Watching the Watchdog: China's State Compensation Law as a Remedy for Procuratorial Misconduct

Keith Hand
WATCHING THE WATCHDOG: CHINA’S STATE COMPENSATION LAW AS A REMEDY FOR PROCURATORIAL MISCONDUCT

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Abstract: In 1994, China enacted a comprehensive State Compensation Law ("SCL"). The SCL provides individuals and legal entities with the right to compensation in a limited number of situations in which they are harmed by illegal government acts. The purpose of the law is twofold: (1) to guarantee the rights of individuals and legal entities to obtain compensation and (2) to encourage state officials to exercise their powers lawfully. In theory, the SCL provides an important check on the conduct of procurators and other government officials. China’s procurators serve dual roles as criminal prosecutors and as supervisors of the legal process. As supervisors of the legal process, procurators are largely responsible for policing themselves and preventing procuratorial misconduct. There are few external controls on procurators, and the controls that exist are weak and seldom applied in practice. This Comment examines the issue of whether the SCL will provide an adequate citizen-based check on procuratorial power. It argues that while the SCL should be considered a positive step towards promoting greater official accountability and protecting individual rights in China, limitations on the scope of the law, flaws in the procedures for state compensation, the limited liability of individual procurators for compensation expenses, and official resistance to the SCL’s implementation severely limit the utility of the law as a remedy for procuratorial and other official misconduct.

I. INTRODUCTION

Since the mid 1990’s, the National People’s Congress ("NPC") of the People’s Republic of China ("PRC") has made a number of promising changes to the PRC criminal justice system. The NPC approved amendments to the PRC Criminal Law1 and, in an attempt to professionalize China’s corps of judicial and law enforcement personnel and fight official corruption, passed legislation governing the standards and duties of judges, prosecutors, and police.2 The most far-reaching reforms came in March of

† The author would like to thank Professor Jerome A. Cohen, Professor Donald Clarke, and his father, Bruce G. Hand, for their guidance and suggestions on this Comment. The author would also like to thank the Council on Foreign Relations for its support of the initial draft of this Comment.

1 New Criminal Law Enshrines Rule of Law, BEIJING XINHUA DOMESTIC SERVICE, May 14, 1997, translated in BRITISH BROADCASTING CORPORATION ("BBC") SUMMARY OF WORLD BROADCASTS, Mar. 17, 1997, available in LEXIS, Asiapc Library, Allnews File. Among other reforms, the new amendments established the principle that an act may not be considered a crime unless it is explicitly defined as such in the Criminal Law. Id.

1996, when the NPC approved extensive amendments to the PRC Criminal Procedure Law ("CPL"). Included in the many changes to this twenty-year old law were revised provisions that provide defendants with greater access to defense counsel, create a greater separation of prosecutorial and judicial functions, and limit the Chinese practice of "verdict first, trial later" by enhancing the role of trial courts. Although elements of PRC criminal procedure continue to fall short of international standards, these legislative achievements represent positive steps towards promoting the rule of law and the rights of criminal defendants in China.

China's procuratorates, or prosecutorial organs, play a key role in enforcing these new procedural protections and professional standards. As the designated watchdogs of China's legal system, procuratorates are responsible for addressing violations of criminal statutes and pursuing complaints of official misconduct. As prosecutors and in some cases investigators, however, procurators must fulfill a crime-fighting function that is not always consistent with their duty as supervisors of the legal process; in their zeal to catch and convict criminals, procurators themselves sometimes violate the law. This conflict raises a number of questions. Are there legal checks on procuratorial power in China? What remedies are available to Chinese citizens if procurators pursue false charges against them or violate their recently strengthened procedural rights? Who is watching the watchdog?

China's 1994 State Compensation Law ("SCL") provides some answers to these questions. Under the SCL, individuals and legal entities may obtain compensation in a limited number of situations in which they are harmed by the illegal acts of state organs or officials. In theory, the purpose of the SCL is twofold: (1) to guarantee the rights of individuals and legal entities to obtain state compensation and (2) to encourage state organs and

4 LAWYERS COMM. FOR HUMAN RIGHTS, supra note 3, at 61.
5 See infra Part II.
officials to exercise their powers and functions legally. This Comment addresses the issue of whether the SCL and its implementing regulations are adequate to fulfill this dual purpose and to serve as a citizen-based check on procuratorial power. Part II of this Comment introduces the problem of procuratorial misconduct and the need for effective remedies to counter such misconduct. Part III traces the development of state compensation in China. Part IV describes the provisions of the SCL in detail and examines the application of the SCL to procuratorial misconduct. In this discussion, problems with the SCL are identified and revisions to the law and its implementing regulations are suggested. Part V provides an analysis of the first four years of experience under the SCL. Because the activities of China’s procuracy fall under the SCL’s criminal compensation provisions, this Comment focuses on the criminal compensation portion of the law. However, SCL procedures for administrative compensation are addressed at appropriate points in the discussion to provide a comparative framework and a basis for possible revisions to the criminal compensation system.

This Comment argues that while the SCL should be considered a positive step towards promoting greater official accountability and protecting individual rights in China, the law’s practical utility as a remedy for procuratorial misconduct and as a mechanism for encouraging proper procuratorial behavior is limited. The SCL is limited in scope and does not provide a right to compensation for many violations of criminal procedure and other potentially harmful conduct by officials. Claimants face numerous procedural and practical obstacles in applying for compensation, and procuratorates that violate individual rights are held accountable for compensation costs in only a small number of situations. Finally, the first four years of experience under the law indicate that Chinese citizens do not understand their rights under the SCL and that procurators and other officials are resisting implementation of the law. In addition, the standard compensation awards may be too low to make it worthwhile for some citizens to pursue compensation claims. These problems will need to be addressed before the SCL will attain its full potential as a legal check on procuratorial power.

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7 Id. art. 1.
II.

THE PROBLEM OF AN UNCHECKED PROCURATORATE

Although the PRC Constitution refers to procuratorates as the state organs for “legal supervision,” procuratorates exercise both prosecutorial and watchdog functions. In their prosecutorial role, procuratorates review cases investigated by public security officials, decide whether to approve arrests and prosecute criminal suspects, and carry out public prosecutions on behalf of the state. As the watchdogs of China’s bureaucracy and legal system, however, procuratorates are also responsible for investigating cases involving official graft and dereliction of duty; supervising criminal investigations, trials, and the execution of sentences; and investigating citizen complaints against state personnel. These supervisory powers include the right to appeal verdicts if a procuratorate determines that a criminal or civil court has made errors. Article 8 of China’s CPL confirms the role of procuratorates as supervisors of the criminal process.

Despite the watchdog role of the procuratorates, corruption and abuses by procurators are widespread. PRC Procurator General Han Zhubin recently admitted that corruption, favoritism, and torture by procurators are “rampant” in some areas of the country. Lawlessness in the criminal justice system has even prompted Li Peng, the hard-line chairman of the NPC, to propose reforms such as open trials and more active supervision of law enforcers by local people’s congresses. Although China’s chief

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10 Id. arts. 5-6.
12 CPL, supra note 11, art. 8.
14 Daniel Kwan, Li Peng Pushes for Juries and Open Trials, S. CHINA MORNING POST, Sept. 17, 1998, at 7, available in LEXIS, AsiaPac Library, Schina File. According to the PRC Constitution, all cases handled by the people’s courts, except those involving special circumstances, are supposed to be open. PRC Constitution, supra note 8, art. 125. China’s national legislature is called the National People’s Congress. Id. art. 58. There are local people’s congresses at the various administrative levels of the
procurator has attempted to paint the worst cases of abuse as the work of a few black sheep, other sources indicate that problems in the justice system are so widespread that "public respect for law enforcement agencies is at an all-time low." In a crackdown on procuratorial and judicial misconduct in the first eight months of 1998, for example, PRC investigators examined 50,000 cases and discovered that 1454 of them had been mishandled. As part of the shake-up, 756 procurators were disciplined. These figures, along with public promises by procuratorial officials to rectify the problem, indicate that the problem of procuratorial misconduct is a serious one.

In some cases, the policies of the PRC leadership exacerbate the problem of procuratorial misconduct. In response to the waves of crime and official corruption that have swept across China in recent decades, the PRC government has embarked on a series of yanda, or "strike hard" anti-crime campaigns. Yanda campaigns, typically short in term but characterized by large-scale arrests and the application of particularly harsh anti-crime tactics, are perceived by the leadership to be popular with the public. In the frenzy to strike hard at crime and show substantive results, however, procuratorates and other law enforcement agencies have often neglected rules of criminal procedure.

When exercising their prosecutorial powers, procuratorates faces few meaningful external checks. Formally, people's congresses at each level of government supervise procuratorial organs at the corresponding level and

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Chinese state. Id. arts. 95-102. Formally, people's congresses at the various levels of government have the power to supervise procuratorial organs at the corresponding level. See infra note 24 and accompanying text.

15 Kwan, supra note 13.
16 Susan Lawrence, Crooked Cops, FAR E. ECON. REV., Aug. 20, 1998, at 12.
18 Id.
22 Id. at 22. In the wake of the most recent yanda campaign in 1996, international observers and Chinese legal scholars expressed concerns that pressure on law enforcement officials to get results led to quick executions, arbitrary arrests, and a general neglect of legal procedure. Id.
23 See supra note 14.
have the power to appoint and dismiss procurators.\textsuperscript{24} Citizens may lodge complaints with a people's congress by means of a formal petition or by writing a letter of complaint.\textsuperscript{25} In practice, however, the power of people's congresses to supervise procuratorial conduct is limited. Although both the NPC and local people's congresses have been more active in investigating complaints and inspecting procuratorates and other state organs over the past several years,\textsuperscript{26} real power over the dismissal of procurators still rests with local Communist Party ("Party") officials, who must approve decisions to dismiss government officials.\textsuperscript{27} In this political environment, people's congresses have found it difficult to supervise procuratorates and other state organs.\textsuperscript{28} While head procurators, judges, and public security officials usually serve as deputy Party secretaries, the leaders of people's congresses are often excluded from Party committees that oversee procuratorates or are outranked by public security chiefs and procurators.\textsuperscript{29} These higher-ranking officials can hinder efforts by the people's congresses to supervise their organizations.\textsuperscript{30}

There are some indications that people's congresses may begin to take a more active role in policing both procuratorates and courts. In response to the widespread problem of misconduct in law enforcement, China's leaders are working to expand the supervisory powers of people's congresses.\textsuperscript{31} In August 1999, the NPC approved a set of draft regulations that give it and local people's congresses enhanced powers to supervise the work of procurators and judges.\textsuperscript{32} Specifically, the draft regulations give people's congresses jurisdiction over major misjudged cases and illegal activities by judges and law enforcement officials and describe the scope, procedures,

\textsuperscript{24} PRC Constitution, supra note 8, arts. 3, 101, 104, 133; Organic Law of the People's Procuratorates, supra note 9, art. 23; Di Mao, NPC Playing Supervisory Role, CHINA L., Sept. 15, 1995, at 60.

\textsuperscript{25} Written interview with Supreme People's Procuratorate Official (name withheld upon request) (Sept. 1998) (on file with author) [hereinafter SPP Official].

\textsuperscript{26} Di Mao, supra note 24, at 61-62.

\textsuperscript{27} Susan V. Lawrence, Excising the Cancer, FAR E. ECON. REV., Aug. 20, 1998, at 11 (quoting He Zengke, a researcher with a Communist Party Central Committee think-tank that is studying ways to counter official corruption).

\textsuperscript{28} Kevin O'Brien, Chinese People's Congresses and Legislative Embeddedness: Understanding Early Organizational Development, 27 COMP. POL. STUD. 80, 92, 98 (1994).

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} See supra note 14 and accompanying text.

and methods for such supervision. According to Chinese legislators, the draft regulations are intended to provide a foundation for a "supervision law" to be enacted at some future date.

At this early stage, however, it is unclear whether these regulations will provide an effective check on procuratorates. In early comments on the regulations, NPC Chairman Li Peng stressed that people's congresses are to carry out their work under the leadership of Party committees. Thus, procurators and other law enforcement officers on Party committees may still be able to use their influence to interfere with supervision of their organizations by people's congresses. In addition, reports indicate that the people's congresses will exercise their supervisory powers only in "major" cases. According to members of the NPC Standing Committee, the people's congresses should urge judicial organs to re-examine cases in which people have "strong" complaints and should only re-examine cases themselves if people have "very strong complaints" and the case is difficult for judicial organs to deal with. Such language suggests that supervision by the people's congresses may protect individuals in only a few of the most egregious cases of procuratorial misconduct and not in the majority of misconduct cases in which individual rights are abused at the hands of procurators.

China's judiciary has even less power than the people's congresses to supervise the country's procuratorates. In fact, the judiciary is subject to some supervision by procuratorial organs. If a procuratorate determines that a people's court has committed "actual errors in judgments and orders," it can call for a re-adjudication of the case according to procedures for adjudication supervision in the CPL. With regard to the judiciary's power to sanction procurators, the judiciary has limited power to remedy procurator misconduct in the pretrial phase. There are no circumstances under which trial courts may return cases to procuratorates on the basis of pretrial irregularities, and appeals courts may remand cases only for one of

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34. Id.
36. See supra note 28 and accompanying text.
39. *Organic Law of the People's Procuratorates*, supra note 9, art. 5(4); CPL, supra note 11, art. 169.
40. CPL, supra note 11, arts. 203-07; *Organic Law of the People's Procuratorates*, supra note 9, art. 5(4).
an enumerated list of procedural violations in the trial phase. While trial courts may in theory exclude illegally obtained evidence, nothing in the CPL requires the exclusion of such evidence and the prerogative is rarely exercised.

Outside of limited supervision by the people's congresses and the judiciary, China's procuratorates are responsible for policing themselves. Several legal mechanisms exist through which procuratorates carry out internal controls. Under the 1995 Procurators Law, procuratorates may mete out a variety of administrative punishments, from warnings to reductions in pay and dismissals, to procurators who violate the law. A recent circular on procuratorial misjudgments issued by the Supreme People's Procuratorate, China's highest procuratorial body, has further strengthened this framework. The circular establishes guidelines and mandates for the investigation of procurators who misjudge cases or violate procedural rules. The circular is part of a larger effort to crack down on abuses by criminal justice officials. This effort has resulted in the investigation and disciplining of some procurators and judges, but relies heavily on self-policing.

Although recent internal efforts to combat procuratorial abuses are encouraging, self-policing by procuratorates is not an adequate check on misconduct. Studies on administrative review in China indicate that individuals rarely succeed in redressing grievances through such channels. While individuals do have the right to lodge complaints in cases of procuratorial misconduct, procuratorates are the organs that investigate such

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42 Id.
43 HE JIANHONG & JOHN R. WALTZ, CRIMINAL PROSECUTION IN THE PEOPLE'S REPUBLIC OF CHINA AND THE UNITED STATES OF AMERICA: A COMPARATIVE STUDY 268 (1995). The CPL states, "[t]he use of torture to coerce statements and the gathering of evidence by threat, enticement, deceit, or other unlawful methods are strictly prohibited." CPL, supra note 11, art. 43. No provision of the CPL mandates the exclusion of such evidence, however.
44 Procurators Law, supra note 2, arts. 33-36.
45 The Supreme People's Procuratorate is China's highest procuratorial organ and directs the work of procuratorates at lower levels. Organic Law of the People's Procuratorates, supra note 9, arts. 2, 10.
47 Id.
48 See supra note 17 and accompanying text.
49 Shake-up of Procuratorial System, supra note 17. The vice-president of the Supreme People's Court has noted that the new system relies heavily on self-policing. Id.
complaints, and no legal mechanism exists through which citizens can compel a procuratorate to carry out its duty to supervise the criminal process. Other possible mechanisms for exposing abuses and creating pressure for investigations, such as an independent press, do not presently exist in China. Finally, while the people's congresses may begin to play a more active role in the supervision of procuratorial work, their new supervisory powers are untested, and it may be difficult from a practical standpoint for people's congresses to deal with every case of procuratorial misconduct in China.

Given the structure of internal controls, rectification of procuratorial misconduct depends almost entirely upon the will of the procuratorate itself. When procuratorates place a higher priority on fighting crime than on observing rights, as they have in the yanda campaigns, or are unwilling to take action against one of their own officials, most of the mechanisms for addressing procuratorial misconduct are inadequate. This raises the specter of a procuratorate able to exercise its prosecutorial and investigative authority in an arbitrary, uncontrolled fashion without fear of reprisal by other branches of the government. It also highlights the importance of a recent law that provides citizens with an alternative remedy for procuratorial misconduct—the State Compensation Law.

III. THE DEVELOPMENT OF CHINA'S STATE COMPENSATION SYSTEM

The State Compensation Law was adopted by the Standing Committee of the Eighth National People's Congress in May of 1994. The law was intended to guarantee victims of illegal government acts the right to state compensation and to encourage procurators and other officials to carry

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51 LAWYERS COMM. FOR HUMAN RIGHTS, supra note 3, at 73-74. The Supreme People's Procuratorate and provincial-level procuratorates are reported to have established hotlines for direct complaints. China: Procurator General Hears Complaints on Procurator Day, BEIJING XINHUA, reprinted in FBIS-CHI 98-148, May 28, 1998. In July 1998, calls to only one of the three numbers were answered by a person. The other lines were not operational or were answered by a recording. While the establishment of these hotlines should be seen as a positive development, they are useful only to the extent that the procuratorate follows up on the complaints.

52 LAWYERS COMM. FOR HUMAN RIGHTS, supra note 3, at 74.

53 Lawrence, supra note 27. There is some evidence that China's government-controlled press is taking a more active role in exposing abuses by law enforcement officials. Concerned about the wide scale of misconduct and the resentment it engenders in the populace, the central government has recently begun to permit, and in some cases has encouraged, press coverage of misconduct cases. See Elisabeth Rosenthal, Police Abuses Start to Get Attention in China, N.Y. TIMES, Mar. 8, 1999, at A1.

54 See supra notes 32-38 and accompanying text.

55 SCL, supra note 6.
out their duties lawfully.\textsuperscript{56} Although previous legislation in China provided a right to compensation for some improper state acts, the SCL was the first PRC statute to establish a comprehensive and detailed system for state compensation. When the SCL was passed, it was trumpeted as a significant step towards curtailting official abuse and protecting human rights in China.\textsuperscript{57} In the context of the present discussion, the SCL is an important piece of legislation because it establishes a clearly defined right to compensation and a specific process through which individuals can challenge procuratorial misconduct. It also provides a mechanism through which individuals can compel a review of procuratorial acts by a state organ other than the procuratorate.

\textit{A. International Trends in State Compensation}

China's enactment of the SCL corresponds with a general international trend towards the expansion of governmental and official liability. Over the past century, many countries have recognized the need for a legal framework that provides compensation for injuries caused by governmental acts and encourages proper conduct on the part of governmental actors.\textsuperscript{58} Although a detailed discussion of these complex and varied legal frameworks is beyond the scope of this Comment, several general trends in the area of governmental liability should be noted. At various points over the last century, most legal systems limited or abandoned the doctrine of absolute sovereign immunity under which a state was held to be immune from suits in its own courts.\textsuperscript{59} The departure from the sovereign immunity doctrine led to the development of new concepts of

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\item \textsuperscript{56} Id. art. 1.
\item \textsuperscript{58} There are several excellent comparative studies of governmental liability systems. For a discussion of Western governmental liability systems, see \textit{GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY} (John Bell & Anthony W. Bradley eds., 1991). For a discussion of Asian governmental liability systems, see \textit{COMPARATIVE STUDIES ON GOVERNMENTAL LIABILITY IN EAST AND SOUTHEAST ASIA} (Yong Zhang ed., 1999) \textit{[hereinafter GOVERNMENTAL LIABILITY IN ASIA].}
\item \textsuperscript{59} Anthony W. Bradley & John Bell, \textit{Governmental Liability: A Preliminary Assessment}, in \textit{GOVERNMENTAL LIABILITY: A COMPARATIVE STUDY}, \textit{supra} note 58, at 1, 5. Bell and Bradley note that while the doctrine of absolute sovereign immunity has been abandoned in most countries, it still influences the parameters of official liability in some places, particularly common law countries such as the United States and Canada. Id. \textit{See also Yong Zhang, Commentaries—Comparative Studies on the Development of Governmental Liability in East and Southeast Asia, in GOVERNMENTAL LIABILITY IN ASIA, supra note 58, at 201, 201-05.}
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general state liability for injuries caused by official acts. In addition, immunities from lawsuits that some officials have long enjoyed have also been narrowed in many countries. In general, the liability of both the state and individual government officials is expanding.

In enacting a comprehensive national law on state compensation, China followed in the footsteps of other East Asian countries. Since World War II, Japan, South Korea, and Taiwan have all passed state compensation acts. Although the state compensation systems in these three countries differ in many respects, several basic features are common to all of them. First, under each of the compensation statutes, the state must provide compensation when public officials, in the course of performing their official duties, intentionally or negligently commit unlawful acts that cause injury to individuals. None of the statutes specifies or limits the unlawful acts for which compensation may be given. Second, the government has a right to demand reimbursement of compensation expenses from individual officials whose intentional or grossly negligent acts cause damage and result in compensation claims. Finally, all three countries have enacted statutes that deal specifically with compensation for wrongful detentions or arrests.

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60 Toshiro Fuke, Historical Phases of State Liability As Law of Remedies—Some Introductory Remarks, in Government Liability in Asia, supra note 58, at 1, 1-2. There are numerous examples of these developments. In 1947, England passed the Crown Proceedings Act, under which the central government became liable for injuries under the general rules of tort law. John Bell, The Law of England and Wales, in Government Liability: A Comparative Perspective, supra note 58, at 17, 18. In the United States, the Federal Tort Claims Act, passed in 1946, gives federal courts broad jurisdiction to hear tort claims against the United States. Ronald A. Cass, Official Liability in America: Actors and Incentives, in Governmental Liability: A Comparative Perspective, supra note 58, at 110, 118. Since before World War I, the German state has been liable for the wrongful acts of public officials. In 1981, Germany enacted a comprehensive state liability act that was later found to be unconstitutional. Wolfgang Rüfner, Basic Elements of German Law on State Liability, in Governmental Liability: A Comparative Perspective, supra note 58, at 219, 252-53, 272-73. For the development of state compensation laws in East Asia, see infra notes 63-67 and accompanying text.

61 See generally Governmental Liability: A Comparative Study, supra note 58.

62 Id.


64 State Compensation Law of Japan, supra note 63, art. 1; State Redress Act of Korea, supra note 63, art. 2(1); State Compensation Law of Taiwan, supra note 63, art. 2.

65 State Compensation Law of Japan, supra note 63, art. 1(2); State Redress Act of Korea, supra note 63, art. 2(2); State Compensation Law of Taiwan, supra note 63, art. 2.

Despite the passage of such "criminal compensation" statutes, each country's general state compensation act still applies to the acts of judges and prosecutors (although in some cases the general compensation statutes may not apply to judicial officials in the same way that they apply to other officials). Chinese scholars indicate that the drafters of the SCL borrowed provisions from the state compensation laws of other countries. China's SCL thus shares a number of characteristics with these statutes.

B. The Legal Foundations and Development of State Compensation in China

The SCL is not the first or only legal document in the PRC to deal with state compensation. The legal basis for state compensation is found in the PRC Constitution, which guarantees compensation to citizens who have "suffered losses as a result of the infringement of their civic rights by any state organ or functionary." In China, such constitutional rights cannot be directly invoked by citizens or enforced by a people's court without specific


67 The provisions of the State Compensation Law of Taiwan apply to judges and prosecutors when these officials are found to have committed a criminal offense while conducting a trial or prosecution. State Compensation Law of Taiwan, supra note 63, art. 13. The Supreme Court of Japan has held that judicial acts fall within the scope of its state compensation law, but only if "judicial authority has been exercised undoubtedly contrary to the aims of vested authority, such as a judgment being made with an illegal or unlawful purpose." K. Kamino, Governmental Compensations [sic] in Japan, in GOVERNMENT LIABILITY IN ASIA, supra note 58, at 95, 100 (quoting the Japanese Supreme Court's decision of March 2, 1982 (36 Minsyu No. 3 (1982), at 329)). The State Redress Act of Korea also applies to judicial acts, but compensation liability for such acts is more difficult to establish than for other official acts. Won Woo Suh, Governmental Liability in Korea, in GOVERNMENT LIABILITY IN ASIA, supra note 58, at 9, 15.


69 See infra Part IV.A.

70 PRC Constitution, supra note 8, art. 41. China's first constitution, which was adopted in 1954, also contained a compensation provision. Article 97 of the 1954 PRC Constitution provided, "If the rights of the citizen have been violated by civil servants, and the violation has caused damage, the citizen has a right to seek damages." Yong Zhang, Governmental Liability in China, in GOVERNMENTAL LIABILITY IN ASIA, supra note 58, at 49, 51. This provision was ignored in practice. Id. at 52. Provisions for state compensation were deleted from the 1975 and 1978 PRC Constitutions for ideological reasons. The provisions were seen as unnecessary because, in theory, government organs were made up of the people and the wealth of China belonged to the people. Thus, according to Yong Zhang, there was "neither a political nor an ideological conflict of interest between the government and the people." Id. State compensation was reinstated in the 1982 PRC Constitution as part of China's legal reform effort. Id. at 52-53.
laws and regulations to implement them. Prior to the passage of the State Compensation Law in 1994, a number of such laws existed. The 1981 Economic Contract Law and 1987 Customs Law, for example, contained narrow provisions related to state compensation. More significantly, the 1986 General Principles of the Civil Law ("GPCL") provided a general statutory basis for liability on the part of state organs. According to Article 121 of the GPCL, "if a state agency or its work personnel, while executing its duties, violates the lawful rights and interests of a citizen or legal person, thereby causing damage, it shall bear civil responsibility." In practice, however, Article 121 was too brief and general to deal with the variety of complex legal issues related to state compensation, and more detailed legislation was deemed necessary. Because the SCL is a more recent statute dealing with the same subject as Article 121 of the GPCL and is more detailed than Article 121, state compensation claimants may no longer bring claims under the GPCL.

In 1989, the NPC passed the PRC Administrative Litigation Law ("ALL"). The passage of the ALL constituted China's first step towards establishing a comprehensive legal framework for state compensation. The ALL provides detailed procedures through which Chinese citizens, legal entities, and organizations may challenge a range of administrative acts. Among the acts covered by the law are administrative penalties such as detentions, fines, cancellations of permits or licenses, and property

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74 Lin Feng, supra note 71, at 403.
75 LIN FENG, ADMINISTRATIVE LAW PROCEDURES AND REMEDIES 278 (1996). It is unclear whether only those claimants with a right to compensation under the SCL are barred from bringing an Article 121 claim or whether the SCL is now the sole legal basis for bringing a claim for injuries caused by state organs exercising their powers and functions. Prior to the passage of the SCL, Chinese citizens could sue for damages when a state official, while carrying out his or her duties, caused damage intentionally or as a result of negligence. Yong Zhang, supra note 70, at 72. However, the SCL clearly establishes illegality, and excludes liability and fault, as the basis for state liability. Id. The SCL also lists the specific acts for which compensation liability may arise. Thus, in theory, the state is not liable for compensation in other cases. Id. This leaves many victims of illegal official acts not listed in the law, as well as victims of lawful but negligent acts, without a legal remedy.
confiscation; coercive administrative measures such as the restriction of personal freedom or the seizure of property; and infringement by administrative authorities on other personal or property rights. Under the ALL, courts may revoke improper administrative acts, require new administrative action, and modify administrative penalties if they are clearly unjust. Courts may also award compensation for damages resulting from unlawful or improper administrative acts. The compensation provisions in the ALL emphasize the right of individuals, legal entities, and other organizations to seek compensation. The ALL compensation provisions are also more specific than those of Article 121 of the GPCL. However, the ALL does not give a right to compensation for some illegal administrative acts and does not provide a method for calculating the amount of compensation or a mechanism for the payment of compensation.

Following on the heels of the ALL, the State Compensation Law represents the most recent and most significant step in the establishment of a comprehensive system of state compensation in the PRC. Administrative law scholar Lin Feng argues that the drafting of the SCL was initiated to "secure the implementation of the ALL soon after its adoption." There are several reasons for viewing the SCL as a complement to or extension of the ALL. The SCL addresses administrative compensation in more detail than the ALL, drops the ALL's requirement that compensation be provided only for "concrete administrative acts," and expands the range of illegal state acts for which compensation liability may arise. In addition, it is clear that Chinese lawmakers intended the SCL to be applied in conjunction with the ALL because the SCL stipulates that claimants may file their claims for administrative compensation as part of an administrative lawsuit.

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78 ALL, supra note 76, art. 11.
79 Id. art. 54.
80 Id. arts. 67-68. A compensation claim under the ALL must first be brought to the responsible administrative organ, but later may be filed as a suit in a people's court if the claimant is not satisfied with the administrative decision. Id.
82 X. Liu, supra note 71, at 82. For example, the ALL does not apply when the illegal use of police weapons or gear causes injury or death. Lin Feng, supra note 71, at 411.
83 LIN FENG, supra note 75, at 271.
84 The SCL provides specific procedures for administering state compensation as well as guidelines for calculating state compensation amounts. SCL, supra note 6, arts. 9-14, 25-29.
85 Id. arts. 3-4. The term "concrete administrative acts" is not defined in the ALL but has been interpreted to exclude numerous administrative acts from the scope of the ALL. Minxin Pei, supra note 50, at 835. One Chinese administrative law scholar concedes that nobody can precisely define the concept. Interview with Wang Xixin, Professor of Administrative and Constitutional Law at Beijing University, in Seattle, Washington (Mar. 10, 1999) [hereinafter Wang Interview].
86 SCL, supra note 6, art. 9.
Lin Feng’s characterization of the SCL must be qualified in several respects, however. First, as Lin indicates, the scope of the SCL is narrower than the ALL in that it covers only illegal state acts, while the ALL covers both illegal and wrongful administrative acts. Second, and more importantly, the SCL establishes a right to compensation in an entirely new class of cases involving criminal justice organs. The SCL contains different provisions for “administrative” and “criminal” compensation cases. A compensation case is classified as criminal if investigative, procuratorial, judicial, or prison management organs or officials, while exercising their functions and powers, infringe upon the personal or property rights of an individual or a legal entity. The term “criminal compensation” in this sense does not refer to any criminal act on the part of the official (although a criminal compensation case may involve such an act) but instead refers to compensation liability that arises in the course of a criminal investigation and prosecution. Criminal compensation is handled through a separate, nonjudicial procedure. Thus, criminal compensation claims may not be filed as part of an administrative lawsuit. With the exception of public security organs, which both investigate criminal cases (a judicial administration function) and carry out administrative punishments, the state organs subject to the SCL’s criminal compensation provisions cannot be sued under the ALL, and consequently are not subject to the ALL’s provisions on compensation. The SCL thus provides for new compensation liability on the part of public security, procuratorial, judicial, and prison management organs that arises when these organs perform judicial administration functions, a significant development that is obscured if the SCL is viewed only as an extension of the ALL.

The issues of whether to include criminal compensation in the SCL and what specific procedure for criminal compensation should be used were

87 Lin Feng, supra note 71, at 411.
88 SCL, supra note 6, ch. III.
89 Id. arts. 15-16.
90 Id. arts. 20-22.
91 According to Professor Wang Xixin, the procuratorate is not considered an administrative organ and thus is not subject to the ALL. Wang Interview, supra note 85. This is confirmed by Pei’s study, which does not include procuratorial, judicial, or prison management organs in its list of government agencies that have been sued under the ALL. Minxin Pei, supra note 50, at 839-40. The presence of public security organs in the category of defendants under the ALL may be explained by the fact that public security organs investigate crimes and also have the power to mete out administrative punishments in certain types of cases. It is also confirmed in the SCL, which distinguishes administrative acts from acts related to procuratorial, judicial, and prison management functions and sets different compensation standards and procedures for each category. SCL, supra note 6, arts. 3, 15.
hotly debated during the drafting process.\textsuperscript{92} Such debate is not surprising considering the political climate in which the SCL was passed. Fears of rising crime and efforts to "strike hard" at criminals strongly influence discourse on issues related to criminal justice in the PRC.\textsuperscript{93} Since criminal compensation has the potential to make law enforcement personnel less aggressive for fear of incurring liability, it was probably viewed as an impediment to crime-fighting efforts.\textsuperscript{94} Differences in the scope and procedures for criminal and administrative compensation appear to make it more difficult for claimants to receive criminal compensation and less likely that individual criminal justice officials will be punished for misconduct.\textsuperscript{95} Thus, the debates over criminal compensation may have resulted in compromises that weakened the SCL's criminal compensation provisions.

IV. THE PROVISIONS OF THE STATE COMPENSATION LAW AND THEIR APPLICATION TO PROCURATORIAL MISCONDUCT

A. The Scope of State Compensation

The scope of the SCL is defined in three distinct sections of the law. Section 1 outlines the general requirements for compensation liability.\textsuperscript{96} Section 2 describes the scope of administrative compensation.\textsuperscript{97} Because the administrative compensation provisions do not apply to procuratorates, they are not addressed here. Section 3 defines the scope of criminal compensation and discusses how it applies to procuratorates.\textsuperscript{98} The provisions defining the scope of the SCL suffer from a number of deficiencies. First, ambiguities in some of these provisions have led to confusion and debate regarding the types of misconduct that the law applies

\textsuperscript{92} Gu Angran, Guojia Peichangfa Zhiding Qingkuang he Zhuyao Wenti (The Establishment and Key Issues of the State Compensation Law), ZHONGGUO FAXOE [CHINESE LEGAL SCI.], no. 2, 1995, at 18; Lin Feng, supra note 71, at 413 (citing Zhu Weijiu, Comment on the State Compensation Law of the People's Republic of China, ZHONGGUO LOSHI [CHINA L.], 1994, at 29).

\textsuperscript{93} LAWYERS COMM. FOR HUMAN RIGHTS, supra note 3, at 5-6.

\textsuperscript{94} There is some evidence that these concerns were discussed in the drafting process. Lin Feng contends that the compensation liability of individual administrative officials was limited to cases of intentional and grossly negligent misconduct so that they would not become overcautious. This argument was probably made in the criminal compensation context as well. See Lin Feng, supra note 71, at 413 (citing ZHONGHUA RENMIN GONGHEGUO GUOJIA PEICHANGFA SHIYI [INTERPRETATION OF THE STATE COMPENSATION LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 36 (Hu Kangsheng ed., 1994)).

\textsuperscript{95} See infra Part IV.

\textsuperscript{96} SCL, supra note 6, ch. I.

\textsuperscript{97} Id. ch. II.

\textsuperscript{98} Id. ch. III.
to. Second, restrictions on the scope of the SCL limit its effectiveness as a remedy for many types of procuratorial misconduct.

1. The General Scope of State Compensation

The general scope of the SCL is set out in Article 2, which states that a right to compensation under the SCL exists when state organs or personnel harm citizens, legal persons, or other entities through the illegal exercise of their functions and powers. This provision places four limitations on the scope of state compensation. First, the infringing entity must be a state organ or an employee of a state organ. Thus, the acts of Communist Party organs and personnel are beyond the scope of the law. Second, the act or omission that gives rise to a compensation claim must relate to the state functions and powers of the organ or official in question. As a corollary, in order for a compensation right to exist, some special relationship must exist between a state organ and a claimant under the SCL, such as the relationship between a procuratorate and a criminal defendant. Third, the illegality (weifaxing) of the act, and not fault or intention, is the basis for compensation liability under the SCL (although as discussed infra, the determination of whether individual officials must reimburse the state for compensation expenses is based on fault). Finally, the illegal act must be the cause of an injury to the claimant and the injury must be proven.

The ambiguity of several of the requirements for state compensation has generated debate among Chinese scholars over the scope of the SCL. For example, there are varying opinions on when an act relates to an official

99 Id. art. 2.
100 DING YUECHAO ET AL., GUOHA PEICHANGFA YUANLI YU SHIWU [STATE COMPENSATION LAW PRINCIPLES AND PRACTICE] 72 (1998). Although the acts of Communist Party organs and officials are not explicitly excluded by the SCL, they do not fall within the scope of the law because the Communist Party is a political entity and not a state organ. Id.
101 Id.
102 Id. at 73.
103 ZHONGGUO PEICHANG FAŁU SHIWU QUANSHU [PRACTICE GUIDE TO CHINA’S LAW OF COMPENSATION] 94 (Zhu Xuanfeng & Ji Feng eds., 1995) [hereinafter PRACTICE GUIDE TO CHINA’S COMPENSATION LAW]; Lin Feng, supra note 71, at 406. Lin Feng provides an example to illustrate this special relationship. A policeman investigating a criminal suspect has the necessary relationship with the suspect for compensation liability to arise. If the policeman injures a bystander in pursuing the suspect, the bystander could not bring a claim under the SCL because there is no special relationship between a policeman and a bystander. Id. at 407.
104 See Lin Feng, supra note 71, at 405.
function or duty. Personal acts committed by state functionaries that do not relate to their specific functions or powers do not fall within the scope of the SCL. However, some scholars argue that when an official commits a personal act while taking on the appearance of performing his or her official functions, compensation liability may arise. In this view, a policeman who causes an accident while driving a police car for personal use would be liable under the SCL. Without a clear definition in the SCL, however, the scope of the law with respect to official powers and functions remains uncertain.

The SCL requirement that an exercise of state power be illegal to fall within the scope of the law has also generated some debate. Illegality is not defined in the SCL. Some Chinese scholars contend that an act is illegal under the SCL if it violates any written law or regulation, whether substantive or procedural, including the PRC Constitution, statutes, administrative rules and regulations, local rules and regulations, and other normative documents. Other scholars argue that violations of general principles of law, such as the principles of honesty and trust or the principle of not abusing official discretion, also constitute illegal acts for the purposes of the SCL. Again, because the term illegal is not defined, the scope of the SCL is unclear.

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106 For a detailed discussion of the varying views on this issue, see Guojia Peichangfa Shishizhong de Ruogan Wenti [Several Problems in the Implementation of the State Compensation Law], Jingji Ribao [ECON. DAILY], May 5, 1999, available in China Infobank, supra note 46 [hereinafter SCL Implementation, Several Problems].

107 Ding Yuechao et al., supra note 100, at 77. For example, both a market regulator who exceeds her legal power in regulating the market and a police officer who tortures a suspect have committed acts that fall within the scope of the law. If a procurator unlawfully tries to regulate business, however, this act does not fall within the scope of the SCL because it does not bear any relation to the functions or powers of a procurator. Presumably, citizens and legal entities harmed as the result of the personal act of an official that was unrelated to the official's powers and functions could bring an action under the General Principles of the Civil Law. Id.; see also SCL, supra note 6, arts. 5, 17(4).

108 X. Liu, supra note 71, at 83.

109 Id. One Chinese commentator argues that the following acts fall within the scope of the SCL: (1) acts related to executing the duties and responsibilities given to state organs and personnel under the PRC Constitution or a statute, or acts intimately related to the execution of such duties (such as when a procurator tortures a suspect in the course of an interrogation); (2) abuses of power or functions for some illegal purpose; (3) failing to act when there is a legal duty to act; and (4) acts which, although outside of the scope of the duties, obligations, or responsibilities bestowed upon a state organ or official under the law, would nonetheless be considered by people to be exercises of a state function or power. (For example, if a traffic officer detained a driver when the officer only had the power to fine or warn the drivers, the detention would fall within the scope of the SCL.) SCL Implementation, Several Problems, supra note 106.

110 Ding Yuechao et al., supra note 100, at 78-82; Yong Zhang, Governmental Liability in China, supra note 70, at 57-59.

111 Ding Yuechao et al., supra note 100, at 78-82; Yong Zhang, Governmental Liability in China, supra note 70, at 60.
In addition to creating ambiguity regarding the scope of state compensation, the SCL's focus on the illegality of state acts, as opposed to the subjective fault or intent of state organs or officials, has had the effect of excluding many types of injury from the scope of the law. Damages resulting from flaws in public works or public utilities, for example, cannot be recovered under the SCL because they are not the result of an "illegal" act. Moreover, because of the limited scope of the law, individuals injured as a result of other lawful but negligent exercises of official power may be left without a right to compensation at all. For example, if a policeman lawfully but negligently shoots at a criminal and one of the bullets hits an innocent bystander, the bystander does not have a claim under the SCL. Prior to the passage of the SCL, compensation for such injuries could be recovered under Article 121 of the GPCL. However, the SCL specifies that the state is liable for damages only for illegal exercises of state power. Thus, in theory, damages for injuries resulting from lawful exercises of state power can no longer be recovered under the GPCL provision. Victims with such harms are thus left without a legal right to compensation and can only hope to receive discretionary "policy reparations" from the state to compensate them for their damages.

2. The Scope of Criminal Compensation

The specific circumstances under which criminal compensation may be obtained are listed in Articles 15 and 16 of the SCL. Under these provisions, victims are entitled to criminal compensation if procuratorial, judicial, investigative, or prison management organs or officials, in the exercise of their functions and powers, infringe upon personal or property rights in the following ways:

15(1) Wrongfully (cuowu) detaining people in the absence of corpora delicti [the body of facts that constitute an offense] or people who are not proven by fact to be suspects of major crimes;

15(2) Wrongfully arresting people in the absence of corpora delicti;

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112 Yong Zhang, supra note 70, at 63, 66 (citing an official explanation of a draft of the State Compensation Law). Damages resulting from flaws in public works can be recovered under Articles 125 and 126 of the GPCL. Id.

113 Id. at 71.

114 Id. at 72.

115 Id.

116 Id.

117 Id. at 66-71; see also supra note 75 and accompanying text.
15(3) Enforcing the original penalty before the ruling is changed to not guilty during retrials held in accordance with procedures for supervising judicial administration;

15(4) Using torture to coerce statements, inflicting physical injuries on or causing the deaths of citizens through violent acts such as physical assault, or instigating other people to cause physical injuries or death through similar acts;

15(5) Inflicting physical injuries on or causing the death of citizens through the illegal use of weapons or police gear;

16(1) Illegally (weifa) instituting such measures as confiscating, seizing, freezing, and retrieving property; or

16(2) Collecting fines or confiscating property as originally sentenced before the verdict is changed to not guilty during retrials held in accordance with procedures for supervising judicial administration.\(^{118}\)

Although the SCL provisions on criminal compensation appear to be broad in scope, language in the statute and interpretations of the law reveal a number of limitations. First, guilty individuals do not have a right to criminal compensation in many of the circumstances listed in Articles 15 and 16. For example, unless found innocent of a crime, individuals are not eligible to be compensated for violations of personal freedom that stem from detention or arrest (jinya).\(^{119}\) This limitation is derived from language in Articles 15(1) and 15(2), which requires arrests and detentions to be "wrongful" and "in the absence of criminal facts" for compensation liability to arise. Thus, an individual initially detained in the absence of evidence that he or she committed a crime but later found guilty of a crime could not be compensated.\(^{120}\) Guilty individuals who serve longer terms than the law provides for their crime, or who are held in prison beyond their sentence, are also ineligible.\(^{121}\) This limitation applies to some illegal property seizures as

\(^{118}\) SCL, supra note 6, arts. 15-16.

\(^{119}\) See Ma Huaide, Guojia Peichangfa De Lilun Yu Shiwu [Theory and Practice of the State Compensation Law] 211 (1994); Ding Yuechao et al., supra note 100, at 188-90; Lawyers Comm. for Human Rights, supra note 3, at 76; Xiao Xun, Zhonghua Renmin Gongheguo Guojia Peichangfa De Lilun Yu Shiyong Zhinan [Guide to Theory and Practice of China's State Compensation Law] 161-80 (1994). Xiao gives three reasons for denying compensation rights to the guilty in these circumstances. First, compensation in such cases would damage the enthusiasm of law enforcement authorities in the midst of the wave of criminal activity that has accompanied economic reform in China. Second, in many cases, criminals have damaged state property or interests and should shoulder the burden of compensating the state. Finally, giving convicted criminals compensation would make them arrogant, damage the spirit of their victims, and harm public opinion of the government. Id.

\(^{120}\) Ding Yuechao et al., supra note 100, at 194.

\(^{121}\) Lawyers Comm. for Human Rights, supra note 3, at 76. But see Ma Huaide, supra note 119, at 216-17. Ma Huaide argues that compensation should be given for the illegal extension of criminal sentences or sentences that are harsher than those legally prescribed for the crime in question. Id.
Although Article 16(1) does not contain the same language as Articles 15(1) and 15(2), procuratorial officials contend that guilty individuals may not be compensated for improper seizures of their property. In contrast, in cases of injuries or death caused by torture or the illegal use of police weapons, the right to compensation does not depend on the guilt or innocence of the victim. Such acts are deemed violations of the right to life and health and are viewed as legitimate harms regardless of the victim’s criminal status.

A second limitation is that violations of criminal procedure are unlikely to be compensated even though such violations are considered “illegal acts” that fall within the general scope of the SCL. This is partly because compensation for “wrongful” detentions, “wrongful” arrests, and most illegal property seizures is contingent on the guilt or innocence of the defendant. Thus, when a defendant is arrested without a warrant but found guilty of a crime, the defendant does not have a right to compensation for the procedural violation. Similarly, when a defendant’s property is seized without a warrant but the evidence seized proves to be related to a crime for which the defendant is later found guilty, the improper seizure is not grounds for compensation.

Another reason violations of procedure are unlikely to be compensated is that the short list of circumstances in which criminal compensation can be claimed does not include most procedural violations. This is significant because the SCL is a law of limited scope, and state compensation is only available in the circumstances specifically described in the law. Thus, many violations of criminal procedure do not give rise to compensation liability because they do not fit within any of the listed categories of compensable rights violations. Failing to notify family members of a detention or refusing to permit criminal suspects to meet with defense counsel are two examples of procedural violations that are not

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122 SPP Official, supra note 25.
123 Id. This view, expressed by a Supreme People’s Procuratorate official, is not universal. At least one Chinese scholar argues that if the property seized is not related to a crime, the right to compensation is not contingent on the innocence of the victim. DING YUECHAO ET AL., supra note 100, at 204.
124 SPP Official, supra note 25; XIAO XUN, supra note 119, at 161, 164-65.
125 Id.
126 See supra notes 119-120 and accompanying text.
127 SPP Official, supra note 25.
128 PRACTICE GUIDE TO CHINA’S COMPENSATION LAW, supra note 103, at 94. In this sense, the scope of China’s State Compensation Law is much more limited than that of the Japanese, South Korean, and Taiwanese state compensation statutes, which only require that official acts be “unlawful” or “illegal” and do not limit the specific circumstances under which compensation may be obtained. See supra notes 63-67 and accompanying text.
included in the scope of criminal compensation. These violations seriously hinder the ability of a criminal suspect to mount an effective defense. However, because these and other violations of procedure are not mentioned in Articles 15 and 16, the SCL does not provide a remedy for them.

The SCL's lack of emphasis on procedure suggests that the law should be viewed primarily as a remedy for misjudgments, wrongful detentions or charges, and illegal violence by criminal justice officials rather than as a remedy for procedural violations. The small number of published criminal compensation cases confirms this conclusion—all of them deal with either torture or the misjudgment or wrongful detention of a defendant. The emphasis on substance over procedure is not surprising given the prevailing Chinese attitude that procedural rules should be followed when possible but should not stand in the way of fighting crime. Chinese scholars and officials generally agree that as long as a crime has taken place, violations of criminal procedure (other than those involving physical harm to a defendant) should be rectified through administrative channels rather than through the state compensation system.

Finally, Article 17 of the SCL lists several specific circumstances in which state organs are not responsible for compensation. These include cases in which citizens injure themselves intentionally, give false confessions, or are not responsible for crimes because they are underage or mentally ill. State compensation is also precluded when defendants are taken into custody but later released because their offenses are “minor” and not considered “crimes.” Such releases are permitted under Article 15 of

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129 CPL, supra note 11, arts. 64, 96.
130 For SCL cases, see GUDIA PEICHANG MINGAN DIANPING [REVIEW OF NOTABLE STATE COMPENSATION CASES] (Liu Fuhua ed., 1997); Xu Xun, State Compensation—Three Years of Experience with the Law in China, CHINA L., Mar. 15, 1998, at 60; Li Monan Peichangan [The Compensation Case of Li Moan] and Pei Hanlong Peichangan [The Compensation Case of Pei Hanlong], available in ZUIGAO RENMIN JIANCHAYUAN GONGBAO [THE GAZETTE OF THE SUPREME PEOPLE'S PROCURATE], Nov. 11, 1998, reprinted in China Infobank, supra note 46; Shang Cai Jianchayuan Cuobu Pei Jiu Wan [Wrongful Arrest by the Shang Cai Procuratorate Results in Compensation of Ninety Thousand], FAZHI RIBAO [LEGAL SYS. DAILY], Nov. 8, 1999, at 1.
131 Donald Clarke, Justice and the Legal System in China 15-16 (1995) (unpublished manuscript, on file with author). A revised version of this article may be found in CHINA IN THE 1990'S 83-93 (Robert Benewick & Paul Wingrove eds., 1995).
132 SPP Official, supra note 25; EXPLANATION OF THE STATE COMPENSATION LAW, supra note 68, at 200-01; PRACTICE GUIDE TO CHINA'S COMPENSATION LAW, supra note 103, at 117.
133 SCL, supra note 6, arts. 17(1)-(2) (citing the PRC Criminal Code arts. 14, 15), 17(5).
134 Id. art. 17(3) (citing the PRC Criminal Procedure Law art. 11). This is an extension of the rule of no compensation for the guilty. LAWYERS COMM. FOR HUMAN RIGHTS, supra note 3, at 76.
the CPL. This provision appears to provide a loophole for public security or procuratorial organs that have improperly detained a suspect. If such individuals are released under the pretense of Article 15, they cannot claim compensation for their detention. Under a final, catchall exception, the state is not responsible for compensation in “other circumstances prescribed by law.” Although there are no laws that specify other exceptions to the SCL, some Chinese scholars have argued that exemptions from general tortious liability under the GPCL, such as in cases of force majeure or emergency, would apply under this provision.

3. The SCL As Applied to the Procuratorate

Procuratorates could incur liability under most of the circumstances enumerated in Articles 15 and 16 of the SCL. Only Articles 15(3) and 16(2), which deal with the improper enforcement of judgments, do not apply to procuratorates. Thus, procuratorates could be liable for misjudgments, unlawful detentions, the physical abuse of suspects, and illegal property seizures. Of particular significance to procuratorates is the SCL provision on wrongful arrests. Under the SCL, the organ that approves arrests (the procuratorate) is responsible for compensation if an arrest is made in the absence of criminal facts. In addition, the procuratorate that approves an arrest is responsible for paying compensation if a court finds that the defendant is not guilty of criminal charges. Procuratorates and courts of first instance are also jointly responsible for compensation if a court of second instance overturns a guilty verdict. Such provisions highlight the formality of an “arrest” in Chinese criminal procedure. Under the Chinese

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135 CPL, supra note 11, art. 15(1). When the SCL was promulgated, the Criminal Procedure Law had not yet been revised. As such, Article 17(3) of the SCL refers to Article 11 of the 1979 CPL. China’s Supreme People’s Court has confirmed that Article 17(3) of the SCL now incorporates Article 15 of the revised CPL. Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zhixing Zhonghua Renmin Gongheguo Guojia Peichangfa Jige Wenti de Jieshi [Supreme People’s Court Interpretation of Several Problems Regarding Implementation of the State Compensation Law by the People’s Courts], reprinted in 1997 ZHONGGUO FA LU NIANJIAN [1997 CHINA L. YEARBOOK] 556 (1997) [hereinafter 1997 CHINA L. YEARBOOK].

136 SCL, supra note 6, art. 17(6).

137 DING YUECHAO ET AL., supra note 100, at 218.

138 Questions and Answers on Criminal Compensation by the Procuratorial Authority, source obtained from the Beijing office of Paul, Weiss, Rifkind, Wharton & Garrison (on file with author). All of the circumstances in Articles 15 and 16, except 15(3) and 15(4), are listed by procuratorial officials as circumstances under which the procuratorate could be liable for compensation. Id. See also DING YUECHAO ET AL., supra note 100, at 220-25.

139 SCL, supra note 6, art. 19.

140 Id.

141 Id.
system, individuals under investigation for crimes are initially “detained” by public security organs. Only when sufficient evidence of a crime has been gathered will a public security organ request formal approval from a procuratorate to make an arrest. Thus, in theory, the SCL provisions on wrongful arrest place new pressures on procuratorates to ensure that the evidence of a crime is sufficient to obtain a conviction before a formal arrest is made. If the evidence is not sufficient and the arrest is thus “wrongful,” a procuratorate may face liability for state compensation if the defendant is found innocent.

4. Recommendations Related to the Scope of the SCL

Although the SCL applies to a broad range of state acts, several steps should be taken to clarify the general scope of the law and to provide a mechanism for those injured by lawful but negligent government acts to receive compensation. First, to avoid confusion in its application, the SCL should clarify which acts are considered “illegal” for the purposes of the law and when an act relates to official “functions and powers.” Chinese scholars agree that a more precise definition of “illegality” is needed. This need was also recognized by the government of Liaoning Province, which passed local implementing regulations in 1996 that specify when an act is illegal for the purposes of the SCL. Such a clarification could be provided in local regulations, in an official interpretation by the courts or the NPC, or in an amendment to the SCL. Clarification at the national level would have the advantage of creating a uniform national standard for the application of the SCL. Given the debate over when an act relates to “official functions and powers,” a clarification of this phrase would also be advisable. Finally, the NPC should either include negligent acts that cause injury within the SCL’s definition of “illegal” acts or confirm that compensation for such acts can still be pursued under the GPCL. Otherwise, many victims of lawful but

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142 See generally CPL, supra note 11, arts. 50-76.
143 Yong Zhang, supra note 70, at 60.
144 The Liaoning Province implementing regulations for the SCL define an “illegal” act as a violation of the constitution, law, administrative regulations, or local laws and regulations. According to the regulations, such violations include (1) incorrectly applying a law or regulation; (2) violating legal procedure; (3) exceeding official powers; (4) abusing official powers; and (5) failing to carry out, or delaying in carrying out, a legal duty. Liaoning Sheng Shishi "Zhonghua Renmin Gongheguo Guojia Peichangfa" Ruogan Guiding [Liaoning Province, Several Provisions on the Implementation of “The State Compensation Law of the People’s Republic of China”] (effective June 1, 1996) art. 5 [hereinafter Liaoning Provisions], reprinted in China Infobank, supra note 46.
145 Yong Zhang, supra note 70, at 60.
146 Id. at 78.
negligent government acts could be left without any compensation if the
government fails to provide compensation voluntarily.

PRC legislators should also consider amending the provisions
defining the scope of criminal compensation. First, violations of procedure
need to be covered more adequately. Procedural protections are worth little
if they cannot be enforced effectively. Presently, there are no effective
mechanisms through which complaints related to procedural rights can be
pursued outside of procuratorial review.147 Chinese legislators should thus
consider providing a specific right to compensation in cases involving
procedural violations. At a minimum, such a right should be available to
victims who are innocent of a crime or, if the procedural violation is one that
hinders the ability of a suspect to mount an adequate legal defense (such as
the denial of access to legal counsel), to any defendant. Second, the SCL
should confirm that the right of a defendant to compensation is not
automatically precluded if the suspect is released pursuant to Article 15 of
the CPL. Some inquiry into the circumstances of the release should be
permitted in order to ensure that criminal justice organs do not manipulate
this exception to avoid compensation liability for wrongful detentions.

B. State Compensation Standards, Funding, and Liability Allocation

1. Standards for Calculating State Compensation

The various standards for calculating compensation are specified in
Articles 25 through 29 of the SCL. Calculation methods differ according to
the type of harm in question. For violations of the right to personal freedom,
an indemnity is paid for each day of wrongful detention. The daily
indemnity corresponds to the average daily wage set by the state for staff
and workers for the previous year148 and is thus uniform throughout China.
Under Article 30, state organs responsible for wrongful detentions, arrests,
and judgments must also apologize, restore the reputation of the victim, and
eliminate any impacts of the detention or misjudgment.149

Compensation for violations of the right to life and health is
calculated differently. If the illegal acts of a state organ cause injury,
compensation under the SCL consists of reimbursement for medical
expenses, a daily indemnity for the loss of income from work based on the
average wage described above, and daily expenses for the victim based on

147 See supra Part II.
148 SCL, supra note 6, art. 26.
149 Id. art. 30.
the living expenses provided by local welfare agencies for loss of work. If the abuse results in death, the family of the victim is entitled to funeral expenses and an indemnity of up to twenty times the annual wage of state workers and staff for the previous year. In addition, living expenses are paid to the dependents of victims who are unable to work themselves. In 1998, the maximum compensation allowed in the case of death was the equivalent of 12,000 U.S. dollars. The uniform indemnities and compensation limits established for wrongful detentions and harms to life and health may be greater or less than the actual damages suffered by the claimant. The use of these uniform standards suggests that the framers of the SCL placed a greater emphasis on deterring official misconduct than on compensating claimants for their actual damages.

Compensation for violations of property rights is more limited. If confiscated property is in the same condition as it was when it was taken, successful claimants are only entitled to the return of their property plus interest. No compensation is provided for loss of use. Additional indemnities are only available if the property is lost or stolen, in which case compensation is based on the damage to or value of the property in question. In all cases of compensation for illegal property seizures, only direct damages to property are compensated.

2. State Compensation Funding

Local governments provide state compensation funds. Regulations issued by the State Council, China’s top government organ, require financial organs at each level of government to budget compensation

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150 Id. art. 27. For temporary loss of work, the maximum indemnity allowed is five times the annual wage for workers and staff set by the state. If the illegal official act causes a permanent disability, the maximum indemnity is 10 times the annual wage if the loss of work is partial and 20 times the annual wage if it is total. Id.

151 Id. Emotional harms stemming from either an unlawful detention or from physical abuse are not compensated unless they result in some material injury to the victim or the victim’s family. See REVIEW OF NOTABLE STATE COMPENSATION CASES, supra note 130, at 237-38. For example, if anxiety resulting from a wrongful arrest causes a heart problem, the state organ responsible for compensation would be obliged to pay for medical expenses related to the heart problem. Id.

152 Id.

153 Rosenthal, supra note 53.

154 Yong Zhang, supra note 59, at 213-14.

155 SCL, supra note 6, art. 28; Xu Xun, supra note 130, at 61.

156 SCL, supra note 6, art. 28.

157 Id.

expenses according to their "actual situation."\textsuperscript{159} Except in a limited number of situations in which state organs or officials responsible for state compensation may be required to reimburse the financial organs, all state compensation claims are paid from these general funds.\textsuperscript{160} The State Council regulations also direct local governments at the provincial level to promulgate detailed regulations for the handling of compensation expenses.\textsuperscript{161} This delegation of responsibility for compensation expenses has not been without problems, as many local governments either lack the ability or the willingness to provide compensation funds.\textsuperscript{162} Local regulations detailing punishments for misappropriation of compensation funds suggest that the embezzlement of such funds may be a problem as well.\textsuperscript{163} Thus, in some localities, winning a compensation claim against a procuratorate or another government organ is of little use because there are no funds to pay the claim.

3. The Liability of State Organs and Officials Under the SCL

Both state organs and individual officials may be liable in a state compensation case. Under both the administrative and criminal compensation procedures outlined in the SCL, the state organ responsible for compensation must initially pay the claimant.\textsuperscript{164} In the case of wrongful detentions and arrests, the organ that authorized the detention or arrest is responsible for compensation.\textsuperscript{165} When a guilty verdict is overturned, both the court of first instance and the procuratorate are responsible for


\textsuperscript{160} See infra notes 164-174 and accompanying text.

\textsuperscript{161} SCL Expense Procedures, supra note 159, art. 15.

\textsuperscript{162} Wang Interview, supra note 85; Sunhai Dongxi Yao Pei! Guojia Peichangfa Shishi Si Nian Huimou, Minzhu Fazhi Shuping [If You Damage Things, You Must Pay! A Look Back on Four Years of Implementing the State Compensation Law, Commentary on Democracy and the Rule of Law], Renmin Ribao [People's Daily], Dec. 8, 1999, at 12 [hereinafter If You Damage Things, You Must Pay!].

\textsuperscript{163} For an example of such local regulations, see Anhui Sheng Guojia Peichang Feiyong Guanli Guiding [Anhui Province, Provisions on the Management of State Compensation Expenses] (passed June 18, 1999) art. 20 [hereinafter Anhui Provisions], reprinted in China Infobank, supra note 46.

\textsuperscript{164} SCL, supra note 6, arts. 13, 21.

\textsuperscript{165} Id. art. 19.
compensation. State Council regulations on compensation expenses direct that these payments should first be made from the organ’s reserves or from funds earmarked for its own use. Afterwards, the violating organizations are directed to apply for refunds from state financial organs at the corresponding level of government. While requests for reimbursement in administrative compensation cases may be rejected if the state organ has committed intentional or serious mistakes, there are no grounds upon which an application may be rejected in a criminal compensation case. Thus, procuratorates need not be concerned that compensation payments will reduce their operating budgets.

After initially paying compensation to a victim, state organs may seek reimbursement from the individual personnel responsible for the illegal acts. However, the potential liability of administrative and judicial personnel differs significantly. An administrative official who commits illegal acts intentionally or as a result of “grave errors” can be required to reimburse his or her administrative unit for compensation paid. In contrast, criminal justice officials can only be required to reimburse the state in cases of torture, the illegal use of weapons or police gear, corruption, or fraudulent practices undertaken out of personal considerations. Thus, in most cases of wrongful arrest, detention, or property seizure giving rise to a right to compensation under the SCL, individual procurators cannot be required to reimburse their units.

In limited circumstances, individual procurators responsible for violations that fall under the SCL may face other sanctions. In cases of torture, the illegal use of weapons, or corruption, the SCL directs the “relevant bodies” to discipline responsible personnel and, if the violations constitute crimes, to investigate the criminal responsibility of the perpetrators. Under the CPL, victims themselves have a right to compel

166 Id. 167 SCL Expense Procedures, supra note 159, art. 7. 168 Id. 169 Id. art. 10. 170 SCL, supra note 6, art. 14. 171 Id. art. 24. Some local regulations provide detailed guidance on the amount of reimbursement that must be provided by individual officials. In Chongqing, for example, individual procurators are required to reimburse the state for between 50% and 100% of compensation expenses paid for torture, violent acts, or corruption in the judicial process. Such reimbursements may be deducted from the monthly salary of the procurator in question. However, the total amount reimbursed may not exceed four times the basic monthly salary of the procurator. Chongqing Shi Shishi “Zhonghua Renmin Gongheguo Guojia Peichangfa” Banfa [Chongqing City Procedures for Implementing the “State Compensation Law of the People’s Republic of China”] (passed May 29, 1998) arts. 39-40 [hereinafter Chongqing Procedures], reprinted in China Infobank, supra note 46. 172 SCL, supra note 6, art. 24.
the prosecution of offenses that amount to crimes if a procuratorate refuses to do so.\textsuperscript{173} Officials who infringe on the property rights of a victim may also be fined or penalized under the law.\textsuperscript{174} However, except in cases of torture, which is a criminal offense, there is no mechanism in the law through which a victim can enforce such sanctions. Thus, the application of these penalties depends entirely upon the will of the relevant government organs.

The limited liability of procuratorates and their personnel for rights violations makes it less likely that the SCL will achieve its goal of discouraging improper behavior on the part of procurators. If procuratorates are able to obtain reimbursement from other government organs, there is little institutional incentive for them to root out and prevent illegal behavior. Furthermore, individual procurators prone to misconduct cannot be expected to be concerned about wrongful detentions, arrests, and property seizures because they have no potential liability in such cases. As Chinese judicial officials who have evaluated the SCL's effectiveness have noted, one of the major problems with the implementation of the law is that the liability of individual state officials for rights violations is often not pursued and, as a consequence, officials in the same state organs and departments continually cause problems.\textsuperscript{175} The judicial officials contend that the failure of state organs to pursue reimbursement for rights violations makes the achievement of the SCL's goal of encouraging officials to exercise power in accordance with the law difficult.\textsuperscript{176}

4. Recommendations Related to the Allocation of State Compensation Liability

To put some teeth into its stated goal of encouraging proper official behavior, the SCL should permit procuratorates to seek reimbursement of compensation expenses from procurators who intentionally, or through gross negligence, commit an illegal act that results in the payment of criminal compensation. Such a provision has been included in Taiwan's criminal

\textsuperscript{173} Review of Notable State Compensation Cases, supra note 130, at 238; CPL, supra note 11, arts. 170-73.

\textsuperscript{174} SCL, supra note 6, art. 28(1).

\textsuperscript{175} If You Damage Things, You Must Pay!, supra note 162. Although the official was probably referring to situations in which individual liability under the SCL is possible but not pursued, the observation would apply with even greater force to cases in which no individual liability under the SCL is possible.

\textsuperscript{176} Id.
compensation law, which covers wrongful detentions and executions. The adoption of such a provision would bring the SCL's criminal compensation provisions on individual liability into parity with similar provisions in the administrative compensation portion of the law. Holding procurators liable for compensation expenses only when they commit intentional or grossly negligent acts of misconduct should allay concerns that procurators will become timid in exercising their duties for fear of incurring liability, while at the same time providing a personal financial disincentive for misconduct. In addition, state organs responsible for compensation claims or the head officers of such state organs should be sanctioned for rights violations and for the failure to pursue individual responsibility for rights violations. Sanctions could include reductions in the following year's budgetary allotments for the state organ in question or a salary reduction or demotion for procuratorial chiefs who are negligent in managing their departments or who fail to punish offending procurators. Some local governments in China have already realized the need for such measures and have given financial organs the power to reduce the budgets of state organs that do not pursue reimbursement of compensation expenses when such reimbursement is appropriate. Similar provisions should be included in the SCL or national regulations to ensure that procuratorates and their head officials have an incentive to root out abuse.

C. State Compensation Procedures

Compensation claimants must go through a complex and sometimes lengthy set of procedures in order to receive compensation under the SCL. The process of applying for state compensation is divided into two distinct phases. First, the claimant must obtain legal confirmation of a violation of his or her rights. Legal confirmation can be difficult to obtain and, as discussed below, is one of the weakest links in the SCL. Second, the claimant must make a formal application for compensation.

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177 Criminal Compensation Law of Taiwan, supra note 66, art. 16.
178 SCL, supra note 6, art. 14.
179 See supra note 175.
1. Legal Confirmation of Rights Violations

a. Legal confirmation procedures

A compensation claimant must obtain legal confirmation of a rights violation before making an application for state compensation. Little is stated about legal confirmation in the SCL. The law simply provides that state organs are responsible for paying criminal compensation if the occurrence of one of an enumerated list of violations has been "legally confirmed," and that a claimant may file a "petition" if a request for confirmation is denied. In practice, this provision has been interpreted to mean that compensation applications cannot be accepted until there is legal confirmation of a rights violation and, with the exception of cases involving torture or the misuse of police weapons, evidence that the claimant has not committed a crime. Obtaining legal confirmation and applying for compensation are thus separate processes.

Supplementary regulations issued by the Supreme People's Procuratorate establish specific procedures for legal confirmation. A violation is considered legally confirmed if a claimant possesses one or more of the following documents: (1) a decision by a procuratorate to cancel or revoke a detention warrant, arrest warrant, or case file; (2) a decision by a procuratorate not to prosecute a case or to review and correct a case; (3) a certificate from the police revoking a case and setting a suspect free; (4) a legally effective judgment or ruling of a people's court declaring a defendant innocent; (5) a decision that procuratorial officials engaged in torture or the misuse of police weapons while exercising their powers; or (6) an affirmation that a property seizure was illegal. In some of these situations, the documentation must be provided by either the procuratorate itself or by its immediate superior. Without one of these documents, the

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181 SCL, supra note 6, art. 20.
182 Id.
183 SPP Official, supra note 25.
184 Id.
185 Renmin Jianshuyuan Xingshi Peichang Gongzuo Zanxing Guiding [Temporary Provisions of the People's Procuratorate on Criminal Compensation Work] (passed Nov. 18, 1997) art. 6 [hereinafter Procuratorate Compensation Regulations], reprinted in 1998 ZHONGGUO FALU NIANYAN [1998 CHINA L. YEARBOOK] 685-87 (1998). According to the regulations, the compensation applicant must have actual documentary evidence of a decision not to prosecute, for example. Conceivably, a procuratorate could decide not to prosecute a criminal case but refuse to provide the necessary documentation of such a decision.
victim must request confirmation from the relevant procuratorate department.\textsuperscript{187} If the procuratorate refuses to confirm the violation, the victim may apply to the procuratorate at the next level for reconsideration.\textsuperscript{188} Beyond this, however, the victim has no further right of appeal.

For victims of procuratorial abuse, the legal confirmation process contains a number of critical flaws.\textsuperscript{189} First, the credibility of the confirmation process is compromised because individuals without one of the confirmation documents must initially apply to the organ that violated their rights. The fact that a state organ responsible for violating a claimant's rights reviews a compensation application creates an obvious conflict of interest and raises serious questions of fairness and objectivity; a procuratorate may, out of its own self-interest or in order to protect an individual procurator, simply refuse to provide confirmation. Second, reconsideration by an upper-level procuratorate may not be an effective check on abuses at lower levels. Lower-level organs of judicial administration in China often solicit the views of their superiors before making important decisions.\textsuperscript{190} Thus, the decision of the lower-level procuratorate may already reflect the opinion of the procuratorate office that will reconsider the case. Applying for this type of administrative reconsideration is rarely an effective way for individuals to redress grievances in the PRC.\textsuperscript{191}

In addition, individuals requesting legal confirmation for criminal compensation cases have no right to appeal denials of confirmation decisions to the compensation committee of a people's court.\textsuperscript{192} As discussed \textit{infra}, procuratorates also review formal applications for compensation.\textsuperscript{193} In the formal compensation application phase, applicants

\begin{itemize}
\item \textsuperscript{187} Procuratorate Compensation Regulations, \textit{supra} note 185, art. 7. Confirmation decisions must be reported to the procuratorate committee. \textit{Id.}
\item \textsuperscript{188} \textit{Id.} art. 8.
\item \textsuperscript{189} See LAWYERS COMM. FOR HUMAN RIGHTS, \textit{supra} note 3, at 75-76. The Lawyers Committee report briefly addresses the issue of legal confirmation and concludes that it is one of the primary defects in the SCL. Chinese commentators have also criticized the legal confirmation process. See Ren Xinqian \& Zhou Yuliang, \textit{Luelun Renmin Peichang Weiyuanhui de Zuzhi Xingshi he Gongzuo Fangzhi [A Brief Discussion of the Organizational Structure and Working Methods of the People's Court Compensation Committees]}, XIANDAI FAXUE [MODERN L.], Apr. 1998, at 60-63. This is an excellent review and critique of the people's court compensation committees written by two members of the Chongqing High Level People's Court.
\item \textsuperscript{190} Lin Feng, \textit{supra} note 105, at 21.
\item \textsuperscript{191} See \textit{supra} note 50 and accompanying text.
\item \textsuperscript{192} Claimants could petition the corresponding level people's congress if their confirmation request were denied. SPP Official, \textit{supra} note 25. This right of petition is not specifically provided for in the SCL, however. It is also of questionable effectiveness given the weak supervisory powers of the people's congresses.
\item \textsuperscript{193} See \textit{infra} Part IV.C.2.
\end{itemize}
may appeal a denial to a quasi-judicial body called the people’s court compensation committee (“compensation committee”). In the case of legal confirmation, however, compensation committees do not have the authority to accept and hear legal confirmation appeals. Thus, if the violating procuratorate or its superior does not confirm the rights violation, a victim of procuratorial misconduct could be left without a remedy if the victim does not possess the documentation required for automatic confirmation. This procedural rule for criminal compensation cases contrasts sharply with the rule applied in administrative compensation cases. In an administrative compensation case, a claimant may appeal a denial of legal confirmation or compensation to a people’s court. In fact, while claimants in a criminal compensation case must obtain legal confirmation before applying for compensation, in an administrative compensation case a people’s court can simultaneously address the issues of confirmation and compensation as part of an administrative lawsuit.

Another problem with legal confirmation is that the procuratorate regulations set no specific time within which a confirmation decision must be made. It is thus potentially easy for a procuratorate to block a request for legal confirmation and, since such confirmation is required for a formal compensation application to be accepted, to block a victim’s entire claim. An obstructionist procuratorate can either deny a victim’s request with knowledge that the victim has no recourse to the people’s courts or simply delay making a decision with the knowledge that there is no legally mandated time within which it is required to act. This is more than just a theoretical problem. According to Chinese reports, legal confirmation is difficult to obtain and officials commonly evade compensation by refusing

194 For a description of the compensation committees and their role in the compensation application process, see infra notes 212-226 and accompanying text.


197 Id.

198 Procuratorate Compensation Regulations, supra note 185, arts. 5-10. In contrast, procuratorates are legally obligated to respond to formal compensation applications within designated time limits. See infra notes 210-212 and accompanying text.
to give legal confirmation of rights violations. Thus, the legal confirmation process is one of the weak links in the SCL.

b. Recommendations for improving the legal confirmation process

Several steps should be taken to remedy problems with the legal confirmation process. First, the SCL and its implementing regulations should include provisions that allow criminal compensation claimants to appeal denials of their confirmation requests to a people’s court or to a compensation committee. Such procedures would protect compensation claimants by giving them a clear right and a concrete procedure through which to appeal confirmation decisions to a government body other than the procuratorate. In addition, specific time limits should be set within which procuratorates must respond to requests for legal confirmation of a rights violation. At least two local governments have already recognized the need for such time limits. In their implementing regulations for the SCL, both Chongqing City and Liaoning Province require legal confirmation requests to be answered no later than one month after they are received. Most local governments have not passed such implementing regulations, however. Time limits for confirmation should thus be included in either the SCL itself or in implementing regulations to ensure that the SCL is applied uniformly throughout China.

2. Applications for State Compensation

a. Application procedures

Up to three different state organs may review a criminal compensation application. A claimant must first apply to the state organ responsible for violating his or her rights. In the case of procuratorates, supplementary regulations stipulate that each procuratorate must establish a criminal

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199 If You Damage Things, You Must Pay!, supra note 162. Both the director of the criminal compensation committee office of the Guangzhou Mid-level People’s Court and the vice-chairman of the Chongqing City People’s Congress Standing Committee discussed the problems with the legal confirmation process. According to a report in the People’s Daily, such problems are common throughout China. Id.

200 Ma Huaide acknowledges the problems with legal confirmation but argues that the right to petition is sufficient to protect compensation claimants. MA HUAIDE, supra note 119, at 235. The procuratorial organ at the next level of government hears such petitions, however. As argued in this Comment, reconsideration by the procuratorate is not an adequate protection for claimants. To preserve objectivity and fairness, petitions for confirmation should be heard by a government organ other than the procuratorate.

201 Liaoning Provisions, supra note 144, art. 12; Chongqing Procedures, supra note 171, art. 10.

202 SCL, supra note 6, art. 20.
compensation office to handle such compensation requests.\footnote{203} Upon accepting an application, a procuratorate conducts a preliminary review of the case. Compensation applications may be rejected at this stage for the following reasons: (1) the violation in question occurred before the SCL was effective, (2) the applicant does not belong to the class of individuals or organizations that may be compensated under the law, (3) the period for filing has expired, (4) the act in question is not within the scope of Articles 15 or 16 of the law, or (5) the applicant’s materials are incomplete.\footnote{204} In addition, if the reviewing procuratorate determines that it is not the organ responsible for compensation, the applicant is directed to apply to the proper organ.\footnote{205} If the application passes this initial review, a case is filed.\footnote{206} An expert in the compensation office then investigates the application and accompanying evidentiary materials in detail and makes a recommendation on whether or not to pay compensation and, if so, the amount that should be paid.\footnote{207} After examination and verification by a superior in the office, the recommendation is reported to the chief procurator.\footnote{208} In difficult cases, the chief procurator may consult the procuratorate committee for a decision.\footnote{209} If compensation is approved, it must be paid within two months of the initial application.\footnote{210}

Following initial application to the responsible government organ, claimants have two opportunities to appeal compensation decisions. If the responsible procuratorate does not compensate a claimant within two months after an application is made, or if a claimant objects to the amount of compensation, the claimant may appeal to the procuratorate at the next level for reconsideration.\footnote{211} If the claimant does not agree with the reconsideration decision or a decision is not made within two months, the claimant may make a final appeal to a compensation committee of the people’s court at the same level of government as the procuratorate that reconsidered the case.\footnote{212} This appeals process for criminal compensation differs from that used in administrative compensation cases. In administrative compensation cases, claimants must first apply to the responsible organ but subsequently may file suit in a people’s court if they

\begin{itemize}
\item \footnote{203} Procuratorate Compensation Regulations, supra note 185, art. 3.
\item \footnote{204} Id. arts. 11-13.
\item \footnote{205} Id. art. 13.
\item \footnote{206} Id. art. 13(7).
\item \footnote{207} Id. arts. 14-18.
\item \footnote{208} Id. arts. 4, 17.
\item \footnote{209} Id.
\item \footnote{210} Id. art. 18.
\item \footnote{211} SCL, supra note 6, art. 21; Procuratorate Compensation Regulations, supra note 185, arts. 19-26.
\item \footnote{212} SCL, supra note 6, art. 22.
\end{itemize}
object to the initial handling of their case.\textsuperscript{213} During the drafting process, the issue of whether criminal compensation claimants should have the right to file appeals in a people’s court was a contentious one.\textsuperscript{214} Ultimately, compensation committees were designated to hear criminal compensation appeals because of a concern that in a proceeding before a people’s court, judicial and procuratorial organs would become “defendants.”\textsuperscript{215} This position was seen as inconsistent with their status as adjudicative and supervisory bodies.\textsuperscript{216} Proponents of giving claimants the right to reconsideration instead of the right to sue in people’s courts also argued that claimants would question the fairness of a compensation hearing before a people’s court, which is part of the judicial administration apparatus and is itself subject to supervision by the procuratorate.\textsuperscript{217}

Compensation committees conduct what is essentially an administrative review of the cases brought to them. The committee consists of three to seven judges, depending on the level of the court.\textsuperscript{218} The director of the compensation committee is usually a deputy chief of the court in which the committee sits.\textsuperscript{219} Although the structure of compensation committees and the procedures for review vary, most courts have established case-handling offices below the compensation committees that review and make recommendations on cases.\textsuperscript{220} Cases are typically reviewed by a single case manager who may or may not sit on the committee and who may request evidence or other materials from any of the parties involved.\textsuperscript{221} The review is not open, and the process itself is not considered litigious.\textsuperscript{222} After

\textsuperscript{213} Id. art. 13.
\textsuperscript{214} MA HUAIDE, supra note 119, at 249.
\textsuperscript{215} PRACTICE GUIDE TO CHINA’S COMPENSATION LAW, supra note 103, at 127; MA HUAIDE, supra note 119, at 249.
\textsuperscript{216} PRACTICE GUIDE TO CHINA’S COMPENSATION LAW, supra note 103, at 127; MA HUAIDE, supra note 119, at 249.
\textsuperscript{217} MA HUAIDE, supra note 119, at 249.
\textsuperscript{218} SCL, supra note 6, art. 23. The number of members corresponds to the level of the court. Compensation committees of intermediate-level courts are required to have from three to five committee members, while compensation committees of high-level courts are required to have from five to seven members. Zuigao Renmin Fayuan Guanyu Guanche Zhixing “Zhonghua Renmin Gongheguo Guojia Peichangfa” Sheli Peichang Weiyuanhui de Tongzhi [Supreme People’s Court Notice on Implementing the State Compensation Law and Establishing Compensation Committees] (issued Dec. 23, 1994), reprinted in DING YUECHAO ET AL., supra note 100, at 331-32.
\textsuperscript{219} Ren Xinqian & Zhou Yuliang, supra note 189, at 60.
\textsuperscript{220} Id. at 60-63. In the majority of courts, compensation committees are independent bodies with case-handling offices staffed by specialists. In some courts, however, compensation committees are not independent of other chambers of the court, and no handling office is established. In these courts, cases are reviewed by other chambers of the court and submitted to a compensation committee for a final decision. Id.
\textsuperscript{221} Id. at 60-62.
\textsuperscript{222} Id.; Compensation Committee Regulations, supra note 195, arts. 10, 13.
reviewing the case, the case handler files a report and recommendation with
the committee, which then makes a final decision on the issue of
compensation.\textsuperscript{223} In complex or difficult cases, such decisions must be
submitted to the head of the court for review and for a decision by the
court’s adjudication committee.\textsuperscript{224} The adjudication committee, which
includes the court president, vice-president, and other judicial officials, is
the highest decisionmaking body of the court and has the power to decide
individual cases or order a judge to hand down a particular verdict.\textsuperscript{225}
Compensation committee decisions must be made within three months of
the filing of the case and are legally binding on the parties.\textsuperscript{226} After a
decision has been made, the claimant’s right to reconsideration is exhausted.

While the appeals procedure provides criminal compensation
claimants with several opportunities to appeal decisions, it suffers from a
number of deficiencies. Like the confirmation appeals process, the
application process is compromised because claimants must initially apply
to the state organ that violated their rights. Although a compensation
division separate from the accused procuratorate department is designated to
handle applications, compensation is still subject to approval by the chief
procurator or procuratorate committee. Also, as illustrated in the discussion
on legal confirmation, reconsideration by an upper-level procuratorate may
not be entirely objective.

The compensation committee system also suffers from several
weaknesses. As a number of Chinese judicial officials contend, the practice
of having non-committee members review and make recommendations on
cases could lower the quality of compensation work because the committee
members rely solely on the review and recommendation of a case handler.\textsuperscript{227}
In such a case, committee members must make a final decision without
having been involved in the investigation of the case and thus may lack a
detailed understanding of the facts.\textsuperscript{228} The practice of appointing the court’s
deputy chief as the compensation committee director and the fact that the
compensation committee is responsible to the court are also concerns.
These factors weaken the objectivity of the committee, particularly in cases

\textsuperscript{223} Ren Xinqian & Zhou Yuliang, supra note 189, at 61.
\textsuperscript{224} Compensation Committee Regulations, supra note 195, art. 15.
\textsuperscript{225} Donald C. Clarke, \textit{Power and Politics in the Chinese Court System: The Execution of Civil
\textsuperscript{226} Compensation Committee Regulations, supra note 195, arts. 20-21. In difficult cases, the review
period may be extended for up to three months upon the approval of the head of the court. \textit{Id.}
\textsuperscript{227} Ren Xinqian & Zhou Yuliang, supra note 189, at 62-63.
\textsuperscript{228} \textit{Id.}
in which a procuratorate or court is the state organ responsible for compensation.229

Finally, requiring claims to be filed with a compensation committee instead of with a regular court may reduce the probability that a claimant will achieve a favorable result. Unlike administrative lawsuits, reviews by criminal compensation committees (or their case-handling offices) are neither open nor adversarial.230 This makes it impossible for claimants to challenge evidence provided by a state organ to a compensation committee, and may reduce the probability that a result favorable to a claimant will be reached at earlier stages of the compensation process. One study on administrative litigation in the PRC suggests that the threat of public disclosure of improper official acts may be partly responsible for a large number of administrative cases that are settled favorably for plaintiffs outside of court.231 Losing an administrative suit may undermine the authority of an agency, blemish the record of officials involved, and expose abuses of power publicly, thereby forcing higher organs to clamp down on the agency involved.232 Thus, by simply filing a suit in a people’s court, plaintiffs proceeding under the Administrative Litigation Law stand a significant chance of obtaining a favorable result.233 In contrast, the threat of an open, adversarial hearing in which procuratorial misdeeds will be publicly scrutinized and debated is not present in the SCL context. Thus, procuratorates responsible for compensation may be less motivated to grant compensation when they review a case and more willing to proceed to a compensation committee hearing.

b. Recommendations related to the SCL application and adjudication process

A number of steps should be taken to address deficiencies in the SCL application and adjudication process. To improve the quality of case adjudication, one or more members of the compensation committee that will decide a case should be responsible for conducting the initial review of the

229 Id.
230 Compensation Committee Regulations, supra note 195, art. 13.
231 Minxin Pei, supra note 50, at 844. According to Pei’s study, the percentage of administrative lawsuits in which plaintiffs received favorable rulings ranged from 16% to 23% annually from 1992 to 1995. In 1994 and 1995, 16.7% and 22.5% of cases, respectively, were settled outside of court, pushing the percentage of cases in which plaintiffs achieved a favorable result to about 40% for those years. Id.
232 Id.
233 Id.
case. In addition, Chinese judicial officials suggest that to safeguard the impartiality of compensation committees and to avoid conflicts of interest, compensation committees should be staffed by compensation specialists that do not hold other positions and should be supervised by people’s congresses rather than by courts. They also argue that it would ultimately be desirable to have compensation cases adjudicated by a separate body altogether, such as a special compensation court. Having compensation cases adjudicated by a special court and placing such a court directly under the supervision of the people’s congresses would improve the objectivity of the compensation process. It would also address concerns that the hearing of criminal compensation cases by the people’s courts could be deemed unfair by claimants or, in cases in which a procuratorate is the responsible state organ, would compromise the supervisory status of procuratorates. Finally, opening compensation committee proceedings or providing claimants with access to the courts could help to create public pressure on government organs in the criminal compensation context, increase the leverage of claimants in compensation cases, and thus strengthen the SCL as a remedy against official abuse.

V. THE STATE COMPENSATION LAW IN PRACTICE, 1995-1998

Since its adoption in 1994, the SCL has only achieved marginal success. This is evident from the small number of compensation cases. According to official statistics, courts handled 197 criminal compensation cases in 1995, 398 in 1996, and 531 in 1997. Procuratorial organs accepted 379 compensation applications in 1996 and 669 applications in 1997. Although these statistics indicate a steady increase in the number of criminal compensation cases, recent figures on the large number of cases mishandled by China’s procurators suggest that the number should be significantly higher. In the first eight months of 1998 alone, courts corrected over 8110 misjudged cases and procurators reconsidered 1125 mishandled criminal cases. These figures do not include cases involving

234 Ren Xinqian & Zhou Yuliang, supra note 189, at 62-63.
235 Id.
236 Id. at 63.
237 Id.
240 Shake-up of Procuratorial System, supra note 17, and accompanying text.
illegal property seizures or misconduct involving violence. Given what appears to be wide-scale misconduct in China’s criminal justice system, the country’s large population of 1.3 billion, and the large number of criminal cases filed in China annually, the total number of compensation cases filed seems very low.241

Several reasons have been advanced for the small number of compensation claims. According to Chinese reports, lack of public knowledge about the SCL and its procedures is one factor that has contributed to the low number of cases.242 Potential applicants fear that officials will simply protect each other and do not understand that the SCL can be used to protect the rights of citizens.243 Another factor appears to be a feeling on the part of urban residents that the potential gain from filing a claim is not significant. A disproportionate number of compensation cases have been filed in economically backward areas, where the size of compensation awards is large relative to the income of victims.244 Indemnities for violating the personal freedom of individuals are calculated on the basis of an average daily wage set by the state for staff and workers for the previous year.245 This national average may be too low to make it worthwhile to pursue compensation claims in larger cities, where incomes are relatively high. As such, fewer compensation claims are filed in high-income areas such as Beijing and Shanghai because the costs of applying for compensation in terms of time and money are not adequately offset by compensation awards.246

Official resistance to implementation of the SCL has also contributed to the small number of cases filed. According to Li Xinsheng, a judge working in the field of administrative law, some officials refuse to pay compensation because they believe that laws are used to “crack down on people, not to protect them” and fear that compensation will weaken government authority.247 They also worry that compensation cases will

241 In 1997, there was only one procuratorial compensation case for every 1.9 million people in China. A December 1998 article in the People’s Daily questioned how the number of compensation cases could be so low in a country where there are more than one million criminal and civil cases annually, the unfair application of the law is a chronic social problem, and the Communist Party is striving to address the problem of corruption in judicial administration. If You Damage Things, You Must Pay!, supra note 162.
242 Xu Xun, supra note 130, at 61-62; If You Damage Things, You Must Pay!, supra note 162.
243 If You Damage Things, You Must Pay!, supra note 162.
244 Xu Xun, supra note 130, at 61.
245 See supra notes 148-152 and accompanying text.
246 Xu Xun, supra note 130, at 61.
247 Id. at 62. These comments are echoed by those of Deputy Procurator General Zhang Qiong, who has stated that the main problem with implementation of the criminal compensation system is resistance from local officials who “set compensation against crushing criminal activities.” Inspecting Authorities Shall Properly Implement Criminal Compensation Work, Interview with Mr. Zhang Qiong, Deputy Attorney
expose their abuses and adversely affect their achievement evaluations.\textsuperscript{248} Such officials avoid paying compensation in a number of ways. Some officials threaten compensation applicants.\textsuperscript{249} Others ignore compensation procedures, drag out cases until the applicants give up, or simply refuse to provide legal confirmation for rights violations.\textsuperscript{250} Some officials pay compensation, but use slush funds or income from fines to pay claimants instead of applying for reimbursement from government finance bureaus.\textsuperscript{251} This is done in order to avoid exposure\textsuperscript{252} and, presumably, detection of their abuses by higher-level authorities. This last method of disposing of compensation cases is particularly disturbing because it indicates that officials are engaging in further violations of law for the purpose of paying state compensation claims.\textsuperscript{253} In all, such evidence of official resistance heightens concerns about procedural weaknesses in the SCL and the enforcement of the law. Procurators and other officials who view the SCL as a detriment to crime-fighting efforts are more likely to take advantage of the law's loopholes.

Lack of awareness, low potential returns, and official threats and unresponsiveness are not the only factors that discourage criminal compensation claims. Claimants also have a limited probability of success even if they persevere to the final stages of the compensation process. In 1996, for example, procuratorial organs accepted 379 compensation cases, completed the handling of 343 cases, and awarded compensation in only 44 cases.\textsuperscript{254} Of 73 cases reconsidered by upper-level procuratorates in that year, decisions were overturned in only 5 cases.\textsuperscript{255} In 1997, procuratorial organs accepted 669 compensation cases, filed 464 cases for investigation, and awarded compensation in 96 cases.\textsuperscript{256} Thus, over three-quarters of the claimants who managed to complete the compensation procedure in 1996 and 1997 were unsuccessful. The odds of a successful result appear to be

\textsuperscript{248} Xu Xun, supra note 130, at 61; \textit{If You Damage Things, You Must Pay!}, supra note 162.
\textsuperscript{249} Xu Xun, supra note 130, at 61.
\textsuperscript{250} \textit{If You Damage Things, You Must Pay!}, supra note 162.
\textsuperscript{251} Id. According to Chinese reports, these problems are common throughout the country. \textit{Id}.
\textsuperscript{252} Id.
\textsuperscript{253} In other words, officials may use money obtained through corrupt practices, and may be encouraged to engage in such practices, to pay compensation claims. This would be a perverse result given the fact that the SCL was designed to prevent official misconduct.
\textsuperscript{254} 1997 CHINA L. YEARBOOK, supra note 135, at 183. The disposition of 58 cases filed for investigation is not clear from the statistics.
\textsuperscript{255} Id. It should be noted that 20 of the 73 reconsidered cases are not accounted for in the statistics.
\textsuperscript{256} 1997 CHINA L. YEARBOOK, supra note 135, at 155. According to the statistics, 98 cases are still being handled. \textit{Id}. No statistics were available for cases reconsidered in 1997.
somewhat better in cases reviewed by compensation committees. From 1995 to the end of 1997, people’s courts at the intermediate level or above accepted 1126 criminal compensation cases and awarded compensation in 364, or 42%, of the 870 cases completed. Although the compensation committee numbers are encouraging for claimants, many cases handled by procuratorates are not appealed to a compensation committee, perhaps because claimants fear they have little chance of success once their initial claims have been rejected by a procuratorate. Overall, claimants face an uphill battle in pursuing compensation claims against procuratorates. Confronted with resistance by officials, the trouble of bringing a compensation application, the relatively limited financial rewards of pursuing a claim in urban areas, and a low probability of success, many claimants may conclude that the SCL is not a useful mechanism through which to redress their grievances against procurators and other government officials.

VI. CONCLUSION

Admittedly, several more years of experience under the SCL and more comprehensive statistics on criminal compensation are needed in order to definitively assess whether the SCL is an effective remedy for procuratorial misconduct. However, based on information currently available, it is clear that changes to the SCL and its implementing regulations are needed if its goals are to be realized. Specifically, the scope of the SCL and exceptions to the law should be defined more precisely, procedural rights for criminal suspects should be more adequately protected, and individual procurators should be required to reimburse the state for compensation expenses in cases of intentional or grossly negligent misconduct. Moreover, to safeguard the impartiality of the review process and to solve the problem of legal confirmation, the SCL should give applicants the right to an open, adversarial hearing before a people’s court or

257 See 1996 CHINA L. YEARBOOK, supra note 159, at 129; 1997 CHINA L. YEARBOOK, supra note 135, at 167; 1998 CHINA L. YEARBOOK, supra note 185, at 137. Unfortunately, separate statistics for cases involving the procuratorate are not available. The statistics break down as follows: 1997, 531 cases accepted, compensation awarded in 226, or 53% of the 425 cases completed; 1996, 398 cases accepted, compensation awarded in 74, or 25% of the 291 cases completed; 1995, 197 cases accepted, compensation awarded in 64, or 42% of the 154 cases completed.

258 This is evident from a comparison of the total number of cases reviewed by compensation committees (which include all compensation cases involving investigative, procuratorial, judicial, and prison management organs) and the number of cases handled by the procuratorate.
a compensation committee on the issues of compensation and legal confirmation.

While the number of compensation cases has increased steadily, the low number of cases relative to China’s population and the number of misconduct cases involving criminal justice officials suggest that many victims of procuratorial misconduct are not using the SCCL. Educating both citizens and officials about the SCCL and enforcing the law will help to raise the number of cases and alleviate the threat of official retaliation against claimants. Perhaps equally important, the potential gains from pursuing compensation must be worth the risks and costs. In this respect, the daily indemnity for violations of personal freedom should be adjusted to reflect regional variations in income. Amending the SCCL to provide loss of use damages for illegally confiscated property might also make pursuing a state compensation claim more worthwhile. Official resistance to implementation of the SCCL must also be dealt with. Such recalcitrance increases the risk that procedural weaknesses in the law will be manipulated and heightens the need for these flaws to be addressed rapidly. Addressing procedural weaknesses in the law may in turn encourage claimants to pursue valid claims. With fewer procedural obstacles in the way, claimants will have an improved chance of success and may begin to view the SCCL as a legitimate mechanism through which to respond to procuratorial misconduct.

Promulgating local implementing regulations may be one way to deal with these problems. Some local governments have passed SCCL implementing regulations that address substantive and procedural problems in the law, a development that has attracted the attention of the NPC and China’s Supreme People’s Court.259 While the passage of such local regulations is a positive development, reliance on local regulations may lead to disparate application of the SCCL and leave some victims of misconduct unprotected; local governments may enact different regulations or may choose not to enact such regulations at all. Consequently, amending the SCCL or national implementing regulations for the SCCL would be a more effective long-term solution for dealing with problems that have arisen in the implementation of the law.

The need to improve the SCCL and its implementation should not detract from the great significance of this piece of legislation, however. While this Comment has criticized certain aspects of the law, from a broad perspective the SCCL represents an important achievement in China’s legal reform effort. The SCCL is a significant symbolic step because its very

259 If You Damage Things, You Must Pay!, supra note 162.
enactment is recognition by the state that procurators and other officials make mistakes and that China’s citizens should be compensated for such misconduct. It is also substantively important because individuals now have a concrete, officially recognized mechanism through which to challenge procuratorial misconduct and, if necessary, to compel an external review of procuratorial acts. Thus, while the law contains deficiencies and the number of compensation cases is not large at present, the SCL provides one of the few remedies through which citizens can protect themselves and take action against procuratorial abuse. In this sense, the SCL is an important step in the right direction.