

Legal Studies 161	
Chinese Law & Society Spring, 2012 T-Th 9:30-11am 390 Hearst Mining	Prof. Berring 345 North Addition, Boalt Hall berringr@law.berkeley.edu Office Hours Tuesday 2-3:00 Or by Appointment, Café Zeb in the Law School

The Rules of the Road

The class will meet in Room 390, Hearst Mining on Tuesday and Thursdays from 9:30am-11am. The course has an ambitious agenda. We start by talking about traditional Chinese thinkers, and the basic questions about law, politics and society that they raise. Unless you understand these questions, and the disputes over the answers to them, you cannot understand modern China. From that beginning in the world of the ancients, we will progress all the way to 2012. That is a lot of ground to cover, but we seem to make it most years. I will not assume that you have any background in China or in law. If you do have some background, you may disagree with some of what I say, but if so, that is all to the good.

Beginning the second week of the semester, there will be one section meeting per week. Grades will be based on a midterm, a short paper, and a final exam. You are required to purchase three books. McGregor's, *The Party* was published this year. It will be relevant to the second half of the class. It is the best treatment that I have found of the Chinese legal and political system in 2012. You also must buy a collection of short stories written by Robert van Gulik, *The Celebrated Cases of Judge Dee*. Van Gulik wrote mystery novels set in ancient China. You may find the stories to be odd, but it is the setting that is important. Van Gulik provided a good glimpse of life in traditional China. I have been assigning this book for many years so there should be used copies available if you do not wish to buy a new one. A paper based on your reading of the Van Gulik book will be worth 25% of your grade. The paper will be short and creative, and will be due March 10. For the third book, I will offer you a choice of three titles. Each will be a paperback. We will discuss this the first week of class. All other readings will be posted on bSpace. Some will be required, many will be there for those who want to go deeper into a topic that we touch upon. Another 25% of the grade will come from your midterm. The midterm will be at the end of the sixth week of class. 50% of your grade will be based on your performance on the final. I will also allocate points to each GSI to reward those who participate in sections.

There will be a course website on bSpace. I will use it to post readings and links to useful information. By using this, we will be able to avoid using a Course Reader. At the first class I will post a link for a reading about Confucius. It would be a good idea for you to check this out right away. Some folks are put off by the idea of starting with such an

ancient thinker. Checking this out is a good way to determine if you will enjoy what follows. I am going to assign a fairly light reading load, but I will assume that you have done it. We will talk about my plan in class.

What Lies Ahead

In the early part of the class we will look at traditional Chinese thinkers. You cannot understand the way that China deals with the issues of today unless you understand the basic questions that have framed Chinese legal and political thought for centuries. In this part of the course the lectures are especially important. After covering that material we will skip to the 19th Century when the western powers, with their legal systems, collided with China. The reverberations of this period are still with us. We will trace China's various attempts at legal reform in the 20th Century and then close with a look at the China of 2012. This is not a course in how to do business in China, but we will end up discussing how business is done in China. Inevitably, events in China will grab our attention. Thus, the syllabus is always subject to change. In 2008 the Olympics and the situation in Tibet took over the final weeks of the course. Last spring, the worldwide financial crisis demanded our focus. Only time will tell. The one sure thing about studying China is that nothing is sure.

Readings for Week 1-3

Read the excerpt from Professor Head's China's Legal Soul that is posted on bSpace under the Resources tab. It gives a useful picture of traditional China. If you decide to stick with the class there will be links to Mencius and Han Fei Tzu as well. The one on Mencius covers some other thinkers, Motze and Yangtz. (The Romanization of the Chinese language has shifted over the years. Ergo the name of a thinker like Mencius may be spelled a variety of ways. I will use the most common form, but we will put together a term list that will include the variations.) They are only important for purposes of contrast. The point of these readings is not to make you an expert on Confucian or Legalist doctrine. We are only using them as a basis for understanding the relationship of law and society in China. As stated above, the lectures are especially important in this part of the course.

You should also use the first three weeks to begin to read the Van Gulik book. It will be most relevant at this point in the course. As we go along, I may assign a few sources on the Internet that you can consult for background.

Week 1: Tuesday, January 17 and Thursday, January 19

Tuesday, January 17

We will devote class on the first day to discussing what the course will cover, why you might want to take it, as well as why you might not want to do so. Some very preliminary

reflections on the problems inherent in the study of law, and in the study of China will be set out.

Thursday, January 19

This lecture will set out a framework for looking at legal issues in China. To this end, I will introduce a model that includes six functions that law can play in society. This is not a perfect model, nor is it one that all scholars would approve. But it is a tool that we can use to ask questions. The functions are: Criminal Matters, Dispute Resolution, Family Issues, Property, Agreements and Status/ Human Rights. We will begin to apply this structure to China. We will reflect on how America in 2012 views these issues and then ask how a traditional Confucian might view each of them.

Week 2: Tuesday, January 24 and Thursday, January 26

Tuesday, January 24

Today we discuss the impact of Confucius on China's traditional social structure and theories of government. The discussion of Confucius that you can find under the Resources tab on bSpace will be important here. There is also a short list of quotations drawn from the Analects there. How does a Confucian society function? We will introduce ideas that will resonate throughout the semester. How does Confucius see government structured? What is the role of law? Though Confucius was a failure in his own time, why does his philosophy carry such power? The Pole Star theory of leadership will be introduced. The five relationships and the four classes will be set out. How can you make society harmonious? What is the role of law in a just society? The political thought of Confucius is what matters most.

Thursday, January 26

We look at variations on the Confucian theme. Mencius and Hsun--Tzu (Xunzi) will be discussed. Why is the nature of man important to the way that a legal and political system is set up? What is the role of law in governing society? We will discuss the beginnings of Legalism in China. Han Fei-tzu will be introduced. Check the References section of the website for links on Hsun-Tzu (Xunzi) and Han Fei Tzu. Some of the distinctions made by these thinkers will seem too abstract to matter, but they will matter a great deal.

Week 3: Tuesday, January 31 & Thursday, February 2

The relationship between Confucian li and Legalist fa will be explored. Then we approach the Confucianization of the Law by examining how Confucian doctrine and

Legalist theory are united. We will discuss the Ch'in (Qin) Dynasty, the first Dynasty of China as we know it, and how it blended into the Han Dynasty. The Resources tab has a link for a brief discussion of the life Qin Shih Huang Dih. I hope to discuss the impact of Taoism (Daoism) and Buddhism briefly. We will also discuss who and what a magistrate was in China. As we will be on the topic of magistrates, on Thursday I will discuss the topics for the paper on the Judge Dee book.

At the end of this week we make an astounding leap from the basic questions raised by ancient philosophers to the world of China in the 19th Century. I will try to make sense of this maneuver. We will discuss what happens when the Qing Dynasty collides with the West in the 19th Century. We will discuss the era of unequal treaties, the Opium Wars, extra-territoriality and outright seizures of Chinese land. Hong Kong will serve as an example. Issues in international law and nationalism will be explored. Did law play a role in the Chinese response? How can the Dynasty try to save itself? We will look at Sun Yat Sen, Yuan Shih Kai and K'ang You Wei as examples of ways in which to respond to China's plight. I will introduce the model of the conservative, the reformer and revolutionary. Perhaps the folk tale at the beginning of class will be the way? The article entitled *Speculations on Chinese Law*, written by me, and found under the Resources tab should help here.

Readings for Weeks 4-6

The question of China's passage through the endgame of Dynastic Rule into the first half of the 20th Century, and the 1949 creation of the PRC raise very complicated issues. To help you understand them, take another look at the article that I wrote on the topic on bSpace. It is not in final form, but it will give you insight on how I see the topic. I hope to post some links to other discussions as well. History plays an important role in the Chinese identity. It is crucial to see the power of these issues. You should begin reading the optional book that you have chosen at this point. The midterm is scheduled for the end of Week 6. It will cover the traditional period. We will supply term lists to help you prepare.

Week 4: Tuesday, February 7 & Thursday, February 9

Reading the *Speculations* article should help here. Try to get a feel for the disastrous circumstances faced by China in the 19th and 20th Century. Faced with the overwhelming power of the Western nations and, eventually, Japan, how could China respond? The profound dislocations of this period are hard for us to see in Berkeley in 2012, but we will try. We will look at the movement from Imperial Dynasty to nascent Republic to Warlords to the KMT government of Chiang Kai Shek and the birth of the Communist movement. What are the roots of China's problems? How does law fit in?

Week 5: Tuesday, February 14 & Thursday, February 16

To help keep these very complicated matters clear, I will post a timeline for the events that take place in 20th Century under the Resources tab. The turmoil of these years can pull one into a morass of detail; we will stay at the surface and move quickly, looking at the large issues. Last week we reached the founding of the Republic of China in 1927, and the beginning of the rise of Chairman Mao. This week, we will discuss the Long March and the Yan'an period. Each of these iconic events is crucial in understanding China. The touchy concept of the "True Believer" will also be explored. I will step back on Tuesday and discuss the issues surrounding the formation of a state and the concept of sovereignty. The current crisis in the Israel and Palestine is bringing this question out in sharp relief for some students. We will get there soon with the Taiwan issue, but this may be a good point to reinforce the concept. Then we will discuss the first decades of the PRC from 1949 until 1978. We will use the legal categories of Property, Status and Criminal Law as major discussion points. The issues of "red versus expert" and the "mass line" will be explored. What was Mao's theory of government and revolution? We will discuss the role of Constitutions, the legal profession in the PRC.

If all goes as planned I will discuss the prompts for the Judge Dee paper this week.

Week Six: Tuesday, February 21 and Thursday, February 23

Tuesday, February 21

The plan will be to summarize the course so far to prepare you for the midterm. We may have fallen a bit behind by this point as we face a lot of time and events. If we need to flesh out the ideas from last week, we will do so. I will schedule some extra office hours as well.

*****Midterm Exam: Thursday, February 23th*****

We will have the midterm in class. The midterm will cover the material which we explored to this point in the class. You will hear a lot about it before we get there.

Week 7 Tuesday, February 28 & Thursday, March 1

Reading: My *Speculations* article should help. Review it. Read McGregor, Chapter 1, pp1-33. Chapter 8 "Tombstone" pp. 229-262 provides some great background on this period.

This week will discuss the Chinese Communist Party (CCP) and the state. This is no easy task. I will pause to reset our agenda now that the midterm is past us. First we briefly will recap the period when Mao was in power: 1949-1976. We began this discussion last week but we covered a lot of ground so I will touch upon it on Tuesday. Some of you may be confused because in places I may make Chairman Mao sound like a hero. He was a complicated figure who accomplished some amazing feats. While the question of Mao's legacy may be unresolved yet, we are coming upon the part where he is responsible for millions of deaths. The Cultural Revolution is a bit like the tao. It is hard to describe. But I will try. Check the Cultural Revolution link under the Resources tab for background with some names and faces. You will not need to know all of this information, but it may help you make sense of what I am saying. Also this week we enter the era of Deng Xiaoping. I will post some good links for you to get background. Deng is an amazing figure, the architect of the China of 2012. How did he manage to pull off the move away from Maoism? Why was law such a big part of it? This week we will begin to work through the functions of law as they apply to modern Chinese Law and Society. The McGregor book is a great aid here. Though I disagree with some of the things that he says, he provides some terrific insights. To comprehend where China is today, you must understand the Chinese Communist Party (CCP). How does the CCP relate to the state? How does it live with the legal system? Is China developing a new kind of law? These are enormously difficult questions that will undergird the rest of the semester. Chapter 1 of the Party is a good guide.

On Thursday we will look at the functioning of Family Law in China. Marriage, birth control and the one child policy will be the major issues with a discussion of the role of women also playing an important role. This will mean a dip back into the 19th Century before we return to 2012. Check out the link on the One Child Policy under the Resources tab. Where are the women in the McGregor book? How were they portrayed in the Judge Dee book?

Week 8: Tuesday, March 6 and Thursday, March 8

*******The Judge Dee Papers are due Thursday, March 8******

Reading. McGregor, Chapter 2, "China, Inc." and Chapter 7, "Deng Perfects Socialism" will help with Tuesday's class. For a view of an SEZ, check out the video link posted under the References tab.

In the last 35 years China has gone from economic chaos to becoming a global economic superpower. How did Deng and his successors pull it off? With no industrial base, with an eviscerated educational system and with no experience in modernization, where could China turn? Did foreigners have the secret? How did Special Economic Zones come about? Was it foreign investment that did the trick? And how did the Party

weather all of this change? What does law have to do with it? Deng saw law as the pathway to modernization. What was he thinking? China had to reform its industrial sector. How to deal with the iron rice bowl? How to deal with an ideologically based CPC? China faced an enormous fiscal crisis in the 1990s. How did it survive? There is a lot to discuss and the McGregor book is a great help here.

On Thursday we will collect the Judge Dee papers after class. Remember to put your name on it, and to save a copy for your records. That way, if I lose your paper, you can just hand me a new one. Also, if you ever want a letter of recommendation, and you wrote a really fine Judge Dee paper, it is good to show it to me.

Week 9: Tuesday, March 13 & Thursday, March 15

Reading. I will post links to Charter '08 and an article titled "The Anaconda in the Chandelier" on bSpace.

On Tuesday, we will discuss the control of information and the use of propaganda. The CPC has been expert at controlling information flow since 1949. Nothing would have been possible without the penetration into the daily life of the average Chinese person that the Party attained. The power of free speech and the danger of censorship will be explored. I will link you to some very current news articles as the PRC responds to the challenges of 2012.

On Thursday, Xiao Qiang, noted Chinese activist, editor of the China Digital Times and former winner of a MacArthur Foundation Genius Grant, will speak to the class. Xiao will discuss river crabs, netizens and the meaning of wild grass horses. Each of these terms are important descriptors of the battle over information on the Internet. His perspectives on the control of information in China are invaluable.

Week 10: Tuesday, March 20 and Thursday, March 22

Reading: For both this week and Week 11, read Chapter 2 & 4 of The Party by McGregor. For Week 10 I have placed a link to Professor Lubman's recent blog as well as a discussion of Liu's Fate and a link to the Wikipedia entry on Capital Punishment in

China under the Resources tab. Professor Lubman is quite cynical about the current legal system in China. I will try to put it into perspective.

This week we will examine the institutions that are part of the Chinese legal and political structure through the lens of two of the functions of law: Criminal Law and Agreements. How does the government function? What is the relationship between the government and the Communist Party? What about the courts? Is China moving towards a Western Legal System? We will look at the role lawyers play in China today and we will examine some notorious recent cases. Capital punishment and criminal procedure will offer two points of analysis. I will post some links under the Resources tab that should provide useful background.. As part of this exploration we will revisit some fundamental ideas about the Rule of Law and civil society. These are tricky waters and we will navigate them with care.

Recognizing that this is the last class before Spring Break, I will offer a small gift to those who attend the lecture.

March 26 – March 30 is Spring Break. May you be on a beach somewhere far from here seeking the tao. I will be reading Judge Dee papers

Week 11: Tuesday, April 3 and Thursday, April 5

Read: Chapter 4 of The Party. There will also be materials posted under the Resources tab.

This week we cover sovereignty issues. Tuesday we will discuss Taiwan. Why is there still great concern about Taiwan's place in the world? Should Taiwan be viewed as a great triumph of the democratic process? Is it a model for the PRC? Will the problems that exist ever be solved? Under the Reference tab you will find a link to the Wikipedia discussion of the Republic of China, which is not bad, and the CIA Factbook entry for Taiwan. There are also some links about Tibet. I will talk about them in class on Tuesday. Thursday we will cover Hong Kong and Tibet. What are the common threads in the discussion? Why was the status of Hong Kong peacefully settled while Tibet remains a problem? Who is the Dalai Lama? Is he a religious figure, a political leader or both? We will try to get our arms around why this is such a sensitive topic. This will be a week that will call for balancing contradiction.

Week 12: Tuesday, April 10 and Thursday, April 12

We begin this week discussing International Law and international trade. We will step back and look for the role that history plays in China's view of world geo-politics. What do treaties mean? What does the WTO do, and why is China's participation so important? What is China's role in the 21st Century? What are the Spratley Islands and why are they important? Where does military power fit into the equation? Where does Japan fit in to the equation? Must China and the United States be adversaries? The recent matter concerning the trial of employees of the Rio Tinto Company by China will be a good talking off point for us. There is a link to a recent blog posting by Professor Lubman on the Rio Tinto matter under the Resources tab. There is another link to a short video on the development of the Shenzhen Special Economic Zone. For information on the WTO, try its website at www.wto.org. There is a special section for students. Thursday we will look at the issue of human rights. This is a very delicate question that runs to the basic nature of the relation between the individual and the state. We have already touched on human rights issues, but this time we will approach the topic straight on. These are questions that elicit strong feelings and which are hard to answer. Under the Reference tab you will find materials from both the United States and the Chinese perspective.

Week 13: Tuesday, April 17 and Thursday, April 19

I have added a new link in the Resources tab called 'House Churches in China.' This article appeared in the New York Times on April 18, 2012, and it encapsulates several lines of our discussion. It is impossible to resist commenting on it. For the balance of the week we first will look at Property law in China. It is very much in flux. How can a society based on socialist principles support a very high end luxury real estate market? Could China face a real estate bubble like the one that occurred in the United States? What does it mean to own something? Can the CCP rationalize having millionaires as members? Looking closely at China's property system may give us perspective on our own concepts. I will direct you to some useful sources under the Resources tab. Status and Agreements issues will be part of this discussion as well. Then we will also look at the future of relations between the United States and China. Can we co-exist in peace? Will China be the dominant power in the Pacific? Where does Japan fit into this picture? What will the next few decades show?

Week 14: Tuesday, April 24 and Thursday, April 26

The continuing nest of issues surrounding the detention of Ai Weiwei and the conviction of Liu Xiaobo have emerged as important point throughout the past few weeks. Rather than focusing on a new issue, I will use this week to concentrate on McGregor's, *The Party*. We have already covered much of this territory, but this time I will work through the book, making it the center of the enterprise. Therefore you should have completed the book by this point.

LAST CLASS DAY for UC is April 27.

Week 15: Tuesday, May 1 and Thursday, May 3

This week is designated the Reading and Review Week. By rule I am not to introduce any new material this week. On Tuesday I will give a summary of the course with an eye to preparing you for the final exam. On Thursday, I am not certain yet what we will do. Time will tell.

The Final Exam is scheduled for Wednesday, May 9th, 11:30 am -2:30 pm.