

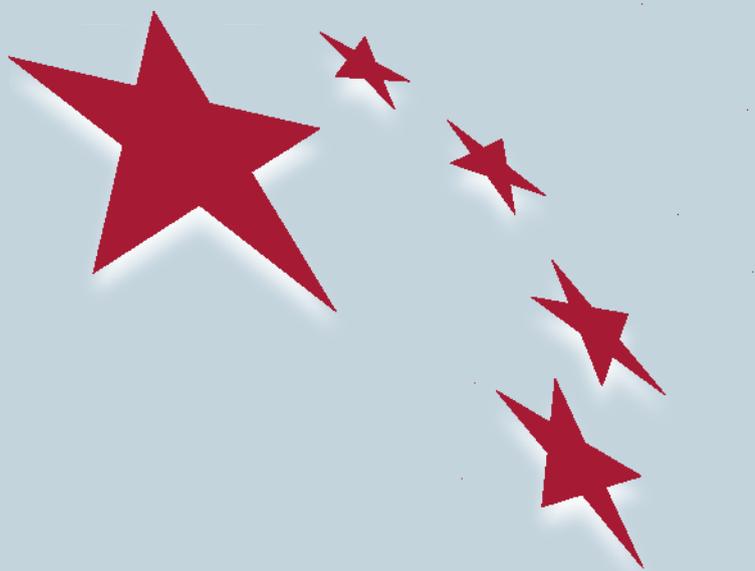
Rule of Law in China: Chinese Law and Business

Constitutional Conflict and the Role of the National People's Congress

Zhenmin Wang

The Foundation for Law, Justice and Society
in collaboration with
The Centre for Socio-Legal Studies,
University of Oxford

www.fljs.org



Executive Summary

- Constitutional disputes are unique among social disputes, given that the constitutionality or legality of laws (acts) and government actions is contested, and to solve them requires particular institutions and procedures. China revised its legal system, including criminal, civil, and administrative litigation procedures, after the Cultural Revolution in the late 1970s and promised to establish a socialist rule of law through the 1999 constitutional amendments. However, China was slow to develop a sound constitutional review mechanism, which meant that constitutional law did not form part of the common conception of rule of law.
- Constitutional litigation is an important component of the rule of law. Recent years have witnessed a marked progress in the establishment of a workable constitutional review system and an improved constitutional interpretation mechanism. As the supreme organ of state power, the National People's Congress (NPC) and its Standing Committee (NPCSC) are responsible for constitutional review, and the NPCSC is China's constitutional interpretation body.
- In 2000 the Law on Legislation was enacted to introduce a new constitutional review procedure. Now any institution, citizen, or enterprise may file a constitutional complaint against an administrative or local regulation to the NPCSC. The NPCSC has a special department to consider such actions. Although the number of cases is not publicized, media reports suggest that many cases have tested China's new constitutional review procedure and the constitutional interpretation system, mainly brought by the general public. The issues include discrimination, equality, the right to receive education, economic matters, and so on. Decisions are not formally made or publicized by the NPCSC, although this may change in time.
- It would be beneficial to establish a separate institution especially for constitutional review and constitutional interpretation. The constitutional review and interpretation procedure should also be more standardized and legalized.
- In the future, citizens' fundamental constitutional rights should be mainly protected by ordinary courts through ordinary judicial procedures. The constitutional council or committee should only be responsible for abstract constitutional review and interpretation. There should be a division of labour on constitutional matters between this constitutional council or committee and ordinary courts. This would integrate the new constitutional review and interpretation mechanism with the people's congresses system.

Constitutional Conflict and the Role of the National People's Congress

Introduction

Over many years in China, there has been uncertainty over the mechanism by which to settle disputes, whether in court or an arbitration proceeding, in which the constitutionality or legality of an act (law), or government or local regulation, is called into question. For instance, one company is litigating against another company in a Chinese court, and a new executive regulation passed by the State Council (China's cabinet) is applied to settle this dispute. However, if the defendant company challenges the constitutionality of this executive regulation, this would substantially influence the final result of the court proceeding. How could the defendant company proceed its constitutional claims and what procedures would be instigated by this action?

If such issues are raised, according to the Chinese constitutional and legal systems, the National People's Congress (NPC) and its Standing Committee (NPCSC) are vested with the power to conduct constitutional review and settle constitutional disputes. Nevertheless, there are many problems to be resolved. Firstly, the NPC and NPCSC are charged with constitutional review and interpretation, but rarely enact it, which means that, in practice, there are still many lower level regulations inconsistent with the constitution and higher level laws. Secondly, current mechanisms for invoking review or interpretation are too complicated; even if improved, current mechanisms would still not be adequate. To overcome this, it may be necessary to establish a special constitutional council/committee (or court), or to give the Supreme People's Court (SPC) or ordinary courts more powers. Thirdly, if the current system is maintained, the role of ordinary courts may need to be revised or their powers in relation to the NPC and NPCSC clarified. In this policy brief, I will analyse the recent efforts by the NPC and the NPCSC in formalizing relevant procedures and addressing other problems.

The NPC and the NPCSC as China's primary constitutional dispute resolution body

According to the Chinese constitution, the NPC and NPCSC are not only China's highest legislative bodies, but also authoritative dispute resolution organs. They are responsible for enforcing the Chinese constitution and interpreting the constitution and acts. NPC involvement may potentially influence dispute resolution in two ways: one is the constitutional *review* of acts by the NPC; the second the constitutional and legal *interpretation* by the NPCSC, which may influence the court ruling and thereby have an indirect impact on dispute resolution.

Constitutional contradiction: Special Administrative Regions

The NPC is responsible for reviewing the constitutionality of acts made by itself or the NPCSC. Of course it also has the general power to review the constitutionality of the actions by the State Council and the Central Military Commission. Since 1982, however, there have been only two cases where the NPC did constitutionally review the acts made by itself.

China and the UK concluded the *Joint Declaration on the Question of Hong Kong* in 1984, according to which China would resume sovereignty over Hong Kong on 1 July 1997. The post-1997 basic policies of China regarding Hong Kong were elaborated by the Chinese government in the *Joint Declaration*. These basic policies encompass, primarily, the concepts of 'one country two systems', 'Hong Kong people running Hong Kong', and a high level of autonomy. China promised in the *Joint Declaration* that it would make a law to enshrine these policy commitments so that these basic policies do not change whenever the leadership changes. Serving as the mini-constitution for the future Hong Kong Special Administrative Region (SAR), the Basic Law was thus enacted by the NPC on 4 April 1990 after a drafting process lasting nearly five years.

During the drafting process, some members of the Hong Kong legal profession raised a constitutional question. The Basic Law (draft) itself was good enough to protect the capitalism, rule of law, and style of life in Hong Kong. However, upon Hong Kong's return to Chinese sovereignty, it was also subject to the higher law of the Chinese constitution itself, which is a socialist constitution requiring that socialism be practised all over China. Article 1 explicitly provides that:

The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China. Sabotage of the socialist system by any organization or individual is prohibited.

By contrast, Hong Kong SAR Basic Law clearly provides that Hong Kong does not practice socialism and shall maintain its capitalism for fifty years after its handover to China in 1997. The Basic Law would appear to fundamentally contradict the Chinese constitution, and there were concerns that the Basic Law might be subject to Chinese constitutional review in the future. If so, the constitutional uncertainty that would result could lead to social unrest, and severely strike the confidence of the business community. In order to solve this constitutional question, upon the adoption of the Basic Law in the Seventh NPC, the NPC conducted a review of the Basic Law and made the following amendment to Article 31 of the constitution:

'The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of the specific conditions.' The Basic Law of the Hong Kong Special Administrative Region is constitutional as it is enacted in accordance with the Constitution of the People's Republic of China and in light of the specific conditions of Hong Kong.¹

This decision settled the constitutionality question of the Hong Kong Basic Law. The Chinese constitution therefore not only safeguards socialism in mainland China, but also permits capitalism in some special Chinese territories. The decision served to promote confidence amongst the Hong Kong legal profession and its people in the constitutionality of the Basic Law.

More recently, when the Basic Law of the Macao SAR was adopted in March 1993, the NPC conducted another constitutionality review and passed exactly the same decision.² To date, the NPC has yet to conduct constitutional reviews of acts by the NPCSC, or regulations by the State Council or Central Military Commission, or by provincial congresses.

The scope of NPCSC constitutional review

The NPC meets only once a year, with each session lasting between ten days and two weeks. It has over 2900 members and nine sub-committees. Clearly, it is technically impossible for the NPC to frequently exercise its function as China's 'constitutional court'. Consequently, the Chinese constitution primarily empowers the NPCSC to exercise constitutional review.

The NPCSC has 175 members, and meets every two months, enabling it to enact this role much more effectively. According to the constitution, The NPCSC has the power to:

- interpret the constitution and supervise its enforcement;
- interpret statutes;
- annul administrative rules and regulations, decisions, or orders of the State Council that contravene the constitution or the statutes; and
- annul local regulations or decisions of the organs of state power or provinces, autonomous regions, and municipalities directly under the central government that contravene the constitution, the statutes, or the administrative rules and regulations.

1. *Decision of the National People's Congress on the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990.

2. *Decision of the National People's Congress on the Basic Law of the Macao Special Administrative Region of the People's Republic of China*, adopted at the First Session of the Eighth National People's Congress on 31 March 1993.

In 2000, constitutional review by the NPCSC was formalized by the Law on Legislation.

According to Article 90 of the Law on Legislation, the following institutions can be the 'plaintiffs' to initiate the procedure: the State Council, the Central Military Commission, the SPC, the Supreme People's Procuratorate. What is revolutionary is that this Law also authorizes:

'Other government bodies or social organizations, enterprises, institutions, and citizens who find that certain administrative regulations, local regulations, autonomous regulations, or separate regulations contravene the constitution or the laws may make a written suggestion to the Standing Committee of the NPC for review'

For the first time in the history of the People's Republic of China, an individual citizen or an enterprise may file a constitutional complaint to the NPCSC. This establishes a direct link between citizens and the top constitutionality review body.

But what is the procedure by which this may actually be carried out? When such a written 'request' reaches the NPC Standing Committee and is accepted, The Law on Legislation (2000) provides a detailed, if complicated, procedure to proceed.³ This new procedure is neither legislative nor judicial. What is most striking is that it introduces a type of 'hearing' proceeding which enables the defendant to argue before the NPC committees.

In June 2004, the NPC Standing Committee established a new working agency under its Legislative Affairs Commission to review whether legislation or government decisions comply with the constitution.

Whilst this marks significant progress, there is, however, much that can be further improved. For example, the plaintiffs do not have equal opportunity to argue before the committees. To successfully register a constitutional review claim is not easy.

Even if the application is accepted and the review is completed, the final decision is not currently publicized, though this may change in future.

Moreover, only regulations made by the State Council and the provincial-level people's congresses are subject to this procedure. It is not clear whether constitutional review over a law is applicable. Most significantly, citizens cannot file a constitutionality review application to the NPCSC against a directive made by a ministry or commission under the State Council, even though individuals can do so against a regulation by the State Council itself.

The constitutional question of these directives of Cabinet ministries and commissions are decided by the State Council through another procedure.⁴ The scope of NPCSC constitutional review is clearly too limited, but significant progress has been made.

Since 2000, this procedure has been tried many times by institutions and individual citizens. Although the exact number of such cases are not publicized, media reports would suggest that there have been many cases that have tested this new constitutional review procedure. The applications are mainly from individual citizens, who raise issues concerning discrimination, equality, right to receive education, economic matters, and so on.

One special feature of this procedure is that any citizen can file a constitutional complaint to the NPCSC, even if he or she is not directly affected by the substance of the complaint, and it is not necessary that there be any actual dispute. By contrast, under the common law system, a person must have substantial relationship with the dispute and the dispute must actually exist before the parties file a constitutional review case to the court. Since 2000, many such kinds of constitutional review 'suggestions' are brought to the NPCSC.

In March 2003, Sun Zhigang, an employee at Guangzhou Daqi Garment Company was beaten to death at a penitentiary hospital just hours after

3. For a detailed description of the procedure, see Wang Zhenmin (2004) *Constitutional Review in China*. Beijing: China University of Political Science and Law Press, p. 116.

4. For detailed analysis of that system, see Song Dahan (2003) *A Practical Handbook for Record-making of Regulations, Directives and Other Regulatory Documents* Beijing: China Fazhi Press

being detained as a vagrant for not carrying identification. The State Council issued the *Measures for Internment and Deportation of Urban Vagrants and Beggars* in 1982 (hereafter referred to as the *Measures*), an administrative regulation which authorized the police to house urban vagrants and then deport them to their hometowns. Stirred up by Sun's case, three Doctor of Juridical Science (SJD) students in Beijing wrote to the NPCSC and appealed for a review of the constitutionality of the *Measures*. They argued that the constitution protects citizen's freedom of the person, whilst the Law on Legislation stipulates that any provisions concerning deprivation of the human rights and democratic rights of citizens must be made in the form of laws by the NPC or its Standing Committee. This being the case, the State Council does not have the power to deprive such rights through administrative regulations. This is the first high-profile, public test to the new constitutional review procedure provided by the Law on Legislation. The result was that the State Council took the initiative and abolished the regulation before the NPCSC took any action.

Constitutional review and provincial courts

Since this is a relatively new procedure, unfamiliar even to many lawyers, citizens or companies may still expect local courts to exercise constitutionality or legality review over a provincial regulation. For example, in 2002, a judge in Luoyang city, Henan Province ruled that a regulation of the Henan Provincial People's Congress conflicted with a national law and was thus invalid. The judge even abolished the provincial regulation in her decision, causing a constitutional crisis in Henan province. The Standing Committee of the Henan Provincial Congress demanded that the Provincial Higher Court re-try the case, claiming that even local regulations which do not comply with the Constitution and the national law, are under the jurisdiction of the NPCSC, not the court, in cases of constitutional review. Accordingly, the Henan Higher Court later re-tried the case and overturned the ruling.

In practice though, constitutional judicial review by ordinary courts does take place from time to time. In addition to the NPC and the NPCSC, local people's

congresses and their standing committees are constitutionally obliged to supervise the enforcement of the constitution in their respective regions. According to Article 99 of the constitution, local people's congresses at different levels ensure the observance and implementation of the constitution, the statutes, and the administrative rules and regulations in their respective administrative areas. Some provincial congresses have formalized local constitutional supervision procedure.

The SPC and constitutional review

According to the Chinese constitution, the power to interpret the constitution and laws belongs to the NPCSC, not the Supreme Court. The interpretation by the NPCSC is final and authoritative, and must not only be obeyed by all administrative bodies and social organisations, but also be followed by courts in deciding specific cases.

Subject to this condition, the NPCSC authorizes the SPC to give judicial interpretations on the application of laws and regulations in deciding cases. Such judicial interpretations by the SPC are confined to issues arising from specific application of laws and regulations in the judicial process, and should not contradict the original intent of the laws and regulations. While the interpretations by the NPCSC are primary in nature, the judicial interpretations are secondary. Likewise, according to Hong Kong and Macao Basic Laws, under the 'one country two systems' policy, Hong Kong and Macao judiciaries are also authorized by the NPCSC to interpret the Basic Law in the judicial process.

Constitutional interpretation and adjudication

Although the SPC, Hong Kong, and Macao judiciaries are authorized by the NPCSC to interpret laws in settling disputes, this authorization is conditional. Under certain circumstances, the SPC, Hong Kong and Macao judiciaries are constitutionally required to submit the provisions at issue to the NPCSC for a final interpretation before the courts make a final ruling. For the Beijing-based SPC, according to Article 42 of the 2000 Law on Legislation, these circumstances include: 1) when the stipulations of

the laws require clearer and specific meanings; 2) after the laws have been promulgated, there appear new circumstances which require stipulations on the basis of their application, the SPC cannot interpret the law on its own and must request the NPCSC for a final interpretation before rendering a final decision. This provides the basis of the constitutional link between the NPCSC interpretation and the ordinary court system.

For the Hong Kong and Macao courts, if a Basic Law provision to be interpreted relates to matters within the jurisdiction of the central government or to central-SAR relations, the Hong Kong and Macao Courts of Final Appeal shall, before a non-appealable final judgment is rendered, petition the NPCSC for interpretation of the provision at issue. When a Hong Kong or Macao court applies the said provision, the interpretation by the NPCSC shall be followed, but previous judgments are not affected. If the NPCSC decides to interpret certain provisions of the Basic Law, it must consult its Committee for the Basic Law (Article 158, Hong Kong Basic Law and Article 143 of Macao Basic Law).

Under the common law system, the power of final legal interpretation and the power of final adjudication are exercised in a unified way by the highest court (the court of final adjudication). Under China's constitutional system, however, the power of final constitutional interpretation and the power of final adjudication are not exercised by the same body but rather by two separate bodies; that is, by the NPCSC and the courts including the SPC in Beijing and Hong Kong/Macao courts.

Under the 'one country, two systems' arrangement, China still has only one body that exercises the power of final interpretation of the constitution and its laws (that is, the NPCSC), but so far there are three bodies that exercise the power of final adjudication (the SPC in Beijing and the two SAR Courts of Final Appeal in Hong Kong and Macao). Among these three courts of final adjudication, no one is subordinated to another, with each one exercising its own power of final adjudication in its respective jurisdiction. However, they are all subject

to the final constitutional and legal interpretations by the NPCSC. The final constitutional and legal interpretation powers are unified, even though the power of final adjudication is exercised separately by three courts of final appeal respectively based in Beijing, Hong Kong, and Macao.

NPCSC constitutional interpretation

According to the Chinese doctrine of constitutional and legal interpretation, the power of constitutional and legal interpretation is ancillary to the highest state power. The power to interpret the constitution and laws is a power belonging to the NPCSC, distinct from, but equally as important as its legislative, supervisory, resolution-adopting, and appointment/removal powers. The NPCSC is both a legislative body and a body for supreme constitutional interpretation. Its constitution-interpreting action is neither judicial nor legislative, but rather a special interpreting procedure in nature.

Under the Chinese legal interpretive theory, the purpose of law-interpretation is to ascertain the legislative intent and precise meaning of legal provisions, and the legislative body is deemed to have a clearer understanding of the precise meaning of legal provisions than do other state bodies, including judicial bodies. Moreover, from a procedural standpoint, the NPCSC's legislative function and its law-interpreting function are exercised separately through different procedures.

Procedure for the enactment of NPCSC interpretations

Unlike its regular legislative procedure, the interpretation procedure adopted by the NPCSC is special in the following ways.

The first difference lies in the initiation of the interpretive procedure. The State Council, the Central Military Commission, the SPC, the Supreme People's Procuratorate, and the special committees of the NPC and people's congresses of the provinces, autonomous regions, and municipalities directly under the central government may ask the Standing Committee for interpretations of law (Article 43 of

the 2000 Law on Legislation). Of course the NPCSC can also interpret laws on its own initiative. This Law does not mention whether or not the parties can file an interpretation application to the NPCSC.

For the two Basic Laws, there are three bodies empowered to potentially initiate the NPCSC's interpretive mechanism: one is the NPCSC acting on its own initiative; the second is the State Council requesting the NPCSC to interpret the Basic Law; and the third is the Court of Final Appeal of the Hong Kong SAR.

Section Four of Chapter Two of the Law on Legislation specifically provides for the 'interpretation of laws'. *The NPCSC Working Procedure on the Interpretation of Laws* adopted at the Twelfth Chairmen's Meeting of the Tenth NPCSC in 2004 further specifies and regularizes detailed working procedures for the interpretation of laws. When interpreting the Basic Laws, the NPCSC, in addition to complying with these procedural requirements, meticulously made certain special arrangements. For example, prior to the interpretation of the Basic Law by the NPCSC in 2005, the NPCSC designated senior officials to hold 'discussion sessions' in Shenzhen to hear the opinions of Hong Kong people, particularly the opinion of the legal community, including persons who opposed interpreting the Basic Law or who held a different view on interpreting the Basic Law. These sessions were in effect similar to pre-trial hearings. Another respect in which interpretation of the Basic Law by the NPCSC differs from its interpretation of other laws is that the Committee for the Basic Law under the NPCSC must be consulted.

Interpretive cases by the NPCSC

According to Chen Sixi, the director general of the Constitutional Affairs Section of the Legislative Affairs Commission of the NPC, before 1996, although the NPCSC did interpret laws several times, some of these actions were not specially identified as 'legal interpretations', though some would argue that these were not, in fact, interpretations but general NPCSC decisions. After careful research, his

opinion is that the NPCSC has made constitutional and legal interpretations at least thirty-two times since 1954. There were fourteen interpretations from 1954 to 1960,⁵ one in 1978, three from 1981 to 1995, and fourteen since 1996.⁶ Some of them were requested by the SPC or the Supreme People's Procuratorate. Among the fourteen interpretations since 1996, nine applied to the Criminal Law, two concerned the application of China Nationality Law to Hong Kong and Macao, and three concerned Hong Kong Basic Law.⁷

Suggested reforms of the constitutional adjudication mechanism

Alongside China's developing dispute resolution mechanisms such as the improving court system, arbitration, mediation, and so forth, the dispute resolution function of the NPC and the NPCSC are also being strengthened. To further this goal and continue in this direction, the NPC and the NPCSC need to continue to develop both institutionally and systemically. Even though the constitutional review and constitutional interpretation procedures have been improved since 2000, they remain too complicated to enable efficient implementation.

In the long term, it would be much more practical if these important functions were separated institutionally from the routine legislative and supervisory functions of the NPC and the NPCSC. A constitutional council or committee would be a much more suitable body through which China could establish its constitutionalism and rule of law. Some commentators have suggested that the SPC should be authorized to discharge the business of constitutional review and constitutional interpretation.

5. The Chinese constitution was passed by the First NPC in 1954.

The current constitution was enacted by the Fifth NPC in 1982.

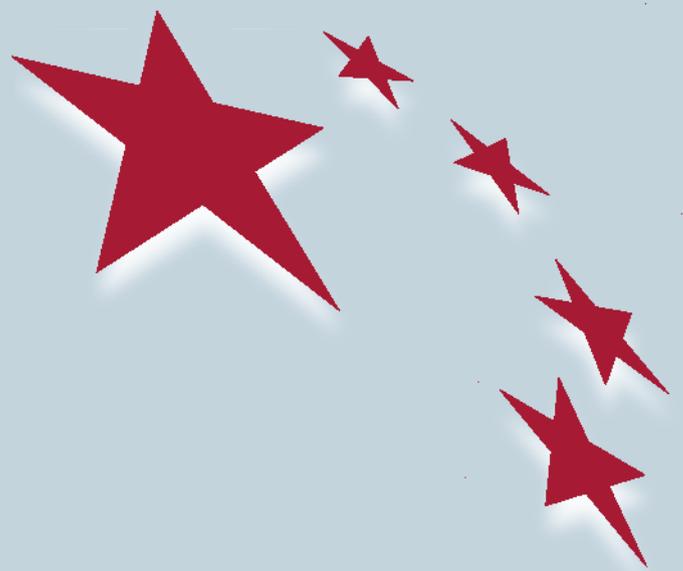
6. See Chen Sixi *On Legislative Interpretation in China*. International Conference on Hong Kong Basic Law, City University of Hong Kong, 22–23 June 2007.

7. The three interpretations took place respectively on 26 June 1999, 6 April 2004, and 24 April 2005.

This is not realistic simply because the people's congresses system is China's fundamental political system. Moreover, the ordinary courts do not have the credibility necessary to exercise this important power.

Notwithstanding this, if a constitutional council or committee is established, the responsibility of the ordinary courts in protecting fundamental constitutional rights should not be discharged completely. What the ordinary courts should not do is to conduct abstract

constitutional review over acts, regulations, and constitutional interpretation. There should be a division of labour between the would-be constitutional council or committee and ordinary courts, whereby the constitutional council or committee is responsible for abstract constitutional review and constitutional interpretation, whilst the ordinary courts assume responsibility for protecting the concrete fundamental constitutional rights of citizens.



The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

Rule of Law in China: Chinese Law and Business

The main objective of the programme is to study the ways in which Chinese law and legal institutions encounter and interact with the social environment, including economic and political factors, at local, regional, national, and international levels.

The Foundation's perspective in pursuing this objective is that of entrepreneurs considering investment in China, the lawyers advising them, executives of an international institution or non-governmental authority, or senior public officials of another country. The combination of this objective and our particular perspective constitutes a unique approach to the study of the role of law and its relationship to other aspects of society in China.

Zhenmin Wang is professor and vice dean of the Beijing-based Tsinghua University School of Law. He is a member of the Committee for Hong Kong Basic Law under the Standing Committee of the Chinese National People's Congress and concurrently a member of the Committee for Macao Basic Law. As a member of the China Law Society, Professor Wang serves as vice president of the China Association of Constitutional Law. He is also a senior research fellow of the Institute for Hong Kong and Macao Affairs under the Development Research Center of the State Council. His teaching and research focus on constitutional and administrative law, legal reform, and legal education. He has published two books and over fifty articles on constitutional law and human rights.

For further information please visit
our website at www.fljs.org
or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD
T · +44 (0)1865 284433
F · +44 (0)1865 284434
E · info@fljs.org
W · www.fljs.org