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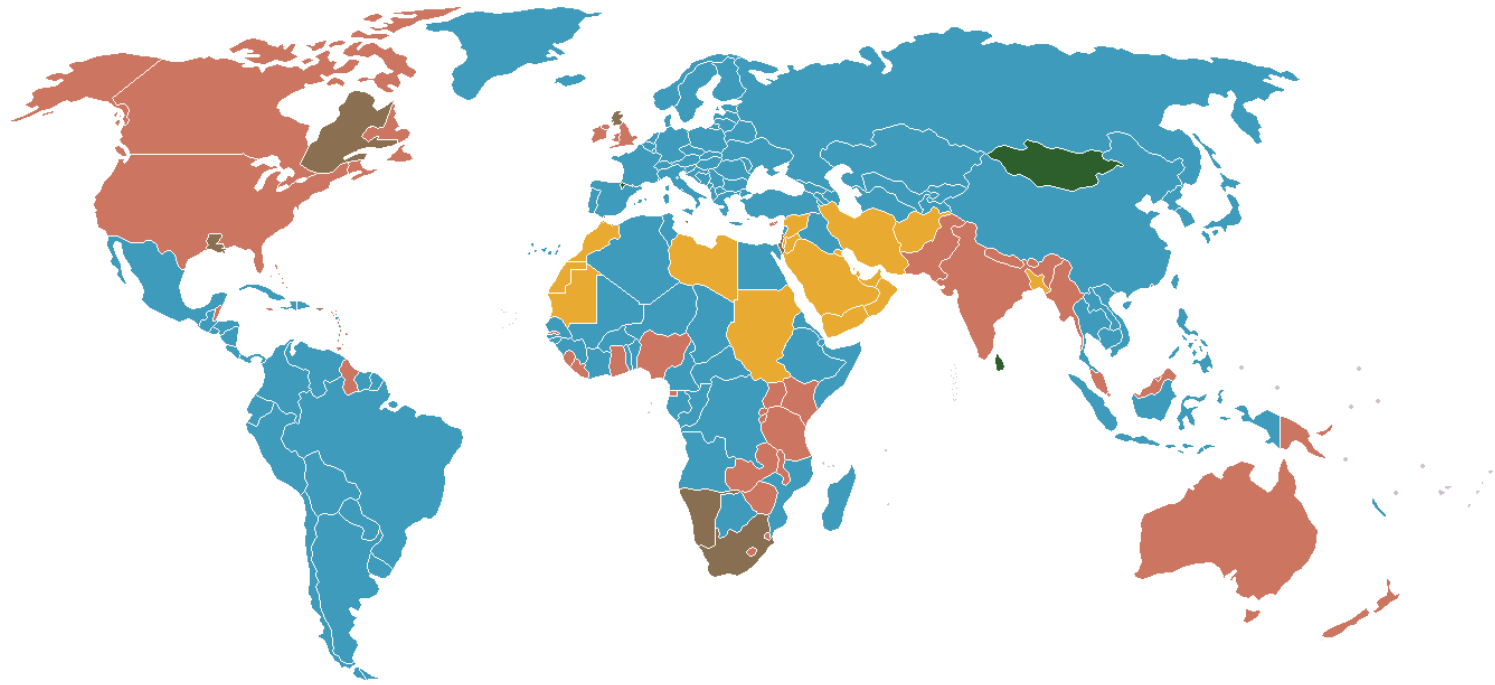
Max Planck Institute for Comparative and International Private Law

## Chinese Business Law






### Chinese Legal System: Sources and Lawmaking in the People's Republic of China



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Legal Systems of the World

-  Civil law
-  Common law
-  Mixed jurisdictions (civil and common law)
-  Customary law
-  Sharia





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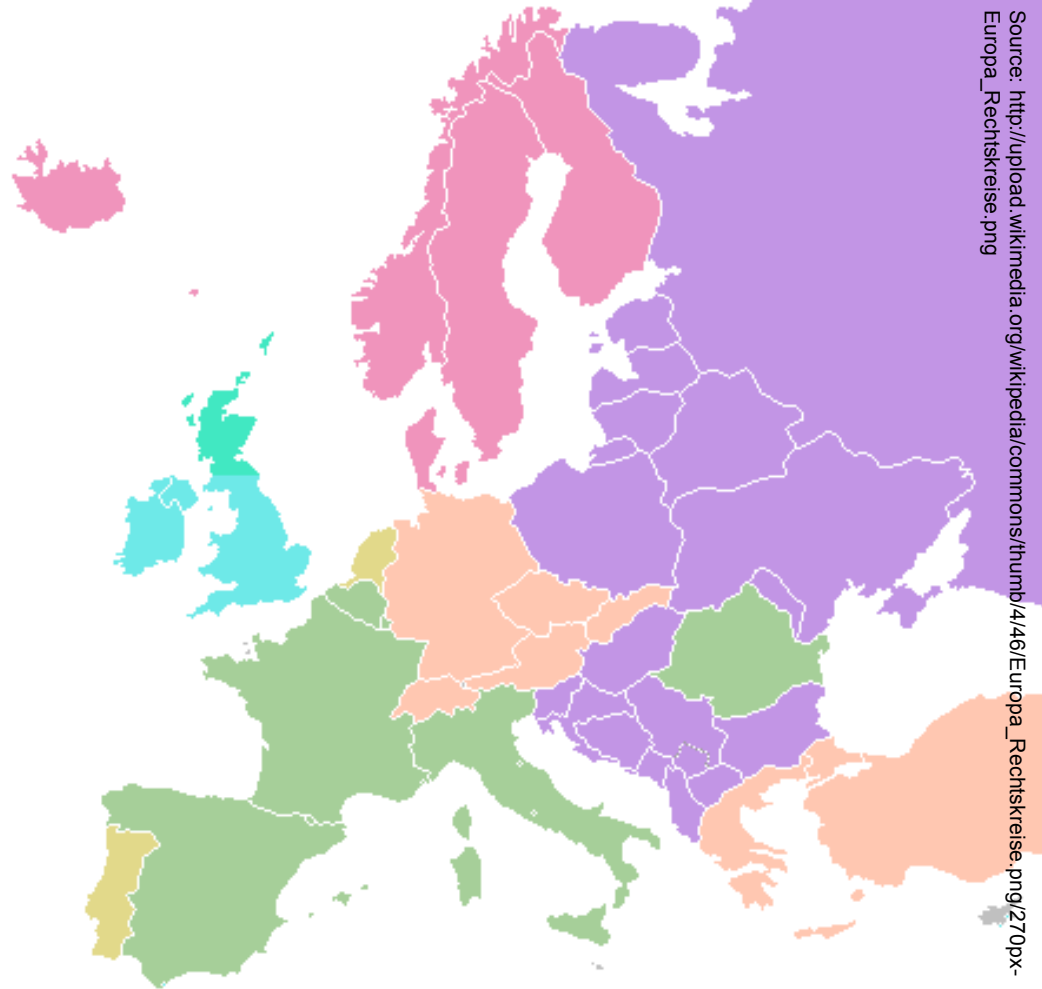


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**Subgroups**

**Legal Systems in Europe**

-  Common law
-  Roman Law
-  Germanic Law
-  Scandinavian Law



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## Law in the PR China: Content

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- I. Law and Culture
- II. Management and Culture
- III. Law and the Open Door Policy
- IV. Law, Politics and the Nature of Chinese Lawmaking
- V. Lawmaking



## I. Law and Culture

Traditional China was not a law-oriented culture.

- Personal relationships and the moral duties, tied to such relationships, were elevated above abstract impersonal laws or rights.

This view of society lies at the heart of Confucianism.

- State-supported philosophy which, for nearly 2000 years, shaped Chinese administration and the moral and social attitudes of the Chinese people to a remarkable extend.



## I. Law and Culture

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Confucius said in the Analects:

“If people be led by law (法- fǎ) and uniformity be sought to be given to them by punishments, they will try to avoid punishments but have no sense of shame.”

“If they be led by virtue and uniformity is sought to be given them by Li (禮- lǐ) they will have a sense of shame and moreover, will become good.”



## I. Law and Culture

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The notion that strong reliance of Fa (法- fǎ) is evidence of a breakdown in the social order and a lack of harmony between the state and society is deeply ingrained in traditional Chinese thinking.

- Western legal procedure tends to depersonalize claims in order to emphasize the question at issue.
- Confucian tradition personalizes all claims, seeing them in the context of social human relationships.



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## II. Management and Culture

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### Experiences in Cross-cultural cooperation

#### The Western way

Believe in processes/ organization

Analytical, focus on facts and results

“Either-or”

Critical, self responsible

Flat hierarchy, superior as “coach”

Open, direct

Active conflict management

Stick to principles: “I will not bend.”

#### The Chinese way

Believe in social relationships

Holistic view, focus on social systems

„Both as well“

Respectful, fit into the group

Strong hierarchy, superior as  
“leader and protector”

Cautious, indirect

Avoidance of conflicts, preservation of  
“harmony”

Flexibility: “I will bend.”



## II. Management and Culture

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### Different leadership principles



#### Targets

Tangible  
Detailed vision/mission  
→ Precise action recommendation

Moving, flexible  
Fuzzy vision/mission  
→ General, visual, fuzzy

#### Strategy

Based on detailed analysis  
Incl. action plan  
→ Precise and focused

Opportunity driven  
Guided by a few Principles  
→ Universally valid

#### Corporate culture

“Craftsman”,  
direct & open communication  
→ Quality focused,  
open for dispute

“Tradesman”,  
informal communication  
→ Price oriented,  
harmony focused

#### Organization

Efficiency driven,  
precisely defined,  
process oriented

Hierarchy driven,  
socially defined,  
network oriented

#### Personnel management

Individual performance,  
competition

Group performance,  
harmony



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## II. Management and Culture



### Potential fields of conflict



Return on investment ⇔ Staff social benefits

Strict cost management ⇔ Staff expectations on fast salary development

Focus on international market ⇔ Focus on domestic market

Performance culture ⇔ Staff “convenience” and “family” thinking

Self responsibility ⇔ Avoidance of individual responsibility

Active conflict management ⇔ “Harmony” at any price

Clear and transparent processes ⇔ “Guanxi” (关系) i.e. personal relationships



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### III. Law and the Open Door Policy

Three decades ago (at the end of 1978), DENG Xiaoping announced a major socialist policy reversal, proclaiming an Open Door Policy and an Economic Reform Program that decentralized economic control and freed domestic economic activities from state management.

→ Foreign investment and advance technology were invited to China.

Purpose: Establishing the economic preconditions for the program of “Four Modernizations” (四个现代化) – of agriculture, industry, national defense and science and technology.



### III. Law and the Open Door Policy

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Explanations to overcome ideological burdens  
(socialist system ↔ capitalist methods):

- “Capitalist” methods are not the monopoly of capitalism and capitalist societies – “it does not matter whether the cat is black or white, so long as it catches mice” (DENG Xiaoping).
  
- “It is no crime to be a millionaire; being a socialist millionaire is one way of making a contribution to socialist development.”



### III. Law and the Open Door Policy

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Foreign investments and joint ventures with foreign firms, capital or individuals are seen as a significant role in the process of modernizing and stimulating production for the market.

They do so through

1. technology transfer,
2. introduction of skills and more effective management procedures,
3. greater knowledge of foreign markets and
4. saving or earning foreign exchange by import replacement and expanded production for export.



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### III. Law and the Open Door Policy

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The 1982 Constitution (宪法- xiànfǎ) enshrines and endorses these new politics:

- According to Article 5 (introduced in 1999) the PR China practices “Ruling the Country by Law” (依法治国) and builds a “socialist country governed according to law” (社会主义法治国家).



### III. Law and the Open Door Policy

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- Article 11 describes the individual and private economy (个体经济、私营经济) of urban and rural working people, operated within the limits prescribed by law, as an important component of the socialist market economy.
- Its lawful rights and interests are protected by the State, though the State also „guides, helps and supervises the individual economy by exercising administrative control” (Article 11 para. 2).



### III. Law and the Open Door Policy

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- Article 18 permits foreign enterprises, other foreign economic organizations and individual foreigners to invest in China and to enter into various forms of economic co-operation with Chinese enterprises and other economic organizations in accordance with the law of the PR China.



### III. Law and the Open Door Policy

Other, more general rights and duties, can also be found in the Constitution (Article 33 to 56).

However, Chinese courts have held, that the Constitution is not a law citable in courts as one calling for direct implementation.

The Constitution is only seen as a guideline and statement of policy put into effect by separate legislations.



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## IV. Law, Politics and the Nature of Chinese Lawmaking

The frank anti-legalism of the years 1958 to 1976 has been abandoned.

Law (especially economic law in the early 1980s) was taken to be a necessary foundation

1. for the working of a pluralist, partly market-based economy and
2. for the government's policy of attracting foreign investment and encouraging joint ventures.



## IV. Law, Politics and the Nature of Chinese Lawmaking

Law was meant to provide a stable framework for economic activities and citizens' lives.

→ In this, the contrast between DENG Xiaoping's China and MAO's China is immense.

Nevertheless, foreign investors should not assume that the Chinese economy and the Chinese legal system operate just like other systems or that laws, rules and procedures are approached in the same spirit.



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## IV. Law, Politics and the Nature of Chinese Lawmaking

Possible explanations:

- China was not a law-oriented culture (Confucianism).
- Chinese language places great weight on vagueness (so does law).
- Law was and remains a part of the superstructure of society (“rule by law” as opposed to “rule of law”).



## IV. Law, Politics and the Nature of Chinese Lawmaking

### **New developments:**

- “Harmonious society” (和谐社会) since 2006
  - Suppression of “Petitioners” (上访) pleading for a legal remedy or a redress of grievances
  - Priority on mediation and rejection of a more professional judiciary (with less political influence)
  
- Campaign against “right lawyers” (维权律师, i.e. legal advocates for victims of injustice) since July 9, 2015 (709 crackdown)
  - Rejection of the reform towards “rule of law” for the sake of social stability?
  
- Social credit system (社会信用体系) since 2017 to be established by 2020
  - Computer based substitute of a flawed judicial system?



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## V. Lawmaking

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1. Lawmaking at the National Level
  - a. National People's Congress and its Standing Committee
  - b. State Council
  - c. State Council Buwei (部委)
  
2. Lawmaking at the Local Level
  - a. Local People's Congresses
  - b. Local People's Governments
  
3. Quasi-legislation
  - a. Published “Quasi-Legislation”
  - b. Unpublished „Legal“ Instruments
  
4. Interpretation



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## V. Lawmaking

**LEGISLATIVE**

**NATIONAL**

National People's Congress (NPC), Art. 62 No. 3 Constitution:  
**Basic Laws (基本法律)**

Standing Committee of the NPC, Art. 67 No. 2 Constitution:  
**Laws (法律)**

**LOCAL**

Local People's Congresses and their Standing Committees,  
Art. 100 Constitution:  
**Local regulations (地方性法规)**

**Furthermore**

People's Congresses of autonomous regions, Art. 116  
Constitution:  
**Autonomy- und specific Provisions (自治条例和单行条例)**

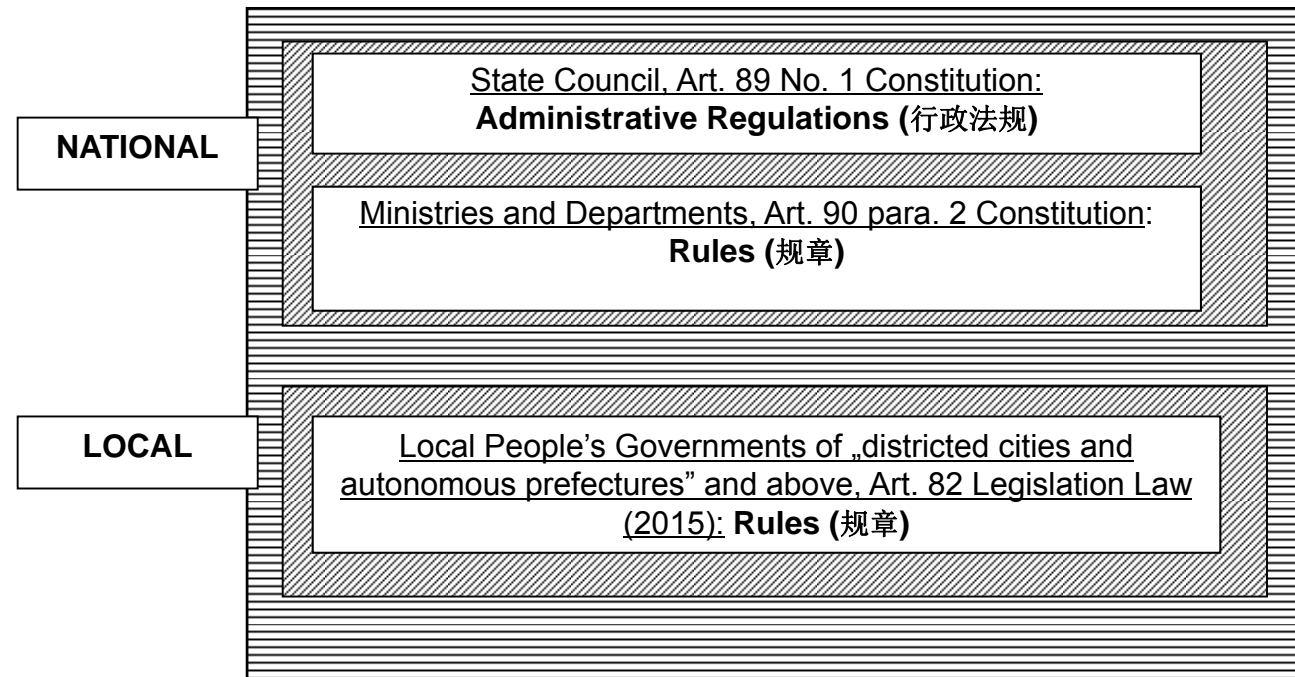
People's Congresses of provinces and municipalities with an  
Special Economic Zone, Art. 74 Legislation Law (2015):  
**Regulations applicable within the Special Economic Zone**  
**(在经济特区范围内实施的法规)**



## V. Lawmaking

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**EXECUTIVE**

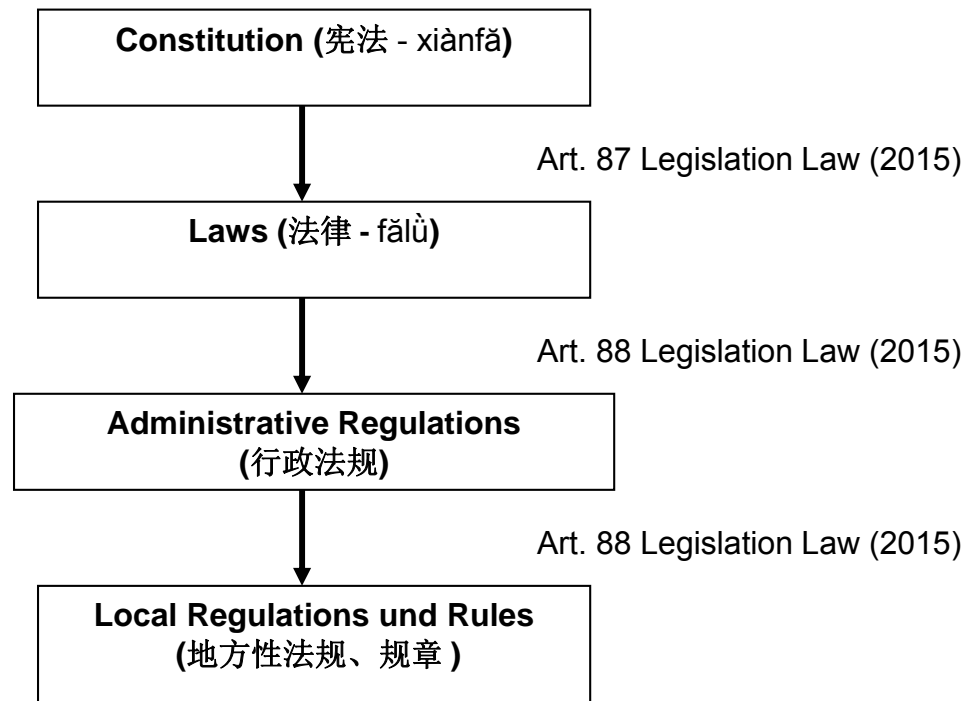




## V. Lawmaking

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### Hierarchy of laws

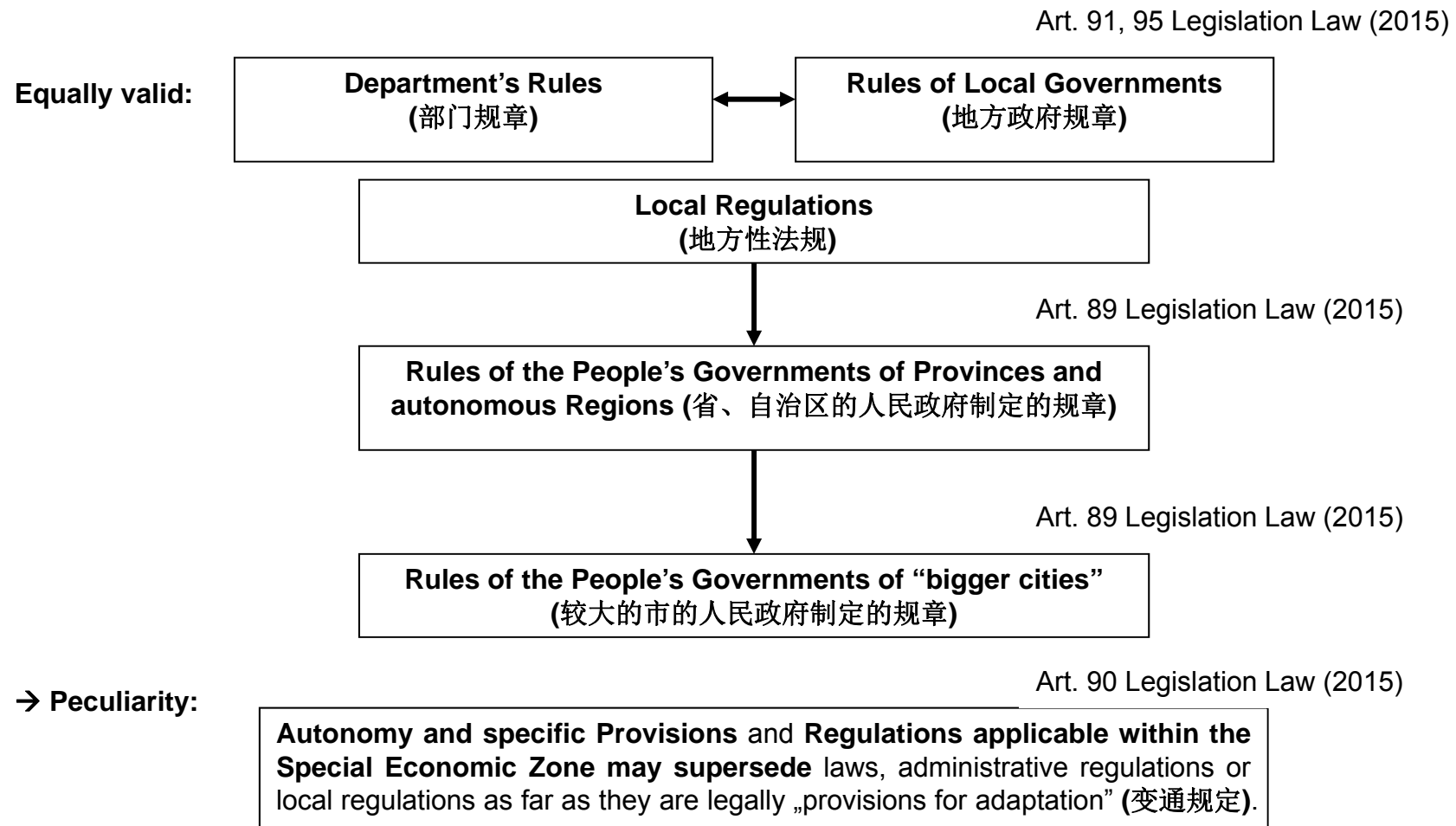




## V. Lawmaking

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### Hierarchy of laws





## V. Lawmaking

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  - a. Published “Quasi-Legislation”
  - b. Unpublished „Legal“ Instruments
  
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## V. Lawmaking: 3. a “Quasi-legislation”

### a. Published “Quasi-Legislation”

“Specification” (具体化 - jùtīhua) is the process by which principle-like laws are narrowed down through a succession of enactments so that they can be applied to local reality.

The formulation of rules by local governments (of provinces, autonomous regions, municipalities directly under the Central Government, districted cities and autonomous prefectures) is only one step in this process.

However, the lowest level of government in a particular locality is where the final level of specification takes place.



## V. Lawmaking: 3. a “Quasi-legislation”

These norms at the lowest level of government are difficult to define in terms of law.

In fact, enactments made by authorities at the county level or below are not qualified as “law” in the Chinese legal system.

They are merely normative documents (规范性文件) that lack legal effect before the relevant tribunal, under either the “Administrative Litigation Law” or the “Administrative Reconsideration Law”, merely possess “administrative binding force”.

These normative documents can also originate from local “Buwei” functional departments (e.g. the provincial administration of industry and commerce, land administration bureau, labor departments, tax bureau and foreign economic relations and trade bureau).



## V. Lawmaking:

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## V. Lawmaking: 3. b “Quasi-legislation”

### **b. Unpublished „Legal“ Instruments**

Some rules formulated by the State Council and local government departments are neither promulgated, issued nor even included in internal document series.

Although fewer in number now than they were in previous years, such documents still exist and can be quite important.

Such “normative documents” are not subject to any enactment procedures and therefore import great flexibility into the legal system.

→ Their essential changeability can engender exactly what legal system was supposed to alleviate: uncertainty.



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## V. Lawmaking:

1. Lawmaking at the National Level
2. Lawmaking at the Local Level
3. Quasi-legislation
4. Interpretation
  - a. Statutory Interpretation
  - b. Administrative Interpretation
  - c. Judicial Interpretation



## V. Lawmaking: 4. Interpretation

Chinese legal theorists distinguish between formal and informal interpretation.

Informal interpretations, which appear in scholarly writings, are not binding and lose their persuasive effect if formal interpretations have been issued on the same point.

Formal interpretations are made by state organs and have binding legal force.

Formal interpretation in turn can be separated into (1) statutory, (2) judicial and (3) administrative interpretation.

**Administrative interpretation** and **statutory interpretation** are accepted sources of law in the PR China.



## V. Lawmaking: 4. Interpretation

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### a. Statutory Interpretation.

According to article 67 No. 4 Constitution the Standing Committee of the NPC has exclusive authority to interpret the laws.

However, as the Constitution has not laid down any procedure for legal interpretation, the standing committee has only rarely exercised its judicial function (on the Criminal Law and on the Basic Law of Hong Kong).

Through a resolution in 1981, the NPC delegated the power of statutory interpretation to the Supreme People's Court and the Supreme People's Procuratorate.

The result has been the unofficial assumption by the Supreme People's Court, through its Gazette, of the role of interpreting national law.



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## V. Lawmaking:

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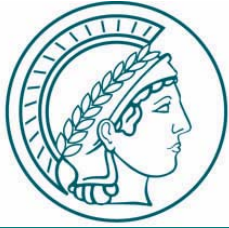
## V. Lawmaking: 4. Interpretation

### **b. Administrative Interpretation**

According to the Resolution of the NPC of 1981, the State Council and its subordinate ministries and departments have the authority to make interpretations in regard to the specific application of administrative rules and regulations not being subjected to judicial and procuratorial work.

Similarly, responsible departments under local people's governments are entitled to make interpretations concerning the specific application of laws and regulations of local character.

Sometimes the department responsible for interpreting an administrative regulation is stated in one of the last paragraphs of the regulation in question (one could then speak of “Specification” as Interpretation).



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## V. Lawmaking:

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  - b. Administrative Interpretation
  - c. Judicial Interpretation



## V. Lawmaking: 4. Interpretation

### c. Judicial Interpretation

The Supreme People's Court („SPC“-最高人民法院) and the Supreme People's Procuratorate („SPP“- 最高人民检察院) are authorized to issue interpretations of law binding on the lower courts and procuracy.

The procedure for judicial interpretation of the “SPC” is determined in the “Various Provisions of the “SPC” Concerning the Work of Judicial Interpretation”, issued in 1997 and revised in 2007.

According to article 5 Provisions the interpretations “have the force of law” (具有法律效力).

From the wording one could assume that, at least as far as the people's courts are concerned, the “SPC” is placing its interpretations above State Council administrative regulations, rules (“guizhang” – 规章) and local regulations.



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## V. Lawmaking: 4. Interpretation

### c. Judicial Interpretation

Since March 2015 legal basis for judicial interpretations in the “Legislation Law” (立法法)

Article 104 The interpretations on specific application of law in trial [...] as developed by the SPC [...] shall primarily involve the specific clauses of laws and conform to the objectives, principles, and original meaning of legislation. [...]



## V. Lawmaking: 4. Interpretation

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These interpretative documents, according to Art. 6 of the Provisions, are issued as interpretations (解释), provisions (规定) or approving answers (批复).

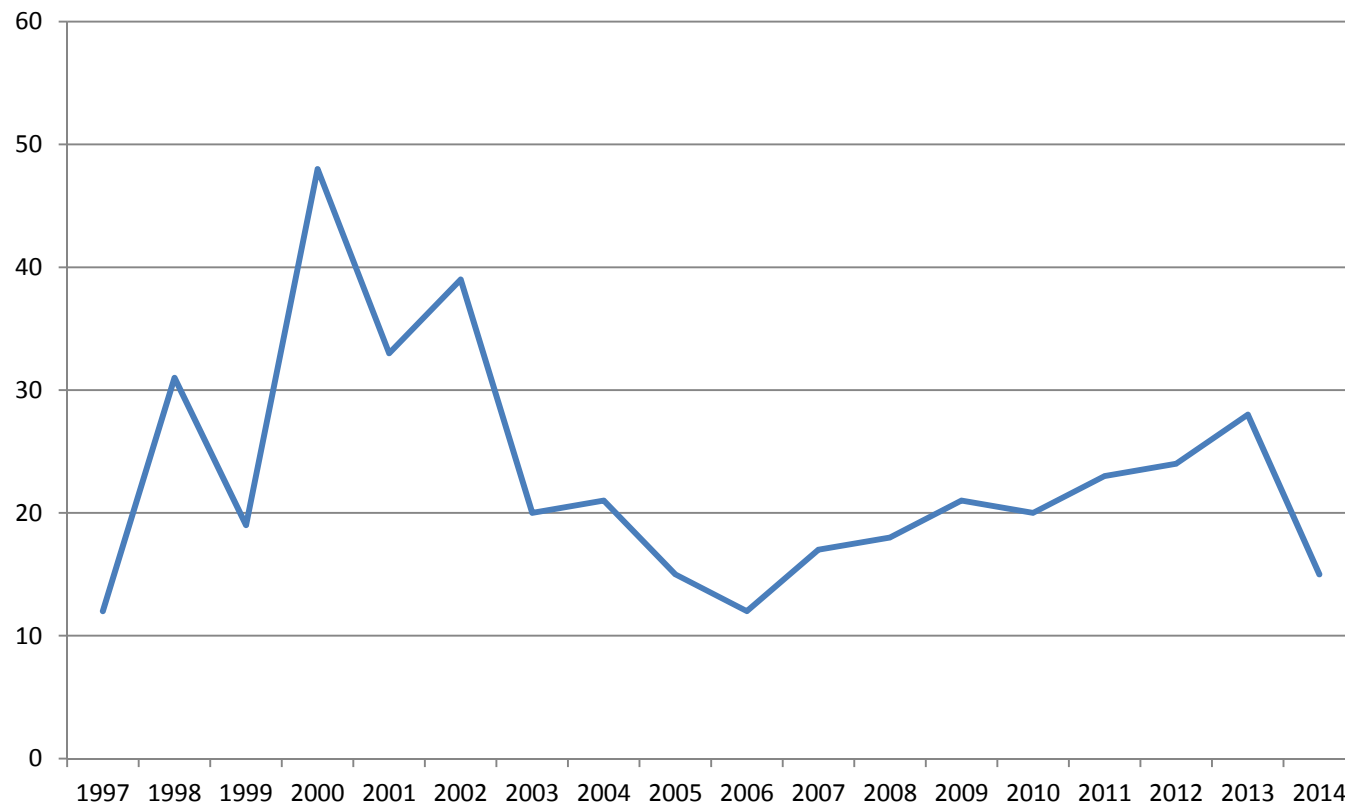
- The “SPC” may use the form of an interpretation to issue provisions concerning the application of laws.
- Provisions are used by the “SPC” to give specifications (规范) or make suggestions (意见) concerning the judicial work “in accordance with the spirit of the legislator” (根据立法精神).
- The approving answers are used in response to a request for a legal opinion submitted by a lower court.



## V. Lawmaking: 4. Interpretation

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### Judicial Interpretations 1997 to 2014 (Total: 416)

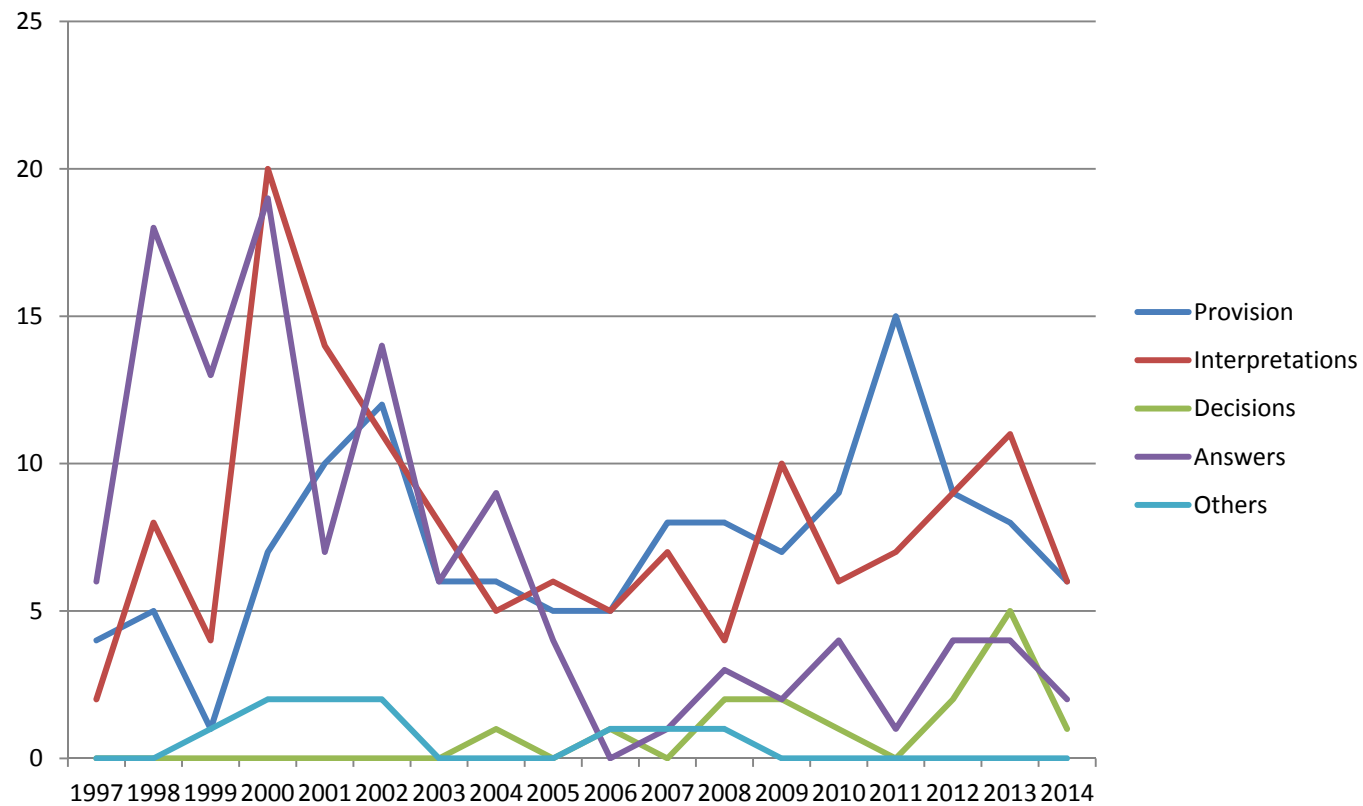




## V. Lawmaking: 4. Interpretation

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### Judicial Interpretation 1997 to 2014: Types

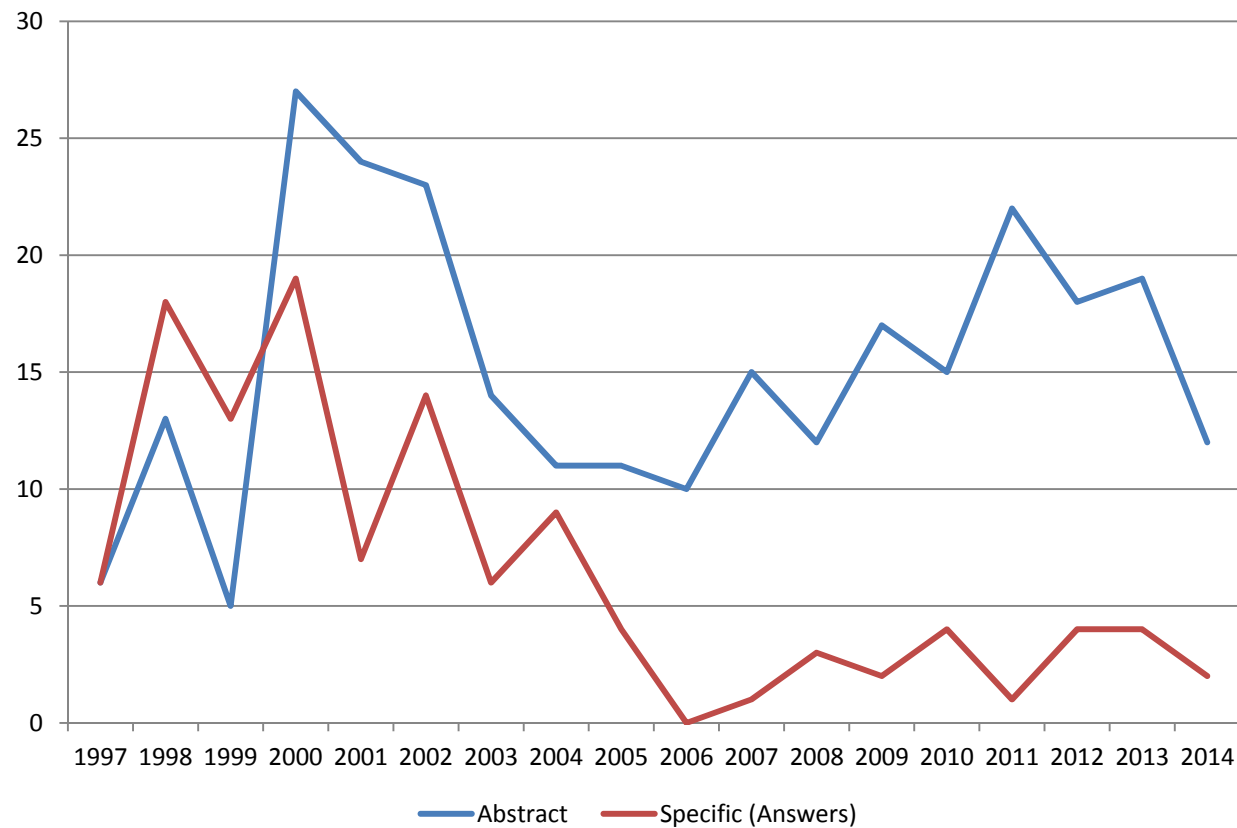




## V. Lawmaking: 4. Interpretation

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### Judicial Interpretation 1997 to 2014: Abstract vs. Specific





## V. Lawmaking: 4. Interpretation

Another interpretation, not mentioned in the Provisions, but widely accepted, is the selection and publication of typical cases that have arisen in the lower courts.

However, decisions made by judges in relation to specific cases are not binding and do not have the power of precedent, although these decisions were adopted by the “SPC” and published in the Gazette, they attain unofficial precedent status.

Judicial interpretation can also be carried out by provincial level courts in relation to the actual application of regulations and rules enacted by the local people's congresses and local people's governments, although it is unclear how such interpretations are issued.

→ Still allowed under the revised (2015) Legislation Law?



## V. Lawmaking: 4. Interpretation

Since 2010/2011: SPC promulgates “guiding cases” (指导性案例) :

- First group of (four) guiding cases were promulgated in December 2011
  - Until mid-2017: 16 “groups” of 87 guiding cases were promulgated
  - Aim: unification of judicial decisions
  - Problem 1: Relationship of guiding cases to other forms of published cases
  - Problem 2: Binding effect of guiding cases (“When trying similar cases, people's courts at all levels shall use the guiding cases issued by the Supreme People's Court as a reference [参照].” Art. 7 Provisions on Case Guidance 2010)
- For more details see Björn Ahl, *Justizreform in China* (2015), pp. 200 et seq. and: China Guiding Case Project of Stanford Law School (<https://cgc.law.stanford.edu/>)



## Map of the People's Republic of China

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