

FOREIGN DEVILS

Law's Imperial Discourse and the Status of Tibet

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This paper explores the intimate and yet extimate relations between Tibet, China and Britain in the first half of the twentieth century, and then the rather more fraught relationship between Tibet and China following the Chinese invasion of Tibet in 1950. In the first half of the twentieth century, Tibet was a pawn in the quasi-imperial struggle between China and Britain. It was this imperial power-play between Britain and China that rendered ambiguous Tibet's legal status in the emerging body of modern international law. It was the British use of the term 'suzerain' when defining China's role in Tibet that was at the centre of this ambiguity. This had far-reaching consequences that in part legitimated the Chinese invasion of Tibet as well as the effacement of Tibet's indigenous legal tradition. Although Tibet is known primarily as a centre of religious monasticism, it has a long and culturally distinct legal tradition dating back to the time of the great Tibetan Empire (the seventh to the thirteenth centuries). Over the following centuries, the Tibetan legal system underwent significant changes, the most notable of which was the assimilation of a Buddhist jurisprudence. This jurisprudence was also to inform Tibet's relations with its neighbours, including China, but was to be shattered following the Chinese invasion. By utilising postmodern theory, I show that what characterises both Chinese (Nationalist and Communist) and Western legal narratives *vis-à-vis* their relation to 'traditional' Tibet is the claim to universal rationality. This relation is fundamentally incommensurable and reveals itself in the temporal disjuncture that these competing legal systems inhabit. On the one hand, we have modernity and the privileging of the temporal order of the present, and on the other hand we have the Buddhist legal system of Tibet and the double time that it inhabits — the temporal order of the cosmos and the temporal order of legal enunciation. In its universalising move, Chinese rule can never be universal enough, as it must constantly constitute itself against the mark of Tibetan difference, a difference which Chinese rule in Tibet can never quite consign to the past.

I hereby make known these commands to all you righteous folk, that ye may strive with one accord to exterminate all foreign devils, and so turn aside the wrath of heaven. This shall be accounted unto you for well

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doing; and on the day when it is done, the wind and rain shall be according to your desire.¹

The demon-masked ones from England came to the border and invaded with an army ... Not long after they came to Lhasa making a clamour of meaningless noise ...²

The impetus for this article was the observation that there were fundamental differences in how Tibet and China sought to resist Western imperialism. At the end of the nineteenth century, China began to assimilate Western-styled legal and scientific values as a means to achieve modernisation and preserve China's international standing. Meanwhile, the religious foundations of the Tibetan state necessitated a different kind of negotiation with modernity. Furthermore, Tibet's geographical location between the three great powers of Russia, China and British India placed limitations upon Tibet's freedom to pursue a unilateral strategy of modernisation. This article is a preliminary exploration of two hypotheses: first, that Chinese and Western discourses have converged to produce a compelling metanarrative that traditional Tibet was a primitive, pre-legal society; and second, that this metanarrative has prejudiced considerations of Tibet's legal status. Exploring these hypotheses highlights significant overlaps between the project of modernity, colonialism, international law and Chinese reformulations of Sino-Tibetan relations. Furthermore, by paying closer consideration to the intersection between international legal theory, colonialism and the 'Tibet Question', the Chinese role in the equation can be subjected to an alternative analysis.

The terms by which China articulated the Sino-Tibetan relationship underwent a significant shift after the demise of the Qing dynasty. This shift was both a product of and a response to Western imperialism. China's subsequent occupation of Tibet must be seen as a defensive reaction against foreign aggression. Additionally, in contemporary official Chinese statements regarding Tibet, it is possible to detect a genuine incomprehension as to why Tibet should fail to welcome Chinese intervention. According to the People's Republic of China (PRC), Tibet was feudal and superstitious and in need of external help in order to achieve modernisation. There are important parallels between this perception and that embedded within nineteenth century European imperialism: both legitimised their role by reference to a 'civilising mission' based upon a combination of science and law, and framed by a universalistic discourse of modernity.

In 1950, the People's Liberation Army of the PRC invaded Tibet and, following the Tibetan defeat, Tibet was incorporated into the 'motherland' by

¹ Excerpt from a placard posted in West City, Peking during the Boxer uprising of 1900: Coates (2000), p 128.

² From the Thirteenth Dalai Lama's (1876–1933) official hagiography, *A String of Wondrous Gems, a Drop from the Ocean of Liberated Life of the Great Thirteenth, the Incomparably Kind Lord of All Buddhas, He of the Highest Stage, Crown Ornament of Samsara and Nirvana*. Cited in French (1995), p 240.

the Sino-Tibetan Agreement of 1951.³ In the contemporary international legal context, the primary issue is the nature of Tibet's status prior to 1951. If Tibet was a state when China took military control of Lhasa, then the legal principles governing the use of force (Art 2(4) UN Charter) and the conquest of territory apply. If Tibet was not a state, the issue is one internal to China, although certain issues of international human rights law may still be relevant. Self-determination principles may also apply, regardless of whether China is an occupying or colonial power. However, prevailing opinion is that self-determination does not generally signify a right of secession except in the decolonisation process.⁴ In the postcolonial world, self-determination is a gift bestowed by states, not a privilege usurped by Emperors, and 'the end of Empire has merely revealed most states to be imperial'.⁵

In this context, it is not surprising that the debate over Tibet's status tends to present the issue as a local conflict between Tibet and China. Whether or not the conflict is seen as inter-state or intra-state tends to vary according to political sympathies, but the essential dynamics of the arguments employed remain the same. This has obscured from view the fact the legal status of Tibet was first brought into question by European powers. Britain, in particular, played a key role by employing the term 'suzerainty' to define Imperial China's role in Tibet. The British use of the term 'suzerainty' served strategic purposes, for the British objective at the turn of the twentieth century was to establish Tibet as a neutral buffer state. Reports of intrigue between Russia and Lhasa had compelled the British government of India to adopt a 'forward' policy so as to secure the frontier of the Empire. For the British project to be successful, it was essential that Tibet was neither wholly part of the British Empire nor wholly part of the Chinese Empire. At the same time, it was equally important that Tibet was not wholly independent and free to forge an alliance with Russia.

It has been said that the British people have a distinctive grasp of the concept of irony. However, when Colonel Younghusband swept into Tibet in 1903, conveying the pomp and grandeur of the British Empire to the plains and mountain passes of Tibet, it appears that irony is one of the few things he left behind.⁶ Reporting to the Secretary of the British Government of India, Younghusband described preliminary negotiations with the Tibetans near to the border. Having explained that the purpose of his mission was to establish trade relations, he then informed the Tibetan representatives that a trade route

³ Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet 1951

⁴ Musgrave (1997), pp 188–207.

⁵ Simpson (1996), p 255.

⁶ Nevertheless, Younghusband found room for, among other personal effects: 67 shirts; 12 coats; numerous suits, including a full dress suit, a morning suit, a mess suit, camp suits and various marching suits; a smoking jacket; a variety of 11 hats, including a shikar hat to be worn when shooting partridges in the Chumbi valley and, last but not least, a campaign bath. All of these were transported over high Himalayan passes on the backs of men and pack animals. See French (1995), pp 200–201.

would ensure that 'you will be able to buy all your things much cheaper than you can now'. On hearing this, the Tibetan representatives burst into laughter, presumably wondering why such a benevolent mission should require the backup of 1150 troops with heavy artillery, over 11 000 pack animals and 10 000 'coolies'.⁷ Younghusband, clearly perplexed by the response of the Tibetan representatives, reported: 'Curiously enough they also laughed equally heartily when I said that the new treaty would have to be much stricter than the old one.'⁸ Failing to understand why the Tibetans should not only resist British overtures, but consider them a joke, Younghusband concluded that the Tibetans were 'very like big children'.⁹

The false notion that Tibetans are a simple, pre-modern folk both unwilling and unable to grasp the political and legal complexities of advanced civilisation is one that has persisted. It is a notion that is found in current Chinese discourse, serving to bolster attempts to legitimise China's rule over Tibet.¹⁰ It is also a notion that has currency within Western discourse, frequently embedded within the polemic of 'Free Tibet' supporters. Both constructions presuppose that Tibet was a last remaining enclave of the pre-modern, and that Tibet — whether 'Shangri-la' or 'feudalistic slave society' —

⁷ Schell (2000), p 192.

⁸ The old treaty referred to was the 1890 'Convention Relating to Sikkim and Tibet', amended in 1893 to include trade regulations. This treaty was concluded between Britain and China following the British annexation of Sikkim, a kingdom within the Tibetan sphere of influence. Tibet expressly repudiated this treaty and proceeded to occupy part of the territory claimed by Britain. This was one of the causes of the British invasion of 1903–04. See Van Walt (1987), pp 309 and 297–300; Norbu (1990), pp 31–33.

⁹ Coates (1999), p 105. Possibly Younghusband was equally perplexed when the Tibetans remained unpersuaded by displays of British imperial ritual arranged for 'ceremonial effect'. These included ordering the Thirty-Second Sikh Pioneers to appear 'resplendent in full dress uniform'. Unfortunately for Younghusband, the Tibetans failed to be won over by British sartorial panache: Schell (2000), p 192. It is useful to recall here Paul Rabinow's declaration that 'we need to anthropologise the West: show how exotic its constitution of reality has been; emphasize those domains most taken for granted (this includes epistemology and economics); make them seem as historically peculiar as possible': Rabinow (1986), p 241.

¹⁰ So, for example, during a 'Spiritual Civilisation' mobilisation rally in Lhasa on 23 July 1996, the Tibetan Autonomous Region Party Secretary criticised Tibetans for 'roaming from place to place, avoiding productive work, turning the prayer wheels all the year round, and begging everywhere': Tibet Information Network (2000b), p 13. His comments reflect a wider Han Chinese racial discourse which describes Tibetans as 'like pigs who don't know anything', 'like animals', 'stupid', 'backward' and so on: Kolas (1998), p 69. Whilst notions of Tibetan racial inferiority are absent from official PRC publications, Chinese intellectuals frequently rate the country's major ethnic groups in descending order from Han to Tibetan: Sautman (1997), pp 81, 86.

was destined to succumb to a flood of *externally produced* modernity.¹¹ In this construction, traditional Tibet is perpetually and irreconcilably receding from the possibility of a modern Tibet. Tibetans, it seems, are simply incapable of interacting with modernity on their own terms, and 'Tibetaness' becomes a static construct to be either struggled against or, alternatively, to be preserved as an exotic artefact of a lost age.¹² The irony is that — as a retrospective analysis of the Younghusband encounter shows — the Tibetan experience has frequently called into question the very foundations of modernity's claim to progress. Professor Samdhong Rinpoche, the prime minister of the Tibetan government-in-exile, drew on this irony when he said:

The world today boasts of human development, of the many scientific and technological advancements of man reaching the moon and beyond, but the conscience of human beings to provide protection to each others human rights, which did not exist (possibly) in the ancient times, is not there even today ... This is what humanity has achieved after so much ... advancement. The attitude of man to fight and kill each other has remained unchanged through the ages. That is why old backward traditional and orthodox people and nations like us cannot understand the meaning of this new civilisation.¹³

It is, perhaps, a generic feature of conflicts everywhere that they should increasingly be seen to focus upon sets of polarised differences. In such circumstances — that is, in the struggle between *either* and *or* — what hope is there for dispute resolution if it is not in one side's acquiescence to powerlessness? The competing claims of the Tibetan government-in-exile and the PRC regarding the right to rule Tibet have not been immune to this process. It is a dispute frequently articulated as a struggle between the traditional and the modern. On the one hand there is the Tibetan struggle to preserve traditional ways of life; on the other there is the goal of Tibet's modernisation advocated by China. Yet the ongoing debate over Tibet's status also testifies to the fact that the origins of a conflict may be a complex web of shifting variables too promiscuous to settle comfortably in an 'either/or' framework. Such historical complexity is not particularly amenable to either polemic or legal analysis. However, modernity has a strategy to simplify this

¹¹ By modernity, I am referring to what Duara defined as 'a discourse which structures the prescription of the world not only cognitively, through the categories of rationality and science, but also by means of such values as progress and secularism, which are often inseparably entwined with the former': Duara (1991), p 67.

¹² For an alternative reading of how Tibetans in post-Mao China have struggled to define modernity on their own terms, see Huber (2002). Additionally, the Dalai Lama's ongoing dialogue with Western neuroscientists regarding Buddhist methodology or 'mind science' is particularly instructive. This dialogue opens the way for a collapse of the traditional/modern divide by illustrating how traditional Tibetan Buddhist philosophy can contribute to modernity: Goleman (2003).

¹³ Tibetan Parliamentary and Policy Research Centre (1996), pp 4–5. Parentheses added.

process — it introduces a conceptual space between the past (tradition), and the present (modern). It is from within this space, analogous to colonialism's *terra nullius*, that 'the emergence of modernity — as an ideology of *beginning, modernity as the new*' — takes place.¹⁴ It is what Bhabha has described as that 'temporal caesura' that exists between 'two time-schemes in which the historicity of the human is thought'.¹⁵ From this space emerges modernity's myth of progress, in which the 'belatedness' of the Other gives substance to the universal normativity of modernist values.¹⁶ It is this myth that masks the inherently insubstantial nature of modernity's advancement, as Samdhong Rinpoche's comment highlights.

In the context of the legal status of Tibet, this gap has had far-reaching consequences. Tibet's difficulty in approaching an international legal resolution is, in part, that its history as a unique political entity is out of synch with its history as an 'international' legal entity. The traditional Tibetan polity has been erased in the light of modern legal definitions of statehood. This is not to say that Tibet has no valid historical claim to statehood, but rather that the process by which a European-constructed international law came to incorporate the non-European world reflected European colonial objectives rather than the historical existence of alternative legal traditions and worldviews.¹⁷ The Tibetan government-in-exile has struggled to negotiate with modernity in a way that resists both Chinese and Western hegemony, yet still escapes from a static construction of tradition that would relegate Tibetan cultural values to an inert — lifeless — past. Thus, the Tibetan government-in-exile has pursued a process of secularisation and democratisation so as to increase its validity in the international system.¹⁸ At the same time, the exile community voted into office a prime minister — Professor Samdhong Rinpoche — who had publicly refused to run as a candidate. Samdhong Rinpoche had refused to run for the position because he viewed himself to be primarily a scholastic monk; following his unexpected election, he agonised

¹⁴ Bhabha (1991), p 205.

¹⁵ Bhabha (1991), p 195.

¹⁶ Bhabha (1991), p 195. Also see Fitzpatrick (1992), arguing that modern law is the perfection of myth, and that the triumph of modernity is that it succeeds in masking its own mythological grounds.

¹⁷ See Anghie (1999), arguing that the colonial confrontation is central to an understanding of international law, and Fitzpatrick (1992), arguing that modern law is the perfection of myth.

¹⁸ The Tibetan government-in-exile has a democratically elected legislature. Furthermore, it is subject to the checks and balances of several independent Tibetan exile commissions: the Supreme Justice Commission, Tibetan Central Election Commission, Public Service Commission and the Audit Commission. Despite the government-in-exile being located in India, and hence subject to Indian law, the Supreme Justice Commission is able to assert a legal jurisdiction within the framework of Indian arbitration law. See the Tibetan government-in-exile website for further information: www.tibet.com.

over whether he should combine secular and ecclesiastical duties if he accepted the government post.¹⁹

The 'Opening' of Tibet

The Younghusband 'trade' mission outlined above concluded with the invasion of Lhasa and the massacre of the resisting Tibetan army. The British 'victory' was subsequently given legal validation in the form of the 1904 Lhasa Convention, which obligated Tibet to pay an annual indemnity for the next 75 years, 'for the insults offered to and attacks upon the British Commissioner and his following' (Art VI). Article VII provided for the British occupation of the Chumbi Valley, and Article IX laid down provisions restricting Tibet's foreign relations. 'No Representatives or Agents of any foreign Power shall be admitted to Thibet,' it stipulated, without 'the previous consent of the British Government'. The 'insults' referred to in Article VI recall the fact that the Younghusband mission was as much about creating a moment of imperial spectacle as it was about achieving any substantive economic and military goals. The Viceroy of India, Lord Curzon, had been considerably affronted by the Tibetan refusal to enter into relations with the British government of India. The Thirteenth Dalai Lama had returned Lord Curzon's letters unopened, and Westerners were persistently repelled from the border. It was a policy which increasingly infuriated Curzon, who could not tolerate the idea that 'there should exist within less than three hundred miles of the borders of British India a State and a Government, with whom political relations do not so much as exist, and with whom it is impossible even to exchange written communication'.²⁰

However, despite Younghusband's success in opening 'mysterious' Tibet, the invasion attracted negative publicity that the home government was anxious to avoid.²¹ Subsequently, there was to be a strategic retreat from overt British involvement in Tibet. Even before the Younghusband mission's departure, there had been considerable debate concerning the viability of extending the frontiers of the British Empire to incorporate Tibet. Despite Younghusband's assertions to the Tibetans, the primary cause of the invasion was only tenuously connected to British trade interests. Although trade provided an air of legitimacy to the affair, the mission's purpose was to

¹⁹ Account based on a lecture given by Professor Samdhong Rinpoche for the Tibet Society in London, October 2002. Whilst Rinpoche does not view political and religious life to be incompatible per se, his concern was that the international community would regard his appointment as evidence of the Tibetan government-in-exile's failure to modernise: Samdhong Rinpoche, interview with author recorded in Dharamsala, 28 July 2003.

²⁰ Curzon, cited in French (1999), p 186.

²¹ A journalist 'embedded' within the mission telegraphed reports back to London, prompting domestic debate upon the issue: French (1999), pp 203, 223–24. Additionally, the British government had previously assured European powers that there would be no long-term British involvement in Tibet, and was subsequently criticised by Germany, America, France, Italy and Japan: French (1999), pp 250, 254.

counter Russian intrigue. Rumours about an impending Russian and Tibetan collaboration had sparked fear amongst the British government of India, which was at that time already involved in anti-Russian campaigns in Afghanistan.²² To meet the threat posed by Russian expansionism, the British government proposed to establish a ring of neutral buffer states along the edge of the frontier. Tibet was to be one of these. Hence there was never any intention to incorporate Tibet formally into the British Empire, and the British cabinet felt that the treaty negotiated by Younghusband had overstepped the mark.

Meanwhile, China looked on with growing concern. In 1904, Tibet's link to China was weak, but as a traditional tribute paying state Tibet had enjoyed close relations with China throughout the Qing (Manchu) Dynasty (1644–1911).²³ At times, China had considerable influence over Tibet's external relations, particularly after the Tibetan war with Nepal in 1792, when Tibet appealed to China for military assistance.²⁴ The Manchus had stationed two Imperial Residents (Ambans) in Lhasa since 1721, whose exact influence remains controversial. At times the Tibetan government negotiated independently with foreign powers, most notably with Russia. At other times, the Tibetan government used the presence of the Ambans as a shield against unwanted foreign influences, most notably with Britain at the end of the nineteenth century.²⁵

The Demise of the Chinese Tributary System

From the official perspective of the Qing court at Peking, Tibet was incorporated into the Chinese sphere according to the overarching ideology of the tribute system. This ideology was grounded in Confucian values that asserted that social harmony was to be achieved primarily through the institutionalisation of a moral, hierarchical order. At the apex of this moral order was the Chinese Emperor, the Son of Heaven, who mediated between heaven and earth. It was chiefly the Emperor's moral rectitude, outwardly expressed in the performance of rites, that was the wellspring of the continuing moral and cultural well-being of the nation. However, the official ideology of Imperial China was a universalising and totalising ideology, and the Emperor was not only the legitimate ruler of China, but also the centre of the entire world. In this context, heterodoxy posed a threat not simply to the court's ability to govern China, but to the fabric of human worldly existence itself.²⁶ It is from within this framework that all foreign relations during the Qing dynasty were carried out, including those between Tibet and China. The tributary system was the formalised expression of these ideological concerns, and a way to neutralise, and accommodate, the potentially disruptive effect of non-Confucian peoples (barbarians) without diluting the superior Confucian

²² Regarding Russian intrigue, see Andreyev (1996) and Kuleshove (2002). Regarding British campaigns in Afghanistan, see French (1999), pp 34–35.

²³ Rockhill (1998).

²⁴ Rose (1971), pp 52–67.

²⁵ Norbu (1992).

²⁶ Fairbank (1942).

values of Chinese civilisation.²⁷ Aside from the ideological underpinnings, there was also an important economic aspect. All states wishing to enter into trade relations with Imperial China had to do so as tributary states. This was the only legal way to enter into relations. In Imperial archives, European powers are classed as tributary states, as are all Asian states. Generally, all diplomatic and trade missions are recorded as being tributary in nature, regardless of the actual nature of the relationship established.²⁸

The traditional Chinese tributary system gradually broke down following the annexation of Chinese territory by Western powers after 1842. The regime of unequal treaties, by which Western powers gained control of Chinese ports, was clearly the most overt threat to China.²⁹ However, Western expansionism throughout Asia was seen as a threat to the traditional Chinese world order. Both fuelled a growing wave of Chinese nationalism, a movement that gained considerable momentum by the end of the nineteenth century. Whilst there were different factions within this nationalist movement, arguably they all addressed the central question of how to return China to its rightful place as chief civilising force among nations.³⁰ Central to this task was the reassertion of China's regional power. In the context of this project, Tibet became of particular strategic significance following the British invasion of Lhasa in 1904, due to its unique geographical position between British India, Russia and China. Following the Younghusband mission, China proceeded to challenge the British advance in the Himalayas, discussing counter-strategies and asserting a claim to Nepal, Sikkim and Bhutan, as well as Tibet.³¹ Sikkim had been annexed by Britain in 1890.³² Nepal, while not brought under colonial rule, was an established part of the 'informal empire', largely because the British Army relied heavily upon Gurkha contingents.³³ Bhutan had suffered partial defeat during the Anglo-Bhutanese Wars of 1774 and 1865, and was

²⁷ 'Barbarian' is a translation of the Chinese term generally used to denote foreigners. For further discussion, see Fairbank and Teng (1941), p 137.

²⁸ British envoys were highly resistant to the idea of paying tribute. A particular area of contention was that, in order to gain access to the Emperor, a foreign tribute-paying mission was required to kotow (three kneelings and nine head knockings). For an account of the controversy created by British Ambassadors seeking audience, see Pritchard (1943). Other European powers apparently did adhere to Qing protocol: see Fairbank (1942), pp 147–49.

²⁹ For an account of the unequal treaty system, see Wesley-Smith (1998) and Fung (1987).

³⁰ For an account of the reform movement in Imperial China, see Schrecker (1969).

³¹ As the Chinese Representative in Lhasa put it: 'China, Nepal, Tibet, Bhutan and Sikkim might be compared to the five colours, viz. yellow, red, blue, black and green. A skilful painter may so arrange the colours as to produce a number of beautiful designs or effects.' Addy (1996), p 23.

³² Norbu (1992), p 24.

³³ The term 'informal empire' refers here to the definition applied by Gallagher and Robinson (1953), who outlined how informal control mechanisms — both military and trade — facilitated imperial expansion without necessitating direct rule.

formally made a British protectorate by treaty in 1910.³⁴ Tibet, on the outer ring of the buffer region, was in a rather more uncertain position.

Given that the British cabinet was already seeking to distance itself from overt involvement, in 1906 an agreement was reached by which China paid off the entire indemnity imposed on Tibet. Britain also agreed that China was to be exempt from Article IX of the 1904 Lhasa Convention, which barred foreign powers from Tibet without British consent. China's exact role was, however, left undefined. This changed in 1907, when Britain concluded a bilateral treaty with Russia in which both powers recognised China's 'suzerain' role in Tibet. At this point, the British had superficially succeeded in arranging matters as they wished. The 1907 treaty placed a bar on both British and Russian expansionism in Tibet, thus securing Tibet's role as a neutral buffer state. Furthermore, by recognising an influential role for China, both parties could be secure in the knowledge that Tibet was not free to independently subvert that agreement. The way was left open, however, for future Sino-Tibetan conflict. Tibet repudiated all the treaties to which it was subject, but in which it had not participated. China meanwhile, sought to strengthen its regional position, ever wary that not only did Tibetan assertiveness challenge China's role as a regional power but also that, at any moment, Tibet might fall to a more dangerous enemy.³⁵

Sino-Tibetan relations disintegrated rapidly in the years following the British invasion, and when Imperial China collapsed in 1911, Tibet refused to re-establish tributary styled relations with the Nationalist government of the Republic of China.³⁶ Negotiations between China, Tibet and Britain continued, but failed to reach consensus over the demarcation of Sino-Tibetan-Indian borders, and did little to clarify the legal limits of China's influence in Tibet. In 1914, the term 'suzerainty' was resurrected in the tripartite Simla Convention. However, China only initialled the treaty, and later refused to ratify it. As a consequence, the British and Tibetans concluded a bilateral treaty to protect their own interests. The British at this point made a clear statement that, by refusing to ratify the Simla Convention, China had thereby lost all privileges granted therein, including the recognition of Chinese suzerainty over Tibet.³⁷ Nevertheless, the British still sought China's adhesion to the Simla Convention, but no agreement was forthcoming and the intervention of World War I put an end to any further negotiations. The British continued to obfuscate, at times moving to recognise Tibetan independence, at others affirming China's influence.³⁸ The net result was ambiguity, as exemplified by

³⁴ Rose (1977), pp 63–67.

³⁵ As one imperial Chinese official put it: '[Tibet] has long been coveted by the British ... should we prove remiss, the teeth will feel cold when the lips have gone.' Norbu (1992), p 42.

³⁶ The Dalai Lama broke off all traditional ties with China in 1913, following the fall of the Qing Dynasty in 1911. Meanwhile, Chiang Kai-shek urged Tibet to join the Republic of China as one of its 'five races'. Van Walt (1987), p 65.

³⁷ Van Walt (1987), p 58.

³⁸ Van Walt (1987), p 64.

the British statement that Britain recognised 'the integrity of Tibet as a part of the integrity of China, while at the same time safeguarding the interests of Tibet, a country with which His Majesty's Government has intimate treaty relations'.³⁹

Despite the ongoing negotiations, between 1911 and 1949 Tibet enjoyed at least *de facto* independence. This much was acknowledged not only by British sources, but also by Nationalist China.⁴⁰ At the same time, the urgency with which Nationalist China regarded the task of internal unification increased the strategic and ideological significance of the frontier and tributary areas.⁴¹ The fundamental belief that China had to regain its cultural — now national — pre-eminence did not evaporate with the demise of Nationalist China in 1949 — it was also of fundamental importance to the Communists. The extent to which the destruction of the traditional Imperial Chinese world order was to continue to be of significance is evident in Mao's 1939 statement that:

After having inflicted military defeats on China, the imperialist countries forcibly took from her a large number of states, tributary to China, as well as a part of her own territory. Japan appropriated Korea, Taiwan, the Ryukyu Islands, the Pescadores and Port Arthur; England took Burma, Bhutan, Nepal, and Hong Kong; France seized Annam; even a miserable little country like Portugal took Macao from us.⁴²

The British Legacy in Tibet

The use of the term 'suzerain' by the British when defining China's role in Tibet had far-reaching consequences. 'Suzerainty' is a highly ambiguous term, derived from European feudalism, and falling into an indeterminate conceptual space somewhere between that of protectorate, which implies international legal personality, and that of autonomous region, which does not.⁴³ The decision in the *Raan of Kutch Arbitration* implied that vassal states did possess

³⁹ Norbu (1992), p 37.

⁴⁰ The Chinese representative of Chiang Kai-shek's Nationalist government in Lhasa in 1946 acknowledged in his own book, *Tibet and the Tibetans*, that the country had enjoyed *de facto* independence since 1911. Schell (2000), p 24.

⁴¹ It should also be noted that Japanese-Tibetan negotiations were a cause of great anxiety to the Nationalist government of China, which believed that a Japanese invasion from Tibet was imminent: Lin (2002), pp 496–97.

⁴² Later Mao spoke more discreetly of states 'situated around China's border that were formerly under her dependence', avoiding the term 'tributary state': Schram (1963), p 375.

⁴³ Originally an institution of feudal law, 'suzerainty' was a term that defined the relationship between a lord and his vassal or liege men. The application of the term to inter-state relations emerged following the Peace of Westphalia (1648), and regained currency in the nineteenth century, when it was used to describe the condition of states breaking away from disintegrating Empires (for example, the Ottoman Empire): Crawford (1979), pp 186–215.

international legal personality.⁴⁴ However, much earlier the Permanent Court in *Nationality Decrees in Tunis and Morocco* had emphasised that the legal status of dependencies needed to be assessed according to their individual characteristics, a task which the international legal community has largely failed to do in the case of Tibet.⁴⁵ Furthermore, there is a danger that the use of ambiguous terminology is taken to reflect an actual ambiguity of status, rather than any ambiguity in the defining process itself. Hence, for example, Cassese assumes that the British recognition of Chinese suzerainty implies that Tibet had no independent legal personality. As a consequence, the erasure of Tibet's long, and complex, legal and political tradition is but one small footnote away. In a throw-away comment, the issue is resolved as 'more a case of human rights than a case of self-determination'.⁴⁶

Leaving aside for the moment the problematic conceptual separation of human rights from self-determination, in such an analysis the underlying problem regarding the process of definition remains unaddressed. Whilst there is a necessity to address Tibet's position in the context of international law, questions remain regarding the applicability of European feudalistic terminology to a non-European legal tradition grounded in a distinctly Buddhist philosophy. When the British defined Tibet as a 'vassal', they did so without regard for Tibetan self-perceptions, and without any deep intellectual understanding of Tibetan legal and political life. Arguably, the act of *translation* depends upon consensus — it is the acknowledgment of similarity between two terms. The act of *naming*, meanwhile, implies judgment, the relationship between the signified and the signifier being one in which the signifier expresses authority, the signified becoming an artefact of the insight and wisdom of its source. The British choice of legal definition was just such an act of naming, and failed to capture the historical complexities informing the Tibetan legal tradition.

Although Tibet is known primarily as a centre of religious monasticism, it has a long, culturally distinct legal tradition. The origins of Tibetan law can be traced back to the time of the great Tibetan Empire (the seventh to the thirteenth centuries).⁴⁷ Over the following centuries, the Tibetan legal system underwent significant changes, the most notable of which was the assimilation of a Buddhist styled jurisprudence. Whilst the influence of the earlier 'Royal Law' persisted into the twentieth century, providing an important continuity, by the time of the Dalai Lamas, in the seventeenth century, Buddhism had become fully institutionalised, providing the normative framework within

⁴⁴ *Raan of Kutch Arbitration* (1968) 7 ILM 675 at 696–99.

⁴⁵ *Nationality Decrees in Tunis and Morocco* (1923) Ser. B No. 4, p 27.

⁴⁶ Cassese (1998), pp 95–96.

⁴⁷ Legal documents from the empire period attest to a comprehensive, utilitarian legal system that prescribed specific punishments for specific crimes. Civil litigation figured prominently, as did examples of correct judicial procedure: Thomas (1933), p 101, and Richardson (1990), p 17.

which legal and political decisions were made.⁴⁸ Meanwhile, the consolidation of monastic power had established Tibet as a regional authority, which neighbouring states looked to as a source of strength. For example, Ladakh, Sikkim and Bhutan used to pay tri-annual tributes to the Dalai Lama — until the Communist takeover of Tibet in 1951 — and the Tibetan government considered these states to be Tibetan dependencies.⁴⁹ The fact that the Tibetan influence was political, as well as religious, is illustrated by the fact that Tibet mediated in the Anglo-Bhutanese War of 1774.⁵⁰

Whilst scholarly attention has often focused on the traditional Chinese tributary system of foreign relations, in fact a more complex system of trans-Himalayan and East Asian relations existed than Imperial Chinese archives suggest. For example, whilst both Tibet and Nepal paid tribute to China, following the Nepal-Tibet War of 1854–56, Tibet also paid tribute to Nepal.⁵¹ Reciprocally, Nepal was required to help protect Tibet's territorial integrity, and to this purpose provided military assistance to Tibet in 1862.⁵² This shows that China's role as a protector of Tibet was by no means exclusive. The concept of 'tribute' was, in fact, fluid and variable, encompassing a variety of intersecting regional relations. Tibet, as a largely demilitarised state, frequently sought external military aid from foreign powers. Depending upon regional circumstances, at times this aid was drawn from China, at times from Nepal, and, in the twentieth century it was drawn from Russia and Britain simultaneously.⁵³

The dominant understanding of tributary relations between Imperial China and foreign states emerges from studies utilising Imperial Chinese archives.⁵⁴ These studies are useful insofar as they present the orthodox, Confucian worldview. However, caution must be exercised, as the archives provide only a partial, one-sided glimpse of the political reality of the time.⁵⁵ Although foreign sovereigns, including Queen Victoria, were exhorted to display submissiveness to the superior moral dignity of the Chinese Celestial Court, recent work by Edwards has shown that Qing legal statutes dealing with border control incorporated a second level of pragmatic rules and practices

⁴⁸ The Third Dalai Lama was the first to be recognised as such, in 1578. Previous incarnations were retrospectively recognised: Stein (1972), p 82. In 1642, the Fifth Dalai Lama was the first Dalai Lama to govern a unified Tibet, and in 1650 the first Dalai Lama Law Code was written: French (1996), p 448.

⁴⁹ Norbu (1992), p 24. At times Bhutan sought to reiterate that it was independent of Tibet — see Rose (1977), pp 59–61.

⁵⁰ Van Walt (1987), p 26.

⁵¹ This was formalised by the Nepal–Tibet Treaty of 1856. For the treaty text, see Van Walt (1987), pp 294–95.

⁵² Rose (1971), p 122.

⁵³ Van Walt (1987), p 24; Andreyev (1996), pp 8–9.

⁵⁴ See Fairbank and Teng (1941); Fairbank (1942, 1968).

⁵⁵ Indeed, Imperial archives recorded that Sweden and England were dependencies of Holland: Fairbank (1942), p 147.

based upon principles of 'fairness, equality, reciprocity, and mutual respect for "territorial sovereignty"' ⁵⁶

Yet, interestingly, with regards to Tibet it is the orthodox Confucian Chinese representation of tributary relations that has subsequently gained pre-eminence. This orthodox representation emphasises Tibet's inferiority and subordination to Imperial China. In part, the pre-eminence of this interpretation reflects the political reality of post-1950 events, and in particular China's position as a permanent member of the Security Council with the power of veto.⁵⁷ Yet it seems that the PRC's interpretation of traditional Sino-Tibetan relations is in sympathy with Western readings of the religious-secular dynamics that informed Tibet's traditional ties to China. Crucially, the tributary relationship existing between Tibet and Imperial China was distinct in that there was a religious element to the relationship not present elsewhere in the Chinese tributary system.

The conceptual framework for Tibetan foreign relations was *cho-yon* (priest-patron). This uniquely Central Asian concept entailed the 'priest' (Dalai Lama) bestowing spiritual protection upon the 'patron' (traditionally Mongol rulers, later to include the Qing Emperors). In return, the patron was obliged to provide physical protection to the priest. In Tibetan terms, the relationship was similar to that between guru and disciple.⁵⁸ The Tibetan concept of *cho-yon* must be understood in relation to the founding principle of Tibetan law and governance, *chosi nyidan*. This translates as 'religion and politics joined together'.⁵⁹ *Chosi nyidan* expresses the belief that the ideal government exists for a dual cause: for temporal happiness in this world and spiritual happiness in the hereafter. At the same time, because worldly happiness is at best temporary, and at worst an illusion, spiritual endeavours

⁵⁶ Edwards (1987), p 34. Edwards stipulates that 'territorial sovereignty' in this context means that a 'government claims, and is allowed by other states, authority over all persons and activities within its borders. It is not used with the full meaning of the term in contemporary international usage'. For an example of Qing correspondence with Queen Victoria, see Commissioner Lin's 'Moral Advice to Queen Victoria, 1839' translated in Teng and Fairbank (1979), pp 24-27. Lin's letter to the British Queen is courteous, but clearly reflects tributary ideology. The Queen's subjects are consistently referred to as barbarians, and the Queen is commended for her traditional politeness and submissiveness. Additionally, official British communications to the Celestial Court are referred to as 'tributary memorials' (p 24).

⁵⁷ It is worth remembering here that Britain refused to support Tibet's appeal to the UN in 1950, after PRC troops had begun their illegal invasion of Tibetan territory. In this case, the Foreign Office privately concluded that Tibet 'must be regarded as a State to which Article 35(2) of the UN Charter applies and that her appeal may therefore be heard by the United Nations'. Yet the public position was very different: the British government decided that, for the sake of expediency, it would be preferable to argue 'that the legal status of Tibet was extremely obscure and that the matter could best be handled by the Security Council rather than the General Assembly': Shakya (1999), pp 54-55.

⁵⁸ Seyfort (1991); Klieger (1989).

⁵⁹ Wangyal (1975), p 79.

are thus superior to worldly pursuits. In this context, in terms of the patron–priest relationship, ecclesiastical rule was *more advanced* than secular rule. In China, the concept of *lai-hua* — ‘come and be transformed’ — implied that the barbarians could not help but be drawn to Chinese civilisation.⁶⁰ In Tibet, meanwhile, it was accepted that the Tibetan state, by privileging monastic education over military might, was working towards the enlightenment of all sentient beings.⁶¹ The Tibetan Foreign Bureau expressed precisely this view in a letter sent to Chiang Kai-shek in 1946:

There are many great nations on earth who have achieved unprecedented wealth and might, but there is only one nation which is dedicated to the well being of humanity in the world and that is the religious land of Tibet, which cherishes a joint spiritual and temporal system.⁶²

If both Tibet and China viewed themselves as centres of advanced civilisation, then so too did the Western imperial powers. Indeed, the ‘civilising mission’ was the ideological impetus of Western colonialism, and furthermore became central to late nineteenth century juristic efforts to locate international law as a discipline within the wider context of a rational, scientific discourse.⁶³ Law was the instrument of imperialism, the tool with which European artisans would craft the as yet undifferentiated form of the uncivilised. Law would ‘raise the mass of the people’ of the non-European world ‘to a higher plane of civilisation’, a gift which should ‘deserve the gratitude of the silent and ignorant millions’.⁶⁴ At the same time, ‘a legal order structured around the self-determining subject of Europe was, in its terms, the opposite of the authoritarian legal regime necessary for imperial modes of exploitation’.⁶⁵ In essence, the enlightened law of the European world, which sought, in theory, to dispel ‘brute custom’, was threatened by the uncomfortable possibility that, in practice, the gap between the civilised and the uncivilised might prove to be slim.⁶⁶ As Douglas has observed, ‘in the maintenance of purity borders become perilous places’.⁶⁷ Against this threat, it was modernity that was to be employed to police the borders between the uncivilised and the civilised. Modernity, allied to rationality and science,

⁶⁰ Fairbank (1942), p 132.

⁶¹ In Tibet, monks represented 13 per cent of the population, and about 26 per cent of the males: Goldstein (1990), p 231.

⁶² Goldstein (1990), p 253.

⁶³ Anghie (1999); Sugarman (1991).

⁶⁴ Lugard (1965), cited in Fitzpatrick (1992), p 107.

⁶⁵ Fitzpatrick (1992), p 108.

⁶⁶ Austin advocated a law based upon ‘manly reason’, rather than rules based upon ‘brute custom’, which were the ‘monstrous or crude productions of childish and imbecile intellect’: Austin (1998), pp 64–65.

⁶⁷ Douglas (1970), p 116.

separated European culture from a potentially overwhelming flood of alternative traditions and histories.

In this context, it is highly significant that the Tibetan belief in the superiority of ecclesiastic rule, and the profoundly religious nature of Tibetan society, should contrast so starkly with the modernist emphasis upon secular forms of law and governance. It is of little surprise that the Tibetan concept of *cho-yon* failed to be accurately translated. In modernist terms, the priest of the *cho-yon* dyad is automatically assumed to be the inferior, without legitimate legal or political authority. The priest is emblematic of the traditional past that the secular authority of modernity seeks to overcome. The universalising totality of modernity necessitated that law usurp God, so as to provide itself with ontological legitimacy. As Pierre Schlag notes, the 'slippage from the epistemic to the ontological allows the law and its artefactual forms — doctrines, principles, policies, and so on — to be treated as objects in their own right. It is this slippage that enables legal thinkers to treat the law as an *authoritative* source that exists independently of the beliefs of the legal (or the wider) community.'⁶⁸

The Rise of Chinese Modernism

The Tibetan state was not prepared to relinquish its Buddhist philosophical foundations, and sought to protect itself from foreign encroachment by resisting any domestic reform that might alter the political balance between the clergy and the laity.⁶⁹ However, since the rise of the unequal treaty regime in China, the Chinese debate upon resistance and reform took a notably different form. At the end of the nineteenth century, conservative styled Confucianists had argued against the assimilation of Western ideas, but the stronger voice belonged to reformists who advocated the blending of Western technologies with Chinese morality, the product of which would be a superior and unique civilisation. International law was to be one such technology, and efforts were made to translate European jurisprudence into Chinese.⁷⁰ Post-1911, the Nationalist Government of China furthered this cause, specifically articulating its strategy to restore China to greatness in the language of science and international law. To these ends, there was an adaptation of Social Darwinism, a movement that had supported Western colonialism.⁷¹

Against this backdrop, there was considerable hostility towards religious activity. Between 1900 and 1930, various campaigns against rural religion were launched. These Nationalist Party campaigns marked a departure from the traditional Confucian suppression of ideological heterodoxy in that there was now a 'much more absolutising distinction between the scientific and the

⁶⁸ Schlag (1997), p 440.

⁶⁹ This is not to say that there was not a debate upon the merits of reform. For a study of the shifting internal power relations in Tibet, 1913–51, see Goldstein (1992).

⁷⁰ Wang (1990), p 4.

⁷¹ Zhao (2000), p 25.

primitive'.⁷² Accordingly, various laws were promulgated to bring about the rational advancement of the masses. The 1928 'Standards for Preserving and Abandoning Gods and Shrines' insisted that religious authority was obsolete and that a superstitious nation would become 'the laughing stock of the scientific world'.⁷³ This was further reinforced by a range of laws promulgated between 1928 and 1930, such as the 'Procedure for the Abolition of Occupations of Divination, Astrology, Physiognomy and Palmistry, Sorcery and Geomancy' (1928), 'Procedures for Banning and Managing Superstitious Objects and Professions' (1930) and 'Prohibition of Divinatory Medicines' (1929).

The Nationalist anti-religion drives were not anti-Buddhist, and the implication here is not that, by extension, they became implicitly anti-Tibetan.⁷⁴ Rather, their significance lies in the formulation of a dichotomy between a traditional, religious and superstitious past on the one hand, and a secular, rational and scientific future on the other. This laid the foundations for later ideological developments, where Maoism denounced all religion as not merely the 'opium of the people', but as 'poison'.⁷⁵ Marxist historical materialism, as adapted by Mao, extended the Social Darwinist theories of the Chinese Nationalists by advocating the evolutionary superiority of the non-religious, socialist state.

The theory of historical materialism also supported a pre-existing racial classification system, in which Tibetans were ranked at the lowest rung of racial evolution and Han Chinese at the top. This racial classification in some ways reflects the Imperial Chinese assertion that Tibetans were barbarians, but in the traditional Chinese worldview all foreigners were barbarians, and the distinction made was based upon cultural, rather than racial, characteristics. The rise of nationalism shifted the conceptual basis of these distinctions, and a distinctive racial discourse emerged alongside concerns with modernisation, science and rational progress. This discourse achieved continuity in Communist thought and persists today.⁷⁶ At the same time, historical materialism 'assumes a progressive development of human society towards

⁷² These campaigns had an important economic function as they sought to bring the resources and funds of religious groups under the control of the Nationalist party: Duara (1991), pp 75–76.

⁷³ Duara (1991), p 79.

⁷⁴ Not all religious activity was proscribed, only the types of activity that the party classified as 'superstitious'. Organised religion, such as Buddhism, was protected by the new regulations: Duara (1991), p 79.

⁷⁵ Miller (1990), p 223. It is with some irony that Mao's first reference to the question of religion, in his 1927 report 'An Investigation into the Peasant Movement in Hunan', praised the anti-religious drive of peasant associations. He stated: 'Everywhere they advocate the appropriation of temple property in order to start peasant schools.' Welch (1972), p 2. The reality was more complex — the Nationalist Party had in fact expropriated rural temples for its own financial ends, and the schools Mao referred to were of little or no benefit to the peasants: Duara (1991), p 78.

⁷⁶ Sautman (1997).

greater union and the eventual overcoming of cultural, racial and linguistic barriers'.⁷⁷ When the People's Liberation Army marched into Tibet to conduct the supposedly 'Peaceful Liberation', their advance was distinguished from that of a non-socialist army.⁷⁸ The People's Liberation Army was an interventionist force that existed to help the people when they were incapable of helping themselves, and should they be so uncivilised that they failed to appreciate the fact, this only heightened the urgency of the 'development' task at hand.⁷⁹

Whilst Mao, following the arguments employed by Lenin, initially promised minority nationalities the right to secede, underlying this was the assertion that self-determining minorities would be voluntarily drawn to the superior example of the socialist state. In this context, any desire for secession could only be seen as a failure of the socialist state to live up to its own ideals.⁸⁰ Secession was both a threat to the desired territorial boundaries of the socialist, multi-national state, and to the ideological foundations upon which that state was based. Hence the right to secede was endorsed by the Chinese Communist Party in 1930s and 1940s, in the form of a constitution and a written resolution. Then, after the party came to power, it was a right swiftly erased. The 1949 Common Program, setting the standard still in place today, declared that any act threatening to split 'the unity of the various nationalities shall be prohibited'.⁸¹

Unsurprisingly, religious activity remains one of the primary areas of contention between the Chinese Communist Party and Tibetans living in what are now the various Tibetan autonomous areas of the PRC.⁸² Article 11 of the PRC *Law of Regional National Autonomy* guarantees freedom of 'normal religious activities'. However, the state reserves the right to define what is, or is not, 'normal' religion, thus maintaining its grip upon the ideological life of the nation. Tibetan cultural identity treads a tenuous line between state-

⁷⁷ Keller (1994), p 62.

⁷⁸ The Marxist-Leninist view adopted by the Chinese Communist Party further maintains that class has domestic and international forms. Internally, a nation is comprised of dichotomous antagonistic classes; externally, a nation also has class characteristics. The Tibetans, and other people, were understood as oppressed nations, and they were promised self-determination as a way of achieving equality with the Chinese people: Bulag (2000), p 537.

⁷⁹ For this formulation, see generally Jin (1981).

⁸⁰ Musgrave (1997), p 20.

⁸¹ Nonetheless, after the party came to power, it initially allowed laws to be made at the provincial level under a 'multi-layer legislative system'. However, this multi-layer system was abolished in the 1954 constitution, which meant that, whilst autonomous regions were still provided for, legislative control was effectively returned to the centre: Pahn (1996), p 91.

⁸² Traditional Tibet was divided into three principalities: Ut'sang, Khams and Amdo. After 1951, Ut'sang became the Tibetan Autonomous Region of the PRC (TAR). Meanwhile, Khams and Amdo became incorporated into modern-day Gansu, Qinghai, Sichuan and Yunnan provinces of the PRC, but have some autonomous status at the provincial and county level.

sanctioned ethnic difference on the one hand, and anti-Chinese splittist activity on the other. A qualifying clause of Article 11 states: 'Religious bodies and religious affairs shall not be subject to any foreign domination.' This is the core of the problem, for all principal Tibetan religious leaders, including the Dalai Lama, are now living in exile in India. Religious activity in Tibet is thus routinely regarded as a threat to national security. Essentially, Tibetan religious activity is equated with Tibetan resistance, and both are seen as more dangerous than their equivalents in the Chinese population.

The PRC has put considerable effort into redefining Tibetan culture in socialist terms with 'national local characteristics'.⁸³ In essence, the process of assimilation, which is the mechanism by which the PRC seeks conflict resolution, requires a restructuring of Tibetan history.⁸⁴ Hence, in schools, the Tibetan word for history (*rgyal rabs*) is reserved for Chinese history, whereas Tibetan history is termed legends or fables (*lo rgyus*).⁸⁵ This reflects a dynamic also present in the wider international legal community. It is a dynamic born of the tension between the self-determining state, committed to modernity, and a wayward faction of potentially self-determining minorities, who may assert a worrisome, competing version of that modernity. The Communist assertion of a universal and inherently superior ideology has parallels within the traditional Confucian concept of *lai-hua*; it also has parallels with Western imperialism's 'civilising mission'.

Conclusion

Whilst the concept of self-determination has, to a certain extent, evolved from a political ideal to a legal right, it remains inadequately defined. Furthermore, the tension between the right to self-determination and the right of territorial integrity has not been resolved. This is especially apparent when the right to self-determination is viewed alongside international legal instruments dealing with minority rights. Hence the 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities' seeks to place the rights of minorities in the context of the sovereign equality, territorial integrity and political independence of the states to which those minorities 'belong'.⁸⁶ This reflects the nineteenth century European jurisprudential concern with demarcating the boundaries between the civilised and the

⁸³ This phrase was employed in a project to transform Lhasa into a 'socialist city with national, local characteristics'. The much-maligned 'Lhasa 2000' project, which had its inception in 1980, involved the mass destruction of traditional Tibetan architecture, which was replaced with utilitarian buildings. Tibetans were forcibly relocated into new houses ill-suited to the harsh climate: Tibetan Youth Congress (1995), p 53.

⁸⁴ For general comment on the dynamics of Chinese nationalism and the process of ethnic assimilation, see Zhao (2000), especially pp 25–28. For the PRC's policy of population transfer as a solution to the nationality problem, see Tibet Information Network (2000a).

⁸⁵ Kolas (1998), p 75.

⁸⁶ GA Resolution 47/135, Article 8.

uncivilised. Westlake, for example, in his chapters on the principles of international law (1894), stated that: 'Of uncivilised natives international law takes no account. This ... does not mean all rights are denied to such natives ... they have the claim of the ignorant and helpless on the enlightened and strong: and that claim is more likely to receive justice.'⁸⁷

Today, ambiguities that previously attended the concept of statehood — which has, over the course of the twentieth century, become an absolute, something that either exists or does not — are now played out primarily within the context of the 'right' to self-determination. However, the concept of self-determination is one that is fundamentally limited. Despite the comforting rhetoric of the International Human Rights Covenants, within the present system self-determination is not a pre-existing right; it is a right that must be granted by a more competent authority.⁸⁸ As such, it is a right that is implicitly better protected — and policed — within the boundaries of established states. As Rigo-Sureda puts it, self-determination is 'in fact ridiculous because the people cannot decide until somebody decides who are the people'.⁸⁹ The imposition of modernity has facilitated this limitation of self-determination by relegating the voice of alternative traditions — the unrepresented peoples and nations — to a past that is moribund and inert compared with the dynamic, striving, progress of the present.

In this context, how is one to evaluate Sautman's assertion that, by advocating the self-determination of the Tibetan people, the Dalai Lama is pursuing an argument analogous to that of Le Pen, the leader of France's ultra-right Front National. Both, he writes, 'refer to "cultural genocide" in epitomizing the effects of migration on their native lands'.⁹⁰ The implication is that the disparities and differences that exist between peoples and cultures are inherently problematic, and are better viewed as historical anomalies to be overcome. In the context of the universal, modernist heterodoxy, alternative traditions and histories become a threat. But is universality, as defined in modernist terms, capable of achieving genuine harmony or consensus? The unresolved paradox of modernity is that, whilst it aspires to the universal, the universal can only be achieved by jettisoning competing voices. The opposition between modernity and tradition ensures that universality remains an impossibility in modernist terms.

In Bhabha's *temporal caesura*, that conceptual space between past and present in which modernity as sign — modernity as the myth of progress and 'ideology of *beginning*' — emerges, within that gap the possibility of other times and other spaces lingers.⁹¹ 'It is because the present has the value of "sign" that modernity is iterative; a continual questioning of the conditions of existence; making problematic its own discourse not simply "as ideas" but also

⁸⁷ Cited in Fitzpatrick (1992), p 108.

⁸⁸ Article 1 of both the International Covenant on Civil and Political Rights 1976 and the International Covenant on Economic, Social and Cultural Rights 1976.

⁸⁹ Cited in Berman (1998), p 68.

⁹⁰ Sautman (2001), p 110.

⁹¹ Bhabha (1991), p 205.

as the position and status of the *locus* of social enunciation.⁹² The *temporal caesura* renders the project of modernity contradictory and unresolved precisely because it 'opens up a time-lag at the point at which we speak of humanity through its differentiations — gender, race, class — that marks an excessive marginality of modernity'.⁹³

The universalistic assumptions of modernity have been subjected to the critique of postmodernity, yet the impact of this critique has to have significant impact upon how the right of self-determination is expressed in international law. Ironically, although the globalising force of modernity appears incontestable, at a theoretical level it is postmodernity that now represents the vanguard; modernity itself is falling away into the background. The possibility for plurality — for a genuine dialogue between the traditional and the modern — remains. The Chinese theory of modernisation, in both its Nationalist and its Socialist forms, differed from Western models of modernisation based upon capitalism. Yet both shared a commitment to universalistic values of progress that were set in contradistinction to backward, or less efficient, pre-modern social systems founded upon religious, rather than secular and scientific, ideals. The overlap between Western and Chinese theories of modernity may enrich readings of the international legal status of Tibet. This overlap is suggestive of an implicit sympathy between Chinese and Western discourses. This further suggests the possibility that both have worked in tandem to negate Tibet's assertion of independent legal personality.

Both Western and Chinese discourses have constructed Tibet and Tibetans as 'pre-modern' and 'pre-legal'. These notions are predicated upon modernity's opposition to the religious. Yet, if the postmodern now represents the vanguard, then arguably rather than being 'backward' Tibetan Buddhist philosophy was fundamentally ahead of its time. What Tibetan philosophy teaches is, as Mabbett noted in his comparative analysis of the Buddhist philosopher Nagarjuna and the French deconstructionist Derrida, that 'concepts, dogmas, and rational constructions of all sorts that presuppose the existence of things, fail to capture the ultimate truth. The truth must always defeat any attempt to shut a door upon it, to give it a fixed and final shape.'⁹⁴ In this light, the artificial separation of the pre-modern and the modern, or the civilised and the uncivilised, collapses under the weight of modernity's myth of progress.

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⁹² Bhabha (1991), p 201.

⁹³ Bhabha (1991), p 195.

⁹⁴ Mabbett (1995), p 205. See also Jinpa (2002).

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