

## Contemporary Chinese Legal Institutions for the US Lawyer

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"China is no longer an elective course, it's core curriculum..." - Stephen A. Schwarzman

Whether students in this course pursue careers in corporate or small firms, government, business, academia, or nearly anything else, it is likely that they will encounter the Chinese legal system at some point. From divorce cases in which a couple owns a Shanghai apartment, to structuring investment in Guangdong, to advising a company with an employee arrested in Beijing, many aspects of Chinese law are becoming relevant to legal practitioners all over the world. Because law and practice in China evolve quickly, this course focuses primarily on giving students a broad and foundational understanding of the Chinese legal system. Understanding its institutions, history, politics, and culture will provide a solid basis for working in what will be a China-centric world for decades to come. The goal of this course is not only to prepare students for a world where China is increasingly important, but also to study how China got to where it is today and where it is going, thereby deepening their understanding of the meaning of law.

### Course Requirements

#### a. Readings & Discussion

All class members will be expected to have read chapters or articles pertaining to a given week's discussion topic. Readings are designed to be challenging and help students learn to synthesize and bring to bear a larger amounts of material for discussion. However, students *are not* necessarily expected to have mastered every concept covered by every piece. In China's legal system circumstances change quickly and the priority is for students to have a broad overview of the relevant laws and issues, rather than a mastery of specific laws or doctrines. Both the readings and research paper are designed to make students feel comfortable consulting and analyzing a variety of sources.

#### b. Final Exam

Graded work for this course will consist of a 48 hour take home open book exam capped at 3,000 words. Although the theme of the exam will be fairly general, students will be expected to produce substantial well-cited sources to support their factual claims and argument. Students who intend to perform well are advised to have carefully reviewed and organized their notes and materials in preparation for the exam.

### ***Week 1 Introduction to China, its Culture, and Legal System***

This week provides an introduction to China and its legal system. We will briefly cover China's geography and the pronunciation of Chinese names and words. We examine the basics of China's legal institutions as a basis for understanding the major themes of the course.

Pinyin Pronunciation: <http://weber.ucsd.edu/~dkjordan/chin/pinyin1.html>

Stanley B. Lubman, BIRD IN A CAGE (Stanford University Press 1999) Chapters 1 & 2  
(39 pages).

Frank K. Upham, Who Will Find the Defendant If He Stays with His Sheep?, 114 YALE LAW J. 1675 (2005) (43 pages).

### ***Week 2 Law, Society, and Politics in Imperial and Republican China***

We examine the pre-communist history of Chinese law. The key themes are how the legal system changed to reflect the different societies and political realities of the Qing and Republican periods. Many of the topics and themes that we will see later will be foreshadowed here.

- Philip Huang, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA (Stanford University Press 2002) (Pages 1-70, 119-135, 201-216).

### ***Week 3 Law, Society, and Politics under Mao***

Just as China's legal system changed between the Qing and Republican periods, the values and priorities of the Mao era are expressed in its legal institutions, or lack thereof. Pay attention to subtle and not so subtle signs of important Mao era concepts such as mediation and the prioritization of politics and class above other concerns. Note how this era provides the context and foundation on which China's reform era system was built. Stanley B. Lubman, BIRD IN A CAGE (Stanford University Press 1999) Chapters 3 & 4 (61 pages).

Jerome A. Cohen, The Chinese Communist Party and "Judicial Independence": 1949-1959, 82 HARV. LAW REV. 967 (1969) (40 pages).

### ***Week 4 Judges and the Courts***

Starting from a low base of legal and economic development has provided challenges that make the creation of an effective and impartial court system in China exceptionally difficult. As Prof. Balme's piece will show, this is all the more true the farther one looks from China's developed coastal regions. Corruption and a lack of education, professionalism, and training among Chinese judges provides the CCP with an excuse not to allow more judicial independence. What does the current state of China's judiciary mean for its legal system and its future development?

The Organic Law of the People's Courts of the People's Republic of China (6 Pages).

Judge's Law of the People's Republic of China (8 pages)

Benjamin L. Liebman, China's Courts: Restricted Reform, 191 CHINA Q. 620 (2007) (19 pages).

Stanley B. Lubman, BIRD IN A CAGE (Stanford University Press 1999) Chapter 9 (48 pages).

Stéphanie Balme, Local Courts in Gansu and Shaanxi: Quest for Independence and Dignity, in JUDIC. INDEPENDENCE CHINA (Randall Peerenboom ed., Cambridge University Press 2010) (26 pages).

### ***Week 5 The Legal Profession***

In many societies, lawyers are not only a vital part of making a legal system legible to ordinary people, but are themselves often prominent citizens and political leaders. The position of the legal profession in China, however, is much more fraught. The tenuous place of lawyers in contemporary China, from junior lawyers who barely manage to feed

themselves by taking divorce cases to well-known human rights litigators who are harassed by China's police, presents a vivid portrayal of the status of law in modern China.

The Lawyers Law of the People's Republic of China (7 pages)

Ethan Michelson, Lawyers, Political Embeddedness, 113 AM. J. SOCIOLOGY 352 (2007) (51 pages).

Stanley B. Lubman, BIRD IN A CAGE (Stanford University Press 1999) (pages 151-159).

### **Week 6 Law and Development**

China has undergone the single most impressive bout of development in the history of humanity. This has not only brought the PRC to the foreground of everything from global manufacturing to nuclear diplomacy, it has challenged, though not necessarily disproven, ideas about the need for a predictable legal system as a prerequisite for economic growth. This week, students should keep in mind the questions: What role did the legal system play in China's economic development? What are the wider political and social repercussions of this role?

Donald C. Clarke, China: Creating a Legal System for a Market Economy, ASIAN DEVELOPMENT BANK (2007) (24 pages).

Stanley B. Lubman, BIRD IN A CAGE (Stanford University Press 1999) Chapter 5 (36 pages).

### **Week 7 Arbitration and Mediation**

Despite an underdeveloped legal system, China is able to attract tremendous amounts of foreign investment and trade. One of the most important reasons it is able to do this is that it created a reasonably effective and impartial system for the arbitration of international disputes. Yet, at the same time China's arbitration system facilitates globalized commerce, it harkens back to Maoist and/or Confucian ideals of mediation and a more "harmonious" method of resolving conflicts. Today we ask if this system has become a bit outdated.

CIETAC Arbitration Rules, CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION (20 pages).

Stanley B. Lubman, BIRD IN A CAGE (Stanford University Press 1999) Chapter 8 (30 pages).

Arbitration in China, report by NORTON ROSE (14 Pages).

Michael J. Moser & Peter Yuen, *The New CIETAC Arbitration Rules*, 21 ARBITRATION INTERNATIONAL 3 (2005) 391-403.

### **Week 8 Contracts**

Contracts are at the basis of much of commercial and civil law. Yet, like so many aspects of the Chinese legal system, they are not necessarily as straightforward as they might seem. Today we will see that Chinese contract law mixes common and civil law systems, planned and market economics, and resulted from a mix of domestic and international concerns.

Contract Law of the People's Republic of China (23 pages).

Stanley B. Lubman, *BIRD IN A CAGE* (Stanford University Press 1999) (pages 173-191).

Jun Zhao, *Puzzle of Freedom of Contract in China's Contract Law*, *The*, 17 *ILSA J. INT. COMP. LAW* 105 (2010) (23 pages).

### ***Week 9 Criminal Law and Human Rights***

Human rights are a common topic for external criticism of China, but what are the on the ground realities? How does Chinese law, particularly criminal law, protect or fail to protect human rights? Are the failures the result of the laws themselves or of institutional problems?

The Criminal Procedure Law of the People's Republic of China (29 pages)

Jonathan Kinkel & William Hurst, *Access to Justice in Post-Mao China*, 11 *J. EAST ASIAN STUD.* 467 (2011) (pages 467-78).

Ira Belkin, *China's Criminal Justice System*, 6 *WASH. J. MOD. CHINA* 61 (2000) (26 pages).

### ***Week 10 Politics, Government, and Administrative Law***

China's government is often portrayed as a monolithic authoritarian big brother, yet its legal system permits some channels for directly challenging the state in court. This week provides insight into China's political institutions and shows how administrative litigation offers the possibility of controlling and restricting the "authoritarian zeal" of the Chinese state. Hung tells us that China's accession to the WTO has helped make administrative litigation a reality while Givens demonstrates that foreigners are reluctant to use the system and prefer extra-legal means of solving their problems with the Chinese state.

Administrative Litigation Law of the People's Republic of China (10 pages)

Jonathan Kinkel & William Hurst, *Access to Justice in Post-Mao China*, 11 *J. EAST ASIAN STUD.* 467 (2011) (pages 479-91).

John Givens, *On Their Best Behaviour* (31 pages).

### ***Week 11 Family Law and Inheritance***

Family law in China is a fascinating contradiction of local/traditional Chinese culture and global connections. At the same time that an increasing number of divorce and inheritance cases around the world involve property in the PRC, its laws regarding these subjects go a remarkable way towards reflecting aspects of Chinese culture. Family law in China also opens the door to an important conversation about legal convergence and globalization.

1. Marriage Law of the People's Republic of China (8 pages).

Law of Succession of the People's Republic of China (6 pages).

Deborah Davis, *Who Gets the House?*, 36 *MOD. CHINA* 463 (2010) (21 pages).

Frances H. Foster, *Dark Side of Trusts*, 2 *WASH. UNIV. GLOB. STUD. LAW REV.* 151 (2003) (36 pages).

**Optional:** Philip Huang, *CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA* (Stanford University Press 2002) (Pages 136-200).

### **Week 12 Work, Labor, and Law**

As China has become the “world’s factory”, how labor is treated is an increasingly important and controversial issue. China’s legal system provides formal rights for workers, but the extent to which they are able to exercise them can often be limited by a variety of factors. Similarly, foreign companies with interests in China face challenges when attempting to keep on the right side of both law and public relations while still keeping down costs.

Labor Contract Law of the People's Republic of China (19 pages)

Hilary K. Josephs, Measuring Progress Under China’s Labor Law, 30 COMP. LABOR LAW POLICY J. 373 (2008) (22 pages).

Mary E. Gallagher and Baohua Dong, *Legislating Harmony: Labor Law Reform in Contemporary China*, in IRON RICE BOWL INFORMALIZATION 36 (2011) (38 pages).

### **Week 13 Property Rights and Land**

Private ownership of land has been legal in China since 2007 and, even then, only in cities. Who owns and controls land in the PRC is a vital issue from a political, legal, ethical, and economic viewpoint. In particular, the politics, litigation, and finances related to land seizures by local governments is probably the single most volatile topic in the contemporary PRC. Can the Chinese state use its legal system to balance the tension between communist rhetoric and the reality of rising inequality and increasing private ownership?

Property Law of the People's Republic of China (44 pages).

Mo Zhang, From Public to Private, 5 BERKELEY BUS. LAW J. 317 (2008) (42 pages).

Keliang Zhu and Roy Prosterman, *Securing Land Rights for Chinese Farmers*, CATO DEV. POLICY ANAL. SER. (2007) (15 pages).

**Optional:** Philip Huang, CODE, CUSTOM, AND LEGAL PRACTICE IN CHINA (Stanford University Press 2002) (pages 71-135).

### **Week 14 China’s Environmental Movement?**

Simply looking out the window on a winter’s day in Beijing provides a hint of the tremendous environmental challenges that the PRC faces. Is China’s legal system giving a budding environmental movement the tools to challenge polluters or does it stifle China’s greens by curtailing civil society?

*Environmental Protection Law of the People's Republic of China* (5 pages).

Rachel E. Stern, “From Dispute to Decision: Suing Polluters in China,” *The China Quarterly* 206 (2011): 294–312 (18 pages).

Alex Wang, “Role of Law in Environmental Protection in China: Recent Developments, The,” *Vermont Journal of Environmental Law* 8 (2007 2006): 195 (29 pages).

Donald C. Clarke, Professor of Law at the George Washington University Law School, maintains an up-to-date directory of resources for the study of Chinese law:

[http://docs.law.gwu.edu/facweb/dclarke/public/Research\\_Guides.html](http://docs.law.gwu.edu/facweb/dclarke/public/Research_Guides.html)

A directory listing a large number of research guides for Chinese law may be found here:

<http://faculty.laverne.edu/~ajiang/cafil/ChineseLegalResearchGuides.pdf>