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STUDENT ARTICLE: The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the PRC

Marc Rosenberg

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**The Chinese Legal System Made Easy: A Survey of the Structure of
Government, Creation of Legislation, and the Judicial System Under the
Constitution and Major Statutes of the People's Republic of China**

Marc Rosenberg*

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I. Introduction

The scope of this article is confined to analyzing and discussing the legal system of the People's Republic of China (hereinafter "PRC"). The special areas of Taiwan, Macao, Hong Kong or the PRC Prefectures and Autonomous Regions that have separate and individualized legal systems are beyond the scope of this paper. The purpose of this article is to give the reader a general idea of the Chinese legal system as a whole. Discussions on particular topics like human rights or intellectual property that are the main topics of the bulk of many other articles dealing with China are only dealt with only in a very cursory manner here, if they are dealt with at all. It is hoped that after studying this article the reader will gain knowledge about the theoretical structure of the Chinese legal system as it exists in the PRC, the political organs that make the laws and some of the major codes and legislation presently in force.

This article refrains from judging the theory upon which the system is based; and also refrains from indicating inconsistencies between the laws as written and application in practice. This article is intended to be a general unbiased description of the Chinese judicial system in its theoretical form, presented in a simple and straightforward manner that will allow the reader to gain a basic understanding of the structure of the legal system in the PRC.

I have attempted to provide information regarding the Chinese legal system in the simplest means possible. To that end, neither Chinese characters nor phonetic equivalents appear anywhere in this essay, and I have attempted to standardize the jumble of translations found in many other sources to avoid confusion. An abbreviation key also appears at the end in an Appendix. Should the reader get lost in the alphabet soup of abbreviated titles for governmental organs or laws, the key of abbreviations provides quick and easy guidance. Because this paper analyses a broad topic with limited scope, the material presented is very selective. For a

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thorough understanding of any of the major topics in this paper further reading is recommended.

II. The Constitution and the Structure of the State

A. The Constitution ¹

A review of the Constitution of the PRC (hereinafter the "Constitution") is a good starting place for understanding the framework of the legal system in the PRC. Among the reasons that the Constitution is important is that the vocabulary, terminology, and language in which discussion about government and state affairs takes place, and in which the government is described in the official media, all of which is provided by the Constitution.² Some jurists in China consider the Constitution to be the "mother-law from which other laws are derived as if they were its children."³ In any case, the Constitution is the "fundamental law of the state and has supreme legal authority" where there is a conflict between the Constitution and another law.⁴

Besides a Preamble at the beginning of the Constitution and a final chapter designating design of the national flag and location of the capitol, the Constitution is made up of three main chapters that discuss respectively the General Principles of the Nation, the Fundamental Rights and Duties of Citizens, and The Structure of the State.

The rights and freedoms provided for in Chapter 2 of the Constitution can be broken down into at least 8 categories: (1) the right to equality before the law; (2) political rights and freedom; (3) religious freedom; (4) personal freedom; (5) social and economic rights; (6) cultural and educational rights; (7) rights relating to women and families; and (8) rights of overseas and returned overseas Chinese people.⁵ However, the exercise by citizens of their rights and freedoms may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.⁶ In addition, there is interdependence between the rights and duties of each person. Every citizen enjoys the rights and at the same time must perform the duties prescribed by the Constitution and the law.⁷ According to the Constitution, Chinese citizens should perform the following duties:

¹ THE CONSTITUTION OF THE PRC (1993), (adopted at the Fifth Session of the Fifth National People's Congress and Promulgated for Implementation by the Proclamation of the National People's Congress on December 4, 1982, as amended at the First Session of the Seventh National People's Congress on April 12, 1988, and again at the First Session of the Seventh National People's Congress on March 29, 1993.) [note: earlier drafts of the Constitution were also implemented in 1954, 1975, & 1978.]

² ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 41 (1992).

³ *Id.* at 45 n. 29 (citing CPC Central Party School, *Law Uni*(1984)).

⁴ CONSTITUTION PREAMBLE (1993).

⁵ CHEN, *supra* note 2, at 51-52.

⁶ CONSTITUTION art. 51 (1993).

⁷ *Id.*, art. 33.

- (1) It is the inviolable duty of all Chinese people, including our compatriots in Taiwan, to accomplish the great task of unifying the motherland;⁸
- (2) Citizens of the People's Republic of China have the right as well as the duty to receive an education;⁹
- (3) Both husband and wife have the duty to practice family planning. Parents have the duty to rear and educate their children who are minors, and children who have come of age have the duty to support and assist their parents;¹⁰
- (4) It is the duty of citizens of the People's Republic of China to safeguard the security, honor and interests of the motherland; they must not commit acts detrimental to the security, honor and interests of the motherland;¹¹ and
- (5) It is the duty of citizens of the People's Republic of China to pay taxes in accordance with the law.

It should be noted that Article 3 of the Constitution compels the state organs of the PRC to practice the principles of 'democratic centralism'. Democratic centralism, as it is generally understood, consists of four rules: (1) the individual should be subordinated to the organization; (2) the minority should be subordinated to the majority; (3) the lower-level organ should be subordinated to the higher level organ; and (4) the local authority should be subordinated to the central authority.¹² The Preamble to the Constitution also contains the 'Four Basic Principles' articulated by Deng Xiaoping and later incorporated by the Communist Party of China (CPC). The 'Four Basic Principles' include (1) keeping to the socialist road, (2) upholding the people's democratic dictatorship, (3) insisting on the leadership of the CPC, and (4) Marxism-Leninism-Mao Zedong Thought.¹³ Therefore, although the Constitution provides for a functional division of powers between legislative, executive, judicial and procuratorial organs, not only are all organs subject to the principle of the leadership of the CPC,¹⁴ but all members of the Government must also be members of the CPC.¹⁵

According to the Constitution, the main governmental branches directly involved in legal matters are a legislative branch, a judicial branch and a procuratorate.¹⁶ In the most basic terms, the legislative branch makes the laws, the judicial branch resolves disputes by applying the law and the procurators are

⁸ CONSTITUTION PREAMBLE; *see also* *Id.* art. 52.

⁹ *Id.* art. 46.

¹⁰ *Id.* art. 49.

¹¹ *Id.* art. 54.

¹² CHEN, *supra* note 2, at 50 (*citing* CHINESE LAW DICTIONARY EDITORIAL COMMITTEE (1984)).

¹³ *Id.* at 53.

¹⁴ *Id.* at 40.

¹⁵ THOMAS CHIU ET AL., LEGAL SYSTEMS OF THE PRC 43 (1991).

¹⁶ Although Executive and Administrative functions are discussed, this article will concentrate on the governmental bodies that deal most directly with the creation and application of law.

responsible for the prosecution of criminal offenses and to make sure that the proper laws and procedures are applied in court. All of these governmental bodies are organized at various levels in society, including the central [national] level, the provincial level, the city level, and the township and village level.

"Although China is a country composed of many ethnic groups, some of whom have a small degree of autonomy to develop their own laws, it is a unitary, not a federated state."¹⁷ "Since China adopts the unitary system ... all local government organs function under the unified leadership of the central authorities and within the scope of power delegated by the central authorities."¹⁸ Because the central authorities hold such broad powers, a basic understanding of the structure of China's organization is important in understanding the workings of the governmental/legal system.

B. The Structure of the State¹⁹

China's constitutional structure is unitary and centralized, and the constitutional structure provides for five political-legal state organs,²⁰ including (1) the State Council; (2) the President of the PRC; (3) the Judiciary; (4) the Procuratorate; and (5) the Central Military Commission.²¹ Although the Constitution does not provide for the CPC as a specific governmental organ, the CPC is like the foundation upon which the rest of the governmental structure of the PRC is built. Therefore, it is appropriate to begin this section with a brief paragraph relating to the CPC.

1. The Communist Party of China (CPC)

"China is a socialist country where the CPC is the permanent ruling party."²² All members of the Chinese Government must be members of the CPC.²³ The structure of the CPC organization is set up like a pyramid and mirrors that of the structure of the state. The Party organization is set up in every farming community and factory at the local level, through the party congresses at the provincial and municipal levels, up to the National Party Congress.²⁴ The National Party Congress presides over all lower units, as well as electing the CPC's Central Committee. The Central Committee has a number of special departments that includes "representatives from the military, the public sector, trade unions, and youth

¹⁷ TAO-TAI HSIA & CONSTANCE AXINN JOHNSON, LAW MAKING IN THE PEOPLE'S REPUBLIC OF CHINA: TERMS, PROCEDURES, HIERARCHY, AND INTERPRETATION I (1986).

¹⁸ Wang Chenguang, *Introduction: An Emerging Legal System*, in INTRODUCTION TO CHINESE LAW §1.13, at 15-16 (Wang Chenguang & Zhang Xianchu eds., 1997).

¹⁹ Much information in the following sections, including the Constitution, the Codes Civil and Criminal Codes, information on each branch of the government and other relevant laws, can be found at CHINALAW WEB (visited May 14, 2001) <<http://www.qis.net/chinalaw/index.html>>.

²⁰ Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 54 (1997).

²¹ CONSTITUTION § IV arts. 94-95 (1993).

²² Zhu Guobin, *Constitutional Law*, in INTRODUCTION TO CHINESE LAW § 2.04, at 36 (Wang Chenguang & Zhang Xianchu eds., 1997).

²³ CHIU ET AL, *supra* note 15, at 43.

²⁴ *Id.*

leagues.” In turn, the primary task of the Central Committee is to elect the Politburo. The Politburo is a group of about twenty people who meet once a week to discuss the daily running of the country. Much of the real power in the PRC is centered in this group of representatives.²⁵

2. The National People’s Congress (NPC)

a. The Standing Committee of the NPC

Under the Constitution, the National People’s Congress of the PRC (hereinafter “NPC”) is the highest organ of state power. The permanent body of the NPC is the Standing Committee of the NPC.²⁶ The NPC and its Standing Committee exercise the legislative power of the state.²⁷ Among the broad powers of the NPC and Standing Committee is the power to amend the Constitution, appoint the President and Vice-president of the PRC, appoint or remove any member of the Supreme People’s Court or Supreme People’s Procuratorate and to annul or amend any statutes or regulations enacted by state organs at lower levels which are in conflict with the Constitution or other major statutes. The Supreme People’s Court, the State Council and the Supreme People’s Procuratorate, report and are responsible to the NPC.²⁸

Since the NPC only convenes for a Plenary Session once each year, and because with its over 35,000 members the Plenary Session of the NPC is so unwieldy in size,²⁹ it is the Standing Committee that performs most of the general legislative functions the rest of the year. The Standing Committee of the NPC meets in a two-week session once every two months,³⁰ and is comprised of members selected from among the Plenary Session’s delegates.³¹ The term of office for delegates on the Standing Committee is five years, commencing with the first session of each new NPC. There are no term limits on Standing Committee delegates. In addition to overseeing the NPC’s constitutional responsibilities when the Plenary Session is not in session, the Standing Committee also administers the NPC’s bureaucracy, formulates and directs the NPC’s long-term plans, sets the agenda both for itself and for the Plenary Session, and directs information flow both within the NPC and between the NPC and outside entities.

"Most of the seats in the NPC are elected by the members of the people's congresses of the 31 administrative units at the provincial level, the remainder are elected by the People's Liberation Army in accordance with the Measures on the Election by the People's Liberation Army of Deputies to the NPC and Local People's Congresses (1981)."³²

²⁵ *Id.* at 46.

²⁶ CONSTITUTION art. 57.

²⁷ *Id.* art. 58.

²⁸ Jerome A. Cohen, *Reforming China’s Civil Procedure: Judging the Courts*, 45 AM. J. COM L. 793, 795 (1997).

²⁹ HSIA & JOHNSON, *supra* note 17, at 4.

³⁰ Dowdle, *supra* note 20, at 26 (*citing* PROCEDURAL RULES OF THE STANDING COMMITTEE, art. 3).

³¹ *Id.* at 26.

³² CHEN, *supra* note 2, at 55.

The Chairmen's Group heads the Standing Committee. The principal function of the Chairmen's Group is to set and oversee the agenda for the Standing Committee.³³ This includes setting meeting dates and approving the agenda for Standing Committee sessions, overseeing the work of and setting the assignments for the special standing committees and any other special committees the NPC has formed, and serving as the "floor manager" for draft bills. The Chairmen's Group may also develop its own legislative proposals and may instigate changes in the structure of the Standing Committee.³⁴

Although these powers are primarily procedural, they give the Chairmen's Group a great deal of control over the activities of the Standing Committee (and, by extension, over the activities of the whole NPC). As acting manager for all bills that come before the Standing Committee, the Chairmen's Group decides not only when a particular bill will go to the floor, but also if a particular draft will go the floor at all. This gives the Chairmen's Group a de facto veto over all legislative proposals submitted to the NPC.³⁵

(i) NPC Special Committees³⁶

There are seven special committees that have been formed under the NPC. These are: (1) the Committee on Finance and Economy; (2) the Committee on Education, Science, Culture and Public Health; (3) the Law Committee; (4) the Nationalities Committee; (5) the Foreign Affairs Committee; (6) the Overseas Chinese Committee; and (7) the Committee on International and Judicial Affairs.³⁷

(ii) Commission for Legislative Affairs (CLA)

The Commission for Legislative Affairs (hereinafter "CLA") is a support organ for the Standing Committee and is principally responsible for the NPC's legislative drafting. At present, the CLA has a research staff of over 200 people distributed among five research offices. These offices include four departments specializing in economic law, civil law, criminal law, and public law (administrative and constitutional law), as well as a non-specialized "Research Office." Most of the research staff in these offices possess law degrees. The CLA also has its own general office, which oversees the CLA's staffing needs. The CLA is not subject to the CPC's organizational system, and thus, is generally able to control its own hiring. This gives the CLA a more professional and higher quality staff than those found in many other Chinese governmental or political organs.³⁸

The CLA also has its own law library, which it administers independently of the NPC's main library. The entire research staff of the CLA also serves as the research staff for the Legal Affairs Working Committee, however, the leadership and

³³ ORGANIZATION LAW OF THE NATIONAL PEOPLE'S CONGRESS, art. 26.

³⁴ Dowdle, *supra* note 20, at 26-27.

³⁵ *Id.* at 27.

³⁶ For a helpful visual aid in understanding the structure of the NPC Committees, refer to the chart in CHIU, ET AL., *supra* note 15, at 49.

³⁷ CHEN, *supra* note 2, at 55-56.

³⁸ Dowdle, *supra* note 20, at 41.

the functional roles of each organ remains separate.³⁹ The CLA has a number of distinct institutional functions within the NPC's legislative process. In addition to drafting legislative proposals for the Standing Committee and Chairmen's Group, it also evaluates legislative drafts submitted to the NPC from other drafters, summarizes and reports to the Chairmen's Group the opinions of the various special standing committees regarding legislative proposals, promulgates "legal interpretations" under its own name, and is frequently consulted by the Supreme People's Court regarding particular interpretive problems.⁴⁰

b. The Plenary Session of the NPC

The Plenary Session is the full meeting of the NPC delegates. Under the Constitution, the Plenary Session must convene at least once a year in the first quarter of the year.⁴¹ Sessions normally run for between two and three weeks.⁴² When the Plenary Session is in session, the Standing Committee ceases to exist and control over the NPC's official activities is assumed by the Plenary Session's temporary leadership, the Presidium.⁴³

Each Plenary Session is administered by a Presidium. The Presidium is a temporary body that exists only for the duration of one Plenary Session.⁴⁴ The Presidium consists of around 150 members, most of who are representatives from each province and from each national minority group of over 100,000 members. The members may also include those who are not delegates to the NPC; such members may include party leaders of the CPC, representatives from the military, various trade associations, and representatives of other social interests.⁴⁵ Presidium members are nominated by the Standing Committee and confirmed by the Plenary Session.⁴⁶ Once formed, the Presidium elects its own leadership, called the Standing Chairmen, to preside over the Presidium's own agenda. By tradition, the members of the Presidium's Standing Chairmen consist of the NPC Standing Committee's Chairmen's Group, along with one additional person drawn from and selected by the CPC Politburo.⁴⁷

During a Plenary Session, the delegate body is divided into 32 delegate groups, which are more practical for a delegate discussion.⁴⁸ Delegate groups are formed according to the appointing jurisdiction.⁴⁹ Each delegate group also has the capacity to submit legislative proposals to the Plenary Session.⁵⁰

³⁹ *Id.* at 42.

⁴⁰ *Id.*

⁴¹ CONSTITUTION art. 61; Dowdle, *supra* note 20, at 28 (citing PROCEDURAL RULES OF THE PLENARY SESSION, art. 2).

⁴² Dowdle, *supra* note 20, at 29.

⁴³ *Id.* at 26.

⁴⁴ *Id.* at 29.

⁴⁵ *Id.* at 30.

⁴⁶ Dowdle, *supra* note 20, at 30 (citing PROCEDURAL RULES OF THE PLENARY SESSION, art.

8).

⁴⁷ *Id.* at 30.

⁴⁸ *Id.* at 29 (citing PROCEDURAL RULES OF THE PLENARY SESSION, art. 7).

⁴⁹ *Id.*

⁵⁰ *Id.*

The NPC generally consists of approximately 3,000 members who serve for five-year terms, and are elected and paid by the province or unit they represent,⁵¹ with a certain number of delegate slots assigned to the People's Liberation Army. A delegate must be over 18 years old, a citizen of China, mentally competent, and not have had any of his or her political rights curtailed by criminal conviction.⁵²

In selecting delegates to the Plenary Session for each new term of the NPC, the outgoing NPC Standing Committee determines how many delegate slots shall be apportioned to each province and the People's Liberation Army. The provincial Party Standing Committee then drafts up a name list of proposed nominees and submits its draft list to the Standing Committee of the Provincial People's Congress for confirmation.⁵³ At the same time, the Provincial People's Congress draws up its own list of nominees, who are placed on that list upon motion by 10 or more delegates. The Party's list is combined with the Congress's list, and the combined list is then submitted to the floor of the Provincial Congress for deliberation and amendment. Finally, the Standing Committee for the Provincial People's Congress draws up the official list of nominees, which is then submitted to the delegates for formal vote.

Each nominee is voted on individually, and nominees are confirmed if they receive affirmative votes from more than half of those casting ballots. If the number of candidates confirmed exceeds the number of delegate positions available, delegates are selected on the basis of the highest number of affirmative votes received. If the number of confirmed candidates is less than the number of delegate slots to be filled, a second list of nominees is made up for the remaining slots and the process is repeated.

3. The President of the People's Republic of China

The President of the PRC is the head of the State and the main representative of China in both foreign and domestic matters.⁵⁴ Under the current Constitution, the President has the power to promulgate statutes adopted by the NPC; appoint and remove members of the State Council; confer State medals and titles of honor in line with the decision of the NPC and its Standing Committee; issue orders for special pardons; proclaim martial law; declare a state of war and issue orders of mobilization; accept letters of credential offered by foreign diplomatic representatives on behalf of the People's Republic of China; appoint and recall China's diplomatic envoys stationed abroad and ratify and abrogate treaties and important agreements signed with foreign States.

China's system of the head of State is a system of collective leadership. The President of the State is subordinate to the NPC and directly receives instructions from higher State power organs. The Constitution provides that any Chinese citizen

⁵¹ CONSTITUTION art. 60.

⁵² *Id.* art. 34.

⁵³ Dowdle, *supra* note 20, at 38.

⁵⁴ See China Today, *Law, Justice & Legal Services: State Organs of the People's Republic of China* (visited May 14, 2001) <<http://www.chinatoday.com/general/a04.htm>> [hereinafter *China Today*].

who has reached the age of 45 and has the right to vote and to stand for election can be a candidate for the presidency, however, they must first be nominated by the NPC.⁵⁵

4. The State Council

The executive body of the NPC is known as the State Council of the PRC,⁵⁶ or the Central People's Government.⁵⁷ The State Council of the PRC is both the highest executive organ of state power and the highest organ of state administration,⁵⁸ in addition, it is the constitutional organ most closely affiliated with the CPC. Within the State Council are some of the most important offices in the state and party apparatus of the PRC, including: (1) the General Secretary of the CPC, (2) the Premier of the State Council, and (3) the Chairman of the Central Military Commission. The premier of the State Council is nominated by the President, reviewed by the NPC, and appointed and removed by the President. Other members of the State Council are nominated by the Premier, decided by the NPC or its Standing Committee, and appointed and removed by the President. In the State Council, the term of office is five years, and incumbents can not be re-appointed after two successive terms.⁵⁹

The State Council has relatively broad legislative powers that allow it to draft and promulgate regulations on a wide variety of matters without requiring a parliamentary grant of legislative authority. The State Council, as executive branch, also has the authority to submit draft bills directly to the NPC. The wide and fairly unelaborated powers of the State Council are set out in Article 89 of the Constitution, among which are some law-making powers.⁶⁰ The State Council is responsible for carrying out the principles and policies of the CPC, the regulations and laws adopted by the NPC, as well as the affairs such as China's internal politics, diplomacy, national defense, finance, economy, culture, and education.⁶¹ The State Council's law making powers include:

- (a) the power to enact, adopt and repeal administrative rules and regulations in accordance with the Constitution and the statutes;
- (b) the power to submit proposals to the NPC and its Standing Committee;
- (c) the power to exercise unified leadership over the work of various State ministries and commissions, and the work of local administrative organs at different levels, and to direct all other administrative work across the nation;
- (d) the power to draw up plans for economic and social development, and to organize, coordinate and administer the social production and economic development;

⁵⁵ *Id.*

⁵⁶ CONSTITUTION art. 85.

⁵⁷ *Id.*

⁵⁸ *China Today, supra note 54.*

⁵⁹ *Id.*

⁶⁰ CHEN, *supra note 2*, at 56.

⁶¹ *China Today, supra note 54.*

- (e) the power to conduct foreign affairs and to conclude treaties and agreements with foreign states and submit suggestions and proposals to the NPC and its Standing Committee on major issues of foreign affairs;
- (f) the power to direct and administer affairs of social life and culture, including the power to declare martial law; and
- (g) the power to direct and administer affairs conferred by the NPC and its Standing Committee.

5. The Central Military Commission (CMC)

The Constitution provides that the national armed forces are under the direction and command of the State Central Military Commission. The members of the State Central Military Commission are also members of the Communist Party's Central Military Commission. Therefore the national armed forces are indirectly under the control of the CPC. The Chairman of the Central Military Commission is elected by the NPC, and other members are chosen by the NPC and its Standing Committee after being nominated by the Chairman. The Chinese military currently maintains about a 3-million strong armed force.⁶²

6. The Local People's Congresses and Local People's Government's at Various Levels⁶³

There is a Local People's Congress for each of the 30 provinces, municipalities and autonomous regions in the PRC.⁶⁴ People's Congresses at the provincial and county levels are elected every five years by people's congresses at the next lower level,⁶⁵ and the congresses at the county and township level are, in turn, directly elected by citizens for a three-year term.⁶⁶ The present means of direct elections of local government officials is carried out according to the Electoral Law of the NPC and Local People's Congresses. The Constitution provides that all citizens aged 18 or above have the right to vote or be a candidate,⁶⁷ and that candidates may be nominated by political parties, people's organizations or by ten voters jointly. However, the electoral committee, whose members are generally CPC members appointed by the standing committee of the county people's congresses, has the power of preparing the "formal list of candidates" to be voted upon, and not every person nominated will appear on the list.⁶⁸

⁶² *Id.*

⁶³ The Local People's Congresses are administered according to the precepts provided in the Constitution and the Organic Law of the Local People's Congresses and the Local People's Governments.

⁶⁴ CHIU ET AL, *supra* note 15, at 53-54.

⁶⁵ CONSTITUTION art. 97.

⁶⁶ *Id.* art. 98; *see also* CHEN, *supra* note 2, at 61.

⁶⁷ CONSTITUTION art. 34.

⁶⁸ CHEN, *supra* note 2, at 67.

7. The People's Courts and the People's Procuratorates

a. Courts

According to the Constitution, the people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual.⁶⁹ The Court system is also centralized and built in a pyramid structure with the city and township having the courts of first instance or the Primary People's Courts at the bottom, moving up to the People's Intermediate Courts, and then the Provincial People's High Courts, and finally the Supreme People's Court at the top. The topic of the courts will be dealt with at length under Section IV of this paper.

b. Procuratorates⁷⁰

Article 130 of the Constitution of the People's Republic of China provides that the PRC establishes the Supreme People's Procuratorate and local people's procuratorates at each level of the governmental structure.⁷¹ The people's procuratorates are state organs for legal supervision, and act as both the prosecutor of criminal cases at each level of the court system, as well as a supervisor of the courts to make sure that the correct procedure is adhered to.

According to Article 132 of the Constitution, the Supreme People's Procuratorate is the highest procuratorial organ of the state. It directs the work of the local people's procuratorates at the various levels. As well, it exercises procuratorial authority in major criminal cases that have an impact on the entire country and lodge a protest if some definite error is found in a verdict or sentence by a people's court at any level. The Supreme People's Procuratorate can also supervise trials of civil suits and administrative litigation. Finally, it supervises the activities of prisons, houses of detention and institutions in charge of reform through labor.

Each people's procuratorate has a procuratorial committee that is expected to institute the system of democratic centralism and, under the direction of the chief procurator, to discuss and decide important cases and other major issues, on the principle of the minority being subordinate to the majority.⁷² If the chief procurator disagrees with the majority's decision on an important matter, it is referred to the standing committee of the people's congress at the corresponding level for final decision.

The purpose of the procuratorates is to safeguard the unity of the country, the people's democratic dictatorship and the socialist legal system; to maintain public order, including order in production and other work, in education and scientific research, and in the daily life of the people; to protect the socialist property owned by the whole people and by collectives and the private property lawfully owned by individuals; to protect the citizens' rights of the person other rights; and to ensure the

⁶⁹ CONSTITUTION art. 126.

⁷⁰ The Procuratorates are guided by the Constitution and the Organic Law of the People's Procuratorates, adopted at the Second Session of the Sixth National People's Congress on September 2, 1983.

⁷¹ CONSTITUTION art. 130.

⁷² Zhu, *supra* note 22, § 2.17 at 63 (*citing* ORGANIC LAW OF THE PEOPLE'S PROCURATORS, art. 3).

smooth progress of socialist modernization. The procuratorates are also supposed to educate the citizens, encouraging them to be loyal to their socialist motherland, to conscientiously observe the Constitution and the laws and to combat illegal activities.⁷³

The procuratorates review cases investigated by the public security organs and state security agencies and decide whether to approve arrest and whether to prosecute, as well, they supervise the investigation activities of public security organs and state security agencies to determine whether they conform to the law. The procuratorates also initiate and support public prosecutions of criminal cases and supervise the criminal trials, verdicts and sentencing of the people's courts to determine whether they conform to the law. In cases where the procurators find definite errors, they lodge protests in accordance with the procedure for appeal. The procurators also supervise the execution of sentences in criminal cases and the activities of prisons, houses of detention and institutions in charge of reform or rehabilitation through labor.⁷⁴

In exercising their supervisory functions and their procuratorial authority, the procuratorates are expected to adhere to certain principles. In the exercise of procuratorial authority by the people's procuratorates, the laws are supposed to be applied equally to all citizens and no privileges are supposed to be allowed. In dealing with cases the people's procuratorates should always make careful investigations, study the evidence and seek truth from facts. They are to lay stress on material evidence rather than readily giving credence to oral statements, and to strictly forbid security personnel to coerce confessions. They should observe and enforce the law to the letter and investigate thoroughly the responsibility of anyone who violates it. The functionaries of the people's procuratorates at all levels are expected to pay great attention to facts and to the law, to be faithful to the socialist cause and to serve the people wholeheartedly.⁷⁵

III. How Laws Are Passed (In Order of Hierarchy of Laws)

A. Drafting Legislation for the Central Government

Almost all legislative proposals issuing to the NPC in the name of the Chairmen's Group or the Standing Committee are drafted by the CLA. The CLA has been the lead drafter for most of the NPC's more progressive, controversial, and/or high profile legislative initiatives.⁷⁶ The first step in the CLA's drafting process involves forming a "drafting group" to research and formulate the initial draft of the legislative proposal. The drafting group need not necessarily be comprised of CLA

⁷³ From materials provided by the General Office of the Supreme People's Procuratorate of the People's Republic of China. The Supreme People's Procuratorate, People's Republic of China, 147 Bei He Yan Street, Beijing, P.R. China / Telephone: 008640 6512 5902 or 0086 10 65241850 (1998).

⁷⁴ Zhu, *supra* note 22, §2.17 at 62 (citing THE ORGANIC LAW OF THE PEOPLE'S PROCURATORATES, art. 5).

⁷⁵ From materials provided by the General Office of the Supreme People's Procuratorate of the People's Republic of China, *supra* note 73.

⁷⁶ Dowdle, *supra* note 20, at 65.

staffers. Frequently, in fact, it is comprised principally of selected academics.⁷⁷ After the drafting group's draft is completed, the CLA circulates it for comment. Copies are sent to relevant substantive special standing committees, each of which replies with its own written evaluations. Comments on the draft are also invited from a wide range of governmental, political and social organizations; from selected members of the academic community; and increasingly from foreign consultants. The CLA also convenes a series of meetings with other governmental officials and outside experts to discuss the draft.⁷⁸

After these group discussions, the CLA will then modify the drafting group's initial draft. If these modifications are substantial, the CLA will again circulate the now modified draft for comment and may convene additional meetings to discuss the draft. Once the CLA comes up with a suitable draft, called the preliminary draft, it also produces a "drafting report" detailing the main points and purposes of the law, as well as the main points and concerns raised by the special standing committees and other sources in the course of the drafting process. The CLA then submits that report and the preliminary draft to the Chairmen's Group for inclusion on the NPC's legislative docket.

If a proposal is submitted to the NPC by some organ other than the Chairmen's Group or the Standing Committee it first goes to the Secretary's Group for preliminary evaluation.⁷⁹ The Secretary's Group decides whether to place that bill immediately on the Chairmen's Group's docket or to first send it to the special standing committees for evaluation and comment.

Once a legislative proposal reaches the Chairmen's Group, the Chairmen's Group decides when and whether to include it in the meeting agenda for the Standing Committee. The Chairmen's Group is not obligated to include the proposal on that agenda. Alternatively, it may decide to send the proposal to the CLA for revision.⁸⁰

The NPC uses four types of legislative instruments in the creation of law, including (1) statutes, (2) resolutions, (3) declarations, and (4) CLA legislative interpretations. Statutes, which include both "basic laws" passed by the Plenary Session and ordinary laws passed by the Standing Committee, are the highest source of law in China other than the Constitution. Resolutions are used primarily to promulgate supplemental legislation that attaches to existing statutes, and are considered to be "legislative interpretations" of the existing law.

Declarations and CLA legislative interpretations are not legally binding, and are not considered by the courts to be official sources of law. Nevertheless, these interpretations occasionally influence the legislative interpretations promulgated by the Supreme People's Court, which are increasingly considered binding sources of law. Declarations are used for non-judicial matters, primarily those relating to the NPC's efforts to supervise the other constitutional organs.

B. Legislation Passed During the Plenary Session

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ PROCEDURAL RULES OF THE STANDING COMMITTEE, art. 12.

⁸⁰ Dowdle, *supra* note 20, at 73.

Chinese jurists tend to consider anything enacted by the NPC itself as a "basic law." The legislation passed by the NPC includes such laws as the Constitution⁸¹ and the major codes.⁸² Besides the Constitution, the "major codes" include such laws as the Code of Criminal Procedure, the Substantive Criminal Law, and the Code of Civil Procedure.

1. Basic Laws

A Plenary Session of the entire NPC is held once a year,⁸³ and this meeting generally lasts for several weeks. Immediately before this formal meeting, the Standing Committee of the NPC elects a "Presidium."⁸⁴ Representatives of the Presidium chair the Plenary Sessions. Because of the large size of the NPC, most discussion on new bills or motions takes place in meetings of delegations formed according to the electoral units for the NPC. The delegation will discuss a matter, and the head of the delegation will report the decisions of the group to the Presidium or the Plenary Session of the NPC.⁸⁵ The Presidium also decides whether particular motions or bills are to be included in the agenda for the NPC session.⁸⁶

There are four main stages in the enactment of a law: (1) the presentation of a bill to the NPC; (2) the examination of a bill by the Legal Affairs Working Committee; (3) the passing of a bill by the NPC; and (4) the publication of the law.⁸⁷

The State Council, the Supreme People's Court, the Supreme People's Procuratorate, and the Central Military Commission may submit a draft of a bill to the NPC, and these bills must eventually appear on the NPC's agenda. When the NPC is in session a bill can also be submitted to the NPC by the various NPC Committees specified under Article 70 of the Constitution,⁸⁸ as well as any group of 30 or more deputies or any delegation from an electoral unit; however, such bills are added to the NPC's agenda at the discretion of the Presidium of the NPC.⁸⁹

Once a bill has been submitted, the Presidium of the NPC⁹⁰ can decide to either refer the bill to a relevant special committee of the NPC for consideration or to include on the NPC meeting agenda.⁹¹ If the Presidium puts the bill on the agenda the following sequence will occur:

⁸¹ CONSTITUTION (1993).

⁸² HSIA & JOHNSON, *supra* note 17, at 5.

⁸³ CONSTITUTION art. 61.

⁸⁴ CHEN, *supra* note 2, at 56 n. 15 (*citing* ORGANIC LAW OF THE NATIONAL PEOPLE'S CONGRESS, art.5; PROCEDURAL RULES OF THE NATIONAL PEOPLE'S CONGRESS, art.8); *see also* HSIA & JOHNSON, *supra* note 17, at 5.

⁸⁵ CHEN, *supra* note 2, at 56 nn.22-23 (*citing* ORGANIC LAW OF THE NATIONAL PEOPLE'S CONGRESS, art.4; PROCEDURAL RULES OF THE NATIONAL PEOPLE'S CONGRESS, art. 7).

⁸⁶ *Id.* at 56, n. 21 (*citing* ORGANIC LAW OF THE NATIONAL PEOPLE'S CONGRESS, art. 10; PROCEDURAL RULES OF THE NATIONAL PEOPLE'S CONGRESS, art. 21).

⁸⁷ CPC CENTRAL PARTY SCHOOL, LAW UNIT 51 (1984).

⁸⁸ CHEN, *supra* note 2, at 55-56.

⁸⁹ HSIA & JOHNSON, *supra* note 17, at 5.

⁹⁰ *Id.*

⁹¹ CHEN, *supra* note 2, at 55 n.21 (*citing* ORGANIC LAW OF THE NATIONAL PEOPLE'S CONGRESS, art. 10; PROCEDURAL RULES OF THE NATIONAL PEOPLE'S CONGRESS, art. 21).

- (1) the bill will be explained at an NPC meeting by a representative of the bill;
- (2) the proposed bill will be separately considered by all NPC delegations;
- (3) the bill is then examined by the legal scholars in the Legal Work Commission who consider the opinions of the NPC delegations, research the subject, review the proposed bill, and suggest any changes.⁹²;
- (4) the Presidium will decide whether or not to approve the amended bill; and
- (5) if approved by the Presidium will present the bill to the Plenary Session of the NPC, and the bill may then be passed into law by a majority vote.⁹³

A law passed by the NPC will be promulgated by the President of the NPC⁹⁴ and published in the Gazette of the NPC Standing Committee.⁹⁵

2. Resolutions

The procedures used by the Plenary Session for considering draft resolutions are almost identical to those used for basic laws, the only difference being that there is no second review and amending of the Legal Affairs Working Committee's revised draft by an expanded meeting of the Presidium. Instead, the Presidium body immediately decides whether to send the proposed resolution to the floor of the Plenary Session for vote, or to send in its stead a motion recommending that the resolution be referred to the Standing Committee. If the Plenary Session refers the resolution to the Standing Committee, the Standing Committee revises and votes upon that resolution using its own procedures.⁹⁶ If the Standing Committee ultimately passes the resolution, the resolution as passed must be reported to the next Plenary Session. As with all other bills and motions, a draft resolution must receive a simple majority of the full delegate body to pass.⁹⁷

3. Constitutional Amendments

The procedures for passing constitutional amendments are the same as those for passing basic laws except that proposed constitutional amendments may only be introduced to the Plenary Session by either the Standing Committee or if sponsored jointly by twenty percent or more of the total delegate body.⁹⁸ Constitutional amendments must receive an affirmative vote of at least two thirds of the total delegate body to pass.⁹⁹

⁹² HSIA & JOHNSON, *supra* note 17, at 6.

⁹³ CHEN, *supra* note 2, at 81 n. 26-27 (*citing* PROCEDURAL RULES OF THE NATIONAL PEOPLE'S CONGRESS, arts. 23-24).

⁹⁴ CONSTITUTION art. 80.

⁹⁵ CHEN, *supra* note 2, at 82.

⁹⁶ PROCEDURAL RULES OF THE PLENARY SESSION, art. 28.

⁹⁷ *Id.* art. 51.

⁹⁸ CONSTITUTION art. 64.

⁹⁹ *Id.* art. 64.

4. Organic Laws

Organic Laws are national laws that are enacted either by the NPC, or the Standing Committee when the NPC is not in session. Organic Laws create the framework by which all state organs must conform and within which they function. Each governmental organ has its own organic law. These laws are considered "organic" because it is from the base of these laws that rest of the governmental and legal system grows.¹⁰⁰ For example, within the Organic Law of the Local People's Congresses or the Organic Law of the People's Courts are found a description of the functions of each organ, the rules relating to the operation of each organ and the powers each organ possesses. With these foundations established, each organ can then, in turn, branch out in order to take care of the work it must do.

C. Legislation Passed By the Standing Committee

Each enactment of the Standing Committee falls into one of two broad categories, "statutes" and "resolutions." Statutes and resolutions both have legal force, but they can be distinguished from each other in at least two ways. One distinction is that resolutions are sometimes smaller in scope than laws. Another scenario in which a resolution is passed is when there is an urgent need for some legislation, but there is some uncertainty as to how the legislation will work in actual practice. If successful, these resolutions may reach statute status in a few years. The NPC and the Standing Committee both also have the ability to pass resolutions, which generally act as amendments or supplements to already existing laws.¹⁰¹

1. Statutes

After the Chairmen's Group approves a statutory legislative proposal, it places that proposal on the Standing Committee's docket for preliminary review and amending. At the initial review, the preliminary draft of the bill is reported before the floor of the Standing Committee by the bill's drafter or lead drafter. In addition to the legislative draft, the drafter also provides an "explanation," which sets out the general purpose of the draft legislation, notes particularly important provisions contained in the draft, and notes any important issues that arose during drafting. The delegates then retire into groups to discuss the draft. Representatives from the bill's drafters attend these discussions.¹⁰² Delegates also receive copies of the CLA's summary report of the special standing committees' evaluations. The General Office records the group discussions.¹⁰³

Following the preliminary review and amending, the Chairmen's Group sends the proposal to the Legal Affairs Working Committee (hereinafter "LAWC") for revision.¹⁰⁴ The revision process used by the LAWC is similar to the drafting process used by the CLA. The relevant special committees prepare reports

¹⁰⁰ CHIU ET AL, *supra* note 15, at 40.

¹⁰¹ HSIA & JOHNSON, *supra* note 17, at 6-7.

¹⁰² Dowdle, *supra* note 20, at 74 n.389 (citing PROCEDURAL RULES OF THE STANDING COMMITTEE, art. 15).

¹⁰³ *Id.* at 74.

¹⁰⁴ *Id.* at 75 n.391 (citing PROCEDURAL RULES OF THE STANDING COMMITTEE, art. 16).

suggesting changes to that draft in line with the major points raised in the Standing Committee's preliminary review and amending.

Once it receives the committees' evaluations, the LAWC prepares a "revised draft." If the revisions made to the draft are substantial it may be circulated for comment among governmental bodies, scholars, and representatives from selected public interests. The LAWC also prepares a report detailing the various issues that arose during the preliminary review and amending and in the revision comments obtained from the other special standing committees, why it made the various revisions it did it, and why it rejected other recommended revisions.¹⁰⁵ The LAWC then forwards the revised draft and accompanying report to the Chairmen's Group, which, if it approves, schedules another review on the Standing Committee floor. Alternatively, the Chairmen's Group may return the draft to the LAWC for further revision.

At the second review and amending, the revised draft and its accompanying report are read out by the LAWC.¹⁰⁶ The delegates again discuss the revised draft in groups also attended by representatives of the bill's drafter. If this review does not reveal significant dissension among the delegates, the Chairmen's Group will send the bill up for vote at the end of the session. Otherwise, the Chairmen's Group will move that the bill be sent down for further revision.¹⁰⁷ A bill may be sent back for revision any number of times, but each time the decision to send the bill back to committee must be approved by the delegate body.

Legislative proposals are passed by affirmative vote of more than half of the total number of delegates to the Standing Committee.¹⁰⁸ If voted down, a proposal is quashed and may not be put up for vote again in subsequent sessions.

2. Resolutions

The Standing Committee's legislative procedures for considering draft resolutions are generally similar to those used for statutory proposals. Draft resolutions may be introduced by anyone with standing to introduce draft legislation. As with statutory proposals, draft resolutions not originating from the CLA will be forwarded by the Secretary's Group to the special committees of the NPC for evaluation and comment before being placed on the Chairmen's Group's docket (with delegates' drafts subject to possible rejection by the Secretary's Group).¹⁰⁹ Upon reaching the Standing Committee, the draft resolution and "explanation" outlining the rationale, purpose, methodology and the important points of the resolution is read out to the Standing Committee by its drafter, after which the delegates retire into groups to discuss the draft.

Unlike statutory proposals, however, a draft resolution is most commonly voted on in the same session in which it is introduced. At the same time the delegates retire into groups to discuss the proposal, the proposed resolution is also

¹⁰⁵ *Id.* at 75 n.394.

¹⁰⁶ *Id.* at 75 n. 395.

¹⁰⁷ *Id.* at 75 n. 397 (*citing* PROCEDURAL RULES OF THE STANDING COMMITTEE, art. 20).

¹⁰⁸ *Id.* at 76 n. 399 (*citing* PROCEDURAL RULES OF THE STANDING COMMITTEE, art. 30).

¹⁰⁹ *Id.* at 76 n. 404 (*citing* PROCEDURAL RULES OF THE STANDING COMMITTEE, art. 12).

sent to the relevant special standing committees for evaluation and report. After discussions are concluded and the special standing committees have issued reports, the LAWC prepares a report summarizing various issues and concerns raised by delegates and the special standing committees. This report is then sent to the Chairmen's Group.

The Chairmen's Group then decides whether to send the proposal up for a vote at the end of that same session, or to send it to the LAWC for revision and re-consideration at subsequent sessions. If the Chairmen's Group decides to send the draft up for vote that session, it will nevertheless commonly request the LAWC make minor revisions to the draft in line with the more important points outlined in that Committee's summary report. Near the end of the session, the LAWC will then report out to the whole floor its revised draft, and along with its revision report, and the revised draft is reviewed and amended once by the delegates meeting in full committee. If no major disagreements arise, the resolution is put to vote at the end of that session. Otherwise, the Chairmen's Group can move that the draft be returned to the LAWC for further revision. If the floor approves that motion, the proposal goes back to committee, otherwise, the proposal must go to vote.

D. Lawmaking by the State Counsel

1. Administrative Regulations

As mentioned earlier, the executive body of the NPC is known as the State Council,¹¹⁰ or the Central People's Government.¹¹¹ The wide powers of the State Council are set out in Article 89 of the Constitution, among which are some law-making powers.¹¹² Among the law-making powers of the State Council is the power to establish administrative regulations. These administrative regulations are generally either detailed rules for implementing laws or experimental rules where there are no governing laws. The State Council should not make any laws that contravene either the Constitution or existing law.¹¹³

2. Administrative Rules

There are many subordinate ministries, commissions and departments under the State Council, each of which has people responsible for drafting laws that relate to the specific branch from which the drafter comes. Generally a draft of a bill is prepared by the appropriate subordinate unit and then submitted to the State Council for examination and possible authorization.¹¹⁴ This bill is then submitted to the NPC for ratification.

E. Legal Interpretation

Many statutes adopted in China have been vague and ambiguous, and the resulting inevitable differences in understanding have resulted in a need for detailed

¹¹⁰ CONSTITUTION arts. 57, 85.

¹¹¹ CONSTITUTION art. 85.

¹¹² CHEN, *supra* note 2, at 60.

¹¹³ Wang, *supra* note 18, § 1.13, at 15-16.

¹¹⁴ HSIA & JOHNSON, *supra* note 17, at 8.

explanations of the statutes in order to apply the statutes uniformly and properly.¹¹⁵ There are three groups with the ability to provide official interpretations of existing legislation. These three groups are:

- (1) The NPC's Standing Committee has the constitutional power of legal interpretation concerning the limits and definitions of national statutes.¹¹⁶
- (2) The State Council, the executive branch of the Chinese government, can interpret national statutes that are unrelated to court trials.¹¹⁷
- (3) The power of the Supreme People's Court is officially limited to interpreting only national statutes and decrees that govern court trials, and in addition, the Supreme People's Procuratorate shares the power of judicial interpretation for they are granted the power to interpret questions involving the specific application of statutes and decrees with regard to procuratorial proceedings. If the interpretations provided by the Supreme People's Court and the Supreme People's Procuratorate conflict with each other, both interpretations must be submitted to the Standing Committee for final determination.¹¹⁸

1. Legislative Interpretation by the Standing Committee of the NPC

China relies on a civil law system in which the power to issue binding interpretations of law is regarded as a legislative or administrative function rather than a judicial function.¹¹⁹ The Constitution assigns power to issue interpretations to the Standing Committee, in part to allow that body to issue supplemental legislation for even basic laws. Theoretically, Standing Committee interpretations should not contravene the existing text of the law or the fundamental principles underlying the law, nor should they significantly remake the law being interpreted. Interpretations are generally promulgated as resolutions, since the statutory process is time consuming and cumbersome for the more modest matters addressed by these interpretations.

2. Executive Interpretation by the State Council

"The State Council and its relevant departments may interpret points of law arising from the concrete application of the law in areas other than adjudicative and procedural work."¹²⁰

3. Judicial Interpretation by the Supreme People's Court

The NPC has dedicated itself to drafting legislation on almost every topic imaginable and, as a result, is over extended.¹²¹ The NPC Plenary Sessions are short

¹¹⁵ Li Wei, *Judicial Interpretation in China*, 5 WILLAMETTE J. INT'L L. & DISP. RESOL. 87, 91 (1998).

¹¹⁶ RESOLUTION OF THE STANDING COMMITTEE OF THE NATIONAL PEOPLE'S CONGRESS PROVIDING AN IMPROVED INTERPRETATION OF LAW, reprinted in 1 *The Laws of the People's Republic of China 1979-1982*, 251.

¹¹⁷ *Id.* at 251.

¹¹⁸ *Id.*

¹¹⁹ See Dowdle, *supra* note 20, at 82.

¹²⁰ CHEN, *supra* note 2, at 96.

and filled with the tasks of adopting new statutes and hearing and reviewing governmental working reports, leaving the NPC little time to review problems associated with the application of existing statutes. Because of this, the NPC has effectively encouraged the Supreme People's Court to provide expansive interpretations of all the new legislation.¹²² The NPC has enjoyed the benefit of the judicial interpretations of the Supreme People's Court, which have provided much needed help, and have "effectively relieved the Congress from the burden of reviewing and amending statutes."¹²³

In addition, the Supreme People's Court is well equipped for performing this function. The Supreme People's Court is composed largely of legal professionals who possess substantial legal expertise and routinely interpret statutes. Supreme People's Court judges also often consult with pertinent ministries or the Congress' Legal Affairs Office before interpreting the law. In doing so, the Supreme People's Court serves as a useful shortcut by producing urgently needed interpretations of, or amendments to, statutes without going through the normal legislative procedure.¹²⁴

The Supreme People's Court has rarely relied upon specific case decisions to interpret the law. The form of judicial interpretations used by the Supreme People's Court includes: (1) letters of reply; (2) opinions, notices, measures, or provisions; and (3) comments on published model cases.¹²⁵

a. *Letters of Reply.*

The form of judicial interpretation most commonly used by the Supreme People's Court is the "Letter of Reply."¹²⁶ When a trial court has a question about a statutory provision during its proceedings, it raises the issue to the provincial higher court. When certain about the answer the provincial higher court will orally answer the question, when uncertain the higher court submits the issue to the Supreme People's Court in writing.

The Supreme People's Court then responds to a question from a provincial court with a Letter of Reply, providing an interpretation. After receiving the Letter of Reply, the higher court then relays it to the trial court that had originally raised the issue.¹²⁷ The Supreme People's Court notifies the lower courts that its Letters of Reply function only as advisory documents, so that courts soliciting the views of the Supreme People's Court about the application of statutes to actual disputes must decide their cases independently.¹²⁸ If a lower court does follow the opinion

¹²¹ Wei, *supra* note 115, at 104.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 105.

¹²⁵ HSIA & JOHNSON, *supra* note 17, at 22-23; see also Shizhou Wang, *The Judicial Explanation in Chinese Criminal Law*, 43 AM. J. COMP. L. 569, 570-71 (1995).

¹²⁶ Wei, *supra* note 115, at 95.

¹²⁷ *Id.*

¹²⁸ Originally the SPC's opinion was binding on the lower court, but this power was criticized for barring the lower courts from arriving at their decisions independently, and the SPC gave up this power on its own initiative.

expressed in a Letter of Reply, the lower court is not permitted to cite the Supreme People's Court as a source of law.¹²⁹ Letters of Reply have had little general application or influence in Chinese legal practice because they have usually been short and case specific, however, they can still affect a specific case or line of cases if the lower courts decided to follow them.¹³⁰

b. *Opinions, Notices, Measures, and Provisions*

The Supreme People's Court most often uses opinions, notices, measures, and provisions to explain the general application of a specific statute. These forms of judicial interpretation usually provide complete interpretations of the statute as well as answer questions concerning the application of a particular statute, and because of this they are often quite lengthy. Usually the Supreme People's Court itself initiates these interpretations, and they generally take the form of administrative rules purporting to implement a specific statute.

c. *Published Model Cases*

The Gazette of the Supreme People's Court of the People's Republic of China began reporting cases in 1985.¹³¹ The Gazette is divided into three parts: Court decrees and opinions, judicial interpretations, and decided cases. Although opinions published by the Supreme People's Court are not allowed to be cited in lower court decisions¹³² they might still be seen to have at least some presidential value. In fact, when the Court's spokesman announced the publication of the Gazette in May 1985, he identified the purpose as being to "provide better guidance to local courts for correctly applying laws and decrees."¹³³ And in his 1988 annual report to the NPC, the former President of the Court said:

The principal purpose [of the Gazette] is to achieve uniformity in sentencing standards for important and complex criminal cases, to provide models for determining criminality and sentencing standards in newly emerged criminal cases, and to provide models for civil and economic cases that have arisen recently from activities under the policy of reform and openness.¹³⁴

Most of the cases reported in the Gazette are from decisions of lower courts that are submitted to the Supreme People's Court. The lower courts are supposed to submit to the Supreme People's Court decisions that involve either important or complex issues. This reporting to the Supreme People's Court is part of an "internal

¹²⁹ REPLY OF THE SPC CONCERNING HOW PEOPLE'S COURTS SHOULD UTILIZE NORMATIVE LEGAL DOCUMENTS WHEN PROVIDING LEGAL DOCUMENTATION, cited in Nanpin Liu, "Legal Precedents" With Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 J. CHINESE L. 107, 122 (1991).

¹³⁰ Wei, *supra* note 115, at 97 (1998).

¹³¹ Nanping Liu, "Legal Precedents" With Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court, 5 J. CHINESE L. 107 (1991)].

¹³² *Id.* at 115.

¹³³ *Id.* at 114. (citing CHINA DAILY, May 26, 1985).

¹³⁴ GAZETTE OF THE SUPREME PEOPLE'S COURT OF THE PEOPLE'S REPUBLIC OF CHINA, No. 2, at 11 (1988).

reporting channel."¹³⁵ The Court selects desirable cases and then substantially edits or rewrites most of these selected cases in order to make them understood and followed the way the Court wants.¹³⁶ Besides the open channel of publication in the Gazette, the Court continues to use a traditional "internal channel" as a kind of supplement.¹³⁷ If cases are "mature" enough for the Court to give an opinion on the issue and let it serve as a "weather vane" for the general public and/or nationally "representative" or typical enough to warrant such publicity and uniformity the Court will more likely publish its opinion. Cases that are less significant, have little national impact, or are more tentative in nature are more likely to use the internal channel.¹³⁸

F. Policy

It is important to keep in mind that in China, policy and law are linked. Just because there is no national law on a subject does not mean that such areas are not centrally directed. Policy statements by key party officials may have a force close to law, and often appear in legal publications and collections of law. In fact, the Organic Law of the Local People's Congresses and Local People's Government's of the PRC, Article 8, suggest that there is binding force to policy by including it as enforceable along with other legal documents like the Constitution and the laws.¹³⁹

G. Local Regulations and Administrative Rules

The Organic Law of Local People's Congresses and Local People's Governments provide that people's congresses at the provincial level and municipal level that have been approved by the State Council have the authority to create laws, and many of these people's congresses have enacted such local regulations. Local regulations are confined within their respective geographical territories.¹⁴⁰ Once a local regulation has been passed it must be reported to the State Council so that the regulation may be recorded.¹⁴¹

Local regulation applies to the daily administration of each particular area. At the local level there are four layers of regulations that affect the "man on the street." The legislation at this level includes: (1) the basic laws and major codes passed by the NPC, (2) administrative regulations adopted by the State Council, (3) specific regulations enacted by the people's congresses at the Provincial level, and (4) the local regulations passed by the people's congresses at the city or township level.

There are three basic categories of locally enacted regulations, including: (1) regulations needed to implement the laws of the central government to fit local conditions, (2) regulations of a supplementary nature for general national laws that

¹³⁵ Liu, *supra* note 131, at 116.

¹³⁶ *Id.* at 116.

¹³⁷ *Id.*

¹³⁸ *Id.* at 116-17.

¹³⁹ HSIA & JOHNSON, *supra* note 17, at 25.

¹⁴⁰ Wang, *supra* note 18, § 1.16, at 20.

¹⁴¹ CHEN, *supra* note 2, at 85-86.

have no detailed provisions on a specific subject, and (3) regulations that deal with strictly local issues. Such local regulations should not conflict with any national law or policy and are, therefore, reviewed by the Legal Work Commission of the Standing Committee in order to assure constitutionality.¹⁴²

H. Common Practice (Customary Law)

China enjoys a rich 5000 year-old recorded history, and even in the present day the force of custom is particularly strong. Many present-day customs in the PRC are directly descended from its Confucian heritage. The Confucian code stressed such things as resolving disputes without recourse to the courts, recognition of social position and age, and respect and obedience toward such authority. The Chinese people are generally conservative, and their customs and habits generally change slowly. It is not surprising, then, that at every stage of the Chinese legal and governmental system social mores and customs are prevalent in the way the parties interact with each other and the methods by which business is conducted.

In addition to the Han Chinese, which makes up over 90% of the population, there are over 50 minority groups in the PRC. These minority groups are given some right to fashion their own laws according to their customs. A description of these customs is not within the scope of this article, but it is useful to be familiar with such customs before traveling to, or doing business with, persons in such autonomous regions.

IV. The Judicial System

The PRC has approximately 30 high courts, almost 400 intermediate courts and over 3,000 basic courts. More than half of the roughly 215,000 judicial personnel who staff these institutions are judges.¹⁴³ Currently, all courts are guided mainly by the Constitution and the Organic Law of the People's Courts of 1979, as amended in 1983. Every court in the judicial system is supposed to rely on the following constitutional principles in conducting judicial work:¹⁴⁴ (1) all citizens are equal before the law; (2) the people's courts shall exercise judicial power independently and are not subject to any interference by the administrative institutions, public organizations or individuals; (3) open trials should be conducted; (4) no one is guilty before proven so before the people's courts; (5) the accused has a right to defense; (6) citizens of all nationalities have the right to use their own spoken and written languages in the court proceedings.

A. Courts Available

China has a centralized judicial system, in which there are courts established at various levels of the state, including: (1) The Supreme People's Court (the national level); (2) Provincial High People's Courts (provincial level); (3) Intermediate People's Courts (large city level); (4) Primary People's Courts (local city, county and township level); and (5) Courts of limited jurisdiction.

¹⁴² HSIA & JOHNSON, *supra* note 17, at 11-12.

¹⁴³ Cohen, *supra* note 28, at 795.

¹⁴⁴ Zhu, *supra* note 22, § 2.16, at 58.

The responsibility of each of these People's Courts is defined as follows:

To try criminal and civil cases, and through judicial activities to punish all criminal elements and to resolve civil disputes so that the system of democratic dictatorship of the people, and the socialist legal system and the social order can be maintained; to protect the socialist property owned by the whole of the people and the property owned collectively by the working masses; to protect the legitimate property privately owned by any citizen; to protect the property legitimately owned by joint ventures with Chinese and foreign capital; to protect the personal, democratic, and other rights of the citizen; to safeguard the socialist revolution and the socialist construction in order that the state will proceed successfully.¹⁴⁵

1. Primary People's Courts

The Primary People's Courts are the local trial courts, and deal with eighty percent of the cases of first instance in the country.¹⁴⁶ There is no jury system in the trial courts, rather, there is a panel composed of three judges or of judges and people's assessors.¹⁴⁷ In China, it is the responsibility of the panel to find the facts and apply the law. Either attorneys or judges can conduct questioning.¹⁴⁸

The Primary People's Court has jurisdiction over ordinary criminal cases committed by citizens of the PRC,¹⁴⁹ however, crimes carrying a possible sentence of life imprisonment or the death penalty, and criminal cases in which the offenders are foreigners, are within the initial jurisdiction of the Intermediate People's Court.¹⁵⁰ In some cases a Primary People's Court may choose to defer jurisdiction to a higher court.¹⁵¹

2. Intermediate People's Courts

Intermediate People's Courts are established at the provincial level. The jurisdiction of these courts includes cases of first instance as assigned by specific laws or transferred up *sua sponte* by the primary courts. Some cases in which the Intermediate Courts are assigned by statute to be courts of first instance include cases which may involve life-sentences or the death penalty, cases of counter-

¹⁴⁵ Wang, *supra* note 18, §4.01 at 108 (citing ORGANIC LAW OF THE PEOPLE'S COURTS, art. 3).

¹⁴⁶ CHEN, *supra* note 2, at 109.

¹⁴⁷ CRIMINAL PROCEDURE LAW OF THE PRC, adopted at the Second Session of the Standing Committee of the Fifth NPC on July 1, 1979, and revised in according with the Decision on Revising the Criminal Procedure Law of the PRC adopted at the Forth Session of the Eighth NPC on March 17, 1996, art. 147 (visited May 14, 2001) <www.quis.net/chinalq/proc60.htm>.

¹⁴⁸ Pamela A. Seay, *Law, Crime, and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China*, 9 IND. INT'L & COMP. L. REV. 143, 148 (1998).

¹⁴⁹ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147., art. 19.

¹⁵⁰ *Id.* art. 20.

¹⁵¹ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147., art. 23; *see also* Seay, *supra* note 148, at 149.

revolutionary crimes, cases involving foreigners and foreign civil cases.¹⁵² The Intermediate People's Courts also adjudicate cases that have been appealed from the Primary People's Courts.¹⁵³

3. High People's Courts

The High People's Courts are established at the provincial level and have original jurisdiction over what are considered to be the most important cases within the province. The determination of importance is within the discretion of the court. In addition, the High People's Courts have appellate jurisdiction over cases that originated in the Intermediate People's Courts. The High People's Courts are also charged with the supervision of the administration in their jurisdiction.¹⁵⁴

4. The Supreme People's Court

The Supreme People's Court is the highest judicial organ in China. Although there is a multitude of branches and divisions working within and under the Supreme People's Court, the three main divisions of the Court are comprised of a criminal division, a civil division, an administrative division, and an economic division.¹⁵⁵

The senior judges who work at the Supreme People's Court in Beijing spend most of their time as administrators and de facto legislators rather than adjudicators. The Supreme People's Court has over a hundred judges and a large staff "who supervise a nationally-unified court system consisting of three levels of lower courts plus military and maritime, railway and other transportation courts and who from time to time issue elaborate 'opinions' on relevant laws."¹⁵⁶

B. Basic Principles of the Judicial System

1. The Civil Law System In China

The Chinese people have developed a civil law system rather than a common law system.¹⁵⁷ As in other civil law countries, the legal system is viewed as, "an organic, comprehensive and unified whole consisting of well-defined divisions or branches of the law into which all laws may be classified in an exhaustive manner."¹⁵⁸ There are nine major branches of law identified in the PRC, including:¹⁵⁹ (1) Constitutional Law; (2) Administrative Law; (3) Criminal Law; (4) Civil Law; (5) Economic Law; (6) Family Law; (7) Labor Law; (8) The Law of Procedure (Civil, Criminal and Administrative); and (9) International Law. Each branch of law has extensive legislation codified in the form of statutes, rules and regulations.

¹⁵² CHEN, *supra* note 2, at 109.

¹⁵³ Zhu, *supra* note 22, § 2.16, at 61.

¹⁵⁴ CHIU ET AL, *supra* note 15, at 72.

¹⁵⁵ Zhu, *supra* note 22, § 2.16, at 60; *see also* CHEN, *supra* note 2, at 108-109.

¹⁵⁶ Cohen, *supra* note 28, at 794-95.

¹⁵⁷ Liu, *supra* note 131, at 108.

¹⁵⁸ CHEN, *supra* note 2, at 185.

¹⁵⁹ CPC CENTRAL PARTY SCHOOL, Law Unit 60 (1984).

In the civil law jurisdiction of China, judicial proceedings are determined on the basis of analyzing the facts with reference to the statutes and, if necessary, the judge may either consult one of the acceptable codified forms of legal interpretation or submit legal questions to a higher judicial or governmental authority. Verdicts of past court proceedings, including those of the Supreme People's Court, have no binding power over the later verdict of other courts but serve only for reference purposes. Judges determine the verdict of a case by interpreting the relevant statute. Previous case law is not binding on, and in fact cannot be cited to by, the court.¹⁶⁰

2. The General Principles of Civil Law (Civil Law Code)¹⁶¹

The provisions in the Civil Law Code provide the scope, terminology and principles of the civil law system in China, codify the civil rights and liabilities of parties in a dispute, and provide the basis for various civil actions. The Civil Law Code contains nine chapters, including: General Principles; Citizens; Legal Persons; Civil Law Acts and Agency; Civil Law Rights; Civil Liability; Limitation of Action; Application of Law in Civil Relations With Foreigners; and Supplementary Provisions

The basic principles of Chinese civil law are provided in Chapter 1 of the Civil Law Code, and include the principles of equality, voluntariness, exchange of equivalent values, fairness, and good faith.¹⁶² Chapters 2 and 3 define the requirements for capacity and status of "legal person" in order to be a party to a dispute. The rest of the chapters mainly deal with the elements that form the basis of a civil action.

The basis of a civil action generally depends on the civil liability of one party for damage done to the property, or in some cases the person, of another party.¹⁶³ "Civil Liability is based on the existence of civil duties which may arise from the provisions of the law or an agreement between the parties."¹⁶⁴ There are four basic elements that must be proved for an act to result in civil liability. Civil liability occurs when there is (1) a wrongful act (2) committed with a culpable mental state that, (3) through direct causation, (4) damages another party.¹⁶⁵

Even when these elements do occur, however, the Civil Law Code provides four types of legal justification whose presence will exonerate such acting party from

¹⁶⁰ Dr Zhenmin Wang, *The Civil Law Tradition in China and Its Future Development*, Department of Law, Qinghua University, Beijing, China, *Explanations of Various Issues Concerning the PRC* (visited May 14, 2001) <<http://www.qis.net/chinalaw/explan1.htm>>.

¹⁶¹ GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA, (Adopted at the Fourth Session of the Sixth National People's Congress, promulgated by Order No. 37 of the President of the People's Republic of China on April 12, 1986, and effective as of January 1, 1987) [hereinafter CIVIL LAW CODE]; also see CIVIL LAW CODE (visited May 14, 2001) <www.qis.net/chinalw/prclaw27.htm>.

¹⁶² CIVIL LAW CODE, *supra* note 161, arts. 3-4.

¹⁶³ Ling Bing, *Civil Law*, INTRODUCTION TO CHINESE LAW § 6.19 at 220 (Wang Chenguang & Zhang Xianchu eds. 1997).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* § 6.19 at 220-22.

civil liability.¹⁶⁶ These forms of legal justification include necessity;¹⁶⁷ fault of the injured party/assumption of risk;¹⁶⁸ self-defense;¹⁶⁹ and force majeure [unforeseeable, unavoidable or irresistible forces or events].¹⁷⁰ Where all of these conditions are absent and a party is found to have injured another party, there are ten main methods for bearing civil liability and making restitution to a damaged party.¹⁷¹

According to Article 134 of the Civil Law Code, the main methods of bearing civil liability are: cessation of infringements; removal of obstacles; elimination of dangers; return of property; restoration of original condition; repair, reworking or replacement; compensation for losses; payment of breach of contract damages; elimination of ill effects and rehabilitation of reputation; and extension of apology.

C. Civil Actions & Civil Procedure ¹⁷²

1. Civil Actions I – Filing a Case

Primary People's Courts are the courts of first instance for most civil matters. The main exceptions to this rule are that in cases involving foreigners the Intermediate People's Courts will first hear a case, and if a case is sufficiently important on a national level it will first be heard by the Supreme People's Court.¹⁷³

A civil case is commenced when the plaintiff files a bill of complaint. The bill of complaint must contain a description of the plaintiff, a detail of the claim, including facts and the law upon which the claim is based and the evidence, including the names and addresses of witnesses. Both parties then appear before the court, state their cases, and request the court to settle the matter. The court then appoints personnel to investigate the complaint, collect evidence, and interview the witnesses. The Court has seven days to examine the situation and determine whether there is sufficient evidence to move forward with a trial.¹⁷⁴

The Court serves the defendant with a copy of the indictment within five days after the case is recorded for a hearing, and the defendant then has fifteen days after receiving the complaint to respond to the Court.¹⁷⁵ A collegial panel is then formed, and the parties are notified three days before the hearing.¹⁷⁶

¹⁶⁶ *Id.* § 6.19 at 222.

¹⁶⁷ CIVIL LAW CODE, *supra* note 161, art. 129.

¹⁶⁸ *Id.* arts. 123, 127, 131.

¹⁶⁹ *Id.* art. 128.

¹⁷⁰ *Id.* art. 153.

¹⁷¹ *Id.* art. 134.

¹⁷² CIVIL PROCEDURE LAW OF THE PRC, *supra* note 147.

¹⁷³ CHIU ET AL, *supra* note 15, at 69.

¹⁷⁴ Zhang Xianchu, *Law of Civil Procedure*, in INTRODUCTION TO CHINESE LAW § 12.11. at 421 (Wang Chenguang & Zhang Xianchu eds.1997).

¹⁷⁵ *Id.*, §12.11 at 421.

¹⁷⁶ CIVIL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 122.

Before any civil case can be brought before one of the people's courts there must first be an attempt at mediation or reconciliation,¹⁷⁷ and if the case is a minor civil case it may be submitted for arbitration at this point.

2. Civil Actions II - Alternative Dispute Resolution

The history of mediation-reconciliation in China goes back to ancient times. The attempt to avoid litigation is strong, customary and deeply engraved in the culture. It is not surprising that parties involved in minor civil or administrative disputes as well as offenders and victims of minor crimes are required to first submit to an attempt at mediation.

In China, mediation is informal and flexible and "finds its support in public opinion, custom, tradition, persuasion, and education."¹⁷⁸ This mediation takes place in the context of a nation with a largely integrated world-view; with parties who share a large set of values and assumptions that can be appealed to in order to put the dispute into a larger perspective, and to allow the parties more readily to modify their positions in order to further their shared vision. Traditionally, in Chinese culture, each person's identity is "intimately and essentially defined by his or her many relationships within the intricate network of Chinese society."¹⁷⁹ Disputes never affect only the primary parties, but also affect the lives of many other people connected to the parties by various ties.¹⁸⁰

Mediation derives its force from the fact that the disputants are members of interwoven network of social and work organizations.¹⁸¹ "To live up to moral standards, the individual must measure his own interest against the interest of the collectives in which he participates, and against the interests of the state." Mediators can also appeal to party policy by presenting the issues in a dispute so that a larger issue of party policy may transcend the disputants' personal grievances.¹⁸²

There are three types of reconciliation:

- (1) Court Reconciliation: Reconciliation within litigation of civil, administrative or minor criminal disputes that is overseen by a judge or collegiate bench, and such judge or bench is responsible for educating and encouraging the parties to reach an agreement.¹⁸³
- (2) People's Reconciliation (or Meditation): A non-legally binding agreement to local disputes that are not being litigated. When there is a local dispute, a local organization called the People's Reconciliation Committees¹⁸⁴ plays a key role in the mediation process. The

¹⁷⁷ CHIU ET AL, *supra* note 15, at 69, 83.

¹⁷⁸ Justice Robert F. Utter, *Tribute: Dispute Resolution in China*, 62 WASH. L. REV. 383, 391 (1987).

¹⁷⁹ A. CLAYRE, *THE HEART OF THE DRAGON* 92-93 (1985).

¹⁸⁰ Utter, *supra* note 178, at 394.

¹⁸¹ *Id.* at 391.

¹⁸² *Id.* at 391-92.

¹⁸³ John SiJian Mo, *Alternative Dispute Resolution*, in *INTRODUCTION TO CHINESE LAW* § 11.07 at 377 (Wang Chenguang & Zhang Xianchu eds. 1997).

¹⁸⁴ *Id.*, § 11.04 at 371.

Committee is usually made up of a local neighborhood committee, elected by people in the area and under the supervision of a local branch of the CPC. If the dispute is unresolved it may reach the level where it will be litigated.¹⁸⁵

- (3) Administrative Reconciliation: A mechanism for resolution of disputes between individuals and administrative organs.¹⁸⁶

Many contractual disputes are resolved by way of arbitration, which is often a condition of the contract itself. The process of arbitration generally involves a case first being brought to mediation. If mediation fails, either party may apply to the relevant arbitration organs or in the alternative go directly to court. If the case goes directly to court then the other party can not seek to have the matter arbitrated. If the matter goes to arbitration, a hearing where testimony and evidence are presented takes place. A party that is not satisfied with the arbiter's decision may bring the matter to court. If the matter goes to court it may only have one hearing and the decision in court is final.¹⁸⁷

3. Civil Actions III – Proceeding to Trial

If a trial is necessary, the proceedings may be “conducted in either a courtroom or on a particular sight, such as a party’s workplace or place of residence, in order to promote awareness of the Law.”¹⁸⁸ A trial proceeds in the four stages provided for under the Civil Procedure Law, Articles 123 through 134. The four stages of the trial include: Session Opening, Court Investigation, Court Debate, and Pronouncement of Judgment.

The session opens with the Court determining if all the participants to the action are present. The Court then announces the subject matter of the proceedings, informs the parties of their respective rights and duties concerning the litigation, and asks whether any of the parties desire to have any member of the bench withdrawn for any reason.¹⁸⁹

The Court then proceeds with the investigation, which is conducted in the following order:¹⁹⁰ opening statements by each party; testimony of the witnesses; presentation of all physical evidence;¹⁹¹ reading out of the conclusion of the expert witnesses; and reading out of the record of site inspection.

In a civil case the party making the claim carries the burden of proof and must produce the relevant supporting evidence.¹⁹² Evidence is to be presented in

¹⁸⁵ CHIU ET AL, *supra* note 15, at 86.

¹⁸⁶ CHIU ET AL, *supra* note 15, at 87; *see also* Mo, *supra* note 183, § 11.05, at 374.

¹⁸⁷ CHIU ET AL, *supra* note 15, at 82; *see also* Zhang, *supra* note 174, § 12.13, at 426.

¹⁸⁸ Zhang, *supra* note 174, § 12.11, at 422.

¹⁸⁹ *Id.*

¹⁹⁰ CIVIL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 124.

¹⁹¹ According to CIVIL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 63; the types of evidence which can be presented to the court includes: (1) material evidence and documentary evidence; (2) testimony of witnesses; (3) statements of victims; (4) statements of defendants; (5) conclusions of experts; (6) records of inspection and examination.

¹⁹² CIVIL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 64; *see also* Zhang, *supra* note 174, § 12.06 at 417.¹⁹² Mo, *supra* note 183, § 11.04, at 371.

court and is subject to cross-examination.¹⁹³ All documents should be originals. Copies are not allowed unless there are genuine difficulties in presenting the originals, and copies thus presented must be notarized. Either party or the court may apply to preserve evidence that will possibly be lost, destroyed or difficult to attain at a later date.¹⁹⁴

When each party has presented their case they enter into a debate. After the debate the judge once again asks the parties their opinions. Based on the evidence presented in court and the views expressed in the debate, the court may make new efforts to mediate the dispute. If efforts to mediate fail then the court will enter its judgment without delay.¹⁹⁵ The parties are informed of their right to appeal, the time limit for an appeal, and the court that has jurisdiction over their appeal.¹⁹⁶

A party that disagrees with the ruling has fifteen days from judgment or ten days from a ruling to appeal the case to a higher court. The opposing party receives copies of the petition and is given fifteen days to respond. Each case may be heard a maximum of two times, a trial of first instance and one appeal.¹⁹⁷ If the appeal is heard and judgment delivered the ruling will be final, with no further right to appeal.¹⁹⁸

D. Criminal Prosecutions

1. Substantive Criminal Law¹⁹⁹

a. *The Elements of a Crime*

Article 13 of the Criminal Law defines a criminal act as:

All acts that endanger the sovereignty, territorial integrity, and security of the state; split the state; subvert the political power of the people's democratic dictatorship and overthrow the socialist system; undermine social and economic order; violate property owned by the state or property collectively owned by the laboring masses; violate citizens' privately owned property; infringe upon citizens' rights of the person, democratic rights, and other rights; and other acts that endanger society, are crimes if according to law they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes.

¹⁹³ Zhang, *supra* note 174, § 12.06, at 417.

¹⁹⁴ *Id.* § 12.06 at 417-18.

¹⁹⁵ *Id.* § 12.11, at 423.

¹⁹⁶ *Id.* § 12.12, at 423.

¹⁹⁷ *Id.* § 12.10, at 421.

¹⁹⁸ CHIU ET AL., *supra* note 15, at 88.

¹⁹⁹ CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA, (Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997) [hereinafter CRIMINAL LAW].

According to Chinese criminal law theory the four basic elements necessary in order to establish criminal liability are the: (1) Subject - the person who performed the criminal act; (2) Subjective Aspect - the person's intention or negligence; (3) Object - the type of crime; and (4) Objective Aspect - the harm caused. "If any one of these elements is missing or deficient then this will affect the criminal liability."²⁰⁰

(i) The Subject

The person who commits the crime must have capacity to do so. Under Article 17 of the Criminal Law, there is no capacity for criminal liability for those below the age of 14. Those between 14 and 16 years old are only responsible for serious crimes, and those under 18 years of age receive lighter or mitigated punishment.²⁰¹ When a person is "unable to recognize or control his own conduct" by reason of insanity he bears no criminal liability.²⁰²

(ii) The Subjective Aspect

If the mental element of the crime cannot be proven, then there is no criminal liability.²⁰³ A crime may be committed either intentionally or negligently.²⁰⁴ According to the Criminal Law:

Article 14. An intentional crime is a crime constituted as a result of clear knowledge that one's own act will cause socially dangerous consequences, and of hope for or indifference to the occurrence of those consequences.

Article 15. A negligent crime occurs when one should foresee that one's act may cause socially dangerous consequences but fails to do so because of carelessness or, having foreseen the consequences, readily assumes he can prevent them, with the result that these consequences occur.

(iii) The Objective Aspect

The objective aspect includes the offensive act (or omission), the harmful consequence and a necessity of causation between them.²⁰⁵

(iv) The Object

The object is not the victim, but is the 'right' or 'social value' that is violated by the commission of the offense.²⁰⁶ For example, in the crime of theft the 'object' is the violation of public or private property rights.

²⁰⁰ Ian Dobinson, *Criminal Law*, in INTRODUCTION TO CHINESE LAW § 4.04, at 111 (Wang Chenguang & Zhang Xianchu eds. 1997).

²⁰¹ *Id.* § 4.04, at 111.

²⁰² CRIMINAL LAW, *supra* note 199, art. 18.

²⁰³ Dobinson, *supra* note 200, at 111.

²⁰⁴ CRIMINAL LAW, *supra* note 199, arts. 14- 15.

²⁰⁵ Dobinson, *supra* note 200, § 4.05, at 113.

b. *Specific Offenses*

“Crimes that share the same object can be grouped together as the same type of crime.”²⁰⁷ Ultimately all offenses share the same ‘common object’ of being an infringement of either personal or democratic rights.²⁰⁸ In Part Two of the Criminal Law there are about 150 Specific Offenses ordered by the objects of the crime. If a specific crime is not clearly defined within the Criminal Code then it may be determined by analogy to the closest provision in the laws. However, approval for judgment of such a case must be obtained from the Supreme People’s Court.²⁰⁹

2. Pre-litigation [Law Enforcement – The Public Security Bureau (PSB)]

The majority of all criminal proceedings are initially brought by the PSB. The PSB is granted power by the Criminal Procedure Law to prevent and stop crimes, to arrest offenders, and to disclose and prove these crimes. Like most governmental organs in China, the PSB exists at all levels of the government. At each level the PSB is answerable both to the local people’s congress of that district and to the division of the PSB directly above it.²¹⁰ Ultimately, the PSB answers to the Ministry of Public Security, which in turn is a department of the State Council.²¹¹ The PSB has the two roles of public administration and the investigation of crime.

The public administration responsibilities of the PSB include:²¹²

- a. Issuing identity cards and monitoring the movement of residents in a particular area;
- b. Administration of special businesses, such as restaurants, hotels, and repair establishments to make sure they are not fronts for criminal activity;
- c. Administration of urban traffic;
- d. Administration of fire control;
- e. Management of dangerous substances;
- f. Administration of Border Patrol;
- g. Administration of internal defense against counter-revolutionary activities;
- h. Administration of public order;
- i. Administration of the sentence of reform through labor; and
- j. Regulation of public health;

During the administration of its duties, if the PSB discovers any activity that warrants investigating, the PSB is charged with²¹³ finding facts, discovering evidence, and searching for accomplices; substantiating the evidence to assure innocent people aren’t punished; deciding how to handle the case; and educating the

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* § 4.11, at 119-20.

²¹⁰ CHIU ET AL, *supra* note 15, at 94.

²¹¹ *Id.* at 93.

²¹² *Id.* at 95-97.

²¹³ *Id.* at 95.

criminal elements to admit their crimes and to change their behavior so as to abide by the law.

3. Criminal Procedure Law (CPL)²¹⁴

The Criminal Procedure Law of 1979 governs criminal procedure in China. The criminal procedure is split into three stages: investigation, prosecution and trial.²¹⁵ The CPL has been modified in significant ways by passage of the Amendment to the Criminal Procedure Law in 1996.

Prosecutions of criminal cases are initiated by the reporting of a crime by citizens or the detection of crime by law enforcement. When citizens report a crime or a crime is detected by law enforcement, the relevant branch of law enforcement begins an investigation. If the investigation reveals criminal activity then a warrant will be issued for arrest of the suspect. Public security organs are also permitted to detain individuals who are in the process of committing a crime; are identified by a victim or eyewitness; are found to have criminal evidence at their place of residence; attempt to escape or commit suicide; may possibly destroy or falsify evidence; or cannot be positively identified.²¹⁷

Within twenty-four hours of detention the public security organs must conduct an interrogation of the detainee. Depending on their conclusions, the public security organs may apply for an arrest warrant, conditionally release the individual, or release the detainee if there is no evidence of criminal activity. The detainee may also be subject to house arrest pending further investigation. If the procuratorate arrests an individual, the accused may either choose to explain his actions, or plead either guilty or innocent. The investigation will also include questioning of witnesses and examination of all other evidence. If the procuratorate is convinced that the proof of guilt is shown by all relevant testimony and evidence he will refer the matter to the court.²¹⁸

The CPL provides for a preliminary hearing of cases sent to court by the procuratorate during which the court considers the case to determine whether to go forward with a full trial. An affirmative decision is rendered where the facts of a crime are clear and the evidence is complete.²¹⁹ If the required standard is not met, the case may be remanded to the procuratorate for supplementary investigation. If the court determines that "there is no need for a criminal sentence" the court may demand that the procuratorate withdraw its prosecution. A demand to withdraw the prosecution could also be prescribed if the required standard was so far from being met that remand for further investigation did not seem useful. The procurator may be

²¹⁴ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147.

²¹⁵ Fu Hualing, *Criminal Procedure Law*, INTRODUCTION TO CHINESE LAW § 5.01, at 129 (Wang Chenguang & Zhang Xianchu eds. 1997).

²¹⁶ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, arts. 61, 63; *see also* CHIU ET AL, *supra* note 15, at 90; Fu, *supra* note 215, § 5.05, at 135.

²¹⁷ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, arts. 61, 63; *see also* CHIU ET AL, *supra* note 15, at 90; Fu, *supra* note 215, § 5.05, at 135.

²¹⁸ CHIU ET AL, *supra* note 15, at 90.

²¹⁹ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, arts. 135-137, 150.

called in during the preliminary hearing to clarify points about the case.²²⁰ The defendant does not seem to be expected to appear at this proceeding,²²¹ and apparently no defense counsel may be present.²²²

The CPL allows a maximum of ten days of detention.²²³ After that, either a formal arrest must be approved and an investigation set in motion, or the suspect should be released.²²⁴ The CPL attempts to restrict arrest to cases meeting four conditions: (1) the principal facts of the crime have already been clarified; (2) on the basis of the facts the person could be sentenced to a term of imprisonment; (3) allowing the person to remain out of custody with a guarantor or under surveillance would be insufficient to prevent danger to society; and (4) there is the necessity of arrest.²²⁵

Generally, a maximum of five-and-one-half months may elapse between the initiation of the investigation and the decision to prosecute, although it is possible for the state to be granted extensions.²²⁶ In addition, the Standing Committee of the NPC on application may grant an indefinite extension of the investigation by the Supreme People's Procuratorate "in especially major or complex cases".²²⁷

It should be noted that "where a victim has suffered material losses as a result of the defendant's criminal act, he shall have the right to file an incidental civil action during the course of the criminal proceedings."²²⁸ The criminal action and the civil action will be heard together at the same trial,²²⁹ and if the civil party in a criminal trial is not satisfied with the outcome it can appeal the case as it relates to the civil action and the appellate court will hear the entire case again.²³⁰

4. Litigation

The CPL calls for the gathering of evidence "that can prove the defendant's guilt or innocence and the gravity of the circumstances of the crime."²³¹ Following the general statement that "facts that prove the true circumstances of a case are evidence,"²³² the CPL lists seven categories of evidence, including: (1) material and documentary evidence; (2) testimony of witnesses; (3) statements of victims; (4)

²²⁰ Timothy A. Gelatt, *Chinese Criminal Code Symposium: The People's Republic of China and The Presumption of Innocence*, 73 J. CRIM. L. & CRIMINOLOGY 259, 292-93 (1982).

²²¹ See generally CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, Part 2, ch. III, arts. 136-146.

²²² *Id.*

²²³ *Id.* art. 134.

²²⁴ *Id.*

²²⁵ *Id.* art. 60; see also Gelatt, *supra* note 219, at 293-94.

²²⁶ *Id.* arts. 124, 126, 134.

²²⁷ *Id.* art. 125.

²²⁸ *Id.* art. 77; see also Fu, *supra* note 215, § 5.15, at 151. The second part of this footnote does not contain the language referred to in the text above.

²²⁹ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 78.

²³⁰ Dobinson, *supra* note 200, § 5.13, at 149-50.

²³¹ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 43.

²³² *Id.*, art. 42.

²³³ See Seay, *supra* note 148, at 150.

statements of defendants; (5) conclusions of experts; (6) records of inspection and examination; and (7) auto-visual materials.²³⁴

The CPL has no restrictive rules of evidence, though it does provide that the "use of torture to coerce statements and the gathering of evidence by threat, enticement, deceit or other unlawful means are strictly prohibited."²³⁵ In addition, the accused cannot be convicted solely on his or her own confession without corroborating evidence.²³⁶ Two specific provisions support the general statement that "evidence must undergo examination for truth before it can be used as the basis for determining cases."²³⁷ The first is the provision providing that "in cases where there is only the testimony of the defendant and there is no other evidence, the defendant cannot be determined guilty and sentenced to a criminal punishment."²³⁸ Another provision states that, where there is no confession but other evidence is "complete and reliable," guilt may be found.²³⁹

Another provision for verification of evidence requires witnesses and their testimony be subjected to in-court questioning and verification by the prosecutor, the defendant and defender before such testimony may be used as the basis for determining a case.²⁴⁰ However, the defendant's right to confront witnesses may be undermined by a conflicting provision that provides that records of testimony of witnesses not present in court may be read out in court and the "opinions of parties and defenders heard."²⁴¹

Under the CPL, the defense counsel at trial has the responsibility to present materials and opinions proving that the defendant is not guilty on the basis of the facts and the law, that his crime is minor, or that he should receive a mitigated punishment or be exempted from criminal responsibility.²⁴² After the court questions the defendant, both prosecution and defense may question the defendant with the permission of the presiding judge.²⁴³ The defense may request that the presiding judge allow for the questioning of witnesses.²⁴⁴ The defense also has the right "to apply to notify new witnesses to come to court, to obtain new material evidence, and to apply for new expert evaluation or inspection."²⁴⁵ After conclusion of the tribunal's inquiry and the statement of the prosecutor, the defender makes his statement and defense.²⁴⁶ After the close of debate among participants in the trial, the defendant has the right to make a final statement.²⁴⁷

²³⁴ See Seay, *supra* note 148, at 150.

²³⁵ CRIMINAL PROCEDURE LAW OF THE PRC *supra* note 147, art. 43.

²³⁶ *Id.* art. 46.

²³⁷ *Id.* art. 42.

²³⁸ *Id.* art. 46.

²³⁹ *Id.*

²⁴⁰ *Id.* art. 47.

²⁴¹ *Id.* art. 157.

²⁴² *Id.* art. 35.

²⁴³ *Id.* art. 156.

²⁴⁴ *Id.*

²⁴⁵ *Id.* art. 159.

²⁴⁶ *Id.* art. 160.

²⁴⁷ *Id.*

Based on the facts and evidence that have been presented, and on the provisions of the relevant laws, the judicial panel then renders a judgment as to whether the defendant is guilty or innocent,²⁴⁸ what crime he committed, what criminal punishment is to be applied or whether he should be exempted from criminal punishment.

a. *Presumptions.*

According to Chinese criminal procedure, the courts should not engage in either the "presumption of guilt" or in the "presumption of innocence."²⁴⁹ In resolving the case at hand, the Court should not initially presume anything, rather, it should "seek truth from the facts."²⁵⁰ In order for the Court to make a determination, there should be a thorough investigation using reliable evidence, a strict prohibition on extracting confessions by force,²⁵¹ and related principles of China's new legal order employed to achieve an accurate and fair administration of justice.²⁵² According to the CPL, the Court should decide a case based on the established facts and evidence in accordance with the provision for relevant laws.²⁵³

b. *The Burden of Proof*

The initial burden of proof in order to get a case heard before the court is on the state. The state must provide a Bill of Prosecution to the Court that details the alleged criminal activity, a list of all the evidence and the names of witnesses, and only then will the court decide whether or not to hear the case.²⁵⁴

c. *Right to Counsel*

Until very recently, lawyers were not allowed to represent a client before a trial began, and only seven days before the trial began was the defendant given a copy of the Bill of Prosecution and allowed to look for an attorney.²⁵⁵ Only at that time did the attorney have the right to access of the client and those materials relevant to the court proceeding.

The recent 1996 Amendment to the CPL greatly modified the existing provision on representation of criminal defendants in the PRC. The new CPL recognizes two stages of legal representation: the investigative stage and the prosecution and trial stage.²⁵⁶ An attorney now has the right to see his client from

²⁴⁸ *Id.* art. 162.

²⁴⁹ Gelatt, *supra* note 219, at 260-61.

²⁵⁰ PEOPLE'S DAILY NEWSPAPER, *Famous Legal Scholar Zhang Youyu Answers Reporter's Questions*, Nov. 22, 1980, at 1.

²⁵¹ CRIMINAL PROCEDURE LAW OF THE PRC *supra* note 147, art. 43.

²⁵² PEOPLE'S DAILY NEWSPAPER, *supra* note 248.

²⁵³ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 162.

²⁵⁴ *Id.* art. 150.

²⁵⁵ CRIMINAL PROCEDURE LAW OF THE PRC (1979), art. 110.

²⁵⁶ Fu, *supra* note 215, § 5.19 at 160.

the day he is put under any restrictive measures imposed by an investigative body.²⁵⁷ However, not only is the attorney limited to merely inquiring about the name of the alleged offense, but any lawyer-client conference is subject to supervision by the investigating body during any interview.²⁵⁸

From the first day a case reaches the stage of judicial prosecution, the defense attorney gains access to, and is allowed to copy, all litigation documents.²⁵⁹ At this point, the lawyer learns the identities of witnesses and can begin interviewing them. The defense attorney may even collect information from the victims, if the attorney first gets permission from the procuratorate or court.²⁶⁰

d. *Verdicts*

According to Article 162(1) of the 1996 Amendment to the CPL, a court may find the defendant guilty if the facts of the case are clear, the evidence is reliable and sufficient, and the defendant is guilty according to the law. The defendant cannot be found guilty if either there is insufficient evidence to prove that the defendant is guilty or the act committed by the defendant does not rise to the level of being a criminal act.

e. *Adjudicative Review*

The court that hears the appeal is based upon the court from which the appeal is made. A criminal trial may begin at any of the four levels of the people's courts, depending on the type of crime committed. An appeal from the Primary People's Court goes to the Intermediate People's Court, appeals from the Intermediate People's Court go to the Higher People's Court, and any appeal from the Higher People's Court goes to the Supreme People's Court.²⁶¹ A court judgment may only be appealed once, no matter in which court the proceedings began.²⁶² Therefore, the limit for which any case may be heard is two trials, and the decision of the second court is final and cannot be appealed.²⁶³ The time limit for appeal of a judgment is ten days.²⁶⁴

In the trial court, an accused may choose to be represented by counsel, appear pro se, or be represented by a family member.²⁶⁵ Upon the conclusion of a trial, both the accused and the state have the right to appeal.²⁶⁶ Under Chinese law and beliefs, this concept allows for justice to be served, no matter which side originally prevailed.²⁶⁷ If the accused or his representative raise the appeal, there can be no increase in the penalty or punishment, no matter what the finding of the

²⁵⁷ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 96.

²⁵⁸ Fu, *supra* note 215, § 5.19, at 160-61.

²⁵⁹ CRIMINAL PROCEDURE LAW OF PRC, *supra* note 147, art. 36.

²⁶⁰ *Id.* art. 37; see also Fu, *supra* note 215, § 5.19, at 161.

²⁶¹ See Seay, *supra* note 148, at 150-51.

²⁶² CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 10.

²⁶³ Wang, *supra* note 18, § 1.18, at 24.

²⁶⁴ CRIMINAL PROCEDURE LAW OF PRC, *supra* note 147, art. 183.

²⁶⁵ *Id.* art. 32.

²⁶⁶ *Id.* art. 180.

²⁶⁷ See Seay, *supra* note 148, at 150.

appellate court.²⁶⁸ Where the procurator raises the appeal, however, there is no limit on the imposition of sentence by the appellate court or, if remanded, by the trial court.²⁶⁹

Appellate courts of the PRC conduct a complete review of both the facts and the law.²⁷⁰ After rehearing the entire case, the appellate court may choose to reject the appeal and affirm the original judgment, revise the judgment, or rescind the original judgment and remand for retrial.²⁷¹

V. Conclusion

There are still obstacles to the implementation of much of the new legislation that has recently been passed in China, and there is more progressive legislation that yet needs to be written. However, the foundation of a better society has been laid. When awareness of these new laws emerges in the PRC, and when the old guard is no more, it is possible that China may rise to take its place among the societies of the world that are recognized as following the rule of law. Knowledge of the rules is the first step towards implementing them. Hopefully this paper can provide some of that knowledge.

The foregoing general survey of the Chinese legal system is by no means complete. The evolution of the Chinese legal system is presently in rapid development, and the quantity of legislation on specific branches of the law is immense. Further study is essential for an in-depth understanding of any individual topic. However, if this paper either stimulates interest in the reader on the topic of Chinese law or answers questions sought by the reader on this topic, then this article has been successful in its aims.

²⁶⁸ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, art. 190.

²⁶⁹ *Id.* art. 190.

²⁷⁰ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147 art.186; *see also* Dobinson, *supra* note 200, § 5.18, at 157.

²⁷¹ CRIMINAL PROCEDURE LAW OF THE PRC, *supra* note 147, art.189; *see also* Seay, *supra* note 148, at 151.

²⁷² CRIMINAL LAW, *supra* note 199, Part I, Chapter III.

²⁷³ CRIMINAL PROCEDURE LAW OF THE PRC. *supra* note 147, arts. 51, 199; *see also* CHEN, *supra* note 2, at 188-89.

²⁷⁴ CRIMINAL LAW, *supra* note 199, Chapter III.

²⁷⁵ Seay, *supra* note 148, at 151.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ CHIU ET AL, *supra* note 15, at 106.

²⁸⁰ *Id.* at 107.

²⁸¹ *Id.* at 109.

²⁸² *Id.* at 112.

²⁸³ *Id.* at 112-13.

²⁸⁴ Seay, *supra* note 148, at 152.

²⁸⁵ CHIU ET AL, *supra* note 15, at 109.

²⁸⁶ These rights include such things as the right to vote in elections or to be elected, or to hold a position in a State office.

²⁸⁷ CHIU ET AL, *supra* note 15, at 109.

Appendix (Key to Abbreviations)

1. CLA	Commission for Legislative Affairs
2. CPC	Communist Party of China
3. CPL	Criminal Procedure Law of the PRC
4. Civil Law Code	The General Principles of the Civil Law
5. LAWC	Legal Affairs Working Committee
6. NPC	National People's Congress
7. PRC	People's Republic of China
8. PSB	Public Security Bureau