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THE SOCIALIST LEGAL SYSTEM WITH CHINESE CHARACTERISTICS: CHINA'S DISCOURSE FOR THE RULE OF LAW AND A BITTER EXPERIENCE

*Mo Zhang**

ABSTRACT

The rule of law both as a legal concept and as a practice in China has become the subject of great attention. There is increasing international pressure on China to build a legal system that is premised on the “rule of law.” Domestically, the three-decades of economic reform generated a growing demand for the production of a legal system that will secure justice and restore the public confidence in the judiciary. China’s commitment to the rule of law is implicated by its effort to develop a socialist legal system that maintains Chinese characteristics.

The specifics of what is a socialist legal system and what constitutes Chinese characteristics in terms of the rule of law are subject to further debate. The Confucian heritage rooted legal tradition and the single party ruling system have significantly shaped the legal landscape of the country, making the route to the rule of law in China a long and thorny one. Despite China’s socialist laurel, the civil law influence apparent since the late 19th century remains highly visible in the modern Chinese legal system.

China is determined to develop a legal system under the banner of the rule of law that is consistent with its unique philosophy of governance. Whatever difference there may exist between China’s rule of law discourse and the rest of the world’s, the development of a rule of law in China that incorporates Chinese characteristics signals China’s determination to move the country toward a sound legal system meaningful for China and for the international community as well. Among many challenges, however, the biggest one is perhaps how to reconcile the role of the ruling communist party and the “rule of law.”

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I. INTRODUCTION

Beginning with the onset of vast economic reform in 1979, China has attempted to build its legal system according to the rule of law theory. In 1997, the ruling Communist Party of China ("CPC") made it a goal to establish a "socialist legal system with Chinese characteristics" by 2010.¹ This goal was intended to serve a two-fold purpose: to demonstrate China's commitment to the rule of law and to differentiate China's legal system from the rest of the world's.² This

1. Jiang Zemin, Report at the 15th National Congress of the CPC: Hold High the Great Banner of Deng Xiaoping Theory for an All-round Advancement of the Cause of Building Socialism with Chinese Characteristics to the 21st Century, Sept. 12, 1997, <http://news.sina.com.cn/c/2002-10-22/140477724.html>. For an English translation, see <http://www.fas.org/news/china/1997/970912-prc.htm>.

2. See SUN GUOHUA, A STUDY IN THE SOCIALIST LEGAL SYSTEM WITH CHINESE CHARACTERISTICS, CONCEPT, THEORY AND STRUCTURE 24-26 (China Democracy and Legality

commitment, however controversial, helped China gain its membership in the World Trade Organization (“WTO”) in December 2001.³

In early 2008, the Chinese Government proclaimed that such a legal system had been primarily established, implicating that the 2010 goal would be reached as planned.⁴ On February 28, 2008, the Press Office of the State Council released *The White Paper on China’s Rule of Law*,⁵ which heralded China’s development of a socialist legal system with unique Chinese characteristics as one of the greatest achievements in the advancement of the rule of law in China.⁶

Many Westerners who are familiar with the rule of law concept may contemplate what the socialist legal system developed in China encompasses, and what the incorporation of Chinese characteristics actually entails.⁷ In his book *The Civil Law Tradition*, Professor John Merryman categorized three highly influential legal traditions: the civil law, common law, and socialist legal traditions.⁸ However, the socialist law referred to in Merryman’s book was synonymous with the former Soviet law or Stalinist law,⁹ and thus did not necessarily reflect the law in China, notwithstanding the fact that China was and still is a socialist country.

Some critics of the Chinese legal system believe that implementation of the rule of law remains distant, even though the concept is not entirely new to the nation and despite efforts taken to promote governing the country according to law.¹⁰ Others argue that embedded in traditional Chinese culture is a “reluctance

Press 2009). All translations of sources written in Chinese are the work of the author. The author has verified the corresponding citations and footnotes.

3. Under the term of its accession to the WTO, China was obligated to further undertake reform to bring its legal and regulatory system in line with those of other WTO members. Decision, *Accession of the People’s Republic of China*, WTO Doc #01-5996, WT/L/432, an English text of the accession, available at <http://docsonline.wto.org>.

4. Wu Banguo, Report on the Work of the Standing Committee of the 11th National People’s Congress (NPC), Mar. 9, 2009, available at http://www.npc.gov.cn/englishnpc/Speeches/2009-03/16/content_1493447.htm (“Since the reform and adoption of the opening-door policy, through the joint efforts from all aspects, toward the end of the term of the 10th NPC, the socialist legal system with Chinese characteristics... had basically been established”).

5. Press Release, Office of the State Council of China, White Paper on the Rule of Law in China, available at http://www.chinadaily.com.cn/china/2008-02/28/content_6494029.htm [hereinafter White Paper].

6. *Id.*

7. See Randell Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 MICH. J. INT’L L. 471, 474-75 (2001-2002) [hereinafter *Debating Rule of Law in China*]; see also Jianguy Wang, *The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development*, SINGAPORE J. LEGAL STUD. 347, 348-49 (2004).

8. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 1 (Stanford Univ. Press, 2d ed., 1985).

9. *Id.* at 4-5.

10. See Wejen Chang, *Foreword* to *THE LIMITS OF THE RULE OF LAW IN CHINA*, at vii (Karen G. Turner, James V. Feinerman & R. Kent Guy eds., Univ. of Washington Press 2000).

to follow formal laws,' and a 'fundamental lack of respect for procedural justice.'"¹¹ Still, many have hailed China's legal development in the past thirty years, but worry that the rule of law experiment is at a crossroads and has lost momentum.¹² As a result, there are those who have described China's road toward the rule of law, to emphasize the duration and security of the path to implementation,¹³ as a "long march," the same term used to describe the massive military retreat undertaken by the Red Army of the CPC from 1934-1935.¹⁴

Nevertheless, no one denies "that establishing the rule of law in China has become a priority for its government."¹⁵ However, what might appear problematic to foreign observers is the uniquely Chinese application of the rule of law theory. While the past thirty years have experienced a conceptual change from the development of the legal system to the building of the rule of law, in China, the substance of the rule of law remains open to debate.¹⁶ Since 1999, when the Constitution of 1982 was amended to mandate that the country be governed according to law, the phrase "ruled by law" has been used more frequently than "rule of law."¹⁷

The question remains as to how the rule of law will develop in China. In past decades, China's effort to build a legal system was essentially made under the notion that there must be law to rely upon, law must be observed, enforcement of law must be strict, and violators of the law must be punished.¹⁸ This legal policy was announced by Deng Xiaoping in 1978 as an effort to move China quickly out

11. Jonathan Ocko, *Using the Past to Make a Case for the Rule of Law*, in THE LIMITS OF THE RULE OF LAW IN CHINA 65 (Karen G. Turner, James V. Feinerman & R. Kent Guy eds, Univ. of Washington Press 2000) (citing Yuanyuan Shen, *Conceptions and Receptions of Legality*, in THE LIMITS OF THE RULE OF LAW IN CHINA & Margaret Y.K. Woo, *Law and Discretion in the Modern Chinese Courts*, in THE LIMITS OF THE RULE OF LAW IN CHINA) (discussing the challenges in the implementation of the rule of law in China and the different scholarly views on the success of the rule of law in China).

12. James Feinerman, *In China, Justice in Reserve*, THE WASHINGTON POST, Dec. 18, 2008 at A25.

13. RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (Cambridge Univ. Press, 2002) [hereinafter CHINA'S LONG MARCH].

14. The "Long March" started in Yudu in the province of Jiangxi in October of 1934 and ended one year later in Yan An of Shanxi Province. The retreat lasted approximately 270 days and the Red Army traveled by foot some 12,500 kilometers (8,000 miles) along a road full of snow-capped mountains and swamps. See *The Long March of the Communist Party in China*, available at <http://www.sjsu.edu/faculty/watkins/longmarch.htm>.

15. Eric Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L., 43, 44 (2001).

16. Wang Chenguang, *From the Rule of Man to the Rule of Law*, in CHINA'S JOURNEY TOWARD THE RULE OF LAW: LEGAL REFORM 1978-2008, 6-8 (Cai Dingjian & Wang Chenguang, 2008).

17. The 1999 Amendments added a new paragraph to Article 5, which reads: "The People's Republic of China governs country according to law and makes it a socialist country ruled by law." XIAN FA, art. 5 (1982) (P.R.C.), translated in Constitution of the People's Republic of China, available at <http://english.people.com.cn/constitution/constitution.html>.

18. Deng Xiaoping, Speech at the Closing Session of the Central Working Conference: Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future (Dec. 13, 1978), in SELECTED WORKS OF DENG XIAOPING, Vol. II, translated in <http://english.peopledaily.com.cn/dengxp/vol2/text/b1260.html>.

of the nightmare of “lawless” left by the ten-year chaos of the Cultural Revolution (1966-1976).¹⁹ This policy was once asserted as the official definition of the “rule of law;” however, it has been replaced with the idea of “ruled by law” today.²⁰ The premise on which the development of the rule of law in China is based is the socialist legal system that bears Chinese characteristics.

In the West, although the traditional idea of “the rule of law is rooted in Aristotle’s dictum that law must be granted greater authority than the will of any individual,”²¹ it remains an “essentially contested concept.”²² Therefore, there is a gap in the literature on the rule of law, and no concise lexicon detailing the precise elements comprising the rule of law exists.²³ In an attempt to offer a clearer definition, one theorist describes the rule of law in terms of a “thin” and “thick” dichotomy.²⁴ The “thin” theory focuses on the formal aspect of the rule of law, stressing that formal rules are the most efficacious and legitimate way to protect substantive value.²⁵ The “thick” theory looks beyond mere rules, believing that “the existence of pre-announced, objectively-knowable and impartially-applied rules must be supplemented by relating such formal virtue to a substantive account of democratic justice.”²⁶

The rule of law as developed in China does not seem to follow any traditional Western patterns²⁷ but rather it is encumbered by Chinese legal traditions that might make many Westerners uncomfortable.²⁸ Some legal scholars have come to the conclusion that “neither traditional history nor the policies of the past two decades offers strong evidence that a system following the principles of the rule of

19. *Id.*

20. HE QINGHUA & REN CHAO, PURSUIT OF THE RULE OF LAW, A COMPARATIVE STUDY ON CONCEPTIONS, PATHS AND MODELS, 8-10 (Peking Univ. Press 2005); *see also* White Paper, *supra* note 5.

21. Karen Turner, *Introduction to THE LIMITS OF THE RULE OF LAW IN CHINA* 65 (Karen G. Turner, James V. Feinerman & R. Kent Guy eds., Univ. of Washington Press 2000).

22. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989).

23. BARRY HAGER, *THE RULE OF LAW, A LEXICON FOR POLICY MAKERS* (The Mansfield Center for Pacific Affairs 1999). For a more detailed discussion on the rule of law, *see* David Kairys, *Search for the Rule of Law*, 36 SUFFOLK U. L. REV. 307 (2003).

24. *See* CHINA’S LONG MARCH, *supra* note 14, at 3.

25. *Id.*

26. ALLAN HUTCHINSON, *THE RULE OF LAW REVISITED: DEMOCRACY AND COURTS, IN RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER*, 196, 199 (David Dyzenhaus ed. Hart Publ’g, 1999). For a general discussion about the “thin” and “thick” theories, *see* CHINA’S LONG MARCH, *supra* note 14, at 8. *See also* Wang, *supra* note 7, at 348.

27. SUN GUOHUA, *A STUDY IN THE SOCIALIST LEGAL SYSTEM WITH CHINESE CHARACTERISTICS, CONCEPT, THEORY AND STRUCTURE* 24-26, 490 (China Democracy and Legality Press 2009).

28. *See* William Jones, *Trying to Understand the Current Chinese Legal System, in UNDERSTANDING CHINA’S LEGAL SYSTEM* 7, 40-41 (Stephen Hsu, New York Univ. Press 2003); *see also* Wang, *supra* note 7, at 348 (“Given China’s current authoritarian ruling regime, the possibility of adopting a liberal democratic version of the rule of law in the near future is dim. However, the realization of a “thin” version of the rule of law in China is also challenged as being insufficient on a variety of grounds.”).

law will emerge in China in the near future.”²⁹ Nonetheless, there has been considerable evidence during the past decades that China is shifting toward a system that complies with the basic elements of a “thin” rule of law.³⁰

In addition, under Western legal theory, the rule of law is viewed as a concept distinct from that of the “rule by law.”³¹ The “rule of law” is said to emphasize “the ability of law and legal systems to impose meaningful restraints on the state and individual members of the ruling elite,”³² and the “rule by law” refers to “an instrumental conception of law in which law is merely a tool to be used as state sees fit.”³³ In China, the general understanding of the rule of law may vary, but no distinction seems to have been made between the “rule of law” and the “rule by law.”³⁴ In fact, the two terms are used interchangeably to mean a legal environment in which the country is governed according to the law.³⁵

It is also important to note that China does not regard the rule of law as having universal application.³⁶ Instead it insists that the rule of law in a country is determined by and conforms to its national conditions and social system.³⁷ In China, the national conditions and social systems are inclusively prescribed by the term “Chinese characteristics.”³⁸ Governing the country according to law and building a socialist country under the “rule of law” are being interpreted as the Chinese people’s demand, pursuit, and practice.³⁹

This article addresses how the “rule of law” is adopted and practiced in China in light of the modern Chinese legal framework, namely the socialist legal system. It analyzes what the incorporation of Chinese characteristics might implicate for the rule of law and articulates the major issues facing the nation in its pursuit of the rule of law. The article argues that China’s discourse for the rule of law is heavily influenced by its legal tradition and yet closely interwoven with the country’s modern reform initiatives. The article is not intended to discuss the rule of law

29. Turner, *supra* note 21, at 17.

30. *Debating Rule of Law in China*, *supra* note 8, at 478-79 (“[T]he constitutive elements of a thin conception include the following: there must be procedural rules for lawmaking and laws must be made by an entity with the authority to make laws in accordance with such rules to be valid; laws must be made public and readily accessible; laws must be generally applicable: that is, laws must not be aimed at a particular person and must treat similarly situated people equally; laws must be relatively clear; laws generally must be prospective rather than retroactive; laws must be consistent on the whole; laws must be relatively stable; laws must be fairly applied; laws must be enforced: the gap between the law on the books and law in practice should be narrow; and laws must be reasonably acceptable to a majority of the populace or people affected or at least the key group affected) by the laws.”).

31. CHINA’S LONG MARCH, *supra* note 14, at 8 (emphasis added).

32. *Id.*

33. *Id.*

34. *Id.*

35. See WU ZHUMO & LI SHUANGYUAN, A GENERAL INTRODUCTION TO JURISPRUDENCE 53 (Univ. Textbook Series, Law Press 2007).

36. See White Paper, *supra* note 5, at foreword.

37. *Id.*

38. *Id.*

39. *Id.*

theories in general, but rather offers a case study in a Chinese version of the rule of law, with a focus on the socialist nature of the legal system that China is determined to build.

Part II of the article provides an overview of the legal system in China. It begins with an analysis of the historical doctrines that influenced the country for centuries and then discusses the Chinese legal tradition and its development. It also examines the influence of the civil law on the Chinese legal system and the building of this system under socialist ideology. Part III focuses on the Chinese conception of the rule of law and explores the implications of the rule of law in China's socialist legal system. Part IV analyzes the relationship of Chinese characteristics as applied in the nation's commitment to the rule of law and offers a critical view as to which Chinese characteristics are being employed. Part V seeks to identify major issues facing China on its way toward the rule of law.

In Part VI, this article concludes that China has learned much from past experience about the dangers associated with a lack of a sound legal system, but it remains at a critical stage in the development of a legal system where "rule of law" is meaningful both domestically and abroad. This article does not suggest that China should embrace the Western conception of rule of law in order to create a functioning legal system. It does, however, argue that a legal system that adheres to the rule of law would require China to further depart from authoritarianism and to move toward democracy in its social, political, and legal structures. With this in mind, it is hoped that the building of the socialist legal system with Chinese characteristics will help develop the rule of law in the nation.

II. THE DEVELOPMENT OF A LEGAL SYSTEM IN CHINA

For decades, China has attempted to build a legal system as part of its reform initiatives.⁴⁰ The term "build" as it is employed here does not mean that China is structuring its legal system from the ground up, nor does it infer that China is breaking off from its legal history of thousands of years.⁴¹ For purposes of this article, "build" may be best characterized as "restructure," a process by which the legal system is said to be evolving. More importantly, China desires to portray itself as a country governed by law, away from its old image thirty years ago as a lawless country.⁴²

It is nearly impossible to understand China's legal system without first looking into its legal history for two reasons: First, any legal system, however ancient or recently developed, is always changing, and therefore an examination of history offers a better prospect for understanding such changes.⁴³ Second, it is

40. See Natalie Lichtenstein, *Law in China's Economic Development: An Essay From Afar, in UNDERSTANDING CHINA'S LEGAL SYSTEM*, *supra* note 28, at 274.

41. See XU ZHONGMING AND REN QIANG, *LEGAL SPIRITS OF CHINA 1-10* (Guangdong People's Press, 2007).

42. See QINGHUA & CHAO, *supra* note 20, at 15-17.

43. See Alan Watson, *Legal Changes: Sources of Law and Legal Culture*, 131 U. PA. L. REV. 1121, 1122 (1983) (discussing why legal history offers the best prospects for understanding

believed that “legal tradition itself plays an important role in shaping legal changes,”⁴⁴ and to a certain extent determines the pattern of the changes.⁴⁵ Thus, it is necessary to take a look at Chinese legal history, as well as classic Chinese legal philosophy, which still retains influence in the country.

A. *Chinese Legal History in Brief*

Broadly speaking, Chinese legal history can be divided into four different periods, beginning with the formation of *Huaxia* tribes (2850 B.C. to 2205 B.C.) and ending during the time of Spring & Autumn and Warring States (770 B.C. to 221 B.C.). This period was labeled the period of Three Sovereigns and Five Emperors (*San Huang Wu Di*),⁴⁶ Xia (2070 B.C. to 1600 B.C.), Shang (1600 B.C. to 1046 B.C.), and Zhou Dynasties (1046 B.C. to 221 B.C.).⁴⁷ In general, any time before Xia Dynasty in China is classified as the prehistoric age.⁴⁸ Additionally, the Zhou Dynasty consisted of Western Zhou (1046 B.C. to 770 B.C.) and Eastern Zhou (770 B.C. to 221 B.C.). Eastern Zhou was further divided into the Spring & Autumn period (770 B.C. to 476 B.C.) and the Warring States period (476 B.C. to 221 B.C.).⁴⁹

Xia, founded by Yu, was the first dynasty of China and it also symbolized the early *Huaxia* civilization (Chinese Civilization).⁵⁰ The Xia Dynasty is historically significant because it represents the birth of the Chinese “state” and the beginning of the slavery society in China.⁵¹ In addition, Xia is also regarded as the embryonic stage of the Chinese legal system, developed from the custom-based religious rites of the Shan Huang & Wu Di Dynasties.⁵² Most significantly, during the Xia dynasty, a set of etiquettes were established as social norms and evolved into the

legal change).

44. *Id.* at 1152.

45. *Id.* at 1134.

46. LIHUI YANG & DEMING AN, HANDBOOK OF CHINESE MYTHOLOGY 253-66 (ABC-CLIO, Inc. 2005). Since the “Three Sovereigns and Five Emperors” were mythological rulers of China during the period of pre-history, Chinese historians have offered various interpretations of who they were. One well accepted interpretation is that the “Three Sovereigns” were “*Nüwa*,” “*Fuxi*,” and *Shennong* (also called “*Yan Di*”), and the “Five Emperors” were “Yellow Emperor” (or “*Huang Di*”), “*Zhuanxu*,” “*Ku*,” “*Yao*” and “*Shun*.”

47. Subhuti Dharmananda, *Chinese Dynasties*, <http://www.itmonline.org/arts/dynasties.htm> (last visited Feb. 22, 2010). This dynastic history and time periods were based on the “*Table of Dynastic Periods of Xia, Shang and Zhou*” published in 2000 by the Research Group organized through then State Commission of Science and Technology under the State grant.

48. ZHANG ZHONGQIU, A COMPARATIVE STUDY IN CHINESE AND WESTERN LEGAL CULTURES 5 (China Univ. of Pol. Sci. and Law Press 2006) [hereinafter A COMPARATIVE STUDY].

49. HISTORY OF CHINA, VOL. I (Haiyan Press 2001).

50. ZHANG JINFAN, EVOLUTION OF THE CHINESE LEGAL CIVILIZATION 14 (China Univ. of Pol. Sci. and Law Press 1999).

51. *Id.* at 20.

52. See XIN CHUNYING, CHINESE LEGAL SYSTEM AND CURRENT LEGAL REFORM 2, 310 (Law Press 1999).

behavior rules of the state.⁵³ The etiquette rules, taken together, were called *Li* (commonly translated as “the rules of propriety” or “rites”) which later developed into the “standardized and systemized” social norms called *Zhou Li* in the West Zhou.⁵⁴

Closely related to *Li* was the concept of *Xing* which also emerged during the Xia dynasty.⁵⁵ *Xing*, meaning punishment, was used to implement *Li*. In Xia dynasty, a violation of *Li* would constitute a criminal offense upon which a penalty would be imposed.⁵⁶ In Chinese legal history, *Xing* is considered the initial form of criminal law because it is mainly comprised of penalties for criminal offenses.⁵⁷ For example, by the time of Zhou Dynasty, there had developed so-called *Wu Xing* (Five Punishments) to help maintain *Li* and social orders. The *Wu Xing* included *Mo* (tattooing the face), *Yi* (chopping off the nose), *Yue* (cutting off the feet), *Gong* (castration), and *Dapi* (death penalty or decapitation).⁵⁸

The most distinctive feature of the legal system in the Xia, Shang and Zhou Dynasties was the intimate entanglement of *Li* with *Xing*, effectively the country was “ruled by *Li* and run by *Xing*.”⁵⁹ Specifically, whatever was not allowed by *Li* would be prohibited by *Xing* and anything in compliance with *Li* would necessarily be permissible by *Xing*.⁶⁰ In other words, *Li* was not only the source of *Xing* but also enforced by *Xing*.⁶¹ Thus, with *Li* taking a dominant role at that time, the law was basically a combination of “*Li*” and “*Xing*”.⁶²

The second period of Chinese legal history is referred to as the imperial period, stretched over two thousand years from the founding of Qin Dynasty (221 B.C.) to the fall of Qing Dynasty (1911). During that period, China witnessed more than a dozen dynasties that encompassed both feudal and semi-colonial societies.⁶³ During this time the tradition of combining *Li* and *Xing* remained in the

53. ZHANG JINFAN, *THE TRADITION AND MODERN TRANSITION OF CHINESE LAW* 4 (Law Press 2005).

54. *Id.*

55. JINFAN, *supra* note 50, at 25-27.

56. See ZHANG ZHONGQIU, *LEGAL CULTURES IN A COMPARATIVE VISION* 52 (Law Press 2003) [hereinafter *LEGAL CULTURES*].

57. *Id.*

58. *Id.*

59. See GAO MINXUAN & ZHAO BINGZHI, *EVOLUTION OF CHINESE CRIMINAL LEGISLATION* 1 (Law Press 2007).

60. *Id.* at 2.

61. *Id.*

62. JINFAN, *supra* note 50, at 3-22.

63. MINXUAN & BINGZHI, *supra* note 59, at 5-29 (describing the legislations of feudal societies). Those dynasties were *Qin* (221 B.C. to 206 B.C.), *Han* (206 B.C. to 220), *Three Kingdoms and Wei* (226-280), *Jin* (265-420), *Southern and Northern Empires* (420-589), *Sui* (581-618), *Tang* (618-907), *5 Imperia and 10 Kingdoms* (907-960), *Song* (960-1279), *Yuan* (1206-1368), *Ming* (1368-1644), and *Qing* (1644-1911). *Id.* Note that among those dynasties, some coexisted in difference areas, and some were overlapping because when the new dynasty was founded the existing dynasty had not yet been completely ruled out. *Id.*

legal system and developed into a synergy of *Li* and *Fa* (Law).⁶⁴ In addition, the codified statutes became the primary source of law.⁶⁵ Among all of the legal codes that were enacted in that period, the *Tang Code* was regarded as the most influential.⁶⁶

The major development of the Chinese legal system in the second period of legal history was that *Li* became the mainstay of the system, while *Fa* was used secondarily to supplement *Li*.⁶⁷ During imperial times, the heart of *Li* was to protect the authority of the emperor.⁶⁸ In addition, the patriarchal, kinship-premised social system and tradition made the emperor the ruler of the country and ultimate source of law.⁶⁹ Because of this imperial China was commonly classified as being ruled by men rather than by law.⁷⁰ Another distinction of the imperial legal system was that the majority of laws were criminally oriented and there was no distinction between criminal law and civil law.⁷¹

The third period of the Chinese legal system spanned from 1911 to 1949. During this time, the imperial system ended and a republic system was established,⁷² so that the third period is also called the republic period. The most significant characteristic of the republic period was that the traditional chain between *Li* and *Fa* broke, and a new legal system was formed.⁷³ For these reasons, the third period is deemed a transitional period.⁷⁴

The dramatic changes in the republic period were driven by two unprecedented forces: one external and one internal. Externally, the Opium War in 1840 signaled the death of China's long held policy of self-seclusion and forced China to open its door to the Western world.⁷⁵ As a result of foreign occupation, Western ideologies were ushered into the country and clashes occurred between those ideologies, *Li*, and the patriarchic Chinese tradition.⁷⁶ Hence, China entered

64. WU SHUCHENG, *HISTORY OF CHINA LEGAL THOUGHTS* 79 (Law Press 2004).

65. JINFAN, *supra* note 50, at 4-5.

66. *Id.* at 264.

67. *Id.* at 1-2.

68. *Id.* at 1.

69. See Jones, *supra* note 29, at 9 (describing the Emperor's power in early Chinese history).

70. *Id.* at 9-10; see also CHUNYING, *supra* note 52, at 312-13.

71. See CHUNYING, *supra* note 52, at 313.

72. *Id.* at 322.

73. See LEGAL CULTURES, *supra* note 56, at 85-93.

74. *Id.*; see also CHUNYING, *supra* note 52, at 324 (discussing various kinds of political forces in China that attempted to make a constitution and legal system that was suitable to their own political aims).

75. See JEROME COHEN, *Foreword to THE RULE OF LAW, PERSPECTIVES FROM THE PACIFIC RIM*, xi (Mansfield Center for Pacific Affairs 2000), available at http://mansfieldfdn.org/programs/program_pdfs/02foreword.pdf.

76. See CHUNYING, *supra* note 52, at 317-24 (discussing the struggles between scholars who wanted to adopt Western legal standards and those that held onto the patriarchic Chinese tradition); see also XU ZHONGMING & REN QIANG, *supra* note 41, at 254-56.

into an era of social changes that eventually led the country away from both feudalism and the imperial system.⁷⁷

Internally, China's unexpected defeat by foreign forces during the Opium War of 1840 and other subsequent losses, emphasized the fading glory of imperial power. A group of political elites within the central government tried to revive China by calling for "learning from the West."⁷⁸ They opined that in order to make China strong again it was necessary to imitate the Western countries both politically and economically.⁷⁹ To that end, they launched a campaign historically called the Westernization Movement (*Yangwu Yundong*) in the nation, aimed at developing national industries and an army.⁸⁰

In the late nineteenth century, another group of reformists emerged, leading the 1898 Legal Reform (*Wuxu Bianfa*).⁸¹ They believed that in order to remove China from its state of backwardness, political and legal reform was necessary.⁸² With that in mind, they studied Western political systems and attempted to introduce some aspects into China as a means of revitalizing the nation.⁸³ They hoped that their efforts would establish a constitutional monarchy in the country.⁸⁴

In the face of strong resistance from the ruling conservative power in the Forbidden City, neither the Westernization Movement, nor the 1898 Legal Reform succeeded.⁸⁵ Nevertheless, these scholars inevitably brought Western political concepts and democratic ideologies to China, which in part planted the seeds for the 1911 Revolution (*Xinhai Revolution*).⁸⁶ It was this Revolution that relegated China's more than two-thousand-year old imperial system into the annals of history.⁸⁷

One significant achievement of the 1911 Revolution was the establishment of a republican government formed under the Three Principles of the People⁸⁸ and the theory of The Constitution of Five Powers advocated by Dr. Sun Ya-tsen,⁸⁹ the

77. CHUNYING, *supra* note 52, at 325.

78. See also ZHONGMING & QIANG, *supra* note 41, at 254-56.

79. CHUNYING, *supra* note 52, at 317 (discussing the bourgeois reformers who reasoned that the prosperity in the West was due to "separation of powers" and open justice).

80. See JINFAN, *supra* note 53, at 356. See generally XIA DONGYUAN, A STUDY IN THE LATE QING WESTERNIZATION MOVEMENT (Si Chuan People's Press 1985) (discussing the Westernization Movement in China during the first Republic).

81. See JINFAN, *supra* note 53, at 367-68.

82. *Id.* at 368-70.

83. *Id.*

84. *Id.*

85. *Id.*

86. See generally JOHN K. FAIRBANK & EDWIN O. REISCHAUER, CHINA – TRADITION AND TRANSFORMATION (Houghton Mifflin Company 1989).

87. ZHONGMING & QIANG, *supra* note 41, at 357.

88. Sun Yat-Sen, *The Three Principles of the People*, <http://chnm.gmu.edu/revolution/d/582/> (last visited Feb. 22, 2010). The three principles were "nationalism," "people's democratic rights," and "people's wellbeing."

89. Encyclopedia Britannica Online, *Five-Power Constitution*,

founder of the Republic of China. In the meantime, the 1911 Revolution marked the fall of the *Li*-based classic Chinese law and offended the imperial power centered legal system.⁹⁰ Unfortunately, due to constant internal conflicts, China's war against Japanese occupation, and its civil war, the newly born republic was never actually stabilized. Consequently, the ideas of *Three Principles of the People* and the *Constitution of Five Powers* were barely implemented.⁹¹ Although under the Nationalist government led by Chiang Kai-shek, a set of laws known as *The Six Codes* were compiled and promulgated, they were not applied as intended, and eventually were abolished by the communist government in 1949.⁹²

The fourth period of Chinese legal history started with the founding of the People's Republic of China in 1949. This period, commonly referred to as the socialist period, can be further divided into Mao's era (Mao Zedong) and the post-Mao era. During Mao's reign from 1949 to 1976, China adopted Soviet-style socialism which Mao later transformed into the "revolutionary movements," in which he sought to keep the color of China "red" or, in other words, to resist capitalism.⁹³ In the legal fora, Mao annulled all laws enacted by the Nationalist government before 1949 and attempted to replace them with socialist laws or "the people's laws" to be enacted thereafter.⁹⁴

Unfortunately, due to Mao's zealotry in the "class struggle,"⁹⁵ the country's endeavor to establish legality was entirely shelved in 1957 when the nation-wide Anti-Rightists movement was lunched to suppress intellectuals.⁹⁶ After that, the legal work in China stalled and during the Cultural Revolution (1966 to 1976), the country actually had no law at all. For that reason, many regarded Mao's era as the era of "lawlessness."⁹⁷ According to a foreign observer, under Mao's reign, the vast land of China existed in a legal vacuum for thirty years.⁹⁸

<http://www.britannica.com/EBchecked/topic/209065/Five-Power-Constitution> ("Under Dr. *Sun Yat-sen's* doctrine, a constitution in China should set forth five independent powers, namely legislative power, executive power, judicial power, examinational power and supervisory power.").

90. See CHUNYING, *supra* note 52, at 322.

91. *Id.* at 324.

92. The Six Codes included Constitution, Civil Code, Commercial Code (later merged into the Civil Code and replaced by Administrative Law), Panel Code, Criminal Procedures and Civil Procedures. The Six Codes were repealed by the communist government in February 1949. See RALPH H. FOLSOM, JOHN H. MINAN & LEE ANN OTTO, *LAW AND POLITICS IN THE PEOPLE'S REPUBLIC OF CHINA* 19, 25 (West 1992).

93. See CHUNYING, *supra* note 52, at 327 (discussing that for Mao and his comrades, the Soviet-style socialistic system would provide guidance for China).

94. According to Mao, the laws in the communist China "[were] made by the working people themselves." See MAO TSE-TUNG, *SELECTED WORKS OF MAO TSE-TUNG* 359 (New York International Publishers 1977).

95. In his famous article "*On the People's Democratic Dictatorship*" published in June 30, 1949, Mao stated that "the State apparatus, including the army, the police and the courts, [were] the instrument by which one class oppresses the other" and therefore the antagonist, violent and not benevolent. *Id.* at 418.

96. See generally, NARANARAYAN DAS, *CHINA'S HUNDRED WEEDS, A STUDY OF THE ANTI-RIGHTIST CAMPAIGN IN CHINA (1957-1958)* (K.P. Bagchi & Co. 1979).

97. LASZLO LADANY, *LAW AND LEGALITY IN CHINA, THE TESTAMENT OF A CHINA-*

Mao's death in 1976 made it possible for China to move in a different direction. Most striking were the abandonment of Mao's class struggle theory and the re-positioning of China to focus on "economic development" rather than "political movements."⁹⁹ In 1978, a nationwide economic reform to modernize the country was initiated.¹⁰⁰ Along with the economic reform there was an explosion of legislation resulting in numerous laws and regulations. In 1982, China rewrote its Constitution, attempting to bring the country back to a society of legality.¹⁰¹ The 1982 Constitution was amended in 1988, 1993, 1999, and 2004.

Since 1978, China has been in the course of restructuring its economic system. This economic reform has not only helped China become an emerging power in the international economy, but has also introduced two Western concepts that drastically changed the country. The first concept is the "market economy," which formed the basis for the economic reform in China,¹⁰² although the term "market economy", as used in China, is squared with the word "socialist." The second concept is the "rule of law," an ideology that China is committed to incorporating into its legal system so that the country is to be governed by law.¹⁰³

B. Classic Chinese Legal Philosophy

Whatever the Chinese legal system's current state, it still embodies a distinctive legal tradition that evolved from its history. Many aspects of this tradition continue to have powerful and unique effects on the development of the current legal system and theories; and the philosophical tenants inherent in the traditional legal system are clearly discernable in the course of such development.¹⁰⁴ Hence, an understanding of classic Chinese legal philosophy and tradition is essential to understand its modern development.¹⁰⁵

The classic Chinese legal philosophy can be traced back as early as the period spanning Spring-Autumn and Warring States.¹⁰⁶ In Chinese history, the Spring-

WATCHER 52 (Univ. of Hawaii Press 1992).

98. *Id.* at 55.

99. See CHUNYING, *supra* note 52, at 337-40. See also XU CHENGDE, CONSTITUTION 72-75 (People's Univ. Press 1999).

100. WU JINGLIAN, THE ECONOMIC REFORM IN MODERN CHINA 55-60 (China Far-East Press 2003).

101. CHUNYING, *supra* note 52, at 354 (outlining the four Constitutions of the PRC); see CHENGDE, *supra* note 99, at 72-73.

102. JI GUIZHEN, TWENTY YEARS REFORM OF OWNERSHIP IN CHINA, 1-18 (Zhongzhou Ancient Books Press 1998).

103. CHUNYING, *supra* note 52, at 338-41.

104. See ZHONGMING & QIANG, *supra* note 41, at 4-8.

105. FOLSOM, MINAN & OTTO, *supra* note 92, at 1.

106. Claudio Cioffi-Revilla & David Lai, *War and Politics in Ancient China, 2700 B.C. to 722 B.C.: Measurement and Comparative Analysis*, 39 J. OF CONFLICT RESOL. 467, 470-71 (2005). In *Xia, Shang, and West Zhou Dynasties*, certain legal theories such as the patriarchal-clan-based "Li" developed, but the more systematical legal theories developed in the period of Spring-Autumn and Warring States. *Id.*

Autumn and Warring States period was so significant that it commands a lengthy discussion in all history books.¹⁰⁷ In this period, China transitioned from a slavery-based society to a feudal one.¹⁰⁸ Because of its nature, this period was full of substantial social changes that led to the boom of new theories.¹⁰⁹

The most significant social change during this period was the emergence of independent “little kingdoms” (dukedom), comprised of former territories ceded by the king (Son of the Heaven) to the nobles, including relatives and family members of the king.¹¹⁰ Because of this change, the king’s power was substantially weakened and the “little kingdoms” each functioned as a state independent from the king.¹¹¹ One major phenomenon resulting from this change was the “collapse” of *Zhou Li*, which had been employed to maintain the absolute authority of the king.¹¹²

Corresponding with the collapse of *Zhou Li* was the flourishing of new theories and ideas. Many intellectuals affiliated with the different “little kingdoms” competed to find a “good theory and philosophy” to govern their state and make it stronger.¹¹³ As a result, there grew a diverse intellectual force known as the “hundred intellectuals” (*zhu zi mai jia*), and each of the intellectuals not only actively developed its own thoughts and ideas, but also openly debated with others.¹¹⁴ The intellectual debates about politics and social order gave rise to a historical social environment—one in which the “hundred intellectuals” contended.¹¹⁵

The intellectual debates yielded four major schools of thought (the “big four”) that had a tremendous impact on Chinese legal philosophy and jurisprudence. The big four were comprised of the Confucianists (*Ru Jia*), Taoists (*Dao Jia*), Legalists (*Fa Jia*), and Mohists (*Mo Jia*).¹¹⁶ Much of the significance of these four schools of thought is due to the fact that each school was directly associated with some China’s most famous philosophers.¹¹⁷ Among the big four, the Confucianists and the Legalists were the most influential on the development of the traditional Chinese legal system.¹¹⁸

107. JINFAN, *supra* note 50, at 77-100.

108. *Id.* at 77.

109. *Id.* at 88.

110. *Id.* at 77-78.

111. *Id.*

112. *Id.* See also SHUCHENG, *supra* note 64, at 79.

113. See SHUCHENG, *supra* note 64, at 79.

114. *Id.*

115. *Id.*

116. *Id.* at 79-82.

117. *Id.*

118. *Id.*

1. The Confucian School of Thought

The Confucian School was founded by Confucius (551 B.C. to 479 B.C.)¹¹⁹ and was further developed by Mencius (372 B.C. to 289 B.C.).¹²⁰ Many of Confucius' philosophic thoughts and apothegms were based on conversations with his students; consequently, these records were compiled by his disciples into the famous book, *The Analects of Confucius (Lunyu)*. While being engaged in education, Confucius also put huge effort into editing *The Book of Songs (Shijing)*, *The Book of Documents (Shanghsu)*, the *I Ching (the Book of Changes or Yijing or Zhou Yi)*, revising *The Records of Rites (Liji)*, and writing *The Spring and Autumn Annals (Chunqiu)*.¹²¹ These books established the theoretical basis for the Confucian School of thought.¹²²

119. See HISTORY OF CHINA, *supra* note 49, at 114-15. Confucius, named Qiu and styled Zhongni (social name), was born in the state of Lu, today's Shandong Province. A poor descendant of a dispossessed noble family, he had a tumultuous childhood—his father died when he was three years old and his mother passed away when he was seventeen. Upon reaching adulthood, he had to support himself by undertaking such petty jobs as keeping a warehouse and caring for livestock. He always had an interest in politics, but it was not until age 50 that Confucius was made a city magistrate of Lu. He was subsequently appointed as the Secretary of Justice of Lu and eventually achieved the status of Lu's Chief Minister. Although Confucius had great ambition to serve the state of Lu, his political career was not successful. Since his political views were at odds with the Duke of Lu, Confucius resigned from the post of Chief Minister at age fifty-five and left Lu to travel around to different states. He returned to Lu in 484 B.C. and spent the rest of his life teaching and writing. Confucius' early life was strongly influenced by his mother, who taught him how to appreciate and practice rites during his childhood. From a young age, he extensively studied the rites of Zhou, and was reputed to be a man of fairness, politeness, and possessed of a love of learning. He was also an avid music lover, believing that music could help instill kindness and uprightness of character. As noted, one of the most important parts of Confucius' life was his love of teaching. He taught not only rites and philosophy, but also poetry and music. Confucius died in 479 B.C. *Id.* at 72.

120. See generally, ALAN K.L. CHAN, *MENCIUS: CONTEXTS AND INTERPRETATIONS* (Univ. of Hawaii Press 2002). Mencius, named Ke, was a well-known philosopher in the period of the Warring States, and a loyal advocate and defender of the Confucian School against rival philosophic doctrines. Mencius is believed to have studied with Confucius' grandson Zisi. Like Confucius, Mencius traveled from state to state and tried to use his philosophy to influence politics. While not successful, he made great contributions to the Confucian School of thought by explicitly interpreting Confucianism and developing the theory into a system of philosophic thinking. Both Confucius and Mencius were regarded as the great intellectuals and philosophers in China's history, and they were commonly referred as "The Sages" of the nation. In addition, Confucius hailed as a great educator because he devoted much of his life to teaching, legendarily inspiring seventy-two bright disciples (*Xianren*) and three thousands followers (*Dizi*). The philosophy and ideology held by Confucius and Mencius as well as their followers was called *The Doctrine of Confucius – Mencius (Kong-Meng Zhidao)*, which was branded as "Ru," or collectively as *Confucianism*.

121. J.Y. Tan, *Confucianism and Neo-Confucianism*, 4 NEW CATHOLIC ENCYCLOPEDIA 95 (2003), available at <http://www.jonathantan.org/essays/Chinese-NCE-Confucianism.pdf>. In Chinese history, there is a well-known collection of classics called *Four Books and Five Classics (Si Shu Wu Jing)*. The *Four Books* are comprised of *The Great Learning (Da Xue)*, *The Doctrine of the Mean (Zhong Yong)*, *The Analects of Confucius (Lunyu)*, and *The Mencius (Mengzi)*. The *Five Classics* are "*The Book of Songs*" (*Shijing*), "*The Book of Documents*" (*Shujing*), "*The Book of Changes (Yijing)*", "*The Book of Rites*" (*Liji*), and "*The Spring and Autumn Annals*" (*Chunqiu*).

Confucius devoted all of his work to the restoration of *Li* by focusing on forming an aristocratic system premised on *Li* ideology. He believed that a country must have a social order under which all people behaved within the boundaries of *Li*. He attempted to promote a rigidly stratified social hierarchy in which no one could ever step beyond their limits. In his words, a good country would embody the order of “*Jun Jun, Chen Chen, Fu Fu, Zi Zi*,” meaning that the ruler must be like a ruler, the subject like a subject, the father like a father, and the son like a son.¹²³

Mencius elaborated on Confucianism, as well as his own philosophic thoughts, in his book *Mengzi*.¹²⁴ *Mengzi*'s most important contribution to Confucianism was the concept of benevolent government (*Ren Zheng*).¹²⁵ Mencius distinguished himself from others by proposing a theory in which human beings are naturally good.¹²⁶ He further developed the idea of benevolence and believed that people have an inherent ability to become benevolent, but require cultivation to exercise benevolence well.¹²⁷

According to *Mengzi*, a benevolent ruler is one who makes the interests of the people his top priority.¹²⁸ In the words of *Mengzi*, people should come first, followed by the state, and the last in line should be the ruler.¹²⁹ Thus, a ruler must first gain the confidence and support of his people. It was Mencius's belief that a non-benevolent ruler may hold the reins of a state, but would never gain the trust of his people.¹³⁰

In addition to Mencius, Xunzi (313 B.C. to 238 B.C.) is another Confucian master worthy of mention.¹³¹ An extremely sophisticated and influential philosopher in the Warring States period, Xunzi was deemed the epitome of the

Five of the *Four Books and Five Classics* are related to Confucius and Confucian doctrines.

122. See generally XINZHONG YAO, AN INTRODUCTION TO CONFUCIANISM (Cambridge Univ. Press 2000).

123. See CONFUCIUS, THE ANALECTS bk. 12.11 (Raymond Dawson trans., Oxford Univ. Press 1993).

124. Because of his strong support of Confucian doctrines, as well as his creative work in expounding Confucianism, Mencius became the “master” after Confucius, lauded as the “second sage” (*Ya Shen*). CHAN, *supra* note 120, at 3.

125. ZHONGMING & QIANG, *supra* note 41, at 60-62.

126. SHUCHENG, *supra* note 64, at 150.

127. In Mencius' view, an infant instinctively knows how to love his parents, and when he grows up, he naturally knows how to respect his older brothers. Loving one's parents is benevolence and respecting one's older brothers is rightness – these principles resonate with all people. See JIN XIN, MENCIOUS, Book 7A. It was also Mencius' proposition that the goodness of human nature akin to the downward tendency of water: just as water has a down-running tendency, all people have a tendency toward goodness. See MENCIOUS, GAO ZHI, BOOK 6A. For an English translation of MENGZI, see MENGZI WITH SELECTIONS FROM TRADITIONAL COMMENTARIES (Bryan W. Van Norden, trans., Hackett 2008).

128. SHUCHENG, *supra* note 64, at 150.

129. See MENGZI, *supra* note 127, at 187.

130. *Id.*

131. ENCYCLOPEDIA BRITANNICA: Xunzi, <http://www.britannica.com/EBchecked/topic/274068/Xunzi> (last visited Feb. 22, 2010). Also known as *Hsun Tse*, named *Kuang* and styled *Qing*.

Confucian School, consolidating Confucian tradition with legalist ideas.¹³² He viewed *Li* and *Fa* as derived from the same source, interpreting *Li* in light of *Fa*. He believed that the integration of *Fa* into *Li* would best serve both the legal tradition and reality.¹³³ The major book containing the writing of Xunzi is the *Xunzi*.¹³⁴

The most notable aspect of Xunzi's philosophy was his doctrine of "bad human nature."¹³⁵ In opposition to Mencius, Xunzi argued that all people were born with a "bad" nature; however, this predisposition could be fundamentally transformed through education and social discipline.¹³⁶ According to Xunzi, there is nothing higher than the transformation of man in harmony with natural order.¹³⁷ Human nature provides a significant barrier to moral improvement, but the barrier can be overcome. The disposition of people ultimately depends on what skills and knowledge they acquire as a result of education and socialization.¹³⁸ More importantly, Xunzi placed great emphasis on *Fa* and actively advocated the notion that *Fa* should be equally applied to everyone, regardless of his or her social status.¹³⁹ Xunzi's idea of the application of law is believed to have had a strong influence on the development of Legalism.¹⁴⁰

Historically, Xunzi is regarded as having developed the *Doctrine of Confucius – Mencius* in a reformative way.¹⁴¹ He divided *Li* into two different functions: to serve as the ideological foundation of the country and as a basic value of the family.¹⁴² In addition, Xunzi associated *Li* more with the political structure than with the clan system.¹⁴³ Unlike Confucius and Mencius, Xunzi opposed the aristocratic, hereditary system and favored a bureaucracy-based, centralization of

132. JINFAN, *supra* note 50, at 98-100.

133. ZHAO MING, AN INTRODUCTION TO PRE-QIN CONFUCIAN POLITICAL PHILOSOPHIES, 36-41 (Beijing Univ. Press 2004).

134. *Xunzi* consists of thirty-two chapters, most of which are believed to be Xunzi's own work. A full text is available in Chinese at http://www.quanxue.cn/ct_yujia/XunZi/Xunzi12.html. For an English translation, See JOHN KNOBLOCK, XUNZI, A TRANSLATION AND STUDY OF THE COMPLETE WORKS, VOL. I-III (Stanford Univ. Press 1990).

135. JINFAN, *supra* note 50, at 98.

136. Xunzi used the term "bad" to indicate self-regarding desire or instinct by birth. Each person has his or her own desire, and without proper guidance through education or discipline, the unregulated pursuit or struggle for personal desire could cause social turmoil, ultimately leading to strife and disorder. See MING, *supra* note 133, at 38-39; see also CHINESE CIVILIZATION: A SOURCEBOOK 24-26 (Patricia Buckley Ebrey ed., Free Press, 2d 1993).

137. JINFAN, *supra* note 50, at 98-99.

138. CUI YONGDONG, DOCTRINES OF STATE ADMINISTRATION OF POLITICAL THINKERS 48-49 (China Univ. of Political Science & Law Press 2007).

139. SHUCHENG, *supra* note 64, at 151.

140. *Id.*; see also JINFAN, *supra* note 51, at 99-100.

141. SHUCHENG, *supra* note 64, at 151; see also JINFAN, *supra* note 50, at 98-99.

142. Jonathan W. Schofer, *Virtues in Xunzi's Thought*, 21 J. OF RELIGIOUS ETHICS 117, 128-29 (1993).

143. JINFAN, *supra* note 50, at 99.

state power.¹⁴⁴ For example, Xunzi's political views included a desire "to esteem those who are knowledgeable and to employ those who are capable."¹⁴⁵ Thus, in Xunzi's opinion, the appointment of any public officer should be made on the basis of merit rather than family status.¹⁴⁶

2. The Legalist School of Thought

The antithesis of Confucianism is Legalism, a pragmatic political philosophy propagated by legalists such as Shang Yang,¹⁴⁷ Han Fei,¹⁴⁸ and Li Si.¹⁴⁹ *The Book*

144. SHUCHENG, *supra* note 64, at 150.

145. See KNOBLOCK, *supra* note 135, ch. 9, *Wang Zhi* (System of King).

146. *Id.*

147. Shan Yang (d. 338 B.C.), also known as Wei Yang or Gongsun Yang, and nicknamed the "Lord of Shang," came from the state of Wei to the state of Qin in 361 B.C., to serve Duke Xiao of Qin. Shan Yang brought with him a copy of the *Canons of Law (Fa Jing)*, the classic law book of *Li Kui*. Under the support of Duke Xiao, Shang Yang lunched Qin's political reform, known as *The Political Reform of Shang Yang* or *Shang Yang Bian Fa*, and enacted sweeping changes. The reform helped transform Qin into a strong state and ultimately made the state the first dynasty of China (the Qin Dynasty, 221 – 206 BC) by conquering all other states and unifying the country. Shang Yang's political opinions and philosophies were set forth in *The Book of Lord Shang (Shang Jun Shu)*, a book compiled by scholars after Shang Yang died. A significant part of Shang Yang reform was abolishing the land ownership scheme known as the "System of Nine Squares," established during the time of slavery and seeking to replace it with a two-layer administrative structure called the system of prefectures and counties.

The "Nine Squares" was named after a Chinese character "井" (*well*). This scheme was employed as both the means to determine the rank of officials and the instrument to control slaves. The system of prefecture and counties focused on the ease of administration and the preservation of highly centralized governmental power. Partly due to its effectiveness in the exercise of central control, this system has remained unchanged. Currently, the basic conception of the prefecture and counties system is still well received. See HISTORY OF CHINA, *supra* note 49, at 127.

148. Han Fei (d. 234 BC), a descendant of noble family of the state of Han, was a disciple of Xunzi and a great philosopher of his time. Han Fei studied legalist ideas and developed a comprehensive theory of legalism in his book *The Han Feizi*, which consisted of fifty-five chapters. Because of this contribution, Han Fei was credited with epitomizing legalist thoughts and a systemized theory of legalism. Han Fei attempted to promote reform in the state of Han, but was unsuccessful because his political ideas were not favored by Han's king. Disappointed at home, Han came to Qin in 234 B.C. and found favor with the king of Qin, who was later crowned as the first Emperor of China, Qin Shi Huang. Unfortunately, Han was jailed a year later on a false charge and committed suicide. See JINFAN, *supra* note 50, at 95-98.

149. China, *Li Si*, <http://history.cultural-china.com/en/47History2307.html> (last visited Feb. 16, 2010). Like Han Fei, Li Si (d. 208 B.C.) was a student of Xunzi. Li Si was a powerful and highly controversial political figure. He helped Qin win the war against all neighboring states, thus unifying the country with the founding of the Qin Dynasty. When serving as the prime minister for both Qin Shi Huang and his son, Qin Er Shi (229 B.C. – 207 B.C.), Li Si managed to put the legalist theory into action and enacted harsh laws to implement it. For example, in order to stabilize Qin's power, Li Si persuaded Qin Shi Huang to suppress intellectual dissent by burning all books and records containing key Confucian texts, and burying some 460 Confucian scholars – the incident historically known as *The Burning Books and Burying Intellectuals (Fen Shu Keng Ru)*. In addition, according to *The Records of the Grand Historian* written by Sima Qian of the Han Dynasty, Li Si also caused the death of Han Fei, based on his envy of Han Fei's intellect. Other major Legalists of the era included Li Kui (d. 395 B.C.) of the state of Wei, Shen

of Lord Shang and Han Feizi were the principal sources of Legalist doctrine. *The Book of Lord Shang* recorded Shang Yang's reform initiatives and addressed both the origin and the role of law.¹⁵⁰ It emphasized the importance of law in governing a country and promoted the idea of "equal punishment" (*Yi Xing*): that the imposition of punishment should not take into consideration the social status of the person being punished.¹⁵¹ *Han Feizi* essentially restated the previous Legalist ideologies and advocated a system of laws that would enable a ruler to govern efficiently, even ruthlessly.¹⁵² Thus, the striking difference between Confucianism and Legalism is that the former upheld "rule by *Li*" while the latter strove for "rule by law."

Han Feizi was also significant because the book explicitly described the political strategies of governance.¹⁵³ It synthesized the *Fa*, *Shu*, and *Shi* into a general scheme for ruling of the country.¹⁵⁴ *Fa* encompasses the laws, rules, or legal norms, which helped establish the desired social standards, regulate human behavior, and maintain the power of the ruler and the state.¹⁵⁵ *Shu* denoted the strategies or measures by which the ruler's power was exercised and his decisions were carried out.¹⁵⁶ *Shi* represented the authority and power that rested with the ruler and commanded the full respect and obedience of the ruled.¹⁵⁷

According to Han Fei, the *Fa*, *Shu*, and *Shi* were indispensable components of being a ruler. Without the *Fa*, the country would become uncontrollable since the *Fa* made governance possible; short of the *Shu*, the *Fa* would not be effectively implemented resulting in the mismanagement of the country; absent the *Shi*, the *Fa* would not be respected and the ruler's role would be diminished. Thus, it was Han Fei's belief that if the ruler could rely on the *Fa* and live with the *Shi*, the country would remain under control.¹⁵⁸ He also emphasized that a ruler could not afford to lose either the *Fa* or the *Shu* because the *Fa* served as the premise of the *Shi*, and the *Shu* functioned as the means to realize and maintain the *Shi*.¹⁵⁹

In short, Legalism advanced the idea that the law was designed to support the ruler and the state.¹⁶⁰ The Legalists advocated that law should be given absolute authoritativeness so that it would become the sole criterion by which to judge right from wrong.¹⁶¹ They favored heavy punishments because they considered it vitally

Dao (d. 315) of the state of Zhao, and Shen Buhai (d. 337 BC) of the state of Chu.

150. YANG SHANG, *THE BOOK OF LORD SHANG* (J.J.L. Duyvendak trans., The Commercial Press 2006).

151. JINFAN, *supra* note 50, at 95.

152. *Id.* at 96-98.

153. *Id.* at 97.

154. SHUCHENG, *supra* note 64, at 142.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. YONGDONG, *supra* note 138, at 176-200.

160. SHUCHENG, *supra* note 64, at 140-41.

161. *Id.*

important to equip the law with great “deterrent force.”¹⁶² However, the Legalists also promoted equal application of the law, positing that if the punishments were harsh and the law equally applied, neither the powerful nor the weak would be able to escape the state’s control and the authority of the ruler.¹⁶³

Currently, many in China view Legalism as an early incarnation of the rule of law concept that placed the law above all else, in terms of state power and administration.¹⁶⁴ However, it is important to note that the rule of law advanced by the Legalists had a clear focus on punishment and maintenance of the ruler’s power.¹⁶⁵ Conceptually, it differed from the Western notion of rule of law, in that Legalism had nothing to do with constitutionalism or an independent judiciary,¹⁶⁶ rather, the rule of law theory, as employed in ancient China, was intimately related to upholding of the supremacy of the imperial authority.¹⁶⁷

C. *The Traditional Chinese Legal System*

China’s legal system has its origin in the Xia, Shang and Zhou Dynasties. But it did not become a true “system” until after the Qin Dynasty (221 B.C. to 206 B.C.). Specifically, the unification of China into a single state during the Qin Dynasty made it possible to have a statewide legal system.¹⁶⁸ In the Han Dynasty (206 B.C. to 220 A.D.) when Confucianism became the state orthodox ideology, the Chinese legal system embarked on the development of a tradition that would influence China for nearly two thousand years.¹⁶⁹ Finally, in the Tang Dynasty (618 A.D. to 907 A.D.) the Chinese legal system fully developed as a “system,” represented by the *Tang Code*.¹⁷⁰ The *Tang Code* laid a foundation for the traditional Chinese legal system, which included various historical features, discussed below.¹⁷¹

1. **The Dominance of Confucian Philosophy and the Integration of Li and Fa with Li as the Core**

The most striking feature of the traditional Chinese legal system was its concomitance with the Confucian philosophy.¹⁷² During the Qin dynasty, Confucianism had sunk into the limbo of diminished status because Legalism was in the first Emperor’s good graces, particularly during the dark period of Burning

162. *Id.* at 139.

163. *Id.* at 140.

164. YONGDONG, *supra* note 138, at 145-50; *see also* SHUCHENG, *supra* note 64, at 135-36.

165. SHUCHENG, *supra* note 64, at 135-36.

166. William P. Alford, *The Inscrutable Occidental? Implication of Roberto Unger’s Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915, 947-48 (1986).

167. JINFAN, *supra* note 50, at 98.

168. *Id.* at 135-38.

169. *Id.* at 144.

170. *Id.* at 253.

171. *Id.* at 253.

172. *Id.* at 1.

of Books and Burying of Intellectuals (212 B.C.).¹⁷³ But in the Han Dynasty, under the suggestion of Dong Zhongshu,¹⁷⁴ Emperor Wudi adopted a state policy that “proscrib[ed] hundred[s] of other schools of thought and espous[ed] Confucian ideology only.”¹⁷⁵ As a result of that policy, Confucianism emerged again, becoming the orthodox ideology of the country that lasted for almost the entire period of Chinese imperial history.¹⁷⁶

Of all the factors credited for the dominance of Confucianism, three are the most notable. First was the Confucian system of social estate that was aimed at maintaining the imperial power.¹⁷⁷ Based on the Confucian “three cardinal guides and five virtues,”¹⁷⁸ the social estate system was an imperial power-centered social and political order under which the country operated. The second factor was the clan-based ethnic standard established by Confucianists,¹⁷⁹ which served as an ideological device to unify the country around the emperor, granting him exclusively absolute power.¹⁸⁰ The third factor was the authoritarian structure of bureaucracies created under the imperial power to govern the country.¹⁸¹ Although Confucianism advocated a benevolent government, its conception of the superiority of imperial power in fact formed a theoretical basis to justify the authoritarian nature of the government.¹⁸²

At the heart of Confucianism was the idea of *Li*. In general, *Li* is a classic Chinese social construct, used extensively to refer to norms of social behavior and moral standards.¹⁸³ Deemed a Chinese ideograph, *Li* is a complicated concept because it embodies the entire spectrum of interaction with humans, nature, and even material objects.¹⁸⁴ Indeed, in Chinese history, *Li* played a significant role in

173. The Burning of Books and Burying of Intellectuals refer to a policy and sequence of events in which the Qin Dynasty suppressed all schools of thought other than the Legalism. See SIMA QIAN, RECORDS OF THE GRAND HISTORIAN: QIN DYNASTY xiii (Burton Watson trans., The Chinese Univ. of Hong Kong 1993). Full Chinese text available at <http://guji.artx.cn/Article/2201.html>.

174. Dong Zhongshu (179-140 B.C.) was a famous scholar in the Han Dynasty who was instrumental in establishing Confucianism as the official ideology of ancient China. As chief minister to the emperor Wu, Dong was responsible for the dismissal of all non-Confucian scholars from the government. Encyclopedia Britannica, *Dong Zhongshu*, <http://www.britannica.com/EBchecked/topic/608995/Dong-Zhongshu> (last visited Mar. 5, 2010).

175. JINFAN, *supra* note 51, at 147-48.

176. *Id.* at 144.

177. ZHONGQIU, *supra* note 48, at 134-35.

178. The “three cardinal guides” included that of “the ruler over subject, the father over son, and the husband over wife,” and the “five virtues” comprised of “benevolence, righteousness, ritual, wisdom and honesty.” WarriorTours, Confucianism, http://www.warriortours.com/intro/religion_confucianism.htm (last visited Mar. 5, 2010).

179. JINFAN, *supra* note 50, at 5-6.

180. ZHONGQIU, *supra* note 48, at 134-35.

181. CHUNYING, *supra* note 52, at 3.

182. JINFAN, *supra* note 50, at 5-6.

183. *Id.* at 3.

184. See generally CONFUCIAN PERSONALITIES (Arthur Wright & Denis Twitchett eds.,

both the regulation of human activities, and in defining the relationship between humans and nature. The conception of *Li* and all theories developed under its sacred rubric constituted the main theme of traditional Chinese legal culture.¹⁸⁵

At its inception, *Li* originated from the religious rites that were used to worship heaven and the ancestors.¹⁸⁶ *Li* began transitioning to systemized norms of conduct when the Lord of Zhou stipulated *Zhou Li*, infusing *Li* with political functions to serve as a primary means to govern the state.¹⁸⁷ At that time, as noted earlier, the very purpose of *Li* was to help build a political and social system under which a hierarchical order was established and maintained.¹⁸⁸ Pursuant to that order, people were ranked on the basis of their social status and were generally classified as the noble, respected, inferior, or lowly. Thus, upon the enactment of *Zhou Li*, *Li* evolved from religious rites to social norms.¹⁸⁹

According to *Zhou Li*, the order of hierarchy was to be strictly followed and no one could violate it.¹⁹⁰ Thus, in a state, everyone was subservient to the king. Additionally, the inferior could not offend the noble, and the poor could not be treated the same as the wealthy.¹⁹¹ Similarly, in a family, the younger was obedient to the elder, the son was servile to the father, and the lowly had to listen to the respected.¹⁹² From the viewpoint of the Lord of Zhou, when *Li* was observed, everything in the state would be well ordered and the country would be strong, otherwise the whole society could descend into chaos.¹⁹³

Social upheaval during the periods of Spring-Autumn and Warring States, led to a movement to abandon *Zhou Li*.¹⁹⁴ However, believing that *Li* was essential to the stability and development of the state, Confucius focused much of his effort on restoring *Zhou Li*.¹⁹⁵ On the one hand, Confucius stressed the importance of maintaining the *Zhou Li* social order. On the other hand, he introduced into *Li* his idea of *Ren* (benevolence),¹⁹⁶ making “*Li*” and “*Ren*” the two key elements of Confucianism.

According to Confucius, if a person lacked *Ren*, he would fail to observe *Li*.¹⁹⁷ Thus, in order to comply with *Li*, it was essential to possess morals such as filial submission, brotherliness, righteousness, good faith, and loyalty, basic norms

Stanford Press 1962) (describing how the concept of *Li* permeated Chinese society and was a pillar of Confucianism).

185. ZHONGMING & QIANG, *supra* note 41, at 47-60.

186. *Id.* at 39-47.

187. *Id.* at 59.

188. *Id.*

189. *Id.* at 45-47.

190. JINFAN, *supra* note 53, at 11-13.

191. *Id.* at 12.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. ZHONGMING & QIANG, *supra* note 41, at 60-61.

197. CONFUCIUS, *supra* note 123, bk. 1.2.

of virtue.¹⁹⁸ To that end, Confucius strongly advocated the concept of the rule of virtue by emphasizing the political approach of “guiding with virtue and regulating with *Li*.”¹⁹⁹ When speaking of *Li*, Confucius and his followers believed that adherence to *Li* would lead people to abide by the virtues and follow the rites appropriate to their social, political, and personal status.²⁰⁰

Hence, *Li* basically served two major functions, acting both as a moral standard and norms of conduct. The whole idea of *Li* was to promote a social scheme of “three cardinal guides” and “five virtues,” and to help establish a king-centered aristocratic political system.²⁰¹ However, from the beginning, the Legalists were vehemently opposed to Confucian ideology. For a long period of time, especially during the Qin Dynasty when Legalism was the ruling force, Confucianism was considered merely a scholarly doctrine and did not play much of a role in the social and political arena. It was in the Han Dynasty that Confucianism became more influential and ultimately was made the state orthodoxy.²⁰²

A historical reason for Confucianism’s acceptance in the Han Dynasty was the swift fall of the Qin Dynasty, in which tyranny was commonplace.²⁰³ The lesson the Han learned from the Qin was that in order to rule the country, all policies must be tempered with benevolence and mercy.²⁰⁴ For that reason, Emperor Wudi took Dong Zhongshu’s advice and adopted Confucian *Li* as the basic means of governance in order to create a benevolent government. Since then, *Li* became an important part of Chinese legal system.²⁰⁵

198. Steve Stegeman, Book Note, 14 CHINA REV. INT’L, 394, 394-400 (2007) (reviewing KIM-CHONG CHONG, EARLY CONFUCIUS ETHICS: CONCEPTS AND ARGUMENTS (2007)).

199. JINFAN, *supra* note 50, at 88.

200. Jeffrey Riegel, *Confucious*, Stanford Encyclopedia of Philosophy (Sept. 5, 2006) <http://www.plato.stanford.edu/entries/confucius/>. In Confucian texts, *Li* was stated explicitly in various rites. The book of *Li Ji (Records of Li)* was the most influential work containing texts of *Li*. In accordance with *Li Ji*, Confucius addressed the scope of *Li* extensively, including some “300 major and 3000 minor rules of ritual.” In fact, Confucius extended his discussion about *Li* to a wide range of topics, from eating and drinking, women’s walking, clothing, and mourning; to learning, appropriate attitude towards elders, loyalty to superiors and ultimately to the ruler of the state.

201. See JOSH MCDOWELL & DON STEWART, HANDBOOK OF TODAY’S RELIGIONS: Confucianism (1992), available at http://www.greatcom.org/resources/handbook_of_todays_religions/03chap04/default.htm. It was Confucius’s strong belief that if the ruler acted like a ruler, the subject like a subject, the father like a father, and the son like a son, the order of the society and the stability of the state were readily attainable.

202. JINFAN, *supra* note 50, at 144.

203. EMuseum @ Minnesota State University, Han Dynasty, http://www.mnsu.edu/emuseum/prehistory/china/early_imperial_china/han.html (last visited Mar. 5, 2010).

204. JINFAN, *supra* note 50, at 144-46.

205. *Id.* at 144.

When Confucianism was upheld as the state orthodox ideology, it was actually combined with the methodology of *Fa*, which had been promoted by Legalism due to a belief that *Fa* was indispensable in the ruling of a country.²⁰⁶ Therefore, during the Han Dynasty, China entered into a period in which the development of Chinese legal system consisted of the integration of Confucian *Li*, into Legalist *Fa*, making *Li* a central element of the legal system.²⁰⁷

The integration of *Li* into *Fa* in the Han Dynasty began with the use of Confucian classics to interpret law and even to determine cases. At that time, cases were typically adjudicated in line with the ideology and spirit of classic Confucian works like the *Spring & Autumn Annals*.²⁰⁸ As part of the integration effort, Dong Zhongshu compiled all relevant cases into his famous book, *Adjudication of Cases under the Spring & Autumn Annals (Chun Qiu Jue Yu)*.²⁰⁹ Dong's book is considered the first casebook in Chinese legal history and a symbol of Confucianization of *Fa*.²¹⁰

The practice of adjudication under the *Spring & Autumn Annals* was in place until the Tang Dynasty when the *Tang Code* was promulgated. As the first comprehensive codification of law in China, the *Tang Code* was very influential in many ways. Most significantly, the *Tang Code* became the legislative blueprint for all subsequent dynasties.²¹¹ In the *Tang Code*, the integration of the *Li* and the *Fa* was more systemized and formalized. In fact, many in China regarded the whole *Tang Code* as an outward legal expression of the *Li* not only because it was deeply rooted in the *Li*, but also because it legalized the *Li* as the basic social norms of conduct.²¹²

Under the *Tang Code*, the *Li* served as the foundational influence on Chinese legal policies, using punishment as the means of implementation.²¹³ For example, the *Tang Code* specified ten categories of major crimes upon which the death penalty would be imposed²¹⁴ and each was directly related to violation of the

206. *Id.* at 17.

207. SHI GUANGQUAN, THE COMPROMISE OF LI AND LAW AND HISTORICAL CHANGES OF CHINESE TRADITIONAL LEGAL CULTURE, 31-47 (Law Press 2006).

208. Cultural China, The Four Books and Five Classics, <http://history.cultural-china.com/en/173History4610.html> (last visited Feb. 16, 2010). The classic Confucian works consist of four books and five classics known as *Shi Su Wu Jing*. The Four Books are THE GREAT LEARNING (*Da Xue*), THE DOCTRINE OF THE GOLDEN MEAN (*Zhong Yong*), THE ANALECTS OF CONFUCIUS (*Lun Yu*), and THE MENCIUS (*Meng Zhi*). The Five Classics refer to THE BOOK OF SONGS (*Shi Jing*), THE CLASSIC OF HISTORY (*Shu Jing*), THE BOOK OF CHANGES (*Yi Jing*), THE CLASSIC OF RITES (*Li Jing*), and THE SPRING & AUTUMN ANNALS (*Chun Qiu*). *Id.*

209. JINFAN, *supra* note 50, at 149-50.

210. *Id.*

211. *Id.* at 253.

212. *Id.*

213. THE T'ANG CODE: VOL. I, GENERAL PRINCIPLES 14 (Wallace Johnson trans., Princeton Univ. Press 1979).

214. The ten major crimes (abominations) included plotting rebellion, plotting great sedition, plotting treason, contumacy, depravity, great irreverence, lack of filial piety, discord, unrighteousness, and incest. *Id.* at 17.

Confucian-based *Three Cardinal Guides*.²¹⁵ In addition, several provisions in the *Tang Code* were simply the parallel of rites in the *Zhou Li*. Moreover, the *Li* was also employed to determine such considerations as the severity of the punishment and sentencing.²¹⁶

In sum, by imbedding the Confucian-based Three Cardinal Guides in the statutes and making *Li* the core element of the law, the *Tang Code* formally codified the *Li*.²¹⁷ The very focus of the *Tang Code* was essentially on maintaining the ultimate authority of imperial power,²¹⁸ and the reasoning was simple. The most important of the Three Cardinal Guides, was the concept of “ruler over subject” which emphasized “loyalty.” The remaining Guides of “father over son” and “husband over wife” were concerned with “filial piety.” Both “loyalty” and “filial piety” were the fundamental values of the *Li*.²¹⁹ The *Tang Code* was historically viewed in China as the legislative agglomeration of the *Li* and the *Fa*, hailed as a typical representation of the legal system in which the *Li* was well incorporated into the *Fa*.²²⁰

2. The Chinese Criminal Law-Focused Legal Tradition and the Subordination of the Judiciary to the Administration.

Another unique characteristic of the Chinese legal system is that the civil law was largely overshadowed by the criminal law.²²¹ This occurred because the *Li*-premised legal system was mainly concerned with the relationship between the state and its citizens (a vertical relationship); there was little attention to civil matters (a horizontal relationship).²²² Consequently, to a great extent, the *Fa*, (law), was synonymous with punishment (*Xing*); the fundamental role of the *Fa* was to “stop violence and eliminate evil.”²²³

Thus, the traditional Chinese legal system was almost entirely a criminal law system. A closer examination of Chinese legal history reveals that in almost every dynasty, criminal law constituted the backbone of the *Fa* and the legal code consisted mostly of the penal code. However, the provisions of the legal code were not only intended to express criminal offenses.²²⁴ In the traditional Chinese

215. JINFAN, *supra* note 50, at 256.

216. See Ebrey, *supra* note 136, at 116-19.

217. JINFAN, *supra* note 53, at 23-68.

218. *Id.*

219. *Id.*

220. *Id.* at 23.

221. *Id.*

222. *Id.* A vertical relationship refers to the relationship between a government and its people while a horizontal relationship refers to the relationship individuals have between themselves.

223. *Id.* at 68.

224. CHUNYING, *supra* note 52, at 3-4.

legal system, the same code contained both criminal and civil law, placing criminal punishment at the center.²²⁵

What followed was the creation of a judiciary that prioritized criminal law and punishment. At the central level, there were three legal branches: the Board of Punishment (*Xing Bu*), the Central Judicial Court (*Da Li Si*), and the Office of Censors, or *Censorate* (*Yu Shi Tai*).²²⁶ This three-branch format was established during the Tang dynasty, and subsequent dynasties largely adhered to it.²²⁷

The Board of Punishment was in charge of drafting and examining laws and regulations, and classifying criminal punishment. Although it functioned more like a legislative body, it had the power to review judgments concerning the death sentence and exile.²²⁸ The Central Judicial Court was responsible for adjudicating all cases, except for the death penalty and exile cases that were subject to the Board of Punishment's review and approval.²²⁹ The Office of Censors mainly dealt with supervision of officials at the central and local level, but was also authorized to adjudicate certain cases.²³⁰

The Board of Punishment was the most powerful of the three branches, since it was the top body of criminal law legislation and enforcement. Notwithstanding the division of power between these branches, the power of final adjudication rested with the emperor.²³¹ The emperor was the ultimate source of law not only because his words had binding legal effect, but also because he possessed ultimate judicial power. Thus, the emperor possessed all the powers of the legislature, executive, and judiciary.²³²

In addition, although the Central Judicial Court was much like the supreme court of a nation, the judiciary was not independent.²³³ Rather, it was generally subordinate to the administration for several reasons. First, the emperor had the final say in all cases, and the imperial edict was the supreme law of the land.²³⁴ In addition, the Central Judicial Court was less powerful than the Board of Punishment and was often influenced by the Office of Censors. The so-called "joint hearing by three branches" (*San Tang Hui Shen*) was a common occurrence.²³⁵ Finally, there were no local courts, an executive officer handled everything at the local level.²³⁶

225. *Id.* at 313.

226. JINFAN, *supra* note 50, at 138-39, 269-70, 478-79.

227. *Id.*

228. *Id.*

229. *Id.*

230. During the Ming Dynasty, the office of censor was renamed the council of supervision. *See id.* at 478.

231. *Id.*

232. *Id.* at 478.

233. *Id.*

234. *Id.*

235. Under the specific edict of the emperor, the three branches would sit together to try a case that was regarded as important or that had a significant impact. *See id.* at 520-21.

236. *Id.* at 132.

Beginning with the Qin Dynasty, the local administration was divided into three levels: province, prefecture, and county—all under the direct control of the central government.²³⁷ Each of these local administrative offices was called *Yamen* because it served as both the executive office and the courtroom. As such, the executive officer was empowered with judicial authority and a considerable amount of his daily work involved adjudicating civil and criminal cases.²³⁸

The combination of the executive and the judiciary into one local office was a peculiar system that appeared throughout the feudal period of Chinese history. The underlying rationale was to ensure that the imperial power was not compromised and the emperor retained control of the reins of the nation's judiciary.²³⁹ Unfortunately, as a consequence of the system, the executive was superior to the judiciary and enjoyed the privilege of being able to interfere with judicial proceedings. Given this two-fold authority, executive and judiciary, a local chief official was often venerated as "parental officer" (*Fu Mu Guan*), giving him the right and authority to determine the life of any particular person.²⁴⁰ Many officers took advantage of this power.

D. Civil Law Influence and a Change of Tradition

In the late 19th century, the great glory of China was abruptly diminished when its imperial dignity was shattered by the cannons of foreign superpowers emerging from the Western industrial revolution.²⁴¹ During the Opium War (1849-42) foreign invaders were able to infiltrate and occupy Chinese territory, ending a period of peace and isolation in the country.²⁴² At that time, China lost its capacity to resist foreign invasion and was completely unable to contend with foreign troops. A principal reason for the defeat was that China lagged behind the western world both politically and economically.²⁴³

The end of China's isolation was an immediate consequence of the Opium Wars. In defeat, China had no leverage to bargain and was essentially forced to sign many "unequal treaties."²⁴⁴ Eager to take advantage of China's weakened

237. *Id.* at 214. During the Qin Dynasty, there were two levels: prefecture and county. During the East Han Dynasty (25-220 A.D.), province was created above the prefecture and county.

238. *Id.*

239. *Id.*

240. *Id.*

241. CHUNYING, *supra* note 52, at 315.

242. *Id.*; WILLIAM L. TUNG, CHINA AND THE FOREIGN POWERS: THE IMPACT OF AND REACTION TO UNEQUAL TREATIES 7 (Oceana 1970).

243. CHUNYING, *supra* note 52, at 315.

244. COHEN, *supra* note 75, at xi. These "unequal treaties" benefitted other nations at the expense of China's sovereignty and "judicial and administrative integrity[.]" TUNG, *supra* note 243, at 8. For example, under the Treaty of Nanking, which ended the Opium War, Great Britain took possession of Hong Kong, opened several ports to "British trade and residence[.]" and forced China to pay a twenty-one million dollar indemnity. *Id.* at 20. By 1905, nineteen countries "had entered into unequal treaties with China." *Id.* at 30.

state, through these treaties, Western countries, later joined by Japan, established extraterritorial spheres of influence on Chinese soil.²⁴⁵ In these extraterritorial spheres of influence, Western nations established their own civil and criminal courts,²⁴⁶ and Western citizens in China were not subject to Chinese law.²⁴⁷ In other words, extraterritoriality allowed these foreign nations to administer "Western justice" by establishing "treaty ports" or "spheres of influence" within China.²⁴⁸

After the Opium Wars, Western influence began to take hold in China. Faced with the unpleasant experience of foreign occupation, many in the Forbidden City sought a cure to revitalize the ailing country and began to desire political and legal reform.²⁴⁹ Responding to an influx of Western capital, China began revising its laws in 1902.²⁵⁰

One significant revision included the use of foreign laws as a reference, for the first time basing a great deal of the legal revision on Western legal models.²⁵¹ In fact, many in China even believed that the country should follow the lead of powerful European countries and adopt a constitutional government.²⁵² As part of the effort to investigate foreign laws, many foreign legal books and articles were translated into Chinese.²⁵³ In addition, scholars who had trained overseas introduced foreign laws and legal culture.²⁵⁴ During this time, an increasing number of students were provided with government grants to study foreign law and, as a result, many students received their legal education overseas, mainly in Europe.²⁵⁵

245. COHEN, *supra* note 75, at xi.

246. Jones, *supra* note 28, at 20.

247. *Id.*

248. COHEN, *supra* note 75, at xi.

249. CHUNYING, *supra* note 52, at 316-17.

250. *Id.* at 319. China studied the possible establishment of a national assembly and a constitution. KEVIN J. O'BRIEN, REFORM WITHOUT LIBERALIZATION 13 (Cambridge Univ. Press 1990).

251. O'BRIEN, *supra* note 250, at 13.

252. *Id.* at 13-14. For purposes of the reform, the Emperor appointed jurists Shen Jiaben and Wu Tingfang to be Commissioners of Legal Revision, both having great access to Western legal materials. Also in 1904, Emperor Guangxu issued an edict to Prince Tsa Tchen, stating, "the development of commercial relations, the encouragement to industry have always been the primary duty of the government, and must be carefully attended to. We hereby order that Tsai Tchen, Tuan Chih Kai and Wu Ting Fang commissioned to compile a commercial code which will constitute the rule to be observed in commercial transactions." JOSEPH AN-PAO WANG, CHINA STUDIES, STUDIES IN CHINESE GOVERNMENT AND LAW, CIVIL CODE AND THE REPUBLIC OF CHINA, x-xi (Univ. Publications of America, Inc. 1976).

253. O'BRIEN, *supra* note 250, at 13.

254. CHUNYING, *supra* note 52, at 318.

255. *Id.* It should be noted that the foreign missionaries who poured into China during the late nineteenth century played an important role in introducing Western culture to the Chinese tradition, opening Chinese eyes to the outside world. In 1876, the total number of foreign Protestant missionaries was 473. KENNETH SCOTT LATOURETTE, THE DEVELOPMENT OF CHINA 163 (Houghton Mifflin 1917). In 1889, this figure went up to 1,296. *Id.* By 1893, the total number of church members in China was 55,093. *Id.* Although the missions were related to

This legal reform further fortified the concept of “learning from the West” in China. In 1907 a national body—the Office of Legal Revision—was created and became responsible for making legal revisions and drafting new laws.²⁵⁶ The Office of Legal Revision consisted of Chinese students who had returned from studying abroad in Japan, Europe, and the United States. Further, illustrating its intent to learn from the west, the Office of Legal Revision hired a Japanese jurist as an advisor on legal drafting for the imperial government.²⁵⁷ At that time, Japan had completed its civil and commercial codification, which was modeled primarily on the German codes.²⁵⁸ In December 1910, the first draft of the Civil Code was complete and it was finalized in 1911.²⁵⁹

The draft of the Civil Code was based primarily on German and Japanese law models.²⁶⁰ It contained five chapters, the first three of which were drafted by the Japanese jurist in the Office of Legal Revision.²⁶¹ In addition, many civil law concepts were borrowed and incorporated into the draft; these concepts were also addressed in the legal writings and legal textbooks as well.²⁶² Moreover, Chinese legal scholars translated a number of European laws and legal books into Chinese.²⁶³

Despite the progress made on the Civil Code, it was never enacted into law. In 1911, the Xinhai Revolution (named after the Chinese year of *Xinghai*) stormed China.²⁶⁴ The Revolution brought the end to the Qing Dynasty and led to the establishment of the Republic of China.²⁶⁵ Despite the Civil Code’s doomed fate, the Revolution resulted in historic changes. The emperor was dethroned and imperial power was destroyed.²⁶⁶ The traditional Chinese legal system, centered on imperial supremacy, ended in the country.

Nevertheless, after the 1911 Revolution, the government used many of the provisions in the unfinished Civil Code while drafting work resumed.²⁶⁷ The

religion, their widespread presence in China made it possible to significantly increase the exposure of the country to the foreign ideology and social value. *Id.*

256. See WANG, *supra* note 252, at x-xi.

257. The Japanese jurist was Mr. Y.M. Matsuoka. *Id.* at 18. During that reform period, anxious to follow Japan’s emergence from the old feudalism into a modern country, hundreds of Chinese students went to Japan to study, a significant number of them went to Japanese law schools. *See id.*

258. *See id.*

259. *See id.* at 16-20.

260. Jones, *supra* note 28, at 20.

261. WANG, *supra* note 252, at 16-20.

262. See WANG JIAFU, CIVIL LAW OBLIGATIO 17-18 (Law Press 1991). *See also* ZHUONGMING & QIANG, *supra* note 41, at 340-42.

263. JIAFU, *supra* note 262, at 17-18.

264. See CHUNYING, *supra* note 52, at 322; *see also* ZHUONGMING & QIANG, *supra* note 41, at 357.

265. CHUNYING, *supra* note 52, at 322.

266. Jones, *supra* note 28, at 19.

267. GUOHUA, *supra* note 2, at 23.

second draft, completed in 1925, essentially followed the blueprint of the first draft while enhancing its civil law characteristics.²⁶⁸ Unfortunately, power struggles amongst warlords created considerable political chaos during this period and the second draft met the same fate as the first, never being completed.²⁶⁹

The enactment of China's Civil Code finally came to fruition in 1930,²⁷⁰ under the National Government led by Chiang Kai-shek (1887–1975) who ruled the country from 1927 to 1949.²⁷¹ The 1930 Civil Code consisted of five Parts, including the “General Principles, Obligations, Rights over Things, Family, and Succession.”²⁷² Since the Code was devised on the foundation of the first two drafts, it necessarily inherited the civil law tradition.²⁷³ In addition to its civil law style of division between general principles and specific provisions, the Code was replete with civil law concepts. For example, Part III of the Code dealt with property rights, but it used the name of “Rights over Things.”²⁷⁴ “Things” is a term for property in civil law countries.²⁷⁵

In addition to the 1930 Civil Code, five other major codes were promulgated between 1928 and 1937.²⁷⁶ All together, these compositions were called “The Six Codes” or the “Code of Six Laws” (*Liu Fa Quan Shu*) and were compiled in a corpus of law.²⁷⁷ Like the 1930 Civil Code, the other five codes relied heavily on civil law tradition, and contained many legal principles taken from Germany and Japan.²⁷⁸ The major categories of law, both conceptually and structurally, paralleled those commonly used in the civil law countries. For example, even the term, Six Codes, was borrowed from the French “Five Codes” enacted after the 1789 French Revolution.²⁷⁹

268. See JIAFU, *supra* note 262, at 16-20.

269. See WANG, *supra* note 252, at 19.

270. Yin-Ching Chen, *Civil Law Development: China and Taiwan*, 2 STAN. J. E. ASIAN AFF 8, 9 (2002), available at <http://www.stanford.edu/group/sjeaa/journal2/china1.pdf>.

271. See generally JAY TAYLOR, *THE GENERALISSMO: CHIANG KAI-SHEK AND THE STRUGGLE FOR MODERN CHINA* (Belknap Press 2009).

272. WANG, *supra* note 252, at xiv-xv (noting that Part I was adopted on May 23, 1929 and took effect October 10, 1929, Parts II and III were promulgated in November 1920 and effective May 30, 1930, and Parts IV and V were enacted in the end of 1930).

273. JIAFU, *supra* note 262, at 16-20.

274. See WANG, *supra* note 252, at 19.

275. Mo Zhang, *From Public to Private: the Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L. J. 317, 322 (2008).

276. The six codes were “the Constitution, the Civil Code, the Criminal Code, the Codes of Civil and Criminal Procedure, and administrative law.” Jones, *supra* note 28, at 20.

277. See WANG, *supra* note 252, at 16-19.

278. Jones, *supra* note 28, at 20.

279. See Percy R. Luney, Jr., *Traditional and Foreign Influences: Systems of Law in China and Japan*, 52 L. & CONTEMP. PROBS, 129, 131 (1989). The Five Codes of France consisted of the Civil Code, Commercial Code, Code of Civil Procedures, Code of Criminal Procedures, and Penal Code. Although the French Constitution was adopted later, the name of Five Codes was not changed. But in Japan, when the French Codes were translated into Japanese, they were named as the Book of French Laws. See *The Napoleon Series: The Civil Code*, http://www.napoleon-series.org/research/government/c_code.html#book1 (last visited Feb. 21, 2010).

The adoption of the Six Codes altered the Chinese legal system from a single, unified code focused on criminal law to a function-driven system of separate codes for separate areas of law.²⁸⁰ Note that the word “altered” is used here to mean that the Chinese legal tradition was changed, but not eliminated, as a result of embracing Chinese civil law.²⁸¹ Perhaps at this level, enactment of the Six Codes could be heralded as the complete reception of the civil law tradition in China.

In fact, the Six Codes retained quite a number of legal principles and rules from the Qing Code.²⁸² One example is the use of “forced analogy” (*Bi Fu*) to help determine criminal offenses that were not readily found in the provisions of the code.²⁸³ Despite the strong influence of civil law tradition, mainly in the areas of legal philosophy and jurisprudence, no clear cut distinction was ever made between Chinese legal tradition and the contemporary legal system, especially with respect to the deeply-rooted concept of *Li*.²⁸⁴ In addition, the clan-based ethic standard and the authoritarian structure of bureaucrats remained influential.²⁸⁵

Since the Qin Dynasty (221 B.C. to 206 B.C.), each dynasty in China followed a pattern of highly centralized state power with an expansive reach over every corner of the country.²⁸⁶ After the last Emperor was dethroned in 1911, many revolutionaries, including Dr. Sun Yat-sen, the founding father of the Republic of China, still believed that it was necessary to establish a government that had an “all-purpose” function, with each individual under government power, ready to sacrifice personal interests in order to preserve such power.²⁸⁷ Although Dr. Sun Yat-sen premised his idea of revolution on the Three People’s Principles (nationalism, democracy, and equalization), he actually tried to promote a “guided democracy.”²⁸⁸ Under this guided democracy, the state would undergo a brief period of military dictatorship while the people were “trained to exercise democracy.”²⁸⁹

But indeed, between the legal reform in late Qing Dynasty and the adoption of the Six Codes by the Nationalist government in 1930s, China’s legal system evolved, developing traits of a civil law system.²⁹⁰ First, codes and statutes became the primary sources of law, while case law precedent was not generally given binding effect.²⁹¹ Although court decisions may have supplemented statutes by

280. ZHONGMING & QIANG, *supra* note 41, at 357-62.

281. *See id.*

282. *See id.*

283. SHUCHENG, *supra* note 64, at 150.

284. *See* ZHONGQIU, *supra* note 56, at 6-7.

285. SHUCHENG, *supra* note 64, at 150.

286. JINFAN, *supra* note 50, at 137-43.

287. WANG, *supra* note 252, at 416-17.

288. Washington State University, World Civilizations, Modern China: Sun Yat-Sen, <http://www.wsu.edu/~dee/MODCHINA/SUN.HTM> (last visited Mar. 4, 2010).

289. *Id.*

290. CHUNYING, *supra* note 52, at 322-25.

291. GUOHUA, *supra* note 2, at 23-24.

creating binding decisions, under the system of the Six Codes, such decisions had to meet two requirements: (1) the Supreme Court had to make the decisions; and (2) the Judicial Council of Central Authorities (*Si Fa Yuan*) had to review the decisions and approve them as “precedent.”²⁹²

Second, the laws or statutes were enacted in the common pattern of a civil law system.²⁹³ The manifestation of this pattern related to the structural layout of the laws or statutes and consisted of two major parts: the general principles and the specific provisions.²⁹⁴ Although the general principles appear vague, they serve a dual function: they set the tone for the law and provided guidance for its application, and they could be used directly as legal authority to determine cases, especially when no specific provision could be readily applied.²⁹⁵

Therefore, in terms of legal structure and terminological origin, the modern Chinese legal system bears a stronger resemblance to the civil law system than to that of the Chinese tradition.²⁹⁶ However, this observation does not indicate that the traditional Chinese legal system has no influence in the modern time; rather, the legal philosophy and ideology that developed over the nation’s thousand-year history has had a strong impact on today’s legal system.²⁹⁷

E. Building a Socialist Legal System in Modern China

When the Communist Party of China (CPC) came to power in 1949, one of its most astounding moves was to abolish the Six Codes and all other legislation created under the Nationalist government.²⁹⁸ This abolition was part of major effort to remove the capitalist influences and to establish a new socialist legal system.²⁹⁹ The new system was not “built from scratch,” but rather was based, at least in part, on the legal and administrative practices that Chinese communists had developed in the areas that they had controlled before 1949.³⁰⁰ However, even with this pre-

292. *Id.* The Judicial Council of Central Authorities (JCCA) was the highest judicial body of the nation and now still exists in Taiwan. Judicial Yuan, *The Judiciary Under the Five-Power Constitution and its Epochal Significance*, <http://www.judicial.gov.tw/en/english/aboutus/aboutus04/aboutus04-01.asp> (last visited Feb. 21, 2010). Currently, the JCCA, consisting of 15 judges, is mainly responsible for interpreting constitution, laws and regulations. Judicial Yuan, *Structure and Functions of the Judicial Yuan*, <http://www.judicial.gov.tw/en/english/aboutus/aboutus04/aboutus04-03.asp> (last visited Feb. 21, 2010).

293. *See* GUOHUA, *supra* note 2, at 18-19.

294. *See id.*

295. *Id.* at 23-24.

296. *Id.*

297. ZHONGQIU, *supra* note 56, at 1-17.

298. *Id.*

299. Tao-tai Hsia & Wendy I. Zeldin, *Recent Legal Developments in the People’s Republic of China*, 28 HARV. INT’L L. J., 249, 251 (1987). In February 1949, the CCP issued the “Directive Regarding the Abolition of the Guomindang’s *Complete Book of Six Codes* and the Affirmation of the Legal Principles in the Liberated Areas,” which annulled all of the Nationalist regime’s laws and regulations. *Id.*

300. *Id.* The legal system that Communists had developed in the areas they controlled before 1949 was simple and “consisted of major principles and rules of conduct concerning the

1949 experience, the CPC had difficulties determining how the socialist legal system in China would develop.³⁰¹

The abolition of the Six Codes, as Mao Zedong himself recognized, left the Chinese legal system as little more than a blank piece of “white paper.”³⁰² Believing that to build a socialist legal system, it ought to follow Soviet footprints, China looked to the Soviet Union as a model.³⁰³ Consequently, almost all laws and regulations promulgated in the country in early 1950s, including the 1954 Constitution, evidenced a clear Soviet influence.³⁰⁴

Despite being labeled “socialist,” Soviet law had a notable French influence.³⁰⁵ In this context, even if the annulment of the Six Codes severed the socialist legal system from the Nationalist legal system, the civil law feature was not diminished; instead, it was actually carried over and strengthened in the modern legal system of China. For example, institutionally, at no time during the development of the Chinese socialist legal system were courts given any power to create laws.³⁰⁶

Also worth noting was the Confucian influence on the development of the socialist legal system. Undoubtedly, the dominance of the Confucian paradigm in China officially ended with the collapse of Qing Dynasty in 1911.³⁰⁷ But Confucian tradition as an ideological and social force did not vanish with the change of the government banner,³⁰⁸ rather, it continued to influence the country in many ways.³⁰⁹ Although the Communist government claimed that the socialist legal system had no connection with the imperial legal system, the Confucian legacy was undeniable. In fact, many of the first generation of CPC leaders were themselves educated in the old Confucian-style schools.³¹⁰

Development of the socialist legal system consisted of two stages. During the first stage, from 1949 to 1976, China created a legal infrastructure under the Soviet approach, but rapidly descended into political fanaticism.³¹¹ The Cultural Revolution, a ten-year period of turmoil that paralyzed the legal system, was the

suppression of political opposition and common crimes as well as reforms concerning land holding and the structure of family.” Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711, 719 (1994).

301. See Hsia & Zeldin, *supra* note 299 (describing the experimental and provisional nature of the new laws).

302. CHUNYING, *supra* note 52, at 328-29.

303. CHUNYING, *supra* note 52, at 330.

304. *Id.*

305. See generally MERRYMAN, *supra* note 9, at 4, 18, 144.

306. CHENGDE, *supra* note 99, at 260.

307. See CHUNYING, *supra* note 52, at 9-10; see also ZHONGMING & QIANG, *supra* note 41, at 257-58.

308. ZHONGMING & QIANG, *supra* note 41, at 359-60.

309. CHENGDE, *supra* note 99, at 260; see also JINFAN, *supra* note 50, at 13.

310. For example, Mao Zedong himself was a master of Chinese ancient literature and had great attainments in Chinese culture and history.

311. CHUNYING, *supra* note 52, at 329-37.

most devastating episode of the period.³¹² During this time, only Mao's philosophy of political and class struggle remained.³¹³ Law schools closed, and "most of the traces of a formal legal system disappeared. . ."³¹⁴ Thus, many Chinese commentators describe the Cultural Revolution as a time of legal anarchy.³¹⁵

On the surface, Mao's "class struggle" theory seemed to make China a pure socialist country. Mao's real motivation for reform, however, was driven by his strong appetite for power.³¹⁶ Mao was influenced by his profound knowledge of the traditional Chinese imperial system to such a great degree that he was receptive to being portrayed as an "emperor," particularly during the 1960s, and did not tolerate any challenge to his authority.³¹⁷

The second stage of China's legal development began after Mao's death in 1976.³¹⁸ The vast economic reform spearheaded by Deng Xiaoping in 1978 profoundly reversed Mao's course and set China on track to a market economy.³¹⁹ Acclaimed as the chief architect of the reform, Deng completely abandoned Mao's theory of "class struggle" and sought to modernize China by adopting an "opening-door" policy to connect the country with rest of the world. Standing firmly on his "Cat Theory,"³²⁰ Deng pushed through the economic reform by setting aside the debates on whether the market economy, was socialist or capitalist.³²¹

In conjunction with the economic reform there was a massive legislative reform. Realizing the severe damage caused to the nation by the lawlessness of

312. *Id.* at 334-37.

313. Liwei Wang, *The Chinese Traditions Inimicable to the Patent Law*, 14 NW. J. INT'L L. & BUS. 15, 61 (1993). Mao derived his ideas on class struggle from his understanding of the statement made by Marx and Engels in their "Manifesto of the Communist Party" that "[t]he history of all hitherto existing society is the history of class struggles." KARL MARX & FREDERICK ENGELS, *MANIFESTO OF THE COMMUNIST PARTY 2* (1948), available at <http://www.marxists.org/archive/marx/works/1848/communist-manifesto/>.

314. Jones, *supra* note 28, at 39.

315. *Debating Rule of Law in China*, *supra* note 7, at n.47.

316. See CHUNYING, *supra* note 52 at 335-37; see generally, Vladimir Petrov, *Mao, Stalin, and Kim Il sung: An interpretive essay*, 13 EAST ASIA 3 (1994).

317. For instance, the purpose of the Cultural Revolution, according to Mao, was to eliminate all leading "capitalist roaders." See Sylvia Chan, *The Image of a "Capitalist Roader" – Some Dissident Short Stories in the Hundred Flowers Period*, 2 AUSTR. J. CHINESE AFF. 77, 77-79 (1979). But those who were marked as the leading "capitalist roaders" were in fact the people, including Liu Shaoqi, then the President of China, who were at odds with Mao because they believed that the country urgently needed economic construction rather than the class struggle. Lowell Dittmer, *Death and Transfiguration: Liu Shaoqi's Rehabilitation and Contemporary Chinese Politics*, 40 J. ASIAN STUD. 455, 462 (1981). At that time, leading "capitalist roaders" suffered greatly. *Id.* at 457. The price Liu Shaoqi paid was his life. *Id.*

318. CHUNYING, *supra* note 52, at 337.

319. *Id.* at 339; Jones, *supra* note 28, at 20. See Lichtenstein, *supra* note 40, at 275-76.

320. The "Cat Theory" came from Deng's famous proposition: "[b]lack or white, it is a good cat that catches mice." Li YongYan, *China as Easy as One Two Three*, ASIAN TIMES ONLINE, June 12, 2004, available at <http://www.atimes.com/atimes/China/FF12Ad03.html>; see generally DAVID SHAMBAUGH, *DENG XIAOPING: PORTRAIT OF A CHINESE STATESMAN* (Oxford Univ. Press 1995).

321. JINGLIAN, *supra* note 100, at 75-76.

Mao's era, beginning in the late 1970s China entered into a period of rebuilding its legal system.³²² Thus, a great effort was made to swiftly construct a legal infrastructure by enacting laws and regulations at an accelerated pace.³²³ The progress was obvious: from 1979 to 2008, the National People's Congress (NPC), the nation's top legislative body, promulgated over 231 laws, and the State Council enacted more than 600 regulations.³²⁴ In addition, local people's congresses passed over seven thousand local regulations, and various ministries and regional governments issued multiple rules and decrees.³²⁵

III. THE RULE OF LAW IN THE CHINESE CONTEXT

It may be inferred from Chinese legal history that while the country had a legal system in place for thousands of years, the rule of law, as both a legal concept and an actual practice, was alien to it. Conceptually, in traditional Chinese legal literature, nothing implicated the rule of law. While the Legalist doctrine attached great importance to legal norms, it is equally true that the norms the Legalists advocated functioned primarily as tools to maintain the totalitarian society structure or the *shi* (the imperial power).³²⁶ In practice, according to Chinese legal history, the law always purported to govern the people, rather than to place restrictions on the government.³²⁷

The rule of law in China is therefore an imported concept. But as it is applied in the country today, the rule of law is becoming adapted into Chinese reality and contains Chinese characteristics. During the past decades, the rule of law in China has been a hotly contested subject, discussed and debated among foreigners and within the Chinese legal community.³²⁸ Foreign lawyers and scholars wanted to see their countries' understanding of the rule of law applied in China³²⁹ while their

322. Jones, *supra* note 28, at 39.

323. CHUNYING, *supra* note 52, at 338-39.

324. White Paper, *supra* note 5 (follow "Legislation and Legal System with Chinese Characteristics" hyperlinks).

325. *Id.*

326. SHUCHENG, *supra* note 64, at 143.

327. Three elements were essential and indispensable to the traditional Chinese legal system: imperial power, a clan-based ethic standard, and the totalitarian structure of bureaucrats. Both imperial power and the clan-based ethic standard were directly associated with the exercise of "Li" because they were all a matter of loyalty and obedience, which constituted not only the ideological but also the practical basis for society. The top-down bureaucratic structure served as a mechanism to ensure that the central power was not challenged and that the emperor remained ultimately sovereign. Thus, under this system it is difficult, if not impossible, to imagine any room for the rule of law. See *supra* Part II.A-B

328. See Chenguang, *supra* note 16, at 4-5 (describing Chinese scholars' debates over whether China should continue using the term "legal system" or adopt the term the rule of law and over the meaning of the rule of law).

329. See Pitman B. Potter, *The Legal Implications of China's Accession to the WTO*, 167 THE CHINA Q. 592, 603 (2001) (examining the fundamental changes to China's Constitution that are necessary to bring it into conformance with the WTO's General Agreement on Tariffs and Trade).

Chinese counterparts were eager to develop a Chinese version of the “rule of law,” based the historical, social, and political context of Chinese legal system.³³⁰

From the Chinese government’s viewpoint, the lesson learned from the void of a legal system during the Cultural Revolution is that the building of an effective legal system in the country is a necessity.³³¹ More importantly, economic reform and the increasingly international presence require China to commit to the rule of law. However, there is a growing concern of undue western influence on what the rule of law should mean in China, especially in the context of civil liberties and government control, or individual rights as opposed to government power.³³²

Due to this unique history, the rule of law in China is inevitably driven to take its own path. It is being employed as a bench mark to help differentiate today’s China from its ancient image of the rule of man. The rule of man was the old legal system which was centered on imperial power, leading to the lawlessness of Mao’s era.³³³ Today, the rule of law is primarily considered a legal structure instrumental in building social order and maintaining stability.³³⁴ Finally, as noted, the rule of law is widely used as a synonym for “ruling the country by law.”³³⁵

A. *The Chinese Meaning of the Rule of Law*

Many in China have attempted to define the rule of law in concrete ways that they believe more accurately reflect its essence.³³⁶ As a result, the rule of law has been articulated in various forms, from “constrain[ing] the arbitrary act of the government” to “facilitate[ing] and ensur[ing] economic development;” and from “protect[ing] the individual against the state” to “provid[ing] fair mechanism for resolving disputes. . . .”³³⁷ However, the official meaning that captures the Chinese conception of the rule of law comes from the statement made by Jiang Zemin in his report at the 15th National Congress of the CPC in 1997.³³⁸

According to Jiang:

330. CHUNYING, *supra* note 52, at 351-53; Zhu Weijiu, *Toward Rule of Law Government*, in CHINA’S JOURNEY TOWARD THE RULE OF LAW, LEGAL REFORM, 1978-2009, 26-27 (Cai Dingjian & Wang Chenguang 2008). *See also Debating the Rule of Law in China*, *supra* note 7, at 526 (describing the theory that China is “so different from other countries [that] it is likely to develop its own long term, stable alternative to rule of law.)

331. CHUNYING, *supra* note 52, at 339-40.

332. *Id.* at 351-53.

333. *See* Chenguang, *supra* note 16, at 4; *see also* SHU GUOYING, THE LADDER OF JURISPRUDENCE 283 (Tsinghua Univ. Press 2006) (describing the quest for the rule of law in China as a hundred year dream).

334. *Debating Rule of Law in China*, *supra* note 7, at 498.

335. *See* ZHUMO & SHUANGYUAN, *supra* note 35, at 53.

336. *See* Peerenboom, *Ruling the Country in Accordance with Law, Reflections on the Rule and Role of Law in Contemporary China*, in CHINESE LAW AND LEGAL THEORY 177, 182 (Perry Keller ed., Ashgate, 2001).

337. *Id.* (citations omitted).

338. *See* ZHUMO & SHUANGYUAN, *supra* note 35, at 53 (stressing the efforts to improve the legal system so that the country is ruled by law).

Ruling the country by law means that the broad masses of the people, under the leadership of the Party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, economic and cultural undertakings and social affairs, and see to it that all work of the state proceeds in keeping with law, and that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader.³³⁹

Obviously, this statement is a mixed, if not confusing, expression of the desire to build a consistent legal system that the government will abide by. Such a system is a key component of the “rule of law.”³⁴⁰

In fact, the terms of the rule did not receive official policy endorsement by the Chinese government until 1996.³⁴¹ From the beginning of the economic reform movement in 1979, one task of the political platform was to strengthen the legal system so that the laws would not change every time the leadership changes, or whenever the leaders change their view.³⁴² In the early 1980s, the Chinese legal community called for the development of the rule of law in response to the government’s practice of reviewing and approving cases handled by the judiciary.³⁴³ This call generated a national debate on the rule of law versus the rule of man.³⁴⁴ The key issue was whether or not the term rule of law should be used in the country because it was deemed different from the officially recognized term “legal system.”³⁴⁵

In 1996, thanks to the unremitting efforts of legal scholars, rule of law as a legal concept began to appear in government policy, finally becoming an official term in China.³⁴⁶ The acceptance of the term “rule of law” not only ended the debate, it also furthered China’s development into a socialist country governed by

339. Zemin, *supra* note 1.

340. See HAGER, *supra* note 23, at 19–48. According to one view, the rule of law in modern, Western society, contains the following core components: Constitutionalism, government bound by law, independent judiciary, fair and consistent application of law, transparency and accessibility of law, efficient and timely application of law, protection of property and economic rights, protection of human and intellectual rights, and transparency and accessibility of the established process for the change of law. *Id.*

341. See CHINA’S LONG MARCH, *supra* note 14, at 1 (noting that this policy endorsement ultimately led to the amendment of the Chinese constitution that incorporated the rule of law).

342. See Xiaoping, *supra* note 18.

343. Chenguang, *supra* note 16, at 7. A common phenomenon at that time was that any case handled by either people’s court or people’s procurateriate would need to get approval from the party committee of government at the same level before a decision was made. This practice was repealed in September 1979 under the CPC’s Instruction on the Firm Assurance of the Earnest Implementation of Criminal Law and Criminal Procedure Law. *Id.*

344. *Id.*

345. See *id.*

346. See *id.* For example, some leading Chinese scholars strongly advocated for the use of the term rule of law in their lectures to central government officials in 1996 regarding the formation of a legal system.

the law, resulting in a constitutional mandate in 1999.³⁴⁷ A significant move in this regard was the judicial reform under the so-called “Five Year Reform” program, issued by the Supreme People’s Court in 1999.³⁴⁸ The reform was aimed at promoting judicial justice and impartiality while restoring public confidence in the judiciary.³⁴⁹

There is no question that progress has been made by China towards fulfilling the pledge to rule the country according to law. In fact, the rule of law is becoming a popular and frequently used term; one commentator has suggested that it is virtually impossible now to open any Chinese newspaper without seeing a reference to the “rule of law.”³⁵⁰ But given the remarkable impact of both the Chinese legal tradition and the legal ideology of the CPC, it would be unrealistic to expect the rule of law in China to be an exact replica of its Western counterparts.³⁵¹ Clearly, there remains a degree of resistance in the country to a purely Western conception of the rule of law.³⁵²

B. Law as Defined and Understood in China

It is now recognized in China that “‘rule of law’ signifies that a political civilization has developed to a certain historic stage” and “as the crystallization of human wisdom, it is desired and pursued by people of all countries.”³⁵³ However, despite this recognition, the rule of law in China must be viewed on its own terms. Fundamentally, the practice of the rule of law in China is, to a great extent, affected by the way that law is defined and understood in the country.

As noted, law in ancient China took the original form of *Xing*, meaning “punishment,” which was grounded upon the power of ruling authority.³⁵⁴ This served to create social norms that required obedience.³⁵⁵ Under the legalist philosophy, law was viewed as an instrumental means to maintain economic order.³⁵⁶ However, the Confucianist orthodoxy made the law a coercive means to implement the *Li*, as well as measures that supplemented virtues or moral standards.³⁵⁷ This was achieved through a body of rules promulgated by the

347. See CHINA’S LONG MARCH, *supra* note 14, at 154-56 (discussing the legal reform movement).

348. *Id.*

349. Since 1999, there have been three “Five Year Reform” programs: 1999-2003, 2004-2009, and 2009-2013.

350. CHINA’S LONG MARCH, *supra* note 14, at 1.

351. See Peerenboom, *supra* note 338, at 205 (acknowledging that the ends served by rule of law in China may be different from the ends it serves elsewhere).

352. HAGER, *supra* note 23, at 1 (stating that some Asian leaders are skeptical of the rule of law because of its failure to achieve its purported ideal ends in the West).

353. See White Paper, *supra* note 5.

354. See Yu Xingzhong, *Legal Pragmatism in the People’s Republic of China*, 3 J. OF CHINESE L. 29, 31-32 reprinted in CHINESE LAW AND LEGAL THEORY 61, 63-64 (Perry Keller ed., Ashgate 2001) (highlighting the focus on punishment in early forms of Chinese law).

355. *Id.* at 31.

356. *Id.* at 41.

357. See ZHONGMING & QIANG, *supra* note 41, at 60-64; see also JINFAN, *supra* note 50, at

emperor in the form of a code.³⁵⁸ This code constituted the central element of the legal system for almost the entire period of the dynastical time.³⁵⁹ Because law in traditional Chinese society was made and understood primarily to govern the behavior of people, it was closely associated with power.³⁶⁰

In recent history, China has absorbed the civil law tradition and, as a result, European elements are easily identifiable in Chinese law.³⁶¹ Similarly, the Nationalist Government adopted a series of laws in the form of the Six Codes, based on the European civil law model,³⁶² but because China suffered a period of constant political upheaval and foreign occupations between the fall of the Qing dynasty in 1911 and the founding of the People's Republic in 1949,³⁶³ these laws were never fully implemented, and were abolished entirely in 1949 when Communist Government came to power.³⁶⁴

After 1949, the establishment of socialist law or "people's law" became a main pursuit in China. In Mao's era, however, this pursuit turned into a crucial "class struggle" that lasted until 1978, when the country again began to focus on its socialist law endeavor.³⁶⁵ In the modern Chinese jurisprudence, the theoretic underpinnings of law were, and still are, the doctrine of Marxism.³⁶⁶ Although the definition of law given by Chinese scholars is similar to the one created by A. Y. Vyshinsky, a Soviet legal scholar of 1930s,³⁶⁷ many in China are now reluctant to discuss the Soviet influence on Chinese law.³⁶⁸ Instead, they only consider Marx's work to be the original, authoritative source of their conception of the law.³⁶⁹

1-2.

358. JINFAN, *supra* note 50, at 1-2.

359. Jones, *supra* note 28, at 9.

360. Xingzhong, *supra* note 354, at 63-64; *see also* ZHUMO & SHUANGYUAN, *supra* note 35, at 3-4.

361. Xingzhong, *supra* note 354, at 63-64; *see also* ZHUMO & SHUANGYUAN, *supra* note 35, at 3-4.

362. *See* discussion *supra* notes 260-285 and accompanying text.

363. *Id.*

364. Xingzhong, *supra* note 356, at 33 (pointing out that the CPC Central Committee issued an instruction abolishing the Six Codes and mandating that judicial work should rely on the new laws of the people.").

365. ZHUMO & SHUANGYUAN, *supra* note 35.

366. ZHUMO & SHUANGYUAN, *supra* note 35, at 5-6; *see also* CHENGDE, *supra* note 99, at 3-4.

367. *See* Xingzhong, *supra* note 354, at 68-69. Under the Vyshinsky's definition, law is "the aggregate of the rules of conduct expressing the will of the dominant class and established in legal order, as well as of the customs and rules of community life confirmed by the state authority, the application whereof is guaranteed by the coercive force of state to the end of safeguarding, making secure and developing social relationships and arrangements advantageous and agreeable to the dominant class." *See* Vyshinsky, *The Fundamental Tasks of the Social Science of the Soviet Socialist Law*, in *SOVIET LEGAL PHILOSOPHY* 304, 336 (Hugh Babb trans., Harvard 1951).

368. Xingzhong, *supra* note 354, at 37.

369. ZHUMO & SHUANGYUAN, *supra* note 35, at 5; *see also* CHENGDE, *supra* note 99, at 3.

In modern China, the most common understanding of law is as an expression of the will of the dominant or ruling class.³⁷⁰ This understanding is premised on Marx and Engels' *Manifesto of Communist Party* in which the bourgeois jurisprudence was criticized for being the will of the bourgeois class made into a law for all.³⁷¹ In an official textbook, law is defined as "the aggregate of the rules of conducts enacted or approved by the state, expressing the will of the dominant class determined by certain economic conditions and meeting the common need of the society, containing rights and obligations, and application of which is guaranteed by the coercive force of the state."³⁷²

Thus, what is important is that law in China is considered to comprise a "nature of class," which means that it is dependent on the will of the dominant class and also serves the need of such class.³⁷³ Since the dominant class refers to the class that retains the power of the state,³⁷⁴ and the CPC is deemed as the only representative of it, the law in China is actually the expression of the will of the Communist party.³⁷⁵ With that knowledge, it is not hard to understand why the whole work of the NPC is aimed at ensuring that the propositions of the CPC become the will of the state through the legislative process.³⁷⁶

During Mao's era, the concept of law as a nature of class was overly stressed. The outcome was painful: law was crafted mainly to preserve the class struggle and was eventually replaced by the party's policies and Mao's *Quotations*.³⁷⁷ In addition, law, if any, took the form of public law, leaving out law regarding general civil matters.³⁷⁸ After Mao's death, the situation changed gradually. At present, it is recognized in China that law serves the common needs of the society or has a social nature, which implicates the common good regardless of the class.³⁷⁹ But still, class remains the centerpiece of jurisprudence.

370. Xinzhong, *supra* note 354, at 38.

371. See MARX & ENGELS, *supra* note 313, at 32 (declaring that "your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class.").

372. See ZHUMO & LSHUANGYUAN, *supra* note 35, at 16.

373. *Id.*

374. See *id.* at 11. See also ZHONGMING & QIANG, *supra* note 41, at 364-70.

375. ZHUMO & SHUANGYUAN, *supra* note 35, at 25-26. See also Zuo Zeyuan, AN INTRODUCTION TO LAW 4-5, 33 (Law Press 2007).

376. Wu Bangguo, Chairman, National People's Congress of China, Speech at the First Assembly Meeting of the 11th National Congress: Stick to the Path of Political Development of Socialism with Chinese Characteristics and Strive to Upgrade the Work of the National People's Congress to a New Level (Mar. 19, 2008), available at <http://politics.people.com.cn/GB/1024/7129950.html>.

377. CHUNYING, *supra* note 52, at 14-18; see generally Mao Ze-dong, QUOTATIONS FROM CHAIRMAN MAO (1964).

378. See TONG ROU ET AL., CHINESE CIVIL LAW 13-15 (Law Press 1990).

379. The sociality in this regard includes rules adopted for the management of public facilities, protection of environment, promotion of public health, etc. See Randall Peerenboom, *Democracy and Rule of Law in East Asia, In East Asian Democracies: Deepening, Reversal, and Non Liberal Alternatives*, Yin-Wah Chu and Siu-Lun Wong, eds., Taylor and Francis, Forthcoming (2008).

C. Law and Government

In the West, the heart of the rule of law is that the government itself is bound by law.³⁸⁰ This notion is derived from the concerns for limits on governmental power.³⁸¹ Thus, in the Western democratic system, statutes passed by the legislature bind all of government. When making the statutes, the legislature is bound by the limits prescribed by the constitution, a formal document that carries the general consent of the governed or the will of people.³⁸² Under this system, a major function of law is to prevent government from abuse of power and from arbitrary and unfair treatment of individuals.³⁸³

This is not yet the case in China. Historically, China was a bureaucratically organized country with a Confucian tradition that relied on benevolent rulers acting for the good of the country.³⁸⁴ This created a strong desire among the general public to rely on government rather than on law.³⁸⁵ Even today, this tradition maintains its influence in the country. For example, it is a commonly held belief in China that a good government is the source of a better life for the people, and the traditional concept of a “parental officer,” whose job is to make decisions for the people, remains intact in the minds of the public and the government.³⁸⁶ Thus, it is often the case in China that people rely on the government office rather than a court to address their grievances and to solve their disputes, believing that the government is more powerful than the judiciary.³⁸⁷

Standing closely in line with the above Confucian tradition was the top-down authoritarian system that served as the back bone of the state administration. Historically, the center of this authoritarian system was the imperial power. After the founding of the People’s Republic of China, a so-called “democratic centralization of authority” (DCA) has been adopted. Since the focal point of the DCA is on centralization, the government is still structured to secure central authority and control.³⁸⁸ In addition, the DCA shares many common features with

380. See HAGER, *supra* note 23, at 21 (discussing a Constitution that binds the government as a core component of the rule of law).

381. *Id.*

382. *Id.* at 21-23.

383. *Id.* at 23.

384. *Id.* at 25 (concluding that the emphasis in China was on “the need for wise and benevolent leaders using the law to impose order and achieve the highest good for the whole society”).

385. *Id.* at 15 (discussing the reliance in China on the “great man” as the source of good governance).

386. CAI DINGJIAN, TOWARD THE RULE OF LAW GOVERNMENT, IN CHINA’S JOURNEY TOWARD THE RULE OF LAW, LEGAL REFORM, 1978-2009 (Dingjian & Chenguang eds., Social Sciences Academy Press 2008).

387. See e.g., Mo Zhang, *From Public to Private: the Newly Enacted Chinese Property Law and Protection of Property Right in China*, 5 BERKELEY BUS. L. J. (2008) (discussing the inability of Chinese courts to enforce property laws with regard to the “Chong Quin Nail House” case).

388. Despite the change in name, the top-down feature of the system has remained

the traditional authoritarian system. A highly notable commonality is that the government at both central and local levels is very powerful and barely accountable.³⁸⁹ More disturbing is the complex political entanglement between the government and the CPC at every level in the current system.³⁹⁰

An important notion that underlies all legal work in China is the desire for social and political stability³⁹¹ and as such, the law must serve as a mechanism to achieve that stability. This notion helps determine the aim of the rule of law in China. For example, to rule country by law is taken by the CPC as the basic strategy³⁹² necessary for a vital guarantee of lasting political stability in the country.³⁹³ In the mean time, stability serves as a pragmatic parameter that is used to judge government work at all levels, helping to evaluate job performance and promotion of government officials.³⁹⁴

For obvious reasons, the CPC's strategy focuses not on how to impose restraints on government but on how to confine the conduct of people. The first reason is the conviction that the essence of stability is the CPC's leadership or power.³⁹⁵ Second, stability in China is not viewed in terms of popular control over the government, but rather as governmental control over the society.³⁹⁶ As a matter of fact, in many cases maintaining stability became the political justification for suppressing any civil activity or dissenting voice that might be a threat to government power.³⁹⁷ China also lacks a tradition of challenging the legitimacy of government because of the belief that the power of government, at any level, is not regarded as being given by the people but by a higher level of government authority.

unchanged. In addition, the single party controlled system is deemed a sort of Neo-authoritarian system. See CHINA'S LONG MARCH, *supra* note 14, at 188.

389. See Chenguang, *supra* note 17, at 29

390. The current government structure is based on a system of executive responsibility under the leadership of the committee of the CPC.

391. A very popular slogan in China today is "stability overrides everything." See "Tech: Is China Catching Taiwan" BUSINESSWEEK, December 11, 2009 available at http://www.businessweek.com/globalbiz/blog/eyeonasia/archives/2009/12/tech_is_china_c.html (last visited Mar. 5, 2010).

392. Zemin, *supra* note 1.

393. *Id.*

394. *Id.*

395. See Hu Kangsheng, Remarks Before the National People's Congress, *Study Constitution, Be loyal to Constitution and Preserve Authority of Constitution*, Feb. 2, 2009, available at http://www.npc.gov.cn/npc/xinwen/2009-02/28/content_1476418.htm (noting that the People's Congress system is conducive to safeguarding national unification and national unity).

396. See, e.g., Press Release, VOA News, *China's Legislature Stresses Social Stability* (Mar. 6, 2009), <http://www1.voanews.com/english/news/a-13-2009-03-06-voa13-68772437.html>.

397. See generally H.H. Lai, *Religious policies in post-totalitarian China: Maintaining political monopoly over a reviving society*, 11 JOURNAL OF CHINESE POLITICAL SCIENCE 55 (March 2006).

D. Law and Confucian Impacts

China was once reputed as a country governed by a rule of man.³⁹⁸ This was not only because Confucian orthodoxy significantly undermined the function of law in favor of moral standards, expressed by the *Li*, but also because the traditional Chinese legal system was centralized in the imperial power of one person, the emperor. Another reason was perhaps the lawlessness created by Mao's unlimited power that penetrated the country for decades.

In an effort to revamp its legal system in the last thirty years, China has made significant progress in departing from the old image of the rule of man and assigning an important role to law.³⁹⁹ A substantial step in this regard was the constitutional commitment made in 1999 to govern the country according to law. In addition, extensive legislation also helped demonstrate the country's move toward rule of law.⁴⁰⁰

Ideologically however, China is still wrestling with the proper interplay between law and man. As a result of the Confucian impact, there is a strong belief in China that law is not enough to govern a society.⁴⁰¹ This belief has at least two implications. First, good moral norms are essential to written law and sometimes play an even more important role in governing behavior. Second, even though laws are in place, they cannot execute themselves, and as such people are needed to implement laws.⁴⁰² Therefore, there remains a preference for depending on the "right" man or "great" man for good governance.⁴⁰³

This preference derives from a Confucian proposition that law does not work by itself.⁴⁰⁴ This places the emphasis on the role of man in making the law work. As between the law and man, a well stated Confucian view was that "there is a ruling man but not a ruling law."⁴⁰⁵ This view implies that law could not cover everything nor could it cope with a changing situation, and therefore, there is a need for the right person.⁴⁰⁶ Thus, when it gets the right ruler the law lasts;

398. See generally Jones, *supra* note 28; see also CHUNYING, *supra* note 52, at 22.

399. Jerome A. Cohen, *China's Legal Reform at the Crossroads*, FAR EASTERN ECON. REV. 23 (Mar. 2006) available at <http://www.paulweiss.com/files/Publication/84c640ce-49b1-4548-9ad7-586cd0e214bd/Presentation/PublicationAttachment/8b121247-4f31-4c55-9ce1-18b0283c5241/FEELR.pdf>.

400. See CHINA'S LONG MARCH, *supra* note 14, at ix-x. See also Lichtenstein, *supra* note 41, at 286-90.

401. JEROME A. COHEN, *THE CRIMINAL PROCESS IN THE PEOPLE'S REPUBLIC OF CHINA 1949-1963, AN INTRODUCTION* 4 (Harvard Univ. Press 1968).

402. Chenguang, *supra* note 16, at 7.

403. HAGER, *supra* note 23, at 13.

404. Chenguang, *supra* note 16, at 7.

405. See, e.g., XUNZI: A TRANSLATION AND STUDY OF THE COMPLETE WORKS, VOL. II, 175 (John Knoblock trans., Stanford Univ. Press 1990) (Xunzi, the equivalent of Aristotle in China, stated that "there are men who can bring order about, but there is no model that will ever produce it").

406. SHUCHENG, *supra* note 64, at 154.

however, upon losing that ruler, it perishes.⁴⁰⁷ Xunzi concluded that there have been cases in which chaos occurred despite a good law, but chaos has never ensued with a good ruler in charge.⁴⁰⁸

Therefore, although the light of the rule of law has been shed on China today, pursuit of the rule of law is still proscribed by the country's long lasting Confucian tradition, and belief that law must be supplemented by the rule of man.⁴⁰⁹ In a broad sense, maintaining absolute leadership amongst the men at the top of the CPC's is entrenched as the prerequisite for the exercise of the rule of law. Many people therefore are driven to conclude that only CPC may bring a bright future to China.⁴¹⁰ Commands or even words from the top CPC leader are weighted most heavily because political uniformity is a must for all government officials. In China, the term "uniform" is in many cases a euphemism for "central."⁴¹¹

E. Law and Social Harmony

Since 2003, the CPC created authoritative guidance for the nation in the form of a political ideology called the "scientific outlook on development" ("SOOD").⁴¹² One year later, the CPC launched a campaign for the building of a harmonious society.⁴¹³ In essence, the SOOD is interpreted to mean "putting people first, with an aim to achieve comprehensive, coordinated and sustainable development,"⁴¹⁴ while the idea of the harmonious society is the continuity of the national heritage bestowed by the *Confucian* tradition of promoting "natural ease" or harmony.⁴¹⁵ In 2006 the CPC passed a resolution that made it a goal to create harmonious socialist society in China by 2020.⁴¹⁶

The relevance here is that the concepts of both "putting people first" and "social harmony" are now taken as the main themes for the development of rule of law in China. According to Chinese President Hu Jintao, the rule of law is the best

407. XUNZI, *supra* note 405, at 135.

408. *Id.*

409. Chenguang, *supra* note 16, at 7.

410. Zhuo Zeyuan, *Harmonious Society and Rule of Law, in* RULING COUNTRY ACCORDING TO LAW AND THE BUILDING OF HARMONIOUS SOCIETY 43-47 (Li Lin ed., China Legal Publishing House 2007); *see also* CHENGDE, *supra* note 99, at 82-86.

411. Cohen, *China's Legal Reform at the Crossroads, supra* note 401, at 27.

412. Joseph Fewsmith, *Promoting the Scientific Development Concept, CHINA LEADERSHIP MONITOR*, http://media.hoover.org/documents/clm11_jf.pdf (last visited Mar. 5, 2010) (discussing the creation scientific development concept at the CPC's Third Plenary Session of the 16th National Congress in 2003).

413. *Id.* (indicating that building a harmonious society was put forward by the CPC in its Forth Plenary Session of the 16th National Congress in 2004)

414. Press Release, Communiqué of the Third Plenary Session of the 16th Central Committee of the CPC, Xinhua News Agency (Oct. 14, 2003) <http://www.people.com.cn/GB/shizheng/1024/2133923.html>.

415. CONFUCIUS, *supra* note 124, at 4, para. 12.

416. Press Release, *China Publishes Resolution on Building Harmonious Society*, Xin Hua News Agency (Oct. 18, 2006) <http://english.cri.cn/2946/2006/10/18/176@152257.htm> (discussing the adoption of the resolution at the Sixth Plenary Session of the 16th National Congress in 2006).

way for settling social conflicts peacefully and rationally.⁴¹⁷ Echoing Hu's remarks, many in China advocate the idea that a harmonious society is a rule of law society, believing that law is the aggregate of rules of conduct necessary for social harmony.⁴¹⁸ In addition, there are a growing number of advocates in China that believe that the concept of putting people first is the basic spirit of law.⁴¹⁹

The very concept of harmony under the *Confucian* tradition was the promotion of tolerance and conciliation among people with different thoughts and backgrounds, thereby creating a peacefully interpersonal relationship. A civil and ethic principle considered Confucius' lifetime motto was "what you do not want done to yourself, do not do to others."⁴²⁰ This principle was also meant to be a social standard for the judgment of people. From the viewpoint of Confucius, a noble man seeks harmony despite differences while a petty man stays in discord despite of agreement.⁴²¹ In addition, Mencius laid out three essential elements for success, which included "time opportunity," "topographic advantage," and "harmony of people," viewing the harmony of people as the most critical.⁴²²

Today, the drive to form a harmonious society in China serves multiple purposes. In one respect, it reinforces the need for social order and stability under the leadership of the CPC, based on the belief that harmony would not be achieved without an orderly and stable society.⁴²³ In another respect, it helps alleviate the tension caused by the increasing disparity between rich and poor, as well as the growing public outrage over the unceasing political corruption. More significantly, it helps justify the "Chinese characteristics" that support the political system currently in operation.⁴²⁴

The building of social harmony seems to have become a strong ideological force that is being grafted onto the development of the rule of law, although at present there have been more words than actions.⁴²⁵ The concept of social harmony, though still vague in many aspects, is being incorporated in the legal

417. *Roundup: Human Rights Issue at 22nd Congress on Law of the World*, China Society for Human Rights Studies, <http://211.167.236.236/zt/magazine/200402006215101321.htm> (last visited Mar. 5, 2010).

418. Zeyuan, *supra* note 412, at 33; see also Wang Liming, *A Harmonious Society Should be a Rule of Law Society*, in *RULING COUNTRY ACCORDING TO LAW AND THE BUILDING OF HARMONIOUS SOCIETY* 211 (Li Lin, ed., China Legal Publishing House 2007).

419. Lv Shilun & Gao Zhong, *Socialist Harmonious Society and the Rule of Law Spirits of Putting People First*, in *RULING COUNTRY ACCORDING TO LAW AND THE BUILDING OF HARMONIOUS SOCIETY* 211 (Li Lin, ed., China Legal Publishing House 2007).

420. Confucius, *supra* note 123, at 62, para. 24.

421. *Id.* at 52, para. 23.

422. MENZGI, *supra* note 127, at 50.

423. Liming, *supra* note 418, at 211.

424. Li Lin, *The Role of People's Congress System in the Building of the Harmonious Society*, in *RULING COUNTRY ACCORDING TO LAW AND THE BUILDING OF HARMONIOUS SOCIETY* 157 (Lin Li, ed., China Legal Publishing House 2007) (remarking that the CPC-led People's Congress system is appraised as the "political foundation and institutional safeguard for the socialist harmonious society in China.").

425. *Id.* at 1-3.

framework of China. It has become imperative that the rule of law be geared toward creating and enhancing social harmony. Interestingly, the year 2020 is projected, as the deadline for China to become a harmonious society, whether or not this is realistic.

The doctrine of putting people first also has its origin in Confucian philosophy. As noted, Mencius placed a high value on the benevolence of a ruler, believe he must care about the people.⁴²⁶ Xunzi went even further, warning of the danger of losing the people's confidence by metaphorically emphasizing that "[i]t is the water that sustains the boat, and it is the water that capsizes the boat."⁴²⁷ The message both Mencius and Xunzi intended to send was clear: the ruler should not be too cruel to the ruled. Unfortunately, at most times in the history of China this message was merely a hope.

The Chinese now see putting people first as progress toward appreciating the value of people both as individuals and as a social force.⁴²⁸ It is also considered an indicator that the country is moving toward respecting personal liberty and human rights.⁴²⁹ Practically, however, putting people first is both a pragmatic and political strategy, aimed at retaining public support for the CPC. In this regard it is fair to say that putting people first does not change the bureaucratic tradition but rather it revives the Confucian belief in benevolence of government over people.

For example, in order to spur into motion the doctrine of putting people first, some courts in China initiated to reproduce a trial format called "Ma Xiwu Trial Method" (Ma's Method) that was used mainly in the late 1940s and early 1950s in the liberal areas of China. The highlight of the *Ma's* Method was "trial at the edge of a field," which actually entailed a bench trial at the corner of a farm or in the courtyard of a household.⁴³⁰ Driven by his belief that the judiciary must serve the people and that party policy was the most direct law, Ma Xiwu (a non-legally trained government bureaucrat turned judge himself) took the position that such a trial, out of a formal courtroom and with no legal jargon, was easiest for people to understand.⁴³¹ He preferred to call his trials mediation rather than adjudication.⁴³² It was also his view that the satisfaction of people was the major criterion for measuring the outcome of the trial.⁴³³ The *Ma Method* was hailed by many top leaders of China and Ma Xiwu himself was praised by Chairman Mao as a person closest to the people.⁴³⁴

426. See MENGZI, *supra* note 127 (discussing benevolence as a qualification of a good ruler).

427. Knoblock, *supra* note 405 at 262.

428. Shilun & Zhong, *supra* note 419, at 24-25.

429. See Li Buyun, *Doctrinal Highlights of the "Social Harmony,"* in RULING COUNTRY ACCORDING TO LAW AND THE BUILDING OF HARMONIOUS SOCIETY 7 (Lin Li, ed., China Legal Publishing House 2007).

430. *The Biggest Controversy over Judicial Reform - the Revival of Ma Xiwu*, SOUTHERN WEEKEND (CHINA), June 11, 2009, at A8.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

The initiation received an endorsement from the Supreme People's Court. As a result, a nationwide campaign was launched under the slogan that the "people's court serves people."⁴³⁵ In many courts, particularly at trial level, judges were required to follow *Ma's Method* by conducting trials in the field to show that the judiciary cares about the people.⁴³⁶ Believing that *Ma's Method* exemplified how to put people first, some courts even went further by opposing wearing a robe during the trial because in their view it separated the judge from the people.⁴³⁷ Indeed, the advancement of *Ma's Method* caused a great deal of controversy; many regarded this practice as a reversal of the on-going judicial reform that had helped restore judicial professionalism.⁴³⁸

IV. CHINESE CHARACTERISTICS: THE SPIRIT OF THE SOCIALIST LEGAL SYSTEM IN CHINA AND A CONCEPT YET TO BE FURTHER DEFINED

China is determined to build a socialist legal system with Chinese characteristics. Based on the massive amount of legislation in the past three decades, China claims that the foundation of the modern Chinese legal system has already been laid: this foundation is described as consisting of one core, three levels, and seven categories.⁴³⁹

At the core is the 1982 Constitution that has been amended four times through 2004.⁴⁴⁰ Under the Constitution, there are three levels of legislations, representing the hierarchy of legal sources. At the top is "law," followed by "regulations" and then "rules or decrees."⁴⁴¹ The seven categories are the branches of law, which are

435. Supreme Court News Report, *Vice President Shen Deyong's Written Message to the Conference on "People's Court Serves People,"* July 29, 2009, <http://www.court.gov.cn/news/bulletin/release/200907290004.htm> (last visited Mar. 5, 2010) (noting that the "People's court serves people" was a slogan the current President of the Court prompted as a concrete step to carry out the notion of "putting people first." It is deemed by the Supreme People's Court as an incarnation of a scientific outlook on development in the judiciary).

436. *The High Court President of Henan Province Actively Pursues the Ma Xiwu Trial Method,* TAKUNGPAO NEWSPAPER, July 24, 2009, available at <http://henan.takungpao.com/news/ShowArticle.asp?ArticleID=37747>.

437. See Li Zhen & Huang Xiaozhen, *Upholding the Flag of Ma Xiwu Trial Method Unwaveringly,* <http://www.chinacourt.org/html/article/200907/23/366557.shtml> (criticizing Western-style practices, including wearing robes and wigs).

438. *Do Not Return to Ma Xiwu Rigidly,* SOUTHERN WEEKEND (CHINA), June 11, 2009, A3; see also Zhang Weiping, *What Do We Need to Go Back to Ma Xiwu, Method or Spirit?* http://news.ifeng.com/opinion/200906/0613_23_1201152.shtml (last visited Mar. 5, 2010).

439. White Paper, *supra* note 5, at 4.

440. See generally, XIAN FA (2004) (P.R.C.), available at <http://english.people.com.cn/constitution/constitution.html> (last visited Mar. 5, 2010). The Constitution now effective in China was adopted on December 4, 1982, and was amended respectively on April 12, 1988, March 31, 1992, March 15, 1999, and March 14, 2004.

441. In China, the legislation passed by the National People's Congress are called "law," the legislation made by the State Council and Provincial People's Congress are termed "regulations," and legislation adopted by various government ministries/agencies and by local government are termed as "rules or decrees." See White Paper, *supra* note 5, at 4.

the (a) Constitution and related law, (b) civil and commercial law, (c) administrative law, (d) economic law, (e) social law, (f) criminal law, and (g) litigation and non-litigation procedure law.⁴⁴²

The hallmark of the modern Chinese legal system is the Chinese characteristics—a term seemingly indefinable, although it generally refers to distinctive features of Chinese law and its legal system. Quite often the term is employed to justify the discord of Chinese legal practices with those commonly accepted elsewhere, and to explain the relative weakness of Chinese legal order when compared to the administrative power. In addition, as often seen, the lack of understanding of Chinese characteristics can serve as a handy defense against foreign criticism of the Chinese legal system.

The simplest way to understand the meaning of the term “Chinese characteristics” is by noting that the Chinese legal system stands on socialism while it reflects the Chinese reality. However, neither the meaning of “socialism” nor the substance of “Chinese reality” is well defined or coherently stated. Further, despite its socialist theme, the current Chinese legal system is still affected by the Chinese legal tradition, as well as its experimentation with foreign law.⁴⁴³

Some in China would support the claim that the socialist legal system with Chinese characteristics has been preliminarily formed. They argue that the adoption of the policy of “governing country by law” and the enactment of a comprehensive set of laws demonstrates the existence such a system.⁴⁴⁴ While adhering to the CPC’s carefully selected wording to describe the socialist legal system, they have endeavored to further explain the Chinese features of the system.⁴⁴⁵ Unfortunately, this explanation offers little meaningful substance, but instead is simply a political slogan.

Nevertheless, modern China’s socialist legal system may be classified as a civil law system governed by socialist ideology with Confucian ethos representing Chinese tradition. This classification acknowledges the fact that the modern Chinese legal system falls within the family of civil law due to its origin of development and in its pattern of legislation.⁴⁴⁶

Undoubtedly, it is difficult to understand the modern Chinese legal system without knowledge of the Chinese characteristics. But the term itself is troublesome. Even within China there is considerable difficulty with it, because of its abstract concept, confusing nature, and the politically sensitive debates amongst

442. *See id.*

443. Perry Keller, *Sources of Order in Chinese Law*, 42 AM. J. COMP. L. 711 (1994) (“China possesses . . . a highly sophisticated Confucian based legal history which once formed the philosophic backbone of imperial law and continues to resonate in contemporary legal culture. The country has also undergone a series of experiments in the reception of foreign law).

444. GUOHUA, *supra* note 2, at 43-46.

445. *Id.* at 24-29. These features include (a) under the guidance of socialist theory with Chinese characteristics and ideology of socialist legality, (b) reflection of the common will of vast majority of people led by the working class, (c) pursuit of internal harmony and unification of the system, (d) in light of material living condition of modern China and (e) an open, involving and continuously improving system.

446. *Id.* at 24.

legal scholars regarding its precise definition.⁴⁴⁷ However, although many lines might be drawn in the sand, there are two features that are fundamental: leadership of the CPC and socialism.

A. *The CPC's Leadership*

China is a country controlled by a single party. According to the 1982 Constitution (as amended in 2004), “[b]oth the victory of China’s new-democratic revolution and the success in its socialist cause have been achieved . . . under the leadership of the Communist Party of China [T]he Chinese people of all nationalities will continue to adhere to the people’s democratic dictatorship . . . to turn China into a powerful and prosperous socialist country with a high level of culture and democracy.”⁴⁴⁸ Hence, unlike political parties elsewhere, the CPC is the only party in China, and it possesses all powers of the nation, including the military.⁴⁴⁹

There are a certain number of non-communist political parties in China, collectively called “democratic parties and groups,”⁴⁵⁰ but these parties play a very limited role in Chinese politics. Their function is basically consultative.⁴⁵¹ The political venue available to them is the National Committee of the Chinese People’s Political Consultative Conference (CPPCC), which is controlled by the CPC.⁴⁵² Specifically, no political party or group may be formed without approval the CPC’s approval. Every non-communist party or political group must be registered in order to exist, providing a mechanism to further screen for the organizations.⁴⁵³ Finally, no opposition party is recognized or allowed.⁴⁵⁴

447. *Id.* at 1-4.

448. XIAN FA, amend. 3 (1982) (P.R.C.).

449. *Id.*

450. Chinese People’s Political Consultative Conference, Process of Founding and Key Achievements in History, <http://www.china.org.cn/english/archiveen/27750.htm> (last visited Mar. 5, 2010). Currently, there are eight democratic parties/groups, including the Revolution Committee of Chinese Guomintang (RCCK), China Democratic League (CDL), China Democratic National Construction Association (CDNCA), China Association for Promoting Democracy (CAPD), the Chinese Peasants and Works Democratic Party (CPWDP), China Zigong Dang, Jiu San Society, and the Taiwan Democratic Self-Government League.

451. *Id.*

452. *See id.* The principles set to govern the CPPCC clearly state that The Chinese People’s Political Consultative Conference is an organization of the united front of the Chinese people, an important institution of multi-party cooperation and political consultation under the leadership of the Communist Party of China, a major form for carrying forward socialist democracy in the political life of the country.

453. Under the 1998 State Council’s Regulation of Administration of Registration of Social Groups and Organizations, to form a social group or organization, a two step procedure must be followed: review and approval by a competent authority, and registration with a relevant civil affairs department at the county level government or above. It is required that any activities of the social group or organization so formed shall stick with constitutional principles. One of such principles is the leadership of the communist party. The regulation is available at <http://www.jxepb.gov.cn/Zcfg/fgtl/shtt.htm>.

454. Bangguo, *supra* note 376.

Certainly, at the center of the Chinese characteristics in the country's modern legal system is the unshakable leadership of the CPC. Thus, the CPC leadership not only determines the trend of legal development in China, but also affects how law is made and enforced. From legal perspective, the key issue is not whether China will be governed by law, but rather, how the will of the CPC is to be implemented. This phenomenon is reminiscent of traditional Confucian philosophy in that the success of the country depends on a leader, not on a system—a very close call to the rule of man,⁴⁵⁵ or more specific, the rule of party.⁴⁵⁶

For example, in the legislative arena, it is unyielding principle that the Central Committee of the CPC must examine and approve all drafts of major laws of national importance.⁴⁵⁷ In 1991, this principle was unequivocally announced by an internally circulated official document of the CPC's Central Committee.⁴⁵⁸ Although the document limited the application of this principle to important laws primarily in political, economic and administrative areas, virtually all laws passed by the NPC were pre-reviewed and approved by the Central Committee of the CPC.⁴⁵⁹

The adoption of the 2004 amendments to the 1982 Constitution provided evidence of the active role that the CPC had in the nation's legislation. On

455. Chenguang, *supra* note 16, at 29; *see also* Weijiu, *supra* note 332, at 92-93. First

456. Chenguang, *supra* note 16, at 29.

457. *See* Qin Qianhong, *The Impacts of the Communist Party of China on Legislation*, Beijing University China Law Info., available at http://article1.chinalawinfo.com/Article_Detail.asp?ArticleID=23338.

458. The document was named *Several Opinions of the Central Committee of the Communist Party of China on the Strengthening of the Leadership over the State Legislative Work*, CCP Central Committee Document Number 8 (1991). Under the Opinions, the Central Committee of the CPC shall retain a control of the legislative process in the following four ways: (a) any amendment to the constitution and certain drafts of political importance or of vitally economic or administrative importance, must be examined by the Politburo of the Central Committee of the CPC before being submitted to the National People's Congress for review, and all other proposals for constitutional amendments must also be submitted through the party organization of the NPC to the Central Committee of CPC for review; (b) for any law in political area, before it is drafted, the Standing Committee of the NPC must have the legislative thought and principles of the law reported to the Central Committee of the CPC for approval; (c) any draft law of political area or of important economic and administrative areas must be reported to the Politburo or Standing Committee of the Central Committee of the CPC for approval before it is submitted to the NPC for review; and (d) Central Committee of the CPC shall exercise its leadership uniformly over all law drafting work. All laws drafted by the NPC and its Standing Committee must be reported by the party organization at NPC to the Central Committee of the CPC for approval, and all laws drafted by other competent government departments, if the review of the NPC is required, must also be reported to the Central Committee of the CPC for approval. *See id.* In order to implement the Opinion, the Provincial Committee of the Communist Party of Zhejiang issue "matching opinions" entitled "Opinions of the Committee of the CPC of Zhejiang Province on Further Advancement of Local Legislation" in order to assure the party's leadership over local legislation. *Opinions of the Committee of the CPC of Zhejiang Province on Further Advancement of Local Legislation*, FindLaw.cn, available at <http://china.findlaw.cn/fagui/gj/22/16011.html>.

459. *See id.*

December 12, 2003, the Central Committee of the CPC made a proposal to the Standing Committee of the NPC to amend the 1982 Constitution.⁴⁶⁰ An important amendment in the proposal included the addition of the “Three Represents” concept, put forth by former President Jiang Zemin,⁴⁶¹ together with Marxism-Leninism, Mao Zedong Thought, and Deng Xiaoping Theory as the governing ideology of the country.⁴⁶² This proposal was met with overwhelming criticism, especially from legal scholars.⁴⁶³ Critics argued that the “Three Represents” concept was no more than an ethic norm or political guide applicable only to the CPC and its members, and therefore should not be included in the Constitution, which governs the country as a whole.⁴⁶⁴ Some critics also pointed out that the use of abbreviations in the Constitution would cause confusion and set a bad precedent of legal vagueness.⁴⁶⁵

During the NPC’s “reading process” of the proposed amendment, these criticisms were ignored, and all voices against the proposal were silenced from the published materials and media.⁴⁶⁶ Then, at its national session in March 2004, the NPC adopted the CPC’s proposal without changing a word.⁴⁶⁷ Among the 2,903 delegates present at the meeting, 2,863 voted in favor, ten voted against, and seventeen abstained.⁴⁶⁸ In order to ensure the passage of the amendment, the provision of the “Three Represents” concept was bundled with other important provisions (e.g., protection of private property and safeguarding human rights) and the vote was taken on an “all or nothing” basis.⁴⁶⁹

Structurally, from the central level to the grass roots, the leadership of the CPC is secured through so-called “party branches” or party committees, depending on the site of particular work units.⁴⁷⁰ Thus in almost every employment sector, including businesses and universities, behind the executive head there is a party

460. *See id.*

461. *See What is “Three Represents” CPC Theory?, China Through a Lens*, <http://www.china.org.cn/english/zhuanti/3represents/68735.htm> (last visited March 2, 2010). The “Three Represents” states that the CPC represents the development trends of advanced productive force, the orientation of an advanced culture, and the fundamental interests of the overwhelming majority of the people of China. *Id.* This idea was put forth by *Jiang Zemin* in 2000 in an official tour in Guangdong. *The Important Thinking of Three Represents, Baidu*, available at <http://baike.baidu.com/view/545466.htm>.

462. *The Important Thinking of Three Represents, Baidu*, available at <http://baike.baidu.com/view/545466.htm>.

463. *Id.*

464. *Id.*

465. *Id.*

466. *Cf.* News Release, Top Legislature Closes Session, Adopts Amendment to the Constitution, The Consulate General of the People’s Republic of China in Los Angeles, <http://losangeles.china-consulate.org/eng/news/topnews/t76971.htm> (last visited Feb. 9, 2010).

467. *See generally id.*

468. *Id.*

469. *Id.*

470. *The Communist Party of China (CPC)*, PEOPLE’S DAILY ONLINE, <http://english.peopledaily.com.cn/data/organs/cpc.html> (last visited Mar. 2, 2010).

chief who actually exercises ultimate control.⁴⁷¹ Even a Chinese law firm is no exception. For example, in order to achieve party control over the practice of law, the Ministry of Justice (MOJ) makes it imperative that each law firm form a party branch or a quasi-party organization.⁴⁷² According to the MOJ, as of July 31, 2009, out of approximately 14,662 Chinese law firms, 3,895 have formed a party branch, and 8,075 have established a total of 2,692 joint party branches, meaning that one party branch deals with several law firms.⁴⁷³ For the remaining 2,741 law firms that have no party member, each has an “in house” party instructor or party liaison dispatched as a watchdog by the local justice bureau.⁴⁷⁴

B. Socialism

Since the CPC came to power in 1949, socialism has become a national brand for China. During Mao’s era, it served as a weapon to exterminate all capitalist and other non-socialist elements as labeled by Mao without offering any rational basis. In other words, Mao pushed the socialist ideology to such an extreme that anything he deemed “socialist,” even poverty, was a good thing. For instance, a very popular slogan in the Cultural Revolution was “we would rather have socialist weeds than have capitalist seedling,” symbolizing a resolved mind for socialism.⁴⁷⁵ Ironically, however, a vast majority of people did not fully understand the socialist ideology.

The economic reform dramatically changed China’s approach toward socialism. Most visibly, China became more pragmatic than ideological with regard to the socialist belief. Specifically, based on his Cat Theory, Deng Xiaoping made a monumental impact on socialism in 1992, declaring that socialism also needed a market.⁴⁷⁶ In 1993, the notion of “the preliminary stage of socialism” was adopted for China to, at least in part, justify the transition from a planned economy to a market economy,⁴⁷⁷ resulting in the eventual abandonment of the planned economy.

471. Only in certain circumstances, are both the executive and party posts assumed by one person. *Id.*

472. See *A Full Coverage of Party Organization and Work over Lawyers*, Legal Popularization Net, Aug. 9, 2009, http://www.moj.gov.cn/2008rdgz/2009-08/06/content_1134646.htm.

473. *Id.*

474. See *id.* See also Andrew Jacobs, *Arrest in China Rattles Backers of Legal Rights*, NY TIMES, Aug. 10, 2009, at A1.

475. See Cultural Revolution Slogans, http://www.stnn.cc:82/global/wg/wg5/200605/t20060512_211255.html. The slogan denotes a preference for all things socialist, even with the knowledge that an alternative model might provide more economic comfort. It reflects the Maoist philosophy that even though socialism might provide less economic benefit, it would still be preferable to the alternatives.

476. See Xiaoping, *supra* note 19, Vol. III at 373. During his famous southern tour in 1992, Deng Xiaoping made the follow remark: “The essential difference between the socialism and capitalism is not whether to weigh more on plan or on market. Planned economy is not equal to socialism since capitalism also has a plan; market economy is not equal to capitalism because socialism needs market as well.”

477. IAN FA (1982) (P.R.C.).

Despite this change, China has not moved away from socialism, but has rather kept the socialist brand and applied it in a more expansive way. Consequently, China's market economy is described as a socialist market economy, although many doubt that socialism and market economy can really coexist. By the same token, the legal system is crowned with the socialist laurel.⁴⁷⁸

The socialist influence is seen in many different aspects of the Chinese economy, most apparent is the concept of "public ownership," an economic mainstay of socialism in China.⁴⁷⁹ There are two basic forms of public ownership in China: whole people ownership and collective ownership.⁴⁸⁰ Under Article 6 of the 1982 Constitution (as amended 2004), the basis of China's socialist economic system is public ownership of the means of production— namely, sole ownership by the people and collective ownership by the working class.⁴⁸¹ Article 7 further describes whole people ownership as the state-owned economy, and designates it as the leading force in the nation's economy.⁴⁸²

Collective ownership refers to the public ownership other than the state ownership. In accordance with Article 8 of the 1982 Constitution (as amended 2004), collective ownership by the working class includes all forms of cooperative economy in rural areas, such as producer's supply and marketing, credit and consumer's cooperatives.⁴⁸³ Pursuant to Article 8, rural collective economic organizations are controlled by a dual operation system that combines centralized and decentralized operation, based on operation by households under a contract.⁴⁸⁴

Recently, there has been a shift of attention to private ownership. Until 1988, public ownership was the only type of ownership that was legally recognized and protected in China. Historically, socialism was interpreted and understood in China as a system that would not tolerate private ownership.⁴⁸⁵ This sentiment was influenced by Lenin's proposition, translated into Chinese, meaning "we do not recognize private law," and was thus considered a sacred tenet.⁴⁸⁶ The non-recognition of private ownership also came from Mao's revolutionary doctrine that private ownership was the source of all evil, and the ultimate goal of the communist party was to eliminate it.⁴⁸⁷

478. GUOHUA, *supra* note 2, at 13-15.

479. XIAN FA, art. 7 (1982) (P.R.C.). *See also* CHENGDE, *supra* note 100, at 90-91.

480. XIAN FA, art. 7 (1982) (P.R.C.).

481. *Id.* at art. 6.

482. *Id.* at art. 7.

483. XIAN FA, art. 8 (1982) (P.R.C.).

484. *Id.*

485. *See* JINGLIAN, *supra* note 100, at 35-38.

486. *See* Jiang Ping, *Speech at the Forum on the Civil Law Tradition of Civil Code*, <http://www.fsou.com.cn/html/text/art/3355725/335572553.html> (last visited Feb. 9, 2010). This proposition was stated in the instructive opinions of Lenin to the draft civil code of the Soviet Union in 1922. Many in China now believe that there was a mistranslation of Lenin's words: they posit that what Lenin meant was that "we do not recognize anything "private," and its purpose was to enhance government control over the private matters."

487. *See* Hu Fuchen, *Is the Private Ownership the Source of All Evils?*

However, the attitude toward private ownership in China changed with the economic reform. The official recognition of private ownership in the nation came in 1988 when the 1982 Constitution was amended for the first time.⁴⁸⁸ The 1988 Amendment, however, did not use the term private ownership; instead, it used “private sector of the economy.”⁴⁸⁹ Further, according to Article 11 of the 1982 Constitution (as amended in 1988), the private sector of the economy was only deemed as “a complement to the socialist public economy.”⁴⁹⁰ In the 1999 Amendment, the private sector of the economy was advanced as “a major component of the socialist market economy.”⁴⁹¹

The adoption of the Property Law in 2006 was a further move towards private ownership in China, but it did not change the preferred status of public ownership. Thus, while the practice of market economy in China opened the door for private ownership and created the need to provide legal protection for private property,⁴⁹² socialism made public ownership a top priority and boundary, limiting the reach of private ownership. In this context, although the socialist market economy in China may evade precise definition, it possesses the Chinese characteristics that allow diverse forms of ownerships to co-exist, with public ownership as the pinnacle.⁴⁹³

<http://wuliucun.ycool.com/post.3036184.html>. In the mid of 1950s, Mao, believing in the communist principles stated by Karl Marx in his *MENIFESTO OF THE COMMUNIST PARTY* (e.g., to eliminate private ownership), declared that China must eliminate capitalism and must refuse the concept of private ownership. Based on that belief, Mao launched a nationwide campaign of socialist transformation from 1953-1956. One primary purpose of the campaign was to nationalize, in whole or part, all private owned enterprises and to make the public ownership the sole ownership of the country. See JIANG PING, *A COURSE IN CHINESE REAL RIGHTS LAW*, 1 (Intellectual Property Rights Press, 2007). See also Meng Lingwei, *Standing in the Beginning of 21st Century to Look Back to the Three Transformations Campaign*, available at <http://www.tecn.cn/data/detail.php?id=981>.

488. See XIAN FA, amend. 1 (1982) (P.R.C.). Prior to the amendment, the 1982 Constitution allowed the existence of “individual economy of urban and rural people.” But as many believed in China, in a legal sense the “individual economy” and “private economy” are two different concepts. For example, one typical feature of individual economy is that the individual is owner of the means of production but he is also the worker. The private economy involves an employment of others. Thus, in the 1988 Amendment, the private economy was added in line with the individual economy.

489. *Id.*, at amend. 1.1.

490. *Id.* at art. 11 (amended 1988). The new paragraph added in 1988 Amendment to Article 11 of the 1982 Constitution reads: “The State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of economy is a complement to the socialist public economy. The State protects the lawful rights and the interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.” *Id.*, at amend. 1.1.

491. *Id.*, at amend. 3.

492. See JINGLIAN, *supra* note 100, at 170-74.

493. See *Id.*

V. CRITICAL ISSUES FACING THE CHINESE LEGAL SYSTEM AND CHINA'S MOVE TOWARD THE RULE OF LAW

The three-decade momentum of economic reform in China has accelerated the country's effort to build its legal system and to commit to legal reform for the development of the "rule of law." As a remarkable result of economic reform, China has become the fastest growing economy and is already the third largest economy in today's world.⁴⁹⁴ However, the creation of a legal system is still struggling to incorporate Chinese characteristics; consequently, the development of the rule of law has been on a zigzagged path. Despite the progress that has been made, the future remains unclear. There are many minefields in the legal reform to contend with, and the ability to move forward is extremely limited in almost all politically sensitive areas, particularly in those that directly involve the leadership of the CPC.

As noted at the beginning of this article, China has set 2010 as the year to mark the birth of the socialist legal system with Chinese characteristics. The advantage of having such a system is that it enables China to claim to have the "rule of law."⁴⁹⁵ But the reality of the country's legal system necessarily casts doubts about the possibilities of maintaining the "rule of law." There are several critical issues to the development of modern Chinese legal system in the realm of the rule of law.

A. *The Theme of a Legal System: Rights-Based v. Obligations-Based*

Rights and obligations are two fundamental values contained in any legal system.⁴⁹⁶ Generally, a right is a legal or moral entitlement, while an obligation is considered to be a course of action imposed by law, society, or conscience by which one is bound or restricted.⁴⁹⁷ Both the notion of rights, and the interaction between rights and obligations, determine the character and nature of a society, which in turn affects the legal structure of the society.⁴⁹⁸ In a legally-ordered society, rights are the center of attention because they are directly related to the dignity of human beings and the basic order of the human society.⁴⁹⁹ In addition, rights are deemed vitally important in any theory of justice.⁵⁰⁰

494. *See Id.*

495. White Paper, *supra* note 5.

496. *See* K. D. Irani, *Values and Rights Underlying Social Justice*, in RANDOLPH BRAHAM, SOCIAL JUSTICE 29 (Springer 1982).

497. *See* H.L.A. HART, THE CONCEPT OF LAW (2d. ed.) 170-171 (Oxford 1994). *See also* Daniel Elazar, *Changing Conception of Rights in the United States and the West*, 22 J. FEDERALISM 14 (Spring 1992).

498. Irani, *supra* note 496, at 16-18.

499. HART, *supra* note 497, at 269.

500. HART, *supra* note 497, at 162-183. *See also* Jeanne Duly & Judith Lumley, *Individual Rights and Social Justice*, 28 AUSTRALIAN AND NEW ZEALAND JOURNAL OF PUBLIC HEALTH 507 (2004).

The notion of rights may differ from country to country, but for purposes of discussion, it can be divided into two major categories. One category is called “universalism” or “egalitarianism,”⁵⁰¹ and the other is referred to as “authoritarianism” or “hierarchism.”⁵⁰² The former is the modern conception of rights, which holds that equal rights are granted to all people.⁵⁰³ The latter represents the historical notion that different rights ought to be granted to different people depending on status, and as a result some should have more rights than the others.⁵⁰⁴ In addition, there are two main modern conceptions of rights, namely natural rights and legal rights.⁵⁰⁵ The idea of natural rights holds that there is a certain list of rights enshrined in nature that cannot be legitimately modified by any human power.⁵⁰⁶ Legal rights, however, are considered to be human constructs, created by society, enforced by governments and subject to change.⁵⁰⁷

China is a country in which obligations are weighed significantly over rights, and hardly any right may be deemed natural.⁵⁰⁸ The Confucian creed that “the ruler must be like a ruler, the subject like a subject, the father like a father, and the son like a son”⁵⁰⁹ set an insurmountable boundary that defined the propriety of a person’s behavior, in reference to their status.⁵¹⁰ As noted, the very focus of the creed was on the obligations of both loyalty and filial piety, upholding the principle that to be loyal, one must commit his life to serve, and to be filial, one must devote all he could.⁵¹¹ Thus in regard to the law, the theme was mainly to impose duties and obligations through punishment rather than to recognize rights and protect entitlements.

In Mao’s era, the obligation-based theme became a political force. And as such, no one dared to mention individual rights; rather, the focus was on the interest of the society as a whole.⁵¹² Pursuant to Mao’s proletarian theory, people

501. See *Egalitarianism*, Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/egalitarianism/> (last visited Feb. 13, 2010).

502. *Id.* (“Egalitarian doctrines tend to express the idea that all human persons are equal in fundamental worth or moral status.”).

503. See RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 128 (Harvard Univ. Press 2000). See also *Egalitarianism*, *supra* note 501.

504. *Authoritarianism*, Encyclopedia Britannica Online, <http://www.britannica.com/EBchecked/topic/44640/authoritarianism> (last visited Feb. 23, 2010) (“In government, authoritarianism denotes any political system that concentrates power in the hands of a leader or a small elite that is not constitutionally responsible to the body of the people.”).

505. See James Madison, *Introduction of the Bill of Rights in Congress*, 1789 Jun 8, Jul 21, Aug 13, 18-19; *Annals* 1:424-50, 661-65, 707-17, 757-59, 766, available at http://constitution.org/ac/0001/r01-1bill_of_rights_hr1789.htm.

506. See 15 AM. JUR. 2D CIVIL RIGHTS §2 (2000).

507. *Id.*

508. See Orts, *supra* note 15, at 113 n.481 (“The concept of ‘rights’ is not indigenous in Chinese thought, whether ancient or Marxist. It is an idea transplanted from the west.”).

509. See CONFUCIUS, *THE ANALECTS*, *supra* note 123.

510. *Id.*; Chenguang, *supra* note 16, at 22.

511. JINFAN, *supra* note 53, at 17, 50-53.

512. See *Id.*

in the working class should have nothing claimed as their own.⁵¹³ Therefore, for many decades, all of China was subject to social and public interest, and all individuals had to subordinate their rights to the “great cause of socialism.”⁵¹⁴

The development of the market economy in China, however, has generated a drive to reverse the order of rights and obligations. Since the 1990s, there has been an increasing demand for the respect and protection of individual rights or human rights. In the late 1990s, a national debate began among scholars, regarding whether the modern Chinese legal system should be premised on rights instead of obligations.⁵¹⁵ Those who opposed the obligation-based legal scheme argued that the pursuit of a market economy in China raised a great necessity to place civic rights ahead of obligations. They believed that modern law in China should rest with a basic assumption that rights should take priority over obligations.⁵¹⁶

Although the debate did not produce an immediate institutional change in favor of rights-based legal system and no consensus was reached, it undoubtedly helped increase public awareness as well as consciousness of civic and civil rights. Partly for those reasons, the debate was considered a major breakthrough from the conventional ideology China that overly stressed obligations and belittled rights.⁵¹⁷ In addition, many saw the legislative trend in recent years toward protection of consumer rights as a sign of change in the legal framework appreciating the importance of rights.⁵¹⁸

Moreover, the commitment made by the CPC to “putting people first” and “building of a harmonious society,” though very policy-driven, also implicates a change in the government attitude towards concern for the people.⁵¹⁹ This commitment responds to the growing anger of the public over the spreading corruption in the government, including the judiciary. Its purpose is to alleviate the public concern over the degeneration inside the communist party, and to help maintain the society’s stability.⁵²⁰ Nevertheless, it demonstrates that more importance is being attached to the rights of people. Another indication of the recognition of these rights was the 2004 amendments to the 1982 Constitution, which strengthened the constitutional protection of private property rights and expressed respect for and safeguarding of human rights.⁵²¹

Regardless, the theme of the legal system in China has not yet shifted to a rights-based system. Many institutional hurdles found in the CPC⁵²² make it

513. *See Id.*

514. JINGLIAN, *supra* note 100, at 37-38; *see also* LADANY, *supra* note 97, at 67-70.

515. Chenguang, *supra* note 16, at 22.

516. *Id.*

517. *Id.*

518. *Id.*

519. *See* Lin, *supra* note 424, at 28-32.

520. *See* COHEN, *supra* note 401.

521. *See* XIAN FA, amend. 4 (1982) (P.R.C.).

522. The lack of a checks and balance mechanism over the power of the CPC is just one of these hurdles. The other one is China’s “officer oriented” or “power driven” political culture.

extremely difficult to routinely put people first or duly respect the rights of people.⁵²³ For instance, government officials at any level are appointed and, in many cases, are hand-picked by the communist party committee at the responding level. Those officials, once appointed, are only responsible to their superiors and are most concerned with satisfying them.⁵²⁴

For Chinese officials, there is no concept of constituency or a constituent. Given that their power is unchecked and directly linked to all government privileges and benefits, legal or illegal alike, an officer's rank or status carries significantly more meaning than anything else.⁵²⁵ Therefore, despite the commitment repeatedly made by the Central Committee of the CPC to respect the rights of people, the general public at large somehow remains skeptical of it. Regarding the theme of rights contained in the legal system, two fundamental questions remain unresolved. What are the basic rights that are unalienable to people? And how will these rights be effectively protected?

B. The Role of the CPC: Supremacy of the Party v. Supremacy of the Law

The toughest issue facing the development of the modern Chinese legal system is the position and role of the CPC vis-à-vis that of law. On its face, the provisions of law seem to be clear and straightforward. Under the 1982 Constitution (as amended in 2004), people of all nationalities, all state organs, the armed forces, all political parties and public organizations, and all enterprises and institutions in the country, must take the Constitution as the basic standard of conduct, must uphold the dignity of the Constitution and ensure its implementation.⁵²⁶ Also, there is a constitutional requirement that no organization or individual be privileged beyond the constitution or law.⁵²⁷

It is logical to infer from the Constitution that all parties in China, including the CPC, shall act under and in compliance with the Constitution. And in this context, it appears that the Constitution is the supreme law of the country. But in fact, the power of the Constitution is always challenged by the power of the CPC, and in many cases, the CPC is placed above the Constitution. People therefore

The essence of the "officer oriented" political culture is that the sole purpose of going to school is to become an officer, and an officer is the person who has all powers and privilege. According to *Confucius*, doing well in study leads to becoming an officer. Under the *Confucian* philosophy, government office is a noble position and being an officer is the purpose of study. See CONFUCIUS, THE ANALECTS, *supra* note 123.

523. See discussion, *supra* notes 449-474 and accompanying text. Because of the strong influence of the "officer-oriented" culture, the center of attention at the lower level of government office in most cases is the satisfaction of the superior rather than the people under its administration. For general discussion, see Shen Xiaoping, *the Origin of the "Officer-Oriented" Phenomenon and Possible Ways to Deal with it*, available at http://news.xinhuanet.com/theory/2009-03/26/content_11068545.htm. See also Jerome Cohen, *The Great Stonewall of China*, WALL STREET JOURNAL, Apr. 5, 2006.

524. *Id.*

525. *Id.* See also CHUNYING, *supra* note 52, at 22-23, 26-27.

526. See XIAN FA, pmbl. (1982) (P.R.C.).

527. See *Id.* at art. 5.

question which has superiority in China: the Constitution or the CPC. A seemingly unsolvable puzzle is whether the CPC must also be subject to the law. There are several attributes to this confusing, but real phenomenon, embedded in the political structure of the nation.

First, there is the Constitution itself. Although the 1982 Constitution (as amended in 2004) states that the country is to be governed by law, it emphasizes the leadership of the Communist Party⁵²⁸ and upholds the single party ruling system. The amended Constitution firmly states that the CPC-led system of multi-party cooperation and political consultation shall exist and develop for a long time to come.⁵²⁹ This creates at least two major loopholes.

One loophole is that the Constitution actually places the CPC above all other people and provides the CPC with the absolute power. The other is that a lack of checks and balances under the Constitution renders it impossible to prevent the CPC from abusing power. Thus, the CPC can become the most binding force, leading the general public to believe that it is more powerful than the Constitution. In addition, the unchecked power of the CPC inevitably becomes a breeding ground for corruption. Although the CPC has been trying to incorporate a vigorous internal check system against corruption, such self-vigilance has yet to prove effective.

The second attribute is the official conception of law. As discussed, law in China is commonly considered a manifestation of the will of the ruling class, and legislation is the process of turning that will into the will of the state.⁵³⁰ Because this “will” theory underlies all legislation in China, the CPC holds the real legislative power, although under the 1982 Constitution (as amended in 2004), the NPC and its Standing Committee exercise the legislative power over the state.⁵³¹ The reality is that despite its constitutional power, the NPC must follow the leadership of the CPC. As noted, the legislative process of the NPC consists of making the CPC’s opinion the will of the state through NPC’s legislation. In addition, it is required that the NPC must make all efforts to ensure that all candidates recommended for various government posts by the CPC are both elected and appointed.⁵³² For these reasons the NPC is often nicknamed the “rubber stamp.”

The third attribute is that the CPC controls elections of delegates to the NPC. Pursuant to the 1982 Constitution (as amended in 2004), the NPC is composed of delegates elected from the provinces, autonomous regions, municipalities directly under the Central Government, the special administrative regions, and the armed forces.⁵³³ The facts tell a different story. The direct election of delegates only

528. *See Id.* at pmb1.

529. *Id.* at art. 4 (amended 1993).

530. SHEN ZONGLING, JURISPRUDENCE (2d ed) 32 (Higher Education Press 2d ed. 2004); *see also* ZUO ZEYUAN, AN INTRODUCTION TO LAW 19 (Law Press 2009).

531. XIAN FA, art. 58 (1982) (P.R.C.).

532. *See* Bangguo, *supra* note 4.

533. XIAN FA, art. 59 (1982) (P.R.C.).

takes place at the county level, and all other delegates are elected from the candidates recommended by the CPC.⁵³⁴ Moreover, the election of delegates to the NPC is based on a quota determined by the NPC's Standing Committee under a framework agreed upon by the CPC.⁵³⁵

Among the total number of delegates to be allocated, about ten percent are directly controlled by the NPC. Direct control means that the NPC earmarks certain number of delegates to certain provinces and such provinces ensure that these earmarked delegates are duly elected, although those delegates have little or nothing to do with the people of particular province. Another provocative point is that among the delegates of NPC, a vast majority of them are the members of the CPC.⁵³⁶ As a general principle, all delegates who are CPC members must vote for whatever proposals the CPC has made for the NPC.⁵³⁷

In addition, during NPC meetings, delegates indulge in conversations about how wonderful the CPC leadership is and how significant the achievement made at all levels of government has been.⁵³⁸ Delegates rarely criticize the work of the CPC or the government. In the 2009 NPC annual assembly meeting, as one delegate from Guangdong sharply noted, for every ten minute speech allowed per delegate during the NPC's group discussion at the meeting, some eight minutes were used to offer flattery or praise the work of the government, then to the self achievement, leaving little time to address any serious and legitimate business concerns.⁵³⁹

The fourth attribute relates to the CPC's control of judiciary. Prescribed in the 1982 Constitution (as amended in 2004), the people's courts of China have independent power to adjudicate cases in accordance with the law and are not subject to interference by any administrative agencies, public organization, or individuals.⁵⁴⁰ However, it is unclear whether the constitutional power of independence reserved for the Chinese courts is subject to the challenge by the CPC. Although the Constitution is vague in this regard, it appears that no judicial power may trump the authority of the CPC.

The CPC's control of the judiciary can be easily ascertained. First, all courts in China are bound by a stated principle that the judiciary's work must adhere to the leadership of the CPC.⁵⁴¹ The foremost responsibility of the judiciary is to

534. *Id.*

535. *Id.*

536. For example, CPC members comprised 54.48% of 1st NPC, 57.75% of the 2nd NPC 57.75%, 54/83% of the 3rd NPC, 76.3% of the 4th NPC, 72.78% of the 5th NPC, 62.5% of the 6th NPC, 66.8% of the 7th NPC, 68.4% of the 8th NPC, and 71.5% the 9th NPC. Ming Xia, *China's National People's Congress: Institutional Transformation in the Process of Regime Transition (1978-98)*, 4 J. LEGIS. STUD. 103, 129 (1998).

537. See Yang, *Zhong Nanshan: Some of the Representatives of 10 Minutes and 8 Minutes in the Praises*, March 11, 2009, <http://news.sohu.com/20090311/n262724662.shtml>.

538. *Id.*

539. *Id.* ("We shall not use 8 minutes to sing the praises during our 10-minute talk in the Congress." Zhong is a delegate from Guangdong province and is well-known as a bold speaker making comments on politics).

540. See XIAN FA, art. 126 (1982) (P.R.C.).

541. See Wang Shenjun, President of the Supreme People's Court of China, *Adhering to the*

provide legal safeguards so that the CPC's leadership is not tarnished. The appointment of judges is generally designed to better serve the interest of the CPC. Particularly, most presidents of the courts, if not all, are political appointees many of which do not even have a legal background.⁵⁴² People's courts at all levels are directly under the supervision of the political and legal committees of the CPC at their corresponding levels, and all major cases must be reported to such committees before a court judgment is made.⁵⁴³

A descriptive catchphrase for the relationship between the CPC and the people's courts is the slogan recently adopted by the Supreme People's Court as its guiding principle for the courts. The slogan, once featured on the home page of the Supreme People's Court website and still present in many courts, pronounces the "Three Supremacies" in order of importance: "the Cause of the Communist Party Supreme, the Interest of People Supreme, and the Constitution Law Supreme."⁵⁴⁴ Obviously, under the "Three Supremacies" doctrine, the cause of the CPC must be a top priority for the courts.

C. The Dominance of Public Ownership: Public Domain v. Private Interest

One significant change throughout the past three decades in China, resulting from the economic reform, was the change in the country's ownership structure, from single public ownership to a co-existence of private ownerships. Since 1988, when private economy was formally legalized in the nation,⁵⁴⁵ the protection of private ownership has become an issue generating a great deal of debate and controversy. At the forefront of this debate is whether private ownership shall enjoy the same protection as the public ownership does.

Guiding Principle of the "Three Supremacies" and Driving to Achieve the New Development of the Court Work, Speech at the National Teleconference of People's Courts (Dec. 18, 2009), <http://www.court.gov.cn/html/article/200912/21/1557.shtml>.

542. See China Economic Net (CE.cn) Report, July 29, 2009, http://www.ce.cn/xwzx/gnsz/gdxw/200907/20/20090720_19577050.shtml. For example, the current President of the Supreme People's Court, appointed in March 2008, is not a trained lawyer. A most recent survey reveals that among thirty presidents of provincial people's courts, fourteen are government officials with a little or no legal training, fourteen have some work experience in legal areas (a few are formally trained lawyers), and two are from academia.

543. See *A Brief Introduction to China*, LAW INFO CHINA, <http://www.lawinfochina.com/Legal/index.asp> (last visited Mar. 5, 2010).

544. Three Supremacies Doctrine, http://news.xinhuanet.com/newscenter/2007-12/25/content_7312439.htm (last visited Feb. 10, 2010). The Three Supremacies Doctrine first appeared in Hu Jintao's speech at his meeting with the representatives of the National Conference on Politics and Law and senior judges and prosecutors in Beijing on December 25, 2007.

545. See XIAN FA, amend. 1 (1982) (P.R.C.). The 1988 Amendment to the 1982 Constitution added to Article 11 the following paragraph: "The State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The State protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy."

What remains unchanged is the dominant position of public ownership. Although the goal of economic reform in 1992 was to establish a system of “socialist market economy,”⁵⁴⁶ the term “socialist” refers to the guarantee of public ownership, and state ownership in particular, which is the “leading force” of the nation’s economy.⁵⁴⁷ Private ownership, as defined in the 1999 Amendment to the 1982 Constitution, is at most, “an important component of the socialist market economy.”⁵⁴⁸

It should be noted that since 2004 there have been two important pieces of legislation aimed at protection of private ownership, or the interest of private property. The 2004 Amendments to the 1982 Constitution legally recognized the inviolable nature of private property, alleviating the previously entrenched hostility to private property in the country.⁵⁴⁹ Next, the Property Law was passed on March 16, 2007.⁵⁵⁰ The Property Law, for the first time in the Chinese history, granted an equal protection to all property rights, public and private alike, and altered the orthodox notion of the nation against private ownership.⁵⁵¹

However, the protection of private property rights and private interest does not seem to rest with ease. On the contrary, public demand for equal protection of private property still meets strong resistance from the traditional holding of the superiority of socialist public ownership over all other forms of ownership.⁵⁵² One legitimate concern, for example, is how the Property Law is to be implemented.⁵⁵³ China is currently dealing with a thorny problem relating to its property law: specifically, how to change the ideology of the predominance of public property so that a legal framework can provide equal protection to private property, especially where the public domain and the private interest conflict.⁵⁵⁴

It is even more difficult to limit the government’s power to interfere with individual liberty and private property rights. The interference in most cases originates from the government’s strong appetite for control, in conjunction with

546. See Xin Hua News Agency Report on the Conference, http://news.xinhuanet.com/ziliao/2003-01/20/content_697129.htm (last visited Mar. 18, 2010). At the 14th National Conference of the Communist Party, held from October 1 to 18, 1992, establishing the socialist market economy system was officially prescribed as the ultimate goal of the economic reform.

547. *Id.*

548. 1999 Amendment to the 1982 Constitution, <http://www.asianlii.org/cn/legis/cen/laws/attcotproc1999567/> (last visited Feb. 13, 2010).

549. See generally, Mo Zhang, *supra* note 387.

550. Property Rights Law of the People’s Republic of China (PRC), *translated in* Property Rights Law of the People’s Republic of China (Leman, Lee & Xu) *available at* <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html>. The Property Law became effective October 1, 2007. The law purports to offer equal protection of rights for private property and public assets.

551. See generally, Mo Zhang, *supra* note 387.

552. See Songyan Sue, *New Property Law Shakes Up China*, BBC News, Mar. 8, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6429977.stm>.

553. Mo Zhang, *supra* note 387, at 333-37.

554. *Id.*

its desire to maintain social stability.⁵⁵⁵ Surely, there is nothing wrong with the government maintaining social stability, but the question is whether stability should be achieved at the cost of loss of property or violation of the rights of particular individuals, or if it should be maintained by preventing the misconduct of government. Unfortunately, the focus in China has been largely on the behavior of people rather than on government actions.⁵⁵⁶ And as noted, the lower level government officials often care more about their job performance and satisfying their superiors than about the interests of the general public.⁵⁵⁷

VI. CONCLUSION

The socialist legal system with Chinese characteristics is the legal apparatus with which the rule of law is to be practiced in China. The system is a mixture of legal traditions and the modern reality of the country, including a Western influence. More distinctively, the system is intended to show the world that China knows well the significance and value of the rule of law, and cherishes the fruit it has received in building the country under the rule of law.⁵⁵⁸ But it is also designed to send a strong message that the rule of law, as developed in China, must be compatible with the national conditions and social system of the country.⁵⁵⁹

It is well recognized that no nation has ever produced legislation—substantive, organizational, and procedural—more quickly than China did in the past quarter century.⁵⁶⁰ The volume of legislation was overwhelming and the amount of law “ballooned.”⁵⁶¹ The progress is remarkable. It is perhaps on this ground that China is eager to proclaim that the socialist legal system with Chinese characteristics has now been formed. It is also the reason why China seems confident that it will beat the 2010 timeline for the establishment of the system as such.

However, the rule of law should mean much more than just legislation. Even under Deng Xiaoping’s definition of the rule of law, China is now only at the stage

555. Jerome Cohen, *China’s Legal Reform at the Crossroads*, *supra* note 401.

556. See Su Sengxiang, *How should We Treat “Nail House”?*, Mar. 22, 2007, http://news.xinhuanet.com/legal/2007-03/22/content_5879558.htm. For example, in a “nail house” situation, the owner of the household is normally blamed for not respecting the government, and rarely were people led to think that there was something wrong with the government.

557. See Cai Huihong, *Cultural Shackles – on the Slow Pace of the State Owned Enterprises Reform of China*, <http://www.myshow.com.cn/class/oBarticle1.htm> (last visited Feb. 10, 2010); see also Patrick Randolph, Speech at the 2003 Congressional-Executive Commission on China Roundtable, *Ownership with Chinese Characteristics: Private Property Rights and Land Reform in the People’s Republic of China*, <http://www.cecc.gov>. In China, local, county, and provincial government overlords all have an interest in power, and were they to coincide, the power would come down very hard on the neck of the average citizen.

558. White Paper, *supra* note 5.

559. See *id.*

560. Cohen, *China’s Legal Reform at the Crossroads*, *supra* note 401, at 24.

561. See Orts, *supra* note 15, at 64.

of "there must be law to rely on."⁵⁶² Therefore, there is still a long way to go. Although China has learned its lesson from the past experience of lawlessness and realized how important it is to have a legal system in operation,⁵⁶³ the biggest challenge that lies ahead is how to develop the legal system so that the rule of law becomes meaningful to the country and to the rest of the world. To that end, it would require China to further depart from the authoritarian tradition and move more toward democracy in its social, political, and legal structures.

What remains lacking in China is the public confidence in the legal system because the general public still doubts that the current Chinese legal system is adequate to provide a just result.⁵⁶⁴ People are constantly plagued by lingering misgivings that the system will work as it should. There seems to be little doubt that the establishment of the socialist legal system provides an important legal infrastructure for the development of the rule of law in China.⁵⁶⁵ Given the political hurdles associated with the Chinese characteristics that dictate the country, the path toward the rule of law in the country will be challenging and setbacks along the way are certainly not unconceivable.⁵⁶⁶ It is hoped, however, that the country is moving in the right direction to establish a sound legal system so that the rule of law may eventually be fostered.⁵⁶⁷

While in many cases China turned its eyes to other countries for direction while drafting legislation, especially in the country's underdeveloped areas of law, it would be naive to assume that China should follow a certain legal pattern or theory that is popular elsewhere to make its legal system better in terms of the rule of law. China will develop its legal system in its own Chinese way, as is implied by Chinese characteristics. For example, in response to the growing demand in the country for a democratic government,⁵⁶⁸ the CPC repeatedly forecloses the possibility of following the Western political system with a basis of separation of power.⁵⁶⁹ The Central Committee of the CPC shut the door by criticizing the Western separation of power as a "rival show" which is not suitable to China because there are no "rivals" in China between the party and government, or its branches.⁵⁷⁰

562. See CHUNYING, *supra* note 52, at 18-26.

563. See generally discussion *supra* notes 88-103 and accompanying text.

564. See Margaret Woo, *Law and Discretion in Contemporary Chinese Courts*, in THE LIMITS OF THE RULE OF LAW IN CHINA 185 (Karen G. Turner, et al. eds., Univ. of Washington Press 2000).

565. See White Paper, *supra* note 5.

566. See Chenguang, *supra* note 16, at 32.

567. See Weijiu, *supra* note 332, at 92-99.

568. See WANG ZHENMIN, A SYSTEM OF UNCONSTITUTIONALITY REVIEW IN CHINA 1-18 (China Univ. of Political Science & Law Press 2004).

569. See Banguo, *supra* note 4.

570. See *Id.* (criticism both exemplifies and signifies the Chinese characteristics).