

## **THE LEGAL SYSTEMS IN INDIA-CHINA: A COMPARATIVE PERSPECTIVE**

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*Today, India and China are two of the world's fastest developing economies. At some level, these two countries share a lot in common; however, the differences are also stark. Presently, they are also in close competition for global trade. They both are constantly changing their laws to bring in economic reforms to keep up with the pace of development and to satisfy the highest expectations of global investors. Against this backdrop, we analyze their legal systems from philosophical, historical, social and cultural perspectives. Indeed, a comparative analysis of these legal systems reveals how globalization has the potential to change domestic legal systems all around the globe.*

### **I. INTRODUCTION**

Today, India and China hold the key for the world economy. They are slated to be the fastest growing economies. Increasingly, investors all around the globe are keeping a close watch on the developments in these two countries. Against this backdrop, this article seeks to draw a comparison between the two legal systems of India and China. Accordingly, we have identified six vital points of comparison for the legal systems, *viz.*, (a.) *Philosophical Influences*; (b) *Historical*; (c) *Constitutional*; (d) *Legislative*; (e.) *Dispute Resolution*; and (f.) *Public-Private Interplay*.

Organizationally, the comparative analysis is divided into six sections. In section I, we trace the philosophical influences on the evolution of the legal systems. Section II briefly examines the relevant historical record to identify the process of development. History sheds light on how foreign intervention and revolution against these foreign rulers shaped India and China's modern legal systems. A brief account of reforms also gives useful insights into how globalization is changing internal legal systems around the world. Section III identifies trends of constitutionalism and modern reforms in governance. Section IV highlights the modern legislative mechanisms in both countries. Section V focuses on the dispute resolution system and identifies how two legal systems are changing their laws regarding private investors' needs for effective dispute resolution. Finally, Section VI reviews the role of public and private partnership and its legal significance in the modern economic, social and political context.

## II. PHILOSOPHICAL INFLUENCES

Historically speaking, several schools of philosophy have had an indelible impact on the evolution of the legal system both in India and China. At the outset, it is instructive to have a broad overview of the philosophical influences to fully appraise the legal system. In India, *Dharma* has been the pre-dominant ancient philosophy seeking to create a place where individuals and societies could obtain self-realization. Interestingly, *Confucianism* and *Daoism*, in China, had shared these goals. *Buddhism* is a commonly shared philosophy, which have equally affected the social, political and economic development in both countries. Against this backdrop, this section critically examines the philosophical influences on the development of legal systems.

### (A) Influences on India's Legal System

The ancient Indian legal jurisprudence is deeply rooted in the philosophy of '*dharma*'<sup>1</sup>, which is comparable to the modern legal jurisprudential theory of 'grund-norm' seeking to establish a peremptory norm within a legal system. '*Dharma*' means 'justice,' defined as what is right in a given circumstance and seeks to protect those who follow the path of Dharma, i.e., of righteousness. The term has also been interpreted to include the uplifting of living beings. '*Dharma*' was designed to regulate individual conduct, rights and liberty in consonance with the larger interest of the society. In turn, society had to safeguard and protect the interest of individuals in all respects. '*Dharma*', therefore, governs the mutual obligations of the individual and society. Thus, the protection of '*dharma*' was an integral aspect of public life in ancient India.

The body of the ancient Indian legal system can broadly be classified into two categories, *namely*, sources of law and customs. The sources of law were primarily the religious texts, *namely*, *Vedas*<sup>2</sup> (primary texts of Hinduism), the *Sruti*<sup>3</sup> (which literally means what is heard), the *Smritis*<sup>4</sup> (which means what is remembered) or the *Dharamshastras*, each of which offered a set of legal rules to govern society and behavior of the individual. It is noteworthy that the latter two texts and their commentaries specifically dealt with civil and criminal laws. In addition, custom also played a key role in shaping the law. Usages when fully developed into customs supplemented the law on the subject. As a matter of fact, the modern text of *Smriti* reflects the customs that had evolved over a period of time. Therefore, custom gave the law an organic character, meaning that the contents, substance and present structure of codified law in India is drawn from customs handed down as *Smiriti*, or "memory".

### (B) Influences on Chinese Legal System

As with India, the sources of Chinese legal system are myriad. At an introductory level, several unique Chinese philosophies, Confucianism, Daoism, and Legalism, help explain the evolution of the legal system in China.

(1.) *Confucianism and Confucian Disciples*: Originating around the Sixth Century BCE (before the common era), Confucianism is the most significant philosophical influence on China's legal development. Confucianism emphasizes the community over the individual, assumes hierarchical relationships in the political and socialized spheres, and requires that people should understand the correct conduct demanded by each type

of relationship and act accordingly.<sup>5</sup> Somewhat similar to *Dharma, Li* (proper behavior) is essential for good governance, crime prevention, and supporting the social order. Confucian thought holds that *li* is preferable to *fa* (enforcement of positive laws or system of punishments), which is viewed as a means of encouraging persons to break the law rather than do what is right.<sup>6</sup> The concept of “face” originates in Confucian thought and, for example, helps explain the reluctance of Chinese persons to initiate litigation.<sup>7</sup>

Three of Confucius’s disciples, Mozi (c. 5th Century BCE), Mencius (c. 371 BCE) and Xunzi (c. 298 BCE), promoted variants of traditional Confucian thought.<sup>8</sup> Mozi posited that persons with virtue and ability should govern and be elevated instead of persons inheriting positions of authority. Mencius believed that man is inherently good and a government should help people to preserve such status through benevolent rule. Contrary to Mencius, Xunzi posited that man possessed evil, but that evil could be changed through self-improvement and self-fulfillment. Study and education, Xunzi believed, can lead to self-improvement, and therefore study and education should be supported by government.

(2.) *Daoism*: A second significant influence, Daoism, originated around 500 BCE and encouraged people to follow the *Dao* (the way). Daoist thought “opposes institutions and organizations, moral laws, and governments as human artifices which obstruct” adherents from following “the Way.”<sup>9</sup> A central tenet of Daoism, *wu-wei*, translated as “non-action,” is the concept that a ruler should create a natural state of harmony from which action emerges spontaneously or naturally. “Pairs of opposites” or “unity of opposites” is another important tenet in Daoist thought, and suggests that each side of any given argument is right and wrong.<sup>10</sup> Writers have suggested that paradox and ambiguity arise from the unity of opposites; this ambiguity is seen as an influence on legal development.<sup>11</sup>

(3.) *Legalism*: Legalism, emerging around 200 BCE, also has influenced China’s legal development. Legalists believe that man is essentially selfish and that a system of rewards and punishment (with an emphasis on the latter) was needed to keep social order. Among other concepts, legalists believed in a single, standard set of individual duties to the state and society necessary for a ruler to be effective.<sup>12</sup> The opposite of Confucian thought, Legalism promotes *fa* over *li*. Legalism continues to influence how Chinese individuals regard interaction with the State.

It is evident from the prevalent legal system in India that a prominent feature of legal philosophies has been the interest of society above an individual. Remarkably, the ancient Indian legal system embodied the concept of *dharma* installing a preemptory norm of law in the regulation of human behavior and governance. It is also interesting to note that though the ancient Indian legal system was largely based on religious scriptures, it had a unique distinction of being reduced into “writing” fulfilling the objective of certainty in a legal system.

### III THE HISTORICAL FLASHBACK

Often history serves as a powerful source of interpretation. The legal system is no exception. This section briefly touches on different phases of historical development to critically assess its impact in shaping the legal system.

### (A) Rulers Prior to Foreign Invasion

(1) *India*: Prior to foreign intervention of Moughals and British, India was fragmented into numerous princely states each having its own system of governance. Primarily, the system of governance was based on monarchy. Barring few exceptions, the King had the ultimate authority for all the matters including legislative, judicial and executive. As discussed above, the laws were largely based on the religious scriptures.

(2) *China's Empire*: The historical legacy from China's imperial governments also influences today's Chinese legal system. Modern Chinese legal theory continues to reflect a combination of such influences.<sup>13</sup> The Emperor Qin Shi Huang started the Qin Dynasty in 221 BCE, China's first centralized government. The Qin was followed by the Han, the Sui, the Tang, the Song, the Yuan, the Ming, and the Qing Dynasties. China's imperial system lasted with some interruptions until the overthrow of the last Qing Emperor, Pu Yi, in 1911.

In China's imperial system, as the "Son of Heaven" and "Ruler of All Under Heaven," the Emperor assumed responsibility for maintaining "civilized" society and for mediating the relationship between that society and heaven. The result is that imperial China is characterized as *renzhi* (rule of man) rather than *fazhi* (rule of law). The legal system existed as an implement to govern and control the public for the benefit of the rulers.

A first western view into imperial China's legal system came from Lord Macartney's 1792-1794 mission to China. The mission brought back a copy of the Qing Dynasty legal code, an examination of which illustrated that China had a unique conception of the law.<sup>14</sup> Under this code, there was no independent judiciary either in the provinces or in Beijing. Instead, country magistrates acted as detectives, judges, and jury.<sup>15</sup> These magistrates accumulated evidence, evaluated the evidence, rendered a judgment, and passed sentence. Although the magistrates often relied on a member of their clerical staff who was familiar with the law, there was no independent profession of law and no lawyers.<sup>16</sup> Potential defendants commonly paid bribes to the mediator's staff in order to dismiss the action. These "yaman runners" supplemented their incomes by accepting bribes to quiet legal matters.<sup>17</sup> Imperial Chinese courts almost exclusively heard criminal cases, as civil cases were almost always settled through arbitration or mediation. The Qing-era legal system maintained the hierarchical social values that were propagated through the central government's Confucian teachings.<sup>18</sup>

Given this background, it is not surprising that early Chinese social theory expressed deep skepticism about the corrective function of law. Judges were viewed as the emperor's agents and lawyers were held in low esteem. The only lawyers permitted to practice in imperial China were the state's own legal specialists. Even as late as the Qing dynasty, which ended in 1911, to initiate legal action was a crime, and lawyers were derided as "people who write with poisoned pens."<sup>19</sup>

The civil service bureaucracy effectively ran China prior to 1911. This bureaucracy first emerged during the Qin and Han dynasties. Such strong centralized bureaucracies were developed first as a counterweight to, and later as a replacement for, land-owning nobility. Bureaucrats were steeped in Confucian traditions and intensely loyal to the state. Aspects of this bureaucracy remain today, especially, as discussed below, in the various administrative entities under the State Council.

## **(B) Foreign Intervention**

### **(1) India**

(a) *India's Mughul Empire*: The Sixteenth Century witnessed the establishment of totally autocratic rule wherein the word of the Sultan (Emperor) was the law. Theocracy and military power were its dominant features. The Sultan acted as if he was "Pope and Caesar rolled in one".<sup>20</sup> The Mughul rule in India remained a centralized anarchy. The personality of a ruler remained a dominant factor. If the Sultan happened to be wise and a benevolent person, the Mughul machinery worked well as was seen during the regime of Akbar. Akbar developed the revenue administration system in great detail. A special feature introduced by him was the Mansabdari system under which the army, the peerage and civil administration were all rolled into one. By the end of the 17th century, the Mughul machinery became thoroughly corrupt. The East India Company and the British Government understood this and stepped in.

(b) *The East India Company and British Rule*: As the Mughul Empire degenerated, the British Empire attempted to fill the void. The British realized that, amidst chaos and confusion, no successful trading activity was feasible. As observed by Mason, "The East India Company did not see merely a company formed for extension of British commerce but in reality a delegation of the whole power and sovereignty of the British Kingdom".

India's legal system witnessed a complete overhauling. As of today, India continues with the same basic laws which were written by the British with a few changes, including the introduction of the court system.

### **(2) China: The Opium Wars and Foreign Concessions**

Foreign intervention in China took a different form than foreign intervention in India. Although foreign powers did not supplant the Chinese imperial system, *per se*, foreign involvement in China has had a lasting impact. Foreign involvement in China intensified after China's 1842 defeat in the Opium War with Great Britain. As in India, foreign powers were able to enforce extraterritorial treatment of their nationals in China. As such, for example, American citizens present in China were not subject to Chinese law for their activities within China. Further, in this example, an American citizen would not be subject to Chinese taxation, the jurisdiction of China's courts or arrest by Chinese police forces. At various points, the United States, Great Britain, France, Germany, and Japan benefited from such "unequal treaties". These treaties bred distrust of the Chinese government among Chinese citizens, who viewed the government as unable to control foreigners.<sup>21</sup> The extraterritoriality granted through these "unequal treaties" did not end until 1943, and provided the Chinese Communist Party ("CCP") with a justification to isolate China in the years after 1949 and undo the many legal reforms that had been undertaken to that point. The influence of the "unequal treaties" helps explain why the Chinese government very strongly prefers that legal development and reform come from within China.<sup>22</sup>

The period from the start of the disintegration of China's last dynasty to the Communist victory in 1949 was marked by political turmoil, including foreign invasions, native uprisings (such as the Taiping and Boxer rebellions), and the effects of global

and civil war. Hastening the fall of the Qing dynasty, Sun Yat-sen led a rebellion that resulted in the declaration of a Chinese republic in 1911. This first Chinese revolution dissolved into a dictatorship and “a decade of warlordism” from 1916 to 1927. The Nationalist revolution that coincided with the struggle against Japan in World War II from 1931-1945 disintegrated into a civil war between Nationalist and Communist factions that was not resolved until the Communist victory in 1949. Chiang Kai-Shek ran his portions of China any way he could and the Guomindang ran an inefficient and corrupt bureaucracy. Obviously, this turmoil was not propitious for legal development.<sup>23</sup>

### **(C) Independence and Revolution**

(1) *India*: The Indian Independence Act, 1947, was passed by the British Parliament and Royal assent was given whereby independent India came into being on August 15, 1947. Prior to independence, the Government of India Act, 1930, provided the framework for governance in the country. The Constituent Assembly, elected in 1946, had already begun the task of framing the Constitution of India. Finally, a written constitution was adopted on November 26, 1949 and India became a Republic on January 26, 1950.

(2) *China*: Upon its victory in 1949, the CCP invalidated the entire corpus of laws that had been in force to that date. Echoing Confucian thought, Mao eschewed written laws and favored a system of general principles interpreted and applied by cadres. The Confucian ideals of family loyalty, virtue, and collective action were used to reinforce the CCP’s power. Mao also embraced legalist theory in the CCP as sole arbiter of right and wrong, and using a system of rewards and punishments to maintain social control.<sup>24</sup> Between 1949 and 1957, the government established the groundwork for a new socialist legal system borrowed heavily from the Soviet legal system. In that same time period, the number of lawyers practicing in China fell from 60,000 to 2,800, with most new lawyers taught by Soviet advisors in China. By the end of the 1970s, China had virtually no written law.<sup>25</sup>

Obviously, given Mao Zedong’s belief that a legal system only “dams up the free flow of revolution,” it is not surprising that legal development waned after the Communist victory in 1949. As a result of the “Hundred Flowers” movement and related “Anti-Rightist” campaigns, the private practice of law was banned, law libraries were disbursed or destroyed, and law faculties were sent to the countryside. The Ministry of Justice was closed in 1959. The Cultural Revolution destroyed virtually all legal professionals and closed all law schools as lawyers and the law were defined to be counter-revolutionary. As Mao stated at the time, “We want the rule of the individual not the rule of law.”<sup>26</sup> Therefore, as Kenneth Lieberthal writes:

*As of 1977, therefore, China was governed by decrees, bureaucratic regulations, and the personal orders of various officials; it had no codes of law at all. In addition, many decrees, regulations and so on were kept secret.*<sup>27</sup>

### **(D) Reforms and History**

#### **(1) India**

(a.) *Post Independence Reforms: 1947-1991*: Post-independence, the adoption of the Constitution of India in 1950 had a profound impact on the legal system. Under Article

372 of the Constitution, the old laws were allowed to continue in so far as they were in conformity with the letter and spirit of the Constitution. Then India undertook a massive nationalization process, and largely became a closed economy.

(b) *Economic Liberalization: 1991-2002*: After four decades of import substitution, economic reforms were introduced to bring the domestic economy into the mainstream of global commerce. Domestic laws, such as intellectual property laws, were amended to fulfill India's obligations under the World Trade Organization ('WTO'). Independent regulatory authorities were created in specialized fields of economic activity such as capital markets, telecommunications, electricity, insurance, etc. These independent regulatory agencies were assigned all three functions, namely, executive, legislative and judicial. The alternative dispute resolution system was overhauled by enacting the Arbitration and Conciliation Act of 1996, which replaced the old Act of 1940. This legislation, among others, provided for limited judicial interference, arbitral award to be recognized as *decree* enforceable by the court of law, and mechanisms to enforce international arbitral awards to make the alternative dispute resolution system efficient and effective.

(c) *Recent Economic Reforms: 2002 to date*: As part of the process of liberalization of the economy, India has substantially eased restrictions on Foreign Direct Investment (FDI), exchange control regime and tariffs. Recently, there have been several amendments to the Code of Civil Procedure 1908 to simplify the dispute resolution system of the courts. It is primarily aimed at expediting the resolution of disputes in the courts.

## (2) China

The Cultural Revolution ended in 1976 with Mao's death and the arrest of the Gang of Four. After ten years of lawlessness, the Chinese government took steps to slowly open China to the rest of the world. The recent revival of China's civil law system can be traced to the "Four Modernizations," a program started at the Third Plenum of the 11th Central Committee in 1978. Development of a modern legal system was an integral part of the "Four Modernizations" program and seen as essential to economic reform and as a means to prevent a recurrence of the abuses of the Cultural Revolution.<sup>28</sup> The "Four Modernizations" stressed the need to develop a legal system that (a) ensures the stability and continuity of the laws; (b) guarantees the equality of all people before the laws and denies anyone the privilege to being above the law; and (c) provides that the law may be revised only through legal procedures and not at the personal whim of a particular leader. As a result of the "Four Modernizations," many laws revoked before 1978 were restored, legal colleges were established, and thousands of new legal rules were promulgated. The Ministry of Justice was also reestablished, and the four-tiered system of state courts was revamped, with an increasing emphasis on judicial competence. Note, though, that Deng Xiaoping and other reformers did not promote the rule of law as a goal in and of itself, and did not promote the rule of law as a means of achieving western-style liberal democracy. Instead, Deng and other reformers saw that economic development required a rules-based system in discrete areas, such as foreign investment, and promoted the rule of law within China's commercial sector.

The reconstruction continued through the 1980s. China's written Constitution was adopted at the Fifth Session of the Fifth National People's Congress on December 4, 1982, and amended in 1988, 1993, 1999, and 2004.<sup>29</sup> The General Principles of Civil Law (General Principles), the first general civil law in the PRC, was promulgated on April 12, 1986 and became effective as of January 1, 1987.<sup>30</sup>

In 1993, the Central Committee of the Chinese Communist Party issued the Decision of the CPC Central Committee On Some Issues Concerning the Establishment of a Socialist Market Economic Structure.<sup>31</sup> The Decision, at Section IX, provides that the PRC must "pay due attention to tightening up the legal system, bringing the effort of reform and opening up to the outside world within the framework of a legal system, and learning how to manage the economy by legal means."<sup>32</sup>

In 1997, the National People's Congress (NPC) explicitly incorporated the rule of law as a basic guiding principle into its foundation documents, and made the rule of law a separate subject in the plan for political reform. At the same time, the NPC proposed to institute a comprehensive legal framework with Chinese characteristics by the year 2010. Reformers in the PRC government believed that emphasizing and amplifying on the rule of law coincided with the notion that economic modernization requires "getting on track with the international community."<sup>33</sup>

In the run-up to World Trade Organization accession, the PRC's central leadership launched a top down review of all laws and regulations to determine WTO compatibility. During this process, the State Council reviewed regulations issued by some thirty-five ministries and bureaus, including all relevant regulations promulgated by the then-Ministry of Foreign Trade and Economic Cooperation (MOFTEC), now the Ministry of Commerce (MOFCOM).<sup>34</sup> MOFCOM amended over 2,000 laws and regulations, abolished over 800, and announced an intention to adopt over 300 new laws and regulations, all in order to make China's legal system more consistent with its WTO commitments.<sup>35</sup>

In his Report on the Work of the Government, delivered at the 5th Session of the 9th National People's Congress on March 5, 2002, then-Premier Zhu Rongji stated:

*"This year we need to concentrate on increasing our international competitiveness and fulfilling the following tasks on the basis of what has been achieved. First, following the principles of the uniformity of law, nondiscrimination, and openness and transparency, we need to quickly improve the system of foreign-related economic laws and statutes so that they are suitable to domestic conditions and the WTO rules and able to guarantee fair and efficient law enforcement... Fourth, we need to study and publicize information about the WTO and its rules, and we need to provide training to public servants, especially leading cadres at and above county and division level and to managerial staff in large and medium-sized enterprises by stages and in groups. We need to bring forth, through training, a contingent of people who are well acquainted with the WTO rules and international economic cooperation and trade... We should conscientiously implement the basic principle of "running the country according to law", perform official duties lawfully and managing the government by high standards... We should deepen reform, reduce the scope of administrative examination and approval, standardize and simplify necessary approval procedures, stress openness and transparency, and clearly define responsibilities."<sup>36</sup>*

Recently, the State Council Legislative Affairs Office has circulated a draft Program for Carrying out Administration According to the Law for comment.<sup>37</sup> The draft is a ten-year blueprint for establishing administration “according to the law” and sets forth guiding principles and concrete measures to address specific rule of law problems. This set of goals provides a useful, but perhaps not convincing, set of minimum reform benchmarks from which to gauge rule of law progress.

#### **(IV) CONSTITUTIONAL FORMS OF GOVERNMENT AND THE RULE OF LAW**

##### **(A) Fundamental Aspects of the Constitution of India**

The Constitution of India is now more than 55 years old (adopted on November 26, 1949) and, thus far, has gone through a series of amendments all making it the lengthiest constitution in the world with 395 Articles, 12 Schedules and 2 Appendices. So far, the Constitution has been amended 92 times. The adoption of the Constitution fundamentally changed the rule of law, in as much as it incorporated a detailed bill of fundamental rights<sup>38</sup> with an independent judiciary armed with the power of judicial review. It is noteworthy that it also provides for the Fundamental Duties of the Citizen<sup>39</sup>; however, they are not before a court of law. The founders of the constitution provided a tripartite system (legislature, executive and judiciary) of governance with a fairly strict separation of powers.

##### **(B) Fundamental Aspects of China’s Constitution**

The People’s Republic of China’s current written Constitution was adopted at the Fifth Session of the Fifth National People’s Congress on December 4, 1982, and amended in 1988, 1993, 1999, and 2004.<sup>40</sup> At 135 clauses, it is shorter than the Indian Constitution. The Chinese Constitution has a ‘down-up’ perspective in that it describes and controls the individual’s relationship with the state and society. The Constitution has five sections: the preamble, general principles, the fundamental rights and duties of citizens, the structure of the state, and the national flag and emblems of state.

The original 1982 Constitution reflected the leadership’s determination to lay a lasting institutional foundation for domestic stability and modernization. Originally, China’s Constitution was based on the Soviet Union’s 1936 Constitution. Unlike the Soviet model that contained an explicit right of secession and creates a federal system, China’s Constitution explicitly forbids secession and creates a unitary multi-national state.

Article 1 of the Constitution describes China as a “people’s democratic dictatorship,” a system based on an alliance of the workers and peasants and led by CPC. The new version of the Constitution, as compared to the 1954 edition of China’s Constitution, deemphasizes class struggle and places top priority on development and on incorporating the contributions and interests of nonparty groups that can play a central role in modernization.

The Constitution provides that socialist law is a regulator of political behavior. Thus, the rights and obligations of citizens are set out in detail in Chapter 2 of the Constitution. For example, Article 35 of the 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.” Also, Article 53 states that citizens must abide by the law and observe labor discipline and public order. (This level of detail may be the result of the excesses of the Cultural Revolution.)

The Constitution is specific about the responsibilities and functions of offices and organs in the state structure. There are clear admonitions against familiar practices such as concentrating power in the hands of a few leaders and permitting lifelong tenure in leadership positions. Also, the Constitution provides the legal framework for the liberalizing economic policies of the 1980s.

The Constitution was amended in March 2004 to enhance constitutional protections for private property and, for the first time, declares “The state respects and protects human rights.” Other amendments adopted in 2004 incorporate Jiang Zemin’s “Three Represents” theory as a guiding ideology of the State, strengthen the State’s role in directing the private economy, and calls for implementing the rule of law and accountable governance.

### **(C) Rule of Law in India**

The Constitution of India is the supreme law of the land. It arms the judiciary with the power of judicial review. The action of every branch of the government is amenable to the judicial review. The fundamental rights of the people can be enforced through appropriate writ remedy by the courts.<sup>41</sup> One of the unique features is that it creates a mechanism to directly approach the Supreme Court of India for the violation of fundamental rights.<sup>42</sup> The right to life and personal liberty cannot be suspended even during the time of emergency.<sup>43</sup> Further, it provides for no levy of tax without the authority of law<sup>44</sup> and no one can be deprived of its property except by the authority of law<sup>45</sup>. There is a mechanism in place for making an amendment to the Constitution: however, the power of amendment has been severely limited by the Supreme Court in the most celebrated decision in *Keshvananda Bharti v. State of Kerala*<sup>46</sup>, wherein the largest bench (13 Judges) of the Supreme Court of India propounded the *theory of basic structure of the constitution*. The court ruled that certain features make up the basic structure of the constitution, and are not even subject to constituent power of the parliament to amend the constitution.

### **(D) The Rule of Law in China**

While China’s Constitution states that all Chinese organizations, including the CPC, are subordinate to the Constitution, most external observers believe that the Constitution is subordinate to the CPC. Importantly, Chinese citizens do not have a legal mechanism to enforce their constitutional rights, and the government seems unlikely to create such a process in the near future.

### **(V) LEGISLATIVE ACTIVITY**

Legislative activity in India takes place primarily in the Parliament and in the State Legislatures. The Executive, namely the President and the Governors in the States, have ordinance-making powers. There is also a substantial body of executive law-making in the form of delegated legislation as well as regulations by various statutorily created

regulatory agencies which maintain independence from the formal executive and legislative branches.

### **(A) India: Parliamentary form of the Government**

India's Constitution sets up Parliamentary Government both at the Center and at the State level. The executive power of the Government of India is vested with the President whose duties are largely ceremonial<sup>47</sup>. The President and Vice President are elected indirectly for a term of 5 years by a special electoral college.<sup>48</sup> In the exercise of his powers and functions, the President acts on the aid and advice of the Council of Ministers headed by the Prime Minister.<sup>49</sup> The President appoints the Prime Minister who is designated by legislators of the political party or coalition commanding a parliamentary majority and the other Ministers are appointed on the advice of the Prime Minister. The Council of Ministers must accept responsibility for every executive act and is collectively accountable for its action to Parliament.<sup>50</sup> The President has, therefore, the status of a formal or Constitutional Head, similar to that of the Crown under the British Parliamentary System.

The bicameral Parliamentary system consists of the *Rajya Sabha* (Upper House) and the *Lok Sabha* (Lower House or House of the people). The Council of Ministers is responsible to the *Lok Sabha*.<sup>51</sup>

The President exercises ordinance-making powers in specified situations.<sup>52</sup> Similar legislative powers are exercisable by the Governor at the State level.<sup>53</sup> Apart from these mechanisms, there exist independent regulatory agencies, which are imparted control in the area of economic regulations, for example, of the Securities and Exchange Board of India (SEBI) and the Telecom Regulatory Authority of India (TRAI). These are maintained independently from the formal structure of the executive and legislative branches and they create a parallel body of legislation in the form of regulations and rules. They also exercise judicial functions.

### **(B) China's Legislative System**

Hong Kong University Faculty of Law Professor, Don Lewis, was the first to postulate that China's legislative system is not as much "legislative" as it is "administrative." There is significant truth to Professor Lewis' observation, a truth that impacts any analysis of the non-judicial decision-making apparatus in today's China. Legislative power is diffused among various branches of China's central government, including the National People's Congress, State Council and the ministries under the State Council.<sup>54</sup>

The diffusion of power is complicated by the complexity of Chinese normative legal rules, including basic laws (*jiben falu*), other laws (*falu*), regulations (*tiaoli*), sets of rules (*guize*), detailed rules (*xize*), measures (*banfa*), decisions (*jueding*), resolutions (*jueyi*), and orders (*mingling*).<sup>55</sup> In addition, various government entities still maintain a number of unpublished legal rules (*neibu*), usually internal policy directives,<sup>56</sup> and it is not uncommon (but becoming less so) for legal rules to be inconsistent with one another.

The Chinese government has considerable powers. It can deny approval for proposed projects, and it can withdraw licenses from existing ones. As distinct from power, government also has great authority, meaning that government in China often gets its

own way without having to invoke its formal powers by “suggesting” that companies or individuals should pursue a certain course of action. This is similar to the Daoist concept of Wu Wei.

(1) *National People’s Congress and its Standing Committee*: The PRC Constitution states that the NPC is the ultimate promulgator of *jiben falu*, *falu*, and amendments to the PRC Constitution, the highest forms of law in the PRC after the PRC Constitution.<sup>57</sup> The NPC has institutionalized the process of creating specialized committees to focus on specific areas of law and, in March 2003, the NPC established nine specialized committees for the 10th NPC.<sup>58</sup>

Traditionally, the NPC has been a “rubber stamp” legislature subservient to the wishes of the Communist Party of China (CPC) leadership. It was common for laws to be drafted entirely within the State Council before being given over to the NPC for promulgation. However, as a result of leadership efforts to improve the legislative system, the NPC has started to exercise its legislative and policy agenda more consistently with its constitutional mandate.<sup>59</sup>

The NPC Standing Committee may issue decrees (*faling*), interpretations of laws (*jieshi falu*), and partial or individually focused regulations (*bufenxing* and *danxing fagui*). It also may enact and amend laws other than those enacted by the NPC itself.<sup>60</sup> Although the NPC Standing Committee is more limited in the types of laws it can draft, because it controls the legislative agenda for a longer period each year, it has produced a larger body of law than the NPC itself.<sup>61</sup>

The NPC Standing Committee recently has expanded from 155 to 175 members, with the 20 new members serving as full-time delegates with training in specialized areas such as law and economics.<sup>62</sup> The Committee is empowered to interpret basic laws where the specific meaning of a provision of such legislation requires further clarification, or a new situation arises after enactment of such legislation, thereby requiring clarification of the basis of its application.<sup>63</sup> In February 2004, it adopted a set of procedures on legal interpretation, pursuant to which the NPC Standing Committee may entrust the State Council Legislative Affairs Commission with drafting legal interpretations.<sup>64</sup> While the NPC Standing Committee has the formal power to enforce the Constitution and invalidate conflicting laws and regulations, it rarely has done so.

(2) *The State Council and its Ministries*: The NPC and its Standing Committee may delegate to the State Council and its ministries the power to enact administrative regulations to (1) implement a national law; or (2) address issues delegated to the State Council pursuant to Article 89 of the Constitution.<sup>65</sup> Many ministries and departments under the State Council also have assumed a general rulemaking power, enabling them to issue any rule deemed necessary to carry out their functions.<sup>66</sup> The State Council supervises more than 30 departments including ministries, commissions, administrations and offices.<sup>67</sup> The State Council also maintains a large staff that drafts detailed regulations and has reflected an overall trend in Chinese government institutions toward greater professional competence and specialization.<sup>68</sup> Improving the quality of its regulations and avoiding conflicts among legal rules have been high priorities for the central government.

Through organizational changes, the State Council has sought to improve efficiency, combat corruption, and advance market-oriented economic reforms. In its March 2003 reform plan, the NPC merged the former MOFTEC and the State Economic and Trade Commission to create the new MOFCOM.<sup>69</sup> MOFCOM has simplified access to China's economy for foreign businesses and investors through greater centralization and coordination of regulatory activities. In other potentially important changes, the NPC created a new commission to supervise state-owned enterprises, with a mandate to supervise state capital, but not to participate in the management of the specific enterprises. These changes are a step toward greater transparency as the integration of the trade functions may provide a more consistent and coherent means of promulgating trade measures.<sup>70</sup>

(3) *Sub-national Governments*: Delegation of economic-related legal rulemaking power from Beijing to the provinces was seen as necessary to stimulate economic growth. This delegation allowed certain areas, such as designated Special Economic Zones, to create a legal infrastructure to regulate foreign investment, even if such infrastructure conflicted with national law. As such, local bureaucracies answer more to local business and labor than to Beijing.<sup>71</sup> While the central government has been diligent in its efforts to uniformly administer China's trade regime, strong local interest in specific economic entities engenders local protectionism.<sup>72</sup> The legislative and administrative action at the local level, which technically is controlled by Beijing, still operates with very limited supervision and virtually no transparency.<sup>73</sup> *Neibu* materials, a relic of the pre-reform period, are used extensively by sub-national administrative bodies.<sup>74</sup>

The Organic Law on Local People's Governments and Congresses provides that each province, centrally administered municipality (Beijing, Chongqing, Shanghai, and Tianjin), and autonomous region is to have its own LPC.<sup>75</sup> The Organic Law also provides for local congresses at the county level and below. Like the NPC at the national level, LPCs also have risen in prominence and importance in recent years.<sup>76</sup> The Chinese Constitution charges LPCs with legislating on specific matters relating to the localities and drafting local regulations to implement certain NPC laws.<sup>77</sup> Local governments also have the power to draft regulations or detailed implementation rules similar to those that a State Council ministry would draft. The Legislation Law requires that LPCs have internal procedures similar to those laid out for the NPC and its Standing Committee for drafting and debating legislation.<sup>78</sup>

In an effort to curb the influence of sub-national interests over the economy, the State Council on April 21, 2001 released Regulation Concerning Prohibiting Implementation of Regional Barriers in the Course of Market Economy Activities. Pursuant to this regulation, the central government has new powers to discipline local officials who pursue or implement policies inconsistent with national laws and regulations and, by extension China's WTO obligations.

## **(VI) ALTERNATIVE DISPUTE RESOLUTION MECHANISMS**

### **(A) India**

(1) *Introduction to the Court System*: The judiciary in India is centralized and the Union Judiciary consists of the Supreme Court of India, which is the highest court of the

land.<sup>79</sup> The Supreme Court is the ultimate court of appeals and hears appeals from the High Courts and acts as a court of review over subordinate tribunals. It exercises original jurisdiction in disputes between the Union and the States or between the States inter-se. It also has the power to issue writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, and *certiorari* and *quo warranto* for the enforcement of fundamental rights. The law declared by the Supreme Court is considered the law of the land and all other Courts are bound by it.<sup>80</sup>

The State Judiciary consists of a High Court for each State and subordinate courts. The High Court hears appeals from the subordinate courts and tribunals. It also acts as a court of revision for the subordinate courts and tribunals. The High Court has powers to issue writs of habeas corpus, certiorari and others. Some High Courts also exercise original jurisdiction in civil matters and admiralty jurisdiction. Subordinate courts are divided into criminal and civil courts. Appeals from these courts are heard in the District Court and then the High Court, if merited.

There also exists a system of administrative adjudication, and specialized tribunals have been established under various enactments such as the Income tax Tribunals, the Company Law Board, the Consumer Forums, Administrative Tribunals, the Debt Recovery Tribunal, etc. All these are under the superintendence of the High Court within whose territorial jurisdiction they function.

(2) *Independence of the Judiciary*: Indian polity is based on a separation of powers. Such separation is not rigid and most bodies exercise elements of executive, legislative and judicial functions. However, independence of the judiciary forms the basic structure of Indian constitutionalism.<sup>81</sup>

(3) *Alternate Dispute Resolution*: Alternative Dispute Resolution Process (ADR) holds promise for economical and quick dispensation of justice through negotiation and intermediation. If there is a perception that ADR is an improvement over the current system, there should logically be a group who benefits from the existing inefficient system who would like the introduction of the concept delayed to the extent possible. Hence, despite the honest intention of the judicial reformers in India, the ADR system has not developed as rapidly as it should have.

(4) *Mediation*: The term mediation has been defined in Black's Law Dictionary as a "private, informal dispute resolution process in which a neutral third party, the mediator, helps the parties to reach an agreement". Mediation was first introduced into India by the Arbitration and Conciliation Act, 1996. Section 30 of this Act specifically encourages parties to seek mediation and conciliation even when arbitral proceedings are underway. The Arbitration and Conciliation Act, 1996, however, does not draw up the rules for mediation as it does for conciliation. The process of mediation as an alternative dispute resolution (ADR) was institutionalized in India by the Code of Civil Procedure (Amendment) Act, 1999 wherein a new section was introduced. The said section provides for 'judicial mediation', as opposed to 'voluntary mediation'. A court can now identify cases where an amicable settlement is possible by formulating the terms of such a settlement and invite the parties to the dispute to negotiate the terms of settlement. Where the court comes to the conclusion that mediation is the appropriate mode of settlement, it may itself act as a mediator and 'shall affect a compromise between the

parties'. In a voluntary effort, the mediator facilitates communication between parties and encourages settlement. There is reasonable latitude available to the mediator, as he can privately discuss the merits of the dispute(s) with each party individually.

(5) *Conciliation*: The Part III of the Arbitration and Conciliation Act, 1996 specifically provides for the process of commencement of conciliation process, appointment of conciliators, role of conciliators, etc. The said Act stipulates that the parties shall not initiate any arbitral or judicial proceedings in respect of a dispute during the conciliation proceedings for the subject matter except in a situation wherein it becomes necessary for preserving the rights of the parties.

(6) *Arbitration*: Arbitration, which in contrast to mediation and conciliation is a more formal, quasi-judicial process, has been hailed as the next revolution in the judicial administration in India. The courts in India are deluged with a huge number of cases pending. Further, increasing costs of litigation and delays have been a source of concern for those who believe that a good dispute resolution mechanism is the essence of commercial progress.

In the past, statutory provisions on arbitration were contained in three different enactments, viz., the Arbitration (Protocol and Convention) Act, 1937, The Arbitration Act, 1940, and the Foreign Awards (Recognition and Enforcement) Act, 1961. The Arbitration Act, 1940 laid down the framework within which domestic arbitration could be conducted in India, while the other two Acts dealt with foreign awards. The Arbitration and Conciliation Act, 1996 repeals these three Acts, consolidating and amending the law pertaining to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Further, it defines the law relating to conciliation, providing for matters connected therewith and incidental thereto on the basis of the Model Law on International Commercial Arbitration adopted by the UNCITRAL in 1985.

Under the 1996 Act where there is an arbitration agreement, the judicial authority is required to direct the parties to resort to arbitration as per the agreement. The grounds on which the award of an arbitrator may be challenged before the court have been substantially reduced<sup>82</sup> and the powers of the arbitrator have been amplified.<sup>83</sup> The Act also recognized the importance of transnational commercial arbitration and it specifically provides that even where the arbitration is held in India, the parties to the contract are free to designate the law applicable to the substance of the dispute.<sup>84</sup>

(7) *Enforcement of Foreign Awards*: Part II of the Arbitration and Conciliation Act, 1996 deals with enforcement of foreign awards. A foreign award is defined as an arbitral award on differences arising out of legal relationships considered to be commercial under the law in force in India, in pursuance of an arbitration agreement in writing and made in one of such territories, which is a party to the New York Convention and has a reciprocal arrangement with India.

The enforcement requires recognition by the court that the award is enforceable. For this, the party seeking enforcement is required to move an application along with the original award or its authentic copy, original arbitration agreement or its certified copy and such evidence as may be necessary to prove that it is a foreign award. The party opposing enforcement then furnishes requisite proof of one or more defenses

available and if the court is satisfied that the award is enforceable, it will enforce the award as a decree

(8) *Recent Judicial Trends: (a) Public Interest Litigation:* The earlier phase of judicial activity, beginning in 1950, was a comparatively conservative phase during which there was greater emphasis on the literal interpretation of the Constitutional freedoms.<sup>85</sup> In later years, judicial interpretation leaned towards the doctrine of “public interest litigation”, and expanded the concept of standing, *locus standi*, whereby a public spirited citizen was empowered to espouse the cause of others.<sup>86</sup> In another case<sup>87</sup> the court accepted the *habeas corpus* petition of a prisoner complaining of brutal assault by a head warden of another prisoner.<sup>88</sup> This broadening of rule of *locus standi* has been largely responsible for the development of public law.

In this new era of public interest litigation, the courts have also relaxed rules of procedure, holding that the court may even be moved by a letter addressed to a judge, in place of the ordinary process of a petition supported by an affidavit.<sup>89</sup>

(b) *Expanding Horizons of Writ Proceedings:* The Supreme Court, by evolving its writ jurisdiction, developed the public law doctrine of compensation for violation of human rights as a constitutional tort in the case of *Nilabati Behera v. State of Orissa*<sup>90</sup>. This was the case in which the victim of crime was given monetary compensation by the Supreme Court even before the accused persons were held guilty in the criminal trial. There are a few other cases in which the compensation has been paid by the Supreme Court to the victims of crime (generally of rape or custodial deaths). It has thus expanded the scope of writ jurisdiction to redress situations of extreme injustice and to provide immediate redress to the aggrieved. The Court has also applied writ proceedings to further develop the fundamental human rights under the Constitution.<sup>91</sup> The right to life and liberty enshrined in Article .21 of the Constitution has been interpreted to mean a right to live with dignity which in turn, implies that the basic human rights to food ,water ,shelter, to pollution free air , medical care , education , transport, right to livelihood and such other rights have all been included in Fundamental rights though they are not specified as such in the Constitution.

## **(B) China**

(1) *China's Judiciary:* China's court system is divided into four levels: (a) the Supreme People's Court (“SPC”); (b) the higher (provincial) people's courts; (c) the intermediate (municipal) people's courts; and (d) the basic (county) people's courts. Each level consists of administrative, criminal, civil, and economic divisions.<sup>92</sup>

Article 127 of the PRC Constitution authorizes the SPC as the ultimate judicial organ in China. The SPC oversees the operation of lower-level courts through, inter alia, directives on matters of legal interpretation and administration. Note, however, that the SPC's decisions, as the decisions of lower-level Chinese courts, are not formally binding precedent. While the SPC does not have formal authority to interpret the law (such power is reserved to legislative bodies), the SPC has issued, over the past several years, multiple memoranda and guidance notes on discrete areas of the law. Note further that Chinese courts are limited in their power to review and interpret administrative regulations.<sup>93</sup>

In late February 2002, the SPC announced that it was designating a number of courts at provincial and local levels to handle commercial cases involving foreign parties.<sup>94</sup> Pursuant to the Supreme People's Court Regulations on Certain Issues Regarding Jurisdiction of Foreign-Related Civil and Commercial Lawsuits (effective March 1, 2002), the lowest level people's courts and a great number of intermediate people's courts are prohibited from hearing certain foreign-related civil and commercial lawsuits. Five types of foreign-related civil and commercial disputes must be sent to one of a small group of higher-level people's courts: (1) contracts and torts cases; (2) letters of credit disputes; (3) applications for revocation, admission or enforcement of foreign arbitral awards; (4) review of the validity of arbitration clauses in foreign-related civil and commercial transactions; and (5) applications for admission and enforcement of foreign court judgments. Courts authorized to hear such cases include: (1) people's courts in economic and technology development zones approved by the State Council; (2) intermediate people's courts in provincial capitals and "centrally-governed municipalities"; (3) intermediate people's courts in special economic zones and "separate plan municipalities"; (4) other intermediate people's courts designated by the Supreme People's Court; and (5) high people's courts.<sup>95</sup>

Recently, Beijing No. 2 Intermediate People's Court created a special bench to handle foreign-related cases, including trade and non-trade related cases.<sup>96</sup>

SPC President Justice Xiao Yang has urged the courts to implement the SPC's 2001-2005 Education and Training Plan for Court Officials throughout the Country.<sup>97</sup> Pursuant to this training plan, Justice Xiao seeks to train judges in new laws and WTO rules, and, in his words, to produce "expert judges" who are thoroughly trained in legal theories, have demonstrated expertise in relevant academic disciplines of law, experienced in judicial practice, and have "super legal skills" in doing their work. Related thereto, on July 29, 2002, the SPC released its Opinions on Strengthening the Development of Professionalism of Judges, which require enhanced professional entry standards, ethics, and skills. The reforms envisaged in these opinions will help to improve the professional quality of the Chinese judiciary so as to make the judicial process a more fair and efficient process.

(2) *Alternative Dispute Resolution*: Given the influence of Confucian thought, and other influences, the Chinese prefer non-litigation options to dispute resolution. Mediation is encouraged under Chinese law, and is specifically referenced in Sino-foreign joint venture laws and regulations as well as Contract Law. People's Mediation Committees (over one million are in existence) settle several million disputes per year, and hear disputes ranging from domestic relations to debtor/creditor issues. The China International Economic and Trade Arbitration Commission encourages mediation for those arbitration matters accepted by it.

(3) *Issues Facing China's Judicial System*: China's judiciary faces several challenges: The quality and availability of court judgments is a concern. In 1999, the SPC issued guidelines requiring statements of legal reasoning in judicial decisions and issued regulations on the publication of judgments.<sup>98</sup> The publication regulations call for influential or typical cases to be published in legal and general circulation papers, encourage courts to publish ordinary judgments in a timely manner, and highlight the

Internet as an important medium for the publication of judgments. Although courts and publishers still heavily edit many decisions, the number of complete judgments available and the quality of judgments is slowly on the rise.<sup>99</sup> There is no formal court reporting system in China, online or in print, although judges are interested in developing such a system.<sup>100</sup> Many courts in less-developed or rural areas lack computers and other basic equipment, making the publication of judgments difficult. In addition, many judges lack the training and expertise to draft publishable decisions with citations to the law and clear legal reasoning. Perhaps due to this concern, SPC regulations require all judgments to be submitted to an editorial committee for approval and specifically prohibit the publication of “substandard” judgments.

Chinese courts are subject to extra-judicial interference. Courts often are treated as agencies of the national bureaucracy, and there is little differentiation between their work and the work of other agencies. While the Chinese Constitution provides that the courts are not subject to interference by administrative organs, social organizations, or individuals, judges are expected to adhere to the Party leadership and submit to the supervision of the people’s congresses and the procuratorate.<sup>101</sup> Party groups within the courts enforce Party discipline and the Party approves judicial appointments and personnel decisions. The Party exercises direct influence in individual cases through the Political-Legal Committees at each level of government.<sup>102</sup> Under the Chinese Constitution and national law, both the procuratorate and the people’s congresses have the power to supervise the work of judges and the courts, and to call for the reconsideration of cases.<sup>103</sup>

Judicial training is another significant challenge. Chinese courts are engaged in a large-scale program of mandatory training for judges. The SPC established a National Judicial College in Beijing in 1997 and issued regulations that require provincial-level people’s courts to establish and carry out judicial training programs.<sup>104</sup> While the length and quality of training varies, official Chinese sources report that over 200,000 judges and court personnel have received at least some additional legal training. In addition, SPC regulations require local courts to establish training implementation and evaluation plans and judges to complete one month of continuing legal education every three years.<sup>105</sup>

Ineffective judicial ethics is another problem. It is not uncommon for courts to accept cases to help local parties, even if it means a deliberate misinterpretation of the law. It is not uncommon for lower courts to consult with or ask instructions from higher courts even in advance of hearing cases. Lawyers often entertain judges before whom the lawyer has a pending case. There are instances of judges accepting money and gifts from parties with business before the judge. As such, there is a widespread perception that judges, particularly outside of China’s big cities, are more influenced by local political or business pressures than they are by written regulations or signed contracts.<sup>106</sup>

One consequence of the limited power of Chinese courts is that many court judgments are not enforced. Enforcement of judicial decisions remains a problem even though Article 313 of the PRC Criminal Code makes it a crime to refuse to execute a judgment or order of a people’s court. As a July 2003 report by China’s official Xinhua News Agency notes, most court enforcement orders remain unresolved, “leaving a blemish on the reputation of the judiciary.”<sup>107</sup> The problem is serious enough that judicial leaders

have made improving the enforcement of judgments a key reform goal. Beijing law enforcement agencies have begun to bring criminal charges against parties who refuse to carry out judgments or who aid in frustrating court judgments.<sup>108</sup>

Sub-national governments are the most significant source of external interference in judicial decision-making by interfering in the judicial process in order to protect local industries or litigants, or, in the case of administrative lawsuits, to shield themselves from liability.<sup>109</sup> Local governments are able to exert influence on judges because they control local judicial salaries and court finances and also make judicial appointments.<sup>110</sup> According to one recent SPC study, over 68% of surveyed judges identified local protectionism as a major cause of unfairness in judicial decisions.<sup>111</sup> Judicial authorities in China speak frequently about the problem of administrative interference and have identified the spread of local protectionism as a significant problem facing the courts.<sup>112</sup>

The SPC and NPC apparently are discussing major structural reforms to combat the problem of local administrative interference in the courts. Three principal reforms under discussion are: (1) establishing a system of national judicial circuits that transcend administrative boundaries, which in theory would reduce the influence of local governments; (2) centralizing control over court finances and judicial salaries; and (3) transferring control over the appointment of judges at high-level courts or above to the central government, and control over appointments at intermediate-level courts and below to provincial governments.<sup>113</sup> Although only in the early stages of discussion, such reforms could help alleviate the problem of local protectionism and as a result enhance the autonomy of the judiciary.

## **(VII) PUBLIC-PRIVATE INTERPLAY**

### **(A) India**

India sought to establish a 'Welfare State' after independence. This objective was voiced in the Preamble to the Constitution of India. The Directive Principles are guidelines to the government to be kept in mind while framing laws and policies. India adopted a mixed economy. A policy of central planning was adopted and a large number of public enterprises were established in India. Independent India saw a phenomenal growth in public undertakings due to setting up of new industries. The 1970s witnessed the nationalization of the coal and oil industry and this added to the existing public-sector undertakings. However, by the mid 1980's, it was generally felt that the pattern of this "command economy" was proving counter productive and a large number of public enterprises were wasting valuable resources of the Government.

After liberalization of the economy in 1991, the Indian corporate sector was revamped. The old and well established companies like Tata, Birla, Godrej and Bajaj, which prospered earlier under the protective cover of old policies, quickly reworked their strategies to remain in the forefront of Indian business. At the same time, a number of new companies viz., Wipro and Infosys emerged and many multinational companies were also established in India. These companies either entered into joint ventures with Indian companies or established wholly owned subsidiaries in India. While this injected dynamism into the economy, the private sector enterprises made little contribution to the removal of poverty in India and the problems of poor productivity and internal

deficiencies persisted. Further, neither the norms of ethics nor those of efficiency marked the working of most of the private sector enterprises. The private enterprises were also found to be making inadequate investments in Research and Development.

Institutional reforms were introduced in 1991, which involved enhancing the freedom to produce and trade, and also increased access to avenues of finance both domestically and globally.<sup>114</sup> However, the full potential of these reforms will be realized only with responsible corporate behavior.

### **(B) China**

The Chinese legal system does not have a tradition of allowing or encouraging public participation in the drafting process for legal rules. Although the Legislation Law allows the NPC to solicit outside opinions in the drafting process, it is not required to do so. Therefore, the NPC has little incentive to provide increased transparency.<sup>115</sup> Administrative entities have a tradition of (1) implementing legal rules without notice or an opportunity for affected parties to comment; or (2) issuing draft legal rules to concerned domestic industry representatives and selected scholars. WTO accession has prompted the central government and a number of subnational governments to increase public participation in the drafting process for legal rules.

As a result of WTO accession, the Regulations on Administrative Regulation Formulation Procedures and the Regulations on Legal Code Formulation Procedures (collectively, the Regulations), both effective from January 1, 2002, require the publication of amended or new legal rules thirty days before their adoption.<sup>116</sup> The Regulations allow issuing bodies to solicit comments from authorities, organizations, and civilians during the drafting process. Face-to-face consultations on the text of new and amended legal rules have become more common.

However, the Regulations do not establish a formal mechanism for incorporating public opinion into the drafting process nor do they require the solicitation of public comment. There is little evidence that the public at large has much exposure to the legislative or administrative process. There are indications that “public” commentators are selected and supervised by the relevant government ministry and that distribution of draft legal rules will be made only to a select group.

### **(VIII) CONCLUSION**

While the foregoing analysis does not reflect an exhaustive review of the basis of law, the legal systems or the rule of law in India or China, it does offer a basis of how the legal systems and standards have developed. We have provided reflections that summarize the similarities and contrasts between India and China with respect to the rule of law. We argue that the legal systems of India and China are evolving and are impacted by the rapid growth of the markets in these two economies. Market development is generally a stimulus for legal reforms as legal changes to make a legal system would also induce market growth, and there is no exception to that rule in the cases of markets in India and China.

## NOTES

1. The word *Dharma* originated from the Sanskrit language, and does not have a synonym in any other language.
2. There are four Vedas, the Rig Veda, Sama Veda, Yajur Veda and Atharva Veda. The Vedas are the primary texts of Hinduism. They also had a vast influence on Buddhism, Jainism, and Sikhism. The Rig Veda, the oldest of the four Vedas, was composed about 1500 B.C., and codified about 600 B.C. It is unknown when it was finally committed to writing, but this probably was at some point after 300 B.C.
3. *Sruti* is direct experience. Great saints heard the eternal truth of religion and left a record of the same for the benefit of posterity. These records constitute the *Vedas*. Hence, *Sruti* is the primary authority. *Smriti* is a recollection of that experience. These are based on the teachings of the *Vedas*.
4. The laws regulating Hindu society are codified in *Smritis*. There are eighteen main *Smritis* or *Dharamshastras*. The most important are those of *Manu*, *Yajnavalkya* and *Parasara*. *Manusmriti*, or Laws of Manu, has been an important source of law in traditional Indian society.
5. Zimmerman at 8-10. From the Han Dynasty (206 B.C.-220 A.D.) to the collapse of the Qing Dynasty in 1911, Confucian ideals were required curricula for government officials. Confucian ideals, despite official denials, remain influential in today's China. *Id.*
6. James M. Zimmerman (1999), *China Law Deskbook: A Legal Guide For Foreign-Invested Enterprises* 8 [hereinafter Zimmerman].
7. Tim Ambler and Morgen Witzel (2004), *Doing Business in China*, 72, 76-77.
8. *Id.*
9. *Id.* at 10.
10. Tim Ambler and Morgen Witzel (2004), *Doing Business in China*, 72.
11. *Id.*
12. *Id.* at 11-12. Legalism views the law as a way to strengthen state rule over groups and individuals; a ruler, to Legalists, could not rule effectively without a system of laws. *Id.*
13. *Id.* at 55.
14. See Jonathan D. Spence (1999), *The Search For Modern China*, 123-128 [hereinafter Spence].
15. Most disputes were referred to mediators who were either respected members of a local community or leaders of influential lineage organizations. This judicial structure was reinforced by a community mutual responsibility system, the *baojia*. Under this system, all Chinese households were registered in groups and supervised by a chosen member of the group. This leader's responsibilities included ensuring local law and order. *Id.* at 123-128.
16. *Id.*
17. *Id.*
18. *Id.*
19. Orts at 54.
20. Jagmohan, *Soul and Structuring of Governance in India*, 23.
21. Zimmerman at 42.
22. Zimmerman at 46.
23. See also Orts at 57.
24. Zimmerman at 47.
25. *Id.*
26. Orts at 59.
27. Kenneth Lieberthal (1995), *Governing China*, 150-151 [hereinafter Lieberthal].

28. Zimmerman at 49.
29. Zhonghua Renmin Gongheguo Xianfa [Constitution of the People's Republic of China] (2004).
30. [General Principles of the Civil Law of the People's Republic of China] (1987). Interestingly, **Article 6 states that** "civil activities must be in compliance with the law; where there are no relevant provisions in the law, they shall be in compliance with state policies." Important for an analysis of China's commitment to its WTO obligations, General Principles of Civil Law states: "The stipulations of the international treaty shall apply if any international treaty concluded or joined by the People's Republic of China contains provisions different from those in the civil laws of the People's Republic of China. However, provisions concerning which the People's Republic of China has announced reservations shall be exempted. International practice can be applied to matters for which neither the law of the People's Republic of China nor any international treaty concluded or joined to by the People's Republic of China has any prescription or stipulation." *Id.* at Article 142.
31. *See* Lieberthal at 419-440. The Decision was adopted on November 14, 1993 by the 3rd Plenary Session of the 14th Central Committee of the Chinese Communist Party.
32. *Id.*
33. Orts at 45.
34. The National People's Congress approved the State Council's reform plan on March 10, 2003 to fold the State Economic and Trade Commission (SETC) and Ministry of Foreign Trade and Economic Cooperation (MOFTEC) into a newly established Ministry of Commerce (MOFCOM). MOFCOM assumed responsibilities both as China's primary regulator of foreign investment as well as coordinator of China's domestic and foreign trade and international economic cooperation. Moreover, MOFCOM is to develop relevant laws and regulations to implement China's WTO commitments. This article will use MOFTEC and MOFCOM, as the case may be, in a manner consistent with the entity's name as of the date of the action being described.
35. Complementing this process, each relevant ministry or bureau conducted an industry-specific legal review that included industry input. In addition to this review, the State Council and the central government ministries promulgated and amended dozens of laws and regulations incorporating China's WTO commitments into Chinese law. One estimate places the number of new or revised laws and regulations at over seventy. Examples of these laws and regulation include regulations governing foreign investment in telecommunications and insurance services and new regulations on foreign investment in banking services, road transportation and international freight agency services. Regulations on countervailing duties and antidumping have also been revised.
36. *Report on the Work of the Government* (delivered at the 5th Session of the 9th National People's Congress, March 5, 2002) available at <http://www1.chinadaily.com.cn/highlights/docs/2002-03-18/61384.html>. The next day, Zeng Peiyan, Minister in Charge of the State Development Planning Commission stated, in the Report on the Implementation of the 2001 Plan for National Economic and Social Development and on the Draft 2002 Plan for National Economic and Social Development (available at <http://www1.chinadaily.com.cn/news/cb/2002-03-18/61383.html>), "The basic role of the market in the allocation of resources should be fully exploited. The law governing economic development should be followed. International practice will be taken into consideration. The way government functions will be changed and the macro-regulation will be improved to create a sound environment for economic development. Speeding up efforts to develop the legal system. Legislative plans of the National People's Congress will be conscientiously implemented in drafting laws. We will formulate or revise related administrative statutes, rules and regulations as soon as possible and review local government statutes, rules and regulations and other regulation-related documents, taking into consideration the requirements for developing the socialist market economy, the rules of the World Trade Organization and our commitments to that organization. We will continue to draw up administrative statutes and regulations to rectify and standardize market order. All authorities should follow the law in carrying out their administrative duties and perform their functions strictly within the jurisdiction and according to the procedures specified in laws and regulations."

37. *Ten Years to Government According to Law*, The 21st Century Business Herald, available at <http://www.nanfangdaily.com.cn/jj/20040205/zj/200402040253.asp>.
38. Part III of the Constitution, Articles 12-35.
39. Part IVA, Article 51A.
40. Zhonghua Renmin Gongheguo Xianfa [Constitution of the People's Republic of China] (2004).
41. See Article 32, 226 & 227 of the Constitution of India.
42. Article 32 of the Constitution of India.
43. ADM Jabalpur v. Shivkant Shukla, AIR1976 SC 1907.
44. Article 265 of the Constitution of India.
45. Article 300A.
46. AIR 1073 SC 1461
47. Article 53(1), Constitution of India.
48. The respective terms of the President and Vice-President are staggered, and the Vice President does not automatically become President following the death or removal of the President.
49. Article 74(1), Constitution of India.
50. This rule is incorporated in Article 75(3) of the Constitution of India.
51. The Legislatures of the States and the Union Territories elect 233 members to the *Rajya Sabha* and the President appoints another 12 members. The elected members of the *Rajya Sabha* serve a term of 6 years with one-third up for election every 2 years. The *Lok Sabha* consists of 545 members out of which 543 are elected directly by the people and the remaining 2 for a term of 5 years. At the State level, some of the legislatures are bicameral which is patterned after the Upper House and the Lower House. The States' Chief Ministers are responsible to the legislatures in the same way the Prime Minister is responsible to Parliament. Every State also has a Governor, appointed by the President of India, who generally assumes powers directed by the Central Government.
52. Article 123 of the Constitution of India provides that if at any time, except when both Houses of Parliament are in session, "the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require". An Ordinance so promulgated has the same force and effect as an Act of Parliament, but the Ordinance should be laid before both Houses of Parliament upon re-assembly of the Parliament.
53. Article 213.
54. See Lubman at 389. The NPC consists of delegates from lower-level people's congresses for five year terms, and meets each March. PRC Constitution Art. 80; Election Law of National People's Congress Ch. 3. This concern was raised by the Working Party on China's WTO accession. In response to raised concerns, the PRC representative stated that in accordance with the Constitution and the Law on Legislation of the People's Republic of China, the National People's Congress was the highest organ of state power. The State Council was the executive body of the highest organ of state power. The State Council, in accordance with the Constitution and relevant laws, was entrusted with the power to formulate administrative regulations. The ministries, commissions and other competent departments of the State Council could issue departmental rules within the jurisdiction of their respective departments and in accordance with the laws and administrative regulations. The provincial people's congresses and their standing committees could adopt local regulations. The provincial governments had the power to make local government rules. The National People's Congress and its Standing Committee had the power to annul the administrative regulations that contradicted the Constitution and laws as well as the local regulations that contradicted the Constitution, laws and administrative regulations. The State Council had the power to annul departmental rules and local government rules that were inconsistent with the Constitution, laws or administrative regulations. The PRC representative stated that, according

to the Constitution and the Law on the Procedures of Conclusion of Treaties, the WTO Agreement fell within the category of “important international agreements” subject to the ratification by the Standing Committee of the National People’s Congress. China would ensure that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations. For this purpose, China had commenced a plan to systematically revise its relevant domestic laws. If administrative regulations, departmental rules or other measures were not in place within such time frames, authorities would still honor China’s obligations under the WTO Agreement and Accession Protocol. Working Party Report at 66-68.

55. Zimmerman at 35-36.
56. Zimmerman at 36-37.
57. The Presidium, the highest office within the NPC, issues the general legislative program for each five-year period and ultimately decides whether or not to allow the NPC to review draft laws. PRC Constitution, Arts. 57, *et. seq.* The *Legislation Law* states that only the NPC (and in specific cases, the NPC Standing Committee) can legislate on matters relating to the structure of state organs, the criminal justice system, and the deprivation of the personal freedom of citizens. Only national law may be enacted in respect of matters relating to: (i) state sovereignty; (ii) the establishment, organization and authority of various people’s congresses, people’s governments, people’s courts and people’s procuratorates; (iii) autonomy system of ethnic regions, system of special administrative region, and system of autonomy at the grass-root level; (iv) crimes and criminal sanctions; (v) the deprivation of the political rights of a citizen, or compulsory measures and penalties involving restriction of personal freedom; (vi) expropriation of non-state assets; (vii) fundamental civil institutions; (viii) fundamental economic system and basic fiscal, tax, customs, financial and foreign trade systems; (ix) litigation and arbitration system; (x) other matters the regulation of which must be carried out through enactment of national law by the National People’s Congress or the Standing Committee thereof. *Legislation Law*, Art. 8.
58. The 2003 announcement stated that “the National People’s Congress establishes an ethnic specialized committee, a law specialized committee, an internal judicial committee, a finance and economics committee, an education, science, culture and healthcare committee, a foreign affairs committee, an overseas Chinese committee, an environmental and natural resources protection committee, and an agricultural enterprise and village committee.” *See* The Decision of the 10th National People’s Congress on the Establishment of Specialized Committees [*Dishijie quanguo renmin daibiao dahui diyi ci huiyi guanyu sheli dishijie quanguo renmin daibiao dahui zhuanmen weiyuanhui de jueding*] (Mar. 6, 2003), available at <http://www.law-lib.com/law/lawview.asp?id=42898>.
59. *See* Murray Scot Tanner (1999), “The National People’s Congress” in Merle Goldman and Roderick MacFarquhar (eds.), *The Paradox Of China’s Post-Mao Reforms*, 101
60. Note, though that when the National People’s Congress is not in session, the Standing Committee may amend and supplement national law enacted by the National People’s Congress, provided that any amendment or supplement may not contravene the basic principles of such national law.
61. Like the NPC as a whole, the Standing Committee has made efforts to improve the quality of the legislation it promulgates. In 2003, the Standing Committee expanded from 155 to 175 members. The 20 new members serve as full-time delegates (as opposed to many older Standing Committee members who serve only on a part-time basis) and have professional backgrounds in subjects such as law and economics. The Standing Committee also has its own specialized bureaucracy to assist in drafting and supervising legislation.
62. CECC 2003 REPORT at 58.
63. Article 42 of *Legislation Law*.
64. *See*, <http://www.people.com.cn/GB/shehui/1060/2344379.html>; [http://www.legalinfo.gov.cn/fzxw/2004-02/18/content\\_75531.htm](http://www.legalinfo.gov.cn/fzxw/2004-02/18/content_75531.htm). The new procedures reportedly set out in detail the entities that can petition for an interpretation, the NPC committees that should comment on interpretation,

and general requirements for hearings and deliberations and provide that interpretations should be issued within 45 days of a request.

65. An enabling decision shall specify the objective and scope of the authorization. The enabled body shall exercise such power in strict compliance with the objectives and scope of authorization. The enabled body may not re-delegate its authority to any other body. Legislation Law, Art. 10. For a matter covered by an enabling decision, if the conditions are ripe for the enactment of a national law, the National People's Congress or the Standing Committee thereof shall enact a national law in a timely manner. Upon enactment of the national law, the relevant authority for lawmaking in respect of the matter shall be terminated. *Id.* at Art. 11. The State Council exercises the following functions and powers: (1) to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the statutes; (2) to submit proposals to the National People's Congress or its Standing Committee; (3) to lay down the tasks and responsibilities of the ministries and commissions of the State Council, to exercise unified leadership over the work of the ministries and commissions and to direct all other administrative work of a national character that does not fall within the jurisdiction of the ministries and commissions; (4) to exercise unified leadership over the work of local organs of state administration at different levels throughout the country, and to lay down the detailed division of functions and powers between the Central Government and the organs of state administration of provinces, autonomous regions and municipalities directly under the Central Government; (5) to draw up and implement the plan for national economic and social development and the state budget; (6) to direct and administer economic work and urban and rural development; (7) to direct and administer the work concerning education, science, culture, public health, physical culture and family planning; (8) to direct and administer the work concerning civil affairs, public security, judicial administration, supervision and other related matters; (9) to conduct foreign affairs and conclude treaties and agreements with foreign states; (10) to direct and administer the building of national defense; (11) to direct and administer affairs concerning the nationalities and to safeguard the equal rights of minority nationalities and the right of autonomy of the national autonomous areas; (12) to protect the legitimate rights and interests of Chinese nationals residing abroad and protect the lawful rights and interests of returned overseas Chinese and of the family members of Chinese nationals residing abroad; (13) to alter or annul inappropriate orders, directives and regulations issued by the ministries or commissions; (14) to alter or annul inappropriate decisions and orders issued by local organs of state administration at different levels; (15) to approve the geographic division of provinces, autonomous regions and municipalities directly under the Central Government, and to approve the establishment and geographic division of autonomous prefectures, counties, autonomous counties and cities; (16) to decide on the enforcement of martial law in parts of provinces, autonomous regions and municipalities directly under the Central Government; (17) to examine and decide on the size of administrative organs and, in accordance with the law, to appoint, remove and train administrative officers, appraise their work and reward or punish them; and (18) to exercise such other functions and powers as the National People's Congress or its Standing Committee may assign it. PRC Constitution Art. 89.
66. Lubman at 389-390.
67. Despite this large number, the State Council, over the last five years, has reduced the number of subordinate departments by 25% and reduced payroll in those departments by 50%. Provincial-level departments were reduced by 50% and local bureaucracy was reduced by 20% over the same period. *China Succeeds in Government Institution Reform*, China Daily (June 20, 2002) at [http://www.chinadaily.com.cn/highlights/16\\_party/achievements/620.htm](http://www.chinadaily.com.cn/highlights/16_party/achievements/620.htm).
68. The State Council set legislative competence as a high priority in before the National People's Congress enacted the Legislation Law for that specific purpose. See General Office of the State Council, Notice on Several Opinions Regarding Improving the Legislative Work of the State Council and the 1998 State Council Legislative Plan [*Guanyu yin fa guowuyuan lifa gongzuo ruogan yijian he 1998 nian lifa gongzuo anpai de tongzhi*] in The State Council Gazette [*Guowuyuan gongbao*], No. 14 (1998): 588-91 (stating that the goal of improving government legislation is a central component of Deng Xiao Ping theory and the basic CCP line of thought).

69. *See Specialists' Discussion: The Ministry of Commerce and a New Era of Trade* [Zhuanjia fangtan: shangwu bu zhuzheng xin maoyi shidai], People's Daily [Renmin wang], (Mar. 3, 2003) available at <http://www.peopledaily.com.cn/GB/shizheng/252/10434/44>.
70. CECC 2003 REPORT at 68.
71. Note, though, that empowering certain localities can have beneficial effects. Chinese press reports indicate that the national government has given the city of Shenzhen permission to open up certain sectors to foreign investment two years earlier than under China's WTO commitments. The sectors include securities, ports, logistics, trade and procurement. Restrictions on foreign investment will remain in seven areas, including publications and trading in grain and processed oil.
72. *The Rule of Law In China: Lawyers Without Law? Hearing Before the Congressional-Executive Commission on China*, 108th Cong. (2003) (testimony of James Feinerman, Professor of Law at Georgetown University Law Center).
73. Ostry at 13.
74. *Id.*
75. Organic Law on Local People's Governments and Congresses, Art. 1.
76. *See, e.g.,* Young Nam Cho (2002)., "From 'Rubber Stamps' to 'Iron Stamps': The Emergence of Chinese Local Congresses as Supervisory Powerhouses", *China Quarterly*, Vol.171, 724.
77. PRC Constitution, ch. 5. Certain areas, such as Tibet (Xizang), Xinjiang, Inner Mongolia, and the Shenzhen special economic zone, have special legislative powers superior to those of other provincial and directly administered municipalities. The local congresses in these areas have the power, within their specific NPC mandates, to enact legislation that conflicts with the law promulgated by the NPC and NPSC. Legislation Law, ch. 4, sec. 1.
78. Legislation Law, art. 68.
79. The Supreme Court consists of a Chief Justice and such number of puisne judges as the Union Legislative may legislate. The judges of the Supreme Court are appointed by the President in consultation with the Chief Justice of India. The senior-most puisne judge is normally appointed the Chief Justice of India. A judge of the Supreme Court holds office until he attains the age of 65 years.
80. Article 141.
81. *S.P. Gupta v. Union of India*, 1981 Supp. S.C. 87, 408.
82. Such a challenge is now permitted only on the basis of invalidity of the agreement, for want of jurisdiction on the part of the arbitrator or for lack of proper notice to a party for the appointment of the arbitrator or of arbitral proceedings or a party being unable to present its case. At the same time, an award can now be set aside if it is in conflict with "the public policy of India" - a ground which covers, *inter-alia*, fraud and corruption.
83. This has been achieved by inserting specific provisions on several issues, such as the law to be applied by him, power to determine the venue of arbitration in case the parties fail to arrive at an agreement, power to appoint experts, power to act on the report of a party, power to apply to the court for assistance for taking evidence, power to award interest, etc.
84. Under the 1996 Act, unless the agreement provides otherwise, the arbitrators are required to give reasons for the award.
85. For instance, in the case of *A. K. Gopalan v. State of Madras*, AIR 1950 SC 27.
86. *S. P. Gupta v. Union of India*, AIR 1982 SC 149.
87. *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579.
88. For instance, in *S. P. Gupta*, the court held, "the strict rule of standing ...is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy body or a meddle interloper but who has sufficient interest in the proceedings
89. *Dr. Upendra Baxi v. State of Uttar Pradesh*, (1981) 3 Scale 1137.

90. AIR 1993 SC 1960.
91. Rudal Shah v. State of Bihar, AIR 1983 SC 1086
92. Zimmerman at 64.
93. Lubman at 282.
94. Supreme People's Court, Regulations on Several Problems in the Trial of Trade-Related Administrative Litigation Cases [*Zuigao renmin fayuan guanyu shenli guoji maoyi xingzheng anjian ruogan wenti de guiding*], issued 8 August 2002; Supreme People's Court Regulations on the Application of Law in the Trial of Anti-Subsidy Administrative Litigation Cases [*Zuigao renmin fayuan guanyu shenli fan butie xingzheng anjian ying yong falu ruogan wenti de guiding*], issued 11 September 2002; Supreme People's Court Regulations on the Application of Law in the Trial of Anti-Dumping Administrative Litigation Cases [*Zuigao renmin fayuan guanyu shenli fan qingxiaoxingzheng anjian ying yong falu ruogan wenti de guiding*], issued 1 January 2003.
95. According to a press release by the SPC following the announcement of these regulations, the promulgation of the Regulations aims at optimizing the country's judicial resources by giving foreign-related cases to the more experienced courts and minimizing local protectionism by broadening the geographic area under the jurisdiction of an authorized court.
96. People's Daily, February 4, 2002.
97. See Vincent Cheng Yang at 22.
98. Supreme People's Court Notice Regarding the Promulgation of "Forms for Criminal Judgments by People's Courts" [*Zuigao renmin fayuan guanyu yinfa "fayuan xingshi susong wenjian yangshi"*], issued 30 April 1999. Supreme People's Court, Measures on the Management of Publication of Judgment Documents [*Zuigao renmin fayuan panjue wenshu gongbu guanli banfa*], issued 15 June 2000.
99. These include the Guangzhou Maritime Court and the Tianjin High People's Court, and the Zhongyuan District Court in Zhengzhou. Hawes, at 8; "Tianjin Becomes First PRC Higher Court to Set Legal Precedents," Xinhua, 1 August 2003, in FBIS, Doc. ID CPP20030801000164.
100. *Promoting the Rule of Law in China: Roundtable Before the Congressional Executive Commission on China*, 107th Cong., May 24, 2002 (testimony of Robert J. Reinstein, Dean of Temple Law School).
101. PRC Constitution, Art. 126. See also Xiao Yang, *Vigorously Proceed with Professionalization Constructions of the Body of Judges, Seeking Truth [Qiushi]*, (May 1, 2003) translated in FBIS, Doc. ID: CPP20021023000078; *Supreme People's Court Opinions on Strengthening the Construction of Grassroots People's Courts* [*Zuigao renmin fayuan guanyu jiaqiang renmin fayuan jiceng jianshe de ruogan yijian*], (Aug. 13, 2000); *Senior Procurator: Judicial Reforms should Support and Perfect Judicial Independence with Chinese Characteristics* [*Gao jian: sifa gaige yao jianchi he wanshan zhongguo tese de sifa dili*], Xinhua, (June 12, 2003).
102. Lubman at 264.
103. PRC Constitution, Arts. 67(6), 129; People's Republic of China Organic Law of the People's Procuratorates [*Zhonghua renmin gongheguo renmin jianchayuan zuzhifa*], Arts. 5–6; People's Republic of China Criminal Procedure Law [*Zhonghua renmin gongheguo xingshi susongfa*], Art. 8, chapter V; People's Republic of China Civil Procedure Law [*Zhonghua renmin gongheguo minshi susongfa*], Arts. 185–6.
104. *Id.*
105. Supreme People's Court 2003 Work Report, 11 March 2003. Supreme People's Court Circular on Enforcing PRC Judges Law [*Zuigao renmin fayuan guanyu guancheluoshi "Zhonghua renmin gongheguo faguanfa" de tongzhi*], issued 11 July 2001; Judicial Training Regulations [*Faguan peixun tiaolie*], issued 20 October 2000.
106. On March 19, 2004, the MOJ and SPC issued the *Regulation on Standardizing the Relationship Between Lawyers and Judges* setting standards for the relationships between judges and attorneys.

108. *New 'Enforcement Notices' Designed to Increase Legal Transparency*, Xinhua (English edition), in FBIS, Doc ID: CPP20030703000060.
109. See <http://www.chinacourt.org/public/detail.php?id=84494>; See also <http://www.jcrb.com/zyw/n25/ca138142.htm>.
110. Veron Hung, *China's Commitment on Independent Judicial Review: An Opportunity for Political Reform* 12, Working Paper of the Carnegie Endowment for International Peace, No. 32, (Nov. 2002).
111. *Id.* at 9. Formally, people's congresses appoint court presidents at the corresponding level, who then nominate assistant judges. In practice, however, local governments and Party committees control the appointment process.
112. Zhu Qiwen, *Elevate Quality of Judges*, China Daily, (Mar. 9, 2002), available at [www.Chinadaily.com.cn](http://www.Chinadaily.com.cn).
113. See, e.g., Supreme People's Court 2003 Work Report, 11 March 2003; Supreme People's Court 2002 Work Report, March 2002; Five Year Plan for PRC Court Reform, Legal Daily [*Fazhi ribao*], 23 October 1999, No. 1.
114. CECC 2003 Report at 66.
115. Mathew Joseph, Rupa R. Nitsure, L. Bhagirathi and Madan Sabnavis, *India's Economic Reforms: Private Corporate Sector Response*, <http://www.sba.muohio.edu/ABAS/1998/BUDANEW.pdf>
116. Legislation Law, arts. 34 and 35.
117. CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, 107TH CONG., 2002 ANNUAL REPORT 47, [hereinafter CECC 2002 Annual Report]. Similarly, the State Council's Procedural Rules for Formulating Administrative Regulations require that the State Council gather opinions from relevant government bodies, associations, and citizens, but does not require the release of draft regulations to the public at large. Procedural Rules for Formulating Administrative Regulations [Xingzheng fagui zhiding chengxu tiaoli], issued 11 November 2000, arts. 12, 19, 20, 22.