

# 1 An overview of the Chinese legal system

In December 2001, China acceded to the World Trade Organization (WTO). This event is significant not only for the Chinese, but also for foreign investors who want to establish a presence in China. It is expected that China's entry into the WTO will result in trade liberalization, and, thus, increased investment opportunities for foreign investors. To enter the Chinese market, foreign investors must understand the legal and business environments in which they will operate. Accordingly, this book aims to introduce the legal framework of conducting business in China, with emphasis on business entities, investment vehicles, contracts, intellectual property, labor and employment, consumer protection, tax considerations, securities, banking, and dispute resolution. Before delving into specific issues, however, it is imperative to have an overview of the Chinese legal system.

## The Chinese legal system from 1949–78

To understand the present, one must know the past. Having defeated the Kuomintang (国民党), who subsequently fled to Taiwan, the Chinese Communist Party (共产党) (the Party) established the People's Republic of China in 1949. At the outset, the new regime abolished Kuomintang's legal system, which was considered to have supported "semi-feudal" or "semi-colonial" rule. Thereafter, it removed most of the judges who had been appointed by the Kuomintang government. In addition, the Party initiated several mass campaigns, such as the Land Reform Movement and the Movement against "Three Evils,"<sup>1</sup> to prepare the masses for a new political order. During those campaigns, "mass trials" were conducted to try the "enemies"<sup>2</sup> before assembled crowds. In terms of formal legal norms, only a handful of laws were enacted during this period, such as the Marriage Law, the Trade Union Law, and the Land Reform Law. Meanwhile, the government under the leadership of the Party carried out nationalization and collectivization measures. Consequently, large private industrial and commercial establishments were converted into state-owned enterprises, while medium-sized and small industrial and commercial concerns were grouped together to become collectives.

As China followed the Soviet Union in adopting a command economy, efforts were also undertaken to develop a legal system based on the Soviet model. From 1953, the government launched several legislative projects with the help of Soviet

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jurists. As a result, the first Constitution was promulgated in 1954, followed by laws relating to the state structure. The drafting of a criminal code, civil code, and criminal procedure code was also begun. Moreover, legal institutions were strengthened. For example, the concept of judicial independence was introduced, and law schools were set up to train judges and lawyers. Nevertheless, the efforts in constructing a socialist legal system did not last long. From the mid-1950s, a series of political events in China and the Maoist ideology in great measure immobilized the construction of a legal system.

In 1956, the Party launched the Hundred Flowers Movement, encouraging people to express views and criticisms. In response, many people spoke out and criticized the Party. Thereafter, the Party launched the Anti-Rightist Campaign to purge its critics. Hundreds of people, especially lawyers and judges who had been quite outspoken, were sentenced to “re-education through labor” (劳改) without any formal court proceedings. These two mass campaigns triggered the weakening of legal institutions. For instance, lawyers stopped practicing law, and law schools were switched to teach politics.

Furthermore, according to Mao Zedong (Mao), there were two basic types of social contradictions – “contradictions among the people” and “contradictions against the people.” Simply stated, “contradictions among the people” were day-to-day conflicts among ordinary people, whereas “contradictions against the people” were conflicts between the people and the enemies. To resolve conflicts among ordinary citizens, education and persuasion through mediation was the preferred means. To resolve conflicts between the people and the enemies, legal institutions, such as formal trial proceedings, were employed. Since the majority of conflicts were among the people, the construction of a legal system was not an exigency. Although the drafting of the Criminal and Criminal Procedure Codes was resumed in the early 1960s, laws and legal institutions were relegated to oblivion during the subsequent Cultural Revolution.

The notorious Cultural Revolution began in 1966, when Mao launched a mass campaign to purge counter-revolutionaries, revisionists, and “people on the capitalist road” with the assistance of the Red Guards, who consisted mainly of students and young people. Numerous people were persecuted, factories were closed down, and political meetings were the order of the day. Many contemporary scholars and commentators view the Cultural Revolution as a power struggle between the pragmatists and the radicals in the Party. Whatever the real cause, law was denounced as a legacy of capitalism and a restraint on the revolutionary masses. As a result, law schools were closed down, lawyers were persecuted, and courts were combined with public-security bureaus under military control. With the abolition of legal institutions, “politics was in command.” After Mao died in September 1976, the Gang of Four (the leading radicals in the Party) was arrested and put on trial. The downfall of the Gang of Four led to the demise of the Cultural Revolution. As the Cultural Revolution ended, the country faced the urgent tasks of enacting legal norms and restoring legal institutions.

### **Economic and legal reforms in the late 1970s and early 1980s**

During the Cultural Revolution, political struggles put the country's economic and legal developments completely on hold. In the late 1970s, the new leadership headed by Deng Xiaoping decided to modernize the country's industry, agriculture, national defense, and science and technology. Toward this end, China implemented economic reforms and opened its door to the outside world.

Economic reforms commenced with the decollectivization of agricultural production. Prior to 1979, agricultural production in China was collective. The agricultural hierarchy consisted of communes, brigades, production teams, and individual households. Farming households were to complete production orders from their production teams. In return, the team leader would give farming households grains and other coupons. Farming households could also keep a small portion of their produce for consumption. At the end of the 1970s, the household responsibility system was implemented. This system allowed farming households to contract with their production teams. Once they had fulfilled the agreed-upon quotas of production, they could keep whatever was left. In addition, they were allowed to engage in sideline production or planting cash crops. Consequently, farming households became much more productive, and their income substantially increased.

Owing to the success of the household responsibility system, the leadership decided to implement economic reforms in industrial production. As mentioned above, China had adopted a command economy. In this kind of economy, the central government promulgated five-year plans and made annual economic decisions, on the basis of which regional authorities formulated their respective economic programs. Moreover, production from state-owned enterprises was under the supervision of their respective departments-in-charge, and their economic performance was evaluated in terms of output rather than profit. Since the state routinely meted out subsidies to loss-making enterprises, many state-owned enterprises suffered from inefficiency and low productivity. Hence, in the early 1980s, the central government decentralized economic decision-making. Local governments and enterprises were given more autonomy to make economic and production decisions. In addition, enterprise directors became accountable for profits and losses.

To attract foreign capital, technology, and management expertise, China passed its first foreign investment law, the Law on Sino-Foreign Equity Joint Ventures, in 1979. Moreover, the government established four Special Economic Zones (SEZs) – Shenzhen, Zhuhai, Shantou, and Xiamen – where investment incentives, such as preferential tax treatment, were offered to foreign investors. Subsequently, the government designated 14 Open Coastal Cities, such as Dalian, Fuzhou, Guangzhou, Shanghai, Ningbo, Qingdao, and Tianjin, to increase the inflow of foreign capital and technology. This open-door policy encouraged many foreign investors and overseas Chinese from Hong Kong, Macau, and Taiwan to invest in China, and thus, contributed to the country's rapid economic growth. Calculated at the 1978 constant price, China experienced an average annual GDP growth rate of 9.3 percent in the period of 1978–98.<sup>3</sup>

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The preceding economic reforms led to the increased complexity of commercial transactions. In particular, the successful absorption of foreign investment depended on an effective legal system in which the rights and interests of foreign investors would be protected. Most importantly, the leaders at that time, many of whom had suffered persecution during the Cultural Revolution, believed that a sound legal system was indispensable to protecting citizens' basic rights and contributing to the country's political and social stability. Hence, efforts were undertaken to rebuild a legal system. For example, the Ministry of Justice was restored in 1979, legal education was revived, and courts were reopened.

This chapter and the remainder of this book introduce the reader to the contemporary Chinese legal system, namely, what has been accomplished in a span of 30 years. In implementing economic and legal reforms, China has taken an incremental approach. That is, without years of accumulated experiences, China has often adopted economic measures and enacted legislation on a trial basis before any full-fledged implementation. For years, scholars and commentators from countries having relatively developed legal systems have criticized the Chinese legal system for various deficiencies, such as ambiguous legal provisions and weak enforcement. Having joined the WTO, China will have to accelerate its efforts in reforming and refining its legal system. Like the study of many other legal systems, our study of Chinese law also commences with the Constitution.

#### **Constitution and state structure**

China's Constitution is the fundamental law of the state and has supreme legal authority. Since its establishment in 1949, China has promulgated four Constitutions – 1954, 1975, 1978, and 1982 Constitutions. As of October 2007, the 1982 Constitution, the latest Constitution, had been revised four times.<sup>4</sup> The Constitution outlines the basic structure of the state by delineating the rights and responsibilities of major government organs. Consequently, the following discussion will first highlight the important provisions of the 1982 Constitution and then introduce the various constituents of the state.

#### ***The 1982 Constitution***

According to the Preamble of the 1982 Constitution, the basic task of the nation is to concentrate its efforts on "socialist modernization construction" (社会主义现代化建设) along the road of Chinese-style socialism. The Chinese people are to work diligently and self-reliantly; to achieve step-by-step the modernization of the country's industry, agriculture, national defense, and science and technology; and to promote the coordinated development of material civilization, political civilization, and spiritual civilization. Moreover, the five principles of foreign policy consist of:

- 1 mutual respect for sovereignty and territorial integrity;
- 2 mutual non-aggression;

- 3 mutual noninterference with internal affairs;
- 4 equality and mutual benefit; and
- 5 peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries.

Hence, the Preamble outlines the directions the country is to take and the bases on which China will handle foreign affairs.

Chapter One of the Constitution contains general principles. Apparently, the Constitution avows the rule of law because the state upholds the uniformity and dignity of the socialist legal system; all state organs, armed forces, political parties, social organizations, enterprises, and institutions must abide by the Constitution and the law; and no organization or individual is privileged to be above the Constitution or the law. In addition, China is a socialist country because the means of production is owned by the whole people or collectively owned by the working people and land in the city is owned by the state, while land in the rural and suburban areas is owned by collectives. No organization or individual may appropriate, buy, sell, or unlawfully transfer land, but the right to the use of the land, which is referred to as land use right (土地使用权), may be transferred in accordance with the law.

On the economic side, China is to adopt a socialist market economy. Public ownership is the principal component, but diverse forms of ownership may coexist. In fact, the non-public sectors of the economy, such as the individual sector (个体经济) and the private sector (私营经济), are important components of the socialist market economy. Citizens have the inviolable right to lawful private property, and compensation must be made for any expropriation or requisition. Moreover, China permits foreign investment, and the rights and interests of foreign enterprises, foreign economic organizations, and Sino-foreign equity joint ventures are protected under Chinese law.

Chapter Two of the Constitution enunciates the fundamental rights and duties of Chinese citizens. Chinese citizens are equal before the law, and the state respects and protects human rights. The Chinese version of the Bill of Rights includes freedom of speech, of the press, of assembly, of association, of procession, and of demonstration (article 35); freedom of religious belief (article 36); freedom of person (article 37); personal dignity (article 38); no unlawful search of residence (article 39); and freedom and privacy of correspondence (article 40). Nonetheless, these rights are not absolute because the exercise of such rights may not infringe upon the interests of the state, society, and the collective, and upon the lawful freedoms and rights of other citizens (article 51). Chapter Three of the Constitution outlines the structure of the state, which will be discussed in the subsequent sections of this chapter.

In comparing the Chinese Constitution with those of the USA and the Soviet Union, Professor Jones makes the following observations.<sup>5</sup> First of all, the structures of the US Constitution and the Chinese Constitution are similar. That is, in both Constitutions, the powers of the most important government organs are depicted in general terms, and the government organs (the legislative, the executive, and

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the judicial) are also similar. Moreover, both China and the USA have a Bill of Rights. Nonetheless, the Chinese Constitution differs from the US Constitution in that China has additional institutions (the Central Military Commission and the Procuratorate), and China is a unitary rather than a federal state. On the other hand, the basic similarities between the Chinese Constitution and the Soviet Constitution are the inclusion of ideological statements and the clear recognition of Marxism as the official doctrine of the state. Besides, the Chinese procuratorate is of Soviet origin, and the use of standing committees of large government organs to do the real work is common to both countries.

To sum up, China, as a socialist country, is developing a socialist market economy. The principal form of ownership is public ownership, but other forms of ownership may coexist. The state protects private property and foreign investment. Despite the debate over whether China is a rule-of-law or rule-by-law country and the advocacy of having the rule of virtue complementary to the rule of law, Chinese citizens are equal before the law and no organization or individual is privileged to be above the Constitution or the law.

### *The overall state structure*

In China, state power is divided among five constituents. The Party has political power, people's congresses have legislative power, the State Council (国务院) and its ministries and commissions have executive power, the people's courts have judicial power, and the people's procuratorates have procuratorial power. The state hierarchy consists of the central, provincial, municipal, county, township, and village levels. There are 23 provinces, five autonomous regions,<sup>6</sup> four municipalities directly under the central government,<sup>7</sup> and two Special Administrative Regions<sup>8</sup> (see Figure 1.1 below).

At the central level, the National People's Congress (全国人民代表大会) (NPC) has the highest power. The State Council, Supreme People's Court (最高人民法院), Supreme People's Procuratorate (最高人民检察院), and the Central Military Commission are accountable to the NPC (see Figure 1.2 below). Accordingly, the question is whether China has the doctrine of separation of power. On one hand, one may argue that China maintains separation of power because various government organs hold different types of power and perform different functions. On the other hand, one may assert that China does not practice separation of power because, first, the NPC has the highest power and supervises the State Council, Supreme People's Court, and Supreme People's Procuratorate, and, second, the power to interpret laws belongs to the NPC Standing Committee.

At the local levels of province, municipality, county, township, and village, the preceding structure is replicated. The people's congress has the highest power. The local government, people's court, and people's procuratorate are accountable to the local people's congress. Moreover, higher-level governments, people's courts, and people's procuratorates have supervisory power over lower-level governments, people's courts, and people's procuratorates. For example, a municipal government is accountable to the provincial government, and a people's procuratorate at the

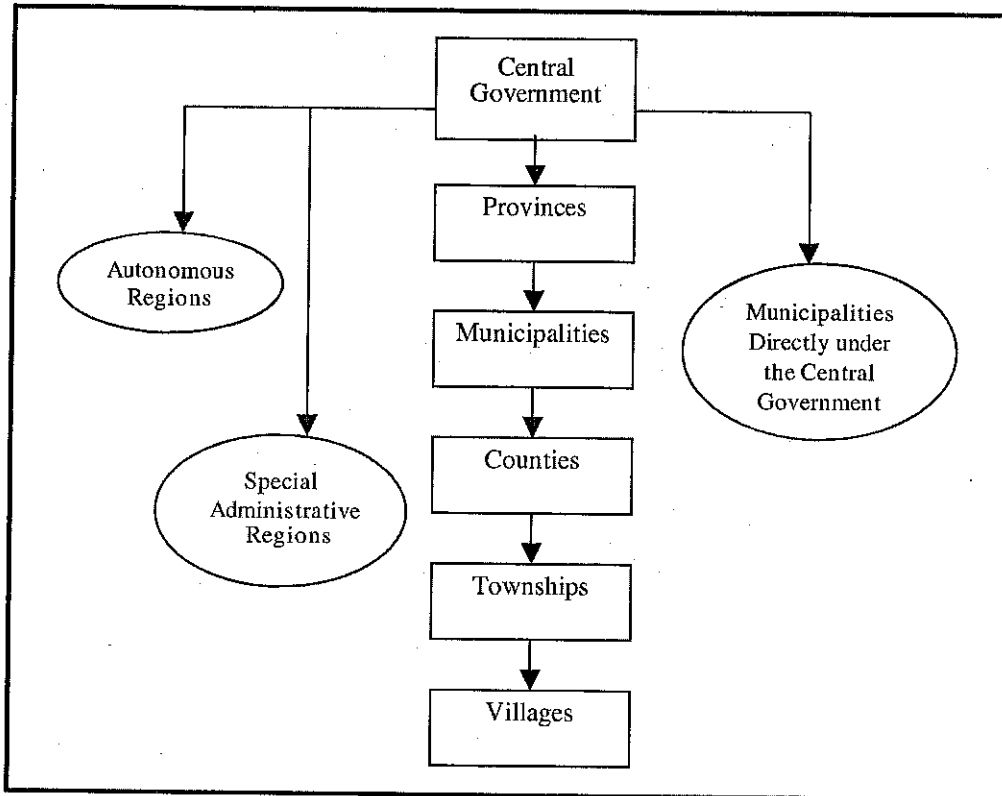


Figure 1.1 Administrative hierarchy.

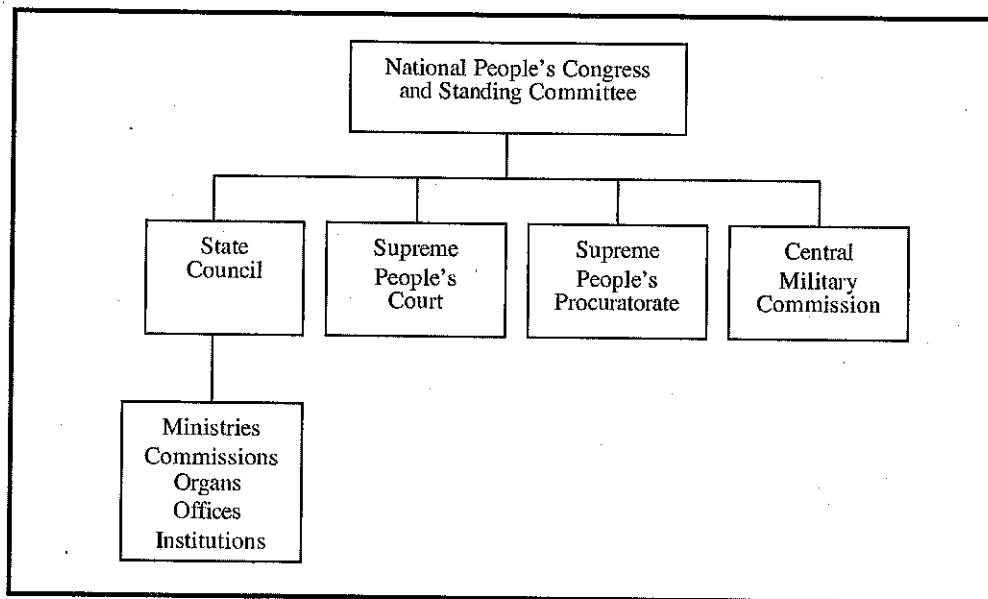


Figure 1.2 Central-level government.

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municipal level is accountable to a procuratorate at the provincial level (see Figure 1.3 below).

The Party was founded in 1921. With the National Congress of the Party at the top, Party congresses at the levels of province, autonomous region, municipality directly under the central government, and other municipalities provide leadership and establish national and local policies. Nevertheless, the Chinese People's Political Consultative Conference (中国人民政治协商会议), "a broadly representative organization of the united front," has non-Party members and serves as an advisory body.

The President of China is the head of state. The NPC elects and removes the President and the Vice-President. The President acts in accordance with the decisions of the NPC and its Standing Committee. The President promulgates laws, appoints and removes members of the State Council, receives foreign diplomats, ratifies and abrogates treaties, confers state honors, issues the order of special amnesty, etc. The Vice-President assists the President in his or her work and may perform functions or exercise powers entrusted by the President.

### *The National People's Congress*

The NPC and local people's congresses at various levels are the organs through which citizens exercise power. The NPC is the highest organ of state power and the highest legislative body. The NPC is composed of deputies elected by the provinces, autonomous regions, municipalities directly under the central government, and the armed forces. There are about 3,000 deputies to the NPC. The NPC is elected for a term of five years. The NPC meets in session once a year for a period of one to three weeks. The 11th NPC commenced in March 2008.

The major functions and powers of the NPC include the following. It amends the Constitution and supervises its implementation. It enacts and amends basic laws

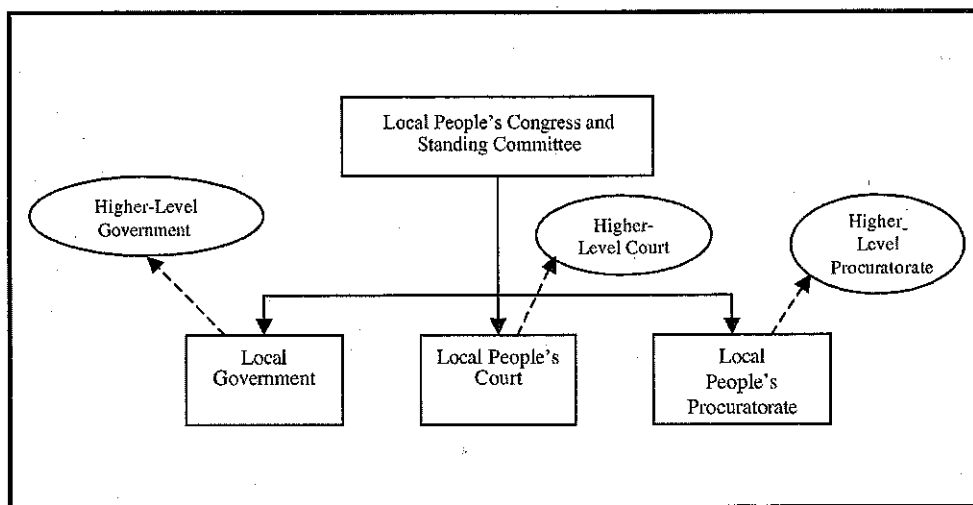


Figure 1.3 Local-level government.

concerning criminal offenses, civil affairs, state organs, and other matters. It appoints and removes top officials of the highest state organs, such as the President of China, the President of the Supreme People's Court, and the Procurator-General of the Supreme People's Procuratorate. It examines and approves national economic and social development plans and the state budget. It approves the establishment of provinces, autonomous regions, municipalities directly under the central government, and Special Administrative Regions.

The NPC has nine Special Committees: Ethnicity; Law; Foreign Affairs; Overseas Chinese; Internal and Judicial Affairs; Finance and Economics; Education, Science, Culture, and Public Health; Environmental Protection and Resource Conservation; and Agriculture and Rural Affairs. The main work of these committees is to examine, discuss, and draw up relevant bills and draft resolutions. When the NPC is not in session, these committees work under the direction of the NPC Standing Committee.

The NPC Standing Committee (全国人民代表大会常务委员会) is the permanent body of the NPC. Members of the Standing Committee are elected by the NPC for the same term as that of the NPC. Currently, the NPC Standing Committee has more than 160 members. The Chairperson and Vice-Chairperson of the Standing Committee cannot serve more than two consecutive terms. Nobody on the Standing Committee can hold office in any of the administrative, judicial, or procuratorial organs. The Standing Committee meets in session once every two months.

The major functions and powers of the Standing Committee include the following. It interprets the Constitution and supervises its enforcement. It enacts and amends laws, except for those that should be enacted by the NPC. It supplements or amends laws enacted by the NPC when the NPC is not in session. It interprets laws. It supervises the work of the State Council, the Central Military Commission, the Supreme People's Court, and the Supreme People's Procuratorate. It annuls administrative regulations, decisions, and decrees of the State Council that contravene the Constitution or laws. It annuls local regulations or decisions that contravene the Constitution, laws, or administrative regulations or resolutions. It appoints and removes the vice-presidents and judges of the Supreme People's Court, members of its Adjudicative Committee, and the President of the Military Court at the suggestion of the President of the Supreme People's Court. It decides on the ratification or abrogation of treaties.

### *The State Council*

The State Council is the highest organ of state administration. The Premier, vice-premiers, state councilors, ministers in charge of ministries, ministers in charge of commissions, the Auditor-General, and Secretary-General comprise the State Council. The working organ of the State Council is its General Affairs Office. The term of office of the State Council is the same as that of the NPC. The Premier, vice-premiers, and state councilors cannot serve more than two consecutive terms.

Under the State Council, there are ministries, commissions, organs, offices, and institutions. As of December 2007, the State Council is composed of 28 ministries

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and commissions, such as the Ministry of Commerce, Ministry of Finance, Ministry of Justice, Ministry of Foreign Affairs, Ministry of Land and Resources, State Development and Reform Commission, State Ethnic Affairs Commission, the People's Bank of China, and the State Audit Office. Moreover, the State Council has 18 administrative organs, four offices, and 14 institutions. For instance, the State Administration of Taxation, State Administration for Industry and Commerce, State Statistics Bureau, State Administration of Customs, and State Intellectual Property Office are administrative organs directly under the State Council; the Overseas Chinese Affairs Office and Legislative Affairs Office are administrative offices directly under the State Council; and the Xinhua News Agency, China Securities Regulatory Commission, and Chinese Academy of Sciences are institutions directly under the State Council. Apart from these government entities, there are various bureaus overseen by the ministries and commissions. The State Council has been restructured from time to time, and a major restructuring will occur in the coming months.

Succinctly, the State Council exercises the following major functions and powers. It adopts administrative measures, enacts administrative regulations, and issues decisions and orders in accordance with the Constitution and laws. It submits proposals to the NPC or its Standing Committee. It exercises unified leadership over the work of local organs of state administration at different levels. It formulates and implements plans for national economic and social development and the state budget. It administers work concerning urban and rural development, education, science, culture, public health, civil affairs, public security, judicial administration, foreign affairs, national defense, etc. It amends or annuls inappropriate orders, directives, and rules issued by ministries or commissions.

### *The Supreme People's Procuratorate*

The Supreme People's Procuratorate is the highest state organ of judicial supervision. Being responsible to the NPC and its Standing Committee, it directs the work of local people's procuratorates. According to the Law on the Organization of the People's Procuratorate,<sup>9</sup> people's procuratorates are to supervise judicial proceedings in criminal cases, investigate directly accepted criminal cases, examine criminal cases investigated by public-security organs and decide whether or not to arrest and prosecute the suspect, and lodge protests to people's courts against effective, but incorrect, judgments or rulings. To protect citizens' rights against public officials, people's procuratorates also handle cases of officials' misconduct in office. The term of office of the Procurator-General of the Supreme People's Procuratorate is the same as that of the NPC.

### **Legislation**

Since China commenced legal reforms in the late 1970s, numerous laws, regulations, rules, and decrees have been promulgated. Notwithstanding the sheer volume of legal norms, lawmaking in China was plagued with problems. For instance,

people's congresses at various levels were criticized for being "rubber stamps." In addition, different lawmaking entities issued inconsistent legal norms on the same or related subjects, and laws and regulations passed at various times contained conflicting provisions on the same subject. Thus, it was unclear which legal provision should govern. Furthermore, government rules were issued, amended, or repealed without immediate or widespread publication, which made it difficult to tell whether a certain subject was being regulated or a particular rule was still in effect. In view of these problems, the NPC enacted the Legislation Law in 2000.<sup>10</sup> Together with the Constitution, the Legislation Law provides clear and uniform guidance on legislative activities.

### *Types of legal norms and lawmaking entities*

In China, legal norms consist of the Constitution (宪法), basic laws (基本法), administrative regulations (行政法规), government rules (部门规章 or 地方政府规章), local regulations (地方性法规), and self-governing or specific regulations (自治条例 or 单行法).

As mentioned above, the NPC adopts and amends the Constitution. The NPC also has the power to enact and amend basic laws (or laws) relating to criminal matters, civil affairs, and government organs, as well as other types of basic laws. Moreover, the NPC Standing Committee has the power to enact and amend laws other than those that should be made by the NPC, and while the NPC is not in session, to supplement and amend those laws made by the NPC. Specifically, the following matters are to be regulated by means of law: sovereignty issues; the establishment, organization, and powers of people's congresses, people's governments, people's courts, and people's procuratorates at various levels; systems relating to the self-governance of ethnic areas and grassroots organizations<sup>11</sup> or to Special Administrative Regions; crimes and punishments; deprivation of political rights; compulsory measures and punishments restricting freedom of person; governmental expropriation of non-state-owned property; the basic system of civil affairs; basic systems relating to economics, fiscal policy, taxes, customs, finance, and foreign trade; and litigation and arbitration systems. Some examples of basic laws are the Criminal Law, Trade Union Law, Marriage Law, and Civil Procedure Law.

To perform its mission, the State Council is empowered to enact administrative regulations to implement basic laws as well as regulations regarding matters falling within its administrative power. An example of this type of administrative regulation is the Regulations on the Administration of Broadcasting Television. Moreover, the NPC and its Standing Committee can authorize the State Council to enact administrative regulations on those matters for which laws have not been made, except for crimes and punishments, deprivation of political rights, compulsory measures and punishments restricting freedom of person, and judicial system. The Provisional Regulations on Private Enterprises is an example of this type of administrative regulation.

Ministries and commissions under the State Council, including the People's Bank of China and the State Audit Office, and administrative organs directly

under the central government may enact ministerial and departmental rules (部门规章) on matters falling within their respective administrative powers in order to implement laws as well as the State Council's administrative regulations, resolutions, and decrees. One example of this type of government rule is the Rules on the Administration of Patent Agencies. If a matter falls within the powers of two ministries or departments, it should be submitted to the State Council for the enactment of an administrative regulation, or the relevant ministries or departments jointly should make a government rule on such subject. For instance, in 1994, the Ministry of Labor and the Ministry of Foreign Trade and Economic Cooperation jointly promulgated the Rules on Labor Management in Foreign Investment Enterprises. Likewise, the people's governments of provinces, autonomous regions, municipalities directly under the central government, and larger cities may enact local government rules (地方政府规章) to implement basic laws, administrative regulations and local regulations, and to deal with concrete administrative matters within their respective administrative districts. One good example is the Notice of the Zhejiang People's Government concerning the Establishment of a Government Procurement System. Since these two types of rules are similar and are ranked the same in the hierarchy of legal norms (discussed below), they are collectively termed "government rules" here.

Furthermore, people's congresses and their standing committees of provinces, autonomous regions, and municipalities directly under the central government may enact local regulations in light of the actual circumstances and practical needs of their respective administrative areas. Cities where the people's governments of autonomous regions are located, SEZs, and larger cities approved by the State Council may enact local regulations, subject to the approval of the standing committees of the provincial or autonomous-regional people's congresses. Besides local affairs, local regulations may be enacted to implement laws and administrative regulations. Furthermore, except for matters that must be regulated by laws, provinces, autonomous regions, municipalities directly under the central government, and larger cities may enact local regulations if no laws or administrative regulations dealing with the same subjects exist. One example of local regulation is the Measures of the Anhui Province on the Handling of Water Traffic Accidents.

Finally, the people's congresses of ethnic autonomous areas may enact self-governing or specific regulations in light of local political, economic, and cultural characteristics. The self-governing or specific regulations of autonomous regions become effective upon the approval of the NPC Standing Committee. The self-governing or specific regulations of an autonomous prefecture or autonomous county become effective upon the approval of the standing committee of the people's congress of the province, autonomous region, or city directly under the central government. In implementing laws and administrative regulations by means of self-governing or specific regulations, autonomous areas may make adaptations in accordance with local circumstances, but not in contradiction of the basic principles of the laws or administrative regulations. One example of self-governing regulation is the Measures of Ningxia Hui Autonomous Region on the Management of Sports Competition.

### *Hierarchy of legal norms*

As previously mentioned, the Constitution is the supreme law of the country. Therefore, basic laws, administrative regulations, government rules, local regulations, and self-governing or specific regulations cannot contravene the Constitution. In addition, administrative regulations must be made in accordance with the Constitution and basic laws; local regulations cannot contradict the Constitution, basic laws, and administrative regulations; and government rules are mainly enactments of ministries or commissions under the State Council or of local governments.

Consequently, basic laws take precedence over administrative regulations, local regulations, and government rules; and administrative regulations take precedence over local regulations and government rules. Moreover, local regulations take precedence over government rules enacted by the same-level or lower-level government. Finally, government rules made by the people's government of a larger city are subordinate to those made by the provincial or autonomous-regional government. In short, the Constitution is at the top of the legal hierarchy. The laws adopted by the NPC or its Standing Committee and administrative regulations enacted by the State Council rank second and third, respectively.

### *Inconsistencies between legal norms*

As a rule, inconsistencies between legal norms can be resolved with reference to the preceding hierarchy of legal norms. Where conflicting provisions exist in laws, administrative regulations, local regulations, self-governing or specific regulations, or government rules made by the same entity, the specific will take precedence over the general,<sup>12</sup> and the new will take precedence over the old.

Procedurally, conflicting provisions between two laws are to be resolved by the NPC Standing Committee, while conflicting provisions between two administrative regulations are to be determined by the State Council. In a similar vein, conflicting provisions between new and old government rules made by the same government organ are to be determined by the government organ. However, conflicting provisions between laws and regulations based on delegated power are to be determined by the NPC Standing Committee.

Furthermore, conflicting provisions between local regulations and government rules issued by ministries or departments under the State Council should be referred to the State Council. In that case, the State Council may decide either to apply the local regulation in the relevant locality, or to submit to the NPC Standing Committee for a determination. Likewise, if there are conflicting provisions between government rules issued by different ministries or departments under the State Council, or conflicting provisions between government rules issued by ministries or departments and government rules issued by local governments, the State Council should make a determination.

*Interpretation of legal norms*

Depending on the interpretative entity, there are four types of legal interpretation in China: legislative, administrative, judicial, and procuratorial. In terms of legal significance, legislative interpretation has the greatest weight, while judicial and procuratorial interpretations appear to have the least, and administrative interpretation falls somewhere in the middle. The NPC Standing Committee is authorized to interpret laws where it is necessary to give more concrete meaning to the law, or where new circumstances have arisen since the enactment of the law and it is necessary to clarify the appropriate legal basis. The interpretations of the Standing Committee have the same legal effect as laws.

In 1981, the NPC Standing Committee adopted a resolution,<sup>13</sup> allowing the State Council and departments-in-charge to interpret laws or decrees<sup>14</sup> with respect to their non-trial or non-procuratorial application. This resolution, however, does not deal with the interpretation of administrative regulations or government rules. For years, the State Council and its subordinates have been the exclusive interpreters of administrative regulations or government rules. In a circular to local people's governments, ministries and commissions, and administrative organs directly under the central government,<sup>15</sup> the State Council maintains that it has the power to supplement and clarify the limits of administrative regulations, and that departments-in-charge are to interpret administrative regulations with respect to their specific application. Thus, it is common for the State Council and ministries to indicate in administrative regulations or government rules which entity has the power to interpret the provisions therein. For example, the Ministry of Labor and Social Security (currently the Ministry of Human Resources and Social Security) was to interpret the Regulations on the Handling of Labor Disputes in Enterprises. In interpreting administrative regulations or government rules, the people's courts always defer to the relevant ministries or departments.

As discussed above, the people's court is the judicial organ of the country, and the people's procuratorate is the state organ for legal supervision. The Constitution does not authorize people's courts to interpret laws and regulations. To facilitate the uniform application of laws by courts across the country, the 1981 Resolution also authorizes the Supreme People's Court to interpret laws or decrees relating to their specific application at trial. Even so, the interpretative power of the Supreme People's Court should be limited because no constitutional or statutory provisions indicate that judicial interpretations have the same legal effect as laws. However, in a 1997 circular,<sup>16</sup> the Supreme People's Court maintained that its interpretations had legal effect. Recently, in the Provisions on Work Regarding Judicial Interpretations,<sup>17</sup> the Supreme People's Court again reiterates that judicial interpretations have legal effect. If a lower court bases its judgment on both law and judicial interpretation, it should first cite the legal rule and then the judicial interpretation.

Specifically, judicial interpretation can be given in four different formats – interpretation, provision, reply, and decision. An “interpretation” is to be used when a judicial interpretation is formulated to explain how to apply specifically a

piece of legislation at trial or how to apply the law to a particular type of case or issue. The format of “provision” should be used when it is necessary to formulate norms and opinions for administration of justice based on the spirit of law. “Reply” refers to a judicial interpretation formulated in response to the request of a high people’s court or military court for direction on the specific application of law at trial. A “decision” should be used when a judicial interpretation is amended or repealed. For instance, in November 2000, the Supreme People’s Court issued to Jilin Province High People’s Court the Reply Concerning Questions in the Trial of a Criminal Case with an Incidental Civil Action. Moreover, the Supreme People’s Court has issued judicial interpretations to provide a complete set of answers to questions with respect to the application of a particular statute. These general interpretations often supplement broad, ambiguous, or vague provisions in existing laws, and thus, become a source of law. One example of this type of judicial interpretation is the Interpretations Concerning Several Questions about the Application of the Securities Law.

The 1981 Resolution also authorizes the Supreme People’s Procuratorate to interpret laws or decrees relating to their specific application in procuratorial work. Like the Supreme People’s Court, the Supreme People’s Procuratorate also maintains that its interpretations have the same effect as laws.<sup>18</sup> If the interpretation provided by the Supreme People’s Court conflicts with that of the Supreme People’s Procuratorate, both interpretations must be submitted to the NPC Standing Committee for interpretation or determination.

## **The judicial system**

Since the late 1970s, China has undertaken various efforts to rebuild or revitalize its judicial system. Nonetheless, the Chinese judicial system has been much criticized, especially on the poor quality of judges, lack of judicial independence, and weak enforcement. Therefore, this section first introduces the Chinese court system and then explains the controversy over the lack of judicial independence.

### *Levels of court*

In China, there are four levels of general jurisdiction courts. At the national level, there is the Supreme People’s Court. At the level of province, autonomous region, or municipality directly under the central government, there are high people’s courts (about 30). In districts within provinces or autonomous regions, municipalities directly under the central government, municipalities in provinces and autonomous regions, and autonomous prefectures, there are intermediate people’s courts (about 380). At the level of county, autonomous county, municipality not dividing into districts, or district within a municipality, there are basic people’s courts (about 3,000). Moreover, China adopts a two-trial system, namely, one trial at the court of first instance and one appeal at the court of second instance. In each court, there are various divisions. Most courts have the criminal division, civil division, and administrative division. Some courts also have other divisions, such as the

economic division, intellectual property division, and bankruptcy division. The criminal division deals with crimes, the civil division hears civil disputes, and the administrative division processes complaints against government organs. Furthermore, China has special people's courts, such as military courts, maritime courts, railway transportation courts, and forest courts (see Figure 1.4 below).

The Supreme People's Court is accountable to the NPC and its Standing Committee. The NPC elects the President (院长) of the Supreme People's Court. The term of office of the President of the Supreme People's Court is the same as that of NPC. Upon recommendation of the President of the Supreme People's Court, the NPC Standing Committee appoints the Vice-President (副院长), chief judge of a division (庭长), deputy chief judge of a division (副庭长), judges (法官), and members of the adjudicative committee (审判委员会). The Constitution mandates that the Supreme People's Court supervise the administration of justice by local people's courts and special courts at all levels. As already mentioned, the Supreme People's Court provides interpretations of questions concerning specific applications of laws at trial.

The people's courts at various levels are accountable to the organs of state power that create them, that is, people's congresses. The court president of a local people's court is elected by the local people's congress. If the local people's congress is not in session and the standing committee wants to replace the president of a people's court, it may do so by submitting to the standing committee of the people's congress at the next higher level for approval. The vice-president, members of the adjudicative committee, chief judge of a division, deputy chief judge of a division,

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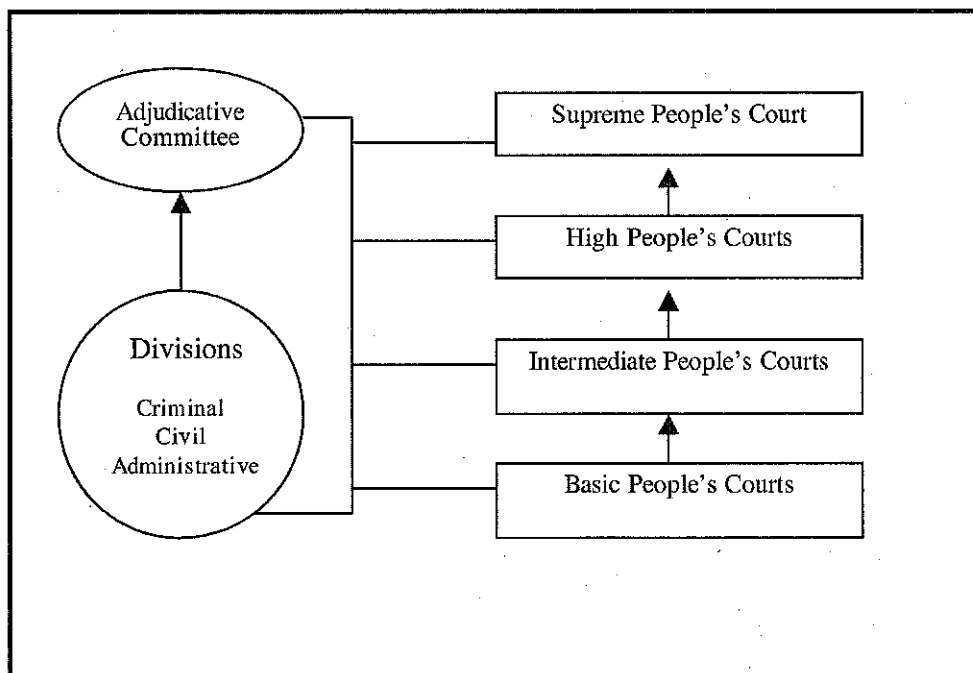


Figure 1.4 Courts.

and judges are appointed by the standing committee of the people's congress. Assistant judges (助理审判员) are appointed by the people's court.

### *Jurisdiction*

According to the Law on the Organization of the People's Court,<sup>19</sup> basic people's courts are courts of first instance in criminal and civil cases. However, the basic people's court may request to have a case transferred to the intermediate people's court if it thinks that the case is significant. In addition, basic people's courts are to handle civil disputes that do not need a court session or minor criminal offenses, as well as direct the work of people's mediation committees.

Intermediate people's courts are courts of first instance as stipulated in laws or decrees. Moreover, intermediate people's courts handle appeals against judgments or rulings made by basic people's courts as well as protests lodged by people's procuratorates against effective, but incorrect, judgments or rulings. The intermediate people's court may also request to have an important civil or criminal case transferred to the high people's court. Similarly, high people's courts are courts of first instance as stipulated in laws or decrees. They also handle appeals or protests against judgments or rulings made by lower people's courts.

The Supreme People's Court is the court of first instance as stipulated in laws or decrees or if it deems appropriate. The Supreme People's Court handles appeals against judgments and rulings made by high people's courts or special people's courts, as well as protests lodged by the Supreme People's Procuratorate.

### *Judges*

After the Cultural Revolution, courts were reopened, but very few qualified judges were available. In addition, retired military personnel were often appointed as judges in local people's courts. As a result, the competency of many judges was questionable. In 1995, China passed its Judges Law,<sup>20</sup> outlining the qualifications as well as the rights and duties of judges. Specifically, the Judges Law provides that judges cannot be dismissed without cause or without legal procedure; the wages of judges are to be increased at fixed intervals; and the performance of judges is to be evaluated annually.

To become a judge or an assistant judge, a Chinese citizen must:

- 1 be at least 23 years old;
- 2 have graduated with a degree in law or a degree in another area of specialization (but having professional knowledge in law) from an institution of higher education and have engaged in legal work for two years (or three years for those who will become judges in the high people's courts and the Supreme People's Court), or have obtained a master's or doctorate degree in law or a master's or doctorate degree in another area of specialization (but having professional knowledge in law) from an institution of higher education and have engaged in legal work for one year (or two years for those who will

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- become judges in the high people's courts and the Supreme People's Court);
- 3 have not been criminally punished or dismissed from public office; and
- 4 have passed a judge examination administered by the Supreme People's Court.

In addition, a judge cannot serve concurrently as a member of the standing committee of a people's congress; work for an administrative or procuratorial organ, enterprise, or institution; or practice as a lawyer.

### *Judicial independence*

In many countries, such as the USA and Japan, judicial independence means that a judge independently makes decision in an individual case without any interference. In China, however, judicial independence has a somewhat different meaning. Article 126 of the Constitution and article 4 of the Law on the Organization of the People's Court provide that people's courts exercise judicial power independently and are not subject to interference by any administrative organs, social organizations, or individuals. Hence, judicial independence refers to the independence of the court as a collective entity vis-à-vis other state organs or external bodies.

Furthermore, an adjudicative committee is to be established in each court. The adjudicative committee is composed of the court president and some judges appointed by the standing committee of the people's congress upon the recommendation of the court president. Its mission is to summarize trial experiences and to discuss important or difficult cases as well as other questions relating to the administration of justice. A court may claim independence, but an individual judge or a collegiate bench does not act independently when deciding important cases. This is because the adjudicative committee may direct the individual judge or collegiate bench as to what verdict should be given, and the judge or collegiate bench just implements the decision of the committee.

Given that judicial independence in China refers to the independence of the court vis-à-vis other entities, judicial independence may not be achieved for at least two reasons. First, local people's courts at various levels are supported financially by local governments. Thus, there is a strong incentive for local people's courts to protect local interests. Second, the appointment or removal of judges is subject to the approval of local people's congresses and their standing committees. Hence, judges may be susceptible to the influence of the deputies to local people's congresses. In other words, local protectionism and personal interest may have a negative impact on judicial independence.

### *Judicial reform*

In 1999, the Supreme People's Court promulgated the first five-year reform program (1999 to 2003), which was meant to further deepen the reform of trial format; establish an organizational form in conformity with the rules of administration of justice; scientifically establish the internal organs of the court; deepen the reform

of the court's personnel management system; strengthen the modernization of the court's operations and further raise judicial efficiency and the management level of the court; reinforce the construction of systems, perfect supervision mechanisms, and protect the integrity of administration of justice; and actively explore further reforms of the court.<sup>21</sup>

In 2005, the Supreme People's Court promulgated the second five-year reform program (2004 to 2008) to further enhance the judicial system. The program aims to reform and improve: the litigation proceedings; the system of judicial guidance and the mechanisms for the uniform application of laws; the enforcement system and working mechanisms; the judicial organization and judicial organ; the management systems for trial and administrative affairs; the personnel management system of the judiciary; and the systems of internal supervision and of external supervision of the people's court.<sup>22</sup>

### **The legal profession**

After the Cultural Revolution, lawyers began to reappear and law schools were reopened or formed. Initially, Chinese lawyers worked for the government. Over the years, lawyers have become the advocates for individual citizens, private law firms have increased steadily, and the self-regulating All China Lawyers Association has been established.

#### *Lawyers*

For 16 years, the Chinese legal profession was regulated under a provisional regulation. In 1996, the Lawyers Law<sup>23</sup> was promulgated, providing guidance on the rights and duties of lawyers, qualification requirements, law firms, lawyer associations, legal aid, and disciplinary measures. Subsequently, detailed rules for its implementation have also been issued, covering such areas as legal service fees and the bar examination. As of 2007, the Lawyers Law has been amended twice.

To practice law, one must secure a practicing license. To obtain a practicing license, one must uphold the Constitution, pass the uniform bar examination, complete one full year's apprenticeship in a law firm, and have sound character. Nonetheless, if any person who holds a degree from an institution of higher education and has worked in a field that urgently needs legal service personnel for 15 years, or any person who has worked in high-level posts or obtained equivalent professional level and has relevant professional legal knowledge, wants to apply for a practicing license; the judicial-administration department of the State Council, that is, the Ministry of Justice, can assess his or her qualifications and decide on whether or not to grant a license.

A lawyer may practice with only one law firm. A public servant cannot currently work as a practicing lawyer. A law firm must have its own name, domicile, and articles of association; lawyer(s); and the amount of capital as prescribed by the Ministry of Justice. In addition, the founder of the law firm must be a lawyer who has a certain amount of practical experience and has not been punished with the

suspension of his or her license in the previous three years. A law firm must also obtain a practicing license.

To set up a solo practice, the lawyer must have five or more years of practical experience. To establish a partnership, there must be at least three partners, and the founder must be a lawyer with three or more years of practical experience. Moreover, a partnership law firm may open a branch office if it has been established for three or more years and has 20 or more practicing lawyers.

A lawyer association is a self-regulating legal-person social organization. A lawyer, as well as a law firm, must join a local lawyer association, and thus, become a member of the All China Lawyers Association. Legal service fees are to be charged in accordance with state regulations. Even so, lawyers and law firms must provide legal aid in accordance with the law.

### *Foreign law firms*

According to the Regulations on the Administration of Representative Offices of Foreign Law Firms in China,<sup>24</sup> a foreign law firm, foreign organization, or foreigner may not engage in legal-service activities in the name of a consulting company or any other names. Nonetheless, foreign law firms are allowed to establish representative offices in China if they meet certain requirements and receive permission from the Ministry of Justice. The requirements are as follows:

- 1 The foreign law firm must have lawfully practiced law in its own country and have not been punished for any violation of professional ethics or disciplinary measures.
- 2 The representatives of the foreign law firm in China must be duly licensed lawyers and members of the relevant lawyer association, have practiced law outside China for at least two years, and have never been criminally punished or punished for violating professional ethics or disciplinary measures.
- 3 The chief representative must have practiced law outside China for at least three years and be a partner of the foreign law firm.
- 4 The law firm has practical needs to establish a representative office in China.

Once the foreign law firm has obtained the necessary permission, it must register with the local judicial-administration department at the level of province, autonomous region, or municipality directly under the central government. The representative office and the representatives must register every year; and any merger, division, or addition of representatives must be approved.

Currently, foreign law firms can advise clients on the laws of their home countries; advise clients on international treaties and customary rules; take instructions from clients or Chinese law firms and act on their behalf in their home jurisdictions; give instructions to Chinese law firms on behalf of their foreign clients; conclude contracts with Chinese law firms to maintain a long-term agency relationship; and provide information relating to China's legal environment. Although the representative offices of law firms from Hong Kong are regulated separately due

to the Closer Economic Partnership Arrangement between mainland China and Hong Kong, their scope of activities is quite similar to that of the representative offices of foreign law firms.

Nevertheless, the representative office cannot hire Chinese lawyers, and its Chinese assistants cannot provide legal services. Moreover, a foreign lawyer must stay in China for at least six months per year. If the foreign lawyer stays in China for less than six months, he or she will not be able to register in the following year. Likewise, if the foreign lawyer's Chinese license is revoked, he or she will not be able to represent foreign law firms in China for five years. Furthermore, a foreign lawyer may not serve concurrently as the representatives of two foreign law firms in China.

Prior to China's accession to the WTO, the activities of the representative offices of foreign law firms were restricted. To fulfill its WTO commitments, China has liberalized its legal-service sector. For example, there is no more limit on the number of representative offices in China, the establishment of representative offices is not limited to certain cities, and the business activities of the representative office and of the representative(s) have been expanded. Nevertheless, a memorandum issued by the Shanghai Bar Association on 17 April 2006 and entitled "The Situation of Illegal Business Activities Practiced by the Foreign Law Firms in Shanghai Is Severe" claims that some foreign law firms have engaged in unauthorized practice of law, such as hiring a large number of "assistants" with Chinese lawyer practicing licenses to provide legal services; engaging in Chinese legal services as partners or consultants through establishing or controlling Chinese law firms; controlling the litigation procedure through such activities as investigation, collection of evidence, provision of legal opinion, etc.<sup>25</sup>

### Further reading

- Corne, Peter Howard, "Creation and Application of Law in the PRC," *The American Journal of Comparative Law* 50, 2002, pp. 369–443.
- Jones, William C., "The Constitution of the People's Republic of China," *Washington University Law Quarterly* 63, 1985, pp. 707–35.
- Lubman, Stanley, "Bird in a Cage: Chinese Law Reforms after Twenty Years," *Northwestern Journal of International Law and Business* 20, 2000, pp. 383–423.
- Peerenboom, Randall, "The X-Files: Past and Present Portrayals of China's Alien 'Legal System'," *Washington University Global Studies Law Review* 2, 2003, pp. 37–95.

### Notes

- 1 The "three evils" were corruption, waste, and bureaucratism in the Party, government agencies, and state-owned enterprises.
- 2 Generally, the "enemies" referred to counter-revolutionaries, landlords, and criminals.
- 3 This figure is derived from the State Statistics Bureau, *China Statistical Yearbook 1999*, Beijing: China Statistics Press, 1999, p. 55 and 58.
- 4 The Constitution of the People's Republic of China, adopted at the 5th Session of the 5th National People's Congress on 4 December 1982 and amended at the 1st Session

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- of the 7th National People's Congress on 12 April 1988, the 1st Session of the 8th National People's Congress on 29 March 1993, the 2nd Session of the 9th National People's Congress on 15 March 1999, and the 2nd Session of the 10th National People's Congress on 14 March 2004, respectively.
- 5 See William C. Jones, "The Constitution of the People's Republic of China," *Washington University Law Quarterly*, Vol. 63, 1985, p. 707, nn. 1 and 2.
  - 6 The five autonomous regions, where ethnic minorities reside, are in Xinjiang, Tibet, Inner Mongolia, Guangxi, and Ningxia.
  - 7 The four municipalities directly under the central government are Beijing, Tianjin, Shanghai, and Chongqing.
  - 8 The two Special Administrative Regions are Hong Kong and Macau.
  - 9 The Law of the People's Republic of China on the Organization of the People's Procuratorate, adopted at the 2nd Session of the 5th National People's Congress on 1 July 1979 and amended at the 2nd Session of the Standing Committee of the 6th National People's Congress on 2 September 1983.
  - 10 The Legislation Law of the People's Republic of China, adopted at the 3rd Session of the 9th National People's Congress on 15 March 2000.
  - 11 Examples of grassroots organizations are residents' committees in the urban areas and villagers' committees in the rural areas.
  - 12 One exception is that the Property Law takes precedence over the Guarantee Law, see art. 178 of the Property Law of the People's Republic of China, adopted at the 5th Session of the 10th National People's Congress on 16 March 2007.
  - 13 The Resolution Regarding the Strengthening of Legal Interpretative Work, promulgated by the 19th Session of the Standing Committee of the 5th National People's Congress on 10 June 1981.
  - 14 The NPC Standing Committee sometimes passes a resolution or a decree instead of enacting a law, especially on a matter having only one or a few issues.
  - 15 The Notice Concerning Questions about the Procedures and Powers in the Interpretation of Administrative Regulations, promulgated by the State Council on 3 March 1993 and 10 May 1999.
  - 16 The Several Provisions on Work Concerning Judicial Interpretations, promulgated by the Supreme People's Court on 23 June 1997.
  - 17 The Provisions on Work Regarding Judicial Interpretations, promulgated by the Supreme People's Court on 23 March 2007.
  - 18 The Provisional Regulations on Legal Interpretative Work of the Supreme People's Procuratorate, promulgated by the Supreme People's Procuratorate on 9 December 1996.
  - 19 The Law of the People's Republic of China on the Organization of the People's Court, adopted at the 2nd Session of the 5th National People's Congress on 1 July 1979 and amended at the 2nd Session of the Standing Committee of the 6th National People's Congress on 2 September 1983 and the 24th Session of the Standing Committee of the 10th National People's Congress on 31 October 2006, respectively.
  - 20 The Judges Law of the People's Republic of China, adopted at the 12th Session of the Standing Committee of the 8th National People's Congress on 28 February 1995 and amended at the 22nd Session of the 9th National People's Congress on 30 June 2001.
  - 21 The Five-Year Outline for Reforming the People's Court, promulgated by the Supreme People's Court on 20 October 1999.
  - 22 The Second Five-Year Outline for Reforming the People's Court (2004–2008), promulgated by the Supreme People's Court on 26 October 2005.
  - 23 The Lawyers Law of the People's Republic of China, adopted at the 19th Session of the Standing Committee of the 8th National People's Congress on 15 May 1996 and amended at the 25th Session of the Standing Committee of the 9th National People's Congress on 29 December 2001 and at the 30th Session of the Standing Committee of the 10th National People's Congress on 28 October 2007.