

Legislating, the Judiciary, and Lawyers in China

The development of the lawmaking process in the People's Republic of China has gone through a number of stages since its founding in 1949. During the period 1949–1957, the government established the groundwork for the new socialist legal system, borrowing heavily from the Soviet legal system. During the period 1966–1976, the Cultural Revolution led to a virtual destruction of the legal system, and virtually no new laws were adopted. In July 1979, after China made a commitment to reform its legal system to encourage economic development and modernization, the National People's Congress (NPC) promulgated a number of organic laws (*zuzhi fa*) that outlined the status, internal structure, and legislative drafting procedures for the government's administrative and legislative entities.¹ The NPC also developed *zuzhi fa* for the administration of the court system and prosecutorial functions of the state. At the same time, the NPC also promulgated the Criminal Law and Criminal Procedure Law of the People's Republic of China.² Additionally, a revised Constitution was adopted on December 4, 1982 by the 5th Session of the 5th National People's Congress.³

1. On July 1, 1979, the NPC adopted the Organic Law of the Local People's Congresses and Local People's Governments, the Electoral Law for the National People's Congress and Local People's Congresses of All Levels, the Organic Law of the People's Court, and the Organic Law of the People's Procuratorates. The NPC also adopted a resolution declaring that all laws enacted since the founding of the PRC were to remain in effect as long as they did not conflict with the Constitution and more recently enacted legislation. In reality, most of the laws from the Mao era have either been replaced or are no longer in force. Capener, *An American in Beijing: Perspectives on the Rule of Law in China*, 1988 B.Y.U. L. REV. 567, 573; Li, *Philosophical Influences on Contemporary Chinese Law*, 6 IND. INT'L & COMP. L. REV. 327, 331 (1996).

2. See *infra* Chapter 23, "Criminal Liability for FIE Activities."

3. The 1982 version of the Constitution was amended by the NPC in 1988, 1993, 1999, and 2004. See CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA (adopted on December 4, 1982 by the

Since the early 1980s, the PRC leadership has consistently called for improvements to China's legal system to further the government's economic development plans. Deng Xiaoping stated in 1984 that China's "legal system is not perfect, and therefore we shall have to formulate a number of laws, decrees and regulations to have our democracy systemized and governed by law."⁴ In October 1987, Chinese Communist Party General Secretary Zhao Ziyang, in a report to the 13th Party Congress, emphasized the need to "further perfect legislation governing business dealings with foreign firms."⁵

This chapter reviews the administrative framework for lawmaking institutions in China, the role of the CCP in the legislative process, the Chinese judiciary, and the burgeoning legal profession in the PRC.

A. Legislative Institutions

1. National People's Congress

The NPC is the "highest organ of state power" and is constitutionally charged with the legislative power of the state.⁶ Under China's Constitution, "[a]ll citizens of the People's Republic of China are equal before the law" and "[a]ll power in the People's Republic belongs to the people."⁷ The NPC is a single-chamber body and is composed of approximately 3,000 delegates elected by the various provinces, autonomous regions, and municipalities directly under the supervision of the central government (i.e., Beijing, Shanghai, Chongqing, and Tianjin), and the armed forces.⁸ Under the NPC's control are the State Council (the Central People's Government), the Supreme People's Court, the Supreme People's Procuratorate, and the Central Military Commission.

The NPC meets in session once a year for a two- or three-week period of time, and primarily evaluates and approves the lawmaking activities of the NPC Standing Committee, the members of which are appointed by the

5th Sess. of the National People's Congress and amended), *reprinted in* CHINA LAWS FOR FOREIGN BUSINESS (CCH), Business Regulation ¶ 4-500.

4. SELECTED WORKS OF DENG XIAOPING, 219, 318-19 (Chinese ed. 1984).

5. U.S.-CHINA BUSINESS COUNCIL, THE CHINA MARKET INTELLIGENCE, Nov. 1987, at 2.

6. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA, arts. 57, 58 (hereinafter "CONST."). In theory, no law or administrative or local rules and regulations are allowed to contravene the Constitution, and all state organizations, the armed forces, and political parties are bound by the terms of the Constitution. No organization or individual is above the Constitution or the law. CONST., art. 5. *See generally* The National People's Congress of the People's Republic of China, <http://www.npc.gov.cn>.

7. CONST., arts. 2, 33.

8. CONST., art. 59.

NPC.⁹ The NPC's legislative functions include the power to amend and implement the Constitution, and to enact the basic law (*jiben falu*).¹⁰ In addition to the power of appointment, the NPC has the right to examine and approve the Standing Committee's report on implementing the plan for national economic and social development; examine and approve the state budget and the report on its implementation; approve the establishment of provinces, autonomous regions, and municipalities under the supervision of the central government; decide on the establishment of special administrative regions and the systems to be instituted therein; and declare war and mobilize the armed services.¹¹

The NPC Standing Committee, which consists of approximately 150–200 individuals appointed by the NPC, is responsible for the interpretation and implementation of the Constitution¹² and the enactment, interpretation, and amendment of the laws.¹³ In theory, the NPC Standing Committee is empowered to enact laws other than basic laws, and to amend basic laws in a manner consistent with the original legislation. Since 1979, the Standing Committee has enacted over 300 laws.¹⁴ Any deputy/delegate of the NPC and any member of the Standing Committee may introduce legislative proposals for consideration.¹⁵ The legislative procedures of the PRC do not

9. CONST., art. 67. The NPC has the right to select members of the Standing Committee of the NPC; to elect the President and the Vice-President of the PRC; to decide on the choice of the Premier, Vice-Premiers, State Councilors, and ministers in charge of the various ministries and commissions; elect the President of the Supreme Court; and other functions. CONST., art. 67(9)–(13).

10. The “basic law” is national legislation that has a significant impact on fundamental rights and obligations. The importance of “basic law” is unclear given that other bodies, including the NPC Standing Committee and the State Council, have taken the lead in developing laws and regulations that significantly impact fundamental rights and obligations. From a practical point of view, the role of NPC law-making is delegated to the NPC Standing Committee given that the NPC meets infrequently.

11. CONST., art. 67(1)–(8), (14)–(21).

12. Unlike the U.S. legal system, the courts in China do not have the power to interpret the Constitution. Only the NPC and the Standing Committee share this role.

13. CONST., arts. 65, 66, 67.

14. The standing committees of the local people's congresses in the various provinces have enacted over 3,000 local rules and regulations.

15. CONST., art. 72. The NPC's legislative procedures mandate that a proposal for a law requires the support of 38 NPC delegates in order to be submitted for consideration. Upon submission, the proposal is tendered to a special committee with jurisdiction to review the proposal (*see infra* note 20 and accompanying text) for evaluation. The special committee will in turn report its assessment to the Legal Committee of the NPC Standing Committee and the NPC Commission of Legal Affairs. The Commission, which consists of approximately 100 legal experts, is responsible for evaluating the legislative proposal and reports to the Legal Committee. The Legal Committee finalizes the draft for submission to the NPC. The NPC's legislative procedures are set forth in the RULES OF PROCEDURE OF THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA (1989). For an analysis of the Rules, *see* Leung, *Chinese Law-Making: A Case of Legislative Disorder*, 8 CHINA LAW NEWS 1, 2 (Feb. 27, 1998). *See generally* LEGISLATIVE DRAFTING FOR MARKET REFORM: SOME LESSONS FROM CHINA (A. Seidman & R. Seidman, eds. 1997).

provide for public debate or participation, nor do they provide for formal publication and distribution of draft laws.¹⁶

To ensure that its legislative efforts are implemented, the NPC Standing Committee has carried out multiple forms of supervision over the performance of the government, the courts, and the People's Procuratorate. In 1993, recognizing that implementation lags behind the promulgation of legislation, the NPC adopted the *Regulations of the NPC Standing Committee on the Inspection and Supervision of Law Enforcement* (the "Supervision Regulations").¹⁷ The Supervision Regulations established a framework for systematic inspection and supervision of law enforcement to ensure that the laws are accepted, applied, and enforced. Between 1994 and 1996, the NPC established a total of 46 supervision task forces to evaluate the implementation and enforcement of 13 laws, including the Labor Law¹⁸ and the Environmental Protection Law.¹⁹

A number of special committees are under the supervision of the Standing Committee, including the Nationalities Committee; the Law Committee; the Financial and Economics Committee; the Education, Science, Culture, and Public Health Committee; the Foreign Affairs Committee; the Overseas Chinese Committee; the Committee for Internal and Judicial Affairs; and the Committee on Environmental and Resource Protection.²⁰ These committees evaluate and develop legislation concerning their respective areas of expertise.

16. See *infra* footnote 60 and accompanying text (discussion of Legislation Law). See generally Leung, *supra* note 15, at 5 (author proposes that the NPC provide for a procedure to review law proposals and to require that the proponents prepare a legislative "impact statement" that evaluates the impact and need for the proposed law). On April 29, 1998, Li Peng, the Chairman of the Standing Committee of the NPC, stated that the NPC needs to make the legislating process more open to public opinion. The proposal received the unanimous support of the 140 members of the Second Session of the 9th NPC Standing Committee meeting. In response, the NPC published a draft of the revised land administration law. See also Sun, *Legislation Needs Democracy*, CHINA DAILY, Apr. 30, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>. Thereafter, the NPC published a number of draft laws, including the draft Marriage Law and draft Contract Law, and solicited the input of individuals, enterprises, and foreign parties affected by the legislative proposals. See Guo, *Draft Marriage Clause Draws Controversy*, CHINA DAILY, Oct. 16, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>; *Democratic Legislation to Produce Better Laws*, CHINA DAILY, Sept. 28, 1998, available on Lexis, News Library, or on the Web site of CHINA DAILY at <http://www.chinadaily.com.cn> (The CHINA DAILY states that "[t]he top legislature recently published the draft of the contract law to solicit public advice. This shows the country welcomes public participation in the legal system.")

17. Jin, *New Approaches of People's Congresses in China to Supervise Law Enforcement*, 10 CHINA L. Q. 53 (Mar. 15, 1997).

18. See *infra* Chapter 10, "Labor and Employment Law."

19. See *infra* Chapter 18, "Environmental Protection." For an analysis of the report issued by the NPC concerning the implementation of the Law on Environmental Protection, see Jin, *supra* note 17, at 55-56.

20. CONST., art. 70. All of the committees mentioned, except for the last two, are permanent committees.

The CCP does not have the constitutional authority to initiate and control the legislative process, or to draft and lobby for particular legislation.²¹ However, the CCP's own Constitution provides that the party has the authority to supervise the legislative, judicial, and administrative organizations of the state.²² In addition, party membership has traditionally been an essential requirement for a leadership position and party politics play a crucial role in advancement and achievement in government. Critics claim that the NPC is not a true legislative organization that encourages debate; rather, it is a rubber-stamping body that unquestioningly follows the party line, and the annual meetings and media coverage are intended to create the illusion of democracy.

2. President of the PRC

The President of the PRC is elected by the NPC and is the chief executive officer of the government. The President has the power to promulgate the statutes adopted by the NPC; appoint and remove members of the State Council; issue orders of pardons; proclaim martial law; declare a state of war and issue orders of mobilization; accept diplomatic credentials offered by foreign representatives; appoint and recall China's diplomatic envoys stationed abroad; and ratify and abrogate treaties and important agreements signed with foreign governments.²³ The Constitution provides that any citizen who has reached the age of 45 and is eligible to vote may be a candidate for the presidency; however, he or she must be nominated and elected by the NPC.²⁴ There is no limitation on the President's term of office.²⁵

3. State Council

The State Council, also referred to as the Central People's Government, is similar in function to the cabinet of the U.S. Executive Branch and is empowered to enact administrative rules and regulations.²⁶ The State Council is the highest organ of State administration, and supervises the various ministries,

21. China has eight political parties in addition to the CCP. These parties have a small membership and play an inconsequential role. Observers, however, believe that political reform will develop over time. See generally Chen, *China to Test Waters of Political Reform*, WALL ST. J., July 27, 1998, at A11, col. 1.

22. CONSTITUTION OF THE COMMUNIST PARTY OF CHINA (1982), translated in BEIJING REVIEW 8 (1982).

23. CONST., art. 80. Since the mid-1990s, the President has also served as the General Secretary of the Chinese Communist Party and is responsible for policy and direction. The responsibility for implementation of the law and policy is left for the Premier of the People's Republic of China and the State Council.

24. CONST., § II, preamble.

25. CONST., art. 83.

26. CONST., art. 89. The State Council's legislative powers are not clearly defined, which allows the Council to control both the executive and legislative functions through administrative fiat.

bureaus, commissions, and local governments.²⁷ The State Council and its ministries and commissions are authorized to issue orders, directives, and administrative regulations (*xingzheng fagui*) within the jurisdiction of its respective departments.²⁸ Such administrative regulations have the power of law in that they are only subordinate to the Constitution and the basic and national laws. State Council administrative regulations are also controlling over local and provincial laws and regulations. Since 1979, the State Council has issued over 1,000 administrative laws and regulations concerning its various ministries and commissions.

The division of the State Council responsible for legislative matters is the Legislative Affairs Office (LAO). The LAO was originally established in 1954 and abolished in 1959, and was later reestablished in 1986. The principal functions of the LAO are to develop legislative plans; to draft, edit, and publish national legislation; and to evaluate the implementation of legislation. The LAO solicits the opinions of legal scholars and other experts in the law drafting process.²⁹ After a draft law is prepared, the LAO will submit the draft to the Legislative Affairs Commission, which is a ministry-level organization and a working committee of the NPC Standing Committee. The Legislative Affairs Commission has several departments, including the Economic Law Department, Civil Law Department, and the State Law Department. The Legislative Affairs Commission is responsible for reviewing and revising laws submitted by the LAO, and will thereafter submit the bills to the NPC Standing Committee or directly to the NPC. If adopted, a legislative proposal will be promulgated into law by the President.

Every five years for the past 30 years, the NPC has announced institutional reorganization of the various ministries and, among other changes, reduced the total number from 45 to 27 ministries.³⁰ The purpose of the reforms is to improve efficiency, streamline the massive government bureaucracy, separate the government from economic enterprise administration, reduce the scope of

27. See generally I. DERBYSHIRE, *POLITICS IN CHINA: FROM MAO TO THE POST-DENG ERA 174–75* (1991).

28. CONST., art. 90.

29. The American Chamber of Commerce China (AmCham-China) has an ongoing dialogue and program with the LAO that allows the American business community to provide advance input, basic research, and recommendations on high-priority laws. Foreign trade associations have never before been welcome to participate at this critical stage of the legislative drafting process—i.e., before the LAO delivers a final law to be reviewed and approved by the National People's Congress. In 2009, the LAO had a working list of over 100 laws and key regulations that were required to be drafted or amended.

30. See generally Harpole, *New Governmental Structure Emerges from Ninth National People's Congress Session*, 9 CHINA LAW NEWS 1 (Mar. 26, 1998); *Restructuring China's Government: Reins of Reform*, EIU BUSINESS ASIA (April 6, 1998) L. Dong, T. Christensen, & M. Painter, *A Case Study of China's Administrative Reform: The Importation of the Super-Department*, AM. REV. PUB. ADMIN., April 15, 2009.

corruption, and reduce the civil service.³¹ Those ministries most affected by the 1998 reforms were those focused on industry-specific areas such as coal, oil, internal trade, and chemicals, all of which were perceived to micromanage and interfere with the economy. The reform plans also called for privatization of certain ministry-owned enterprises and eliminated the life-long tenure system for cadres. In 2008, the NPC created a number of “super ministries” on energy, transportation, industries, and environmental protection. The State Council is responsible for carrying out the reorganization plans. The following is the list of key current ministries under the State Council:

National Audit Office (NAO)

National Development and Reform Commission (NDRC)³²

National Population and Family Planning Commission

People’s Bank of China (PBOC)³³

State Ethnic Affairs Commission

Ministry of Agriculture (MOA)

Ministry of Civil Affairs (MCA)³⁴

Ministry of Commerce (MOFCOM)³⁵

31. Between 1979 and 1998, the number of civil servants in China increased by 82.3 percent, while the size of the population only increased by 27.1 percent. The 1998 reforms call for eliminating approximately 4 million government jobs. See *Domestic News Economic Plans*, CHINA ECONOMIC REV. (April 23, 1998).

32. The principal functions of the NDRC are to develop and implement macroeconomic policies, monitor the national economy, approve major construction projects impacting the economy, guide and promote economic restructuring, manage the readjustment of China’s industrial structure, promote the development of agriculture and rural economy, develop plans for the energy sector and manage national oil reserves, promote investment in the western, central, and northeast regions of China, and submit a national economic plan annually to the NPC. See National Development and Reform Commission (NDRC), <http://www.ndrc.gov.cn>. In 1998, the State Development Planning Commission replaced the State Planning Commission (SPC), an entity that held a key role in China’s planned economy. As China moved away from a planned economy to a market economy, the role of the Commission diminished. In 2003, the SDPC was renamed the National Development and Reform Commission (NDRC) and has been restructured to assume (1) most of the SDPC’s responsibilities; (2) the duties of the State Economic System Restructuring Office (SESRC), which was abolished; and (3) certain responsibilities of the former State Economic and Trade Commission (SETC) such as the administration of investments in technology by domestic enterprises, industry planning, and planning for trade of key industrial products and raw materials.

33. See The People’s Bank of China, <http://www.pbc.gov.cn>. For a discussion of the PBOC history and mission, see *infra* Chapter 11, “Financial Regulation,” § A.

34. See Ministry of Civil Affairs, <http://www.mca.gov.cn>. The Ministry of Civil Affairs (MCA) is responsible for the registration and supervision of all social organizations, foundations, and industry associations. The MCA drafts and implements policies and regulations regarding disabled persons, the elderly, orphans, disadvantaged workers, charitable functions, and neighborhood committees. The MCA coordinates disaster relief efforts throughout China, social welfare programs, and the governance of village-level elections. FIEs are involved with the MCA with respect to corporate social responsibility (CSR) activities in China, disaster awareness and response programs, and other social programs.

35. See Ministry of Commerce, <http://www.mofcom.gov.cn>. The 1998 institutional reform plan broadened the power of the State Economic and Trade Commission (SETC), which was responsible for developing and implementing national economic policy. The SETC assumed regulatory control over five different ministries including the Ministry of Coal Industry, Ministry of Machine Building Industry, Ministry of Metallurgical Industry, Ministry of Internal Trade, and the Ministry of Chemical Industry. These industry-specific ministries became bureaus under the auspices of the SETC. The

Ministry of Culture

Ministry of Education (MOE)

Ministry of Environmental Protection (MEP)³⁶

Ministry of Finance (MOF)³⁷

Ministry of Foreign Affairs (MOFA)³⁸

Ministry of Health (MOH)³⁹

Ministry of Housing and Urban-Rural Development (MOHURD)⁴⁰

Ministry of Human Resources and Social Security (MOHRSS)⁴¹

Ministry of Chemical Industry was replaced by the SETC-controlled Petrochemical Industry Bureau and assumed regulatory functions over the China Petroleum and Natural Gas Corporation and the China Petroleum and Chemical Industry Corporation. In 2003, the SETC was merged with the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) to form the Ministry of Commerce (MOFCOM). MOFCOM assumed (1) all of MOFTEC's foreign investment and other authority; (2) certain responsibilities of the SETC, including overall domestic and foreign trade and economic policy administration and administration of industrial product and raw material import and export; and (3) the responsibility from the State Development Planning Commission (SDPC) to administer agricultural trade. The SETC thereafter ceased to exist.

36. See Ministry of Environmental Protection, <http://www.mep.gov.cn>. In 2008, the State Environmental Protection Administration (SEPA) was given a new title and promoted from a sub-ministry to a ministry-level entity. The new entity is known as the Ministry of Environmental Protection and has greater power over environmental protection enforcement issues. At one time, environmental protection issues were under the supervision of the Ministry of Construction. The new title and elevation to a higher level reflects the NPC's great concern with environmental affairs, as well as public expectation of stronger environmental protection, sustainable growth, and improved living conditions. See generally Xin Qiu & Honglin Li, *China's Environmental Super Ministry Reform: Background, Challenges, and the Future*, 39 ENV. L. REP. 10152 (Feb. 2009); *China Agency Given Greater Powers*, CHINA DAILY, Apr. 1, 1998.

37. See Ministry of Finance, <http://www.mof.gov.cn>. The Ministry of Finance is responsible for administering the state's budget and audit process; drafting and implementing laws, regulations, and policies on financial and tax policy; managing allocation and use of public assets; managing China's government procurement policies and procedures; and managing state revenues from taxes, treasury bonds, and hard currency reserves.

38. See Ministry of Foreign Affairs, <http://www.fmprc.gov.cn>. The Ministry of Foreign Affairs (MOFA) is responsible for China's foreign affairs and represents the Chinese government in relations with international organizations and foreign countries. MOFA is responsible for releasing the state's major foreign policies, decisions, foreign affairs documents and statements, and is responsible for bilateral and multilateral negotiations.

39. See Ministry of Health, <http://www.moh.gov.cn> and State Food and Drug Administration, <http://www.sfda.gov.cn>. The 1998 reforms provided that the State Drug Administration replaces the State Pharmaceutical Administration, the State Administration of Traditional Chinese Medicines, and the pharmaceutical department of the Ministry of Health. In 2003, the SDA's role was expanded to supervise food, health products, and cosmetics, and was renamed the State Food and Drug Administration (SFDA). Some of the food- and cosmetic-related functions of the Ministry of Health were transferred to the SFDA. The SFDA is the primary regulatory agency responsible for supervising the pharmaceutical, medical device, food, cosmetics, and health foods industries.

40. The NPC created a Ministry of Housing and Urban-Rural Construction (MOHURD), which replaced the Ministry of Construction. MOHURD is responsible for drafting laws, regulations, and development plans for municipal and rural planning and construction. See Ministry of Housing and Urban-Rural Construction, <http://www.mohurd.gov.cn>.

41. In 2003, the Ministry of Labor and Social Security replaced the Ministry of Labor, the Ministry of Personnel, the personnel functions of the Ministry of Civil Affairs, and the medical insurance functions of the Ministry of Health. A bureau-level department for issues involving civil servants has been established under the MOHRSS, and the State Administration of Foreign Experts Affairs has been merged into the MOHRSS. See Ministry of Human Resources and Social Security, <http://www.mohrss.gov.cn>.

Ministry of Industry and Information Technology (MIIT)⁴²
 Ministry of Justice (MOJ)⁴³
 Ministry of Land and Resources (MLR)⁴⁴
 Ministry of National Defense
 Ministry of Public Security (MPS)⁴⁵
 Ministry of Railways (MOR)
 Ministry of Science and Technology (MOST)⁴⁶
 Ministry of State Security (MSS)
 Ministry of Supervision
 Ministry of Transport (MOT)⁴⁷
 Ministry of Water Resources (MWR)

42. See Ministry of Industry and Information Technology, <http://www.miit.gov.cn>. In 1998, the Ministry of Information Industry (MII) replaced and assumed the functions of the Ministry of Posts and Telecommunications (MPT), the Ministry of Electronics Industry, the Ministry of Radio, Film, and Television, the China Aerospace Industry Corporation, and the China Aviation Industry Corporation. See *Brief Introduction to the Departments of the Ministry of Information Industry*, 134 CHINA INTERNATIONAL BUSINESS (MOFTEC) 37 (1998). Following reform in 2003 and 2008, the MIIT integrated the NDRC's functions concerning industry and trade management; the functions of the Commission of Science, Technology and Industry for National Defense (except nuclear power management); and the functions of the Ministry of Information Industry and the State Council Information Office. A new state bureau of science, technology and industry for national defense was formed under the new ministry. The State Tobacco Monopoly Administration was also merged into the new ministry. The Commission of Science, Technology, and Industry for National Defense, the Ministry of Information Industry, and the State Council Information Office were dissolved.

43. See Ministry of Justice, <http://www.moj.gov.cn>. The MOJ supervises China's legal system and prison system, and publishes information about the national legal system and China's laws and regulations. The MOJ licenses domestic and foreign law firms and lawyers, manages bar associations such as the All China Lawyer's Association, and supervises notary institutions and services.

44. See Ministry of Land and Resources, <http://www.mlr.gov.cn>. The Ministry of Land and Resources (MLR) is responsible for the planning, protection, and utilization of China's natural resources such as land, mineral, and marine resources. The MLR is responsible for drafting and implementing laws and regulations governing the management of land, mineral, and marine resources (with the exception of marine fishery resources managed by the Ministry of Agriculture). They are also responsible for administrative review of and developing plans for the protection, preservation, and utilization of mineral and marine resources to prevent and mitigate geological hazards and protect sites of geological importance. The MLR is also responsible for developing a system to administrate land titles; developing a system for the registration of land use; performing other duties assigned by the State Council; and managing the State Oceanic Administration and the State Bureau of Surveying and Mapping.

45. See Ministry of Public Security, <http://www.mps.gov.cn>. The Ministry of Public Security (MPS or PSB) is the principal public security agency (police) in China and is responsible for the prevention, suppression, and investigation of criminal activities; traffic control, crowd control, and fire prevention and suppression; management of the household registration system and issuance of identification cards, international exit-and-entry; maintenance of border security; security and protection of state-assigned persons, venues, and facilities; management of gatherings, parades, and demonstrations; security review and management of public information networks; and public outreach. FIEs will work frequently with the PSB regarding visas and residence permits.

46. See Ministry of Science and Technology, <http://www.most.gov.cn>. The Ministry of Science and Technology replaced the State Science and Technology Commission.

47. See Ministry of Transportation, <http://www.mot.gov.cn>. The Ministry of Transportation integrates the functions of the Ministry of Communications and the General Administration of Civil Aviation, as well as the Ministry of Construction's functions on urban public transportation management. A State Bureau of Civil Aviation will be formed under the MOT and the State Post Bureau will come under the MOT's jurisdiction. The Ministry of Railways will continue to exist independently.

Other important commissions and departments under the State Council include the Administration of Quality Supervision, Inspection, and Quarantine (AQSIQ),⁴⁸ China Banking Regulatory Commission (CBRC),⁴⁹ China Insurance Regulatory Commission (CIRC), China Securities Regulatory Commission (CSRC),⁵⁰ State Assets Supervision and Administration Commission (SASAC),⁵¹ State Administration of Industry and Commerce (SAIC),⁵² China Customs,⁵³ and State Administration of Taxation (SAT).⁵⁴ Other changes include that the State Forestry Bureau replaces the Ministry of Forestry and will come under the direct supervision of the State Council; the State Physical Culture & Sports Commission is replaced by the Council of Physical Culture & Sports; the State Administration of Radio, Film, & Television (SARFT) replaces the Ministry of Radio, Film, and Television; and the State Commission for Restructuring the Economic System is reorganized as a research institution under the control of the State Council.

48. See Administration of Quality Supervision, Inspection, and Quarantine, <http://www.aqsiq.gov.cn>. The AQSIQ was established in 2001 with the merger of the State Administration of Exit/Entry Commodity Inspection and Quarantine (CIQ) and the State Bureau of Quality Technical Supervision (SBQTS). Prior to 2001, the CIQ was responsible for the inspection of imports and the SBQTS was responsible for the inspection of domestically produced goods. The creation of the AQSIQ was required by WTO national treatment standards to unify China's inspection system. The prior CIQ regime was viewed as a non-tariff barrier by foreign companies. The Certification and Accreditation Administration (CNCA) operates as a separate institution under the AQSIQ. See Certification and Accreditation Administration, <http://www.cnca.gov.cn>.

49. See China Banking Regulatory Commission, <http://www.cbrc.gov.cn>. As part of the 2003 reform, the China Banking Regulatory Commission was formed to regulate and supervise the banking industry in China, and assumes functions that were previously under the control of the People's Bank of China (PBOC), which will continue to function as a central bank and not a regulatory agency.

50. See China Securities Regulatory Commission, <http://www.csrc.gov.cn>. The China Securities Regulatory Commission is a ministry-level institution directly under the State Council that regulates China's securities and futures markets with an objective to ensure the orderly operation of the markets. The commission consists of 18 departments and has 36 regional bureaus throughout the country, as well as offices for securities regulation in Shanghai and Shenzhen.

51. See State-owned Assets Supervision and Administration Commission of the State Council, <http://www.sasac.gov.cn>. In 2003, the government formed the SASAC, which is responsible for all duties of the Central Enterprise Working Committee of the PRC Communist Party, the SETC, and the Ministry of Finance with respect to the reform and supervision of state-owned enterprises and state-owned assets.

52. See State Administration for Industry and Commerce, <http://www.saic.gov.cn>. The State Administration for Industry & Commerce (SAIC) is responsible for market supervision/regulation and related law enforcement through administrative means; areas as competition, consumer protection, and trademark protection; registration of enterprises and issuance of business licenses; the annual review process for enterprises; review of contracts that may be considered monopolistic or an abuse of dominant market position; investigation of counterfeiting and inferior-quality products; investigation of illegal direct selling and pyramid selling cases; investigation of unfair competition and commercial bribery; and process trademark registration and administrative procedures relevant to trademarks.

53. See General Administration of Customs, <http://www.customs.gov.cn>.

54. See State Administration of Taxation, <http://www.chinatax.gov.cn>. The State Administration of Taxation is a ministry-level department directly under the State Council and is responsible for the Chinese government's tax policies, tax collection, international exchange and cooperation on taxation, and certifying tax agents.

4. Local People's Congresses

In China, there are 23 provinces (including Taiwan), four municipalities directly under the central government (Beijing, Shanghai, Chongqing, and Tianjin), five autonomous regions inhabited primarily by minority groups (non-Han), and the Hong Kong and Macao Special Administrative Regions.⁵⁵ The people's congresses of the provinces, regions, and municipalities and their respective standing committees may adopt regulations that govern local activities. The local congresses are required to report their legislative activities to the NPC Standing Committee for approval. The organizational structure of the local congresses mirrors the NPC structure, and the provincial governments generally adopt reforms initiated by the NPC at the national level.

The local people's congresses have adopted over 5,000 local laws since 1979, ranging from traffic rules and foreign investment incentives to domestic relations laws.⁵⁶ In addition to enacting laws that regulate purely local activities, local people's congresses have also been authorized to enact foreign investment laws for the four special economic zones, the designated coastal cities and Hainan Island, and technological and special development zones. For example, the cities of Shenzhen and Shanghai have been authorized to enact laws on an experimental basis to allow authorities to observe their function and effects prior to nationwide application. Local law may not be in conflict with the Constitution or with national laws or administrative regulations. As a result, a foreign investor must take into consideration a wide range of laws that may affect a particular operation, including laws developed on a national, provincial, or local level, and those developed by zone authorities.

5. Language and the Hierarchy of the Law

Chinese written laws use a number of terms to define the scope of application and the level of authority of enactment. Terms include laws (*fa*), regulations or provisions (*tiaoli*), rules (*guize*), detailed rules (*xize*), methods or measures (*banfa*), decisions (*jueding*), resolutions (*jueyi*, *guiding*), and orders (*mingling*). A law (*fa*) is a statute that has been enacted by the NPC

55. The Hong Kong SAR is discussed separately. See Chapter 24, *infra*, "Special Zones Regional Development Initiatives of the PRC," § B.

56. Although the legislative power of the NPC is paramount over local authorities, local legislation sometimes conflicts with national legislation concerning certain issues. For example, in 1986 the central government issued regulations setting a national standard for usury. This rule was disputed by some local authorities given that interest rates on private loans differed depending upon the development level of a particular region. See Ping, *Drafting the Contract Law in China*, 10 COLUM. J. ASIAN LAW, 245, 247 (1996). See generally Y. CHO, LOCAL PEOPLE'S CONGRESSES IN CHINA: DEVELOPMENT AND TRANSITION (2009).

or its Standing Committee.⁵⁷ Regulations (*tiaoli*), also translated as “provisions” or “measures,” are administrative rules designed to implement a law or policy and are usually issued by the State Council. In contrast, a regulation (*guiding*) is issued by a lower-level agency and addresses a narrower question.

A set of rules (*guize*) or detailed rules (*xize*) is usually issued by a ministry, and often includes specific rules of interpretation or explanation of a law or regulation. Methods or measures (*banfa*) are rules or regulations that are more detailed and seek to address a narrow issue. A judicial or administrative decision (*jueding*) is for explanatory purposes.

State organizations, political parties, and social organizations adopt resolutions (*jueyi*), which have little prescriptive legislative value but record common concerns and opinions expressed at a particular meeting or forum. An order (*mingling*) refers to a proclamation issued by a state organization that is intended to prescribe legal standards.

The use of the various terms generally reflects the governmental level of enactment or promulgation. Although the government is careful to avoid the conflicting use of the above terms, in the mid-1980s the State Council realized that the overlapping use of the terms made it “difficult to determine the extent of [the law’s] effectiveness, the nature of the authority which promulgated it, or the scope of its applications.”⁵⁸ The State Council has taken steps to emphasize that the terms should be used properly to reflect the level of authority and the scope of enactment.

In countries with more well-developed legal systems, primary and secondary legal resources are generally available for legal practitioners. In China, however, the publication of laws and regulations has become standard only since the mid-1980s. Prior to the Open Door policy, publication of China’s laws was irregular. Even today, many laws are not published until long after they have been promulgated, and China has no public reporter system of judicial opinions or decisions. It is anticipated that Chinese laws will become more accessible, however, with the introduction of electronic publishing.

57. For example, the Labor Law of the People’s Republic of China is a basic law adopted by the NPC. The term *fa* is used in a number of compounds such as *fadian* (i.e., a systematic body of law), and *falinghuibian* (i.e., a collective body of laws and regulations).

58. *Report of the State Council Working Group for Reorganizing Laws and Regulations of Various Departments of the State Council and Future Work*, June 10, 1985, reprinted in STATE COUNCIL BULLETIN 745 (1985).

6. Review of the Legislative Process

Although China must be complimented for its extraordinary efforts to rebuild its legal system, the legislative process has been characterized as lacking in transparency, and has resulted in the development of laws and regulations that favor the interests of government rather than individuals and private enterprise.⁵⁹ The language of Chinese law is also often purposefully ambiguous and vague in order to leave open several possible interpretations. Such vagueness allows administrative agencies broad powers to promulgate regulations, rules, and explanatory circulars that interpret the law in a manner that best fits the agency's view with little oversight and supervision of the administrative rulemaking process.

Any discussion of the law in China would not be complete without mention of the unpublished internal (*neibu*) rules and regulations issued by the various ministries and commissions. *Neibu* are usually internal policy directives concerning the implementation and interpretation of codified laws, which, until promulgated, are confidential and may not be disclosed to foreign parties. *Neibu* may encompass internal policies concerning the use of foreign currency accounts, employment issues, production scheduling, or any other unwritten requirement passed down from the top to the lower-level officials in a government organization. Now that China is a member of the WTO, however, it has an obligation to publish any law or regulation that applies to foreign investors.

In an attempt to address the deficiencies in the system, the NPC in 2000 adopted the Legislation Law, which outlines the scope of the lawmaking and rulemaking authority of legislative and administrative organs and also formalizes the legislative process, specifically with respect to the laws promulgated by the NPC and its Standing Committee.⁶⁰ The Legislation Law outlines standards for the drafting, revision, and repeal of laws, administrative regulations, local regulations, and special enactments, including the formulation, revision, and repeal of rules and regulations by the State Council departments and local governments. The Legislation Law also lists the matters for which the NPC has exclusive jurisdiction for lawmaking, including matters involving the deprivation of citizens' political rights, criminal punishments or compulsive measures and punishments limiting personal

59. See Corne, *Legal System Reforms Promise Substantive—but Limited—Improvement*, 11 CHINA L. & PRAC. 29 (June 1997).

60. Legislation Law of the People's Republic of China (Adopted at the third Session of the Ninth National People's Congress on March 15, 2000 and promulgated by Order No. 31 of the President of the People's Republic of China on March 15, 2000) (hereinafter the "Legislation Law"). For an analysis of the Legislation Law, see P. Corne, *The New PRC Legislation Law: The Emperor's New Clothes?*, 14 CHINA L. & PRAC. 30 (May 2000). See also M. Dudek & A. Wang, *Lifting the Veil: Transparency in China*, 16 CHINA L. & PRAC. 64 (June 2002).

freedom, expropriation of private or non-State-owned property, the basic laws regulating the economic system (such as foreign trade, tax, finance, banking, and customs), and litigation and arbitration systems.⁶¹

The Legislation Law details the national-level legislative process, including the authority and jurisdiction of the NPC Standing Committee to issue interpretations and clarifications of the law. In situations where clarification of a law is required or new circumstances require clarification of the implementation of a law, the NPC Standing Committee is authorized to interpret the law.⁶² The Legislation Law also provides that the State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate, and provincial-level people's congresses may request the NPC Standing Committee to interpret a law in question.⁶³

In addition to the Legislation Law, the State Council has issued a number of regulations concerning the legislative process specifically to meet China's obligations of transparency under WTO. These regulations include the Regulations on Administrative Regulation Formulation Procedures, the Regulations on Legal Code Formulation Procedures, and the Regulations on Recordal of Regulations and Legal Codes. These regulations provide that all new and amended administrative regulations and codes must be published in the *Gazette of the State Council* (or similar publication of the applicable local government) 30 days before implementation. The regulations also allow, but do not require, administrative agencies to solicit draft regulations and rules for comment by affected individuals or enterprises, or to hold public hearings concerning proposals.

The Regulations on Recordal of Regulations and Legal Codes require the administrative authorities to register all promulgated regulations and rules with the Legislative Affairs Office (LAO) of the State Council. In addition, and most importantly, the Recordal Regulations establish a review process whereby interested persons may request that the LAO review a regulation or rule to determine consistency with the basic laws or national legislation. The Recordal Regulations provide a mechanism for legislative consistency and a potential avenue of review to counter any activist legislation at the provincial or municipal level that is inconsistent with a law of the central government.

Although the Legislation Law and various State Council regulations on the law and rulemaking processes are a step in the right direction to

61. Legislation Law, art. 8.

62. Legislation Law, ch. 4. Traditionally, the Supreme People's Court has assumed the unofficial position of interpreter of the national law by publishing interpretations in the SPC's GAZETTE. See N. LIU, JUDICIAL INTERPRETATION IN CHINA (1997).

63. Legislation Law, arts. 42, 43.

institutionalize legislative review, the judiciary is still barred from invalidating a law or regulation, although the courts may refuse to apply a regulation that conflicts with a higher law, regulation, or the Constitution. The absence of independent judicial oversight of the rulemaking process, a mainstay of the doctrine of separation of powers, has not been advanced under China's legal system.

B. Judicial System

1. Supreme People's Court

The Supreme People's Court is the highest judicial organ in the PRC and is specifically authorized by the Constitution.⁶⁴ The Supreme People's Court supervises the administration of justice by the local people's courts. Although the Supreme People's Court issues directives for the purpose of guiding China's lower courts in applying a particular law or with respect to judicial administration, there is no formal system of judicial precedent.⁶⁵ The court does not have the power to interpret the law even though it has, in recent years, assumed the role of interpreting the law by issuing explanatory

64. CONST., art. 127. The Supreme People's Court traces its roots back to the first Supreme Court established in China in 1931. The term "people's court" was adopted in 1948. See Organic Law of the People's Courts of the People's Republic of China, adopted at the 2nd Sess. of the Standing Comm. of the 5th National People's Congress on July 1, 1979, amended at the 2nd Sess. of the Standing Comm. of the 6th National People's Congress on September 2, 1983, and amended at the 24th Sess. of the Standing Comm. of the 10th National People's Congress on October 31, 2006 [hereinafter the "People's Court Law"]. The people's courts are required to exercise judicial power independently in accordance with the law and shall not be subject to any interference by any administrative organ, public organization, or individual. People's Court Law, art. 4. In judicial proceedings in the people's courts, the law is required to be applied equally to all citizens regardless of ethnic status, race, sex, occupation, family background, religious belief, education, property status, or length of residency. People's Court Law, art. 5. The courts are required to provide translations to any party to a court proceeding, especially where the party is a minority. People's Court Law, art. 6. The people's courts are required to hear a case in open court, except for those cases involving state secrets, personal privacy, and juvenile delinquency. People's Court Law, art. 7. The Supreme People's Court is responsible to and reports on its work to the National People's Congress and its Standing Committee. Local people's courts are responsible to and report to the local people's congresses and local standing committees. People's Court Law, art. 17.

65. See Liu, "Legal Precedents" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 J. CHINESE L. 107 (1991) (discussing the role of published decisions in China and the development of the law). The majority of the decisions published by the Supreme People's Court (since commencing in 1985) have focused on providing guidance to the lower courts for purposes of uniformity in sentencing standards in criminal cases. *Id.* at 128–29. See also A. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (1992). Chen states:

The typical judgment of a Chinese court is short and does not set out lines or steps of legal reasoning and logical analysis in a way as detailed as in the judgments in common law courts. Relevant statutory provisions may be referred to, but the precise relationship between them in their application to the case will not usually be discussed at length. As there is no established doctrine of precedent, case law will seldom be referred to in the judgment. Lawyers' submissions are not usually responded to in the judgment. Dissenting judgments are not allowed.

Id. at 114.

memoranda with respect to particular laws or legal issues, especially at the behest of the lower courts. The authority to interpret is vested with legislative bodies such as the government ministries. The people's courts are empowered to adjudicate only individual cases, and are not allowed to set precedent for other courts or cases. This system ensures that no individual judge or group of judges can make the law and allows the NPC to retain control and authority over the lawmaking process.⁶⁶ Thus, statutory law plays a prominent role in China's legal system while judicial precedent plays a supplementary role. Nevertheless, the Supreme People's Court has issued thousands of written judicial interpretations that provide the lower courts with guidance on a broad range of substantive and procedural topics.

The Chinese court system is divided into four levels: (1) the Supreme People's Court at the national level, (2) the higher people's court at the provincial level, (3) the intermediate people's court at the municipal level, and (4) the basic people's court at the county level. In general, each court consists of criminal, civil, economic, and administrative divisions. In addition, specialized courts have been established within the court systems in every major city in China. For example, Intellectual Property Tribunals have been established by the Beijing Municipal Intermediate People's Court and the Beijing Municipal Higher People's Court. There are also special courts established as separate branches, such as the Maritime Court, Military Court, and Railway Transport Court, which are under the supervision of the Supreme People's Court.⁶⁷

In theory, all courts in China exercise judicial autonomy, and are not subject to interference by state administrative organs, public organizations, or individuals.⁶⁸ However, the Supreme People's Court, and the judicial system in general, is subject to the supervision of the NPC and the NPC Standing Committee with respect to administrative issues, the political direction of judicial policy, and the general application of the law.⁶⁹

66. See Baker, *Forgotten Legal China*, 17 HOUSTON J. INT'L L. 363, 367-68 (1995).

67. There are 54 military courts, 73 railway courts, and 10 maritime courts in cities throughout China including Guangzhou, Shanghai, Qingdao, Tianjin, Wuhan, Dalian, Haikou, Ningbo, Beihai, and Xiamen.

68. CONST., arts. 126, 128; See also CODE OF CIVIL PROCEDURE OF THE PEOPLE'S REPUBLIC OF CHINA, art. 6 (adopted April 9, 1991, by the 4th Session of the Standing Committee of the 7th National People's Congress and revised at the 30th Sess. of the Standing Comm. of the 10th NPC on Oct. 28, 2007), reprinted in CHINA LAWS FOR FOREIGN BUSINESS (CCH), Business Regulation ¶ 19-201 [hereinafter "Civil Procedure Law." One writer noted that the independence of the judiciary "represents a great breakthrough in Chinese legal history, which is replete with examples of court decisions resulting from personal influence." Sang, *China's Civil Procedure Law: A New Guide for Dispute Resolution in China*, 26 INT'L LAW. 413, 416 (1992). A survey of lawyers and judges found that 80 percent believed that "judicial independence" means freedom from interference from administrative organs and not the CCP. P. CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM 252 n.33 (1997).

69. CONST., art. 128. The people's courts, including the Supreme People's Court, are not allowed to interpret the Constitution. Only the NPC and its Standing Committee have that power. Moreover, the judges of the Supreme People's Court are appointed by the NPC.

The NPC has adopted a Civil Procedure Law governing the court process in civil actions.⁷⁰ Prior to 1910, China had no formal civil procedure law and developed such a law only after the Western powers pressured China to modify and improve its legal system as an incentive to relinquish extraterritorial privileges.⁷¹ However, there is evidence of criminal codes as far back as the Qin Dynasty (221–206 BCE).⁷² The 1991 Civil Procedure Law is a by-product of ongoing legal reform resulting from China's Open Door policy.

A foreign national or foreign entity initiating or responding to legal action in the people's court has the same litigation rights and obligations as Chinese citizens.⁷³ The 1991 Civil Procedure Law has a specific section designed for actions involving foreign parties. Whenever this section does not contain a specific provision dealing with a foreign party, all other provisions are deemed to apply.

2. People's Procuratorates

As in other civil law systems, China has a procuracy system that parallels the court system but is independent from both the courts and the Ministry of Justice, and is responsible for supervision of the judicial system.⁷⁴ During the Cultural Revolution, the procuratorial organs were dissolved but were later revived in 1979. In July of 1979, the NPC adopted a revised Organic Law of the People's Procuratorates providing that the procurators are entrusted with supervision of the courts and administrative tribunals; investigation and prosecution of illegal conduct committed by government officials and

70. For a discussion of litigation procedures, see Chapter 22, "Litigation in the People's Court." The Civil Procedure Law replaced the former civil procedure law, which was adopted in 1982. For an analysis of the Civil Procedure Law, see Sang, *supra* note 68, at 413.

71. A civil procedure law was developed by Shen Jianben, a jurist appointed by Emperor Guangxu in 1902. See *supra* Chapter 2, "Development of the Chinese Legal System," § B, n.35 and accompanying text. The Nationalist government enacted a civil procedure law in 1936, which was abolished when the CCP took power. In the 1950s, the NPC drafted a civil procedure law that was never promulgated. Sang, *supra* note 68, at 414.

72. Sang, *supra* note 68, at 414.

73. Civil Procedure Law, art. 5. One qualification to this rule of equal rights applies if the foreign party's country imposes restrictions on Chinese citizens. In such a case, the people's court will exercise reciprocity and place the same restrictions on the foreign litigant. In addition, foreign party actions will not be decided within any specific period of time. In contrast, in purely domestic actions, the court is required to render a decision within six months of filing. *Id.* at 135, 250. Diplomatic corps may assert immunity under principles of international law. *Id.* at art. 239. Of particular concern for foreigners is the court's right to issue an injunction prohibiting a foreigner from leaving the country in unresolved civil cases. See Law of the People's Republic of China on the Control of Foreigners Entering and Leaving the Country (adopted on November 22, 1985, at the 13th Sess. of the Standing Comm. of the NPC) art. 23(2), *reprinted in* CHINA LAWS FOR FOREIGN BUSINESS (CCH), Business Regulation ¶ 19-510.

74. CONST., art. 129; Public Procurators Law of the People's Republic of China (promulgated on July 1, 1995, by the National People's Congress and revised on June 30, 2001) (outlines the qualifications, appointment process, removal, training and education, and penalties for procurators). For a discussion of the Supreme People's Procuratorate, see P. Corne, *supra* note 68, at 261–62. Information concerning the Supreme People's Procuratorate is available on the Web site of the Supreme People's Court at <http://www.chinacourt.org>.

judicial officers including acts of embezzlement, bribery, and other forms of corruption; and investigation and prosecution of activities deemed to be a threat to public security.⁷⁵

The procuratorates act independently and are not subject to interference by government agencies or individuals.⁷⁶ The procuracy may intervene on behalf of the State before any tribunal. The Supreme People's Procuratorate answers directly to the NPC and its Standing Committee, and is responsible for supervising the local and special procuratorates.⁷⁷

3. Legal Profession

In ancient China, lawyers were not trained in schools, but instead were usually taught by a teacher as an apprentice, or by a father to his son. Until the reform process started 30 years ago, the Chinese bar was essentially nonexistent. Traditionally, the Chinese people have never supported the use of lawyers in society. A lawyer's worthiness of hire is still not fully accepted because the role of the advocate often conflicts with the Chinese preference for conciliation and mediation.

As China's legal system becomes more and more complex and the government continues its support of law school education, however, the legal profession gains more respect and prominence. With the reopening of the MOJ in 1978, legal education began anew with approximately 2,000 students enrolled in the study of law the first year.⁷⁸ Today, there are now several institutions that offer legal training to students, including law schools under the direction of the MOJ and major Chinese national and provincial universities.⁷⁹

75. CONST., art. 129; Civil Procedure Law, art. 14.

76. CONST., art. 131. See *China Procurators Emphasizing Procedural Awareness*, CHINA DAILY, June 4, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>. The Supreme People's Procuratorate requires more transparency in the procuratorial system. Effective October 26, 1998, procuratorates are required to provide witnesses, suspects, and victims in criminal cases with a written card outlining their basic legal rights. See Shaw, *A Historic First: Rights Listed on Cards*, CHINA DAILY, Oct. 27, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>.

77. CONST., art. 133.

78. In the past two decades, the number of lawyers in China has increased significantly. In 1979, there were only 79 government-supported law firms and 212 lawyers nationwide. In 1998, there were over 8,300 law firms with 101,220 lawyers. In 2002, there were over 136,000 lawyers and 10,000 law firms or offices nationwide. In 2008, the number of lawyers increased to over 156,000. The passage rate for the lawyers' examination is only 10 percent for first-time takers. Zong, *Legal System Puts Its Achievements on Record*, CHINA DAILY, June 17, 1998; *Number of Lawyers in China Rising Rapidly—Trade Group*, WALL ST. J., July 7, 2002.

79. Li, *supra* note 1, at 329. See also Guo, *Lawyers' Job Appealing to Young, Educated*, CHINA DAILY, Oct. 12, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>.

On August 26, 1980, the MOJ issued regulations governing the legal profession in China.⁸⁰ In order to qualify as a lawyer, the 1980 Lawyer's Regulations require that a person receive a certificate from the MOJ and be "patriotic" and "support the socialist system." Qualifications for a certificate include legal training, internships, and the taking of an examination.

To further encourage the development of the legal profession, the NPC Standing Committee initiated a five-year public education program on China's laws and legal system in November of 1985.⁸¹ The public education program resulted in the publication of numerous newspaper articles explaining the new system. Moreover, interviews and lectures were held on television and radio, and public trials were used as educational tools.⁸²

In 1997, the NPC's first comprehensive law governing the legal profession became effective (and was subsequently amended in 2001 and 2007).⁸³ Prior to January 1, 1997, PRC lawyers were considered "functionaries of the State" and their duties were "to ensure the proper implementation of the law and the protection of the interests of the State and collectives."⁸⁴ Law firms were considered public institutions under the leadership and supervision of the MOJ.⁸⁵ In contrast, the PRC Lawyer's Law drops the "functionaries" language and provides that lawyers are required to "protect the legal

80. Provisional Regulations of the People's Republic of China on Lawyers (adopted August 26, 1980 by the 15th Sess. of the Standing Committee of the 5th National People's Congress), art. 1 [hereinafter "1980 Lawyer's Regulations"]. For a discussion of the 1980 Lawyer's Regulations, see Cohen, *China's New Lawyer's Law*, 66 A.B.A.J. 1533 (1980).

81. *Legal Studies: A Nationwide Assignment*, BEIJING REVIEW, December 23, 1989.

82. Li, *supra* note 1, at 328-29.

83. Law of the People's Republic of China on Lawyers (adopted May 15, 1996, by the 19th Sess. of the Standing Committee of the 8th National People's Congress and revised in 2001 and 2007 by the Standing Comm. of the National People's Congress), art. 1 [hereinafter "PRC Lawyer's Law"], reprinted in CHINA LAWS FOR FOREIGN BUSINESS (CCH), Business Regulation ¶ 16-650. See also Rules of the Shenzhen SEZ on Lawyers (adopted on February 24, 1995, by the 28th Sess. of the Standing Comm. of the 1st Shenzhen Municipal People's Congress and amended on April 9, 1997, by the Standing Comm. of the Shenzhen People's Congress). The MOJ has also developed regulations for law partnerships that set forth the requirements for minimum capital, minimum number of partners (3), and a written partnership agreement. The partnership law also sets forth grounds for termination of the partnership, liquidation, liability issues, and professional ethics. See Measures of Administration on Partnership Law Firms (promulgated by the Ministry of Justice on June 16, 2004), reprinted in CHINA LAWS FOR FOREIGN BUSINESS (CCH), Business Regulation ¶ 13-355. See also Establishment, Amendment and Cancellation of Registration of Partnership Law Firms Procedures (issued on January 20, 2003 by the Judicial Bureau of the Beijing Municipality). In 1996, at least 30 percent of China's lawyers were university graduates with bachelor's degrees and 54.7 percent were junior college graduates. In addition, more than 3,000 were holders of advanced degrees or were foreign trained. See *Record of Events (October-December 1996)*, 1996 CHINA LAW 101; Wang & Shao, *Vital for Market Economy: Lawyer's Education Advancing*, CHINA DAILY, June 24, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>; *China Sets Standards for Legal Profession*, THE LAWYER (Jan. 14, 1997), available on Lexis, News Library; H. Wong & A. Arkel, *China's Revised Lawyer Law: Practical Benefits for a Strengthened Legal Profession*, CHINA L. & PRAC. (October 2007).

84. 1980 Lawyer's Regulations, art. 1.

85. 1980 Lawyer's Regulations, art. 13.

rights and interests of the parties concerned.”⁸⁶ Nevertheless, the Chinese legal profession is still not wholly independent from the government, as the MOJ is required to supervise lawyers, law firms, and lawyer’s associations.⁸⁷ The MOJ is also responsible for administering qualifying exams and licensing⁸⁸ and disciplining attorneys for misconduct.⁸⁹ The PRC Lawyer’s Law provides that a lawyer and his or her firm is liable for compensation as a result of malpractice, and sets forth standards for confidentiality, conflicts of interest, prohibitions on improper ex parte communications and bribery, and prohibitions on the fabrication or use of false evidence.⁹⁰ The PRC Lawyer’s Law further provides that law firms are prohibited from engaging in any other business activities other than legal services, are required to abide by tax laws and regulations, and are prohibited from paying finder’s fees to solicit business or engaging in defamatory advertising.⁹¹

The independence of Chinese lawyers remains in question. In a 1993 survey of Chinese lawyers, 94 percent of the 127 interviewed reported that their legal work was interfered with by the government, the CCP, or by social contacts involving litigants.⁹² Such interference has led many lawyers to take

86. PRC Lawyer’s Law, art. 2.

87. PRC Lawyer’s Law, art. 6. In August of 1998, the American Bar Association offered to assist the All-China Lawyers Association in developing an independent bar. *See U.S. Lawyers to Help China Organize Independent Bar*, CHINA DAILY, Aug. 11, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>.

88. PRC Lawyer’s Law, arts. 6–9. The National Lawyer Qualification Examination is administered annually, usually during the month of October. In 1998, 15,102 individuals, or 12 percent of the candidates, passed the examination. Over 120,000 people, a record, participated in 1998’s examination. The MOJ found that 82 percent of the candidates who passed the exam in 1998 were under the age of 30. Shao, *Exam Tests Abilities of Lawyers*, CHINA DAILY, Dec. 8, 1998, available on Lexis, News Library, or on the Web site of CHINA DAILY at <http://www.chinadaily.com.cn>.

89. PRC Lawyer’s Law, art. 47–55.

90. PRC Lawyer’s Law, arts. 49, 54.

91. PRC Lawyer’s Law, arts. 25, 26, 27. *See also* State Administration of Taxation Notice Regarding Strengthening the Levying and Auditing of Personal Taxes of Investors in Law Firms and Other Intermediary Organizations, Notice No. 123, issued September 29, 2002 by the State Administration of Taxation. Law firms and lawyers are also bound by regulatory standards concerning fee agreements and fee schedules. *See* PRC Lawyer’s Law, arts. 25, 59; Administrative Measures on Fees for Lawyer Services (jointly issued by the National Development and Reform Commission and Ministry of Justice on April 13, 2006) (standards for transparency in fee structures, client agreements, government-guided pricing for certain types of cases, contingency and project-based fees, contingency fee caps at 30 percent, fee contract terms, invoicing, billing of costs, use of estimates for travel costs, assignments of legal aid cases, liability and penalties, mediation and dispute resolution, and public complaint process for fees).

92. GONG XIANG RUI, ET AL., FAZHI DE LIXIANG YU XIANSHI [THE IDEAL AND REALITY OF THE RULE OF LAW] 34, tables 3-3-3 & 3-3-4 (Beijing, China, China University of Politics and Law Press 1993). *See also* P. Corne, *supra* note 68, at 244–255. In July of 1998, the All-China Lawyer’s Association (ACLA) established the National Committee for the Protection of Lawyer’s Rights and Interests, an organization designed to protect the rights of the legal profession in China. The Committee provides legal assistance to lawyers whose “life and property are infringed upon in the conduct of their legitimate practice.” *See China Lawyers Need to be Defended Too*, CHINA DAILY, Aug. 11, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>. For a discussion concerning the problems confronting the legal profession in China, *see* LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS (New York, Lawyers

a more conciliatory approach when representing foreign parties. Although many Chinese lawyers are slowly becoming more zealous advocates of their clients' interests, Chinese lawyers traditionally will not aggressively represent their clients in either court proceedings or contract negotiations because they risk damaging their careers. This is especially true for lawyers in smaller cities or those firms that are state funded. Moreover, under the PRC Lawyer's Law, a lawyer may be disbarred, disciplined, or subject to criminal prosecution if he or she reveals "state secrets," conceals important facts during an investigation or trial, or even "makes speeches which are detrimental to state security."⁹³ A lawyer thus risks disbarment if he or she offers evidence that is exculpatory but may be deemed to be "state secrets," refuses to advise the prosecution of evidence that is incriminating, or presents oral arguments in a court proceeding that may, in effect, touch on undefined and ambiguous state or national security issues (such as in the representation of defendants accused of terrorism, separatist activities, or similar allegations). Furthermore, while the PRC Lawyer's Law as amended in 2007 outlines the duty of confidentiality, the obligations set forth in the law are not comparable to the common-law protections recognized by the attorney-client privilege.⁹⁴

Foreign law firms were formally allowed to practice in China on a limited basis in 1992. The MOJ's approval process has historically been on a trial

Committee for Human Rights 1998), available via the Web site of the LCHR at <http://www.lchr.org>. See also Qizhi Luo, *Autonomy, Qualification and Professionalism of the PRC Bar*, 12 J. ASIAN L. (Fall 1998) (author discusses how the PRC Lawyers' Law represents a compromise resulting from the endeavors of the PRC authorities and the Chinese Bar to develop a more professional and accountable legal community, and reviews the evolution of the PRC legal community since the early 1980s); E. Michelson, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, AM. J. SOCIOLOGY (2007) (The author reviews the political embeddedness of Chinese lawyers, which is defined broadly as bureaucratic, instrumental, or affective ties to the state and its actors. This embeddedness helps Chinese lawyers survive their everyday difficulties, such as routine administrative interference, demands for compensation, and police harassment and intimidation. The author concludes that Chinese lawyers' dependence on state actors both inside and outside the judicial system preserves the value of political connections inside.). There are also special rules for state-funded law firms. See *Methods for the Administration of State-Funded Law Firms* (promulgated October 25, 1996 by the Ministry of Justice, effective January 1, 1997).

93. 1997 PRC Lawyer's Law, arts. 38, 49(8) & (9). The disclosure of "state secrets" is prohibited by law. The relevant regulations define the terms "secret information" and "illegal disclosure" in broad terms. "State secrets" are defined as "matters that affect the security and interests of the state" and are illustrated by broad categories of information relating to national defense, "important policy decisions on state affairs," "economic and social development," "science and technology development," "criminal investigations," and "other state secrets that by decision of the state departments on protecting state secrets should be safeguarded." Law on Safeguarding State Security of the People's Republic of China (promulgated by the State Council in 1993); Detailed Rules for the Implementation of the Law on Safeguarding State Security of the People's Republic of China (promulgated by the State Council in 1994). Interestingly, the PRC Lawyer's Law provides that whenever a lawyer is detained or arrested for alleged criminal activity related to litigation activities, the detaining authorities are required to notify his or her family, law firm, and the bar association within 24 hours. PRC Lawyer's Law, art. 37.

94. Lawyer's Law, art. 45(1) provides that if an attorney conceals facts or threatens or solicits others to conceal facts from a court, the court may revoke that attorney's license and subject the lawyer to criminal liability. This rule is consistent with Article 70 of the Civil Procedure Law, which requires a lawyer to reveal any facts that are relevant to a case.

basis and the waiting list for licensing has been extensive. Post-WTO, the government began to provide greater access to foreign law firms in China, and in 2003 there were 115 foreign law firms approved to open representative offices.⁹⁵ Foreign law firms are prohibited from representing clients in Chinese courts or in matters involving purely domestic legal issues.⁹⁶ Overseas firms may represent their foreign clients in China and throughout Asia from China, and represent Chinese-funded companies in their outbound matters.

China is also taking steps to ensure that its judges and court officials are properly trained and supervised.⁹⁷ Prior to 1997, many judges in Chinese

95. Regulations on the Administration of Resident Representative Offices in China of Foreign Law Firms (State Council Order No. 338, adopted at the 51st Executive Meeting of the State Council on December 19, 2001 and effective on January 1, 2002) (outlining the establishment procedures for foreign law firms in China, permissible scope of business, supervision, and liability), *reprinted in CHINA LAWS FOR FOREIGN BUSINESS* (CCH), Business Regulation ¶ 16-653; Measures for the Registration of Permanent Resident Lawyers of the Offices of Foreign Law Firms in China (adopted on September 18, 1999 by the 4th Executive Committee of the 4th Session of the All-China Lawyers Association), *reprinted in CHINA LAWS FOR FOREIGN BUSINESS* (CCH), Business Regulation ¶ 16-652 (ACLA procedures for registering foreign law firms); Ministry of Justice Announcement No. 19 (issued on October 8, 2003 by the MOJ) (115 representative offices of foreign law firms approved); see Chapter 5, *infra*, “Foreign Investment Guidelines and Industry-Specific Regulations,” § B.19.

96. Civil Procedure Law, art. 241. See generally Bangsberg, *China Eyeing Legal Sector: Foreign Law Firms May Get More Latitude*, J. OF COMMERCE (Aug. 18, 1998), available on Lexis, News Library, or at the Web site for the JOURNAL OF COMMERCE at <http://www.joc.com>. See also Interim Provisions of the Ministry of Justice and the State Administration of Industry and Commerce on the Setting Up of the Office of Foreign Law Firms in China (issued on May 26, 1992, by the MOJ and the SAIC). See also Administrative Measures on Resident Representative Offices in Mainland China of Law Firms from Hong Kong and Macao Special Administrative Regions (Order No. 70 of the Ministry of Justice, promulgated on March 13, 2002), *reprinted in CHINA LAWS FOR FOREIGN BUSINESS* (CCH), Business Regulation ¶ 7-610 (outlining procedures for the establishment, management, and termination of rep office law firms from Hong Kong and Macao); Implementing Rules Regarding Foreign Law Firms (issued on June 4, 2002 by the Ministry of Justice). See generally R. Guo, *Time to Honor China's WTO Commitments: MOJ Issues Implementing Rules Regarding Foreign Law Firms*, CHINA L. & PRAC. (Oct. 2002).

97. Law of Judges of the People's Republic of China (promulgated on February 28, 1995 by the 8th National People's Congress, and amended on June 30, 2001 by the Standing Comm. of the 9th National People's Congress and effective January 1, 2002). The Amended Judges Law enhances the qualifications and training for judges. In order to qualify, a candidate for a judge position is required to (1) hold a bachelor of laws degree or non-law degree with relevant legal expertise, and have worked in the legal field for at least two years; or (2) obtain a master of laws degree or a non-law master's degree with one year of work experience. To sit on the Supreme People's Court or upper-level courts the qualifications are higher. Candidates for judge positions are required to pass the Uniform Judiciary Examination. The Supreme People's Court established a telephone hotline for persons to complain about any judge or judicial officer who engages in embezzlement, bribery, or other corrupt activities such as abuse of power, concealing or forging evidence, leaking secrets, or unlawful coercion. See *Reporting Center*, CHINA DAILY, May 12, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>. The National Judges College (NJC) is a full-time professional institution and has branches in the high people's courts in Beijing, Shanghai, Tianjin, Inner Mongolia, Sichuan, Shandong, Heilongjiang, Henan, Gansu, Guangdong, Guangxi, and Jiangsu. Since 1997, the NJC has helped more than 170,000 judges improve their skills and experience. A person who desires to become a judge must pass a standard national test for law professionals, including judges, prosecutors, and lawyers. The Superior People's Court realized the importance of training to prepare judges for new types of cases and the increasing complexity of cases post-WTO. In addition to substantive areas of the law, the NJC also trains judges in judicial ethics and case management. The courts have also convicted prosecutors who abuse their positions of authority. On March 17, 1998, the Intermediate

courts were appointed based upon party activities or military background, and may not have received any formal legal training. In response, China amended the Law on Judges and established the National Judges College based in Beijing, under the supervision of the Supreme People's Court, which is designed to provide continuing legal education for judges and to train attorneys that aspire to be judges.

4. Rule of Law in China

China has recently made progress in developing a legal system that reflects, and in some respects is consistent with, international norms. Prolific legislative activity and increased emphasis on implementation and enforcement are positive steps indicative of China's seriousness about the establishment of a genuine legal system based upon the rule of law.⁹⁸ Nevertheless, the legacy

Court of Fuzhou, Fujian Province, sentenced three procurators for torturing a suspect into confessing a crime to 15-year jail terms. *Procurators in Jail*, CHINA DAILY, March 27, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>. For a discussion on the PRC's reform of judicial administration and recently developed standards for judicial officers, see R. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS: LAW WITH CHINESE CHARACTERISTICS (1997). The MOJ encourages legal exchanges between Chinese practitioners and judges with their foreign counterparts. See generally Wang & Shao, *China, U.S. Discuss Legal Traditions*, CHINA DAILY, Feb. 3, 1999, available on Lexis, News Library, or on the Web site of CHINA DAILY at <http://www.chinadaily.com.cn> (discusses visit to China by U.S. Supreme Court Justice Anthony Kennedy); Shao, *A Trial Look at Trial Law System*, CHINA DAILY, Oct. 30, 1998, available on Lexis, News Library, or on the Web site of CHINA DAILY at <http://www.chinadaily.com.cn> (discusses mock trials designed to improve the quality of China's judges co-sponsored by the American Bar Association, the Berlin Judges Association, the Ford Foundation, and the National Judges College in Beijing). The number of female judges in China has increased. In 1998, the Supreme People's Court noted that there are approximately 28,000 female judges in China, or 16.8 percent of the total number of judges in China. See Hu, *Women Judges Respectable*, CHINA DAILY, Sept. 16, 1998, available on Lexis, News Library, or at the Web site of CHINA DAILY at <http://www.chinadaily.com.cn>. The number of female judges in China increased to 45,000 in 2010. See *China's 45,000 Woman Judges*, January 10, 2010, available on the Web site of the All-China Woman's Federation at www.womanofchina.cn. The Supreme People's Court issued a directive in 1999 allowing for the appointment of judges in a competitive manner and based upon qualifications rather than politics, favoritism, or personal connections (*guanxi*). See *Judgeships Now Open to Competition*, CHINA DAILY, April 9, 1999, available on Lexis, News Library, or at the Web site of CHINA DAILY at <http://www.chinadaily.com.cn>. Since 2000, the courts have clamped down on misconduct by judicial officers. See *1517 Court Staff Found Violating Law, Discipline*, PEOPLE'S DAILY, Jan. 7, 2001; *Supreme Court Tightens Internal Discipline through Inspection*, PEOPLE'S DAILY, Oct. 8, 2002; *China Punishes 972 Court Staff for Violating Discipline Law*, PEOPLE'S DAILY, Dec. 16, 2003, available at <http://www.peopledaily.com.cn>.

98. The "rule of law" has been defined as the "supremacy of the law" and provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application. BLACK'S LAW DICTIONARY 1196 (5th ed. 1979). See generally R. PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002); Capener, *An American in Beijing: Perspectives on the Rule of Law in China*, 1988 B.Y.U. L. REV. 567 (1988); Turner, *Rule of Law Ideals in Early China?*, 6 J. CHINESE L. 1 (1992). See also Hong, *Members See Need for Society of More Law*, CHINA DAILY, Mar. 5, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn> (NPC members call for improving the legal system to strengthen enforcement, improving the skills and training of law enforcement personnel, and changing trial methods to increase the openness of the judicial system). In April 1998, MOJ Minister Gao Changli stated that the "rule of law" would be the guiding principle of China's judicial departments during the following years. Chen, *Minister: Promoting "Rule of Law,"* CHINA DAILY, Apr. 27, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>; Hong, *Governing by Law*

of past and persistent political intermeddling raises questions as to whether a true rule of law exists, or will ever exist, in China.⁹⁹ Until there is assurance that Chinese courts will follow the written law without regard to politics, confidence in the legal system will remain an open issue.¹⁰⁰

Moreover, the extensive use of personal connections (*guanxi*) to circumvent the law or to gain leniency seriously undermines the public's confidence in the judicial system. The institution of *guanxi* has its roots in the hierarchical social order of Confucianism and plays an important role in contemporary Chinese society. As a result of a constant shortage of services and goods, people are compelled to use networking to overcome the Chinese bureaucracy. Those who have such connections are able to improve their job and personal situations, or may "go through the back door" (*zou hou men*) to secure government approval.¹⁰¹

Guanxi is less relevant in today's China, and will probably further diminish in value over the next decade. True *guanxi* may result in misuse and corruption. In the past, the Chinese government (and low-paid government officials) was empowered to authorize or approve the grant or use of land and resources, access to energy, access to business opportunities and government procurement projects, issuance of permits/licenses or concessions, and other necessities. Officials would dole out resources and opportunities to those who paid homage or gave something in return. Today, while the government is still the source of power over these items, there are laws and established procedures in place to regulate the allocation and procure-

Key to State, CHINA DAILY, March 13, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>. During its 1999 session, the NPC amended the Constitution to affirmatively assert the country's adherence to the rule of law. The amendment includes the following language added to Article 5 of the Constitution: "The People's Republic of China should implement the principle of ruling the country by law, governing the country according to law, and making it a socialist country ruled by law." The NPC Standing Committee maintains that this constitutional amendment is designed to ensure that China will "no longer change its ruling styles with the change of leaders." Xu, *Amendments Wait for NPC Approval*, CHINA DAILY, Feb. 1, 1999, available on Lexis, News Library, or on the Web site of CHINA DAILY at <http://www.chinadaily.com.cn>.

99. As is evident in the enforcement of its criminal laws after Tiananmen Square in 1989, the Chinese government still views the law and government policy as tools of social control. The CCP also has its own set of rules to impose party discipline on errand members, which it carries out independent of the criminal law. See *Legal System & Human Rights Under the Absolute Leadership of the Party*, INSIDE CHINA MAINLAND, May 1, 1998, available on Lexis, News Library; *China Publishes Guide to Communist Discipline*, REUTERS WORLD SERVICE, Mar. 7, 1997, available on Lexis, News Library.

100. On May 21, 1998, the president of the Supreme People's Court, Xiao Yang, invited members of the National People's Congress to criticize the court's work. Interestingly, Xiao stressed that sound supervision of the court by the NPC was necessary to ensure the impartiality of the court. Xiao's statements appeared to further welcome political interference in the court's work. See *Supervision Sought*, CHINA DAILY, March 23, 1998, available on Lexis, News Library, or on the Web site of the CHINA DAILY at <http://www.chinadaily.com.cn>.

101. There is no English equivalent to the term *guanxi*, but it usually is translated as "personal connections." The Chinese term actually has a negative connotation and implies the misuse of a personal relationship with a government official. See generally J. Cohen, *Dispute Resolution in China: Putting the House in Order*, CHINA L. & PRAC. (Jan. 2002).

ment processes, and laws to counter the corruption that often goes hand in hand with the practice of *guanxi*.

There are several reasons why *guanxi* is diminishing—albeit slowly—as a business tool: (1) the government’s emphasis on the rule of law (as opposed to the rule of man evident in Maoist China); (2) the procedural safeguards available for administrative abuses of power, such as under the Administrative Litigation Law and the Licensing Law (which, in theory, are intended to provide administrative and judicial avenues to complain or appeal adverse decisions of bureaucrats); and (3) the crackdown on corruption. In prior years, there was a lack of transparency in the permit process, which required having relationships or connections to get what one needed or risk wasting time or not being able to secure the needed license or opportunity.

The *guanxi* of the past almost invariably meant that some form of compensation was required. Today, having *guanxi* is not necessarily the same as making payoffs to government officials. Any foreign party with the right product or services and the right strategy can develop relationships and connections to help them succeed in China. No payoffs or illicit compensation are, or should be, required. Similarly, if a foreign investor follows the law, it should be allowed to secure the permits and licenses needed to operate without payoffs. If a foreign investor finds itself making payoffs, then it may eventually find itself in a trap of unlawful activity under the laws of both China and the United States (or of another home country).

A by-product of *guanxi* is the institution of nepotism in China, which has allowed senior cadres and their children (*gaoganzidi*) to monopolize key businesses and to hold substantial real property interests in Hong Kong and throughout the mainland.¹⁰² The majority of Chinese people view such favoritism as a remnant of feudal times. Consequently, the common people and foreign investors cannot be expected to develop confidence in China’s legal system until more progress is made concerning the adoption and recognition of the rule of law.¹⁰³

102. The *gaoganzidi* have exploited their top-level connections in Beijing for gifts of property and money provided by Hong Kong business leaders eager to court Beijing for their own financial betterment. See P. Corne, *supra* note 68, at 232–33.

103. Some observers believe that *guanxi* will never be supplanted by the rule of law. See P. Corne, *supra* note 68, at 230–31. Corne believes that “it is unlikely that administrators or the regulated will change their behavior to make law their principal reference.” *Id.* at 231.

