

## **The Judicial System of China**

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The judiciary in China has both broad and narrow meanings. Broadly speaking, the judiciary means law-enforcement activities conducted by the country's judicial organs and organizations in handling prosecuted or non-prosecuted cases. Narrowly speaking, it applies to law-enforcement activities conducted by the country's judicial organs in handling prosecuted cases.

This research paper uses the term in the broader sense. Judicial organs here mean public-security organs (including state security organs) responsible for investigation, prosecution, trial and execution of cases, the prosecutors, the trial institutions and the custodial system. Judicial organizations here refer to lawyers, public notaries, and arbitration organizations. The latter, though not part of the judicial apparatus, are an integral part and a link in the overall judiciary system.

### **History**

Between the Anti-Rightist Campaign of 1957 and the legal reforms of 1979, the courts viewed by the leftists as troublesome and unreliable, played only a small role in the judicial system. Most of their functions were handled by other party or government organs. In 1979, however, the National People's Congress began the process of restoring the judicial system. The world was able to see an early example of this reinstituted system in action in the showcase trial of the Gang of Four and six other members of the "Lin-Jiang clique" from November 1980 to January 1981 (see the Four Modernizations). The trial, which was publicized to show that China had restored a legal system that made all citizens equal before the law, actually appeared to many foreign

observers to be more a political than a legal exercise. Nevertheless, it was intended to show that China was committed to restoring a judicial system.

The Ministry of Justice, abolished in 1959, was re-established under the 1979 legal reforms to administer the newly restored judicial system. With the support of local judicial departments and bureaus, the ministry was charged with supervising personnel management, training, and funding for the courts and associated organizations and was given responsibility for overseeing legal research and exchanges with foreign judicial bodies.

Chinese law is one of the oldest legal traditions in the world. In the 20th and 21st century, law in China has been a complex mix of traditional Chinese approaches and appropriation of Western conventions.

For most of the history of China, its legal system has been based on the Confucian philosophy of social control through moral education, as well as the Legalist emphasis on codified law and criminal sanction. Following the Revolution of 1911, the Republic of China adopted a largely Western-style legal code. In the civil law tradition (specifically German-influenced). The establishment of the People's Republic of China in 1949 brought with it a more Soviet-influenced system of socialist law. However, earlier traditions from Chinese history have retained their influence, even to the present.

### **Chinese Legal Tradition**

The word for law in classical Chinese was 法. The Chinese character for 法 denotes a meaning of "fair", "straight" and "just", derived from its water radical . It also carries the sense of "standard, measurement, and model".<sup>1</sup> Derk Bodde and Clarence Morris held that the concept of 法 had an

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<sup>1</sup> See Lang Chippings, "Explicating 'Law': A Comparative Perspective of Chinese and Western Legal Culture" (1989) 3(1) Journal of Chinese Law 55-92.

association with yì ("social rightness").<sup>2</sup> Yan Fu, in his Chinese translation of Montesquieu's *De l'esprit des lois* published in 1913, warned his readers about the difference between the Chinese fǎ and Western law: "The word 'law' in Western languages has four different interpretations in Chinese as in lǐ ("order"), lǐ ("rites", "decorum"), fǎ ("human laws") and zhì ("control").<sup>3</sup>

A term which preceded fǎ was xíng, which originally probably referred to decapitation. Xíng later evolved to be a general term for laws that related to criminal punishment. The early history *Shang Shu* recorded the earliest forms of the "five penalties": tattooing, disfigurement, castration, mutilation, and death. Once written law came into existence, the meaning of xíng was extended to include not only punishments but also any state prohibitions whose violation would result in punishments. In modern times, xíng may be understood in the sense of penal law or criminal law. An example of the classical use of xíng is Xíng Bù (lit. "Department of Punishment") for the legal or justice department in imperial China.

The two major Chinese philosophical schools discussed below, Confucianism and Legalism, strongly influenced the idea of law in China. Briefly, under Confucianism, the state should lead the people with virtue and thus create a sense of shame which will prevent bad conduct. Under Legalism, law is to be publicly promulgated standards of conduct backed by state coercion. The tension between these two systems is that Confucianism relies on tradition to make the leader the head of household of all China, while Legalism makes standard law that even the emperor should be bound by. The common factor is that both endorse to different degrees a paternalistic conception of the state, which knows better than its citizens and makes laws to protect them. This concept persisted throughout the imperial period, into the republican period, and can still be seen acting today.

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<sup>2</sup> Derk Bodde and Clarence Morris, *Law in Imperial China: Exemplified by 190 Ching Dynasty Cases with Historical, Social, and Judicial Commentaries* (Philadelphia: University of Pennsylvania Press, 1973) at 14-15.

<sup>3</sup> Yan Fu, *Fayi* ["The Spirit of the Laws"] (Beijing: The Commercial Press, 1981) at 2.

Unlike many other major civilizations where written law was held in honor and often attributed to divine origin, law in early China was viewed in purely secular terms, and its initial appearance was greeted with hostility by Confucian thinkers as indicative of a serious moral decline, a violation of human morality, and even a disturbance of the total cosmic order.<sup>4</sup> Historically, the people's awareness and acceptance of ethical norms was shaped far more by the pervasive influence of custom and usage of property and by inculcating moral precepts than by any formally enacted system of law. Early emperors however embraced the Legalist ideal as a way of exerting control over their large and growing territory and population. This process was integrated with traditional Chinese beliefs in the cosmic order, holding that correct behavior was behavior consonant with the appropriate responses set by fǎ. Xíng states the potential costs to the individual of exceeding them and imposes penalties for these actions.<sup>5</sup>

The imperial period was characterized mainly by the concept of law as serving the state, a means of exerting control over the citizenry. In the late Qing dynasty there were efforts to reform the law codes mainly by importing German codes with slight modifications. This effort continued and was amplified in the republican period resulting in the Provisional Constitution of 1912 which included the idea of equality under the law, rights for women, and broader rights for citizens' vis-à-vis the government. The onset of the communist period at first rolled back the development of individual rights with the primary concept of law returning to that of a tool of the state. After the Cultural Revolution devastated the ranks of intellectuals and legal professionals, it took until 1982 for the idea of individual rights to reemerge as a significant influence on Chinese law. The current constitution, created in 1982, states in Article V that no organization or individual is above the law and in Article III makes the People's Congresses and state

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<sup>4</sup> Note 4 at 13.

<sup>5</sup> Brian E. McKnight, *Law and Order in Sung China* (London: Cambridge University Press, 1992) at 6.

administration responsible to the people, paving the way for later efforts to allow enforcement of individual rights. Passage of the Administrative Litigation Law of 1987 created legal recourse for individuals from arbitrary government action, an avenue previously unavailable. Despite the deep-seated norm against legal proceedings, litigation in the Chinese courts has increased dramatically, especially in recent years. The continuing weakness of courts resulting from their dependence on the local government for financial support and enforcement undermines the effectiveness of these remedies but this has also begun to change with China's initiatives to increase legal training and the professionalism of the judiciary.

One avenue of individual appeal from government action which continues to be important is the custom of *xinfang* or petitions by citizens to the individual officials for change. The continuing wide use of *xinfang* reflects the fact that many officials are still able to avoid legal sanctions and the underlying avoidance of the legal system, as well as the personal ability of officials to personally intervene to change unjust results. Recently *xinfang* has been institutionalized to some extent with the central government mandating that every level of administration establish a *xinfang* office to handle petitions and report them up to high levels. This solution by exertion of personal power clearly goes against the idea of rule of law, and worse, some scholars have noted that *xinfang* today functions more as an informational collection system for the government than an effective review mechanism.

### **Confucianism and Legalism**

Confucianism and Legalism are two major Classical legal theories or philosophies developed during the Spring and Autumn period and the Warring States period, a time that saw the most impressive proliferation of new ideas and philosophies in Chinese history. While both theories call for governmental hierarchy, they differ drastically in their views of human potential and the preferred means to achieve

political order. Nevertheless, both theories have influenced and continue to influence the development of cultural, social, and legal norms in China.<sup>6</sup>

## **Confucianism**

The basic premise of Confucianism is the idea that human beings are fundamentally good. With this optimistic view on human potential, Confucius advocates for ruling through li—traditional customs, mores, and norms—which allow people to have a sense of shame and become humane people with good character, rather than through government regulations and penal law. The idea is that people will internalize the acceptable norms and only take proper actions. This will not only lead to a harmonious social order, but it will also provide the additional benefit of improving an individual's inner character and the overall quality of the society. In contrast, codified laws require external compliance, and people may abide by the laws without fully understanding the reason for compliance. As such, a social order achieved through formal laws does not come with the additional benefit of better citizenry. It is worth noting, however, that even Confucius did not advocate for the elimination of formal laws. Rather, according to Confucius, laws should be used minimally and reserved only for those that insist on pursuing one's self-interests without taking into account the wellbeing of the society.

As Confucius rejects the general use of formal laws to achieve social order, what lies vital to Confucius' theory is the willing participation by citizens of the society to search for commonly accepted, cooperative solutions. In addition to willing participation of citizens, there must also be grounds or bases upon which commonly acceptable solutions can be arrived at the concept known as li. Li is commonly understood as a set of culturally and socially valued norms that provide guidance to proper behaviors that will ultimately lead to a harmonious society. These

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<sup>6</sup> Farah, Paolo Davide (2008). "The Influence of Confucianism on the Construction of the Chinese Political and Juridical System". Retrieved 5 November 2015.

norms are not fixed or unchangeable over time but rather a reflection of what is accepted at a particular time in a particular context. When conflicts arise, the li have to be applied and interpreted to produce a just result and restore the harmony of the society. However, in the absence of any procedural safeguard afforded by codified laws, interpretation of li is subject to abuse.

Recognizing that people in a society hold diverse interests, Confucius charges the ruler with the responsibility to unify these interests and maintain social order. This is not done by dictatorship but by setting an example. Therefore, a ruler needs not to force his people to behave properly. Instead, the ruler needs only to make himself respectful, and the people will be induced and enlightened by his superior virtues to follow his example—an ideal known as wúwéi. Nevertheless, the ruler must know and understand the li to be able to create solutions to conflict and problems the society faces. As the people are to follow the moral standards and example set by the ruler, to a large extent, the quality of the ruler determines the quality of the political order.

### **Legalism**

In contrast to Confucius' li-based theory, the Legalism advocates the utilization of codified laws and harsh punishment to achieve social order. This is due to the legalists' belief that all human beings are born evil and self-interested. Therefore, if left unrestrained, people would engage in selfish behavior which will undoubtedly lead to social unrest. To cure this defect and force people to behave morally, the only way, believed the legalists, is to publicly promulgate clearly written laws and impose harsh punishments.

Realizing that the abilities of rulers are often limited and that reliance on the ruler's ability and judgment often leads to adverse results, the legalists designed a system in which the law is run by the state, not the ruler. This ensures that the laws will be applied impartially without the

interference of personal bias of the ruler or ones who are responsible for applying the laws. It also makes it irrelevant whether the ruler has superior abilities. This non-action promoted by the legalists is their understanding of the concept of wuwei, which is different from the Confucians' understanding of the same concept.

### **Comparison**

Notwithstanding such an understanding, the ruler, like in Confucianism, has the ultimate authority to decide what the law should be. Therefore, like Confucianism, Legalism is subject to abuse as well. In fact, the Qin emperor implemented strict laws and extremely harsh punishments without taking into account mitigating circumstances even for insignificant crimes. For example, books were burned and people holding different ideals were buried alive. While the Qin emperor successfully instilled fear and respect for law into the minds of his people, the harshness of the law led to his quick demise after only 14 years of reigning over China.

In summary, although both Confucianism and Legalism were developed in a period of turmoil and both were aimed at the re-unification of the country, the two theories went opposite directions with one advocating for and one against the use of formal laws to achieve social order. What the two theories have in common is their concession of the ultimate authority to the ruler, who remained above and beyond the li or law. It is true that neither theory is ideal in achieving a social order. Nevertheless, both theories have had a significant impact on the cultural and legal development in China, and their influence remains visible today.

The significant influence of the Legalist tradition in Chinese law has historically been overlooked. Although the Confucian ideology provided the fundamentals for the substance of traditional law, the Legalist school constructed the important framework of the traditional legal



system. The Han dynasty retained the basic legal system established under the Qin but modified some of the harsher aspects in line with the Confucian philosophy of social control.

The Han dynasty formally recognized four sources of law: lü ("codified laws"), ling ("the emperor's order"), ke ("statutes inherited from previous dynasties") and bi ("precedents"), among which ling has the highest binding power over the other three. Most legal professionals were not lawyers but generalists trained in philosophy and literature. The local, classically trained, Confucian gentry played a crucial role as arbiters and handled all but the most serious local disputes.

Eventually, the incorporation of the essentials of Confucianist li into legal codes occurred with this Confucian conception dominating ancient Chinese law. Ch'ü concludes that the gradual process of Confucianisation of law was the most significant development in the legal system of China prior to 20th century modernization.<sup>7</sup> The line between ruling by moral influence and ruling by punishment was not always clearly delineated. For example, li could be enforced by moral influence and legal means. The metamorphosis of li into law depended on its widespread and unvaried acceptance by society.

Although the codification of law was largely completed by the Tang Code of CE 624, throughout the centuries the Confucian foundations of the Tang Code were retained, and indeed with some aspects of it strengthened by the later dynasties. The Great Ming Code, which was a model for the Qing code, covered every part of social and political life, especially family and ritual, but also foreign relations and even relations of earthly life with the cosmos.<sup>8</sup>

The Confucian notion that morality and self-discipline was more important than legal codes caused many historians, such as Max Weber, until the mid-20th century to conclude that law was

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<sup>7</sup> Jiang (2005), p. Introduction

not an important part of Imperial Chinese society. This notion, however, has come under extreme criticism and is no longer the conventional wisdom among Sinologists, who have concluded that Imperial China had an elaborate system of both criminal and civil law which was comparable to anything found in Europe.

During the Qing dynasty, criminal justice was based on extremely detailed Great Qing Legal Code. One element of the traditional Chinese criminal justice system is the notion that criminal law has a moral purpose, one of which is to get the convicted to repent and see the error of his ways. In the traditional Chinese legal system, a person could not be convicted of a crime unless he has confessed. This often led to the use of torture, in order to extract the necessary confession. These elements still influence modern Chinese views toward law. All capital offenses were reported to the capital and required the personal approval of the emperor.

There was no civil code separate from the criminal code, which led to the now discredited belief that traditional Chinese law had no civil law. More recent studies have demonstrated that most of the magistrates' legal work was in civil disputes, and that there was an elaborate system of civil law which used the criminal code to establish torts.

## **Modernisation**

The introduction and translation of Western legal texts into Chinese is believed to have been started under the auspices of Lin Zexu in 1839. More systematic introduction of Western law together with other Western sciences started with the establishment of Tongwen Guan in 1862. The major efforts in translation of Western law that continued until the 1920s prepared the building blocks for modern Chinese legal language and Chinese law.<sup>8</sup> Legal translation was very

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<sup>8</sup> Yu Jiang, "Jindai Zhongguo faxue yuci de xingcheng yu fazhan" "Formation and development of modern Chinese legal language and terms" in Zhongxi falü chuantong ["Chinese and Western Legal Tradition"], vol. 1 (Beijing: Zhongguo zhengfa daxue chubanshe, 2001)

important from 1896 to 1936 during which period the Chinese absorbed and codified their version of Western laws. These efforts were assisted by the medium of the Japanese legal language and law developed in Japan during the Meiji period which involved in large part Japanese translation of European Continental laws.

In the late Qing dynasty there was a concerted effort to establish legal codes based on European models. Because of the German victory in the Franco-Prussian War and because Japan was used as the model for political and legal reform, the law codes which were adopted were modeled closely after that of Germany.

Attitudes toward the traditional Chinese legal system changed markedly in the late-20th century. Most Chinese and Westerners of the early 20th century regarded the traditional Chinese legal system as backward and barbaric. However, extensive research into China's traditional legal system has caused attitudes to become more favorable in the late-20th and early 21st centuries. Researchers of the early and mid-20th century tended to compare the traditional Chinese legal system to then contemporary systems, finding the former to be backward. However, more recent research compared the 18th-century Chinese legal system to European systems of the 18th century, resulting in a far more positive view of traditional Chinese law.

The Department of Punishment was changed to fa bu ("Department of Law") in the early 1900s legal reforms.

## Republic of China

Law in the Republic of China (Taiwan) is mainly a civil law system. The legal structure is codified into the Six Codes: the Constitution, the Civil Code, the Code of Civil Procedures, the Criminal Code, the Code of Criminal Procedures and in Administrative Laws.

## **People's Republic of China**

After the Communist victory in 1949, the newly established People's Republic of China (PRC) quickly abolished the ROC's legal codes and attempted to create a system of socialist law copied from the Soviet Union. With the Sino-Soviet split (1960-1989) and the Cultural Revolution (1966-1976), all legal work came under suspicion of being counter-revolutionary, and the legal system completely collapsed.

Over the past century China has had several constitutions.<sup>9</sup> The first attempts towards implementing a constitution in China occurred during the final decade (1902-1912) of the Qing Dynasty. Various controlling groups subsequently promulgated different constitutions between that time and the establishment of the PRC in 1949. The PRC had a provisional constitution from its inception until the enactment of its first constitution in 1954. This initial constitution was based on the constitution of the Soviet Union. It was shortly ignored, however, and became without legal force. Although it provided for the election of the National People's Congress (NPC) every four years as the highest state power, these guidelines were not adhered to. The second constitution of the PRC, modeled on the ideology of the Cultural Revolution, came into force in 1975. This constitution subjected the NPC to the Communist Party of China and removed previous constitutional protections such as equality under the law and private-property succession rights. It was also immediately disregarded through breaches of its provisions and non-adherence to guidelines regarding the NPC. The third constitution of the PRC was adopted in 1978. Although this version moved away from the ideologies of the Cultural Revolution, it did retain some remnants of it. It also retained Communist Party control over the state structure.

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<sup>9</sup> Albert Hung-Yee Chen (1992), pp. 42-45

However, reformists subsequently gained power, which led to the breakdown of this constitution as focus shifted to economic construction and modernization.

With the start of the Deng Xiaoping reforms (ca 1979), the need for reconstructing a legal system to restrain abuses of official authority and revolutionary excesses was seen. In 1982 the National People's Congress adopted a new state constitution that emphasized the rule of law under which even party leaders are theoretically held accountable. Legal reconstruction occurred in piecemeal fashion. Typically, temporary or local regulations would be established; after a few years of experimentation, conflicting regulations and laws would be standardized.

The current Constitution of the PRC, enacted in 1982, reflects the model of the first PRC constitution.<sup>10</sup> The Constitution provides for leadership through the working class, led in turn by the Communist Party. This Constitution also contains more extensive rights than any of the previous constitutions. The rights include equality before the law, political rights, religious freedom, personal freedom, social and economic rights, cultural and educational rights, and familial rights. These rights, however, are connected to social duties. The duties include safeguarding the unity, security, honor, and interests of the country, observing law and social ethics, paying taxes, and serving in the military. Neither the rights nor duties provided for in the Constitution are exhaustive.

The Constitution provides that the NPC is the supreme organ of state power over a structure of other people's congresses at various levels.<sup>11</sup>

The NPC has power to:

- amend the Constitution by a two-thirds majority

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<sup>10</sup> Albert Hung-Yee Chen (1992), pp. 45-54

<sup>11</sup> Albert Hung-Yee Chen (1992), pp. 48-55

- promulgate legislation
- elect and remove highest-level officials
- determine the budget
- control economic and social-development planning

The NPC also includes a Standing Committee that functions much as the NPC does when the NPC is not in session. Although the Standing Committee has had some powers since 1955, its law-making powers were initially provided for in the 1982 Constitution. The NPC sits at the highest level in the hierarchy of governmental structure in the PRC. This national level is followed in descending order by the provincial level (including autonomous regions and municipalities directly under the national level), the prefectural level, the county level, and the townships and towns level. Government members at the lower two levels are directly elected, and those at the higher levels are elected by the lower levels. In addition to the NPC, the provincial people's congresses possesses legislative power and can pass laws so long as they do not contravene the Constitution or higher legislation or administrative regulations.

The Constitution states its own supremacy.<sup>12</sup> However, it has been theorized at the supremacy of the Communist Party means that the Constitution and law are not supreme, and that this perspective results from the Marxist view of law as simply a superstructure combined with a lack of recognition of rule of law in philosophical or historical tradition. Although the Constitution provides for legislative, executive, judicial, and procuratorial powers, they all remain subject to Communist Party leadership. Often, important political decisions are made through actions which are not regulated by the Constitution. Additionally, courts need not rely on the Constitution in deciding cases, and they may not review legislation for Constitutionality.

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<sup>12</sup> Albert Hung-Yee Chen (1992), pp. 40-46

Nonetheless the Constitution does provide the linguistic framework for conducting government affairs and describing them in the media.

Since 1979, when the drive to establish a functioning legal system began, more than 300 laws and regulations, most of them in the economic area, have been promulgated. The use of mediation committees, informed groups of citizens who resolve about 90% of the PRC's civil disputes and some minor criminal cases at no cost to the parties, is one innovative device. More than 800,000 such committees operate in both rural and urban areas.

In drafting the new laws, the PRC has not copied any other legal system wholesale, and the general pattern has involved issuing laws for a specific topic or location. Often laws are drafted on a trial basis, with the law being redrafted after several years. This process of creating a legal infrastructure piecemeal has led to many situations where the laws are missing, confusing, or contradictory, and has led to judicial decisions having more precedential value than in most civil law jurisdictions. In formulating laws, the PRC has been influenced by a number of sources, including traditional Chinese views toward the role of law, the PRC's socialist background, the German-based law of the Republic of China on Taiwan, and the English-based common law used in Hong Kong.

Legal reform became a government priority in the 1990s. The Chinese government has promoted a reform it often calls "legalisation". Legalisation, among other things, has provided the régime with a gloss of legitimacy and has enhanced predictability. There have been major efforts in the rationalization and strengthening of the legal structure and institution building in terms of developing and improving the professionalism of the legislature, judiciary and legal profession. As market reforms have deepened and social inequality has widened, legal forums—ranging from

mediation and arbitration commissions to courts—have come to play an increasingly prominent role.

The 1994 Administrative Procedural Law allows citizens to sue officials for abuse of authority or malfeasance. In addition, the criminal law and the criminal-procedures laws were amended to introduce significant reforms. The criminal-law amendments abolished the crime of "counter-revolutionary" activity. However political dissidents are sometimes charged on the grounds of subverting state security or of publishing state secrets. Criminal-procedures reforms also encouraged establishment of a more transparent, adversarial trial process. Minor crimes such as prostitution and drug use are sometimes dealt with under re-education through labor laws. The PRC constitution and laws provide for fundamental human rights, including due process, but some have argued that they are often ignored in practice.<sup>13</sup> The basic principles of Chinese legislative drafting include generality and flexibility. Sometimes excessive generality and omissions in Chinese law, coupled with the wide discretionary powers conferred on local authorities to implement laws, undermines the predictability and certainty of law. Furthermore, as Chinese law is intended to be educative, the language of the law is that of the ordinary language comprehensible to the average citizen, although many laws are drafted in broad and indeterminate language.

As a result of a pending trade war with the United States of America over violations of intellectual property rights of American corporations in the early 1990s, the People's Republic of

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<sup>13</sup> See Human rights in the People's Republic of China.



China's trademark law has been modified and as of 1995 offers significant protections to foreign trademark-owners.<sup>14</sup>

After their respective transfers of sovereignty, Hong Kong and Macau continue to practice English Common Law and Portuguese legal systems respectively, with their own courts of final appeal. In other words, Hong Kong and Macau lie outside of the legal jurisdiction of the People's Republic of China, except on constitutional issues.

Due to the growing sophistication of Chinese laws, the expansion of the rule of law, as well as an influx of foreign law firms, China has also begun to develop a legal-services market. Foreign lawyers have accompanied foreign capital and their clients to China, which has had an immense influence on the promulgation of new Chinese laws based on international norms, especially in regards to intellectual property and corporate and securities law.<sup>15</sup>

On July 1, 1992, in order to meet growing demand, the Chinese government opened the legal-services market to foreign law-firms, allowing them to establish offices in China when the Ministry of Justice and the State Administration of Industry and Commerce (SAOIC) issued the Provisional Regulation of Establishment of Offices by Foreign Law Firms regulation.<sup>16</sup>

As a result, many foreign law firms, including the United States' Baker & McKenzie and Paul, Weiss, Rifkind, Wharton & Garrison, along with several British firms, incorporated consulting firms in their home countries or in Hong Kong and then set up subsidiaries in Beijing or Shanghai to provide legal services.

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<sup>14</sup> Alford, William P. (1995). *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*. Stanford, California: Stanford University Press. ISBN 0-8047-2270-6

<sup>15</sup> Alford, William P. (1995). *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*. Stanford, California: Stanford University Press. ISBN 0-8047-2270-6.

<sup>16</sup> The Internationalization of China's Legal Services Market

However, many regulatory barriers to entry remain to protect the domestic legal industry. Issues relating to Chinese law must be referred to Chinese law firms, and foreign lawyers are also prohibited from interpreting or practicing Chinese law or from representing their clients in court. However, in reality many foreign law firms interpret laws and manage litigation by directing the local firms they must have cooperative relationships with. In this regard, China's restrictive legal market can be directly tied to a phobia of people asserting their legal rights in the face of rampant corruption. Information received from the State Council Legislative Office suggests that China may be allowing foreigners to sit the Chinese Lawyers Examination, or have a mutual recognition treaty with other countries to allow foreign lawyers to conduct non-litigation Chinese legal work.

While China's legal market continues to open up, China's laws and regulations have helped the development of a number of domestic Chinese firms specializing in working with foreigners to meet the demand of a booming economy. According to Asia Law and Business magazine China Awards, the top China firms were King & Wood PRC Lawyers, Commerce & Finance Law Offices, Fangda Partners, Haiwen & Partners, Jun He Law Offices and Lehman, Lee & Xu.<sup>17</sup>

### **Legal Rights**

Classical Chinese does not have a semantic equivalent to the concept of "rights". The idea of rights was introduced to China from the West. Its translation as quánlì was coined by William Alexander Parsons Martin in 1864, in his translation of Henry Wheaton's Elements of International Law.

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<sup>17</sup> ALB Awards

## Rule of Law

One of the most commonly used phrases in contemporary China, by legal scholars and politicians alike, is fǎzhì. Fǎzhì can be translated into English as "rule of law", but questions have often been asked whether Chinese leaders meant "rule by law", which means the instrumental use of laws by rulers to facilitate social control and to impose punishment as understood in the Legalist tradition.<sup>[17]</sup> The related concepts of yǐ fǎzhì guó: "governing the nation in accordance with law") and jiànshè shèhuì zhǔyì fǎzhì guójiā (: "building a socialist rule of law state") have been part of the Chinese Communist Party's official policy since the mid-1990s. In 1999, the NPC adopted an amendment to the Chinese Constitution, incorporating both concepts in Article 5.

The existence of the rule of law in China has been widely debated.<sup>18</sup> When discussing Chinese law, it is worth noting that various expressions have been used, including "strengthening the law," "tightening up the legal system," "abiding by the law in administration," "rule by law," and the "rule of law". Different shades of meanings have been attached to each of these terms, but Chinese officials and scholars have employed the expressions rather loosely and sometimes interchangeably.<sup>19</sup> However, the central government had originally preferred the expression, "strengthening the law/legal system" to "the rule of law". It was thought that the latter might give a controversial connotation of the instrumentality, while the former conveyed a straightforward meaning of strengthening the law and institutions. "Strengthening the law"

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<sup>18</sup> Randall Peerenboom & He Xin, Dispute Resolution in China: Patterns, Causes, and Prognosis, 4 East Asia Law Review (2009), found at Penn. ALR website

<sup>19</sup> Linda Chelan Li, The "Rule of Law" Policy in Guangdong: Continuity or Departure; Meaning, Significance and Processes. (2000), 199-220

meant reform of legislation and enforcement of laws.<sup>20</sup> There are differing theories of the rule of law. One theory is the "thin", or formal, theory of rule of law, and the other is the "thick" theory.

The "thin" theory of rule of law is described by Randall Peerenboom: as at the basest level incorporating a legal system that imposes meaningful restraints on the state and individuals in ruling power, that the law is supreme, and that all citizens are equal before the. According to Lon Fuller's account of thin theory, rule of law exists in a society when the laws of that society are "general, public, prospective, clear, consistent, capable of being followed, stable, and enforced. The thin theory has also been explained by Joseph Raz as emphasizing the formal or instrumental aspects of a legal system regardless of whether it is part of a particular political structure, i.e. a democratic or non-democratic society. Thick theory rule of law espouses all the elements of thin theory in addition imposes a political, social, and economic concept into the rule of law. The rule of law is regarded by some as presupposing political or economic structures of liberal democracy, human rights and other ideal socio-legal order. Some scholars believe that given China's socialist and non-democratic political system and practice, it is at best regarded as a country of rule by law with law used by the state as an instrument for social control. However, others rely on the formal or thin theory of rule of law to interpret fazhi as a legal reality in China. Additionally, some believe that China may still fall short of the thin theory of rule of law.

Of particular relevance to the second principle set out above, was the enactment of the Administrative Permission Law of the PRC (APL) on 27 August 2003, effective from July 2004. The APL for the first time requires all laws and regulations that subject any civil act to approval requirements to be published.<sup>21</sup>

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<sup>20</sup> Linda Chelan Li, The "Rule of Law" Policy in Guangdong: Continuity or Departure: Meaning, Significance and Processes. (2000), 199-220

<sup>21</sup> "China Briefing Business Reports" (PDF). Asia Briefing. 2008. Retrieved 2009-02-08

The APL also provides that only those laws adopted by the National People's Congress or its Standing Committee, administrative regulations promulgated by the State Council, and local regulations adopted by the local people's congresses may impose administrative approval requirements. Individual ministries or agencies (central or local) do not have such powers except in specified circumstances. This is consistent with the hierarchy of laws and regulations provided under the Legislative Law of the PRC. The enactment of the APL represents an encouraging step forward.<sup>22</sup>

Despite the newly elevated role of courts in Chinese society, there still remains some consensus about defects in China's legal system in regards to progressing towards the rule of law. Scholars point to the following defects as slowing movement toward rule of law. These include:

- First, the National People's Congress is ineffective at executing its constitutional duty to legislate and supervise the government.<sup>23</sup>
- Second, the Chinese Constitution is not treated as the supreme law, nor is it enforced.<sup>24</sup>
- Third, the judiciary is not independent from political pressure. On the other hand, direct intervention in particular cases by the CCP has lessened in recent years, as has the direct influence of the CCP on the legislative process.<sup>25</sup>
- Fourth, there is a high level of corruption among public officials. Personal favors, bribery, and taking of public monies are all too common at all levels of government.<sup>26</sup>

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<sup>22</sup> "China Briefing Business Reports" (PDF). Asia Briefing. 2008. Retrieved 2009-02-08

<sup>23</sup> Albert Hung-yee Chen, *An Introduction to the Legal Systems of the People's Republic of China*, Butterworths Asia (1992), 80-82

<sup>24</sup> Chen, 107; Randal Peerenboom, *China's Long March Toward Rule of Law*, Cambridge University Press (2002), 61

<sup>25</sup> Chen, 106, 117-121

<sup>26</sup> Peerenboom, 295-297

- Finally, the legal profession is inadequate for lack of qualified attorneys and judges.<sup>27</sup>

This failure is being remedied by legislation aimed at instituting higher educational standards for judges, opening more courts and law schools throughout China.<sup>28</sup>

In the 2000s, the Weiyan movement began in the PRC, seeking to advance citizens' rights partly by petitioning for enforcement of existing laws, and partly through activism. Lawyers in the movement have seen some court victories, but in other cases they are unsuccessful.

### **Judicial Branch**

The judicial branch is one of three branches of government in the People's Republic of China, along with the executive and legislative branches. Strictly speaking, it refers to the activities of the People's Court system. The Chinese court system is based on civil law modeled after the legal systems of Germany and France, but with local characteristics,

Constitutionally, the court system is intended to exercise judicial power independently and free of interference from administrative organs, public organizations, and individuals. Yet the constitution simultaneously emphasizes the principle of the "leadership of the Communist Party."<sup>29</sup> As stated by former SPC President Xiao Yang in 2007, "the power of the courts to adjudicate independently doesn't mean at all independence from the Party. It is the opposite, the embodiment of a high degree of responsibility vis-à-vis Party undertakings."<sup>30</sup>

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<sup>27</sup> Chen, 121-123

<sup>28</sup> Peerenboom, 290-293

<sup>29</sup> Human Rights Watch: Walking on Thin Ice April 28, 2008.

<sup>30</sup> Xiao Yang, "A correct concept of judicial authority is the proper meaning of rule of law" China Court Daily, 2007-10-18

The judicial system of the China is established in Articles 123-135, and consists of the people's courts, the Supreme People's Court, the people's procuratorates, the Supreme People's Procuratorate, military procuratorates and other special people's procuratorates. Article 129 refers to the people's procuratorates as "state organs for legal supervision." In 1983 the NPC amended the Organic Law of the People's Procuratorates, which included an enumeration of the powers and functions of the procuratorates. The functions seem to set up an organization which initially performs similar to a prosecutor in the United States, in that it oversees investigations by the public security

According to the Constitution of the People's Republic of China of 1982 and the Organic Law of the People's Courts that went into effect on January 1, 1980, the Chinese courts are divided into a four-level court system:

- At the highest level is the Supreme People's Court (SPC) in Beijing, the premier appellate forum of the land, which supervises the administration of justice by all subordinate "local" and "special" people's courts. It is the court of last resort for the whole People's Republic of China except for Macau and Hong Kong.
- Local people's courts: the courts of the first instance.
- Handle criminal and civil cases. These people's courts make up the remaining three levels of the court system and consist of "high people's courts" at the level of the provinces, autonomous regions, and special municipalities; "intermediate people's courts" at the level of prefectures, autonomous prefectures, and municipalities; and "basic people's courts" at the level of autonomous counties, towns, and municipal districts.
- Courts of Special Jurisdiction (special courts) comprises the Military Court of China (military), Railway Transport Court of China (railroad transportation) and Maritime Court of China (water transportation), and forestry.

The court system is paralleled by a hierarchy of prosecuting offices called people's procuratorates, the highest being the Supreme People's Procuratorate<sup>31</sup>.

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organs and decides which cases will be prosecuted. However, the oversight of the procuratorates extends beyond investigation and trial, into supervision of the legal activities of the people's courts, the execution of judgments, and the activities of prisons

<sup>31</sup> The Supreme People's Procuratorate (Chinese; pinyin: Zuìgāo Rénmín Jiǎncháyuàn) is the highest agency at the national level responsible for both prosecution and investigation in the People's Republic of China.

Hong Kong and Macau have separate court systems due to their historical status as British and Portuguese colonies, respectively.

### **Court Structure**

There is a hierarchy within the court structure from the top down: The Supreme People's Courts, the Higher People's Courts, the Intermediate People's Courts, and the Basic People's Courts. The Basic People's Courts are comprised of more than 3,000 courts at county level, which are further subdivided into about 20,000 smaller units referred to as people's tribunals located in towns and villages. There are 376 Intermediate People's Courts and 31 Higher People's Courts located in the provinces.<sup>32</sup> Additionally, there are a number of specialized courts, for example those dealing with railway transportation, forest affairs, the People's Liberation Army (PLA) and maritime issues. Jurisdiction is allocated partially through the Constitution, the 1979 Organic Law of the People's Courts, the Law of Criminal Procedure, the Law of Civil Procedure, and the Law of Administrative Procedure.

Litigants are generally limited to one appeal, on the theory of finality of judgment by two trials. Cases of second instances are often reviewed *de novo* as to both law and facts. Requests for appellate review take the form of appeals and protests (in criminal cases). Appeals are lodged by parties to the case, defendants and private prosecutors. Protests are filed by the procuratorate in criminal cases when it is believed that an error has occurred in the law or facts as determined by the judgment or order of the court of first instance. In civil cases the procuratorate does not possess a right to file a direct protest, but it can initiate adjudication supervision via a protest. Adjudication supervision refers to a type of discretionary post-“final” decision review, which may occur in certain situations in criminal cases.

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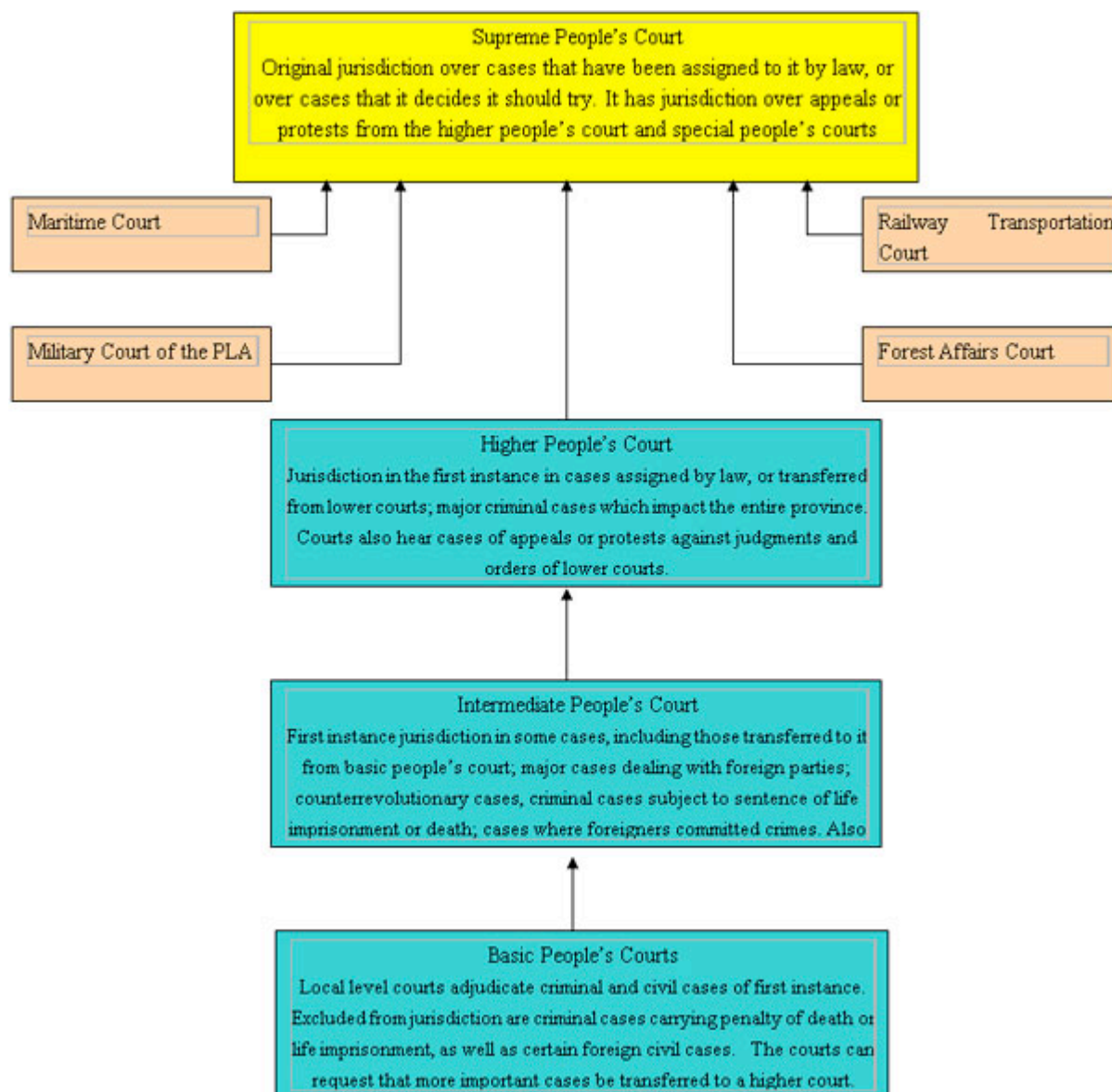
<sup>32</sup> See Albert Hy Chen, *An Introduction to the Legal System of the People's Republic of China* 107-108 (1998).



## Legal System of China

I. The Trial System; II. Prosecution System; III. System Governing Investigations; IV. Jail System; V. Arbitration System; VI. Lawyer System; VII. Mediation System; VIII. Public Notary System; IX. System for Judicial Administration; X. State Compensation System ; XI. Legal Assistance

### Hierarchy of Courts



## **I. The Trial System**

The trial system refers to the court system governing the establishment of courts, judges, and trials.

### **Organization and Responsibilities of People's Courts**

According to the current Constitution, and the Law on the Organization of People's Courts, People's Courts represent the main trial organ of the state. Organizationally, this court system consists of local courts, special courts and the Supreme Court, with all the first two subject to the supervision of the latter. Local courts are established in accordance with the administrative divisions, while special courts are set up where necessary.

1. Local courts are divided into three levels: Grassroots, Intermediate and Higher.

Under the Law on the Organization of People's Courts, grassroots-level courts consist of tribunals in counties/autonomous counties, cities without administrative districts, or administrative districts of cities. Their responsibilities are:

Try criminal, civil and administrative cases as courts of first hearing, except where otherwise provided for by law. Cases deemed to be of a serious nature that should be handled by superior courts can be referred to those superior courts;

Handle civil disputes and misdemeanors that do not need trials;

Guide the work of the People's Arbitration Committees.

To facilitate lawsuits, grassroots courts may set up tribunals, which are not trial units, but have the responsibility to hear general civil and misdemeanors, guide the work of People's Arbitration Committees, publicize laws and regulations, and handle petitions. Their judgments and decisions represent the judgments and decisions of the grassroots People's Courts.

Intermediate courts are those set up in prefectures, cities directly under provinces (autonomous

regions and municipalities directly under the central government) and districts in the four municipalities directly under the central government (hereinafter referred to as "municipalities").

Their responsibilities include:

Try the following categories of cases:

- a) First-hearing cases under their jurisdiction, as prescribed by law. According to the Law on Criminal Procedures, these cases include those involving national security; criminal cases that may involve life imprisonment or the death penalty; criminal cases committed by foreigners or cases involving Chinese citizens violating the lawful rights and interests of foreigners. According to the Law on Civil Procedures, civil cases heard by intermediate courts are major foreign-related cases; cases of major implications within their jurisdictions; and cases that intermediate courts are ordered to hear by the Supreme Court. In addition, according to the Law on Administrative Procedures, intermediate courts are authorized to hear the following cases: verification of patent rights; customs handling; suits against administrative actions taken by State Council departments or governments of the provinces (autonomous regions, municipalities); other important and complicated cases;
- b) First-hearing cases transferred by grassroots courts;
- c) Cases appealing or protesting the verdicts and decisions of grassroots courts.

For criminal, civil and administrative cases that intermediate courts deem to be of a serious nature, the intermediate court may request that the cases be transferred to superior courts.

Supervise the performance of grassroots courts within their jurisdiction. They have the power to examine or order grassroots courts to re-examine verdicts or decisions issued by those courts that have already taken effect but that have been found to contain errors.

According to the law on court organization, Higher Courts are set up in provinces (autonomous

regions and municipalities). Their responsibilities include:

Try the following categories of cases:

- a) Criminal, civil and administrative cases of major proportions and complications under their jurisdiction, as provided for by the law;
- b) First-hearing cases transferred by lower courts;
- c) Cases appealing or protesting the verdicts and decisions made by lower courts. Higher courts in areas where a maritime court is located are authorized to try cases appealing the verdicts and rulings made by the maritime court;
- d) Protested cases submitted by prosecutors in accordance with trial-monitoring procedures.

Review first-hearing cases involving the death penalty ruled by intermediate courts where the accused renounces the right to appeal. If the Higher Court raises no objection to the death penalty, it then files the case with the Supreme Court for verification; if it disagrees with the death penalty ruling, it can either re-examine the case or refer the case back to the Intermediate Court.

Review cases submitted by intermediate courts involving a death penalty with two years' reprieve.

Approve certain death-penalty cases as authorized by the Supreme Court.

Supervise trials by lower courts. For verdicts or judgments passed by lower courts that have been found to contain errors, higher courts are authorized to hear or ask lower courts to reexamine the case.

2. Special courts are courts set up in special departments for special cases wherever necessary.

Currently, China has special courts handling military, maritime, railway cases.

Military courts are set up at three levels: grassroots; Great Military Region, Services and Arms;

and the PLA Court.

The PLA Court is the supreme military court whose responsibilities include:

Try first-hearing cases involving crimes committed by individuals above the division commander level.

Try foreign-related criminal cases.

Try second-hearing cases, verification and review of cases involving death penalty.

Great Military Region and Services and Arms Courts are intermediate courts set up in great military regions, the navy, the air force, the Second Artillery Army and the PLA General Headquarters. Their responsibilities include:

Try first-hearing cases involving crimes committed by individuals at the deputy division commander and regiment level.

Try cases that may involve death penalty and cases under their jurisdiction as authorized or designated by superior military courts.

Try cases appealing or protesting rulings or verdicts passed by lower courts.

Grassroots military courts consist of tribunals set up in armies, provincial military regions, naval fleets, and air forces within Great Military Regions and in army units deployed in Beijing directly under the headquarters. Their responsibilities include:

Try cases involving crimes committed by individuals under the battalion commander level and first-hearing cases that may involve a penalty up to life imprisonment.

Try first-hearing cases under its jurisdiction as authorized or designated by superior military courts.

Maritime courts are special courts set up to try first-hearing maritime or sea-shipping cases for the purpose of exercising judicial jurisdiction over maritime affairs. In May 1989, the Supreme

People's Court made a Decision on the Scope of Cases to Be Handled by Maritime Courts. That decision specified that maritime courts handle maritime or commercial cases between Chinese legal persons/citizens, between Chinese legal persons/citizens and foreign legal persons/citizens, and between foreign legal persons/citizens. These cases fall into 14 subsets in five categories: Ten categories of cases involving maritime torts and disputes, including: damage claim cases involving collision of vessels; damage claim cases involving vessels colliding into buildings and facilities on the sea, sea-linked waters and ports; claim cases involving vessels discharging or leaking hazardous materials or waste water causing water pollution or damaging other vessels or cargo; claim cases involving casualties in the course of sea-borne shipping or operations on the sea, sea-linked waters and ports.

Fourteen categories of commercial cases, including: cases involving shipping contract disputes; contract dispute cases involving passengers and baggage; cases involving seaman labor contract disputes; cases involving maritime rescue and salvage contract disputes; cases involving maritime insurance contract disputes.

Eleven other categories of maritime cases, including: cases involving major liabilities in shipping and maritime operations; cases involving port operation disputes; cases involving general average disputes; cases involving offshore development and exploitation; cases involving the ownership, proprietorship, mortgage or preferred maritime right of claim of vessels; administrative cases involving maritime or inland river authorities; and cases involving maritime fraud.

Five categories of cases involving maritime enforcement, including: cases involving compulsory enforcement requested by maritime and inland river authorities; cases involving applications for enforcement of arbitration awards filed by litigants; cases involving applications filed with

Chinese maritime courts by litigants for recognition and enforcement of arbitration awards given by arbitration agencies in foreign countries or regions, in accordance with provisions of the convention on recognition and enforcement of foreign arbitration; cases involving applications filed by litigants to Chinese maritime courts for assistance in enforcement of rulings given by foreign courts, in accordance with judicial assistance accords China signed with foreign countries, or with the principle of reciprocity.

Two categories of cases involving requests for preservation: cases involving pleas for detaining vessels prior to the opening of trial; cases involving pleas for detaining cargoes aboard ships or fuel for the ships prior to the opening of trial.

Railway transportation tribunals are special courts set up along railways that try the following types of cases:

Criminal cases investigated by railway public-security authorities and filed by railway prosecutors.

Cases involving economic disputes. In accordance with rulings of the Supreme People's Court, these cases fall into 12 categories: cases involving railway cargo transportation contract disputes; cases involving disputes over the execution of international railway collaboration contracts; cases involving economic disputes within the railway system; cases involving torts that have resulted in damages to railways in violation of railway safety regulations; and tort cases involving human and property losses caused by railway operations and dispatch operations, where the litigant chooses to bring action to the railway tribunal.

3. The Supreme People's Court is located in Beijing, capital city of China. It is the highest judicial organ, exercising the highest judicial power while supervising lower courts and special courts. The Supreme People's Court is presided over by one president and a number of vice

presidents, chief justices and justices. The Supreme People's Court exercises the following powers:

Supervise lower courts and special courts. For judgments and rulings passed by lower and special courts that have been found to contain errors, the Supreme People's Court have the power to hear the cases or order lower courts to reexamine the cases.

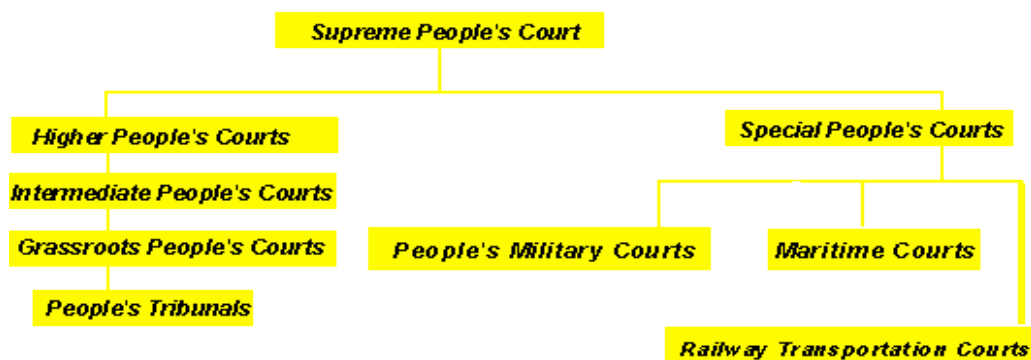
Try the following cases:

- a) First-hearing cases falling under its jurisdiction as prescribed by the law or as deemed necessary by the court itself. The Law on Criminal Procedure stipulates that the Supreme People's Court has first-hearing right to try criminal and civil cases of major proportions nationwide. The Law on Administrative Procedure provides that the Supreme People's Court has first-hearing jurisdiction over administrative cases of a material and complicated nature.
  - b) Cases appealing or protesting rulings of higher courts and special courts, and protested cases submitted by the Supreme People's Procuratorate in accordance with legal procedures.
- Approve death penalty cases.

Issue judicial interpretations on how to apply law and writs.

Lead and manage judicial administration of courts at all levels across the country.

### **Organizational structure of the court system in China:**





## **Judge System**

The judge system, a major component of the judiciary, refers to all the rules and institutions related to the election and qualification of judges, forms of election, tenures, rewards and penalties, and salary and compensation of judges. China promulgated a Judge Law on February 28, 1995, which contains 17 chapters and 42 articles.

### **1. Qualifications of Judges**

Judges exercise state judicial power in accordance with law. They include presidents and vice presidents of courts at various levels, members of judicial committees, presidents and vice presidents of tribunals, judges and assistant judges. The responsibility of judges is to participate in collegiate panels or be independent judges at trials.

Judges are elected with the following qualifications:

A citizen of the People's Republic of China;

At least 23 years of age;

Supports the Constitution of the People's Republic of China;

In good political, professional and moral standing;

In good health;

A graduate of law from an institution of higher learning, or a non-law graduate from an institution of higher learning with in-depth knowledge of law, with two years of working experience; or holders of a bachelor's degree in JD with a full year of working experience; those holding a Master's or Ph.D. degree in JD are not subject to the working-experience limit described above.

Those that have been penalized for crimes or have been dismissed from their public offices shall not be elected judges.

In addition, according to the Law on the Organization of People's Courts, presidents, vice presidents, presiding judge and deputy presiding judge of tribunals, judges and assistant judges, as well as People's Assessors shall be citizens with voting rights and rights of being elected, 23 years of age and with legal knowledge.

## 2. The Appointment and Removal of Judges

The Constitution and laws provide for the powers and procedures for appointing and removing judges.

Presidents of courts at local levels are elected and removed by the People's Congress at the same level and the tenure of the presidents is the same as the People's Congress; the president nominates the vice president, members of the Judicial Committee, presiding judges, deputy presiding judges and judges for appointment and removal by the Standing Committee of the People's Congress at the same level. Assistant judges of a court are appointed and removed by the president of the court. Judges sitting at special courts are elected and removed with procedures separately set forth by the Standing Committee of the National People's Congress.

Primary judges and assistant judges are recruited from among qualified candidates through open examination. The president, vice president, members of the Judicial Committee, presiding judge and deputy presiding judge shall be selected from among candidates who have practical working experience.

Judges shall not concurrently hold positions in the Standing Committee of the People's Congress, executive offices, the procuratorate, business, non-profit institutions, or in the legal profession.

Judges who have lost their citizenship, been found to be incompetent, been unable to perform

their duties for a protracted period of time due to disciplinary violations, criminal records or health reasons, shall be removed from their position in accordance with legal procedures.

### 3. Safeguards for Judges

The Judge Law provides judges with the following safeguards:

Professional safeguards: Judges shall be granted adequate powers and working conditions in order to perform their duties; they shall be free from interference in exercising their judicial powers from any administrative authorities or individual; they shall not be removed, demoted, dismissed or disciplined unless for statutory reasons and procedures.

Salary safeguards: Judges shall receive remuneration for their performance of duties and enjoy insurance and other benefits.

Corporal safeguard: Judges shall receive legal protection for their corporal, property and residential safety.

Others: Judges shall have the right to resign, petition or accuse, or participate in training.

### 4. Promotions

Judges are divided into 12 levels, with the president of the Supreme People's Court being the Chief Justice and those between Level 2 and 12 being labeled Justice, Senior Judge and Judge. The level of seniority is determined by the judge's position, performance, professionalism and seniority. Promotions are based on annual performance reviews, which are conducted by the courts where the judges serve. Performance reviews shall be conducted in an objective, impartial manner and combine evaluations by both superiors and subordinates.

## 5. Rewards and Penalties

Judges are rewarded for their outstanding performance and contributions. Rewards can be public recognition of performance, Third Reward, Second Reward, First Reward and the conferring of an honorary title.

Judges must not engage in any of the following acts: disseminate information harmful to the reputation of the state; participate in illegal organizations; participate in anti-government gatherings, demonstrations and protests; participate in strikes; embezzle or take bribes; practice favoritism in breach of law; extort confessions by torture; conceal or forge evidence; leak state secrets or confidential information related to judicial proceedings; abuse power to violate the lawful rights and interests of citizens, legal persons or other organizations; neglect duties resulting in wrong rulings or serious damages to the litigant(s); purposefully delay proceedings; abuse power to seek profit for themselves or others; engage in business activities; meet in private with litigants and their representatives and accept their gifts and favors.

Judges who engage in any of the above acts will be disciplined to varying degrees. These can be warnings; a record of demerit in personal files; a record of a major demerit; demotion; removal from position; dismissal from office. A removal from position is accompanied by a lowering of salary and rank; those who have committed a crime will be prosecuted for their criminal liabilities.

## 6. Other Provisions

Judges enjoy rights of retirement, resignation, training, petition and complaint. After retirement, they shall be entitled to pension insurance and other benefits as prescribed by the state.

## Forms of Court Trials

According to the Law on the Organization of People's Court and other laws, trials of People's Courts take the following forms:

### 1. Sole Judge Court

This kind of court is presided over by one judge for trying simple cases. Legally speaking, these cases include:

First-hearing criminal cases handled upon complaint and other minor criminal cases;

Simple civil cases and cases involving economic disputes handled by grassroots courts and their detached tribunals;

Cases tried using special procedures, except for cases involving voters' qualification or other complicated cases, which should be tried by a collegiate panel.

### 2. Collegiate Panels

Collegiate panels consist of at least three judges or a combination of judges and People's Assessors. First-hearing criminal and civil cases are generally tried by a collegiate panel except for those simple cases for which a sole judge is sufficient. First-hearing administrative cases, without exception, are handled by a collegiate panel; second-hearing, reexamined cases and death penalty verification cases are handled by a collegiate panel.

A collegiate panel, as a basic form of the People's Court, is not inflexible in its composition; rather, its members are appointed on a case-by-case basis. The president or the presiding judge designates a judge to be the chief judge. When the president of the court or the presiding judge of a tribunal themselves attend a case, they serve as the chief judge concurrently. When assessing a case, the collegiate panel should follow the principle of the minority submitting to the opinions of the majority when disagreement arises. The opinions

of the minority, however, should be recorded in the court log with signatures of members of the panel.

### 3. Judicial Committee

According to the Law on the Organization of People's Courts, courts at all levels set up a Judicial Committee, the members of which are nominated by the president for appointment by the People's Congress at the same level. The Judicial Committee is presided over by the president of the court and its responsibilities include:

Deliberate on major, complicated cases;

Summarize judicial practices;

Discuss other judicial issues.

## **The Fundamentals of China's Judicial System**

### 1. Open Trials

Article 125 of the Constitution provides that open trials mean that all cases tried by courts should be conducted openly unless otherwise provided for by the law. Even cases that are not tried openly should be publicized when the verdict is passed. "Open" means the entire process should be open to public auditing and to the press. For cases that, by law, should be open to the public, the court should announce before the trial opens the outline of the case, the name of the litigant, the time and the place of the trial.

Article 7 of the Law on the Organization of People's Courts provides that the following three types of cases are not open to the public:

Cases involving state secrets;

Cases involving personal privacy;

Cases involving crimes committed by minors.

In addition, in accordance with provisions of civil procedure law, cases involving divorce and trade secrets may, upon request by litigants, not be open to the public.

## 2. Defense System

The Constitution and the law on the organization of courts provide that the accused is entitled to the right to a proper defense. The law on criminal procedure further provides that the courts have the obligation to ensure that the accused obtains defense, and sets forth specific procedures that any suspects or accused may, in addition to exercising the right to defend themselves, appoint one or two representatives to defend them. Those eligible to defend the accused include:

### **Lawyers;**

Persons recommended by people's organizations or the employer of the suspect or the accused;

The custodian or relative of the suspect or the accused.

However, those that are currently serving a sentence or those that have been deprived of, or are restricted in personal freedom should not represent the suspect or the accused.

For public-prosecuted cases, the suspect has the right to appoint a defender starting from the day the case is transferred for prosecution; for privately prosecuted cases, the accused has the right to appoint a defender anytime. Should the accused, for economic or other reasons, be unable to appoint a defender to a court where a public prosecutor appears, the court may designate a legal-aid lawyer to defend him or her free of charge. Furthermore, when the accused is blind, deaf, mute or a minor and has not appointed a defender, or when the accused may face death penalty and does not appoint a defender, the court should designate a

legal-aid lawyer to defend him or her free of charge.

### 3. Second Instance Being Final

Article 12 of the Law on the Organization of People's Courts states that the courts have to try cases on two levels, with the second instance being the final judgment. This means a case is closed after going through two levels of trial.

The courts practice a four-level system in which the second instance is the final judgment. Jurisdiction depends on the nature and complexity of the case. Should the litigant not agree with the judgment or ruling of the first instance, he or she may, within a specified period of time, appeal to the higher court. If the procuratorate believes that the first-instance ruling or judgment is indeed mistaken, it may, within a specified period of time, protest the ruling or judgment to the higher court. If, within the specified period of time, the litigant fails to appeal and the procurator fails to protest, then the first-instance judgment or ruling stands as the legally binding judgment or ruling. The superior court, after reviewing appealed or protested cases in accordance with second-instance procedures, passes a judgment or ruling that is the final judgment or ruling. Except for cases involving the death penalty, all other cases take legal effect immediately upon announcement.

In accordance with legal provisions, the following cases are tried with the first instance being final:

First-instance cases handled by the Supreme People's Court;

Cases heard by grassroots courts in accordance with civil procedures, such as voter qualification cases, cases determining citizens to be legally disabled or partially disabled, cases pronouncing persons missing, cases pronouncing persons dead, or cases determining



property unclaimed.

#### 4. System of Collegiate Panels

Article 10 of the Law on the Organization of People's Court provides that courts shall practice a system of collegiate panels when trying cases. Except for first-instance simple civil cases and other cases otherwise provided for by the law, all cases are tried with a collegiate panel present. This system refers to a panel of at least three judges or a combination of at least three judges and People's Assessors, as opposed to trials conducted by one judge alone. The composition of the collegiate panel should be an odd number, usually three, and the principle of the minority submitting to the majority is observed, provided that the opinions of the minority are recorded in the court log. The judges and People's Assessors enjoy the same rights.

#### 5. Challenge System

The challenge system refers to a system in which judicial officers shall or are required to withdraw from the cases because of their special relationship with these cases or litigants, which may undermine the impartiality of the judgment.

In accordance with criminal procedures, judges, prosecutors and investigators who meet any of the following conditions shall voluntarily withdraw or be challenged by litigants or their representatives to withdraw from the cases:

They themselves are litigants or next-of-kin of litigants;

They themselves or their close relatives hold stakes in the case;

They have held the positions as witness, expert witness, defender or the advocate of litigants in incidental civil actions;

They have other types of relations with litigants to the suit that may affect the fair handling of the case.

These restrictions apply to secretaries, translators and experts as well.

The withdrawal of judges is decided by the president of the court; while the withdrawal of the president is decided by the Judicial Committee of the court.

The civil procedure law and administrative procedure law have similar provisions.

#### 6. System for Verification of Death Penalty Cases

This system refers to the procedures and rules that have to be observed in verifying death penalty cases.

The Law on the Organization of People's Courts and the Criminal Procedure Law provide that all death penalty cases, unless handled by the Supreme People's Court, are reported to the Supreme People's Court for verification and approval. The Supreme People's Court, if necessary, may authorize Higher People's Courts at the provincial level to exercise that power for death-penalty cases involving homicides, rape, robbery, explosion and other crimes that seriously threaten public security and social security. Cases involving a death penalty with a two-year probation ruled by intermediate courts are verified and approved by higher courts. Death penalty cases ruled by intermediate courts are first verified and approved by higher courts before being submitted to the Supreme People's Court for verification and approval. Should the higher court disagree with the death penalty verdict, it may want to hear the case or refer it back for re-examination.

#### 7. System for Judicial Supervision

Also known as the re-examination system, this refers to a special arrangement for the court to reexamine judgments and rulings that have already taken effect. It actually represents a

remedy to the system of second instance being final.

According to the Law on the Organization of People's Courts and the three procedural laws on civil, criminal and administrative cases, China's system of judicial supervision comprises the following components:

The precondition for initiating the judicial supervision procedure is that judgments and rulings that have already taken effect have been found to contain errors in establishment of facts or application of laws.

The judicial supervision procedure can only be initiated by presidents of courts, superior courts, superior procuratorates, the Supreme People's Court and the Supreme People's Procuratorate.

The way this procedure works is that presidents of courts ask the Judicial Committee to handle the matter; the Supreme People's Court asks or designates lower courts to reexamine the case; the Supreme People's Procuratorate and higher procuratorates protest a case in accordance with procedures for judicial supervision.

In reexamining a case under the judicial supervision procedure, courts form a separate Collegiate Panel. If the original case was a first-instance case, then it should be re-examined in accordance with first-instance procedures; rulings or judgments arising thereof are subject to appeal or protest. If the original case was a second-instance case, or was tried by higher courts, then second-instance procedures should be followed and rulings or judgments arising thereof shall be final.

#### 8. System of Judicial Assistance

This refers to a practice whereby the judicial authorities of a country (usually courts), in accordance with international treaties or bilateral/multilateral agreements (or the principle of

reciprocity in the absence of a treaty), perform the judicial procedures at the request of another country's judicial authorities or parties to a lawsuit.

Judicial assistance in China consists of three aspects:

Delivery of documents and investigations in search of evidence;

Mutual recognition and enforcement of court rulings and arbitration awards;

Criminal judicial assistance, including delivery of documents, investigation in search of evidence and extradition of criminals.

## **II. Prosecution System**

The prosecution system refers to the nature, mission and organizational structure of a country's prosecution apparatus, as well as the principles for its organization and activities and working institutions.

According to the Law on the Organization of People's Procuratorates, the People's Procuratorates are the State's organs for legal supervision that exercise the power of prosecution. They are elected by and report to the People's Congress at the same level.

### **Organization of Procuratorates**

Article 2 of the Law on the Organization of People's Procuratorates states that procuratorates are set up at the supreme and local levels; in addition, special procuratorates such as military procuratorial organs are set up. Such a top-down structure reflects the pyramid structure of the country's prosecution, in which the superior leads the subordinate. This is noticeably different from the court system in which the higher court supervises the lower court. This centralized system is created to maintain the consistency of the country's legal structure.

The Supreme People's Procuratorate leads local and special procuratorates. Local means provincial, autonomous regional and municipal procuratorates and their branches, as well as

procuratorates at the autonomous prefecture/cities directly under provincial governments, county, city, autonomous city and urban district levels. Special procuratorates include military and railway transportation prosecution. Procuratorates are established at levels corresponding to those of courts so that cases can be prosecuted in accordance with legal procedures.

### Responsibilities of Procuratorates

According to the Law on the Organization of People's Procuratorates and other related laws, procuratorates exercise the following powers:

Exercise the power of prosecution on cases of treason, separatism and major crimes seriously hindering the uniform implementation of the state's policies, laws, writs, administrative decrees;

Investigate criminal cases they directly handle;

Review cases investigated by public security and state security authorities to decide if arrests, prosecutions are warranted; supervise the legality of such investigations;

Initiate public prosecution and support public prosecution for criminal cases; supervise the legality of trials conducted by courts;

Supervise the rulings and judgments on criminal cases and the legality of activities of jails, detention centers and reform-through-labor institutions;

Supervise civil and administrative trials of courts.

### Organizational Structure of Procuratorates

Organizationally, procuratorates are composed of procuratorial committees and other specialized departments.

#### 1. Procuratorial Committee

The chief prosecutor of a procuratorate oversees the day-to-day operation of procuratorates.

Clause 2, Article 3 of the Law on the Organization of People's Procuratorates states that People's

Procuratorates at all levels should establish a Procuratorial Committee and a democratic centralization system should be implemented. The committee should, under the leadership of the chief prosecutor, deliberate on major cases and other major issues. Should the chief prosecutor disagree with the decision of the majority of the committee members, he or she may refer the issue to the People's Congress at the same level for adjudication.

## 2. Working Body

Internally, working bodies are created within each procuratorate. These include prosecutors for criminal, economic, disciplinary, jails, and civil and administrative cases. In particular, procuratorates have set up anti-corruption bureaus and reporting centers that fight embezzlement, bribery, dereliction and infringements of rights through collaboration with the masses.

### **System of Prosecutors**

This system aims at managing prosecutors who, in accordance with laws, exercise the state power of prosecution at procuratorates. It consists of rules specifying the responsibilities, rights and obligations, qualifications, appointments and removals, examination, training, awards and penalties, salary and compensation, resignation, and retirement of prosecutors. The Prosecutors Law was adopted on February 28, 1995 at the 12th session of the Standing Committee of the Eighth National People's Congress. That law went into force on July 1, 1995.

#### 1. Qualifications of Prosecutors

Prosecutors include chief prosecutor and deputy prosecutor of People's Procuratorates at all levels, members of the Procuratorial Committee, prosecutors and assistant prosecutors.

Prosecutors as a whole must meet the following qualifications:

Be a citizen of the People's Republic of China;

Be at least 23 years of age;

Support the Constitution of the People's Republic of China;

Be in political, professional and moral standing;

Be in good health;

A graduate of law from an institution of higher learning, or a non-law graduate from an institution of higher learning with in-depth knowledge of law, with two years of working experience; or holders of a bachelor's degree in law with a full year of working experience; those holding a Master's or Ph.D. degree in law are not subject to the working-experience limit described above.

Those that have been penalized for crimes or have been dismissed from their public offices cannot be elected judges.

Prosecutors obtain their qualifications in two ways:

Through qualification examinations. Open examinations are administered regularly by the Supreme People's Procuratorate to recruit junior and assistant prosecutors. Chinese citizens with a three-year college education are eligible for the examination. Those who have passed the examination and are deemed as being in good political and ethical standing will be qualified as prosecutors and awarded a Certificate of Qualifications for Prosecutor;

Through training and tests.

Prosecutors and prosecution personnel can be disqualified for any of the following reasons:

Resignation approved;

Dismissed by procuratorial bodies;

Removal of name from roll;

Removal from office as a disciplinary penalty;

Removal from position;

Criminally penalized;

Other reasons incompatible with the position of prosecutor.

## 2. System for Appointment and Removal of Prosecutors

The chief prosecutor is elected and removed by the People's Congress at the same level, but the appointment and removal of local chief prosecutors have to be reported to the chief prosecutor of higher procuratorates who, in turn, will submit the appointments and removals to the Standing Committee of the People's Congress at the same level for approval.

The appointment and removal of the deputy chief prosecutor, members of the Procuratorial Committee and prosecutors must be submitted to the Standing Committee of the People's Congress at the same level, but the appointment and removal of assistant prosecutors can be approved by the chief prosecutor.

## 3. Promotions, Awards and Penalties of Prosecutors

Prosecutors are promoted in two ways: regular promotions and selective promotions.

Prosecutors are divided into 12 ranks, with the highest being the Chief Prosecutor of the Supreme People's Procuratorate, followed by Grand Prosecutors, Senior Prosecutors and prosecutors (level 2 through 12). The ranking of prosecutors is determined by a range of factors, including their position, performance, professionalism and seniority.

Awards are typically a combination of moral and material incentives. These include public recognition of achievements, Third Prize, Second Prize, First Prize and the conferring of an honorary title.

Penalties include warning, a record of demerit in personal files; a record of a major demerit; demotion; removal from position; dismissal from office. A removal from position is accompanied by a lowering of salary and rank; those who have committed a crime will be



prosecuted for their criminal liabilities.

#### 4. Safeguards for Prosecutors

Prosecutors are protected by law in performing their duties. These include:

Professional safeguards: Prosecutors are free from interference in exercising their judicial powers from any administrative authorities, social organization or individual; they shall not be removed, demoted, dismissed or disciplined unless for statutory reasons and procedures.

Corporal safeguard: Prosecutors receive legal protection for their corporal, property and residential safety.

Salary safeguards: Prosecutors receive remuneration for their performance of duties and enjoy insurance and other benefits.

Others: Prosecutors are entitled to powers and working conditions befitting their performance of duties; they have the right to resign, petition or accuse.

#### Working Procedures

These govern the scope of operations and activities for prosecutors. They include:

1. Procedures for procuratorates supervising criminal investigations undertaken by public security (including state security) authorities.

Verify and approve arrest warrants. The Constitution provides that, unless approved or ruled by procuratorates or courts and executed by public security authorities, citizens are not subject to arrest;

Verify criminal cases concluded and transferred by public security authorities to determine if public prosecution is warranted.

Supervise the legality of investigation activities by public security authorities.

2. Procedures for prosecutors to directly accept and investigate cases. According to an order

issued by the Supreme People's Procuratorate in early 1998, 53 types of cases in four categories are directly handled by procuratorates:

Embezzlement and bribery as defined in Chapter 8, Criminal Code, as well as other crimes such as misappropriation of public funds as defined in other chapters that should be penalized as those specified in Chapter 8;

Derelection of duties as defined in Chapter 9, Criminal Code, including abuse of power, negligence of duties, perversion of law in prosecution and adjudication;

Violation of citizens' corporal rights and democratic rights committed by government employees, such as illegal detention, illegal searches and extortion of confessions through torture;

Other major crimes committed by government employees that require direct involvement of procuratorates; in such cases, approval by procuratorates above the provincial level is needed.

3. Public prosecution: According to the Criminal Law and criminal procedure law, except for a few private prosecution cases, most criminal cases will be publicly prosecuted by People's Procuratorates to People's Courts that have jurisdiction. Cases submitted by public security authorities have to be reviewed by procuratorates without exception and a decision on public prosecution should be made within a month. For cases of a substantive and complicated nature, that deadline can be extended by another half month. Public prosecutions have to be brought to courts with jurisdiction for cases for which facts have been verified and evidence is accurate and sufficient and for which criminal liabilities must be prosecuted.

4. Judicial supervision - supervision over judicial activities undertaken by courts in handling civil, criminal and administrative cases. The appearance of prosecutors in trials of criminal cases means not just support of public prosecution but also supervision of the trial proceedings. In addition, prosecutors are empowered to protest rulings or judgments on criminal cases wrongly

passed by courts.

5. Supervision on enforcement of criminal rulings and on jails. This includes:

Execution death penalty: Members of procuratorates must be present at executions to supervise proceedings and verify the identity of the condemned prisoner.

Penalties carried out at jails and penitentiaries, including the legality of reduction in sentencing, probation, medical parole, serving sentence outside prison, and suspension of sentence.

Legality of activities at detention centers and reform-through-labor institutions.

### **System Governing Investigations**

This system governs investigations and other mandatory measures taken in accordance with law by public security authorities and procuratorates in handling cases. It consists of provisions regarding the nature and mission, organizational structure, principles of activities and working procedures of investigation authorities.

#### **Status and Nature of Public Security Authorities**

public security authorities are an important part of the government. They are both an administrative arm and a judicial organ since they are in charge of criminal investigations, playing a unique role in cracking down on crimes and maintaining social security.

#### **Criminal Police**

Criminal police are a major force of the police.

#### **1. Qualification Requirements for Investigative Officers**

Article 26 of the People's Police Law provides that investigative officers should meet the following conditions:

Citizens at least 18 years of age;

Support the Constitution of the People's Republic of China;

In good political, professional and moral standing;

In good health;

Have at least a senior high school education;

Willing to be a policeman.

Persons who have the following records should not be a member of the police:

Having received criminal penalty for committing a crime;

Having been dismissed from public office.

## 2. Promotions

Police are divided into 13 ranks in five categories:

Police Commissioner and Deputy Commissioner;

Police Superintendent Level 1, 2 and 3;

Police Inspector Level 1, 2 and 3;

Police Sergeant Level 1, 2 and 3;

Police Constable Level 1 and 2.

The Ministry of Public Security supervises the ranking and promotions of the police.

## Investigations

### 1. Acceptance and Establishment of Cases

Public security authorities should immediately accept, inquire about, take notes of and hear cases of suspects turned in, reported or brought to the police by citizens or suspects who turn themselves in. Those that meet conditions should be accepted and filed as a case and for complicated and material cases, an investigation plan and, if necessary, necessary measures have to be taken.

### 2. Procedures for Criminal Investigations

For criminal cases that already been filed with the police, investigations should be launched for a thorough and impartial collection of evidence that may determine whether the suspect is guilty or innocent and, if guilty, whether it is a felon or a misdemeanor. Depending on actual needs, various detective means and measures will be taken in strict compliance with statutory procedures.

### 3. Procedures for Detentions and Arrests

Public security authorities may proceed to detain criminals caught in the act or material suspects in accordance with statutory procedures; they may also seek approval from procuratorates for an arrest warrant for suspects for whom sufficient evidence of incrimination exists and a sentence is likely, and for whom measures such as obtaining a guarantor in anticipation of trial out of custody and surveillance of residence is insufficient for ensuring social security and order.

### 4. Procedures for Case Transfer and Prosecution

Cases concluded by public security authorities for which the facts are clearly established, evidence is verified and sufficient, the nature of crime and name of felony correctly defined, legal procedures completed and for which criminal liabilities should be prosecuted, should be transferred to the procuratorate at the same level to determine whether public prosecution is warranted.

### 5. Procedures for Evidence Gathering

Detectives should strictly follow statutory procedures in collecting all kinds of evidence that can prove whether a suspect is guilty or not, or how serious the felony is. Extortion of confession through torture and collecting evidence through threat, inducement, deception or other illegal means are strictly forbidden.

#### **IV. Jail System**

The Prison Law of the People's Republic of China was adopted and went into force on December 20, 1994 at the 11th meeting of the Standing Committee of the Eighth National People's Congress.

##### **Regulatory Authorities**

The Prison Law provides that the State Council judicial administration (Ministry of Justice) supervises all prisons across the country. The Ministry of Justice has a Bureau of Prison Administration that supervises all prisons in the country. In the provinces (municipalities directly under the central government and autonomous regions), offices of justice are responsible for managing prisons in their own jurisdiction through their prison administration arms.

Prisons in China are divided into two categories:

Prisons incarcerating inmates who have been condemned by courts to a fixed-term sentence, life sentence or death penalty with two years reprieve. Male and female inmates are warded separately, with female wards managed by female law enforcement personnel. Prisons may also be divided into wards for felons and criminals of misdemeanor.

Penitentiaries for juvenile delinquents, criminals of minor age who have been condemned by courts to a fixed-term sentence, life sentence or death penalty with two years reprieve. Special protection is extended to juvenile delinquents, with customized procedures in place to cater to their needs.

##### **Prison Setup and Staffing**

The Prison Law provides that the State Council judicial administration approves the establishment, elimination and relocation of prisons in line with historical, economic and natural factors. This provision is designed to optimize the distribution of prisons and ensure the unified,

effective and accurate execution of penalties.

Prisons usually have one warden and several deputy wardens and various administrative departments and staff. In addition to administrative offices and commercial institutions, prisons also have sanitary and education facilities.

The Prison Law provides that the managerial personnel of prisons are members of the police force who enjoy the same legal status as public security and traffic police.

#### Financial System of Prisons

The Prison Law states that the state ensures funding for prisons in reforming inmates. Expenses related to prison police, reformation of prisoners, daily life of inmates, maintenance of prison facilities and other items are budgeted for in the central government's planning. The state provides production facilities and funding needed for prison labor. Land, mineral resources and other natural resources legally employed by prisons, as well as the property of prisons are protected by law; no entity or individual can trespass or damage those properties.

#### Fundamental Principles

Article 3 of the Prison Law states that prisons should follow the principle of combining penalty with reform, education with labor, in a bid to reform prisoners into law-abiding citizens.

##### 1. Transformation Through Punishment

Prisons punish criminals because, without punishment, it is difficult for criminals to come to grips with their crimes and begin their life anew. While punishment focuses on enforcement, reform focuses on transformation. Punishment is the means, while transformation is the end. The purpose of punishment is to transform criminals into law-abiding citizens. This is precisely what criminal penalties are for. Prisons do not punish criminals for punishment's sake.

##### 2. Combining Education with Labor

To effectively reform prisoners, it is also necessary to combine education with labor. Education can be multifaceted: ideological, cultural, vocational and technical.

### Execution of Penalties

Law enforcement authorities implement criminal rulings and judgments passed by judicial authorities that have already taken effect, in accordance with legal procedures. Chinese prisons execute the following types of penalties:

1. Committal, i.e. commitment to imprisonment of convicts who have been condemned to death penalty with two years reprieve, life sentence or a fixed-term sentence. Committal means the beginning of the execution of penalty, a serious law enforcement activity. Therefore, it must be conducted in strict compliance with legal procedures.

Public security authorities that incarcerate criminals that have been condemned to death penalty with two years reprieve, life sentence or a fixed-term sentence must transfer the criminals to prisons for execution of penalty within one month of receipt of the execution notice or ruling.

While transferring the criminals to the prison, courts must present relevant legal documents including copies of the prosecution statement prepared by the procuratorate, the ruling by the court, notice of execution and form of registration for closure of case. Prison authorities may reject criminals if these documents are not received. If these documents are not complete or contain errors, the court that issues the ruling in effect has to amend or correct the documents in a timely fashion; those that may lead to mistaken imprisonment may not be accepted.

Criminals that have been taken in should go through physical, corporal and personal-effect examinations. Criminals condemned to life imprisonment or fixed-term sentence who have been found, during the physical examination, to have contracted serious illness needing medical treatment on bail or female criminals who are pregnant or breast-feeding their newborn may be



exempted from imprisonment temporarily. That provision, however does not include criminals condemned to death penalty with a two years reprieve. The prison should notify the court of the result of the physical examination and the court, in turn, should decide whether the criminals should be allowed to seek medical treatment on parole. Personal effects that have been found to be incompatible with regulations should be confiscated; non-essentials should, upon approval of the inmate, be turned in to the prison authorities for safekeeping or returned to the relatives of the inmate. Female inmates should be examined by female police officers. Criminals should not bring their children with them to the prison.

Upon admission into the prison, the prison authorities should notify the family of the inmate; the notice should be issued within five days of admission.

## 2. Handling of Petitions, Accusations and Reporting by Inmates

During the execution of penalty, petitions filed by inmates should be referred without delay to procuratorates or courts. Prisons should set up a complaints box and designate a special individual to open the box in order to facilitate grievance redress. The procuratorates or the courts should notify the prison within six days of receipt of a letter of suggestions submitted by the prison.

Inmates have the right to bring a charge against or report prison police and other personnel for their illegal acts. The prison authorities should process the submitted materials and get the matter resolved if it falls within their jurisdiction; if it is not within their jurisdiction, then it should be transferred without delay to procuratorates or courts.

## 3. Serving a Sentence Outside the Prison

This is a system that allows criminals who meet prescribed conditions to serve their sentence outside the prison temporarily. This is done in two ways. First, upon announcement of the ruling,

if the convict is seriously ill warranting medical treatment on bail, or is pregnant or breast-feeding her baby, the court may decide that the convict can serve his or her sentence outside the prison. Second, while serving a term, an inmate may be permitted to serve the remainder of the sentence outside the prison through meeting the following conditions: seriously ill and in danger of death in the short term; serious chronic illness for which medical treatment is not effective; over 60 years of age, in poor physical conditions and unlikely to endanger society anymore; physically handicapped and unable to work. In such cases, the prison authorities should prepare a written proposal and submit it to prison administration authorities of the provinces (municipalities and autonomous regions).

Once the circumstances permitting a temporary serving of a sentence outside the prison are no longer there, prisoners should be readmitted and continue to serve their sentence. If the decision was made by a court, the prisoner should be handed over by the public security handler to the prison authorities; if the decision was made by the prison authorities, the public security authorities that handle the case should notify the prison authorities in a timely fashion. Those that have already served their sentence outside the prison should complete release formalities at the original admission prison. For those that died while serving their sentence outside the prison, public security authorities should notify the original admission prison of the death.

#### 4. Commutation of Sentence and Parole

Commutation means an abatement of sentence in accordance with legal requirements and procedures. Prisons are responsible for filing applications to courts for prisoners who meet requirements for commutation. The court should review an application and adjudicate within one month of receipt of proposal. For complicated or extraordinary cases, that deadline may be extended for one more month.

## 5. Release and Placement

Upon completion of their term, prisoners should be released and issued a certificate of release.

The prisoner should provide a written evaluation of the prisoner's performance in prison and hand it over along with a copy of the ruling to the public security outlet that handles the registration of permanent residence of the former prisoner.

The released person should apply for registration of permanent residence with the local public security authorities with the certificate of release and they should enjoy equal rights as other citizens.

### Prison Administration

Prison administration includes the following:

#### 1. Classification

Prisoners, based on the nature of their crime, type of penalty, length of sentence, performance, age, gender and other characteristics, are classified into different groups and are incarcerated, managed and educated accordingly.

#### 2. Use of Warning, Preventive Devices and Weapons

Warning, including armed warning, is resorted to by prison police to maintain normal order and security at prisons. Prison authorities may also decide to take security precautions such as guarding and control behind the cordon line. In addition, the prison authorities should also mobilize militias, security-maintenance organizations and the general public surrounding the prison to maintain order and security in the surrounding areas. Once inmates attempt to escape, riot, revolt, or outsiders attempt to break into a jail or stage a riot, prison police can join hands with external forces to put down the unrest.

Preventive devices are used for inmates inclined to commit dangerous acts. They are not to be

used for inmates who are advanced in age with illness, handicapped inmates and minor inmates under normal circumstances. Except for rare circumstances, they are not to be used on female inmates. Inmates who wear these preventive devices should not participate in labor activities organized by prison authorities.

Use of preventive devices on inmates must be approved by prison authorities. If a contingency warrants it, these devices can be put on inmates before approval is secured, but approval formalities must be secured immediately afterwards. Inmates should not wear handcuffs or shackles longer than seven days normally and not longer than 15 days maximum, except for prisoners awaiting execution.

Armed police and prison police may use weapons in emergency situations in compliance with legal procedures.

### 3. Communications and Meetings

While serving their sentence, prisoners may communicate with others, but their correspondence must be screened by relevant authorities. However, their letters to superior prison and judicial authorities should not be screened.

While serving their sentence, prisoners may also meet with visiting relatives or custodians. In principle, they should not meet people outside their kinship, unless otherwise approved.

In practice, aside from normal visiting times, prison authorities also allow prisoners to visit their family or handle a family emergency for a period of three to five days, but not to exceed seven days in special circumstances.

### 4. Living and Hygiene

Adult prisoners normally work eight hours a day; extended work hours as necessitated by production plans should be approved by prison authorities.

Prisoners also have two hours of study time and eight hours of sleep every day. Prisoners of minor age work half a day and study half a day; their sleep time should be no less than nine hours a day. Prisoners of minor age should not engage in heavy manual labor, labor that is beyond their physical capabilities, or other work that hampers their physical health. In addition, prisoners should have time for cultural or sports activities everyday.

Prisoners should take statutory holidays and weekends off.

Prisoners should be provided with food and beverages comparable to those provided to workers in similar fields at local state-owned enterprises of similar size. Prisoner kitchens should be managed by full-time staff and efforts should be made to improve the diet of prisoners as much as possible.

Prison cells and surrounding facilities should comply with requirements for incarcerating criminals and other statutory requirements such as sanitation, fire control, anti-earthquake and heating standards.

In addition, prisons should also set up clinics or hospitals in accordance with the size of the prison and the number of inmates and be equipped with needed medical devices and drugs.

## 5. Rewards and Punishment

Prison authorities may reward or punish inmates in compliance with legal procedures on the basis of evaluations of prisoners' performance in transforming themselves through education and labor.

Evaluations cover prisoners' ideological, educational (political, cultural and technical), disciplinary and physical labor performance.

Rewards can be public recognition, material incentive or a record of merit in the individual's personal file; punishments can be warning, a record of demerit in the individual's personal file or

solitary confinement. Any reward or punishment should be recorded faithfully in the prisoner's file.

## **V. Arbitration System**

Arbitration is a legal arrangement whereby both parties to a civil (commercial) dispute reach an agreement to voluntarily submit the case to a third party to adjudicate in accordance with specified procedures and rules and following the principle of impartiality, and whereby both parties are bound to enforce the ruling.

Arbitration is usually a non-governmental trade activity; it represents a private action. Together with composition, mediation and action, it is a common way to settle civil (commercial) disputes. Arbitration, however, is subject to state supervision. The State intervenes through courts in accordance with legal provisions of the place where the arbitration takes place in the validity of the arbitration award, the making of arbitration procedures, the enforcement of awards and in the case of involuntary enforcement by a party. Arbitration, therefore, is a judicial activity and a part of China's judicial regime.

The Arbitration Law of the People's Republic of China, promulgated on August 31, 1994, unified arbitration practices across the country and harmonizes China's arbitration system with internationally accepted principles, systems and practices.

### **Basic Principles**

#### **1. Voluntarism:**

Parties to a dispute should voluntarily reach an agreement to resolve their dispute through arbitration. An arbitration committee shall not consider a case without application from a party to the agreement.

#### **2. Independence:**

Arbitration should be independent of any interference from administrative bodies, social organizations or individuals.

An arbitration agency is not part of the administrative apparatus.

Arbitration institutions are established geographically, independent from each other; they have no affiliation among themselves.

Arbitration committees, arbitration associations and arbitration tribunals are also independent from each other, with arbitration tribunals adjudicating cases free from interference by arbitration associations or arbitration committees.

Courts must exercise the power of supervision over arbitration activities; however, arbitration is not dependent on adjudication and arbitration institutions are not dependent on courts.

### 3. Legality and Impartiality:

The Arbitration Law provides that arbitration should be based on facts, comply with laws and resolve disputes in an impartial and reasonable manner.

#### Arbitration Bodies

##### 1. Arbitration Association

China Arbitration Association is a self-disciplinary organization of arbiters. It supervises arbitration committees and their members and the behaviors of arbiters in accordance with their constitution. Arbitration committees are members of the China Arbitration Association. The constitution of the association is made by a national congress. It makes arbitration rules in accordance with the Arbitration Law and the Civil Procedure Law.

##### 2. Arbitration Committees

Arbitration committees are executive bodies established in capital cities of provinces, municipalities and autonomous regions. They can also be set up in other cities if necessary.

Arbitration committees are formed with members from government departments and chambers of commerce and registered with the judicial administration of the province (municipality, autonomous region).

An arbitration committee consists of one chairman, two-to-four vice chairmen, and seven to 11 members. The chairman, vice chairmen and members should be legal and trade experts and individuals with working experience. The number of legal and trade experts should not be less than one third of the membership of an arbitration committee.

Arbiters should meet the following qualifications:

Eight full years in the arbitration field;

Eight full years in the legal profession;

Eight full years as judge;

Specialized in legal research and teaching and holding a senior professional title;

Familiar with legal knowledge, specializing in economic and trade activities and holding a senior professional title or with equivalent qualifications.

An arbitration committee has different panels of arbiters for different trades.

### 3. Arbitration Tribunals

After taking up an arbitration case, an arbitration committee does not directly arbitrate the case; instead, it forms an arbitration tribunal to adjudicate the case.

Organizationally, an arbitration tribunal can be a collegiate panel or a sole arbitrator. An arbitration panel should be composed of three arbiters, one of whom should be the chief arbiter who presides over the arbitration.

In case the parties agree to form a tribunal of three arbiters, each party should designate, or ask an arbitration committee to designate, one arbiter, and the third arbiter, who should be jointly



selected by the parties or designated by the arbitration committee chairman jointly authorized by the parties, should be the chief arbiter. In case the parties agree to form a sole-arbiter tribunal, the arbiter should be jointly selected by the parties or designated by the arbitration committee chairman jointly authorized by the parties.

## Essential Components of Arbitration

### 1. Arbitration or Adjudication

This practice represents a respect for the parties' right of choice as to the way to settle their dispute. It means:

If the parties have reached an agreement on arbitration, it rules out the jurisdiction of the court over the dispute; the parties can only apply for arbitration to an arbitration body rather than bringing action to the court.

However, courts may have jurisdiction over disputes that the parties have already signed an agreement about under special circumstances. These include:

The arbitration agreement is invalid or its validity has expired;

One party brings a suit to the court and the other party answers the lawsuit and mounts a substantial defense that does not challenge the jurisdiction of the court over the dispute. In such cases, the parties are understood to have renounced the original arbitration agreement and the court has judicial power to adjudicate the case.

### 2. One Instance Being Final

This means that the ruling takes effect immediately upon pronouncement. Even if the parties are not happy with the ruling, they cannot file a suit to the court for the same dispute or apply for arbitration or reconsideration to arbitration organizations. Instead, they should automatically implement the ruling; otherwise the other party has the right to apply to the court for

enforcement.

As a remedy to the one-instance-being-final practice, however, parties may apply to the court for a review and verification of the case and annulment of the arbitration ruling if they believe it is indeed wrong and conditions for a legal revocation have been met.

#### China International Economic and Trade Arbitration Committee

The China International Economic and Trade Arbitration Committee is the only arbitration agency in China that handles international economic and trade disputes. It is headquartered in Beijing, with branch offices in Shenzhen and Shanghai.

### **VI. Lawyer System**

This system governs the nature, mission, organization, operational principles of lawyers, as well as how lawyers provide legal services.

#### Nature, Mission and Status

##### 1. Nature

Article 2 of the Lawyers Law of the People's Republic of China, promulgated on May 15, 1996, defines lawyers as "professionals who have obtained a practicing license through legal means to provide legal services." Lawyers are an important force for the construction of the legal system in China. Article 3 provides that practicing lawyers must abide by the Constitution and laws and adhere to the code of ethics and professional discipline for lawyers. They must use facts as basis and law as yardstick for practicing.

##### 2. Mission

The mission of lawyers is to achieve the objective specified in state laws through the practice of law. Article 1 of the Lawyers Law states that the mission of lawyers is to maintain the lawful rights and interests of the parties to a suit and maintain proper implementation of law. These two

objectives are mutually complementary because the maintenance of lawful rights and interests is consistent with the maintenance of the right implementation of law.

### 3. Status of Lawyers

Chinese lawyers play an independent role in lawsuits. They do not belong to courts or procuratorates, nor do they belong to their clients. They participate in lawsuits in order to maintain the legal rights and interests of their clients. They are independent. They enjoy not only rights of an ordinary participant in a lawsuit, but also rights compatible with the exercise of the duties of a lawyer.

#### Qualifications for Licensing

To practice, lawyers must first obtain professional qualifications and apply for a license after probation. After obtaining qualifications, they must receive the license for practicing in accordance with legal procedures in order to practice law as a lawyer. Only then can they enjoy the rights of lawyers while assuming duties accordingly.

Individuals who have obtained legal qualifications may retain their qualifications and not engage in the legal profession for a period of time. This is known as separation of legal qualifications from legal practicing.

### 1. Legal Qualifications

Article 6 of the Lawyers Law provides that there are two ways for obtaining legal qualifications: through national examination or approval by judicial authorities.

According to Article 6, "The state shall administer a national examination to determine lawyer qualification. Persons with a three-year college education in law and above or with equivalent qualifications, as well as persons with a bachelor's degree in other disciplines and above, can be awarded lawyer's qualifications by the State Council judicial administration after passing the

national examination."

Article 7 provides that persons with a four-year college education in law and above who have engaged in law studies and teaching and hold a senior professional title or with equivalent qualifications and who have applied for a practicing license may be granted lawyer's qualifications subject to approval by the State Council judicial authorities.

## 2. Licensing

### a) Prerequisites for Applying for Practicing License

Article 8 of the Lawyers Law states that applicants for a practicing license must support the Constitution of the People's Republic of China and meet the following requirements:

Fully qualified;

Full year of internship at a law firm;

Be in good standing.

### b) Rejection of Applications

Article 9 states that applicants who meet any of the following conditions will be denied a practicing license:

Unable to perform civil acts or are restricted in performing civil acts;

Have been criminally penalized (but not including crimes of negligence);

Have been dismissed from public offices or had their practicing license revoked.

### c) Procedures for Applications

Applicants must first submit, through their current or future law firm, all the required application documents to the local judicial authorities. According to Article 10 of the Lawyers Law, these documents should include the following:

Letter of application; Certificate of Lawyer Qualification;

Internship Performance Evaluation by the law firm where the applicant has worked;  
Copies of the applicant's identification documents.

The local judicial authorities should form an opinion within 15 days of receipt of the application documents and report the matter to the provincial (autonomous regional/municipal) judicial authorities. The judicial authorities of the provinces, municipalities and autonomous regions should, after reviewing the documents submitted, grant a practicing license to applicants who meet the requirements as specified in the Lawyers Law within 30 days of receipt of the application. Those who fail to meet the requirements will be denied a practicing license and should be notified of the decision in a written form within 30 days of receipt of the application.

#### d) Registration of License

Lawyers should register their practicing license once a year; unregistered licenses are not valid. Registration is administered by judicial authorities above the Judicial Bureau at the provincial (municipal or autonomous regional) level. If necessary, registration can also be administered by judicial bureaus at the prefectural (city or county) level with authorization from higher judicial authorities.

### 3. Licensing Restrictions

Article 12 of the Lawyers Law provides that lawyers should practice at one law firm rather than at two or more simultaneously. No geographical restrictions should be imposed.

Article 13 states that incumbent government office holders should not concurrently be lawyers. While serving on the Standing Committee of the People's Congress at various levels, lawyers should not practice.

Article 14 provides that unlicensed persons should not practice as lawyers or represent or defend clients for a profit.

Persons engaging in legal teaching and research should not be partners in a partnership or a cooperative law firm.

## Law Firms

Article 15 of the Lawyers Law provides, "A law firm is the practicing institution of lawyers" and the basic unit for regulation of the legal profession. Practicing lawyers are dispatched by their law firms and they practice in the name of the law firms.

### 1. Nature of Law Firms

The Lawyers Law provides for three forms of law firms: state-funded, cooperative and partnership. Different operational mechanisms are permitted for different forms of law firms and they assume different legal obligations (civil liabilities).

Article 16 states that state-funded law firms should practice law and assume liabilities with all their assets.

Article 17 says that lawyers may form cooperative law firms and assume liabilities with all their assets.

Article 18 says that lawyers may form partnership law firms and partners assume unlimited and joint liabilities for their firm.

### 2. Establishment of a Law Firm

a) Article 15 provides that law firms should meet the following requirements:

Have their own name, residence and articles of association;

Have more than 100,000 RMB of assets;

Have lawyers who meet requirements of this Law.

b) Approval Procedures

Article 19 states that applications for establishment of a law firm should be reviewed and

verified by judicial authorities at the provincial (autonomous regional/municipal) level or above and a license should be issued to applicants who meet the requirements of this Law within 30 days of receipt of application; those who fail to meet the requirements should be denied a practicing license and be informed of the decision within 30 days of receipt of application.

#### c) Establishment of Branch Offices

Article 20 provides that law firms may set up branch offices subject to review and approval by local judicial authorities of the province (autonomous region/municipality) where the branch office is to be set up. The parent law firm should assume liabilities for their branch offices.

#### d) Alteration and Termination of Law Firms

Article 21 states that law firms should report any alteration of name, location, articles of association and partnership or dissolution to the original approval authorities.

### 3. Internal Management

Article 23 states that lawyers should undertake business through their law firm, which should sign a written contract with their clients, charge them fees in compliance with state regulations, and record the fees faithfully into books.

Article 24 states that law firms and lawyers should not engage in acts of unfair competition such as defaming other lawyers or paying commissions on referrals.

### 4. Transformation of Law Firms

Law firms are undergoing reforms aimed at severing any links with government departments.

According to a State Council notice [Guofaban 2000 No. 51] on the separation of intermediary organizations engaged in economic certification from government departments and a Ministry of Justice notice on the separation of law firms and legal counseling institutions from government offices, the following types of law firms should sever their links with the government:

State-funded law firms that have already achieved a balance of payments;

Law firms affiliated with non-profit institutions, enterprises or social organizations;

Legal counseling service providers established with approval of judicial authorities and affiliated with government offices, non-profit institutions, enterprises or social organizations.

After severing ties with government offices, these law firms should be transformed into partnership or cooperative law firms no longer affiliated with administrative or institutional entities. They will no longer enjoy privileges associated with ranking government offices. State-funded law firms that have not yet realized a balance of payments and which are still dependent upon state subsidies will not participate in the separation program.

This program was completed before October 31, 2000.

The definition and disposal of state assets were based on the principle of “whoever invests owns the property.” While ensuring the integrity of state assets, the policy takes into account assets formed by legal professionals with their intellectual work.

## Business, Rights and Duties of Practicing Lawyers

### 1. Business

Article 25 of the Lawyers Law provides that lawyers may engage in the following businesses:

Be legal counsels at the request of citizens, legal entities and other organizations;

Represent clients and participate in lawsuits at the request of parties to civil and administrative cases;

Provide legal counseling at the request of criminal suspects and file complaints, lawsuits or applications for obtaining a guarantor while awaiting trial on behalf of clients; act as defense attorney at the request of the suspect, the accused or the court; act as the advocate and participate in lawsuits at the request of private prosecutors, victims or their next-of-kin relatives in public-



prosecution cases;

File complaints on behalf of clients;

Participate in mediation and arbitration at the request of clients;

Provide legal services at the request of clients who are not parties to a lawsuit; and

Provide legal counseling, draft lawsuit documents and other legal documents.

## 2. Rights and Obligations of Lawyers

According to the Lawyers Law, the Criminal Procedure Law, the Civil Procedure Law, the Administrative Procedure Law and other regulatory interpretations, lawyers enjoy the following rights and assume the following obligations.

### a) Rights

Investigation. Article 31 of Lawyers Law provides that when handling legal cases, lawyers, subject to permission by relevant entities or individuals, investigate them for fact-finding purposes.

Access to documents and files. The Criminal Procedure Law provides that the defense attorney may, from the day the procuratorate reviews a lawsuit, access, transcribe or copy judicial documents and technical appraisal documents of the case; they may also, from the day the court handles the case, access, transcribe or copy factual documents used in the case. Article 30 of the Lawyers Law provides that lawyers participating in lawsuits may, in compliance with procedural law, access documents related to the case.

Meet and communicate with persons with limited personal freedoms.

Appear in court and participate in lawsuits.

Refuse to defend and represent any client.

Lawyers' corporal rights are inviolable.

## b) Obligations

Abide by the Constitution and laws and observe codes of ethics and professional discipline;

Defend and represent clients unless circumstances require otherwise;

Provide legal aid;

Maintain confidentiality. Article 33 of the Lawyers Law states that lawyers should maintain state secrets and commercial secrets known to them in the practice of law and they should not reveal the privacy of their clients;

Refrain from accepting special cases. Article 34 of the Lawyers Law states that lawyers should represent both parties to a dispute at the same time. Article 36 provides that lawyers who have served as judges and prosecutors should not represent or defend clients within two years of retirement from the court or procuratorate;

Refrain from representing clients in private;

Refrain from profiting from parties to a dispute by taking advantage of the convenience of legal service or accept money or gifts from clients;

Refrain from meeting judges and prosecutors in violation of rules;

Refrain from giving gifts to or bribe judges, prosecutors, arbiters and other related personnel, or prompting or instigating their clients to bribe;

Refrain from hampering testimony giving. Article 35 of the Lawyers Law provides that lawyers should not engage in perjury, hide facts or threaten or prompt others to commit perjury, hide facts or interfere in the legal collection of evidence by the other party;

Refrain from disturbing the order of a court of law or an arbitration tribunal.

## Bar Associations

### 1. Nature of Bar Associations

Clause 1, Article 37 of the Lawyers Law states, "Bar associations are non-governmental organizations enjoying the status of legal entities. They are the self-disciplinary bodies of lawyers."

Status of bar associations: Judicial authorities instruct and supervise bar associations.

## 2. Setup of Bar Associations

Clause 2, Article 37 states that a China National Bar Association will be established at the national level and local bar associations set up at provincial (autonomous regional/municipal) levels. Cities with different districts may set up local bar associations if necessary.

## 3. Relations Between Bar Associations and Lawyers

Clause 2, Article 39 provides that lawyers must join a local bar association. Lawyers who are members of a local bar association are also members of the national bar association. In accordance with the constitution of the bar association, members enjoy rights and perform duties accordingly.

## 4. Responsibilities of Bar Associations

Article 40 of the Lawyers Law states that bar associations should perform the following duties:

Ensure legal practicing for lawyers and safeguard their lawful rights and interests;

Summarize and exchange experiences among lawyers;

Organize legal training programs;

Publicize, inspect and supervise lawyers' code of ethics and professional discipline;

Organize lawyers to undertake international exchanges;

Arbitrate disputes arising from the practice of law;

Other duties as specified in law.

Bar associations should reward or penalize lawyers in accordance with their constitution or

bylaws.

## Code of Ethics, Professional Discipline and Penalties for Lawyers

### 1. Code of Ethics

According to the Code of Ethics and Professional Discipline for Lawyers adopted on October 6, 1996 by the China National Bar Association, lawyers should:

Always be client-oriented;

Be faithful to their code of ethics, safeguard the legality of the state and social justice;

Be honest and trustworthy, providing legal assistance to clients dutifully;

Respect each other and compete fairly;

Be clean and maintain self-discipline;

Be loyal to the legal profession and maintain the reputation of lawyers.

### 2. Professional Discipline

The above-mentioned Code of 1996 imposes the following disciplines on lawyers:

Disciplines at the workplace: lawyers should not charge fees exorbitantly;

Disciplines during action and arbitration;

Disciplines governing lawyers' relations with their clients and the defendant;

Disciplines governing relations among lawyers themselves.

### 3. Penalties for Lawyers

The Ministry of Justice on October 22, 1992 published penalties for lawyers who breach their code of ethics and professional discipline.

a) Main provisions on penalties:

Warning;

Suspension of business;

Disqualification of lawyers.

b) Enforcement body and procedures

Judicial authorities above prefecture, city and county level should be the enforcement body.

Legal disciplinary committees should be established within those judicial authorities to enforce penalties. Members of the committee should include practicing lawyers, lawyers' associations and judicial personnel.

Procedures for enforcing penalties:

Submission and review of proposal to mete out penalty;

Appraisal of the penalty measure;

Review;

Enforcement of penalty.

## **VII. Mediation System**

### Definition and Types of Mediation

#### 1. Definition

Mediation is an effort by a third party to encourage parties to a dispute to voluntarily reach an agreement to resolve their dispute.

#### 2. Types of Mediation

There are currently four types of mediation practices in China:

Civil mediation: Mediation by People's Mediation Committees outside the court.

Judicial mediation: Mediation by a court of law in civil and economic disputes and minor criminal cases inside the court. For marital cases, inside-court mediation is a necessary procedure. Whether or not to seek judicial mediation is for litigants to decide. Mediation is not a necessary procedure. A court's mediation document is as valid as its verdict.

Administrative mediation: This can be outside-the-court mediation by grassroots governments such as a township government in ordinary civil disputes, or outside-the-court mediation by government departments in compliance with legal provisions in specific civil disputes, economic disputes or labor disputes.

Arbitration mediation: Mediation by arbitration bodies in arbitration cases. Arbitration is called upon only if mediation fails to resolve the differences. This is also an outside-the-court mediation.

## Civil Mediation

### 1. Nature, Mission and Principles

This system originated in ancient China and took shape in the 1930s when China was locked in a war against Japanese aggression. It was formalized in the early 1950s when the People's Republic was founded.

#### a) Nature

Article 111 of the Constitution of the People's Republic of China states, "People's Mediation Committees are a working committee under grassroots autonomous organizations - Residents Committee, Villagers Committee - whose mission is to mediate civil disputes."

Essentially, these committees are a supplement to the judicial system, an autonomous arrangement for citizens to resolve their own disputes. It is a legal practice with Chinese characteristics.

#### b) Mission

Article 5 of the Regulations for the Organization of People's Mediation Committees states, "The mission of People's Mediation Committees is to mediate civil disputes and, through such mediation, publicize laws, regulations, rules and policies and educate citizens to abide by laws

and respect universally accepted morals."

c) Basic principles

Reasonable and legal;

Voluntary, equal;

Respect for the right to sue.

2. Form of Organization

a) People's Mediation Committee

The Constitution and laws provide that the People's Mediation Committees are non-governmental organizations under Villagers Committees and Residents Committee for mediating civil disputes. They operate under the guidance of grassroots government and courts.

b) People's Mediators

According to law, People's Mediators should have the following qualifications:

Impartiality;

Close to the people;

Enthusiastic about mediation;

Knowledgeable about legal and policy issues;

Be adult citizens

c) Judicial Assistants

According to the Regulations for the Organization of People's Mediation Committees, People's Mediation Committees work under the guidance of grassroots governments and courts.

Grassroots governments are set up at the township level. Judicial assistants are responsible for helping People's Mediation Committees in their mediation work.

Grassroots courts supervise mediation committees through their tribunals. They invite members

of the committee to participate in court-mediated cases, audit trials, help analyze cases and exchange experiences.

### 3. Procedures

#### a) Mediation procedures

Accept a dispute;

Prepare for mediation;

Mediation;

Reach agreement;

Close of mediation

#### b) Ways of mediation

Mediation can be direct, open, common or joint.

Mediation techniques include role-modeling, reasoning and resort to law.

People's Mediation Committees should not just passively mediate disputes; rather, they should actively seek to prevent and reduce civil disputes and prevent such disputes from escalating.

#### Judicial Mediation

Article 35 of the Law on Civil Procedures of the People's Republic of China states, "When handling civil cases, courts of law should, based on consent of the litigants, mediate the cases on the merits of the cases themselves."

#### 1. Ways of Mediation

Article 86 of the above-mentioned law provides that when mediating cases, courts may be presided over by a sole judge or by a collegiate panel and mediation should take place on the spot as much as possible. Courts may notify, in a simple way, the litigants and witnesses to appear in court.



Article 87 also specifies that courts may invite relevant entities or individuals to assist, and the invited entities or individuals should assist the courts in mediation.

## 2. Mediation Agreement

Article 88 stipulates that an agreement between the litigants must be arrived at through the consent of all parties and should not be imposed on them; the contents of the agreement should not contravene the law.

## 3. Mediation Document

### a) Generation of the mediation document

Article 89 of the Civil Procedure Law says that if an agreement is reached between the parties after mediation, the court should prepare a mediation document, which should specify what the dispute is about, the facts, and the result.

The mediation document should be signed by the judge and the clerk and affixed with an official seal of the court. Then, it should be delivered to the parties. It becomes legally binding after the parties sign it.

### b) When a mediation document is not required

Article 90 of the Civil Procedure Law says that the court may choose not to prepare a mediation document under any of the following circumstances:

A divorce case that ends up with reunion through mediation;

Adoption cases where the relation of adoption is sustained through mediation;

Cases that are enforceable immediately;

Other cases where a mediation document is not required.

Agreements for which a mediation document is not needed should be recorded in the court log

and will become legally binding upon signature of the parties, judges and the clerk.

#### 4. Failure of Mediation

Article 91 of the Civil Procedure Law provides that a court of law should adjudicate in a timely fashion if mediation fails to produce an agreement or if one party retracts before the mediation document arrives.

### **VIII. Public Notary System**

Public notaries are persons accredited by the state to witness civil matters for legal purposes. In the past, public notaries were state offices representing the state in witnessing legal relations in civil matters. State notary offices, at the request of applicants, notarize legal acts and the truthfulness and legality of legal documents and facts in order to protect public property and safeguard the lawful rights and interests of citizens. Since October 1, 2000, the Ministry of Justice has implemented a plan to reform the notary system. Under the new scheme, public notary offices are no longer administrative bodies; rather, they are non-profit entities with a legal-person status that independently conduct notary business to meet market demand and assume full responsibility for their operations. In the future, the state will no longer approve the establishment of public notary offices as administrative bodies. Public notaries will be recruited openly through examinations administered by the Ministry of Justice.

#### Setup of Public Notary Offices

Public notary offices are set up in municipalities directly under the central government, counties (autonomous counties), and cities. Subject to approval from judicial authorities of provinces, autonomous regions and municipalities, districts of cities may also set up public notary offices.

All the offices are independent of each other.

Each office should have a director and a deputy director who should be notaries themselves.

## Scope of Business

Notarize civil legal acts such as contracts, trusts, wills, gifts, division of property, and adoption of children;

Notarize facts that amount to civil legal acts such as birth, death, marriage, divorce, kinship, identity, degree, and experience;

Notarize documents that amount to civil legal acts such as authenticity of signatures and seals on certificates, consistency of copies of certificates, excerpts, translations and photocopies with the originals;

Notarize the enforceability of creditor documents such as repayment agreements and contracts on recovery of debts;

Auxiliary business, such as preservation of evidence, maintenance of wills or other documents, drafting notary documents on behalf of clients, notarizing the opening of lottery draws, etc.

## Validity of Contracts

Notarized documents are good for the following four purposes:

Evidence. Article 67 of the Civil Procedure Law states, "Legal acts, legal facts and documents that have been notarized through legal procedures should be regarded as a basis for establishing facts, except where opposing evidence is sufficient to overrule the notarized documents."

Enforceability. At present, this is limited only to the recovery of debts and goods. Liability documents notarized by public notaries are enforceable; if one party fails to comply, the other party can apply to the local grassroots court that has jurisdiction for enforcement.

Legality. This means certain legal acts take effect and become legally binding only after they are notarized. These include adoption of children and marriage registration between Chinese citizens and foreigners.

Extraterritoriality. Notarized documents are legally valid outside China. This is an extension of the inherent legal effect of notarized documents abroad. According to international practice, notarized documents sent by Chinese citizens and legal entities for use abroad can take legal effect and be accepted by the host country only after they are certified by the Chinese Foreign Ministry and Foreign Affairs Offices of the provinces, autonomous regions and municipalities or foreign embassies or consulates in China.

## Procedures

Public notary offices and persons applying for notarization should observe the following procedures:

### 1. Application and Acceptance of Applications

Except for wills and adoption, which require the applicant to go to the public notary office in person, citizens or legal persons can authorize an agent to handle the notarization procedures on their behalf. Applications should be filed with a public notary office that has jurisdiction and an application form should be filled out and be affixed with a signature or seal. Applications should come with other supporting documentation such as ID, letter of authorization, documents to be notarized, property ownership certificates or other materials. The public notary office should make a preliminary decision whether to accept the application or not upon receipt of application documents.

### 2. Review

An important link in notarization, public notaries should carefully review the number of applicants, identity, qualifications, capability of civil acts, intentions of applicants and applicable rights. They should also verify whether the acts, facts or documents to be notarized are true and legal, whether the documents to be notarized are complete, whether the wording is accurate, and

whether the signature or seal is complete.

### 3. Certification

Public notaries should produce a public notary certificate for qualified applicants.

### 4. Special Procedures

These refer to procedures required for special types of public notarization, such as tendering and bidding, opening of lottery draws and auction bids. In such cases, public notaries should be at the scene themselves and read a public notary statement regarding what is truthful and legal.

Furthermore, they should produce a notary document and deliver it to applicants within seven days of notarization.

### 5. Reconsideration

Applicants who object to decisions given by a public notary office not to accept an application, refuse to notarize or withdraw a public notary document may apply within a specified period of time to the judicial authorities for reconsideration; those who object to the reconsideration decision may file a suit to a court of law within the specified period of time.

## **IX. System for Judicial Administration**

The judicial administration is an important component of the state apparatus and a major functional department of the government. It is responsible for administering judicial execution and managing laws and regulations.

Organizationally, the Ministry of Justice supervises all the judicial departments across the country; local judicial authorities are subordinate to superior judicial authorities and to the government at the same level.

Main responsibilities of judicial authorities include:

#### 1. Manage Reform-through-labor and Reeducation-through-labor Institutions

Organize and lead reform-through-labor and reeducation-through-labor work;

Set the location of jails and reformatories and placement of prisoners and inmates;

Direct, supervise and inspect prisons and reformatories and accurately implement policies and guidelines for reform- and re-education-through-labor work;

Propose or review decisions concerning reform- or re-education-through-labor;

Draft and review long-term plans and annual plans;

Direct jails and reformatories to improve management;

Sum up and promote advanced practices in reform- and re-education-through-labor;

Inspect and handle major incidents that take place at jails or reformatories;

Mete out disciplinary penalties for wardens who violate laws or discipline;

Manage, inspect, train and promote officers at jails and reformatories.

## 2. Regulate Lawyers

Supervise and direct lawyers, law firms and bar associations;

Review constitutions of bar associations;

Handle applications for taking part in lawyers qualification examination and administer the examination;

Confer lawyer's qualifications and licenses;

Determine the setup of law firms and the development of lawyers;

Draft rules for legal assistance;

Penalize lawyers who breach professional discipline, including revoking qualifications of those who are seriously incompetent;

Develop rules for lawyers to charge fees;

Sum up and promote good practices of lawyers;

Draft development plans for the legal profession.

### 3. Regulate Public Notaries

Supervise public notaries;

Determine the setup of public notary offices, the staffing, organization and examination of public notaries;

Appoint and remove the director and deputy director of public notary offices;

Supervise fee-charging and expenditures by public notaries;

Perform disciplinary inspections of public notaries;

Sum up and promote good practices of public notaries.

### 4. Manage Training of Judicial Officials

Draft guidelines for training judicial officials and develop training plans;

Direct the operation of political and law schools, including training of faculty and developing of textbooks;

Sum up and promote good practices in training.

### 5. Manage Legal Education

Set the direction of legal education, draft development plans, coordinate legal education nationwide, and collaborate with the Ministry of Education in supervising legal education across the country;

Appoint and remove leading officials of political and law schools affiliated with the Ministry of Justice, review and approve capital expenditures and major expenditures of those schools, determine the setup of programs, enrolment and placement of graduates;

Take the lead in developing textbooks for legal education across the country.

## 6. Direct People's Mediation Committees

Manage the organizational, ideological and operational buildup of People's Mediation

Committees and direct them in their mediation work;

Study causes, characteristics and patterns of civil disputes and propose ways to prevent such disputes;

Publicize policies, laws and ethics;

Sum up and promote good practices in mediation.

## 7. Promote Public Awareness of Rule of Law

This includes collaboration with relevant departments in launching publicity campaigns, introducing legal courses into schools and publishing legal periodicals and books.

## 8. Supervise Foreign Affairs of Judicial Departments.

The Ministry of Justice supervises all foreign affairs of the country's judicial organs. This entails determination of direction, scope and forms of foreign affairs and logistical arrangements; sending delegations to visit abroad and attend international conferences; receiving foreign visitors and briefing them on China's legal developments; conducting international legal assistance.

## 9. Supervise Theory-building and Research in Judicial Administration

Define the organizational setup and missions of research institutions in the judicial apparatus; Draft laws, regulations and rules concerning judicial administration and Study issues related to judicial administration, crimes (particularly juvenile delinquency).

## **X. State Compensation System**

The state, under this system, is required to compensate for damages it has caused through infringement of citizens' rights. Article 2 of the Law on State Compensation, passed on May 12,



1994 by the Eighth National People's Congress states, "Citizens, legal persons or other organizations have the right to seek compensation from the state if state organs and office holders abuse their power and infringe upon their lawful rights and interests and have caused damages thereof."

The State Compensation Law specifies two kinds of compensation: administrative and criminal.

#### Administrative Compensation

The state should assume the responsibility of compensation if government offices or their staff abuse their power and infringe upon the lawful rights and interests of citizens, legal persons or other organizations and have caused damages thereof. Administrative compensation is the primary component of state compensation.

#### 1. Scope of Compensation

Articles 3 and 4 of the State Compensation Law specifies the scope of compensation:

Unlawfully detain citizens or adopt unlawful administrative, forceful measures to restrict citizens' corporal freedom;

Unlawfully incarcerate citizens or adopt other measures depriving citizens of their corporal freedom;

Use violent means such as battering or induce others to use violent means such as battering that has caused physical injuries or death to citizens;

Abuse weapons or police devices and have caused physical injuries or death to citizens;

Other unlawful acts that have caused physical injuries or death to citizens;

Abuse administrative penalties such as imposing fines, revoking licenses or permits, ordering suspension of business or confiscation of property;

Abuse administrative measures such as sequestering, detaining or freezing property;

Abuse government regulations in expropriating property or levying fees;

Other unlawful acts that have caused property damages to citizens.

Article 5 of the State Compensation Law also specifies a number of situations where the state does not assume the responsibility for compensation:

Personal acts by government employees unrelated to the exercise of their duties;

Damages caused by acts committed by citizens, legal persons or other organizations themselves;  
and

Other situations as provided for in the law.

## 2. Compensation Body

The State Compensation Law provides for the following ways for defining responsibility of compensation:

If damage is done by a government office or its staff, then the office should assume the responsibility for compensation;

If damage is done by more than two government offices, then all the offices involved should jointly assume the responsibility for compensation;

If damage is done by organizations under authorization of laws and regulations, then the authorized organizations should assume the responsibility for compensation;

If damage is done by organizations or individuals authorized by government bodies in the exercise of authorized powers, then the authorizing bodies should assume the responsibility for compensation;

If the government body responsible for compensation no longer exists, then its succeeding body should assume the responsibility for compensation; if no such succeeding body exists, then the

administrative body that eliminates the body responsible for compensation should assume that responsibility;

If damage is awarded by an administrative reconsideration body, then the original body that causes the damage should be held responsible for compensation; however, if the reconsideration decision has aggravated the damage done, then the reconsideration body should assume responsibility for compensation for the aggravated part.

Claimants of administrative compensation should first file their claim with the administrative body responsible for compensation; they may also raise their claim while applying for administrative reconsideration or filing an administrative suit. They should not directly file a suit without first going through the administrative body responsible for compensation.

### Criminal Compensation

Criminal compensation applies when the judicial authorities wrongly detain or arrest citizens or wrongly adjudicate cases.

#### 1. Scope of Compensation

Articles 15 and 16 of the State Compensation Law specifies the scope of criminal compensation as follows:

Wrongly detain persons without incriminating facts or without facts proving that the persons are prime suspects;

Wrongly arrest persons without incriminating facts;

Persons who are pronounced innocent in a judicial review but who have already served their sentence as ruled in the original trial;

Extort a confession through torture or cause physical injuries or death to citizens through battery by judicial personnel or others at their instigation;

Abuse weapons or police devices and have caused physical injuries or death to citizens;  
Abuse administrative measures such as sequestering, detaining, freezing or recovering property;  
Persons who are pronounced innocent in a judicial review but who have already paid the fine and whose property has already been confiscated as ruled in the original trial.

Article 18 of the State Compensation Law also specifies that the state shall not assume the liability for criminal compensation under any of the following circumstances:

Persons who have been detained or penalized for purposeful perjury or forgery of other incriminating evidence;

Persons who, under Articles 14 and 15 of the Criminal Law, should not assume criminal liability but who have been detained;

Persons who, under Article 11 of the Criminal Procedure Law, should not be criminally prosecuted but who have been detained;

Acts committed by individuals unrelated to the exercise of their duty as personnel of the state investigative, procuratorial, judicial or jail authorities;

Injuries caused by citizens themselves through self-injury or deliberate self-hurt;

Other situations as provided for in the law.

## 2. Compensation Body

The State Compensation Law provides for the following ways for defining responsibility of compensation:

If damage is done to citizens, legal persons or other organizations by government offices or their staff when exercising investigative, procuratorial, judicial or jail management duties, then the offices should assume the responsibility for compensation;

If citizens are wrongly detained without incriminating facts or without facts proving that they are

prime suspects, then the body that made the detention decision should assume responsibility for compensation;

If citizens are wrongly arrested without incriminating facts, then the body that made the arrest decision should assume responsibility for compensation;

For persons who are pronounced innocent in a re-trial, the original court that gave the ruling already in effect should bear the responsibility for compensation; for persons who are pronounced innocent in the second instance, the court that gave the first-instance ruling and the body that made the arrest decision should jointly bear responsibility for compensation.

Claimants of criminal compensation should first file their claim with the body responsible for compensation; they may also apply to higher authorities for administrative reconsideration within 30 days of expiry of the term if compensation is rejected after expiry of the term, or if they object to the amount of compensation.

A compensation committee composed of three to seven judges should be set up in a court above the intermediate level.

Compensation-paying bodies, reconsideration bodies or courts shall charge no fees on compensation claimants.

State compensation is paid in monetary form. Whenever possible, recovery or reinstatement of property should be implemented. State compensation is calculated in the following ways:

For citizens whose personal freedom has been infringed, the amount of daily compensation is calculated on the basis of average daily wage for workers in the preceding year;

For citizens whose life and health rights have been infringed, the amount of compensation should be calculated in the following ways:

a) For those who sustained physical injuries, the compensatory body should pay their medical

fees and loss of income caused by absence from work. Daily compensation for the loss of income is calculated on the basis of the average daily wage for workers in the preceding year, with the maximum being five times the average annual wage for workers in the preceding year;

b) For those who lost partial or full working capabilities, the compensatory body should pay their medical fee and a disability compensation, the amount of which depends on the degree of the disability. The maximum for partial disability should be 10 times the average annual wage for workers in the preceding year;

c) For those who lost all their working capabilities, the maximum should be 20 times and living expenses should be paid for their dependents who are unable to work;

d) For those who died, the compensatory body should pay death compensation and a funeral fee, with the maximum being 20 times the annual wage for workers in the preceding year. In addition, it should also pay living expenses for dependents of the victims.

3. Compensation for damages done to the property of citizens, legal persons or other organizations should be paid in the following ways:

Return of property in the case of imposition of fines, recovery or confiscation of property, or expropriation of property or collection of fees in violation of regulations;

Remove the sequestration, detention or freezing action on the property if it is wrongly sequestered, detained or frozen; if property is damaged or lost, restore it to original shape if possible; if not, compensate for the damage;

If the property due to be returned is damaged, restore it to its original shape if possible; if not, compensate for the damage;

If the property due to be returned is lost, compensate for the loss;

If the property is already auctioned off, pay the claimant the proceeds from the auction;

If a business owner is wrongly revoked of his license or ordered to suspend his business, compensate for his current expenses incurred during the suspension of business;

If other damages are done to an individual's property, compensate for the direct losses arising thereof.

Compensation expenditures should be budgeted for by governments at all levels.

Article 32 of the State Compensation Law provides for the validity of state compensation:

"Claimants should file their appeal for state compensation within two years beginning from the date when the acts of government bodies and their staff in exercising their duties are established as unlawful, not including the days of detention."

Article 33 of the same law specifies how foreign-related state compensation is calculated: "This law applies to foreign individuals, enterprises and organizations within the territory of the People's Republic of China. Where the home country of the foreign individual, enterprise or organization does not protect or limits the rights to state compensation of individuals, enterprises or organizations of the People's Republic of China in that country, the People's Republic of China will reciprocate that policy toward individuals, enterprises or organizations of that country." This provision reflects both China's respect for the rights of foreign individuals, enterprises and organizations and its sovereignty and dignity.

Articles 14 and 24 of the State Compensation Law provides for the right of recovery for the state in administrative and criminal compensation: "Compensatory bodies, after paying for the damages or losses, will recover, in part or in full, the amount of compensation from the individuals or authorized organizations or individuals that are responsible, whether purposefully or otherwise, for the damage or loss." This includes the following situations: 1) Situations as defined in Clauses 4 and 5 in Article 15 of this law; 2) Persons who are pronounced innocent in a

re-trial in accordance with the judicial review procedures, but for whom the original ruling of fines or confiscation of property has already been carried out.

## **XI. Legal Assistance**

Legal assistance is a system of legal remedy adopted by many countries in the world. Under this system, the state, throughout the legal process and at all levels, provides legal assistance, through reduction or exemption of fees, to the underprivileged of society who have difficulty safeguarding their own rights through the normal legal means, because of economic problems or otherwise. As a major safeguard to realize social justice and judicial parity and to protect civil rights, legal assistance occupies a very important position in a country's judicial system.

Article 34 of the revised Criminal Procedure Law of the People's Republic of China, passed on March 17, 1996, states, "For public-prosecuted cases, the court can designate a lawyer who provides legal assistance to defend the accused if the accused fails to appoint a defense attorney for economic or other reasons. If the accused fail to appoint a defender because they are blind, deaf, mute or a minor, the court should designate a lawyer who provides legal aid to defend the accused. If the accused receives a death penalty, but fails to appoint a defense attorney, the court should designate a lawyer who provides legal aid to defend the accused." This is the first time in the history of Chinese legislation that legal assistance was written into law.

The Lawyers Law, passed on May 15, 1996, provides more specifics with regard to legal assistance. Chapter 6 of the law says, "Citizens who need legal assistance but cannot afford to pay for lawyers' fees, may, in accordance with state regulations, seek legal assistance in matters such as supporting the elderly, workplace injuries, criminal lawsuits, state compensation, and the granting of pensions for the disabled or survivors of an accident. Lawyers should assume the responsibility of legal assistance and dutifully help those in need in accordance with State



regulations. Specific rules for legal assistance will be worked out by the State Council judicial administration and submitted to the State Council for approval." These provisions define the scope of legal assistance and require lawyers to provide legal assistance. In addition, they lay the foundation for future legislation on legal aid.

At present, China has formed a four-tier legal assistance structure:

1. At the national level, a Center for Legal Assistance has been created under the Ministry of Justice to supervise and coordinate legal assistance across the country. This center, created on May 26, 1997, is responsible for supervising legal assistance, drafting regulations and rules, mapping out medium- to long-term plans and annual plans, coordinate legal assistance work nationwide, and conducting exchanges with foreign legal-aid groups and individuals.

On the same day, the China Legal Aid Foundation was created to raise, manage and use the funds, publicize the legal aid system, and promote judicial justice. Funding comes from donations and sponsorships given by domestic organizations, enterprises and individuals; interest; proceeds from bond and stock trading.

2. Legal-aid centers have also been established in provinces (autonomous regions) to supervise and coordinate legal-aid work in their respective jurisdiction.

3. The next tier is prefectures and cities where the legal-aid centers perform a dual duty: administer and implement legal-aid programs in their jurisdiction.

4. Finally, where conditions permit, legal-aid centers are also set up in counties and districts; where conditions do not permit, the Judicial Bureau of the counties and districts should be responsible for legal aid.

Applicants for legal aid should meet two conditions: that have sufficient reason to prove they need legal assistance to safeguard their lawful rights and interests; and that they indeed cannot

afford to pay, in part or full, the legal fees.

Legal assistance is rendered by three groups of people: lawyers, public notaries and grassroots legal professionals. Lawyers provide procedural aid (including defense for criminal cases, representation for criminal cases, and representation for civil procedures) and non-procedural aid; public notaries provide notarization assistance; grassroots legal professionals provide legal counseling, document drafting and general non-procedural aid.

In China, legal aid is funded by three sources: government, social donations and volunteering. Though still in an embryonic stage, China's legal-aid system as a major legal institution will surely play an important role in realizing the rule of law in China, safeguarding fundamental human rights and promoting social stability.

## **Civil Law System**

In 1986 the NPC adopted the General Principles of Civil Law of the People's Republic of China, which helped clarify the scope of the civil law. Article 2 states that the civil law governs the personal and property relationships between citizens and/or legal persons. Additionally, the civil law is comprised by other more specific pieces of legislation dealing with a vast array topics spanning marriage, land administration, environmental law, copyright, and trademark.

## **Civil Procedure**

The first codification of the provisional Civil Procedure Law of the PRC was passed in 1982. In 1991, the provisional code was replaced through the enactment of the Law of Civil Procedure by the NPC. In a court of first instance, a case will proceed under one of two forms of procedure,

either ordinary procedure, or summary procedure. Under ordinary procedure, a case is initiated by filing a writ with a court, who will examine the writ to determine if the requirements for bringing the action are met. If the requirements are met, then the court should file the case. If the court does not decide to file the case, this decision can be appealed by the plaintiff. (Art. 112) If the case is initiated, the court must serve the writ on the defendant, who is permitted to file a defense to the plaintiff's claim.

Prior to the commencement of trial, it is the duty of the court's adjudicative personnel to review the case and its materials and carry out an investigation seeking to collect the evidence that is necessary to the determination of the case. Also before to trial, mediation often with the hope that the parties can voluntarily settle their dispute. In the event that the pretrial mediation is unsuccessful, the parties must be given notice that the case is going to proceed to trial, and when they are to appear before the court.

There are three stages to the ordinary trial process. The first stage is investigation, where the parties and witnesses are questioned by the court, and there is the presentation of material and documentary evidence. (Article 124) The second is the court debate, this is comprised of the parties and their counsel offering their arguments. (Art. 127) The third stage is the judgment of the case, assuming that mediation is once again unsuccessful. (Art. 128).

Under the summary procedure, the basic people's courts and its tribunals can decide simple civil cases in a less formalistic manner (Art. 142). The plaintiff's claim may be presented orally, or the disputing parties can go directly to court together and request that the court issue an immediate resolution. Only one adjudicator hears the case, and the procedures are far less formal.

Appeals can be taken to the next higher level court by any of the parties to the case. A bench of adjudicators will review the facts and the law of the case, which can involve an open hearing, but one is not required. Also at the appellate level, a mediation may occur. (Art. 155). The decision by the court of second instance is final and legally effective. However, the adjudicative supervision can be initiated by a court, a party, or a procuratorate under Article 179.

### **Criminal Law System**

The current Criminal Law Code was first adopted in 1979 and later amended in 1997. As supplement to the Code, there have been several other additions to the criminal law enacted primarily by the NPC's Standing Committee. Aside from protecting society from harm, a key goal underlying the criminal laws, and the system in general are to reform the person convicted of the crime. The means by which the Chinese corrections system attempts to reform criminals includes education, labor and skills training.

### **Criminal Procedure**

The modern Law of Criminal Procedure was initially established in 1979, and subsequently amended in 1996. There are five principle stages of a criminal case: initiation, investigation, prosecution, adjudication, and execution of the sentence. The filing, or initiation of criminal cases and the investigation is carried out by the public security organs or the procuratorate. Often the public security organ is responsible for detaining suspects (no prior authorization needed from procuratorate), executing arrests (prior authorization needed), initial questioning and surveillance of residence (Article 38 of the Criminal Code). The prosecution is to be initiated by the procuratorate if the facts indicate a crime has been committed. The procuratorate also questions the suspect, and then issues one of four possible determinations:

- 1) send the case back to the public security organ for further investigation;

- 2) initiate a public prosecution;
- 3) excuse the suspect from prosecution; or
- 4) decide not to initiate a prosecution

In the instance where the procuratorate decides to initiate a prosecution, the case then advances to the court of first instance, usually the local basic people's court depending upon the nature of the crime (see chart above for more detail on jurisdiction). At the formal trial, there are five stages. First the chief adjudicator begins and the procurator reads the indictment. Second, the adjudicators question the defendant and the other parties (procurator, defense and victim) may be given permission to interrogate defendant. Also during this stage other witnesses are examined by the adjudicators and the procurator, and if granted permission the defendant and his defender may question the witnesses. The third stage is the oral argument phase, "court debate," where the procurator, victim, defendant and defender are permitted to make speeches supporting their cause. Fourth, the chief adjudicator will announce that the court debate is finished and the defendant is given the right to make a final statement. Finally, the case is deliberated by the court, and the judgment is announced in public.

After the court of first instance has rendered its decision, the case is subject to one subsequent review in a court of second instance via an appeal or a protest. The defendant, or the person who brought the prosecution (in a private prosecution) are permitted to initiate an appeal within the statute of limitations period ([put in link here](#)). The procuratorate may file a protest if it is displeased with the first instance court's disposition of the case. After the court of second instance has decided a case it is deemed legally effective. Nevertheless, the decision may be subject to challenge via the adjudicatory supervision.

## Administrative Law

The Law of Administrative Litigation, passed in 1989 by the NPC allows citizens, legal persons and organizations to bring legal challenges against certain administrative action. For a brief outline see the following page. In addition to the Law of Administrative Litigation, there are numerous administrative laws and rules dealing with particular subjects, and issued by various state and local organs.

Administrative adjudication takes two forms benefit-conferring and burden- imposing. The types of administrative actions that can be challenged must be ‘concrete actions’ which include: administrative punishments (such as detentions and fines), administrative coercive measures, interference with the operations of enterprises, refusal to take action or perform an obligation, unlawful demands for performance of duties, and violations of rights of the person or a property right. The review of state action is carried out in the local people’s courts. Court review of agency action is not permitted for state action involving national defense or foreign affairs. Moreover, the court cannot review administrative legislation or rule makings. There are different official sources of Chinese law.<sup>33</sup>

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<sup>33</sup> Official Sources of Law

### Statutory Law

Laws (*fa lü*): promulgated by the National People’s Congress (NPC) and its Standing Committee.

Administrative Regulations (*xing zheng fa güi*): promulgated by the State Council.

Local Regulations (*di fang fa güi*): promulgated by local People’s Congress (hereinafter Local NPC) and its standing committee.

Administrative Rules (*xingzheng güizhang*), including:

Local Rules (*difang zhengfu güizhang*): promulgated by the local governments;

Departmental Rules (*bumen güizhang*): promulgated by the ministries and commissions under the State Council, the People’s Bank of China, the Auditing Office, and other departments with administrative responsibilities directly under the State Council.

Military Regulations: promulgated by the Central Military Commission in accordance with the Constitution and the Laws, and Military Rules enacted by the lower level military authorities within their powers and responsibilities.

### Judicial Interpretation

Judicial precedents are not enforceable in China. The Supreme People’s Court (SPC), however, bears the authority to issue Judicial Interpretations (*sifa jieshi*) as guidelines to the trials, which are nationally enforceable.

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## Treaties

The treaties (*tiao yue*) China has entered are also legally effective documents. The PRC Constitution and the Law of Legislation do not provide the relationship between treaties and domestic law.

## Print Sources

### Official Publications of Statutory Law

#### Official Publications of Individual Statutes

Laws: Gazette of the Standing Committee of the National People's Congress (NPC Gazette)

Administrative Regulations: Gazette of the State Council (State Council Gazette)

Local Regulations: Gazette of the standing committees of the relevant people's congress

Departmental Rules: State Council Gazette or gazette of the relevant department

Local Rules: Gazette of the relevant people's government

Military Regulations and Rules: only those non-confidential could be published, which must on the military newspapers

#### Official Publications of Statutory Compilations (non-exclusive)

Zhonghua Renmin Gongheguo Falü Huibian [The Laws of the People's Republic of China], edited by the NPC Standing Committee Law Working Commission (NPCLWC), published by the People's Press (available at the Law Library of Congress: KNQ12.C48)

Zhonghua Renmin Gongheguo Xianxing Falü Xingzheng Fagui Huibian [The Effective Laws and Administrative Regulations of the People's Republic of China], edited by the NPCLWC, published by the People's Press (available at the Law Library of Congress: KNQ13 2002a)

[Note: NPCLWC is authorized to compile Laws, comprehensive compilations of Laws, Administrative Regulations, Local Regulations and Administrative Rules. The People's Press (*ren min chu ban she*) is designated to publish the compilations for the NPCLWC.]

Zhonghua Renmin Gongheguo Fagui Huibian [The Laws and Regulations of the People's Republic of China], edited by the Legislative Affairs Office of the State Council (SCLAO), published by the Chinese Legal System Press (available at the Law Library of Congress: KNQ12.C483);

Zhonghua Renmin Gongheguo Xin Fagui Huibian [New Laws and Regulations of the People's Republic of China], edited by the SCLAO, published by the Chinese Legal System Press (available at the Law Library of Congress: KNQ12.C45)

[Note: the SCLAO is authorized to compile Administrative Regulations, and comprehensive compilations of Laws, Administrative Regulations, Local Regulations and Administrative Rules. The People's Press, Law Press China (*fa lü chu ban she*), Chinese Legal System Press (*zhong guo fa zhi chu ban she*) and Democracy and Law Publishing House (*min zhu fa zhi chu ban she*) (collectively, the Four Law Publishers) are designated as the publishers of the compilations for the SCLAO.]

Zhongguo Huanjing Baohu Fagui Quanshu [Compilation of the Laws and Regulations of the Environmental Protect], edited by the National Environmental Protection Bureau (available at the Law Library of Congress: KNQ3128.A32)

[Note: Each of the departments of the State Council is authorized to compile the Department Rules within its area of power and responsibility, and comprehensive compilations of Laws, Administrative Regulations and Department Rules within its area of power and responsibility. The designated publishers of these compilations are the professional publishing houses managed by the departments, and if no such publishing house is available, one of other central government professional publishers approved by the Administration of Press and Publication, or one of the above mentioned Four Law Publishers may be designated as publisher.

Hunansheng Difangxing Fagui Huibian [Local Regulations of Hunan Province], edited by the Legal Working Committee of the Standing Committee of the Hunan Provincial People's Congress (available at the Law Library of Congress: KNQ5902.3)

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[Note: the local people's congress and the government's designated authorities (which are generally legal offices within the congress and government) are authorized to compile and publish the Local Regulations and Local Rules within their own legislative authorities, as well as comprehensive compilations of Local Regulations and Local Rules effective in their region. The publishers may be local publishers, or the Four Law Publishers.]

#### Official Publications of Judicial Interpretation

The SPC publish judicial interpretations in its gazette. The SPC also publishes judicial interpretations in its subsidiary newspaper, the *People's Court (renmin fayuan bao)*. There are compilations of judicial interpretation available, which, however, are not designated by the SPC as official.

Example: Zuixin Zhonghua Renmin Gongheguo Changyong Sifa Jieshi Quanshu [Compilation of the Most Recent Often-Used Judicial Interpretation of the People's Republic of China], available at the Law Library of Congress (K28.I536).

#### Official Case Law Publishing

Case law is not a primary source of PRC law; thus, decisions are not required by law to be made public. The courts publish only a small amount of selected cases in their gazettes. No court in China currently publishes all of their court opinions without selection and amendments.

Though not designated by any laws or regulations as official, ren min fa yuan an li xuan [Selective Compilation of the People's Court Cases] is generally taken to be official because its publication is decided by the SPC.

#### Official Publication of Treaties

Zhonghua Renmin Gongheguo Tiaoyue Ji [International Treaties of the People's republic of China], edited by the MFA (available at the Law Library of Congress: KZ965.3.C45)

[Note: Treaties which the NPC Standing Committee has decided to ratify or to accede to are published in the NPC Gazette. The official publication of other treaties depends on the decision of the State Council. The Ministry of Foreign Affairs is authorized to compile treaties into *Zhonghua Renmin Gongheguo Tiaoyue Ji (Collection of the Treaties of the People's Republic of China)*, and publish this compilation.]

#### Printed Publication in English

Example: Zhonghua Renmin Gongheguo Falü Huibian [Chinese-English Edition, Laws of the People's Republic of China], compiled by the NPCLWC, published by the Law Press China (available at the Law Library of Congress: KNQ3190. A28)

[Note: The English versions of PRC statutes have no legal effect in China, even if they are translated and published by the legislative authorities. However, the law does provide official publication of the English versions of laws and administrative regulations. In addition, these English versions of statutory compilations must be published by the Foreign Language Press (*wai wen chu ban she*), the People's Press, or Law Press China.

Laws: must be compiled by the NPCLWC, or the NPCLWC involves itself in the editorial process.

Administrative Regulations: must be compiled by the SCLAO, or the SCLAO is involved in the editorial process.

#### Web Resources

##### Online Databases

ChinaLawInfo (in Chinese and in English) – affiliated with the Peking University Law School, this online legal database includes laws, regulations, journal articles, legal news.



## Conclusion

The legal system of the People's Republic of China (PRC) is defined by the government as a "socialist legal system." Despite the official definition, however, China's legal system is based primarily on the model of Civil Law. The Constitution of the People's Republic of China is the highest law within China. The current version was adopted in 1982 with further revisions in 1988, 1993, 1999, and 2004.

There are four levels of the court system in China: the grassroots, intermediate, higher and supreme people's courts, in addition to special courts such as the military, maritime, railway and forestry courts.

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- iSinoLaw (in both Chinese and English) – launched in 2000 by isinolaw Limited and isinolaw Research Center in Hong Kong, containing comprehensive Chinese legal documents.
  - Ceilaw (in Chinese) – affiliated with the State Council, this database used to be available within Chinese government agencies via an internal government communication network. The Web site was launched in 1997 and is available in Chinese only.  
Official Government Resources
  - The Central government's official Web site, in both Chinese and English
  - The Supreme People's Court's official Web site . Most of the judicial interpretations issued by the SPC are available on this Web site.
  - Chinacourt.org (in English) – is sponsored by the Supreme People's Court of the PRC and focuses on judicial news and legal information. Access service is free, and the laws and regulations are available in English. However, court judgments are not a predominant part of on this site. The database can only be searched by using keywords.
  - English Web site of Xinhuanet – the official government affiliated news agency.  
Web Sites in English
  - AsianLII – the website contains an A to Z list of laws of the PRC derived mainly from government websites including ChinaLaw (Information Centre for Legislative Affairs Office of the PRC State Council) and ChinaCourt (Supreme Peoples' Court).
  - SinoLaw – this database is run by a Chinese information service agency in Beijing. Though SinoLaw emphasizes commercial and business laws, it also includes basic laws, major statutes, and regulations of the PRC.
  - China Law Digest
  - Research Guides to Chinese Law
  - China Law Blog
  - ABA Section of International Law: China Committee
  - EastView Online – the full text journal database houses a comprehensive range of research articles, including legal literature. This commercial database has an English index and also Chinese full text.
  - Chinese Legal Research – University of Washington School of Law, Gallagher Law Library
  - Chinese Law Prof Blog – run by Prof. Donald Clarke, George Washington University Law School

China's legal system covers laws that fall under seven categories and three different levels. The seven categories are the Constitution and Constitution-related, civil and commercial, administrative, economic, social, and criminal laws and the law on lawsuit and non-lawsuit procedures. The three different levels are state laws, administrative regulations and local statutes. By March 2008, the NPC and its Standing Committee had promulgated more than 229 laws currently in force, the State Council had issued over 600 administrative regulations currently in force, local people's congresses and their standing committees had enacted over 7,000 local statutes currently in force, and the people's congresses of national autonomous areas had enacted over 600 regulations concerning autonomy and local needs. A socialist legal system having Chinese characteristics and centered on the Constitution has taken initial shape. China now has laws governing the basic, important aspects of its political, economic, cultural and social life.

Concerning the Constitution and Constitution-related laws, in addition to having adopted the current Constitution and its four amendments, China has also enacted the Electoral Law, Law on Deputies to the NPC and to Local People's Congresses, and a number of organic laws for state organs, Legislative Law, the Supervision Law and other laws related to state organs. China has also enacted laws concerning systems for regional ethnic autonomy, special administrative regions and primary-level mass self-governance: principally the Law on the Autonomy of Ethnic Minority Regions, the Basic Law of the Hong Kong Special Administrative Region, the Basic Law of the Macao Special Administrative Region, the Organic Law of Villagers' Committees and the Organic Law of Urban Neighborhood Committees.

With regard to civil and commercial law, China has enacted laws concerning property and personal relations between individual entities with equal standing in society. These principally include the General Principles of Civil Law, the Contract Law, the Guarantee Law, the Auction

Law, the Trademark Law, the Patent Law, the Copyright Law, the Marriage Law, the Inheritance Law, and the Adoption Law. China also enacted laws concerning commercial relations between individual entities with equal standing in society: principally the Company Law, the Partnership Law, the Law on Single Investor Enterprises, the Securities Law, the Insurance Law, the Negotiable Instruments Law, the Commercial Banking Law, the Maritime law and the Trust Law.

Concerning administrative law, China has enacted laws concerning state administration: principally the Regulations on Administrative Penalties Concerning Law Enforcement, the Administrative Punishment Law, the Administrative Licensing Law, the National Defense Law, the Government Procurement Law, the Education Law, the Law on Scientific and Technological Progress, the Law on Preventing and Controlling Communicable Diseases and the Environmental Protection Law. China has also enacted laws related to oversight of administrative activities: mainly the Law on Administrative Supervision and the Law on Administrative Reconsideration.

With regard to economic law, China has enacted laws concerning macro-economic controls: principally the Budget Law, the Audit Law, the Law on the People's Bank of China, the Price Law, the Personal Income Tax Law, and the Law on Tax Collection and Management. China has enacted laws for maintaining market order: principally the Law on Product Quality and the Advertising Law. China has enacted laws for opening wider to the outside world: principally the Law on Joint Ventures with Chinese and Foreign Investment, the Law on Sino-Foreign Contract Joint Ventures, the Law on Wholly Foreign-Invested Enterprises, and the Foreign Trade Law. China has enacted laws to promote industrial development: principally the Agriculture Law, the Highway Law, the Civil Aviation Law, and the Electric Power Law. China has enacted

laws for protecting and rationally developing natural resources: principally the Forestry Law, the Grassland Law, the Water Law, the Mineral Resources Law, and the Law on Land Management. China has also enacted laws for standardizing economic activities: principally the Metrology Law, the Statistics Law and the Surveying Law.

Concerning social law, China has enacted laws concerning labor relations and safeguarding workers: principally the Labor Law, the Trade Union Law and the Law on Mining Safety. China has also enacted laws protecting special groups in society: principally the Law on Security for the Disabled, the Law Protecting Minors, the Law Safeguarding the Rights and Interests of Women and the Law Safeguarding the Rights and Interests of the Elderly.

With regard to criminal law, China has enacted the Criminal Law and adopted more than 10 related supplementary decisions, amendments and legal interpretations to standardize definitions of crimes, assignment of criminal responsibility and determination of punishment.

Concerning lawsuit and non-lawsuit procedures, China has enacted laws to standardize procedures for lawsuits and other legal actions: principally the Criminal Procedures Law, the Civil Procedures Law, the Administrative Procedures Law, the Law on Special Procedures for Maritime Lawsuits, the Extradition Law, and the Arbitration Law.

To adapt to new changes brought about by the development of the market economy, all-round social progress and China's entry into the WTO, China continued to enact new laws and amend and improve the laws currently in force to create a socialist legal system with Chinese characteristics till 2010.

The judicial system is a major component of the political system, while judicial impartiality is a significant guarantee of social justice.

Since the founding of New China in 1949, and especially since the reform and opening-up policies were introduced some three decades ago, China, proceeding from its national conditions, carrying on the achievements of Chinese traditional legal culture and learning from other civilizations regarding their rule of law, has been building and improving its socialist judicial system with Chinese characteristics, safeguarding social justice and making significant contributions to the rule of law of the mankind.

China's judicial system is generally consistent with its basic national conditions at the primary stage of socialism, its state system of people's democratic dictatorship, and its government system of the National People's Congress. With the further development of China's reform and opening up, particularly due to the development of the socialist market economy, the comprehensive implementation of the fundamental principle of rule of law, and the increasing demands of the public for justice, China's judicial system urgently needs to be reformed, improved and developed.

In recent years, China has been promoting the reform of the judicial system and its work mechanism vigorously, steadily and pragmatically. Aiming to safeguard judicial justice and focusing on optimizing the allocation of judicial functions and power, enhancing protection of human rights, improving judicial capacity, and practicing the principle of "judicature for the people," China has been striving to improve its judicial system with Chinese characteristics, expand judicial democracy, promote judicial openness and ensure judicial impartiality. This provides a solid judicial guarantee for China's economic development, social harmony and national stability.

Through judicial reform, China has constantly improved the socialist judicial system with Chinese characteristics, enhancing rigorous, just, polite and incorruptible law enforcement by the

country's judicial organs, promoting the country's scientific development of judicial work and personnel, and winning the public's approval and support.

As circumstances keep changing, there is no end to innovation. Judicial reform is regarded as an important part of China's political system reform; it is the self-improvement and development of a socialist judicial system with Chinese characteristics. It remains a long and arduous task, and we will deepen the reform along with economic and social development. Establishing a just, effective and authoritative socialist judicial system with Chinese characteristics is the goal of our reform, and China will make continuous efforts to achieve this goal.

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