be a result much welcomed by Beijing.²⁸

An American effort to destroy terrorist networks in Central Asia is in China's short-term interest. Molding the U.S. presence so that it will be more aligned with China's long-term interests will require multilateral efforts that place China in a leading role in determining the future of

Central Asia. Stealing the spotlight from the Shanghai Organization for Cooperation is not advisable in the long-term because it perpetuates Chinese perception of encirclement. Moreover, allowing China to take a leading role in Central Asia will satisfy China's desire to have involvement in the region as it once did in the days of the tributary system. This sort of framework encourages multilateral strategic partnerships involving the United States and China.

Engaging China through multilateralism has long been on the agenda for some policy makers. Nesting the security alliances that flank China's eastern front in multilateral institutions engages China and will start East Asia on a path towards greater institutionalization that, as exemplified by Europe, leads to greater peace and settles long-held resentments. As argued by Douglas Paal, multilateralism is still in its embryonic stages in East Asia,²⁹ but the extreme shock of September 11 gives states the impetus for greater cooperation in intelligence-sharing and military exercises. Cooperative ties of this nature can direct states toward multilateral efforts in the future. China may view the deployment of the JSDF forces as a harbinger of Japanese militarization when Japan remains tied to the hip of the U.S. Placing the JSDF within the framework of a multilateral security organization could calm Chinese anxiety, and forging a similar multilateral framework in Central Asia could relax Chinese fears of encirclement.

Perception of intent rather than actual intent has robbed China, Japan, and the United States of the chance to assess where their respective interests coincide. Identifying and constructing institutions that mitigate conflicts of interest should rank high on the U.S. "to-do" list in East Asia. September 11 has expanded the frontier for

²⁷ Soong-Bum Ahn, "China as Number One," 252.

²⁸ *South China Morning Post*, 19 September 2001.

²⁹ Douglas Paal, "Nesting the Alliances in the Emerging Context of Asia-Pacific Multilateral Process: A U.S. Perspective," (Stanford: Stanford University Asia/Pacific Research Center, July 1999).

a more comprehensive Sino-Japanese-American cooperation. Asia may remain “ripe for rivalry”, but with renewed alliances directed toward multilateralism, the United States can become a broker for cooperation.

This essay was written while on leave during Fall 2001. In it, the author lays out the possibilities for cooperation between China and the US in the wake of the events of September 11.

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The Case of the Virgin Prostitute:

CHINESE MEDIA AND LEGAL REFORM

— Qiang Fang —

The years preceding the People's Republic of China's (PRC) open-door policy of 1978, especially during the Great Proletarian Cultural Revolution (1966-1976), as Xiaoshan, a writer for *Law and Life* magazine argued recently, comprised a virtually lawless period during which torture and public display of criminals were the most common acts of authority.¹ Not only was no single law legislated by the National People's Congress (NPC), but "law" itself had also largely been reduced to the exertion of the willpower of individual cadres. To put it another way, the status of "criminal," especially those who had been arrested and then brutally tortured political prisoners like the Rightists, was decided not by law, but by Communist Party leaders at all levels. Even the former Chinese President, Liu Shaoqi, a long time comrade of Mao Zedong, was illegally arrested and tortured to death, despite a clear stipulation in the Chinese constitution reserving the dismissal of the national President for the NPC.

Memories of such unpleasant incidents were of primary importance to China's post-1978 legal reform, when Deng Xiaoping, who himself was a victim in the Cultural Revolution, called on China to reform and open its doors to the outside world, and as an important component of this comprehensive institutional reform movement, the Chinese legal system has seen dramatic development

since then. For instance, before 1978, a mere eleven laws had been legislated by the NPC, and none of them was enforced during the Cultural Revolution. However, since 1978 and especially after 1989, both Chinese national and local congresses have enacted thousands of laws. In the NPC alone, 291 laws were legislated in that time, 216 of them after 1989. Moreover, the increase in the number of laws was matched by an increase in attention devoted to individual rights within these laws. For example, China signed the United Nations Convention against Torture in 1988; seven years later, the NPC enacted the Judges Law and the People's Police Law in which torture is clearly prohibited. Even more telling is the switch from a presumption, dating to ancient times, of the accused's guilt, to a presumption of a defendant's innocence in 1996. Police today are required by law to show their arrest warrant when arresting suspects. In theory, all are equal before law.²

Other distinct evidence of progress toward the rule of law can be found in this period. People show an increasing sensitivity to law when settling their disputes. The legal profession has become more attractive and respectable, as demonstrated by the tens of thousands of youths who have taken the lawyer qualification test every year throughout the 1990s. Judges, whose poor quality has long invited criticism by observers, will soon be

¹ Xiaoshan, "Law and Life, Raise Doubt on 'Public Arrest,'" *Falu Yu Shenghuo (Law and Life Magazine)* 10, 2001.

² Article 6, Chinese Criminal Procedure Law (Revised), 1996.

required to hold a bachelor's degree in law. However, despite the progress made by Chinese legal reformers, and despite the fact that the present legal environment is far better-developed than the period preceding the PRC's reform, some questions remain: how close does Chinese law come to meeting society's need for regulation? To what extent have those new laws been implemented? What problems persist?

This paper examines a recent case involving a girl who, though actually a virgin, was forced through torture to confess to being a prostitute. I will not approach this case through any jurist's opinion, nor through the victim's eyes. Rather, I shall study it from the Chinese public media's perspective, to illustrate, according to news articles, what progress has been made in legal reform and what challenges remain, with an eye toward the implementation of the rule of law. Then, from a critical reading of the articles, including a comparison to Western media treatment of Chinese criminal justice, I shall attempt to evaluate the degree to which the views forwarded by Chinese public media are accurate by examining where they succeeded in highlighting certain challenges, as well as signs of progress, and where they failed.

I

Ma Dandan is an eighteen-year-old girl who lives in a small village in Jingyang county, Shaanxi province. On January 8, 2001, while watching TV in her sister's barber shop with her brother-in-law and her niece, two plain-clad men suddenly came directly in her living room as if they were looking for something. Ma Dandan asked them whether they wanted a haircut. The men did not answer but one of them asked for a girl named Ma Dandan. After Ma Dandan identified herself, the men then said they were policemen and forced her into a van.

The men, named Wang Haitao and Hu Anding, were from the local police station. That night, they tortured Ma for almost twenty-

three hours in the presence of the chief police officer, Peng Liang. According to the Qilu Evening News, a Shandong provincial newspaper, they repeatedly beat her on her head and body and did not allow her to eat or drink. They finally forced her to sign her name on a confession before releasing her. Subsequently, the Jingyang county police published a falsified report that changed Ma Dandan's arrest date to February 9, a month later, and described Ma Dandan as a male.

Hoping to restore her reputation, which is considered very important in rural China, Ma Dandan submitted a petition of revision to the Xianyang city police bureau, the authorities superior to the Jingyang county police, requesting the dismissal of the Jingyang county police's judgment, punishment of the policemen who tortured her, an amount of 8000RMB (US\$1000) to cover treatment and salary loss, and 50,000RMB (US\$ 6000) in damages for psychological distress.

However, despite Ma's requests, the Xianyang police bureau did nothing. They instead asked her to be inspected by a local hospital to confirm that she was a virgin. Even after the doctors certified her virginity, the Xianyang police still took no action. Enraged, Ma Dandan disclosed her case to the media. The next day the Huashang Daily in Shaanxi reported this case, causing an immediate sensation among the public.

In response to public fury, the Jingyang county police finally apologized to Ma Dandan for their misdeed. However, the Xianyang police wanted Ma Dandan to submit to another inspection of her virginity to "make sure." Ma Dandan submitted to this request for a second time, though she felt that it was shameful. However, a Qilu Evening News report presented this requirement as a police attempt to take advantage of the second inspection to find any problems which might justify their misdeed.³

When the attempt failed to bear fruit, the police finally succumbed to pressure from the media, withdrawing their former report on Ma Dandan and dismissing the

³ "The Secret of an Eighteen-Year-Old Girl Being Forced to Admit a Prostitute," Qilu Evening News, 12 March 2001.

policemen who committed the torture. Ma Dandan was not satisfied with the police decision because she thought they were not properly punished. She therefore submitted a petition to the local Xianyang court asking for a 5 million RMB (US\$600,000) payment for psychological damages on February 13.

Although the court determined that Ma Dandan was in fact innocent, had been brutally tortured for almost twenty-three hours by the policemen, and had already paid more than 1000RMB (US\$130) for medical treatment, the Xianyang court awarded her only 74.66RMB (US\$9) as compensation. Still unsatisfied, Ma Dandan sent a second petition to the same court insisting on her 5 million RMB (US\$600,000) spiritual remuneration and a public apology by the Jingyang police. This suit has yet to be settled.

II

This case is simple, involving only a common girl, but the media's coverage of it reveals both challenges and progress for the reform and development of Chinese criminal law. The most obvious challenge is police corruption, which largely takes the form of abuses of power, which can be seen in their torture of suspects. When Ma Dandan was humiliated by the police and decided to reveal her story to the media, the Huashang Daily first published the case and the news quickly spread all over China. Although they analyzed the case from different angles, the initial reports provided a relatively detailed explanation of this case. For example, a report of the Qilu Evening News quoted Ma Dandan's words about her experience of being tortured on March 12 reads:

I was driven to a room. After asking me for my name, birth date and home address, Wang Haitao asked me whether I knew the reason they had arrested me. I said, 'no.' He then said I was not honest. Hu Anding came in to

interrogate me afterward. When I said, 'Why did you arrest me?' Hu jumped up and slapped my face, and then he took me by the collar and led me outside. He cuffed me on a basketball frame... Until 4:30 am, I had not drunk any water, and I suffered continuous beatings and abuses in the cold outside night...⁴

Yu Teng, the first Huashang Daily journalist to interview Ma Dandan, later reported more of Ma Dandan's statement:

At about four o'clock AM, January 9, 2001, when Wang Haitao and Hu Anding failed to get anything useful... Peng Liang, the chief of Jingyang police station, appeared. Peng led me to his office to continue the interrogation and wanted a confession that I had committed 'prostitution' before. Peng said, 'I have already arrested the guy who has had sex with you and he has confessed. If you still don't confess, I will tell everybody you know. I will tell your parents, sisters and brothers, and let them all know you are a prostitute. How can you be a person in the future? However, if you confess, I will let you leave immediately and I will not tell anyone else.' Peng then began touching me on my breast and face. Being scared, I cried and shouted loudly. Peng said, 'Here, I am the king and the law. All your crying and shouting is useless. No one would dare enter unless I order them to.' Seeing that I still would not confess, he threatened me, 'I will throw you in prison and let you know the taste of it if you don't confess.' When I refused, he kicked me on my belly, making me lose consciousness.⁵

As the sensation surrounding Ma Dandan's suit grew, however, instead of

⁴ "The Secret of an Eighteen-Year-Old Girl Being Forced to Admit a Prostitute," Qilu Evening News, 12 March 2001.

⁵ Yu Teng, "The Case of The Prostitute Attracts the Heart of the Nation, Ma Dandan Breaks Her Heart for Regaining Her Purity," Huashang Daily, 24 July 2001.

continuing to provide readers with neutral, full coverage of the case, reports tended to focus on the abuse of power by the police and seriously criticized problems in China's criminal justice system. In a July 23, 2001 article in Beijing Youth Daily entitled, "The case of Virgin Prostitute: The Enlarged Virgin Hymen and the Ignored Small Detail," Lao Cai, for instance, argues that a small group of thugs had compromised the law. "In the 23 hours when she lost her physical freedom, Ma Dandan was cuffed, slapped on the face, beaten, threatened, stripped of her pants, abused, and sexually molested."⁶ Lao Cai goes on to say the law afforded Ma Dandan no means of defending herself; instead, she was forced to sign a so-called "confession." Lao concludes with a claim that in some distant regions, [criminal] law has been reduced to a means by which a small number of thugs can arbitrarily display their influence in pursuit of their own interests, bully common people, and find an outlet for their sexual desires. As such, [current] law does not effectively empower common people to take advantage of their rights, because, as it does not successfully limit officials' power, the power given to them by the people becomes a "sharp weapon" against the people.⁷

Lao Cai also calls on people to look carefully at the specifics of the Ma Dandan case, for he believes within the details of the damage to Ma Dandan's body and psyche, lies the evidence of many grave, widespread problems in China's criminal justice system including irresponsibility, low quality of personnel, and dereliction of duty. If people do not understand these specifics, he continues, they have no basis for assessing a fitting punishment for those wrongdoers, and will not learn adequately from the case to prevent another tragedy like Ma Dandan's from taking

place again. Thus, the spirit of the Rule of law will not be achieved.⁸

A July 26, 2001 Labor Daily article, "Human Dignity is the First Thing," charges police with corruption and abuse of power. It said:

We are surprised at their desecration of the law and of the image of the People's Police; we are most surprised because, in their eyes, there is no such thing as human dignity. [The police] involved in this case deliberately ignored details [indicating Ma Dandan's innocence] in order to win. While we are surprised at the lack of attention paid to just this sort of violation of human dignity, we are more surprised that law cannot cover everything.⁹

Cui Li, a reporter from the China Youth Daily, quotes Yuan Shuhong, a law professor from the Institute of State Administration, as saying, "In pursuit of so-called 'evidence,' the police turned Ma Dandan into a 'man' so that they could accuse her of 'committing prostitution,' as if by turning white to black or a deer into a horse. Such activity is a case of forging proof and accordingly violates criminal law."¹⁰ "After reviewing this case," Yuan said, "activities committed by the police such as punishment, forced interrogation, and forcing a girl to do medical tests violate human rights laws. Since such violations are very serious and will badly influence [public sentiment], heavy punishment of those who are responsible is vital."¹¹ In this way, the media devoted much attention to the challenge police corruption represents to the establishment of Rule of law.

The second challenge after police corruption that the public media emphasizes

⁶ Lao Cai, "The Case of Virgin Prostitute: The Enlarged Virgin Hymen and the Ignored Small Detail," Beijing Youth Daily, 23 July 2001.

⁷ Lao Cai, "The Case of Virgin Prostitute: The Enlarged Virgin Hymen and the Ignored Small Detail," Beijing Youth Daily, 23 July 2001.

⁸ Lao Cai, "The Case of Virgin Prostitute: The Enlarged Virgin Hymen and the Ignored Small Detail," Beijing Youth Daily, 23 July 2001.

⁹ Liu Jiawei, "Human Dignity is the First Thing," Labor Daily, 26 July 2001.

¹⁰ Cui Li, "Tracking the Case of Virgin Prostitute: Specialists Say the Police Violated Law by Turning the Truth Upside Down," China Youth Daily, 11 May 2001.

¹¹ Cui Li, "Tracking the Case of Virgin Prostitute: Specialists Say the Police Violated Law by Turning the Truth Upside Down," China Youth Daily, 11 May 2001.

is the defective nature of the State Compensation Law. After the court ordered the Jingyang police to give Ma Dandan 74.66RMB (US\$9) as a remuneration, and Ma Dandan was so angered that she decided to launch the currently pending suit, public media responded with the publication of numerous articles, most of which presented the court's judgment as absurd. In a June 24, 2001 Legal Daily article, "The Law Separated From Human Beings," Zhou Shijun vehemently argues against the judgment:

Although Ma Dandan's individual freedom had been denied for as long as 23 hours, and although medical care for injuries sustained during police torture alone cost Ma Dandan over 1000RMB [US\$ 120], the court, 'according to the law', ordered the Jingyang police to pay merely 74.66RMB as Ma Dandan's compensation. As for the psychological damage to Ma Dandan and her family, our existing laws have no clear provisions [for remuneration].¹²

Zhou then poses a question and a possible solution:

Is the law not making fun of Ma Dandan? In the case of the 'Virgin Prostitute,' it is obvious that Ma Dandan suffered spiritually. Yet the State Compensation Law can only recognize physical and property damage, but not spiritual damage. Therefore, a pittance of 74 RMB is to serve as a spiritual remuneration for the police abuse of Ma Dandan.

Finally, Zhou sharply criticizes the law, which he views as unable to provide people with much-needed protection. "Everyone says, 'The net of law is so tight that no one can evade its punishment.'" However, in the case of the

'Virgin Prostitute,' why did the law act so generously to such arrogant defendants???"¹³

Likewise, when Cui Li asked Professor Yuan for his view of the State Compensation Law with respect to Ma Dandan, Yuan said he was not surprised at her small compensation, given that "the State Compensation Law states that the standard compensation for confining an individual's freedom is equivalent to the national average daily wage of the last year, which is to say, only about several dozen RMB. The 74.66 RMB compensation might come from the days that the plaintiff had been confined." Yuan then concluded that the biggest tragedy in this case was the State Compensation Law itself.¹⁴

In another article in the China Youth Daily published after Cui Li's, Chen Jieren also pointed out the problem as intrinsic to China's State Compensation Law. He quoted an unnamed specialist's opinion – that the law was flawed in its protection of people's rights:

The State Compensation Law's Articles 3 and 4 simply recognize the range of the state compensation, which only states that 'if, while implementing policy, a government entity and its staff violate citizens' physical or property rights, the victims have the right to ask for compensation.' Spiritual compensation, however, is not included.¹⁵

Even Wang Zhouhu, the Northwest Legal Institute professor who represented the Jingyang police in court, supported the court's judgment in favor of Ma. Responding to a Legal Daily reporter's question regarding whether he see the compensation plan as reasonable, he answers:

For the cases relating to the violations of fame and dignity, Article 30 of the State Compensation Law has only

¹² Zhou Shijun, "The Law Separated from Human Beings," Legal Daily, 24 June 2001.

¹³ Zhou Shijun, "The Law Separated from Human Beings," Legal Daily, 24 June 2001.

¹⁴ Cui Li, "Tracking the Case of Virgin Prostitute: Specialists Say the Police Violated Law by Turning the Truth Upside Down," China Youth Daily, 11 May 2001.

¹⁵ Chen Jieren, "The Tragedy of Ma Dandan, Rethinking the Dilemma of Law in the Virgin Prostitute Case," China Youth Daily, 8 August 2001.

recognized remuneration by means of retraction of slander or apology though not through monetary compensation. As a scholar, I, too, am unsatisfied with the contents of the State Compensation Law. Yet, under the current legal system, it is hardly possible for the courts to surpass [the compensation provisions in] that law. Morally and emotionally speaking, I am deeply sympathetic to the experience of the plaintiff, but laws are laws: reaching judgments should follow the law, use the law, and defend the law, and must not be influenced by popular opinion.¹⁶

Given that this very sanctity of the law, including the State Compensation Law, appears to only be preserved at the expense of what many scholars see as justice for Ma, the pressure to modify the law is high. Within this dynamic, the *Jiangnan Times*' publication of a speech delivered by a professor from China's Political and Legal University is timely. In his speech, he argues for a pressing need to revise the State Compensation Law: "Regarding damages caused by the state, spiritual damages outweigh property damages." The professor elaborates:

For example, if a man has been sentenced for ten days, he suffers more spiritual damage than physical and property damage. The earlier sensational case of 'Ma Dandan Virgin Prostitute' is a typical example. The victim [Ma Dandan] suffered great psychological as well as physical damage but merely obtained 74 RMB. All of us feel this is ridiculous. However, there is nothing to be done for her, because it is all the compensation law allows. Thus, monetary remuneration for spiritual damages should be added in the State Compensation Law.¹⁷

These views resonated with public opinion. A website belonging to the *People's*

Daily polled its members on whether they saw the court's judgment as "legal," with about 85% regarding it as "illegal," and 11% regarding it as "legal." Members were also polled on whether they saw the judgment as "reasonable," with almost 95% of respondents regarding it as "unreasonable" and only 3% regarding it as "reasonable." In this instance, the views expressed in the press and those held by the public are consonant, demonstrating a considerable sensitivity to popular sentiment on the part of a press that ultimately aims to serve the general public.¹⁸ Again reacting to public opinion, the media devoted much attention to a challenge facing the establishment of Rule of law, in this instance the shortcomings of the State Compensation Law.

Beyond police corruption and the nature of the State Compensation law, the application of law, specifically the state's willingness to act in accordance with the law, emerged as a third major question the public media posed. Yu Teng's report, "The Case of The Prostitute Attracts Attention of the People, Ma Dandan Breaks Her Heart to Restore Her Reputation," highlights the law's unequal treatment of authorities of higher status. Though the Jingyang police had tortured Ma Dandan brutally, Yu learns that:

The cause of the Ma Dandan "Virgin Prostitute" case, Peng Liang, has been transferred to another police station in the nearby town, Yunyang... [which made] Ma Dandan's family upset. What confuses them is why, in court, they always faced the two policemen. Why would no one do anything to punish Peng Liang, Wang Haitao and Hu Anding [together]?¹⁹

Yu Teng directs this question toward Wang Bingsheng, a *Huashang Daily* legal advisor, who replies that the Administrative Procedure Law was not applied to all responsible

¹⁶ Gao Di, "Using Reason to Defend Rights: Another Topic of the Virgin Prostitute Case," *Legal Daily*, 20 August 2001.

¹⁷ "Specialists suggest the need to revise the State Compensation Law," *Jiangnan Times*, 19 September 2001.

¹⁸ People's Website belonging to the *People's Daily*, 10 August 2001.

¹⁹ Yu Teng, "The Case of The Prostitute Attracts the Heart of the Nation, Ma Dandan Breaks Her Heart for Regaining Her Purity," *Huashang Daily*, 24 July 2001.

violators because they represent the state administration.

If in Wang's formulation, the police represent the state, does that role mean they will not be punished in line with law? A Labor Daily report, "Enforcing Administrative Law Must Not Ignore Morality," provides answers to this question. It argues that hierarchical consciousness is the main cause of apparent inequality under the law:

"Generally speaking, one main reason [for the practice of torture] is that some 'Official Masters' do not recognize common people's rights at all by heart. Do the illegal interrogation, stripping, and abuse of [an inferior] represent [unjust] damages [to Ma Dandan's well-being]? [From the masters' point of view] she is lucky to have received any remuneration, so why does she still want compensation for psychological damage? In addition, the failure [of the criminal justice system] to apply the law equally is another important contributing factor."²⁰

In a seminar on China's administrative law organized by the Beijing Youth Daily, Chen Yaowen, editor-in-chief of China Central Television (CCTV), argues that the administration is like a big basket; when its staff violate law, they would all be put in the basket, and there would be no punishment for a single person. Even if a policeman were driven out of the Party, he would still be a policeman. But what about Ma Dandan? After her humiliation, she might be burdened by the dispute throughout her life. A common person and an official are indeed unequal in present judicial practice. Since officials are treated as superior to common people, common people are unable to address a dispute with the administration as equals. In this case, Ma

Dandan was inferior and therefore in a weak position. If, on the contrary, it was Ma Dandan who had beaten a policeman, that would be real news.²¹

Another article by Chen Jieren included some jurists' views about the unfairness in the Ma Dandan case based on a study of criminal law itself. According to One jurist, Article 247 of Chinese criminal law indicates that if court staff use force on suspects, defendants, or witnesses to get testimony, they are to be imprisoned for no more than three years or be forced to do certain labor service. If their actions result in any injury or the death of the suspects, they are to be punished severely in keeping with Articles 234 and 232, which exhaustively detail punishments for those guilty of police torture. Despite this, the law in question does not protect people who are not suspects, defendants or witnesses such as plaintiffs like Ma, who might seek damages from any state entity in a lawsuit.²² This report also quotes a lawyer who claims that Article 247 of Chinese criminal law "actually harbors and protects those officials who use force to extract testimony."²³ In this way, the public media went to great lengths to stress the challenges facing the adaptation of Chinese society to rule of law.

While the public media has focused on the problems of the legal system, it has also carried several positive stories on progress toward rule of law. For example, after suffering torture and humiliation in the Jingyang police station, Ma Dandan and her family dared to sue the police, earning Yu Teng's admiration, as expressed in her article, "The Full Coverage of The Absurd Virgin Prostitute Case." "If I were a member of Ma Dandan's family," Yu writes, "I don't know whether I would have had the courage to face that law suit."²⁴ Indeed, Yu has great reason to admire Ma, as it is no easy task for a peasant family at the bottom of

²⁰ Wei Wenbiao, "Enforcing Administration Law Must Not Forget Morality," Labor Daily, 6 August 2001.

²¹ Chen Yaowen (in seminar), "Administration Law Doesn't Provide Compensation, Then Who Can Soften Ma Dandan's Injury?" Beijing Youth Daily, 31 July 2001.

²² Chen Jieren, "The Tragedy of Ma Dandan - Rethinking the Dilemma of Law in the Virgin Prostitute Case," China Youth Daily, 8 August 2001.

²³ Chen Jieren, "The Tragedy of Ma Dandan - Rethinking the Dilemma of Law in the Virgin Prostitute Case," China Youth Daily, 8 August 2001.

²⁴ Yu Teng, "The Full Coverage of The Absurd Virgin Prostitute Case," Huashang Daily, 24 July 2001.

the society to challenge the police, one of the most powerful organs of the government. The other major sign of progress toward rule of law to which much of the press devoted considerable attention was the willingness of many jurists and scholars to express their discontent with the Xianyang Court's judgment, even to seriously criticize the legal system; such criticism was unheard of two decades earlier.

The media's celebration of this openness is in fact what emboldened more prominent legal scholars to express equally candid, critical views concerning faults in China's laws and in its judicial system, which were in turn printed. Major figures including Yuan Shuhong of the Institute of State Administration, Wan Zhouhu of the Northwest Legal Institute, and He Weifang of Beijing University not only criticized the State Compensation Law, but also called for a revision of that law. As Yuan Shuhong argues, "state compensation [law] should not simply offer help to the victim and protect his rights, but it should also prevent the administrative and judicial government from violating the law."²⁵ Equally bold among these was China's People's Police University associate professor Yu Lingyun, who makes a clearer, if comparatively conservative, argument about changing China's legal system. "Ma Dandan got only 74 RMB spiritual compensation," Yu argues. "This is reasonable according to the law. What is certain is that the [judicial] system has flaws. Yet, as for any flaws related to the system, they can only be resolved by means of the system."²⁶

More significantly, several scholars felt comfortable in extending their blame beyond the State Compensation Law by denouncing the current Chinese judicial and social system that produced the haughty attitude of the police and allowed them to go unpunished. Wei Wenbiao and Chen Yaowen both argue that in China, a hierarchical social

system exists in which the police behave as the "official-master," above commoners such as Ma Dandan in terms of status, and by extension, possess the *de jure* right to preferential treatment by the judicial system. With respect to this problem, a Ph.D. student from China's Political and Legal University, Yang Weidong crystallizes the perceived need for fundamental social change:

As far as the origin of official power is concerned, it should be no different from citizen's power. [But] traditionally, people do not treat citizens' rights as possessing a status equal to those of the state. Rather, people often place the state and its administrators in a position superior to that of human rights. This is the question we must deal with. We should reconsider public rights as well as the coordination of the relationship between public rights and the citizen.²⁷

Generally speaking, then, we see that, despite the public's distaste for the Xianyang court's judgment, the media coverage of Ma Dandan's suit served to highlight progress in the establishment of the rule of law. Simple details that might be taken for granted outside China, such as the fact that the court reached its judgment in accordance with legal statutes as opposed to a judge's own whimsy, or even that both plaintiff and defendant decided, in spite of their different social roles, to face each other in court with legal representation, represent enormous progress in China. As Wang Zhouhu said to a journalist of the *China Youth Daily*, "I want to emphasize here that any organization or person, no matter whether [he behaves] lawfully or unlawfully, should have equal legal status and rights. Even in the case of a person as inexcusable as a murderer, he can also have the right to defend himself in court. This is a crucial embodiment of the rule of law."²⁸

²⁵ Cui Li, *China Youth Daily*, 11 May 2001.

²⁶ Yang Weidong (in seminar), "Administration Law Doesn't Provide Compensation, Then Who Can Soften Ma Dandan's Injury?" *Beijing Youth Daily*, 31 July 2001.

²⁷ Yang Weidong (in seminar), "Administration Law Doesn't Provide Compensation, Then Who Can Soften Ma Dandan's Injury?" *Beijing Youth Daily*, 31 July 2001.

²⁸ Gao Di, "Using Reason to Defend Rights: Another Topic of the Virgin Prostitute Case," *Legal Daily*, 20 August 2001.

In conclusion, in the case of the virgin prostitute, China's public media cover both challenges facing China's present legal establishment, as well as that establishment's progress toward the rule of law. The next questions therefore become: do the problems and progress for Chinese legal reform, as presented by China's media, match those identified by foreign media or specialist observers? More generally, what have the Chinese public media missed, and why?

III

Flaws in the present Chinese legal system reported by China's media have also received the attention of major overseas media and scholars. Chief among these is the widespread use of torture in law enforcement. Observers hailing not only from newspapers such as The New York Times but also from well-established human rights groups including Human Rights Watch and Amnesty International have reported a great deal of police torture as well, though I have seen nothing in their reports on the Ma Dandan case.

Craig S. Smith, a reporter for The New York Times, is no less of a stranger to police torture than the Chinese themselves. In an article entitled "Torture Hurries New Wave of Execution in China," Smith exposes a case in which a Chinese man, Liu Minghe, was wrongly charged with murder by Chinese police during the recent "Strike Hard" campaign against crime. Although Mr. Liu was finally acquitted, he was originally convicted based on a confession extracted by police torture, and had already spent five years in prison awaiting execution. He comments more generally in an article on the seriousness and frequency of torture activities in China:

China routinely executes more people than all other countries combined. This year, though, has been far from routine.

Without much notice at home or abroad, the government has begun sending unknown thousands of people to execution grounds, often after they have been tortured into confessing crimes that to foreigners seem minor.²⁹

Smith also quotes Liu's wife, who says that her husband "was handcuffed to a window so that he could either stand or hang from his wrists he was only allowed to eat a few bites of food by lowering his head to a bowl." Worse, a document submitted by Mr. Liu's lawyer said that he "had not been allowed to drink or close his eyes during the interrogation." Moreover, Smith adds, policemen who torture suspects are not only free of punishment, but are also actually rewarded by their superiors. "Though forced confessions are technically illegal, the country's Public Security Ministry – whose local bureaus are charged with investigating crimes – reward officers who extract confessions, while usually only lightly punishing those whose abuse goes too far."³⁰

Smith's report is not alone. In the 2001 Amnesty International Report, China's police torture and ill-treatment of people in custody is one of the main issues:

Torture and ill treatment of detainees remained widespread. Victims included both political detainees and criminal suspects. Incidents were reported in police stations, detention centers, prisons, labor camps, repatriation centers and drug rehabilitation centers. There were also frequent reports of the use of torture during non-custodial control measures such as 'residential supervision' and during the 'special isolation' of officials being investigated for alleged corruption.³¹

Similarly, the latest Human Rights Watch report also points out the legal abuses

²⁹ Craig S. Smith, "Torture Hurries New Wave of Execution in China," The New York Times, 9 September 2001.

³⁰ Craig S. Smith, "Torture Hurries New Wave of Execution in China," The New York Times, 9 September 2001.

³¹ "Amnesty International Report 2001: China," Amnesty International Publications, 2001. Available at: < <http://web.amnesty.org/web/ar2001.nsf/webasacountries/CHINA?OpenDocument>>.

in China, though it acknowledges some progress. “Legal reform moved forward, but judicial abuses were still common. In Hebei province, a high court on three occasions overturned murder convictions against four peasants, citing doctored evidence, torture, and threats. Local officials, however, decided to try the men again.”³²

After torture, Chinese media charges of unequal application of the law are matched by foreign media and scholars. Generally speaking, the Chinese legislators’ mindset, premised on the assumption that all are equal before the law, is seen as naive, given that such an ideal has never been fully realized in any society, let alone in Chinese society where a long-established tradition of inequality before the law has rendered equal application of the law an especially daunting task. As T’ung-Tsu Ch’u argues in his book, Law and Society in Traditional China, Confucian doctrine all but prohibits the application of law to implicate one’s superior. Even if an administrator violated a law, he would be treated differently from common people:

Unlike the common people, the nobles and officials were not under the jurisdiction of the ordinary legal mechanism and procedures. As a rule, the authorities had no right to arrest or investigate them unless permission to do so had been granted by the emperor. It was regulated in Han times that when nobles and officials from certain ranks were guilty, special permission had to be requested from the emperor before they were arrested or investigated.³³

Despite the fact that exceptions can be located during various emperors’ reigns, this tradition, Ch’u argues, has lasted throughout the dynasties.

Although Ch’u’s applies this assertion to the pre-republican period, the

unequal application of law in today’s China, to which Chinese news articles point in the Ma Dandan case, does not differ fundamentally from the phenomenon he outlines. Returning to Smith’s article, “Torture Hurries New Wave of Execution in China,” the eventual overturning of Mr.Liu’s conviction is attributed to his Party membership and relatively high social position: “Mr. Liu might be dead today had not his longtime Communist Party membership and social position been a factor that made the provincial court look more carefully at his case, his family and lawyers say. Money also helped. Mr. Liu’s family has spent more than \$36,000 on his defense, an enormous sum here.” Smith then underscores the exceptional nature of Liu’s reversal of fortune: “the vast majority of people executed in China have neither position nor money and their cases often get less scrutiny than Mr. Liu’s, defendants’ lawyers say.”³⁴

A New York based Chinese-language news publication, The Epoch Times, published a similar article on August 24th 2001 entitled, “Only Because His Father Runs Police Station, Rapist Declared Innocent Then Flees.” The article provides an account of how a man named Li Jian, whose father headed a police station, raped a woman with two accomplices in Gutian County, Fujian Province. The same night, the police arrested all three rapists. When the rapists were put to trial in the local court, judge Su Jiafu freed them claiming that evidence was not sufficient. Later, the truth finally emerged: Li Jian’s father bribed Su, asking him to free his son. Both cases demonstrate the continued correlation between sociopolitical status and privileged legal treatment; had Li Jian lacked such an “omnipotent” father, he would likely have been convicted.

As for China’s legal progress, though foreign observers tend to interpret “progress” somewhat differently, they too acknowledge that certain progress has been

³² “Human Rights Watch Report 2001: China and Tibet,” Human Rights Watch, 2001. Available at: < <http://www.hrw.org/wr2k1/asia/china.html>>.

³³ T’ung-Tsu Ch’u, Law and Society in Traditional China (The Hague and Paris: Mouton & Co, 1961), 177.

³⁴ Craig S. Smith, “Chinese Fight Crime with Torture and Execution,” The New York Times, 9 September 2001.

made. For instance, in a [Christian Science Monitor](#) article, “New for China’s Courts: Trained Judges, Standard Rules” Robert Marquand affirms changes taking place in China’s legal system:

As China undergoes a massive transition to a market economy – something that may bring social unrest – Chinese leaders are moving to reform the feudal and Soviet-era-style justice system in the hope that this will provide an important ‘safety valve’ for popular grievances. It is a vast and difficult undertaking.³⁵

Marquand then lists a number of new reform measures, regardless of whether they have been actually implemented.

Experiments are under way in local and state courts with relatively new rules, like the presumption of innocence for those accused. Legal aid centers are being set up in every county. And three weeks ago, a highly touted new mandate from the National Party Congress ordered all judges to have legal training.³⁶

From this, we can see that progress in the development of the rule of law in China has registered with journalists outside China.

Nor have such positive aspects of China’s legal system escaped the notice of Human Rights Watch and Amnesty International, both of which habitually criticize China’s poor human rights record. As the [Human Rights Watch’s World Report 2001](#) states:

On the positive side, Chinese authorities continued to reform the legal system, seeking international expertise to help design new legal

structures, train judicial and legal personnel, and help disseminate information on the reforms to the public, the courts, and the police.³⁷

Likewise, Amnesty International’s 2001 report also confirms China’s legal progress, “Although implementation of the law continued to be arbitrary in many cases, the government renewed efforts to encourage implementation of 1997 legal changes, including some aimed at improving the fairness of trials.”³⁸

In sum, not only have China’s public media have demonstrated a sensitive awareness to legal issues including police torture and unequal application of law as well as progress made in reforming China’s legal system, but this understanding on the media’s part is strikingly similar to the analysis of prominent journalists and scholars outside China. Still, questions remain: to what extent is the Chinese media’s interpretation accurate? Is that interpretation comprehensive?

As we know from the above Chinese public news articles, many journalists presented the inadequacy of the State Compensation Law as a big, if not the biggest, contributing factor to the “virgin prostitute” tragedy. Prominent law scholar Yuan Shuhong holds a similar view, specifically that the biggest tragedy in this case is the State Compensation Law itself. Was the weakness of the Compensation Law on its own in fact the main problem behind this case? Although the problem of incomplete legislation is not uncommon in the Chinese legal system, I find this argument dubious in light of the inconsistency with which law generally is applied in court settings. Even if China had a radically more encompassing State Compensation Law, the law would probably not fully implemented.

What about Chinese Criminal Procedural Law? Article 247 clearly states,

³⁵ Robert Marquand, “New for China’s Courts: Trained Judges, Standard Rules,” [The Christian Science Monitor](#), 16 August 2001.

³⁶ Robert Marquand, “New for China’s Courts: Trained Judges, Standard Rules,” [The Christian Science Monitor](#), 16 August 2001.

³⁷ “Human Rights Watch Report 2001: China and Tibet,” Human Rights Watch, 2001.

³⁸ “Amnesty International Report 2001: China,” Amnesty International Publications, 2001.

“Any judicial staff using force on suspects and defendants to acquire evidence will be imprisoned up to three years. If the force causes any injury or death, according to Articles 234 and 232, the perpetrators will be heavily punished.”³⁹ However, at the time of the Ma Dandan case, neither this Law, revised in 1996, let alone the UN’s Convention Against Torture, ratified in 1988, impeded police torture of Ma Dandan. As Smith notes, not only are police not punished for torturing suspects as mandated by law, but they are actually rewarded by their superiors for extracting a confession irrespective of the means of extraction. Given Smith’s observation that torture is rewarded rather than punished, future potential torturers have scant motive to heed the law.

What of the Presumption of Innocence codified in 1996? Article 12 of the Procedural Criminal Law states, “Before a People’s court determines a conviction, suspects may not be accused of being guilty.”⁴⁰ To date, this legal principle has rarely been respected. For centuries, Chinese people have been accustomed to a presumption of guilt, and this presumption is so deeply ingrained in people’s minds that it cannot be easily done away with. Guo Luoji, a Chinese scholar who was the first prominent individual to sue the Chinese Communist Party, discusses the deep-rooted tradition of “the presumption of guilt.” Guo writes, “For thousands of years in feudal society, China always applied the law of ‘the Presumption of Guilt.’ Once a person is arrested, he will automatically be presumed as guilty.” Guo argues such tradition is far from dead at the present – it is even evident in Deng Xiaoping’s policies. He then makes reference to Marx’s assertion that the traditions of forebears long since dead, like dreams, are still entangled in living men’s brains.⁴¹ Again, in the Ma Dandan case, the police arrested Ma Dandan because they assumed she was guilty even though they did not have valid evidence. Based on the presumption of guilt, the police

tortured Ma Dandan in order to obtain sustainable evidence by force. When they were torturing Ma Dandan, last on the police’s list of considerations was the principle of the Presumption of Innocence. Such violations of fundamental, albeit new, legal tenets do little to suggest that such ingrained practices can be legislated away.

An article in China Rights Forum discussing rights of Chinese lawyers argues that Chinese lawyers often have to confront empty legal promises. For instance, as far as the collection of evidence is concerned, though the law is well drawn, many man-made obstacles remain:

Both the CPL (Criminal Procedure Law) and the Lawyers Law specify that lawyers have the right to collect evidence about the case themselves. After the case is transferred to the courts for trial, lawyers are allowed access to certain materials about the case held by the authorities. During trial, lawyers should be able to cross-examine witness, review the evidence presented by procurators and conduct legal defense on behalf of defendants. However, in practice, lawyers frequently encounter obstacles in presenting a proper defense for their clients. These obstacles include: restricted access to evidence collected by procurators; insufficient power to collect evidence; and inability to cross-examine prosecution witnesses who have provided testimony but who do not appear in court.⁴²

These man-made obstacles cast more doubt on the public media’s general consensus that the incompleteness of the statutes is the biggest problem. The above argument is a persuasive indication that the problem lies in the overall implementation of the legal system and not just in the statutes. Economist He Qinglian When

³⁹ Chinese Criminal Procedure Law (Revised), 1996, Article 247.

⁴⁰ Chinese Criminal Procedure Law (Revised), 1996, Article 12.

⁴¹ Guo Luoji, Real Report of CCP’s Illegal Violations (Democratic University Press, 1997), 193.

⁴² “Empty Promises: The Role of Lawyers, Human Rights Protections & China’s Criminal Procedure Law in Practice,” China Rights Forum, September 2001, 41.

expresses a similar view: “I have heard more than once the sighs of legal staff, ‘a lack of law to implement is no longer the problem. The problem is non-implementation of the law.’”⁴³ Thus there is strong indication that Chinese public media have failed to provide an accurate analysis of the defects in China’s criminal justice system.

Why the failure? The Chinese media, although currently more autonomous than in the recent past, remains highly regulated by the government. In other words, the media is obliged by the authorities to serve the interest of government, the interest of socialism, and above all, the interest of the Communist Party. Under these conditions, few dare publish any article criticizing the political system as a whole. This does well to illustrate why coverage of the Ma Dandan case focused overwhelmingly on police torture and the weakness of the State Compensation Law, and said nothing about the political system that done as much to sustain the police as it has to reform the law.

Such avoidance of indicting the political system can be seen in Wei Wenbiao argument in the *Labor Daily* that the Ma Dandan case occurred because the police did not have any “basic moral sense” (*jiben daode yishi*). If the police had this, “this lawsuit would not have been necessary. Certainly, the premise is that the police should have a certain moral sense.”⁴⁴ Yan Yang’s, argument in *China Youth Daily* that the three policemen should assume exclusive responsibility, smacks of the same avoidance – he presents the police abuse of their administrative power as an abandonment and violation of national authority:

Although [the policemen’s] mistake was made when they were applying the national authority, the fault itself was a kind of individual activity and not a national one. In this ‘Virgin Prostitute Case’, these policemen involved should be responsible for all the mistakes.

When they become the defendants, they will not be the people’s police, but will become common people. And their mistakes are simply individual ones.⁴⁵

In fact, what was behind the police torture, violation of law, and the absurd compensation of 74 RMB was not their own lack of morality, but basic defects in the political system. In China, it is the Chinese Communist Party (CCP) that claims authority over almost everything. Even though Chinese leaders such as Jiang Zemin have called for establishing the rule of law (*yi fa zhi guo*) for years, so far the Party has not made any great progress to this end. Although the PRC Constitution states that all policemen, judges and prosecutors are accountable to the National and Local People’s Congresses, judicial personnel actually report to “Political and Legal Committees,” which are appointed by the CCP. Thus the judiciary is effectively accountable to the Party before the People’s Congresses, and by extension, the law.

In addition to being subordinated to CCP superiors within the judiciary, all judicial organs are concurrently under the authority of their respective local governments. Local governments are given the power over judicial workers’ employment, salaries, and housing; in this way the system provides local governments with the ability to influence judicial process. A lack of judicial independence is the byproduct of a political system that subjects the judiciary to the authority of both the CCP and local government. “Chinese judicial workers and Communist Party members alike had been accustomed to regard judicial independence as no more than a myth for the justification of bourgeois dictatorship;” Harold M Tanner remarked on the myth of Chinese judicial independence in his book *Strike Hard*. “In fact, as judicial power was regarded in instrumental terms as a means for the imposition of the will of the ruling class on social reality, the judiciary could never be independent.”⁴⁶

⁴³ He Qinglian, *The Trap of Modernization* (Beijing: Today’s China Press, 1998), 371.

⁴⁴ Wei Wenbiao, “Enforcing Administration Law Must Not Forget Morality,” *Labor Daily*, 6 August 2001.

⁴⁵ Yan Yang, “The Humbled 74.66 RMB,” *China Youth Daily*, 23 May 2001.

⁴⁶ Harold M. Tanner, *Strike Hard: Anti-Crime Campaigns and Chinese Criminal Justice, 1979-1985* (Cornell: Cornell University Press, 1999), 51.

Under the PRC political system, the CCP has supreme power, and as such acts as the real “supreme court” in China. Thus China’s courts, as Marquand wrote, “do not have an independent judiciary that can make decisions separate from Communist Party influence.”⁴⁷ Guo Luoji also argues, “That the CCP has the privilege of being exempt from any legal inspection is the lynchpin of the flawed China’s legal system.”⁴⁸ This fits well with an overwhelming indifference among police, judges and procurators toward common people’s complaints and even law suits against their abuses of power. Given this dynamic, they would know, even if they were to be dismissed under heavy public pressure, their dismissal would merely mean a job transfer.

In the case of Ma Dandan, Peng Liang, former head of the Jingyang County police station is now employed in Chengguan town police station. For Peng, the difference is simply a transfer from Jingyang to Chengguan; in Chengguan, he is still a People’s Policeman. Peng has hardly received serious punishment for his illegal acts of torture and forgery because his activity, as his lawyer Wang Zhouhu argues, was sanctioned by government. Therefore, it is the government that should be punished and not just Peng Liang. If Peng Liang violated the criminal law, then it means the government also violated the same law. Yet, in the present Chinese political system, who can sue the all-powerful government? It is a lawsuit without any hope of success. Due to the nature of Chinese media, few of them will ever dare challenge their boss, the government.

The media fails to notice that major progress has indeed been made in the Chinese legal system because it stems from their own changing role in the system. Had there not been mass news coverage of the Ma Dandan case, the result would have been quite different. In the aforementioned case, when the Jingyang police failed to apologize to her, Ma Dandan revealed her experience to the media. This resulted in numerous reports by the media, and

within a week, Ma Dandan became so popular that the local police, bringing gifts, had to go to her home to apologize. It is also due to the public media’s report that some famous lawyers provided Ma Dandan free service. Because of public encouragement, Ma Dandan stuck to her 5 million RMB compensation lawsuit against the police. Although the result may never favor her, as Yu Teng said: “the public media’s reports have already given Ma Dandan’s reputation.”⁴⁹ No matter the legal result, the Jingyang police lost the lawsuit, because their reputation of brutal torture has become well known in China.

Someone might say that this progress has only been made in the media. However, if the media can play such a significant role in legal cases, sometimes even changing the result or heavily influencing judges’ decisions, can anyone still believe it is only progress in the media? We have to realize that even ten years ago, such a role for the media in judicial cases would have been unimaginable.

IV

Although the Ma Dandan case exposes only the tip of the Chinese legal iceberg, it discloses both the progress that has been made and problems that remain. The problems revealed in the public reports have existed in China’s legal history and in those of other civilizations for centuries. The present government has inevitably inherited some, if not most, traditions from former dynasties. According to a Chinese saying, “three-inch thick ice cannot be made in one day.” If these problems have existed for a long time, a short time is insufficient to eradicate them. There has also been clear progress in the reports of the public media. More people are now willing to go to the courts to settle disputes than ever before. Such a thing was rare decades earlier, when there were not many lawyers, and disputes were largely solved by negotiation. Again, going back two decades earlier, we

⁴⁷ Robert Marquand, “New for China’s Courts: Trained Judges, Standard Rules,” *The Christian Science Monitor*, 16 August 2001.

⁴⁸ Guo Luoji, *Real Report of CCP’s Illegal Violations* (Democratic University Press, 1997), 123.

⁴⁹ Yu Teng, “Specialists Comment the Case of Virgin Prostitute”, *Huashang Daily*, Mar 24, 2001.

would find few scholars commenting on legal reform, an exclusive concern of the central government.

The Chinese public media is incorrect in arguing that a lack of laws is to blame for Ma Dandan's tragedy. It is important to realize that even the good laws

were not implemented. Thus the fundamental reason for China's continuing legal problems lies in a political system, which, for the Chinese public media, discussion is still taboo. Only a decisive change in China's political system will solve those remaining judicial problems.

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Between Worlds:

GUARDIANS IN TIBET AS AGENTS OF TRANSFORMATION

Kumar Narayanan*

I. INTRODUCTION

In a single step, one can cross the threshold of the Jokhang, stepping from the bustle of the Barkhor market to the devout atmosphere inside, moving from a heady jumble of merchants, soldiers, tourists and townsfolk, of warrens and back alleys teeming with shops and the sharp cries of peddlers, to a world of monks, devotees and deities, of the heavy smell of yak butter lamps and the hushed steps of pilgrims. Watching over this threshold, and every such space in Tibetan temples are vibrant, ferocious guardians who mount a fierce watch over entering pilgrims. Vivid and horrific, laden with imagery, symbolism, and dynamism, these guardian deities were old friends – I had seen them in temples across Asia, from my native South India all the way to China, from the crumbling caves of the ancient Silk Road to the shrines of modern Japan. Still, my encounter with the Tibetan guardian image was like no other: with a distinctly wrathful iconography featuring blazing eyes, brilliant colors, garlands of freshly severed heads, mythical weapons, and a furious bloodstained scowl, Tibetan guardians are singularly terrible apparitions.

Despite their prevalence in Tibetan Buddhism, guardian deities are defined by

contradiction. They are at once inside and outside, sacred and mundane, demonic and divine, wrathful in a compassionate and peaceful religion. In the following pages, I will attempt to explore the complex role and function of guardians in Tibet as well as account for the paradoxes inherent in these ferocious guardians.

Guardian deities, I will argue, are agents of transformation. In the first section I define guardian deities, and illustrate a few of the complexities in their classification. I then discuss how guardians are marginalized, and mark transitions between the profane and the sacred in both mandala and in temples. In an effort to understand the liminal identity of guardians, we look to the myth of the demoness and the Jokhang. I hope to demonstrate that this beautiful tale describes the deep roots that contemporary Tibetan guardians have in the arcane traditions that existed before Buddhism. Finally, I will attempt to capture guardians in motion, from demonic to divine, by looking to the elaborate mythology in which they are embedded. We find time and again that guardians change the spatial and religious axes in which they are embedded, and are themselves transformed by this process.

Like Lhasa itself, my case will revolve around the Jokhang temple (see III), the

* **Acknowledgments:** This project would not have been possible without many people and organizations: my advisors Bernard Faure and Mark Mancall, as well as to Hilton Obenzinger, all of whom were patient with me and my ignorance, the Undergraduate Research Office, and the Institute for International Education for their generous funding, especially to Richard Goldie who directly sponsored my project, James Russell and Liu Zhijun, who traveled with me and shared in my experiences, Sha Wu-tian, an archaeologist who gave me free access to the magnificent caves at Dunhuang, Pema Chodring, a monk at the Jokhang, the multitude of people in Tibet and in China who shared with me their kindness, and facilitated my journey and research, my family both for extensive help with Indian mythology and for worrying about me while in Tibet.

spiritual center of Tibet. First built over 13 centuries ago by the famous king Songtsen Gampo, the Jokhang has subsequently been rebuilt numerous times.¹ Nonetheless, its art, architecture, and sculptures allow us to decode the palimpsest of Tibetan notions of guardianship. The primary text must be the fantastic guardian image – but I will draw upon a diverse array of disciplines, including anthropology, history, art history, and religious studies in order to unpack the guardian image and its supporting mythology.

We begin our journey at the antechamber of the Jokhang, where the gentle scrape of prayer blocks and the soft murmur of chanting mixes with the thick fragrance of incense from the giant brazier. Pilgrims from all corners of Tibet and beyond are gathered here, but few are looking at the giant *lokpalas*, or guardians of direction, painted in brilliant color on the walls flanking the threshold. Beyond are the mystical inner chambers of the Jokhang, adorned with compassionate Buddhas and gently smiling apostles – but for a moment, at least, we shall linger at the threshold.

II. A BRIEF ORIENTATION

The classification of guardian deities in Tibet is characterized by complexity. In both India and China there are a few classes of guardians who fit neatly into categories, such as *dvarapala* - guardian of the gate, *lokpala* - guardian of direction, or *dharmapala* – guardian of duty; on the other hand, in Tibet there are not only several classes of guardians, but also numerous intersections between diverse representations of Tibetan guardians and protective deities

For all their diversity, guardian deities can easily be recognized by a combination of stereotypical location and wrathful features.² Typically, their facial features are “wrathful,” and it is possible to organize Tibetan deities

strictly according to their demeanor. In his beautiful book, *Ruthless Compassion*, Robert Linrothe introduces the category of *krodha - vighnantaka* (in Sanskrit “wrathful destroyer of obstacles”),³ or wrathful deities. Guardians are often wrathful, and share specific iconographical elements. In *Oracles and Demons of Tibet*, the classic compendium on the topic, Rene de Nebesky – Wojkowitz describes:

The wrathful protective deities are mostly described as figures possessing stout bodies, short, thick and strong limbs and many of them have several heads and a great number of hands and feet. The color of their bodies and faces is frequently compared with the characteristic hue of clouds, precious stones, etc. ... the mouth is contorted into an angry smile, from its corners protrude long fangs ... the protruding, bloodshot eyes have an angry and staring expression and usually a third eye is visible in the middle of the forehead.⁴

These are some of the features that typify guardian deities of Tibet (see IV). Many others, such as their bright color, the furious dance on the back of a pathetic creature, and the fire that rages behind them, are consistent with their ferocity and fierceness.

However, defining guardianship based strictly on wrathful iconography is problematic as wrathfulness has a wide scope in Tibetan religion. For example, relatively high status deities such as *Avalokitesvara* or *Manjushri* might have a wrathful form just as they have a compassionate form. Linrothe organizes the relationship between wrathful deities into a single diagram (see Figure 1). The key variable that differentiates these deities is relative status, and guardians are considered to be of lower status than other wrathful deities. The profane status of guardian deities often manifests itself in the

¹ Victor Chan, *Tibet Handbook* (Chico, CA: Moon Publications, 1994), 63.

² Robert Linrothe, *Ruthless Compassion: Wrathful Deities in early Indo-Tibetan Esoteric Buddhist Art*. (London: Serindia Publications, 1999), 20-29.

³ Robert Linrothe, *Ruthless Compassion*, 12.

^{4, 5} Rene de Nebesky-Wojkowitz, *Oracles and Demons of Tibet: The Cult and Iconography of Tibetan Protective Deities*. (Gravenhange: Mouton, 1956), 6.

placement of guardian deities. Typically, guardians appear on the periphery at thresholds, outer walls, flanking major deities, or in *gonkhangs*, special protector chapels on the outer kora of temples.

There are several classes of guardian deities, such as *lokpalas*, *dvarapalas*, and *dharmapalas*. Many of them have deep roots in India, which we shall see has great relevance in thinking about guardian deities of Tibet. The Indian guardians originated from the form of a *yaksa*,⁵ a curious tutelary deity that predated Vedic culture. Guardian deities followed the trajectory of Buddhism as it spread to the Kushans (in present-day Afghanistan), across the expansive Silk Road and into China during the first millennium.⁶ Though a developed concept of sacred space existed in China before the arrival of Buddhism,⁷ there is little question that guardians in their current form arrived with Buddhism via the Silk Road. Whether Tibetans first encountered Buddhism and its guardians upon their early ravages of central Asia, through intermittent official channels with China and India, or through a slow diffusion of ideas over the Himalayas remains unknown. However, there can be no mistake regarding the transformation that Buddhism effected upon Tibet.⁸ Buddhist protective deities were central players in this fundamental societal change. As in China, the guardians of Tibet arrived with Buddhism. However, I hope to demonstrate that the source of the current guardian image originates in the dialogue between Buddhism and indigenous Tibetan tradition.

III. AT THE THRESHOLD

In the Indian view, the threshold is a singular location, in suspension between inside and outside, as illustrated by the myth of Narasimhan,

the fifth avatar of Vishnu. According to the myth, the king Hryanakasyipu meditated for several years in order to win the gods' favor, and thereby achieved everlasting life. However, the gods refused to grant him immortality; instead, they restricted the conditions on his death. He could not be killed inside or outside, during day or night, by man or beast, or by weapons or natural causes. On the strength of these boons, Hryanakasyipu became arrogant and terrorized his subjects fearlessly. In response to the intense prayer of a young devotee, Vishnu returned to earth in the form of a man-lion, Narasimhan, in order to kill the tyrannical king. Narasimhan cleverly takes Hryanakasyipu to the threshold at twilight, and kills him with his nails. The crux of the story is that Narasimhan is only able evade all the restrictions on the circumstances on Hryanakasyipu's death by looking in between the conventions of night and day, man and animal, weapon and hand, as well as inside and outside. The threshold, the site at which Narasimhan kills Hryanakasyipu, is an interstitial place.⁹

Though this story is Indian, it reflects a conception of the threshold that is consistent in temples across Asia. As Bernard Faure observes, from a Chinese viewpoint of space and place, "The threshold in many local traditions, is a dangerous place, a focal point where space inverts ... and Turner, among others, has stressed that liminal states and individuals are both ambiguous and dangerous."¹⁰ In Tibet, whose temples and monasteries are, in part, inspired by both their Indian and Chinese counterparts,¹¹ the threshold is a definitively liminal place. The placement of guardian deities at the threshold, then, is indicative of their peripheral status as well as their ambivalence.

Guardians are also peripheral in mandala, the "sacred circles" which are central to Esoteric (or Tantric) Buddhism.¹² As a "geometric projection of the world reduced to

⁵Robert Linrothe, *Ruthless Compassion*, 46.

⁷ Edward Conze, *A Short History of Buddhism*, (London: Unwin Paperbacks, 1982)

⁸ Bernard Faure, "Space and Place in Chinese Religious Traditions," *History of Religions*. (Chicago: University of Chicago Press, 1987), 337-356

⁹ Marilyn Rhies, *Worlds in Transformation: Tibetan Art of Wisdom and Compassion* (New York: Tibet House in association with the Shelley and Donald Rubin Foundation: Distributed by Harry N. Abrams, 1999).

¹⁰ I first read this story as a comic book in the infamous *Amar Chitra Katha*. However, you can find a version of this story at: <http://www.hindumythology.com>.

¹¹ Bernard Faure, *Space and Place in Chinese Religious Traditions*, 351.

¹² David Snellgrove and Hugh Richardson, *A Cultural History of Tibet* (New York: F. A. Praeger, 1968), 78.

an essential pattern,”¹³ mandala portray everything from the sweep of life and time to stylized line patterns. Mandala have diverse potential psychological and philosophical functions, and as renderings of the Buddhist cosmos, offer deep insights on guardianship.

For instance, guardians, typically *lokpalas*, often appear in the outer rings of the concentric circles of mandala in their official capacity, keeping watch over the cardinal directions. Even mandala with no visible guardians retain the idea of a protected space. For example, in symbolic mandala composed of concentric geometry, a design element often alludes to guardians. Common representations include changes in color, or renderings of a charnel ground.¹⁴ Furthermore, the fabled abodes of many guardian deities include the hallmark features of mandala. The *lokpala* Vaisravana lives “In the middle of the four lakes lying in the four cardinal points.”¹⁵ Dorje Shugden is “surrounded by a protective circle of meteoric iron.”¹⁶ Both contain direct references to the directional matrix contained in mandala, and the carving out of a protected circle.

At their heart, mandala are protective structures. For instance, the traveling camps and the war camps of Tibet are arranged in mandalic patterns. In Stein’s *Tibetan Civilization*, it is possible to glimpse the Dalai Lama’s traveling camp (See VII), strikingly reminiscent of mandala. The similarity is no coincidence: judging from Stein’s account, early Tibetan camps are:

clearly comprised of concentric enclosures, for we are told of three successive gateways at a hundred paces distance from on another, *guarded by soldiers and sorcerers or priests* who escorted the visitor. In the center was a

great standard with a high platform ... the hierarchies lived at the center ... with a throne and a statue of a protective deity ... [emphasis added]¹⁷

This description of a ninth century camp, recorded by the Chinese at the historic signing of a treaty with the Tibetans, is shot through with mandala. Like all mandala, we see concentric circles revolving around a clear axis. This description suggests that mandala were practical protective enclosures; indeed, their layered structures make sense if one considers them as a fortification. Notably, the Tibetan traveling camps also feature “thresholds,” gateways between successive enclosures, with human guardians mediating each gateway. The date (around 822 CE) puts the camp/mandala on the cusp of Buddhism encroachment on Tibet and invites speculation about how deeply rooted mandalic thinking is in Tibet.

“A mandala delineates a consecrated superficies and protects it from invasion by disintegrating forces,” wrote the 11th century sage Abhayakaragupta, an Indian scholar revered by Tibetans.¹⁸ A demarcation between sacred and profane space, order and chaos is clear throughout mandala iconography; and even the simplest of mandala illustrate this concept. In line drawings of mandala from Tibet, and even China, circular patterns of lines are often embedded in more intricate, convoluted patterns. Beyond the outermost rings of this mandala is a jumble of disordered, undulating lines, in sharp contrast to the mandala itself, which is comprised of rigid geometry.

Mandala create a polarity between protected and unprotected space (see Figure 2, bottom left), between sacred and profane, divine and demonic, order and chaos, tamed

¹³ Reginald A. Ray, *Mandala Symbolism in Tantric Buddhism*, Ph.D Dissertation, University of Chicago, 1973, 148.

¹⁴ Giuseppe Tucci, *The Theory and Practice of the Mandala*. trans. Alan Houghton Brodrick. (London: Rider, & Co, 1961), 25.

¹⁵ This became clear to me through discussions with the proprietor of a mandala shop just behind the Jokhang, in Lhasa. I was able to discuss this only while haggling over the price of a painting.

¹⁶ Rene de Nebesky-Wojkowitz. *Oracles and Demons of Tibet*, 72.

¹⁷ Rene de Nebesky-Wojkowitz. *Oracles and Demons of Tibet*, 136.

¹⁸ Rolf Stein, *Tibetan Civilization* (Stanford: Stanford University Press 1972), 119.

and wild. It is possible to extend this polarity along several axes, such as between heaven and earth, stillness and motion, passive and active, or masculine and feminine. The polarity that is set up between mandala and non-mandala space is central to understanding the nature of the worlds that guardians stand in between. With one foot in mandalic space, and one foot outside of mandala, they are truly between worlds, the very worlds that the pilgrim crosses when stepping over the threshold.

As one moves inward in a mandala, one progresses in discrete increments towards sanctity, order, passivity, divinity, or heaven, rather like ascending a stepladder. The concept of incremental progression is where guardians become paramount in mandala. Guardian deities stand watch over the contact points, the “thresholds” between the different levels of mandala. As Ray comments, “the integration and hierarchical arrangement of [the mandala’s] terrible deities [indicates] not only their fundamental importance to the Tantric process of transformation, but also to the different stages of awareness bound up within this process.”¹⁹ The guardian deities directly catalyze the transition between different levels, changing the untamed, disordered world to the consecrated space of mandala.

The Jokhang temple is no exception, and “encloses” the deity Jowo, around whom the entire temple revolves. The polarities of mandala are articulated in a pilgrims progress throughout the Jokhang temple. At the periphery, one encounters guardians, fiery, motive scrollwork, black frescoes, angry dancing demons and tiger skins. Moving inward through successive thresholds, the artwork retreats not in color but in temper: gods and famous monks can be observed to offer blessings with tranquil expressions, until finally the intrepid pilgrim glimpses the ultimate compassionate smile of Jowo in the inner sanctum, and then returns to the melee of the world outside.

The role of the guardians in the transformation of mandala is only the first level of their story, the first layer on our palimpsest of guardianship. The Tibetan rendition of guardian deities encompasses more than articulations of consecrated space. To visualize these underlying layers of guardianship and engage their identity, we must look deeper at the Jokhang, not in space, but in time.

IV. THE JOKHANG AND THE DEMONESS

There is rumored to be a stone in the Jokhang that sounds like the sea. According to legend, behind this stone is a passageway that leads to an ancient, subterranean lake.²⁰ In the Tibetan view, this lake, over which the entire Jokhang is built, is no ordinary body of water, but the heart of a gigantic demoness. The tale of the demoness, and how she was subdued is an organizing principle in thinking about the adoption of Buddhism in Tibet. The story accounts for the construction of the Jokhang and her sister temples, as far afield as Kham²¹ and Bhutan and details the shift towards Buddhism in Tibet. Primarily, it is a story of the transformation of Tibet and the fate of all guardian deities.

The tale goes something like this: Songtsen Gampo, the Tibetan king who played a major role in consolidating the power of the Yarlung Valley kings, wanted to build a worthy temple to enshrine the gifts which he received as part of his dowry from his marriage to the Chinese Princess Wencheng. She brought with her many fantastic treasures, including a magnificent Buddha statue, Jowo. Their original attempts to build a temple failed, being mysteriously undone at night. To determine the source of the trouble, the king and Princess Wencheng visited nearby Pabonka monastery and divined the presence of a supine demoness who inhabited the whole of Tibet.²²

Upon perceiving the demoness, King Songtsen Gampo set out to tame it. He

¹⁹ Lokesh Chandra, *Tibetan Mandala* (New Delhi: Aditya Prakashan, 1995).

²⁰ Reginald A. Ray, *Mandala Symbolism in Tantric Buddhism*, 194-195

²¹ Chris Taylor, *The Lonely Planet: Tibet*. (Hawthorn, Australia: Lonely Planet Publications 1995).

²² Eastern Tibet is located in the western half of the modern Chinese province of Sichuan.

determined that her heart was contained in a lake at the site of the present day Jokhang:

The most important and vital landmark of the “*Srin*-land,” is the “Plain of Milk” at Lhasa. It is of crucial importance, because this is the very spot where her heart-blood is pulsating. The three mountains which encircle the “Plain of Milk” denote her two breasts, and are her lifeline ... Her subjugation is successfully achieved by the erection of Buddhist structures upon her body, at cardinal and other significant points. Having been pinned down by brute force, she is now completely immobilized, and the construction of the temples can begin: on her arms and legs, on her hips and shoulders, and on her knees and elbows, thirteen temples in total are raised. By erecting these edifices, the Jokhang, as the dominant structure—placed on top of her heart—her life force is repressed and she is pacified, but not defeated²³

This story is one of taming, and subjugation. The fate of the *Srin mo* demoness²⁴ can only be seen as symbolic: but if this is a story of conquest, what is the element that is buckling under, and that which is forcing it down? One could construe the *Srin mo* demoness as a manifestation of the unruly, hostile elements of Tibet, an instance of “adverse and unaccountable influences” which the guardians must combat. Thus in the Tibetan view, “the entire shape of the landscape perceived as highly deleterious. The [tale of the demoness] goes on to attribute the unsavory behavior of the country’s inhabitants, such as banditry, etc. to the *Srin mo* land.”²⁵ The *Srin*

mo demoness can be thought of as an “exponent of a chthonic and telluric forces of the cosmic substratum,”²⁶ supporting the relationship of the demoness to physical landscape of Tibet. If the demoness stands for the harsh landscape and unruly aspects of Tibetan culture, then Buddhism can be seen as an impetus to tame the land and transform it into a sacred, habitable space.

However, if we further unpack the symbolism of the demoness, it becomes clear that the demoness transcends a simple metaphor for the landscape. In her insightful piece “Down with the Demoness, Reflections on Feminine Ground in Tibet,” Janet Gyatso identifies the subjugation of feminine ground as domination over a pointedly female force. Both Gyatso and Rosemarie Volkmann suggest that the demoness subduing myth is a kind of rape of Tibet. Though the implications of such a reading are beyond the scope of this essay,²⁷ we shall return to interesting variations upon this theme later.

The method of subjugation that is prescribed is to pin the demoness at critical points, involving physical control of the demoness by erecting sacred edifices over her hips, joints, arms and legs.²⁸ Elaborating on this idea, Stein points out that the “conquering and civilizing function ... was performed in accordance with Chinese ideas: in square concentric zones, each boxed in by the next and extending further and further from the center.”²⁹ This construct has to be seen as mandala – the explicit reference to the cardinal direction and the concentric zones of temples are the hallmarks of mandala space. Furthermore, it is telling that the impetus for the subjugation of the demoness stems from Princess Wencheng, whom we may think of

²³ Victor Chan, *Tibet Handbook*, 63.

²⁴ Rosemarie Volkmann, “The Genetrix/Progenitress as the Exponent of the Underworld” in Ria Kloppenborg and Wouter J. Hanegraaff, eds., *Female Stereotypes in Religious Traditions* (Leiden, NY: E.J. Brill, 1995), 198.

²⁵ Akin to an Indian *rakshasa*.

²⁶ Janet Gyatso, *Down With the Demoness: Reflections on a Feminine Ground in Tibet*, 37.

²⁷ Rosemarie Volkmann, “The Genetrix,” 197.

²⁸ Both Janet Gyatso and Rosemarie Volkmann provide a wonderful and intelligent feminist analysis of the temple that subjugates the demoness. Later, when I introduce Drukpa Kunley, an occult divine madman, I shall once again return to a sexual reading of subjugation. This is an interesting topic that is the focus of an altogether different direction of inquiry into the relationship between sex and Esoteric Buddhism.

²⁹ Rolf Stein, *Tibetan Civilization*, 39. Here is Stein’s original citation: “rGyal-rabs-rnamesk-kyi ‘byung-thsul gsa-ba’l me-lon. 104 Dege By bsodnams rgyal – mtshan, 1508”

as the long arm of Chinese influence. The Jowo statue, a marriage present from China, is a rather obvious attempt to convert and pacify the heathen Tibetans, whom the Chinese view as a “savage race”³⁰ threatening their western trade routes.³¹

The fate of the demoness foretells the story of guardians, who have their origins in the demonic world. Foreign Buddhism attempts to fix local gods, as indicated by Faure:

...while Ch’an masters were intent on desacralizing places such as mountains, and imposing on them the abstract space of their monasteries, they became engrossed in enshrining relics and erecting stupas in order to fix dangerous chthonian influences, the creating of new centers, new sacred spaces or places that were protected by local gods and were in due time identified with them.³²

The fate of many local gods, then is to be fixed (or, if you are a *Srin mo* demoness, impaled) and then converted to guardians of the very spaces that converted them.

Another key point is that the demoness story is thought to have penetrated Tibetan consciousness well after the construction of the Jokhang. The late Michael Aris identifies the twelfth century *Mani bka’bum* as the seminal *gter-ma*³³ text for the Buddhist retrospective account of Songtsen Gampo’s reign and the first appearance of the supine demoness in Buddhist literature.³⁴ Though the *Srin mo* demoness may have deep origins in Tibet, there is a distinct revisionist aspect to the myth of the demoness. This is a story of Buddhism looking back and contemplating its own unfolding in an alien land.

The conversion of Tibet to Buddhism was a slow and difficult process,³⁵ suggesting another possible rendering of the demoness – she represents not only landscape, unruly Tibetan culture, but also entrenched indigenous tradition. Evangelical Buddhists would obviously consider this tradition an obstacle: profane, demonic, chaotic, feminine, and uncivilized. Rolf Stein, in his pioneering treatise on Tibetan culture, *Tibetan Civilization*, finds a volume of evidence for pre-Buddhist customs, and groups them under the heading “The Nameless Religion.”³⁶ Though these pre-Buddhist customs are opaque to present generations, they are a perennial specter in our consideration of Tibetan guardians and we will find evidence of them below in the gods of cairns and local gods.

The story of the demoness is one of Tibet’s transformation. An invading force, Buddhism, enters Tibet, and subjugates the threat opposing its arrival. Tibetan society was profoundly changed by the arrival of Buddhism, and Buddhism was itself changed in this process:

... what interests us particularly is just how much the native Tibetan genius turned all these foreign influences in specifically Tibetan directions, and how much of the original Tibetan indigenous culture remained as a coherent part of the new Tibetan Buddhist civilization.³⁷

As we think more about the origin of guardianship, it behooves us to follow these roots in the traditions that predate Buddhism and explore the native Tibetan genius, for the origins of guardian deities and the fate of the “nameless religion” in Tibet are intimately intertwined.

³⁰ Rolf Stein, *Tibetan Civilization*, 39.

³¹ The Sui Shu is a Chinese text found at Dunhuang dating from the Sui Dynasty 581-618 BCE. Quoted in: Janet Gyatso, *Down With the Demoness: Reflections on a Feminine Ground in Tibet*, 34.

³² Tibet was a major power in Central Asia, with an immense sphere of influence that included the Silk Road. For more information, see Christopher Beckwith, *The Tibetan Empire in Central Asia*. (Princeton: Princeton University Press, 1987).

³³ Bernard Faure, “Space and Place in Chinese Religious Traditions,” 355.

³⁴ A tradition or ‘sect’ within Tibetan Buddhism

³⁵ Janet Gyatso, *Down With the Demoness: Reflections on a Feminine Ground in Tibet*, 36.

³⁶ David Snellgrove and Hugh Richardson, *A Cultural History of Tibet*, 92-93.

³⁷ Rolf Stein, *Tibetan Civilization*, 191-223.

V. THE ORIGINS OF GUARDIANS

The hillsides of Tibet are sprinkled with heaps of stones – cairns – brightly festooned with prayer flags, yak skulls, and bits of yak fur. Rolf Stein describes a Tibetans' interaction with these cairns:

Every traveler that crosses the pass lays a stone on the heap, or, failing that a bone, rag, or tuft of wool or hair. At the same time, he calls out "The gods (of the sky, *lha*) are victorious, the demons are vanquished, *ki-ki, so-so!*" The exclamations at the end are war-cries. They are accounted for by the warlike nature of the gods (*drga-lha*) and the idea of passing through a difficult or strategic place. It is for this reason that other crossing places -- fords and bridges -- are marked in the same way.³⁸

As with the temple threshold, cairns denote a point of contact between two distinct regions of sacred space. In many cases, cairns simply mark the pass between two valleys or a river crossing. Summit cairns, perched atop mountains, denote the more subtle transition between heaven and earth. The stacked stones of cairns, with their tapered tower, are designed to represent the *mu*, rope, or ladder to the sky.³⁹ One finds cairns in a similar capacity at other auspicious locations, and at other salient junctions between earth and sky.

Like guardians, cairns confer protection at ambivalent places, whether it is the threshold or the mountain pass. All Tibetan travelers, from bus drivers to nomads, invoke the

protection of the gods before proceeding. According to Drukpa Kunley⁴⁰, a "mad" saint, poet and shaman of Tibet:

Formerly, at the time when the world was made, the heap of stones was built on the white glacier. *It is the road-marker of man's protecting gods ...* afterwards people built it in their own country or village -- road marker of the mighty god of the country; then by lake and rock -- road marker of the gods of the soil [emphasis added].⁴¹

Protection, then, is a fundamental part of cairns, and is part of their original charter. An even more interesting point that Drukpa Kunley points out is the connection between cairns and local deities of place, the "gods of the soil" and the country or village gods, a point that we shall return to shortly.

Stein points out that, "Dimly, too, the heap of stones must have conjured up the idea of a tomb."⁴² Tombs are perhaps the aboriginal protected space, and perhaps were the birthplace of guardian deities. As Sha Wu-tian, a Dunhuang archeologist, sketched for me, guardians have been found throughout the construction of Chinese tombs. The famous terracotta army of Qin Shi Huang is an army of such guardians, protecting the tomb of the ancient Chinese tyrant.⁴³ Though little is known about early Tibetan burial practice, Stein points out that "it is possible that the early kings [of Tibet] were inspired by great Chinese tombs."⁴⁴

In Tibet, the original tomb guardians may have descended from actual people. The tomb was "guarded by ministers who behaved 'like

³⁸ David Snellgrove and Hugh Richardson, *A Cultural History of Tibet*, 73.

³⁹ Rolf Stein, *Tibetan Civilization*, 206.

⁴⁰ Rolf Stein, *Tibetan Civilization*, 212.

⁴¹ Who was Drukpa Kunley? I find that question difficult to answer. One was prophet, poet, saint and shaman somehow rolled together. For more information and an account of his charmed life, see *The Divine Madman*, translated by Keith Dowman. Drukpa Kunley's ribald adventures are a strange brew of sexual exploits, inspired religion, and Tibetan humor. He is a favorite subject of beer hall stories, a saint "closest to the hearts of the common people." For me, Drukpa Kunley is a rare vista into a different Tibetan religious world, beyond and before Buddhism. Notice that his comments, in the space of three lines, unify much of the intersection between cairns, protector, and local / country gods that I am trying to articulate. For more information, see: Dowman, *The Divine Madman* (London, UK: Rider and Co., 1980).

⁴² "Autobiography of Drukpa Kinley (80a-b)" in Rolf Stein, *Tibetan Civilization*, 98. See also: "Autobiography of Drukpa Kinley xylograph 2 vols 16th century" (Stein's original citation).

⁴³ Rolf Stein, *Tibetan Civilization*, 206.

⁴⁴ Shaanxi Museum, *Qin Shi Huang: Pottery Figures of Warriors and Figures* (Shaanxi Museum, 1981).

dead men' and were thus enshrined as 'servants of the corpse.'"⁴⁵ According to an early Chinese text, some rituals included the practice of posting a living person by a fallen warrior as a sort of guardian. This living guardian would accept food and clothes for the fallen man. Stein discusses ancient kings whose subjects were buried alive with a king's statue.⁴⁶ In time, these living tomb guardians have been converted to effigies and sculptures, the inspiration for the present incarnations of guardian deities. In any case, tombs are a sanctified space, and similar to mandala and temples, are delineated from the outside world by guardians.

The typical guardian image is replete with the symbolism of death:

Human corpses - mummified, fresh, and in decomposition - are lying scattered around ... inside, the palace, corpses of men and carcasses of horses are spread out, and the blood of men and horses streams together forming a lake. Human skins and hides of tigers are stretched into curtains. The smoke of the "great burnt offering" (i.e. human flesh) spreads into the ten quarters of the world. Outside, on top of a platform, revived corpses and raksasas are jumping around, and the four classes of accompanying attendants and skeletons perform there a dance. On all sides are hung as tapestries fresh skins of elephants and skins drawn from corpses⁴⁷

According to their mythology, guardian deities are often found at cemeteries and at charnel grounds,⁴⁸ and, as mentioned in previous sections, are rendered this way in mandala. Some of their most distinguishing features, such as the crown of five skulls, the skull cup,

bloodstained mouths, or the freshly severed heads are direct references to death.

The tight relationship of guardians with death, or *Bardo*,⁴⁹ is a further component of their transformative capacity. Charnel grounds and cemeteries are located on the periphery of human settlements and lie well outside the conventional conception of sacred. Like the guardians themselves, the cemetery is at once demonic and divine, pure and impure. The charnel ground and the cemetery are points of transition between life and afterlife, heaven and earth, and the cemetery is a sort of threshold. At the crucial transition between life and death, the guardian serves to transform the soul along the same axes that they transform space in mandala: impurity into purity, chaotic into ordered, demonic into divine, profane into sacred.

Another common abode of guardian deities are the mountains of Tibet. As Stein observes, mountains are representative of both tombs and guardians:

"Mountain and tomb were analogous in character ... where human or stone 'witnesses' guarded the tombs of the historic kings ... the tomb guardian of Yumbu Lhakar, the first royal castle was the sacred mountain Shampo Kangtsen."⁵⁰

The first kings of Tibet are not known to possess explicit tombs; rather, mountains have become their tombs. The tombs of later kings, such as at Chonggye, are built in their image. Furthermore, the spirits of the first kings of Tibet are the source of many of the gods of the countryside as well as those of landscape, and have taken up residence among the breathtaking mountains of Tibet.

The interwoven symbolism of tombs, mountains, cairns, and guardians is beautifully

⁴⁵ Rolf Stein, *Tibetan Civilization*, 202.

⁴⁶ Rolf Stein, *Tibetan Civilization*, 133.

⁴⁷ Rolf Stein, *Tibetan Civilization*, 201.

⁴⁸ Rene de Nebesky-Wojkowitz, *Oracles and Demons of Tibet*, 137.

⁴⁹ This is the 'burning ground' in Hindu mythology, site of all types of demons, spirits, and other unfriendly creatures. Typically, decaying corpses might pile up here, waiting for cremation. I am not sure how Tibetan view cremation. As far as I know, cremation has never been a major death rite in Tibet.

⁵⁰ W.Y. Evantz - Wentz, *The Tibetan Book of the Dead* (Oxford, UK: Oxford University Press, 1974). I spent a lot of time looking through this book, and determined that an exploration of wrathfulness in the *Bardo Thodol* is a fascinating but altogether separate topic.

intricate. Simply put, each of these facets of Tibetan tradition are related through their reference to sacred space and Tibetan ideas of protection. They also encompass the idea of “local” or country gods, as the passage from Drukpa Kunley’s narrative above illustrates. Many of these local gods who originated from the life spirits of Tibet’s first kings, inhabit foci of the sacred landscape, such as mountains and rivers.

Many of the “gods of the country” – local, indigenous gods had interesting fates as Buddhism encroached on Tibet:

Both Bon and Old Order (Nyingma, Tibetan Buddhism’s oldest sect) developed new sets of temple-rituals, which paid honor both to the buddhas and the new Buddhist gods of Indian origin, as well as to selected indigenous gods, who *from now on began to manifest themselves as protectors of the new religion*.⁵¹

Indeed, the origins of guardians lie outside of Buddhism, and several of the surrounding mysteries thus fall under a new light. Consider the *gonkhang*, the protector’s chapel that stood unique to Tibetan temples. In Trandruk monastery, sister temple to the Jokhang in the Yarlung Valley, I saw angry masks fixed upon the threshold, scowling fury in bright colors. A monk sat in one corner, beating a deep, resonant drum. Inside, protectors were positioned slightly at or above eye level, covered by a cloth to shield the eyes of the pilgrims from their horrible faces. Like the masks on the threshold, nothing about the *gonkhang* is Buddhist; rather it could potentially be linked to the indigenous, pre-Buddhist traditions.

Typically, after local deities are tamed, they then faithfully serve Buddhism as protectors under oath. Padmasabhava, the great Buddhist missionary from India, is the keeper of many of these oaths: “many Tibetan deities

[are] said to have tried to obstruct Padmasambhava’s mission in Tibet, but were eventually subdued and even turned into protectors of the Buddhist teachings.”⁵² The same principles we find in the colorful stories of Drukpa Kunley, who demonstrates “not merely how to destroy demons, but [also how] to transform them into guardians and protectors of the Buddha’s Truth.”⁵³

We find, then, that the fate of the demoness is the fate of many of the guardians of Tibet. Guardians are subjugated local gods, who have been converted and transformed by Buddhism. It is important to remember that the demoness is *not* killed,⁵⁴ instead, she is transformed: her story and the story of guardians across Tibet are stories of subjugation, of taming a threat from a powerful opposing force.

The story of subjugation plays out in the guardian image, where we often see guardians dancing on the broken backs of pathetic creatures as acts of violence. The violent essence of the guardian image, then, may be linked to its origins; indeed, though freshly severed heads, pouches full of disease, and skin smeared with human blood can be construed as philosophical devices, this denies the rather obvious demonic imagery of these hideous talismans. Such fierce and disgusting iconography may suggest something of the stress of syncretism upon both Buddhism and an indigenous tradition in Tibet. If this is the case, then guardians are a point of departure for a reading of the subjugation of Tibet that is divergent from the monastic view: that of the forcible conversion of the local populace to an alien religion. The violence and wrath of the guardian and the fear that it inspires are testaments to the stress of transformation.

Guardians in Tibet, then, have primary connections to the landscape, as well as with cairns and tombs via their interface with sacred landscape and space. Guardian deities, who may have distant beginnings in an indigenous, pre-Buddhist Tibet, must be

⁵¹ Rolf Stein, *Tibetan Civilization*, 206.

⁵² David Snellgrove and Hugh Richardson, *A Cultural History of Tibet*, 109.

⁵³ Rene de Nebesky-Wojkowitz, *Oracles and Demons of Tibet*, 154.

⁵⁴ Keith Dowman, *The Divine Madman*, 17.

understood as creatures of syncretism with encroaching Buddhist deities. Today, they appear in the same places and roles as Buddhist protectors. The guardian deities are emblematic of a tamed, indigenous religion, but they are also purveyors of the very process of subjugation that they have experienced. Guardians transform threats to Buddhism and are themselves transformed along the similar axes, and their vivid iconography bears testament to the tension and stress of transformation.

Though Buddhism chooses to view the guardians as tamed, the indigenous, subjugated religion is not incapable of fighting back. Indeed, as I looked at the guardians of the Jokhang day after day, week after week, I could not be entirely sure that they were holding still.

VI. THE AMBITION OF GUARDIANS

One of the most beloved deities in Hinduism is Ganesa, the elephant headed god. Any child in an Indian family inevitably hears volumes about Ganesa. Of course, one of these stories relates how it was that Ganesa came to have an elephant head:

Parvati is disturbed by her husband while she is bathing. Displeased, she decides she needs a faithful doorkeeper. With the 'impurities' from her ablutions, she creates a handsome young man [Ganesa], who is to allow no one to enter. Siva tries to force his way, but Ganesa stops him. Siva calls in the troops, Visnu (and Skanda) are repelled, but by means of a trick, the creation of a beautiful woman named Maya who momentarily distracts the guard, the assailants cut off Ganesa's

head. Parvati is furious and creates goddesses who attacks the gods. She finally agrees to make peace on condition that her 'son' be brought back to life. Siva cuts off the head of an elephant that has only one tusk and puts it in place of Ganesa's severed head. He entrusts him with the command of the armies [ganas].⁵⁵

In this myth, Ganesa is the faithful guardian. He sacrifices a part of himself in the line of duty and is transformed as a result. This change is a recurrent theme in many tales of guardianship.⁵⁶

Another tale, recounted in the *Bhavagatham*,⁵⁷ provides further insight on the mobility of guardians. Jaya and Vijaya were evil kings. In order to redeem themselves, they had to be born three times on earth, always as enemies of Vishnu and slain by the hand of his avatar. These three rebirths include famous villains in the Vaishnavite cannon, such as Sisupala and Kamsa (in the Mahabharata) Ravana and Kumbakarna (in the Ramayana) and Hiranyaksa and Hiranyakasipu—the very same king who was slain at the threshold by Narasihman, Vishnu's fifth avatar. After their time on earth, the two gatekeepers were allowed into the good graces of Vishnu, where they were allowed to become the gate guardians of Vaikuntha and of Vaishnavite temples.⁵⁸ Once again, the concept of transformation is part and parcel of guardianship. A key point is that there is a direction to their change. Jaya and Vijaya begin far out of favor with Vishnu, and end up as vital, but still peripheral figures in Vaishnavite temples. They are moving *through* the position of the guardian of the gate. Guardians are *not* gods who fall out of favor, and are banished to the periphery; rather, they are in motion from profane to sacred.

⁵⁵ Janet Gyatso, *Down With the Demoness: Reflections on a Feminine Ground in Tibet*, 42.

⁵⁶ Rolf Stein, *The Guardian of the Gate*, 896.

⁵⁷ "Parvati, and the closed door to their room is guarded by Ganesa. Krsna throws the ax at him, and Ganesa consents to receive the blow with one of tusks, which breaks," Rolf Stein, *The Guardian of the Gate*, 897.

⁵⁸ *Bhavagatham*. This is a text of collected oral stories in Tamil, my mother tongue. It is mainly about Krishna and Vishnu. It is a major text in the Vaishnavite canon. Its relevance to Tibet is perhaps marginal; I merely wish to illustrate that dynamism is part of guardianship. An English version is available at: <http://www.hindumythology.com/>

The “direction” of their transformation, from profane to sacred is rooted in the resilience of indigenous tradition. We would expect these indigenous forces to “fight back,” to vie for a stake in the present religion of Tibet. In Tibet, the beautiful story of Dorje Shugden illustrates the tenacity of indigenous Tibetan religion. Dorje Shugden is currently the focus of a firestorm that is currently raging through the Gelugpa sect stemming from deep historical and textual roots.⁵⁹ I believe that the conflict illustrates the ambition and motion of guardian deities. Consider the relatively recent origin of story of Dorje Shugden:⁶⁰

Diseases raged in towns and villages, which killed people and animals. The Tibetan Government suffered misfortunes repeatedly and even the [fifth] Dalai Lama was not spared: some unknown, evil force began to manifest itself, mostly at noon, by turning over the dishes with the food which was being served to the Dalai Lama and causing damage to his personal property ... Astrologers and oracles soon discovered that a vengeance-seeking spirit was the cause of all this trouble. Many experienced lamas and magicians tried to destroy this evil force or to avert at least its harmful influence ... the Tibetan Government requested the learned and experienced head-lama of Mindoling monastery to catch and destroy the roaming demon. The head-lama, taking his seat in front of the Potala, performed *asBying sreg* ceremony, and by the power of his magic incantations he managed to attract the spirit into a ladle which he held in readiness in his hand. Just when he was going to burn his captive, *bSke khrad*, the wrathful aspect of *Tsang pa*, decided to help the imprisoned spirit ... For a moment, the head-lama’s attention got

distracted from the ladle and immediately the imprisoned spirit slipped out. Since all subsequent trials proved again in vain, the Tibetan Government and the spiritual leaders of the Gelugpa sect, who by now discovered that the cause of all the misfortune was the injustice they had done to *bSod nams grags pa*, decided to request his spirit to make peace with them, and instead of causing further harm to become a protective deity of the Yellow Hats. To this the spirit agreed, and under the name Dorje Shugden, he became one of the chief divine protectors of the Gelugpa order and a dutiful guardian of its monasteries.⁶¹

Several features of this story are by now familiar. Though the demon is not pinioned, as in the story of Jokhang, there is a clear bid to tame and control the demon by putting it in a ladle. When this attempt fails, the Tibetan Government resorts to diplomacy in order to contain the demon, which ultimately prevails. Still, the drive to fold the demon under the umbrella of Buddhism is unambiguous.

Like many guardian deities, Dorje Shugden is a demon turned to the good. Though demons can “cross over” from profane to sacred, Dorje Shugden cannot easily shirk his demonic origins. The logical place for him, then, is in a marginal, entry-level post as a guardian deity. From this position, his demonic energy is harnessed to subjugate the enemies of Buddhism without any threat to the integrity of Buddhism. Though his profane origins do not allow them to easily transgress the threshold to the sacred space within, must he always remain there?

As illustrated by tale of Pehar, it is not impossible for guardians to move inwards and upwards in status. Pehar, a major wrathful deity, has many alleged origins. What is clear is that Pehar was once only a minor guardian,

⁵⁹ *Bhavagatham* from <http://www.hindumythology.com/>

⁶⁰ George Dreyfus, “The Shuk-Den Affair: The Origins of a Controversy.” Available at <http://www.tibet.com/dholgyal/shugden-origins.html>.

⁶¹ I should stress that my version of this tale comes from faithful Nebesky-Wojkowitz. I have since found many different versions of the tale on the web; but it is hard for me, naive about the controversy and the forces at work within it, to discern the bias in each viewpoint. Clearly, those vying for Shugden’s ascendancy would present the protector in a more favorable light than Shugden’s detractors. Then again, Nebesky-Wojkowitz’s version predates the controversy, and presents the details in a slightly different light.

as the protector of Samye. As legend goes, he traveled in a box to the major monastery of Drepung, where he became chief protector of Drepung – a big promotion. Today he is no longer strictly a guardian. He is no longer placed liminally, and comes complete with his own retinue. He is the subject of rituals and offerings, and appears at festivals as well. Pehar visits major Lamas in their dreams, has incarnations, and periodically possesses entranced devotees. Pehar is among the deities is properly classified as a tutelary deity, a *yidam*. Nonetheless, he has humble origins as a guardian, and his wrathful iconography bears the mark of his tenure as a guardian.

Dorje Shugden's own ambitions lie in an ancient Tibetan tradition, which "claims that the guardian-deity Dorje Shugden, "Powerful Thunderbolt," will succeed Pehar as the head of all "*jig rten pa'I srung ma* once the latter advances into the rank of those guardian-deities who stand already outside the worldly spheres."⁶² It is precisely his mobility that is the source of the conflict over his status among the Gelugpa. Among some factions of the Tibetan government in Dharmasala, Dorje Shugden has moved from his post as a mere protector and crossed over the threshold to become a *yidam*, and the most important protector of the Gelugpa sect.⁶³ Dorje Shugden's meteoric rise from a marginal protector to the center of a major conflict was primarily due to his popularity with several influential teachers. Among his current supporters, he is considered to be the major protector of the Gelugpa.

Dorje Shugden begins as a wayward spirit, an obstacle to Buddhism, and is currently moving towards a major protector of the largest sect of Tibetan Buddhism. The current conflict among the Tibetan exile community is in large part political. However, it is also about whether it is appropriate for Dorje Shugden to ascend past his peripheral, liminal identity and become a *yidam*. This conflict, then, is the natural product of the tension set in motion by the

arrival of Buddhism in Tibet centuries ago. Dorje Shugden exemplifies the resilience of indigenous religion. Through Dorje Shugden, we are partially able to explain the wrathful motif that runs deep in Tibetan religion. The *yidams* and wrathful deities are perhaps guardians who, after serving their time on the periphery, have ascended to more sacred, less peripheral positions within Tibetan religion. However, the wrathful iconography of these successful aspirants bears the demonic mark of their profane origins.

Guardian deities, are *alive* as cultural icons, possessing ambition and agency:

... mundane protectors (*'jig rtenpa'i lha*) are guardians in a universe alive with forces which can quickly become threatening, and are considered by Tibetans to be particularly effective because they are mundane, i.e., unenlightened. They share human emotions such as anger or jealousy, which makes them more effective than the more remote supra-mundane deities (*'jig rten las 'das pa'i lha*), but also more prone to take offense at the actions of humans or other protectors.⁶⁴

In the Tibetan view, guardians have to be alive in order to respond to the threats to Buddhism. The logic in placing guardian deities at the threshold is thus transparent. Their links to the demonic world, from which they originate, allow them to be more effective at dealing with the obstacles to Buddhism, invariably manifested in the form of demons. As transformed demons themselves, they are best equipped to deal with their wayward brethren and convert them to Buddhism. Additionally, the threshold is a point of contact between the worlds of sacred and profane; and it makes utter sense to place guardians at this transitional space. Deities in the inner ranks of a temple are too spatially and religiously removed to make a difference at the periphery.

⁶² Rene de Nebesky-Wojkowitz, *Oracles and Demons of Tibet*, 136.

⁶³ Rene de Nebesky-Wojkowitz, *Oracles and Demons of Tibet*, 140.

⁶⁴ For more information regarding the controversy and its implications, see: <http://www.tibet.com/dholgyal/> for the official line of the Tibetan Government in exile. Also see <http://www.shugden.com/> for the opposite viewpoint from the Dorje Shugden International Coalition.

VII. CONCLUSION

When I stepped over the threshold of the Jokhang for the very first time, I thought my curiosity about the fantastic Tibetan guardians would force me to explore every corner of the magical world inside the gates of the Jokhang. It seems, however, that I never left the periphery. By looking in between worlds, we have to some extent penetrated the historical, spatial and mythical dimensions of Tibetan Buddhism in order to tease out a coherent story of guardian deities in Tibet.

This story features guardian deities, incarnated in guardians of the gate, of the law, and of direction, as agents of active transformation. They remain suspended between outside and inside, profane and sacred, demonic and divine, their liminal identity defining them, extending beyond their placement to all aspects of their identity within Tibetan Buddhism. To account for the paradoxes that characterize guardians, we have looked to the rich mythology underlying guardians. One of these myths, that of the construction of the Jokhang to subjugate a demoness which inhabited Tibet, is an organizing principle for guardian deities. As an allegory for the conversion of Tibet to a Buddhist state, the myth details the subjugation of pre-Buddhist Tibet via mandala space. The origins of guardians have deep roots in these extant traditions, and can be thought of as products of the syncretism between indigenous tradition and encroaching Buddhism. However, they are not static images – many guardian deities are in motion from

profane to sacred, bringing with them their demonic roots.

And what of guardians elsewhere? Guardian deities are fundamental to most Asian religious structures. Despite diverse readings of Buddhism and Hinduism across Asia, guardians remain constant fixtures of gate and the periphery. The unbridled wrath and terrifying imagery of the guardian image in Tibet is unparalleled, except in Japan, a sister tradition of Buddhism that is perhaps related in its appropriation of tension with local traditions. Though the existence of guardian figures is ubiquitous, the specific flavor of guardian deities is culturally contingent. For example, the squat, stout guardians of Indonesia⁶⁵ are counterpoints to the more princely versions in India, and to the many-armed demons of Tibet. Despite the considerable variation among guardians, the themes of transformation, dynamism, and syncretism found in Tibet may be applied with broad strokes across Asia. However, each rendering of guardianship merits independent inquiry to discover the particular beauty and history that must surround the guardian image in its many and brilliant colors.

Even in our current journey, it is difficult to say just how far we have gotten inside the question of guardianship, or how many additional layers exist upon our palimpsest of Tibetan Guardians. Given the intricate and beautiful complexity of religion in Tibet, it is likely that there many, many more. In this essay, I am certain that we have only scratched the surface of a deep topic in Tibet that will sustain a myriad of questions.

This essay is a modified version of an undergraduate thesis in the Humanities Honors Program and was funded by the Office of Undergraduate Research and Institute for International Education's Asia / Pacific Scholar's Program. It also won the 2000 Humanities Honors Program Prize for Excellence.

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⁶⁵ George Dreyfus. "The Shuk-den Affair"

⁶⁶ The dvarapalas of Indonesia are fascinating. According to art historian A. J. Bernet Kempers They are pointedly *not* wrathful,: "[dvarapalas] can hardly be called very terrifying. Central Javanese art avoided generally speaking all kinds of things that might upset the pious visitor. Even these guardians, meant to drive away evil influences, are in tune with this intention. In later times, however, in Eastern Java and Bali all kinds of terrible faces were depicted in order to create an auspicious atmosphere," A. J. Bernet-Kemper, *Ancient Indonesian Art*. (Cambridge: Harvard University Press, 1959), 54.

The Japanese Wireless Telecommunications Industry:

INNOVATION, ORGANIZATIONAL STRUCTURES,
AND GOVERNMENT POLICY

Kenji Erik Kushida

I. INTRODUCTION

Wireless telecommunications are revolutionizing communication. People can communicate with one another from anywhere, and vast information resources are becoming increasingly accessible anytime, anywhere. As wireless telecommunications technology improves, the future holds countless possibilities and opportunities to enhance people's lives and methods of work. Japan's wireless telecommunications industry has recently become the focus of international attention in discussions about cellular telephone industries and wireless telecommunications.¹ Most such discussions and analyses of Japan's wireless telecommunications industry tend to focus on three major points, and the objective of our study is to explain these points.

First, Japan's cellular internet connection services enjoy a market size, profitability, and diversity and sophistication of content yet to be seen anywhere else in the world. Second, the technological sophistication of handsets currently only available in Japan surpasses handsets in all other wireless telecommunications markets. Third, NTT Docomo, the dominant cellular telecommunications company in Japan, has enjoyed wild domestic success and profits.

These three points become relevant to almost all studies of wireless telecommunications due to the following reason: Japan has had a closed, self-contained domestic industry until now, but with the imminent global adoption of a next-generation global telecommunications standard, the Japanese service providers and handset manufacturers are poising themselves to enter global wireless telecommunications markets. This is likely to change global competitive landscapes significantly, and there is widespread speculation about how wireless telecommunications markets will change in the future.

The widespread attention given to Japan's wireless telecommunications industry is significant both in studying the Japanese economy and in examining global wireless telecommunications. First, it is surprising for a Japanese industry to pioneer new technology, such as cellular internet connection services. Most previous examples of Japanese industries that became internationally successful owed their competitiveness to technological prominence in improving the manufacturing of products along existing designs – *process innovation* – rather than through innovation in content.² In other words, we now see Japan taking a different type of technological leadership. Second, in examining global wireless telecom-

¹ Popular media, exemplified by all major newspapers and magazines such as the *Economist*, *Business Week*, *Newsweek* and *Time* have all written about the sophistication and future potential of Japan's wireless handsets and services. Furthermore, seminars at Stanford University with presentations by important figures in the Japanese wireless industry have been packed beyond capacity.

² Aoki, Masahiko, *Towards a Comparative Institutional Analysis* (Cambridge: MIT Press, 2001), IV-17.

munications, we see a shift in the location of technological leadership in this industry. Until recently, Europe has been the main focal point of wireless telecommunications, with firms such as Nokia and Ericsson dominating handset manufacturing, and European service providers setting the standards for cellular service. Now, technological advances beyond all those in other areas of the world can be seen in the Japanese wireless telecommunications industry.

To explain these three observations, we must divide our explanation into *how* and *why*. More specifically, we must examine *how* the industry developed to cause these observations, and *why* it was able to develop in these ways. To answer *how* the industry developed, we will trace the development of Japan's wireless telecommunications industry. In explaining *why* the industry was able to develop as it did, we look at previous studies of industries producing innovation. For the Japanese automobile industry, process innovation leading to technologically advanced manufacturing has often been attributed to organizational factors such as the *kanban system* and supplier *keiretsu* organizations.³ Radical innovation in computer designs have been attributed to properties of the design structure of computers, and rapid innovation in Silicon Valley has been attributed to broad organizational structures in the region. Therefore, we apply three theories explaining innovation to determine whether, and if so how, the organizational structure of Japan's wireless telecom industry sheds light on the question of why the developments we observe were able to occur.

In this paper, we first conduct an overview of the current state and development of Japan's wireless telecom industry. Next, we will briefly present three theoretical frameworks attempting to explain relationships between system design, organizational structures, and different types of innovation. Following this we will synthesize the theories to create an explanatory narrative to understand how the industry developed to create the observations we examine.

II. THE THREE OBSERVATIONS

First, let us expand on the three key observations to establish an idea of the type of developments we attempt to explain. The first observation is the high level of development in cellular internet connections services. Each cellular service provider in Japan offers an internet connection service allowing subscribers to use internet e-mail compatible with all conventional internet e-mail,⁴ browse world-wide-web sites with content optimized for cellular phones, and download various type of data, such as photos, music, or small programs, to be saved in the phone itself. Internet e-mail allows subscribers to communicate with anyone, anywhere, at any time to any other device compatible with e-mail, such as computer users overseas or cell phones in delivery trucks. Access to world-wide-web pages allows subscribers to gather a wide variety of information ranging from local maps and directions to news and train schedules, and allowing reservations of tickets and bank transactions to be made from anywhere at any time. Finally, the ability to download various types of data in handsets leads us to an examination of handsets.

The second observation is the sophistication of Japan's handsets. Cellular handsets in Japan have been the lightest and smallest in the world since 1996, and are the first, and so far only, handsets to incorporate a number of advanced technologies. Those include 65,000 color active matrix TFT displays,⁵ integrated digital cameras, radios, mp3 players, as well as designs that allow handsets to be directly inserted into PC-Card slots to function as wireless modems in notebook computers.⁶ Handsets with integrated digital cameras allow digital photos to be sent as e-mail attachments to other handsets or computers. Integrated mp3 players allow users to download music from the internet or other devices, insert headphones into a handset, still smaller and lighter than many non-Japanese handsets, and use the device as a phone, portable music player,

³ Aoki, Masahiko, *Information, Incentives, and Bargaining in the Japanese Economy* (Great Britain: Cambridge University Press, 1988), 22, 25.

⁴ Internet e-mail refers to the type of e-mail used by almost all users e-mailing via computers.

⁵ This is roughly the quality of higher-end notebook computer displays.

⁶ As of this writing, Japan is the only country with handsets incorporating these elements.

and web-browser.⁷ Furthermore, incoming-call melodies in Japanese handsets have developed to the point that 16-tone chords using FM sourcing are standard features – meaning that sound quality is close to an FM radio-broadcast without the static – and large selections of melodies are downloadable from internet sites, also allowing users to create their own sound files.

The third observation, dominance of NTT Docomo, is dramatic. Spun out of the former telecommunications monopoly, NTT, as an unprofitable division, it became the top market capitalized company on Japanese stock markets in February, 2000. Its operating profits grew to 686 billion yen⁸ in nine years, and with the exception of one year, it has consistently had a market share of over 50 percent in a rapidly expanding market.

III. DEVELOPMENT OF THE JAPANESE TELECOMMUNICATIONS INDUSTRY

We divide the history of Japan's wireless telecommunications industry into three periods, corresponding to major systemic changes in the industry.

The Current Period — 1999 until late 2001

-The Industry

The Japanese wireless telecommunications market enjoys a large market size both in terms of subscribers as a proportion of the population,

as well as in terms of the sheer number of subscribers. Three service providers with nationwide networks compete under two standards. There are a large number of handset manufacturers, with most large consumer electronics companies producing cellular handsets.

As of January 2001, approximately 50 percent of the Japanese population used some form of cellular phone.⁹ As a percentage of the population, Japan had the second largest usage among the G-8 countries and the second largest absolute number of subscribers in the world in January, 2000.¹⁰

The three main service providers are NTT Docomo, KDDI, and J-phone. NTT Docomo became the largest market capitalized firm in Japan in February 2000, and has remained in that position since. It consistently holds approximately 60 percent of the market share, and is clearly the dominant player in the industry. KDDI is the fourth largest communications firm in the world following NTT, AT&T, and Deutsch Telecom, with a market share of approximately 25 percent.¹¹ J-phone has a market share of approximately 16 percent.¹² The two cellular network standards used by these three service providers are PDC and CDMAOne. Adopted only in Japan, PDC is used by NTT Docomo and J-phone, and is incompatible with all other standards used in the world. CDMAOne, on the other hand, used by KDDI, is a global standard, one of the many standards adopted in areas such as North and South America, parts of Europe, China, Korea, the Philippines, and Russia.¹³

⁷ The technological sophistication of Japanese handset is especially impressive when compared directly with standard models manufactured by foreign manufacturers in the Japanese market. Competing in the same market, one might expect foreign manufacturers to match commercially successful designs introduced by domestic manufacturers. As of January 2001, Nokia and Ericsson's handsets had monochrome, 60-character displays, and were capable of producing 4-tone harmonies. At the same time, Sony's handset had approximately twice the screen size with a 65,000 color TFT display, was capable of 16-tone harmonies, sported an integrated mp3 player, and was capable of running Java applets. One might still argue that the foreign handsets were competing on different design grounds. Ericsson's advertising campaign did stress design, with the phrase "Simple beauty from Sweden." However, the handsets are significantly larger and heavier than domestic handsets, and consumers generally regard them as somewhat stylish but impractical for anything except voice communication. (Premium Newsletter, *Mobile Media Japan*, Vol. 1 (January, 2001): 14 <<http://www.mobilemediajapan.com>> (accessed 5 April, 2001))

⁸ \$5.5 billion at an exchange rate of 1 USD = 125 Yen

⁹ population figures from the Statistics Bureau of Japan <http://www.stat.go.jp/english/e_cen_en.htm> and total market figures from <www.mobilemediajapan.com>

¹⁰ Policy Report, Ministry of Posts and Telecommunications, 2000. <<http://www.mpt.go.jp/policyreports/japanese/papers/h12/1-index.html>>

¹¹ Tsuyama, Keiko, *NTT & KDDI Dounaru Tsushin Gyokai* (Tokyo: Nihon jitsugyou shuppan sha, 2000), 12.

¹² Yahoo Finance, <<http://sg.biz.yahoo.com/010406/15/m62s.html>>

-Handsets

Almost all major Japanese consumer electronics companies, such as Matsushita, NEC, Mitsubishi, Sony, and Fujitsu produce cellular handsets.¹⁴ The leading global handset manufacturers, Ericsson, Nokia, and Motorola have also recently entered the Japanese handset market.¹⁵ These handset manufacturers operate on contracts with service providers, who buy the handsets outright, then market them under their own distribution channels. Therefore, service providers have the option of absorbing handset costs when consumers subscribe to their service. Each service provider has a different set of manufacturers providing handsets for their service, although many manufacturers make handsets for multiple providers. In other words, a consumer subscribing to NTT Docomo's service can choose from one set of handsets, manufactured by a certain set of manufacturers, while a KDDI or J-phone subscriber faces a different set of handsets to choose from. Manufacturers such as NEC make handsets for all three services, while Sony offers handsets only for Docomo and KDDI, and companies such as Sanyo manufacture handsets solely for KDDI's service.

Service providers and handset manufacturers work together closely. Service providers have extensive R&D labs that actively play a role in handset development.¹⁶ Providers often pass patents and information to manufacturers and jointly develop products – color display handsets being a prominent example of such joint development.¹⁷ NTT Docomo has the most extensive R&D lab and effectively controls the PDC standard because its predecessor, the tele-

communications monopoly NTT, developed the standard. In many cases, Docomo holds the details of a technology, and manufacturers develop handsets according to unidirectional information passed down from Docomo.¹⁸ Docomo has a "mobile technology division" whose purpose is to ascertain whether the wishes of Docomo project divisions are technologically feasible, and then request manufacturers to make handsets according to its specifications. Handsets taking advantage of Docomo's internet connection service, i-mode, were manufactured in this fashion, with Docomo developing the technology and sending specifications and orders to manufacturers.¹⁹

Service providers, especially Docomo, can also wield power over handset manufacturers. Manufacturers are required to obtain permission from Docomo to sell the same handsets ordered by Docomo to other providers. In April of 1999, Japan's Fair Trade Commission issued a warning to Docomo for purposefully delaying permission by several months to ensure that handsets for its own service remained a technological step ahead of its competitors' handsets.²⁰ Furthermore, Docomo has been known to alter its specifications, forcing manufacturers to adjust their products, causing delays in shipping the same handsets to other providers.²¹ Whether other providers also exert this type of influence over handset manufacturers, and if so, to what extent they do, is unclear.²² Furthermore, the difference in the set of manufacturers between service providers suggests the existence of more than simply contractual relationships. In a pattern often seen in Japanese industries, previous relationships and relationships through shareholder groupings may play a role in determining

¹³ Shinohara, Isao, *Docomo ga sekai wo seisuru hi* (Tokyo: Toyo keizai shinpo sha, 2000), data page 8.

¹⁴ The complete list of domestic handset manufacturers is quite extensive, and is the following: NEC, Sharp, Sony, Denso, Fujitsu, Panasonic, Mitsubishi, Casio, Kyocera, Sanyo, Toshiba, Hitachi, Panasonic, Pioneer, Kenwood.

¹⁵ As of October, 2000, Nokia had approximately 30% of the global market, Motorola had 15%, and Ericsson had 11% (Nakagawa, Masahiro, "Keitai Denwa secta ni kansuru kyousou kankyou bunseki repoto," *Kokusai kyousouryoku kenkyu kai* 7 (2000).

¹⁶ Ohoshi Koji, the previous president and current chairman of Docomo claims that Docomo's R&D labs are the most extensive wireless cellular R&D labs in the world, while KDDI's R&D labs are widely acclaimed for their R&D in satellite telecommunications. (Yuasa, Izumi, *NTT Docomo no chousen* (Tokyo: Kouso bou, 2000), 74)

¹⁷ Yuasa, *NTT Docomo no chousen*, 167.

¹⁸ Yuasa, *NTT Docomo no chousen*, 167.

¹⁹ Matsunaga, Mari, *I-mode Jiken* (Tokyo: Kadokawa shoten, 2000), 154.

²⁰ Yuasa, *NTT Docomo no chousen*, 167.

²¹ Yuasa, *NTT Docomo no chousen*, 167.

the service providers to which manufacturers sell handsets.

-Cellular internet connection services

As of April 2001, approximately half of all Japanese cellular users subscribed to one of the services offered by the three providers, with the market growing by over 36 million people in two years.²³ Docomo's i-mode service has approximately 64 percent of the market share, while EZWeb from KDDI has 19 percent, and J-sky from J-phone has 17 percent.

There are two standards used for these internet connection services. HTML²⁴ variants are used by Docomo and J-phone, while WAP²⁵ is employed by KDDI. I-mode and J-sky both use proprietary, simplified versions of the HTML language, with a number of additional features that take advantage of handsets. The two services differ slightly in their implementations of HTML. They were originally designed to be mutually exclusive, but each provider has recently been adding converter applications to access each other's content. Docomo's language, Compact HTML, has more features than J-phone's implementation of HTML, termed MML (Mobile Markup Language), and several versions of Compact HTML have been released as the capability of handsets has improved. Improvements include larger screen sizes, the addition and subsequent improvement of color displays, and the incorporation of a version of Java.²⁶ I-mode phones can now run Java applets written in a proprietary form of Java, unsurprisingly named by Docomo as i-java. WAP, employed by KDDI's EZWeb is an international standard for mobile applications using HDML (Handheld Device Markup Language), and is incompatible with HTML. The amount of content written in HDML is dwarfed by the simplified HTML content.²⁷

In each service, the portal²⁸ is a menu system constructed by the provider, rather than being a general search engine, and users cannot change the portal. The menu provides easy access to "recommended," or "official" sites. Content providers apply and pay to become official sites listed in the menu system, and providers examine content before giving approval. For official sites requiring membership or usage fees, the amount charged appears on the monthly bill from the service provider.²⁹ However, the cellular internet connections services are not closed systems. The steps needed to access a screen allowing users to manually enter addresses are neither complicated nor difficult, and major third-party search engines such as *yahoo*, *google*, and *excite* have released mobile versions for all three services.

Development of the Japanese wireless telecommunications industry — 1980s-1999

-The Industry

An examination of the development of the Japanese wireless telecommunications industry should start in 1985, when the national telecommunications monopoly was privatized to create NTT (Nippon Telephone and Telegraph), a private company with certain monopoly rights such as the last mile for telephone networks. This privatization was the result of the first of many "NTT laws" enacted by what was then the Ministry of Posts and Telecommunications. In 1987, analog wireless cellular service was launched, using the PDC format developed by NTT. This PDC format was a proprietary format used only in Japan, and until global standards were adopted, the Japanese wireless telecommunications industry was completely isolated from developments in wireless markets in other parts of the world. Also in 1987, DDI and IDO entered the tele-

²² Most information is about NTT Docomo, and with its dominant market share, Docomo can be expected to have more clout, but its actions are also scrutinized more carefully by all observers.

²³ For information, see <<http://www.mobilemediajapan.com>>

²⁴ HTML (Hyper Text Markup Language) is the coding language used in internet web pages.

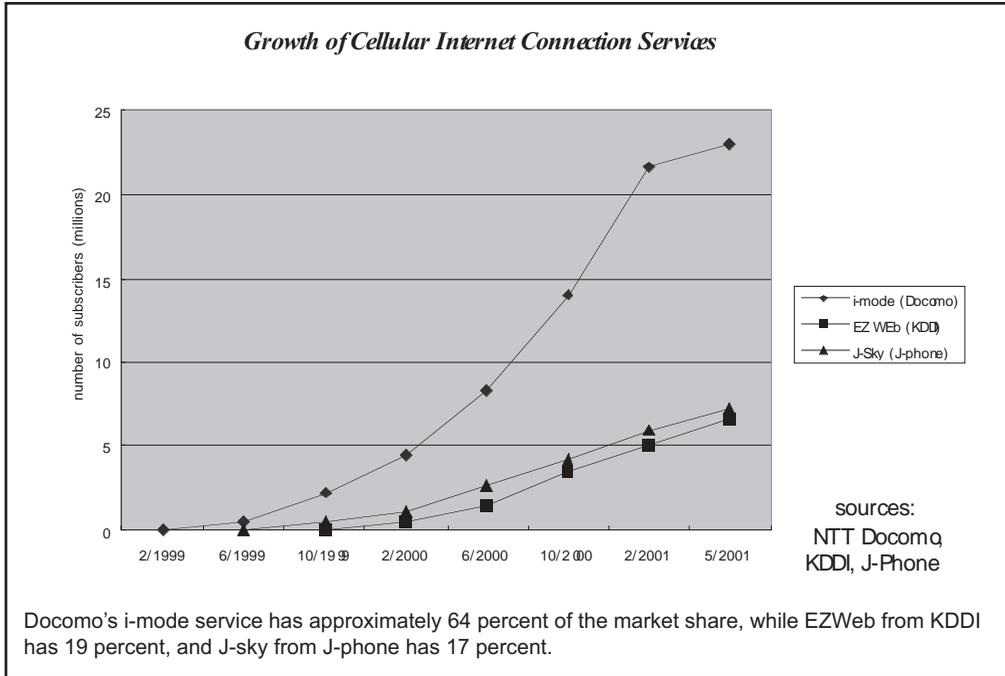
²⁵ Wireless Application Protocol

²⁶ Java is a coding language allowing small applications to be downloaded from a central source and executed locally, without requiring a connection to the central source once it downloaded.

²⁷ Shinohara, *Docomo ga sekai wo seisuru hi*, 49.

²⁸ The "web page" equivalent shown first every time the cellular internet connection is activated.

²⁹ Yuasa, *NTT Docomo no chousen*, 96.



communications market as a result of deregulation in 1985. In 1991, NTT introduced the first model of its “Mova” series with a dramatic reduction in entry price, and the cellular market size grew to just over one percent of the population for the first time. In 1992, as a result of another “NTT law” in 1990, the cellular division of NTT was spun out, creating NTT Docomo. Even at this time, the Japanese cellular industry was lagging far behind that of other countries. Service prices were four to five times more expensive, and the market size still remained only slightly more than one percent of the population.³⁰ By 1994 Docomo had undertaken aggressive price cuts in entry and monthly fees, and had abolished expensive deposit fees for handsets, which were on a rental basis. Between 1993 and 1994, the number of subscribers doubled from 2 million to 4 million users. Finally, in 1993, the digital cellular network was introduced, improving sound quality.

The year 1994 was a watershed in the industry’s development. A series of deregulations changed the industry structure significantly. First, competitors in the cellular industry emerged – Tokyo Digital Phone (later

to become part of J-phone) and Tsuka Cellular (later consolidated into KDDI). Second, the manufacture of handsets was liberalized, allowing service providers to purchase handsets from external sources. Finally, handsets could be sold to customers outright rather than having to be leased. These developments were identical to earlier deregulations of land-line telecommunications, in which competition was introduced, telephone leasing was abolished, and manufacturing was liberalized.³¹ Growth in demand began to accelerate, and the installed user base increased by more than a factor of two.

Furthermore, in late 1994, the industry’s current retail structure and district company organization was established. First, largely as a response to how the newly entered competitors successfully organized their retail networks, Docomo revamped its sales network. Primary demand was unexpectedly from retail consumers rather than business users, which Docomo had originally targeted – legacy of NTT business practices. The sales network was altered from a small number of directly controlled sales units, again legacy of NTT, to outsourced sales units. Two hundred

³⁰ Ohoshi, Koji, *Docomo Kyuseichou no Keiei* (Tokyo: Diamond sha, 2000), 1-2.

³¹ Ohoshi, *Docomo Kyuseichou no Keiei*, 3.

forty specialty stores were established within that year in the Kanto region, and large electronics and discount stores were allowed to sell subscriptions and handsets.³² By July 2000, over ten thousand retail channels had been established, including specialty and general electronics stores. Second, Docomo divided itself into nine district companies to micro-manage sales, advertising, and regional management tasks according to local conditions.³³ Top-level management from the central company were placed at the head of each district company to integrate management.³⁴ Since the competitors were already divided into districts, as will be examined in depth later, this restructuring by Docomo essentially established the current district structures.

Price wars began in 1994, and in 1995, introductory fees were abolished and monthly fees were further reduced. Handset costs were often almost completely absorbed by service providers, and consumers usually expected to pay less than a tenth of the price for handsets that might have otherwise cost more than \$100. In 1996, non-voice application began to proliferate as short message systems became popular and the *Pocketboard* mentioned earlier was introduced. Between 1993 and 1996, the market expanded by a factor of two or more every year, starting at 2 million users in 1993, reaching 21 million in 1996.

In 1997, Docomo began operations with ALADIN, the integrated information system mentioned earlier when examining retail. The system was designed with a modular architecture to effectively cope with exploding demand. The largest open client/server network in 1997, it combined user, sales, branch, and customer balance information, along with telephone number allocations into one database, which was then accessible to the service order center, network service center, routers and billing and accounting divisions. In 1999, Docomo introduced i-mode, and a national network using the CDMAOne standard was completed. At this point, in our analytical divisions of the industry's development, the tran-

sition was made to a period of mainstream non-voice communications and multiple domestic standards.

“THE ENTRANCE OF JAPANESE SERVICE PROVIDERS AND HANDSET MANUFACTURERS IN GLOBAL WIRELESS TELECOMMUNICATIONS MARKETS IS CAUSING WIDESPREAD SPECULATION ABOUT HOW THE MARKET WILL CHANGE IN THE FUTURE.”

-Proliferation and Consolidation

In focusing on the development of service providers, we see a trend of proliferation followed by consolidation from the inception of wireless services to the current industry organization. In 1985, when NTT was privatized, the Ministry of Post and Telecommunications divided Japan into nine districts in a policy identical to previous telecommunications policy. When competition was allowed in 1992, the policy restricted entry to only one new carrier in addition to NTT per district. When IDO and DDI Cellular established themselves as competitors in the cellular market, they were forced to divide themselves between districts. IDO established itself in the Tokyo and Tokai region under the name Tokyo Digital Phone (the Pacific coastal region between Tokyo and Osaka) to concentrate on service to Tokyo, and DDI took everywhere else, concentrating on cities such as Osaka in Western Japan, under the name Tsuka Cellular.³⁵

In 1991, when the Ministry of Post and Telecommunications adopted a digital cellular network, it loosened restrictions on competition, allowing three carriers in addition to NTT per district. By 1996, Tokyo, Osaka, Nagoya, and major metropolitan areas had four competing service providers — Tsuka Cellular, Digital Phone, IDO, and NTT Docomo. The rest of the nation had three competitors,

³² Ohoshi, *Docomo Kyuseichou no Keiei*, 132.

³³ Ohoshi, *Docomo Kyuseichou no Keiei*, 138.

³⁴ Ohoshi, *Docomo Kyuseichou no Keiei*, 140.

³⁵ Tsuyama, *NTT & KDDI Dounaru Tsushin Gyokai*, 81.

Docomo, Digital Tsuka, and DDI.³⁶ Thus Docomo was the only carrier with a nation-wide network under same name. Others providers had contracts with other networks allowing roaming, but predictably, this proliferation of carriers with different service areas led to consumer confusion.

In late 1996, the Ministry of Post and Telecommunications announced that for the next generation wireless standard, IMT-2000, only three providers could compete in each district.³⁷ It may be noted that this time, NTT was not specified in the legislation. Following this announcement, widespread consolidation began to occur in the industry. In the spring of 1997, DDI and IDO joined hands, establishing a unified national network. In 1998, they introduced a competing standard with faster speeds, CDMAOne, completing a national network in April 1999.³⁸ In 1999, another unified national provider, J-phone was established when Digital Phone and Digital Tsuka (confusingly, a different company from Tsuka) merged. This was a result of the purchase of Nissan's shares by Nippon Telecom, who held majority stakes in Digital Phone and jointly owned Digital Tsuka with Nissan.³⁹ Finally, in late 2000, DDI and IDO joined a major telecommunications company, KDD, which held Tsuka, consolidating into KDDI, standardizing its brand nationally as "au" for CDMAOne service, and retaining Tsuka for PDC service. Thus by January 2001, the Japanese industry had consolidated into three nationally unified carriers operating under three brand names.

-Handsets

The development of handsets in Japan was rapid, and the industry underwent a major structural change in 1994. Initially, all handsets were manufactured by NTT, which we can assume was closely cooperating with a selected manufacturer on terms similar to an OEM contract. In 1987, when the analog service began, handsets weighed 2 kg, and were known as "shoulder phones."⁴⁰ In 1990, the smallest and lightest cellphone in Japan at the time, *Handiphone mini* was introduced. In 1991, further

miniaturization resulted in the *Mova*, weighing 220 grams. As mentioned earlier, handset manufacturing was liberalized in 1994, and any manufacturer could be contracted in production. In 1995, the Digital Mova series was introduced, becoming the smallest and lightest handset in the world in 1996. By this time, the number of manufacturers and varieties of handsets had exploded. In 1997, color handsets were introduced, and handsets were as light as 75 grams. Up to this point, the development of handsets could be characterized by miniaturization and functionality improvement. From 1997 on, as data transfer became an option, handsets with radical design departures began to appear. Handsets that mimicked PC cards were introduced in 1999, and in 2000, handsets with mp3 players and radios were introduced. By 2001, handsets with digital cameras and models with connectivity to Nintendo Gameboys and automobile GPS systems had been introduced.

-Internet connection services

Development of the internet connection services, which revealed unforeseen demand, shifted the global center of gravity of innovation in telecommunication service to Japan. The story of how the pioneering i-mode developed has been widely publicized, but sources documenting development of EZWeb and J-sky are scarce. However, the other services were following the footsteps of a model already proven to be successful. Therefore, our main interest is the development of i-mode.

I-mode developed as an in-house venture under strong presidential directives, working outside the established organizational norms of NTT Docomo. In late 1996 or early 1997, seeing the impending saturation of the voice-based communications market, the president of NTT Docomo at the time, Ohoshi Koji, appointed an engineer, Enoki Keiichi, to lead a new project to enable some form of successful non-voice communications application. Enoki was not only given unlimited financial and R&D resources, but also free rein over hiring

³⁶ Tsuyama, *NTT & KDDI Dounaru Tsushin Gyokai*, 80.

³⁷ Policy Report, Ministry of Post and Telecommunications, 1997. <<http://www.mpt.go.jp/policyreports/japanese/papers/index-98wp.html>> (accessed 5 May 2001).

³⁸ Tsuyama, *NTT & KDDI Dounaru Tsushin Gyokai*, 84.

³⁹ Yuasa, *NTT Docomo no chousen*, 76.

⁴⁰ Motorola had already succeeded in 1985 in manufacturing "handset" style cellular phones that were much smaller and lighter than these "shoulder phones." (Ohoshi, *Docomo Kyuseichou no Keiei*, 126.)

personnel. In establishing a team, he hired several key people from outside the NTT group – a radical departure from NTT’s historical record and corporate culture. McKinsey consultants were also hired, another departure from Japanese corporate culture in general, especially for the conservative NTT group. The McKinsey consultants were a significant force driving the initial establishment of a conceptual framework for the service.⁴¹

Enoki was a strong leader, making several pivotal decisions that contributed to the wide success of i-mode. First, in 1997 he chose to adopt a simplified form of HTML rather than WAP, despite the fact that Docomo was scheduled to join the international “WAP forum” later that year.⁴² His rationale was that at the time, WAP protocol had not yet been established as a widely used standard, and that an HTML-based language could tap into the installed base of HTML pages and users familiar with HTML. This adoption of HTML on a basic level was one factor many people cited as “user-friendly” when they created content, and was probably one of the major factors contributing to the explosion of i-mode enabled pages immediately after its release. Second, among researchers and managers he hired from outside the NTT group, one of the key figures was a successful magazine editor, Matsunaga Mari, who established several policies for i-mode that successfully targeted mass consumers. First, Matsunaga set an extremely low price for i-mode subscription. Despite adamant opposition from McKinsey consultants and many engineers, she set the basic monthly fee at 300 yen,⁴³ the same price as monthly magazines. Her rationale was that if the price allowed i-mode to be as accessible as magazines on a magazine stand, people could easily initially subscribe out of curiosity. This pricing scheme is also a widely recognized causal factor for the explosion of i-mode subscribers that rapidly established a large installed base. Second, Matsunaga chose to create a proprietary menu as the portal, allowing Docomo to choose easily viewed content rather than simply relying on a search engine portal for people to roam

freely. Once again, McKinsey consultants and several engineers advised against this move.⁴⁴ However, in hindsight, since the level of diffusion of computers and the internet in Japan is low vis-à-vis many developed nations, a great proportion of i-mode users are unfamiliar with these technologies, making this menu system a widely acknowledged factor contributing to the success of i-mode.

Ezweb was introduced in April, 1999, and J-sky was introduced in December, 1999. They took advantage of an already cultivated market, and documentation about their development is unavailable. Their growth has been rapid, as seen in the chart earlier, but i-mode still dominates the internet connection service market.

Issues for the near future – 2001 ~

Analog cellular networks are known as first generation; digital networks are second generation; and in late 2001, third generation cellular networks, commonly known as IMT-2000 (International Mobile Telecommunications Standard 2000) are scheduled to begin service. The International Telecommunications Union (ITU) based in Geneva, Switzerland, composed of 189 member states and 650 industry members, which decides on many global standards, chose three global standards for the third generation service. When successfully implemented, third generation services are expected to offer 30 to 200 times faster throughput speeds⁴⁵ while using bandwidth more efficiently, creating potential for a broad variety of applications and uses.

Two major third generation standards approved by ITU, Wideband CDMA (W-CDMA) and CDMA 2000, are battling to become the dominant global third generation standard. These two standards will initially be incompatible with one another, but they can be expected to eventually attain mutual compatibility, since the ITU approval of both was because both were based on CDMA encoding and displayed potential for compatibility.⁴⁶ W-CDMA was developed by NTT Docomo, and CDMA 2000

⁴¹ Matsunaga, *I-mode Jiken*, 28.

⁴² Matsunaga, *I-mode Jiken*, 144.

⁴³ \$2.40 at an exchange rate of 1 USD = 125 yen

⁴⁴ Matsunaga, *I-mode Jiken*, 75.

⁴⁵ Second generation services offer a throughput of 10 kilobits per second, while third generation services are expected to offer between 384 kilobits per second to 2 megabits per second (*The road to IMT 2000*, International Telecommunications Union. <http://www.itu.int/imt/what_is/roadto/index.html> (accessed 5 May, 2001).

⁴⁶ Yuasa, *NTT Docomo no chousen*, 49.

was developed by Qualcomm of the US. The battle of global standards is being waged because the wider the acceptance of one standard, the larger the market to which service providers have access.

In Japan, W-CDMA will be adopted by NTT Docomo and J-phone, with Docomo planning to begin test service in late 2001, and J-phone beginning service the next year. KDDI, which is now using CDMAOne, a less developed form of CDMA2000, considered a 2.5 generation standard, since its transmission speeds are faster than first generation, but slower than third generation standards, is expected to maintain its CDMA One network while gradually phasing into CDMA 2000. As of spring 2001, a majority of service providers have pledged adoption of W-CDMA in Japan, Europe, parts of Southeast Asia, and parts of North America, while major providers in North America, China, and other parts of Southeast Asia have pledged adoption of CDMA 2000.

The adoption of a global standard by all service providers signifies entrance of the Japanese wireless telecommunications industry into global markets. Japanese service providers will be in a position to directly compete against service providers in other parts of the world using their technological and organizational expertise. NTT Docomo, which is expected to have technological advantages over other service providers using the W-CDMA standard, since they were mainly responsible for its development, has been expanding its presence throughout the world in preparation for this convergence. It has purchased shares of major wireless providers such as AT&T Wireless in the US, the Hutchison Telephone company in Hong Kong, Hutchison 3G UK of Great Britain, KG Telecom of Taiwan, KPN mobile of the Netherlands, and Telecom Italia Mobile. It has also begun sending managers to Hong Kong.⁴⁷ The specifics on how Docomo expects to profit from tie-ups with foreign firms are still unclear. At the same time, foreign service providers will have access to Japanese markets beyond providing capital and strategic advice, such as Vodafone has begun doing for J-phone.

For Japanese handset manufacturers, a common global standard increases their potential mar-

ket several times. While the Japanese domestic standard was isolated, the main thrust of their R&D was directed towards PDC format handsets, and their product line for other standards, sold in other parts of the world, was sparse. However, with W-CDMA, the main thrust of their R&D efforts are applicable to global markets, and since they have been working closely with Docomo, their implementation of W-CDMA is expected to be technologically sophisticated. Several manufacturers have openly declared their intent to capture a large portion of the global market shares currently enjoyed by Ericsson and Nokia.⁴⁸ At the same time, foreign manufacturers can enter the Japanese market with their flagship products, rather than reengineering handsets for the PDC format. Along with the three large globally dominant firms, low-cost, low-end handsets from Taiwan and Korea can be expected to compete on Japanese markets as well.

The globalization of handset markets may erode a large portion of the power held by Japanese handset providers, especially NTT Docomo, over handset manufacturers. While Japan's market was in isolation, the incentive to work with the dominant provider was large, but if manufacturers have access to larger markets than Japan, they may gain bargaining power vis-à-vis Docomo, threatening to sell products to only competitors if they are confident in other markets. With increased competition among service providers, offering fewer popular handset models would be a severe disadvantage for Docomo. Therefore, handset manufacturers may be expected to gain more autonomy.

For software content providers, depending on the type of standard adopted for third-generation devices, the convergence of domestic and global markets may increase initial business chances, but also entails high-level competition. Since Japanese content providers will have already had substantial experience creating content for cellular handsets, they may be expected to have superior implementation in the short run, since they may be on the third or fourth version of releases. However, content accessible anywhere in the world may not be an advantage until business models can be established allowing payment from users of other ser-

⁴⁷ General report, NTT Docomo. <<http://www.nttdocomo.co.jp/new/contents/01/whatnew0129.html>> (accessed 6 May, 2001).

⁴⁸ "Matsushita...Sony set to take Ericsson, Nokia 3G handset share," News release. <http://www.mformobile.com/default.asp?Redirect=main.asp?pk=12591> (accessed 6 May, 2001).

⁴⁹ Baldwin, Clarkiss Y. and Kim B. Clark, *Design Rules*, (Cambridge: MIT Press, 2000), 12.

vices in other countries, which may not work in the same manner as Japan. Furthermore, without local patent or intellectual property rights, the likelihood of a similar or reverse-engineered service appearing in different countries is possible. Finally, large global content providers can be expected to move into the Japanese market in the fashion of yahoo or ebay. However, these implications from convergence do not necessarily affect service providers' monopoly over the portal, using menu systems.

IV. THEORIES

Baldwin and Clark

In Design Rules, Baldwin and Clark develop a highly sophisticated theoretical framework exploring modularity and its effects on organizational and industrial evolution. They are, at the broadest level, trying to formulate a theory of how design modularity is conducive to innovation. The core of their argument is essentially as follows: *Modularity in the design of a system opens new paths for system design as a whole.*⁴⁹ *This will cause an explosion in the number of designs, potentially entailing a radical change in the market value of the entire system.*⁵⁰ The mechanism causing an explosion of designs and subsequent change in market value is "a decentralized search by many designers for valuable options."⁵¹

Langlois and Robertson

The main argument Langlois and Robertson present in Firms, Markets, and Economic Change is essentially as follows: *For generating innovative concepts under conditions of extreme uncertainty, large numbers of teams working independently are better than large, vertically integrated firms that internalize change. However, large, centralized firms do have*

advantages in implementing new technologies. In this framework, uncertainty is defined as conditions in which the product and process technologies are evolving, with the nature and size of markets yet to be determined.⁵² Langlois and Robertson extend Baldwin and Clark's theory, adding the dimension of *implementation of innovation.*

Aoki

Aoki, in Towards a Comparative Institutional Analysis, creates a theoretical framework identifying organizational structures observed in major industrial models. Prominent models include the vertical hierarchies in the "American model" of production, horizontal hierarchies in Japanese production models, and decentralized industry clusters observed in Silicon Valley. Aoki maps information flows between different components within organizational structures, arguing that each type of organization is best suited to deal with environments with specific types of uncertainty. Aoki extends the previous two theories, which only deal with radical conceptual innovation, by including information flows in his analysis. In Aoki's framework, tacit information sharing seen in Japanese-style horizontal hierarchies is best suited for *process innovation*, where design trajectories are known.

V. ANALYSIS

Theories

Now that we have introduced empirical evidence and three theories of technological development, we are ready to create an explanatory historical narrative of to Japan's wireless telecommunications industry.

⁵⁰ Baldwin and Clark, Design Rules, 245.

⁵¹ Baldwin and Clark, Design Rules, 14.

⁵² Langlois and Robertson, Firms, Markets and Economic Change : A Dynamic Theory of Business Institutions, (New York: Routelage, 1995), 149.

In the 1980s the Japanese wireless telecommunications industry was founded when the PDC format was adopted and spectrum was allocated to NTT. The PDC format, incompatible with all other standards in the world, isolated Japan's cellular industry from global competition.

From the 1980s to 1999, Japan's wireless services and handsets underwent rapid process innovation, catching up to and subsequently surpassing international competition within the same design trajectories. During the period from the 1980s to 1994, we observe the following. Japan's wireless telecommunications industry remained at a comparatively backward state of development vis-à-vis other wireless telecommunications industries until the early 1990s. As seen earlier, service was expensive, coverage was poor, and handsets developed from larger models optimized for cars to smaller "handset" devices, but were technologically less developed vis-à-vis models in global markets. In 1993, the digital network was established nationally, and by 1994, the gap had closed significantly – service prices had decreased significantly but were still higher, service coverage had improved substantially, but was not without significant gaps, and handsets had become dramatically smaller, but were not yet the smallest in the world. In sum, during this period, infrastructure was established and designs were fundamentally altered to align design trajectories with the rest of the world, allowing incremental improvement and mass production.

Using the theories, we can explain these developments as the effective implementation of innovation due to vertical integration. During this period, most of the innovation was from abroad. NTT Docomo looked at services and handsets in other parts of the world, incorporating similar business models and designs into its service and handsets. The organization of Japan's wireless telecommunica-

tions industry offered the following advantages. First, innovation could be implemented rapidly due to the high level of vertical integration, as explained by Langlois and Robertson. Second, Aoki's framework explains how the vertical hierarchy allowed rapid implementation of centralized decisions from the top down, and that the organization was conducive to incremental improvement and mass production.

From 1994 until 1999, we observe that the gap closed between global cellular service markets and Japan's market, and

"THE GLOBALIZATION OF HANDSET MARKETS MAY ERODE A LARGE PORTION OF THE POWER HELD BY JAPANESE HANDSET PROVIDERS, ESPECIALLY NTT DOCOMO, OVER HANDSET MANUFACTURERS".

that Japanese handsets surpassed international competition in terms of miniaturization and sophistication. Service prices in Japan were lowered to similar levels as other cellular markets, and service functionality caught up to cellular industries in other countries, with seamless area coverage and new features such as short messaging systems. In 1996, a Japanese handset became the world's smallest handset, and by 1997, the standard Japanese handset size was smaller than models manufactured by globally dominant handset manufacturers. Pointers, menus, and complex ringing melodies were introduced in Japanese handsets, becoming standard features before many global manufacturers had even introduced such features. The number of handset designs had increased, and as seen earlier, the market value of the entire cellular service system rose dramatically.

These developments can be explained as process innovation that occurred more rapidly in Japan than in the rest of the

⁵³ As mentioned earlier, the automobile and semiconductor industries, along with sectors such as consumer electronics are prominent examples.

beginning to pioneer in services and embark on new handset design trajectories. The Japanese wireless telecommunications industry was first to experience the proliferation of internet sites, high level of subscription, and extensive utilization of internet e-mail, although later short messaging systems began to proliferate worldwide, and a functional cellular internet connection service was offered in Finland.⁵⁴ Handset designs began to diverge vis-à-vis the rest of the world with the introduction of the aforementioned digital cameras, mp3 players, and PC card functionality seen only in Japan.

The development of cellular internet connection services can be explained as fairly radical innovation, while improvements in handsets are rapid process innovation combined with more radical recombinations of technology. In all three theories, the cellular internet connection service is a radical innovation, explained by a decentralization of the locus of decision-making. Baldwin and Clark articulate this decentralization as modularity, while in Langlois and Robertson's theory, the organization of this system is close to innovative networks, or Silicon Valley clustering, in Aoki's terms. The departure of the design trajectory in handsets is explained by Langlois and Robertson's theory as the rapid implementation of innovations⁵⁵ made possible with keiretsu networks. Using Aoki's framework, we extend this explanation by showing that the combination of relational and non-relational contracting is conducive not only to rapid process innovation but also to potentially more radical innovation.⁵⁶ These developments – radical innovation and a departure of design trajectories – is uncommon among Japan industries competing globally.

The dominance of Docomo can be explained to a degree by examining the

change in its organizational structure and the network effects it captured. First, we have seen that Docomo changed its organizational structure when handset manufacturing was liberalized to create an organizational form most conducive to rapid process innovation. Had Docomo continued to sell handsets under its own name through OEM relationships with one or two handset manufacturers, it is likely that Docomo would have lost its competitive edge in handset sophistication, since process innovation would not have been as rapid. Second, in applying the experience of the US Hi-Fi Stereo industry to Japan, we have seen that Docomo successfully took advantage of network effects to create positive feedback loops, attracting and retaining subscribers as new services were introduced.

VI. ANSWERING THE INITIAL QUESTIONS

Thus we are now in a position to take the contemporary observations made about Japan's wireless telecommunications industry and explain the development in the following manner. In the most simplified explanation, the three key observations – pioneering cellular internet connection services, technologically developed handsets, and Docomo's dominance – are the result of three distinct phases of development. First, in an environment where design trajectories were known, basic infrastructure was rapidly installed and design trajectories were aligned with other wireless telecommunications industries worldwide. This could be accomplished effectively due to high levels of vertical integration. Second, rapid and accelerating process innovation resulted in Japan's cellular services and handsets rapidly catching up to global

⁵⁴ "The Wireless Wars," *International Herald Tribune*, 4 December 2000, insert, p. 1.

⁵⁵ In this case we refer to innovations from other industries, such as mp3 players and small digital cameras.

⁵⁶ The suppliers keiretsu allows joint development and the rapid implementation of innovations, with Sony's incorporation of mp3 players into its handset being an example. The potential for new relationships with an IA-IE organization also allows more radical innovation, such as Kyocera cameras being implemented into Sanyo handsets although the companies are not part of keiretsu organizations.

standards, with handsets subsequently surpassing globally dominant handset models. Rapid process innovation was largely a function of a degree of vertical disintegration and keiretsu organizations, and Docomo's retention of dominance was partly due to its corresponding vertical disintegration. Third, cellular internet connection services introduced radical innovation into the industry, and handset designs departed from global design trajectories as faster process innovation and more radical innovation occurred. Radical innovation in an environment of extreme uncertainty was due to adoption of a system decentralizing the locus of decision-making, and the departure in handset design trajectories was possible with an organizational structure combining relational and non-relational contracting. As innovations were introduced, Docomo was able to capitalize on network effects to secure its dominant position.

In sum, organizational structures maximizing advantages of development given the environmental uncertainty gave rise to successful cellular internet connection services and highly advanced handsets, and Docomo remained dominant by adapting organizational structures and capturing network effects.

Policy

Let us now examine the effects of policy on development of the Japanese wireless telecommunications industry. As has already been firmly established, development of the industry initially lagged behind other industrialized nations, but by the time of convergence with global markets, process innovation has overtaken the rest of the world, and development is on a trajectory of radical innovation.

Through the narrative of development we constructed in the previous section, we used theories explaining innovation to examine *why* these developments could occur. We found that the organizational structures in various areas of the Japanese wireless industry maximized advantages of development given the type of environmental uncertainty. It is now our task to examine *how policy affected* the creation of those organizational structures. Since we have already seen the various government policies in our early historical overview of the industry, we now reassemble them to obtain a cohesive picture of how they affected the organizational structures.

First, the Ministry of Posts and Telecommunications (MPT) created an isolated domestic market with a vertically integrated monopoly. By approving a proprietary standard and allocating wavelength spectrum only to NTT, the Japanese market was later isolated from potential foreign competition. Furthermore, the telecommunications industry consisted of a monopoly, which was not broken up until after a digital network was implemented nationally. However, it is difficult to claim that policy *created* this configuration. In the nascent stages of wireless communications, it was not expected that services would develop in the current fashion, and benefits of standardization across countries and regions were unrecognized.⁵⁷ Telecommunication in almost all countries in the world also started as government monopolies. Therefore, having a proprietary domestic standard and a vertically integrated telecommunications monopoly was more of a global norm than a policy outcome.⁵⁸

However, given that the basic industry structure and global isolation were a

⁵⁷ In the early stages of wireless telecommunications, when cellular phones were "automobile phones" and took up the entire trunk of a car, the market was considered to have an extremely limited capacity, potential benefits from standardizing formats were never conceived. (Kano, Sadahiko, "Technical innovations, standardization and regional comparison – a case study in mobile communications," *Telecommunications Policy* (2000), 312. <<http://www.elsevier.com/locate/telpol>>)

⁵⁸ The US and European telecommunications companies all started out as government monopolies, and first-generation analog standards were different in each region. (Kano, "Technical innovations, standardization and regional comparison – a case study in mobile communications," 310.)

global norm, the timing for adoption of a digital net work took advantage of the industry structure. The MPT adopted a digital network *before* it introduced competition into the service provider market. Adoption of the digital network at this time took advantage of the vertically integrated, monopolistic nature of the industry, since the entire industry was able to implement this structural innovation⁵⁹ rapidly. As seen earlier, contrasting this centralized shift to a digital network is the experience of the US cellular service industry, in which half the service providers still use analog networks, preventing the spread of high-performance non-voice communications. Whether this timing was intentional or not is unclear, and is beyond the scope of this paper.

Second, MPT policy changed the industry structure in 1994, introducing competition and allowing vertical disintegration. In introducing competition into the cellular service market, the MPT allowed four providers per district. This level of competition is rare in other parts of the world,⁶⁰ effectively shifting the industry from a monopoly to an arena of intense competition. Faced with this intense competition, NTT Docomo engaged in extensive restructuring of its capabilities, implementing a network-integrated functional hierarchy structure. At the same time that competition in the service provider market was introduced, liberalization of handset manufacturing directly created the less vertically-integrated suppliers keiretsu organizations. Since relational contracting began to fade only in the late 1990s, the creation of suppliers keiretsu was a naturally expected outcome from liberalizing handsets. In the realm of handset manufacturing, consumer electronics companies entering the handset manufacturing business already had networks of suppliers keiretsu. Thus with the

introduction of competition and the liberalization of handset manufacturing, policy created an environment and an industry structure conducive to rapid process innovation.

Third, adoption of IMT 2000 and the subsequent limiting of competition, decreasing the number of service providers to three per district, precipitated the unification of carriers into nationally unified providers. This prepared the industry for global competition from a national standpoint, since R&D efforts would be consolidated and small, regional carriers that might become likely candidates for foreign takeovers would be part of a large, nationally unified company.

Finally, the MPT did not step in to regulate non-voice communications at all. Given that the experience of development in the computer industry and Silicon Valley were essentially free of government intervention aside from investment and bankruptcy laws conducive to startup ventures, it seems that decentralized, modular systems can develop effectively without policy initiatives. Therefore, inaction on the part of the MPT in this case aided development of the organizational structural of internet connection services, best adapted in environments of extreme uncertainty.

Thus, through action or inaction, intentional or not, we find that government policy was, in fact, greatly responsible for creating the organizational structures that we concluded maximized advantages of development given the type of environmental uncertainty.

VII. CONCLUSION

In this paper, we examined Japan's wireless telecommunications industry, which has recently been receiving international atten-

⁵⁹ Recall that *structural* innovation, as defined by Langlois and Robertson, indicate an innovation requiring all other components to be altered when implementing the innovation, contrasting an *autonomous* innovation, where innovation can be implemented into each component independently. Since changing cellular networks from analog to cellular require changes in all broadcasting hardware as well as handsets and software operating the entire system, it is structural innovation.

⁶⁰ Tsuyama, *NTT & KDDI Dounaru Tsushin Gyokai*, 83.

tion, but which has not been analyzed at an academic level. By rigorously applying three theories of innovation to explain the development of this industry, we found how organizational structures have contributed to the three most commonly made observations, and the role policies played in shaping those organizational structures.

As third generation networks are introduced globally, wireless telecommunications

will further change how we live and how we work. Rapid and extensive change in the industry on a global scale is widely predicted and anticipated within the next decade. This study provides a basic understanding of this industry in its first decade of significance, and a way to think about this industry that will become the basis for how we understand a significant portion of our world as it changes our lives in the future.

This essay is a modified version of an undergraduate honors thesis that received the Firestone Medal for Excellence in Research in the field of East Asian Studies in 2001.

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Revising the Japanese Commercial Code:

A SUMMARY AND EVALUATION OF THE REFORM EFFORT

Mark Poe, Kay Shimizu,
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INTRODUCTION

Over the course of the last decade, the Japanese government has tried a wide range of schemes intended to reinvigorate the economy. Among the more widely publicized attempts have been the slashing of interest rates to near zero percent,¹ massive government expenditures on public works projects,² deficit spending at unprecedented levels,³ and the distribution of shopping coupons worth \$165 to the elderly and families with children, with the goal of stimulating consumer spending.⁴ None of these efforts has had a lasting effect on the national economy, and the search for a remedy continues. Concurrently, much hope has been pinned on a comprehensive reform effort dubbed the “Big Bang.”⁵ The scope of the Big Bang is very broad, including reforms in banking, capital markets, insurance, and

accounting standards.⁶ Although not explicitly part of the Big Bang, another significant reform effort seeks to revise Japan’s Commercial Code. The Commercial Code has been revised numerous times in the postwar period, but the current effort would result in the most significant changes in fifty years.⁷

The proposed revisions to the Commercial Code are numerous and wide-ranging, but can be loosely grouped into two categories—those that address corporate structure and deal mechanics, and those that address corporate governance.⁸ This paper seeks to provide a summary and evaluation of the proposed revisions to the Commercial Code, discusses the extent to which those revisions have been adopted by Japanese companies thus far, and speculates about other changes that must occur in corresponding laws and institutions to support the Commercial Code revisions.

¹ Chiaki Nishiyama, “Tax Cuts Put Japan on Track,” *JAPAN TIMES*, 20 July 1999.

² Hugh Cortazzi, “Japan on the Verge of Change?,” *JAPAN TIMES*, 17 Nov 1999.

³ Cortazzi.

⁴ Sheryl WuDunn, “Japan Announces \$195 Billion Plan to Revive Economy,” *N.Y. TIMES*, 16 Nov 1998, at A1.

⁵ The program was announced in 1997 by then Prime Minister Ryutaro Hashimoto. It takes its name from the British financial reform package of 1986, which proved moderately successful in stimulating the British economy.

⁶ Michael Bacon, Peter Dyaico & Asahi Yamashita, “Japanese Capital Markets and the ‘Big Bang’,” <<http://www.orrick.com/about/offices/Tokyo/article2.htm>> (1998).

⁷ Mark D. West, “The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States 47” (2000) (unpublished manuscript), available at <<http://papers.ssrn.com/sol3/delivery.cfm/>>; *NIHON KEIZAI SHINBUN*, *Commercial Code to Get Revamp*, 11 September 2000.

⁸ Thanks to Tony Zaloom of Tokyo’s Mori Sogo Law Firm for this categorization scheme. Mr. Zaloom is the chairperson of the American Chamber of Commerce in Japan’s Commercial Code Task Force Committee, and has been a substantial source of insight during the preparation of this paper.

I. THE MOVEMENT TO REFORM JAPANESE CORPORATE LAW

A. Brief History of Reform Efforts

Japanese corporate law has always been modeled after that of Western countries. Japan's first declaration of a corporate code came in 1899, after the Japanese government commissioned a German scholar named Hermann Roesler to write a draft based on the German code.⁹ That code went through several revisions during the first half of the 20th century, but was largely discarded after World War II, in part because the U.S. Occupation forces believed that the nature of Japanese corporations was one of the factors that led to Japanese aggression preceding the war. In its place, Occupation officials encouraged Japan to adopt a more democratic corporate governance structure. The primary architects of the new code were officials in the Supreme Commander for the Allied Powers' (SCAP) Legal Section. In an interesting historical quirk, three of the five officials in charge of drafting the code were trial lawyers from Illinois and graduates of the University of Illinois.¹⁰ As a result, the Japanese Commercial Code closely resembles the Illinois code. Rather than simply imposing the code, SCAP sought the input of Japanese officials, scholars, and business organizations. But although the Americans made several compromises,¹¹ the final draft of the code that the Diet adopted in May of 1950 was essentially a replica of the Illinois code.

Since the war, the Commercial Code has been revised 22 times, eleven of which have been substantial reforms,¹² but the current reform effort is widely viewed as the most thorough overhaul in the lifetime of the code. Editors at Japan's leading economic newspaper, the *Nihon Keizai Shimbun*, routinely refer to the current effort as "the first

major revision of the Commercial Code in 50 years."¹³ The latest round of reform efforts might be considered to have begun with the collapse of the bubble economy in 1993, but the level of interest in corporate reform has crescendoed only in the past few years. In April of 2001, Japan's Ministry of Justice released an interim proposal for reforming the Commercial Code that packages together dozens of changes in all areas of the code, many of which mark a shift away from the five main characteristics of the traditional Japanese corporate environment: bank-centered capital markets, *keiretsu*-controlled stock ownership patterns, administrative guidance, insider-dominated board of directors, and weak external monitoring of corporate management.

B. The Players in Corporate Law Reform

Due to the potential political and economic impact of an overhaul of the Japanese Commercial Code, many parties have taken an interest in the reform process, and have sought to have their interests adequately represented. As would be expected, government bureaucrats, business organizations, academics, and actors representing foreign interests are currently jockeying for influence over the final legislation that will be proposed to the Diet. The proposals supported by these various groups are often conflicting, and few proposals have unanimous support. Rather than attempting to list each reform proposal supported by each party, this section first gives a short description of the process by which legislation is generated, followed by a brief description of the general interests of each of the main actors.¹⁴

1. The process of generating legislation

A large part of the legislation that is introduced to the Diet is generated by *shingikai*

⁹ West, 11.

¹⁰ West, 12.

¹¹ West, 16-17.

¹² West, 26.

¹³ "Commercial Code to Get Revamp," *NIKKEI WEEKLY*, 11 Sept 2000; "Business Calls for Faster Legal Revision," *NIKKEI WEEKLY*, 23 Oct 2000.

¹⁴ The descriptions of the actors' interests are based in large part on characterizations given by Tony Zaloom. Any inaccuracies, though, are the fault of the authors.

advisory committees and bureaucrats working in the various cabinet ministries. Which ministry drafts a given proposal is largely determined by the subject-matter of the legislation. Almost every corporate law revision in the postwar period has come solely from the Ministry of Justice (MOJ) and is the work of three or four officials,¹⁵ but because the current reform effort is so sweeping, officials from other ministries have been seconded to MOJ to collaborate in the development of the legislation.¹⁶ The standard route of a Commercial Code revision begins with a standing advisory committee of the MOJ called the Legislative Committee.¹⁷ The Legislative Committee oversees two smaller panels, the Commercial Code and the Company Law Subcommittees. The appropriate subcommittee solicits opinions from interested groups, discusses and develops an outline for the change, then presents it to the full Legislative Committee, which publicly presents the proposal and again receives comments before the bill is drafted by MOJ. The bill is then submitted to the cabinet for approval before being sent to the Diet for deliberation and enactment. Although ministry officials have the final say in shaping legislation for the Diet, the advisory committees are an extremely influential, if not determinative, part of the process.¹⁸

2. Ministry of Justice

The Ministry of Justice is the most significant actor in the current reform effort. It is a rather conservative organization, and is hesitant to enact any sudden, radical changes. For example, in its most recent proposal, the MOJ has suggested that rather than do away with the failed *kansayaku* auditor system, it would allow corporations to choose between keeping their *kansayaku* in a strengthened

form, or selecting *one* outside director. The MOJ is also not as open to foreign participation as some of the other ministries, and has refused to allow ACCJ (American Chamber of Commerce in Japan) to participate in its advisory committee meetings.¹⁹

The MOJ has drawn some criticism for not acting quickly enough in proposing actual reform legislation to the Diet.²⁰ Although it refers to the current reform effort as the *bappon kaikaku*, or “drastic reform,” the iterative process by which it develops legislation can take a considerable amount of time; some of the elements of its April, 2001 interim proposal have been pending for as long as four years. Part of the problem is that its advisory councils are hesitant to make bold changes to the Commercial Code, and instead have worked very incrementally.²¹

3. Ministry of Economics, Trade, and Industry

Although its former embodiment, MITI, had long been known as a stalwart defender of the status quo, METI has been a surprisingly progressive proponent of corporate law reform. According to Tony Zaloom, Chair of the American Chamber of Commerce in Japan’s (“ACCJ”) Commercial Code Task Force Committee, METI is now “the major force behind the reforms” and is advocating for a more accountable, market-oriented approach to corporate governance.²² Since METI is largely responsible for Japanese industrial policy, perhaps it is feeling additional pressure to turn Japan’s economy around, and has decided that reform of the Commercial Code is one step in that process. Although it is not directly involved in shaping legislation to submit to the Diet, METI has seconded several employees to MOJ to participate in the development of legislation.²³ In addition, METI has its own Commercial Code advisory

¹⁵ West, 36.

¹⁶ Interview with Tony Zaloom, chair of the ACCJ’s Commercial Code Task Force Committee (May 4, 2001).

¹⁷ West, 36.

¹⁸ West, 33.

¹⁹ Interview with Tony Zaloom.

²⁰ “Business Calls for Faster Legal Revision,” THE NIKKEI WEEKLY, 23 Oct 2000.

²¹ Interview with Tony Zaloom.

²² Interview with Tony Zaloom.

²³ Interview with Tony Zaloom.

committee that feeds into the MOJ process, and it has allowed Mr. Zaloom to participate in its deliberations as the ACCJ's representative.

4. Ministry of Finance

Because of the wide range of reforms that have been suggested in the current revision movement, the Ministry of Finance (MOF) is necessarily involved in the effort. It has its own advisory committees to develop and evaluate reform proposals, and it continually consults with MOJ. Many of the proposed reforms, including almost anything that affects stock, directly implicate matters of MOF jurisdiction, and will only succeed if MOF gives its assent. MOF seems generally supportive of the effort to reform the Commercial Code. It was the lead ministry in enacting the financial reforms of the "Big Bang," being partly motivated by fear that Japanese financial products were falling behind those from the United States and Europe.²⁴ If it believes that Japan is losing a similar race in the area of corporate structure and governance, one would expect it to support the changes sought by MOJ and METI.

The unclear hierarchy between the ministries lends itself to a certain amount of confusion. For example, some of the corporate governance proposals from MOJ distinguish between companies not based on whether they are privately or publicly owned, but based on their size, even though that criterion is not especially helpful for corporate governance purposes. The reason for doing so, apparently, is to avoid any conflict that might arise should the MOJ directly interfere with MOF jurisdiction over publicly traded companies.²⁵

5. Keidanren

The Japan Federation of Economic Organizations, or *Keidanren*, is the most influential business organization in Japan and has traditionally been a very conservative organization, dominated by the bastions of Japanese industry like steel companies and auto manufacturers.²⁶ *Keidanren's* membership includes 800 of Japan's largest corporations and 100 trade and industrial organizations.²⁷ Although it has been fully supportive of changes that would remove restrictions on corporate structure and financing, since it is dominated by incumbent managers, it is leery of corporate governance changes and other revisions that would allow for greater external control of management. For example, *Keidanren* strongly opposes any suggestion that companies should be required to add outside directors to corporate boards, insisting that outsiders would never have sufficient expertise and understanding of the business to adequately supervise it.²⁸ Instead, *Keidanren* insists that accountability can be sufficiently increased by strengthening the existing *kansayaku* system by, for instance, increasing the number of *kansayaku* and requiring that at least half of them be outsiders to the firm.²⁹ Similarly, *Keidanren* is seeking to once again restrict the derivative suit rules that were relaxed in 1993, to make it harder for shareholders to directly challenge board decisions.³⁰

As a balance against their desire to maintain control, however, *Keidanren* members must weigh their need for external sources of capital, especially as their ability to rely on bank-financing declines. *Keidanren* position papers thus make some

²⁴ Bacon, Dyaico, & Yamashita.

²⁵ E-mail from Nick Benes, ACCJ, to ACCJ Commercial Code Task Force Committee members (May 27, 2001) (on file with authors).

²⁶ Interview with Tony Zaloom.

²⁷ West, 30.

²⁸ Keidanren, *Summary of the "Points of Discussion Relating to Corporate Governance in Japanese Public Companies (Interim Report)"*, policy paper (Nov. 21, 2000), <<http://www.keidanren.or.jp/english/policy/2000/061.html>> [hereinafter Keidanren, *Interim Report*].

²⁹ Keidanren, *Urgent Recommendations Concerning Corporate Governance*, policy paper (Sept. 16, 1997), <<http://www.keidanren.or.jp/english/policy/pol067.html>> [hereinafter Keidanren, *Urgent Recommendations*].

³⁰ Interview with Tony Zaloom.

concessions to shareholders, calling for such things as the acceptance of foreign accounting standards³¹ and the need to “build corporate governance that places even more importance on shareholder value.”³² The organization recognizes that it must increasingly look to foreign sources of capital, and notes that one trend in capital markets is the “increase in the number of foreign investors, who have greater voice.”³³

6. American Chamber of Commerce in Japan

Now in its 54th year, the ACCJ is an organization of more than 3200 American business people and has been the most active foreign influence on the direction of corporate reform in Japan.³⁴ The organization has formed a special committee to evaluate and make proposals to the Ministry of Justice, and actively distributes its viewpoints to the business press.³⁵ The ACCJ’s interest in corporate reform seems to be motivated by the desire to increase the similarity between Japanese and American corporate law so that foreign businesses and investors will be better able to predict the outcomes of their activities. In fact, a close look at the proposals suggested by the ACCJ reveals that nearly all of them are direct transplants from American corporate law.

The ACCJ represents both investors and those who are seeking business opportunities in Japan. Among the many ways that American investors would benefit through some of the proposed reforms is through having Japanese boards of directors held more directly accountable to the shareholders’ interests. Many people believe that the legal revisions will lead to better-managed companies that will in turn make more

money for their shareholders. Perhaps an even stronger incentive for ACCJ members is that a similar body of corporate law and clearly compatible goals would make it easier for American corporations to deal with their Japanese counterparts in business transactions.³⁶ As an example, when American and Japanese businesses merge or enter into joint ventures in the current environment, there can be considerable confusion as to the proper corporate purpose and direction. This confusion would likely be reduced if both the American and Japanese managers agreed that they were individually accountable for the performance of the venture, and that their primary goal was the maximization of shareholder value.

7. Shareholder Groups

Among all of the parties representing their interests in the current reform effort, there is one conspicuous absence—the shareholders themselves. The ACCJ and CalPERS play a limited role in representing shareholders, but there is apparently no domestic counterpart to these groups that is taking an active role. The absence of shareholders is quite ironic, especially given the fact that many of the reform proponents claim that corporate shareholders will be the primary beneficiaries of the reforms. Although one would probably not expect individual investors to have sufficient incentive to become actively involved in the decision-making process, domestic institutional investors such as pension plans and fund managers would seem to have a lot at stake in the outcome. Whether their absence is properly attributed to legal restraints, a culture of shareholder

³¹ Keidanren, *Toward Creating a Competitive Capital Market*, policy paper (Nov. 24, 1999), <<http://www.keidanren.or.jp/english/policy/pol112.html>>.

³² Keidanren, *Urgent Recommendations*.

³³ Keidanren, *Interim Report*. It is unclear whether *Keidanren* means to say that foreigners have a greater voice due to their increasing numbers, or that foreigners are generally more demanding and vocal shareholders. More than likely, both of these things are true.

³⁴ American Chamber of Commerce in Japan website, <<http://www.accj.or.jp/default.asp>>.

³⁵ Interview with Tony Zaloom; ACCJ, *Commercial Code Task Force Meeting Minutes* (Sept. 1, 2000), <<http://www.accj.or.jp/News/viewNews.asp?XID=3182>>.

³⁶ Interview with Tony Zaloom.

passivity, or to other reasons,³⁷ their absence from the debate is noteworthy.³⁸

C. Proposed Revisions of Japanese Corporate Law

Over the last several years, there has been a plethora of proposals for various revisions to Japanese corporate law. For brevity's sake, this paper highlights four significant proposals by presenting each proposal, and where necessary, describing it, explaining the rationale behind it, identifying its main proponents and opponents, and commenting on its status, likelihood of adoption, and other features. These proposals are in various stages of advancement. Some of them have already been adopted, some are contained in a tentative package of proposals released by MOJ in April 2001, and some may never be enacted. In addition, the reader should be cautioned that the descriptions are not based on complete information, and might therefore contain inaccuracies.

1. Deal Mechanics Proposals

(1) Proposal: Facilitate Mergers/Corporate Restructuring

Description: Japanese corporate law is full of restrictive rules that impede corporations from acquiring each other and from changing their corporate structure. Partly as a result, Japanese companies have long been conglomerations of completely dissimilar operations and enterprises.³⁹ One of the

legal roadblocks was that Japan had long had a ban on pure holding companies, fearing that that structure would lead to anti-competitive business practices. The Diet lifted the ban in 1997, so that now it is much easier for corporate parents to reorganize and trade their business units.⁴⁰

For a few years following the sanctioning of holding companies, impediments to effective reorganization remained. Japan has historically lacked a share exchange system, so that a single hold-out shareholder could prevent a firm from purchasing another as a wholly owned subsidiary. In 1999 the Diet passed a bill that allowed for compulsory share exchange if endorsed by a two-thirds majority of the shares present at a shareholder's meeting. The bill also granted appraisal rights to dissenters.⁴¹

Another impediment to efficient corporate structuring was that until 2000, Japan had no provisions regarding corporate spin-offs, which allow a corporation to divide itself into separate companies.⁴² The absence of spin-off provisions became a pressing issue as the economy continued to stagnate, and corporations increasingly needed to streamline themselves by divesting of unprofitable divisions.

Obstacles to mergers still exist, especially for international corporations. Japan has complicated rules concerning cross-border share exchanges, and although the ACCJ and the U.S. government have persistently called for the simplification of the rules, the April 2001 reform package released by MOJ failed to make any allowance for such transactions.⁴³

³⁷ Side-By-Side Comparison of USG Submission on Commercial Code Issues and Summarized Contents of Ministry of Justice Interim Report 7 (May 11, 2001) [hereinafter USG Submission] (report distributed by U.S. embassy personnel, on file with authors).

³⁸ Mark J. Roe, Economic Competitiveness and the Law: Article and Comment: Some Differences in Corporate Structure in Germany, Japan, and the United States, 102 YALE L.J. 1977-79 (1993); Bernard S. Black, Legal Theory: Is Corporate Law Trivial?: A Political and Economic Analysis, 84 Nw. U.L. Rev. 542 (1990).

³⁹ Dean A. Yoost & Ross Kerley, "Japan's Changing Landscape," PricewaterhouseCoopers bulletin (1998), <http://211.14.130.185/other_research/JapansChangingLandscape.html> [hereinafter Yoost & Kerley, Changing Landscape].

⁴⁰ Yoost & Kerley, "Changing Landscape".

⁴¹ West, 55.

⁴² West, 55.

⁴³ USG Submission.

Rationale: It is believed that a relaxation of the rules governing corporate organization will encourage the consolidation and restructuring of corporations, leading to increased competitiveness of Japanese industry.⁴⁴ This streamlining allows corporations to concentrate on their core businesses, and to jettison enterprises that aren't performing well.

Proponents/Opponents: Every major interest group appears to support the liberalization of rules that unnecessarily restrict corporate structure. Although such deregulation would seem to reduce the power of the governmental bureaucracy, it appears that the ministries have put aside their jurisdictional jealousy in favor of reinvigorating the national economy. As for the failure to ease cross-border transactions, one can speculate that it is motivated by old-fashioned national protectionism.

Comments: Many of the most glaring impediments to corporate reorganization seem to have been resolved over the last decade, probably due to the lack of any strong interest groups opposed to such reform. Although these reforms would seem to be quite significant in terms of stimulating the economy, there has not been significant improvement at the national level since these reforms were enacted. Perhaps the extent of the overhaul is so great that corporations have not had sufficient time to make use of the liberalizations.

(2) Proposal: Reduce the level of cross-shareholding

Description: The traditional practice of cross-shareholding is being attacked in several ways. First, beginning in 2002, new corporate accounting rules will require that cross-held

shares be assessed at their market value rather than their book value.⁴⁵ Because the market value is much more volatile than the book value, banks and corporations are expected to have incentive to divest of their cross-holdings. Especially if the economy continues to stagnate, corporations can be expected to attempt to unload these depreciating assets and invest the cash in more profitable endeavors.⁴⁶

Regulators from Japan's Financial Services Agency are proposing to take a more direct tack to encourage banks to sell their cross-held shares. In June of 2001 the agency unveiled its proposal to require that a bank's shareholdings be less than the value of its capital holdings.⁴⁷ The proposal would require banks to divest of all excess shares over a three-year period, a present total of more than 10 trillion yen.⁴⁸

Rationale: Untangling the web of cross-shareholding is expected to have positive effects both on deal mechanics and on corporate governance. From the deal mechanics side, mergers and acquisitions will become easier as the percentage of shares in a firm's market float increases. When a majority of companies have more than a majority of their outstanding shares in the open market, one would expect that a market for corporate control would develop, which would in turn tend to increase the accuracy of share-pricing. From a purely corporate governance standpoint, directors will need to be more attentive to shareholders and share value because they won't be able to count on support from cross-holdings. In sum, the untangling of cross-held shares is expected to force managers to focus primarily on shareholder value.

Proponents/Opponents: There have been few, if any, vocal opponents of reducing the level of cross-shareholding. The government

⁴⁴ "Government OK's Bill to Revise Commercial Code," *JAPAN ECONOMIC NEWSWIRE*, 8 Mar 1999.

⁴⁵ Ginko Kobayashi, "Academic Criticizes Government Stock Plan," *THE DAILY YOMIURI*, 6 Feb 2001, at PC3.

⁴⁶ Yoost & Kerley, "Changing Landscape."

⁴⁷ Gillian Tett, "Japan Plans to Force Banks to Sell Equities," *FIN. TIMES*, 14 June 2001 at 11.

⁴⁸ Tett.

ministries, the ACCJ, and institutional investors all strongly support the idea.⁴⁹ Although it wouldn't seem that the incumbent managers who control *Keidanren* would benefit from untangling the web, they have not actively opposed the suggestion.

Comments: Reducing the level of cross-shareholding will probably have as significant an impact on Japanese corporate behavior as any of the other proposed reforms. In an environment of extensive friendly cross-shareholding, minority shareholders are essentially frozen out of all decision-making authority. Moreover, fostering the relationship between the cross-shareholders takes precedence over assuring maximum return to shareholders. If the currently cross-held shares are entirely divested, many of the enigmatic aspects of Japanese corporate behavior may disappear as well.

It appears that the cross-shareholdings are already beginning to unwind. Through 1999 and the first half of 2000, major banks sold cross-held shares of a total value of more than 4 trillion yen.⁵⁰

2. Corporate Governance Proposals

(1) Proposal: Require publicly-traded companies to add independent directors to their boards

Description: Probably no proposal has been more controversial than the suggestion that corporations be required to have independent directors on their boards. There have been a

variety of specific proposals, from CalPERS and the Corporate Governance Forum of Japan's recommendation that independent directors comprise a majority of the board,⁵¹ to the MOJ's proposal in April, 2001 that all large companies be required to have *one* independent director on their board.⁵² The ACCJ has alternatively proposed that companies be allowed to eliminate the *kansayaku* if they add outside directors that total one-third of a board's membership.⁵³

Rationale: Independent, outside directors are thought to not be as beholden to the insiders of a corporation as directors who have spent their entire career with the firm. Outside directors, having less allegiance to employees and less interest in increasing corporate perquisites, are expected to serve as the shareholders' representatives in board decision-making. The proponents of independent directors predict that they will increase corporate prosperity and limit self-dealing and agency costs.

Proponents/Opponents: *Keidanren* staunchly opposes the idea of allowing outsiders to meddle with a company's strategic planning. Instead, the organization seems to think that companies should be able to opt for outside directors should they desire them.⁵⁴ The ACCJ, CalPERS, and individual investors strongly support the revision, so long as a meaningful number of independent directors is required.⁵⁵ Caught in the middle, the MOJ and other regulators have tended to avoid the issue.⁵⁶ Even though independent directors are

⁴⁹ CalPERS Corporate Governance Market Principles, Japan, (2000) [hereinafter CalPERS Principles], available at <<http://www.thecorporatelibrary.com/docs/calpers/corporate%20governance%20market%20principles%20japan.html>>; Tett; Interview with Tony Zalom.

⁵⁰ Kobayashi.

⁵¹ CalPERS Principles; Corporate Governance Forum of Japan, *Corporate Governance Principles: A Japanese View* (interim report) (1997), at <<http://papers.ssrn.com/sol3/delivery.cfm/98041401.pdf?abstractid=76148>> principle 8B.

⁵² USG Submission.

⁵³ American Chamber of Commerce in Japan, Commercial Code Task Force Committee, *Revision of the Commercial Code – Corporate Governance*, (Feb. 28, 2001), at <<http://www.accj.or.jp/News/viewNews.asp?XID=3781>> [hereinafter ACCJ, *Revision*]; Benes.

⁵⁴ Interview with Tony Zalom; Keidanren, *Interim Report*.

⁵⁵ In one of the position papers it has circulated, the ACCJ cites a study by the Life Insurance Association that reveals that 84% of stockholding investors "believe that the most desirable and effective way to improve corporate governance would be to install outside directors to the board." ACCJ, *Revision*.

⁵⁶ Interview with Tony Zalom; ACCJ, *Revision*.

considered in the 2001 MOJ proposal, it is clear that MOJ does not fully support the idea, or it would have required something more than a single token outsider.

Comments: Whether corporations should be forced to add outside directors will probably remain a major area of discussion for the duration of the reform effort. But even if independent directors are not required by law, many corporations will probably add them voluntarily, especially those firms seeking foreign capital and listing on American stock exchanges. Even domestically, if other factors (such as cross-shareholdings and derivative suits) change, market forces might express a strong preference for outside directors.

(2) Proposal: Strengthen the role of the *kansayaku*

Description: As an alternative to adding independent directors to corporate boards, several groups have proposed that the role of *kansayaku* simply be strengthened. *Keidanren* has suggested that the number of *outside kansayaku* be increased from the current one to at least half of the total number.⁵⁷ *Keidanren* would also have the definition of outside auditor made stricter by excluding anyone who has ever worked for the corporation or its subsidiaries. The LDP subcommittee on corporate governance proposed similar changes.⁵⁸

Rationale: Advocates of the *kansayaku* system believe that *kansayaku* can fulfill a similar role to outside directors by cautioning the board when it approaches an ethical misstep. They do not believe, however, that anyone but inside directors who are familiar with a company's operations should have a vote in management matters. The ACCJ characterizes *Keidanren's* support for

strengthened *kansayaku* as an excuse to avoid adding outside directors to corporate boards.⁵⁹

Proponents/Opponents: At this point, it appears that *Keidanren* and a few members of ministry advisory committees are the only ones who still have faith in the *kansayaku* system. Foreign interests are strongly opposed to having *kansayaku* be a required element of their Japanese subsidiaries, believing that it is entirely redundant to their already outsider-dominated boards.⁶⁰ Even the MOJ appears to have lost some faith in *kansayaku*; its April 2001 proposal makes *kansayaku* optional for corporations that have majority-outsider audit committees.⁶¹

Comments: As the idea of independent directors gains support, the institution of the *kansayaku* will most likely fade away. *Kansayaku* are simply not vested with enough power and authority to prevent insider-dominated boards from doing whatever they want to do.

II. EMBRACING REFORMS - TO WHAT EXTENT?

The extent to which corporations have embraced the Commercial Code reforms remains questionable. While adherence to the legal requirements may create an illusion of compliance and rapid change, whether or not the intended results will emerge remains to be seen. The following section provides insight into the extent to which Japanese corporations have responded to the reforms as well as some of the barriers to reform that remain.

A. Responses to Deal Mechanics Proposals

1. **Proposal:** Facilitate mergers/corporate restructuring

⁵⁷ *Keidanren, Urgent Recommendations.*

⁵⁸ ACCJ, *Revision.*

⁵⁹ ACCJ, *Revision.*

⁶⁰ Benes.

⁶¹ USG Submission.

Current Response: Increase in M&A (Mergers and Acquisitions) activity

(a) merger procedures

i. The amendments

In an effort to provide Japanese corporations with organizational flexibility, on October 1, 1997, the Japanese government amended the Commercial Code to simplify and rationalize merger procedures. Prior to this amendment, a company was required to notify all the creditors individually of its merger plans and give them the right to raise objections. Now, a company has only to put a notice in a daily newspaper. Previously, a company also had to hold a shareholders' meeting both before and after a merger. Now, it has to hold a meeting only before a merger. In addition, a company does not have to hold a shareholders' meeting in the case of a small merger.^{62, 63}

ii. Large immediate reaction to amendments

The year following the amendment saw a strong increase in M&A activity in Japan generally, and perhaps most dramatically in the international arena, with a number of high profile acquisitions by foreign companies. Statistics estimate the increase in the number of overall M&A transactions at approximately 30 percent.⁶⁴ Average deal sizes more than doubled from about -4.8 billion yen in 1997 to -9.8 billion yen in 1998. The average size of transactions by foreign companies increased even more sharply from about -10 billion yen in 1997 to over -31.5 billion yen in 1998.

In terms of the types of transactions, the greatest growth overall occurred in the form of stock acquisitions and business transfers (*eigyo hikiuke*), including spin-offs of company business divisions. However, asset acquisitions remain a popular structure for

acquisitions by foreign acquirers, particularly where the target company is distressed or failing and the acquirer wishes to avoid assuming liability for bad assets and potential hidden liabilities.⁶⁵

iii. Decline in activity in 1999-2000

In more recent years, M&A activity in Japan has slowed down, perhaps as a result of the continuing economic slump in Japan as well as declining economic situations abroad, particularly in the United States. M&A activity in Japan in 2000 more than halved compared to 1999, according to figures compiled by Thomson Financial Securities Data.⁶⁶ Deals announced by November 2000 with a Japanese involvement were worth 104,588 million US dollars compared to 229,748 million US dollars in 1999.

iv. Reforms continue despite decline in high profile M&A activity

While the pace of M&A activity has slowed down considerably over the past couple of years, the decline in volume and number of transactions does not necessarily signify a halt to reforms. Many analysts foresee a continuation of the financial problems now afflicting the Japanese economy for at least the near- to medium-term. M&A activity will continue to increase as pressures to restructure and consolidate grow more and more intense in the times ahead.

In fact, there are strong signs that M&A activity is broadening out in Japan as corporate restructuring starts to permeate the economy. While the expected rush of foreign-led deals is not going to happen, the Japanese market continues to evolve slowly. The pace of corporate restructuring in Japan

⁶² A small merger refers to a case where the new stock issued by the acquiring company is less than 1/20 of its total stock.

⁶³ Hidehiko Nishiyama, "Japan's Regulatory Reforms: Part II," October 2000 1 (2000), at <<http://www.jetro.org/inside/10Oct2000.html>>.

⁶⁴ Grant Finlayson and Makiko Ushijima, "M&A in Japan", Orrick.com, at <<http://www.orrick.com/about/offices/tokyo/article1.htm>> (1999).

⁶⁵ Nishiyama.

⁶⁶ David Ibson, "SURVEY - FOREIGN INVESTMENT IN JAPAN: M&A 'rush hour' falls flat: INVESTMENT", *FINANCIAL TIMES*, 17 November 2000 (2000), at <<http://news.ft.com/ft/gx/cgi/ftc?pagename=View&c=Collection&cid=FTD4NZ6J2FC&title=Foreign-Investment-in-Japan&pagetag=2ctfijj§iontag=na/ctyind&gaid=001117001593>>.

⁶⁷ Ibson.

is very low compared to the United States or Europe. In Europe, M&A activity as a percentage of GDP was 18 percent last year (1999), in the United States it was 14 percent, while in Japan it was 6 percent.⁶⁷

While sizeable deal-making was dominated by banking and telecommunications in 2000, this year a number of new sectors are starting to show signs of life, such as smaller telecoms, insurance, pharmaceuticals, and vehicle parts. In addition, areas such as the hospitality industry, retailing and consumer finance are beginning to revive.

Furthermore, there are a number of short-term factors that indicate that the pace of restructuring could pick up. For example, the four leading banks' cross shareholdings in Japanese companies will continue to be unwound, freeing long-held scrip. In addition, new accounting regulations that mean assets must be marked to market for the first time should also help highlight possible acquisition targets as distressed companies are flushed out of the system. However, most bankers say the fundamental motivating force behind the creation of a buoyant and flourishing M&A market will be the eventual realization inside Japanese companies that they need to improve their returns on capital.⁶⁸

(b) M&A law - Anti-Monopoly Law

The Japanese government also amended the Anti-Monopoly Law, effective January 1, 1999, to increase the size of M&A that must be reported to the Japan Fair Trade Commission (JFTC). Before, all mergers had to be reported in advance, and acquisitions by companies whose combined assets exceeded Yen2 billion (\$18 million) had to be reported after the fact. Now, the reporting is required only when a company whose total assets are over Yen10 billion (\$90 million) merges with or acquires a company whose assets are over Yen1 billion (\$9 million).⁶⁹

As a result of this amendment, the number of M&A reported to JFTC decreased dramatically. The number of mergers reported in advance in 1999 dropped to less than one tenth of 2,300, which was the number for 1996. The number of acquisitions reported after the fact dropped from 9,400 in 1996 to 1,600 in 1999.

In addition, JFTC issued guidelines for M&A in December 1998 to clarify the application of the law and to improve predictability. The old threshold that basically prohibited mergers resulting in a market share of 25 percent or more was rescinded. Now, not only market share, but other factors are also considered, such as rank in the market, the number of competitors, and the possible emergence of new competitors. The possibility of imports is also taken into account.

2. Proposal: Reduce the level of cross-shareholding

Current Response: Falling cross-shareholding rates

Cross-shareholding rates have been gradually falling in recent years, as banks and other shareholders, forced by economic conditions to pursue higher profits, are redirecting funds away from less-productive investments in affiliated companies.⁷⁰ Since the late 1980s, the ownership structure of Japanese companies has been changing. Specifically, the shareholding by domestic corporations, especially financial institutions, has been diminishing significantly.⁷¹

The successive deterioration in share prices and profits of Japanese companies in the 1990s highlighted the costs of cross-shareholdings. Such holdings worsen efficiency in asset management and expose the asset value and profit of a holder company to share price volatility. Additionally, the damaged capital base of banks post bubble economy has made it more

⁶⁸ Ibison.

⁶⁹ Nishiyama.

⁷⁰ CalPERS, "Principles for Good Governance in Japan," Japan Market Principles, at <<http://www.calpers-governance.org/principles/international/japan/page06.asp>> (1999).

⁷¹ "OECD Corporate Governance Statistics," OECD, at <<http://www.oecd.org/daf/corporate-affairs/governance/statistics.htm>> (2000).

difficult for banks to keep a substantial amount of corporate shares.⁷² Cross-shareholding by banks heavily influenced their close relationships with the client companies, thereby weakening their ability to conduct effective monitoring of the client company management.

The reduction in the share of strategic holders has been filled by the increase of pure investment purpose holders. Among them, foreign investors have increased their share remarkably. Their share now reaches 10 percent of total stocks of listed companies. Pension funds have also expanded their holdings, though they still hold less than 4 percent. The increase of holdings by such investors translates into the erosion of the stable ownership structure, thus increasing the influence of shareholders to the management.⁷³

i. Cross-shareholding has declined

According to a report from the NLI Research Institute, at the end of fiscal year 1999, the cross-holding ratio stood at 10.53 percent in value (2.69 percent decline from the previous year), and 11.22 percent in share count (1.20 percent decline).⁷⁴ These ratios marked new lows since the survey's inception, and indicate that cross-holdings continue to unwind at a rapid pace. Similarly, the long-term holding ratio — a broadly defined cross-holding ratio which includes not only the confirmed cross-holdings but one-sided shareholdings by financial institutions, and one-sided shareholdings of financial stocks by other companies — also reached new lows of 37.87 percent in value (2.03 percent decline) and 34.71 percent in share count (2.16 percent decline).⁷⁵

ii. Both banks and business companies are unwinding

A breakdown of the decline in cross-holding ratio (value based) by shareholders

shows that banks held 1.05 percent less of business company stocks, while business companies held 0.90 percent less of bank stocks, business companies held 0.32 percent less of stocks in other business companies, and other cross-holdings fell 0.42 percent. When cross-holdings began declining from fiscal 1996, business companies first began selling bank stocks, followed by banks selling business company stocks. But in fiscal 1999, both banks and business companies are actively unwinding cross-holdings in each other.

iii. Corporate group companies are slower to unwind cross-holdings

The cross-holding ratio of companies affiliated with corporate groups fell 1.54 percent to 20.25 percent, compared to a 2.56 percent decline among non-affiliated companies to 6.77 percent. This result indicates that depressed stock prices in the post-bubble period have triggered unwinding starting with tenuous cross-holdings, which grew in the bubble period for reasons other than the conventional objectives of stabilizing management and cementing business partnerships.

iv. Keiretsu cross-holdings decline significantly

Cross-holding ratios fell 2.01 percent to 22.96 percent for the Mitsubishi group, 3.45 percent to 23.00 percent for the Sumitomo group, 3.51 percent to 16.21 percent for the Fuji group, 0.68 percent to 16.38 percent for the Dai-Ichi Kangyo group, and 2.96 percent to 14.33 percent for the Sanwa group. The sole exception was the Mitsui group, whose ratio rose 2.26 percent to 23.01 percent. But even Mitsui's ratio would have declined when excluding the extraordinary factor of change in major shareholders of group companies. The number of companies with some form of

⁷² Takahiro Yasui, "Corporate Governance in Japan and its Relevance to the Baltic Region," OECD, at <<http://www.oecd.org/daf/corporate-affairs/governance/in-baltics/yasui.pdf>> (October, 1999).

⁷³ Yasui.

⁷⁴ Hideaki Inoue, "Companies Continue to Unwind Cross-Shareholdings - The Fiscal 1999 Cross-Shareholding Survey," NLI Research, at <<http://www.nli-research.co.jp/eng/resea/econo/eco0010a.pdf>>

⁷⁵ Inoue.

⁷⁶ "Management embracing idea of outside directors," *THE NIKKEI WEEKLY*, 16 July 2001 ÷ 5 (2001), at <<http://www.nni.nikkei.co.jp/AC/TNW/Search/Nni20010716GY7H4FIN.htm>>.

confirmed cross-holdings continued to decline moderately to 2,290 companies under the new standards, or 92.6 percent of all surveyed companies (1.1 percent decline from previous year).

v. Barriers to further reform - why some may oppose less cross-holdings

Compared to cross-holding structures in which corporate shareholders act as silent partners, the expected trend toward shareholder value focused on share prices and corporate management will heighten the importance of return on equity, disclosure practices, and investor relations activities by companies. However, while these issues are crucial for Japan's corporate system to conform to global standards, their implementation will take much time. As a practical matter, concrete measures need to be considered to avoid any negative effects in the short term.

vi. Absorption of Unwound Cross-Holdings

A major concern in unwinding cross-holdings is the potential negative effect on stock prices from releasing massive amounts of previously untraded shares. Thus partly from the viewpoint of stabilizing share prices, attention has focused on measures to absorb of these shares. There are two options: share repurchases and share contributions to pension funds.

(a) *Repurchase of shares*

The fiscal 1994 revision of the Commercial Law allows share repurchases. This and the introduction of stock options are expected to alleviate supply and demand imbalances caused by unwinding. In fact, suspension of the tax on imputed dividends in fiscal 1995 made repurchases practicable for companies. Between fiscal 1996 and 1999, share repurchases of 439 companies totaling 2.34 trillion yen were reported in the *Nikkei Shinbun*. However, there was no correlation between changes in cross-holding ratios and share repurchases, and thus we cannot confirm that repurchases contributed to the unwinding of cross-shareholdings.

(b) *Contribution to pension funds*

Since the accounting rules for retirement benefits were adopted in March 2001, companies are now required to record pension and retirement lump-sum reserve shortfalls as liabilities, and amortize them over a maximum of 15 years. Sony and other companies who have adopted SEC standards in their accounting rules have already been contributing cross-held shares to their underfunded pension funds. The development of trust products and establishment of accounting rules are expected to expand the use of this method significantly, thereby helping to alleviate unwinding to some extent. However, many companies are trying to reduce liabilities through early amortization. Based on data from the *Nikkei Kaisha Joho*, planned amortization of liabilities were estimated to reach 7.57 trillion yen in the March 2001 term, but decline to approximately one trillion yen from the March 2002 term, and thus have only a transitory effect in unwinding cross-holdings.

With efforts to unwind tenuous cross-holdings almost at an end, further progress in unwinding cross-holdings will require not only share repurchases and contributions to pension funds, but addressing issues for stabilizing management such as the scheduling of annual general meetings and exercising voting rights. Unless these issues are specifically addressed, the unwinding of cross-holdings may cause unnecessary confusion to corporate management. In addition to long-term reforms in the corporate system such as enhanced disclosure and investor relations activities, Japan must also address more immediate concerns such as share price volatility and management stability.

B. *Responses to Corporate Governance Proposals*

1. Proposal: Require publicly-traded companies to add independent directors to their boards

Current Response: Independent directors and the corporate-officer system

As noted in Part I, most Japanese boards are very large and composed exclusively of

inside company executives. Such a governing body is inefficient and ineffective from the independent shareholders' point of view. In the past, the cross-shareholding system ensured many Japanese companies a majority of pro-management shareholders. As more banks which are major shareholders of their clients' companies divest of these cross-holdings, the Japanese traditional composition of the board of directors must also evolve to better serve its independent shareholders.

Key reforms aimed at improving the functioning of the board of directors include a) the introduction of independent directors and b) the adoption of the corporate officer system. The importance of the reforms of the boards of directors far outweigh those of retirement payouts for directors or the appointment of auditors, as these boards form the core of corporate governance. The following section will discuss these two reforms in turn.

a) The introduction of independent directors

According to firms listed on the first section of the Tokyo Stock Exchange who were surveyed in June 2001 by *The Nihon Keizai Shimbun*, 38 percent of the 740 companies that gave valid responses said they had appointed directors from outside their companies.⁷⁶ Only 16.9 percent of companies listed on the first section of the Tokyo Stock Exchange said they were against legislation obliging firms to employ an outside director, compared with 33.1 percent in favor.⁷⁷ Though big names like Sumitomo Chemical Co., Teijin Ltd. and the Japan Federation of Economic Organizations opposed the idea, the survey showed the practice is spreading rapidly.

Indeed news of the hiring of independent directors has become more frequent and common. More than half the board members at well-known large

companies such as Hoya Corp., Square Co., Densai-Lambda KK and Seiyo Food Systems Inc. are from outside the companies.⁷⁸ Kinki Nippon Railway Co., SSP Co. and five other firms hire more than five outside directors. Chugai Pharmaceutical Co. will soon have a former executive of U.S. pharmaceutical giant Merck & Co. join its board, while Shin-Etsu Chemical Co. will take on the former chairman of Dow Chemical Co. at the end of this month.

Some of the problems remaining despite the reforms include the following:

a. Top executives continue to dominate boards

Supervisory functions exercised by boards will not be strengthened even with the adoption of corporate-officer systems or appointments of outside directors as long as top executives continue to dominate boards. To protect shareholders, it is essential for directors to be able to press for bold management changes when performance deteriorates. Hence the need for an independent director.

b. Lack of pressure from institutional investors

There is a lack of pressure from institutional investors. Western companies have strengthened their boards' supervision of top executives under strong pressure from pension funds and other institutional investors. In contrast, even at Japanese companies that have implemented board reforms, top managers themselves have led reforms of corporate governance before institutional investors intensified pressure.

c. Lack of appropriate/experienced people

Almost all of the companies Walden, an asset management company, surveyed

⁷⁷ "Corporate Japan Moving Toward Management Reform: Survey", *NIHON KEIZAI SHINBUN MORNING EDITION* 15 June 2001 ÷ 2 (2001), at <<http://www.nni.nikkei.co.jp/AC/TNKS/Search/Nni20010615D15JF625.htm>>. [hereinafter NKS, *Corporate Japan*]

The survey was based on 740 valid responses from 1,464 companies listed on the TSE's first section as of May 28. Companies that close books in March were asked to answer based on their projections after annual shareholders meetings.

⁷⁸ NKS, *Corporate Japan*.

said that they had no independent directors and were not contemplating adding any soon.⁷⁹ Many cited the lack of qualified independent directors. While Walden’s expectation of US companies is that at least half of the directors should be independent, Walden cannot support over 90 percent of Japanese director slates due to a lack of independent directors in conjunction with little advance notice of proxy agendas.⁸⁰

d. Some other things need to change to make independent directors effective.

Last autumn, Tokyo Electron Ltd. set up a nomination committee composed of representative managing directors and directors holding concurrent posts of chairmen of related companies, giving it the authority to select candidate directors and recommend them to the board. Company presidents have generally had the exclusive right to appoint and dismiss top executives and directors. They also had considerable discretion on management decisions. But these privileges are bound to decline as shareholder rights become stronger.

An interim draft plan for Commercial Code revision emphasizes strengthening the supervisory functions of boards of directors, partly by mandating the appointment of outside directors. However, if the current system allowing presidents to act arbitrarily remains untouched, supervision cannot be reinforced effectively.

b) The introduction of the corporate officer system

A corporate officer is a person who is appointed as an executor or performer of the actual business activities in a company. The corporate officer is appointed in a board meeting, with no particular director having the discretion of removing an executive officer from his/

her position. Concurrently the senior executive officer is usually a director on the board, and the top executive officer is the CEO, which is almost the equivalent of a president of a company.

An increasing number of companies have also introduced the corporate officer system, which organizationally separates the board and the management in order to clarify the role of the board.⁸¹ The function of directors is to establish strategy or basic plan of the company and to watch or supervise its performance, while the executive officers perform everyday business operations.

Adoption of the corporate executive officer system is designed to facilitate speedier decision-making on the business front while clarifying the responsibilities,

FOR IMMEDIATE RELEASE

JT Accelerates Reforms of Management System to Enhance

Corporate Value and Corporate Governance

TOKYO, May 17, 2001 — Japan Tobacco Inc. (JT) (TSE: 2914), aiming to transform itself into “a global growth company that efficiently and effectively develops diversified, value-creating businesses,” today took new steps in its company-wide reform of its management systems. These reforms are specifically directed at enhancing corporate value and corporate governance.

The changes announced today — third stage in a series of recent reforms — aim to separate the functions of company-wide management strategy decision-making from business-operation execution and to reinforce each, in order to facilitate faster and higher quality decisions and execution.

⁷⁹ “International Corporate Governance,” Walden Asset Management : Emerging Issues, at <<http://www.waldenassetmgmt.com/social/topics/99114.html>> (November, 1999).

Walden Asset Management Nov 1999 [hereinafter WALDEN, *Corporate Governance*]

⁸⁰ WALDEN, *Corporate Governance*.

⁸¹ Yasui.

performance standards and achievement evaluation for each executive officer.⁸²

Executive officers, appointed by the board of directors, are charged with carrying out individual tasks, including corporate management, business operations, and work involving regional operations departments. While their status remains employees, their remuneration and bonuses will be commensurate with their contributions to corporate management and performance, pursuant to clarification and evaluation of their responsibilities and achievements.

A survey by *Nihon Keizai Shimbun Inc.* shows that 35.7 percent of companies listed on the first section of the Tokyo Stock Exchange have introduced corporate officer systems, while 14.1 percent are considering the same move.⁸³

In 1997, Sony Corporation adopted the executive officer system for the first time in Japan, then 180 companies among the top listed 2,500 companies followed within two and half years. Furthermore, more than 1,000 companies are observed to follow them in a couple of years.⁸⁴

The rapid diffusion of the corporate officer system indicates that a growing number of firms have reduced the number of directors to intensify discussions and quicken decision-making. Among companies which have introduced the system, Shimizu Corp. slashed its number of directors to nine from 45 in fiscal 1998, and Itochu Corp. reduced the number to 12 from 45. NKK Corp., Asahi Breweries Ltd. and Mitsubishi Chemical Corp. cut their boards by more than 70 percent from five years earlier. Daiwa Securities Group Inc., which moved into a holding company system, managed a 87.5 percent cut.

Other companies which have yet to adopt the system are nevertheless moving to downsize upper management to allow quicker decision-making. Mitsubishi Heavy Industries

Ltd. now has 27 senior managers, down from 39 five years earlier.

So far there has been no legal descriptions about an executive officer system in Japan, but as investor demands intensify in a sluggish economy, the executive officer system may be established as a de facto standard way of corporate management.

The rapid diffusion of the adoption of independent outside board of directors and the introduction of the corporate officer system can be seen in many company advertisements attempting to improve their image through advertised corporate governance reforms. The case of Japan Tobacco Inc.⁸⁵ well illustrates this point.

On May 17, 2001, Japan Tobacco Inc. released the following statement:

Highlights of the management organizational reforms included:

1. Ensuring the qualification of individuals appointed to the board and a reduction in its members from 24 to 11, already reduced from 31 last year.
2. The introduction of a corporate (executive) officer system. The role of executive officers is intended to be clearly delineated with officers being assigned responsibilities for business execution in their respective area of authority, based on the board's corporate-wide management strategy.
3. The establishment of an advisory committee. An advisory committee comprised of qualified outside individuals is intended to be established by October. This committee will advise JT on the mid-to long-range direction of company business and other important matters.
4. The reorganization of the corporate headquarters. Corporate Headquarters will

⁸² NKS, Corporate Japan.

⁸³ NKS, Corporate Japan.

⁸⁴ Kanzo Kobayashi, "Executive Officer of a Japanese Corporation" (*translated*), at <http://www.nti.co.jp/~kobakan/contents/executiveofficer_j.html> (April 2, 2000).

⁸⁵ Japan Tobacco Inc., with sales in the year ended March 31 2001 of US \$36 billion (translated at a rate of US \$1 = Yen 123.90), is one of the world's largest manufacturers of tobacco products and has three of the world's top five brands in its product portfolio. Since its privatization in 1985, it has actively diversified its operations into pharmaceuticals and foods.

be reorganized in order to produce faster and higher quality business execution. The existing alignment will be reorganized into a new organizational structure with units that have clearly defined functions aimed at increasing efficiency and strengthening various corporate functions, including communication with stakeholders, in an effort to increase corporate brand value.

JT's advertisement is typical of the companies attempting reforms in its corporate structure.

2. Proposal: Strengthen the role of the *kansayaku*⁸⁶

A few reform-minded businessmen want Japan to get rid of its system of compliant board appointments, called *kansayaku*, in favor of American-inspired independent directors. In theory, the *kansayaku* keep an independent eye on the activities of a board of directors. In practice, there is precious little objective oversight.

Reformers had been hoping that competition in the marketplace would drive out the weaker Japanese system, forcing the *kansayaku* to naturally disappear. However, the business establishment, helped by the government, is trying to avoid the prospect of truly independent directors. They hope that a currently proposed bill would weaken the shareholder-lawsuit system, strengthen the *kansayaku* and get rid of all debate about any possible alternatives.

III. NECESSARY CHANGES TO LAWS, INSTITUTIONS, & CULTURE RELATED TO THE COMMERCIAL CODE

Legal reforms occur within a larger system of laws, institutions, and culture. Isolated reforms can flounder if they are

contrary to the stream of the larger system. Are the current Japanese Commercial Code reforms and proposed reforms isolated and doomed, or are there sufficient shifts in the larger system to support the Commercial Code changes? Section A of Part III looks at tax law, accounting standards, employment law, and bankruptcy law as they relate to the Commercial Code reforms, and Section B of Part III describes the culture of disclosure and activist institutional shareholders needed to encourage the Commercial Code reform goals.

A. Necessary Reform in Surrounding Laws

1. Proposal: Facilitate Mergers / Corporate Restructuring

(a) Tax Code and Accounting Standard Reforms

Changes in the Tax Code and accounting standards are needed to support corporate restructuring by providing incentives to encourage companies to take advantage of new measures.⁸⁷

Corporate Reorganization and Consolidated Taxation Background. In Japan, tax rules regarding reorganization previously treated mergers favorably but spin-offs unfavorably. Thus, for instance, two companies, A and B, which both had appreciated assets, could merge into a single company without paying corporate income tax on the amount of asset appreciation. Once they merged, however, they could not divide into companies A and B without paying income tax at the corporate level.⁸⁸ Thus, in addition, even after Commercial Code revisions allowed corporate restructuring, the risks of considerable tax burdens arising from corporate spin-offs left the reforms unenticing.⁸⁹

⁸⁶ Yasui.

⁸⁷ Hideki Kanda, "Path Dependence and Comparative Corporate Governance: Taxes and the Structure of Japanese Firms: The Hidden Aspects of Income Taxation", 74 WASH. U.L.Q. 393, 393-394 (1996). See also *Main Points of the Report for FY 2001 Tax Reform Submitted by the Government Tax Commission to Prime Minister Mori* (December 13, 2000), at <<http://www.mof.go.jp/english/tax/tax2001/tax2001a.pdf>> [hereinafter *MOF Tax Reforms*].

⁸⁸ Kanda, 399.

⁸⁹ American Chamber of Commerce Japan, Japan-America Cooperative Conference Committee Views, "Improve the Tax System to Respond to the Internationalization of Business," (Sept. 29, 2000), at <http://www.accj.or.jp/News/view_News.asp?XID=3219> [hereinafter *ACCJ, Improve Tax System*].

Furthermore, prior tax rules regarding parent-subsidiary taxation also encouraged integration. If the business operations of P, S1, and S2 were put within a single entity, such entity could offset profits against losses. However, once S1 and S2 were maintained as separate corporate entities, there was no way of offsetting the losses.⁹⁰ Thus, for example, when a profitable firm would spin off a red-ink business, the parent's gains would increase and consequently increase corporate and other taxes.⁹¹ In effect, disincentives in the Tax Code, not simply the Commercial Code, previously constrained firms from pursuing the most efficient corporate structures.

Corporate Reorganization Tax Reforms.

Tax reforms submitted by the Ministry of Finance (MOF) were created to facilitate the corporate spin-offs allowed in the 2000 revisions to the Commercial Code.⁹² The tax rules took effect as of April 1, 2001 and allow for the tax-free restructuring of corporate operations under certain circumstances.⁹³ The new framework simplifies the legal procedures for creating spin-offs and consolidating operations, while offering tax breaks,⁹⁴ including allowing companies to carry over the profit and loss of assets transferred in the restructuring of companies under certain conditions.⁹⁵ This reform brings Japanese Tax Code more into

line with the U.S. Tax Code where companies may merge or divide without paying income taxes at the corporate level.⁹⁶ The effect of the corporate reorganization tax reform is already apparent. Firms are increasingly splitting businesses along product lines or geographical areas and spinning off unprofitable divisions.⁹⁷

Consolidated Accounting Standards Reform for Tax Purposes. In addition to the corporate reorganization tax reforms, the consolidated accounting standards for tax purposes slated to come into force in April 2002 will permit losses at affiliates and subsidiaries to be written off against income, effectively reducing total tax bills⁹⁸ and making Japanese Tax Code more similar to U.S. Tax Code.⁹⁹

The consolidated accounting standards in Japan will likely encourage more companies to switch to the holding company structure¹⁰⁰ or to spin off subsidiaries.¹⁰¹ While the corporate reorganization reforms have already made it easier for firms to spin off unprofitable divisions, the holding company structure will become a viable option upon the introduction of the consolidated taxation system.¹⁰²

In sum, the 2001 Tax Code reforms giving favorable tax treatment to reorganization and the forthcoming 2002 Tax Code reforms regarding tax-related consolidated accounting standards give businesses more options for ownership structures.¹⁰³ Without these Tax

⁹⁰ Kanda, 399.

⁹¹ "Firms Rush To Reorganize Under New Corporate Spinoff Rules", NIHON KEIZAI SHIMBUN, 27 March 2001, at <<http://www.nni.nikkei.co.jp/AC/TNKS/Search/Nni20010326D26JFF05.htm>> [hereinafter NKS, *Reorganize*].

⁹² "MOF Tax Reforms; FY 2001 Tax Reform: Main Points", Ministry of Finance, 20 Dec 2000, at <<http://www.mof.go.jp/english/tax/tax2001/tax2001a.pdf>> [hereinafter MOF, *Tax Outline*].

⁹³ Dean A. Yoost and Ross Kerley, "Mergers and Acquisitions: Japan", INTERNATIONAL FINANCIAL LAW REVIEW, March 2001, at <<http://www.legalmediagrÖ/default.asp?Page=1&clIndex=O&SID=1404&M=3&Y=200>> [hereinafter Yoost & Kerley, *M&A*].

⁹⁴ NKS, *Reorganize*.

⁹⁵ *MOF Tax Reforms*.

⁹⁶ Kanda, 399; Yoost & Kerley, *M&A*.

⁹⁷ "Corporate Spinoffs: Legislation Accelerates Corporate Restructuring," NIHON KEIZAI SHIMBUN MORNING EDITION, 26 June 2001, at <<http://www.nni.nikkei.co.jp/AC/TNKS/Search/Nni20010626DNBN626H.htm>> [hereinafter NKS, *Corporate Spinoffs*].

⁹⁸ NKS, *Corporate Spinoffs*; *MOF Tax Reforms*; Yoost & Kerley, *M&A*.

⁹⁹ Kanda, 398-399; Yoost & Kerley, *M&A*.

¹⁰⁰ NKS, *Corporate Spinoffs*.

¹⁰¹ John Ehara, Address at the American Chamber of Commerce Luncheon at the Tokyo American Club in Tokyo, Japan (June 6, 2001).

¹⁰² Seita Sakamoto and Akikazu Tanaka, "Verdict Out on Listing of Subsidiaries", THE NIKKEI WEEKLY, 15 Jan 2001, at <<http://www.nni.nikkei.co.jp/AC/TNW/Search/Nni200201155MQ1G3FIN.htm>>.

¹⁰³ Sakamoto & Tanaka.

Code reforms accompanying the liberalizing measures in the Commercial Code, companies would not have sufficient financial incentives to take advantage of more efficient corporate structures.

Share Exchange and Transfer Tax Reforms. In October 1999, to provide for the smooth restructuring of corporate groups, the Diet passed legislation allowing companies to swap stock to complete acquisitions,¹⁰⁴ and, in coordination, the MOF Fiscal Year 2001 Tax Reform introduced favorable tax treatment for such stock-swap acquisitions. It allows companies to defer recognition of gain arising from asset transfers and, thus, to defer the tax.¹⁰⁵

However, such favorable treatment extends only to transactions involving domestic entities,¹⁰⁶ while companies using foreign-listed shares as consideration are not eligible for the preferential tax treatment. This requirement makes it significantly less attractive for foreign-listed companies to engage in merger or acquisition transactions in Japan since it either renders M&A transactions less efficient when using listed shares as consideration, or may make it prohibitively expensive by forcing foreign companies to use cash.¹⁰⁷ Equal application of these tax measures to foreign and Japanese companies would encourage an increase in foreign capital investment, and, as a result, this is an area of tax law that needs to be revised to support the Commercial Code reforms.¹⁰⁸

(b) *Employment Law Reforms*

In Japan, employment is an important issue for reform as it is one of the so-called

“three ugly ducks” in the economy: excessive debt, excessive assets, and excessive employment.¹⁰⁹ As the Commercial Code reforms set the stage for corporate reorganization, they will have an impact on employment practices. In fact, corporate reorganization has already begun affecting employee compensation systems and labor unions.¹¹⁰ However, Japanese courts have consistently held that laying off workers during a business slowdown may constitute unfair dismissal.¹¹¹ If the courts continue to hold against businesses that lay off workers during slowdowns and restructuring, then companies may find it more costly to pursue competitive structures than to maintain an excessive workforce.

In only one instance have employment regulations been amended to correspond with changes in the Commercial Code. In conjunction with reforms facilitating corporate restructuring, Japan adopted the Labor Contract Succession Law, which defines rules for transfer of employment incidental to corporate spin-offs. In order to reconcile the need for orderly corporate spin-offs with the need for protecting workers, the Law obligates companies to give recognition, within a certain scope, to worker opposition to transfer of employment and to respect the wishes of workers.¹¹² Beyond this, no specific Labor Law reforms have been proposed or implemented.

(c) *Bankruptcy Law Reforms*

As one of the Commercial Code reforms’ goals is giving companies the financial and structural flexibility needed to pursue corporate restructuring, it is important to consider the bankruptcy system. A

¹⁰⁴ Sakamoto & Tanaka.

¹⁰⁵ *MOF Tax Outline*.

¹⁰⁶ American Chamber of Commerce, “Cross-Border Stock-For-Stock M&As”, (June 1, 2001), at <<http://www.accj.or.jp/News/viewNews.asp?XID=4103>> [hereinafter ACCJ, *Stock Swap*].

¹⁰⁷ ACCJ, *Stock Swap*.

¹⁰⁸ ACCJ, *Improve Tax System*; Jason Singer, “U.S. Group Urges Japan To Relax M&A Rules,” *THE ASIAN WALL STREET JOURNAL*, 31 May 2001, at M1.

¹⁰⁹ Yasuhisa Shiozaki, “Death Spiral, How To Escape It?,” Speech to International Trade and Policy Forum, Economic Strategy Institute, Washington, D.C., Apr. 27, 1999, at <<http://www.y-shiozaki.or.jp/report/report3/990427.html>>.

¹¹⁰ NKS, *Corporate Spinoffs*.

¹¹¹ “Labor Laws”, JETRO, at <<http://www.jetro.go.jp/iv/e/japan/laws/labor1.html>>.

¹¹² JAPAN EXTERNAL TRADE ORGANIZATION (JETRO), HISTORY AND DIRECTION OF AMENDMENTS TO THE COMMERCIAL CODE AND PRINCIPAL ECONOMIC LAWS 40 (2001), 12 [hereinafter JETRO].

competitive economy needs a bankruptcy law that holds failing companies accountable to creditors and yet allows them to reorganize into successful enterprises.

The Japanese bankruptcy system has seen both court-initiated changes in the efficiency of bankruptcy proceedings from around 1998, as well as legislative reforms in the bankruptcy laws themselves in 2000. First, as an example of court-initiated changes, while Japanese courts typically take more than a year to determine whether or not to begin a corporate reorganization procedure, some courts have adopted a fast-track approach in significant reorganization cases, including those for *Tokai Kogyo*, *Daito Kogyo* and other major construction companies. In these cases, the court and the administrator appointed a special advisor to seek new funding sources and were able to conclude the start of the reorganization procedure within two or three months.¹¹³

Second, the Japanese Bankruptcy Code reforms went into effect on April 1, 2000 and brought Japan's bankruptcy system closer to that of the United States. There are two key points to the new law: companies can apply for court protection before their liabilities surpass their assets, and this move needs the approval of half a company's creditors, down from the previous requirement of three-fourths.¹¹⁴ The new bankruptcy law is intended in part to facilitate the transfer of operations of a failed company to its buyer.¹¹⁵ To this end, it has opened the way for a new restructuring method that combines filing for court protection and revival through mergers and acquisitions. Indeed, the new bankruptcy law is one factor leading to the recent increase in buyout activity in Japan.¹¹⁶

2. Proposal: Reduce The Level of Cross-Shareholding

Tax and accounting measures increasing the number of individual investors may facilitate reduction in the level of cross-shareholding. Reforms and needed reforms are discussed below.

Market Value Accounting. While the Japanese economy was experiencing robust growth, appraising financial assets and stocks at the cost of acquisition was a conservative accounting practice. However, after growth rates slowed and the bubble ruptured, appraisal of assets at acquisition costs became a tool for hiding unrealized losses.¹¹⁷ The acquisition value accounting system shifted to a market value system after April 2000. Under the new system, Japanese companies are required to record their holdings of marketable property assets and securities at current market value, rather than at cost. Management can no longer buttress balance sheets with property assets valued at inflated bubble economy levels, or manipulate profits by unwinding unrealized gains.¹¹⁸ As a result, firms that have large quantities of financial assets on their balance sheets, for example as part of *keiretsu*, are seeing their profit streams more exposed to price volatility through movements in equity markets. Thus, market value accounting has added impetus to reducing cross-shareholdings.¹¹⁹

Tokkin Tax Rules. Under Japanese corporate income tax law, when a domestic company invests in another company's shares, the basis of each share of the same company must be adjusted and averaged for income tax purposes. An exception to ordinary Japanese corporate income

¹¹³ Naoki Eguchi, Yoshiaki Muto, and Jeremy Pitts, "Japan Offers Debtors and Creditors Great Options", *INTERNATIONAL FINANCIAL LAW REVIEW*, Apr. 1998, at <<http://www.legalmediagrO/default.asp?Page=1&c Index=1&SID=1860&M=4&Y=199>>.

¹¹⁴ "Bankruptcy Law Broadens Protection", *THE NIKKEI WEEKLY*, 10 April 2000, at <<http://www.nni.nikkei.co.jp/AC/TNW/Search/Nni20000410EE2KA111.htm>> [hereinafter TNW, *Bankruptcy*].

¹¹⁵ TNW, *Bankruptcy*.

¹¹⁶ Ehara.

¹¹⁷ Mitsuhiro Fukao, "Japanese Financial Instability and Weaknesses in the Corporate Governance Structure," speech at the Conference on Corporate Governance in Asia: A Comparative Perspective, for Organization of Economic Co-operation and Development in Seoul, South Korea (March 3-5, 1999) (transcript available at <<http://www.oecd.org/daf/corporate-affairs/governance/roundtables/in-Asia/1999/fukao.pdf>>) at 14.

¹¹⁸ Yoost & Kerley, *M&A*.

¹¹⁹ Yoost & Kerley, *M&A*; JETRO, 18.

tax law is the *Tokutei Kinsen Shintaku*, or *tokkin* rule which allows a company to separate the basis of the securities it holds itself and those held by the trust. Thus, a company may maintain, for example, a 100 yen basis for the first share it buys and keep a 200 yen basis for the second share purchased through the trust.¹²⁰ However, individual investors cannot take advantage of the *tokkin* rule.

Since the *tokkin* rule allows corporate investors to buy and sell a number of shares of the same firm simultaneously and thus recognize a capital gain or loss without changing the size of their stake in the issuing company, trading volume by large institutions in the Japanese stock market increased following the introduction of the *tokkin* rule without decreasing stable stockholding. It is thus plausible that the *tokkin* rule helped to increase *keiretsu* and stable institutional stockholding.¹²¹

If it were concluded that the *tokkin* rule encourages the *keiretsu* structure, then, in light of the goal to reduce cross-shareholding, it would be advisable to eliminate the *tokkin* rule for companies—or, at least, to apply it to individual investors as well.

Stock Investment Trust Tax Rules. Stock investment trusts are similar to U.S. mutual funds. However, the Japanese tax aspects of stock investment trusts are disadvantageous to individual investors. When a personal investor cashes out of an open-ended investment trust, the investor pays both the securities trading tax and a 20% withholding tax on any income. If share prices rise so that the fund has unrealized profits, and then a new investor is added but quickly cancels their account, the investor will be taxed on the unrealized profits in the fund even though they personally have not made any money.¹²² This tax deterrent combined with the tax incentive

for companies to use the *tokkin* system promotes the continued *keiretsu* structure. The Tax Code should enable personal investors to invest in trust funds under the same conditions as they invest in individual stocks.

3. Proposal: Adding Independent Directors and Revising the Role of *Kansayaku*

Accounting standard requirements that accurately reflect the financial health of a company are needed to help investors determine whether directors and *kansayaku* are making poor business decisions or misleading representations to investors.

Accounting Standard-Setting Authority. Accounting rules should be written, not by a ministry, but by a rule-writing institution with the competence, independence, and incentives to write good accounting rules.¹²³ In July 2000, the statutory authority of corporate accounting standard setting was transferred from the Business Accounting Deliberation Council (an advisory body to the Finance Minister) to a newly established Financial Agency, the FSA.¹²⁴

In April of 2001, the FSA was privatized and is now similar to the Financial Accounting Standards Board in the United States.¹²⁵ The hopes are that a private agency will be able to resist pressure from politicians who want such things as postponement of fair-market valuation of banks' long-term securities holding (discussed below).¹²⁶

International Accounting Standards. Beginning in fiscal year 1999, a new accounting standard based on International Accounting Standards (IAS) was systematically applied to publicly traded companies. These standards have had a major impact not merely on the way accounts are

¹²⁰ JETRO, 18.

¹²¹ JETRO, 396-397.

¹²² Fukao, 14.

¹²³ Bernard S. Black, "The Core Institutions that Support Strong Securities Markets," at <http://papers.ssrn.com/paper.taf?abstract_id=231120>, at 8-9 [hereinafter Black, *Core Institutions*].

¹²⁴ "Proposal for Reform of Accounting Standards Setting Body of Japan: A preliminary draft", SUB-COMMITTEE ON CORPORATE ACCOUNTING FINANCIAL RESEARCH COMMITTEE OF THE LIBERAL DEMOCRATIC PARTY, Dec. 21, 1999, at <http://www.y-shiozaki.or.jp/yasuhisa/special_e.html>.

¹²⁵ Yasuhisa Shiozaki, "Sense of Mission: Outlook for U.S.-Japan Economic and Business Relations," *THE JOURNAL*, June 2001, at 23 [hereinafter Shiozaki, *U.S.-Japan*].

¹²⁶ Shiozaki, *U.S.-Japan*.

tabulated, but on the way companies are organized and managed.¹²⁷ Internationally unified standards on corporate governance are necessary to ensure the integrity of audits and prevent improper actions by company management.¹²⁸ In addition, the IAS-like standards have also served as one element driving corporate restructuring in Japan.¹²⁹

Consolidated Accounting Standards Reform For Non-Tax Purposes. Historically, consolidated accounting played a relatively minor role in corporate disclosure because the Commercial Code allowed major accounting standards to be built around an individual company basis. As a result, managers disclosed only the details of the parent company, not those of the subsidiaries owned by larger companies. This enabled the concealment of loss-making deals and activities from the investment community by simply transferring them to subsidiary undertakings.¹³⁰

From reporting periods after April 1999, corporate information has been reported principally on a consolidated basis.¹³¹ Companies are no longer able to “cover up” losses, non-performing assets, and debt-ridden subsidiaries by excluding them from the consolidated assets statement.¹³² Instead, managers have begun to view their companies’ operations as a portfolio of businesses. As a result, there is pressure to create value at the corporate group— not just parent company level— and to restructure via, in part, divestment of sub-performing assets and companies.¹³³

B. Necessary Changes in Culture and Institutions

1. Proposal: Adding Independent Directors and Revising the Role of *Kansayaku*

To be effective, independent directors will need accurate information and the support of investors

to push for financially-sound business decisions. In addition, *kansayaku* will need accurate information, support from management, and pressure from investors to make the shift from an auditing culture of passive-endorsement to one of active review of company financial statements. Thus, the Commercial Code corporate governance reforms require more than changes in law—they require changes in institutional and individual behavior. This section provides a cursory description of the need for a culture of disclosure and activist institutional shareholders.

(a) A Culture of Disclosure

The corporate governance reforms require institutions and players who provide information and whose reputations, and corresponding success, rely upon providing accurate information. This section looks at shifts needed in the “information culture” of two groups, accountants and securities exchanges, to ensure reliable access to information for investors,¹³⁴ thus serving as a check on representations and decisions of the *kansayaku* and directors.

Accountants. Audit requirements and accounting rules are no better than the accountants who conduct the audits. Where the *kansayaku* sign off on falsified financial statements, investors have little confidence in the legitimacy of the financial statements disclosed.¹³⁵ By 1999, the internal auditing systems of Japanese companies had lost much of their credibility. In the bankruptcies of the *jusen* housing finance companies, large construction companies, and financial institutions, there were many cases where it could only be assumed that some of the accountants and auditors turned a blind eye to inaccuracies.¹³⁶

¹²⁷ JETRO, 15.

¹²⁸ “IFAC To Call For Global Corporate Governance Standards”, *NIHON KEIZAI SHIMBUN MORNING EDITION*, 15 May 2001, at <<http://www.nni.nikkei.co.jp/AC/TNKS/Search/Nni20010514D14JFF01.htm>> [hereinafter NKS, *Global Corporate Governance*].

¹²⁹ JETRO, 15.

¹³⁰ Yoost & Kerley, *M&A*.

¹³¹ Yoost & Kerley, *M&A*.

¹³² JETRO, 16.

¹³³ Yoost & Kerley, *M&A*.

¹³⁴ A more thorough discussion of information providers and reputation intermediaries looks at the press, securities analysts, accountants, securities exchanges, and investment banks; however, given the space limitations of this article, the discussion is limited to accountants and security exchanges.

¹³⁵ “Panel Drafts Accounting Reforms,” *THE NIKKEI WEEKLY*, 3 July 2000, at <<http://www.nni.nikkei.co.jp/AC/TNW/Search/Nni20000703MH407992.htm>>.

¹³⁶ Fukao, 15.

To alleviate this basic mistrust of accounting practices, the Commercial Code reform proposal regarding *kansayaku* is an important first step.¹³⁷ However, since accounting is a reputational intermediary often beyond the reach of laws, there must also be voluntary commitments by accountants to “codes of best practice” within each company and corresponding enforcement measures for those who do not adhere.¹³⁸

Furthermore, an important cultural shift is that as Japanese society becomes more litigious, it may also encourage greater adherence to accounting standards. Before the bubble ruptured it was rare for a listed Japanese company to go bankrupt, and, as a result, the risk of lawsuits was limited. However, that is no longer the case. Creditors of Japan Housing Finance, one of the failed *jusen*, sued its auditors for compensation after it failed. If these suits result in stiff penalties to auditors, then they will help restore the relationship of checks and balances between auditors and companies that is necessary for auditing to function properly.¹³⁹

Securities Exchanges. A stock exchange with meaningful listing standards, and the willingness to enforce them by fining or delisting companies that violate disclosure rules, is also an important reputational intermediary. Stock exchanges establish and enforce listing standards, including disclosure requirements, and investors use the listing as a proxy for company quality. Both investors and the exchange understand that false disclosure by a few companies will taint all listed companies and reduce the value of an exchange listing.¹⁴⁰

There are currently four main stock markets in Japan: the Tokyo Stock Exchange,

the Osaka Stock Exchange, Nasdaq Japan, and Mothers. While corporate governance has been improved in varying ways thanks to these exchanges, the adequate transparency still does not exist. Part of the problem is that the individual exchanges set the disclosure rules. The other part of the problem is that many Japanese businessmen consider revealing one’s financial information and growth strategies for everyone to see — including competitors and the *yakuza* — as foolish.¹⁴¹

Given the aversion to revealing financial information and the choice of four exchanges, if one exchange’s disclosure requirements are too daunting, companies can flock to a competing market. Nasdaq Japan, recognizing this ingrained attitude, made some compromises when it began. For example, whereas the U.S. Nasdaq requires at least three independent outside directors on the board, Nasdaq Japan doesn’t require any. This problem should be addressed; the Securities and Exchange Surveillance Commission, for example, might be given more authority to produce a uniform set of standards to which all companies would have to adhere.¹⁴²

(b) *Activist Institutional Shareholders*

In addition to information providers and reputational intermediaries, activist shareholders are key actors needed to promote Commercial Code reforms. While institutional investors cannot directly control self-dealing, they can initiate derivative suits, exercise their voting rights in companies in which they have invested, increase disclosure of information about those companies, threaten to sell off shares, and raise corporate governance issues through shareholder proposals and informal dialogue.¹⁴³ In short, as cross-shareholdings unwind,¹⁴⁴ market pressure from institutional investors will increasingly be crucial in

¹³⁷ NKS, *Global Corporate Governance*.

¹³⁸ Fukao, 15.

¹³⁹ Fukao, 15.

¹⁴⁰ Black, *Core Institutions*, 13.

¹⁴¹ Steve Mollman, “Going Public in Japan: Warts and All”, *THE JAPAN INC NEWSLETTER*, 18 April 2001, at <<http://www.japaninc.net/newsletters/index.html?list=jin&issue=129>>.

¹⁴² Mollman.

¹⁴³ Black, “Core Institutions”, 32; “Why Corporate Governance Today?”, at <<http://www.thecorporatelibrary.coÖ/081495why%20corporate%20governance%today.htm>> [hereinafter *Why Corporate Governance*].

¹⁴⁴ “ANALYSIS: Pressures Build To Increase Shareholder Value”, *NIHON KEIZAI SHIMBUN MORNING EDITION*, 11 July 2001, at <<http://www.nni.nikkei.co.jp/AC/TNKS/Search/Nni20010710D10JFF05.htm>> [hereinafter NKS, *Shareholder Value*].

holding directors accountable for their decisions and *kansayaku* accountable for their representations. This section focuses on private pension plans and stock investment trusts as institutional shareholders.

Japanese Pension Fund Reforms. Pension funds in Japan have the potential of acting as institutional activist shareholders, particularly in light of two recent reforms.¹⁴⁵ In one set of reforms, funds are moving from being controlled by the MOF to private funds that are open to management by foreign asset managers.¹⁴⁶ Private managers will likely focus on investing for returns and, thus, assert pressure on companies to shift to more competitive structures that produce a higher return for their investments.

In a second set of reforms, employers may begin offering defined-contribution rather than defined-benefit plans to their employees.¹⁴⁷ It is likely that as employees contribute and invest their own pension money, large amounts of domestic pension fund money may move into the capital markets.¹⁴⁸ As employees focus on the return on their profit, then they will likely exert a stronger pressure on the pension funds handling their money, insisting on disclosure requirements of both asset management performance and its investment process.¹⁴⁹

Foreign Pension Funds. Pension plans in the United Kingdom, the Netherlands, Canada and the United States are becoming massive investors in the equity securities of foreign countries. The liberalization of

investment restrictions in Japan has conferred economic power on those countries having liquid investable funds.¹⁵⁰ In foreign markets, including Japan's, pension funds use indexed trading and many note that corporate governance is one of the few active mechanisms that may be used to enhance the indexed returns.¹⁵¹ Thus, in many instances, it is foreign institutional investors who are a vigorous force for change of the governance of domestic companies.¹⁵²

Japanese Stock Investment Trusts. Because corporate pension funds and life insurance companies will not be able to buy up all of the shares unwound from dissolution of the interlocking shareholding due to risks associated with asset investments, the individual sector may replace those larger investors. As a result, stock investment trust services will be of growing importance as individuals increasingly use them to diversify their investments.¹⁵³ A stock investment trust industry can perform as an activist institutional shareholder and demand strong disclosure.¹⁵⁴

Foreign Investment Funds. An increasing number of investors in Japan are foreign shareholders.¹⁵⁵ Whereas companies previously turned to their banks to explain earnings results after financial statements were prepared, now, after annual shareholder meetings are completed, the top management of many companies holds meetings with overseas institutional investors.¹⁵⁶ A growing number of firms discuss operating

¹⁴⁵ Nagamori.

¹⁴⁶ Yasuhisa Shiozaki, "The Politics of Reform and Japan's Pension Industry" Speech to Members of the House of Representatives, Japan Society, New York, Sept. 18, 2000, at <<http://www.y-shiozaki.or.jp/report/report3/00918s.html>> [hereinafter Shiozaki, *Japan's Pension Industry*].

¹⁴⁷ "Upper House Approves Bill To Reform Pension," THE JAPAN TIMES ONLINE, 9 June 2001, at <<http://www.japantimes.com/cgi-bin/getarticle.p15?nb20010609a1.htm>>.

¹⁴⁸ Leo C. O'Neill, President of Standard & Poor's, "How Good Corporate Governance Practices Can Lead The Reform of Japan's Business and Financial Systems," American Chamber of Commerce in Japan, Tokyo, June 13, 2001.

¹⁴⁹ Shiozaki, *Japan's Pension Industry*.

¹⁵⁰ "Corporate Governance and Pension Plans: If One Cannot Sell, One Must Care—Positioning Pensions for the Year 2000," 5 May 1995, at <<http://www.lens-library.com/info/whar5.html>> [hereinafter *Wharton Pension*].

¹⁵¹ *Why Corporate Governance*.

¹⁵² *Wharton Pension*.

¹⁵³ Fukao, 4.

¹⁵⁴ Black, *Core Institutions*, 18.

¹⁵⁵ Fukao, 12.

¹⁵⁶ NKS, *Shareholder Value*.

issues with these investors, bringing their proposals to the table at the internal company meetings. A fund manager at a foreign-affiliated asset management firm noted that some executives are using the “voice of overseas shareholders” as a way to push through internal reforms that would not succeed if advocated by the manager alone.¹⁵⁷

IV. CONVERGENCE TOWARDS AN ANGLO-AMERICAN SYSTEM OF CORPORATE GOVERNANCE?

The collapse of the bubble economy and intensifying globalization facilitating rapid capital flows have forced Japanese corporate governance and its surrounding environs to adapt to a deregulated world. Without this deregulation, Japanese companies face tough competition in the international markets. Japanese companies must now adapt to a more shareholder-centered system of corporate governance to raise funds and remain competitive by adapting to the rapid changes of an international market. The changes that ensued form the crux of this paper.

Is there convergence from a Japanese system of corporate governance to an Anglo-American system? According to Bebchuk and Roe, despite the growing power of

competition in international markets and globalization, rapid and complete convergence is not a given.¹⁵⁸ Local rules affect governance more than things like production technologies. They argue that these local rules are more stagnant and difficult to change. Some of the barriers to more rapid reform include some strongly embedded forces in Japanese society. As noted in Part I, the foundations of a stakeholder based Japanese system of corporate governance have been built over time, thereby creating tough barriers to reform. Indeed some scholars remain skeptical of convergence for these very reasons. Yet in Japan, we are seeing change in these very areas: local rules. Given the evidence, it is difficult to argue that the rigid nature of local rules combined with complementarities nurtured over time create stability, as there is much evidence of change in these local rules.

This leads to the question why - why these changes and why now? Perhaps the depth and length of Japan’s economic slump has finally forced changes of this magnitude. Unfortunately, answers to these questions are beyond the scope of this paper. But in terms of convergence, the direction of change is certainly towards and Anglo-American one. Whether or not there will be a complete convergence is uncertain, and perhaps doubtful in the near future.

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¹⁵⁷ NKS, *Shareholder Value*.

¹⁵⁸ Lucian Bebchuk & Mark J. Roe, “A Theory of Path Dependence in Corporate Ownership and Governance”, in *CORPORATE GOVERNANCE TODAY 565* (The Sloan Project on Corporate Governance at Columbia Law School, 1998).

Ambivalences in the South Korean National Security:

AN EVALUATION OF THE US-KOREA SECURITY ALLIANCE

— Georgi Diankov —

INTRODUCTION

This paper argues that there are ambivalences in the South Korean concept of national security. I attribute these weaknesses to the complex task of forming a national security doctrine, which entails a high level of multi-actor coordination with its ally the United States. I divide the factors contributing to these weaknesses in two broad categories: Organizational and Fundamental.

Under the rubric “organizational,” I include those problems in the U.S.– Korean alliance, which stem from the administrative difficulty of coordinating close positions between the governments of the Republic of Korea and the United States. These include the challenges that have arisen from the changing political situations in the two countries – the change of administrations in the U.S. and the rapid democratization of South Korea. As the present year has shown, these changes can be burdensome to the actors involved in the stewardship of the security on the Korean peninsula, as these actors strive to recognize the inevitable consequences of domestic political changes and their bearing on allied coordination. These organizational obstacles, while capable of creating temporary crisis of trust between the allies, are however inherent to the nature of slow-changing security alliances which, like the U.S.-ROK alliance,

have a legacy of bilateral historical commitment. I argue that, paradoxically, these potentially undermining obstacles in fact arise from the deep commitment of the allies to structural hazard within that alliance.

In contrast, under the rubric of historical factors, I highlight some fundamental and entrenched differences in outlook between the ROK and the United States.¹ These concern subtle differences in the goals of the alliance, as well as differences in the attitude toward North Korea. As a sign of these differences, the firm commitment of President Bush to National Missile Defense (NMD) is shown to be inimical to the sunshine policy of President Kim Dae-Jung and to have potentially destabilizing effects on the Korean peninsula. Having reviewed these, we show how these weaknesses can impede rapprochement and re-unification policies.

ORGANIZATIONAL WEAKNESSES

This past year has shown that the ROK-US security alliance suffers from an inability to recognize, anticipate and flexibly respond to the changes in domestic political environment in both countries. The results have been rather worrying. The Bush administration’s Korean policy is now universally perceived as “hardened” and in sharp discontinuity with the

¹We concede that the two types of factors may overlap in many instances. As we explore here, during the crisis of the summer of 1994, the “structural” difficulties of coordination between the U.S. and the ROK were exacerbated by the more fundamental differences in their approaches toward North Korea.

Clinton's administration willingness to negotiate directly with North Korea, while being sensitive to South Korean concerns of undue legitimization of the DPRK's regime by the U.S. Perhaps more surprisingly, the recent hardening has been perceived as a change in position not only to the DPRK but also the ROK itself. Formal commitments and declarations remain fully in place, yet the South Korean establishment has perceived a U.S. tendency to bypass its ally in its resolve to change the tone in its dealings with the Kim

commitment and common goals, tarnished the domestic image of President Kim and called into question the effectiveness of his sunshine policy of engagement. The already high degree of democratization in the ROK makes its politicians, to a historically unprecedented level, captives of popular opinion. Therefore, the U.S. has remained insensitive to the fact that there is a new actor, which must contribute to the maintaining of U.S.-Korea security alliance – public opinion. President Bush's perceived ambiguity and lack of sensitivity has also served to spur already rising hostility toward the U.S. in sections of the South Korean population.

“THE BUSH ADMINISTRATION’S KOREAN POLICY IS NOW UNIVERSALLY PERCEIVED AS “HARDENED” AND IN SHARP DISCONTINUITY WITH THE CLINTON’S ADMINISTRATION WILLINGNESS TO NEGOTIATE DIRECTLY WITH NORTH KOREA.”

None of these developments in the past year has been positive. The rapprochement of 2000 seems to have been followed by the chilliness of 2001, mostly driven by the new American administration. Yet, there is a way in which this negativity can be downplayed. It is in the nature of every new administration to review its foreign policies and some pundits have argued that it is rather more worrying if such a review is not conducted.² Indeed, the new policy review, completed in late spring, has strongly endorsed continuing talks with the DPRK. Thus, with U.S. commitment to dialogue intact, it is more plausible to accept the frictions of the past year partly as an inevitability accompanying the need for policy review and the change of policy makers.

Jong-Il regime. A series of remarks by President Bush, first in March in Washington, D.C. and most recently in October 2001 in Shanghai, depicting Mr. Kim Jong-Il as untrustworthy, have not been coordinated with the South Korean government. The direct upshot of these remarks has been a cancellation by the DPRK delegation of the regularly scheduled meetings with its South Korean counterparts in Seoul. Another result has been the resumption of virulent and familiar attacks against the U.S. in the North Korean media. Thus, the change in Washington has directly impacted South-North dialogue, putting into question the commitments to negotiation laid down in the Basic Agreement and arresting the impetus coming from the historic Kim-Kim summit of 2000.

In this sense, disappointments are to be seen in part as the attempt of the complexly coordinated security structure of the U.S.-Korean alliance to accommodate political changes that come as an inescapable part of democratic processes. Indeed, had it not been so, the alliance would have become a platitude maintained more by historical legacy than genuine domestic support in both countries. In this light, even rising discontent within the ROK as a reaction to recent developments is to be seen as a positive step in the process of true democratic endorsement of the feasibility of the U.S.-ROK alliance – a process, which is ultimately healthy for the fledgling Korean democracy.

The new U.S. administration has also been oblivious to the impact of these policy changes on the South Korean domestic political scene. The hastily arranged summit on March 7 between President Bush and President Kim, for all the formal repetition of

² “The Perils of Progress: The U.S. – South Korean Alliance in a Changing Environment” Che, Glosserman, Pacific Forum CSIS Conference, 2001

However, such an “organizational” explanation is applicable to the temporary crises between the two allies, and does not account for fundamental divergences between the two allies. One such rarely explored difference exists between the attitudes of the two allies toward North Korea.

FUNDAMENTAL FACTORS

DPRK - Irrationality or Malicious intent?

In the past decade, there has emerged a clear dichotomy between U.S. and South Korean views toward North Korea. The difference between the terms above, for policy considerations, consists in the fact that the U.S. views the DPRK as an irrational, or rogue state, which would not be constrained by the absolute certainty of a devastating retaliatory strike, and thus would be free to “irrationally” launch a pre-emptive attack. On the other hand, what we call here “malicious intent” merely expresses South Korean mistrust for the DPRK regime. Such an attitude, however, affirms that deterrence is fully applicable, and thus denies that the DPRK is irrational. This divergence has in times of crises beset smooth ROK–US coordination and resulted in the 1994 major threat of a new Korean War.

Historical evolution of the two views toward North Korea

The attitude of South Korea toward North Korea has roughly followed the trend of the relative economic power of South Korea measured against the North. Thus, while the command economy in the DPRK was creating double-digit growth in the 1960s and early 1970s, the ROK dismissed any initiatives by Kim Il-Sung aimed at establishing close ties because it feared absorption and an inability to counteract the North economically and ideologically. With the start of the decline of the North’s economy, and the economic successes of the Park Chung Hee’s regime,

South Korea became more confident in proposing re-unification formulae, to which it was not committed but which allowed it to wield the image of an active party. Ever since, it has assumed the tactic of rejecting the North’s proposal and then announcing an almost identical proposal. Although such maneuverings, backed by its awareness of its much greater economic advantage, have allowed the ROK to externally appear as an initiator of negotiations, they are also indicative of a deeply held mistrust toward the DPRK and of the conviction that its regime is malicious. These suspicions have, over the years, been vindicated by the well-documented North Korean pursuit of terrorism, spy infiltration and provocation.

The United States, for its part, views North Korea’s regime within its own security lenses – as a rogue state and an irrational regime. This concept has not occurred spontaneously in recent years but has a historical evolution. Starting in the late 1980’s, the DPRK started losing the economic and ideological support of the cash-strapped Soviet Union and the markets of the disintegrating Comecon.³ After the final collapse of the Soviet Union, it was left on its own, with only China continuing to be a formal, yet weary and uncommitted, ally. Soon after the DPRK lost the support of a major nuclear power, U.S. policy makers changed their attitude toward the North. They substituted their previous constraint in dealing with the North, which always involved substantial consultations with the South, for a more brisk, hardened and peremptory approach. The surprising thaw in US–DPRK relations in 1991 – 1992, which resulted in the cancellation of the yearly Team Spirit exercise in South Korea, as a good will gesture by the ROK and the U.S., was soon reversed and the US policy hardened further. When the light-water reactor crisis of 1993–1994 broke out, the US started viewing and officially labeling North Korea an “irrational” regime and a “rogue nation.” While the perception of “irrationality” was based on uncorroborated assumptions of the DPRK’s

³ Comecon – Council of mutual economic assistance was a common market, under the auspices of the USSR that linked the socialist countries in Eastern Europe and beyond.

intentions to build nuclear warheads to be installed on long-range missiles, the hawkish and unchecked policy of intimidation by the U.S. soon resulted in truly irrational statements by the beleaguered and increasingly resourceless DPRK regime. However, even after the favorable resolution of the crisis and the creation of the Agreed Framework, perceptions of the North's irrationality and undependability have persisted. Thus, the views of South Korea and its US ally toward North Korea are quite different. While the ROK believes that the North is a well-calculating but malicious regime, the U.S. to this day adheres to the idea that it is an irrational government, capable of launching itself into a self-destructive war. This divergence of views has been clearly demonstrated by the nuclear crisis of 1994-1995. The end of the Cold War inclined the DPRK to search for desperate bargaining chips, such as the Yongbyong nuclear reactor, as a substitute for the negotiation power that it was rapidly losing. The collapse of the nuclear balance in the world thus revealed the divergence between the views of the ROK and the U.S. governments toward the North for several reasons:

- 1) The regime of Kim Il-Sung was more likely to act desperately to gain bargaining power. Sharply deteriorating economic conditions, international isolation and signs of a possible rift between the political leadership and the military, propelled the North to act in a reckless manner.
- 2) These acts had a high likelihood of being construed by the U.S. establishment as, indeed, irrational acts. The intelligence and military circles have in turn frequently amplified the magnitude of the danger from the North. This self-perpetuated psychological factor and unchecked policy toward the DPRK propelled the U.S. in 1994 to the verge of a decision with grave consequences.

- 3) The emboldened policy of Washington has not always resonated well in Seoul, where the regime is well aware that brinkmanship from the U.S. may lead to a devastating war. The governments in Seoul have so far not subscribed to the Washington view of North Korea as irrational. However, analysts of the Korean peninsula are keenly aware that any desperate and high-risk maneuverings of the North, however well-calculated they are, may gain a momentum of its own and lead to "irrational decisions," if they have to be made under conditions of great stress, such as the possibility of an imminent strike by the U.S.⁴ Pyongyang's June 1994 threat to turn Seoul into "a sea of flames," in retaliation for U.S. sanctions, while predictably upsetting to the South, did not deter high-level U.S. preparations for a conflict.

NATIONAL MISSILE DEFENSE- A FURTHER SIGN OF US-R.O.K. DIVERGENCE

It is exactly these perceptions that initially prompted the Senate to investigate the DPRK's capability to sustain a program of building the long-range Taepo-Dong missile. Ultimately, this belief in irrationality has fueled the now concrete designs for National Missile Defense. If this "irrationality" component in U.S. strategic thinking were removed, and the U.S. started viewing the DPRK as a rational agent, the military justification for the NMD would fall apart. As it is, the concept of NMD is viewed very cautiously and with reserves by the ROK, as it fears that such a move will antagonize the DPRK. Moreover, President Kim has formally declared its support for the 1972 Anti-Ballistic Missile Treaty, which is the principle legal hurdle for the installation of a National Missile Defense. Immediately before meeting Bush, Kim signed a joint

⁴ Bruce Russett, "Pearl Harbor: Deterrence Theory.", believe that the DPRK is either capable of or committed to an irrational inter-continental missile attack against the U.S.

communicate with President Putin on the importance of adhering to this treaty. However, as of December 2001, Russia itself seemed to be conceding that the Anti-Ballistic Missile Treaty of 1972 should be dismantled. If this treaty is indeed invalidated, President Kim may be further discredited both in the eyes of the domestic public and within the circles of U.S. policy makers. South Korea has adamantly opposed NMD for the reason that it may compel the North, which is the main pretext for the building of the system, to assume an offensive posture. Furthermore, as already discussed, the ROK government does not believe that the DPRK is either capable of or committed to an irrational inter-continental missile attack against the U.S.

Explanations for the divergence in outlooks

The first explanation is an “external” one. It posits that divergence between the ROK and its ally the U.S. is in fact accounted for by the relationship between ROK and the DPRK. In this sense, an occasionally inconsistent attitude of the South Korean government toward its U.S. ally is called for by the great mistrust that still exists between the North and the South. Although to Seoul a Korean reunification is highly desirable as a result of a treaty, which, while endorsed by China and the U.S., is a genuinely inter-Korean achievement, this self-reliance in matters political does not translate into a genuinely own national security conception. The lingering suspicion in Seoul about the intentions of the Pyongyang regime makes the continued deployment of U.S. troops a certainty for the foreseeable future. This reliance on the U.S. in turn raises concerns among the North Korean leadership. Confirming this lack of faith, the DPRK has not indicated that it has completely abandoned its old practices of spy infiltration, troop provocations and armament violation in the Demilitarized Zone. Over the decades, actions big and small have effectively undermined the possibility of genuine trust between the two

governments, in spite of the commonly declared vision of a reunified country. It is through this mechanism that genuine belief in a unified country coexists with no less genuine mistrust that, the Kim-Kim summit notwithstanding, has made any progress in relations merely declaratory and void of any real substance.

This self-perpetuating cycle of wishful thinking, unmatched by political courage to overcome mistrust, does not point to clear and easy solutions. The basic security ambivalence could be only converted into resolve for negotiations and good will for concessions in the presence of a remarkably changed external factor, such as an unexpected thaw in the attitude of the Bush administration toward North Korea. Such a thaw is unlikely to come soon. Indeed, as already mentioned, diplomatic reality clearly imposes on the U.S. the need for continued dialogue with the DPRK. However, a rise in contacts is not expected to be sudden, and as history shows, the DPRK regime is peculiar in that it gives equal or greater importance to gestures and reiteration of promises more so than to formally laid down commitments.

The second explanation points to inherent differences in security conceptions between the ROK and the U.S. In spite of being allies, the ROK and the U.S. have had their own preferences and agendas. The fact that their security strategies meet in the same focal point – peace at the DMZ – should not be construed as resulting from a completely overlapping set of preferences and goals. Ultimately, these divergences stem from the differences in the perception of the danger and, even more so, from the distinct evaluations of the security in the region. No doubt some of them arise from the sheer physical distance between the two sets of decision-makers. Placed in different contexts, the two governments have had dissimilar views on the security environment. While plausible, however, such explanation does not fully account for all divergences between ROK and US conceptions of security. We propose that these likely stem from divergent sets of

values, also historically conditioned by differences in the way the two countries have experienced the past fifty years in Northeast Asia.

American officers divided Korea and then fought a now forgotten war.⁵ Later, in the context of a global ideological confrontation, the Korean peninsula was strategically important, yet only so placed in the global standoff between the two superpowers. Therefore, there is a different hierarchy of priorities for the two allies. Thus, the Korean peninsula has historically been important as a constitutive piece of the global order. There is a case to be made that the U.S. has not viewed Korea wholly as an intrinsically valuable partner, but only so as an instrumental means. Said differently, ever since 1950, Korea has held a strategically important place on the U.S. security agenda only looked at from the global viewpoint of a superpower. Understandably, for South Korea, the priorities run in the opposite direction – from the regional to the global level, the greatest concern being the protection of its sovereignty. Thus, peace at the DMZ and eventual reunification may be common goals for the allies, it is the geo-strategic ordering of priorities that accounts for divergences in outlooks.

Finally, while the U.S. did take responsibility for South Korea, it has never genuinely examined its role in the creation of the problem itself. The U.S. was responsible for the arbitrary division of the country along an imaginary line. Furthermore, some scholars have argued that the U.S. should have remained composed in the face of North Korean provocations along the border in 1950, and that, once war broke, it should have remained outside of the conflict.⁶ The U.S. has also never explicitly delineated the extent of its condoning of the Kwangju massacre of May 1980. Even if historical responsibility may be no longer relevant, a certainly grave U.S. mistake has been that, in the light of its engagement, it did not stop viewing its Korean

involvement as merely a part of its global security doctrine.

With a globally worsened security situation, there are slim chances of a U.S. withdrawal in the near future. The administration can and should try to remedy the problems in its alliance with the ROK. The U.S. must show greater sensitivity to ROK concerns and willingness for dialogue with the DPRK. Now that the Bush administration has shown that it is capable of forging its own East Asian policy, the time has come to capitalize on and continue the successes of the previous administration in its insistence on dialogue rather than confrontation.

There are inescapable points of friction between the two allies, as has been shown. Some of them inhere in the structure of the alliance and others are more fundamental. These asymmetries need not, however, become fatal for the future of the alliance. A helpful strategy would be a joint security vision, whereby it is explicitly recognized that the U.S. forces will not be permanently stationed on the peninsula. Rather than adhere to strict timetables, which in an uncertain security situation is not helpful, a conditionality principle may be evoked, whereby the U.S. explicitly recognizes a gradual end of mandate for its forces should reunification proceeds peacefully. What is necessary, therefore, is that the U.S. “empathizes” with its partner by approaching the particular concerns that the ROK has from a regional, and not only global, perspective. In order for the alliance to ultimately fulfill its roles – continued peace and reunification – commitment must be enhanced by sensitivity. Lack of sensitivity and understanding may not kill the alliance, as there will continue to be overriding military justification for its continuation. However, in an atmosphere of reduced trust, the U.S.–ROK alliance will merely perpetuate itself without making possible those conditions for peace and reunification, which must be its ultimate goals.

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⁵ Colonels Dean Rusk and Charles Bonesteel took 30 minutes to divide the country on August 10, 1945, without consulting Koreans and with the tacit approval of Moscow. Cumings 1997 Bruce Cumings, “Korea’s Place in the Sun,” 1997

⁶ Bruce Cumings, “Korea’s Place in the Sun,” 1997

Institutionalized “Corruption”:

IMPLICATIONS FOR LEGAL REFORM IN INDONESIA AND THE NEED TO MAKE HASTE SLOWLY

— Curtis E. Renoe* —

So far as our institution is concerned, there is nothing more important than the issue of corruption . . . At the core of the incidence of poverty is the issue of equity, and at the core of the issues of equity is the issue of corruption.

James D. Wolfensohn,
President of the World Bank
October 1999¹

So who should be put in charge? My granddaughter? She might only be three years old, but she's about the only person around here not corrupt.

Indonesian Farmer
*Kerinci, 1998*²

I. INTRODUCTION

Reformasi Hukum, or law reform, represented one of the major areas of change reformers concentrated upon following the fall of Indonesian President Suharto in May of 1998. Economic, political, and law reform all combined to form a composite push for “*reformasi total*,” a movement on the part of many disparate elements in Indonesian society to correct or at least modify the structures of power and privilege that resulted from

and sustained a thirty-two year authoritarian regime. The motto on the lips of virtually all those demonstrating in the streets was to rid the government of “KKN,” i.e., *Korupsi, Kolusi, and Nepotisme*.³ Once the goal of Suharto’s removal from power was achieved, however, the *Reformasi* movement seemed to splinter into various interest groups, and it became ever more difficult to determine what exactly “reform” meant. Answers seemed to depend largely upon whom one asked. Nevertheless,

¹ Address to the Ninth International Anti-Corruption Conference in Durban, South Africa, as quoted in The World Bank, *Helping Countries Combat Corruption: Progress at the World Bank Since 1997* 6 (2000).

² Interview conducted in Kerinci, Indonesia, July 1998.

³ I.e., Corruption, Collusion, and Nepotism.

* **Acknowledgments:** The author would like to thank the Wenner-Gren Foundation for Anthropological Research, the Fulbright Foundation, Universitas Andalas, the Yale Center on Southeast Asian Studies, and the Department of Anthropology at Yale University for providing support for this research. I must also thank Cathryn M. Houghton and Erik Jensen for helpful comments on this paper and/or for the informal input that led to the form it eventually assumed.

legal reform assumed a prominent place in the new government's agenda.⁴ The goal of this paper is to explore what is meant by "legal reform" in Indonesia with particular reference to "corruption" and to examine how this may or may not be amenable to outside, mostly Western, efforts to promote the "rule of law."

II. LAW AND DEVELOPMENT: THE ROLE OF LEGAL INSTITUTIONS IN ECONOMIC GROWTH

While the exact nature of the relationship between legal institutions and economic development is open to debate,⁵ international lending institutions certainly do not have any qualms about putting money into rule of law projects to promote economic growth in developing countries.⁶ This perceived link between the rule of law and economic development is not lost upon those foreign interests for whom economic growth and political stability in Indonesia represent key goals that structure their relationships with the archipelago.⁷ For example, the United States Embassy in Jakarta offered the following assessment of the

need for legal reform in an economic report issued on March 17, 1999:⁸

Legal reform is at the core of Indonesia's economic reform program, whose success is crucial to Indonesia's future to define the rules of the game. Investors who rode Indonesia's boom, in spite of pernicious structural problems, will look to make more accurate assessments of risk, especially in the short term. Demands for legal reform are part of the overall reform movement sentiment in Indonesia, focused particularly on creating a legal system to mitigate the kinds of abuses that allowed Soeharto era distortions to permeate the economy.

While the assessment of risk certainly is important to making choices when it comes to where one is going to invest one's money, this statement overstates the degree to which the "rules of the game" were unknown or arbitrary during the Suharto regime. Everyone I spoke with in Indonesia knew that certain "fees" were required to conduct business, and this applied to both foreigners and Indonesian citizens. While

⁴ See Mohammad Fajrul Falaakh, "Indonesian Judicial Reform Agenda," *The Jakarta Post*, March 20, 2000; MPR, "Resolution of the People's Consultative Assembly of the Republic of Indonesia on State Policy Guidelines on Development Reform for the Purpose of Salvation and Normalization of National Life," X/MPR/1998, Chapter II, General Conditions, p.37, which stated: "For thirty-two years of the New Order administration, legal development was inadequate, particularly in relation to organic laws and regulations limiting the powers of the president. This condition provides an opportunity for the occurrence of corruption, collusion and nepotism and culminating in interpretations that conform only to the taste of those in authority. These constitute misuse of authority and law, ignorance of a sense of justice and lack of legal protection and certainty for the public. The development of the judiciary by the executive constitutes an opportunity for those in authority to intervene and develop collusion and negative practices in the judicial process. Legal enforcement has not provided a sense of justice and legal certainty in cases against the government or other strong parties, thereby placing the public in a weak position."

⁵ See, e.g., Katharina Pistor & Phillip A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development: 1960-1995* (1999).

⁶ See Richard E. Messick, "Judicial Reform & Economic Development: A Survey of the Issues," 14(1) *The World Bank Research Observer* 117 (1999) (stating that since 1994 the World Bank, the Inter-American Development Bank, and the Asian Development Bank have approved more than \$500 million in loans for judicial reform projects in 26 countries).

⁷ For example, a letter of intent issued by the Indonesian Government in 2000 to the IMF for \$3.6 billion in loans through 2002 emphasized that, "Likewise, the reform of public institutions, notably the empowerment of the judiciary system, is a key to good governance, without which the economy will never become efficient and competitive." See "Bailout Program Extended," *The Jakarta Post*, January 25, 2000.

See also Messick, *supra* note 6, at 118 (stating: "Judicial reform is part of a larger effort to make legal systems in developing countries and transition economies more market friendly").

For a critique of the World Bank's purely "economic" role in legal reform, see Lawyers Committee for Human Rights & Venezuelan Program for Human Rights and Education and Action, *Halfway to Reform: The World Bank and the Venezuelan Justice System* (1996).

⁸ Taken from <www.usembassyjakarta.org/econ/legaldraft.html> (visited on 5/17/01).

foreign businesses had to account for such transaction costs in any budget, so too did local people when it came to getting a job as a civil servant or enrolling their child in a local school or college, among myriad other encounters with the ever-present bureaucracy in Indonesia. Far from being some great unknown, such costs seemed to be quite regular and a subject of everyday discourse.⁹ While business people I spoke with in Jakarta often complained about the cost of doing business in Indonesia, such complaints did not stop many international corporations from investing billions of dollars in all manner of projects and enterprises in Indonesia during the Suharto regime. One must therefore question from whence this anti-corruption rhetoric comes. Is it any coincidence that the rhetoric became so central only after the end of the Cold War and the emergence of a new economic order?¹⁰

Nevertheless, there is much talk in legal development circles about “learning from past mistakes.”¹¹ What seems under-emphasized in even these new approaches, however, is a full appreciation for the degree to which legal institutions are fundamentally social institutions embedded within webs of often conflicting modes of cultural practice. Indeed, most

international efforts aimed at aiding legal reform and democratization in developing countries continue to accept a Western-based model as the basis from which reform must come.¹² While David Trubeck and Marc Galanter’s influential warnings about the danger of imposing ethnocentric assumptions in different cultural-socio-historical contexts seem to have been taken into account,¹³ there are those who remain skeptical that the new efforts to promote the rule of law will meet with any greater success than the perceived failures of the past.¹⁴ The approach adopted in this paper attempts to address both the meanings and impetus for reform both internal and external to Indonesia in hopes of understanding where reform may be successful and what impediments may remain.

III. THE CONSTITUENCY FOR REFORM: A WILL TO CHANGE?

As mentioned earlier, the call for reform and the elimination of corruption is not simply the top-down rhetoric of international interests but rather emerges on a daily basis in the media and often from even the most casual conversations with Indonesians on the streets.¹⁵

⁹ For example, where I worked, it was widely known that to get a job as a beginning teacher in the public school system cost 5 million rupiah (roughly \$625 U.S. at the time). Indeed, it has been argued that corruption may have less of an impact on foreign investment if there is some degree of predictability to the costs of doing business in such an environment.

See Edgardo J. Campos, Donald Lien, & Sanjay Pradhan, “The Impact of Corruption on Investment: Predictability Matters,” 27(6) *World Development* 1059 (1999).

¹⁰ See James W. Williams & Margaret E. Beare, “The Business of Bribery: Globalization, Economic Liberalization, and the ‘Problem’ of Corruption,” 32(2) *Crime, Law and Social Change* 115 (1999).

¹¹ See, e.g., Maxwell O. Chidbundu, “Law in Development: On Tapping, Gourding and Serving Palm Wine,” 29 *Case Western Reserve Journal of International Law* 167 (1997) (discussing the failures of the law and development movement of the 1960s and 1970s and calling for a new approach).

See also, Brian Z. Tamanaha, “The Lessons of Law and Development Studies,” 89 *American J. of International Law* 470 (1995) (providing a general overview of the field of law and development).

¹² See Thomas Carothers, “The Question of Strategy,” in *Aiding Democracy Abroad: The Learning Curve* 85, 85-103 (1999) (presenting the “Democracy Template” and the kinds of aid that correlate with the sometimes implicit assumptions about the nature of democracy and the appropriate role for law and civil society).

¹³ David M. Trubeck & Marc Galanter, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development,” 1974 *Wisconsin Law Review* 1064.

¹⁴ See Patrick McAuslan, “Law, Governance, and the Development of the Market: Practical Problems and Possible Solutions,” in *Good Governance & Law: Legal & Institutional Reform in Developing Countries* (J. Faundez ed., 1997);

Joseph R. Thome, “Comment on McAuslan’s ‘Law, Governance, and the Development of the Market: Practical Problems and Possible Solutions,’” in *Good Governance & Law: Legal & Institutional Reform in Developing Countries* (J. Faundez ed., 1997).

¹⁵ See, e.g., the official homepage of Antikorupsi.org (<www.antikorupsi.org>), an Indonesian NGO that serves as a clearinghouse for information about current cases of corruption and efforts to combat its effects throughout society.

As has often been pointed out, external efforts at reform cannot succeed without the will on the part of those in the target country to reform.¹⁶ The opportunity for real reform in Indonesia thus seems possible given the atmosphere over the past two years, which has made "*reformasi*" the key topic of public debate.¹⁷ Despite this great desire for reform on the public's part, its implementation continues to lag behind this general will. As one observer stated after corruption charges against Djoko Tjandra in the Bank Bali scandal were recently dismissed:¹⁸

The judiciary, particularly the courts, is still run mostly by people from the old regime. Like politicians of that recent bygone era, these judges were notorious for blatantly supporting the tyrannical New Order government. The judiciary is the last bastion of the Soeharto regime, and this goes a long way toward explaining why many of the efforts to prosecute corrupters and human rights abusers from that era have failed upon reaching the courts. The judiciary is the only government branch that has yet to be reformed.

While such comments may represent something of an overstatement in that the military remains practically untouched by efforts at reform,¹⁹ the tone of frustration at the courts' resistance to change comes through

quite clearly nevertheless. Indeed, the writers of one commentary on the state of reform in the judiciary asked the not entirely rhetorical question: "Do the people have to get angry (i.e., go into the streets again) before things will change?"²⁰

In explaining the slow pace of reform, Yushar Yahya, a spokesman from the Attorney General's office, had the following to say about recent efforts to reform government agencies: "[M]ost state institutions have failed to comply with the criteria of clean governance as the institutions' top officials never put them into effect."²¹ Under current efforts at reform, there are simply too few incentives to motivate entrenched bureaucrats to change from long-practiced modes of behavior. Yet, as my Indonesian friend whom I quoted at the beginning of this paper stated, "Who do you want to put in charge?" There is no real thought of replacing the existing members of a civil service corps that numbers approximately four million,²² and institutional behaviors and cultures of petty corruption simply replicate themselves without oversight from what has admittedly become a weakened central government. Any effort at reform must, by necessity, take a considerable amount of time, as a successful change in bureaucratic culture must begin both with the replacement of top officials and the recruitment of new civil servants with an ethic appropriate to an era of reform.²³ Such a process could be quite slow indeed since institutional memory and

¹⁶ See, e.g., Thomas Carothers, "The Rule of Law Revival," 77(2) *Foreign Affairs* 95, 105 (1998) (stating that "rule of law aid cannot substitute for the internal will to reform").

¹⁷ The window for reform may or may not be closing with the appointment of Megawati Sukarnoputri as president in late July 2001. The most disturbing fact of her assuming the office of president may be that she did so largely with the support of the military who see in her shades of her nationalist father, Sukarno. What this means for reform will have to be determined over the course of the next few months.

¹⁸ "Reform the Judiciary," *The Jakarta Post*, March 13, 2000.

¹⁹ For example, the military still retains 38 seats in the national legislature, with some talk that their overt role in politics will be "phased-out" by 2004.

²⁰ See A. Reza Rohadian, Bagus Marsudi, & Barly Haliem Noe, "Apa Rakyat harus Marah dulu?," *Kontan*, edisi (edition) 15/V, 8 January 2001.

²¹ "Observers Urge War Against KKN in Judiciary," *The Jakarta Post*, June 22, 2000.

²² See The World Bank, "Shape and Size of Public Employment for Indonesia," <www1.worldbank.org/publicsector/civilservice/countries/indonesia/shapesize.html>

²³ See J. Faundez, "Legal Reform in Developing and Transition Countries: Making Haste Slowly," paper presented at the Global Conference on Comprehensive Legal & Judicial Development (Washington, D.C. 2000) (discussing the slow pace of legal reform and the necessity of seeing such reform as a very complex process with few quick results).

culture(s) generally conform those who enter them to specific practices and “ways of doing things.”²⁴

In this respect, the move toward decentralization in the post-Suharto era does not make the effort to reform the state bureaucracy any easier.²⁵ Greater independence does not necessarily breed accountability or change practices that led to the public’s frustration in the first place. Nevertheless, one of the central concerns of legal reform in Indonesia advocated by almost all parties is the elimination of the executive branch’s influence on the judiciary with not just nominal, but real independence.²⁶ This goal was achieved in theory if not in practice by Law No. 35 of 1999, which calls for the transfer of court administration, operations, and oversight from the executive branch to the Supreme Court within five years.²⁷ While the call for independence in this area is warranted since the judiciary has historically served as a tool for those in power²⁸ and serves as one of the major building blocks that most see as necessary to establish the rule of law, the fact that the Supreme Court will now be in charge of court administration does not necessarily guarantee adequate safeguards for the

administration of impartial justice, especially considering that there has not been a wholesale turnover of personnel in either the Supreme Court or the judiciary more generally.

IV. THE POLITICAL BASIS OF KORUPSI IN INDONESIA

Somewhat ironically, Suharto came to power in 1966 promising to rid the Old Order government of corruption with the motto of “not only good government, but also clean government.”²⁹ The following 32 years in power saw Suharto, his family, and cronies accumulate billions of dollars in assets as they siphoned off a share from virtually all of the development and private investment projects coming into the country. This system of extraction seeped down to the lowest levels of government, and in many ways, government came to exist for the sake of corruption and personal enrichment. For example, in the remote area in which I conducted my fieldwork, the World Wide Fund for Nature was seriously considering pulling its support for a local conservation project because the “cost of doing business” was simply too high.

²⁴ See Mary Douglas, *How Institutions Think* (1986) (presenting a theory of institutional structure and organization that highlights the way in which institutions structure individuals to think different kinds of thoughts).

²⁵ See “Decentralizing Amid Regional Dissent,” XXVII *The Van Zorge Report on Indonesia* (1999) (discussing recent efforts to implement regional autonomy).

But see, K. G. Enid, “Customer Service as an Element of the Civil Service Reform Programme in Uganda,” 26(66) *Development and Socio-Economic Progress* 39, 47 (1996) (finding that decentralization has helped to improve the responsiveness of the civil service in rural parts of Uganda).

²⁶ See MPR, “Draft Decree of the People’s Consultative Assembly of the Republic of Indonesia Regarding Broad Guidelines of the State Policy for the Years 1999-2004,” MPR/1999, whose goal regarding the judiciary was “to achieve an independent judicial institution free of the influence of those in power and of any party whatsoever” and to “enhance the role of the MPR, the DPR and other high state institutions by confirm their functions, competencies and responsibilities in reference to the principles of division of power and a distinct system of relations between the executive, legislative and judicial institutions.” Australian Legal Resources International is just one among many organizations outside of Indonesia that see real judicial independence as an essential element of any legal reform program.

See also “Legal Reform in a Time of Political Upheaval,” 37(4) *Law Society Journal* 16 (1999) (discussing the need for judicial education, legal drafting, and the introduction of a civil police force).

²⁷ Some worried about the power granted to the Supreme Court under this modified legal regime; while others objected to the fact that the Religious Courts were to be transferred from the Ministry of Religion to the civil court system under the Supreme Court. For general commentary on this law, see “House Amends Judiciary Law as Part of Legal Reform Drive,” *The Jakarta Post*, August 2, 1999.

²⁸ See generally, Daniel Lev, *Legal Evolution & Political Authority in Indonesia* (2000) (a recent compilation of important essays, among which a central theme is the systematic weakening of the judiciary and legal institutions more generally since 1959).

²⁹ Fiona Robertson-Snape, “Corruption, Collusion and Nepotism in Indonesia,” 20(3) *Third World Quarterly* 589 (1999).

By the time bribes and "special fees" had been paid to the national, provincial, and regional officials, any monies for projects on the ground had been virtually depleted.

Most bureaucrats with whom I spoke indicated that government positions offered the opportunity not only for stability but also a decent income by peddling whatever influence they were able to offer. Rather than combating corruption, elites in the central government depended upon allowing the officials under them to exploit their offices to secure their loyalty and support.³⁰ There was thus no incentive to take an aggressive stand against corrupt practices on the part of the bureaucrats at any level who were posted throughout Indonesia, as this patron-client system replicated itself in a series of concentric circles throughout the archipelago. Rather, important government positions were doled out as virtual fiefs, over which officials such as governors and regents were placed who could exploit the resources under their control with impunity. Suharto thus took advantage of indigenous configurations of power including this entrenched patron-client system in which the patron provides a position to one's subordinates in return for their loyalty.³¹ Clients were generally given ample room to maneuver in such a system as long as this loyalty remained.³² This kind of institutionalized corruption spread deep roots throughout all levels of the bureaucracy and remains to this day despite the entering of an era of "*reformasi*."

In part the reasons for this highly centralized system of bureaucracy under the New Order had antecedent sources in the Old Order under Sukarno. Sukarno's fateful 1959 revocation of the 1950 Constitution in favor of the wartime, provisional Constitution of 1945 marked the end of any real democratic impulses or life for the next thirty-nine years. Not insignificantly, this earlier Constitution invested all power in the hands of the executive. There was certainly no separation of powers contemplated in this very basic outline of government. Sukarno eliminated parliamentary democracy and installed himself as an autocrat at the center of the state. The effect upon the development of an independent and functioning judiciary of Sukarno's move toward Guided Democracy and away from parliamentary government was devastating, as the judiciary became largely demoralized and increasingly corrupt.³³

Building upon this tradition, "politics," which connoted internal strife and a lack of communal mindset, became a dirty word under Suharto's New Order government. National elections simply became the exercise of symbolic pageantry and the confirmation of government by consensus in which the ruling party always seemed to win by the same percentage.³⁴ The New Order government set itself up as the provider of peace and stability along with rapid economic development. The fact that civil liberties waned and the government increasingly became rife with corruption seemed to be a bargain the

³⁰ See H. Crouch, "Patrimonialism and Military Rule in Indonesia," 31(4) *World Politics* 571 (1979).

³¹ See Adam Schwartz, *A Nation in Waiting: Indonesia in the 1990's* 136 (1994) (discussing Suharto's belief that such action was simply a legitimate exercise of a traditional Javanese prince). It is also worth noting that the colonial precursor to the state bureaucracy, based on the elevation of the *priyayi* elite (the former Javanese courtly bureaucrats) to positions in the colonial bureaucracy, served as an effective model for the governance of the archipelago once independence was achieved.

See generally, Heather Sutherland, *The Making of a Bureaucratic Elite: The Transformation of the Javanese Priyayi* (1979).

³² For a good example of how susceptible the courts were to political pressure, especially against those who fell into disfavor with those in power or were seen to be disloyal, see Robert Cribb, "The Trials of H. R. Dharsono," *Inside Indonesia* 3 (1988).

³³ See Lev, *supra*, note 28 (discussing the fact that prior to Sukarno's political maneuverings in the late 1950's, the Indonesian judiciary was actually functioning quite well, a history that has been almost completely erased in the memories of present legal practitioners in Indonesia).

³⁴ See Barbara Hatley, "National Ritual, Neighborhood Performance: Celebrating Tjujuhbelasan," 34 *Indonesia* 55 (1982);

John Pemberton, "Notes on the 1982 General Election in Solo," 41 *Indonesia* 1 (1986)

Indonesian people were willing (or were forced) to accept as long as the promise of development held.³⁵ President Suharto even went so far as to name himself *Bapak Pembangunan*, “Father of Development.” This patrimonial state, founded on economic development, only came to an end following the Asian economic crisis of 1997. The bargain had been broached, and the Indonesian people were no longer willing to accept the excesses of a government not delivering on its promises. As prices skyrocketed and the rupiah continued to plummet, the pressure on the government became too great, and after massive street demonstrations and violence in May of 1998, Suharto was forced to step down.³⁶

Even with the removal of Suharto, the basic structure of government administration and economic practice remained largely the same. Under the Suharto regime, the government involved itself heavily in almost every aspect of the economy, which had significant ramifications for the extension of corrupt practices into virtually every transaction. A key economic advisor for Suharto described the system thus:³⁷

In a patriarchal society such as Indonesia, the government had become the ultimate patron. There was almost no element of the economy that was not directly touched by the government...[E]very point of economic interaction within the government was a new opportunity for patronage or corruption.

Petty corruption, the paying of extra or special fees, to get virtually anything done in Indonesia is merely one of the rituals of daily life in Indonesia. One must pay officials to get one’s phone hooked up, one’s water running, register a marriage, etc.

Bureaucratic salaries are clearly one of the factors that lead to the pervasiveness of petty corruption.³⁸ Suharto himself acknowledged such a situation in his autobiography when he stated:³⁹

Corruption in our country is not the result of corrupt minds but of economic pressures. Eventually, when economic development has gone so far as to produce a good overall standard of living, government employees will receive adequate salaries and have no reason to practice corruption.

This remarkable statement comes from one whose own corrupt practices siphoned off untold dollars from the Indonesian economy. Obviously, the acquisition of a more than a “good overall standard of living” was not enough to keep Suharto and his cronies from continually dipping their fingers into the pots of money flowing into and out of Indonesia throughout a thirty-two year reign. Besides the blatant hypocrisy of this statement, what is even more disturbing is the utter lack of acknowledgement of how the government not only tolerated but actively encouraged corruption on the part of its officials to secure their loyalty.⁴⁰

³⁵ However, it should be remembered that the vast majority of economic progress and development benefited the emerging middle class and urban-oriented Indonesians, while much of the rural poor remained virtually untouched in any meaningful way by the lengthy period of sustained growth. See Mochtar Pabottingi, “Indonesia: Historicizing the New Order’s Legitimacy Dilemma,” in *Political Legitimacy in Southeast Asia: The Quest for Moral Authority* 224, 227 (Muthiah Alagappa ed., 1995).

³⁶ Of course, a key element forcing Suharto’s hand during the crisis was the withdrawal of the military’s support.

³⁷ R. Prawiro, *Indonesia’s Struggle for Economic Development* 32 (1998).

³⁸ See Jamie Mackie & Andrew MacIntyre, “Politics,” in *Indonesia’s New Order: The Dynamics of Socio-Economic Transformation* 1, 21-22 (Hal Hill ed., 1994) (stating that “official salaries have lagged far behind the cost of living (so that in 1990, for example, they provided for barely one-third of an official’s household needs”).

But see The World Bank, “Shape and Size of Public Employment for Indonesia,” <www1.worldbank.org/publicsector/civilservice/countries/indonesia/shapesize.html> (accessed 7/30/01) (indicating that recent pay increases over the past two years have led to an equalization of pay for bureaucrats with the private sector).

³⁹ Suharto, *My Thoughts, Words, and Deeds: An Autobiography* 213 (1991).

⁴⁰ See Michael Vatikiotis, *Indonesian Politics under Suharto: Order, Development and Pressure for Change* 52 (1993) (discussing the basis of Suharto’s power as patronage and the allocation of positions from which his cronies could enrich themselves).

*V. CORRUPTION AS A CONTESTED,
NORMATIVE JUDGEMENT*

In the above discussion, I have been making use of the term "corruption" rather freely and in a way that requires further articulation in order to make it serve a useful analytic purpose since definitions of "corruption" depend upon particular cultural ideas and beliefs that define relevant forms of practice.⁴¹ Such definitions obviously vary from one cultural and socio-historical context to another.⁴² Some have even tried to rehabilitate the largely negative connotations of the term "corruption" by pointing to its important role in capital formation and actually speeding up the development process.⁴³ The exact nature of corruption is therefore difficult to define given that "corruption alters its character in response to changing socio-economic, cultural and political factors. As these factors affect corruption, so does corruption affect

them."⁴⁴ To come to an adequate understanding of "corruption," some notion of how this behavior fits within specific cultural logics and is embedded in webs of social relations is thus needed.⁴⁵

The danger inherent in adopting a form of "cultural relativism" when addressing questions of "corruption," however, becomes one in which cultural and value-based explanations often turn into implicit and sometimes explicit justifications for such practices.⁴⁶ There is the additional danger of essentializing "culture" without an adequate appreciation for the configurations of power and political economy that have historically structured the relationships between the developed and developing worlds. The form of inquiry adopted in this paper attempts to avoid such problems, as well as those represented in efforts to "explore how culture...affects the extent to which societies achieve or fail to achieve progress in economic development and political democratization."⁴⁷

⁴¹ See, e.g., Akhil Gupta, "Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, & the Imagined State," 22(2) *American Ethnologist* 375 (1995) (discussing the different modalities of the discourse surrounding what constitutes "corruption" in both national media and village life in India);

For a review of recent development literature surrounding the topic, see Alan Doig & Stephanie McIvor, "Corruption & Its Control in the Developmental Context: An Analysis and Selective Review of the Literature," 20(3) *Third World Quarterly* 657 (1999).

⁴² The historical dimension is of particular interest, especially in post-colonial states such as Indonesia, where the colonial past often served as a model for contemporary forms of extraction, exploitation, and rule by their independent successors. See, e.g., Arvind Verma, "Cultural Roots of Police Corruption in India," 22(3) *Policing* 264 (1999) (discussing the colonial roots of contemporary police corruption as reflected in the maintenance of organizational practices from that era).

See also, Pamela G. Price, "Cosmologies and Corruption in (South India): Thinking Aloud," 2 *Forum for Development Studies* 315 (1999) (arguing that corruption in the Indian bureaucracy is partly a result of underlying historical relations between rank, status, and authority).

⁴³ See, e.g., A. J. Heidenheimer (ed.), *Political Corruption: A Handbook* (1989).

⁴⁴ S. B. Werner, "The Development of Political Corruption: A Case Study of Israel," 31(4) *Political Studies* 638 (1983).

⁴⁵ For an example of an approach along these lines, see J. P. Olivier de Sardan, "A Moral Economy of Corruption in Africa?," 37(1) *The Journal of Modern African Studies* 25 (1999).

⁴⁶ See, e.g., Michael Jacobsen (ed.), *Human Rights and Asian Values: Contesting National Identities and Cultural Representations in Asia* (2000) (discussing the debate concerning the status of "Asian values" and human rights discourse);

Christopher Lingle, *Singapore's Authoritarian Capitalism: Asian Values, Free Market Illusions, and Political Dependency* (1996).

See also, Abdullahi Ahmed An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (1992);

Abdullahi Ahmed An-Na'im & Francis M. Deng (eds.), *Human Rights in Africa: Cross Cultural Perspectives* (1990).

⁴⁷ Samuel P. Huntington, "Cultures Count," in *Culture Matters: How Values Shape Human Progress* xiii, xv (Lawrence E. Harrison & Samuel P. Huntington eds., 2000). I do not have the space to get into a detailed discussion critiquing Huntington's essentialism and uncritical adoption of orientalist rhetoric, but see Aihwa Ong, *Flexible Citizenship: The Cultural Logics of Transnationality* 186-213 (1999) (discussing Huntington's bicultural schema and the rather naïve underlying assumptions forming its basis).

For the articulation of Huntington's extremely influential views on this topic, see Samuel P. Huntington, *The Clash of Civilizations and the Remaking of the World Order* (1996).

By appreciating the lived realities of the bureaucrats and the public they serve who are forced to negotiate their way through official interactions and encounters on a daily basis, this paper thus attempts to adopt a nuanced approach that appreciates the specific cultural meanings attached to practices deemed “corrupt” without completely eliding the fact that such practices often lead to exploitation.⁴⁸

This recognition of “corruption” as a specific articulation of cultural beliefs and orientations within particular political-economic contexts is necessary so as not to take for granted what the term connotes in specific instances. I would argue that the general, “cookie-cutter” approach to reform often fails to account for the particularized history and meaning of the practice of “corruption” by attempting to address what is perceived as a universal, almost purely organizational problem. One could make the argument that attempts to impose values and standards of behavior that may conflict with indigenous practices and configurations of governance may likely result in failure or in the worst case actually end up promoting new forms of corruption as aid money continually pours into economies without underlying controls for its effective or equitable distribution to those in need.⁴⁹ There is even some evidence that reforms in governance and democratization of authoritarian regimes do not necessarily eliminate corruption but rather provide new avenues for its expression and new opportunities for its

practice by those formerly excluded from systems of power and influence.⁵⁰

VI. TRADITIONAL JAVANESE CONCEPTIONS OF POWER AND LINKS TO CORRUPTION?

An argument can be made that the basis from which leadership and ideas of the appropriate configuration of polity operates in Indonesia with some very different assumptions that that to be found in most Western political theory. If such a premise is accepted, an indigenous notion of power would therefore form an important component of any manifestation of “corruption” in that context.⁵¹

One of the most influential articulations of traditional notions of power operative within the Indonesian elite is found in Benedict Anderson’s formulation of the Javanese idea of power and polity, which was originally published in 1972.⁵² In this article Anderson outlines the way in which traditional notions of power in Javanese culture are diametrically opposed to common Western conceptions. For example, where Western political theory tends to think of power as 1) abstract, 2) heterogeneous in its sources, 3) without limitations in regard to its accumulation, and 4) morally ambiguous; traditional Javanese notions see power as 1) concrete, 2) homogenous, 3) of constant quantity, and 4) not raising the question of legitimacy.⁵³ Anderson’s definition of power in traditional Javanese

⁴⁸ For a similar approach to the issue that attempts to take seriously the differences between a largely Western discourse surrounding democracy and economic transparency and indigenous Southeast Asian perspectives, see Vincent Houben, “Economic Crisis and the Culture of Reform in Southeast Asia,” 7(4) *European Review* 487 (1999).

⁴⁹ See, e.g., Morris Szeftel, “Between Governance and Under-Development: Accumulation & Africa’s ‘Catastrophic Corruption,’” 27 *Review of African Political Economy* 287 (2000).

⁵⁰ See, e.g., David Watt, Rachel Flanary, & Robin Theobald, “Democratization or the Democratization of Corruption?: The Case of Uganda,” 37(3) *Commonwealth & Comparative Politics* 37 (1999).

⁵¹ This approach was adopted in somewhat different terms by Robertson-Snape, supra note 29, and some of the following discussion was influenced by that article.

⁵² See Benedict Anderson, “The Idea of Power in Javanese Culture,” in *Language and Power: Exploring Political Cultures in Indonesia* 17 (1990), reprinted from *Culture and Politics in Indonesia* 1 (Claire Holt ed. 1972).

⁵³ Id. at 21-23.

culture has not been free from criticism, particularly in the fact that he does not sufficiently account for the influence of Islamic thought on Indonesian political culture and that his formulations represent an overly simplistic, essentialist account of Javanese political theory divorced from the realities of historical practice.⁵⁴ The broad outlines Anderson explores, however, remain significant for the kinds of political organization deployed within the context of Indonesian politics, whose leaders often saw themselves as modern Javanese princes.⁵⁵

In this indigenous model, power radiates out from the center and all ministerial actions should reflect back to the wishes of that power with little or no accountability to the public at large.⁵⁶ Ideally, there should be no discretion on the part of those appointed to the periphery, as they are seen as the mere extension of the center's will, and actions on the periphery reflect back onto the center. This underlying ideology of power, in which the state's production and stability are fundamental expressions of the center's capacity to rule,⁵⁷ helps to explain the New Order's emphasis on the maintenance of economic progress through development or *pembangunan* and the maintenance of order.⁵⁸

The bureaucratic administrative structure imposed to address this concentration of power at the center had a great deal to do with the eventual appointment of administrators sent from the center to oversee the periphery. From this perspective, "the wealth of the state is in the gift of the ruler and may be distributed

downward through officialdom as the prerequisites of office; but...this distribution is to be conceived not as an obligation of the ruler to his officials, but rather as a mark of his favor."⁵⁹ The end result is that large-scale corruption in post-Independence Indonesia "takes the form of allotting the 'surplus' of certain key sectors of the economy to favored officials or cliques of officials, whether civilian or military."⁶⁰ In the area where I worked, for example, many of the logging and mining concessions went to high ranked military personnel despite the supposed ban on logging and mining in the area due to the establishment of a large national park in the region.

Anderson's model is intriguing, especially as the basic principles he outlines as falling into a traditional Javanese conception of power and polity directly conflict in many ways with Weber's ideal-type of rational-legal bureaucracy, a methodological construct that nevertheless exerts a powerful influence on ideas about how an efficient and rational bureaucracy should function.⁶¹ The basics of Weber's thoughts on rational-legal bureaucracy list the following criteria as the functioning "rules" under which bureaucrats in such an ideal system work: 1) bureaucrats are subject only to the authority of their impersonal official obligations; 2) they are organized by a clearly defined hierarchical system of offices; 3) each office has a clearly defined sphere of competence; 4) the office is filled by free contractual relationships; 5) candidates are selected on the basis of technical qualifications; 6) there are fixed salaries based on rank within

⁵⁴ See, e.g., Pabottinggi, *supra* note 24 at 235-237.

⁵⁵ See John Pemberton, *On the Subject of "Java"* (1994) (exploring how the appearance of order and stability under Suharto was founded upon appeals to traditional Javanese cultural practices and traditions).

⁵⁶ Anderson, *supra* note 51, at 49.

⁵⁷ *Id.* at 33.

⁵⁸ See Ariel Heryanto, "The Language of Development and the Development of Language" 40 *Indonesia* 35 (1985) (discussing the shift in discourse from the organic *perkembangan* to the more mechanical and modernist *pembangunan*, which became the underlying legitimation for Suharto's rule).

⁵⁹ Anderson, *supra* note 51, at 59.

⁶⁰ *Id.* at 60. For a comparative explanation of the development of what the author terms a "clientelist" state in reference to cronyism in Malaysia, see James V. Jesudason, "The Developmental Clientelist State: The Malaysian Case," 23(1/2) *Humboldt Journal of Social Relations* 173 (1997).

⁶¹ See, e.g., Robert Brown & Alan Gutterman, *Asian Economic and Legal Development: Uncertainty, Risk and Legal Efficiency* (1998) (representing a recent example of work in this area that implicitly makes use of a Weberian notion of rational-legal authority).

the organization; 7) the office is treated as the sole, or at least primary, occupation; 8) the job constitutes a career in which promotion is based on seniority or achievement or both; 9) the official works entirely separated from the means of administrations; and 10) the official is subject to strict and systematic discipline.⁶² Some of these factors obviously do not map on very well to traditional Javanese notions of the ideal patron-client relationship, which essentially serves as the model by which most bureaucratic relationships are structured throughout the archipelago. This observation is not to say that the bureaucracy in Indonesia is locked in the past and that “tradition” is thus the root of all the corruption rampant in Indonesia, but such elements arguably do play

bureaucratic practice in Indonesia.

For example, there is a great dispreference in Indonesia for conducting one’s transactions without some sort of personal relationship. This orientation results in a rather blurred boundary between state and civil society and between personal and public life. Indeed, the importance of personal relationships in business and personal transactions cannot be overestimated in Indonesia, and while such a system may appear to result from cronyism and nepotism from an outside perspective, the use of connections to conduct business and handle disputes offers some stability and reassurance in a system where the state can yield arbitrary power with virtual impunity.⁶³ Most of the Indonesians whom I knew felt extremely uncomfortable conducting their affairs in any situation in which they did not know someone. In instances where they had no connections, I often observed that local people brought along an intermediary to negotiate the relationship.

It was virtually unthinkable for them to go into an encounter “cold.” Obviously, such a system may not be the most “efficient” means to conduct business in that such necessities often increase transaction costs,⁶⁴ but underlying cultural configurations about appropriate modes of conduct represent a powerful force that can structure behavior in particular circumstances despite the “cost.” For example, most people with civil disputes or even petty criminal matters would simply avoid the court system altogether and resolve their problems through a third party acting as a intermediary rather than deal with the relatively unknown and potentially arbitrary courts, whose personnel could extract its own, often quite high, transaction costs.⁶⁵

While all the legal actors in Indonesia (e.g., judges, prosecutors, and police) have somewhat different motivations to engage in “corrupt” behavior, a great deal of it comes down to the desire to improve one’s position in life and take advantage of greater opportunities elsewhere, nearer to the centers of power. Professional advancement fundamentally relies upon the ability of the particular official to accumulate resources and cull favor with those able to get them posted in greater positions of influence and power. Given that the Indonesian bureaucratic system has historically served not as a meritocracy but more as an interlocking set of patron-client relationships, there is no real stopping point at which one will stop seeking advancement in this manner. Rather, as one’s power and influence grows, so does the need to accumulate ever more assets and cultivate connections even closer to the center in order to continue on the path to greater opportunity. Some of course will be satisfied to stay at a certain level or will only be able to

⁶² Max Weber, “The Essentials of Bureaucratic Organization: An Ideal-Type Construction,” in *Reader in Bureaucracy* 18, 21-22 (Robert K. Merton, et. al., eds. 1952).

⁶³ For a comparative example from Ghana in the realm of commercial contracts, see Marcel Fafchamps, “The Enforcement of Commercial Contracts in Ghana,” 24 *World Development* 427 (1996) (discussing the complex system of traders that act as essential go-betweens for commercial transactions). See also, Ong, supra note 46 at 155-156 (discussing the importance of what in many respects is an analogous concept of *guanxi* to traditional Chinese business practices).

⁶⁴ See Oliver E. Williamson, “The Institutions of Governance of Economic Development and Reform,” in *Proceedings of the Annual World Bank Conference on Development Economics: 1994* (M. Bruno & B. Pleskovic eds., 1995).

⁶⁵ For example, in the district court in which I conducted my dissertation research, it was well-known that one had to pay a “special fee” to get a civil judgment enforced or to get official papers filed.

go so far in the system, but as long as such incentive structures are in place, the elimination of corruption seems to be a daunting task that may take decades to achieve.

VII. CONCLUSION

I have tried to briefly outline in this paper the ways in which indigenous notions of polity and power influenced the structuring of the modern Indonesian bureaucracy. How this structure led to systematic practices of corruption becomes clear if one realizes that the only way to advance is through the cultivation of one's connections and the offering of sufficient resources to approach the centers of power that continue to wield true influence, even in an era marked by a drive for "*reformasi*."

It is, however, hopeful that the "*reformasi*" movement currently remains strong as well.

Even though there is increasing public frustration at the pace of change, progress in this area has been made, and while it may not be practical to put the children in charge, those children will one day be adults, and that may be the time when reform could truly take hold. Rather than throwing money at what are thoroughly corrupt institutions, perhaps money would be better spent on this rising generation through a strengthening of the Indonesian education system. In this view, "corruption" is not so much a cultural problem in Indonesia as it is a result of the intentional deployment of a political system that rewarded such behavior in the interests of maintaining stability and the status quo. The institutionalization of corrupt behaviors is an area that any legal reform project in Indonesia must be sensitive to while at the same time recognizing that such institutional practices can be very difficult to dislodge once so firmly established.

This paper is largely based upon fifteen months of field research conducted by the author in Indonesia from late 1997 through 1998.

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The Roots and Societal Impact of Islam in Southeast Asia

INTERVIEW WITH PROFESSOR MARK MANCALL

Anthony Shih

WHAT IS THE ORIGIN OF ISLAM IN SOUTHEAST ASIA? HOW IS IT SEPARATE FROM OTHER FORMS OF ISLAM?

The first thing to understand is Islam in Southeast Asia did not come directly from the Middle East; it came from India. The consequence is that the Islam that came into Southeast Asia had already been modified by the experience of Islam in India and had some very strong elements of Sufism in it. Remember that Islam first came to India via the Arabs; that occurred around the 10th century. Then the Turks in Central Asia, along with the Mongols and all the earlier dynasties in India that came from Central Asia modified Islam considerably. It became a “softer” Islam; it was very mystical. So the Islam of India became very different from the Islam of the Middle East. Meanwhile, throughout Southeast Asia, certainly in Indonesia and Malaysia, Thailand, etc., when Islam settles eventually, there was a Hindu Buddhist civilization, which was rooted in the Indian tradition of the Ramayana and the Mahabharata, the great Hindu epics.

So Islam entered this Hindu Buddhist culture. The result was a Sufi-influenced Islam in India coming into an area where there was already an Indian culture – it was an Indianized Islam coming in on top of an Indianized local culture. The individuals that are historically said to have brought Islam into Indonesia are the *Walis*, who were all Sufi mystic types. So there was a hybrid culture evolving,

particularly in Java, for example, and in other parts of Indonesia, and it created an Islam that was very mystical, very fluid, very soft, which developed a kind of spiritualism that was very peculiar in the region. In the time we are talking about – the 14th and 15th centuries – one really could not distinguish between modern-day Malaysia and Indonesia; they were the same cultural area. But Indonesia was overwhelmingly the cultural center; Malaysia was really a kind of commercial entrepôt and the Malays in the Malaysian peninsula at this time had not advanced as far as Indonesia in terms of literacy and so on. There was Muslim settlement in the part of the Malay Peninsula below the modern-day Malaysia-Thailand border.

HAS THERE BEEN AN EXCHANGE BETWEEN MIDDLE EASTERN AND SOUTHEAST ASIAN ISLAM, THEN?

Yes. Beginning in the 19th century, but becoming much more common at the turn of the century, was a phenomenon of which we still know relatively little. This was the development of trade relations and other relations between Arab migrants, particularly from Yemen, to Malaysia and Indonesia. They are a very significant component of the Muslim population, particularly in trading communities along the coasts of Malaysia, Java, and Sumatra. They maintain, right down to the present day, rather close ties with Yemen. It has been found that, even today, people in Yemen continue to wear Malay-influenced

clothing – a lot of young people went back to Yemen for education. So there's an Arab element in Malaysia and Indonesia about which we know relatively little. It is much closer to the puritanical Saudi type of Islam.

Q DOES THIS MEAN THAT VARIOUS FORMS OF ISLAM SEE EACH OTHER AS DISTINCT, SIMILAR TO VARIOUS DENOMINATIONS OF CHRISTIANITY?

Absolutely not. Although Islam in Southeast Asia has these very particular characteristics, there is a concept throughout Islam of the *ummah*. We don't really have a word for it in English, but it's the sense that all Muslims, everywhere in the world, belong to the same community. And Muslims are taught that. Once a year, Mecca is the center of pilgrimages. All Muslims are required to go to Mecca at least once in a lifetime on a pilgrimage if they can afford it. So what you find throughout the Muslim world, including of course Indonesia, Malaysia, and Thailand, is that when it comes time for the *Hajj*, governments hire planes and thousands upon thousands of people go on the *Hajj* from all over Southeast Asia. In Mecca, they mix with other Muslims coming from all over the Muslim world, so that idea that Muslims from all over the world are members of the same community is a very real thing, not a fanciful abstract idea. The annual gathering of Muslims in Mecca, regardless of what part of the world they come from, the color of their skin, their ancestry, or their history, means they all become part of this community. With faster communication, and with the ability, for example, to fly fifty flights every week to Mecca with pilgrims from Indonesia and then bring them home, the sense of being part of the community has grown. Modern technology has resulted in a reinforcement of traditional values by virtue of the fact that it makes communication of traditional values easier. This constant travel is one of the elements that contribute to the evolution of Islam in the modern period of Southeast Asia – there is increasing sense of being part of a

Muslim community that modern technology makes possible. Radio and television can contribute to a reinforcement of traditional values, which is a lesson that Westerners ought to learn.

Secondly, a very important element of education in Indonesia and Malaysia is the system of Muslim schools called the *pesantren* – local Muslim schools, as I think of them. In an environment where modern technology has increasingly reinforced the sense of being part of an Islamic community, the role of Muslim schools in Southeast Asia has also increased precisely because they feed into the idea a Muslim community which itself is an idea reborn every year in Mecca. So it becomes a very complex situation.

Take, for example, the sense that people in the Middle East and Iran have of being the victims of Western colonialism and imperialism. Whether it's a valid sense or not is irrelevant; they feel it, and therefore it's a political reality. It communicates itself – one of the consequences of the *Hajj* and modern communication. It becomes revived through the schools, with even the liberal Muslim schools reinforcing this sense. Consequently, it's not at all surprising that we would find a generalized negative reaction in the *ummah* to the latest Afghan war. It is that reality that makes leaders like, for example, Megawati Sukarnoputri in Indonesia and Dr. Mahathir Mohamad in Malaysia extraordinarily careful in their reaction to the American antiterrorism campaign.

Q THE POLITICAL ROLE OF ISLAM IN SOUTHEAST ASIA SEEMS TO HAVE BEEN GLOSSED OVER IN THE LAST FEW MONTHS. WHAT SORT OF EFFECTS DOES ISLAM HAVE ON THE STATES OF SOUTHEAST ASIA?

A There are four countries in Southeast Asia where Islam is politically significant. In Thailand, there has been the constant dilemma of integrating about a million Muslims into the larger Thai population. They have been included in the bureaucracy; the foreign minister of Thailand has been a Muslim. But

they are very distinctively Muslim – making integration more challenging – and influential enough to keep the Thai government from being overwhelmingly for the war in Afghanistan. What gives Thai Muslims their influence is the fact that they border Malaysia.

In Malaysia, Islam presents, perhaps outside of the Indonesian territory of Aceh, the strongest presence in Southeast Asia. Malaysia has a population that is divided between the Malays and Chinese immigrants. Chinese began immigrating into Malaysia in the first part of the 19th century when the British began to colonize the area. Singapore was a small village, but then the Chinese started coming in and the British decided to establish the city as a major British entrepôt,

along with Malacca and Penang. Penang is almost completely a Chinese city. Until the expulsion of Singapore from Malaysia in the 1960s, the Chinese actually had a numerical majority in Malaysia. With the expulsion of Singapore, the Chinese today number maybe 40 percent of the population, so the Malays have a slight edge. But economically, socially, and educationally, the Malays always were at a disadvantage in comparison to the Chinese. They (the Malays) lived in the *kampung*; they were peasants. During the colonial era, British brought in another element of the population, which is not numerically important but is still very present, to work in the tin mines and the rubber plantations; they brought in Indians. So the result is a three-part population, but the primary part is still the Malays.

Since Malaysia received its independence, there has been a policy of favoring Malay development and finding a way to coexist with the Chinese by incorporating them into society, but nonetheless there is a sharp distinction.

Malay identity has, to a large extent, depended on Islam. One of the problems that Mahathir, the prime minister of Malaysia, has been having is how to allow Islamic institutions to develop within the

government and yet at the same time not have Malaysia become an Islamic state in such a way that the Chinese, who are a crucial and economically important element, will be frightened away. He has had to walk a very, very thin line.

In Indonesia, in spite of the mellifluous quality of Islam that I spoke about before, there are also more puritanical elements. The government has tried to keep these elements under control (Suharto, the recently deposed president of Indonesia, himself practiced a mystical form of Islam). Nevertheless, these puritanical elements have

grown, and there has been a growth of Islamic movements. B.J. Habibie, Suharto's successor, headed one of these movements.

SPEAKING OF INDONESIA, HOW HAVE THE VARIOUS RELIGIOUS COMMUNITIES WITHIN THE NATION COEXISTED?

Beginning already in 1945 was a concept known as the *panca sila*, the five principles of the country, an ancient Sanskrit term which shows the hybrid quality of that society. One of these principles is belief in one god. Indonesians have been very careful not to say what the name of that god is. So, the Muslims believe in Allah, and in Bali, which is a Hindu Buddhist society, a supreme god has emerged over time for various reasons (ultimately, Hindus argue it is all one reality, all one being called god), so they can claim belief in one god. There is also a Christian element, which is particularly strong in eastern Indonesia.

Recently, there has been conflict between Christian and Muslim elements in parts of the country. Under the Dutch there was a policy called *transmigrasi*, meaning transmigration, where Javanese were relocated to other islands, including the eastern islands, in order to relieve population pressure on Java. This became standard policy during the Suharto regime. Needless to say, however, the government often did not provide supplies to these new farming communities of Javanese migrants. So, in the eastern islands, where there was a Christian population stemming all the way from the Spaniards, Dutch, and so on, the Muslim migrants from Java competed for very scarce resources and conflict resulted, especially because the Javanese Muslims felt the government had dumped them in outlying regions without resources. In recent years, this has developed into a very serious conflict, particularly in the Moluku, or the Spice Islands. Nowadays in Java, they recruit people to go on *jihads* in the eastern islands to fight the Christians.

EARLIER, YOU MENTIONED THAT THERE WAS AN ARAB INFLUENCED ELEMENT IN SOUTHEAST ASIA. HAS THIS ELEMENT BEEN POLITICALLY IMPORTANT?

The only place where the Arab *Wahhabi* kind of Islam has any political importance in Southeast Asia is in the northern tip of Sumatra, in the city and region called Aceh. The Dutch never succeeded in quelling this area. The Dutch fought a series of wars, the Aceh Wars at the end of the 19th century, and the Indonesians in a way have continued that war down to the present time. We don't know much about Aceh; it is hard to say why they have had a century of Islamic militancy, but it's simply a fact that the Indonesian government has to contend with.

FINALLY, LET US DISCUSS SOMETHING LESS SPECIFIC TO SOUTHEAST ASIA AND MORE ASSOCIATED WITH ISLAM IN GENERAL. THE WORD "JIHAD" HAS BEEN USED EXTENSIVELY TO DESCRIBE THE ACTIONS LEADING UP TO SEPTEMBER 11TH. THE POINT HAS BEEN RAISED THAT THERE ARE TWO KINDS OF *JIHAD*: ORIGINALLY, IT WAS MEANT TO BE AN INTERNAL SPIRITUAL STRUGGLE, BUT RECENTLY THE TERM HAS BEEN INVOKED TO DESCRIBE SO-CALLED "HOLY WARS." IS IT TRUE THAT THERE IS SUCH A DISTINCTION?

No. In my opinion, it is not a valid opinion. Let me explain why I believe it's wrong. We in the West have a culture in which religion is set off to one side. Many other religious traditions – ways of life – don't make the distinction between the spiritual and the social. They are indeed one. In Buddhism and in Islam, for example, there isn't a distinction between what we in the West call the secular as opposed to the religious. We're talking about a way of life. In that way of life, the *jihad* that is about spiritual values – the struggle with one's self, to live the right kind of life internally – must also be a struggle in society as a whole. The individual is an instant of society. So, if I don't live my life the way I'm supposed to, as a good Buddhist, a good Muslim, or as a good Jew – then how can society be good? And equally, if society isn't organized in that way, how can I lead a good life? What we call fundamentalism is a Western concept. It's a concept that is made possible by this very sharp division we make between the spiritual and the secular, between the inner spiritual life and the external social life. We like to make the distinction in Islam between the internal *jihad* and the external *jihad*. And Muslims who are speaking to Westerners make that distinction as well, because it makes us feel better. But frankly, I would be inclined to find certain respects in the idea of the consonance between the social and individual to be rather interesting in creative and productive life.

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Burma, ASEAN, and Human Rights:

THE DECADE OF CONSTRUCTIVE ENGAGEMENT, 1991-2001

Mann (Mac) Bunyanunda

*On the road to Mandalay,
Where the flyin'-fishes play,
An' the dawn comes up like thunder outer China 'crost the Bay!*

Kipling, "Mandalay"

I. INTRODUCTION

Burma, the land romanticized in Rudyard Kipling's poem "Mandalay," is probably unfamiliar to most Americans. Myanmar,¹ its other name, is likely to be even less familiar. The reason for this is not surprising given that from the 1960s to the late 1980s Burma was one of the most closed societies in the world, akin to the North Korea of today. During its three decades of isolation under the leadership of strongman Ne Win, Burma pursued an austere and inward-looking "Road to Socialism." By the end of the 1980s, this "Road" had led Burma not to socialism, but to economic ruin, leaving it one of the poorest countries in the world with a per capita income hovering around \$250.² But by the end of the Cold War, Burma had begun to emerge from its self-imposed introversion. Although this relatively recent opening to the outside

world has had a mixed impact upon the country and its people, the greater international attention on Burma has focused increased scrutiny on how the Burmese government treats its own citizens. Today, Burma is perhaps more likely known not because of quaint colonial buildings and gilded temples, but because of its atrocious human rights record—a record compiled in an era when many developing nations have moved to embrace democracy and human rights.

From March through September of 1988, Burmese pro-democracy protesters took to the streets in several cities around the country. In what was a new low for the government's already abysmal human rights record, the Burmese military or *Tatmadaw* crushed the protests, ushering in a new era of repression under the State Law and Order Restoration Council or SLORC—a junta whose tactics are more reminiscent of earlier

¹ The name "Burma" is related to the term "Burman," which refers to the majority ethnic group in Burma. In 1990, the ruling military junta changed the official English name to "Myanmar," a Burmese language term used by Burmese speakers in reference to their country. The switch was an attempt by the junta to rid itself of the name "Burma," which was what their British colonizers had used. Thus, the name "Myanmar" has become synonymous with the brutal, repressive state now ruled by the junta. Many countries have refused to recognize the name change and continue to call the country "Burma." For ease of reference, this essay uses the name "Burma" rather than "Myanmar."

² Peter Carey, *From Burma to Myanmar: Military Rule and the Struggle for Democracy* (London: Research Institute for the Study of Conflict and Terrorism, 1997), 1.

periods of naked dictatorial oppression.³ According to the United States Department of State, 3,000 protestors were killed in that summer of blood.⁴ Despite these egregious actions taken against its own people, SLORC promised free and fair elections by May of 1990. Unfortunately for SLORC, the elections were free enough for Nobel Peace laureate⁵ Daw Aung San Suu Kyi's opposition National League for Democracy (NLD) to trounce them at the polls, winning 82 percent of the ballots cast. The NLD took 392 of the 485 seats contested in an overwhelming rejection of the military dictatorship.⁶ It came as little surprise when the military government subsequently discarded the election results outright. Ms. Suu Kyi was placed under house arrest by the government and the Parliament elected in 1990 has never been allowed to convene. Many other NLD officials were also imprisoned or forced into overseas exile.

A decade later, the SLORC junta⁷ is still in power and repressing the people of Burma. Political imprisonment, forced labor, and torture have continued to be the norm. The events of 1988 and 1990 not only led to increased scrutiny by the world community of Burma's human rights record, but also to a wide array of remedies proposed to end the violations and to ease the atmosphere of repression. The responses have ranged from apathy and inaction on one extreme to unilateral sanctions and total investment

freezes on the other. Between these two poles lies the controversial policy of "constructive engagement" introduced by the Association of Southeast Asian Nations or ASEAN. Simply put, the policy of constructive engagement had as one of its ostensible objectives a liberalization of the human rights situation through close cooperation between Burma and its ASEAN neighbors on a wide range of issues.

ASEAN was originally a grouping of six Southeast Asian nations established in 1967 as a loose, non-military organization directed against Vietnam and the communist threat in Southeast Asia. Today, the Association counts as its members all ten nations of Southeast Asia proper, including Vietnam, which became a member in 1995, and Burma, which joined in 1997.⁸ The policy of constructive engagement toward Burma, inspired in 1988,⁹ was initiated in 1991 by Thai Prime Minister Anand Panyarachun in response to SLORC's nullification of the 1990 elections. The policy was formally adopted later that same year at ASEAN's annual ministerial meeting in Kuala Lumpur. Constructive engagement had a multitude of goals, which shall be discussed further and in greater detail. As mentioned, one of these goals included the eventual inclusion of Burma into the Association. The policy was also conceived to deflect American and European Union pressure for sanctions on SLORC so that

³ SLORC is a collective decision-making body with about twenty members of which three are the acknowledged leaders: General Than Shwe, Army commander-in-chief; General Maung Aye, Deputy Army commander-in-chief; Lt. General Khin Nyunt, Director of Defense Services Intelligence. Robert I. Rotberg, Introduction to

Burma: Prospects for a Democratic Future, ed. Robert I. Rotberg (Cambridge: The World Peace Foundation and Harvard Institute for International Development, 1998), 3.

⁴ Congress, House Committee on Foreign Affairs, Subcommittees on Human Rights and International Organizations and on Asian and Pacific Affairs, *The Crackdown in Burma: Suppression of the Democracy Movement and Violations of Human Rights*, 101st Congress, session, 13 September 1989, 3.⁵ Ms. Suu Kyi was the winner of the 1991 Nobel Peace Prize.

⁶ Carey, *From Burma to Myanmar*, 8.

⁷ Within the past three years, SLORC has changed its moniker. It is now euphemistically known as the State Peace and Development Council or the SPDC. This essay uses SLORC to identify the ruling military junta, as the change to SPDC was only a nominal change and nothing more.

⁸ ASEAN's members include its founding member states—Thailand, Singapore, Malaysia, the Philippines, and Indonesia, as well as member states entering later—Brunei, Vietnam, Lao PDR, Burma, and Cambodia.

⁹ In December of 1988, Thai army commander Chavalit Yongchaiyudh negotiated generous logging and fishing deals with the Burmese regime, thus launching an intensive exchange between the military and civilian bureaucracies and later inspiring ASEAN's constructive engagement policy with Burma. Kay Moller, "Cambodia and Burma: the ASEAN Way Ends Here," *Asian Survey* 38, n12 (1998).

ASEAN commercial relations with Burma could continue unimpeded. It was argued that through engagement Burma would be drawn into the Association and into participation in regional affairs, both preludes to Burma's eventual integration into the international community. If all went as planned, constructive engagement would lead to the integration and the drawing out of Burma from the shadows of isolationism and into the light of globalism, which would then have a liberalizing effect on the appalling human rights situation in the country.

It has been a decade since the inception of ASEAN's policy of constructive engagement with and evaluate the success of the much-ballyhooed initiative ten years after its inception. What were ASEAN's goals for this policy and have they been satisfied? More importantly, what has been the impact of constructive engagement on human rights in Burma? How has the policy eased the repression against the Burmese people? Has integration and a greater degree of commercial activity in Burma led to the human rights dividends hoped for in 1991?

One might question why an analysis of constructive engagement is important for international human rights. The answer lies in the general rationale for policies of constructive engagement. Like the US constructive engagement policy toward the Apartheid government of South Africa and other similar policies of the past, ASEAN's actions represent a "soft-line" of thinking on the abuses in Burma. It requires that international procedures for bringing abusers to justice take a secondary position to the much longer and drawn out process of commercial and cultural ties aimed at coaxing dictators from power and "reforming" the offending governments. In short, constructive engagement and similar policies are, in a way, "competitors" to other international mechanisms for rectifying human rights abuses such as unilateral sanctions and intervention by international organs. The fact that these policies have been proposed and implemented by national governments gives them *per se* legitimacy on some level, whether human rights advocates like it or not. It is thus only

logical that constructive engagement policies are subjected to fair analytical scrutiny in order to determine their efficacy and their proper role in bringing abusive regimes into line and justice and dignity to oppressed peoples.

Part II of this essay examines the human rights abuses that were rampant in Burma during the late 1980s and early 1990s. It describes the typical abuses that occurred *before* the initiation of the constructive engagement. Part III focuses on ASEAN and the policy of constructive engagement, analyzing its motivating rationales, goals, and its implementation within the framework of the Association. In addition, the evolution of the policy over the past decade will be discussed. Part IV concludes that the policy has been a failure. It examines the policy today and its results a decade after its genesis and discusses the evidence of its failure, focusing primarily on the issue of human rights but also on Burma's relations with China, and on issues of regional cooperation as well. Finally, Part V briefly considers possible alternative solutions implemented by foreign governments and advocated by influential non-state actors to assist the people of Burma in breaking the shackles of autocracy and dictatorship.

II. BURMA'S HUMAN RIGHTS RECORD IN THE LATE 1980s

As mentioned, Burma is a multi-ethnic state and a former territory of the British Raj in India. In the 1950s, just a few years after gaining independence, the Burmese government under President U Nu sought to build a democratic state within the Non-Aligned Movement. It was not to be as the democratic years came to a violent end in 1962 after a military coup by General Ne Win. Under Ne Win, Burma began its path to the status of a modern-day hermit kingdom. Burma's location on the periphery of South and Southeast Asia allowed it to slowly fade out of sight and out of mind from an increasingly integrating world. It was the August 1988 pro-democracy demonstrations and subsequent violent crackdown that thrust the anachronistic Southeast Asian nation back into the world spotlight.

In 1988, after months of demonstrations, General Ne Win was forced to step down. The respected moderate Dr. Maung Maung, a civilian who promised a national referendum for a multi-party system, replaced him. After only a single month in power, the *Tatmadaw*, under General Saw Maung, returned and deposed the Maung Maung government. The opposition again took to the streets to protest the resumption of military rule under the newly declared SLORC, triggering a violent response by the army. This brutal suppression of students and opposition groups was perhaps the first visible case of human rights abuse that the outside world witnessed in Burma—one case from what turns out to be a litany of atrocities by the government against its own people.

What became increasingly clear at that point was that Burma's quarter-century of isolation masked egregious violations of human rights. The 1988 crackdown claimed the lives of as many as 3,000 protestors with many more forced to flee the country or imprisoned for their actions.¹⁰ Many NLD leaders including secretary-general Aung San Suu Kyi and party chairman U Tin Oo were held under house arrest. Beatings and torture were commonplace. First-hand accounts reported that prisoners were subjected to "cigarette burns, beatings resulting in severe eye and ear injuries, and electric shock to the genitals."¹¹ Furthermore, in some cases, prisoners were packed into small cells and forced to stand knee-deep in water as their captors interrogated them.¹² Sleep deprivation and other torture tactics were the norm during interrogation.¹³ The fact that death was oftentimes the result of this harsh treatment is not surprising. In an effort to woo back students who had fled after the crackdown, the

government established some 27 "reception centers" to receive those who wanted to return. The government promises of humane treatment upon return were, not surprisingly, reneged upon. When a group of 80 students returned in December of 1988, SLORC quickly announced that they were going to punish those who had committed "criminal acts." Amnesty International reported that some of those who returned were arrested and "executed by army units or were shot and killed by soldiers who ambushed them in the forest."¹⁴

The military, back in power, once again asserted its dominance over the people. Local military commanders were granted the powers of summary trial and execution.¹⁵ With martial law declared throughout the entire country, those accused of crimes were absolutely incapable of defending themselves. Military tribunals made up of judges completely lacking in legal training had the final say on all cases both civil and criminal. Lawyers who were too zealous in defense of their activist clients could suffer consequences that would be detrimental to both the client and the lawyer.¹⁶ Furthermore, a general curfew was imposed and gatherings of more than five people were made illegal.

The abuses of the regime were widespread and not restricted to the urban areas. In their battle with ethnic insurgents along the border with Thailand, the *Tatmadaw* made it a routine practice to use the peasantry in forced labor. Peasants were forced to carry equipment and to walk in advance of army troops when booby traps or ambushes were expected.¹⁷ Escapees reported that despite the staggering physical demands of forced labor, they were fed "near-starvation rations and forced to bear overweight loads."¹⁸ This forced

¹⁰ Many pro-democracy activists were apparently dragged from buses and out of teashops to be taken into custody. Many were kidnapped from their homes and some that were detained subsequently disappeared. *The Crackdown in Burma*, 55.

¹¹ *Ibid.*, 25.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*, 66. Nine students arrested in the town of Kawthaung were taken to a nearby military camp. Four were reportedly beheaded. *Ibid.*

¹⁵ *Ibid.*, 25.

¹⁶ *Ibid.*, 26.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

portering is a common tactic used by the army against villagers living near the areas of ethnic rebellion. Some city dwellers were also reported as having been committed to forced labor after the pro-democracy demonstrations were crushed. Peasants who were suspected in aiding and abetting the rebel armies were taken into custody and tortured. It is reported that once in custody, they were beaten and whipped with their fingers crushed or the skin on their legs scraped off with bamboo rods.¹⁹ Village women and girls were frequently raped.²⁰

In short, the SLORC regime during the early 1990s was responsible for horrific atrocities against its own people. The above account, while only the tip of the iceberg in the litany of abuses compiled by the military regime, is nonetheless representative of the human rights situation that prevailed in Burma at that time. It was this record of abuses that ASEAN had to contend with in 1991. As Western governments and international organizations clamored for tough action against Rangoon's intransigence and the continued brutalization of the Burmese people, leaders in ASEAN capitals carefully pondered the problem. For them, the Burma problem was not so cut-and-dried. Human rights was just one of many complex issues that had to be assessed and balanced against a host of other regional interests before a workable and coherent policy solution could be initiated.

III. ASEAN'S "CONSTRUCTIVE ENGAGEMENT"

A. Policy Foundations

The first ASEAN summit was held in Bali, Indonesia, in 1976—nine years after the

establishment of the organization itself. In the Declaration of ASEAN Concord signed by the heads of state of the five founding members, the parameters of the grouping were drawn and the organization given life. In the document, the leaders declared that within ASEAN, member states should act "in accordance with the principles of self-determination, sovereign equality, and non-interference in the internal affairs of nations."²¹ This statement set out what would eventually come to be a long-standing and entrenched "hands-off" practice among member states when in came to each other's domestic affairs. In fact, the traditional ASEAN way of doing business has evolved into a non-confrontational approach that puts quiet diplomacy and behind-the-scenes action ahead of more overt procedures. This way of handling conflict is in contrast to the West's relatively more confrontational approach that emphasizes critical dialogue.²² Accordingly, when it came to the problem of Burma and its human rights records, ASEAN's preferred solution would be a policy that best reflected this principle of non-interference in domestic affairs. From this understanding constructive engagement was born.

1991 by Thai Prime Minister Anand Panyarachun and was later "regionalized" as an ASEAN-wide policy by the other member states.²³ For Thailand, the formulation of the policy was based "upon both realities and aspirations."²⁴ As it shares a 2,400 kilometer-long border with Burma, any effective solution to unrest in Burma was in Thailand's own interests. Furthermore, as a founding member of ASEAN, Thailand had an interest in seeing that Burma joins an Association that included all ten Southeast Asian countries. The policy was meant to focus on encouraging the Burmese junta into realizing the benefits of integrating their country into the region and into the mainstream

¹⁹ *Ibid.*, 56.

²⁰ *Ibid.*, 57.

²¹ Association of Southeast Asian Nations, *Declaration of Concord*, Feb 24, 1976, Section 8.

²² Ironically, many powerful economic interests in the West also agreed with this style when in came to investment in Burma. Li-ann Thio, "Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to go Before I Sleep,"

Yale Human Rights and Development Law Journal 2 (1999): 45.

²³ It should be noted that although a unified ASEAN view exists on the Burma issue, each country holds views that differ slightly from each other depending on their own foreign policy goals. For example, Thailand, one of the two ASEAN countries that share a common border with Burma, is concerned about refugee flows, border clashes, and the drug trade. On the other hand, Indonesia may be more concerned about how its own domestic repression will look in relation to Burma's. Finally, Singapore, Burma's second largest trading partner behind the PRC, is perhaps more interested in the preservation of commercial ties and the junta's receptivity to continued Singaporean investment in Burma.

²⁴ "Engaging Myanmar in ASEAN,"

of the international community. Constructive engagement became a centerpiece for showcasing “the ASEAN way,” an approach that stresses decision-making by consensus and non-interference. In short, it was an attempt that put process over proper institutionalization of norms.

B. Policy Goals and Rationales

Despite the idealistic rhetoric from Bangkok, in ASEAN’s collective view the rationales behind the policy were more complex and pragmatic. Proponents of the idea feared that isolating Burma would be counterproductive given its long history of self-imposed solitude. It was believed that more effective results could be gained through “the wielding of ‘economic carrots’ that can materially benefit all Burmese.”²⁵ Furthermore, economic sanctions would have run counter the policy of non-interference in domestic affairs despite the fact that Burma had not yet become a full member. ASEAN believed that a policy of isolation and pressure on SLORC would only heighten its domestic insecurity, leading to even more brutal repression within the country.²⁶

Despite the attention paid to the issue, the most important goal of constructive engagement was not the resuscitation of a respect for human rights and the ending of the brutal repression in Burma. Although the policy was formulated to appear as a helping hand to Burma it was, not surprisingly, a policy that from the outset was meant to benefit ASEAN’s members first and foremost. The main rationale behind the policy was to counteract the influence of the People’s Republic of China (PRC) on Rangoon and to prevent Burma from becoming the PRC’s Trojan horse in the region.²⁷ A secondary reason for the policy stems from regional nationalism. For its members, the success of ASEAN nurtured pride, confidence, and a sense of regional cohesion. More importantly,

ASEAN has evolved into a “bulwark against over-weening foreign influence in Southeast Asia.”²⁸ Member states did not want to be seen as caving in to human rights pressure from the West. A solution to the matter should only be crafted by ASEAN members and on ASEAN’s terms. In addition, it was hoped that regional cooperation would also benefit from the policy, as there would be greater coordination among member states on region-wide problems. In a twist of irony, constructive engagement also worked to the benefit of ASEAN members that wished to shield their own abusive human rights policies from international scrutiny. Membership in the Association was supposed to enhance legitimacy, not provide a forum in which to expose illegitimacy. Critical commentary on SLORC’s abuses would threaten the critic nation’s own embarrassing domestic policies that then might become fair game for international criticism.²⁹

C. From Constructive Engagement to Flexible Engagement

In 1997, on the eve of the thirtieth anniversary of its founding, two major events conspired to challenge the image and viability of ASEAN and some of its policies. These events would serve to call into question the workability of the cardinal principle of non-interference in light of the ever-deepening ties between the ASEAN nations. Furthermore, the inability of constructive engagement to pay dividends also led to the first cracks in the unified ASEAN position on Burma. These developments would lead to pressure on the constructive engagement policy and to an awkward attempt at reassessment and reformulation of the policy itself.

The most prominent and damaging of the calamitous events of 1997-1998 was clearly the Asian economic crisis. The crisis, triggered by Thailand’s decision to devalue the baht after several attacks by currency speculators, brought economic growth to a

²⁶ Marvin C. Ott, “From Isolation to Relevance,” in *Burma: Prospects for a Democratic Future*, ed. Robert I. Rotberg (Cambridge: The World Peace Foundation and Harvard Institute for International Development, 1998), 74.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Thio, “Implementing Human Rights in ASEAN,” 46.

decided that Burma, along with the Lao People's Democratic Republic and Cambodia, were to become full members by ASEAN's thirtieth anniversary. However, the ascension of the three states to full membership would suffer unexpected setbacks. In Phnom Penh, a coup by First Premier Hun Sen sent Second Premier Norodom Ranariddh into exile on the eve of the Cambodia's ascension to member status.³⁰ The pending decision on Cambodia's admission to membership split the Association with Indonesia and Vietnam favoring quick admission for the Hun Sen regime and Singapore, Thailand, and the Philippines favoring a delay in admission until a peaceful solution to the political crisis could be found. In the end, Cambodian membership was made contingent on the formation of an effective government, thus bringing to light ASEAN's double standards. While member states called for a return to democratic government in Phnom Penh, they admitted Burma through the back door without delay. Furthermore, the requirement of democratic reform placed only on the Cambodian government as a condition of membership seemed glaringly at odds with the principle of non-interference in domestic affairs.

Thailand, already beleaguered by refugee flows, drug smuggling and border conflicts with Burma, responded in the wake of these regional calamities with a controversial proposition to reformulate the policy of constructive engagement.³¹ In a 1998 Government Non-Paper, Thailand proposed a "flexible engagement" approach, not limited to the issue of Burma's human rights record.³² Simply put, the Thai proposal was a challenge to the cardinal principle of non-interference. The Thai position stressed the interdependence of the regional economies while reemphasizing that non-interference was still a valid principle. However, the Thai proposal stated that non-interference should never be absolute. "It must

be subjected to reality tests and accordingly it must be flexible."³³ The proposal recognized that "as the region becomes more inter-dependent, the dividing line between domestic affairs on the one hand and [*sic*] external or trans-national issues on the other is less clear."³⁴ The bottom line was that many matters, traditionally considered to be domestic in nature, have cross-border effects and opinions on these matters should be expressed in an open, frank, and constructive manner.

Although flexible engagement garnered the support of only the Philippines and eventually failed to gain ASEAN-wide support, it signaled a new understanding of regional relations as the Association approached the 21st century. While many member states may have been wary of an attempt to chip away at a core principle like non-interference, the proposal may be an indication of a growing political maturity within the Association – a recognition that regionalism and resilience in the long run would benefit if members took more of an interest in each other.³⁵ It is relevant to this discussion in that it signaled the first signs that constructive engagement, at least in terms of the Burma issue, was failing and needed to be reevaluated. The following Section examines the human rights record in Burma a decade after the initiation of constructive engagement to see what, if anything has changed. In considering that record, it also attempts to explain perhaps why Thailand, the nation that formulated constructive engagement vis-a-vis Burma, was the first to break ranks.

IV. THE FAILED DECADE OF CONSTRUCTIVE ENGAGEMENT

As described in Section II, Burma had a long and brutal history of military

³⁰ The coup occurred just sixteen days prior to when Cambodia was to become a full ASEAN member.

³¹ The United States Department of State has classified Burma as the world's largest producer of opium and heroin and the government of Burma has been decertified by the US for narcotics assistance.

³² "Thailand's Non-Paper on the Flexible Engagement Approach," *Royal Thai Embassy, Washington, D.C. Website*; available from <<http://www.thaiembdc.org/pressctr/pr/pr743.htm>>, accessed 30 April 2001.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Thio, "Implementing Human Rights in ASEAN," 54.

dictatorship and human rights abuse. Constructive engagement was, in part, an attempt to bring an eventual end to the harsh treatment and repression of the Burmese people. Admittedly, such a policy of confidence building and commercial integration will not bring change at a breakneck pace. It would be neither fair nor reasonable to expect miracles overnight. However, after an entire decade of constructive engagement, in order to declare the policy a success, one should at least be able to document clear and substantive movements toward liberalization and freedom within the country. It would not be too much for human rights advocates to expect noticeable change and transformation in Rangoon given that that is exactly what flexible engagement was, among other things, supposed to bring to the people of Burma. Sadly, this has not been the case as constructive engagement has failed to yield dividends not only in the areas of human rights, but in regional cooperation and in the balancing of Chinese influence in the region.

A. Developments in Human Rights

Ten years after the initiation of constructive engagement, Burma remains a pariah state. The standoff between the NLD and the military junta continues. In 1997, SLORC gave a glimmer of hope as it changed its name to the State Peace and Development Council (SPDC) and indicated that they would pursue “disciplined democracy.” It did not take long before the euphemistic character of the new name and new policies became apparent as SLORC took aim at the NLD and opposition leadership by jailing political dissidents in a new wave of arrests.³⁶ SLORC does not only seek to undermine its opponents through repressive measures: abuse of those in rural

areas is ongoing and the stalemate with Aung San Suu Kyi has shown few signs of progress. In an attempt to attack its opponents, SLORC accused several student activists of attempting to assassinate top junta leaders. One individual was sentenced to fifteen years imprisonment for writing a book detailing the history of the student movement. In a related case, Thakin Ohn Myint, an eighty year-old politician and independence hero, was sentenced to seven years of hard labor.³⁷ An uprising planned for the auspicious date of September 9, 1999 (9-9-99) and intended to replicate the uprising of August 8, 1988 (8-8-88), was crushed by the security forces resulting in up to five hundred arrests. In connection with this, two British activists, James Mawdsley and Rachel Goldwyn, were also arrested and sentenced to seventeen and seven years of hard labor, respectively.³⁸ In addition, the recent sentencing of Aye Tha Aung, the representative of the NLD’s four ethnic-minority branches, to 21 years in prison has, according to some analysts, begun to emasculate the NLD, creating a split within opposition ranks.³⁹

Like urban dwellers, villagers and peasants in rural areas have also failed to see their condition improve during the past decade. The government’s counterinsurgency efforts led to the forced relocation of villagers, especially in areas where armed ethnic opposition groups were known to be active.⁴⁰ “After relocation, soldiers frequently burned homes, uprooted crops, and looted belongings”⁴¹ left behind by villagers. Army units have also reportedly beaten and threatened villagers in an attempt to purge rebel army sympathizers from the rural areas.

Forced labor remains prevalent as ethnic minorities and Burman villagers continue to be subjected to it at the hands of the government. Children as young as eight

³⁶ “Human Rights Watch World Report 1999: Burma Human Rights Developments,” *Human Rights Watch*; available from <<http://www.hrw.org/worldreport99/asia/burma.html>>, accessed 1 May 2001.

³⁷ *Ibid.* Thakin Ohn Myint was eventually released in January of 1999 following the visit of United States Congressman Tony Hall. “Burma,”

Human Rights Watch; available from <<http://www.hrw.org/wr2k/Asia-01.htm>>, accessed 1 May 2001.

³⁸ *Ibid.*

³⁹ Shawn W. Crispin, “Going Nowhere,” *Far Eastern Economic Review*, 7 September 2000, 21.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² “Amnesty International Report 2000—Myanmar,”

years old were forced on a regular basis to work on temple construction while others were forced into portering duties for the military.⁴² Those who could not keep up with the column were promptly beaten.⁴³ Not only do the villagers receive no pay, but also they must supply their own food, all under the threat of imprisonment should they refuse to participate.⁴⁴ Aside from portering, forced labor has reportedly been used in a wide range of projects including construction, maintenance, and servicing of military camps, agriculture, and logging, sometimes for the profit of private individuals.⁴⁵ Forced labor has also been the source of controversy in the construction of the Yadana natural gas pipeline by TOTAL of France and Unocal of the United States.⁴⁶

The situation with Aung San Suu Kyi also remains deadlocked, although there have been recent signs of a reinitiating of dialogue between the two sides. Ms. Suu Kyi was placed under house arrest in 1989 not long after the tumult during the pro-democracy protests of 1988. It was not until July of 1995 that she was released, although her freedom of movement is still severely restricted. Twice in the past three years, Ms. Suu Kyi's attempts at leaving her home in Rangoon to meet with her supporters have been stymied by the ruling junta. The first incident resulted in a 13-day stand off that ended only when deteriorating health and dehydration forced her to return home. The second incident resulted in a similar standoff with the Nobel laureate remaining in her car for several days only to be returned to house arrest. NLD headquarters were then promptly raided with Ms. Suu Kyi held incommunicado. She was also prevented

from leaving the country to visit her dying husband in Britain. Although SLORC had allowed her to leave for Britain, it in essence forced her to stay through its unwillingness to guarantee her the right of reentry into Burma. Recently, a potential breakthrough has materialized as Ms. Suu Kyi and the NLD held secret talks with SLORC's generals. Facilitated by the efforts of UN special envoy Razali Ismail, the generals recently invited her for discussions on the country's future, breaking the political deadlock. Ismail, an advisor to Malaysian Prime Minister Mahathir Mohamad, was praised by SLORC as an acceptable negotiator and "a fellow member of Southeast Asia."⁴⁷ The details of what has so far been discussed remain confidential. The initiation of the dialogue was apparently "a collective decision of the leadership and . . . will definitely go on."⁴⁸ Also, in what was perhaps a positive signal, state-run newspapers began referring to Ms. Suu Kyi in full, as Daw Aung San Suu Kyi.⁴⁹ In addition, in April of 2001, the first United Nations human rights investigator to visit Burma in several years reported that the ruling generals would take "concrete measures" to loosen their hold on the country.⁵⁰ Paulo Sergio Pinheiro, a Brazilian academic, visited with Ms. Suu Kyi and NLD leaders during his three-day visit and reported that there was genuine will for change. In reference to the recent discussions between the two sides, Pinheiro stated, "I think that there is a cautious optimism by all parts that something is happening in terms of dialogue or talks."⁵¹

The first dialogue between the generals and the NLD since 1994 is certainly a positive development. However, the

⁴⁴ "Burma Violates Own Ban in Use of Forced Labor," *Human Rights Watch*; available from <<http://www.humanrightswatch.org/press/2001/03/burma0307.htm>>, accessed 1 May 2001.

⁴⁵ "Report of ILO Commission of Inquiry reveals widespread and systematic use of forced labour in Myanmar" *International Labour Organization*; available from <<http://www.ilo.org/public/english/bureau/inf/pr/1998/32.htm>>, accessed 1 May 2001.

⁴⁶ The citation for the relevant case is *Doe v. Unocal*, 110 F. Supp 2d 1294 (C.D. Ca. 2000).

⁴⁷ "Dialogue in Burma: Junta Takes Tentative First Step," *Bangkok Post*, 16 January 2001.

⁴⁸ "Myanmar Softens to Aung San Suu Kyi," *CNN Website*; available from <<http://www.cnn.com/2001/02/26/myanmar/raedler/index.html>>, accessed 21 March 2001.

⁴⁹ *Ibid.*

⁵⁰ Elizabeth Olson, "UN Envoy Finds Signs of Change in Burma," *International Herald Tribune*, 7 April 2001, 5.

⁵¹ *Id.*

⁵² See discussion, *infra*, Section VI.

motivation behind the generals' newfound willingness seems unconnected to the ten years of constructive engagement as announcement of the talks coincided with the release of a substantial Japanese aid package.⁵² Furthermore, while dialogue is crucial, the resumption of talks is in essence a move by the parties back in to square one and should still be viewed at best with most cautious optimism. It does not represent any true progress but rather is merely a reversal of the junta's varying levels of obstinacy and intransigence on the issue of liberalization and democratic reforms seen throughout the past decade. If occasional dialogue between the two sides is all that is to be had in ten years, then surely constructive engagement has not lived up to expectations.

The bottom line is that the human rights situation in Burma is the same, if not worse than it was in 1991. Political repression continues as members of the political opposition are still being subjected to arbitrary arrest and torture. Forced labor, commonplace a decade ago, is still quite prevalent. No substantive progress has been made between the generals and Aung San Suu Kyi. The *Tatmadaw* has only strengthened itself in the intervening decade by increasing the country's armed forces. The junta has also acquired sophisticated technology to maintain its grip on power. The government is now able, through a cyber-warfare center, to intercept telephone and fax messages as well as radio communications.⁵³ If dialogue in the embryonic stages is the only tangible result that the constructive engagement policy has to show for at this juncture, then surely it was not worth the decade of suffering endured by the Burmese people.

B. Developments in Regional Cooperation

As mentioned, human rights liberalization was not the primary goal of constructive engagement. Greater freedoms

in Burma were envisioned as the natural end product from deepened commercial contacts and cooperation on issues of regional concern. Unfortunately, in terms of the latter, Burma has continued its intransigence especially on issues of refugee flows and narcotics trafficking. In a twist of irony, it was this intractability and the resultant detrimental effect on Thailand that pushed Bangkok to propose altering the constructive engagement policy that they had first proposed. Senior Thai Foreign Ministry officials have expressed regret at facilitating Burma's ascension to full membership in 1997.⁵⁴ Flexible engagement was a result of the failure to gain greater cooperation from Burma on issues that affected its neighbors.

The growth of the drug trade has driven a wedge between the Thai and Burmese governments, threatening the rapprochement reached between the two nations in 1997.⁵⁵ Previously, Bangkok, through its support of ethnic rebel armies in Burma, had been able to put pressure on the junta when the need presented itself. Ironically, it was Burma's entry into ASEAN and the regional economic crisis that has allowed Rangoon more autonomy on the issue. For constructive engagement to work, Thailand needs leverage. However, it seems to have lost much of it in recent years. The influx into Thailand of Burmese amphetamines has been a major problem as a staggering 600 million methamphetamine tablets continue to flood into Thailand on an annual basis.⁵⁶ It is estimated that the trade is worth hundreds of millions of dollars.⁵⁷ Progress at stanching the flow of drugs has been difficult because much of this money likely goes into the pockets of the generals in Rangoon. The rationale that ASEAN norms would eventually force Burma to conform has clearly not materialized.

In addition to illegal drugs, a refugee influx also contributed to increasing friction between Bangkok and Rangoon, serving to illustrate yet another area in which constructive

⁵³ Bertil Lintner, "The Army Digs in," *Far Eastern Economic Review*, 2 September 1999, 23.

⁵⁴ Rodney Tasker and Shawn W. Crispin, "Flash Point," *Far Eastern Economic Review*, 1 June 2000, 26.

⁵⁵ Shawn W. Crispin, San Ton Du, Santi Suk and Bertil Lintner, "Drug Tide Strains Ties," *Far Eastern Economic Review*, 9 September 1999, 24.

⁵⁶ Tasker and Crispin, "Flash Point," 24.

⁵⁷ *Ibid.*, 26.

engagement has failed. Approximately 100,000 illegal Burmese migrants and refugees, including ethnic minorities, live in Thailand.⁵⁸ After Thailand released Burmese dissents that occupied Burma's embassy in Bangkok in October of 1999, the junta responded by closing all official crossing points along the Thai border. In response, Thailand proceeded to repatriate many of these refugees in a move that could have destabilized the areas that were already rife with ethnic conflict. The generals retaliated by striking down various corporate arrangements made with Thailand.⁵⁹ Furthermore, regional Burmese commanders were instructed to shoot down any Thai aircraft that entered Burmese airspace during the junta's annual offensive against ethnic insurgents.⁶⁰

In sum, the generals seemed quite satisfied with the status quo on many issues of regional cooperation that were to be assuaged by constructive engagement. While the flare-ups subsided before 1997, the fact that SLORC's intransigence grew after Burma became a full ASEAN member speaks volumes and may be an ominous predictor of future behavior. It plainly serves to illustrate that the junta is exploiting the concessions and conciliatory gestures of constructive engagement. Thailand, which had long led the move to engage SLORC, has had to unexpectedly bear the brunt of the junta's abuse and intransigence as steady streams of refugees and narcotics cross the border.⁶¹

C. *Burma and the PRC*

One of the major goals behind constructive engagement has been the coaxing of Burma away from China's sphere

of influence. Nonetheless, after a decade, Burma is perhaps closer to China than it has ever been. ASEAN was established as a bulwark against communism in Southeast Asia. Much of its efforts were directed toward balancing the Vietnamese threat in the region. After Vietnam acceded to membership in 1995, ASEAN policy gradually shifted to preventing Chinese hegemony in Southeast Asia. The Association has been careful in cultivating and developing its relations with the PRC. Among the most prominent efforts to tie Beijing into multilateral security issues in East Asia is the ASEAN Regional Forum or ARF, an informal "talk shop" where leaders of Pacific Rim nations can meet on a personal, one-to-one level to discuss security-related topics affecting the region. Burma, a gross human rights abuser, would naturally find commonality on many issues with the PRC, something that was discomfiting to ASEAN. Constructive engagement thus came to be one part in a larger effort to stem Chinese influence. Keeping Burma from becoming a Chinese satellite would go a long way toward ASEAN's policy goals.

The PRC has always been a strong supporter of SLORC. Aside from a strong opposition to any kind of sanctions on the junta, the PRC has expressed its willingness to help SLORC in the event of an internal military coup or popular uprising.⁶² Beijing has become a near monopoly supplier of military equipment to the regime and northern Burma has been inundated with Chinese consumer goods and immigrants.⁶³ China is reported to have supplied more than \$1.5 billion worth of military aid in the form of radar equipment, patrol boats, heavy artillery, tanks, anti-aircraft missiles, fighter

⁵⁹ The number of seats that Thai Airways International was allowed to fly into Burma on a weekly basis was slashed from 2,500 to 3,500. *Ibid.*

⁶⁰ *Ibid.*

⁶¹ As of this writing, Burmese and Thai forces have engaged in armed border clashes. After an incursion into and subsequent occupation of Thai territory by the SLORC-backed Red Wa Army, Thai forces repulsed the Red Wa intruders with heavy shelling and F-16 overflights, a tactic of intimidation.

⁶² David I. Steinberg, "The Road to Political Recovery," in *Burma: Prospects for a Democratic Future*, ed. Robert I. Rotberg (Cambridge: The World Peace Foundation and Harvard Institute for International Development, 1998), 279.

⁶³ Marvin Ott, "Don't Push Myanmar into China's Orbit," *Los Angeles Times*, 9 June 1997, sec. B, p. 5.

aircraft, guns and munitions.⁶⁴ Chinese engineers have been building roads and bridges in the country and press reports suggest the presence of Chinese intelligence installations on the Burmese coast.⁶⁵ Other reports confirm that China has been involved in developing a naval base and a radar station along the Bay of Bengal.⁶⁶ Marvin Ott, a professor of national security policy at the National War College, has stated that Burma is now something very close to a Chinese satellite state.⁶⁷ Another expert, J. Mohan Malik, holds the view that “relations between China and Burma have never been closer than they are today.”⁶⁸ President Jiang Zemin’s visit to Burma in mid-December of 2001, the first by a Chinese leader since the events of 1988, further serves to illustrate the PRC’s continuing interest in deepening these already close ties.

Beijing’s interests in Burma are not restricted to military issues, but also extend to areas of commercial development. Trade officials from top Chinese firms have visited Burma since the early 1990s and have gradually expanded investment there as part of the PRC’s goal to link its southwestern provinces to vital export markets in Burma and beyond. Areas of Chinese investment include telecommunications, mining, automotive, aviation, and oil industries.⁶⁹ China has also been increasing its input of foreign direct investment to Burma, with a substantial portion coming through illicit or informal means.⁷⁰ Burma has also been the recipient of several development loans disbursed by Beijing. In approximately one decade, cross border trade

between the two countries has boomed, rising from \$15 million to more than \$800 million.⁷¹ All of this has made China Burma’s largest trading partner.⁷² In order to facilitate further trade, Beijing has proposed a 30-year accord on highway and waterway transport, already accepted in principle by SLORC, which would allow easier and more regular access to Burmese markets.⁷³

It is clear that over the past decade, China’s influence over Burma has in fact increased rather than decreased. China’s ties with Burma are deepening and its leverage over SLORC has only grown during the period of constructive engagement. In both the military and commercial spheres, Burma is perhaps as close to the PRC as ever. But being too close to the Chinese may also have its costs for Burma in the future. Although help from Beijing assures the survival of SLORC, the generals do not want to be overly restricted by its relationship with China. The policy of constructive engagement has not, up to this point, drawn Burma away from China nor has it provided a strong enough alternative to balance Chinese influence. Unfortunately, what the policy may eventually do is to provide the junta with more leverage to play off Beijing against ASEAN and vice versa to the detriment of both sides.

D. Reconsidering Constructive Engagement

This Part of the essay has attempted to illustrate the shortcomings of constructive engagement over the past decade. The human rights record in Burma has not improved by

⁶⁹ Frank S. Jannuzi, “The New Burma Road,” in *Burma: Prospects for a Democratic Future*, ed. Robert I. Rotberg (Cambridge: The World Peace Foundation and Harvard Institute for International Development, 1998), 199.

Since 1997 the Chinese have built a road linking Yunnan province with the Burmese port of Bhammo on the Irrawaddy River. Three dredgers were also given to the Burmese to clear the Irrawaddy for larger barges carrying Chinese goods 1,300 kilometers down river to Rangoon. Furthermore, a new port and shipyard are being constructed with Chinese funds and with the help of Chinese technicians. Sources indicate that the facility is designed to service larger Chinese shipping vessels rather than smaller Burmese vessels. Bertil Lintner, “Friends of Necessity,” *Far Eastern Economic Review Online Edition*; available from <http://www.feer.com/articles/2001/0112_27/p024region.html>, accessed 12 January 2002.

⁷⁰ Mark Mason, “Foreign Direct Investment,” in *Burma: Prospects for a Democratic Future*, ed. Robert I. Rotberg (Cambridge: The World Peace Foundation and Harvard Institute for International Development, 1998), 213.

⁷¹ Ott, “From Isolation to Relevance,” 72.

⁷² Malik, “Burma’s Role in Regional Security,” 122.

⁷³ Lintner, “Friends of Necessity.”

any substantive degree over the last ten years. Abuse of dissidents and opposition leaders has continued while forced labor, torture, and rape are still prevalent. Also, little if any meaningful progress has been made with Aung San Suu Kyi and the NLD, the rightful victors in the 1990 elections. According to the policy's logic, government liberalization and a let-up in SLORC's repression were to be natural results of constructive engagement. Burma has become a full ASEAN member, but one wonders how ASEAN and the region have truly benefited from this elevation of status, which created a strain in ASEAN's relations with the West. Once the main goals of the policy were achieved, the junta was to have by then loosened its iron grip and perhaps mended its ways allowing for a democratically elected leader.

Unfortunately for the people of Burma, none of this has happened. As demonstrated, failures in regional cooperation and in drawing Burma away from the PRC illustrate that the problems of constructive engagement are not isolated to failures in human rights. While they are distinct, those goals are inextricably tied to progress in the areas of human rights. Failure in the non-human rights area serves to demonstrate SLORC's *increasing* control on life within Burma. Admittedly, some ASEAN nations have benefited economically through increased investment in Burma.⁷⁴ However, more investment was part and parcel of the "engagement" aspect of the policy and something that SLORC does not generally resist. Ultimately then, the success or failure of the policy should not be determined on how many foreign companies are in Burma or how many new factories have been built. Investment is only a means to a set of ends. In this author's opinion, nothing "constructive" has been reached so far, especially in the area of human rights. Ten years is an ample time period for positive developments to materialize. Even if one argues that a decade is too early to judge the success or failure of such a policy, one must also ask whether other measures might not bring quicker political liberalization and freedom to the country. Because constructive engagement

has not been successfully implemented, an essential review and substantive reassessment and reformulation of the policy are no doubt urgent and pressing. ASEAN's policy of engagement predicated on non-interference has been revealed as an unworkable and fallacious notion.

V. WHAT TO DO WITH BURMA?

Since ASEAN's inception in 1967, the issue of human rights has not been prominently featured on the grouping's agenda. Instead, the pursuit of regional security and cooperative measures to promote peaceful economic development has been the focus. The policy of constructive engagement reflects this hierarchy of issues, but human rights liberalization was nonetheless a goal of the policy. To date, constructive engagement has failed and must be reconsidered. This Part considers, albeit on a very general level, possible alternative or supplementary measures that might be more effective in bringing the pressure of international human rights norms to bear on SLORC.

A. Strategies From Beyond ASEAN

From the beginning, the policy of constructive engagement has been controversial. Opponents of the policy argue that it is morally repugnant in that it serves to prop up the junta in exchange for economic benefits, mostly for those outside of Burma. Western nations, the main critics of the policy, have implemented methods diametrically opposed to the engagement strategies of the ASEAN countries. Outside of the Association, the tactics used against SLORC have leaned heavily toward isolation and embargoes and away from engagement.

The United States, not surprisingly, has followed a policy course that takes direct aim at the junta's abuses. Washington has regularly condemned the actions of the junta and the Clinton administration instituted

⁷⁴ ASEAN investment in Burma totaled \$3.69 billion (143 enterprises) as of the end of May 1998, accounting for slightly more than half of total foreign direct investments (FDI) in the country. The bulk of FDI in Burma, about 40 percent, went to the hotel and tourism industry, while oil and gas exploration accounted for 30 percent and manufacturing 10 to 15 percent. Among the ASEAN investors in Burma, Singapore is the largest with 66 enterprises worth a total of \$1.48 billion approved by Rangoon. Thailand and Malaysia, the second and third largest investors, has 42 enterprises and 25 enterprises worth \$1.23 billion and \$587 million respectively. *Business in Thailand Magazine*; available from <<http://www.businessinthailandmag.com/archive/july98/crisis43.html>>, accessed 2 Jan 2002.

unilateral sanctions and later in 1997 subsequently banned all new investments in Burma (while leaving existing investments undisturbed). This action was preceded by a halt in all bilateral economic and military assistance and suspension of General System Preference and Most Favored Nation privileges. The US has opposed lending to Burma by international financial institutions. Furthermore, Washington has proposed an international arms embargo to Rangoon. The US Congress has also authorized the president to take harsher actions if repression continues.⁷⁵ Individual American states and municipalities have passed legislation aimed at cutting off business relations in Burma.⁷⁶ Despite these actions, US Commerce Department figures show a “372 percent increase since 1997 [in trade with Burma] and a 118 percent increase since last year [2000] to \$412 million in imports to the United States.”⁷⁷

At a 1997 closed-door meeting with ASEAN leaders, Secretary of State Madeleine Albright strongly denounced Burma. This verbal dressing down was accompanied by Albright’s prepared speech given at the regional meeting that laid out American criticisms of the junta. Albright called Burma a uniquely repressive country where the government protects profits from the drug trade and where drug money is laundered with impunity. She made mention of the fact that in Burma citizens are not allowed to own fax machines and that Burma was the only ASEAN country to be condemned

by the United Nations for failing to respect the results of a democratic election.⁷⁸

Canada followed suit with its own sanctions and has also removed Burma’s eligibility under the General Preferential Tariff and placed it on the Area Controls List, which requires that all exports to Burma have a permit.⁷⁹ Although, in an apparent policy shift, Canadian Foreign Minister Lloyd Axworthy announced that Canada was willing to engage SLORC on the issue of narcotics suppression.

The European Union (EU), a strong critic of constructive engagement, has taken similar actions. In response to Burma’s entry into ASEAN in 1997, the EU temporarily suspended its formal dialogue with the Association. It was so displeased at Burma’s accession to full ASEAN member status that it expanded its existing visa ban on Burmese government officials in October 1998. The EU has also suspended the Generalized Scheme of Preferences or GSP⁸⁰ for Burma as well as initiated an arms embargo. In short, the EU has also taken a firm stand against engagement, preferring to rely instead on sanctions. Nonetheless, the 15-member organization has seen its trade with Burma nearly double between 1999-2000.⁸¹

Japan has taken a more conciliatory posture toward SLORC in an attempt to balance its business interests in the region with its desire to conform to US policy. Tokyo has tried to play the role of friendly counselor to SLORC, urging a more flexible policy toward the NLD.⁸² However, after the

⁷⁵ Recent legislation has called for a ban on apparel imports from Burma. Import apparel from Burma to the US earns the SLORC government close to half a billion dollars per year. Senators Tom Harkin, Jesse Helms, and Mitch McConnell have been especially critical of Burma on this issue. Steven Greenhouse, “Memo Feeds Concern That Exports to US Help Burmese Junta,” *New York Times*, 1 March 2001, sec. A, p. 10.

⁷⁶ By 1998, prominent US companies such as Apple Computer, Motorola, Eastman-Kodak, Pepsico, Levi-Strauss, and Walt Disney had withdrawn from Burma. Notable exceptions included Atlantic Richfield (Arco), and Unocal. Thirteen US cities including New York and San Francisco passed such measures as did Connecticut and Massachusetts. Carey, *From Burma to Myanmar*, 17. The United States Supreme Court has recently struck down these laws.

⁷⁷ Elizabeth Olson, “UN Call to End Burma Abuses Hits Flat Note,” *International Herald Tribune*, 3 May 2001, 17.

⁷⁸ Keith B. Richburg, “Albright Attacks Burmese Rule at Annual Southeast Asia Forum,” *Washington Post*, 28 July 1997, sec. A, p. 13.

⁷⁹ Thio, “Implementing Human Rights in ASEAN,” 44-45.

⁸⁰ The European Union’s GSP is a commercial policy instrument created with the aim of granting to developing countries tariff preferences over developed countries, thus allowing their exports easier access to the European market and promoting industrialization in developing economies.

⁸¹ Olson, “UN Call to End Burma Abuses Hits Flat Note,” 17.

⁸² Ott, “From Isolation to Relevance,” 79.

pro-democracy crackdown Japan suspended plans to restart development aid and withdrew from a Rangoon International Airport construction project. Recently, in response to the resumption of dialogue between the junta and the NLD, Japan has quietly approved the largest grant aid package since 1988. The approval took place after consultation with the US and the UN and earmarks \$28.6 million for hydroelectric projects.⁸³ The US pressured Japan to maintain a united front and to withhold aid, but Japanese officials informally justified the assistance as humanitarian in nature because the Burmese people are in need of electricity.⁸⁴ Japan should generally not be counted on to maintain sanctions with its Asian neighbors for long. It was the first country to break ranks and resume aid to the PRC after the Tiananmen Square massacre, and it seems to be engaging in similar behavior on the Burma issue. Nonetheless, Japanese efforts and hints of aid did succeed in goading SLORC to re-open select universities in August of 2000.⁸⁵

Outside of individual nations, non-governmental organizations have also targeted Burma's atrocious human rights record. One of the more prominent measures involves actions that have been taken by the International Labor Organization or ILO. A UN agency, the ILO sets global standards against unfair labor practices. Decision-making is traditionally done by consensus among the organization's members, which include governments, employers' organizations, and labor unions. A 1998 Report of an ILO Commission of Inquiry examined Burma's observance of the 1930 Forced Labor Convention. It was found that:

[The Commission's report] reveals a saga of untold misery and suffering, oppression

and exploitation of large sections of the population inhabiting Myanmar by the Government, military, and other public officers. It is a story of gross denial of human rights to which the people of Myanmar have been subjected particularly since 1988 and from which they find no escape except fleeing the country.⁸⁶

In June of 2000, delegates to the International Labor Conference passed an unprecedented resolution invoking Article 33 of the ILO Constitution, calling upon Burma to implement the recommendations of the report and to end its practices of forced labor. SLORC responded to this with the decree of October of 2000 that instructed all local officials to stop using forced labor except in public emergencies. The order stated that such action is a violation of Section 374 of the Burmese penal code, which punishes those compelling others to work against their will.⁸⁷ Correctly concluding that the SLORC decree was nothing more than empty words, the ILO took further action in a resolution of November of 2000 that threatened sanctions against Burma.

Unfortunately, the tough stance that the ILO has taken exposed the Organization's lack of enforcement power. ILO sanctions would have limited effect in hitting Burma in the key textile industry because Burma is a member of the World Trade Organization (WTO) and is thus protected by the WTO's free trade rules.⁸⁸ Developing nations are resisting efforts to link trade and labor standards and the Bush administration opposes efforts to directly link worker safeguards to trade issues. Bush would

⁸³ Thomas Crampton, "Japan Rewards Burma for Political Opening," *International Herald Tribune*, 26 April 2001, 6.

⁸⁴ David I. Steinberg, "Burma Has Done Nothing to Deserve Japan's Aid Reward," *International Herald Tribune*, 28 April 2001, 8.

⁸⁵ Crispin, "Going Nowhere," 21.

⁸⁶ "Report of ILO Commission of Inquiry reveals widespread and systematic use of forced labour in Myanmar," *International Labour Organization*; available from <<http://www.ilo.org/public/english/bureau/inf/pr/1998/32.htm>>, accessed 1 May 2001.

⁸⁶ "Report of ILO Commission of Inquiry reveals widespread and systematic use of forced labour in Myanmar," *International Labour Organization*; available from <<http://www.ilo.org/public/english/bureau/inf/pr/1998/32.htm>>, accessed 1 May 2001.

⁸⁷ Human Rights Watch, conducting interviews of Burmese refugees in Chiang Mai, Thailand, have amassed evidence that forced labor, not surprisingly, continued unimpeded after the decree. "Burma Violates Own Ban in Use of Forced Labor," *Human Rights Watch*; available from <<http://www.humanrightswatch.org/press/2001/03/burma0307.htm>>, accessed 1 May 2001.

⁸⁸ Olson, "UN Call to End Burma Abuses Hits Flat Note," 17.

prefer to see this issue in the ILO as opposed to the WTO, although it is the WTO that has the more effective enforcement measures.

Ostensibly, ASEAN is interested in improving the human rights situation in Burma. However, its policies represent those of a soft-line when compared to action taken by Western states and by international organizations. The two views, while having similar goals, represent extremes of approach to an extent. One is left to ask whether a compromise approach can be reached taking into account the human rights concerns of the West as well as the pragmatic goals of Burma's neighbors.

B. A Middle Path Between Sanctions and Constructive Engagement

Burma's litany of human rights abuses is there for the entire world to see. While various measures have been taken in an attempt to restore democracy and to end the repression by SLORC, it is clear that none of them have had the result hoped for. Sanctions by the West have been of minimal impact, although there is the issue of whether ASEAN's engagement with the junta has diluted the effect of such measures. There is no easy answer to the question of what to do with Burma and its human rights record. The answer is likely not so cut-and-dried as to support an all-sanctions or all-engagement approach. In fact, the most efficacious measures would likely incorporate both the carrot as well as the stick.

The engagement-heavy strategy used by ASEAN was doomed from the start. First, it was not a strategy that was primarily targeted at improving human rights. ASEAN, an organization that has not historically placed human rights high on its agenda, had its collective eyes on development, investment, and regional strategy. The human rights benefits that were to flow from the policy are akin to "trickle down" benefits more than anything else. Leading the charge with economic development turned out to have been the wrong move as the various fast-growth

economies of the region stalled, leading to an erosion of ASEAN clout and influence. Constructive engagement had become a euphemism for economic exploitation and opportunism.

The Association's image also suffers when ASEAN speaks out of both sides of its mouth. Actions perceived as hypocritical have led to internal division on the issue. Interference in Cambodia's "internal" affairs while studiously ignoring what is going on in Burma cannot be justified. The decision to admit Burma into ASEAN was a blow to the organization's credibility as Burma proved to be much more of a hindrance and embarrassment than an asset.

The argument that constructive engagement is the first step on Burma's development model is also nonsensical. Indeed, Korea, Singapore and Taiwan all established strong and vibrant economies before any substantial political liberalization took place. However, contrary to some arguments, Burma is not cast from the same mold as the "Asian Dragons" and would not follow the same path to success that the other countries have. While the Dragons had authoritarian governments, they also had strong and enlightened bureaucracies, which held sway in the area of economic policy. The best and the brightest were recruited to the ranks of civilian technocrats and professionals. The Burmese junta does not rely on its intellectuals abroad; it represses them. Burma, while courting economic development, lacks the strong bureaucracy to balance the political leaders. The birth of a force within government strong enough to rival the junta remains highly unlikely without outside impetus. SLORC calls all the shots in the country. It lines its pockets with profits from international dealings relying just as much on the drug trade as it does legitimate business. SLORC essentially lacks the political will and administrative capacity to undergo true economic reforms as such reforms could have an adverse impact on the segments of society that the junta relies on to keep it in power.⁸⁹ Furthermore, Burma has internal stability

⁸⁹ Carey, *From Burma to Myanmar*, 6. Carey lists civil servants, military personnel, employees of State Economic Enterprises, and vested interest groups as those to which the junta relies on for its rule. *Ibid.*

issues with its ethnic insurgents that the Dragons did not. Although Singapore was hardened from its expulsion from Malaysia and South Korea and Taiwan each had communist threats to confront, their populations were united and the threats were external. No such condition exists in Burma. In short, the development model used by other Asian nations is wholly inapplicable to the Burmese context. Therefore, it is irrational to expect the same liberalization that occurred in Singapore, Taiwan, and South Korea to happen in Burma. In addition, if it is political and military elites who are charged with deciding when “sufficient” development has taken place for civil and political liberalization, to whom will they be accountable?

Sanctions also have their limitations. The sanctions taken by Western nations are possible partly because these nations have relatively few interests in Burma. Furthermore, the country does not have much strategic value. And unlike South Africa, which was a target of sanctions, Burma’s neighbors are more sympathetic. The countries surrounding South Africa were not its friends and therefore sanctions were effective; Burma’s neighbors are far less hostile. Nonetheless, economic sanctions have increasingly become one of the more prominent core elements of American foreign policy. The proliferation of embargoes, investment freezes, tariff increases, and selective purchasing laws all reflect this trend. Sanctions seem clean and neat, a proportional response to an international transgression and a complement to the post-Vietnam reluctance on the part of the US to use armed force. While sanctioning campaigns have succeeded, they can also have very undesirable and unintended consequences. Sanctions can have a negative effect on the general population of a target nation, while military and political elites can use their influence to skirt the impact of sanctions. Sanctions can also contribute to a “rally around the flag” effect whereby the population vents its rage on the sanctioning country. If change

is slow to appear or if widespread hardship results, sanctions may weaken domestic and international support for the underlying crusade.

Burma is a country that possesses the ability to withstand sanctions. Unlike oil-dependent Iraq, Burma has no such commodity to sell to the world. Three decades of isolation created a closed nation very accustomed to existing without the help of others. Greater and more comprehensive sanctions would seem totally ineffective given that the PRC would likely not participate, supplying the country with all of the foreign goods and supplies that it needs. In addition, the junta’s reliance on its drug profits would keep it well entrenched.

Although the opposition opposes this, dialogue with SLORC by outside parties is essential. Convincing the generals that all will benefit from greater liberalization cannot be done through sanctions only. Perhaps the best hope for improvements on the human rights front in Burma is for the results of the 1990 elections to be honored. Allowing SLORC to single-handedly implement human rights changes is much like letting the fox guard the hen house. Therefore, ASEAN should engage not only SLORC, but the opposition NLD as well since, after all, it was the NLD that prevailed in the 1990 elections. Perhaps a firm ASEAN stand on giving the NLD more prominence in the entire negotiation process will force the erosion of the political barriers currently holding back the opposition. Some outside force needs to establish itself a role from within the country. Interestingly, the proposal of a Burmese Human Rights Commission by the Australian commissioner for human rights was welcomed by SLORC.⁹⁰ While such a body could become a SLORC tool, that may not be the case in the longer term.

In economic terms, the increased investment and trade with Burma is still an important element in liberalizing the current situation in Burma. However, the idea of

⁹⁰ David I. Steinberg, “Talk to Burma’s Generals,” *Far Eastern Economic Review*, 16 September 1999, 32. There are suggestions that it was Japanese carrots in the form of hints of aid that led to the junta’s receptiveness toward this idea. Crispin, “Going Nowhere,” 21.

increased economic ties perhaps worked better in theory than in practice. While economic ties increased, there was little progress on the political front leaving liberalization in the human rights area to stagnate. Perhaps wealth was being distributed unevenly, creating an even wider gap between a small group of wealthy elites and a mass of underprivileged citizens—conditions that hardly promote democracy and political change. Addressing this issue through a more sensitive investment policy could go a long way in improving the situation.

Notwithstanding its past failures, the most fruitful vehicle for change will still likely be ASEAN. Despite the rough spots in the relationship, it is these nine nations that are in the best position to influence the junta. However, a more proactive and aggressive stance is imperative. The flexible engagement approach, if it ever receives a consensus, could be a step toward this. ASEAN should put the issue of human rights on its agenda as an issue that transcends borders. This concept has long been recognized by the international community and also by ASEAN.⁹¹ The recent Thai-Burmese disputes also illustrate this point very well. Furthermore, ASEAN's sagging international status, prestige, and influence would be greatly enhanced by such a development. It may be more useful and efficacious for Western nations to direct their collective pressure onto the ASEAN nations. Unlike Burma, it is these nations that can ill afford to be ignored and derided by the major Western economic powers. In short, Western initiatives on human rights filtered

through the ASEAN consultative process and like-minded regional governments are a possible solution, combining the strengths of both views.

V. CONCLUSION

ASEAN has failed to induce quantitative and qualitative change in Burma in terms of human rights. The policy of constructive engagement was, from its inception, the wrong tool to use in changing SLORC's unfair and inhumane treatment of its citizens. Although the policy was presented as an alternative to attempts by other nations at forcing change through sanctions and isolation, human rights were not prominent enough in the process of constructive engagement. Because the success of many other constructive engagement goals were tied to success on the human rights front, the failure to achieve those underlying goals doomed human rights liberalization. While the result of the past decade has been disappointing, there is still hope for the future. A solution that takes the middle path between constructive engagement and economic sanctions may allow democracy and respect for individual rights to gain a secure foothold. As Li-ann Thio, a professor of law at the National University of Singapore, has eloquently stated, the project of human rights is a "continuing, open-ended experiment in elucidating the principles of good governance to serve the goal of vindicating human dignity."⁹² Through dialogue, mutual understanding, coordinated global action and cooperation, it will be only a matter of time before the dignity of the Burmese people is so vindicated.

This essay was originally written for a University of Southern California Law School class entitled "International Human Rights."

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⁹¹ Thio, "Implementing Human Rights in ASEAN," 25-29.

⁹² *Ibid.*, 23.