**China Outline**

**Intro**

*Recent Developments*

* November 2012: Xi Jinping becomes Party secretary
* March 2013: Xi Jinping becomes president of the People’s Republic
* Within the party, Document 9 was circulated in April 2013: called promotion of western Constitutional democracy a problem, saw people attempting to undermine Party leadership

*Accomplishments*

* Rapid social/economic development of market economy—China is urbanizing and modernizing overnight. “Explosive economic growth.”
* >500 million out of poverty
* Second largest economy in the world
* Per capita GDP has grown dramatically
* Education: 98% literacy rates in China
* Restoration of China as a leading nation—big player on every issue in the world.

*Challenges*

* Economic:
  + Still many in poverty (128 million). Huge income gap. Those who are part of NPC are especially wealthy.
  + Moving labor force. Many have moved off of the farm, but the migrant population does not enjoy full rights in the city because of the household registration system.
  + Capital flight: Lots of wealthy people are moving money off-shore
    - *Scott Cendrowski*, “Why China’s Rich are Leaving” – better educational options, growing pollution problems, and food safety.
  + Transition from “catch-up” phase to being an innovative leader—independent innovation at its highest level is difficult for China.
* Societal:
  + Aging population
  + No universal pension/social welfare system
  + Corruption
  + Environment and pollution
* Political/Institutional
  + Governability of the nation—there is no federal system. It is difficult for China to structure its authority because of ideological issues.
* Ideological/Spiritual:
  + Hunger for something spiritual—when Party entered, attempt to destroy much of the spiritual values and foundation.

*Legal Challenges*

* Courts and prosecutors under the influence of local government and the people that finance them. Those people have an influence on how the case comes out.
* Detention without formal arrest/trial
* Wrongful convictions
* Observe rules against torture and beating
* Reduce death penalty use
* Open trials, standardize punishment, improve legal assistance, support lawyer’s rights

Geremie Barné, *The Ten Grave Problems Facing China*

* **Economy distorted in structure and low quality** – too much focus on investment and exports. Not consumer-driven.
* Failure to **nurture and grow a middle class**
* **Rural-urban gap** has increased
* **Population policy** lags behind reality – aging population, gender imbalance
* **Bureaucratization** of education and scientific research
* **Environmental pollution** continues to worsen
* Failure to establish a **stable energy supply system**
* Failure to build a **convincing value system**
* **“Passive position” in international order**. Chinese diplomacy has principles/goals, but lacks strategic planning and capacity to carry out.
* Insufficient efforts **for political reform and promoting democracy**.

**Great Chinese Thinkers**

1. **Generally:** Historically, there are three schools of Chinese thought: Confucianism, Daoism, and Legalism. Those schools have played a critical role in shaping Chinese history, and continue to have an effect in present China.
2. **#Confucianism:** Although it is not the only school of thought that has played a role in China’s historical development, Confucianism has certainly been the most influential school of thought. ***Heavily incorporated into current-day thinking***. Used as **alternative to western thought**. Xi Jinping invokes Confucius/Mencius (see day 2 p.1).
   1. ***The Analects:*** Collection of sayings attributed to Confucius that form the basis of Confucianism. Welfare of the state and society depends on the cultivation of the individual and the people—especially the ruler. Everyone’s individual duty and virtue will impact society and the government in a beneficial way.
   2. ***Core Tenets of Confucianism:***
      1. ***The Family:*** Without a doubt, the most important part of any Confucian’s life is their family. **Family is core**. Stability starts with core values of family, which can be extrapolated to larger society. Individual situated in a web of relationships.Confucius’s view of the family is based on ***filial piety*** 🡪 one should display deference to elders, assume the proper role in one’s family, and show loyalty to it.
         1. Hierarchical structure of ***unequal relationships***:
            1. Father-son. Unequal duties – senior is kind to and role-model for junior; junior is loyal/respectful to senior.
      2. ***Rectification of Names:*** According to Confucius, the first priority of any leader is the reification of names. One of primary roles of gov. Literally translated, this means that one should call things by their proper name.
         1. Agreeing on a set of names and ideas means that all individuals have a basic, shared understanding on which to build. ***Unified language***. Plays into WTO effort to translate into Chinese?
         2. Precondition for social harmony
         3. Functions to ensure that leaders are legitimate — you need to live up to the titles you have
         4. Reflects emphasis on ritualism
      3. ***Junzi:*** Confucius believed that each man should strive to be a *junzi*, which roughly translated means a perfect gentleman. The core qualities of a *junzi* are being right, honest, integrity, moral cultivation. ***Moral cultivation*** is an essential part of Confucianism, as well as other schools of thought.
      4. ***Governance and the State:*** Many of the Confucians’ beliefs about the role of family members extend to their conception of the state. Generally, the leader should display the characteristics of a benevolent father to his populace, while the populace should display the characteristics of good children by being obedient and respectful.
         1. ***“Good Ruler”***: look to rituals and pasty history 🡪 provides models of good rulers.
         2. **History crucial** to temporary political discourse.
         3. Subject – Ruler: **unequal duties/responsibilities**. Subject is obedient/deferent. Ruler sets a good example.
         4. Confucius wants ppl to be ***self-motivated***. Not resorting to external force. **External law/punishment is last resort**.
      5. ***Law and Dispute Resolution:*** Given the importance attached to the family and its natural order, it should come as no surprise that Confucians are skeptical about public positive law. Positive laws are not the ideal way of running society. The ideal way is to have people simply fulfill their roles in society. Then society will run itself.
         1. We should aspire to having **no court cases at all**
         2. Criminal law leads to people avoiding punishment, but leading by example actually instills the right values
      6. ***Critiques***
         1. Not a lot of civil society, i.e. institutions between the ruler and the family
         2. Less applicable to modern society, since the means of production have changed so dramatically
   3. ***Disciples of Confucius:*** Confucianism has branched into several different schools of thought, each claiming to be the “true” interpretation of the Master; the main point of disagreement between the two is their beliefs about human nature. BUT both believed need to work hard to cultivate moral character.
      1. ***#Mencius:*** Mencius assumed that **human nature was fundamentally good**, and started with seeds of goodness. If a person cultivated those seeds, then they turned into positive qualities, like humanity, righteousness, propriety, and wisdom.
         1. ***Mencius’s Counsel to Rulers:*** Because Mencius believed that each person’s nature was fundamentally good, he argued that the proper role of a ruler was to help their subjects cultivate their positive qualities.
            1. ***“Mandate of Heaven”*** – if ruler doesn’t live up to expectations/responsibilities 🡪 loses right to rule. Gives legitimacy to the sovereign. Idea that the Emperor has been bestowed with the right to rule over all because of his incredible virtue. (Why Jinping attacks corruption?). The Emperor is a just ruler, and the moment he loses his virtue he forfeits his entitlement (if things are going poorly it’s because of something the Emperor is or isn’t doing) 🡪 poor economic growth would be a reflection of virtues of the Party leadership?
         2. A ruler should not be isolated in his palace, rather, he should be attuned to the needs of the public. Mencius’ famous line: **The public is like water and the ruler is the ship**; the water can either guide the ship or swallow the ship. Thus, it is acceptable for the people to overthrow the ruler when he fails to carry out his duty. The ruler loses his legitimacy, and thus the people are not actually overthrowing the true ruler.
         3. Seen as mentioning law less, since *people are inherently good.*
      2. ***#Xunzi (Hsun Tzu):*** In contrast with Mencius, Xunzi believed that **human nature was fundamentally bad**. However, following the Confucian teaching of moral cultivation, Xunzi argued that **any person who submits oneself to the sage and works diligently has the potential to overcome their evil nature** and become a *Yao*, a great leader.
         1. ***Advice to Rulers:*** In line with his cynical belief about human nature, Xunzi argued that any ruler must enact positive laws, particularly those that promote hierarchy in society. **Elaborate legal institutions. Law should promote good.** 
            1. Raise the good ones, punish the bad ones, etc.
            2. Order demands hierarchy and stratification
            3. He is tougher than the others, *but* he also wants to create structures that help the weak, provide training and opportunity, etc. *but* also to punish the unworthy
            4. Argued that one function of law is to root out those that have failed to overcome their evil human nature
         2. Affirmed Confucian core teachings of devotion to learning, culture and the possibility of human perfectibility.
3. **Daoism and Legalism:** Although Confucianism has been the most dominant ideology throughout China’s history, two other schools of thought have made a significant impact: Daoism and Legalism.
   1. ***#Daoism (Lao Tzu):*** The **central belief of Daoism** is that the individual should be accepting and yielding, have no internal strife or coercion, and act in an effortless and spontaneous manner (pursue Dao, or the Way). As part of this philosophy, Daoists revere ***the sage*** as the ideal ruler. The Sage does not meddle in the lives of others, gives up material things, and guides the people back to a state of pre-historical innocence, in other words, to a time before material things and before the invention of morality. Daoism has sometimes been misinterpreted as an extreme form of *laissez-faire* thought. However, Daoism is better interpreted as a philosophy that idealizes those who are recluse and withdraw from society. Reason for historical lack of litigation in China, combined with Confucius’ negative view of positive law?
      1. ***Daoist Critique of Confucianism:*** Although the two philosophies bear some similarities, Daoists retain a number of sharp critiques of Confucianism. **First**, Daoists argue that knowledge and intelligence create hypocrisy, and the goal of life should be to empty one’s mind. Arrogance. How do you know what you know? Confucians ***think*** they know things. **Second**, the ideal ruler should simply let things happen, whereas Confucians argue that the ruler should be more active in cultivating morality in their followers. Avoid gov. action. Rather, purify the self. Process to live humbly/simply. **Finally**, Daoists are starkly opposed to the hierarchy advocated by Confucians. Instead, they advocate individual cultivation.
         1. Challenge to materialism.
         2. Very skeptical of Confucian morality. Leads to hypocrisy. Problem with hierarchy 🡪 corrupting and pulls away from truth. Very diff. than Confucian conscious effort to think/talk/pursue virtue.
      2. ***Daoist View of Law and Legal Institutions:*** Given their reverence for solitude and withdrawal, Daoists are starkly opposed to formal legal institutions. **Rulers take a back seat 🡪 best government is merely known.** Generally, the more law that exists, the more thieves and robbers there will be. More you talk about good **🡪** more evil is discovered. Presumptuous to punish ppl. End up hurting oneself. Life is hard to capture in the law.
         1. Obviously, a critic of Daoism (perhaps a legalist) would argue that a lack of law will lead to anarchy and chaos. In defense of their position, Daoists retort that no law is needed if individuals withdraw from society and cultivate their inner virtues.
   2. ***#Legalism:*** In stark contrast to the Daoists are the Legalists. Legalists put a premium on the **practical** and **immediate necessities of governing**. As such they are concerned almost exclusively with the mechanisms of control and government. The entire purpose of the philosophy was (1) advocating war as a means of strengthening power, and (2) the state would punish harshly and reward handsomely to incentivize proper behavior and adherence to laws. **Advocated central administration headed by absolute monarch, a set of rules administered with complete regularity and impartiality, and very severe punishments**. Intensely realist view of world.
      1. ***Human Nature:*** Legalists believe that people are limited in their capabilities. Legalists do not necessarily view people as evil, but rather view people as being stupid and unable to rule themselves. View of the Party?
      2. ***Policies:*** In terms of picking officials, the law, when properly administered, will cause the most able people to rise into administrative positions. Choosing by reputation is unreliable. In terms of administering the law, The law is to be administered blindly, simply, and consistently. This is in direct conflict with a Confucian application of laws. Confucians believe that law should take into account individual circumstances and relationships. ( For example, a son assaulting his father is a much graver offense than the father assaulting his son.) Legalists, however, would not make any exemptions or take into account these kinds of circumstances
      3. ***As Compared with Confucians:*** Unlike Confucianism, Legalists argue that families and individuals cannot govern themselves. They need structure and oversight from the state. Whereas Confucians believe that a leader should set an example and that people will follow it, and that law is almost not necessary after that, Legalists believe that the machinery of state should punish harshly. On leadership, whereas Confucians believe that a leader should set an example and that people will follow it, and that law is almost not necessary after that, Legalists believe that the machinery of state should punish harshly. Confucianism would allow small offenses to go unpunished, or trust that the family and social structure would rectify these crimes. Legalists would punish small offenses harshly.
      4. ***As contrasted with Daoism:*** Although Legalism did adopt some ideas from Daoism, namely the role of the ruler. The Legalists ideal ruler would essentially become a figurehead, presiding over a perfectly operating government and system of laws.
      5. ***Critique of Scholars:*** A very negative view of scholars. Scholars, unlike farmers, produce nothing of value. In fact, they suck up the resources of society, at the expense of greater production. Another critique of scholars is that having a wide variety of ideas leads to instability. State should adopt useful ideas, quash all others. Mao burning Confucian texts**.**
      6. ***Problems of Legalism:*** (1) The actual, practical problem of creating a mechanical state, administered by humans, that is able to completely take the human element out of the law. (2) If society is dynamic and changing (which it generally is) how do you create a perfect set of laws? (3) Legalism does not necessarily match the law with underlying moral values. Given that people are less likely to respect a system of laws when it fails to reflect their moral values, Legalists would have problems with compliance.
   3. ***Legalist Theory in Practice; Li Si and the Qin Dynasty:*** Li Si was the prime minister when Qin united all of China under one rule in 221 BC. Li implemented legalistic practices and policies: Abolished all feudal ranks and centralized everything 🡪 gov., society, knowledge; Built great wall and expanded the borders; promote agriculture/despise commerce; destroyed other schools of thought (burn Confucian texts & scholars). **Big on legal institutions**.
      1. Although it attained great initial success, Legalism soon began to show its weaknesses. All power became concentrated in the emperor, so a power struggle ensued when he died 🡪 paralyzed by own autocratic laws. People began a popular revolt, which the government was not able to contain. The revolt ousted the Qin dynasty, and left a bad impression of Legalism. However, the triumphs of Legalism (uniting and standardizing China) greatly affected the nation.
      2. **Ch’in Shih-Huang:** First Qin Emperor. Li was his minister. Burned all kinds of Confucian texts and scholarly works, strict and dictatorial rule.
   4. ***Critique of Confucianism: Han Fei-Tzu*** (student of Xunzi) – skeptical of scholars. Ideal leader is **strong and powerful** 🡪 should be honored and gratify all desires, NOT humble. Much bleaker view about human possibility. Cannot wait for virtuous & lower class has mind of children. People are NOT smart. Ruler needs to establish strong legal structure w/ harsh penalties (opposite of Confucian leniency). Simplify rule. One structure of authority. Education is worrisome. Societal relationships are not as important 🡪 all about law.
   5. ***Modern China: Legalism & Confucianism***: Often talk about legal system with “Chinese characteristics.” Emphasis on virtuous leadership (Confucian) and advancement by meritocracy. Strong censorship by the state. Strong responsibility to family (parents can sue children).
   6. ***Contrasting Rights – Henry Maine:*** If you look at legal systems, you see a progression from status to contract. i.e., traditional status roles become replaced by contract relationships. Highlights the importance of individualism and free will. Whereas one assumes a position as a free individual with a bundle of rights in the West, a person in Confucian society never defines themselves as a legal individual. Rather one’s identity is derived from their relationship to their family.

**Law and Order in Imperial China:**

1. **The #Qing Code:** Codes enacted thousands of years ago still echo today. A great deal of the current law is taken from ancient codes (30-40%) – Basic structure, “Enduring Principles,” doesn’t change. ***Sub-Statutes :*** (“Li”) Codes had general overarching provisions that were handed down from dynasty to dynasty, (which lent legitimacy to current dynasties) but each dynasty/ruler added **sub-statutes**, which were provided detail about how to specifically handle cases. Also, to prevent legal staleness, commentaries changed to keep application current/consistent, and there was vast body of admin rules and commercial customs that change/adapt. Chinese also circulated model cases for use by local magistrates. They were not intended to serve as precedential, but rather to serve as examples for how to handle cases generally.
   1. ***Ten Great Wrongs:*** The Qing Code was centered around the so called t*en great wrongs*, which were thought to be the worst transgressions that one could commit. Generally, the offenses were either **crimes against the emperor**, **crimes against one’s own family** or **crimes against tradition and customs**. For example, (1) Gross Unfialness: Committing crimes against one’s family members. (2) Bringing Suit Against One’s Own Family, (3) Treason, rebellion etc. As a final note, the Code contained few rules governing interactions between unrelated individuals. It focused on crimes against the state and crimes against the Emperor. Emphasizes importance of the FAMILY and the STATE.
      1. ***Expressing Confucian values***: 2/3’s relating to family/family relations; family discord & suing parents seen as ***worse*** than killing stranger. High emphasis on family values.
      2. ***Expressing Responsibility towards the state***: #1 Rebellion. #2 Treason (includes injuring temples/burial grounds, which were symbols). #3 Serving other country. Included emigration. Ppl. **belonged** to Chinese state. #6 Lack of Respect. Proper decorum/exactness when dealing w/ state. Certain food/clothing was reserved for the emperor. This preserved hierarchy and order.
      3. ***Doing What Ought Not be Done:*** Incredibly vague and sweeping. Justified b/c of shared moral conception (clear set of predominate values). Shared conception of moral values breaking down in China? Gives magistrate power to impose uniform Confucian society. Because of the selection process for magistrates, the risk of this provision being applied arbitrarily was at least partially mitigated.
      4. ***Art 15 Exiled***: Woman have to go w/ husband. Sent to less desirable place and put to work. This is a big deal b/c it uprooted person from ancestors, as well as being put in a different linguistic area. Also, person is pulled out of lineage.
   2. ***Other Evidence of Confucian Values in the Code:*** (1) Automatic punishment for accusing a family member of a crime, **regardless** of whether it is true or not. On the other hand, family members may conceal crimes, even when they are sure that they have been committed in order to preserve family structure. (2) Leniency for persons upon whom family members depend for care. (3) Respondeat Superior: The person in charge is generally responsible for the people’s actions under him (Art. 30).
   3. ***How the Qing Code is Relevant Today:*** For one, the Code attained legitimacy by being more or less unchanged over time. Additional evidence of the benefits of consistency in the law can be found in the Cultural Revolution. There, the Party suddenly threw out centuries upon centuries of history and culture. As a result, chaos ensued. Argument for slow change as opposed to radical transformation.
   4. ***Qing Code in Action: In re Hsu Chung-wei:***
      1. **Facts:** Dispute over repayment of a mortgage. (D) and (P) got into an altercation. (P) was killed in the altercation. (P)’s father took a bribe from (D) to keep quiet about the murder. The coroner also took a bribe to cover up the offense. However, (P)’s brother, upon discovering the cover-up, turned in his father.
      2. **Holding:** 1) Ultimately, (P)’s younger brother was punished for ratting out his father, in violation of the core tenets of Confucianism. 2) The Punishment Board, instead of strictly applying the codes to the parties, read the code in light of Confucian values and sought to address the case in terms of family values. 3) Note the tension in punishing (P)’s brother. On one hand, (P)’s brother did justice to his deceased brother by turning in his dad and exposing the truth. On the other hand, (P)’s brother ratted out his dad in the process. Even though the Board punished (P)’s brother, they suggested that he should be happy or honored by doing justice for his brother. 4) Note that banishment was especially serious, because it separated the banished from his family. Even if the person’s immediate family came along, they still lost their ties with their extended family..
      3. **Notes:** portrays sophisticated legal system regarding property. Magistrate deals w/ all local areas gov., but NOT experts on the law. Trained in ***Confucian classics***. Eternal truths? Seen as great principles that will help navigate the particulars. **Under both holdings, magistrate gets punished. Inept, but not corrupt. Why?** Almost strict liability. Encourages carefulness. Ideological: representatives of the emperor aren’t supposed to make mistakes. Lots of built-in checks and appeals to make sure they “got it right.” Central board’s treatment of legal specialists shows societal contempt for litigation. Xi Jinping’s crackdown on corruption stemming from view that officials need to be held to high standard?
      4. ***Alford Article on Criminal Justice System in Late Imperial China*** (class 4, p. 16): As seen in this case, peasants to the Throne viewed process as capable of dispensing justice. We are not justified in saying it was only a tool of the state. **System of checks**—automatic reviews, habeas petitions, censors, etc.—compensates for lack of separation of powers.
2. **Magistrates:** Magistrates were selected based on performance on an exam which tested knowledge of the Confucian classics. The rationale for punishing magistrates harshly for getting things wrong (even without intentional wrong-doing): Because it is so difficult for the provincial authorities to discover magistrate mistakes, punishing harshly is arguably necessary to achieve the proper amount of deterrence. (Ie punitive damages).
   1. ***Relevance Today:*** Given its geographic size, China still struggles with the tension between central and provincial/local governments. In terms of punishments, the modern Chinese state still follows similar policies. Local officials found guilty of corruption are punished extremely harshly, largely for the deterrence effect. The chances of catching any given instance of corruption are low, so the punishment must be especially harsh in order reach the proper level of deterrence.
   2. ***Checks on Magistrates:*** Supposedly, there were **four checks on magistrates**. (1) Elaborate sets of rules designed to cover every fact situation. (2) Mandatory reviewing of serious sentences. (3) Individual’s ability to appeal a sentence to a higher authority (*shang-k`ung*). (4) Higher officials were supposed to supervise the conduct of lower level officials, and *censors* (**censorate)** were supposed to act as free roaming agents who could police various levels of authority. But in reality, magistrates frequently skirted the rules, review of sentences was not effective, there was undue political influence over the process.

1. **Criminal Law and Due Process in Imperial China**
   1. ***Western Notions of Rights and Due Process:*** Prof. Kadish’s article on due process highlights some of the key features of Western criminal procedure. Essentially, due process is seeking to promote and protect two values. **First**, it seeks to obtain accurate results, where accuracy is defined as not placing an innocent person in prison. And **second**, it seeks to protect the dignity of individuals. For example, the state may not engage in illegal searches, forced confessions,
      1. Concerns: dignity, legitimacy of the system, respect for personhood, equal treatment, aspiration for accuracy. “Better many guilty go free than one innocent punished.”
   2. ***Chinese Criminal Procedure:*** Chinese criminal procedure was concerned with consistency and closure. Moreover, *every* legitimate suspect was expected to confess to their crime, meaning that, unlike an American system, no suspect should ever maintain their innocence throughout the proceeding. This reinforced several Confucian values, most important of which was ***moral cultivation***. An individual was expected to own up to their mistakes and seek to reform. Thus, an individual who confessed was granted a much more lenient sentence.
      1. No area for cross-examination. **Central investigation instead of adversarial process**. Elaborate checks on system. Magistrate graded on how he dispensed w/ case. Fine-calibrated rules to handle process. Automatic second-level review. ***Concern for accuracy***. Some torture allowed. No overwhelming sense of protecting the innocent, but large internal incentive to protect family. ***Heightened concern for harmony/order***. Litigation is discouraged. Magistrates known colloquially as “mother & father” 🡪 wise, benevolent official **trusted** to get to the truth. **Serious punishment** if they get it really wrong. Internal logic that served the goals of harmony and order in system. Fealty to the state.
   3. ***Comparing the Two:*** Both systems claim to strive for accuracy and consistency in the criminal process, however each system has very different definitions for these terms. Whereas a Western system defines accuracy as ensuring that no innocent person is convicted, and consistency as granting each individual their inherent rights, the Chinese system defines accuracy and consistency as obtaining a confession for each crime committed. Moreover, whereas a Western system puts a premium on the rights of the individual in the criminal process, the Chinese system places the **highest value on maintaining social order and harmony**. Although there are some similarities. For one, the American criminal justice system does, in fact, obtain confessions for the vast majority of crimes charged by prosecutors in the form of plea bargaining. Additionally, the Chinese system does place at least some value on the individual defendant.
2. **Litigation v. #Mediation in Chinese Justice:** A key difference between Western legal systems and the Chinese legal system is the prevalence of mediation in the latter.
   1. ***Mediation, Informal Processes***: Informal & formal don’t work in isolation. Different problems fit in different spaces. Legal order w/ Chinese characteristics.
      1. ***Boundary Line***: Posture towards formal dispute process = disapproved by both state and community; **crime to be overly litigious** (magistrates demoted for too many cases); allowed to **conceal certain offense w/in families**.
         1. **Cohen:** not a lot in the code to encourage alternative approaches. Contradiction? Lack of formal endorsement. Assumption that family/community will take care of it? Ppl. often sent by to resolve by clan structure. Less expensive. More private.
         2. **“Law of Avoidance”** – not be magistrate where you came from. Magistrate not speaking local tongue, aware of custom, etc. 🡪 attractive to let local structure handle issues.
      2. ***Nature of Mediation Itself***: no lawyers, cross-examination, etc. Senior leader, male & often educated would decide cases (“clan elders have wisdom”).
         1. P. Northrip: substantive value in the process of ***compromise***. Preserves value of community/harmony. In small communities, you want to **preserve relationships**.
         2. Excerpts form Hsien Chin Hu – Compromise yes, but w/in a system w/ very strong Confucian principles. ***Hierarchical***. Men/woman NOT equal. Stratified by status. Preserves the existing social structure. Downsides of mediation. Also, difficult to apply in a modern, international population context.
   2. ***Confucian Values Drive Mediation:*** (1) Litigation showed a shameless concern for one’s own interests. (2) Confucians held social harmony far more important than individual rights. In the event of a dispute, the person in the “wrong” was expected to swallow it for the good of the order, while the person in the “right” was expected to be merciful. Also the **spirit of self criticism**, encouraging people to reflect on their own selves instead of pursuing remedies from others. Seen in CR? Thus, traditional party-driven lawsuits did not fit within this model. (3) Moreover, Confucians highlighted social hierarchy, where people were NOT equal in the social order. The West idealizes the person from the lowest social strata suing the person from the highest social strata. (I.e. the notion that everyone is equal before the law). (4) Finally, the importance of social relationships made the formalized process of lawsuits unappealing.
   3. ***Practical Issues Driving Mediation:*** (1) Courts were located in county seats, which were far away from the homes of many people. (2) There were serious risks in dealing with the magistrate; he was likely to be corrupt, and even if he wasn’t, the magistrate was dealing with countless other issues. (3) The magistrate’s underlings extracted bribes at every step of the way. (4) It was a generally degrading experience for an individual, as the magistrate could order you to do or reveal anything. Additionally, you were subjected to clerks and underlings to whom you had to kowtow, despite the fact that they were lower on the hierarchy of society. (5) Finally, the fact that people lived in close knit rural communities where individuals were highly dependent on one another meant that litigation was risky and frowned upon. It could seriously harm these relationships on which **most people depended**. For example, in The Story of Qiu Jiu, Qiu Jui pursued an embarrassing lawsuit against her village chief, with whom her family had to interact every day.
   4. ***Official Policy Toward Mediation and Disputes:*** Imperial China, and to a large extent modern China, took the stance that there should be no disputes in a Confucian society. A moderately successful official would resolve the disputes brought before him by the book. However, the ideal official would have absolutely no disputes before him. Instead, he would attack problems at their root and resolve issues before they entered the system. Similarly, judges in modern China are praised for resolving disputes before they reach the more formal stages of litigation.
      1. ***What Moron Would Want to Engage in This?*** The only people who would want to engage in this humiliating experience are those that simply wanted to impose costs on their enemies. Although, like Qiu Jui, some people might simply be dissatisfied with the traditional forms of dispute resolution.
   5. ***Policy Implications of Mediation:*** A key question for a country with a developing legal system is whether to focus on litigation or mediaton. Some factors to consider might be (1) How important is it for parties to keep the dispute private? (2) What is the relationship like as between the parties, and as between the official and the parties? (3) How much value do you place on consistency in the application of the black letter law to individual cases? Compare that to how much value you place on accessibility and fitting the law to the individual situation? **Mediation is more accessible and understandable to the average person.**
   6. ***Should modern China promote Chinese characteristics of mediation?***: Are societal underpinnings that made mediation in imperial China (small villages, large family structure, etc.) still relevant today? Geography much less important today. Weaker/disadvantaged members of society may prefer to use formal system. Inside the clan, they often do not get justice. What values are implicit in formal dispute resolution?

**Imperial China and the World Order**

1. **Western Notion of International Order:** The West’s notion of international order was founded in the Westphalian system of equal and sovereign Christian nation-states. This conception of equal states (every country, regardless of size, was at least nominally equal) carried over into the domestic sphere (or instead the conception of individuals carried over into the international sphere), whereby individuals were free and equal. Locke’s notion of social contract. They came together to sacrifice some rights in exchange for protection against the tyranny of the state of nature.
2. **Imperial China’s Notion of the International Order:** China’s notion of the international order was centered around **two concepts:** the tributary system and the unitary state.
   1. ***Tributary System (China overlord of loose hierarchy of tributary peoples):*** China viewed itself as the center of the international order w/ the mandate of heaven, and expected all foreign states to submit to its power, generally through a ritual process known as kowtow. China viewed as both moral and power superior. ***No sovereign equality***.Foreigners (outer fringes of order) were supposed to come w/ tributes. ***China is NOT state, but fount of civilization*** (China had civilizing mission to the world). There were some non-China peoples, but they were viewed as inferior who hoped to receive Chinese benevolence (“hairy barbarians”). They ruled their own territory, but were selected based their acceptance of Confucianism. It also bore ***a similarity to the family***: The emperor (China) was like the ideal Confucian father. He acted with paternalism, but generosity toward tributary states. In return, he expected loyalty and filial piety from those states.
      1. First exposure to international law came with dealings with Dutch East India Company and negotiations with Russia in the Treaty of Nerchinsk and Treaty of Kiakhta. At first, Western countries accepted the tribute system (kowtow), but began to balk with the famous mission of Great Britain’s Lord Macartney in 1793.
      2. By 1861, with translation by W.A.P. Martin of Henry Wheaton’s *Elements of International Law*, China beginning to appreciate ***usefulness of international law as a tool to defend its interests***. Tried to use it in 1893 with Commissioner Lin Tse-Hsu’s letter to Queen Victoria to stop the opium trade. But eventually too, China began to appreciate how limited a tool it was for a China that lacked the military, political, and economic power to defend itself.
3. **Late Imperial China’s Experience with International Law:**
   1. ***China’s Introduction to Western International Law:*** Starting in the 17th century, European powers began to interact with China on a more frequent and formal basis—Dutch East India Company and treaties with Russia. With some exceptions, China stubbornly refused to accede to the “Law of Nations” (Ie European Customs), and instead forced European dignitaries to kowtow. Although Western powers initially accepted tributary system, by the end of the 17th century, they had grown impatient and began mounting pressure for China to operate by European norms. E.g. Lord Macartney’s mission in 1793. By 1861, with translation by W.A.P. Martin of Henry Wheaton’s *Elements of International Law*, China beginning to appreciate usefulness of international law as a tool to (1) defend its interests against Western aggression 2) acquire Western military technology. So in an effort to halt the British from importing opium, the Chinese translated and invoked a covenant of Western international law which held that a sovereign may halt another from importing noxious goods into their country, so long as they gave prior notice. But eventually too, China began to appreciate how limited a tool it was for a China that lacked the military, political, and economic power to defend itself.
      1. ***Lady Hughes Affair:*** During a salutary firing of its guns, a British warship in the port of Canton accidently hit a Chinese fishing vessel, killing two Chinese. The Chinese demanded the gunner, but the British refused. The British feared that the gunner would be subjected to unfair treatment in a foreign legal system. China, on the other hand, was motivated by a desire to avenge the death of their subjects. Moreover, China saw an opportunity to flex their muscle over their own sovereignty. The Chinese then captured a British sailor and offered to trade for the gunner. (Chinese were worried British guy wouldn’t be punished). After a great deal of tension and posturing, the British acquiesced to the exchange. The Chinese strangle him instead of chopping off his head, as a gesture of goodwill to the British, because a good Confucian wants to die with his body intact. The British of course, are not impressed. This is the last time the British surrender a citizen to be tried and punished by the Chinese – regarded it as barbaric, unjust, and lacking due process. **Led to a** **hardening of English attitudes towards efficacy of Chinese law, and paved the way for extraterritoriality**. China NOT conforming to international standards = practical difficulties. Worry if you retain too much “Chinese characteristics.”
   2. ***Canton System:*** Under the *Canton system*, the Chinese allowed westerners to trade in the port of Canton, so long as they were submissive to the Chinese. The Emperor’s official Confucian state could not acknowledge commerce, especially with non-Confucian states, so oversight of the trade was delegated to a pseudo-government/private entity known as the Cohong. Foreign merchants were limited in many ways – no store houses, no direct contact with merchants, only certain times of the year, can’t learn Chinese, etc. Trade was viewed as a ***privilege given*** by the Chinese. Confucian tradition put little value on trade.
      1. ***Rational***: China is fount of civilization. Dealing w/it is a great blessing. China viewed trade as not necessary. Europe needed Chinese goods, but China was self-sufficient. Also, China was worried about the place trade would have on values of Chinese society. Anxious about foreign influence. Self-perspective of Chinese status compared to outside world.
   3. ***Macartney Embassy:*** In 1792, King George III sent Lord Macartney as a special ambassador to the Qing court. Instructions were to negotiate with Qianlong Emperor—Ch’ien-Lung—concerning the regularization of diplomatic and commercial relations between the two countries, and to establish a permanent embassy / envoy to the Celestial Court. Specifically. Britain wanted representative at imperial court, increased trade sites, small island to store goods, removal of the Canton system, and direct communication with Chinese officials.
      1. ***Chinese Response to Macartney:*** Original dispute over Kowtow. Emperor thought British requests were ridiculous. “We don’t really need you.” (1) Stresses that China is the universal state, Notes that Britain has submitted itself to the Emperor by paying tribute. (Placing it into the same category as other Asian nations which China has forced into submission). (2) Refuses permanent diplomatic mission because they would have to entirely submit to Chinese ways. Ie, diplomats must completely adopt Chinese culture, there is little or no acceptance of Western terms. (3) Uses a great deal of paternalistic language. Emperor is assuming the role of the Confucian father. Britain, like a child, should be grateful for the Emperor’s kindness and magnanimity in allowing trade at Canton. **Monumental arrogance led to further hardening of British attitude**.
   4. ***East India Co. and the Opium War:*** British East India Co. dominated British trade with China. Initially, the British purchased tea, but had no comparable commodities to trade. However, the British began selling opium to merchants in India, who then transported it into China for sale and consumption. The demand for opium in China increased to alarming levels. As a result, the Chinese not only became dependent on the British for its opium, but also saw their state begin to collapse as addiction became a serious problem (also viewed British ban on opium hypocritical, hurt economy, made them dependent on outside player) British sent an envoy, who hoped to bargain on equal footing with the Chinese, however the same sentiment in the letter above manifested itself, as the Chinese refused to recognize the envoy as an equal. Chinese appointed Lin, a reputable bureaucrat to deal with the opium problem. Lin miscalculated the situation and imposed an immediate ban on opium, captured British ships in Canton, and took British hostages. The British responded by waging war. The Chinese were entirely unprepared for the power and efficiency of the British army, and the British easily rolled through Chinese territory, capturing city after city.
      1. ***Lin Tse-hsu’s Letter to Victoria:*** Respectfully requested that the British stop smuggling opium into China. Displayed a mix of Confucian moral arguments as well as the paternal viewpoint of the emperor in dealing with foreign states. Raised reciprocity, moral, and legal arguments (suggested use of international law).
      2. ***Nanking Treaty—first of “Unequal treaties”:*** The Treaty of Nanking ended the Opium War. In it, the Chinese gave startling concessions, including Hong Kong, reparations (destroyed opium and CoHong debts), and forced opening of trade ports—instituted “fair and regular” tariff system (British oversaw to ensure payment). Essentially, it was entirely humiliating to the Chinese as it was the first time in their history that they had been completely conquered by a foreign power.
      3. ***U.S. Treaties – Treaty of Wanghia (1844) and Treaty of Tientsin (1858):*** “Most favored nation status” 🡪 whatever the best deal is given to a nation, other nations are entitled to at least that. U.S. wanted equal treatment with the British (plus some). ***Obtained extraterritoriality*** – citizens tried w/in their own systems (Americans could not be prosecuted in Chinese courts). Applied to both criminal and civil cases. Implication was that Chinese law was insufficient, not trusted. Also, Americans allowed to buy property, start missions, contact officials.
         1. Obviously, this was a serious departure from what the Chinese were used to. A ***good Confucian*** would have viewed extraterritoriality with complete contempt: American law, unlike Chinese law, does NOT reflect the Confucian values. **Chinese who experienced this came away with a distaste for “rule of law” in the Western sense**. Reinforced the Confucian notion that law is not the ideal means of settling disputes. Reason for decrease in “rule of law”?
         2. Euro powers soon lined up and demanded the same plus some 🡪 spiral of extraction. \*\* China is weak. Falling apart. Worsens with a series of uprisings in the 19th century.
         3. ***Extraterritoriality in China***: For criminal incidents (American hurts Chinese) 🡪 go to mini courts at U.S. consuls. Leanly staffed and untrained judges. Rather, judge is diplomatic representative, often friends of politicians. NOT a professionalized bar or service. Laws applied were hodgepodge of statutes, unwritten law, and rules having force of law. Constitution did not apply. Chinese were not used to advocating, and it was difficult for them to find U.S. law (magistrate usually took care of law). Chinese understood system as bewildering and designed to get Americans off the hook. Appeals went to San Francisco, but Chinese couldn’t travel there after 182 Chinese exclusion act. For **commercial disputes** 🡪 mixed bench in Shanghai. Westerners also pushed to have extraterritorial protections for Chinese converts to Christianity. Injustice of the whole system reinforces Confucian contempt for law

**RECONSTRUCTION AND REVOLUTION**

**19th and Early 20th Century Reconstruction:**

1. **Key Historical Events, Characters, & Institutions:** 
   1. ***Self-Strengthening Movement***
      1. Movement to strengthen China by adopting Western technologies through a number of diplomatic and military modernization projects launched from 1861 to 1894. But they represented **only a superficial attempt** at modernization, hardly scratching the surface of Western civilization. **Objective was to strengthen the existing order, not replace it**.
   2. ***Foreign Office in Peking***
      1. Treaties required China to open a diplomatic office in Peking to receive foreign ambassadors
   3. ***Treaty Ports***
      1. Treaties forcibly opened a number of Chinese ports to West. Symbols of foreign imperialism and a constant reminder of China’s semi-colonial status, but nurtured a hybrid culture and cosmopolitan environment.
   4. ***Missionaries***
      1. Many said to have behaved with an attitude of self-righteousness, racial arrogance and cultural superiority. However, some decided to secularize their work and promoted Western knowledge. Sponsored schools, libraries, hospitals, newspapers and magazines. Also translated Western works and knowledge. Played an important role in the modern transformation of China.
   5. ***Empress Dowager Tz’u-his***
      1. Empress from 1861-1908. Brutal empress who was the real power behind the throne as regent behind figurehead emperor. Narrow-minded, selfish, and uneducated, but politically astute. Only wanted to hold on to power as long as possible. She must be held largely responsible for the failure of the dynastic regeneration and modernization.
      2. Failed to adopt reforms, but did lend to consistency in governance.
   6. ***Reform Movement of 1898***
      1. Many intellectuals sought to throw off the Western yoke not through revolution, but by reform to the system. Some argued that Confucius was essentially a reformer himself.
         1. Although this movement attained initial success, it was quashed by the Empress in a *coup*.
   7. ***Boxer Rebellion (1900)***
      1. Popular protest by the peasants of northern China directed against Manchu misrule and foreign encroachment. Christian missionaries and converts became ready targets. Fought with their fists due to insufficient weaponry, hence “boxers.” Laid siege to the foreign delegations in Peking. In retaliation, the foreign powers occupied the Chinese capital on 14, August 1900, wreaked devastation on the Boxers and Peking, exacted a crippling indemnity from China and stationed troops in occupation of important lines of communication and strategic points.
         1. **This further humiliation sowed the seeds for even more contempt toward foreign powers**.
   8. ***Manchu Abduction:*** On 12 February 1912, the last Manchu emperor, P’u-yi, was forced to abdicate by the revolutionary government which came into being in Nanking after the Wuchang Uprising.
2. **Reaction Movement Thinkers** – “unequal” treaties void as a legal matter. Like unconsciable.
   1. ***Prince Kung & Wang Tao:*** internal, incremental improvement through the Imperial government.
      1. ***Kung:*** Member of Manchu ruling elite who worked from within to push imperial government to embrace elements of foreign technologies and techniques.Viewed China as weak and in need of reform. “Discovered” international law treatise and recommended its translation into Chinese. Suggested that it could be used as an effective way to address problems with the West. Argues that if China can learn customary international law, it can use that to counter the Europeans with their own tools.
         1. Thus, Chinese viewed customary international law ***as a tool*** to further Chinese interests.
         2. Also advocated for building up of armory, reforming government structure.
      2. ***Wang***: pioneering journalist who argued for an even more extensive emulation of Western ways. Argued Confucius would not have opposed making changes. Pointed out that China was copying only the superficial aspects of Western methods, but little actual substance. The core problem is that Chinese people simply aren’t educated, skilled or sophisticated enough. At best, they’re mediocre. Therefore, urgent problem confronting China lay primarily in the governance of the people, next in the training of soldiers, and in these two matters the crucial thing to aim at is the accumulation of men of ability. Need to copy England: more humane punishments, principle of majority rule, selection of leaders, paring down of extravagancies.
   2. ***K’ang You-wei:*** Radical re-interpretation of Confucianism / grand transformation of China.
      1. Originally brilliant young Confucian scholar. Thinker / reformer who was not one to work from within. Chose instead to **radically re-interpret Confucianism** and to call for a **grand transformation of China**. Promoted Confucius as revolutionary thinker. Saw change in China’s institutions and education system as the only way to overcome internal crises greatly aggravated by foreign aggression. Although his proposals finally gained approval, his reform movement barely lasted 3 months, until Empress Dowager staged a coup 🡪 “100 days reform.” With British help, avoided arrest and spent 15 years in exile. After the Boxer uprising, K’ang the constitutional reformer became a die-hard monarchist. Upon returning to China in 1913, became an indefatigable monarchist campaigner and fierce critic of Sun Yat-Sen and of the Republic.
      2. His writings describe an **Age of Complete Peace-and-Equality**. A very utopian vision: No need for books on laws and punishments, because men will not be evil. Sexual desires will be uninhibited. No sex crimes. No states and therefore will be no severe military laws. No rulers, so no rebellions. No husband and wives, no provisions against sexual immorality, no family relationships, no nobility, no intimidation or coercion, no private property, no burial of the dead, no class divisions, etc. While there may be faults and mistakes, there cannot be sins or crimes). Only negligence. There will be no litigation. Everyone will act like a scholar and a gentleman without being controlled. No punishments under criminal law. **Limited view of law and morality**.
   3. ***Chu I-Hsin:*** Reaction to K’ang Yu-Wei.
      1. Official who withdrew from the government to teach and pursue classical studies; prided himself on his Confucian orthodoxy and made no compromises with Westernization. Chu correctly discerned that the effect of K’ang’s ideas (as expressed in Confucius as a Reformer) would be not only to change the outward forms of Chinese life but ultimately to undermine traditional Confucian morality itself. The “way” of the West could not be adopted piecemeal: its values and institutions were inseparably related. **Cannot adopt Western institutions w/o adopting Western principles** (“barbarian institutions are based on barbarian principles”; cannot accept the one w/o the other). Rather, China should refine the institutions they had. Problems don’t necessarily reflect issues with institutions. China should look to itself and recover its past.
      2. Thought K’ang had heart of a barbarian. Men’s minds are corrupted by utilitarianism.
   4. ***Shen Chia-pen***: **Systematic law reform**. Responding to concerns of extra-territoriality & domestic reasons.
      1. Under this scholar-official’s leadership, China simultaneously sought to review both its entire legal history and the best that the world had to offer in the hope of coming up with a set of codes that would at once be both “modern” and authentically Chinese. Did this out of recognition that the shortcomings of its legal system was **causing China to be viewed as an lower-class state, and perpetuating extraterritoriality**. Concluded that the fundamental problem with China’s laws was a ***huge discrepancy*** between what is considered as serious and as light inside our country and outside. Advocated several concrete reforms, including:
         1. **Reorganization of the punishments:** Banishment has lost its efficacy, beating is for children. We should reform punishments to be like other countries: death, imprisonment, detention and fine. Among these, imprisonment is divided into imprisonment for life and imprisonment for a period.
         2. **Abolition of analogy:** Need a fixed rule and less discretion to prevent abuses of judicial discretion. Due process type issue—too much discretion, predictability, notice, etc. Law should determine the limits of maximum and minimum the judge shall try to decide the case.
         3. **Reform and educate children** who commit crimes, rather than simply punishing.
         4. **Create trained lawyers/judges, establish law schools, educate local officials of the laws**.
      2. ***Preferring Civil Law Over Common Law Systems:*** Late 19th Century, China in dire straight. Sort of huge colony. Adopts complex civil law system. Also, pressure from West during boxer settlement to develop IP law.
         1. Probably because China didn’t have a body of precedent, and a lot easier to transplant: just use a Code from abroad, or write your own Code. **Civil law easier to understand. Doesn’t require sophisticated, legally trained professionals**. Judges also had less prestige and training and stature as common law jurisdictions. A civil law might seem reminiscent to the Qing code system too to a Chinese mind. They know codes. Also, didn’t believe in entrusting judges with that much discretion, that is, Civil law ***more centralized***. Judges were thought of merely as implementers, not as law-makers. Also, Chinese more familiar with the more inquisitorial nature of civil law proceedings, where judge leaves less to the lawyers in the area of fact finding.
3. **#Sun Yatsen and the 20th Century Nationalist Movement:** Revolutionary and founder of the *Koumintang* (Chinese Nationalist Party). Organized and militarized the party – known as the “father of the nation.” Introduced discipline, organization, etc. Was a Western trained intellectual. Advocated for creation of modern industry. More importantly, advocated for modern constitutional system with checks and balances. But was remembered for his **defiance to bureaucrats, traditionalists, and foreign powers**. Viewed China as loose heap of sand 🡪 need instruction and guidance. ***Advocated for a Leninist Party:*** Although Sun did not embrace Marxist ideology, he believed that a militant, vanguard party was necessary to throw off the foreign yoke. Moreover, many of those who led the Communist Revolution were trained under Sun and his Nationalist Party. Sun argued for ***Three Principles of the People*** (became manifesto for change in China):
   1. ***Nationalism:*** In the wake of the Opium War and foreign invasions, China has become a hyper-colony: China is a slave of many foreign powers, which is worse than being a slave of one foreign power. People of China must **band together to throw off the colonial yoke**. But banding together is not by itself sufficient. Internally, China is a ***loose heap of sand***, meaning that there is no cohesion among the people. But the common grounds to hold the people together cannot be the traditional Confucian values and notion of the family. Rather, it **must be nationalism** and the fact that all Chinese **share a common history and ethnicity**.
   2. ***Democracy:*** Sun advocated for a mix of Western democracy with Chinese characteristics. In order to do this, a Nationalist China had to separate sovereignty from ability. In other words, allow the people to control the political parts of the government. But then have bureaucratic civil service administer the government. Advocated for five branches of government—executive, legislature, judicial, plus two that were intended as a check on elected officials and their powers of appointment, and for which Sun believed Chinese political tradition provided a unique precedent: a ***censorate*** or supervisory organ, and an independent civil service system. **Chose officials by virtues of examination 🡪 meritocracy**. Sun envisioned an elaborate government, but believed China was not ready for it. Needed a period of tutelage. Not all rights would be available in the interim.
   3. ***People’s Livelihood:*** A Nationalist Government must provide for the welfare and development of the people. (1) **Equalization of Land:** Impose a tax on land ownership that is proportional to the amount of land that one owns. (2) Building state capital (industry) while not entirely eliminating private capital. Essentially, the state would own large industry and major infrastructure, but market competition would be allowed in other areas. ***Note that*** this final point is one of the reasons that Sun is respected by both the PRC and Taiwan – he was one of the first leaders to advocate for a ***mix of state and private industry***.
4. **John C.H. Wu**: undertook effort to create a new/modern legal system
   1. ***Why did it fail?*** It is very difficult to instill ideas into people. Countryside was in turmoil. “The legal forms and institutions that they took from abroad neither retained their animating spirit when transplanted, nor were adapted by him or others in such as way as to take on an enduring life of their own in a Chinese setting. The laws drawn from the West may have reflected the latest in sophisticated legal thought but Wu—along with the most astute of his contemporaries—proved incapable of designing ways to which they either addressed or were addressed by Chinese conditions. Absent strong moral roots capable of taking hold in the local soil and of sustaining and shaping growth, such laws could not meaningfully survive, no matter how technically proficient those transplanting it might be.”
   2. ***Reasons Why Nationalists’ Rights Movement Failed:*** (1) Unlike Europe, which had centuries of lead-up to Constitutionalism and democracy, there was no historical basis for individual negative rights in China. (2) It is nearly impossible to sustain a Western democracy when the populace is largely illiterate and uneducated. Social contract theory and democracy are predicated on the notion of rational choice. Thus, the argument goes that in order to engage in rational political choice, a person must have a certain degree of literacy. (3) Finally, the national reforms did not affect local and provincial governments.

**Marxism and Revolution**

1. **Theories:**
   1. ***Roscoe Pound:*** Spent significant time in China in the late 1940s serving as an advisor to the Nationalist Government. Wrote about the tension between the **“historical jurists”**, who held that law was something found, not made, and was a product of a people’s culture, expressions and convictions, and **“analytical jurists,”** who held that law was made, not found, and was made to order to satisfy utilitarian demands in a particular place and time. Pound held that law was both made and found. There is an element made by reason to the exigencies of newly-pressing interests and an element found by experience and declared by legislation or left to tradition of teaching and doctrinal writing. Therefore, the interpretation and application of China’s codes are not be blindly borrowed from, even if much influenced by, the interpretation and application of modern codes elsewhere. It is to be remembered that they are Chinese codes, to be applied to the Chinese people, to govern Chinese life.
   2. ***Marxism:*** driving force is **economic relations**. Everything else—law, religion, politics—is superstructure.
      1. ***Theory of History:*** History goes through epochs: Feudal, Imperial, Capitalist, Socialist, Communist. It is driven by the relationship between those who work and those who control the means of production.
      2. ***View of Law:*** Law is merely a part of the superstructure – it is nothing more than a ***tool*** used by those who own the means of production to exploit the workers and keep them blind. **Law obscures/mystifies power relations and preserves them**. Neutrality is a fiction.
      3. ***View of the State:*** Marx believed that when society advanced from capitalism to communism, the state would eventually wither away. By this, Marx meant that, because the state is a superstructure designed to prolong the rule of those who own the means of production, that superstructure will no longer be necessary once the workers have taken control of the society.
      4. ***Marx’s Article on China:*** Marx acknowledges that China is at a more primitive stage of development than Western Europe, where he was convinced the workers’ revolution would begin. China fit into Marx’s view of a social revolution in that: British oppression of China, and the potential failures in the market for Chinese tea (short supply) will help to bring about the socialist in Europe. (Ie revolution might be exported and furthered by economic insecurity in China).
   3. ***Leninism:*** party had big role in preparing the people. **Three takeaway points** (ideas that endure in China):
      1. ***Vision of the State & Law:*** more pragmatic than Marx—coercion and discipline. **Law is a tool to promote communism. Serves as a defense against external/internal enemies**. Law thus serves the interests of the people. Cannot wither away 🡪 needed to protect communism.
      2. ***Role of the Communist Party:*** Lenin developed **“vanguard” concept** 🡪 driving intellectual elite of the party that leads the cause. The masses currently are not ready; the revolution happened too soon, so power must be concentrated on behalf of the people. “Democratic dictatorship” 🡪 no independent civil society.
      3. ***Imperialism as the Highest State of Capitalism:*** Lenin viewed the West as avoiding internal crisis (and thus revolution) by expanding class exploitation to an international scale. **Capitalist nation exploited poorer, proletarian nations**. This is the explanation as to why Marxist ideas had not played out in industrialized nations.
2. **Why were ideas attractive to China?**China felt exploited by Western nations, and communist theory gave a simple and clear explanation. Also explained horrible (recent) events. Provided hope for restructure and change. It was an action plan. Communism seemed scientific and inevitable. Ironically, it was Western ideas. And under Lenin, same condescension of common and big role for the elite. Additionally, Marx predicted China would have big role in world communist movement 🡪 made China feel important, center of history again. And idea of law as bad tool **resonated w/ traditional Confucian ideas**.
   1. It hit a really perfect nerve string/balance among Chinese at that time period: (1) It is not traditional Confucianism (which made China weak) and had come to be questioned by the Chinese in the 1940’s, (2) Nor is it the pure Western ideology that had exploited China for the past century. In fact, Marxism criticized those Imperial powers. The scientism/inevitability of Marxism spoke to China: “Don’t worry, the revolution will inevitably come.”
   2. ***Confucian’s View of Marxism:*** On one hand, both Confucians and Marxists both idealize a society in which law is no longer necessary. No elaborate legal institutions are necessary. Also sounds like Daoism “The Way” the Nirvana endpoint.
3. **Communist Revolution:** Mao had three general points/strategies in pursuing revolution: (1) Following the Marxists’ traditional view of urban proletariat revolution will not work in China. Chinese communist party must focus more on the ***peasant and the countryside*** (where anger is). (2) Mao tapped into the ***nationalist sentiment in the population***. Marshalls population against Japanese. (3) Mao ***reaches out to Chinese women*** to include them in the revolution (horribly subordinated throughout Chinese history). Proposed different roles for women. Essentially doubles his base by including both men and women.
   1. ***Post-Revolutionary Issues:*** In 1949, Mao stressed the importance of addressing society’s economic problems. After the Revolution, China was facing hyperinflation, a lack of legal institutions, etc. Mao believed that the first issue to was to address this, especially the state of rural peasants. ***Other goals include*** (1) Consolidate their support by redistributing land among the peasants, (2) Industrialize China and bolster the economy, (3) Rid the country of foreign influence after centuries of colonialism. (4) Social Welfare reforms like education, eradicate disease, and allow women to get out of arranged marriages.
   2. ***Role of Law in Post-Revolution China:*** Prior to the Cultural Revolution, the communists did, at least to a certain degree, seek to implement their goals by using law. So why not simply do things through brute force? (1) Law **lends legitimacy** to a new regime, both among the people, as well as among other countries. (2) The ever present problem of **central-regional tensions**. Law can be an effective means of controlling the local officials.
      1. ***Challenges in Implementing the Rule of Law:*** (1) Legal institutions were mostly foreign to the countryside. (2) The revolutionary leader were essentially guerrillas. Turning these *junzi* into effective bureaucrats required base line rules. (3) There was an inherent tension between the slow pace of change through the law and the goals of the Communists, which were to implement wide, sweeping social change rapidly.
      2. ***Two Forms of Law:*** External, or formal law, which is established by the state and codified into statute or regulation. But compare this to internal laws, which describe social norms, customs, and traditions.
   3. ***Contradictions:*** In his famous contradictions speech, Mao asserted that contradictions still existed among the people under socialism. **Essentially, how one should be treated under the law depends on one’s *status* in the socialist state**. (1) between people and the enemy 🡪 an enemy of the people who is charged with a crime will be treated harshly, (2) between people and the people 🡪 while a friend of the people will be forgiven. In fact, if a friend of the people commits a crime against an enemy of the people, then the act s considered heroic and patriotic. The notion that one should be **treated differently** based on one’s status rings of Confucianism***.*** “**The people”** means all classes, strata, and social groups that approve of, support and participate in the endeavor to construct socialism. All social forces and social groups that resist the socialist revolution are the **people’s enemies**. Contradictions with the enemy are antagonistic. Contradictions among the people are non-antagonistic. **Antagonist:** we do need a dictatorship to suppress reactionaries and enemies of socialism (violent). But that system does NOT apply within the ranks of the people. **Non-antagonistic:** the people cannot exercise dictatorship over themselves, nor is it possible for one section of the people to suppress another. We resolve such contradictions peacefully, non-coercively, through discussion, criticism, persuasion and education (maybe law). **Thus, resolving contradictions depends on relationship**. Antagonistic relations CAN be turned into non-antagonistic through criticism and education. Status-based treatment of the law.
      1. ***How do you know if friend or not?***History. Ideology (subjective). Class background (objective) – parents, grand-parents, etc.
      2. Confucian hierarchical world of Confucian elite was flipped. Elites/teachers delegitimized. No reverence for superiors.
4. **Post Revolution Issues:**
   1. ***100 Flowers Movement:*** seemed to open up the government to criticism. But so much criticism came in that the Party reversed course and punished all critics brutally. **After 1957, the prestige of the legal institutions such as courts and lawyers fell sharply**. Rights, judicial independence, procuratorial independence, equality before the law, were all denounced as bourgeois and reactionary.
   2. ***Anti-Rightist Movement:*** Reaction against the Hundred Flowers Campaign. lasted from roughly 1957 to 1959, consisted of a series of campaigns to purge alleged "rightists" within the Communist Party of China (CPC) and abroad. The definition of rightists was not always consistent, sometimes including critics to the left of the government, but officially referred to those **intellectuals who appeared to favor capitalism and were against collectivization**. The campaigns were instigated by Chairman Mao Zedong and saw the political persecution of an estimated 550,000 people. **Targeted legal system**.
   3. ***Contradictions Speech:*** In response to the 100 Flower movement. See above.
   4. ***Great Leap Forward:*** Based on the Marxist notion that certain historical happenings are inevitable. Thus, Mao believed that the state could hasten the full realization of Communism. For example, each person had a steel mill in their backyard. Obviously, this dumb idea led to starvation and widespread economic collapse. Utter chaos. Mao almost lost position, but came back in power through Cultural Revolution.
   5. ***Cultural Revolution:*** During the CR, people were instructed to destroy anything bourgeoisie, anything ancient, or anything representing a person in an authority position. It sought to attack procedural regularity. Another thing that the CR sought to destroy was any semblance of Western equal rights. (It was believed to protect class enemies.) Attacks hierarchy of the party (Mao thought revolution had become stultified; worried about cities increasingly benefiting as opposed to rural).
      1. **Idea of perpetual revolution**. Wanted to prevent ossification and bureaucratization of party. “Red” (ideological) vs. “technical” (efficient at the expense of ideological purity). Mao and party consciously chose red at the sacrifice of short-term expediency.
      2. ***What is meant by “Cultural Revolution”?*** Reversing old structure of authority 🡪 parents, teachers, law, hierarchy. Full frontal assault. **Saw law as masking the power structure**. Tool of bourgeoisie oppression. Moved away from formal structure to “struggle sessions” and ad hoc group justice. Closed national congress for many years. Local government shut down. Law schools suspended. Enacted revolutionary constitution that dispense w/ organs of government. Chinese people urged to be guided by Chairman Mao’s thought instead of law. The legal system was decimated as a deliberate target of radicals. The very idea of law was discredited and held in contempt. It was a “shackle” that held back the mass movement. It was not until 1972 that the court system was gradually re-established.
      3. ***“Reflections of a Judge”***: The cultural revolution was a disaster, by 1981 needed some law and order. The leaders of the revolution were criminals – it became clear during the course of the trial that Lin Biao and Jiang Qing were guilty under criminal liability, not just political errors. Offenses included plotting to overthrow the government and split the state, attempting armed rebellions, have people injured/killed, conducting demagogical propaganda, torturing people, and illegally detaining/imprisoning people. Judge here says that errors of political nature (i.e., the cultural revolution) ***can be separated*** from legal crimes.
   6. ***Trial of the Gang of Four:*** Standing Committee of the National People’s Congress, China’s highest organ of state power, decided to set up a Special Court to try the principal members of the two cliques of Lin Biao and Jiang Qing in 1980. **Almost all observers consider it to have been a thinly veiled political trial**. Chinese court wanted to appear legitimate and distinguish themselves from their predecessors. Delayed trail until criminal law and procedures could be established. However, it was clear at the outset what the outcome would be. But needed to worry about stability and not overthrowing Mao, the founder of the system 🡪 said Mao was 70% right, 30% wrong. Also, what do you do when the majority of the country is guilty of crime? Gang of Four as small proxy?
      1. ***Compared to Nuremburg:*** There are a number of comparisons that can be drawn between the Gang of Four Trial and Nuremburg. (1) In both it was unclear what exactly constituted a crime against “humanity/proletariat.” (2) Both had a sense of Victor’s Justice. (3) Perhaps most importantly, both signified an end to an old regime.
      2. ***Goals moving forward:***Stability. Economic growth. Develop legal system. Move to new society and abandon class struggle and dictatorship of the proletariat. Move away from ideological view of law as a tool for party. Increase domestic and international legitimacy (wanted respect and to be a major player). Big move for legality post CR.

**Post-Cultural Revolution Reform**

1. **Introduction to Post-Mao Reforms:**
   1. ***Economic Reform:*** Reform efforts liberalized party control over the economy & society, but maintained the one-party rule. In attempts to dismantle the personality cult that Mao Zedong created, the Party promised a bright economic future for all w/in a relatively short time frame. **Economic Priorities** were reordered placing agriculture & light industry ahead of heavy industry (heavy industry would only receive enough funds as necessary for it to adapt to the needs of the other sectors). ***Farmers*** were given the green light to work private plots & engage in sideline production. ***Egalitarianism*** was attacked as a notion that retarded economic growth. And there was an unprecedented opening to the outside world in search for export markets and the necessary foreign investments, technology & higher-quality consumer goods. Change was rapid & dramatic in the rural sector, moderate in the urban sector, & political reform was ineffective & ultimately divisive.
   2. ***Political Reform:*** 1978-80 was a high time for suggestions for political reform. To the Vice Chairman of the Party (Deng Xiaoping), it was necessary to ensure that the people as a whole enjoyed the power of supervision over the state in a variety of effective ways. In particular, they were to supervise political power @ the basic level, as well as in all enterprises & undertakings. But this promise of extensive reform wasn’t combined w/ sufficient substantive change & many intellectuals & students were frustrated. The substantive change was ruled out by the refusal of senior party leaders to accept structural reform that would lead to a redistribution of power to other groups & orgs. The experiences of the Hundred Flower, the Great Leap Forward & the Cultural Revolution led leaders to be suspicious of participation that wasn’t directly controlled by the Party. The Party ultimately defined the limits on what was **acceptable political reform**. Explains, in part, hesitancy of the party now to relinquish control? Afraid the population will harm itself? Notion of Confucian father doing what is best for his children.
      1. ***Urban Anger*** increased with the higher visibility of official corruption. Student demonstrations were heavily supported by the urban citizenry (they sought more democracy for the people) & the Party was divided on how to respond to the peaceful student demonstrations. (**Tiananmen Square Protests).** The Party didn’t want to respond b/c they refused to recognize autonomous groups w/in the country.
2. **Rational for Legal Reform, Chen Jianfu:** 1978 viewed as turning point in legal development in China—Third Plenary Session declared the large-scale nationwide mass political movements should be stopped and the emphasis should be shifted toward “socialist modernization.” Party leaders consistently emphasized **importance of law** for providing a social order conducive to economic development. Summarized by Deng Xiaoping as a **“Two-Hands” policy** 🡪 on one hand, the economy must be developed, and on the other, the legal system must be strengthened. Very different from Mao (law denounced and rejected). Under Deng, massive and rapid enactment of laws and regulations, particularly regulating economic and commercial relations. Based on perceived need 🡪 ***law was still an instrument of the party***. Law was NOT an end unto itself. Law was an **important tool for implementing Party policies**—policy was the foundation of law and law was the mature form of policy. Legal development occurred in a piecemeal, ad hoc fashion. Law was viewed as “better tool” than policy, capable of securing and institutionalizing ad hoc policies in a more universal manner. Defines rights and duties.
   1. ***Socialist Planned Commodity Economy theory*** quickly dominated ideological thinking in China. However, after Deng’s southern tour, Deng utilized capitalism for building socialism 🡪 led to ***Socialist market economy*** instead of ‘planned economy’ in the constitution. This shift constituted a license to practice capitalism in the economic sphere and to introduce capitalist mechanisms and measures.

**#Constitutions and Constitutionalism in the PRC**

1. **Contrasting Liberal and Socialist Constitutions:**
   1. ***Liberal Constitutions*** emphasize things like individual liberties, property rights, civil society, distrust of state power. Promotes order and stability. Most importantly, Liberal Constitutions are, at least in theory, unchanging in that we only seeks to clarify our understanding of the document. Our understanding of the document may change over time, but its core function and principles stay the same.
   2. ***Socialist Constitutions:*** emphasize state directed change, dominance of the Party, and the importance of the collective welfare of society, and revolution from below. **It is blue print/map—aspirations of where state wants to be**. Goal is egalitarian transformation, not stability. Thus, whereas a liberal constitution is static, a socialist constitution is constantly changing and is flexible to keep pace with the changes from socialism to communism. Moreover, whereas liberal constitutions seek to preserve rights that already exist (generally because people are born with inalienable rights), socialist constitutions seek to radically change rights. They also differ in their conceptions of ***conflict***. Lib const. assume that there will be conflicts between people, thus the instruments of government and civil rights are a way to diffuse disputes. On the other socialist constitutions assume that there will be no conflict *between* the people, but conflicts between those of different classes.
2. **China’s Constitution:** Roadmap/active blue-print that contains fine-tuned, specific provisions. State seen as an actor (“state develops,” “state protects”). Focus/goal of Constitution is to ***achieve socialist modernization***. Emphasizes unity.
   1. ***Preamble:*** The preamble of the constitution sets a roadmap for socialist change. Glorifies China and its accomplishments in the revolution. Reinforces nationalism, however also recognizes that China is a multiethnic state. Note that the Constitution is supposed to be the Supreme law of the land, however, the NPC arguably has this authority.
   2. ***General Principles:*** All power in the PRC belongs to the people. They exercise their power through the NPC and local people’s congresses at different levels.
   3. ***Fundamental Rights and Duties:***
      1. ***Rights:*** (1) All citizens are equal before the law, (2) Freedom of speech, press, assembly, association, procession, demonstration, religious belief, (3) Right and duty to work, (4) Right and duty to receive education, (5) **Limitation:** Exercise of rights may not infringe upon interests of the state, society, and the collective.
         1. So China does, in fact, grant negative rights to its citizens. However, the Constitution explicitly trumps those rights. ***“The state respects and preserves human rights.”***
         2. Also, “freedoms and rights may not infringe upon the interests of the state.” **Art. 51** Emphasizes good of society over the individual.
   4. ***State Structure:***
      1. ***National People’s Congress:*** The NPC is the Supreme organ of state. It chooses the president, vice president, state council, central military commission, SPC,
         1. ***NPC is the Sole Arbiter of the Constitution, Why?:*** The NPC is the representative of the people. Socialist states seek to place power in the hands of the people. The judiciary might be viewed as a Marxist superstructure, that is too far removed from the people
      2. ***Standing Committee:*** The Standing committee is a permanent body that supervises the short and medium term operation of the state. (Because the NPC only meets every so often.) Reviews laws on an informal basis. They call up the lower legislatures/agencies to see if they can work out the conflict informally.
3. **Constitutional Development:**
   1. ***Constitutional Review and Interpretation:* Legislation Law** permits the creation of a NPC standing committee to review the constitutionality of laws. Also granted citizens the power to petition for review of a law. Reminiscent of the legal system in ancient China, where citizens could petition the emperor. However in practice, Constitutional questions are handled privately. Government does NOT want these issues to resolved “Antagonistically.” Rather, they want to give the impression of government organs working harmoniously together.
      1. ***Constitutional Review in Practice:***Constitutional review process not very robust; government has not articulated transparent, visible process by which citizen can bring inconsistency between Constitution/law to Regulation Review and Filing Office (RRFO). RRFO usually talks quietly with subordinate agencies that pass regulations/rules that are inconsistent with Constitution. **Unclear of exact procedure that Standing Committee uses to perform its obligation of constitutional review**. There have been petitions by citizens to Standing Committee about violations of rights and some petitions have prompted state action. So far, no government organization has officially requested a constitutional review. Currently, China still uses a process of internal discussions to amend regulations that violate the law or constitution, rather than the NPC Standing Committee “antagonistically” rescinding them in public 🡪 may demonstrate “harmoniousness” of gov led by single party, but it is not beneficial to rectifying behavior, and misses opportunity of Constitutional education (Cai Dingjian, Class 9 p.18)
   2. ***Yu Xingzhong, “Constitutional Discourse in China”:*** Since its inception in 1949, PRC has enacted four constitutions. Legitimize party domination and promotes its political programs, but due to **lack of effective enforcement mechanisms, they have had almost *no direct relevance* to the daily life of Chinese people**. However, since 1999, Chinese constitutional scholars have conscientiously looked to American and continental European constitutional ideas for inspiration 🡪 increased constitutional discourse. Growing acceptance of “rights talk” (Ancient China did not have a concept of rights). Marxism saw rights as correlative to duties, and as class oriented, with collective rights being much more significant than individual rights. Thus, constitutional rights were overshadowed by interests of the state and the collective.
   3. ***“The Path of Constitutional Development”:*** There is a disparity between what the law pronounces and promises, and what it actually does in practice. The Constitution is a prime example of this. It pronounces a great number of high ideals, but fails to implement them. It is in the interest of an autocratic regime to maintain this façade of a beautiful and perfect exterior. But it is generally not in the interest of the state to actually carry out the laws. There are many disincentives and costs and conflicts that arise. ***See “A Constitution w/o Constitutionalism?” (class 9 pg. 28)***.
      1. ***Will China Follow Through with Putting People’s Welfare First?*** **NO**, because (1) Present regime does not take the long term outlook of an emperor. They are only concerned with their own tenure. (2) Even if the top level officials want to implement Confucian social change, they lack the control over the lower level officials to actually accomplish this. Nonetheless, **China’s Constitution still serves important functions:** (1) It serves the interest of the state in putting up a harmonious and unified façade. (2) Many in the government actually want progressive change, and the Constitution may be the vehicle for that change. (3) Once a provision (human rights etc) is in the Constitution, it is almost impossible for the state to rescind that provision. It is essentially a **one way street**, and if change is likely to occur, then it will occur in the direction at which the Constitution points.
      2. ***Two Cases Illustrate the Strength of Constitutionality in China:***
         1. ***Qi Yuling v. Chen:*** First “Constitutional Case.” Supreme Judicial Court based its decision on what it deemed to be a violation of a citizen’s Constitutional rights. (D) stole (P)’s identity to gain admission to University, (P) sued under the theory that the Constitution guaranteed a citizen a right to an education. SPC agreed, and held that the citizen’s Constitutional right had been violated.
            1. Scholars viewed this as China’s Marbury v. Madison: The first case in which the SPC upholds a citizen’s right under the Constitution. Also asserts the SPC’s right to interpret the Constitution. But on the other hand, a pessimist can argue that the SPC is merely applying a clear cut provision in the Constitution. This is nothing new. It could be narrowed by its facts: One citizen is suing another under tort law.
            2. However, it was **ignored by the state**, and eventually was quietly removed from the books. Illustrates the problem with judicial reform, in that the judiciary is controlled by the court president, and the court president is controlled by the party. ***Chinese courts NOT allowed to cite the Constitution in decisions***.This is true even though the Constitution provides that the judiciary shall be independent. Rather, court functions more as a bureaucracy than Western systems. Provides another example of the disparity between the law in theory, and the law in practice.
         2. ***Sun Zhigang Case:*** Person, a well educated young person, was mistakenly detained under the Detention and Repatriation scheme, which was designed to get rid of beggars and vagrants. Person was then beaten to death while in custody. There was a public outcry. This attracted the attention of high level officials, who then repealed the DR law.
      3. ***Contrasting the Cases: What Will it Take for “Constitutionalism” to Prevail in China –*** Author suggests that we need (1) Tragedy widely reported by the media, (2) Mounting public reactions, (3) Central government takes action to avoid losing face. Author suggests that “Popular Constitutionalism” (Ie popular participation in advancing the Constitution) is necessary, but not sufficient. Also need institutional mechanisms to protect the popular movements and demonstrations. Qin case did not take root because it lacked popular support behind it, whereas the Sun case did have such support. Alford says that the problem with “Popular Constitutionalism” is that violations of Constitutional rights will be prosecuted only if there is a public outcry. **So, the authorities can, in practice, violate rights so long as they don’t cause a public outcry**.
   4. ***The Three Supremes:*** Currently, the courts are guided by the **three supremes:** (1) Party Interest, (2) Public Opinion, and (3) Legal Rules. The courts are now directed to further the policies and goals of the party in their decisions. The central function of the judiciary should be social harmony. Judges are now evaluated based on how well they meet these criteria. So in order to keep/advance their careers, they need to promote them, and not merely “Rule of law.” One way of looking at this is ***short term stability and furthering policy goals, at the cost of long term institutional stability***. Having judges base decisions on public opinion and Party directives does help further short term policies, however, it almost certainly undermines the long-term rule of law.
   5. ***Written and Unwritten Constitutions:*** Argues that all states have an unwritten Constitution which they follow. America has an unwritten Constitution in that judicial review was simply made up. (John Manning might have a structural argument or two in response to this.). For example, in China the Party formulates policy and legislation, and the NPC approves and legitimizes that. Even though this does not follow the text of the Constitution, this is an established system for China and thus serves as the unwritten Constitution. Scholars should not merely look to the text of the document. Instead, they should come down from the clouds and study how the Constitution actually works in practice.
4. ***Professor Yu Notes:*** Constitution has been revised 4 times, but not enforced. Why revise? Party needs justification – addressing legitimacy problem. Party realized constitution was useful tool to move forward with their policies. Led to a general rise of constitutionalism.
   1. Recent setback w/ No.9 document 🡪 Western values no longer welcome. However, setbacks are offset by progress. Strong control of information, but explosion of social media.
   2. Obsession with ***Chinese-ness*** 🡪 develop something uniquely Chinese. Inferiority conflict due to defeat w/ Western powers, which hurt national pride of 2,000 years. China desperately wants the world to recognize China, but simultaneously does not want to appear weak.
   3. ***Constitutionalism:*** Modern Constitutionalism – (1) restriction of government powers; and (2) protection of individual rights. It is **organizational law for society**. Charter. Lays out structure and pronounces goals and rights.
      1. ***In socialist state 🡪 more as road map or aspiration***. Preamble is more important. Lays out blueprint. Separation of party and administration movement just after cultural revolution led to compromise where the Party was in the preamble, but not in the constitutional text itself.
      2. ***In liberal democratic state 🡪 sets playing rules for field***. Less explicit single national goal driven by the state. Rather, more of a framework of rules.
      3. China has no real constitutional history, but does have constitutional ideas. Chinese ministers perceived Western strength as rooted in part by having constitution. Chinese began making constitution **as a way to legitimize power**. After establishment of PRC (1949), abandoned Western-influenced constitutional history.
      4. 1949-1953: No constitution, but had conference that developed a “Common Program.” Quasi-constitution.
      5. 1954: First constitution. Headed by Mao, but drafted after Soviet model. Rough framework that included protection of individual rights. It was not enforced. Mao launched a series of campaigns that led to cultural revolution.
      6. 1975: Adopt second constitution. Short document that reflected left ideology of that time. Illustrated dominance of party and succession. Not implemented.
      7. 1976: Arrest of Gang of Four. Beginning of new era.
      8. 1978: Third constitution. Heavily influenced by party ideology.
      9. 1982: Current constitution.
         1. Chinese believe in changeable nature of constitution.
   4. ***Current Constitution and Issues of Enforceability:*** Establishes democratic dictatorship (adopted form Soviets). **Socialism:** (1) public ownership; (2) control of economy. But socialism in China is a mystic term, hard to understand. Currently, very few people of NPC are from class of peasants/workers. Nature of the NPC has changed from what is stated in the preamble. Unclear idea of ownership in the constitution.
      1. \*\*Chinese understanding of rights is theoretical 🡪 adopt Marx theory of rights as relational duties/obligations. ***In exercising those rights, cannot hurt interests of party/state***. **Basically nullifies rights in balancing interests of society**.
      2. Four positions of thought on constitution – ***see handwritten notes***.

**Chinese Communist #Party**

1. **The Nature of the Party:** Officially, the Party exists outside of the state. However, as a practical matter, nearly every significant official in the state is a member of the Party.
   1. ***Class notes:*** The party is NOT an unchanging entity. Ideology plays a different role over time, e.g., transition from common class party officials to educated elite party. New interweaving between new wealth and party. There is a drive for democratic centralism, and there is diversity of viewpoint at high levels. It is a mistake to see the party as a monolith. Party pervades everything, but it would be unwise to lump everyone together.
      1. ***Party Organization:***Has constitution. Meant to structure and control factions w/in the party. There is a party congress every five years. Central Committee of the Party - ~200 people. Political Bureau - ~ 25 people. Standing Committee - ~ 7-10 people (basically who runs the country).
      2. ***China has own inner disciplinary mechanism***. Ensures high standard for party or separate set of justice/rules for party?
      3. Central party school is the fast-track to party leadership.
      4. ***Zhu, “Party and the Courts”:*** Unabashed about role of the Party. His logic is that the **Party is a vehicle to accomplish the will of the people**. Additionally, he views judicial independence, including in America, as a myth. Really, he believes it is partisanship. The Party’s control allows it to set priorities and develop more quickly than other countries.
   2. ***“The Party: Impenetrable, All Powerful by Ian Johnson” (book review):*** Party is at the center of events and still surprisingly vital. All big Chinese companies still have party secretaries who manage them in conjunction with the CEO. As for smaller companies that were “released” by the Party, government control still remains pervasive, if less heavy-handed. The Party promotion system is self-selecting, with leaders trying to promote people loyal to them so they can advance their own agendas. This leads in factions grouped around leaders with deep and venomous divisions. And the party is still only understood through small slivers of access or insight.
      1. The party has **largely withdrawn** from the personal lives of Chinese citizens, allowing them to pursue their own ambitions and goals as long as they avoid the high crime of directly challenging the party.
      2. The transition of power in 2002 and 2012 with Xi Jinping shows the Party has figured out the **sort of institutional stability** that largely eluded its counterparts in the Soviet Union and the Eastern Bloc. Problems though: no unifying vision really inspires the vast 1.3 billion nation. **Party still pursues the basic “self strengthening” movement of the 1870’s – attaining wealth and power, enhancing nationalism and international dignity, preserving unity and preventing chaos**.
   3. ***“Trimming the Fat”:*** CPC is trying to cut down on bloated membership.
   4. Joining party traditionally offered the promise of both material and professional benefits, and membership is still important for ambitious government officials. The CCP’s ***legitimacy rests primarily on its claim to have delivered economic growth*** and ***political stability***, leading to tangible improvements in the quality of life of the vast majority of Chinese. However, the party’s standing is **undermined by corruption**, the **widening wealth gap** between urban and rural areas, and the **large number of lay-offs** that have accompanied reform. The party has absolute control of the army and still have a substantial control in media and local governments. **But decentralization of power is substantial**.
      1. Today, almost all Chinese companies of any size and importance remain influenced by the party: All state-owned companies have Party secretaries who manage in conjunction with the CEO; For smaller companies, the manager is often a former official or close to Party circles. The Party’s Organization Department is so expansive. It controls the membership of the court, the media, the state company etc.
2. **Zhu Suli:** Dean of Peking U Law School, celebrates indigenous Chinese resources and innovations. Seen as a conservative for wanting distinctly Chinese, party oriented rule of law.
   1. ***“The Party and the Courts, by Zhu Suli”***
      1. Dominant western view is that Chinese judiciary lacks independence
      2. Four Unwarranted assumptions
         1. Judicial autonomy exists as a pure state of reality
         2. We can conduct objective model of judicial autonomy
         3. This model shows that CCP exercises political influence that is inimical to and undermines judicial authority
         4. It is possible to identify and examine this influence, and it is negative.
      3. CCP is still most important political and developmental force for China, and its ***oversight has diminished judicial corruption***
      4. CCP effective at constructing strong, centralized unitary state. Seeks ***fundamental interests of Chinese as a whole, NOT merely one particular class***.
      5. Party and state comingle at every level of government and organizations. Can’t tell where judicial influence would come from, and it often directly contravenes CCP policy
      6. During cultural revolution and other radical periods, CCP officials, including judiciary, prevented unfairness and injustice from radicalism
      7. Interference does not respect the US model, but is actually beneficial for Chinese seeking justice and social solidarity.
         1. ***Why should technocratic judicial determination be superior to political one?***
      8. No universal framework for evaluating judicial independence
         1. In all countries, including US, **party politics influence judiciary**. See, Bush v. Gore, Bork nomination by Reagan.
         2. Chinese judges see themselves as civil servants rather than independent professionals
      9. Don’t prejudge results based on idealized versions of how other counters operate
         * 1. While party can intervene, there have been steps towards broader project of professional, functional judiciary, party influence diminished in all sectors over time

**#Criminal Justice System**

1. **Traditional Criminal Justice System in China:**
   1. ***Ideological Conception:*** Generally, criminal justice in China has been characterized by substantive justice, rather than procedural fairness. In practice, this meant closing every case that came up and doling out punishments to both offenders and those who acted wrongly (but not necessarily criminally). Individuals accused of crimes were expected to confess fully, and were given much more lenient punishments as a result. This was evidence of **two Confucian values**. *First*, that the state was the benevolent and forgiving Confucian father: when its subjects committed wrongs, they were to be scolded, but forgiven. *Second*, confessing demonstrated one’s willingness to engage in moral cultivation, a core attribute of Confucian beliefs.
   2. ***Analogies:*** Rather than being given statutes to determine what was criminal, local magistrates were given hypothetical fact patterns. Local magistrates used these to analogize to the case before them. This process of reasoning by analogy was extremely vague and unpredictable, in that a magistrate could stretch any analogy in order to cover a supposed crime. However, it fit well into Chinese society. For example, “doing what ought not to be done” gave the magistrate power to punish someone who ratted out his brother.
   3. ***Inquisitorial System:*** The magistrate had near absolute power to investigate every part of the case. There were few procedural safeguards. Instead of a Western system which focuses on protecting the individual, the Chinese system focused on **doing substantive justice**, and ensuring that each individual involved in the events received their just desserts. Magistrate was viewed as all-wise and trusted to discern the truth. NOT adversarial. Not necessarily arbitrary because of elaborate system of review. But very magistrate focused and not trying to protect individual rights.
   4. ***20th Century:***Doesn’t change much. China goes w/ civil law, inquisitorial system. First decade in PRC 🡪 very rudimentary justice. During cultural revolution 🡪 system breaks down. Post CR 🡪 reform occurs. China becomes determined to create system less susceptible to arbitrary violence.
   5. ***In Mao’s PRC:*** In line with the Leninist conception of law, Mao believed that criminal law could be used as a tool of the Party to further the socialist revolution. In particular, it could be used to address contradictions among the people, meaning that it applies differently to different people.
2. **Criminal Justice Today:**
   1. ***Criminal Procedure and Abuses:*** Essentially, China’s criminal justice system has **two sides: the formal side and the reeducation through labor side** (eliminated in 2013, but still can get sent to mental hospital or drug rehab w/ no court proceedings; also, there is the party-administered justice system). However, even with this repeal, police still have power to detain persons suspected of crimes related to national security or terrorism in a designated location for ***up to six months***. The agency has to notify relatives w/in 24 hours, but NOT where the person is. Access to lawyer may also be denied. Other provisions allow secret detention of criminal suspects in national security, terrorism and major bribery cases for up to 37 days. Human rights researcher Nicholas Bequelin has noted that “endangering state security” or “terrorism” are **vaguely defined offenses** that have long been manipulated by the government to crack down on dissidents, human-rights lawyers, civil-society activists and Tibetan and Uighur separatists. Additionally, it is possible that **“major bribery”** could be used against foreigners to justify extended detention w/o notification. The most common charge against foreign businessmen have involved a national security crime, the theft of state secrets, which is sometimes applied to documents that are publicly available and ordinary paperwork from state-owned enterprises. Cases no longer have to be tried publicly if they involve “commercial secrets”—decreases transparency.
   2. ***Prosecutions:*** The prosecutor in China wields enormous power. Also note that in line with an inquisitorial system, a victim can initiate a case and become a party to the proceedings, even going so far as to question the defendant. Many Chinese criminal prosecutors feel that the outcome of a case is a personal judgment on their worthiness as a government employee/official. Therefore, the loss of honor and bonuses that result from a single not-guilty verdict provide an incentive for the criminal justice system to convict at a very high rate. In other words, the Party system **demands a certainty of outcome**.
      1. ***Pre-Trial:*** Nearly all of the action in a Chinese criminal proceeding takes place BEFORE trial. Extremely important. Generally, there is enormous pressure for a defendant to confess before trial, as the conviction rate for cases that reach trial is roughly 99%. This is exacerbated by judicial promotion by high conviction rates. There is fairly high standard for arrest, but police ignore it and just ***detain*** people instead (can do it for over a month). **Arrest standards** have undergone some reform to try to get people to the criminal process sooner. There is also a shift to have more access to lawyers. Used to not see lawyer until right before trial. Criminal defense lawyers are low pay and low prestige in China.
      2. ***Trial:*** Before 1996, trial was a formality. Now there is more provision for accused to offer evidence, call witnesses, etc. Not clear if there is a presumption of innocence.
   3. ***Criminal Procedural Reforms:*** China has abolished the analogy process for criminal proceedings. Recently, it has enacted greater rights for defendants and more restrictions on the police/prosecution. Officials can no longer detain defendants indefinitely without informing their families of their whereabouts.
   4. ***Shuanggui*** is a practice of detaining public officials suspected of corruption. The officials are usually held in a small room and tortured repeatedly until they confess. It largely operates outside of the formal structures of the legal system. But given the public hatred toward corrupt officials, it is a widely popular policy. Not only does it serve as a harsh deterrent to officials, it might also satisfy the second element of Nero’s “bread and circuses” style of governance.
   5. ***Acquittals:*** Acquittals are rare. Every 10k tried in 2013, only seven were acquitted. **Chinese tend to explain this as “good work,” “high level of judicial precision” that “filtered out” bad cases**. Built in incentives though. Acquittals signal failure for prosecutors and have direct negative impact on performance evaluations. Rather than risk acquittal, prosecutors will withdraw indictments, especially in political cases. Prosecutors beg judges not to hand down withdrawals. Courts and prosecutors ***work together*** to rule out not-guilty verdicts. Judges view convictions as means for career advancement and tools for maintain stability. Not guilty leads to uptick in petitioning (families feel that judiciary ailed to deliver justice). And higher courts don’t want acquittals in appellate trials b/c they don’t want lower courts being viewed as “wrong” or “bad.”
   6. ***Death Penalty:*** China holds **world record** for the most capital offenses (55) and considers number of executions as a state secret and has never publicized it. In 2007, the power to review all death sentences was given back to the Supreme People’s Court to prevent unjustified and wrongful executions as well as to control the total number of death penalty cases.

**Resolving Disputes And #Court System**

1. **Chinese Court System:** Criminal cases only take up about 10% of docket.
   1. ***Common law vs. Civil law (Continental) context:*** Civil law judges don’t view themselves as different from the government. Civil law system is NOT bound by precedent. Only job is to interpret legislation. Not allowed to make law, and no sense of being bound by past decisions. Role of the judge is more inquisitorial in civil systems. Judge drives more of the litigation, and judge is very much part of administrative-type agency. Civil law system is incentivized for convictions. Prosecutor **doesn’t bring case** unless its almost certain.
      1. Whereas common law countries use juries for virtually all litigation, civil law systems do not. Civil law does not generally have a “trial” in the way that we think of it. Instead, evidence is presented in written form to a judge who has been studying the case for a longer period of time. Thus there is less civic participation in the court room setting, more responsibility is placed on each individual judge, which is ironic because civil law judges are generally less well educated. In civil law, judges are NOT selected from experienced practitioners. Rather, the career path to becoming a judge generally begins immediately following law school. Young attorneys work as evidence gatherers for judges and work their way up the chain. Thus, they think of themselves as government officials instead of independent judiciary. Unlike American and English judges, almost every civil law judge is seeking to rise higher in his service 🡪 obtain more prestigious urban positions. One consequence of this is that the judiciary is less prestigious and younger than they are in common law countries, less well educated. Also, because judges are a bureaucratic corps of government servants, there are a great many ties of outlook and sympathy with other government executives.
      2. The nature of judging has changed a lot in China over the years. China used to pull military officers and make them judges. Legal training has improved, but local courts are **tied closely with local government** 🡪 leads to problems and influence.
   2. ***Composition of the Judiciary***
      1. ***Four Courts:***
         1. Basic District Courts (about 3,000)
         2. Intermediary Courts (390-400)
         3. Provincial High Court
         4. **People’s Supreme Court** – Tons of people and does lots of different things. It is the administrative head of the entire system and is much more involved than Chief Justice Roberts, e.g., promotions, setting rules, etc. Other Roles: does many things under “interpretation.” Official notices and opinions. Actively puts out circular on legal issues. Additionally, court is part of ***larger hierarchy*** 🡪 they want judges at lower levels to know what boundaries and rules there are. Sort of bureaucratic aggrandizement by the court? Court ***runs*** the bureaucracy. **It presides over the whole system and reviews all capital punishment case**s.
      2. ***Hierarchy***
         1. **Political Legal Committee** – Of party. Law enforcement, prosecutors, and judiciary get together to make sure everyone is on the “same page” 🡪 “three fingers on same hand.”
         2. **Adjudication Committee** – Within the court system. Oversees decisions for different or complex cases (either conceptually or politically) 🡪 “those that hear the case don’t decide it; those that decide the case don’t hear it.” Some benefits? It does provide consistency. Also, because the supervised court is starting form scratch, the committee ***provides experience and oversight***. Prevents corruption of younger judges.
            1. Additionally, at each level, the party (people’s congress) is ***superior to the court***. This keeps power in the “hands of the people.”
            2. Courts do NOT interpret the constitution.
            3. Courts do NOT say legislature has illegally delegated authority or the local law has exceeded national law.
            4. Judiciary does NOT interpret agency regulation. Leaves this to agency.
   3. ***Ruiyi Li: Case-law adopted by China? (“Guiding Cases” system)*** (class 12, p. 21)
   4. ***What kind of judicial power does China need? Xin Chunying:*** Judicial reform has been important topic in China, but expectations have not been met and public satisfaction is law. 1997 was first time in the history of the PRC that ruling party explicitly advocated judicial reform in official documents. Concurrently, the gap between legislation and enforcement has been widening. **As legislation improves, people expect rules/regulations written on paper to translate into actual norms of everyday life**. The ***consequences*** of non-enforcement are multi-fold: justice cannot be realized; confidence in law erodes; and it is impossible to build a fair legal order. And many instances of corruption – judicial noncompliance with the law, biased enforcement, extortion, bribery, favors by bending the law, etc. The ***most significant*** achievement of the judicial reform has been the change in the conception of the judiciary—its role and purpose. Changes in judicial concept have opened up space for changes in judicial system (see art. for specifics). However, reform is becoming more difficult. Supervision has resulted in a weaker judiciary. Courts cannot adequately design their own reforms. And judiciary’s efforts to professionalize are hampered b/c they take place w/in the context of the administrative state.
2. **The Story of Qiu Ju**:
   1. ***Rise of Rights Consciousness:*** Qiu Ju might emphasize the rise of rights consciousness in China. People’s rights are enshrined in the Constitution, and the media continues to tout this development. But could it lead to a rights disillusionment? China has seen that before: the National Constitution, which John Wu helped to author, enshrined a number of civil liberties, which were **simply ignored by the state**. This facial contradiction undermined the legitimacy of the Nationalist state.
   2. ***Questions About Qiu Ju:*** Was this a film criticizing China’s legal system? Or was it criticizing Qiu Ju for being too litigious? Likewise, was it demonstrating that a Western notion of litigation simply does not fit in China, especially rural China?
3. **Judicial Independence in China:**
   1. ***Why do we value judicial independence?***Removes adjudication from politics and tyranny of the majority. Protects individual rights. Protects government legitimacy? Equips the judiciary to handle disputes with the government. Helps to ensure equality before the law and encourages the ***perception*** that the process is fair and unbiased.
      1. ***Class 10 Critique of American Judicial Independence:***China wants judges to understand party interests generally. Judiciary critique of state policy would be harmful to society. American system is too political; “independence” is a façade. And too much independence creates problems. Oversight yields uniformity.
   2. ***Looking at China Specifically:*** SPC issues “judicial interpretations” to the lower courts. (Thousands over the past decades). Essentially, the court issues a proactive opinion to the lower court in which it instructs the lower court how to interpret a statute. ***Demographic Issue:*** Many of the older judges were selected fresh out of high school/PLA, thus they never received a formal legal education. Younger judges, on the other hand, are more well educated and have passed bar exams etc.
      1. ***Judicial Independence:*** The Constitution does say that judiciary will “exercise its power independently” but it cant possible mean what it says—independence from the party. Might mean that the courts are functioning independently from most entities, but they are still subject to the NPC. Possible means judiciary should not be corrupt nor champion private interests.
         1. ***Philosophical Views:*** In a ***Lockean*** conception, people give up some of their natural rights in order to obtain the protection of the government. One of the rights they give up is that they are subject to further deprivation of rights by courts. Thus, judicial independence is a means of ensuring that deprivations of rights are just. ***Marxism:*** Marxist would reject the notion that individuals have natural rights that need to be protected. Rights, if any, stem from a person’s class identity. Moreover, the judiciary should act as an arm of the Socialist revolution. It is a tool to further the policies and goals of the Party. (Leninist)
         2. ***Views from Average Chinese:*** Judicial independence suggests that judges will contravene the popular will, ie they will be too far removed from the people. Judicial independence implies that courts will contravene the policies of the state. This is at odds with the CCP’s policy of “harmonious development.” ***Local Protectionism:*** Works both ways. Creating independence (and decreasing localism) results in judges becoming less interested in the lives and welfare of the locals.
   3. ***Ways to Improve Judiciary in China:*** Create some circuit courts—between Supreme Court and provincial courts—to get a little removed from secular influences. Rotating judges – remove them from location that nominated them. Increase judicial pay. More transparency. Reform system of how judges are evaluated. Increase tenure. Make judges sign opinions individually to create accountability. Maybe integrate party discipline into judiciary? Alter pay structure from local government to central government (remove $$ from local power).
4. **Judicial Professionalism in China by Yu Xingzhong:** Judicial Professionalism may not be entirely necessary for administering justice in China. Occupations like accounting and medicine do require professionalism, but resolving civil disputes might not. (Chinese history of informal dispute resolution). ***Liberal Notions of Judicial Independence:*** Highly educated, Special qualifications, professional autonomy, public service, ethics, and obligation to a system of justice.
   1. ***Discourse on Judicial Professionalism in PRC:*** Generally, discourse in this area has centered around Western standards. One of the causes for the drive to increase judicial professionalism is that courts are beginning to hear more complicated and high stakes cases. ***Chief Judge Zhu*** issued several recommendations for professionalism: Ensuring that judges are selected in accordance with the Law on Judges (entrance exams, apprenticeship, and selecting higher level judges from the lower courts). Setting quotas (Ie decreasing the number of judges and increasing the number of assistants).
   2. ***Paths for Judicial Professionalism:*** (1) Idealistic: Embraces Western notions of judicial independence, sees them as universal. (2) Necessity: Judicial independence is necessary to full implement rule of law in China. (3) Elitist: Should be populated by well educated, elite people. (4) Pragmatic: CCP leaderships issues general laws, the judiciary needs to implement or interpret them.
   3. ***Challenges Facing Judicial Professionalism in China:***
      1. *1) Quality of judges and confidence of the people*: As economic reforms took off, more and more judges were required. To meet this demand, China began recruiting judges fresh out of the PLA or high school. Obviously, the quality and effectiveness of these judges in handling increasingly complex cases was very low. In turn, people began to lose faith (if any) in the judicial system and reverted to the age old process of petitioning.
      2. *2) Judicial Polarization*: The original concept of law and courts in Revolutionary China was that it was a tool to further the interests of the CCP. Thus, courts grew up under the control of the Party. However, as Mao exited and China became more liberal, the CCP did not loosen its grip on the judiciary. Thus, judges are still (to some degree) motivated by the ideology of the Party.
      3. *3) Administrationalization of the Judiciary*: Traditionally (and at the start of the PRC) there was no distinction between judges and administrators. Individual judges are always subject to the chief judge. Thus, individual judges lack the autonomy found among every judge in the American system, and Chinese judges become lazy as a result. Judges are treated as civil servants of the state in terms of pay, supervision, standards, etc.
      4. *4) Local Protectionism:* Because each level of court is essentially subject to the corresponding level of the government (People’s Congress), courts protect the interests of the locality in which they sit.
      5. *5) Judicial Populism:* Judges are expected to lend an ear to the people, attend popular meetings, play an active role in popular affairs, solve problems informally etc.
   4. ***Trends in the Development of the Judiciary:***
      1. *1) Political Pragmatism:* SPC accepts a dual responsibility: It is both a political institution that works with/for the NPC, and it is a policy institution, as the leader of the court system. The Court must balance these two roles.
      2. *2) Judicial Professionalism:* One court in Guangzho has taken a number of steps to make its practices more accessible.
      3. *3) Dispute Resolution:* SPC has mandated that courts cut down on the number of judges. When you combine this with (1) the increasing number of disputes and (2) the fact that senior judges must act as administrators of the court system, then you have a serious problem

1. **Mediation:** People’s mediation—the large majority are women. Judicial mediation—tries to broker deal outside litigation. 50% of all civil cases in the last 20 years have resolved by judicial mediation. How volitional is mediation? Some judges are required to mediate 70% of cases. Court system pushing for more judicial mediation (dispute resolution outside adjudication mode).
   1. ***Pros:*** (1) mediation use of consensus-building may result in more satisfaction; (2) easier to deal with politically contentious cases through mediation (pro or con?); (3) may reduce workload of the judiciary.
   2. ***Cons:***(1) may make judges more susceptible to improper influences; (2) judges in bureaucracy graded based on # cases overturned/appealed, so they may use mediation to lighten up dockets and pad stats; (3) judicial involvement in petition system and mediation may not help establish distinctiveness and independence of judicial branch.
      1. Some villagers don’t understand difference between lawyer, cop, and judge – undermines role of judiciary.
   3. People’s Mediation Committees **comprised of local citizens** who have been put in committees by state to carry on mediation; state more involved in mediation than it was in pre-PRC days – State has rules and statistics for mediation. Mediation seeks compromises and day-to-day solutions
      1. To extent that mediation relies on ***local norms/values***, modern society that is **less static may weaken mediator capacity** (although rural China has less movement and more texture for mediation); formal court system may also weaken mediator’s capacity
      2. Some peeps think mediation is a **relic of the past** and should not be part of a modern China; recently, pendulum has swung and peeps study mediation in law school – it may be good to resolve day-to-day disputes with an institution that has traditional resonance with Chinese people – esp in rural China.
   4. ***See “Understanding the Role of People’s Mediation in the Age of Globilization” – John S Mo:*** people’s mediation is supervised by local governments and local courts 🡪 makes it seem highly regulated and closely controlled. Semi official part of judiciary. People’s mediation is meant to be a buffer to ease social tensions at the grassroots level of society (safeguard and assurance for social stability and harmony). In consequence, it must be time-consuming and free of charge. Problem’s going forward include the **highly mobile nature of Chinese society**. Operational model must be modified to reflect changes in Chinese society.
2. **Complaint System / Petitioning** 
   1. The modern legal system doesn’t provide an effective service to the public, so petitioning has become a more useful and affordable channel for solving individual grievances and social conflict. **Petitioning is cheaper and faster than litigation**. Plus, people don’t trust the courts due to corruption. Petitioning is also the traditional practice. The system serves a dual function: (1) it allows ordinary people to protect their legal rights, and (2) it allows administrators to get firsthand information on societal conflict
      1. ***Why Do People Petition?*** (1) A widespread lack of faith in the courts due to a systematic lack of fair trials, (2) To take advantage, ironically, of the lack of an independent judicial system. Xinfang offers the opportunity to influence rulings through the back door.
   2. ***The Good and Bad:*** Petitioning has grown into massive phenomenon in China.
      1. ***The benefits of petitioning*** are (1) It is an **information collection resource**, (2) It helps higher level authorities **check the principal-agent problem and discipline abusive officials**, (3) It serves as **a tripwire**, alerting authorities to issues likely to create social destabilization, (4) It helps authorities **address rights violations**. It largely operates to attract leadership interest to selected cases.
      2. The ***downfalls of petitioning*** are (1) Renders the judicial process **vulnerable to manipulation**, (2) It **cannot handle** more than a small sampling of cases, (3) It has no **procedural safeguards**, (4) It runs a **high risk of corruption and nepotism**.
      3. ***How To Reform Petitioning:*** (1) Address the problem of officials being judged by how many petitions they address. Essentially, petitions distract officials from more productive activities. (2) Ultimately, the problem reflects a lack of alternative options in the system. To truly solve the problems presented with petitioning, China needs to funnel more of its disputes into a legal system, whether that centers around litigation or mediation.
   3. ***China’s Broken Petition Movement (class 13 p.* *27-end)***

**State Institutions (Class 14)**

1. **Hierarchy of Legal Norms:** Refers to what each institution of government has a legal right to do, what its jurisdiction is, and what the relative authority of each source of law is to the others. Is important for actors to know because (1) P**redictability**, in that one can predict how conflicts of law will be resolved. This lends to more economic investment and reliance. (2) **Legitimacy**, in that when there is certainty about the relation of laws to each other, the laws tend to be viewed as more legitimate.
   1. ***Problems for China in Implementing Hierarchy of Legal Norms:*** China has “too many rules and regulations at too many levels”—***proliferation of legal rules***. Almost too much law and too little legality. **Complicated because of the newness of the system, continuing problems with transparency, efforts by some actors enhance their power by acting beyond their formal mandates, and the shadow that the presence of the Party casts on formal state institutions**. Party control corrodes hierarchy of the law; judges are often viewed as telephone operators. Also, constitution holds a different place in China than U.S. Constitution. It is said to be the most important legal document, but it cannot be used for remedial purposes. States over-arching goals, but it is not used as ultimate authority.
      1. ***(Old Notes)*** (1) **The Party**. Even if there is a clear distinction about what each branch of government is supposed to do, the Party can act behind the scenes to get around this. (2) **The massive geography of the country**. Imposing legal norms in a vast country with over 1 billion people is a huge task.
   2. ***Complicated by key delegations of authority:*** NPC Standing Committee delegated authority to Supreme Court to interpret questions about laws passed by the NPC and its Standing Committee 🡪 SPC has issued thousands of judicial interpretations (guidance to lower courts) that are independent of any particular litigation and written in general terms. Some ppl argue SPC has taken advantage of this delegation. NPC, worried about not being able to act quickly enough, also authorized the State Council to establish a legal framework for economic reform, broadly defined, pursuant to which the State Council has issued many measures that might otherwise have been the subject of a law.
   3. The NPC and Standing Committee have the authority to enact legislation. The state council has the power to promulgate regs. Standing Committee has the authority to interpret laws. Provincial authorities may enact laws in so far as they do not conflict with national law. NPC Standing Committee is responsible for directing lower authorities to repeal laws.
      1. ***Hierarchy of Authority:*** Constitution > National Law > National Regulations > Local Law > Local Regulations
2. **State Institutions and How the Relate:**
   1. ***NPC and Legislation:*** China, is in theory, a unitary state. NPC is China’s highest organ of state power and has **sole authority** to amend the Constitution, enact and amend what are called **“basic statutes”** (major statutes meant to be comprehensive, covering broad areas of endeavor—e.g. criminal law, property law, laws of government institutions, etc.), ratify/abrogate treaties, approve state budget and plans for national economic and social development, elect/impeach top officials, and “alter or annul inappropriate decisions” of its Standing Committee (Alford p.7). Full NPC only meets **once a year**. Most law-making activity is conducting by its Standing Committee. In reality, NPC is controlled by Party.
      1. ***How Legislative Agenda Develops:*** The agenda is set mostly by the Party: They don’t control the manner and means, however, they generally affect the general five year legislative plan. Generally, the Party determines the priority of legislation. Varying from most important to moderate importance to least important. The plan for legislation is a carry-over from the notion of a planned economy, although it is still consistent with the way in which China is governed.
   2. ***Standing Committee:*** 155 members, meets bi-monthy and is authorized to interpret the Chinese constitution (though has NOT exercised this authority yet), pass laws other than basic laws, interprets the laws, and supervises the work of the other principal organs of government: the State Council, the Central Military Commission, the Supreme People’s Procurate, and the SPC. Over the years, it created **sub-committees** to review all laws promulgated. In practice, they receive some, not all. Occasionally issue interpretation. (Most basic laws come out of full NPC).
      1. (Old Notes) The part of the NPC that meets regularly (six times/yr). Deals with more day to day enactment of legislation, known as **“regular laws.”** Basic statutes are reserved for the meetings of the NPC, which occurs every two years. The NPC Standing Committee also takes on reports from lower levels of government, and reviews them to ensure that they are not inconsistent with National laws or the Constitution.
   3. ***State Council:*** Executive body, “the highest organ of State administration.” Carries out the laws enacted by the NPC and policies of the Party (in charge of implementation). Promulgates regulations, and has authority delegated to it by the NPC. As a practical matter, people generally look to the State council and the bureaucracy more so than the NPC, because (1) historical significance of Confucian bureaucrats and (2) As a practical matter, even the NPC standing committee meets twice a month. The State Council takes care of the day to day operations of the government.
      1. More regard for executive branch official bureaucracy in China than in US. Gov bureaucracy viewed as more prestigious (i.e., top graduates in China have aspired to join gov bureaucracy – history of ***merit-based selection*** w/Confucian entrance exams); history not fully determinative, but tradition of ‘benevolent’ authorities and executive bureaucracy, whereas in US federalist system reflects suspicion of big gov from the start.
   4. ***Supreme People’s Court:*** Interprets statutes, but does NOT interpret the Constitution. However, **agencies** have authority to interpret their own statutes.
      1. ***Court Update:***20-25% are enforcement actions (people coming back after having won but the outcome was not enforced). Court is cracking down hard on dissidents. Court got positive review vote from NPC.
      2. Courts do NOT have authority to invalidate whole law or body of regulation.
3. **Particular Issues:** NPC and legislation is very much influenced by the Party. Although, it is not the case that the NPC is the instrument of the Party. Rather, the Party exercises **agenda setting control**. Also, lots of intra-ministry rivalry, with each ministry making its own regulation. Can reduce collaboration. And ***funding*** for agencies often come from local government, which often prevents agency action against government. Delegation of authority from the peoples congress now on a more limited time period (5 year v. open ended).
   1. ***Legislation and Central-Regional Issues:*** Generally, Chinese legislation is very broad in its language. It does not feature the kind of regulation earmarking that is prominent in American legislation. (See e.g., specific exemptions for oil companies in Alaska in 2004 oil bill.). This poses a serious problem given that there is so much regional diversity and local variation. For example, a Clean Air Act probably needs to be applied differently in different parts of China. Each region needs different regulations to match its characteristics. In practice, this broad legislation is a form of federalism. Leaving mandates broad allows each local entity to fill in the gaps. But this obviously comes with a whole other host of problems.
   2. ***State Secrets:*** China has the power to classify any information that it deems necessary. Most Chinese academics take the view that judicial review standards in state secrets cases inadequately protect human rights (class 14 p. 22). New classification standards issued in March 2014, providing definitions and procedures lacking in their framework legislation. But it fails to define what “entities” can classify information, with one academic criticizing central SOE’s exercising this authority. Fuzzy line between state secrets and SOE’s trade secrets.
   3. ***Differences in Chinese Officialdom:*** Parental nature of the officials, who are held to almost strict liability (can be subject to criminal punishments for poor performance). Additionally, Chinese officials enjoy elevated status. Not as true in U.S.
4. **Administrative Litigation Law:** Created in 1989 in effect to allow citizens to bring certain actions against officialdom. Applies to both Chinese and foreigners.
   1. ***Limitations:*** Requires a specific act that is bad, NOT just a bad official. Basically this means that it will always be a **local** official. Also cannot sue party, and cannot sue state in areas of national defense or foreign affairs.
      1. Lawyers represent in only 17% of cases—**not a lot of money**, and lawyers may not want to **antagonize local officials**.
   2. ***Relief:*** Court can order an agency to provide compensation for infringing on lawful rights and interests of a citizen, annul an agency act, or order an agency to perform an act.
      1. **Enforcement is a challenge**—courts are not well respected and there is a history of local governments ignoring decisions.
   3. ***Update:*** this year the words “specific act” was taken out, but also provided additional examples. Will this allow citizens to call into question the whole regulatory system? Hard to tell. Maybe, but many that in implementation, it is still about the specific act. Currently, it is NOT about a pattern of behavior.
   4. **Pros:** Legislation focuses on delivery of services and interface ***at local level*** – where majority of people interact with government. Even if ALL doesn’t always work/not always enforced, in theory there is some consequence for agency conduct – so **step towards rule of law/aura of legality** (law has some meaning, about 130k cases a year). No mediation is allowed—**gives more chance for the plaintiff**. Signaling device for senior leaders. Perhaps prevents local abuse?
   5. **Cons:** Local courts still are funded by local officials. Large number of cases settle or are withdrawn (Changed behavior? Threats? Judicial reluctance?) Problems may be more systemic and addressing a specific official does NOT get at root of problem (higher-level officials probably not subject to these suits).Way for Beijing to make itself look good—motivation to ensure central power? Mechanism by which higher officials police lower officials (not sure this is that bad?). Court has enforcement limitations (doesn’t have much power).

**Emergence of the Legal Profession (Class 15 & 16)**

1. **U.S. Perspective:**
   1. ***Why lawyers in the U.S.?*** Benefits of adversarial system. Provides rulemaking through litigation. Addresses individualized problems that arise. And without lawyers, there would be increased regulation. Lawyers are supposed to be autonomous, both form state and from clients.
   2. ***How do we regulate lawyers?*** Bar. Malpractice lawsuits. Court sanctions (benefit of judiciary regulation is that it is independent of political branch and profession).
2. **Chinese Legal Profession:** 
   1. ***Imperial China:*** Lawyers discouraged 🡪 “litigation trickster.” Frowned upon to instigate or be involved w/much litigation. Lawyering was NOT a carved out, state-approved profession, but some people were willing to offer legal advice.
   2. ***Early PRC:*** Generally isolated to major commercial centers. Early in the PRC (‘50’s), China recognized that some legal profession was needed. Led to two basic tracks 🡪 lawyers and “grass-roots” lawyers (glorified paralegals) that worked in countryside.
      1. ***Cultural Revolution:*** law schools closed and profession dismantled.
   3. ***1980’s:***Post CR, laid out plan to redevelop country – why legal profession? Wanted to enter international economy and needed adequate representation. Increase global internal standing and respect. In part, it was a reaction against the personal rule of the CR. China viewed legal profession as a check against arbitrariness. China also was attempting to emulate successful Western powers like U.S. who had a robust legal profession. And it was a means for the government to establish legitimacy. Within China, the increasing use of market forces required lawyers to handle transactions. Both urban and rural population needed means of redress, and the changing society made community-known mediator less effective. This was exacerbated by the flood of social problems that came with opening up of society.
      1. ***Now, like ~250k lawyers***. Largest firm has 3,200 lawyers. You don’t have to study law to take the Chinese bar, but you do have to be a Chinese national.
   4. ***Principle regulatory means for lawyers*:**Yearly renewal of license. This is an important way for the Party to control political lawyers. Lawyers law—306 & 307. Like bar or court rules. Used by Party to interrogate and hassle lawyers and serves as a strong deterrent to defense lawyers in investigating and using witnesses.
      1. Legal system is **dependent upon government**. Politics and relationships shape lawyer behavior. **Access traded off w/ independence**.
      2. China’s Justice Ministry in 2012 issued a requirement that new lawyers and those reapplying for licenses **swear an oath of loyalty to the Communist Party**, another step in reigning lawyers who challenge political/legal systems by which the Party maintains power. **Party’s crackdown on rights lawyers have contributed to rollback of legal reforms and undermine efforts to strengthen rule of law**. Ability of some lawyers to practice have been curtailed, some have been punished/beaten/tortured, especially those championing issues of civil rights/political expression. Justice Ministry explains goal of oath is to ensure core values of “loyalty, devotion to the people, justice and probity” and to “effectively improve the ideological and political quality, professional ethics and skills of lawyers.”
   5. ***Alford Article on Legal Professionalism:*** Emergence of legal profession in China has led to unwarranted assumptions, that Chinese legal profession will be like Americas, and it will lead toward rule of law and market economy. This leads to unwarranted expectations as to manner of change in China and reinforces the inflated sense America has of its own profession. What’s wrong with this picture? (1) As a simple descriptive matter, the role of the profession, if not of a legal development in China more generally, has been **significantly overstated** to date. (2) The ***character*** of the Chinese legal profession has been misunderstood **🡪** leads to bad assessment as to what profession will do for rule of law. (3) No **empirical underpinnings** to justify American hopes of change.
      1. Resort to law/lawyers remains very much the EXCEPTION in China in both big and small matters. The Party still remains above the State’s law, both formally and practically. China remains fundamentally an **administrative state with administrative recourse**. Lawyers have little, if any, part to play in vital avenues through which tens of millions of individuals routinely seek redress—letters and visits process, extrajudicial mediation, rice roots legal works, and other informal processes. And **only 1/10 litigants uses legal counsel**.
      2. Rise of Chinese bar has been accompanied with **increasing corruption**. Many lawyers feel it is ***necessary*** to stay competitive. Also, it is foolish to underestimate either the CCP’s desire to retain power or the self-interest of those who are benefiting from the manner in which power is now held and exercised. Party/state is still heavily involved in the professional lives of lawyers. Some in the Chinese bar, and perhaps most especially elite business practitioners in the capital, have struck deal with party/state, excepting the good life materially and prestige/security in return for foregoing attributes generally associated with legal professionalism in liberal democratic states and for acquiescing in the role of the CP has accorded itself in Chinese political/legal life.
   6. ***Human Rights Lawyers – Teng Biao:*** No judicial independence. Bar controlled by the government. Many law firms refuse to let their lawyers take sensitive cases.
      1. ***Oppression 1 – Deprivation of Legal Practice:*** Annual registration renewal. Halt performance if lawyer refuses to give oath. Some lawyers disbarred if involved in too many civil rights cases. Government will refuse to issue a certificate, even when lawyer passed bar. Detain license.
      2. ***Oppression 2 – Kidnap and Enforce Disappearance***
      3. ***Oppression 3 – Assault and Torture:*** by government, police, in detention, or by hired hooligans.
      4. ***Oppression 5 – Sentence to Prison:*** for perjury or state subversion or cult crimes or for disturbing public order (easy to accuse).
      5. ***Oppression 6 – Other harassment and Punishments:*** deprivation of right to travel abroad or return home. Judicial detention. Forced mental hospital detention. Collective punishment (punishing family).
      6. ***Trends in Human Rights Movement:*** (1) Organization. Without organization (social media). Decentralized – no leader, charter, or fixed membership. (2) Taking movement into the street. (3) Politicization.
   7. ***Position of China towards foreign lawyers?*** Foreign lawyers NOT initially admitted to practice and could not appear in court or give official opinion. However, they are allowed to **counsel on foreign law** (foreign transactions); later, **allowed to advise about general landscape/picture**, e.g. business climate. It was viewed as a means to facilitate global commerce and attract foreign investment.
      1. There has been a ***pushback*** by Chinese law firms and Chinese bar 🡪 in competition w/ U.S. law firms. Former argued that U.S. firms were crossing boundary as to what they could do. What does it mean to “talk about legal environment”?
   8. ***Grass Roots Lawyers (see Alford, “Second lawyers, first principles” p.6 wk 15-16)***
      1. **Two lines:** professionals & para-professionals. In the last 50 years, there has been a fluxuating policy of gov. on whether to increase/decrease the later group 🡪 ***grassroots lawyers***.
         1. **Pros:** know local population; increases access to representation; hard to get professionals out to rural countryside. “..vast swaths of Chinese society lack access to lawyers.” In the absence of a bar accessible to rural Chinese or willing to take the cases of the urban underclass, rice-roots legal workers serve and ***an important function***. Provide services to **millions of citizens** (p. 8). WA: need to move beyond undifferentiated whole.
         2. **Cons:** not fully competent, well-trained, or regulated. It is a model unlike the West, and China wants to have a serious legal profession (or be viewed as having a serious legal profession). Official upgrading of grassroots lawyers to formal status and institution national qualifying test was terminated 🡪 argued rice-roots legal workers were a ***relic of the past***that ill-served a China wishing to demonstrate progress towards a rule of law and the establishment of a world-class legal services market (relic of a time when China had far less human capital and now at best are transitional figures). Others argued that it was difficult for public to distinguish between lawyers and rice-roots legal workers 🡪 argue ppl are being misled and their trust betrayed.
      2. Last year or so, gov. has limited representation by grassroots in court. Recently, gov. said that they cannot represent client unless approved by local authorities. The measure was supposed to prevent incompetent representation, but also prevents lawyers from going after local government.
   9. ***Challenges Facing Legal Profession (p. 14+)***
      1. **Constraints faced due to the structure of the judicial system**—PRC judicial system does NOT ensure the independence of judges.
      2. **Case filing system**—stumbling block for lawyers is the ability to get their case heard, due to the existence of the “filing division” in each people’s court. Gives judges ***substantial discretion***to accept/reject case w/o affording any access or accountability to the public.
      3. **Lack of administrative autonomy for lawyers**—lawyers, law firms and bar associations are subject to the administration and supervision of the local judicial bureau.
      4. **Constraints faced by criminal lawyers**—(most significant constraints). First, gap between rights given to defense lawyers under the law and the rights they actually enjoy. Second, there continues to be inconsistencies between Criminal Procedure law and the Lawyers law. Difficulty getting access to case materials. Only lawyers who are able to “befriend” the police or with good connections to prosecutorial authorities have a better chance of accessing case documents and meeting suspects. 🡪 lawyer might not take “sensitive” cases to ***preserve these relationships***.
3. **FCPA – Foreign Corruption Practices Act:** important for clients and lawyers, as U.S. corporations want to avoid liability. Really picked up steam in the last 4 years. Less enforced in the 90’s. Several other countries (like UK) have passed similar anti-bribery legislation. Implicates ppl at **lots of different levels**. Forces companies to develop large internal compliance programs. ***Sweeping statute***. Now being enforced very aggressively. Normally, you can hire a Chinese investigator to determine who is gov. official, but China has recently cracked down strongly against private investigator firms. Complicates relationship w/ international players.
   1. ***Requirements of FCPA?* Two major threads:** (1) Questionable payments (bribes) & (2) Correct bookkeeping/records. For (1), it is usually some type of payment or promise of payment in order (usually) to get ***favorable business opportunities***. This is problematic for interactions in China b/c Chinese officials are laced throughout all business sectors. How do you know who is gov. or not? **Huge grey area** b/c so much connection to gov. Law is ***“knew or should have known.”*** Also, can run into problems with **normal/customary** Chinese business practices. Paying for celebrations or executive MBA courses? You CAN get ***pre-clearance*** by U.S. gov. in some instances, but resists being pinned down on specifics. Additionally, there is NOT a lot of case law b/c of the large incentive to settle 🡪 makes lines unclear.

**Social Media and the Law (Class 17)**

1. **David Wertime – Social Media in China**: Social media used to be simple(r). Acts in China has ***large public square****.*
   1. ***Weibo:*** Anything you write is public. Ends up creating a lot of ad hoc discussion forums. Allows **local story to go national**. Breaks down local censorship of embarrassing event.
   2. ***Censorship on its own didn’t seem to work for Chinese Gov:*** Image/ideas can spread quickly. Particularly true for influential/famous users.
2. **Benjamin Liebman, “Changing Media, Changing Courts”:** Media and courts, through a tug of war, seek to professionalize one another. Media reports on courts. Courts put pressure on media to report correctly. No, Party tries to exert control over both instead of just refereeing.
   1. ***Media spotlight leads to ad hoc justices 🡪 “media judgment”***. SPC has echoed view of media being an important check on the system – “media supervision of the courts is helping to ensure just and fair outcomes.”
      1. **Problem:** if courts aren’t responsive = immune from public. If courts ***are*** responsive = abdicating authority to mob.
   2. ***Media is a sort of roving band of vigilantes that are right only sometimes:*** Gov officials stopped being showier, in response, as to avoid attention. Gov. set up private reporting channels on officials. Many public interest lawyers say favorable media coverage is the MOST important factor leading to a successful lawsuit. Works against efforts to make gov. more transparent.
      1. **Problems:** Gender bias. Disregard for the facts. Tilt towards negative/sensational. And journals subject to **corruption/bias**. Often use ***informal pressure*** 🡪 telephone judges to express interest in a case even when the journalist has no intention of actually reporting on it—alters case outcomes.
      2. Media influence MOST apparent in criminal cases. Defense lawyers avoid media.
   3. ***Social media is now less of a force***—less serious stories bubbling to the surface. Why? Microblogging from the court has been shut down. Lawyers used to rally support through media. But gov. has gone after lawyers. However, it is **increasingly difficult** to block all reporting on a particular case or top—in particular when the ban is imposed by local or provincial authorities.
   4. ***Benefits*:** Judges state that better access to information makes it easier for them to resist pressure from the CCP officials and others b/c they can respond with improved legal arguments 🡪 growth of the internet appears to encourage **greater innovation and standardization of the law across China**. Also, media also serves as a ***fact-finder***. Party-state superiors often treat media accounts as fact.
      1. ***Sun Zhigang Case:*** 27 yr old migrant worker beaten to death at a detention center for migrant workers. Media firestorm forced authorities to investigate Sun’s murder and punish those responsible. ALSO, led to ***fundamental*** changes to detention system.
3. **Ya-Wen Lei & Danial Xiaodan Zhou, “Constructing Legality…in China’s Networked Public Sphere” 🡪 *Citizens construct legality together.*** 
   1. ***Iceberg theory:*** citizens talk about law and policy together. Tip = concrete experiences that may be negative, but this doesn’t undermine the bulk of the iceberg which is a general positive view of legality.
   2. ***Schism between how authorities talk about law and how citizens talk about law:*** Former focuses on **narrow, bad actors**. Latter focuses on **big issues, normative values**.
   3. ***Informed Disenchantment:*** In addition to personal experience and state propaganda, **public interactions** also shape the construction of legality **🡪** diffusion of info and views in the networked public sphere spreads “informed disenchantment” with the law even to ppl w/o personal experiences with the law. Shape of the iceberg may change as more ppl have negative experiences.
4. **Misc.** 
   1. ***How honest/truthful is the media?*** Self-selects towards negative and outspoken. Also, identity issues of social users 🡪 accounts paid for by the gov. or private corporations? Authenticity of sentiment? Incentive on social media to be **loud/extreme**. Do these ppl really feel this way?
      1. ***Makes social media fault bulwark against gov.***
   2. ***Xi Jinping:*** Since coming to power, there has been a decline in political/public internet chatter. The gov. has **defanged Weibo** 🡪 went after the ppl behind the posts. Had real chilling effect. Also, gov. began to add legal tools to reassert control over cyberspace 🡪 **“online space” the same as “public space” for criminal prosecution**. Huge incentives against anti-gov. speech. Gov. created culture of ***fear*** to tamp down on alternative narrative against the party line. However, Gov. **needs internet to see into public sentiment**. But also needs to fill void of censorship 🡪 leads to silly stuff that looks like grass roots but pushes real content down.
      1. **All that being said, social media still casts a long shadow** – Anyone can still publish anything instantly. Does create transparency. Does create nation-wide minority communities of interest. Makes lurkers feel not alone. “Know who comrades are.” Social media platforms are constantly being repurposed.

**Law and Economic Development**

1. **Introduction: David Dollar**
   1. 67% of the Chinese economy is private. Under Mao = 0%.
   2. ***Three Stages of Development***
      1. (1) **Agriculture Sector** – breaks up land for private use rights. Shift from **collective to private** 🡪 leads to 20% growth.
      2. (2) **Opening Up to Foreign Direct Investment**. Began with labor intensive industries—low wages, large human capital. Now, greater percentage of value ofe exports come domestically from China.
      3. (3) **Legalized Domestic Private Sector**
   3. ***New Reforms/Change:*** China is the biggest exporter. Had to grow faster than world trade, increase share. Exports almost completely manufacturing. Need to shift towards domestic services.
   4. ***Nature of Private Sector:*** Today, China has poor property rights relative to its development. “Beijing Consensus” 🡪 Chinas state capitalism is super model? SOE is service and extraction. Less productive than the private firms – drag on the economy.
      1. 50% of Chinese economy goes to investment. Problem is diminishing marginal returns and excess capacity. Ex. 1/5 of apartments are empty. Little to no return on investment now.
      2. **Solution:** reduce investment. Reign in debt. Replace investment w/ consumption. Exports only model doesn’t work b/c there is no more room in world economy.
   5. ***Reform Agenda:*** (1) Repressed financial system; (2) Increase consumption; (3) Change incentives for local gov.
   6. ***Problem with Population Age:***Workforce is declining. Makes economic shifts more difficult. $$ to retrain as opposed to training new generation.
   7. ***No Authoritative Country has reached 40% of U.S. GDP:*** Authoritarian regimes grow faster at low income levels, but it switches the higher you go. Growth rate drops sharply and you have diminishing returns.
   8. ***See Kevin Rudd notes on U.S./China mistrust and Xi Xinping*** (wants to maintain central political control in context of increasingly vibrant private sector. Anti-corruption efforts are means to ensure long-term political legitimacy and to consolidate power within the Party).
2. **China’s Aspirations:** Official line is ***peace-loving and non-aggressive****.* Haha. Though they have shown aggression in the region (S. China seas). Also, view in the China that U.S. is trying to ***restrain***Chinese growth/prosperity. Ex. IMF Bank (U.S. barred China becoming a member).
3. **Posner—“Creating a Legal Framework for Economic Development” (Rights Hypothesis):** In order to ***sustain economic growth***, a state needs a stable legal system which **protects contracting and property rights**. Otherwise, investors would lack faith in getting a reasonable return on their investment, and would not take the risk.
   1. ***Why law for economic development?*** Most effective way. Contract and property law. Law encourages investment 🡪 predictability, stability. **Increases confidence**. Lowers transaction costs. Encourages trade and economic specialization. Need confidence of ownership to engage in exchange. Posner also probably believes ultimate rationale is that property is a fundamental right of freedom (Lockean idea), distinguished from the State. 🡪 “Washington Consensus.”
      1. Posner’s theory is NOT about politics or distribution. Just about growing the economic pie.
   2. ***Posner:*** argues that a country with a developing legal system should adopt bright line rules instead of standards, such that a ***less sophisticated judiciary can apply those rules.*** Standards (like “due care” or “reasonable person”) are very difficult to apply. They require a high level of legal sophistication. So instead of standards, developing countries should promulgate more narrow and straightforward rules (**“application of rules places few demands on the time and the competence of the judges and is therefore both cheaper and more likely to be accurate”**). Rules also make the judiciary ***more easy to monitor*** (prevents bribery, sheer incompetence etc.). Contract law and property rights are a way of setting up a system that **maximizes economic efficiency**. This includes professional, independent judges, lawyers, and an enforcement system willing to carry out the judge’s orders. Some countries have found other ways of creating a system to foster economic growth. (Threat of violence, family alliances, etc) While these methods are far from ideal – they do work to a certain extent. Developing countries should also consider importing Western commercial rules. (UCC). The UCC has proven immensely successful in encouraging economic activity, and many of its provisions are rule-like and easy to apply. However, the problem is that the UCC is arguably successfully because it reflected trade practices in America and merely codified them. So its success in a developing country will depend, in part, on the degree to which it reflects the already established commercial practices of that state.
   3. ***Economic Rights v. Civil Rights:*** Note that Posner’s theory seems to suggest that economic rights can be **separated from** civil rights, or at least **developed before** civil rights. Civil rights, like freedom of speech and political participation, require a certain level of education and economic success, which can only be attained through contract and property rights. On the other hand, Senn argues that civil liberties are part of the building block, along with contract/property. Civil liberties require officials to pay attention to serious social problems. For example, a country with a free press has never had a famine.
4. **Does China Fit into the Rights Hypothesis?**
   1. ***Explanations:***
      1. 1) Although the courts do not enforce those rights, perhaps they are enforced elsewhere: (Social relationships, business networks). Can have informal institutions that can ***substitute*** for rules of property law. Moreover, given the prevalence of mediation as a dispute resolution, hard and fast contract rules might not be necessary.
         1. Also, even to maintain Posner’s basic judiciary, it might require more civil liberties early on. Who will check judges and ensure consistent enforcement? Might need a more robust system early. Perhaps you need both at beginning. Economic development AND human development.
      2. 2) The rights hypothesis is simply wrong
      3. 3) Distinguish between a legal system that protects private parties’ contract rights, and one that protects property rights vis a vis the state. China has extra legal enforcement mechanisms for contract disputes (informal mediation, personal relationships, familial ties), so a formal contract law system was not necessary for economy growth. But a legal system that protects investors from arbitrary takings by the state is necessary, and
      4. 5) Coming out of the Cultural Revolution, people were eager to cooperate and play by rules set by the state, in order to avoid another disaster. However, as the memories of the Cultural Revolution fade, its ability to maintain consensus and cooperation among economic actors also fades.
5. **Land Reform and Takings:**
   1. ***The Nature of Land Ownership:***
      1. ***Initial points:*** Property is underpinning society more broadly. Valued NOT just for economics, but **helps create community**. In China, there was a very sophisticated system of property law early on that mad it **very difficult to alienate property** 🡪 preserved community.
         1. ***Chinese communists*** – uses peasant inability to access land as spark of revolution. Increased access to land by poor/women. Realized fragmented land is inefficient and took land back and consolidated into communes.
      2. ***Two Categories of Land*:** (1) Urban Land – owned by the state; (2) Suburban or Rural land – owned by the **collective**, NOT the state.
      3. ***Agricultural Land:*** As China begins to break up the communes in the 1980’s, they create new system. Collectives retain ownership of the land, but leases portions of the land to individual families for up to 30 years. In exchange, the lessee pays back a percentage to the commune. Thus, the collective and the individual have a **shared interest** in maximizing the land’s profitability. The contract between the collective and the individual stipulates that the land will be used for agricultural purposes. However, as urban areas encroach upon rural areas, a serious tension is revealed. A collective (or a lessee) cannot simply sell off the land for urban uses. The ***only method*** of changing the land use is by the state taking the land.
         1. **Household Responsibility System (HRS):** Family agrees to manage part of land for a fee. Designed to spur productivity. Considered great success. Spurs growth in the countryside.
      4. ***Urban Land:*** The state owns urban land. The state leases land to industries, developers etc. for use. (Generally for a long term period 50+ years). *In industry*: The land belongs to the state, which leases to the industry. The industry, however, owns everything else – including the factory, machinery, etc.
         1. Tried to apply HRS in urban environment. Began to close down less efficient SoC and allow ppl to buy apartment/house, but NOT land. Effort by China to create legal framework to encourage urban development/renewal.
         2. In cities, allowed people to take mortgages. Leads to explosion of real estate 🡪 ghost cities.
         3. China is trying to stay true to communist ideals of land belonging to the people, but at the same time reap economic benefits of private ownership. Institute **use rights** (not very destabilizing that they don’t own the land forever).
      5. ***1980’s/90’s:*** Allowed developers to come in. Not own the land, but increases productivity. What if it is rural land owned by collectivity? Collectives were looking for $$, needed to produce more revenue, so began to sell use rights. **Problem:** who speaks for collective? Who derives benefits?
         1. Land has greater value under this model, but still NOT alienable 🡪 **enormous temptation** for authorities representing collectives to displace rural population use for commercial use.
      6. ***Trying to have it both ways:*** sell/transfer use rights (getting benefits of market), but refusing to sell land (maintaining political position). Clever compromise? Problems occur in the 80’s/90’s. State doesn’t want to be encumbered by owning everything – police departments, etc.
         1. Rural gov. gets a lot of $$ through real estate development.
         2. Some rural citizens extract a lot of $ from developments. Some rural citizens **don’t mind** being displaced, if it is an upgrade. Depends on who you ask. Older generation has more sense of community loss. But many ppl not happy with what they end up getting.
         3. ***Cultural loss*** – many old buildings destroyed. Whole communities fragmented.
         4. Real estate principle outlet for investment 🡪 lead to ghost cities.
      7. ***Property Law:*** Gives the same property right guarantees to state, group, and privately owned property. Only addresses rural farmers briefly: Once a farmer-lessee runs out their 30 year lease, they may continue operating on the land. (Unclear whether this means indefinitely or instead that they can execute a new lease.
   2. ***Takings and Compensation:*** The state may expropriate land for the “public interest” and must provide fair compensation to the previous owner(s). The **method of determining compensation** for takings of agricultural land is the land’s profit over the last several years. It does NOT consider the land’s market value, or its resale value for urban use. Thus parties are **frequently undercompensated**, while the state and urban developer reap a windfall. Core issues (1) how do you define public interest in a socialist country, (2) how do you determine market value in a socialist country?
      1. **Problem:** ***how do you determine fair value of what you had?*** Rural 🡪 used certain formula. Value added to the property after was typically much larger than compensation, even w/ ppl gaming system (marrying, divorcing, etc.).
      2. **Problem:** ***how do you define “public use”?*** Phrase is NOT defined in the major documents/constitution. Local gov. routinely expropriate collectively-owned land and then promptly transfer use rights in that land to private developers or joint private-public for-profit ventures
   3. ***Problems with Rural Land Ownership:***
      1. ***(1) Insecurity of Land Use Rights:*** The possibility of the government taking the land at any time hangs over the peasants’ heads. (Like driving a car on an icy road – you never know when you’ll lose it). Along with this, the compensation guaranteed under the constitution is not always given. For one, compensation depends on the agricultural production of the land in the past few years, so a bad harvest before a taking could seriously undercompensate the peasant. The value of a piece of expropriated farm land to a developer might be 5 million, however the compensation is determined based on how productive the land has been agriculturally. Thus a lessee might only be given 20,000 dollars. Second, the state might simply not compensate the peasant at all. \*\*\* Land may only be requisitioned for “public interest.” But because China does not have a legal system that defines, through case law, what is meant by this term, officials can essentially use it arbitrarily. A person must be given market value for a taking. There is no neutral, authoritative third party to enforce the contracts between peasant and collective. Because of the disparity in power, the collective can force new terms onto the peasant after the agreement is signed.
      2. ***(2) Undervaluation of Rural Land:*** Two factors combine to make rural land undervalued in the market.
         1. **The Hybrid System:** State ownership of land, but private ownership of other means of production. The lack of land ownership does not harm industry, because they can lease land long enough to recoup their capital investment. However, rural land is affected much more negatively by this problem. Unlike factory owners, a peasant’s land is their primary means of production. Moreover, leased farm land must be used for agricultural purposes for the remainder of the lease period. Thus, leased farm land is less alienable.
         2. **The Dualist System:** China treats farmland different from urban land, Takings problem: Should compensation depend on the value of the land but for the taking? Or should it depend on the new value given to the land by the taking? (Taking certainly increases the land’s value)
   4. ***Political Pressures:*** Reforms of property rights (to guarantee property rights vis a vis the government for the rising middle class) have put Chinese leadership in a difficult position between left and right. Those on the left scoff at the notion of protecting private property in a self proclaimed socialist state. Those on the right (as well as the middle class) argue that protection of private property is necessary.
6. **Domestic Economy and State-Owned Enterprises (#SOE)**
   1. ***Corporate Governance:*** Definitional question 🡪 what is a SOE? Really murky category. Tough to pin down.
      1. Some SOE have divisions/arms that are listed on foreign stock exchanges and have very little ownership, but are ***functionally*** SOE.
      2. Some ppl equate SOE w/ **“majority owned,”** but many companies have significant ownership of sub-national areas of government.
      3. **“Private” companies that still have significant ownership** by government. Often goes by, or is insulated through, several layers of intermediaries.
      4. Even private companies need to remain ***close to the gov.*** ensure **access/benefits**.
         1. Percentage of SOE occupation of economy is thus highly debated. Range from 25%-60%. David Dollar: ~1/3 of economy. WA: who really knows? It is ***major though***, especially in key enterprises—finance, telecomm, aviation. Also in hotels, restaurants, salt, etc.
   2. ***History:*** Conditions of the CR 🡪 incredibly poor. Barely above starvation. Foreign and domestic economy totally segregated. Began experimentation w/ household registration system. Slowly began moving out of planned economy in the 80’s.
      1. **Profound changes:** mid/late ‘90’s. Shed existing responsibilities of gov. in SOE 🡪 assigning housing, social welfare benefits, approving marriages, etc.
         1. China knew they wouldn’t attract foreign investment if they did not reduce state ownership.
         2. **Policy:** hold onto big industries, let go of small. This is misunderstood in the West. Smaller companies farmed out/sold to lower levels of ***government (let go by central government)***. Maintain “state champions” in core, strategic industries. Let go of those that desperately needed foreign investment.
      2. **Change driven by policy and need**. Amended Constitution (blueprint, NOT actionable document) to say respect for legally acquired private property. Began to ***unify rules*** (contract law) for foreign and domestic economy (used to be distinct). Rolled out some IP law. Began to create **civil law code**. Not able to achieve it, but ended up with “general principles” of civil code. Began to drop fixed prices. Developed bankruptcy law. Moved toward credit card economy. Developed legal framework for corporate governance (NOT a lot of user input 🡪 developed by engineer/politicians).
         1. This the early take-off stage in the legal space. Lots of experimentation.
      3. **Rationale:** why do you we care about corporate governance? Stability, efficiency, responsiveness to shareholders, predictability, transparency, responsibility, fairness. ***Rules governing***.
      4. **Complications with SOE’s?** It is probably easier in purely private company to replace personnel. Often times SOE’s have ***socially connected leadership***, which makes it difficult to get rid of them. Greater issues of ***protecting minority shareholder***. Also, State will often have ***different goals*** than shareholder maximization. E.g. employment over profit. Additionally, there is ***decreased transparency***.
   3. ***Structure of SOE’s (Lin & Milhaupt article cls.18 p.16):*** Board sits at the Top. SASAC – holding company. Owns majority share (owns shares “on behalf of Chinese people). Equivalent to ministry. Below that, there are provincial/lower-level counter-parts (see article).
      1. Appointments/promotions driven, in part, by ***Party loyalty***. More emphasis on expertise in purely private sector. Doesn’t mean SOE CEO’s don’t have expertise, just that politics is another consideration.
      2. “But the most important long-term impact of legal reform may lie not in bringing a greater market orientation to the state sector but in creating an institutional environment in which firms without access to the party-state network can raise capital and grow, ultimately diminishing the importance of the national champions in the Chinese economy.”
   4. ***Challenges of SOE’s:*** Appointment of company officers influenced by politics. Institutional loyalty complicates priorities. Monopoly problems more intense 🡪 makes it really hard for innovation and breaking in (**regulated = regulator**). Transparency problems, especially with state secrecy laws. Conflicts of interest. ***Corruption***, especially in light of meager salaries. Long periods of time w/ no dividends. Paid nothing to Chinese treasury. Lots of SOE’s DON’T have corporate boards 🡪 no pretext of regulation driven. Chinese gov. doesn’t recognize distinction between SOE benefit and national security 🡪 **steals U.S. corporate secrets and gives them to SOE’s**. Blocks info going to SOE as “State Secrets.” Harder for private companies in China to get financing from state-owned banks 🡪 has led to unreliable “shadow banking.” Issues with the FCPA – U.S. defines broadly who is “government official.” Problem with U.S. national security when Chinese SOE invests in U.S. companies. This also occurs when it the Chinese company is not an SOE, but a private company under strong state influence.
   5. ***Proposals to Reform/Change Problems of SOEs:*** Come from both w/in and outside China.
      1. **2013 3rd Party Plennum:** More “mixed ownership” 🡪 cleanup companies to create foreign investment, which will lead to better technologies, management practices, efficient, etc.
   6. ***Response to Conventional Wisdom of Economic Development Tied to Legal Development (property/contract and adjudication):*** How do you explain China? Doesn’t seem to fit model?
      1. **Dollar counter:** state-controlled works well in take-off state up to middle income, but need different model to reach higher levels of wealth. Early stages you can rely on other methods to protect property rights (custom/mediation). Higher stages of growth 🡪 more complex. To compete on a global stage requires a longer investment model and greater legal protections.

**#Food Safety and Consumer Protection**

1. **Dr. Yuanyuan Shen Lecture:** U.S. inspects ~2% of food imports. Historically, China was associated with food shortage rather than food safety. Under command controlled economy, NO incentive to improve quality, but also no incentive to cheat.
   1. China’s food control is both vertical and horizontal. Shared responsibility of food control. Lower levels report to and are responsible to central gov.
      1. Can lead to fragmentation. Can only be effective if joint effort.
   2. Conflict of interest in Consumer Protection agency b/c they are ***funded by the government***. Hard for them to be independent, especially when so many enterprises are state-owned.
2. **Ching-Fu Lecture**
   1. ***Food safety is connected w/many other problems*** – weak tort law system, non-independent judiciary, weak civil society, fragmented gov., etc.
   2. ***Compared to U.S., China food recalls are common*** – 48 million sick every year. Also fragmented between FDA & USDA. Ex. 6-7 federal agencies involved in regulating sandwich.
   3. ***Over 16% of U.S. food is imported. Major differences with China:*** greater deterrence ability, stronger civil society, potential reputational costs w/ larger players in market structure, and greater transparency reinforces accountability.
   4. ***Land is overused/riddled with pesticides*** 🡪 may NOT be possible to grow health food in China. U.S. “organic” has issues as well, incentives to cheat.
   5. ***No check on gov. from independent judiciary*** – Central gov. can act more quickly/efficiently? But lose preventative oversight.
3. **Highlights from Reading**
   1. Chinese food product imports to the U.S. are continuing to rise, but inspections in both China and U.S. are NOT keeping pace, posing a growing danger to customers (p.2).
   2. Organic farming in China is a hush-hush affair 🡪 cleanest, safest products are largely channeled to the ***rich and politically connected***. Many of the nation’s best food companies don’t promote or advertise. They don’t want public to know that their limited supply is to the Communist Party officials, dining halls reserved for top athletes, foreign diplomats, and other elites (p.4). The continued existence of *tegong*, or special supply, is treated with secrecy b/c of **public resentment over the privileges of elite class**.
   3. Consumer rights is one of the few areas in which individuals can triumph and use the law to their advantage (p.6).
   4. ***China amends consumer rights law*** – requires business owners to obtain consumer’s consent and explicitly explain the purpose, form and scope of info use before collecting and using customers’ personal information (p.8). Revised law endorses higher compensation for consumers and imposes heavier fines.
   5. Administrative bodies that regulate food are ***often underfunded*** (p.12). Problems of fragmentation of enforcement were worsened by the regulator and regulated being ***tied together economically*** 🡪 fragmentation in power used NOT to promote checks and balances, but rather for the protection of each department’s vested business interests in the enterprises it was charged with regulating (13). These problems were aggravated by tension between central and local gov 🡪 **“local protectionism.”**
   6. China’s Food Safeguard System Today (16). State-level food safety commission set up, seen as a breakthrough toward a more centralized regulatory structure (overcome fragmentation).
   7. ***Challenges China Faces in Improvement*** (25). Extraordinary that China developed set of basic rules and institutions for food safety and quality controls in a relatively short time period. Inadequacy of law/regulations. Deep-rooted structural problems (ties between regulated and regulator). Too many farmers overuse fertilizers, antibiotics and various highly toxic pesticides b/c of shortsightedness or ignorance.
   8. ***Most Chinese believe food safety system is corrupt*** (29). People’s awareness – (1) proliferation and patronage of foreign import food stores. (2) Avoiding street food and cheaper restaurants. (3) Hong Kong/other countries limit amount of baby formula that can be purchased/carried out of country. (4) Proliferation of balcony gardens.

**China and the #WTO**

1. **Introductory Thoughts on China’s Accession:** (1) Go back to the differences between Lord Macartney and the Qing Emperor about what China’s role in trade should be. (Stark disagreements). Skip ahead to China’s policies and views before the WTO accession. **In both cases**, China’s views were very similar (we don’t want foreigners to dictate trade terms to us etc.), and ***China very different than order entering into***. (2) **Both cases**, leads to profound questioning of ***what does it mean to be Chinese?*** What are the “core Chinese values” that the country wishes to maintain? What is it that we actually want to preserve? (3) How do Chinese values mesh with the principles underlying the WTO and Western liberal trade? (4) **Both cases, *lots of practical questions***. How do Chinese elites manage the domestic politics and concerns of accession to the WTO? How do you sell it or spin it to the people? (5) **Both cases,** ***world that China is entering is NOT all that it is cracked up to be***. Chinese NOT treated like equals 🡪 viewed as Western hypocrisy. Politics infuse WTO, despite all its talk as “rule driven” and “equality-based.” In China, some resentment and feeling taken advantage of.
2. **What is the WTO and How Does it Work?**
   1. **History of the WTO:** WTO is a descendant of the GATT (post WWII trade agreement). The GATT, along with the UN and the Bretton Woods trio, were intended to solve some of the problems that caused WWII. More cynically, it was created to counter Soviet influence.
   2. **Comparative Advantage, The Rationale Behind WTO:** The core rationale underlying the WTO is ***comparative economic advantage***. Certain states are able to produce certain goods than other states. So in order to maximize efficiency, the states that can produce goods/services the most cheaply, should be the states that produce those goods. But in order to facilitate this, there must be an international organization devoted to defeating distortionary tariffs etc. In comes the WTO. Note the assumption underlying this: Economic efficiency is the ultimate goal. There is either no or little value in purchasing goods from a country simply out of feelings for that state.
   3. **WTO’s Policies for Implementing This Rationale:** core characteristics of WTO 🡪 (1) MFN and (2) Non-discrimination between foreign/domestic goods.
      1. **Most Favored Nation Status:** WTO members must grant all other members “most favored nation” status – Any benefit granted by one member state to another must be granted to all member states. Ex: US may not place a higher tariff on German steel than it does on Chinese steel. In other words, a member state must treat all other member states the same. This does not mean a state is prohibited from placing tariffs/barriers altogether. Generally, a state may issue a blanket tariff so long as it applies equally to all member states.
      2. **Non-Discrimination Between Foreign/Domestic Goods:** Imported and locally-produced goods should be treated equally. Once the goods have crossed the border and entered into the market, a country cannot discriminate based on nationality
      3. **Reducing Tariff Rates:** WTO held regular negotiations in which member states made commitments to lower trade barriers.
         1. PROBLEM: **non-tariff barriers** 🡪 health/safety inspections that act like tariffs. E.g., restricting American beef b/c of steroids.
         2. Average tariffs in developed countries are ***very low*** b/c of WTO 🡪 has led to non-tariff barriers, in part, to **protect local industries**. Problem: How to distinguish between legitimate non-tariffs and contrived protectionism?
      4. **Anti-Dumping:** States are permitted to take action against dumping policies 🡪 selling at below “fair price” to drive out competition. Anti-dumping deals with ***private organizations***.
      5. **State Subsidization:** Obviously, a state can use subsidies to domestic industries as a way to distort foreign trade and prices. Although more difficult to enforce than up-front tariffs, state-subsidies are nonetheless prohibited by the WTO.
         1. Why should we worry? Unfair to our domestic companies when subsidized goods come in, or competing in foreign market against subsidized companies.
      6. **What is Covered under the WTO?** Initially, only goods were governed by the WTO. However, services began to be covered in a piecemeal fashion in the 90’s.
      7. **Dispute Resolution & WTO:** Pre 95’, any country, including the defendant, could block enforcement of a ruling. Now, in order to block a ruling, *all* states must vote against the ruling.
   4. **1995 Uruguay Round:** Organized WTO. Innovations:
      1. Tried to distinguish between good and false non-tariff barriers. Need some scientific foundation for gov. not to be challenged.
      2. ***Inclusion of services***. WTO/GATT historically about trade in goods, not services. Services are much more complicated to regulate.
      3. ***Addressed IP as an issue for the first time***.
      4. ***Created Comprehensive dispute resolution process***.
3. **Dynamics of China’s Accession:** Initially, Mao called the Bretton Woods Trio a “rich man’s club.” ***After CR 🡪 withdrew***. In the 80’s, began to try to get back in. Took 15 years.
   1. ***China’s Motivation for Joining the WTO:***
      1. **Class notes:** China wants in b/c of ***poor economy***. Wants to be involved in rule-making process. Sense of ***legitimacy, national pride, and status symbol***. Opening up for capital. Increases market discipline and managerial expertise. Send broader signal to the world that China is playing by the rules 🡪 makes them more attractive to FE.
      2. **Exports:** China is an export driven economy: The WTO ensures that China receives most favored nation status, which guarantees it access to foreign markets.
      3. **Guaranteed MFN:** Prior to joining the WTO, China had to renew its “most favored nation” status with the United States on a yearly basis. This was obviously an annual political circus, as well as a public beat up on China. China became worried that the US would revoke its MFN status, especially given the Tiananmen Square incident. They sought a more permanent position.
      4. **Prestige:** A seat in the WTO was an important step in China becoming a world player on the big boy stage.
      5. **Un-stacking the Deck:** The international trade rules and norms were stacked in favor of the West. WTO rules generally turned into international trade customs, which affected members and nonmembers alike. In order to have a say in the formulation of these rules, China would need a seat at the table
      6. **Signal and Guarantee to Foreign Investors:** FDI could rely on certain principles, this increases investments.
      7. **Generating Competition among Domestic Producers:** Some Chinese argued that foreign competition would spur lazy domestic producers to get their act together.
   2. ***Challenges:*** West viewed China as **anti-free market** w/ different structure. U.S. sold it domestically as helping to overcome Chinese human rights issues. Trade = liberalization? Implications of China joining WTO ***weren’t fully evident*** for either side. Rapid change in China and large player entering system.
      1. **Negotiations:** First issue—MFN statues. Congress passed U.S. law that said, “can’t give MFN status to Communist nation.” 🡪 Overcame with 1-year waiver. Renewed each year. Became problematic after Tienamin Square. Finally repealed U.S. law 🡪 removed last stumbling block to joining WTO. 2001.
   3. ***Why China Was Also Hesitant:***
      1. **Doubts about how fairly the rules will be applied:** This implicates historical questions. China has a long historical history of having foreign powers imposing unfair trade terms on them.
      2. **How Chinese producers would fare when faced with Competition from abroad:** This is the counterpoint to the competition above. Additionally, would competition lead to social instability?
      3. **Would the WTO Undermine the Communist Party?** Pres. Clinton lobbied China’s accession by arguing that WTO membership would lead to political liberalization. Obviously, this point was not taken well in China. Additionally, the WTO requires states to be transparent in their legal and commercial practices. There was a worry that forced transparency would undermine the authority of the Party.
   4. ***WTO’s Desire to Co-Opt China:***
      1. **Liberalization of Trade Policies will Lead to Political Liberalization:** Echoes Pres. Clinton’s reasoning above.
      2. **Predictability in Dealing with China, and Access to the World’s Largest Market:** Having China follow customary WTO practices gives investors extra assurances. Moreover, China has the world’s largest potential market, which will inevitably grow. WTO membership gives Western businesses better access to this vast market.
      3. **Dealing with the Inevitable Rise:** Welcoming China into the international norms is necessary and prudent. China will inevitably become one of the world’s most important economic powers. The world ***cannot contain*** the rise of China, but it can attempt to condition its growth along the lines of the WTO’s international norms.
4. **Terms of China’s Accession:**
   1. **Calculation for Determining Dumping:** The simplest and most common means of determining whether a state is dumping is comparing the price of the good in the state in which it’s made, and comparing that to the price it is being sold at in a foreign state. However, this is NOT the way that dumping is calculated for cases involving China: Unlike prices in the US, Chinese domestic prices are not determined by a market – rather they are determined by a state plan. Because one cannot do an apples to apples comparison between these prices, the US simply estimates what the market price of the good *should* be in China, in lieu of what the *actual* price in China is. This is known as ***surrogate country dumping***. This is not very popular among the Chinese, as it can be easily abused by the West.
      1. Difficult to get good info from China. U.S. said, “You can’t use Chinese price b/c we don’t believe the #’s.”
      2. Chinese response: prices from other countries may not reflect reality, and impossible to say before hand what other market will be used to compare. And hard to get data from other countries.
   2. **Uniform Administration:** uniform, impartial, and reasonable way. China can make rules, but can’t apply them arbitrarily to Chinese benefit.
   3. **Transparency & Publication of Regulations:** WTO accession requires that China publish all laws and regulations relating to commerce before they can be enforced. Traditionally, China used a number of **secret, internal laws and regulations** to govern commerce. If you didn’t know rules 🡪 cannot apply rest of obligations. Impossible for business to operate. WTO provisions banned this practice, although it is unclear how effective China has been in implementing these. China is supposed to ***publish beforehand. Required for N&C.***
   4. **Judicial Review**
   5. **Intellectual Property:** China is required to create and apply laws that meet WTO IP regulations. Generally, China has been successful in creating laws that protect IP, however, it has been woefully ineffective in enforcing these laws.
      1. ***Alford to Senate:*** China lacks uniform, effective enforcement of IP laws (37). Results in large IP infringement. It is mistake to view this problem as ***only a matter of will*** and think if U.S. brings enough pressure, we can effect change. Nothing in China comparable to idea of IP prior to introduction by West in early 20th century. Chinese gov. still lacks the infrastructure to carry out IP law. Need to help them build better institutions—growth of legal institutions and civil society.
      2. Some of the highest value in the US economy comes from IP – creative thinking and work. It’s not just the patent stuff, but creative works – books, music, film. Some American industries (i.e. music) are losing out big in China. At one point, stakeholders were upset about this, and there was a very overheated environment in Congress. US brought WTO case against China → led to much calmer Congress, conversations in which Chinese officials recognized that value was there for having taken WTO action. US channeled tensions into a neutral channel that took the pressure off for stupid things to happen and allowed for there to be a reasonable outcome.
   6. **Developing Country Status:** WTO gives leeway to states with developing country status (gets transitional measures to put infrastructure in and get up to speed). China obviously wanted to avail itself of these benefits, West did not want to grant China this status (low per capita income v. massive trading power). Ultimately, ***China acquired this status for some provisions, and not for others.***
   7. **“WTO-Plus” Obligations:** (1) ***Obligations to practice market economy***. Legally bound. China is required to let market forces determine all domestic prices (except for a few categories). (2) ***Obligations on Domestic Governance***. Relate to transparency, DP, regulatory independence, and uniform administration of law. E.g. provide reasonable period for public comment on “all laws, regulations and measures” pertaining to WTO and need to translate into three official WTO languages. (3) ***Obligations on foreign direct investment***. (4) ***Obligations to eliminate tariff exports***. (5) ***Market access commitments that do not fit into the GATT or GATS schedule***.
5. **Looking at China’s Performance:**
   1. ***Overview:*** China initially creates a bunch of new efforts to conform to WTO obligations. Undertakes to revise laws/regulations to conform. **First five years** are relatively uneventful in terms of WTO disputes. Why? Both sides sort of feeling out each other. Giving China a little time to adapt. And economy (pre 2008-09) is pretty good. Sort of a “honeymoon period.” China wanted to establish itself before asserting itself. Didn’t want to dissuade foreign investment. In initial period, still learning how everything works. Like pre-Macarney period.
      1. ***WA:***China did get some concessions early on so they didn’t have to conform all at once. And China went after low-hanging fruit early 🡪 tariff changes as opposed to deep structural changes.
      2. **After first five years**, next decade (9 years) have been ***much more rocky***. **Accomplishments?** China did conform to some of the early judgments it lost. Lowered its tariff rates substantially. Better at making rules and regulations transparent 🡪 publication of binding rules, notice and comment periods, etc. In general, the atmosphere for foreign investment has improved. **Points of contention/controversy?** Still tremendous state involvement in economy. The world thought China would privatize more than it has. IP. Trade secrets. Theft. E.g. “KFG,” “Pizza Ha,” “Pama” (stealing Puma). Even the government uses improperly introduced software. Fake apple stores. Fake paintings (“Van Gogh on Demand”).
      3. **Additional Problems:** Preference for SOE. Regulation/law transparency is still frustrating and incomplete. On the other side, Chinese upset that Chinese is NOT an official language of the WTO. Rectification of names? Problems can be divided into 3 main categories:
         1. ***Could be resolved under existing WTO framework***. E.g., anti-dumping issues. Tariff rates. Import guarantees.
         2. ***NOT going to be resolved immediately and within the WTO***. E.g. spying, anti-trust issues. WTO not equipped to handle. Foreign-direct investment. Will need an exterior agreement.
         3. ***Profound challenges to long-term viability of WTO***. E.g. TPP or other exterior agreements. WTO/GAPP shallow groupings with internal preferences as long as don’t introduce new barriers to outside parties (practical reality; gov. wouldn’t join w/o this). This reflects political realities and hope that these mini-deals will spill over into WTO (“mini laboratories”).
      4. **2001 Doha Round:** about development and developing countries. Didn’t get very far. Stalemate. U.S. said, “in the interim we will promote regional free-trade and agreements.”
      5. **TPP:** part of U.S. repositioning to East Asia (“pivot to Asia”). China views this suspiciously as an attempt to restrain China. TPP was to sure up economic relations in this part of the world, and indicate interest in the area. China views TPP as U.S. effort to exclude China and to sure up other relations. U.S. response: you can join IF you meet standards. China responded by setting up their own alternative agreement. U.S. rhetoric domestically is setting this up as competitive and almost military focused (U.S. Secretary of Defense, “TPP just as important as getting air craft carrier.”). Public still does NOT know what is in TPP. Still be negotiated. Struggle in Congress w/ giving President power to conclude agreement. WA: rhetoric on both sides does not help…
   2. ***Challenges Facing China:***
      1. **Imposing Uniform Trade Practices Across a Large State:** The WTO calls for uniform standards across the entire state. However, this poses **two challenges** for China. ***First***, the enormous geography of China, and the distance between Beijing and the provinces makes it difficult to implement. ***Second***, there are varying customs in different parts of China, which have **persisted for centuries**.
      2. **Enforcing the Laws:** Creating an institution to actually enforce the WTO obligations is a massive challenge.
      3. **Dealing with the Historical Impressions of Trade Agreements:** The results of the Opium wars and the terms of the subsequent trade agreements imposed on China affect the way that Chinese citizens view the WTO.
      4. **Retraining the Judiciary to Apply the WTO:** The WTO represents a significant change.
   3. ***The Good:***
      1. Generally, China made tremendous progress in lowering its tariffs after acceding, especially when compared to the rate at which countries like Japan decreased tariffs after accession. China has also been successful at creating laws and publishing them.
   4. ***The Bad:***
      1. **Intellectual Prop:** Perhaps the most significant issue is protection of IP. China is a signatory to the TRIPS. For example, Mr. Heinman gave the example of the Sherry (sp?) automobile. Essentially, Sherry was making knock off GM cars, in clear violation of IP.
         1. **TRIPS (Agreement on Trade-Related Aspects of IP Rights)** – see group notes.
      2. **Distorting Trade:** China continues to use other methods to create trade barriers and to place its products in a better position. Things like keeping its currency value low, giving preferential treatment to domestic manufacturers, denying licenses and approvals to foreign businesses.
      3. **SOE’s:** The persistence of state owned enterprises, and the state’s presence in domestic industry. Along with this, subsidies to domestic industries, especially to green energy industries.
      4. **Developing State Status:** How to continue the awkward position of China being a developing state in some provisions and a developed state in others.
      5. **Hierarchy of Laws:** Although China has done an adequate job in creating and publishing regulations, it has not resolved the problem of how those regulations fit together. Ie: the hierarchy of legal norms has not been fully established. As a corollary, the local-national tension presents a challenge. Even if the national government wanted to bring China into strict compliance with the WTO, it still faces the problem of bringing the local and provincial governments into compliance.
   5. ***New Announcement:*** China to implement 84 reforms laid out in 4th Party Plenum on rule of law w/ Chinese characteristics.
      1. ***Don’t know what 84 reforms are.***Central committee and Standing Committee announced together.
      2. ***Goals:***(1) **Ensure fair administration of justice**. Courts should accept MORE cases. Try to do more **at trial**. Pry away local gov. control over courts (maybe use provincial court that cuts across more than one province). More life long responsibility of justice. (2) **Enhance the concept of rule of law in China**. Develop concept of “rule of law with Chinese characteristics.” Teach more about law in schools. (3) “Strengthening personnel.” **More lawyers and judges**.
      3. ***Chaz:***CANNOT mediate for cases about Administrative Litigation Law. Pressure should be in courtroom, not peasant getting taken advantage of.

**Environment**

1. **General Comments:** We’re all in this together. U.S. waste product is exported to China. And China’s action is in many ways an ***attempted emulation*** of U.S. living.
   1. ***Semester Themes:***  efforts of Central Authorities trying to address most egregious issues. Challenge of citizen engagement with the law.
   2. ***China’s Top 6 Environmental Concerns***
      1. **Air Pollution** – China now burns 47% of world’s coal.
      2. **Water Pollution** – 48% of water in Beijing is “grade 5” 🡪 not fit for industrial use. Rivers horribly polluted. 90% of groundwater is polluted.
      3. **Desertification** – lack of arable land 🡪 need to use more fertilizer. And development takes land out of agricultural use.
      4. **Biodiversity** – deforestation and desertification leads to habitat loss.
      5. **Cancer Villages** – entire towns so polluted they impose serious cancer risk.
      6. **Population Growth** – 1.3 billion people. Now adopted Western-style habits 🡪 twice as much meat as Americans and binge drinking.
   3. ***Energy supply structure makes the environmental problems difficult to remediate***.
   4. ***China/U.S.*** – Did recently reach **“joint announcement” on climate change**. NOT an agreement. Nobody is binding themselves. But, visual pledge is progress? Sets tone for rest of the world? Removes excuse for other countries? Or, promises don’t get us anywhere?
   5. ***Efforts by China to get ppl to 2nd, 3rd, 4th tier cities. And China is looking to get additional energy resources***.
2. **This past year marked major revision on China’s overarching law on environmental protection*:*** 3-year battle.
   1. ***Positive features:***
      1. Used to one-time fee (fairly low) for polluters 🡪 companies just took it in stride as cost of business. NOW, **day-based punishment** (can fine every day). NO LIMIT to fine. Continual incentive to change.
      2. Some NGO’s can now do environmental litigation. Also, law formalizes the possibility of PI environmental litigation. In prior cases, cases struggled b/c of lack of legal standing.
      3. **Changed metric for evaluating officials** 🡪 now takes into account a little more environmental protections. Prior, environment wasn’t important b/c economic growth was solely rewarded.
      4. **Little more protection for whistle-blowers**.
   2. ***Difficulties in making law effective?***
      1. Local courts/environmental protection bureaus are tied personally and financially to local governments. **Very difficult to shut down local industries if it means destroying local revenues.**
      2. **SOE’s are big polluters.** Very difficult to shut down.
      3. Problems w/ **state subsidization** of clean energy v. trade agreements.
      4. **Chinese internal politics and fragmentation** 🡪 different ministries responsible for different aspects of cleanup/regulation.
      5. Not a lot of **$$** in litigation against local officials. Very hard for individual suits.
      6. **Limited NGO litigation**. Have to be ***recognized by state as “Responsible NGO.”*** Local authorities slow to give recognition? Luckily, “good reputation” qualification was replaced with “have no record of illegal activity.”
   3. ***Historically, local environmental protection bureaus got revenue from fines (kept 20%)***. 🡪 made them happy to let manufacturers keep on polluting so they could keep on fining. New law says EPB CANNOT keep fines.
3. **[Not in my packet] Alford Article on Pollution in China:** The Chinese state has established government agencies (establishing “a leadership group on the environment under the State Council in 1974” and the creating “the ministerial-level State Environmental Protection Administration (SEPA)”), strengthened environmental laws, and initiated high profile environmental campaigns. The state, however, has ***serious problems implementing and enforcing environmental policies***, particularly in rural areas, where there are “overpowering economic incentives to exploit the environment” and large SOEs, collective enterprises, and township-village enterprises often pollute heavily due to poor technologies.
   1. ***Problem of Information:*** Private citizens have standing to bring suits, but a study in the 90’s revealed that this almost never happened. The survey revealed that there’s actually very little use of the legal system. Out of 28 people who had “attempted to take action” on environmental problems, only 5 said they are family members had ever gone to court. *40% of respondents said they didn’t take action because they didn’t know what they could do and the other 40% thought actions they could take would be futile.*
      1. ***Lack of Knowledge:*** despite official propaganda statistics, only 12% of respondents said they knew of the government’s education efforts and only 18/244 knew of the “Air Pollution Law.” Alford et. al believe that part of the failure is that current Chinese law *“is written in general terms that fail to provide a clear statement of rights and responsibilities that can be communicated via a short broadcast” while standards are too technical for a lay audience to understand*.
      2. ***Belief in Utility:*** : 2/3 of respondents believed that lawyers could not affect the outcome of their case, even though more than 50% thought lawyers could effectively represent the interests of their clients. Some respondents seemed insulted at being “asked if they or their family had gone to court, as if it suggested untoward behavior on their part.”
   2. ***Recommendations:*** State must improve education (both basic and specific to the environment) and demonstrate to village committees that the state values the environment, not just pass laws to “reach[] the populace with the message about environmental needs and policies.”
4. **Rachel Stern:** Traces an environmental suit from dispute to decision.
   1. ***The Facts:*** In 1992, the Rongping chlorate factory entered Pingnan village and brought 300 jobs. Then crops died and health problems spread. In 2002, 1721 villagers filed a class action suit that led to an appeal, three years later, at the Fujian Provincial High People’s Court. The Court ordered compensation and cleanup of US $58 per plaintiff. “The vast majority of environmental disputes are handled through government-brokered deals, private concessions or simply when plaintiffs give up and go away.” But disputes are increasing – There were over ~616,000 environmental complaints in China in 2006, 60% more than in 2001.
   2. **Obstacles to Getting Case into Court:**
      1. Statute of limitations begins running once pollution is discovered. The problem is that many plaintiffs **first seek redress through administrative channels, which can eat up a good part of the SoL**.
      2. Judges at the filing division routinely **refuse cases, and judges often do not issue a written rationale**, which prevents plaintiffs from having a record of refusal to formally appeal. This gives “judges latitude to sidestep volatile disagreements that might affect social stability or annual court evaluations.”
      3. The filing division can break up collective lawsuits. While citizens can bring collective suits led by a few representatives under the **1991 Civil Procedure Law**, courts often break them down to ***“maximize per case court fees, boost statistics on the number of cases handled or disarm collective action”***; and filing paperwork for hundreds of identical cases is a major burden and deterrent for suits.
      4. **Local Protectionism:** Observers believe that local governments / courts shelter polluters because they prop up the local government; in the Rongping case, tax revenues from the plant comprised more than 25% of the county’s annual budget.
      5. **Getting a Lawyer to Take Your Case:** Political sensitivity is tough – and plaintiffs opting in might hesitate to give copies of their ID cards; fear of physical harm. Harassment against both lawyers and plaintiffs (particularly leaders of a collective suit) can be very effective (***widespread intimidation, e.g. local officials entering homes, eating food and using bathroom w/o intimidation***) Bringing in famous lawyers from Beijing and Shanghai disposes judges to take complaints more seriously.
   3. ***Issues in Court and Legal Tactics:***
      1. **Environmental Protection Law** and the 2009 Tort Liability Law make polluters liable for damages even if discharge meets government standards. 2009 Tort Liability Law, 2008 Water Pollution Law, 2004 Solid Waste Law, a 2001 SPC explanation, shifts the burden of proof so *defendants* must prove that pollution did not cause losses.
      2. **Hard to get Data:** Gov reports are gold standard. But difficult to get. Factories are also adept at hiding pollution—polluting only at night, building secret underground discharge pipes and storing wastewater in pools that flood during rainstorms.
      3. **Role of Media and Popular Support:** Take example of Qiugang documentary. Chemical factory was polluting nearby village, in clear violation of national law. Village activists brought a number of lawsuits seeking enforcement of environmental law, to no avail. Villagers then went to Beijing to raise awareness in the national government. Although the lawsuits were unsuccessful, the case drew enough public attention that the national government pressured the factory to relocate. Illustrates that while litigation is not necessarily effective at getting environmental results, it can serve as a catalyst for obtaining public attention.
         1. So a good lawyer would not simply put all their chips into a legal argument. Instead, they would raise public awareness, petition the provincial or central government, put pressure on the polluter.
   4. ***Signals:*** Stern argues that the Party gives “signals” to lawyers regarding which cases are acceptable, and which are not. For example, passing a law which places the presumption of causation on defendants signals that environmental cases are good. On the other hand, passing a law that prohibits plaintiffs’ lawyers from working on contingency fees signals that environmental cases are not acceptable. Lawyers who wish to avoid the wrath of state reprisal pay close attention to these signals.

**The Family:**

1. **Confucian View of the Family as Compared to PRC:**
   1. A Confucian family was supposed to be large, with the parents having a number of children. **Large family; lots of sons**. This served the practical function of providing a social welfare net to elderly parents, who had no support from the state. It also served the normative idea of having a large social net. ***Family is hierarchical and gender-based*.** NOT mother-daughter.
      1. ***Mao*** advocated for a population boom: “Each mouth comes with two hands,” believing that a larger population strengthened China. When Marxism (PRC) comes to power, Mao picks up idea of expanding working class (more children = economic growth) and reformed law to benefit woman (allowed to hold interest in land; escape forced marriages, etc.). Millions took PRC on new marriage law and got divorced, to the point the Party later had to put a lid on it.
      2. ***Great Leap Forward & CR very disruptive on family.*** After CR, 1980 promulgate new marriage law 🡪 about family responsibility and family. Designed to allow divorce for those relocated to countryside and then told they could return to cities.
      3. ***Deng and Post-Mao Reform Era:*** believed that excessive population growth will slow down the economic gains. Viewed push of population growth as disastrous. Standard of living will be undercut. “One-child” was initially announced **as a Party policy, rather than a state law** – this allows various localities to make minor deviations from the standard, and permits China to avoid the full brunt of criticism from the international community. In 2002, it was enacted as an official state law. (Developed by some inter-ballistics guy).
      4. ***Families torn apart with migration to cities***. Grandparents/child left behind in village. Increased focus on wealth in ‘80’s and ‘90’s. Intense debate about freedom of marriage. Too much freedom undermines society? Allows husbands to ditch country wife for city mistress. Other side: last thing we want in a reform era is *more* government intrusion. We are adults and want freedom. (Gov is viewed as paternal, so debate not as political and allowed it to go on). Gov split the baby on the debate 🡪 Some relaxation of the law, but need to show “emotionally broken.”
   2. ***Economy/society underwent dramatic changes 🡪 affect marriage/family law***. New issues w/ property and divorce (basically, man gets to keep pre-marital property). Perception is that judicial interpretation favors men.
2. **One Child Policy in Practice:** **Uses both legal and social/policy measures.** Policy takes a carrot and stick approach. The first born child gets the full benefit of state services (e.g. schooling), while subsequently born children are denied state benefits. Families also face fines and sterilization after childbirth. Note that the deterrent effect varies with a person’s wealth. Wealthy families will not be affected by the financial penalties, and vice-versa. ***Policy has profound implications—socially, economically, psychologically (less siblings).*** Policy prevented 300 million births.
   1. Gov emphasizes the social responsibility of family planning (mention it in Constitution). Allowed some regional variation 🡪 cities get one kid; country can have 1-2 (especially if first child is a girl). Engage in popular education about birth control.
      1. ***“Granny police”*** – go around in villages and enforce policy.
   2. ***Consequences for China*** – Population is getting older and older. 4-2-1 ratio. Gender imbalance. No robust social welfare system, so puts burdens on the child. “Little emperor” phenomenon? If parents don’t register birth of baby girl 🡪 no opportunities. Human trafficking of woman 🡪 forced marriages and prostitution. Against the law to abort b/c of gender, but difficult to enforce. Wealthy ppl can just pay fines and absorb costs. Birthrate is now ***below*** replacement level – 1.7 per couple and .75 in Beijing.
      1. Policy elevated the status of females and gave them opportunities they wouldn’t have had with male siblings?
      2. Chinese now seeking asylum in U.S. under one-child policy justification.
   3. **[Not part of class] *Rights:*** (Excerpts from Interview with Zhao Bingli) “The law stipulates the legal rights of people and states the *government should create conditions for the people and provide them with suitable, safe and effective family planning services*” which will “improve the social security system to enable people to benefit from the successful implementation of family planning . . . both history and reality clearly show that ***subsistence and development*** are ***prerequisites for guaranteeing the rights of individual humans***. The great population pressure is a significant factor restraining China’s further development.”
      1. But this conception of rights is clearly at odds with the negative right of controlling one’s reproductive freedom. Take example of Chinese seeking asylum in the US to avoid penalties of one-child-policy.
3. **Demographic Issues:** The one child policy has led to sex-selective abortions, meaning that there is a significantly higher birth rate of males than females. An oversupply of males obviously has serious social consequences. Additionally, the policy causes the society to become “elderly heavy.”
   1. **Population Growth** decreased most dramatically between 1970 and 1979 (fertility rate dropped from 5.9 to 2.9). In 2004, the total fertility rate was 1.7, 1.3 in urban areas and 2.0 in rural areas. Thus, urbanites tend to have one child and non-urbanites two children.
   2. **Sex Ratio** is increasingly imbalanced in China, with 1.17 males to females. This may cause psychological issues for men unable to have families and may threaten social stability. The skewing in the ratio coincided with cheap ultrasound access in the 1980s / 90s, as opposed to substantial enforcement in the one-child policy; the authors believe that even without the policy, sex-selective abortion would continue.
   3. **4:2:1** phenomenon in China describes an increasing proportion of elderly people (4 grandparents to 2 parents to one child). To alleviate the problem, some urban areas are allowing couples who are both only children to have more than one child.
   4. ***Solutions:*** China is becoming a **small family culture**, and relaxing the policy is unlikely to lead to a baby boom. Issues with population growth, the sex ratio imbalance, and increasing number of elderly people suggests that relaxing the policy would be beneficial. *But* the authors believe that the governments’ fears about population control (both overall and in terms of rural-urban migration) means that the government is unlikely to change the policy soon.