

CHINESE LAW IN CONTEXT

CHINESE

LAW

IN

CONTEXT

CHENGLIN LIU

PROFESSOR OF LAW

ST. MARY'S UNIVERSITY SCHOOL OF LAW

SAN ANTONIO, TEXAS



CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2020
Chenglin Liu
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: Liu, Chenglin, author.
Title: Chinese law in context / by Chenglin Liu.
Description: Durham, North Carolina : Carolina Academic
Press, LLC, 2019.
Identifiers: LCCN 2019032370 | ISBN 9781611631555 (paperback)
| ISBN 9781531017934 (ebook)
Subjects: LCSH: Law—China. | Law—China—History. | Law—
China—Philosophy. | Confucianism and law.
Classification: LCC KNQ68.L567 2019 | DDC 349.51—dc23
LC record available at <https://lcn.loc.gov/2019032370>

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

To Jennie and Vincent

SUMMARY OF CONTENTS

Contents	xi
Preface and Acknowledgments	xxi

1.

CONFUCIUS AND THE CHINESE LEGAL TRADITION 3

I. Introduction	3
II. The Dynastic Cycle	7
III. The Zhou Dynasty	8
IV. The Life of Confucius	15
V. Let Hundred Schools of Thought Contend	19
VI. The Core Value of Confucianism: Inequality	31
VII. Administration of Justice	44
VIII. Conclusion: Confucius the Eternal Patriarch	48

2.

THE DEVELOPMENT OF CHINESE CONSTITUTIONALISM 51

I. The Development of Constitutionalism in China	52
II. The 1954 Constitution	55
III. The Cultural Revolution (1966–1976)	77
IV. Conclusion	111

3.

CHINESE TAKINGS LAW FROM A COMPARATIVE PERSPECTIVE 113

I. Introduction	113
II. The Fate of Private Housing In China	116

III.	Bulldozing Homes To Develop The Economy	127
IV.	Comparative Perspective	136
V.	Conclusion: Ideology, Reality, And Administrative Costs	157

4.

SOCIALIZED LIABILITY
IN CHINESE TORT LAW 161

I.	Introduction	161
II.	From Equitable Liability to Socialized Liability	164
III.	Cases Based on Article 24 of the TLL	169
IV.	Article 87 and Falling Object Cases	175
V.	Posthumous Defamation	178
VI.	The Complications of Socialized Liability	181
VII.	Mass Torts, Socialized Liability, and Disutility of the Tort Law	184
VIII.	Conclusion	192

5.

REGULATING SARS IN CHINA:
LAW AS AN ANTIDOTE? 195

I.	Introduction	195
II.	The Development of the SARS Epidemic before April 20, 2003	198
III.	Fighting to Release SARS Information: An Uphill Battle	204
IV.	New Government and New Approach	208
V.	New Regulations on SARS	209
VI.	The SARS Laws Are Neither Original Nor a Breakthrough	227
VII.	Conclusion	234

6.

ESCAPING LIABILITY VIA FORUM NON CONVENIENS:
CONOCOPHILLIPS'S OIL SPILL IN CHINA 239

I.	Introduction: A Tale of Two Oil Spills	239
II.	Forum Non Conveniens	244
III.	The Disparities between Chinese Laws on the Books and in Practice	263

IV. Reasons for Inadequacy	272
V. Conclusion	289

7.

RISKS FACED BY FOREIGN LAWYERS IN CHINA 291

I. Introduction	291
II. A Foreign Citizen Cannot Be Licensed as a Practicing Lawyer in China	295
III. The Regulations and Rules on Foreign Lawyers	296
IV. Regulations and Rules in Detail	298
V. No Official Interpretation of the Regulations and Rules	304
VI. The Plain Meanings of Article 15(5) of the Regulations and Article 33 of the Rules	305
VII. Understanding Chinese Law and Politics	309
VIII. Pressures Mounted Against Foreign Investors in China	321
IX. Conclusion	328

8.

PROFITS ABOVE THE LAW:

CHINA'S MELAMINE TAINTED MILK SCANDAL 329

I. Introduction	329
II. Market Structure, Competition, and Product Quality	333
III. The Sanlu Group and the Tainted Milk Scandal	342
IV. The Government's Handling of the Crisis, Compensation and Litigation	358
V. Conclusion	370

9.

THE OBSTACLES OF OUTSOURCING IMPORTED
FOOD SAFETY TO CHINA 373

I. Introduction	373
II. Regulatory Framework for the Safety of U.S.-Made Food	376
III. The FDA's Weakened Enforcement in the Context of Food Imports	394
IV. Outsourcing Regulatory Power to China	404

V.	Food Safety in China	413
VI.	Comparative Perspectives: Hong Kong and Japan	440
VII.	Conclusion: Some Thoughts on Regulatory Costs, Adverse Selection, and Food Safety	441

10.

LEAVING THE FDA BEHIND:

	PHARMACEUTICAL OUTSOURCING AND DRUG SAFETY	445
I.	The Heparin Crisis	449
II.	FDA Inspections and Challenges in Foreign Countries	450
III.	Counterfeit Drugs	457
IV.	The FDA's Regulatory Outsourcing	462
V.	Drug Regulation in China	465
VI.	The Drug Administration Law	467
VII.	Law in Practice	471
VIII.	Conclusion	484
	Selected Bibliography by Chapter	487
	Index	533

CONTENTS

Preface and Acknowledgments	xxi
-----------------------------	-----

1.

CONFUCIUS AND THE CHINESE LEGAL TRADITION 3

I. Introduction	3
II. The Dynastic Cycle	7
III. The Zhou Dynasty	8
1. The Origin of the Zhou Dynasty	9
2. Mandate of Heaven	10
3. Enfeoffment	12
4. The Fall of the Feudal Order and Confucius's Ideals	13
IV. The Life of Confucius	15
1. The Case of Shaozheng Mao	17
V. Let Hundred Schools of Thought Contend	19
1. Confucianism	20
2. Legalism	22
3. Burning Books and Burying Scholars Alive	25
4. Taoism as Transition	28
5. Confucianization of Law	30
VI. The Core Value of Confucianism: Inequality	31
1. Family Relations and Criminal Penalties	35
2. The Case of Jao (Mother ordered son to purchase poison for her suicide)	37
3. The Case of Chen née Chang (Married daughter's obligation to her parents)	38
4. The Case of Chang (Killing a wife or concubine)	39

5. The Case of Tu (Daughter-in-law's obligation to her father-in-law)	41
6. The Case of Hsing Hai (An official's immunity after killing his son)	42
7. A Sense of Proportionality	43
VII. Administration of Justice	44
1. Lawyers as Litigation Tricksters	45
2. Death Penalty	47
VIII. Conclusion: Confucius the Eternal Patriarch	48

2.

THE DEVELOPMENT OF CHINESE
CONSTITUTIONALISM 51

I. The Development of Constitutionalism in China	52
II. The 1954 Constitution	55
1. The 1954 Constitution	58
2. Basic Rights and Duties	61
3. Quickly Forgotten	63
4. The Case of Hu Feng	64
5. Hu's Arguments	65
6. Mao's Response	67
7. Anti-Rightist Movement and Freedom of Expression	71
III. The Cultural Revolution (1966–1976)	77
1. The 1975 and 1978 Constitutions	81
2. Lessons Learned from the Cultural Revolution	82
3. The 1982 Constitution	88
A. The NPC and NPC Standing Committee (NPCSC)	89
<i>Ms. Shen Jilan, The Longest Serving People's Deputy</i>	98
<i>Case Study: Election Fraud Case, Hunan Hengyan 2014</i>	99
B. The President	102
C. The State Council	103
D. The Central Military Commission (CMC)	107
E. Basic Rights and Obligations	108
IV. Conclusion	111

3.

CHINESE TAKINGS LAW FROM
A COMPARATIVE PERSPECTIVE 113

I. Introduction	113
II. The Fate of Private Housing in China	116
1. The Impact of Marxism on Urban Housing in the 1950s	117
2. State-Managed Mandatory Leasing of Private Housing During Socialist Transformation (Jingzu)	118
3. Deprivation of Private Housing during the Great Proletarian Cultural Revolution (1966–1976)	120
4. Public Housing and Housing Shortage	121
5. Housing Reform and Private Ownership	122
6. Urban Land Ownership and Land Reform	125
III. Bulldozing Homes to Develop the Economy	127
1. Commercial Developers vs. Private Homeowners	127
2. The Chinese Takings Laws	129
3. Problems with the Chinese Takings Laws	129
A. Public Purpose Over Broadly Construed	129
B. Compensation Issues	132
C. Forced Eviction and Due Process of Law	134
IV. Comparative Perspective	136
1. The United States	136
A. Public Purpose: From a Narrow View to a Broad View	136
B. The Kelo Decision	139
C. The Kelo Debate in China	143
2. Singapore	145
A. Public Purpose	146
B. Compensation	150
C. Not a Model for China	153
3. Administrative Costs for Eminent Domain Compared	154
V. Conclusion: Ideology, Reality, and Administrative Costs	157

4.

SOCIALIZED LIABILITY IN
CHINESE TORT LAW 161

I. Introduction	161
II. From Equitable Liability to Socialized Liability	164
1. Equitable Liability (公平原则)	164
2. Socialized Liability (责任社会化)	166
III. Cases Based on Article 24 of the TLL	169
1. <i>Ou Zuming v. Hydraulic Power (HP)</i>	172
2. <i>Hu v. Chen</i>	173
3. The Application of Socialized Liability in <i>Ou Zuming</i> and <i>Hu</i>	174
IV. Article 87 and Falling Object Cases	175
1. <i>Luo v. Lao</i>	176
2. <i>Wen v. Owner</i>	177
3. Article 87 and Socialized Liability	177
V. Posthumous Defamation	178
1. <i>Chen v. Wu</i>	178
VI. The Complications of Socialized Liability	181
1. The Case of Ji Zhongxing	181
VII. Mass Torts, Socialized Liability, and Disutility of the Tort Law	184
1. Students Killed in the Sichuan Earthquake	189
VIII. Conclusion	192

5.

REGULATING SARS IN CHINA:
LAW AS AN ANTIDOTE? 195

I. Introduction	195
II. The Development of the SARS Epidemic before April 20, 2003	198
1. Starting from Guangdong	198
2. From Guangdong to Hong Kong and the Rest of the World	200
3. Entering Beijing	201

III. Fighting to Release SARS Information: An Uphill Battle	204
IV. New Government and New Approach	208
V. New Regulations on SARS	209
1. Emergency Information Reporting	210
A. Reporting Information	211
B. Releasing and Announcing Information	212
C. Individual's Right to Report	214
D. Legal Liabilities for Failing to Report Emergency Information	215
2. Treatment	216
A. Designated Hospitals	216
B. Fever Clinics at Regular Hospitals	218
C. Free Treatment for SARS Patients	219
3. Prevention	221
A. Screening Migrant Workers	221
B. Intentional Spreading of SARS	223
C. Railroads	225
VI. The SARS Laws Are Neither Original Nor a Breakthrough	227
1. The PTID Guiding Principles for Prevention and Treatment of Infectious Diseases	228
2. The PTID Preventive Measures	229
3. The PTID Information Reporting System	230
4. The PTID Epidemic Control Measures	231
5. The Latest Amendment to the PTID	232
VII. Conclusion	234

6.

ESCAPING LIABILITY VIA FORUM
NON CONVENIENS: CONOCOPHILLIPS'S
OIL SPILL IN CHINA 239

I. Introduction: A Tale of Two Oil Spills	239
II. Forum Non Conveniens	244
1. The Development of Forum Non Conveniens	244
2. Critiques of the Forum Non Conveniens Doctrine	246
3. U.S. Courts' Compelling Interest in Foreign Plaintiffs' Cases	251

4. Political Interest Indicates Need for Court Action	254
5. Chinese Plaintiffs in U.S. Courts	258
III. The Disparities between Chinese Laws on the Books and in Practice	263
1. Laws on the Books	264
A. Environmental Protection Law	265
B. Marine Environment Protection Law	266
C. Civil Liability	268
2. Laws in Practice	270
IV. Reasons for Inadequacy	272
1. Lax Enforcement on MNCs	272
2. Local Protectionism	274
3. The Difficulties of Filing Cases in Chinese Courts	279
4. Lack of Judicial Independence	281
5. Coerced Mediation	284
6. Lack of Remedy and Mr. Zhao's Prosecution	286
V. Conclusion	289

7.

RISKS FACED BY FOREIGN LAWYERS
IN CHINA 291

I. Introduction	291
II. A Foreign Citizen Cannot Be Licensed as a Practicing Lawyer in China	295
III. The Regulations and Rules on Foreign Lawyers	296
IV. Regulations and Rules in Detail	298
1. Scope of Services	299
2. Legal Responsibilities	300
3. Enforcement	301
V. No Official Interpretation of the Regulations and Rules	304
VI. The Plain Meanings of Article 15(5) of the Regulations and Article 33 of the Rules	305
1. The Plain Meaning of the Two Articles Based on the Xinhua Dictionary [新华字典]	306

2. The Plain Meaning of the Two Articles Based on the Chinese Legal Dictionary	308
VII. Understanding Chinese Law and Politics	309
1. A Brief Overview of the Chinese Legal System	311
2. Local Protectionism and Reluctance to Rule Against Local Industries	313
3. Lack of Judicial Independence	315
4. Judicial Corruption	316
5. Judicially Coerced Settlements	319
VIII. Pressures Mounted Against Foreign Investors in China	321
IX. Conclusion	328

8.

PROFITS ABOVE THE LAW: CHINA'S MELAMINE
TAINTED MILK SCANDAL 329

I. Introduction	329
II. Market Structure, Competition, and Product Quality	333
1. Demand and Supply of Dairy Products in China	334
A. Growing Demand	334
B. The Sanlu Model and the Supply of Dairy Products	336
2. "Racing to the Bottom": Competition and Quality	338
A. Competition for Raw Milk	338
B. Quality Exemption, Inferior Products, and the "Prisoner's Dilemma"	339
III. The Sanlu Group and the Tainted Milk Scandal	342
1. Sanlu's Cover-Up	342
2. Laws Disregarded	345
A. The Criminal Law of the People's Republic of China (as amended in 2006)	346
B. The Product Quality Law of the People's Republic of China (Amended as 2000)	348
C. Provisions on the Administration of Food Recall of 2007	349
D. Laws on Public Health Emergencies	350

3. Profits above the Law: Reasons for Cover-Up	353
A. Sanlu's Cover-Up	353
B. Local Government's Cover-Up	354
C. Lack of Media Supervision	357
IV. The Government's Handling of the Crisis, Compensation and Litigation	358
1. Resignation upon Taking the Responsibility	359
2. Litigation, Compensation and Social Stability	362
A. Government-Controlled Compensation Scheme	363
B. Social Stability Concern	364
C. Technical Hurdles in Private Litigation	366
V. Conclusion	370

9.

THE OBSTACLES OF OUTSOURCING IMPORTED
FOOD SAFETY TO CHINA 373

I. Introduction	373
II. Regulatory Framework for the Safety of U.S.-Made Food	376
1. The Development of the Regulatory Framework	376
A. The Pure Food and Drug Act of 1906	376
B. The Federal Food, Drug and Cosmetic Act of 1938	378
C. Other Laws and Agencies That Regulate Food Safety	380
2. The Enforcement Tools that Keep U.S.-Made Food Safe	381
A. Factory Inspections	382
B. Criminal Sanctions	383
C. Seizures	386
D. Voluntary Recalls	387
E. Good Manufacturing Practices Regulation (GMP)	390
F. Tort Litigation	391
3. Reforming the Food Safety System	392
A. The Scope of the Problem	392

B. The Food Safety Enhancement Act of 2009	393
III. The FDA's Weakened Enforcement in the Context of Food Imports	394
1. FDA's Refusal of Entry	395
2. Weakened Enforcement	395
A. Weakened Outcome-Based Tools	395
B. Weakened Production-Based Tools	396
3. Challenges of Suing Chinese Manufacturers in the United States	397
4. Challenges of Suing U.S. Retailers	400
IV. Outsourcing Regulatory Power to China	404
1. U.S. Government's Action Plans on Import Safety	404
A. Promoting Import Safety within Existing Resources	405
B. The Ultimate Goal: Reduction of Physical Inspections	405
2. U.S.-China Agreement on Import Safety	406
A. The Blame Game	407
B. Scope of the Agreement	408
C. Controversial Provisions	409
D. Addressing U.S. Concerns	410
E. Benchmarks for Measuring Success	411
F. Winners and Losers	411
V. Food Safety in China	413
1. Development of Food Safety Law	413
2. The Food Safety Law of 2009	415
A. Government Structure and Legislative Background	415
B. Central and Local Enforcement Agencies	417
C. Food Safety Standards	418
D. Enforcement Tools	420
3. Criminal Penalties	421
4. Enforcement Obstacles	424
A. Local Protectionism and the Melamine Tainted Milk Scandal	424
B. Rampant Corruption and Mr. Zheng's Execution	428
C. Fragmented Food Industry and Unethical Practices	434

d. Environmental Degradation and the Case of Aquacultured Seafood	437
VI. Comparative Perspectives: Hong Kong and Japan	440
VII. Conclusion: Some Thoughts on Regulatory Costs, Adverse Selection, and Food Safety	441

10.

LEAVING THE FDA BEHIND:
PHARMACEUTICAL OUTSOURCING
AND DRUG SAFETY 445

I. The Heparin Crisis	449
II. FDA Inspections and Challenges in Foreign Countries	450
1. Challenges to Foreign Inspections	451
III. Counterfeit Drugs	457
1. Distribution Loopholes	460
2. Inadequate Penalties	461
IV. The FDA's Regulatory Outsourcing	462
1. Agreement with China	464
V. Drug Regulation in China	465
VI. The Drug Administration Law	467
1. Inspections	467
2. Fake Drugs	468
3. Criminal Penalties and Civil Liabilities	469
VII. Law in Practice	471
1. Good Manufacturing Practices (GMP)	472
2. National Standards	474
3. New Drug Approval	476
4. Fake Drug Scandals	477
A. Xinfu (clindamycin phosphate glucose)	478
B. Qiqihar No. 2 Pharmaceutical	479
C. Toxic Toothpaste and Pet Food	480
D. Problems Continue	482
VIII. Conclusion	484
Selected Bibliography by Chapter	487
Index	533

PREFACE AND
ACKNOWLEDGMENTS

Taking Chinese law out of context is like taking a fish out of water. Removed from its natural environment, the law soon becomes lifeless.

It is impossible to study Chinese law in the abstract without examining Chinese history and culture, including the shaping influence of the Communist Party of China (CPC) throughout the past 70 years. Comprehensive studies of Chinese law are rare because it is difficult to collect, translate, and synthesize the materials that illuminate the intricacies of the Chinese legal system. It is even more difficult to find a book that provides in-depth analysis of Chinese “caselaw” from a comparative perspective.

Chinese Law in Context is designed to explore Chinese law through the analysis of historical influences, judicial decisions, government scandals, and significant cultural factors. Rather than offering a mere compilation of blackletter law, the text explains how the Chinese legal system operates in practice today to maintain social stability, the overwhelming objective of the CPC.

This book examines several Chinese legal issues from a comparative point of view. Students who are trained in the law of Western legal systems will find these comparative chapters (dealing with governmental takings, torts, civil procedure, and public health and safety) helpful to understanding not only Chinese law but also the American legal system. Several chapters of the book touch upon how China regulates foreign lawyers, as well as food and drug safety. Readers will find these discussions helpful for understanding the thorny issues that arise in trade disputes between the United States and China.

Portions of *Chinese Law in Context* are drawn from law review articles that I have published in the following law journals in the United States:

Arizona Journal of International and Comparative Law
 Cornell International Law Journal
 Harvard International Law Journal (Online Journal)
 Michigan State International Law Review
 Mississippi Law Journal
 St. Mary's Law Journal
 University of Pennsylvania Journal of Law and Social Change
 (University of) Texas International Law Journal
 Washington University Global Studies Law Review
 Washington University Journal of Law and Policy

Annie Bright, Ernest White, and Dominic Castillo provided excellent assistance that improved the draft of this book in numerous ways. Stephanie Huser, Teresita Pinon, Miranda Macias, Alex Matthews, Lilly Wilson, Elizabeth Ziegler, Charles Hosey, Abbie Berger, and Dominique Valenzuela of the Dean's Research Fellows proofread the last draft. I could not imagine how I could have finished the book without these students' unflinching support.

Bonita Roberts provided critical guidance throughout the writing process. I am sincerely thankful for her valuable advice. Stacy Fowler of St. Mary's University Law Library was most helpful in fulfilling my requests for books and articles both in English and Chinese. Jennifer Hill of the Carolina Academic Press provided superb editorial assistance, which made the production of this book possible.

Robert H. Hu invited me to teach Chinese law on numerous occasions at St. Mary's University School of Law's summer program in Beijing, during which I learned greatly from conversations with Chinese colleagues. I also benefited from the insightful comments and generous support from students and scholars in both the United States and China.

I am deeply indebted to Dean Vincent Johnson for his guidance, support, and friendship over the years, without which this book would not have been possible. Associate Dean Ramona Lampley helped me stay on course during this arduous endeavor, for which I am forever grateful.

I have been fortunate to work with my warm-hearted colleagues: John Teeter, Michael Ariens, Al Kauffman, David Schlueter, Bob Summers, Colin Marks, and all faculty members at St. Mary's University School of Law. I am thankful for their enduring support and friendship.

This book has been reviewed by Professor Richard Albert of the University of Texas at Austin School of Law and Professor Tom Ginsburg of the University of Chicago Law School. For their generosity and support, I am immensely grateful.

CHENGLIN LIU
San Antonio, Texas
November 2, 2019

