CLASS 1

HISTORICAL ORIGINS AND DEVELOPMENTS

A. Introduction

[This Chapter is taken from a comparative law casebook I am coauthoring with Professors Miller, Abdullahi An-Na'im and Michael Bazyler. It examines, in particular, the English, German, Chinese, and Islamic legal traditions.]

The previous two parts of the casebook explores the English and German legal systems; the former in the common law tradition and the latter in the civil and constitutional law tradition. In this part, we will turn to a very different system that incorporates elements of both the common law and civil law traditions. To make the system complicated, it also includes some non-Western concepts about the role of law and customs in society, and reflects traces of the socialist legal and socio-economic system that has been instituted in the country since the establishment of the People's Republic of China in October 1949.

During the late nineteenth and early twentieth centuries, China, in an effort to modernize its legal system, borrowed heavily from the Japanese system, which in turn borrowed heavily from the German system. The discussion in this Part, therefore, follows logically from what we learned about the German legal system. Notwithstanding these civil law roots, it is important to keep in mind that the system was developed under very unique political, social, economic, and cultural conditions. Thus, the system also has incorporated many elements of the common law tradition. As the world becomes more globalized and the active academic and cultural exchange of judges and legal scholars continues, the common law elements in the Chinese legal system can only be strengthened.

To help us understand all the different elements of the Chinese legal system, this Part will explore not only Chinese laws and legal institutions, but also the historical, political, social, economic, and cultural conditions under which the system was developed and evolved. Kicking off our discussion of this complex, but interesting system is an excerpt exploring the question "why do we study Chinese law?" Is it because of the country's growing importance? Or is it because we can learn something about comparative law methodologies? Is it because the study will provide insight into the socialist legal tradition? Or is it because, through a study of the Other legal system, we will be able to better understand and appreciate our own legal culture and tradition?

The second excerpt explores a different, but perhaps more important, question, "How should we study Chinese law?" Building upon Edward Said's seminar work in post-colonial studies, *Orientalism*, Teemu Ruskola questioned how the Chinese legal system had been studied. The excerpt is included here not as a criticism of present approaches, but rather as a means to provoke one to rethink what it means to study Chinese law, how it is studied, and what we can learn from this study.

Albert H.Y. Chen, An Introduction to the Legal System of the People's Republic of China 1-5 (3d ed. 2004)

The case of China offers an important challenge, and potentially very fruitful rewards, for such investigations in comparative law and legal theory. With nearly five thousand years of a continuous history of civilisation behind them, the forces of tradition are probably stronger in China than in most other countries in the contemporary world. Yet in the twentieth-century world, modernisation and development have been mainly processes of Westernisation. If one adopts the classification of the legal systems in the contemporary world into three major categories—the common law family, the civil law family and the family of socialist laws—then all these families have their origin in the Western European

states which appeared towards the end of the Middle Ages. In China, as in Japan, the quest for a modern legal system appropriate for a modernised nation has been bound up with the adoption of legal concepts, terminology, institutions and processes which are Western in origin. The case of China provides therefore an example of the transplant of law and legal institutions from one part of the world to another, and their interaction with local culture and traditions obviously deserves study.

. . . [T]he case of China is more complicated than that of Japan. This is because while Japan quickly chose to establish Western-style legal codes and institutions in the late nineteenth century, attempts made by China to 'modernise' its legal system (in the late Qing period, in the Republican period, and in the 1950s) failed one after another (due respectively to the fall of the Qing dynasty; the intervention of the Sino-Japanese War followed by the civil war and finally the Kuomintang's flight to Taiwan; and the leftist policy of dispensing with the legal system since the late 1950s). Furthermore, the ruling ideology of Marxism-Leninism adopted by the People's Republic of China ('PRC') after 1949 is itself ambiguous about the value of legal construction. Marx seemed to believe that law in the bourgeois state was largely a means by which the bourgeoisie maintained their class rule over the proletariat, and that in the classless communist society which represented the final stage of social evolution, there would be no need for law to exist. Although there are different opinions, both in the West and in China today, about what exactly is the true Marxian theory of law, the fact cannot be ignored that in the late 1950s and the Cultural Revolution period, leftist radicals did purport to rely on the Marxist critique of law to denigrate and decimate the elements of Soviet-style 'socialist legality' established in China in the mid-1950s.

The case of China should therefore provide a testing ground for legal theorists who believe in the Marxist approach. To what extent can Marx be held responsible for the atrocities and immense suffering in the periods of lawlessness during the Cultural Revolution? Or is there any relationship between the Marxian theory of law, which after all was mainly a critique of bourgeois law rather than a blueprint for a socialist legal system, and developments relating to law and legal institutions which occurred under communist rule in China? Finally, how should the active efforts in legal-system building which commenced in 1979 be explained or assessed in terms of a Marxian legal theory? These questions constitute much food for thought.

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. . . [From a comparative law perspective, the study of Chinese law is also very important. Such a study] can be considered worthwhile not only because China is the most populous nation in the contemporary world and is becoming an economic giant of the 21st century, but also because the case of the developing Chinese legal system raises interesting theoretical questions such as the following: (1) To what extent are we prisoners of our past? Can China grow out of its traditional legal culture? (2) What is the significance of the concept of families of legal systems in comparative law? Does contemporary Chinese law belong to the civil law family? (3) Does ideology matter to legal development? Can the legal history of the PRC so far be accounted for in terms of shifts in official ideology? (4) What is the relationship between legal and economic development? Is the marketisation of the economy the most important force behind legal change in contemporary China? (5) What is the significance of globalisation and of China's entry to the World Trade Organisation in 2001 for Chinese legal development? (6) What is the relationship between legal and political reforms in China? To what extent does the lack of political reform hinder legal progress? (7) Is there an autonomous logic of legal institutional growth, particularly the development of legislative and judicial institutions, the legal profession and legal discourse? Will the legal reforms engineered by the ruling party unleash unintended consequences that challenge the party's monopoly of power? (8) Is there a universal trajectory of legal evolution, so that the contemporary Chinese legal system may be regarded as a developing one, less advanced than its Western counterparts but in the process of catching up and maturing? (9) Will there be an ultimate convergence of the legal systems and laws of humankind, so that as Kant envisaged in his conception of universal history, all political communities in the world will eventually evolve into peace-loving liberal constitutional states that practice the rule of law and respect human rights?

Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 181-84 (2002)

That the Chinese legal tradition is lacking is an observation as clichéd as the solicitude that is routinely expressed toward comparative law. "To all intents and purposes foreigners are completely in the dark as to what and how law exists in China. Some persons whose reputation for scholarship stands high would deny the right of the Chinese to any law whatsoever—incredibly, but to my knowledge, a fact." This was one Western commentator's melancholic observation at the end of the nineteenth century. The renowned anthropologist Marcel Granet indeed announced in 1934, "The Chinese notion of Order excludes, in all aspects, the idea of Law." And in William Alford's recent observation, Western students of China continue to ignore and misunderstand "the effect of law upon Chinese life."

But just what does it mean to claim that China suffers from a (relative or absolute) lack of "law"? After all, only the most negligent observer could miss the fact that imperial China boasted dynastic legal codes going back to the Tang dynasty, and earlier. The point is usually a subtler one: whatever law China has known is a form that falls short of "real" law. This view is implicit in the oft-stated claim that Chinese law has been historically exclusively penal and associated with criminal sanctions. Especially in continental systems, civil law stands at the heart of jurisprudence, and its absence thus signifies a gaping hole at the center of the Chinese legal system. Sometimes, the implicit yardstick for "real" law is formal legal rationality in the Weberian sense, while at other times it is a liberal legal order that constrains the state in a particular way—a configuration often referred to as "the rule of law." Legal historian Thomas Stephens has recently argued that Chinese law is not even worthy of the term "jurisprudence." As a more descriptive term for the study of Chinese non-law, Stephens offers the neologism "obsequiiprudence," presumably signifying the scholarly study of obsequious submission to authority and hierarchy. Whatever the merits of Stephens' thesis may be, in the view of nineteenth-century international lawyers Chinese law was so "uncivilized" as to exclude China from the "Family of Nations," which in turn served as a justification for reducing the country to a semi-colonial status under a regime of Western extraterritorial privileges.

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. . . [O]utside of the academic study of Chinese law, ideas of China's lawlessness continue to abound. Indeed, one of the primary obstacles to a serious discussion of Chinese law are the blank stares with which one is frequently met upon confessing an interest in the subject: "What Chinese 'law'? There is no law in China!" (Sometimes followed by a more tentative, "Is there law in China?") Unlike the more traditional comparativist who studies French or German law, for example, the student of Chinese law frequently needs to convince her audience that the subject matter exists in the first place.

[There is no merit in debating law's existence in China, but it is important to] analyz[e] how the West has constructed its cultural identity against China in terms of law. Why, despite vigorous efforts to debunk it, does the view of China's lawlessness continue to prevail—not only in the popular opinion and among policy-makers, but even among legal scholars who do not specialize in China as well as China scholars who do not specialize in law? Chinese civil law, for example, has been discovered and re-discovered periodically in the West. What preconceptions make it possible for it to be discovered and forgotten again so quickly, leaving it to wait for yet another round of "discovery"?

NOTES AND COMMENTS

1. "Why China?" is a question that is often posed to those who are interested in studying Chinese law. As William Alford recalled his experience more than two decades ago, "[t]he first

substantive question posed to me as I commenced my graduate work in Chinese studies during the autumn of 1972 was by the late Arthur Wright, who asked why I, a young man of seeming intelligence, was intent on wasting my time on the study of Chinese legal history." William P. Alford, *Law, Law, What Law? Why Western Scholars of China Have Not Had More to Say About Its Law, in* THE LIMITS OF THE RULE OF LAW IN CHINA 45, 45 (Karen G. Turner et al. eds., 2000) [hereinafter LIMITS OF THE RULE OF LAW]. The question, as Professor Alford put it in his response, should not be "Why?" but "Why not?"

2. China is generally considered as lacking in a tradition of rule of law, which will be discussed throughout this Chapter. One question that is rarely addressed is: Are we looking in the right places? Do we know where to look? As the late William Jones cautioned us:

> Chinese law is very easy to misunderstand. It is not at all certain that anyone—Chinese or foreign—understands it. The reason for this is that when we think about law, we think about a formal legal system of the western type. We look at China and expect to find such things as a law of contracts, a bench and bar, and all the other paraphernalia that we associate with law. At present, one can find such institutions in China, but they are modern imports. Until recently, they did not exist. What one found instead—and still finds—quite easily, are a vast number of statements by China's most prominent thinkers, notably including Confucius, that show great hostility to what we think of as law.

William C. Jones, *Trying to Understand the Current Chinese Legal System*, *in* UNDERSTANDING CHINA'S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN (C. Stephen Hsu ed., 2003). For an interesting discussion of the perception that there is no law in China, see Teemu Ruskola, *Law Without Law, or Is "Chinese Law" an Oxymoron?*, 11 WM. & MARY BILL OF RTS. J. 655 (2003). As Professor Ruskola explained,

> the problem is not simply that "Chinese law" is an oxymoron, but that the category of "law" is itself a contradiction, an unstable mix of elements of adjudication and discipline, rule of law and rule of men. Ultimately, the rule- of-law/rule-of-men distinction is too moralistic and too black-and-white to be of analytic utility.

Id. at 656.

3. As Myres McDougal, a leading international law scholar, wrote more than half a century ago: "The greatest confusion [in the comparative law field] continues to prevail about what is being compared, about the purposes of comparison, and about appropriate techniques." Myres McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of World Order*, 1 AM. J. COMP. L. 24, 28-29 (1952). As far as the study of Chinese law is concerned, what is being compared? What are the purposes of comparison? What are the appropriate techniques?

4. A few decades ago, the study of modern Chinese history focused primarily on the Western impact on China. It is not uncommon to find historical accounts of the Opium War, the Taiping Rebellion, treaty port life, missionary activities, the Self-strengthening Movement, and the Boxer Uprising. Interestingly, archival research has demonstrated that the Manchu authorities in the eighteenth and nineteenth centuries were not primarily concerned about those issues. Instead of focusing on foreign aggression in the coastal areas, they considered domestic rebellions and challenges to their inland frontier greater threats to their power.

These differences in perspectives reminded us about the important inquiry made when Paul Cohen asked whether historians are developing a "China-centered history of China." *See* Paul A. Cohen, DISCOVERING HISTORY IN CHINA: AMERICAN HISTORICAL WRITING ON THE RECENT CHINESE PAST (1984). In the Chinese law field, a similar inquiry is in order. Are we developing a "China-centered perspective of Chinese law"? Would the comparative law methodologies that we learned from this course enable us to develop such a perspective? Would they allow us to find only what we set out to find? Or would they allow us to find what we did not set out to find?

B. Law in Imperial China

Although the Chinese legal system has been widely considered today as inadequately developed, this system actually existed for at least two thousand years. While the Tang Code remains the oldest surviving code in China today, followed by the later codes of the Song, Yuan, Ming, and Qing dynasties, the origin of Chinese law and Chinese legal institutions can be traced back to as early as the Spring and Autumn Period in 700-476 B.C. The first excerpt provides a brief history of the development of the legal system in Imperial China. The second excerpt discusses the intense and perennial debate concerning whether a state should use *li* or *fa* to effect social control. While Confucianism, a dominant school of political and social thought, supported the former, Legalism, another school of thought, espoused the latter. In the end, Confucianism prevailed, and Confucianist concepts have found its way to the Chinese legal system. While the *li–fa* debate was important throughout Chinese history, it remains equally relevant today. Indeed, understanding of the debate may help provide useful cultural insights into why the Chinese are reluctant to use legal processes and the challenges confronting legal enforcement.

Albert H.Y. Chen, An Introduction to the Legal System of the People's Republic of China 7-5 (3d ed. 2004)

The most striking contrast between the legal history of China and that of the West is that whereas the highly developed Roman law collapsed as a functioning legal system in Western Europe after the fall of the western Roman Empire in the 5th century AD and thereafter no unified secular legal system has been in existence in Europe (although Roman jurisprudence did shape the development of the legal systems of the modern nation states that emerged at the end of the Middle Ages), China's legal tradition ran continuously since the Tang dynasty (618-907AD) until the fall the Qing as an effective system of law and order administered by a unified and centralised bureaucratic empire. There was a remarkable degree of similarity and continuity between the major law codes of the Tang, Song (960-1279), Yuan (1271-1368), Ming (1368-1644), and Qing (1644-1911) dynasties, while the Tang codes can be traced back through a clear and continuing line of dynastic codes of the laws of the Qin (221-207 BC) and Han (206BC-220AD) dynasties. A general overview of the legal history of China may be provided as follows.

The western Zhou dynasty (ca 1027-770BC) was established after the fall of the Shang dynasty, and the kings of the Zhou ruled by delegating authority to feudal vassals (mainly kin of the king's family) in different principalities. This was the formative period of Chinese culture; it was in this period that some of the key concepts of Chinese civilisation, such as the idea that the ruler ruled by virtue of a Mandate of Heaven, and the doctrine of governing society in accordance with the *li*, were established. . . .

[Broadly defined, *li* covered a wide range of political, social, and familial relationships in society. It informed people of their normative roles, responsibilities, and obligations to others. In a Confucian society, people learned to adjust their views and demands to accommodate other people's needs and desires, to avoid confrontation and conflict, and to preserve harmony. By contrast, *fa*, which was referred generally to as laws and punishment, was derived from the belief that it was impossible to teach people to be good and that *fa* was needed to maintain public order by instructing people what and what not to do. These two concepts will be discussed in more detail in the next excerpt.]

From the eighth century BC onward, there was a steady decline in the power and authority of the Zhou kingship. The period from 700 BC to 256 BC was known as Eastern Zhou. The vassal principalities established themselves as independent kingdoms. At first there were over 140 states (at the beginning of what is known as the Spring and Autumn Period (700-476 BC)), but after many wars and

fierce struggles for survival, only seven kingdoms were left at the beginning of the Warring States Period (475-221 BC).

It was in these periods that China underwent the transition from the phase of unpublicised and largely unwritten legal norms administered by the ruling class to the phase of publicised and written legal norms. In ancient Greece and Rome, such transitions also occurred, and they were often a result of struggle by the lower class against the monopolised administration of 'secret' (in the sense that they were not made known to the subjects) legal norms by the upper class. In the Chinese case, most historians do not interpret the appearance of publicised written laws as a result of class struggles. Instead, the phenomenon was apparently associated with the states' efforts to develop a more effective mode of governance for the purpose of enhancing their strength and of achieving success in power contests against competing states.

Chinese legal historians often refer to the code of the Zheng state in the Spring and Autumn Period as probably the earliest code of law in Chinese history. This was known as the Book of Punishment (*Xingshu*) and was promulgated in 536 BC (an event of comparable significance in legal history to the compilation of the Code of the Twelve Tables of Rome in 450 BC). In the subsequent Warring States period, various codes were developed by states in different parts of China. In 407 BC, Li Kui, the prime minister of the Wei State, compiled the famous Canon of Laws (*Fajing*). This code, often regarded as the first systematic and comprehensive code of criminal law in Chinese history, was divided into six chapters and incorporated materials from statutes and regulations in force in other states in that period. When Shang Yang, a leading thinker of the Legalist school of philosophy, became prime minister in the Qin state, he adapted these Canons of Law for use in Qin. By the middle of the third century BC, the word '*lü*' came to be widely used in China in lieu of the word *fa* and other related words to refer to legislative codes, and this new usage was also adopted by the Qin. (In modern Chinese, the direct equivalent of the word 'law' is *'falü,'* formed by combining the characters for *fa* and *lü*). Subsequently, the Qin [221-207BC] conquered the whole of China and established a highly centralised bureaucratic empire governing the country according to Legalist philosophy.

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The famous First Emperor of Qin established a highly centralized bureaucratic regime, the first of its kind in China, as well as a unified system of criminal law. The Qin dynasty is however usually remembered as a period of harsh and cruel despotism in Chinese history. It was soon overthrown and replaced by the Han dynasty, which adopted Confucianism as the orthodoxy. But the rejection of Legalism did not mean the abolition of laws. The Han continued to make considerable use of the system of codes of law and legal institutions established by the Qin. The more draconian Legalist provisions of the Qin were dropped—several cruel modes of punishment involving mutilation of the body were abolished—but the legal machinery and structures themselves were preserved.

Legal historians describe the development of Chinese law from the times of the Han to the Sui, which re-unified China after period of the Southern and Northern dynasties, as a process of the 'Confucianisation of law' or 'legalisation of Confucianism'. This means that Confucian values influenced the administration of the law, and the content of the *li* gradually found its way into formal legal provisions. Thus, Chen Guyuan, a leading Chinese legal historian, wrote:

> If we consider the formulation of the Chinese legal tradition from the point of view of its systemic construction, then we can say that its body was created by the Legalists, whereas its soul was given to it by the Confucians.

From the Han dynasty onwards, Confucian scholars participated in the drafting of laws, and a kind of legal scholarship (*lüxue*) in analysing and producing commentaries on legal provision developed (yet due to the domination of Confucianism, the kind of wide-ranging theoretical and philosophical debates on the nature and functions of law which flourished in the pre-Qin period were never to be heard again in Chinese history until modern times). In the Jin dynasty (265-420), scholars compiled legal commentaries by applying the principles of the *li*. In the code of the Northern Qi (550-577), we find the

prototype of what was later called the 'ten abominations' (*shi'e*), which reflected Confucian perspectives on the gravest violations of the moral order. Throughout the period from the Han to the end of the Southern and Northern dynasties (420-589), the practice of deciding cases in accordance with Confucian classics rather than by applying legal provisions prevailed. This practice, however, came to an end in the Tang dynasty, when the gradual process of the Confucianisation of the law reached its completion, with the Tang Code representing an almost perfect expression of the legal recognition of Confucian morality and the *li*.

In the year 581, the long period of disunity that began when the Han fell in 220 AD came to an end with the Sui unification of China. The fate of the Sui was similar to that of the Qin which achieved the previous unification: its life was short (581-618) and its reign remembered in history as brutal. The Tang dynasty (618-907) which followed saw the culmination of the development of Confucian legal culture in China and the crowning summation of imperial China's legal achievement in the famous Tang Code (*Tanglü*) (653AD), which was to become a model law adapted for use in the 'Confucian cultural sphere' of Japan, Korea, and Vietnam. It was also during the Tang dynasty that legal scholarship in the form of *lüxue* (as mentioned above) produced its finest product—the *Tanglü shuyi* (the Tang Code with Annotations), containing commentaries on every article of the Code, the commentaries themselves being considered an integral part of the Code and having legal force. Moreover, the Tang produced a famous set of six books of administrative law *(liudian)* which some scholars have described as the most sophisticated legislation on government and administration the world had ever seen.

. . . The Tang Code represented a climax in the development of law and legal scholarship in traditional China. It should be noted that although comprehensive legal codes had been enacted in the Qin and Han dynasties, the Tang code is the oldest surviving code today: all the codes previous to the Tang dynasty's have been lost except that there exists scattered quotations from them in other works. The Tang code is also significant in that it was the basis on which the later codes of the Song, Yuan, Ming and Qing dynasties were developed. The last dynastic code of traditional China was the Statutes and Sub-statutes of Great Qing (*Daqing lüli)* which was compiled in a definitive form in 1740. Commentaries on the code and casebooks were also produced during the Qing dynasty (1644-1911).

Major Periods of Chinese History

Western Zhou	c.a. 1027-770 B.C.
Spring and Autumn Period	700-476 B.C.
Warring States Period	475-221 B.C.
Qin Dynasty	221-207 B.C.
Han Dynasty	206B.C.-220A.D.
Sui Dynasty	581-618
Tang Dynasty	618-907
Song Dynasty	960-1279
Yuan Dynasty	1271-1368
Ming Dynasty	1368-1644
Qing Dynasty	1644-1911
The Republican Era	1912-1949
People's Republic of China	1949-Present

Glenn R. Butterton*, Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. 1081, 1108-11 (1996)

In its purest form, the thesis that China is fundamentally at odds with the Western Rule of Law tradition argues that Chinese society is not and essentially never has been devoted to or guided by the concept of law as it is known in the West. In place of Western-style law, the Chinese rely on a notion of personal relationship associated with the concept of *li*. The concept, though it is widely identified with the teachings of Confucius (551-479 B.C.), antedated him and appears to have been established in Chinese bureaucratic thought and the larger culture during the Western Zhou Period (1122-771 B.C.), if not before. What I will call the "Confucian" perspective turns on the concept of *li*, particularly as it stands in opposition to the concept of *fa*. But where the concept of *li* is identified with Confucius' work, the concept of *fa* is associated with the work of the Chinese Legalist philosophers and the harsh rule of the Qin dynasty in the third century B.C. Put in concise, if misleadingly simple, terms, *li* is associated with propriety and moral force, while *fa* is associated with physical force and law, though the concept of law here invoked includes only a limited subset of the meanings of the word "law" in English.

The concept of *li*, when narrowly construed refers to proper conduct, or politeness or etiquette; more broadly construed, it refers to the whole range of political, social and familial relationships that are the underpinnings of a harmonious Confucian society. Those who are guided by *li* stand ready to adjust their views and demands in order to accommodate the needs and desires of others, and they demonstrate this by yielding to others for the sake of harmony when confrontation and conflict arise. When all parties to a dispute endeavor to make concessions, the necessity for litigation and the promotion of individual rights are both avoided. Individual interests are subordinated to the interests of the group such that one who, to the contrary, insists on individual rights is very much at odds with *li* and with the group as well. "The proper disposition with regard to one's interests," writes Benjamin Schwartz, "is the predisposition to yield rather than the predisposition to insist." *Li* thus tends to lead naturally to compromise and mediation framed not in terms of a legal proposition or requirement but in terms of the circumstances of the participants. As Alice Tay puts it, "Chinese tradition personalizes all claims, seeing them in the context of social human relationships."

The "relationships" of Confucian society consist of connections between various types of political, social and familial roles. The roles are also normative, embodying prescriptions that tell those who play the roles how they ought to act when playing them. Thus, the role of father embodies a norm of proper fatherly behavior; the role of friend embodies a norm of friendship; and similarly, other norms are expressed for the other fundamental roles of wife, child, ruler, subject, elder brother and younger brother. Eventually, Confucianism reduced all relationships to a finite set of fundamental relationships that were presumed to be exhaustive, the so-called Five Relations which obtained between father and child, husband and wife, elder and younger brother, ruler and subject, and friend and friend. The *li* expressed the rules of conduct involved in all of these basic relationships, and, at bottom, the *li* were about the obligations between parties to relationships. Writes William Alford:

> The *li* in their most rigid pre-Confucian form clearly envisioned a hierarchical world, not only along class lines . . . but also along those of gender and age. They also, however, clearly provided that the person who enjoyed the loyalty or support of others by virtue of holding a superior position—be it socially, politically or in the family—owed a commensurate obligation to those providing that loyalty or support.

It is typically assumed that when government leans heavily on *fa* to reinforce its authority, it does so because it has no effective ability to rule by *li*. *Fa*, in contrast to *li*, is a penal concept; it is associated with punishment, serving to maintain public order through the threat of force and physical violence. The intellectual roots of *fa* are in the Legalist movement—a group of political philosophers primarily active in

the China of the fourth and third century B.C., who held that social order could only be maintained by the use of law as a tool for manipulating society. The Qin dynasty adopted the Legalist philosophy and effectively integrated and centralized the whole of the Chinese Empire in the third century B.C. (221-209 B.C.). The Qin ruled with the aid of a harsh penal law and brutal tactics, and developed a vast administrative law bureaucracy to manage the empire they had created. They thus shaped an image of the "rule of law" as brutal and rigid, and that image endured throughout the greatest period of Confucian influence from the first century A.D. to the development of civil-law criminal codes during the late nineteenth-century portion of the Qing dynasty (1644-1912 A.D.) and the beginning of the Republican period following the 1912 revolution, when the last incarnation of those codes was enacted. As for comparing *fa* to *li*, the Confucius of the Analects said "govern the people by regulations, keep order among them by chastisements, and they will flee from you, and lose all self-respect. Govern them by moral force, keep order among them by ritual and they will keep their self-respect and come to you of their own accord."

The penal character of Chinese law led to a general neglect, or at best a limited interest in, such civil law matters as contract, marriage, inheritance and . . . property rights. By contrast, acts of impropriety or criminal violence tended to upset social harmony which had to be restored through the punishment of the perpetrator. Generally, the law operated not between two individuals with the state acting as an intermediary, but rather between an individual and the state. Persons who had suffered injury brought complaints to the state which would then determine whether to act against the offending party; injured individuals never brought claims directly against offending parties nor could they secure legal assistance or expertise from lawyers since there was no formal legal profession that could aid individuals. Typically, an injured party brought a complaint to a magistrate at the district or county level who had wide ranging administrative responsibilities, including "the collection of taxes, the maintenance of public order, and the investigation, prosecution and adjudication of criminal matters". The magistrate, acting as judge and prosecutor, typically had no legal training, but was assisted by an unofficial secretary who was often familiar with the relevant laws and rules and was able to organize trials, propose sentences and write case reports.

The magistrate structure was the device through which the formal system of law figured into the life of the average Chinese, but it was quite distinct from the web of social relationships that gave expression to *li* and effectively shaped behavior in Confucian China. Those relationships included one's extended family and lineage; one's non-blood relatives or extended "family" acquired through friendship; the trade association, guild or crafts group to which one might belong; and the collection of sages in one's community or within one's social circles. The advice, opinions, criticism, mediation efforts and general normative influence of persons in those relationships tended to be the anchor of local society. If conflicts or controversies arose, they were resolved not by the meager formal legal apparatus provided by the Emperor, but by elements of the social court of Confucian society, through the functioning of what are sometimes called "extra-legal procedures". This orientation toward community norms rather than formal law also betrays a deep skepticism toward formal law, its methods of dispute settlement, and especially its outcomes. The extra-legal system, by contrast, had the pragmatic virtue of promising and delivering results since it had the respect of the participants and was built on a deep, local knowledge of the issues and disputants, as well as a powerful drive to restore and maintain community harmony.

NOTES AND COMMENTS

1. This casebook will use Confucianism throughout to denote the historical cultural influence on the Chinese legal system. Nevertheless, it is important to remember that the development of Confucian thoughts has not been static, but rather dynamic. The Confucianism in the Tang dynasty, for example, is quite different from the Confucianism in the Ming dynasty. For discussions of Confucianism

in the Chinese culture, see generally CONFUCIANISM AND CHINESE CIVILIZATION (Arthur F. Wright ed., 1964); CONFUCIANISM FOR THE MODERN WORLD (Daniel A. Bell & Hahm Chaibong, eds., 2003); XINZHONG YAO, AN INTRODUCTION TO CONFUCIANISM (2000). For discussions of Chinese philosophy and the Chinese mind, see generally THE PSYCHOLOGY OF THE CHINESE PEOPLE (Michael Harris Bond ed., 1986); UNDERSTANDING THE CHINESE MIND: THE PHILOSOPHICAL ROOTS (Robert E. Allinson ed., 1991).

2. Although the Chinese embraced *li* and had used *fa* only as the last resort, the use of laws and legal institutions was not abolished in imperial China. Indeed, *li* and *fa* coexisted, and the Chinese emperors had used both concepts to govern the country. Consider, for example, the following introductory commentary in Book I of the Tang Code:

> Virtue and morals are the foundation of government and education, while laws and punishments are the operative agencies of government and education. The former and the latter are necessary complements to each other, just as it takes morning and evening to form a whole day, or spring and autumn to form a whole year.

ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 14 (3d ed. 2004) (quoting the Tang Code translated in John C.H. Wu, *The Status of the Individual in the Political and Legal Traditions of Old and New China*, *in* THE CHINESE MIND 361 (Charles A. Moore ed., 1967)). This commentary, as Professor Chen put it, provided "the best summary of the final synthesis of Confucianism and Legalism, of the *li* and the *fa*, and of morality and law." *Id.*

For further discussion of *li* and *fa*, see GRAY L. DORSEY, JURISCULTURE: CHINA (1993); William P. Alford, *The Inscrutable Occidental? Implications of Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915 (1986); Benjamin Schwartz, *On Attitudes Toward Law in China*, *in* GOVERNMENT UNDER LAW AND THE INDIVIDUAL 27 (Milton Katz ed., 1957); Pat K. Chew, *The Rule of Law: China's Skepticism and the Rule of People*, 20 OHIO ST. J. ON DISP. RESOL. 43 (2005); Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate*, 19 B.U. INT'L L.J. 1, 33–34 (2001). For a collection and analysis of the Tang Code, see THE TANG CODE (Wallace Johnson trans., Princeton Univ. Press 1997).

3. As described above, *fa* is a penal concept and an instrument of social control. It is usually associated with punishment or the threat of force and physical violence. As Professor Daniel Chow noted, "As Confucianism viewed law primarily as a mechanism to maintain social control, the Tang Code and its successors were chiefly criminal in nature, which contributed to a general perception among the populace that law was something to be feared." DAN C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 50 (2003). Thus, he suggested that the Confucianist focus of law as a penal concept, along with its disdain for commerce, had made it difficult for China to develop a sophisticated and complex system of commercial and business laws. Chow also cited as factors the agrarian economy and the authoritarian rule that tended to keep the merchant class subordinate to the landed gentry and government bureaucrats.

Nevertheless, recent archival research seems to suggest that the Qing legal system involved a considerable amount of civil matters. As historian Philip Huang noted:

> The conclusion [that the Qing legal system was predominantly penal and to give little attention to civil matters], however, does not square with the documentary evidence. Archival case records have shown us that the Qing legal system in fact dealt regularly and frequently with civil cases. Perhaps one-third of a county magistrate's total caseload consisted of such cases. And when those cases reached a formal court session, magistrates generally adjudicated in accordance with the code. In those actions, they were usually guided by principles that, though positively spelled out, were nonetheless perfectly clear. The stipulation that nonpayment of a debt would be punished, for example, left no doubt of the debtor's obligation to repay the load as well as the creditor's right to repayment.

PHILIP C. HUANG, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA: THE QING AND THE REPUBLIC COMPARED 23 (2001).

4. Is *li* the same as concepts of ethics, morality, and natural law? As Professor Chen explained:

> The relationship between the *li* and the concepts of ethics, morality, and 'natural law' (in the Western sense) is highly problematic. It might be said that the *li* reflected and was based on ethical and moral standards; it is however doubtful whether these standards constitute a kind of natural law in the western sense, since the ancient Chinese did not perceive a clear distance, strong tension or sharp contrast between the moral requirements of nature and those prevailing in their society. On the contrary, it was believed that the *li* was established by these ages of antiquity, who were wise and virtuous enough to comprehend the requirements of heaven.

5. The Confucian order of social relationships is highly hierarchical. Consider the following examples:

> The penalties for the same act depended upon the social status of the actor or kinship relationship within a family. The most heinous crimes were those that subverted the social hierarchies in the case where an inferior in a relationship committed an offense against a superior. For example, a son who struck his parent could face death by decapitation whereas a parent who killed a child for disobedience might receive a light physical punishment only. A wife striking her husband would result in physical punishment to the wife whereas a husband striking the wife would receive punishment only if she was badly injured. Husbands could divorce their wives on any of seven grounds (including being disobedient to parents-in-law, inability to bear a son, physical disability, among others), but wives could not divorce husbands.

CHOW, *supra* note, at 47-48. Is this a fair system? Today, virtually all societies have recognized equality before the law. However, are there costs associated with embracing such equality? Why did the Chinese prefer a hierarchical system in the first place?

6. In Confucian China, the emperor—and, on very rare occasions, the Empress—derived his authority from the Mandate of Heaven. Such authority placed the emperor not only above his subjects, but also above the law. As Professor Chen noted, "[t]he People could only be the objects of the ruler's love and granting of favours. They could only hope and pray, but had no right to demand, that the ruler would be good and benevolent." CHEN, *supra* note, at 12. Should there be checks and balances? Does the Mandate of Heaven contravene what we today consider the rule of law (as compared to rule of men)? Does this "emperor" mentality explain why China, until lately, has only very limited judicial and procuratorial independence? Does it also explain why local protectionism remains a major problem outside the major Chinese cities? How does the authority of the emperor differ from that of a parliament or a constitution, discussed in the preceding sections?

7. Confucianism emphasized social relationships and duties, rather than individual rights. Should society sacrifice individual rights in its effort to maintain public order? Can we reconcile Confucianism with individual rights? Is Confucianism the reason, or one of the reasons, why China has limited protection of individual human rights? Are there any "Asian values" that warrant special exceptions to international human rights treaties?

For discussions exploring the common grounds and divergences between human rights and the Chinese culture, see, for example, DANIEL A. BELL, EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA (2000); CONFUCIANISM AND HUMAN RIGHTS (Wm. Theodore de Bary & Tu Weiming eds., 1998); WM. THEODORE DE BARY, ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE (1998); THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell eds., 1999); HUMAN RIGHTS AND CHINESE VALUES: LEGAL, PHILOSOPHICAL, AND POLITICAL PERSPECTIVES (Michael C. Davis ed., 1995).

For discussions examining the difficulties in establishing human rights protection in China, see ANN KENT, BETWEEN FREEDOM AND SUBSISTENCE: CHINA AND HUMAN RIGHTS (1993); ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS: THE LIMITS OF COMPLIANCE (1999). For an important collection of translated documents in China's twentieth-century human rights discourse, see THE CHINESE HUMAN RIGHTS READER: DOCUMENTS AND COMMENTARY 1900-2000 (Stephen Angle & Marina Svensson eds., 2002).

8. To some extent, the Confucian order is quite similar to Shari'a and other Islamic Law doctrines discussed in the next part of this casebook. Confucianism was not only limited to China, but had been subscribed to and practiced by people in Japan, Korea, and Vietnam. One, therefore, has to wonder how a country can reduce the tension between its own laws and some higher laws that might transcend national boundaries? Should one preempt the other? Should they co-exist? Who should be the arbiter of the conflict between the two? We will not be able to explore further this important question. However, this question will be addressed in the next part of the casebook.

C. Law in Modern China

Although China was able to maintain its legal system free of Western influence for thousands of years, its defeat in the Opium War in the mid-nineteenth century ended its seclusion from the international community. This war was particularly important, because it not only revealed the backwardness of China despite its earlier technological advances and decline of the Qing dynasty but also highlighted the many differences between the Chinese and Western trading systems. *See generally* JOHN KING FAIRBANK, TRADE AND DIPLOMACY ON THE CHINA COAST: THE OPENING OF THE TREATY PORTS 1842-1854 (1969).

To some extent, these differences were quite similar to the differences in the legal and economic systems about which foreign firms and investors in China complain on a day-to-day basis today. A comparison between what happens today with what happened in the eighteenth and early nineteenth centuries might provide some needed insight into the confrontation that eventually resulted in drastic changes in the Chinese economic, social, political, and legal systems.

Following its defeat in the Opium War, China signed the Treaty of Nanjing of 1842, which ceded the Hong Kong Island to Britain and forced China to open five coastal ports to Western trade. Subsequent defeats by the Western colonial powers subjected China to further "unequal treaties," which required the country to make significant economic and territorial concessions and to provide foreigners with extraterritoriality protection—protection that allowed foreigners accused of crimes against the Chinese to be tried in China according to their own laws by the representatives of their home government.

The latter was particularly troubling and humiliating to the Chinese. As Professor Chen noted:

> Even under international law as it stood at that time, this could be regarded as a violation of the sovereignty of China, but the Western powers justified their demands for extraterritoriality on the grounds that Chinese law was primitive, and, in particular, that Chinese criminal procedure was harsh and uncivilised, and there was no commercial law to protect the rights of the trading community.

CHEN, *supra* note, at 22. Indeed, the ability to remove extraterritorial jurisdictions was so important that China was eager to implement reforms to comply with the new bilateral treaties the country signed in the beginning of the twentieth century. Once the Chinese realized that legal reforms would not affect China's semi-colonial status, it lost interest in pursuing further reforms. *See* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 49 (1995); Yu, *Piracy, Prejudice, and Perspectives*, *supra* note, at 7. For a comprehensive discussion of the

development of extraterritoriality in China, see generally GEORGE W. KEETON, THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA (1969).

In the meantime, China undertook repeated modernization reforms in its desperate attempt to protect the country from further attacks and to regain independence and control of its sovereignty. While its early modernization efforts, known historically as the Self-strengthening Movement, focused mainly on superficial diplomatic, military, and industrial reforms, China soon realized the need for more drastic institutional reforms, especially after it lost the Sino-French War in 1885 and the Sino-Japanese War in 1895. Inspired by successful reforms introduced by Peter the Great of Russia and Emperor Meiji of Japan, Chinese reformers advocated radical reforms of the civil service examinations, education, and political institutions in the image of other countries. These reforms, along with later ones in the Republican era, partly explained why the Chinese legal system heavily borrowed from the Japanese legal system and the civil law tradition.

In 1911, a rebellion in Wuchang (now Wuhan) led to a revolution that resulted in the abdication of the Manchu Emperor, ending 268 years of rule under the Qing dynasty and more than 2000 years of imperial dynasties. Notwithstanding the founding of a new republic, China had yet to experience peace, order, or unity. As historian Immanuel Hsü pointed out, "the early republican years were characterized by moral degradation, monarchist movements, warlordism, and intensified foreign imperialism." IMMANUEL C.Y. HSÜ, THE RISE OF MODERN CHINA 493 (6th ed. 2000). Nevertheless, there were active legal reforms during the early Republican era, and these reforms are an important part of modern Chinese legal history, as the following excerpt will demonstrate.

For texts of modern Chinese history, see generally JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY (2d ed., 2006); HSÜ, *supra*; JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA (2001).

Albert H.Y. Chen, An Introduction to the Legal System of the People's Republic of China 23-24 (3d ed. 2004)

In 1904, a Law Reform Bureau was set up to translate foreign codes of law and to draft new laws for China. In 1908, an Imperial Constitutional Outline was promulgated. Various new codes of law, including codes on criminal law, criminal procedure, civil law, company law, commercial law, and an organic law of the courts, were drafted. The leading figure in these law reform activities was Shen Jiaben, who was appointed the minister for law reform. He had studied the laws of the Western nations, including the newly modernised Japanese law, and was dedicated to the improvement of China's traditional legal system. He advocated the abolition of cruel corporal punishments, the promotion of the idea of human rights, and the prohibition of the sale of persons as if they were property. A believer in ruling the country by law and an advocate of radical reform of the traditional legal order, he encountered strong opposition from conservative Confucianists.

The Qing empire was overthrown in 1911 before it began to implement the new laws which had been drafted. The provisional government which Sun Yat-sen established in Nanjing immediately after the 1911 Revolution promulgated a series of laws and regulations during the three-month period for which it was in power, but state power was then taken over by Yuan Shikai. During the 15-year period in which Yuan and successive governments of the Northern warlords were in power, various laws, particularly criminal legislation, were adopted, which were to some extent based on the draft laws produced in the late Qing law reform movement.

After the completion of the Northern Expedition and the defeat of the warlords, the Kuomintang (alternative translated as the Nationalist Party, hereinafter called the 'KMT') established a government of the Republic of China in Nanjing in 1928. In the period 1928-1935, a series of comprehensive codes of

law were promulgated. They were partly based on the European continental model (such as the laws of Germany, Japan and Switzerland), partly on the Anglo-American model, and also to some extent on the existing traditions of the late Qing and warlord periods. The laws were collectively knows as the Collection of the Six Laws (*Liufa Quanshu*). (Even today, these laws form the basis of the legal system in Taiwan.) A private legal profession also began to practice under the KMT regime.

However, the KMT government never established control over the whole of China because of the dual factors of domestic strife between the KMT and the Chinese communists and of military aggression on the part of Japan. (One writer points out that after two decades of KMT rule, basic-level courts had been established in fewer than one-fourth of all counties in China.) The Communist Party of China (hereinafter called the 'CPC') was founded in 1921 and had co-operated with the Kuomintang in the 'First Revolutionary Civil War' (1923-1927), until Chiang Kai-shek turned against and persecuted the communists in 1927. Since 1927, the Communist Party had tried to develop its own system of government and law in the rural 'revolutionary bases' under its control. For example, in 1931, they formed the Chinese Soviet Republic and promulgated a constitutional outline as well as some laws, largely modelled on enactments in the Soviet Union. A system of 'people's courts' were also established. Thus in works by mainland Chinese scholars on modern Chinese legal history, it is generally stated that the 'people's democratic legal system' had already been developing for a period of 22 years before the People's Republic of China was established in 1949. This period, which these scholars call the 'New Democratic Revolution', included the Second Revolutionary Civil War (1927-1937), the War of Resistance Against Japan (1937-1945), and the Third Revolutionary Civil War (1945-1949).

The laws introduced in these periods in the revolutionary bases were described in Chinese texts as 'anti-imperialist' and 'anti-feudal' in nature. Many were directed towards the overthrow of the 'feudal landlord class' in the rural areas. Different approaches were adopted in accordance with changing circumstances. At some stages the law provided for the reduction of land rent and interest so as to protect the peasants. At other stages, landlords' land was confiscated and given to the peasants.

NOTES AND COMMENTS

1. Consider the following quotes:

> *The political and civil laws of each nation must be proper for the people for whom they are made, so much so that it is a very great accident if those of one nation can fit another . . . . [The laws] must agree . . . with the customs [of the people].*
>
> —Montesquieu
>
> *For governing the people there is no permanent principle save that it is the laws and nothing else which determine the government. Let the laws roll with the times and there will be good government . . . . But let the times shift without any alteration of the laws and there will be disorder.*
>
> —Han Fei

Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 43 (2001). Do you agree with Montesquieu? Do you agree with Han Fei? (Han Fei is the leading proponent of Legalism.)

2. Professor Chen discussed how the late Qing and early Republican governments sought to transplant laws from foreign soils with only scant alteration. How effective are these transplants? Can they be sustainable? *See* ALFORD, *supra*, at 53 (noting the futility of legal reforms in late Qing and the republican period, because the transplanted laws presumed a legal structure and legal consciousness that did not exist in the country at that time). For an insightful comparison between the laws and legal practice in the early Republican era and those of the Qing dynasty, see HUANG, *supra*.

3. Should we distinguish between the transplant of legal concepts and the transplant of legal values? Consider, for example, the following:

> Historically, the term *fazhi*** referred specifically to the doctrine of the Legalists, who competed with the Confucianists for power in the pre-imperial era, two thousand years ago. These early Legalists believed that it was wise to rely on laws, which they viewed as penal rules, rather than ethics to run the state. But after Western political ideas such as democracy and the rule of law were introduced into China in the twentieth century, *fazhi*** has been used to refer as well to the Western notion of the rule of law. Therefore, *fazhi*** has taken on quite different meanings: on the one hand it carries the traditional Chinese sense of rule by law, and on the other hand the Westernized ideal of the rule of law.

Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, *in* THE LIMITS OF THE RULE OF LAW IN CHINA, *supra*, at 20, 24.

D. Law in Communist China

The following excerpt provides a brief history of the development of the socialist legal system since the establishment of the People's Republic of China in October 1949. Through a discussion of the rapidly changing circumstances and the various periods of political turmoil and social upheavals, it explains why China failed to develop the conditions that are needed for a new legal system to take root. Indeed, at the height of the Cultural Revolution, China became a lawless society. Legal institutions were paralyzed or dismantled, and law schools were closed down. The socialist legal system was not revived until after the death of Mao Zedong, when party leaders pushed for the Four Modernizations and re-opened the country to foreign trade. For an insightful personal account of the Great Proletariat Cultural Revolution, see JUNG CHANG, WILD SWANS: THREE DAUGHTERS OF CHINA 273-443 (1991).

Albert H.Y. Chen, An Introduction to the Legal System of the People's Republic of China 25-37 (3d ed. 2004)

Looking back at [the history of the formal construction of a new legal system after the establishment of the PRC in October 1949], a commonly expressed assessment by mainland Chinese scholars is that while significant achievements have been made, painful mistakes have also been committed at some stages; the journey has not been an easy and straightforward one. An outline of major developments is provided below.

The first step in the construction of the new legal system was the abolition of the existing one which was considered to have supported 'semi-feudal and semi-colonial rule'. The Instructions on the Abolition of the Collection of the Six Laws of the Kuomintang and the Confirmation of the Judicial Principles of the Liberated Areas, issued by the Central Committee of the Communist Party of China in February 1949, declared the abolition of all existing laws of the Kuomintang regime. This approach towards existing laws was confirmed by the Common Programme adopted by the Chinese People's Political Consultative Conference in September 1949. The document was jointly produced by the CPC and the 'democratic parties' and served as the provisional constitution of the country until 1954.

The period 1949-1953 was regarded by mainland scholars as the first stage in the 'transition from New Democracy to Socialism'. It was characterised by several mass movements initiated by the Party. Such mass campaigns were conceived at the level of the top Party leadership and involved mobilisation of

'the masses' (the people) to act in accordance with particular Party policies. They were considered necessary to enhance the 'political awakening' of the masses, to break down the old social order, and to establish in its place a new revolutionary order. During the campaigns, ad hoc 'people's tribunals', a kind of revolutionary court were set up, and 'mass trials' were held all over the country. In these trials, the accused were subjected to verbal and physical attacks and cruel and inhuman treatment; they had no right to defend themselves. Feelings of hatred on the part of the assembled crowds were stirred up; they often called for the death penalty and for no mercy for the accused. The number of 'class enemies' executed in this way ranged from 800,000 by Mao Zedong's own admission in 1957 to several million as estimated by scholars. Many more were sentenced to long terms of 'reform through labour'. The practice of mass campaigns and mass accusation and struggle meetings was to become a common feature of Chinese political life until the death of Mao in 1976.

The mass campaigns of the early 1950s included the Land Reform Movement of 1949-1951 to attack the classes of landlords and rich peasants, the 1950 Movement to Suppress Counter-revolutionaries, and the 1952 Movement Against the Three Evils (*sanfan*) and Movement Against the Five Evils (*wufan*). The 'Three Evils' were corruption, waste and bureaucratism in Party and government organs and in state enterprises. The 'Five Evils' were bribery, tax evasion, theft of state property, cheating on government contracts and stealing state economic information, all of which were supposed to be widespread at the time among private industrial and commercial enterprises. *Wufan* was therefore mainly directed towards the 'national bourgeoisie' who at the time were still in control of some industrial and commercial enterprises. In 1952-1953, there was a movement on a smaller scale, known as the Judicial Reform Movement, during which about 80% of judges formerly appointed by the Kuomintang government were removed.

The mass movements were guided in their initial stages by Party policies rather than by any formal legal instruments. However, some of the policies were later codified into law. Important laws introduced before 1954 included the Land Reform Law, the Regulations on the Punishment of Counter-revolutionaries, the Regulations on the Punishment for Corruption, the Marriage Law, the Trade Union Law, and the Outline for Regional National Autonomy. Other laws and decrees were also issued relating to matters such as state institutions, finance and banking, taxes, trade, industry, labour protection, communications, transport, and culture, though many of the legal rules were of a provisional nature.

The period 1953-1956 was described by Chinese scholars as the second stage in China's transition from 'New Democracy' to 'Socialism'. For legal system building, this was a period of planned development and rapid growth. One foreign observer even described it as, relatively speaking, a 'golden age' of law in the PRC. Just as the Soviet economic model was adopted for the PRC's economy, it was also decided to develop a Soviet-style legal system. It should be noted in this regard that in the 1950s, the principle of 'socialist legality' was already fairly well-established in the Soviet Union and Eastern Europe, despite the traditional Marxist theory that law would 'wither away' in the ideal community society. . . .

A highly significant step in the development of the legal system of the young Chinese republic was the promulgation by the new National People's Congress in 1954 of the first Constitution of the PRC. The extent of Soviet influence on Chinese legal drafting in the 1950s may be illustrated by reference to President Liu Shaoqi's speech on the draft constitution:

> When the Constitution Drafting Committee worked on the draft, it used as reference materials the earlier and later constitutions of the Soviet Union and the constitutions of other people's democracies. Obviously, the experience of the advanced socialist countries headed by the Soviet Union has been of great assistance to us. Our draft constitution combines Chinese experience and international experience. Our draft constitution is not only the product of the people's revolutionary movement in this nation, but is also a product of the international socialist movement.

The same first session of the first National People's Congress passed five basic laws relating to the structure of the state: the Organic Laws of the National People's Congress, the State Council, the People's Courts, and the People's Procuratorates, and the Organic Law of Local People's Congresses and Local People's Councils. The framework of the PRC's constitutional and legal system was thus established.

Shortly after the adoption of the Constitution, a climax was reached in what was known as the 'socialist transformation' of agriculture, handicrafts, and capitalist industry and commerce. Rules and regulations relating to these matters were therefore introduced. Other laws and decrees in the economic field were enacted in connection with the implementation of the First Five-Year Plan (1953-1957). In the field of criminal procedure, the Regulations on Arrest and Detention were introduced in 1954. Work on the drafting of basic laws such as the codes of criminal law, civil law and criminal procedure was also begun.

Much progress in legal system building was made in this period, not only in the field of law-making but also in the construction of legal institutions and the development of legal professional practice. The judicial and procuratorial systems were consolidated; basic principles were established such as the equality of citizens before the law, the independent exercise of judicial and procuratorial powers, and handling cases in accordance with the facts and the law; institutions such as public trials, the use of people's assessors in trying cases, the participation of defence lawyers in criminal proceedings and the review of death sentences were developed. At the same time, law schools were set up and legal publications multiplied; lawyers began to practice; legal educational propaganda was promoted among the masses.

Yet it cannot be said that the period 1954-1956 was one of complete peace and unity. In 1955-1956 a second movement against 'counter-revolutionaries' was launched—the campaign against the 'Hu Feng counter-revolutionary clique', which was accompanied by a general campaign against alleged counter-revolutionaries in various sectors. Hu Feng was a poet and literary theorist; he was purged after he presented a report to the Central Committee of the Party criticizing the rigid standards imposed by the Party on literary creation and demanding greater literary and artistic freedom. The campaign against Hu marked the beginning of a series of large-scale persecutions of intellectuals in the next two decades.

The Party policy of strengthening the socialist legal system, also called the 'people's democratic legal system', was confirmed at the Eighth National Congress of the CPC in September 1956. The Congress took the view that socialism had now been basically established in China, and the main contradiction existing in Chinese society was no longer that between the proletariat and the capitalists, but rather between the people's need for rapid economic and cultural development and the failure of the existing economic and cultural conditions to fulfil that need. The main task ahead was therefore the development of the productive forces of society.

Regarding the legal system, Dong Biwu, President of the Supreme People's Court, admitted in his speech that the existing legal system was weak, and discussed the possible causes for such weakness—the traditional feudal-imperial heritage, the fact that the Chinese communist movement was historically a revolutionary movement with the CPC being an organisation outlawed under the legal system of the KMT regime, and the fact that many cadres in the legal and judicial fields of the PRC were new and inexperienced. The Congress therefore declared that one of the most pressing tasks of the country was to codify the laws systematically, so as to develop a more complete and orderly legal system and to safeguard the democratic rights of the people; every person in the country must understand that as long as he or she did not violate the law, his or her rights as a citizen would be protected; all government agencies and organs must strictly abide by the law, and the public security organs, procuratorates and courts must thoroughly carry out the division of responsibility and mutual restraint called for by the principle of legality. Mainland Chinese scholars now believe that the Eighth Party Congress correctly determined the direction of socialist construction and legal system development.

The year 1957 marked another turning point in PRC history. Earlier, in 1956, the Party had announced the new policy of 'letting a hundred flowers bloom and a hundred schools contend', and encouraged all people to help 'rectify' the Party by expressing their opinions freely and offering criticisms on matters such as Party policy. This 'Hundred Flowers Movement' evoked strong criticisms from intellectuals of the Party's bureaucratic practices and repressive policies, the excesses and abuses in the previous mass campaigns, the defects of the existing legal system, and violations of legality. The Party responded by launching the Anti-Rightist Campaign to purge its critics both inside and outside Party ranks. Hundreds of thousands of people were designated as 'rightists' and sent to 'rehabilitation' farms for 're-education through labour' without recourse to any formal court procedure.

Many jurists, lawyers and judges, who had been among the more outspoken critics of the regime during the Hundred Flowers Movement, were the victims of the Anti-Rightist Campaign. They were, for example, accused of 'using the law to oppose the Party', or attempting to reject Party leadership by stressing the independent administration of justice. After 1957, the prestige of legal institutions such as the courts and the procuratorates fell sharply. Lawyers ceased to practice, the publication of legal materials declined, the law schools switched to teach politics rather than law. Many courts, particularly those at lower levels, were merged with the corresponding public security organs and procuratorates. In 1959, the Ministry of Justice and the organs of judicial administration under it were abolished. All the following principles or practices were denounced as bourgeois and reactionary; judicial independence, procuratorial independence and the role of the procuratorates in legal supervision, equality before the law, the emphasis on procedural regularity, the system of defence lawyers in criminal trials, the principles of 'no criminal punishment without violation of a specific law' (*nulla poena sine lege*), correspondence or proportionality between a crime and the punishment for it, socialist humanism in penal policy, the heritability of bourgeois legal ideas, the presumption of innocence on the part of the accused, and the idea of human rights. The system of public trial virtually came to an end.

In the early 1960s, however, there appeared to be a slight abatement of the extreme leftist thinking and practices of the late 1950s in the legal as well as economic arenas. For example, in March 1962, Mao Zedong himself declared that there was a need to exact both criminal and civil laws. In 1962-1963, drafting work on the codes of criminal law and criminal procedure, already begun in the 1950s, was recommenced. There were also relative increases in the numbers of legal educational institutions and law students in the country.

The next stage in PRC political and legal history began in 1966 when Mao Zedong launched the 'Great Proletarian Cultural Revolution' to purge all 'counter-revolutionaries', including the 'revisionists' and 'capitalist roaders in the Party'. Although the precise causes leading to the Cultural Revolution are complex and obscure, a widely held view is that it stemmed from the power struggle at the high echelons of the Party between the 'pragmatists' led by Liu Shaoqi, who wanted to modernise China by methods of rational management with emphasis on technical and administrative skills, and the 'radicals' led by Mao himself, who stressed the primacy of ideological commitment and revolutionary zeal, and advocated continuous revolution and unending class struggles to achieve the utopian goal of the classless society. By relying on his personality cult and appealing to the anti-bureaucratic instinct of the masses, Mao was able to mobilise millions of 'Red Guards'—mainly students and youths—all over the country to support his cause. The result was three years of civil anarchy and a reign of terror in which, according to some estimates, nearly a 100 million people were subject to persecution or victimisation in one way or another. (According to the official materials published in connection with the subsequent trial of the 'Gang of Four', 720,000 persons were directly persecuted during the Cultural Revolution, and 34,000 among them lost their lives.)

During the Cultural Revolution, local Party committees and administrative organs were partly dismantled. Ad hoc groups were set up to carry out Mao's instructions. Many cadres and officials, including those at high levels, were accused of being revisionists or reactionaries, 'dragged out' and 'struggled against' by the Red Guards. An uncountable number of people were randomly branded as counter-revolutionaries and also 'struggled against'; their family members were subject to severe

discrimination. And rival factions of Red Guards, each claiming ideological purity and questioning that of others, fought savagely among themselves.

The 'struggles' of the Cultural Revolution took the forms of 'struggle meetings', arrest, detention, interrogation, torture, imprisonment, exile to labour reform, or execution. The 'struggle meetings' were inhuman and cruel; the accused persons would be shouted at, denounced, insulted, and beaten to death or until they confessed that they were counter-revolutionaries. They were often forced to wear dunces' caps and other signs or labels describing their 'reactionary crimes'; after the struggle sessions they were usually paraded and further humiliated in the streets. The psychological maltreatment was therefore as severe as the physical; gross violations of the human body and of human dignity occurred at the same time. Many victims could not endure this maltreatment and committed suicide or became insane. Apart from attacking persons, the Red Guards also ransacked homes for evidence of counter-revolutionary activities, confiscated property, and destroyed most books or paintings they found as objects of decadent, bourgeois or feudal culture.

It has thus been pointed out that what China went through during the Cultural Revolution was 'like the holocaust'. The brutalisation of the human spirit at the time was particularly severe. As the mainland Chinese philosopher Wang Ruoshui pointed out, in the Cultural Revolution era it was assumed that revolution and humanism were antithetical; humanism was non-revolutionary and bourgeois, and revolutionism ought to be inhuman. Thus cruelty towards class enemies—called *nuigui sheshen* ('freaks and demons')—was glorified as 'revolutionary action' and praised as a moral virtue. Indeed, according to this twisted logic, the more inhuman and cruel the manner in which one behaved towards 'class enemies', the more one showed the firmness of one's 'proletarian class standpoint'. Human rights and dignity were therefore deliberately trampled upon; the theory and practice of class struggle eroded the traditional values of benevolence, compassion, sympathy and trust and brought into being a society filled with suspicion, hostility and the revolutionary 'virtue' of 'class hatred'. The legitimacy of a sphere of private life for each individual was also denied; every single act done or word uttered could be examined and used to incriminate the actor or speaker as a counter-revolutionary.

The demise of the legal system in the Cultural Revolution period was not merely an incidental side-effect of the fanatic and violent political campaigns, mass movements and social upheavals associated with the intensive struggles of those eventful days. The legal system was one of the targets of deliberate attack by the radicals. The very idea of law was discredited and held in contempt. The 'counter-revolutionaries' within the Party were accused of attempting 'to fetter with law the instruments of dictatorship hand and foot, and prevent the masses of the people from daring to interfere with counter-revolutionary activities'. In 1967 the *People's Daily*, the Party's leading newspaper, published an article entitled 'In Praise of Lawlessness', denouncing law as a bourgeois form of restraint on the revolutionary masses. The charge launched against the legal system was that it was a 'shackle' and a 'strait-jacket' holding back the mass movement. Legal construction in the USSR was attacked as a kind of revisionism. The Chinese people were urged to be guided by Chairman Mao's thought instead of by law. Under slogans such as 'smash the Public Security, the Procuratorates and the Courts', or 'the more chaos, the better', legal institutions were attacked and paralysed or dismantled. Law schools were closed down. Members of the legal community were persecuted or forced to shift to other kinds of work. In short, law neither existed as an academic discipline nor as a rational mechanism of social control. It was struggled against and purged. Here, then, was one of those tragic moments in human history when the jurisprudential question as to whether a legal system exists or not, or the sociological question as to the distinction between the state of mature and the state of society, are not merely academic but become practical problems having a direct bearing on the physical and mental survival of significant portions of humanity.

In the less chaotic periods of the Cultural Revolution era, the courts were combined with the public security organs, and both were put under military control. Decisions on criminal cases were almost invariably subject to the approval of the local Party committee. In some periods and localities, civil suits were not entertained by the judicial system at all. It was not until 1972 that the court system was

gradually re-established. The procuratorates were formally abolished in 1969, and were not resurrected until 1978.

After the chaos and disorder of the Cultural Revolution largely came to an end around 1969, the radicals' domination of the Party and the government continued. Class struggle ideology, mass campaigns and repressive policies remained features of the nation's political life until the death of Mao Zedong in September 1976. In the following month, the so-called 'Gang of Four' were arrested and the pragmatists (the leading figure among whom was Deng Xiaoping) began their takeover of state power. Fundamental policy changes were initiated by the new leadership. As far as the legal system was concerned, an important development was the convening of the first session of the Fifth National People's Congress in February 1978. At the meeting, a new Constitution was enacted, and both Hua Guofeng (then CPC Chairman and State Council Premier) and Ye Jianying (then Chairman of the Standing Committee of the National People's Congress) spoke about the need to strengthen the socialist legal system.

The success of Deng Xiaoping and his followers in consolidating their authority was confirmed at the watershed third plenary session of the Eleventh Central Committee of the CPC held in December 1978. In a speech delivered at the preparatory meeting for the session, Deng discussed the question of the legal system in a much-quoted passage:

> In order to safeguard people's democracy, the legal system must be strengthened. Democracy needs to be institutionalised and legalised so that such a system and such laws would not change merely because of a change of leadership or a change in the leaders' views and attention. The present problem is that the laws are incomplete; many laws have not yet been enacted. Leaders' words are often taken as 'law', and if one disagrees with what the leaders say, it is called 'unlawful'. And if the leaders change their words, the 'law' changes accordingly.

The communiqué of the Eleventh Central Committee issued after its third plenary session declared that since the exploiting class in China had basically been eliminated, class contradiction was no longer the dominant contradiction in Chinese society; that economic construction instead of class struggle was now to be emphasised (though the latter still existed within certain limits); that the past practice of mass political campaigns was to be abandoned; and that socialist democracy and a socialist legal system out to be developed in the words of the communiqué:

> In order to safeguard people's democracy, it is imperative to strengthen the socialist legal system so that democracy is systematised and written into law in such a way as to ensure the stability, continuity and full authority of this democratic system and these laws; there must be laws for people to follow, these laws must be observed, their enforcement must be strict and law breakers must be dealt with. From now on, legislative work should have an important place on the agenda of the National People's Congress and its standing Committee. Procuratorial and judicial organs must maintain their independence as is appropriate; they must faithfully abide by the laws, rules and regulations, serve the people's interests, keep to the facts, guarantee the equality of all people before the people's laws, and permit no one to have the privilege of being above the law.

Just as the sabotage of the legal machinery was deliberately engineered by the radicals in the Cultural Revolution days, the return to the idea of the socialist legal system (and the related idea of socialist democracy) was the result of a conscious policy choice of the post-Mao leadership. . . .

. . . .

Since 1979, much work has been done in China to rebuild a legal system. In the period 1979-2003, approximately 1,200 items of laws and regulations have been enacted, including nearly 400 major codes, laws or law-related decisions made by the National People's Congress or its Standing Committee. A new Constitution, the fourth one of the PRC, was promulgated in 1982, affirming the idea of legality and related concepts and principles. In the new constitution of the CPC adopted in 1982, it is also

expressly provided that the Party must operate within the scope of the state constitution and state law. Progress has also been made in legal institution building. For example, legal education has been revived and lawyers have once again begun to practice. By 2003, there were 120,000 lawyers in mainland China. Legal textbooks, periodicals and newspapers have appeared in increasing quantity. Legal educational propaganda has become an integral part of the day-to-day output of the official propaganda machinery, encouraging people to obey the law and to understand their legal rights. The supreme People's Procuratorate was re-established in 1978, followed by the restoration of procuratorates at local levels. The systems of courts and procuratorates have been strengthened. The Ministry of Justice was re-established in 1979. The slogans of 'rule the country by law' and 'rule the country according to law' have been increasingly used. In 1999, the Constitution was amended and the principle of 'ruling the country according to law and constructing a socialist *Rechtsstaat*' (ie 'rule-of-law state') was written into the Constitution.

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. . . [G]iven the historical context as described [here], the progress made in the construction of the Chinese legal system since 1979 has indeed been significant, and has been so recognized by foreign observers. For example, Professor Stanley Lubman of Stanford University described 'the accomplishments of the legal reform to date' as 'impressive': 'law has gained more importance than it has ever progressed in Chinese history', and 'new conceptions of legal rights' have been generated. Professor William Alford of Harvard University described China's efforts in legal system building since 1979 as an 'event of epic historic proportions', and pointed out that 'no other major modern society has endeavoured in so short a time to reconstruct its legal system in so extensive and novel a fashion'. Professor Randall Peerenboom of UCLA suggested that 'China's legal system is in the midst of a transition to a more law-based system': 'there is considerable direct and indirect evidence that China is in the midst of a transition toward some version of rule of law that measures up favourably to the requirements of a thin theory' of the rule of law.

NOTES AND COMMENTS

1. Following the end of the Cultural Revolution, why did the leaders of the Chinese Communist Party choose to return to the Socialist legal system? Was it because of its rehabilitative function—*i.e.*, it would help restore confidence, political stability, and social order in the country? Or was it because of its preventive function—*i.e.*, it would prevent future chaos, like that experienced during the Cultural Revolution? *Cf.* CHOW, *supra*, at 58 ("In a nation such as the United States, law serves to control and protect its citizens against the blind and fanatical adherence to authority. Nothing approaching the Cultural Revolution could have ever transpired in the United States because of, among other reasons, a commitment to law and legal process."), *with* Vivian Grosswald Curran, *Racism's Past and Law's Future*, 28 VT. L. REV. 683, 685 (2004) ("Law's performance generally has been dismal: the judiciaries of nation after nation throughout time have enabled governments to discriminate against, persecute, and even massacre portions of populations." As Professor Curran noted, the laws and the judiciaries in Hitler's Germany and Petain's France did not prevent atrocities, but rather "enabled a reign of terror." *Id.* at 705.

2. Professor Chen synthesized Professor Chow's and Curran's arguments in what he described as "dialectic of the language of liberal legalism":

> the ideas and ideals proclaimed by the law and legal systems can be a double-edged sword. On the one hand, they may appear just and reasonable but in fact clothe a reality of injustice and oppression . . . . On the other hand, rulers who make use of legitimating devices such as the rule of law may have to pay the price of letting their powers be

> fettered and constrained at least to some extent by legal rules and procedures. Such constraints are by no means worthless. In minimizing possible abuses of naked arbitrary power, they do achieve an 'unqualified human good'. Furthermore, liberal legal language may also be relied on, referred to and quoted by the exploited and oppressed to legitimate *their* own claims and express *their* aspirations and hopes. They can point to the gap between the ideals proclaimed in constitutional and legal documents and the different social reality.

ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 4 (3d ed. 2004). Do you agree with Professor Chen?

3. What about the instrumental function, *i.e.*, the legal system provides an important tool to foster economic development? Internally, laws can introduce individual responsibility and accountability while clearly defining property rights. Externally, they can attract foreign investors by providing them with the certainty and predictability needed to make long-term investment decisions. As Professor Chen noted:

> In more and more areas of the Chinese economy, the new policy has been to substitute a market order for bureaucratic planning and administrative directions. This decentralisation of economic decision-making power, and the introduction of individual responsibility and accountability on the part of productive units, were accompanied by an emerging need for an effective legal framework in which property or quasi-property rights are clearly defined, and under which economic entities with their newly acquired freedom can bargain and interact with one another as regards such rights on a contractual rather than an administrative basis. At the same time, as the PRC government attempts to attract foreign investment to participate in industrial development in China and develops more trade relationships with other countries, there also exists a growing demand for a respectable and trustworthy legal system which can ensure that the rights and interests of foreign parties will be fully and effectively recognised, protected and enforced.

CHEN, *supra* note, at 34-36.

Nevertheless, one has to wonder whether China at that time was ready for a wholesale introduction of Western legal reforms, as such reforms sit uneasily with the country's command economy. In fact, what developed in the early 1980s was what commentators have termed "socialist legality with Chinese characteristics." Many of the compromises made in the early legislative reforms were not removed until China moved from a command economy to today's socialist market economy. *See* Peter K. Yu, *From Pirates to Partners (Episode II): Protecting Intellectual Property in China in the Twenty-First Century*, 55 AM. U. L. REV. 901 (2006) [hereinafter Yu, *From Pirates to Partners*]. Today, "red capitalists" were among members of the Chinese Communist Party, and the Chinese Constitution stipulates explicitly that "[c]itizens' lawful private property is inviolable." XIAN FA art. 13 (1982) (amended 2004) (P.R.C.).

4. Commentators generally agree that the above three reasons are all attributes to the conscious choice by the post-Mao's leadership to reinstate the legal system. As Professor Chen summarized:

> First, the weakness of the legal system and, in particular, the lack of acceptance of the authority of law and the concept of fidelity to law, has been identified as a partial cause of, and a condition precedent for, the radicals' successful usurpation of political power and their large-scale persecution of alleged 'rightists' and 'counter-revolutionaries' during the Cultural Revolution. Law and the legal system must therefore be emphasised to prevent the recurrence of the errors and tragedies of that period. . . .
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> . . . .
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> A second factor, which is closely related to the first, was the feeling that law and legality can contribute to political stability and social order, and afford protection to the

> basic rights of the citizen. All these were believed to be what China deeply and urgently needed to have after the Cultural Revolution era. . . .
>
> Thirdly, the new economic policy of China's pragmatic leadership necessitated an increasingly important role being played by the legal system. As declared at the National Conference on Political-Legal Work in July 1982, the main task of political-legal work in the new era was to contribute to economic development and socialist modernisation.

CHEN, *supra* note, at 34-36. As Professor Chow noted, "[u]nderstanding these reasons will . . . be useful in assessing the extent of China's political commitment to the legal system, and the extent into which the rule of law has taken root in China." CHOW, *supra*, at 57.

E. Post-WTO China and the Rule of Law

On December 11, 2001, China became the 143rd member of the World Trade Organization. In the wake of its accession, it undertook massive legal reforms in almost every single area that is somewhat related to international trade. Because the WTO agreements sought to use one-size-fits-all templates to harmonize trade laws of all the WTO member states, many of the laws that have now been transplanted on China's soils might not be responsive to the local conditions. Given the woeful failure of the legal transplant of foreign laws by the late Qing and early Republican authorities, one has to wonder how effective and sustainable are these new transplants are.

For discussions of China's accession to the WTO, see generally CHINA AND THE LONG MARCH TO GLOBAL TRADE: THE ACCESSION OF CHINA TO THE WORLD TRADE ORGANIZATION (Sylvia Ostry et al. eds., 2003); CHINA AND THE WORLD TRADING SYSTEM: ENTERING THE NEW MILLENNIUM (Deborah Z. Cass et al. eds., 2003); China in the World Trading System: Defining the Principles of Engagement (Frederick M. Abbott Ed., 1998); CHINA'S PARTICIPATION IN THE WTO (Henry Gao & Donald Lewis eds., 2005);.GORDON G. CHANG, THE COMING COLLAPSE OF CHINA (2001); NICHOLAS R. LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY (2002); SUPACHAI PANITCHPAKDI & MARK CLIFFORD, CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE (2002); Symposium, *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1 (2003).

Moreover, as the debate about *li* and *fa* reminds us, there are considerable differences among the members of the international community concerning the ultimate goal of the mandatory dispute settlement process used in the WTO. While many consider the process a legalistic, rule-oriented system, others see that it facilitates negotiation and conciliation. *See* Yu, *From Pirates to Partners*, *supra* note. Indeed, article IV of the Marrakesh Agreement Establishing the World Trade Organization stated specifically that the WTO "is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations." Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1197 (1994). One, therefore, has to wonder whether the debate between the Confucianism and Legalism provides insight into China's post-WTO future, and, more interestingly, whether China's WTO membership will bring the millennia-old debate to the international trading forum. The latter, perhaps, may provide another reason why we need to study Chinese law in the first place, thus bringing us back to where we started in this Chapter.

NOTES AND COMMENTS

1. The WTO agreements include considerable "rule of law" elements. But what does "rule of law" mean? Is there a universal definition? Is it good for every country? For discussions of the development of the rule of law in China, see, for example, RONALD C. BROWN, UNDERSTANDING CHINESE COURT AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS (1997); CHINA'S LEGAL REFORMS (Stanley Lubman ed., 1996); DOMESTIC LAW REFORMS IN POST-MAO CHINA (Pitman B. Potter ed., 1994); RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW (1994); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); MURRAY SCOTT TANNER, THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES AND DEMOCRATIC PROSPECTS (1999); THE LIMITS OF THE RULE OF LAW IN CHINA, *supra*.

2. Commentators have distinguished between "rule of law" and "rule by law":

> The difference between *rule by law* understood instrumentally and the *rule of law* as a political and normative theory has profound implications for the future of law in China. The Chinese government seems to be moving strongly toward adopting rule by law in the instrumental, positivist sense of creating consistent and uniform "rules of the game" needed for a modern market economy. Contracts are becoming more reliable, and corporations can be established on firmer ground than previously.

Orts, *supra*, at 106. Is "rule of law" practiced in China today? Or is it "rule by law"? Can the latter ultimately lead to what Professor Orts suggest as the "institutional reform to build a normative rule of law"? Will it? Is "rule of law" a condition precedent for democracy and civil society? *See id*. at 106-10 (discussing future prospects for the rule of law in China).

3. Although the rule of law ideal is central to Western legal tradition, it remains a deeply contested concept even in the Western World. *See* Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT'L L. 471, 472 (2002). Professor Peerenboom separated "rule of law" theories into two general types—"thin" and "thick":

> A thin theory stresses the formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic. Although proponents of thin interpretations of rule of law define it in slightly different ways, there is considerable common ground, with many building on or modifying Lon Fuller's influential account that laws be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.
>
> In contrast to thin versions, thick or substantive conceptions begin with the basic elements of a thin conception. Thick versions then incorporate elements of political morality such as particular economic arrangements (free market capitalism, central planning, and so on), forms of government (democratic, single party socialist, and so on) or conceptions of human rights (liberal, communitarian, collectivist, "Asian Values," and so on).
>
> Thus, the liberal democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of

> human rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights.

Peerenboom, *supra*, at 472.

4. In Jerome Cohen's pioneering study on the Chinese criminal procedure, he recounted his exchange in Hong Kong with "a London-educated Chinese barrister who practices in Hong Kong and is known there as a principal, if unofficial, spokesman of the People's Republic of China":

> "The trouble with you Westerners," the man said, wagging his finger at me before I could sit down, "is that you've never got beyond that primitive stage you call the 'rule of law.' You're all preoccupied with the 'rule of law.' China has always known that law is not enough to govern a society. She knew it twenty-five hundred years ago, and she knows it today."

JEROME A. COHEN, THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION 4 (1968). Is rule of law an end in itself? Or is it a means to an end—if so, what would be that end? Is rule of law really the "primitive stage" as the remark suggested? What would be the next stage, if any, once a state gets past rule of law? Why would Western legal traditions remain preoccupied with the "rule of law" to the exclusion of other normative or social structuring forces?