

China And the Rule of Law: A Primer on The Judicial System and Regulation of Lawyers in The Context of the Chinese Economy and Its State-Owned Enterprises

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Abstract

This article argues that there is a direct relationship between the Chinese legal system, attempts at reforms in the regulation of Chinese lawyers, and the Chinese economy—especially with regard to China’s vast network of state-owned enterprises. The paper considers questions relating to recent negative developments impacting China’s economy, dysfunctions in the operation of China’s state-owned enterprises, and issues relating to certain negative aspects of the Chinese legal system and the competency of China’s judges that impact on China’s commitment to the “rule of law.” Will the realities associated with the Chinese economy overwhelm China’s efforts? In a real sense, is it “government under law or law under government?” Rule of law or rule by law?

Key Words: legal system; economy; state-owned enterprises; judiciary; “rule of law”; capital outflows

“Government under law or law under government? Rule of law or rule by law? That was the hotly debated constitutional law topic in China during the last two decades of the twentieth century” (Cohen, 2021).

1. Introduction: What is “The Rule of Law”?

It is often argued that China’s future lies in its making progress in establishing the “rule of law” so that in both its internal and external relations, China will guaranty to its citizens and trading and investment partners the assurance that contracts and commercial arrangements will be honored and disputes will be adjudicated fairly by individuals well-trained in legal principles and procedures and according to a rules-based system that is not overwhelmed by political considerations.

Professor Richard Fallon of Harvard University provides an interesting construct to this discussion that can be applied to the People’s Republic of China (PRC). Fallon (1997, p. 9) writes: “Against the background of these purposes, leading modern accounts generally emphasize five elements that constitute the Rule of Law. To the extent that these elements exist, the Rule of Law is realized.

- (1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.

(2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz's [Professor of Legal Philosophy at Columbia University] phrase, 'people should be ruled by the law and obey it.'

(3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.

(4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

(5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures" (see also Stein, 2019).

6. The "Rule of Law" and the Chinese Economy: Are They Related?

However, there is one further complication: The Chinese economy. China boasts the second largest economy in the world— second only to that of the United States. However, analysts have concluded that China's economic growth is slowing down as Chinese policymakers assess the results of the property market downturn, with troubles at the major Chinese developer *Country Garden* in sharp focus (Ni, 2023). The context is quite striking: 70% of Chinese household wealth is tied up in real estate. Reuters (2023) reports that "Stress in the property market, which accounts for about a quarter of economic activity, raises further concern about the ability of policymakers to arrest the slide in growth." Lynch (2023) adds: "The core of the problem: a debt-ridden, overbuilt property sector that threatened to smother growth well short of the government's 5 percent annual target."

Some economists underscore that there is a real possibility that China may be unable to meet its growth target of about 5% for 2023 without *more* government spending. While the target of 5% is still a much higher rate of growth than projected for many other major economies, it is, however, still less than the average 10% growth experienced in past decades.

How has China responded? Unlike actions undertaken by the Federal Reserve in the United States which has raised interest rates eleven times in the current cycle of interest rate hikes (Watt, 2023), major Chinese banks actually *cut* interest rates on a range of deposits in the yuan, in order to lessen pressure on bank's profit margins and to reduce lending costs for borrowers, including lowering mortgage rates which should result in a re-stimulation of the real estate market and boost consumer spending.

Reuters (2023) also reported that China's central bank indicated it will cut the amount of foreign exchange that financial institutions must hold as *reserves* to counter pressure on the yuan and suggests that options might include "government-funded consumer vouchers, significant tax cuts, encouraging faster wage growth, building a social safety net with higher pensions, unemployment benefits and better, and more widely available, public services."

Tobin (2023) noted the comments of U.S. Commerce Secretary Gina Raimondo on a recent visit to China. "Increasingly I hear from American business that China is uninvestible because it's become too risky," she said. "So, businesses look for other opportunities; they look for other countries; they look for other places to go." Ziyu (2023) added: "Net foreign direct investment (FDI) in the Chinese mainland tumbled to its lowest quarterly level in more than two decades in the three months through June [of 2023], buffeted by overseas companies' supply chain concerns and geopolitical tensions" (see also Santander Trade, 2023).

Tobin (2023) offers an explanation for the downturn in the Chinese economy and noted that:

"Three years of covid-related lockdowns snarled supply chains. Then came an unpredictable mix of raids on American businesses and opaque penalties — including the increasing use of exit bans against foreign business executives. Taken together, it has made foreign firms — not just U.S. ones — wary of continuing operations in China. China badly needs foreign investment as its economy struggles to rebound from years of pandemic restrictions, amid a mounting real estate debt crisis, record youth unemployment and a consumer spending slowdown. China needs to recognize that they can no longer rely on the sheer mass of their market to attract that type of foreign investment," said Naomi Wilson, vice president of policy, Asia and global trade at the Information Technology Industry Council."

Ni (2023) argues that while some analysts had predicted a recovery in the Chinese economy in 2023, “But recent sets of data suggest otherwise. Retail sales, industrial output and investment in July all grew at a slower-than-expected pace. In the meantime, a fall in aggregate demand has put deflationary pressure on the world’s second-largest economy.”

The COVID-19 pandemic wreaked havoc on China’s economy, as Chinese consumers were left largely to fend for themselves amidst a rash of denials and bluster about the origins of the virus (see Wingrove, Strohm, & Che, 2021). Some economists had expected that the consumer sector would rebound after the main crisis had passed, but that never occurred.

Most problematically, the demand for Chinese exports—the sector that largely fueled China’s growth in the past decades—has softened, declining by 8.8% in August of 2023 (Cunningham, 2023), as key trading partners were forced to deal with rising inflation and rising living costs which have tamped down consumer confidence and spending and only further increased inflationary pressures.

Reuters (2023) reported that two shocks influenced the downturn in the Chinese economy: the global financial crisis of 2008-2009 and a capital outflow crisis of \$500 billion (Rao, 2015) that occurred in 2015 (see also Ryan, 2015) and which continued into 2017 (Chan, 2017).

China responded with a significant boost in infrastructure investment and by encouraging property market speculation. China also embarked on its worldwide “Belt and Road Initiative,” characterized as “the world’s largest infrastructure program” (Schulhof, Vuuren, & Kirchherr, 2022), to solidify its international standing and multilateral economic partnerships (Yu, 2019; Liu, Zhang, & Xiong, 2020; Berlie (ed.), 2020; Zou, Shen, Zhang, & Lee, 2021). Expenditures on infrastructure, however, resulted in the creation of excessive debt, posing further risks to China’s long-range financial stability. Delaney (2023) in fact reported that “China’s debt-to-GDP ratio surged by 12 percentage points last year, to 282 per cent, said Joyce Chang, chair of global research at JP Morgan’s corporate and investment bank, led by an uptick in government debt and local government financing vehicles in particular.”

In response to these challenges, and in the face of youth unemployment above 21 percent (Bridges, 2023; Liang & Marsh, 2023), China focused on household consumption (among the lowest in the world as a percentage of GDP) and in trying to convince Chinese consumers to *spend more and save less* in an environment of *deflation*, which in turn could result in a worsening of the economic slowdown and deepening of debt problems. In fact, De Mott (2023) argues that “China’s economy is likely headed for a financial crash... because of the property bubble that was fueled by soaring debts. In this scenario, the next big step for China is a full-blown financial crisis.”

The question must be asked: How will these economic issues impact on China’s efforts at establishing itself as a nation dedicated to the “rule of law” or will needed reforms in its legal system have to “take a back seat” to the resolution of economic problems?

3. The Constitutional Backdrop

The Constitution of the People's Republic of China (PRC) is the supreme law of the PRC (see Jones, 1985; Xinhua News Agency, 2018). The Constitution was adopted by the 5th National People's Congress (NPC) on December 4, 1982, with further revisions occurring about every five years (Weng, 2009.) The 1982 Constitution is the fourth constitution in PRC history, superseding the 1954 (Chang, 1956), 1975, and 1978 constitutions (de Heer, 1978; Kim & Kearley, 1979). The 1982 Constitution has in turn been amended five times. In addition, constitutional conventions have led to significant changes in the structure of the Chinese government in the absence of changes in the actual text of the Constitution.

The Constitution is organized as follows:

1. Preamble
2. General Principles (Chapter 1)
3. The Fundamental Rights and Duties of Citizens (Chapter 2)
4. The Structure of the State (Chapter 3) — which includes state organs such as the National People's Congress, the President of the People's Republic of China, the State Council, the Central Military Commission, the Local People's Congresses at All Levels and Local People's Governments at All Levels, the Autonomous Organs of Ethnic Autonomous Areas, the Commissions of Supervision, and the People's Courts and People's Procuratorates
5. The National Flag, the National Anthem, the National Emblem and the Capital (Chapter 4)

3.1. Revisions to the 1982 Constitution

There had been five major revisions made by the National People's Congress (NPC) to the 1982 Constitution. The 1982 Constitution is especially noteworthy because it provided a legal basis for the broad changes in China's social and economic institutions (see, e.g., Hu, 2022) and significantly revised the structure of China's government. The posts of President and Vice President, abolished in the 1975 and 1978 constitutions, were re-established.

Amendments to the Constitution can be proposed by the Standing Committee of the National People's Congress, or by more than one-fifth of its deputies. Yin (2022) states:

“In the past four attempts to amend the Constitution, this took place after the Chinese Communist Party Central Committee put forward a proposal to amend the Constitution to the Standing Committee.

After discussion, the Standing Committee will submit a draft amendment to the Constitution to the National People's Congress for deliberation. The National People's Congress can vote to amend the Constitution with a majority of more than two-thirds of its deputies.”

- 7th National People's Congress (1988): The National People's Congress amended Articles 10 and 11 of the Constitution, paving the way for the emergence of the private sector and allowing the transfer of land ownership (NPC Observer, 2018);
- 8th National People's Congress (1993);
- 9th National People's Congress (1999);
- 10th National People's Congress (2004): The Constitution was amended on March 14, 2004 to include guarantees regarding private property (*"legally obtained private property of the citizens shall not be violated"*) and human rights (*"the State respects and protects human rights"*). The 2004 revisions were designed to demonstrate that both the government and the Chinese Communist Party (CCP) recognized the need to adapt to the “booming Chinese economy,” which had resulted in the creation of a growing middle class who increasingly relied on protections of private property (Zhong & Qian, 2014);
- 13th National People's Congress (2018): The Constitution was amended on March 11, 2018 and includes revisions that further enshrined the CCP's control and supremacy (NPC Observer, 2018), including setting up the National Supervisory Commission, establishing a new anti-graft agency, extending the powers of the CCP's graft watchdog, and removing term limits for both the President and Vice President, enabling Xi Jinping, who also serves as General Secretary of the CCP, to remain as president indefinitely (Liang, 2018; Buckley & Meyers, 2018).

The 2018 amendment added the phrases "*Communist Party of China*" and its "*leadership*" into the main body of the Constitution, providing a constitutional basis for China's status as a one-party state and formally rendering any multi-party system unconstitutional (NPC Observer, 2018). The leadership and authority of the CPC is now constitutionally recognized as the "defining feature of socialism with Chinese characteristics," and therefore establishes one-party rule as an end-in-itself (Suzuki, 2018; see also Babones, 2018).

The 1982 Constitution contains 138 articles. Much of the 1982 Constitution was modeled after the 1936 Constitution of the Soviet Union (see Uibopuu, 1979). However, there are some significant differences. While the Soviet constitution contained an explicit right of secession from the Soviet Union (Sunstein, 1991), the Chinese Constitution explicitly forbids secession.

In addition, while the Soviet constitution formally created a federal system, the Chinese constitution formally creates a unitary multi-national state. The Constitution stands in contrast to the western system of separation of powers by the executive, legislative, and judicial functions. The Constitution stipulates the National People's Congress as the highest organ of state authority, under which the State Council, the Supreme People's Court, and the Supreme People's Procuratorate are responsible.

Article 1 of the Constitution describes China as "a socialist state under the people's democratic dictatorship," based on an alliance of the working classes (workers and peasants), led by the Chinese Communist Party (CCP), described as the "vanguard of the working class (Suzuki, 2018). The 1982 State Constitution also identifies socialist law as a "regulator of political behavior" (Zhang, 2018). Interestingly, however, the 1982 Constitution also emphasizes the role of *non-party groups* in the modernization and transformation of the Chinese economy, while still recognizing the "leading role" of the CPC.

In partial recognition of the Cultural Revolution as "characterized by violence and chaos" (see Zhou & Xiao, 2018) and the "Great Leap Forward in the late 1950s... [which] had left China near bankruptcy and with tens of millions dead (Facts and Details, 2023), the 1982 Constitution also places greater attention to clarifying citizens' "fundamental rights and duties," including the right to vote and to stand for election which begin at the age of eighteen except for those disenfranchised by law. The Constitution also guarantees the freedom of religious worship, as well as the "freedom not to believe in any religion," and affirms that "religious bodies and religious affairs are not subject to any foreign domination."

Article 35 of the 1982 Constitution proclaims that "citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession, and of demonstration" (see Sun, 2001). Yin (2022) further enumerates these rights as to:

- Equality
- Vote
- Be elected
- Political freedom
- Freedom of religious belief
- Personal freedom
- Inviolability of personality
- Inviolability of residence
- Freedom of communication and privacy
- Supervision
- Work
- Rest
- Material help
- Education
- Cultural activities

However, Yin (2022) also notes one important *caveat*: "All Chinese citizens enjoy these rights, and must at the same time obey the obligations stipulated in the Constitution," a provision which has subjected China to harsh criticisms that few of these "rights" are protected in actual practice (see Wu, 1988; Di Benedetto, 2023). The United States Department of State (2023) identified the following areas as especially problematic:

- Repression in Xinjiang (Maizland, 2022a);
- Fear of Arbitrary Arrest (e.g., Amnesty International, 2018);
- Religions Freedom Abuses (Raza, 2019; Enos & Kim, 2019; Goh, 2020; Meserole, 2020; China Aid, 2022);
- Stifling Freedom of Expression (Foreign and Commonwealth Office, 2015 (For example, Moynihan and Patel (2021) report that "The Cyberspace Administration of China can suspend or shut down online platforms deemed to breach rules, such as the ban on content deemed 'exaggerated', 'improper' or containing 'sexual provocations', and content 'promoting indecency, vulgarity and kitsch.'");
- Forced Labor (see Swanson, Edmondson, & Wong, 2021);
- Assault on Hong Kong's Autonomy (Soo & Wu, 2021; Maizland, 2022b); and
- Severe Restrictions in Tibet (Socksang, 2021);

4. The Constitution and Changes in the Chinese Economy

The 1982 Constitution provides an extensive legal framework for liberalizing economic policies initially undertaken in the 1980s under Deng Xiaoping (Zhang, 1996), who served as the “paramount leader” of the People’s Republic of China from December 1978 to November 1989, in which the Chinese government would balance centralized economic decision-making, central planning, and ideology with “market forces” (see, e.g., Grant, 1995). The framework embraced the *Four Modernizations* or the four areas of development—agriculture (Dernberger, 1980), industry, science and technology, and defense—“with the goal of fully modernizing those sectors by the end of the 20th century” (Schultz, 1980; Mishra, 1988; Gaur, 2021).

The website “*Facts and Details*” (2023) notes: “Deng had a “three-step” plan for China: 1) step one, double GDP from 1981 to 1990 and ensure enough food and shelter for all people; 2) step two, double GDP again in the 1990s and make sure people live a moderately prosperous life; and 3) step three, achieve modernization by 2050 by raising incomes to the levels of medium-size developed countries.”

Dorn (1976) explains:

“Deng elevated economic development to the primary goal of socialism. His vision of “market socialism with Chinese characteristics” — and his mantra, “Seek truth from facts” — paved the way for the emergence of the nonstate sector and the return of private entrepreneurs. The success of that vision is evident from the fact that China is now the world’s largest trading nation and the second largest economy” (see also Walker, 2021).

The 1982 Constitution allows the *collective economic sector* not owned by the state to play a broader role, the continuance of *state-owned enterprises* (Lin, Lu, Zhang, & Zheng, 2020), and provides for limited *private economic activity* as well. Participants in expanded rural collectives have the right “to farm private plots, engage in household sideline production, and raise privately owned livestock” (see generally Wang, 2016).

The Encyclopedia Britannica (2023) comments:

“The opening of China’s economy to the outside world proceeded apace. In the late 1970s the country adopted a joint-venture law, and it subsequently enacted numerous other laws (such as one governing patents) to create an attractive environment for foreign capital. An initial experiment with “special economic zones” along the southern coast in the late 1970s led in 1984 to a decision to open 14 cities to more intense engagement with the international economy. The idea was to move toward opening ever larger sections of the country to foreign trade and investment, which was accomplished with remarkable success over the next decades. Those zones became the engines driving China’s tremendous and sustained economic growth, and the cities associated with them mushroomed in size—none more so than Shenzhen, which grew from a town of about 30,000 in 1979 to a metropolis of some 7,500,000 in little more than a quarter century.”

In addition, and perhaps more importantly from an economic perspective, while the 1978 Constitution stressed “self-reliance”—essentially *autarky*—in modernization efforts, the 1982 Constitution provides the constitutional basis for the considerable body of laws permitting and encouraging extensive *foreign participation* and *foreign investment* in all aspects of the Chinese economy.

In April of 1986, at the Fourth Session of the Sixth National People’s Congress, the *General Principles of the Civil Code* was approved as “one of China’s basic laws.” The Civil Code consists of more than 150 articles and was intended to regulate China’s internal and external economic relations in order to establish the legal basis to engage in trade and to attract foreign investment. Important provisions define the legal status of economic entities and the property rights that these entities may exercise (see Wang, 2016). The Code clearly stipulated that “private ownership of the means of production” is protected by law and may not be seized or interfered with by any person or organization. It also recognizes partnerships and wholly-owned foreign or joint-venture enterprises, although initially China was penetrated through the joint venture model (Wagner, 1991; Bosshart, Luedi, & Wang, 2010). However, foreign investors are at present not allowed to buy land in China. Land in China belongs to the state and to the collectives, but a foreign investor may be able to acquire certain “land use rights” (Ma, 2021; Lin, 2023) which would protect their positions under certain circumstances.

Interestingly, joint ventures briefly made a “comeback” in the Chinese economy in the early 2010’s. Bosshart, Luedi, and Wang (2010) wrote:

“That makes joint ventures a more appealing option, and so does a growing pool of healthier prospective Chinese partners. All this is prompting some multinationals to reconsider the joint-venture approach as an alternate avenue for getting a stake in the continuing strength of China’s economy.

But while the dynamics have changed, the fundamentals have not: companies pursuing joint ventures would do well to reflect on the lessons of past deals to improve the chances of success. In China, some of those lessons are especially critical, such as choosing partners that can make tangible business contributions, safeguarding intellectual property, ensuring operational control of the joint venture, and managing talent. Others are critical for joint ventures in all geographies, such as aligning strategic priorities, creating a structure that permits rapid responses to change, and preparing up front for eventual restructuring.”

In recent years, however, the joint venture model has been supplanted by the more traditional partnership form. Lang, et al. (2016) write:

“Despite their enthusiasm for JVs, most MNCs believe that they could get more value from these partnerships—and that they give more value than they get. One of the biggest challenges is managing a joint venture once the ink dries on the deal. A mismatch of management skills, approaches, and controls between partners can be a source of conflict and undermine a JV’s outcome. Typical problems include organizational and governance models that don’t work well, cultural differences, and difficulties collaborating.”

Today, however, there is a significant debate whether the policies of the current Chinese President are “undoing of China’s economic miracle” (e.g., Schuman, 2021). Lohman (2021) writes:

“The government is also reasserting control over the private sector – weighing it down with political objectives that distract from its core economic responsibility of maximizing returns. The government’s sabotage of the financial technology firm Ant Group’s initial public offering in 2020 and ride-hailing company Didi in 2021 were the most high-profile examples of the lengths the party is prepared to go when its political mandates are not met.

On financial reform, Beijing has long been reluctant to allow the market to allocate capital. For good reason, because if capital were free to come and go, much of it would leave China. Only by increasing the cost of capital could Beijing prevent that from happening. And doing this would restrain the government-directed development that legitimizes CCP rule.

China is lagging in necessary land, trade and labor reforms as well. To be clear, China’s economy is “open,” to the extent that it is tied to global financial markets and supply chains. It has made strides in making business easier and is a much less severe violator of intellectual property rights than is popularly portrayed (although it may be the most significant). But more efficient regulation of business is not the same as liberal reform.

China faces a dilemma: do the things that will enable it to continue growing at the robust rates of the past, thereby sacrificing some government control, or content itself with lower rates of growth that mean economic stagnation. How China decides will have major geopolitical consequences.”

5. The Chinese Judiciary: Its Role in Assuring the “Rule of Law”

The judicial branch in China is organized under the Constitution and laws of the PRC and is one of five organs of power elected by the People's Congress.

According to Article 131 of the Chinese Constitution, the court system exercises judicial power independently and free of interference from administrative organs, public organizations, and individuals in China. However, as the Congressional-Executive Commission of the United States (2023) writes, “China's judiciary continues to be subject to a variety of internal and external controls that significantly limit its ability to engage in independent decision-making. Several internal mechanisms within the judiciary itself limit the independence of individual judges.”

In reality, the Chinese Communist Party's Central Political and Legal Affairs Commission exercises direct control over all the court system.

Hong Kong and Macau, as Special Administrative Regions or SARs (Hayes, 2022), maintain separate court systems, as mandated by the Constitution and their respective Basic Laws, in accordance with the "one country, two systems" doctrine (Hunter & Quinones, 2017; Hunter & Schild, 2019). The legal systems of Hong Kong and Macau are based on English Common Law and Portuguese civil law, respectively.

The National People's Congress (NPC) of the PRC enacted the *Basic Law of Hong Kong SAR* in April of 1990 and *Basic Law of Macau SAR* in March of 1993 in order to ensure limited state sovereignty for Hong Kong and Macau, and at the same time the "special" economic positions of those two regions. Daily FT (2018) noted that "Since both statutes are national laws, no local laws, including ordinances, administrative regulations and other normative documents, can violate the Basic Law."

This "special arrangement" however, has been called into serious question as China has moved to restrict democracy and independence in Hong Kong, fueling concerns by residents and the world community alike about the future of Hong Kong. Tsoi and Li (2022) write:

"In 1997 Hong Kong was handed back to China, triggering the start of a grand political experiment. Many were anxious about how the capitalist, free-wheeling former British colony would fare under Communist Chinese rule. So, Beijing promised Hong Kong's civil liberties and freedom - unavailable in the mainland - would be preserved for at least 50 years under a novel arrangement called "one country, two systems". Now, after a tumultuous 25 years, that experiment has reached its halfway point. What lies ahead over the next 25 years? A major question is how much political autonomy and freedom Hong Kong will retain."

5.1. Court Structure [See Appendix I]: An Overview

According to the Constitution and the Organic Law of the People's Courts that went into effect on January 1, 1980, Chinese courts are divided into four-levels (Supreme, High, Intermediate and Primary):

- At the highest level is the **Supreme People's Court** (SPC) in Beijing, serving as the "premier" appellate and court of last resort in China. The SPC supervises all subordinate "local" and "special" people's courts. The SPC is comprised of six circuit courts which sit outside of Beijing, and which hear "cross-provincial cases" within their respective jurisdictions (see Keith, Lin, & Hou, 2014).
- **Local people's courts**—the courts of the first instance or "first impression"—have jurisdiction over both criminal and civil cases. People's courts consist of "high people's courts" at the level of the provinces, autonomous regions, and special municipalities; "intermediate people's courts" at the level of prefectures (administrative sub-divisions), autonomous prefectures, and municipalities; and "primary people's courts" at the level of autonomous counties, towns, and municipal districts.
- **Courts of Special Jurisdiction** (special courts) include Military Courts, the Railway Transportation Court of China (with jurisdiction over railroad transportation), Maritime Courts (with jurisdiction over water transportation), Internet Courts, Intellectual Property Courts (Zhao, 2020; Zhu, Tang, Xu, & Tang, 2022; Zhang, Li, & Xu, 2022; Wininger, 2023), and special Financial Courts (with jurisdiction over civil, commercial, and administrative financial cases that were previously under the jurisdiction of the intermediate courts in Beijing). Except for the Military Courts, all other courts of special jurisdiction falls under the general jurisdiction of their respective high court (see Yin, 2022).

Yin, 2022) notes that

"The relationship between the superior and subordinate courts in China is one of supervision only. The higher court cannot directly interfere in a trial of the lower court. However, a higher court can overturn the decision of a lower court at second instance or retrial, where the lower court is found to be wrong in law. Therefore, the lower courts can seek to follow the accepted reasoning of the higher courts, even where they are not formally obliged to do so."

In addition, China employs a system of *people's committees of mediators* as quasi-legal authorities that can resolve civil disputes. A mediation agreement reached with the assistance of a people's mediation committee is legally binding. A party to a mediation must implement the mediation agreement in accordance with the agreed upon terms. The court system in China works in a parallel fashion with a hierarchy of prosecutorial offices called "people's procuratorates," the highest being the Supreme People's Procuratorate or the SPP (Ji, 2022). However, the SPP does not oversee the prosecution of cases from the special administrative regions of Hong Kong or Macau, except those that are investigated by the Office for Safeguarding National Security in the Hong Kong Special Administrative Region relating to national security interests.

Ginsburgs and Stahnke (1964) commented that the powers of the Supreme People's Procurator encompass:

- Overseeing the abidance of the law by all individuals, public organizations and state agencies;
- The investigation of individuals who breach the law or state interests;
- The ability to reject judgements made by lower judicial bodies;
- The supervision of legal abidance in the nation-wide prison system;
- The ability to review and reopen cases dropped by lower procuratorates when petitioned;
- Serving as a legal representative for the Party's interests in civil and administrative lawsuits.

Since local departments of justice operating under the SPP can revoke the license of a lawyer, this power has been used to target lawyers who challenge the authority of the state, particularly human rights lawyers (Davidson, 2021).

5.2. Types of Chinese Courts in Detail

As noted, there are four levels of courts in China: Basic People's Courts, Intermediate People's Courts, High People's Courts, and the Supreme People's Court (Aggarwal, 2017). Courts are organized under the *Organic Law of the People's Courts of the People's Republic of China* (see Lexadin.com, 2023). In terms of their organization and structure:

- A **primary people's court** is a lowest level court in the Courts of General Jurisdiction in the People's Republic of China. The basic people's courts have jurisdiction over cases of "first instance" or first impression at the local level.
Basic people's courts are organized at the county and district level. They consist of a president, vice president, and judges. A basic court may be further divided into criminal, civil, and economic divisions. Basic people's courts also have jurisdiction over cases that are deemed "too trivial" to require a trial and which can be resolved under administrative procedures. Procedures are governed by the *Civil Code of People's Republic of China* (the Civil Code), effective from January 1, 2021, and the *Civil Procedure Law of the People's Republic of China* (the Civil Procedure Law), as amended in 2021.
Primary level people's court have the authority to hear most criminal cases except for crimes that carry a maximum penalty of death or life imprisonment or cases involving national security and terrorism, which are generally heard at an intermediate people's court or a higher court under certain circumstances (see Ahl, 2021).
- An **intermediate people's court** is the second level of people's courts in China. The intermediate people's courts have jurisdiction over "important local cases" in the first instance and may hear appeals from the primary people's courts as well.
- A **high people's court** or **higher people's court** is the highest local court in the People's Republic of China. It is subject to the "People's Congress" at the provincial level.
The President of each high people's court is appointed by the People's Congress. Judges are appointed by the "Standing Committee" of the People's Congress.
- The **Supreme People's Court of the People's Republic of China** is the highest court of the People's Republic of China (Keith, Lin, & Hou, 2014). It hears appeals of cases from the high people's courts and is the trial court for cases relating to matters of "national importance." The court also has quasi-legislative power to issue judicial interpretations and to adjudicate rules relating to court procedures (Chen, 2011).
According to the Chinese Constitution, the Supreme People's Court is accountable to the National People's Congress, which prevents the court from functioning separately and independently of the governmental structure (Qi, 2019). The Supreme People's Court employs about four hundred judges and is served by more than six hundred administrative personnel.

The Supreme People's Court also serves as the highest court for cases investigated by the *Office for Safeguarding National Security in Hong Kong* under Article 56.

5.3. Resolution of Legal Disputes in China

China generally follows a civil rather than a common law tradition (see Jones, 1994). As a result, cases decided by Chinese courts do not establish legally binding precedents. The Supreme People's Court has the right to publish "explanations" of laws which are legally-binding, but the right to interpret the Constitution itself is reserved to legislative organs. A verdict handed down by an inferior court can be challenged in a superior court.

China Briefing (2022) states that "the litigation process in China is generally an inquisitorial one, during which the judge takes dominant roles in the trial and are actively involved in fact finding by questioning the parties. However, this process is turning to be more adversarial in recent years."

In March of 2011, National People's Congress enacted a revised Criminal Procedure Law which prohibited self-incrimination, allowed for the suppression of illegally obtained evidence, and ensured prompt trials for those accused of a crime. Interestingly, the State Council's 2012 *White Paper on Judicial Reform* (China Daily, 2012), unlike previous papers, does not mention the subordination of the judicial system to "the leadership" of the Chinese Communist Party, and replaces any mention of the Chinese Communist Party in other places with "China" (see Lubman, 2012), although the practical implications of this change in perspective is yet to be determined.

The legal system also encourages resolution of civil conflicts through a formal state-sponsored and state-regulated mediation and arbitration system (Zhao, 2022). If both parties to a dispute reach an agreement through this process, it will be legally binding after the agreement is reviewed and approved ("accepted") by a judge of the court in which the case originated.

China Briefing (2022) outlines important aspects of the arbitration and mediation processes. Arbitration in China is regulated by the Civil Code and the *Arbitration Law of the People's Republic of China* (the Arbitration Law), which was last updated in 2017. Some special types of arbitration procedures, such as labor arbitration, are regulated under different provisions of Chinese law (see Fox, Donohue, & Wu, 2005). According to the Arbitration Law, only contractual disputes and disputes concerning property rights and obligations can be subjected to arbitration.

In order to commence arbitration, there must be a valid arbitration agreement in place. Mediation is a voluntary, confidential, and private dispute resolution process in which a neutral person, the mediator, assists the parties to reach their own negotiated settlement agreement. The mediator has no power to impose a settlement. Successful mediation would result in an agreement signed by the parties (Zhao, 2022) resolving the underlying dispute.

6. China and Judges

The total number of judges serving in China is over 100,000 (Yanchao, 2020). According to Li and Liu (2021) judges in China face a "skyrocketing caseload driven by rising economic and social activities," posing "a heavy burden on frontline judges and overtime work is commonly observed in lower-level courts. As a result, thousands of Chinese judges have resigned in the past decade to pursue other careers." Improving the recruitment and training of judges in China is a clear policy objective (He, 2017) and a necessary component of assuring the "rule of law" in China.

Li and Liu (2021) write:

"Driven by Chinese President Xi Jinping's political agenda, the top priority in implementing these reforms was not to enhance judicial autonomy, but to consolidate the power of the Chinese Communist Party (CCP) by asserting tight control over various aspects of Chinese society, including the legal system. ... local Party officials and the CCP's Organisation Department retain considerable influence over the appointment of court presidents and vice-presidents. Reforms to judicial accountability enhanced judges' autonomy, enabling frontline judges to decide most cases without obtaining approval from court leaders or the adjudication committee. The reform provided some protection to frontline judges from external influences. Still, the new system of 'lifetime accountability' made Chinese judges more cautious in making risky or controversial decisions for the sake of self-protection. Various informal channels persist for local governments and other external actors to influence judicial decisions, especially in cases with high political or economic stakes. Judicial corruption remains a rampant problem."

6.1. An Overview of Key Issues Relating to Training of Judges in China (see Liao, Huang, & Deng, 2022)

Yang (2017, p. 251) reported that “Judge selection is a key part of China’s judicial reform because it is concerned with the level of judicial personnel and the quality of dispute resolution, and further related to China’s march toward the rule of law.” Professor Yang is an Assistant Professor at the Institute of Social Sciences of the East China University of Political Science and Law and offers particularly insightful commentary on issues of judicial reform in China. Yang (2017) argues that one of the major impediments to judicial reform lies in the structure of becoming a judge in China. Li and Liu (2021) write that “The quality of judging varies significantly among different regions. Courts in more developed cities and regions recruit judges with superior training and credentials and enjoy strong financial and administrative support from local governments. These are luxuries that courts in less developed areas cannot afford.” Ma (2017) argues that training of judges provides both “opportunities and challenges.”

At the beginning of the foundation of the People’s Republic, there was no formal judicial training required for judges. Judges were even not required to be lawyers and were looked upon more as “judicial bureaucrats.” [For a listing of the various categories of lawyers in China, see Appendix II]. Because of the bureaucratization of the Chinese legal system (Harding, 1984; Burns, 1989; Zang, 2017; Wang, 2019), and the belief that many, if not most, disputes can be resolved through a bureaucratic mechanism, the focus of judicial training has been largely limited to the content and interpretation of what is termed “departmental” or administrative law. Ironically, many of the judges involved in these types of cases were also officials in the various departments or administrative agencies.

Under these circumstances, and in light of core principles of “socialist law” (Quigley, 1989), the training of judges did not necessarily refer to traditional legal education. Clause 2 of *Rules for Judge Training of the People’s Republic of China* provides for the training required of prospective judges, probationary judges (including post-selection training), training for promotion, and post-continued training (see Yanchao, 2020). Training of judges in China is essentially “professional education” aimed at assisting judges in court administration (Yang, 2017). Further, Yang (2017) comments that professional education should be focused on applying “uniform law concepts, renewal of professional knowledge structure, and understanding [of] the legislative spirit as well as the grasp of applying laws.”

Yanchao (2017) notes that in selecting candidates for judgeships,

“The judge election committee in provincial-level courts shall first examine the professional competence of candidates who haven’t been a judge before for the judge recruitment, and then the best candidates will be appointed as judges by the Standing Committee of the National People’s Congress at the corresponding level.

The judges in their first term shall firstly serve in the primary people’s courts. The judges of the intermediate people’s courts will be selected from the judges in the primary people’s courts, while the Supreme People’s Court and the high people’s court can select judges from any court at lower levels.”

Yanchao (2017) continues and outlines the “substantial requirements” that must be satisfied in order to serve as a judge in China today. These requirements include:

- “(1) to be of the nationality of the People’s Republic of China;
- (2) to have a bachelor’s degree or other higher degrees in law major from higher education institutions;
- (3) to have a bachelor’s degree or other higher degrees not in law major from higher education institutions but with a Juris Master’s degree (J.M.), a degree of Master of Laws (LL.M.), or other higher degrees;
- (4) to have a bachelor’s degree or other higher degrees not in law major from higher education institutions but with professional knowledge of law;
- (5) to have engaged in legal practice for at least five years; but the requirement for minimum working years for the legal practice can be relaxed to 4 years in the case of getting a Juris Master’s degree (J.M.) and a degree of Master of Laws (LL.M.), or 3 years in the case of getting a Doctor of Law degree;
- (6) to pass the national unified legal professional qualification examination to obtain the legal professional qualification.”

In addition, candidates for a judgeship must pass the National Judicial Examination. China. Services Info (2018) notes:

“The examination is organized and implemented by the Justice Ministry’s judicial examination institution, with specific examination matters in the charge of judicial administration examination institutions at the provincial, autonomous region, and municipality level and the judicial administration examination institutions of city districts.

The national judicial exam is a uniform exercise that adheres to the principle of fairness and equitability in all procedures, content, mode, administration, grading and qualifications.”

The amended law enacted in 2019 eliminated an enumerated minimum age for judges, which had been established previously at 23. Instead, thresholds for judges related to educational background and practical experience in the practice of law have been raised. “According to China's normal education pattern, it usually takes much time at least at the age of 27 to reach such thresholds” (Yanchao, 2020). A provision in the amended law enacted in 2019 allows lawyers to serve as judges provided that a lawyer should have been engaged in the practice of law for no less than five years.

Certain persons are also disqualified from serving as a judge. They include persons:

- (1) having been subject to punishment for committing a crime;
- (2) having been discharged from public service;
- (3) having a certificate (license) for the practice or for acting as a notary public having been removed or being removed from an arbitration commission for cause.

The appointment of judicial officers in China must be seen in light of inherent contradictions between the stated goal of professionalism and the employment of a large number of non-professionals (bureaucrats or party members) who have nevertheless received “no legal education and have no judicial skills... , and the vague judge admission system [which] has caused great difference in the professional quality of judges” (He, 2017).,

Critics of the current system of judicial training point to the fact that instructors come from Chinese universities, who are often not professors of law but lecturers or instructors having no knowledge of legal theories or of concepts such as legislative intent. Judges who participate in judicial training programs “are likely to find that they are by taught by the judges who are almost the same as them in skills.”

According to the *Rules for Judge Training of the People’s Republic of China*, revised in 2006, training of judges may be conducted by “national judge colleges” established by the Supreme People’s Court (see the website of the Supreme People’s Court of the People’s Republic of China, 2022). In reality, however, most judges are trained at the local level resulting in an endemic “non-systematization,” “difference[s] in juridical concepts,” and the awarding of contradictory judgments in essentially the same cases (see Wang, 2018). In addition, “Local governments are able to exert influence on judges because they control local judicial salaries and court finances and also make judicial appointments” (United States Congressional-Executive Commission on China, 2023). The United States Congressional-Executive Commission on China (2023) has noted that “Local governments are the most significant source of external interference in judicial decision making. Local governments often interfere in judicial decisions in order to protect local industries or litigants, or, in the case of administrative lawsuits, to shield themselves from liability.”

Li and Liu (2021) argue that the “limited efficacy of judicial reforms is ultimately a result of the enduring ideological foundation of the Chinese legal system, which is characterised by Party control and maintaining order,” leading to “a more weaponized judiciary aimed at maintaining social order and strengthening the rule of the Party-state.”

Interestingly, at the same time, “In less political civil and commercial cases, the quality of judicial decision-making has improved thanks to the professionalization of judges and the legal system’s continuous institutional building, which are long-term reform efforts that began before Xi took power” (Li & Liu, 2021).

The quality of judging in China varies significantly among different regions. Courts sitting in more economically developed cities and regions are able to recruit judges with superior training and academic credentials and Li and Liu (2021) report that such courts enjoy strong financial and administrative support from local authorities.

7. Are Issues Systemic Rather Than Reactive?

In addition to issues relating to consumer spending and growth in the Chinese economy, negatives associated with China's state-owned enterprises persist. State-owned enterprises accounted for over 60% of China's market capitalization in 2019 and generated 40% of China's GDP of US\$15.97 trillion (101.36 trillion yuan) in 2020, with domestic and foreign private businesses and investment accounting for the remaining 60%.

Brodsgaard (2018) noted:

“Much has been written on the need for reform of China's state-owned enterprises (SOEs). They play an important role in the Chinese economy, as they dominate China's strategic sectors and pillar industries. They are also key instruments for the implementation of Chinese Communist Party (CCP) policies and strategic initiatives. But in terms of return on assets they are widely regarded as less profitable than privately owned companies.

In the past, substantial reforms to SOEs were consistently announced year after year. This movement toward SOE reform reached a high point in November 2013, when the Third Plenary Session of the 18th Central Committee adopted a comprehensive reform program that contained a key section on SOE reform.

But since then reform within this area has stalled and even gone backwards. Instead of being divided into smaller, mutually competitive companies, China's large SOEs have experienced a process of consolidation that has created even bigger companies.”

The Library of Congress (2023) added:

“Although private sector has been growing steadily, the Chinese economy hasn't transformed into true market economy. The Chinese government controls a large number of state-owned enterprises (SOEs) that dominate strategic sectors as well as banking, and maintains policies that provide preferential treatment of these firms. Industrial policies, mega state-owned enterprises, investment restrictions, and many other government controls have substantial influence on the trade with China.”

Will continued dysfunctions relating to Chinese state-owned enterprises (Jin, Xu, Xin, & Adhikari, 2022), despite efforts at reform, in turn thwart necessary reform efforts in China's legal system, stem the tide of perceived corruption (Griffin, Liu, & Shu, 2021), or improve the quality of Chinese judges which would convince both allies and adversaries that China is indeed committed to the “rule of law”?

8. Concluding Comments and Observations

As China opened its economy from state dominance and state ownership of the factors of production, most evidenced by the predominance of state-owned enterprises, to a model based on “Chinese characteristics” (Cohen, 2021), it would be important to convince potential foreign investors and prospective trading partners that its economy and social-political system were operating under the “rule of law.” This undertaking would certainly involve an analysis of the Chinese Constitution's provisions relating to the organization of the Chinese judiciary, its court structures, provisions for establishing an independent judiciary free from party control and influence, and the creation of a regulatory environment which would guaranty the security of foreign investment and agreed-upon terms of international trade.

However, this analysis cannot be accomplished in a vacuum free from ideology or the practical implications of the marked slow-down in the Chinese economy in several important sectors—especially in the real estate market—and the real prospect of deflation in the Chinese economy, as well as the persistent view that Chinese firms and the Chinese economy is rampant with “poor governance, self-dealing, and inefficiencies” (Griffin, Liu, & Shu, 2021).

China is a nation where there are several movable parts and contradictions in its announced commitment to the “rule of law.” In this context, Li and Liu (2021) write insightfully that dysfunctions in the Chinese legal system may prove insurmountable: “Chinese courts may never break away from the shackle of Party control, but more focus on the everyday work of professionalized judges, instead of top-down political agendas, would certainly make them more competent judicial institutions.”

Only time will tell!

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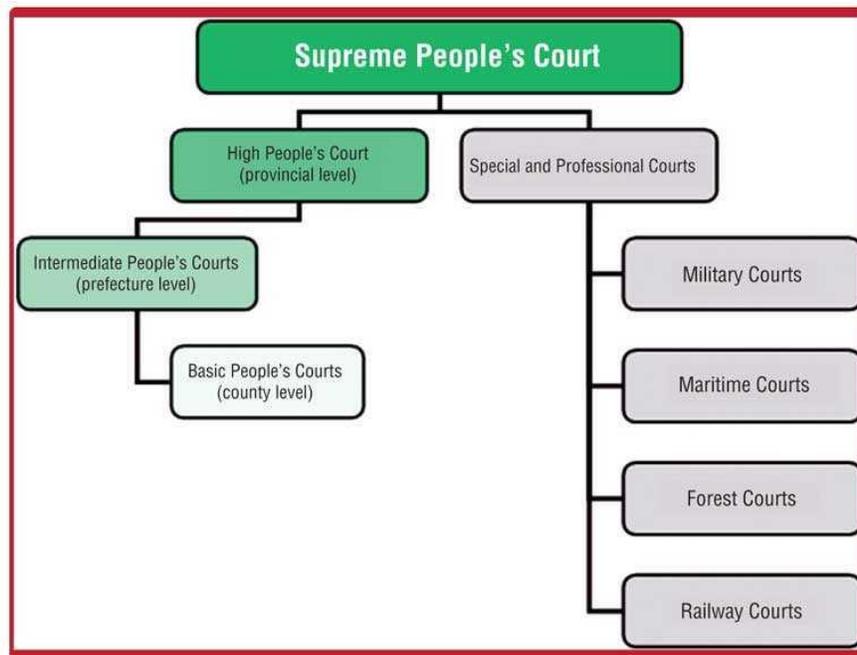
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APPENDIX I – THE STRUCTURE OF THE CHINESE COURT SYSTEM



APPENDIX II- CATEGORIES OF LAWYERS (see Liao, Huang, & Deng, 2023)

There are five categories of lawyers in the People's Republic of China (PRC) (not including the jurisdictions of Hong Kong, Macau or Taiwan):

- **“Private practicing lawyers:** these are independent legal practitioners providing all types of legal services.
- **Part-time practicing lawyers:** these are qualified teachers and professors who work in legal areas in colleges, universities or study and research institutions.
- **Government lawyers:** these are lawyers who are also public servants, but also lawyers. Government lawyers can only serve their own government departments to provide legal advice.
- **In-house lawyers:** they are lawyers who are company employees. In-house lawyers can only provide legal advice to their employers.
- **Military lawyers:** these lawyers are military personnel and can only provide legal services to the military forces.”