

C O M M E N T S

Overview of the Chinese Legal System

by Jingjing Liu

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The People's Republic of China (PRC) was founded in 1949 by the Chinese Communist Party (CCP). For almost three decades after the PRC's establishment, there was a perception that a formal legal system for many areas of national life was unnecessary since the economy was centrally controlled and conflicts could thus be resolved through mediation or administrative means without reference to legal rights and obligations.¹ However, the "Reform and Open Door" policy in the late 1970s, which began China's current rapid economic development and initiated the ongoing transition to a market economy, has had enormous implications for the country's legal development. The 1980s and 1990s saw massive and rapid enactment of laws, including many environmental laws, regulations, and rules.

The rebuilding of China's legal system over the past few decades has generally abandoned ideological requirements and embarked on a massive effort of law transplantation from western legal systems and internationally recognized practices, especially matters related to economic management, as a tool for attracting foreign investment. Modern Chinese law in its forms, structure, and methodologies thus exhibits many western characteristics, though it is generally modeled on the European continental civil law tradition in its legislative techniques.² There has also

been development in the public law areas and significant implications for protecting human rights (written into the 2004 Constitutional Amendment) since China's entry into the World Trade Organization (WTO), which imposes requirements on transparency and accessibility of law, reasonable administration of law, and impartiality, independence, and effectiveness of judicial review.

I. The Political Structure

Modern China is in form a unitary state, as compared to the federal system of the United States. All power flows from the central government in Beijing. However, economic reform has brought significant decentralization of economic administration, and in many cases, Beijing has been unable to supervise effectively the exercise of local government power, leading to substantial de facto autonomy for local governments in many areas of activities.³

The PRC's system of government has not adopted American-style ideas of separation of powers as a form of "checks and balances" between different branches of government, due to the belief that disagreement between different governmental institutions should be avoided because efficiency is the most important consideration for a socialist state like China. Instead, China's central government resembles much more the parliamentary systems common in Europe, where the governmental head, the prime minister, is chosen from and forms a cabinet with other members of the legislature. Thus, unlike in the American system, the head of government (the prime minister) is an individual and office distinct from the head of state (the president of the nation). In the United States, both functions are combined in the American presidency.

According to the Constitution, all power in the PRC belongs to the people and is to be exercised through the National People's Congress (NPC) and local people's congresses at lower governmental levels.⁴ Thus, the NPC in appearance sits on top of China's political power structure as the supreme organ of the state. As a matter of practi-

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1. DONALD C. CLARKE, *THE CHINESE LEGAL SYSTEM* (2005), available at <http://docs.law.gwu.edu/facweb/dclarke/public/ChineseLegalSystem.html>.
2. JIANFU CHEN, *CHINESE LAW: CONTEXT AND TRANSFORMATION* 73 (Leiden, the Netherlands, Martinus Nijhoff Publ. 2008).

3. CLARKE, *supra* note 1.

4. China Constitution, art. 2 (2004).

cal reality, however, most governmental power is exercised by the Standing Committee of the Politburo of the CCP. Because the CCP has party organizations attached to government institutions at all levels and because the great majority of government officials are CCP members, the party plays an important but nontransparent role in and has enormous influence over the operation of China's government at all levels. The result is that even if the law specifies particular requirements, the policies of the Communist Party organization, through the party's influence over the government officials who are also CCP members, may greatly influence how the government implements or otherwise follows the law. The result has been significant transparency issues regarding governmental decisionmaking, including decisionmaking related to projects that have major impacts on the environment.

The NPC, as the supreme organ of state power, has the authority to issue laws binding across China, appoints the president of the nation (currently President Hu Jintao), the premier (the head of the State Council, China's cabinet, currently Premier Wen Jiabao), and the presidents of the Supreme People's Court and the Supreme People's Procuratorate (the national prosecutorial agency). NPC delegates are not elected by a popular vote; they are chosen by the people's congresses at the provincial level. Similarly, provincial people's congress delegates are chosen by people's congresses immediately below them. Direct popular elections are only held at the township and county levels. The NPC has no more than 3,000 delegates,⁵ and representation of women and ethnic minorities is required.⁶ The delegates are selected for a term of five years and can be reappointed for further terms. The NPC convenes once a year, usually in March, for several weeks to discuss important matters of the state.

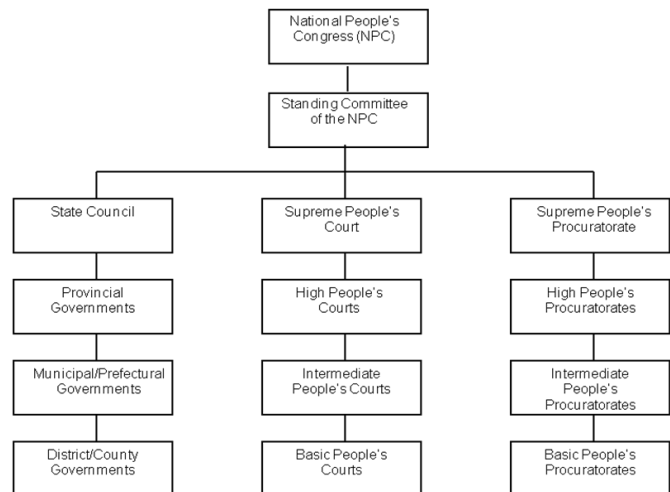
The large number of delegates in the NPC and the infrequency of its meetings prevent the NPC from exercising its stipulated supreme power.⁷ To facilitate the functioning of the government, the Constitution also establishes the Standing Committee of the NPC (SCNPC) as a permanent body of the NPC. The 175 members of the SCNPC are elected by the NPC. The SCNPC is vested by the Constitution with extensive powers, including the power to interpret the Constitution, make and revise laws, certain powers to appoint top government and judicial officials, and otherwise act when the NPC as a whole is not in session. Within the environmental arena, the SCNPC and the Environment and Natural Resources Protection Committee of the NPC play an important role in making, revising, and interpreting environmental statutes, inspecting the implementation of environmental laws, as well as

supervising the work of environmental protection agencies and courts.⁸

The State Council in the central government is responsible for the day-to-day work of operating the government as the highest organ of state administration.⁹ The premier is the head of the State Council, which is divided into various ministries and commissions. This structure of a people's congress on the one hand and a day-to-day government on the other hand is replicated at the local levels as well.

The Supreme People's Court is the highest judicial organ,¹⁰ and the Supreme People's Procuratorate is the highest state organ for legal supervision,¹¹ which includes functions of both bringing criminal prosecutions and ensuring that government agencies act in accordance with the law. The State Council, the Supreme People's Court and the Supreme People's Procuratorate are all responsible to the NPC and the SCNPC.¹² A similar structure exists at the provincial, municipal/prefectural, and district/county level with the local governments, people's courts and people's procuratorates being responsible to the local people's congresses (see the chart below on China's governance structure). An important ministry within the State Council is the Ministry of Justice, which administers prisons, oversees the People's Mediation Committees, the lawyer system and the notary system, manages legal education, and otherwise disseminates legal knowledge.

Figure 1: China's Governance Structure



Though the NPC and the SCNPC are the main legislative bodies, the State Council is de facto the most powerful lawmaking institution, given its extensive inherent and delegated powers of lawmaking. It issues administrative regulations that touch upon almost every aspect of political, social, and economic life in China, and over 70% of the

5. Electoral Law of the PRC on the National People's Congress and Local People's Congress, art. 15 (2010).

6. Electoral Law of the PRC on the National People's Congress and Local People's Congress, arts. 6, 17 (2010).

7. CHEN, *supra* note 2, at 115.

8. Jingjing Liu & Adam Moser, *Environmental Law—China*, in THE ENCYCLOPEDIA OF SUSTAINABILITY VOL. 3: THE LAW AND POLITICS OF SUSTAINABILITY 220-23 (Klaus Bosselmann et al. eds. 2011).

9. China Constitution, art. 85 (2004).

10. China Constitution, art. 127 (2004).

11. China Constitution, arts. 129, 132 (2004).

12. China Constitution, arts. 92, 128, 133 (2004).

laws considered by the NPC and the SCNPC are initiated and drafted by the State Council.¹³

II. History and Legal Context

China's modern legal system combines a number of legal traditions, including features of the continental European civil law tradition, substantial elements borrowed from the socialist law system of the former Soviet Union, and principles inherited from imperial Chinese law. In recent years, especially in the environmental area, American legal principles are also increasingly reflected in China's legal system.¹⁴ Unlike the western legal systems of continental Europe, however, which have been shaped by their roots in the private-law system of Rome or their early religious basis, traditional Chinese law instead centered on state concerns and dealt with private matters only incidentally.¹⁵ There was no special, differentiated institution, such as a "court," before which disputing parties could advance their legal claims.¹⁶ Instead, law was considered to be primarily an instrument for the sovereign to protect and advance the interests of the state and the rulers. As a result, traditional Chinese law was largely penal in nature; civil matters, those dealing with the interests of private parties, were largely left in the hands of customary law.

While ancient China had a highly developed and sophisticated administrative law system, its primary purpose was to ensure that officials followed the law and to increase government efficiency, not to protect individual rights from abuse by public power.¹⁷ The development and operation of the legal profession was strongly discouraged, and lawyers were seen primarily as "litigation tricksters." The emphasis was on substantive justice, with significant attention paid to fact-finding. Notions of procedural justice and due process were virtually nonexistent. In criminal trials, confessions were generally required for conviction, and torture was common. The heavy influence of Confucian values on traditional Chinese legal philosophy is particularly reflected in the general antipathy toward litigation and preference for extrajudicial mechanisms such as mediation as the primary means for dispute resolution. Some of these features in traditional Chinese law, to a certain degree, still influence the development of many aspects of the modern legal regime.

One of the most visible set of characteristics of China's modern legal system arises from the principles adopted from the civil-law tradition: statutory laws are of key importance; court judgments have formally no precedential effect, though they may serve as guidance. However, Chinese laws do give authority to the Supreme People's

Court to issue judicial interpretations, essentially interpretive regulations, and to the Supreme People's Procuratorate to issue procuratorial interpretations on questions of law arising out of specific applications of law in their adjudicative and procuratorial work. In practice, the Supreme People's Court is very active in issuing judicial interpretations that are oftentimes extensive and detailed, and are treated as supplementary laws.

The hierarchy of China's laws and regulations is as follows:

- *Constitution*
- *Laws* by the NPC and the SCNPC
- *Administrative Regulations* by the State Council
- *Local People's Congress Regulations* by local people's congresses and their standing committees at the provincial level
- *Rules*, including *Government Rules* by local governments of provinces, and *Ministry Rules* by central-level ministries, commissions, and agencies directly under the State Council

International treaties ratified by China are directly applicable and prevail if they conflict with domestic law.

III. The Judicial System

There are four levels of general courts in China: the Supreme People's Court at the central government level, the High People's Courts at the provincial level, and the Intermediate and Basic People's Courts at the local level. In addition to these general courts, there are several types of specialized courts that include military courts, maritime courts, courts of railway transportation, courts of forestry affairs, courts of agricultural cultivation, and, recently, environmental courts. Except for military courts, maritime courts, and environmental courts, these specialized courts are generally established at the intermediate court level and at the basic court level. They are subject to the supervision of the high people's court of the provinces where these specialized courts are located.

The Supreme People's Court has jurisdiction as the court of first instance, i.e., original trial jurisdiction, over cases that have major impacts on the whole country, as well as jurisdiction over appeals from high people's courts and specialized people's courts. The Supreme People's Court also issues judicial interpretation, reviews death penalty cases, administers the judiciary, and participates in certain legislative activities.

There are a total of over 30 high people's courts at the provincial level. They serve as the court of first instance over cases that have major impacts on the areas of its jurisdiction and hear appeals from the lower courts. There are around 400 intermediate courts in cities and prefectures within provinces. They serve as the major appellate review body for most of the cases, and have jurisdiction as the

13. CHEN, *supra* note 2, at 183-84.

14. Liu & Moser, *supra* note 8.

15. CLARKE, *supra* note 1.

16. *Id.*

17. There was a notion in traditional Chinese culture that there could not possibly be any substantial conflict between the interests of the state and the interests of its individual citizens, and therefore it was unnecessary to protect individual rights against abuse by public power.

court of first instance over criminal cases subject to sentence of life imprisonment or death, cases where foreigners are accused of committing a crime, major civil cases involving foreign parties, cases that have major impacts in the area of its jurisdiction, and other cases as determined by the Supreme People's Court. The basic courts, a total of over 3,000 at county/district level, serve as the first-instance trial court of most criminal, civil, and administrative cases. Within the environmental arena, the Supreme People's Court plays a role in issuing judicial interpretation, as mentioned above, to clarify important environmental legal concepts and principles, as well as guiding lower-level courts in the application of environmental law by retrial of important and complicated cases. For all other courts, their role in environmental governance includes hearing environmental tort litigation and environmental public interest litigation, conducting judicial review of decisions by environmental protection agencies, and mediating environmental disputes.¹⁸

Courts are responsible and accountable to the people's congresses at the corresponding governmental levels and are financed by the governments at the same level. Courts and judges are, at least theoretically, required to exercise independent judgment in accordance with law. In practice, they are oftentimes subject to influences from a variety of sources, including officials from their local governments, the CCP, powerful individuals, and public opinion (for example, evidenced through the media or public protests). Other than for simple civil and minor criminal cases, trials are conducted by a collegiate panel consisting of judges and layperson assessors¹⁹ (or judges alone for appeal cases). There is no jury. Trials are generally open to the public, except when a case involves state secrets, business secrets, as well as personal privacy. While a judgment at the second instance is usually final, with no further appeals permitted except otherwise provided by law, the appeal involves *de novo* review of both factual findings and legal determinations.

Under its authority to create specialized maritime courts in certain coastal port cities, the Supreme People's Court has established 10 maritime courts, located in the following port cities: Beihai, Dalian, Guangzhou, Haikou, Ningbo, Qingdao, Shanghai, Tianjin, Wuhan, and Xiamen. Maritime courts have only one level, equivalent to that of the intermediate people's courts. Their decisions can be appealed to the high people's court of the provinces where these 10 maritime courts are located. Maritime courts have jurisdiction over maritime torts and contract disputes of first instance. In 2006, maritime courts were given relatively clear jurisdiction over cases involving land-originated pollutants contaminating the ocean as well as navigable watersheds. Experts have supported the maritime courts' jurisdiction over pollution affecting the ocean

and other waters because their specialization in maritime cases has led them to accumulate significant experience in hearing ocean and watershed-related pollution cases. Possibly equally important is the prevailing view that maritime courts are relatively insulated from the local government, since their jurisdiction is not defined by administrative districts and thus may be less subject to the pressures of local protectionism. The result may be lesser risk of interference by local government officials and a greater likelihood that environmental pollution cases are heard fairly and disposed of efficiently.

Another promising new initiative within the Chinese court system to promote stronger environmental governance and better environmental enforcement is the rapid development of specialized environmental courts. The history of environmental courts in China can go back to as early as in the late 1980s, but the speed of establishing environmental courts picked up since 2007 in response to a series of devastating environmental disasters. So far, there are already over 50 environmental courts, environmental tribunals, and environmental collegiate panels set up in more than one dozen provinces across China, in both developed and underdeveloped areas, at the levels of high, intermediate, and basic people's courts. The establishment of these specialized environmental courts helps streamline the process of hearing environmental cases, allows cases to be heard by judges (and layperson assessors) with enhanced technical expertise, and expands the standing for plaintiffs to facilitate environmental public interest litigation that regular courts generally would not accept under existing Chinese law.²⁰

Judicial review in the form observed in the United States, where the courts may review the constitutional validity of legislative acts, does not exist in China. Under China's Constitution, the SCNPC has ultimate authority over legal interpretation, an arrangement that some have described as legislative supremacy. The interpretations of law of the Supreme People's Court may be reviewed and adjusted by the SCNPC.

In keeping with the continental civil-law tradition, the judiciary is viewed largely as a bureaucratic institution, and the status of judges is more akin to civil servants. To become a judge, now one must pass a national judicial bar exam. Law school graduates commonly enter the judiciary soon after graduation and advance in rank and the internal court hierarchy based on their seniority and experience. The adjudication committee, present in each court, is another unique aspect of China's judicial system. An adjudication committee is a body of senior judges and court officials that reviews controversial or complicated cases already tried by other judges in the court to ensure that such cases are resolved appropriately and "correctly." Because the committee does its work generally outside of the view of the public and the parties, and without the benefit of having experienced the trial itself, it has been heavily criticized by foreign as well as Chinese legal scholars. Among the

18. Liu & Moser, *supra* note 8.

19. The use of layperson assessors in trials is viewed by the CCP as a form of public participation in the judicial process and represents one way of exercising popular democracy related to legal processes.

20. Liu & Moser, *supra* note 8.

most significant issues raised have been concerns about the potential for inappropriate political influence in cases and the nontransparent nature of that process.²¹

In addition to trying cases, courts also make extensive use of mediation in civil cases, including in environmental matters. Especially under the leadership of the current Supreme People's Court Chief Justice, Shengjun Wang, the role of mediation has been heavily emphasized in adjudicating civil cases. In court-performed mediations, the judge who hears the case also acts as mediator and sometimes may decide cases based on a proposed solution that was not accepted by parties. A mediation agreement has the same effect as a judgment award and generally cannot be appealed.

Contrary to the U.S. practice of having the sheriff enforce a judgment, Chinese courts are generally responsible for enforcing their own judgments. As a result, courts have encountered significant difficulties in enforcing their awards because of local protectionism and due to the low status of courts in the political hierarchy. It is estimated that as many as 50% of civil awards are actually unenforced.²² While significant efforts are being made to make the judiciary more professional and independent, there are still many poorly trained judges who are susceptible to undue outside influence in Chinese courts.

The procuratorate system is the prosecutorial counterpart to the courts. It has a structure similar to that of the

courts. The Supreme People's Procuratorate operates at the central government level, while there are provincial, municipal, and basic procuratorates at the local level. Similar to other government agencies, all procuratorates are under the dual leadership of the superior procuratorate, as well as the local people's congress and government at the same level. China's procuratorate system performs the following major functions: (1) initiates prosecution of criminal cases investigated and handled by the public security bureaus (local police); (2) investigates and initiates prosecution of criminal cases investigated and handled directly by the procuratorate, e.g., embezzlement and bribery, dereliction of duties, and violation of citizens' corporal rights and democratic rights committed by government employees; (3) supervises the legality of public security authorities' decision on arrests and their criminal investigation; (4) supervises the trial, rulings, and judgments on criminal cases and the legality of activities of jails, detention centers, and reform-through-labor institutions; and (5) supervises civil and administrative trials of courts. When it comes to protecting the environment, the procuratorate is responsible for prosecuting environmental crimes. Also, in recent years, several local people's procuratorates have been experimenting with bringing civil environmental enforcement cases, despite a lack of clear authorization by existing Chinese law, in maritime court, environmental court, as well as regular court.

21. There have been some reforms in recent years on the adjudication committee, such as creating more specialized adjudication committees within a court, e.g., an adjudication committee hearing criminal cases only, as well as requiring members of the adjudication committee to personally attend the hearing. The effectiveness of these reform measures remains to be seen.

22. RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 287 (Cambridge Univ. Press 2002).