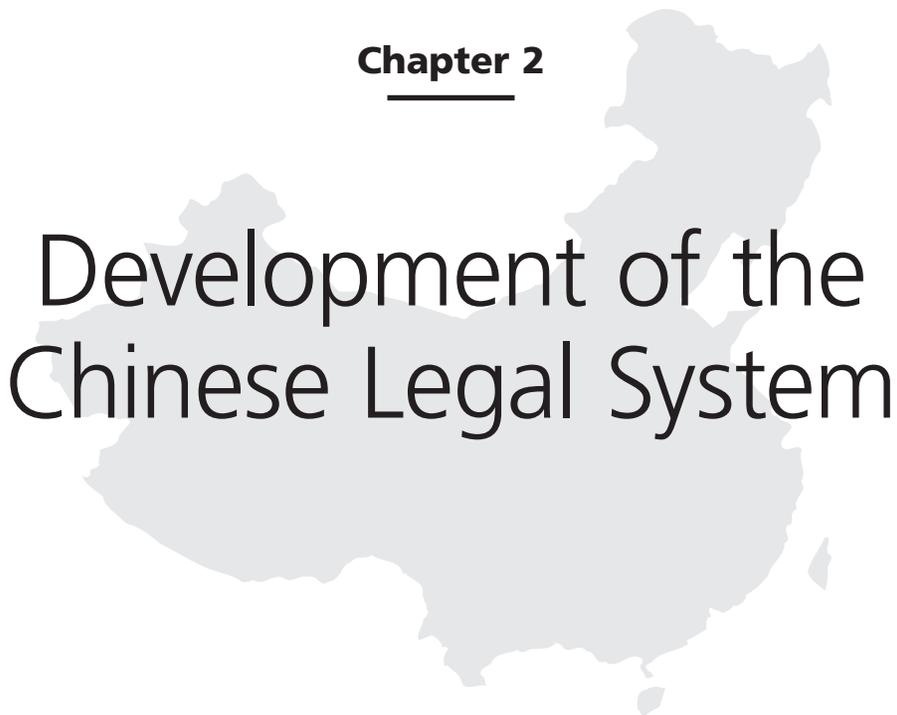


Development of the Chinese Legal System



In order to develop an understanding of contemporary Chinese law and practice, it is imperative to appreciate the social, cultural, political, and historical aspects of Chinese legal tradition. China's current legal system reflects a number of influences including the culture and deeply rooted philosophies of classical China such as Confucianism, Daoism, and Legalism. China's legal system is also influenced by external forces such as the extraterritorial privileges exerted under the Treaty System between China and the Western powers which, in effect, forced China to adopt Western legal principles such as the codes of continental European countries. After the Communist Party took control in 1949, Chinese law was influenced heavily by the political philosophies of Marxism-Leninism, Mao Zedong Thought, and the Soviet legal system. Over the last 30 years, China has adopted a number of laws and regulations from various international sources, especially in the area of commerce, foreign investment, and securities regulations. At the behest of the international community, as China continues to reform its economy, it has been quick to tap into the legal standards of its trading partners to hasten its development efforts, to build the confidence of foreign investors, and to accommodate the entrepreneurial capitalism sweeping the country. This chapter addresses the internal and external factors that have influenced the development of China's contemporary legal system.

A. Philosophical Influences of Chinese Law

1. Confucianism

Confucian codes of conduct, which are clearly defined patterns of obedience, have become inextricably intertwined in Chinese society and culture. The traditional Chinese view of law is primarily influenced by Confucian teachings that an individual should be guided by *li* (virtue or propriety) rather than by *fa* (the law).¹ Confucianism is an ethical system that seeks to teach the proper way for all people to behave in society.

Confucius (551–479 BCE) and his disciple, Mencius (372–289 BCE), developed an entire code of gentlemanly conduct governing good manners, demeanor and gestures, dress, and social grace.² Confucius viewed the ideal person as one who was poised, fearless, well tempered, free of violence and vulgarity, and competent. If one neglects a ritual or engages in a ritual incorrectly, he demonstrates moral anarchy or disorder in an egregious manner.

Confucianism emphasized that *li* represents positive measures for preventing crime and maintaining social order, while *fa* serves as a measure of punishment that only encourages people to evade the law rather than to do what is right. Confucianism emphasized the duties and obligations of people rather than their individual rights. The focus is more on the interests and harmony of the family, clan, or community than the rights of a single person.³ Confucius taught that most of the ills of society existed because people forgot their stations in life and rulers failed to practice virtue.

The rationale of Confucianism is that society is organized in a hierarchy of superior–inferior relationships: the rulers to the subjects, parents to children, men to women. Filial piety (*xiao*), or respect for elders, is a cornerstone of Confucianism. If every person performs his or her role, stability and social order will be sustained. Confucius emphasized complete obedience and loyalty of the inferior to the superior and, at the same time, the benevolence of the superior to the inferior.

There is not a rigid code of law under Confucianism, given that good conduct must come within the person and cannot be enforced by some

1. J. ZHANG, FA SHI JIAN LUE [A SURVEY OF LEGAL HISTORY] 65 (Beijing, China, Mass Publishing House 1987); Zhiping, *Explicating “Law”: A Comparative Perspective of Chinese and Western Legal Culture*, 3 J. CHINESE L. 55 (1989) (discusses the differences between China’s concepts of law and other legal systems); V. LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA AND THE UNITED STATES 13–15, 25–26 (1977) (author discusses the “rule of law” under Confucian philosophy).

2. Confucius is a Latinized form of the title *Kongfuzi* (Master Kong), and Mencius is a Latinized form of the title *Mengfuzi* (Master Meng).

3. A. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA 38 (1992).

organization.⁴ On the civil side, taking legal action against your neighbor is a result of an incapacity to work things out in negotiation.⁵ If a person chooses to have the rulers decide a civil dispute, the result is arbitrary justice by those that hold power.

Confucius was born around the year 551 BCE in what is today the Shandong Province. Although he held only insignificant government positions, he preached a philosophy to the existing rulers on how to improve their governing, but died without seeing his ideas come into practice. Confucius was not a religious leader, nor did he claim any special divine status. His popularity eventually took hold after his death in about 479 BCE and became the dominant philosophy of the administrative classes. Confucianism influenced every aspect of Chinese life, including governmental systems, politics, and the law. Confucianism developed during a time of moral chaos, in which common values were widely rejected, crime was rampant, warlordism was the norm, and government was corrupt and distrusted by the people. Before Confucius, China was a feudal society on the verge of collapse due to increased population and ongoing war. During the Han Dynasty (206 BCE–220 CE), Confucianism was employed as an ideological reference point to allow the Han emperors to run China with a reasonable degree of efficiency. Since that time, and up to the end of the Qing Dynasty in 1911, Confucius's teachings were a curricular mainstay for government officials.⁶ A familiarity with Confucian canons was the principal requirement for civil service examinations.

Confucius believed that people could live together peacefully if they lived by certain traditions that maintained tranquility and social order. He believed that there had once existed a period of time of quiet peace and prosperity in China, and advocated for a return to these traditions. Confucius established the Chinese past as an infallible model for the present.

4. One sinologist noted that “[s]ince the ruler swayed people by his virtuous conduct and moral example, not by law, it was felt that enlightened and civilized persons would be guided by such an example and by the norms of proper conduct without need of regulations.” J. FAIRBANK, *THE UNITED STATES AND CHINA* 106 (1972). See also Ma, *The Chinese Concept of the Individual and the Reception of Foreign Law*, 9 J. CHINESE L. 207 (1995) (discusses the role of the individual in traditional Chinese law and the difficulty of adopting foreign law in the PRC).

5. For all human intercourse in Chinese society, the concept of “losing face,” which has its roots in Confucianism, takes on an important role. The concept of face is akin to status, and a person will go to great lengths to avoid “losing face.” To be proven wrong or incompetent is a profound humiliation. To let down the family, unit, or group is a great shame to the Chinese. Foreigners involved in negotiating with the Chinese need to appreciate this concept. See generally R. KING & S. SCHATZKY, *COPING WITH CHINA* 112–13 (1991).

6. One course of study is *xiu shen*, or cultivation of the self. *Xiu shen* came to mean self-discipline or self-abnegation, and was invoked to make the young conscious of their lowly place in life and responsive to authority and deference to superiors. See generally C. HUCKER, *CHINA'S IMPERIAL PAST* (1973); J. FAIRBANK, *CHINA'S IMPERIAL PAST* (1975); J. GERNET, *A HISTORY OF CHINESE CIVILIZATION* (1982).

Confucian bureaucrats kept the empire intact for 2,000 years, developing in isolation from the rest of the world. Although the dynasties were replaced by the Republic from 1912 to 1949 and by the Communist regime thereafter, the ethos of Confucius remains alive and in practice in modern Chinese society. Although governments and ruling parties have changed over time and each has attempted to abandon the influence of Confucianism, the people continue to revert back to the conservative values of Confucianism's respect for authority, pursuit of privilege, and social grace.

Mencius, like Confucius, believed that rulers receive a mandate from heaven justifying their positions in order to guarantee peace and order among the people they rule. Unlike Confucius, Mencius believed that if a ruler failed to be virtuous, then the people would be absolved of all loyalty to the ruler and could revolt against the ruler. This concept served as a basis for numerous revolutions in China and a succession of new rulers.

Although Confucianism has repeatedly come under attack by the successive governments in modern China, the values of the family and the clan have been given greater importance in the past 30 years as China experiments with entrepreneurial capitalism.

2. Daoism

Daoism (Taoism), a school of thought developed by philosophers Lao Zi (5th century BCE) and Zhuang Zi (4th century BCE), maintains that a person must follow the *Dao*, the way, without interference of desires. Daoists, also known as Quietists, advocated inaction (*wuwei*), political passivity, and spontaneity without human interference. Daoism opposes institutions and organizations, moral laws, and governments as human artifices that obstruct the *Dao*. In practicing *wuwei*, a person accepts without struggle the experiences of life. The purpose of human life, then, is to live a life according to the *Dao*, which requires passivity, individuality, naturalness, calm, simplicity, a free-and-easy approach to life, non-striving, humility, and lack of planning (for to plan is to go counter to the *Dao*). Daoism taught the art of living and surviving by conforming to the natural way of things.

Daoists advocated that the best way to govern the world is not to govern it. Daoism encourages avoiding public duty in order to search for a vision of the transcendental world of the spirit. Daoism viewed that a proper government would be one that would not wage war, would not be complex, would not interfere in people's lives, would not emphasize luxury, ritual, and wealth, and, if practical, would be inactive. The inactivity envisioned would be a government that is merely a guide and not one that governs. Daoists

believed that the order and harmony in nature were far more stable, unified, and enduring than the power of the state or of the civilized institutions constructed by humans.

During its history, Daoism has been referred to as the “other way” given that it coexisted with Confucianism. Daoism, while not radically different, offered a range of alternatives to the Confucian way of life. While Confucianism inspired a religion of ethics and social behavior, Daoism inspired mysticism. Where Confucianism was the school for the elite, Daoism flourished among the common people. Confucianism denounced the principle of *wuwei* and believed in a more active form of government and rigid social control. Daoism sought to promote the inner peace of individuals and harmony with the environment.

Although Daoism may be different from Confucianism, it is not contradictory. Many individuals were both Daoist and Confucianist; each philosophy appealed to different sides of a person’s character. A typical Daoist was someone who was an artisan who depended upon inner spiritual concentration to perfect his or her creativity and skills. Daoists emphasized physical well-being, healthy diets, gymnastics, massage, and herbal medicine. The Daoist was also someone weary of social activism.

Daoists believe in a system of moral retribution. The Daoist gods in heaven and hell would exact strict punishments for wrongdoing. Such a system of moral retribution made it unnecessary for government to develop laws to control behavior. This belief reinforced the values of society and kept the people in check.

3. Legalism

A third school of thought that significantly influenced the current Chinese legal system is Legalism (*fajia*), which has its roots in the teachings of Shang Yang (d. 338 BCE), the advisor to Shi Huang Di, the First Emperor of China. Shi Huang Di was regarded as abusive and a tyrant by Confucianists, although he succeeded in unifying the nation and putting an end to warlordism.

The Legalist advocated rewards and punishments by which to keep all people in order. To the Legalist, man was basically evil and selfish, and required a draconian set of laws that would make them easier to control and to avoid social disruption. The Legalist philosophy advocated dismantling feudal privileges, strict accountability for actions, and the standardization of individual duties in a manner whereby everyone is bound equally to the same standard. Legalism emphasized that the standards do not favor the nobles over the common people.

The Legalist saw the law as a means to secure institutional continuity by means of a strict, clear, and public legal code.⁷ The Legalist argued that a ruler could not govern effectively without a set of laws.⁸ The Legalist doctrine aimed to enforce the law to strengthen the state over the rule of the family or clan. Group responsibility was ordered within the family and among units of families, and all people were under an honor system to report crime or face collective punishment. The constant threat of punishment led to the people's distrust of all forms of government.

Confucianism, Daoism, and Legalism each played a role in developing the legal system of China, both classical and contemporary.⁹ Confucianism, as opposed to Legalism, maintains that the ruling class is controlled by virtue rather than the law. Legalism called for the suppression of dissent. However, both Confucianism and Legalism sought the reunification of a then-divided China, though they took different approaches. And although the Legalists reject the Daoist principle of inaction, Legalism attempts to achieve the ideal world of Daoism by the promulgation and enforcement of positive laws that regulate behavior.

Overall, the Rule of Law (*fazhi*) in ancient China is characterized as a Rule of Man (*renzhi*); the law was designed for the benefit of those governing, rather than as an instrument of divine sanction or supreme authority.¹⁰ To the Legalist, the ruler was above the law. To the Confucianist, legal institutions were secondary to the judgment of moral men. In classical China, the law was a tool of suppression. In contemporary China, legal scholars view the *renzhi* as a part of China's feudal past. An appreciation of these philosophies gives the outsider a better understanding of how the Chinese people view the role of law in Chinese society and the legal institutions that develop, implement, and enforce the law in China.

7. See B. SCHWARTZ, *THE WORLD OF THOUGHT IN ANCIENT CHINA* 321-43 (1985). See also Johnson, *Status and Liability for Punishment in the Tang Code*, 71 CHI.-KENT L. REV. 217, 218-19 (1995) (discussion of the differences between Legalist and Confucian philosophies).

8. One scholar noted that the law of the Legalist was "intended to serve the despot, not to limit him." V. RUBIN, *INDIVIDUAL AND STATE IN ANCIENT CHINA: ESSAYS ON FOUR CHINESE PHILOSOPHERS* 70 (1976).

9. See Li, *Philosophical Influences on Contemporary Chinese Law*, 6 IND. INT'L & COMP. L. REV. 327, 321-35 (1996) (comparison of Confucianism, Daoism, and Legalism and the impact on China's legal system). Buddhism also had an impact on Chinese society, but did not play a significant role in the development of the Chinese legal system. Buddhism, based on the teachings of the Indian Prince Siddhartha (563-483 BCE), is a religious belief that advocates the use of meditation to achieve a state of nirvana and to find relief for human suffering. Buddhism blended with Confucianism and Daoism during its introduction to China. Approximately 68 million Chinese consider themselves Buddhists.

10. For an analysis of the ideal of a rule of law in ancient China, see Turner, *Rule of Law Ideals in Early China?*, 6 J. CHINESE L. 1 (1992).

B. External Influences on the Development of Contemporary Chinese Law

In addition to the purely internal philosophies, the development of China's contemporary legal system was strongly influenced by a number of external factors, including the demands placed on China to reform its legal system as a condition to abolish extraterritorial judicial privileges and the political philosophy of Marxist-Leninist thought that took hold in China after years of war, foreign interference, and abject poverty.

1. Extraterritorial Privileges and Foreign Demands for Legal Reform

For centuries, China flourished in isolation from the rest of the world. Codification of the law in ancient China, which was primarily penal in nature, was undertaken during the Qin (221–206 BCE), Tang (618–907 CE),¹¹ Song (960–1279 CE), Ming (1368–1644 CE), and Qing (1644–1912 CE) dynasties.¹² However, the Chinese courts rarely had occasion to exercise jurisdiction over purely commercial disputes given that civil cases, as a matter of tradition, were settled through either mediation or arbitration. The avoidance of the court process to resolve civil disputes is a result of the people's distrust of legal institutions, where the decision-making was arbitrary, and of the Confucianist emphasis on resolving matters in a virtuous manner.¹³

During the Qing Dynasty (1644–1911), the Western world approached the Manchu rulers for strategic purposes and to open trade. China, at least initially, was ambivalent toward the foreigners and believed that it had no need for relations with Europe and the United States. As traders set up posts in China's coastal areas, the Manchus allowed the foreigners to govern their own affairs but gradually asserted jurisdiction, especially in matters involving crimes against Chinese citizens.

After China was weakened by its defeat during the Opium War, Western powers including Great Britain, Germany, France, and the United States imposed upon China a number of unilateral treaties granting land and

11. See generally Johnson, *supra* note 7, at 217 (1995) (the Tang code is regarded as the basis for subsequent criminal laws developed throughout Asia). The Tang code placed an emphasis on the use of interrogation and confession, and less reliance on lawyers in the representation of an accused. The Tang code is the product of over 1,000 years of legal development.

12. For a discussion of the different dynasties, see J. FAIRBANKS, CHINA: A NEW HISTORY (1994) and Z. JIFAN, CHINESE LEGAL HISTORY (1982). Because of the low literacy rate in Classical China, it is likely that only a few people were aware of the written legal codes. See Johnson, *supra* note 7, at 220.

13. The extensive use of personal connections (*guanxi*) to, among other things, circumvent the law or to gain leniency seriously undermines the public's confidence in the law. See *infra* Chapter 3, "Legislating, the Judiciary, and Lawyers in China," § B.4.

trading concessions in various parts of China. This effectively dismembered China and parceled her off into spheres of influence.¹⁴

The unequal treaties—as they are referred to by the Chinese—established a system of extraterritorial privileges under which foreign subjects were exempt from local jurisdiction, and, instead, were subject to their own national authorities for conduct while physically present in China. These extraterritorial privileges included an exemption from jurisdiction of local courts, freedom from arrest by local officials, and the right to a criminal or civil trial by consular or national courts.¹⁵ Prior to the establishment of extraterritorial privileges, China asserted jurisdiction over foreigners and subjected them to local Chinese law.¹⁶

The United States, for example, secured its extraterritorial privilege in its treaty with China concluded on July 3, 1844. The China Treaty of 1844 provides that “citizens of the United States who may commit any crime in China shall be subject to be tried and punished only by the consul, or other public functionary of the United States, thereto authorized, according to the laws of the United States,” and that “all questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction of and regulated by the authorities of their own Government.”¹⁷ At one time, the United States and several European

14. In some sense, the Qing welcomed the Western powers to assist the ailing government in quashing rebellions, such as the Boxer Rebellion in 1900, with foreign troops (primarily U.S. Marines). For a chronicle of the uprising and ensuing two-month siege of the foreign ministries in Beijing and the foreign community in Tianjin, see D. PRESTON, *THE BOXER REBELLION* (2000); S. SEAGRAVE, *DRAGON LADY: THE LIFE AND LEGEND OF THE LAST EMPRESS OF CHINA* 288–357 (1992).

15. E. BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 433 (1915); E. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 224–25 (1920); see also S. LIU, *EXTRATERRITORIALITY: ITS RISE AND ITS DECLINE* 23 (1925); G. KEETON, *THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA* 157 (1925). See also J. VINCENT, *THE EXTRATERRITORIAL SYSTEM IN CHINA, FINAL PHASE* (Harvard East Asian Monographs No. 30, 1970) (Vincent was a consular-diplomat of the U.S. government in China during the 1920s–30s. Vincent notes that the scope of extraterritorial privilege included, in addition to the court systems, treaty provisions binding China to a fixed and low ad valorem tariff; foreign-administered customs, postal, and tax agencies; provision for foreign warships at coastal ports; foreign-controlled Legation Quarter guards; foreign troops stationed along the train route between Tianjin and Beijing; the right of missionaries to settle, acquire real property, and proselytize throughout the country without hindrance; the right of coastal and inland navigation; and the right to establish educational institutions free from Chinese supervision.)

16. Section 34 of the Chinese Penal Code provided that “all foreigners who come to submit themselves to the government of the Empire, shall, when guilty of offences, be tried and sentenced according to established laws.” G. STAUNTON, *PENAL CODE OF CHINA* 36 (1810), reprinted in S. Liu, *supra* note 15, at 81–82.

17. China-United States Treaty of 1844, arts. 21, 24. This treaty is also referred to as the Treaty of Wanghia after the small village in Southern China where it was signed. For a discussion of the Treaty of Wanghia, see 5 J. MOORE, *INTERNATIONAL LAW DIGEST* 416–26 (1906). This treaty followed the Treaty of Nanjing between Great Britain and China concluded on August 29, 1842, which ended the Opium War. For a Chinese view of the treaty system, see *AN OUTLINE HISTORY OF CHINA* 431–36 (Bai Shouyi, ed., Beijing, China, Foreign Language Press 1982). See also J. SPENCE, *THE SEARCH FOR MODERN CHINA* 158–64 (1990); J. Fairbanks, *supra* note 12, at 199–205 (1994). Extraterritorial jurisdiction in China was secured by 19 countries including, in chronological order: Russia, Great Britain, the United States, France, Sweden, Norway, German Customs Union, Denmark, the Netherlands,

governments had extraterritorial privileges in many African and Middle and Far East countries.¹⁸

This peculiar institution is explained by one jurist as follows: “Owing to diversities of law, custom, and social habits, the citizens and subjects of nations possessing European civilization enjoy in countries of non-European civilization, chiefly in the East, an extensive exemption from the operation of the local law. This exemption is termed ‘extraterritoriality.’”¹⁹

The Western powers imposed the system of extraterritoriality based upon the perceived imperfections in the Chinese legal system. The primary objections to China’s legal system were that the use of penalties was too severe, torture was employed to obtain confessions of guilt, and the courts were corrupt.²⁰ One British diplomat and proponent of extraterritoriality, Sir George Staunton, claimed that “[t]he Chinese laws, as specially applied, and endeavored to be enforced, in cases of homicide, committed by foreigners, are not only unjust, but absolutely intolerable. The demand for blood, in all cases, without reference to circumstances, whether palliative or even justifying, is undoubtedly an intolerable grievance.”²¹ Prior to the unequal treaties providing for extraterritorial privileges, there were several reported cases involving homicide either as a result of self-defense or through gross negligence where the accused was sentenced to death by local Chinese authorities without consideration of whether the conduct was intentional, accidental, or justified under the circumstances.²²

In the first case concerning U.S. interests, the American vessel *Emily* in 1821 was forced to hand over a crewmember to local authorities. This crewmember was convicted and executed for causing the death of a woman when he dropped an earthenware pitcher from the vessel onto the woman, who fell and drowned in the Pearl River near Canton (Guangzhou). The crewmember, Terranova, was handed over to the Chinese authorities after

Spain, Belgium, Italy, Austria-Hungary, Peru, Brazil, Portugal, Japan, Mexico, and Switzerland. See also Quigley, *Extraterritoriality in China*, 20 AM. J. INT’L L. 46, 51 n.21 (1926).

18. See H.R. Doc. No. 326, 59th Cong., 2d Sess. 216–46 (report contains treaties, statutes, and regulations relating to extraterritorial jurisdiction of the United States); see generally G. Keeton, *supra* note 15; S. Liu, *supra* note 15; Quigley, *supra* note 17.

19. 2 J.B. MOORE, A DIGEST OF INTERNATIONAL LAW 593 (1906).

20. W. KOO, STATUS OF ALIENS IN CHINA 123–26 (1912).

21. REMARKS ON THE BRITISH RELATIONS WITH CHINA AND THE PROPOSED PLANS FOR IMPROVING THEM (2d ed., London, 1836), reprinted in S. Liu, *supra* note 15, at 85. Several Chinese jurists disputed the claims that China’s legal system was defective and found that such claims were exaggerated for the purpose of preserving foreign control over Chinese territory. See S. Liu, *supra* note 15, at 88 n.1. One noted historian argues that China’s penal system, although harsh, had a standard of law and order that was comparable to that prevalent in Europe or the United States at the time. See J. Spence, *supra* note 17, at 126.

22. See 2 J. MOORE, INTERNATIONAL LAW DIGEST 644–45 (1906). See also J. Spence, *supra* note 17, at 127 (discussion concerning the *Terranova* case).

the Qing government threatened the cessation of all U.S. trade in the Canton region. The captain of the *Emily* wavered and turned over *Terranova* out of fear that his vessel, loaded with illegal opium, would be confiscated. At the trial, there were no Western observers allowed present in the courtroom, and after a one-day trial, *Terranova* was sentenced to death by strangulation. The sentencing of the sailor violated the Qing government's own procedures in cases of accidental homicide. Cases such as the *Terranova* matter led to the general feeling that the administration of justice in China was capricious, and that individuals guilty of accidental homicide would receive the same punishment as those guilty of murder. The *Terranova* case is cited as a major justification for the establishment of the United States extraterritorial system in China.²³

In response to treaty authorization, foreign governments established a multiplicity of courts physically located in China. At one time, there were almost 100 consular courts throughout China with the largest number established by Japan (44), followed by Great Britain (25), the United States (18), and France (16).²⁴ Each consular court applied the law of its own state and prescribed penalties that that state determined to be proper. The four sources of law of the U.S. consular courts and the United States Court for China included acts of Congress, common law, special decrees and regulations, and Chinese law.²⁵ Each court had exclusive jurisdiction over its own citizens, regardless of the crime or civil claim. For example, a claim against an American citizen was thus required to be made before the U.S. consular court having jurisdiction over the defendant.

In addition to the consular court systems, the United States and Great Britain established their own court systems in China for major civil and criminal cases. The United States, for example, in 1906 established the United States Court for China, which had exclusive jurisdiction in criminal cases except "where the punishment of the offense charged cannot exceed by law one hundred dollars' fine or sixty days' imprisonment or both," and in civil disputes except where "the sum or value of the property involved in the controversy does not exceed five hundred dollars United States money."²⁶ In all other matters, the U.S. consular court had jurisdiction. A litigant had the right to appeal a decision of the United States Court for China to the Ninth Circuit Court of Appeals.

23. See J. Moore, *supra* note 22, at 644–45.

24. The other countries with consular or national courts in China included Portugal (8), Belgium (6), Italy (5), Denmark (1), the Netherlands (1), Spain (1), and Switzerland (1).

25. W. WILLOUGHBY, *FOREIGN RIGHTS AND INTERESTS IN CHINA* 44–51 (1920).

26. See Quigley, *supra* note 17, at 54–55.

On the other hand, claims or charges made against a Chinese citizen by a foreign party were heard by the Chinese Mixed Courts, in which, in addition to the Chinese magistrate, the foreign claimant was allowed to have an assessor present. In contrast, a Chinese claimant was not allowed to have a representative present in the foreign consular courts. In theory, the “Mixed Courts” were Chinese courts having jurisdiction over Chinese defendants and administering Chinese law. By treaty, however, a foreign party was allowed to have an “assessor” attend the proceedings “in the interests of justice” to “examine and to cross-examine witnesses” and “to protest against [the proceedings] in detail.”²⁷ The result was that the foreign governments, and in particular Great Britain, the United States, and France, were allowed to control the proceedings. An American lawyer who practiced law in Shanghai from 1903 to 1905 made the following observation concerning the Mixed Court system in Shanghai:

Whether from indifference, or because of tacit understanding that their presence was not required, Chinese officials have seldom, if ever, attended the proceedings of foreign tribunals when the interests of their countrymen were involved in suits against foreigners. But foreign representatives have always asserted and exercised the right of attending the trial of cases against Chinese when the interests of their nationals were involved. This has led to one of the gravest abuses connected with foreign intercourse in China. Little by little these representatives have arrogated to themselves the right to sit in judgment on mixed cases, and by threats of intimidation to bring the Chinese magistrate who, theoretically, has the sole decision, to the view of the controversy that they favor. Justice under such circumstances is impossible, for to the weakness and native dishonesty of the magistrate is added the aggressive partiality of the foreign representative, who, in the majority of cases does not profess to be a judge at all, but an active advocate on the bench of the cause of its nationals.²⁸

In earlier periods, the Chinese found extraterritorial privileges to be acceptable since the imperial governments preferred that foreign communities

27. *Id.* at 55–56.

28. Ohlinger, *Extraterritorial Jurisdiction in China*, 4 MICH. L. REV. 341, 345–46 (1906). A British barrister noted that the Mixed Court usually adjourned without deciding a case since the assessor and the Chinese Magistrate could never agree on the outcome. See Latter, *The Government of Foreigners in China*, 75 L. QUARTERLY REV. 316, 321 (1903) (“Too often do proceedings in this court develop into a mere wrangle between the assessor and magistrate, each advocating the cause of his own sovereign’s subject.”). The use of assessors in other civil-law countries is common, but they usually respect and defer to the authority and decisions of the judge.

police their own ranks.²⁹ It was also a system that worked for a small population where the foreigners and the local citizenry did not mix. As one writer noted that “the Chinese, when they found that the foreign devils were not to be kept out of their dominions, accepted the inevitable but prayed on all accounts to be excused from the task of governing and administering justice to these barbarians.”³⁰ As populations swelled, however, the system became cumbersome and subject to abuse.

Understandably, the system of extraterritorial privileges, a by-product of the colonial era, was condemned by China as an affront to its sovereignty and its right to maintain judicial autonomy free of foreign influence and interference. Clearly, the extraterritorial system placed the foreign party in a far better position than the local citizenry. Foreigners, under the cloak of extraterritoriality, were also immune from local taxes that the Chinese themselves had to pay.

The system was also criticized by foreign lawyers as being severely flawed in its ability to effectively administer justice³¹ and as a means to skirt the law. One commentator, a former American assessor of the Mixed Court in Shanghai, noted:

The strongest plea for the abolition of extraterritoriality lies in the abuse of this privilege on the part of subjects of foreign powers who use it as a cloak for illegal acts. The continued smuggling of opium and morphine into China is but a single example, although the most striking, of the wrong that is being done to China under the cloak of a foreign extraterritorial jurisdiction.³²

The use of consuls to decide cases has been criticized given that members of the consular service may not have been trained lawyers or judges. Most importantly, the first duty of a consul was to protect the interest of the state's nationals, and was, by definition, biased against the foreign party seeking redress. In addition, the foreign courts were able to exercise jurisdiction only over their own citizens. The courts had no power to punish a non-citizen plaintiff who committed perjury. The courts were also limited in that they could not entertain a counter-claim against a non-citizen plaintiff.

29. One writer noted that “The truth is, China wanted as little intercourse as possible with foreigners, and seeing that it was very difficult to keep them out of her territory, she was willing to let them manage their own household affairs, as best suited to themselves, when they took up their abode therein.” T. JERNIGAN, *CHINA IN LAW AND COMMERCE* 194 (1905).

30. Latter, *supra* note 28, at 316.

31. For a discussion of the flaws and weaknesses of the extraterritorial court system, *see id.* at 316.

32. Bishop, *Extraterritoriality in China*, 5 *CHINESE SOCIAL & POL. SCI. REV.* 175, 177 (1920).

The extraterritorial system also resulted in the general populace's distrust of its own government, which it saw as being inept in handling foreigners. One writer noted that "[b]y making the foreigner immune to Chinese legal control, extraterritoriality put the Chinese ruling class into a situation reminiscent of earlier times, obliged to govern China under a degree of alien hegemony."³³

After the practice had already existed for over 60 years, on the demand of the Chinese government, Great Britain and the United States promised to abolish the extraterritorial system on the condition that China establish a legal system consistent with international norms.³⁴ Article 15 of the commercial treaty between the United States and China of 1903 provides as follows:

The Government of China having expressed a strong desire to reform its judicial system and to bring it into accord with that of Western nations, the United States agrees to give every assistance to such reform and will also be prepared to relinquish extra-territorial rights when satisfied that the state of the Chinese laws, the arrangements for their administration, and other considerations warrant it in so doing.

In response, the Chinese government took steps to reform its legal system, including the establishment of an independent judiciary and codification of its laws. In 1902, the Emperor Guangxu issued an order to reform China's legal system and established a law reform commission headed by jurist Shen Jiaben.³⁵ The Qing Dynasty established China's new Supreme Court in 1906 and encouraged the establishment of courts throughout the provinces. The

33. J. Fairbanks, *supra* note 12, at 204.

34. 1 J. MACMURRAY, *TREATIES & AGREEMENTS CONCERNING CHINA* 351 (1921); 1 MALLOY, *TREATIES* 269. Article 12 of the treaty between China and Great Britain dated September 5, 1902 provides as follows:

China having expressed a strong desire to reform her judicial system and to bring it into accord with that of Western nations, Great Britain agrees to give every assistance to such reform, and she will also be prepared to relinquish her extra-territorial rights when she is satisfied that the state of Chinese laws, the arrangement for their administration, and other considerations warrant her in so doing.

Several other countries agreed to relinquish their extraterritorial privileges on the condition that China reform its judicial system, including Sweden and Switzerland. *Id.* at 745 (Sweden); 2 J. MACMURRAY, *TREATIES & AGREEMENTS CONCERNING CHINA* 1430 (1921) (Switzerland). Similarly, the Western powers agreed to relinquish their extraterritorial rights in Japan after comprehensive reforms were carried out by the Japanese government, including the adoption and enforcement of a code of laws based upon Continental European codes. *See* G. Keeton, *supra* note 15, at 170.

35. Shen Jiaben played a key role in the development of China's legal system. Shen organized a group of scholars to translate into Chinese the law books of Western countries including Germany, Italy, the United States, Russia, Britain, France, and the Netherlands. In 1906, Shen established the first government-run law school. For a discussion of Shen Jiaben's achievements, *see* Gao, *Shen Jiaben—"Matchmaker" Between Chinese and Western Laws in the Later Years of the Qing Dynasty*, 11 CHINA L. Q. 96 (Jun. 30, 1997).

Qing, as well as the Republic (1912–1949), took steps to promulgate criminal and commercial laws. The Republic also took steps to reform China's penal system, including the improvement of sanitary conditions at prisons, the construction of modern prison facilities, and the establishment of programs for re-education of prisoners. The Qing abolished deportation, torture, and the use of the cangue—a square wooden yoke confining the neck and hands and used to publicly humiliate minor criminals.³⁶

Despite undertaking numerous reforms in the first two decades of the 20th century, the foreign powers failed to relinquish their extraterritorial privileges. The Chinese government, in several international fora, repeatedly demanded an end to extraterritoriality.³⁷ At the Paris Peace Conference in 1919, China made an attempt to secure the abolition of the extraterritorial system based upon the adoption of a number of laws and a constitution consistent with Western legal standards.³⁸ In a statement to the Conference, the Chinese delegation demanded that extraterritoriality be abandoned by the Western powers:

While we do not claim that the Chinese laws and their administration have reached such a state as has been attained by the most advanced nations, we do feel confident to assert that China has made very considerable progress in the administration of justice and in all matters pertaining thereto since the signing of the [various] Commercial Treaties.³⁹

No action was taken at the Paris Peace Conference, and the system of extraterritoriality continued. The Western powers reneged on their promise to return to China the German concessions in the Shandong Province and, insultingly, the Treaty of Versailles granted Japan the leaseholds formerly held by Germany.⁴⁰

36. For a discussion of the legal reforms and legal administration during the early part of the 20th century, see Quigley, *supra* note 17, at 61–67.

37. The Chinese Government, in declaring war upon Germany and Austria-Hungary in 1917, abrogated the extraterritorial rights of those countries. Germany formally surrendered its extraterritorial privileges in the Sino-German agreement of May 30, 1921. In 1920, the Soviet government announced its intention to surrender its extraterritorial privileges and other rights in China. Quigley, *supra* note 17, at 51–52.

38. At the time of the Paris Peace Conference, China had adopted a National Constitution; developed civil, criminal, commercial, and procedural codes; established new court systems; improved legal training; and reformed the prison and police systems. These codes were based upon the codes of several Continental European countries, including France, Germany, and Switzerland. S. Liu, *supra* at note 15, at 219–20.

39. QUESTIONS FOR READJUSTMENT SUBMITTED BY CHINA TO THE PARIS PEACE CONFERENCE 14–18 (Paris, 1919).

40. The Versailles Treaty called for the handing over of Germany's former leased territories in China to Japan. The treatment of China at Versailles led to mass protests in Tiananmen Square on May 4, 1919, thereby launching what is known as the May Fourth Movement, which is characterized

The Chinese government again made a plea to end the extraterritorial system during the Conference on the Limitation of Armament (LOA) in November of 1921, which was held in Washington, D.C.⁴¹ During the LOA Conference, the Chinese delegation emphasized that the system of extraterritoriality was “in derogation of China’s sovereign rights, and is regarded by the Chinese people as a national humiliation.”⁴² At the LOA Conference, Dr. Chung Hui Wang, the Chief Justice of China, argued that his country had made considerable progress in modernizing its judicial system. He stated:

A law codification mission for the compilation and revision of law has been sitting since 1904. Five codes have been prepared, some of which have already been put into force. . . . These codes have been prepared with the assistance of foreign experts, and are based on the principles of modern jurisprudence. . . . Then there is a new system of law courts established in 1910. The judges are all modern, trained lawyers, and no one could be appointed a judge unless he had attained the requisite legal training.⁴³

Although the LOA Conference did not result in an end to the system of extraterritoriality, the participants adopted a resolution that resulted in the first serious review of extraterritoriality, which provides, in pertinent part:

[T]he Governments . . . shall establish a Commission . . . to inquire into the present practice of extraterritorial jurisdiction in China, and into the laws and judicial system and methods of judicial administration in China, and to assist and further the efforts of the Chinese Government to effect such legislation and judicial reforms as would warrant the several Powers in relinquishing, either progressively or otherwise, their respective rights of extraterritoriality.⁴⁴

China, despite years of civil war and protracted discussions with the foreign powers to abolish the extraterritorial system, continued to reform its

as the first true nationalist movement in China. Thousands of students took to the streets in Beijing in the largest and most violent demonstration yet seen in the capitol. The demonstrators were incensed by the hypocrisy of the Western powers, which had raised China’s hopes that the “unequal treaties would be abolished and Chinese sovereignty restored.” The protests in Beijing led to nationwide demonstrations throughout China and reshaped intellectual thought in China over the next decades. The May Fourth Movement inspired Chinese activists with all types of ideologies. J. Spence, *supra* note 17, at 293–94, 310–19.

41. For a discussion of the arguments made by the Chinese delegation at the Conference on the Limitation of Armament [hereinafter “LOA Conference”], see S. Liu, *supra* note 15, at 223–25. See also Quigley, *supra* note 17, at 46 (discussion of LOA Conference and resolutions).

42. S. Liu, *supra* note 15, at 223.

43. CONFERENCE ON THE LIMITATION OF ARMAMENT, 932–36 (Washington, 1922).

44. CONFERENCE ON THE LIMITATION OF ARMAMENT, 932–36, 1010 (Washington, 1922).

legal system. Unfortunately, the West resisted relinquishing its extraterritorial privileges for uncertain reasons. One view was that China was a battlefield of military factions incapable of developing and enforcing a predictable rule of law. Others claimed that Chinese embryonic legal institutions could not be trusted, and the horrors of Chinese prisons, torture, and punishment were too vivid to ignore. The real issue, however, was that foreign powers could not envision a loss of the extensive settlements and concessions, nor would they unilaterally relinquish their privileges until their international enemies—specifically the Japanese—either renounced their interests in the Mainland or were evicted from China altogether.

In January of 1943, the Western powers formally abandoned the system of extraterritoriality. China was thereafter allowed to subject foreigners to Chinese laws and the Chinese court system.⁴⁵ In 1949, the Chinese Communist Party (CCP) abolished all laws and the legal system set up by the Republic.

Extraterritorial privileges forced upon successive Chinese regimes left the victorious Communists bitter and hostile toward the West in general. Anger over such privileges, as well as economic coercion, semi-colonialism, and foreign aggression led the CCP to isolate China from the rest of the world, which included a total abandonment of the improvements made to its legal system. The lesson that China learned from extraterritoriality was that the legal system is a vital element of control over individuals and property, foreign trade, and economic development, and that it could never afford to lose control of its judicial functions in the future. The reform of the legal system would either come from within, or with the assistance of foreign legal experts at the express invitation of domestic sources—not by external force or threat.

45. Under China's current Constitution, all foreign enterprises and individuals are bound by China's laws. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, arts. 18 & 32. There is much academic and political debate about who "lost China" and whether a different strategy would have allowed the United States to work closer with the PRC following Mao's ascendancy to power. *See generally* E. KAHN, THE CHINA HANDS (1975) (historical review of the work and inquisition of foreign service officers stationed in China prior to 1949); SERVICE, THE AMERASIA PAPERS: SOME PROBLEMS IN THE HISTORY OF U.S.-CHINA RELATIONS (University of California Center of Chinese Studies No. 7, 1971); BARRETT, DIXIE MISSION: THE UNITED STATES ARMY OBSERVER GROUP IN YENAN 1944 (University of California Center of Chinese Studies No. 6, 1970); BISSON, YENAN IN JUNE 1937: TALKS WITH THE COMMUNIST LEADERS (University of California Center for Chinese Studies No. 11, 1973). For accounts of U.S. engagement in China prior to 1949, *see generally* E. SNOW, RED STAR OVER CHINA (1938); B. TUCHMAN, STILLWELL AND THE AMERICAN EXPERIENCE IN CHINA, 1911-45 (1970); T. WHITE & A. JACOBY, THUNDER OUT OF CHINA (1946).

2. Marxism-Leninism and Mao Zedong Thought and the Development of Chinese Law

In February of 1949, the CCP forcefully removed the Guomindang government, including its judiciary and the entire body of laws. The CCP issued a directive abolishing the Guomindang's six codes, all modeled after European legal codes, including the Constitution, Commercial Law, Civil Law, Civil Code of Procedure, and Criminal Code.⁴⁶ In September of 1949, the CCP issued the *Common Program of the Chinese People's Consultative Conference*, which became the temporary basic law of China until 1954.

The CCP pursued a program based upon the concept of historical determinism, which provides that the party is the primary means of transforming China from a feudalistic society into a Communist utopian society. In order to perfect its unique historical role, the CCP pursued a policy of class struggle that involved the destruction of "class enemies." The hope of utopia appealed to the people after years of war resulted in impoverishment.

Mao borrowed heavily from Confucianism while at the same time denouncing the feudalistic ethos of the ancient philosophy. Mao sought to create a proletarian culture to supplant all feudal, imperialistic, and bourgeois culture. The collective responsibility system of the Communists had its roots in Confucian thought. The Confucianist theory of loyalty to the family was redirected into loyalty to the CCP and the State. The Confucian ideal of virtue under Maoist thought was simply the unequivocal support and practice of the CCP's current political program. A virtuous person in Maoist China was a person who followed the party line. Further, both Maoism and Confucianism eschewed written law entirely in favor of general principles and left it up to the "experts"—cadres in the former and the mandarins in the latter—to apply the principles to specific cases, often with punitive results. The recognition of general principles as opposed to the rule of law is why China, in stark contrast to developed countries, had virtually no written law in the late 1970s.

Mao also drew heavily on Legalism and, like the government of Shi Huang Di, the Communists used Legalism to mobilize the masses to action and to crush opponents. Both Maoism and Legalism share the belief that the state is the sole determinant of right and wrong (to the exclusion of other standards of personal morality such as religion). Legalism and Communism are both systems that maintain social control and order through a system of

46. The CCP order is referred to as 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*. See Li, *Philosophical Influences on Contemporary Chinese Law*, 6 IND. INT'L & COMP. L. REV. 327 (1996).

rewards and punishments and through the institution of an honor system that promotes espionage among family and work units.

Prior to 1949, approximately 60,000 lawyers practiced in China. In 1957, at the time of liberalization known as the Hundred Flowers Movement,⁴⁷ there were approximately 800 “legal advisor’s” offices nationwide. Those offices were staffed by 2,500 full-time and 300 part-time lawyers. During this period, Soviet legal scholars taught students in China, and Chinese students studied in the Soviet Union. China developed a legal framework that included the first PRC Constitution in 1954 and a set of organic laws designed to administer the court and prosecutorial systems. Soviet laws and principles were readily adopted as models until a shift in politics led to the Soviet Union falling into disfavor with Beijing in 1957.⁴⁸

In May of 1957, Mao Zedong encouraged the “blooming of a hundred flowers and the contending of a hundred schools of thought.” Mao called on intellectuals of China to speak out against the abuses in the CCP. After a period of five weeks, the program was terminated and resulted in an “anti-rightist” campaign against those that spoke out. The legal profession and the judicial system were affected. Ideological repression was followed by a purge of the government and the CCP. The anti-rightist movement was followed by an abandonment of the Ministry of Justice (MOJ) in 1959 along with its organizational structure for the legal profession.

From 1958 to 1965, the country focused its attention on developing policy to rapidly transform the country into a world power. During this time period, Mao launched the Great Leap Forward movement, which was intended to heighten economic productivity and self-reliance in China through collectivization of people’s communes and decentralization of industrial production.⁴⁹ The Great Leap Forward resulted in fundamental changes to the family and clan structure by pooling families into communes to participate in massive irrigation and construction projects. The Great Leap Forward is regarded as a failure since the government overstated the production and agricultural results, which led to widespread famine. The Great Leap Forward set the stage for the next round of revolutionary excesses of the Cultural Revolution. Development of the law and legal institutions took on secondary importance to Mao’s goal of mass mobilization to achieve self-reliance.

47. See J. Spence, *supra* note 17, at 569–73.

48. After the Soviet Union fell into disfavor with the PRC, many Chinese jurists and scholars urged the government to modernize China’s legal system by employing Western legal principles. The reformers were later condemned as rightist intellectuals with anti-socialist views. See Li, *supra* note 46, at 328.

49. See generally J. Spence, *supra* note 17, at 578–84.

The environment for the legal profession did not improve during the late 1960s. The Cultural Revolution (1966–1976), which began as a political struggle between Mao Zedong and other CCP leaders for dominance of the party, led to the abandonment of China’s fledgling legal system. The excesses of the Cultural Revolution prohibited the development of either a Western- or Soviet-styled legal system. During the Cultural Revolution, the few open law schools were closed and the law faculty sent to labor camps. The law libraries and books were destroyed by the Red Guard.⁵⁰ The legal profession disappeared overnight, and almost no laws were enacted and no law books published during the Cultural Revolution.

With the near abolition of the legal profession during the 1960s, civil disputes were resolved by local mediators, and criminal matters were handled in the political arena by the Ministry of Public Security, party committee structure, or the state courts that remained open.

3. Influence of Foreign Investment Post-1978

The Cultural Revolution ended in 1976 with the death of Mao and the arrest of the “Gang of Four.”⁵¹ After ten years of lawlessness during the Cultural Revolution, the Chinese government took steps to slowly open China to the rest of the world. In 1978, the government instituted the Four Modernizations, a program designed to develop and modernize China’s agriculture, industry, national defense, and science and technology. Incumbent in this bold plan was the building of a modern legal system as a key element to ensure the institutionalization of economic reform and to gain the confidence of the global community. The Chinese government also emphasized that the excesses of the Cultural Revolution occurred as a result of certain officials taking advantage of China’s incomplete legal system to seize power. To guard China from returning to a similar situation, the National People’s Congress (NPC) stressed the need to develop a legal system to ensure the stability and continuity of the laws; guarantee the equality of all people before

50. Mao invoked the energy of the youthful Red Guard against their elders. The Red Guard, at the encouragement of the Cultural Revolution leaders, destroyed historical buildings, temples, and art objects, and attacked—using physical and emotional tactics—teachers, school administrators, party leaders, and parents. See J. Spence, *supra* note 17, at 602–17. Mao is quoted as instructing the Red Guard to “[d]epend on the rule of man, not the rule of law.” See Capener, *Law and Lawyers in China: An Update*, 13 UTAH B.J. 35–36 (1985).

51. The “Gang of Four,” which included Jiang Qing, the wife of Mao, had tremendous power during the Cultural Revolution and was blamed for many of the excesses of the period. See generally J. Spence, *supra* note 17, at 603–17; YAN JIA QI, *THE TEN YEAR HISTORY OF CULTURAL REVOLUTION IN CHINA* (1987); R. WITKE, *COMRADE CHIANG CH’ING* 295–356 (1977) (Witke’s book is a biography of Jiang Qing and her role in the Cultural Revolution. The interviews leading up to Witke’s book and the book itself were used at Qing’s trial to demonstrate her instability and unfaithfulness to the Communist Party’s message.); *The Rise and Fall of Mao’s Empress*, TIME, Mar. 21, 1977, available at <http://www.time.com>.

the laws; and to deny anyone the privilege of being above the law. This body of law, according to the NPC, should be revised only through legal procedures and not at the personal whim of a particular leader.⁵²

In the interim, the United States officially recognized the People's Republic of China on January 1, 1979, and several months later the two governments established formal diplomatic relations with the opening of respective embassies in Beijing and Washington, D.C.⁵³ At this time, the United States recognized the PRC as the sole legal government of China and terminated diplomatic ties with Taiwan, the Republic of China. However, the United States continued its commercial and unofficial diplomatic ties with Taiwan pursuant to the Taiwan Relations Act.⁵⁴

The reforms led to China's experiment with entrepreneurial capitalism, or "market socialism." The economic liberalization policies of the 1980s gave rise to consumer expectations, personal ambition and initiative, and wealth. The Chinese government, in response, has used the law to harness the entrepreneurial values and to preserve the party's existence and legitimacy. At the same time, the Chinese government has been, and continues to be, under pressure from its trading partners to strengthen its laws, improve the enforcement of its laws, and allow for greater transparency and access to its laws and regulations in order to facilitate market access and stability in its business environment. Although the CCP has not formally abandoned the doctrine of historical determinism, it has replaced the purely Communist utopian ideal with a more realistic market-driven vision for China's future.

52. Chiu, *Certain Problems in Recent Law Reform in the People's Republic of China*, 3 COMP. L. Y. B. 1, 12 (1979).

53. In 1972, the United States and the PRC opened trade with the signing of the Shanghai Communiqué. Since that time, the United States and the PRC have executed a number of important bilateral agreements.

54. 22 U.S.C. § 48.