

## Briefing Paper

### A Brief Introduction to the Chinese Judicial System and Court Hierarchy

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# A BRIEF INTRODUCTION TO THE CHINESE JUDICIAL SYSTEM AND COURT HIERARCHY

## ABSTRACT

*This paper provides a concise and practical summary of the structure of the Chinese judicial system and court hierarchy, explains key legal processes under Chinese procedure law, and examines the role and functions of courts. In offering this introduction to the Chinese judicial system, the paper also discusses key concepts in the Chinese judicial system that do not have directly equivalent counterparts in the Australian judicial system, including: collegiate panels (合议庭); judicial committees (审判委员会); people's assessors (人民陪审员); and the people's procuratorates (人民检察院) (public prosecutor). The paper also outlines some of the recent reforms introduced by the Communist Party's Central Committee in their Third and Fourth Plenum decisions on judicial reform adopted in 2013 and 2014 respectively.*

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# A BRIEF INTRODUCTION TO THE CHINESE JUDICIAL SYSTEM AND COURT HIERARCHY

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## STRUCTURE OF CHINA'S 'JUDICIAL SYSTEM' AND THE PLACE OF THE COURTS IN THE CONSTITUTIONAL STRUCTURE

The concept 'judicial system' (司法系统 or 司法体制) in China is broader in scope than courts and judges. In China, the 'judicial system' commonly includes the People's Courts, the People's Procuratorate, public security agencies under the Ministry of Public Security (公安部 the police) and the justice department (under the Ministry of Justice 司法部). Each has powers and functions defined by the Constitution and laws. This paper limits its focus to courts and makes only passing reference to the other Chinese judicial organs.

China's Constitution provides that all power is unified in the National People's Congress (人民代表大会), which supervises the Supreme People's Court, the Supreme People's Procuratorate and the State Council (the executive). This basic structure has a number of consequences. It establishes separation of functions, but not separation of powers. Each agency is required to exercise their own powers and functions and not interfere in the exercise of functions by any other agency, unless authorised. As a consequence, apart from the Supreme People's Court, which has jurisdiction to issue judicial interpretations, courts do not have formal jurisdiction to interpret laws or to declare laws, rules or regulations invalid. This function is exercised by the Standing Committee of the National People's Congress (人民代表大会常务委员会). The courts exercise jurisdiction to determine the lawfulness of administrative conduct only to the extent specifically granted by legislation.

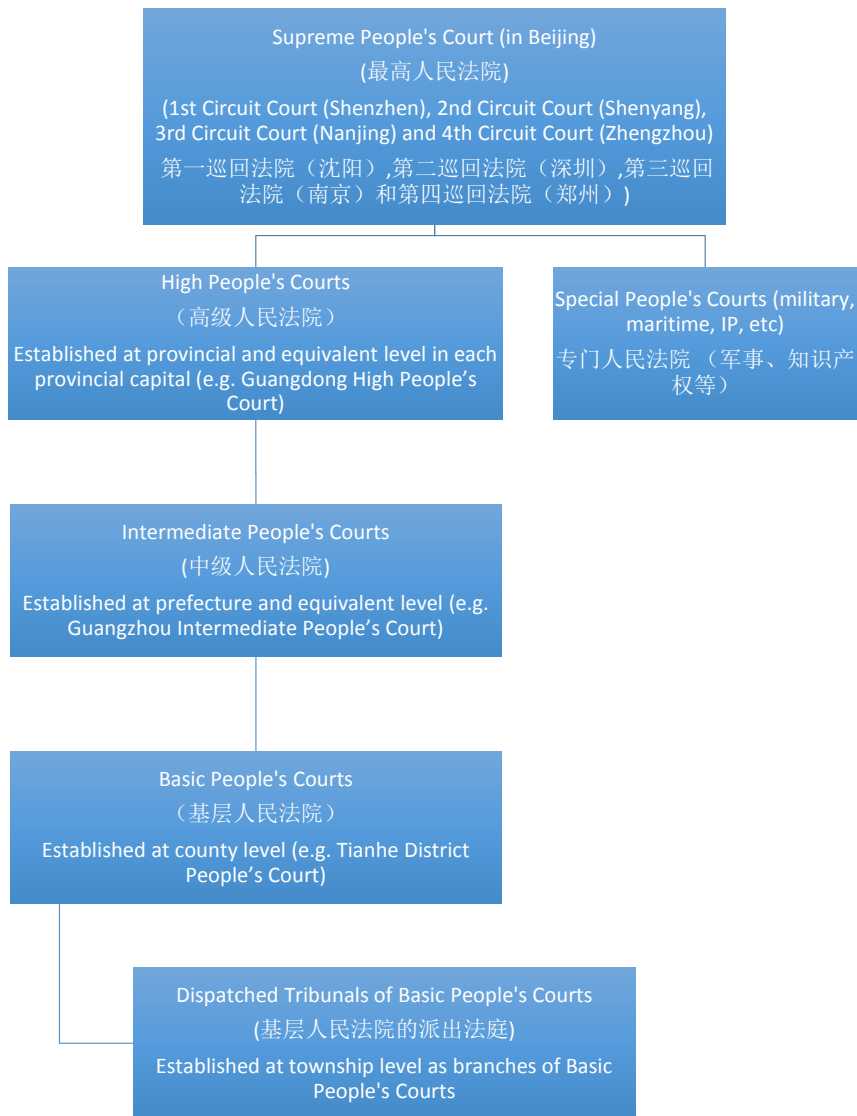
Another important element in understanding the background within which the courts operate is the role of the Communist Party of China. The work of China's judicial agencies is coordinated by the Political-legal Committee of the Communist Party (中央政法委), which operates at all administrative levels. The Political-legal Committee has primary policy oversight of the work of judicial agencies. From early 2014, however, political leadership of judicial reform and the work of the Political-legal Committee has been subordinated to the Central Leading Group for Comprehensively Deepening

Reforms (深化改革领导小组), which is headed by Party Secretary-General Xi Jinping. One of its six specialised sub-groups, the Central Leading Group for Judicial Reform (中央司法体制改革领导小组), is responsible for the work of judicial reform. Many of the most recent reforms to court organisation and the exercise of judicial power stem from decisions of this leading group.

## **ORGANISATION AND STRUCTURE OF THE PEOPLE'S COURTS**

### **Court Hierarchy**

China's Constitution establishes a unitary national court system. So, even though provinces and local areas have a high degree of autonomy, the hierarchy of Chinese courts does not distinguish between state, territory and federal court jurisdictions as in Australia. Details of the hierarchy are provided in the Organic Law of the People's Courts and are outlined below:



## Supreme People's Court

The Supreme People's Court is the highest judicial organ in mainland China<sup>1</sup> and the court of final appeal.<sup>2</sup> The Supreme People's Court has recently established Circuit Courts (巡回法院) in Shenzhen, Shenyang, Nanjing and Zhengzhou to accept and hear relevant cases.<sup>3</sup> The 1st Circuit Court in Shenzhen has jurisdiction over Guangdong Province, Hainan Province and Guangxi Zhuang Autonomous Region. The 2nd Circuit Court in Shenyang covers the provinces of Liaoning, Jilin and Heilongjiang. The 3rd Circuit Court in Nanjing handles major administrative, civil and criminal cases in the provinces of Jiangsu, Zhejiang, Jiangxi and Fujian, and also the Shanghai Municipality. The 4th Circuit Court in Zhengzhou exercises this jurisdiction in the four provinces of Henan, Shanxi, Hubei and Anhui. Judges of the Circuit Courts are selected and appointed by the Supreme People's Court. Judgments, orders or decisions of the Circuit Courts are final and equivalent to those of the Supreme People's Court.

The design of the Chinese courts has been inspired by the civil law tradition in continental Europe, where courts are more inquisitorial than adversarial in nature. The jurisdiction of Chinese courts is divided into three main divisions, namely (1) criminal jurisdiction governed by the 1979 Criminal Procedure Law recently amended in 2013 (刑事诉讼法); (2) civil jurisdiction (including business, economic and intellectual property (IP) matters) governed by the 1991 Civil Procedure Law recently amended in 2013 (民事诉讼法); and (3) administrative jurisdiction (including judicial review and national compensation matters) governed by the 1989 Administrative Litigation Law recently amended in 2014 (行政诉讼法).

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- 1 《中华人民共和国宪法》[Constitution of the People's Republic of China] art 127; 《中华人民共和国法院组织法》[Organic Law of the People's Courts of the People's Republic of China] National People's Congress, 1 July 1979, art 29. The equivalent court in Australia is the High Court of Australia, located in Canberra.
  - 2 Each of Macau and Hong Kong has independent status as a special administrative region under the 'one country, two systems' principle (一国两制) and has its own Court of Final Appeal.
  - 3 See 《最高人民法院关于巡回法庭审理案件若干问题的规定》[Provisions of the Supreme People's Court on Several Issues concerning the Hearing of Cases by Circuit Courts] Supreme People's Court, 5 January 2015, art 1; and Xinhua, 2016.



### *Original Jurisdiction*

For civil cases, the Supreme People's Court has jurisdiction as the court of first instance over the following matters: (1) cases that have a major impact on the whole country; and (2) cases that the Supreme People's Court deems it should hear.<sup>4</sup> For criminal cases, the Supreme People's Court has original jurisdiction over major criminal cases that pertain to the whole nation.<sup>5</sup> Additionally, with respect to administrative cases, the Supreme People's Court has original jurisdiction over grave and complicated administrative cases affecting the whole country.<sup>6</sup> It should be noted that the meaning of 'major impact', 'major' and 'grave and complicated' are not defined under Chinese procedure laws. In practice, it is very rare for cases to be commenced in the Supreme People's Court, especially criminal cases. There is no avenue of appeal from a decision of the Supreme People's Court as the nation's highest court.<sup>7</sup>

### *Appellate Jurisdiction*

The main function of the Supreme People's Court is as a court of appeal from cases commenced in High People's Courts at the provincial level or in special courts.<sup>8</sup> The Supreme People's Court generally does not accept appeal applications from proceedings in Intermediate People's Courts or Basic People's Courts, as the High People's Courts are the judicial bodies designated to hear appeals from these lower courts.

The Supreme People's Court exercises jurisdiction to review all decisions imposing the death penalty. All death penalties, except for those that should be adjudicated by the Supreme People's Court according to law, must be reported to the Supreme People's Court for examination and approval.<sup>9</sup> The death penalty review is conducted by collegiate panels (the meaning of this concept is explained below), each of which

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4 《中华人民共和国民事诉讼法》[Civil Procedure Law of the People Republic of China] National People's Congress, 9 April 1991, art 20.

5 《中华人民共和国刑事诉讼法》[Criminal Procedure Law of the People's Republic of China] National People's Congress, 1 July 1979, art 21.

6 《中华人民共和国行政诉讼法》[Administrative Litigation Law of the People's Republic of China] National People's Congress, 4 April 1989, art 17.

7 Unlike the system in countries such as Vietnam, there is no mechanism for the Supreme People's Court to undertake a cassational review of its own first-instance decisions in which a serious error of law is alleged.

8 《中华人民共和国法院组织法》[Organic Law of the People's Courts of the People's Republic of China] National People's Congress, 1 July 1979, art 31(2).

9 Ibid, art 12; Criminal Procedure Law, art 235.

is composed of three judges.<sup>10</sup> The defendant and his or her defence lawyer have a further opportunity to present their case and arguments to the collegiate panel.<sup>11</sup> The collegiate panel may decide to conduct the review either as a paper-based review or as a court hearing at which witnesses may be called for oral examination and submissions made. The collegiate panel generally conducts a hearing if the defendant appeals the case.

In addition to its adjudication function, the Supreme People's Court also has a quasi-legislative function to enact judicial interpretations (司法解释). Judicial interpretations, which address questions of the meaning and application of laws and regulations by courts, are binding on all courts in China.<sup>12</sup> Laws in China are commonly drafted in broad and general terms, and so judicial interpretations have become an important way to provide guidance on the meaning of specific provisions and the detailed application of laws. The Supreme People's Court has used its power of judicial interpretation liberally, providing interpretations of both specific provisions of laws to be applied by courts in adjudicating cases and comprehensive interpretations of entire laws, such as for example, the Administrative Litigation Law. Whilst some commentators suggest that the latter form of interpretation is beyond the power of the Supreme People's Court, these interpretations continue to be issued and followed. Whilst technically binding only on courts, where the interpretation indirectly impacts on other agencies of state, such as specifying the circumstances where a court will determine an administrative decision to be unlawful, the influence of judicial interpretation extends beyond the courts. However, judicial interpretation is only a secondary source of law, and is (theoretically) invalid if it conflicts with laws enacted by the National People's Congress and its Standing Committee. Judicial interpretation serves a pivotal function for legal practitioners who seek answers to practical questions.

In addition to judicial interpretations, the Supreme People's Court also has a function to issue guiding cases (sometimes referred as 'case guidance') (指导性案例或案例指导) to promote consistency in handling similar cases and 'to unify the criteria for applying law'.<sup>13</sup> To qualify as a guiding case, a judgment must be a legally effective judgment that is clear in the determination of facts, and correct in the application of law.<sup>14</sup> The Office

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10 Criminal Procedure Law, art 238.

11 Ibid, art 240.

12 《最高人民法院发布关于司法解释工作的规定》[Provisions of Supreme People's Court on the Judicial Interpretation Work] Supreme People's Court, 23 March 2007, art 5.

13 《最高人民法院关于案例指导工作的规定实施细则》[Detailed Rules for the Implementation of the Provision of the Supreme People's Court on Case Guidance] Supreme People's Court, 13 March 2015, art 1.

14 Ibid, art 2.

for Case Guidance Work of the Supreme People's Court considers recommendations and selects guiding cases from every level of the court system.<sup>15</sup>

Unlike precedents in common law jurisdictions, which have a binding effect on later disputes, the relevant rules only provide that people's courts at all levels should *refer to* the guiding cases released by the Supreme People's Court when adjudicating similar cases.<sup>16</sup> Two questions arise in this regard: first, what is the meaning of 'refer to' and, second, do courts have any discretion in determining whether to follow the decision in the guiding cases? In elaborating the meaning of 'reference', the relevant rules provide that lower people's courts 'should *quote* the guiding cases *as a reason* for their adjudication, but not cite it as the basis of their adjudication'.<sup>17</sup> In other words, guiding cases should be invoked not as an independent source of law, but instead used as a necessary aid to judicial reasoning. Therefore, it may be argued that guiding cases are intended to exert *de facto* binding authority. However, as the number of guiding cases remains small, their practical influence remains limited. It is not common to find judges referring to guiding cases in their judgments. Guiding cases cannot contradict any written statutes, regulations or even judicial interpretations, and have no legal effect if they do.<sup>18</sup>

### High People's Courts

There are three levels of local courts. High People's Courts (sometimes referred to as 'Higher People's Courts') are the highest level local court at the provincial level (1st administrative level). The 'Provincial level' (省级行政区) corresponds to the hierarchy of Chinese administrative divisions, which includes provinces (省) (for example, Jiangsu Province), the four directly governed municipalities (直辖市) (Shanghai, Beijing, Tianjin and Chongqing), autonomous regions (自治区) (e.g. the Xinjiang Uyghur Autonomous Region) and Special Administrative Regions (特别行政区) (Hong Kong SAR and Macau SAR). In Australia, the courts largely equivalent to the High People's Courts are state and territory supreme courts (though as a unitary system, this level of the Chinese hierarchy does not completely correspond to state and territory Supreme Courts).

A High People's Court has original jurisdiction over civil cases that have a 'major

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15 Ibid, art 4.

16 《最高人民法院印发《关于案例指导工作的规定》的通知》[Notice of the Supreme People's Court on Issuing the Provisions of on Case Guidance] Supreme People's Court, 9 October 2010, art 7.

17 Detailed Rules for the Implementation of the Provision of the Supreme People's Court on Case Guidance, art 10.

18 Ibid, art 12.

impact' on the areas within its jurisdiction.<sup>19</sup> Although the Civil Procedure Law does not define the meaning of 'major impact', the Supreme People's Court has issued a judicial interpretation specifying the monetary value for matters to be considered to have a 'major impact'.<sup>20</sup> The amount varies between provinces (corresponding to the level of economic development of that area). For example, as a general rule, only cases involving a dispute of greater than RMB 500 million (approximately A\$ 100 million) may be commenced in the Shanghai High People's Court as the court of first instance, while the threshold in Xinjiang High People's Court is only RMB 100 million (approximately A\$ 20 million). It should be noted that the aim of the above interpretation is not to limit the general jurisdiction of the High People's Courts under the Civil Procedure Law. Rather, the thresholds merely provide guidance for the courts in considering whether to hear a matter. In fact, the judicial interpretation clearly points out that the High People's Courts *always* have statutory jurisdiction as a court of first instance over major and significant cases, as well as cases that solve technical difficulties in the application of law.<sup>21</sup>

With respect to criminal cases, the High People's Court has original jurisdiction over cases that are significant in the province (or an autonomous region or municipality directly under the Central Government) over which it has jurisdiction.<sup>22</sup> For administrative matters, a High People's Court has original jurisdiction over grave and complicated cases in the areas under its jurisdiction.<sup>23</sup>

As a court of appeal and review, the High People's Court has appellate jurisdiction over all decisions from intermediate courts within its territorial jurisdiction (地域管辖).<sup>24</sup> For example, the City of Guangzhou is the capital city of Guangdong Province, therefore, Guangdong High People's Court has appellate jurisdiction over decisions of the Guangzhou Intermediate People's Court. High People's Courts also have jurisdiction to conduct the final review and approval of a 'death sentence with execution suspended for two years' (死刑缓期两年执行).<sup>25</sup> A death sentence with a two-year suspension of

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19 Civil Procedure Law, art 19.

20 《最高人民法院关于调整高级人民法院和中级人民法院管辖第一审民商事案件标准的通知》[Notice of the Supreme People's Court on Adjusting the Standards Applicable to the Jurisdictions of High People's Courts and Intermediate People's Courts over First-instance Civil and Commercial Cases] Supreme People's Court, 30 April 2015, art 1.

21 Ibid, art 5.

22 Criminal Procedure Law, art 21.

23 Administrative Litigation Law, art 16.

24 The meaning of 'territorial jurisdiction' is defined under Section 2 of the Civil Procedure Law.

25 Criminal Procedure Law, art 237.

execution is a statutory penalty available under Chinese criminal law, under which the convicted person will only be executed if the High People's Court finds that he or she intentionally commits further crimes during their two years in prison. After two years the sentence will be commuted to life imprisonment or, in exceptional cases, fixed-term imprisonment.<sup>26</sup> In reality, it is extremely rare for the convicted person to commit further intentional crimes in the two year period (if only because they are imprisoned during this time).

### Intermediate People's Courts

The Intermediate People's Courts are the second lowest level courts and are established at prefecture level (2nd administrative level). This administrative division includes prefecture-level cities, prefectures, autonomous prefectures and leagues.<sup>27</sup> These courts handle important local cases as the court of first instance and hear appeal cases from the Basic People's Courts (see below).

The Intermediate People's Courts have original jurisdiction over the following civil cases: (1) major cases involving a foreign element; (2) cases that have a major impact on the area at a prefectural level; and (3) cases determined by the Supreme People's Court to be under the jurisdiction of the Intermediate People's Court.<sup>28</sup>

With respect to category (1) above, 'foreign element' ordinarily means a case in which a party is a foreign citizen, a Chinese resident living in a foreign country, a legal entity (for example, company) incorporated under foreign laws, or where the subject matter (such as contracts, trusts) is in, or has a close relationship with, a foreign country.<sup>29</sup> 'Major cases' include cases involving a large amount in dispute, cases with complicated circumstances, cases in which one side comprises a large number of parties, and cases having some other major impact.<sup>30</sup> No judicial interpretation provides further explanation about the meaning of 'a large amount in dispute' or 'complicated circumstances'. Normally, an Australian individual or a corporation would commence proceedings at the Intermediate People's Courts as a first option, subject to any jurisdiction clause

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26 《中华人民共和国刑法》[Criminal Law of the People's Republic of China] National People's Congress, 1 July 1979, arts 48 and 50.

27 A league '盟' in Chinese, is a term commonly used in Inner Mongolia, for example, 锡林郭勒盟.

28 Civil Procedure Law, art 18.

29 《最高人民法院关于适用《中华人民共和国民事诉讼法》的解释》[Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China] Supreme People's Court, 4 February 2015, art 522.

30 Ibid, art 1.

that may exist in the disputed contract or the default rules of territorial jurisdiction under Section 2, Chapter 2 of the Chinese Civil Procedure Law.

With respect to criminal jurisdiction, the Intermediate People's Courts have original jurisdiction over cases endangering state security, cases involving terrorist activities or cases of crimes punishable by life imprisonment or the death penalty. For administrative matters, the Intermediate People's Courts have original jurisdiction over: (1) cases against departments under the State Council or governments at or above county level; (2) cases handled by Customs; and (3) grave and complicated cases in the prefecture level areas.<sup>31</sup>

Recent reforms have resulted in administrative jurisdictions being consolidated in one court or transferred to the railway transportation courts, which originated as courts for hearing railway-related disputes and were subsequently expanded to include disputes generally. The purpose of this reorganisation has been to strengthen the efficiency and expertise in case management and to minimise the undue influence exercised by local governments or government agencies over the handling of administrative cases. For example, in the City of Guangzhou, most of the administrative cases at both first instance and on appeal have been transferred to the jurisdiction of the railway transportation courts, away from the Intermediate People's Court, which would normally have jurisdiction over these administrative disputes (Guangzhou Daily, 2015). Additional judges specialising in administrative law have been allocated to the railway transportation courts to strengthen its capacity.

In Shanghai, the new No 3 Intermediate People's Court was established in 2014 to specialise in handling administrative, IP and other cases specified by law (Xinhuanet, 2014). The new No 3 Intermediate People's Court has jurisdiction over most administrative matters in which the Municipal Government of Shanghai or other municipal-level authorities are the defendants (Xinhuanet, 2014). Similar reforms were also made in Beijing, where the No 4 Beijing Intermediate People's Court specialises in administrative cases where district level governments are sued.

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31 Administrative Litigation Law, art 15.

## Basic People's Courts and its Dispatched Tribunals

The Basic People's Courts (sometimes referred to as Primary People's Courts) are the lowest level courts in the court hierarchy and are established at county or district level (3rd administrative level). These courts have general original jurisdiction, unless otherwise provided by specific laws or regulations.<sup>32</sup> So, an Australian party can choose to resolve a dispute in the Basic People's Court. In practice, the Basic People's Court would either accept an Australian person's application, or remit the case to an Intermediate People's Court if it considered the case to be 'a major case'.

'County or district level' includes counties, county-level cities, districts under prefecture-level cities, forestry districts and autonomous counties. It should be noted that, in practice, it is extremely difficult to distinguish prefecture-level cities (地级市) and county-level cities (县级市) merely based on the name, geographical location or level of economic development of the city. For example, in Jiangsu Province, the City of Xuzhou is a prefecture-level city, while the City of Kunshan is a county-level city under the administration of the City of Suzhou – a prefecture-level city.

The Basic People's Court can establish dispatched tribunals (派出法庭) as branch offices in regional or remote areas, usually at township level (4th administrative level), to exercise its judicial powers and functions. The dispatched tribunals are not separate bodies and are not equivalent to tribunals such as the Victorian Civil and Administrative Tribunal (VCAT) in Victoria. Rather, all orders or judgments made by the dispatched tribunal are authorised by both the tribunal and the corresponding Basic People's Court,<sup>33</sup> and so the orders or judgments of the tribunals should properly be considered as judgments of the Basic People's Court, and appealed to the Intermediate People's Courts.

The Basic People's Courts and their dispatched tribunals are tasked with solving minor civil and administrative cases in a quick and affordable manner. They commonly adjudicate using simplified procedures (also translated as summary procedures) (简易程序), a statutory procedure defined in both the civil and criminal procedural laws.<sup>34</sup> Unlike a collegiate panel that includes at least two professional judges and one people's assessor (人民陪审员), only one professional judge is assigned to each

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32 Administrative Litigation Law, art 14; Criminal Procedure Law, art 19; Civil Procedure Law, art 17.

33 《最高人民法院关于适用《中华人民共和国民事诉讼法》的解释》[Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China] Supreme People's Court, 4 February 2015, arts 262 and 522.

34 Civil Procedure Law, ch 13.

case, which is tried using the simplified procedure.<sup>35</sup> The procedural requirements for litigation and advocacy are reduced – a plaintiff can lodge his or her case simply by oral statement.<sup>36</sup> No written statement of claim is required under the simplified civil procedure. Participation by lawyers is not necessary in the simplified procedure. Furthermore, to encourage self-representation, court or tribunal members can give any necessary explanations of relevant issues in proceedings, such as the burden of proof and parties' procedural rights and obligations, where the parties do not retain a professional lawyer to represent them.<sup>37</sup> The use of simplified procedure is not confined to dispatched tribunals and recently has become more commonly used in first instance trials in other levels of court. However, it is particularly common in dispatched tribunals.

### Special Courts

Apart from local courts of general jurisdiction mentioned above, a number of special courts (特别法院) also play a key role in the Chinese judicial system. The Standing Committee of the National People's Congress has the power to list the functions and powers of special courts and set up new special courts.

Special courts include the military courts (军事法院), the maritime courts (海事法院), the railway transportation courts (铁路运输法院), the forestry courts (林业法院) and the newly established intellectual property courts (知识产权法院). The military court, established within the People's Liberation Army, is responsible for hearing criminal cases involving servicemen and servicewomen. This is a relatively closed system without external supervision.

Maritime courts have been established by the Supreme People's Court in various locations, including the port cities of Guangzhou, Shanghai, Qingdao, Tianjin, Dalian and Haikou. These courts have original jurisdiction over maritime tort disputes,<sup>38</sup> maritime contract disputes,<sup>39</sup> sea environmental protection cases,<sup>40</sup> and maritime administrative

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35 Ibid, art 160.

36 Ibid, art 158.

37 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law, art 268, 522.

38 《最高人民法院关于海事法院受理案件范围的规定》 [Provisions of the Supreme People's Court on the Scope of Cases to Be Accepted by Maritime Courts] Supreme People's Court, 28 December 2015, arts 1-10.

39 Ibid, arts 11-52.

40 Ibid, arts 53-67.



and special procedure cases,<sup>41</sup> including any disputes in this category arising between Chinese and foreign citizens, organisations and enterprises. The procedures of the maritime courts are governed by the Civil Procedure Law. Where there is no provision in the Civil Procedure Law, the Special Maritime Procedure Law applies.<sup>42</sup> However, maritime courts have no jurisdiction over criminal cases and other civil or administrative cases without a 'maritime element'. In the event of a jurisdictional dispute regarding the existence of a 'maritime element', the ordinary court at one level higher than the maritime court and the ordinary court seeking to exercise jurisdiction will determine jurisdiction.<sup>43</sup> The High People's Court in the locality where a particular maritime court is located has appellate jurisdiction over judgments and orders of the maritime court.

As mentioned above, in recent years there has been a major re-organisation of the functions and jurisdiction of the railway transportation people's courts, which were originally a special court. As the number of railway-related cases was very small, some railway courts have been allocated jurisdiction over administrative and other specialised matters. In some cities or municipalities such as Guangzhou, Shanghai, Zhengzhou and Beijing, the railway transportation court is not considered a special court anymore and has been merged into the ordinary court system as a division or branch of the corresponding intermediate people's courts or high people's courts, even while retaining its own name.

In 2014, the Standing Committee of the National People's Congress established three Intellectual Property special courts in Beijing, Shanghai and Guangzhou.<sup>44</sup> Details of these courts' IP jurisdiction are set out in the Decision of Supreme People's Court on Jurisdiction of the IP Courts in Beijing, Shanghai and Guangzhou, which provides for the original jurisdiction, exclusive jurisdiction and appellate jurisdiction over civil and administrative IP cases. The newly established IP courts are not intended to encroach on the general civil jurisdiction of the Basic People's Courts, Intermediate People's Courts or High People's Courts. Rather, the IP special courts exist as a parallel court system, giving parties to IP disputes the option of choosing the most favourable venue

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41 Ibid, arts 79-108.

42 《最高人民法院关于适用《中华人民共和国民事诉讼法》若干问题的解释》[Interpretation on the Supreme People's Court on the Application of the Special Maritime Procedure Law of the People's Republic of China] Supreme People's Court, 1 February 2003, art 2.

43 《中华人民共和国民事诉讼法》[Special Maritime Procedure Law of the People's Republic of China] National People's Congress, 25 December 1999, art 10.

44 《全国人民代表大会常务委员会关于在北京，上海，广州设立知识产权法院的决定》[Decision of the Standing Committees of the National People's Congress on Establishing Intellectual Property Courts in Beijing, Shanghai and Guangzhou] Standing Committees of the National People's Congress, 31 August 2014.

to resolve their dispute.

### **Hong Kong and Macau Special Administrative Regions (SAR)**

Under the 'one country, two systems' principle, the mainland people's court system does not exist in either of the Hong Kong or Macau SARs. Rather, the pre-existing court systems are preserved in Hong Kong and in Macau.

After 1 July 1997, Hong Kong retained its highly autonomous power and maintained its own legal system under the Basic Law (基本法), the constitutional document that enabled Hong Kong to keep its common law tradition. The Court of Final Appeal is the highest court in Hong Kong. The court hierarchy includes the High Court, consisting of the Court of Appeal and the Court of First Instance, the District Court and the Magistrates' Courts.

The power of final interpretation over Hong Kong laws is vested in the Court of Final Appeal, including the power to strike down local ordinances on the ground of inconsistency with the Basic Law. However, the power of statutory interpretation of the Basic Law by the Court of Final Appeal cannot be inconsistent with the 'final interpretation' provided by the Standing Committee of the National People's Congress of PRC in Beijing, by virtue of art 158 of the Basic Law. Article 158(3) provides that if the court is required to interpret a provision of the Basic Law that concerns affairs that are the responsibility of the Central People's Government or the relationship between the Central Authorities and the Hong Kong SAR, it must seek an interpretation of the relevant provision from the Standing Committee, and must follow that interpretation.

The Macau court hierarchy includes the Court of Final Appeal, Intermediate Courts, Courts of the First Instance and Administrative Courts. As with Hong Kong, the final interpretative power of the Macau Basic Law is vested in the Standing Committee of the National People's Congress of PRC.

### **Personnel Hierarchy within a Court**

A People's Court is composed of a president (院长), vice-presidents (副院长), chief judges of divisions (庭长), deputy chief judges of divisions (副庭长), and judges (审判员).<sup>45</sup> With respect to the judges in the Supreme People's Court, the President is commonly referred to as the Chief Justice (首席大法官) and other judges are referred to as Justices (大法官). The President of the High People's Court is commonly referred to as Justice or Senior Judge (高级法官). The hierarchy of court personnel is represented in a diagram below.

A court may set up criminal divisions, civil divisions, or economic divisions which handle general criminal, civil and commercial matters, and other divisions as are deemed

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45 Organic Law of the People's Courts, arts 18, 23, 26 and 30.

necessary.<sup>46</sup> In practice, other divisions commonly established in courts include a case-filing division (立案庭), judicial supervision divisions (审判监督庭), intellectual property divisions (知识产权庭), juvenile divisions (未成年审判庭) in criminal matters regarding juveniles who are under 16 years old, family law divisions (家庭法庭), enforcement divisions (执行庭), and environmental protection divisions (环保庭).<sup>47</sup> Divisions vary from court to court.

Judicial supervision divisions are mainly responsible for the retrial processes (再审程序) (or commonly referred as 'trial supervision' (审判监督程序)) in the Civil Procedure Law<sup>48</sup> and the Criminal Procedure Law.<sup>49</sup>

Traditionally, family law cases have been heard within the civil divisions of the Basic People's Courts, but there has been dissatisfaction with the approach to handling these cases. In 2016, the Supreme People's Court announced a family court pilot project to establish a family division in the Basic People Courts.<sup>50</sup> This reform has been piloted on a small scale in Shenzhen and Zhuhai of Guangdong Province. The jurisdiction of family law divisions includes matrimonial cases such as divorce or revocation of marriage, custody, child support, adoptive relationship disputes and inheritance disputes.

Environmental divisions have commonly been set up since 2007 at all levels of people's courts from Basic People's Courts to the Supreme People's Court. Over 100 environmental divisions have been established at every level of the court hierarchy.<sup>51</sup>

By law, the Presidents of the people's courts are elected and removed by the local people's congresses. In practice, however, this occurs on the recommendation of the local Party Organisation department. Vice-presidents, chief judges of divisions, associate chief judges of divisions, and judges are appointed by the standing committees of the

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46 Ibid.

47 《最高人民法院关于全面加强环境资源审判工作为推进生态文明建设提供有力司法保障的意见》[Opinion of the Supreme People's Court on Fully Strengthening Environmental Resources Trial Work to Provide Powerful Judicial Safeguards for Promoting Eco-civilisation Construction] Supreme People's Court, 23 June 2014.

48 Civil Procedure Law, Ch 16.

49 Criminal Procedure Law, Ch 5.

50 《最高人民法院关于在部分法院开展家事审判方式和工作机制改革试点工作的通知》[Notice of the Supreme People's Court on Commencing Family Law Adjudication and Working Mechanism Reform in Some Courts] Supreme People's Court, 21 April 2016.

51 Legal System Daily, 2014.

local people's congresses.<sup>52</sup>

A People's Court may, according to its needs, be staffed with assistant judges (助理审判员), who are appointed or removed by the people's courts.<sup>53</sup> The role of assistant judges is to help judges in their work. Sometimes they may provisionally exercise the power of a judge, subject to the approval of the judicial committee in the court.<sup>54</sup> People's courts also have clerks (书记员) to keep records of court proceedings and take charge of general administrative matters related to trials.<sup>55</sup>

From 2015, pilot judicial reforms have been undertaken to improve the professionalism and independence of judges. Reforms include centralising the funding of courts, separating administrative from adjudicative work, introducing a life-time responsibility system, increasing judicial salaries and reducing the number of personnel in courts with the status of judge. A quota of between 33-39% of total personnel may now hold the position of judge, with the balance divided between judicial assistants, auxiliary judicial personnel and clerks or administrative personnel. Under these new reforms only judges are authorised to handle cases and individual judges (not the division chief or other leaders within the court) must authorise their own judgments.

A Court President in China adjudicates substantial cases and is primarily in charge of the general administrative affairs of the court. Furthermore, most courts have three to five vice-presidents, who act as coordinators of the substantive divisions and have administrative duties to perform.<sup>56</sup> In addition, the chief judge of divisions and the deputy chief judges of divisions have administrative tasks as the head of the division. Judges in a PRC People's Court are not merely adjudicators. Rather, the role of Chief Judges or Deputy Chief Judges should be understood as that of a head of an executive department, responsible for both the substantial business of the department, namely adjudication, and also the administrative tasks of the department.

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52 Organic Law of the People's Courts, art 34.

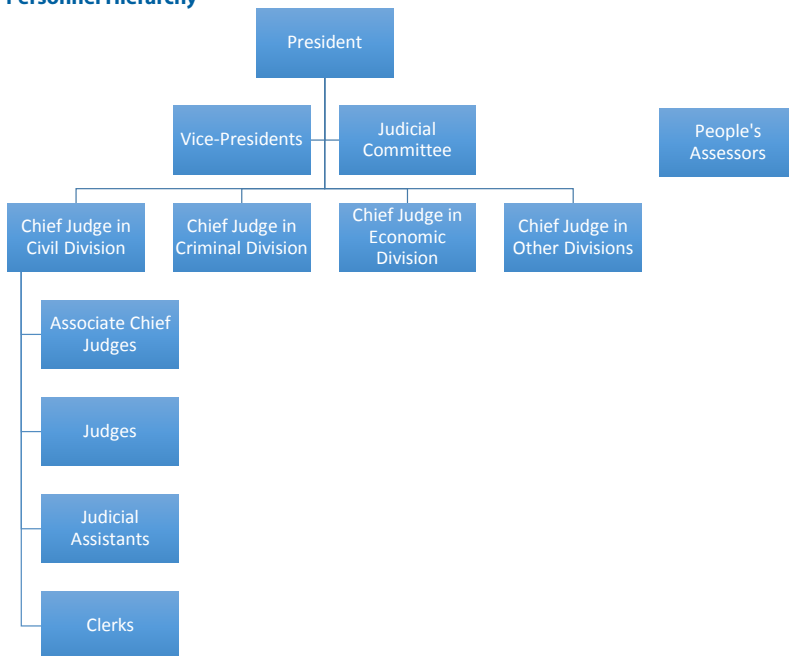
53 Ibid, art 36.

54 Ibid.

55 Ibid, art 39.

56 《中华人民共和国法官法》 [Judges Law of the People's Republic of China] National People's Congress, 30 June 2001, art 6.

## Personnel Hierarchy



## The Collegial System (合议制)

A People's Court commonly adopts the collegiate system in trying cases.<sup>57</sup> The law requires that first instance cases be tried by a collegiate panel (合议庭) of judges (normally three judges) or of judges and people's assessors (人民陪审员) (normally two judges and one people's assessor). The collegiate panel must have an odd number of members. The exception to the collegiate panel is where a matter is tried according to simplified procedure. In simplified civil and administrative cases or minor criminal cases, cases can be tried by a single judge.<sup>58</sup> Appeal cases in courts are heard by a collegiate panel of judges.<sup>59</sup>

The President of the court or the Chief Judge of a division appoints one of the judges

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<sup>57</sup> Organic Law of the People's Courts, art 9(1).

<sup>58</sup> Ibid, art 9(2).

<sup>59</sup> Ibid, art 9(3).

in the collegiate panel to act as the presiding judge (审判长) and to ‘preside over’ the hearing. The liberal meaning of term ‘preside’ (主持) is that the presiding judge can lead the court in procedural aspects, such as deciding time schedules of a hearing. If the President or the Chief Judge participates in the proceedings, then he or she automatically acts as the presiding judge.<sup>60</sup> All judges have equal rights in the trial, deliberation and judgment.<sup>61</sup>

### People’s Assessors (人民陪审员)

China does not have a jury system like Australia and other common law countries. The law provides that lay assessors, called people’s assessors, may form part of the collegiate panel of three to decide cases alongside professional judges. The law grants people’s assessors equal power to the professional judges during a trial in determining both questions of fact and questions of law.<sup>62</sup>

People’s assessors and judges can form a collegiate panel for first-instance cases that have relatively significant social influence or where the parties request the participation of people’s assessors.<sup>63</sup> There is no specific legal or professional requirements to be a people’s assessor. Chinese citizens above 23 years of age with integrity, good conduct and good health can apply for the position.<sup>64</sup> The standing committee of the local people’s congress can appoint people’s assessors based on a recommendation provided by the president of the local court.<sup>65</sup>

There is some difference of opinion about the use of people’s assessors in cases. Some assert that they merely ‘rubber-stamp’ the professional judge’s view because of their lack of legal knowledge and professional expertise. Even more problematic is the assertion that, at times, a people’s assessor will not appear in a court proceeding, but simply signs his or her name at the end of the judgment to confirm agreement with the judgment given by professional judges, whilst at the same time warranting that he or she has duly exercised the power and discharged the duties specified by law (Liu

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60 Ibid, art 9(4).

61 《最高人民法院关于人民法院合议庭工作的若干规定》[Some Provisions of the Supreme People’s Courts Concerning the Work of Collegiate Panels of the People’s Courts] Supreme People’s Court, 5 January 2015, art 4.

62 《全国人民代表大会常务委员会关于完善人民陪审员制度的决定》[Decisions of the Standing Committee of the National People’s Congress on Improvement of the People’s Assessor System] Standing Committee of the National People’s Congress, 28 August 2004, art 1.

63 Ibid, art 2.

64 Ibid, art 5.

65 Ibid, art 8.

Qinghui, 2007: 32, 35-37). However, there have been recent suggestions that they may play a more active role influencing the outcome of cases than was previously thought.

### **Judicial Committees (审判委员会)**

People's courts at various levels establish judicial committees (sometimes translated as 'adjudication committees').<sup>66</sup> These committees, consisting of senior judges and heads of divisions, are responsible for summing up adjudication experience, discussing major or difficult cases, and other adjudication-related matters.<sup>67</sup> The judicial committee is considered to be an internal court body, which, in reality, is the highest authority in the court.

Upon the recommendation of the presidents of the courts, members of the judicial committees are appointed and removed by the standing committees of the people's congress at the corresponding level.<sup>68</sup> For example, members of the judicial committee of the Shanghai High People's Court, which is a provincial-level court, are appointed by the corresponding provincial standing committee of the people's congress (人民代表大会常务委员会) – the Standing Committee of the Shanghai Municipal People's Congress. The president of the people's courts presides over meetings of judicial committees of the people's courts and the chief procurators of the people's procuratorates at the corresponding levels may attend these meetings without voting rights.<sup>69</sup>

If the President of a people's court finds errors in a judgment concerning facts or the application of law, the President must submit the judgment to the judicial committee for disposition.<sup>70</sup> Individual presiding judges of a case may seek the opinion of the judicial committee led by the President before making decisions and giving judgment on matters that come before them. Judicial committees led by the court president have the power to actively review and approve decisions in complex or sensitive cases before judgment is given. Cases in which adjudication committees are involved include those 'involving serious threats to national security', the death penalty, and 'important' matters involving foreigners or persons from Hong Kong, Macau or Taiwan, as well as cases that have a major social impact. Because such committees operate on the basis of the principle of 'democratic centralism' (民主集中制), the decisions made by the judicial committees are binding on the individual presiding judges who heard the case.

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66 Organic Law of the People's Courts, art 10(1).

67 Ibid.

68 Ibid, art 10(2).

69 Ibid, art 10(3).

70 Ibid, art 13(1).

The concept of judicial committees is extremely controversial in China as it undermines the principle of judicial independence, which requires ‘independent and impartial’ judges to decide cases. For many, judicial independence means that judges decide cases based on the facts and evidence presented at hearing, without being subject to outside influence. However, for the framers of the Chinese judicial system, judicial independence does not mean the independence of individual trial judges, but the independence of the administration of justice by people’s courts as collective institutions. This logic is used to justify the continuing role of the judicial committee as a core function of the court system.

One major concern is that the judicial committee makes a determination based on the case file. The parties cannot make oral or written submissions directly to the judicial committee. The members of the judicial committee are detached from the court proceedings, which means they do not hear any witnesses or presentations of argument by the parties and its deliberations are made in the absence of the parties. This mode of operation reflects the long-standing preference of Chinese courts, especially in the courts of appeal, to conduct paper review of cases without the direct participation of parties and their legal representatives. This tendency has weakened somewhat in recent years.

### Rules of Appeal

After a first instance judgment, as a general rule, an aggrieved party may only appeal once as of right to the next higher court on questions of both fact and law.<sup>71</sup> The rule is referred to as the ‘second instance is the last instance’ (两审终审制). After the second instance, the judgment is referred to as a ‘legally effective judgment’ (有法律效力的判决) and can be enforced by judicial police officers.

For example, a disputed case in Pudong People’s Court (a Basic People’s Court in Shanghai) could be appealed to the Shanghai No 1 Intermediate People’s Court (an Intermediate People’s Court in Shanghai). After the appeal, the aggrieved party cannot appeal to a higher court (in the above example, the Shanghai High People’s Court), unless it satisfies very limited exceptions. The death penalty review by the Supreme People’s Court mentioned above is one such exception.

Other exceptions are the retrial process (再审程序) in the Civil Procedure Law and the petition process (申诉程序) in the Criminal Procedure Law.<sup>72</sup> If the parties believe that there is an error in the legally effective judgment (a second instance judgment or a first instance judgment without appeal), they may apply to the people’s court at the next higher level for a retrial (申请再审) in civil proceeding or they may present a petition

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71 Ibid, art 11(1).

72 Civil Procedure Law, arts 198-213; Criminal Procedure Law, arts 241-247.



to the Procuratorate or the people's court in criminal proceedings.<sup>73</sup> The people's courts shall accept the retrial application or the petition if they meet the statutory requirements, such as finding new evidence, identified errors in the application of law in the judgments, or procedural errors in previous proceedings.<sup>74</sup> However, the execution of the judgments must not be suspended during the retrial application or the petition.<sup>75</sup> The Administrative Litigation Law also provides a similar procedure in administrative cases for parties seeking a retrial.<sup>76</sup>

Unlike the court system in Australia, in Chinese people's courts, both factual issues and legal issues can be appealed by applicants. The superior court may, at its discretion, consider the appeal as a new trial and collect evidence and call witnesses on its own motion, or only review the legal issues without calling witnesses and parties.<sup>77</sup>

### **Retrial Order by the Supreme People's Court or Superior Courts**

Apart from appeals by the aggrieved parties, a court at a higher level also can, on its own motion, commence a retrial process for judgments made by its corresponding lower court.<sup>78</sup> If the Supreme People's Court finds an error in a legally effective judgment or order of the people's court at any level, or if the people's court at a higher level finds an error in a legally effective judgment or order of the people's court at a lower level, it has the authority to review the case itself or to direct the lower-level people's court to conduct a retrial.<sup>79</sup> For example, the Shanghai High People's Court has the power to order a retrial for cases determined by the Shanghai No 1 Intermediate People's Court, if the High People's Court finds that the application of law was wrong or there was a factual error in the previous trial.

### **The People's Procuratorates (人民检察院)**

The Procuratorates are in charge of initiating public prosecutions on behalf of the state.

The PRC Constitution also defines the role of the People's Procuratorates as the state organ for legal supervision (法律监督) and as a judicial body. This means that

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73 Civil Procedure Law, art 199; Criminal Procedure Law, art 241.

74 Civil Procedure Law, art 200; Criminal Procedure Law, art 242.

75 Civil Procedure Law, art 199.

76 Ibid, arts 90-91.

77 Civil Procedure Law, art 169.

78 Organic Law of the People's Courts, art 13.

79 Ibid, art 13(2).

the procuratorate is a body with broader powers than simple prosecution.<sup>80</sup> The procuratorate has broad supervisory power over the conduct of trials, prisons and detention centres. Its role and organisation reflect Soviet influence.<sup>81</sup> However, its status and powers, particularly the power of general supervision, are much less than those of its Soviet (and now Russian) counterpart. The officers of procuratorates are called ‘public procurators’ (检察官或者公诉人).

In China it is common to refer to the police, courts and procurators together with a single word: the *gongjianfa* (公检法), which literally means ‘police-procuratorate-court’. This term reflects the reality that these agencies of state — referred to as the judicial organs of state — act in a coordinated fashion to implement state and party justice policies. In the area of criminal justice, in particular, this role is in addition to, and in conflict with, their responsibility to ‘mutually check’ the power of the other agencies.

There are three main functions of the People’s Procuratorates. First, People’s Procuratorates have power to initiate public prosecutions in criminal cases or support prosecutions.<sup>82</sup> This power of public prosecution is similar to the State or Commonwealth DPP in Australia, and public prosecutors in other common law systems. Second, procurators give approval for police arrests and supervise criminal case investigations. In some designated areas such as embezzlement, bribery and dereliction of duty committed by state officials, the procurators have the power to investigate crimes directly without the involvement of police.<sup>83</sup>

Third, and more controversially, the procurator has quasi-judicial powers to lodge a protest (抗诉) against an erroneous court judgment made by the corresponding level court – a power that is not limited to criminal cases, but also extends to civil and administrative cases, even where the parties do not exercise their right of appeal.<sup>84</sup> It should be noted that a protest procedure initiated by the procurator is different from the ordinary appeal process initiated by parties or a retrial order made by superior courts. The protest will only be accepted by superior courts if it complies with the conditions listed in arts 200 and 208 of the Civil Procedure Law or arts 242 and 243 of the Criminal Procedure Law. There is no precondition for an appeal to be accepted by courts. Furthermore, the chief procurators of the people’s procuratorates may, as noted, attend the meetings of judicial committees of the people’s court at the corresponding level

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80 《中华人民共和国宪法》[Constitution of the People’s Republic of China], art 129.

81 Ibid, arts 129-135.

82 《中华人民共和国人民检察院组织法》[Organic Law of the People’s Procuratorates of the People’s Republic of China] National People’s Congress, 1 July 1979, art 5(3).

83 Ibid, art 5(2).

84 Ibid, art 5(4).

without voting rights.<sup>85</sup>

As a result, the Procuratorate is not an ordinary party in a civil or administrative proceeding before a court. Rather, it is a special organ capable of exercising some degree of judicial power. Similarly, the procurator and the defendant in a criminal case are not in an equal adversarial relationship before the court.

Corresponding to the court hierarchy, the People's Procuratorates also have a vertical hierarchy: the Supreme People's Procuratorates (最高人民检察院), provincial level people's procuratorates (省级人民检察院), branches of provincial level people's procuratorates (省级人民检察院分院), county level people's procuratorates (县级人民检察院), and special procuratorates (特别检察院).

### **The Independence of Courts and Judicial Reform**

As mentioned above, people's courts — rather than individual judges — are, at least theoretically, required to exercise independent adjudication in accordance with the law, and are guaranteed freedom from interference by other executive bodies, political organisations and individuals.<sup>86</sup> However, the independence of courts is influenced by the following factors.

First, although there is no direct leadership relationship between superior courts and inferior courts, superior courts can order retrials of the cases judged by inferior courts even where the parties do not appeal to a higher court.

Second, the PRC Constitution states that courts are responsible to the People's Congress and its standing committee at the corresponding levels.<sup>87</sup> The Organic Law of the People's Courts requires courts to report on their work to the local people's congresses and their standing committees.<sup>88</sup> However, there is no further explanation for the meaning of 'responsible' in the Constitution and the extent or scope of the reporting duty. It is not known whether the reporting duty should be performed annually or monthly, or at some other interval, merely based on the literal interpretation of the constitutional provision. In practice, at least, people's courts report their performance annually to people's congresses during the formal conference period, which is open to the public.

Third, courts also experience political interference; mainly by local Communist Party

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85 Organic Law of the People's Courts, art 10(3).

86 Constitution, art 126; Organic Law of the People's Courts, art 4; Judges Law, art 1.

87 Constitution, art 128.

88 Organic Law of the People's Courts, art 16.

agencies, officials and local governments. For example, in bankruptcy law cases, the local governments are often concerned about the potential for social unrest caused if wage arrears are not paid. Therefore, local governments often intervene and courts are reluctant to accept cases for which they have jurisdiction but know they cannot resolve the dispute to the parties' satisfaction.<sup>89</sup> Instead, the courts often defer to the decisions of the local governments. The lack of judicial independence and the low status of both courts and judges have been identified by the Communist Party itself as undermining the successful establishment of China's version of the rule of law. The Decision of the Fourth Plenum of the Central Committee in 2014 emphasised the need for wide-ranging judicial reform to improve judicial fairness and efficiency. These reforms extend to: the court restructuring mentioned in the discussion above; the re-organisation of the personnel of courts and procuratorates to improve professional standard; and changes to law and trial procedures to make the handling of disputes more fair, efficient and 'trial-centred'. Whilst it might appear that trial-centredness involves reforms to strengthen the position of courts vis-a-vis other justice agencies (particularly the procuratorates and police), the actual reforms adopted so far do not clearly do this. It remains to be seen what specific form will be given to reforms under the rubric of 'trial-centred' reform.

## CONCLUSION

The purpose of this briefing paper has been to explain the features of the Chinese judicial structure, and the differences between the court structures in China and other countries such as Australia. No substantive arguments regarding the correctness or efficiency of the Chinese judicial system are analysed in this paper; its purpose is to provide an explanatory overview.

Chinese judicial institutions have some distinctive structures, features and powers and many others that are readily recognisable and comparable. As this paper suggests, the institutional structures that give substantive shape to concepts such as judicial independence (or hinder its realisation) correspond only partially to judicial structures in Australia. It is an interesting time to follow developments within the Chinese judicial system and issues concerning the administration of justice. Much reform is underway. However, the reform that some had hoped for in the late 1980s, involving the dismantling of the Political-legal Committees and direct Party oversight of the work of courts, is now only a very distant hope.

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89 See Biddulph, 2015: 249; and Zhang and Tomasic, 2016: 55-85.

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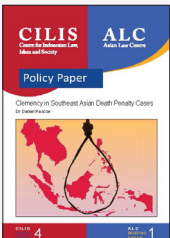
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