

How the Supreme People's Court Drafts Criminal Procedure Judicial Interpretations

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4.1 Introduction

Issuing formal interpretations of law, not connected with specific cases,^{*} is one of the most important functions of the Supreme People's Court (SPC). SPC judicial interpretations (司法解释) have a major impact on how Chinese law is implemented. The SPC continues to focus on this function for reasons connected with the slow pace and abstract language of Chinese legislation, although Chinese scholars and lawyers sometimes criticise the SPC's expansive reading of laws. This chapter will not address that criticism, but rather focus on the way in which the SPC drafts judicial interpretations in the area of criminal procedure law. Judicial interpretations on criminal procedure matters have implications for persons who may enter the Chinese criminal justice system and others.

Drawing on research into the substance of and process by which the SPC drafts judicial interpretations in the area of criminal procedure law,¹ this chapter argues that the drafting process proceeds in a "gated community" of representatives from the relevant authorities. The process creates legal rules that are politically acceptable, legally sound and practicable in the Chinese legal environment. The drafting reflects the quasi-administrative

^{*} The author thanks Dongyu Sun for his research assistance and certain unnamed individuals for sharing their insights with her and others for their comments on earlier drafts of the chapter.

¹ The author draws on a body of authoritative written sources, including SPC documents and publications, particularly *Reference to Criminal Trial*, the regular bulletin of SPC's five criminal divisions, and a recent book by a retired senior SPC judge that is the product of an SPC-sponsored research project, as well as related scholarly literature. Youhai Sun (孙佑海) et al., *Research on the Theory and Practice of Judicial Interpretations* (司法解释的理论与实践研究) (Beijing: China Legal Publishing House (中国法制出版社), 2019). Sun's contributors include senior, experienced judges. This chapter also draws on the author's discussions and correspondence with a number of current and former SPC judges and other legal professionals who have provided additional details. It was written before the SPC released a comprehensive judicial interpretation of the Criminal Procedure Law in 2021.

way in which the SPC operates: professional yet politically attuned. Although discrete efforts are being made to strengthen human rights protections and procedural protections (e.g. increasing ‘trial-centred procedures’) in the course of criminal procedure reforms, those efforts will be restricted to the confines of what is permitted by the political authorities.

This chapter considers the drafting process of judicial interpretations in the area of criminal procedure law against two aspects of China’s judicial reforms.² The first relates to improving the mechanics of judicial interpretation, expressed as ‘strengthening and standardising of the judicial interpretation of law’, as part of the ‘unification of legal standards’ required by the 2014 Communist Party of China (CPC) 4th Plenum Decision, the 4th Five-Year Judicial Reform Plan, the 5th Five-Year Judicial Reform Plan, and a number of SPC documents.³ Article 26 of the 5th Five-Year Judicial Reform Plan has specific language on improving the drafting process, which may mean that the relevant regulations on judicial interpretation drafting will be bolstered by 2023, so that the practices described in this article may evolve.⁴

² This procedure, or a variant of it, has resulted in the 2021 SPC Interpretation on the Application of the Criminal Procedure Law of the PRC (最高人民法院关于适用中华人民共和国刑事诉讼法的解释) of 26 January 2021, www.court.gov.cn/fabu-xiangqing-286491.html, English translation available at www.chinalawtranslate.com/en/spccplinterp2021/ (last accessed 7 April 2021). The text of this article was written before its issuance.

³ CPC Central Committee Decision concerning Several Major Issues in Comprehensively Advancing Governance According to Law (中共中央关于全面推进依法治国若干重大问题的决定) of 10 October 2014, www.chinalawtranslate.com/fourth-plenum-decision/?lang=en (last accessed 6 November 2020). SPC Opinion on Deepening Reform of the People’s Courts Comprehensively: Outline of the 4th Five-year Reform of the People’s Courts (2014–2018) (最高人民法院关于全面深化人民法院改革的意见——第四个五年改革纲要 2014–2018) of 26 February 2015, www.chinacourt.org/law/detail/2015/02/id/148096.shtml (last accessed 6 November 2020). The newest judicial reform document is the SPC Opinion on Deepening the Reform of the Judicial System with Comprehensive Integrated Reforms – Outline of the 5th Five-Year Reform Program of the People’s Courts (5th Five-Year Judicial Reform Plan) (2019–2023) (最高人民法院关于深化人民法院司法体制综合配套改革的意见——人民法院第五个五年改革纲要2019–2023) of 27 February 2019, www.court.gov.cn/fabu-xiangqing-144202.html (last accessed 6 November 2020); English translation available at www.chinalawtranslate.com/supreme-peoples-court-opinions-on-deepening-the-reform-of-the-judicial-system-with-comprehensive-integrated-reforms-outline-of-the-fifth-five-year-reform-program-of-the-peoples-courts-2019-2023/?lang=en (last accessed 6 November 2020).

⁴ Art. 26 requires: ‘Strengthen and regulate work on judicial interpretations, complete mechanisms for researching, initiating, drafting, debating, reviewing, publishing, cleaning up, and revoking judicial interpretations, to improve centralized management and report review mechanisms.’ See comments on the relevant section of the reform programme at Susan

The second aspect relates to criminal procedure reforms. Article 43 of the 5th Five-Year Judicial Reform Plan lists many criminal procedure matters on which the SPC will focus in the next five years. Among the many matters listed are several linked to overall ‘trial-centered criminal procedure’: pre-trial conferences; more effective exclusion of illegal evidence; sentencing procedures when defendants have been convicted under plea leniency arrangements and after trial; standards and procedures for *in-absentia* trials; improved infrastructure for property related to a criminal case, including confiscation of property in the course of criminal proceedings.⁵ This means that in the next few years the SPC will draft many criminal procedure judicial interpretations.⁶ The SPC issued a comprehensive

Finder, ‘China’s New Judicial Reforms on Case Law and Other Guidance’, *Supreme People’s Court Monitor*, 22 June 2019; <https://supremepeoplescourtmonitor.com/2019/06/22/chinas-new-judicial-reforms-on-case-law-other-guidance/> (last accessed 6 November 2020).

⁵ Art. 25 states: ‘Strengthen standardization of trial processes. Draft trial process standards that cover criminal, civil, administrative, state compensation, and other specialized fields. Regulate standards for case closure reports and archiving, and optimize the case file transfer process.’ Art. 43 states: ‘Advance reforms of the criminal procedure system. Deepen the trial-centered criminal procedure reform, advance implementation of the pretrial conference system and the system for exclusion of illegal evidence, improve procedures for courtroom investigations, implement systems for witnesses, evaluators, and investigators to appear in court to testify; implement and improve rules for evidence collected by electronic investigation being sent along with the case and investigated at court; ensuring that hearings play a substantive function. Regulate sentencing procedures for cases where guilt is admitted, and cases where guilt is not admitted. Strictly implement the system of criminal trials in absentia, and systems for the confiscation of unlawful gains where the defendant is at large or deceased, and refine related operational provisions. Expand the use of the smart case-handling assistant system for criminal cases, improve basic evidence guidance in different phases of criminal cases, and cooperate with central departments in embedding it in a cross-departmental big data case-handling platform. Further support pilots on full coverage of defense counsel in criminal cases, improve mechanisms for work connectivity, and fully safeguard the practice rights of defense lawyers. Explore the establishment of systems for giving notice for defense in final review of death penalty cases, and establish related work procedures. Improve systems for the enforcement of criminal penalties, and promote systems for the uniform enforcement of criminal penalties. Promote improvements of the work mechanisms for the transfer of “sick, disabled, and pregnant” criminals for enforcement, to resolve the challenges in transferring criminals who were released pretrial for enforcement. Improve mechanisms for transferring the portion of rulings in criminal cases relating to property for enforcement, and for removal from enforcement. Comprehensively advance people’s courts nationwide online use of a comprehensive and centralized information platform system for assets involved in cases, improving mechanisms for gathering and uploading relevant data. Regulate standards for review of case filing in criminal collateral appeals cases, and improve procedures and requirements for review of criminal collateral appeals cases.’

⁶ Susan Finder, ‘Supreme People’s Court’s 2020 Judicial Interpretation Agenda’, *Supreme People’s Court Monitor*, 2 April 2020, <https://supremepeoplescourtmonitor.com/2020/04/02/supreme-peoples-courts-2020-judicial-interpretation-agenda/> (last accessed 6 November 2020).

interpretation of the Criminal Procedure Law in early 2021 that incorporated provisions on many of these issues.⁷

The National People's Congress (NPC) and its Standing Committee (NPCSC) have omitted the operative details of many aspects of the Criminal Procedure Law, apparently intentionally delegating authority to the SPC to supplement the broad principles in legislation in judicial interpretations. Similarly, authority is delegated to the Supreme People's Procuratorate (SPP). The Ministry of Public Security (MPS) issues related regulations under its regulatory authority. Although scholars and lawyers have criticised the practice of the SPC and SPP issuing what are described as 'abstract' judicial interpretations, the length of the 2013 and 2021 SPC judicial interpretations of the Criminal Procedure Law indicates that the law itself supplies insufficient rules for the courts to hear criminal cases.⁸ The drafting process is a uniquely Chinese process – policy oriented, technocratic, consultative, non-transparent, and more solicitous of the views of the relevant authorities.⁹ The topic of SPC judicial interpretations has attracted a great deal of scholarship both inside and outside China, but much of it fails to explore the institutional imperatives and procedures that surround their drafting.¹⁰

⁷ 2021 SPC Interpretation on the Application of the "Criminal Procedure Law of the PRC".

⁸ SPC Interpretation on the Application of the Criminal Procedure Law (最高人民法院关于适用中华人民共和国刑事诉讼法的解释) of 20 December 2012, English translation available at www.chinalawtranslate.com/en/The-Supreme-People's-Court-interpretation-on-the-application-of-the-Criminal-Procedure-Law/ (last accessed 6 November 2020).

⁹ Qiang Zhou (周强), Report of the SPC concerning Strengthening Criminal Trial Work (最高人民法院关于加强刑事审判工作情况的报告), 23 October 2019, www.npc.gov.cn/npc/c30834/201910/9530cb30be344843a2c9792e3215b515.shtml (last accessed 6 November 2020).

¹⁰ The English language literature includes, e.g., Lo Vai Io, 'Towards the Rule of Law: Judicial Lawmaking in China' (2016) 28 *Bond Law Review*, 149–168; Ronald Keith and Zhiqiu Lin, 'Judicial Interpretation of China's Supreme People's Court as "Secondary Law" with Special Reference to Criminal Law' (2009) 23 *China Information*, 223–255; Mo Zhang, 'Pushing the Envelope: Application of Guiding Cases in Chinese Courts and Development of Case Law in China' (2017) 26 *Washington International Law Journal*, 269–306. The Chinese language literature is larger and includes, e.g., Mingsheng Yuan (袁明圣), 'An Exploration of the Phenomenon of the "Legislationization" of the Judiciary (司法解释"立法化"现象探微)' (2003) (2) *Studies in Law and Business* (法商研究), 3–12; Weiguo Wang (王伟国), 'Four Types of Judicial Law Making by the Supreme People's Court: Focusing on Civil and Commercial by the Supreme People's Court: Focusing on Civil and Commercial Judicial Interpretations (最高人民法院司法造法的四种形态——以民商事类司法解释为对象)' (2008) (4) *Research on Judgments and Interpretations* (判解研究), 145–160; Zhenbao Jin (金振豹), 'Discussion of the Supreme People's Court's Abstract Judicial Interpretation Power (论最高人民法院的抽象司法解释)' (2010) (2) *Journal of Comparative Law* (比较法研究), 55–66; Ding Qi

This chapter first describes the legal basis for judicial interpretations, then introduces the multistage drafting process as it is carried out in the ‘gated community’, and assesses the impact of this drafting.

4.2 Some Background on Judicial Interpretations

Several Chinese laws grant the SPC the authority to issue formal interpretations of law (along with the SPP): the 1981 NPCSC Resolution on Providing an Improved Interpretation of law; the People’s Courts Organisation Law, and the Legislation Law.¹¹ Art. 104 of the Legislation Law, as amended in 2015, gives the most complete description of the SPC’s authority to issue interpretations. narrowing the broader grants in earlier law. The Legislation Law states that the SPC can interpret ‘on the specific application of the law in adjudication work’ adding that the interpretations ‘must mainly focus on specific legal provisions and be consistent with legislative purposes, principles and intent’.¹² As this author wrote in 1993, during that period some of the judicial interpretations that the SPC issued were inconsistent with legislation promulgated by the NPC or NPCSC.¹³ The SPC is required to file its judicial interpretations with the NPCSC within thirty days of promulgation. It must seek an interpretation from the NPCSC, called informally a ‘legislative interpretation’, if the specific meaning of a provision needs to be further defined or new developments make it necessary to define the basis on which to apply the law.

The SPC updated its 1997 judicial interpretation procedural rules in 2007, as the Judicial Interpretation Work Regulations (2007

(齐珩), ‘SPC Judicial Interpretation Authority: Interpreting law or Making Law (最高人民法院司法解释权: 释法抑或造法)’ (2016) (1) *Xiamen University Law Review* (厦门大学法律评论), 66–77.

¹¹ Resolution of the Standing Committee of the National People’s Congress Providing an Improved Interpretation of the Law (全国人民代表大会常务委员会关于加强法律解释工作的决议) of 10 June 1981; People’s Courts Organisation Law (中华人民共和国人民法院组织法) of 1 July 1979, latest revision 26 October 2018.

¹² Interpretation of questions involving the specific application of laws and decrees in adjudication work shall be provided by the Supreme People’s Court. Interpretation of questions involving the specific application of laws and decrees in the procuratorial work of the procuratorates shall be provided by the Supreme People’s Procuratorate. Art. 104 PRC Legislation Law (中华人民共和国立法法) of 15 March 2000, amended in 2015. The 2000 version had been silent about judicial interpretations. However, the 2006 NPC Supervision Law mentions judicial interpretations, requiring them to be filed with the NPCSC; www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21906903.htm (last accessed 6 November 2020).

¹³ Susan Finder, ‘The Supreme People’s Court of the People’s Republic of China’ (1993) 7 *Journal of Chinese Law*, 145–223.

Regulations).¹⁴ In 2015, the SPC issued a document giving additional guidance on judicial interpretation procedures. The notice is entitled the 'Notice concerning the Strict Enforcement of Requirements in Judicial Interpretation Work and the Strengthening of Judicial Interpretation Work' (2015 Notice) although it does not seem to be generally available on public databases.¹⁵ Both the 2007 Regulations and 2015 Notice apply to the drafting of judicial interpretations in all substantive areas and should be read together.

The Legislation Law does not address a number of important points. One critical one is the authority of SPC judicial interpretations: Art. 5 of the 2007 Regulations states that SPC judicial interpretations have the force of law, and Art. 27 permits judicial interpretations to be cited in court judgments. It is unclear whether they are binding on entities and individuals outside the court system, and there is a great deal of scholarly disagreement on that point.¹⁶ What can be said safely is that they are considered highly authoritative to legal practitioners.

A second point that the Legislation Law does not address is the form of judicial interpretations. The 2007 Regulations designate four types of documents as 'judicial interpretations', including one type called 'interpretations' – 解释. According to the 2007 Regulations, documents so designated relate to the application of a particular law or the application of law to a particular type of case or issue in the course of court trials. They take the form of quasi-legislation, unconnected to a judicial decision in a specific case.

The 2007 Regulations and the 2015 Notice together set forth principles for the drafting of judicial interpretations. The latter provides additional guidance on implementing the broad principles in the former. Art. 2 of the 2007 Regulations provides that judicial interpretations must be formulated according to law and the related legislative spirit (根据法律和有关立法精神), requiring interpretations to consolidate the practical needs of adjudication work (结合审判工作实际需要).

The 2015 Notice adds more details to guide the drafters of judicial interpretations. Art. 1 requires that judicial interpretations respect the original intention (原意) of the legislation, and be directed towards resolving actual and difficult issues that the courts encounter in applying

¹⁴ SPC Regulations on Judicial Interpretation Work (最高人民法院关于司法解释工作规定) of 9 March 2007, which replaced initial regulations issued on 1 July 1997.

¹⁵ 最高人民法院关于严格执行司法解释工作规范切实加强司法解释工作的通. This notice, which addresses eight broad issues, seems to be missing from Chinese electronic databases, although it was publicly distributed.

¹⁶ Youhai Sun et al., *Research on the Theory and Practice of Judicial Interpretations*, at 27.

the law.¹⁷ Art. 20 of the 2007 Regulations and Art. 1 of the 2015 Notice state that the interpretation must not exceed the limits of the SPC's authority. Finally, judicial interpretations must reflect the principal views of the relevant authorities.¹⁸

4.3 Judicial Interpretation Drafting Procedures

4.3.1 *The Role of the Party*

As SPC president Zhou Qiang described it in late 2019, it was the Party that announced major goals for the reform of criminal procedure (推进刑事诉讼制度改革作出重大部署). He used similar language when introducing forthcoming criminal procedure reforms (conscientiously implement the reform goals set by the Party Centre (认真落实党中央改革部署)). This language can be understood to refer to longer term reform measures, such as those set out in the 5th Five-Year Court Reform Plan. As will be further explained below, additionally, Party policy led campaigns may also require the SPC to draft ad hoc judicial interpretations. The role of Party institutions in the drafting of judicial interpretations will be explained below.

4.3.2 *How the Drafting Process Starts*

How the drafting process starts is based on the 2007 Regulations and 2015 Notice, and supplemented by bureaucratic custom. The 2007 Regulations refer only to the drafting of judicial interpretations that had been incorporated into the annual list that the Research Office had compiled and for which it had obtained SPC senior leadership approval (立项). However, a close reading of the 2015 Notice reveals that there are also ad hoc judicial interpretation projects (临时司法解释立项). Judge Wu Zhaoxiang (Judge Wu), deputy head of the SPC's Research Office defined ad hoc project approval of judicial interpretations as follows: because of special situations (因特殊情况), related departments (有关部门) [this appears to be a reference to the Central Political–Legal Committee (CPLC), the Central Commission for Discipline Inspection (CCDI)/National Supervision Commission (NSC), the Party Centre or other such departments] propose it. Further, the Research Office reports the ad hoc judicial interpretation project to the responsible vice president for review before approval by the

¹⁷ Art. 3 of the 2007 Regulations and Section 1 of the 2015 Notice.

¹⁸ Art. 20 of the 2007 Regulations, 2015 Notice.

executive vice president or SPC president. He noted that these ad hoc approvals constitute a significant proportion of the judicial interpretation project approvals issued annually. He criticised them for doing great damage to the planning of judicial interpretation.

Under the 2007 Regulations, the Research Office is the gatekeeper for reviewing proposals for judicial interpretations, examining and coordinating drafts of judicial interpretations, and submitting decisions related to judicial interpretations to senior SPC leaders.¹⁹ The 2007 Regulations require the SPC to start the judicial interpretations drafting process (through project approval) if the SPC's adjudication committee makes a request. Other institutions, individuals and divisions of the SPC may submit proposals. Those include higher people's courts, the People's Liberation Army Military Court, NPC representatives, representatives of the China People's Political Consultative Conference (CPPCC), government bodies or institutions, individuals and operational departments (业务部门) of the SPC.²⁰ Although there is no definition of the 'operational departments' of the SPC, they are generally understood to be the various divisions (庭) of the Enforcement Bureau and the Research Office.

In some situations, the team of SPC judges who deal with a given issue, as well as their lower-court counterparts, find that the lack of relevant legal infrastructure complicates their work. They will advocate for a new judicial opinion by preparing a report on the issue, which is reported level by level up the SPC hierarchy up to the senior leadership level. This practice mirrors the typical practice of the party and state organs, as illustrated by the drafters of the Concealing and Disguising of Assets Interpretation.²¹

Because the law and judicial interpretations lacked clear provisions on these issues [i.e. the concealing and disguising of assets] the #4 Criminal Division of the SPC, on the basis of preliminary research, reported for approval level by level and as approved by the SPC adjudication committee after discussion, obtained project approval for this interpretation, and thereafter a drafting small group was formed.²²

¹⁹ Arts. 11–13 and Chapter III of the 2007 Regulations.

²⁰ Art. 10 of the 2007 Regulations.

²¹ SPC Interpretation on Several Issues on the Application of Law in the Trial of Criminal Cases on Cover-up or Concealment of Crime-Related Income and Proceeds Therefrom (最高人民法院关于审理掩饰、隐瞒犯罪所得、犯罪所得收益刑事案件适用法律若干问题的解释) of 29 May 2015.

²² Jianhong Lu (陆建红), Hua Yang (杨华) and Dongfang Cao (曹东方), 'Understanding and Application of the "Interpretation of the SPC of Several Issues on the Application of Law in the Trial of Criminal Cases on the Disguising or Concealment of Crime-Related

After reviewing the proposals (and accompanying documents), the Research Office forwards them to the SPC vice president in charge for initial approval if they were made by an entity other than the SPC adjudication committee.²³ When proposals arise from operational departments (divisions and offices) of the SPC, the Research Office consolidates them for incorporation into the SPC's annual judicial interpretation plan, which is subject to adjudication committee project approval. The SPC's judicial interpretation plans have been made public annually since 2018.²⁴

4.3.3 Drafting Process

As will be further described below, judicial interpretations in criminal procedure law are generally drafted through 'gated community procedures' – technocratic, bureaucratic, consultative, non-transparent and more solicitous of the views of the relevant authorities, with the goal of 'conscientiously fulfilling the goals set by the Party Centre'. One experienced Chinese criminal court judge described the procedures as 'building a cart behind closed doors' (闭门造车), but the expression fails to convey the more accurate picture of the many collaborators of the cart builders.

Income and Proceeds Therefrom" (《关于审理掩饰隐瞒犯罪所得，犯罪所得收益刑事案件适用法律若干问题的解释》的理解与适用) (2016) 104 *Reference to Criminal Trial* (刑事审判参考), 132–133.

²³ Art. 12 of the 2007 Regulations.

²⁴ 2018 Judicial Interpretation Plan (关于印发《人民法院2018年度司法解释立项计划》的通知), issued by the General Office of the SPC (最高人民法院办公厅) on 2 July 2018, explained further in Susan Finder, 'What's on the Supreme People's Court Judicial Interpretation Agenda I', *Supreme People's Court Monitor*, 19 July 2018, <https://supremepeoplescourtmonitor.com/2018/07/19/whats-on-the-supreme-peoples-judicial-interpretation-agenda-i/>, and Susan Finder, 'What's on the Supreme People's Court Judicial Interpretation Agenda II', *Supreme People's Court Monitor*, 20 July 2018, <https://supremepeoplescourtmonitor.com/2018/07/20/whats-on-the-supreme-peoples-judicial-interpretation-agenda-ii/>; 2019 Judicial Interpretation Plan (最高人民法院办公厅关于印发最高人民法院2019年度司法解释立项计划的通知), issued by the General Office of the SPC on 29 April 2019, explained at Susan Finder, 'Supreme People's Court 2019 Judicial Interpretation Agenda I', *Supreme People's Court Monitor*, 25 November 2019, <https://supremepeoplescourtmonitor.com/2019/11/25/supreme-peoples-courts-2019-judicial-interpretation-agenda-i/> and Susan Finder, 'Supreme People's Court 2019 Judicial Interpretation Agenda II', *Supreme People's Court Monitor*, <https://supremepeoplescourtmonitor.com/2019/11/26/supreme-peoples-courts-2019-judicial-interpretation-agenda-ii/>; 2020 Judicial Interpretation Plan (最高人民法院2020年度司法解释立项计划)的通知, explained at Susan Finder, 'Supreme People's Court 2020 Judicial Interpretation Agenda', *Supreme People's Court Monitor*, 2 April 2020, <https://supremepeoplescourtmonitor.com/2020/04/02/supreme-peoples-courts-2020-judicial-interpretation-agenda/> (all last accessed 6 November 2020).

4.3.3.1 Internal Procedures

It can be seen from the annual judicial interpretation agenda that one or more operational divisions of the SPC are tasked with the initial drafting of a judicial interpretation if the issue concerned is relatively focused. The Research Office takes the lead in more general interpretations.²⁵ A drafting team is generally designated. The Research Office, one of whose subdivisions focuses on criminal law issues, has been responsible for drafting judicial interpretations on criminal law and procedure issues, or their coordination, since the early 1980s.²⁶

For example, in the 2020 judicial interpretation agenda, Item 32 is: 'Interpretation on the Application of the PRC Criminal Procedure Law – Responsibility of the Research Office', while 'Provisions on Standards for Changing Judgments in Retrial of Criminal Cases' is the responsibility of the Trial Supervision Division.²⁷

The crucial elements of the drafting process, according to Art. 17 of the 2007 Regulations and Judge Wu's writings, are 'thorough investigation and research', summary of practical trial experience, and the 'broad solicitation of opinions'. Judge Wu noted that the drafting must be 'problem oriented' (坚持问题导向), that is, deal with practical issues.

Close observation of and discrete inquiries into the drafting process of judicial interpretations suggest that 'thorough investigation and research' may include:

- (1) a thorough review of relevant legislation, judicial interpretations and cases;
- (2) consultation among affected divisions or offices of the SPC;
- (3) reports of difficult cases or differences in approach from the lower courts; visiting selected courts; and reviewing reports and case files, to understand issues that arise 'on the frontline';
- (4) for major complex matters, commissioning research reports from the China Institute of Applied Jurisprudence (CIAJ) or the Research Office, possibly drawing on legislation in major jurisdictions;
- (5) for major complex matters, engaging in joint research or designated research with a university;

²⁵ Art. 16 of the 2007 Regulations.

²⁶ Its functions are further set out in the 2000 Guidelines on Internal Institutions of the SPC. Authority of the Entities within the SPC and newly established Institutional Units (最高人民法院机关内设机构及新设事业单位职能), issued by the SPC on 4 December 2000, www.dffy.com/sifashijian/ziliao/201402/35087.html (last accessed 6 November 2020).

²⁷ See above, note 24.

- (6) with necessary approval, undertaking pilot projects; and
- (7) with necessary approval, visiting foreign jurisdictions or otherwise engaging with foreign or international legislation.

The first step in the drafting process is to engage in research on relevant legislation, including prior judicial interpretations and other judicial documents, which had likely been done when reports were assembled to obtain approval to start drafting. The intent is to see what provisions are needed or exist, and which provisions should be incorporated into the judicial interpretation being drafted.

4.3.3.2 Research and Input from Other SPC Divisions and the Lower Courts

The usual practice is as follows. Once a draft prepared by the Research Office or one of the SPC's criminal divisions is considered to be in acceptable form and it has been cleared by either the head or deputy head of the division concerned, it is sent to other relevant SPC divisions (and the Research Office) for comments. Drafters solicit information from the lower courts when drafting judicial interpretations to understand the issues that local judges face in practice, sometimes visiting selected courts.²⁸ For example, the drafters of the Concealing and Disguising of Assets Interpretation described visiting a number of local courts during the research stage:

Drafted a preliminary draft, thereafter amended it multiple times, also went to Chongqing, Sichuan, Jiangsu and other provinces and directly administered cities for research, held research workshops²⁹ in which criminal division judges from three levels of courts – higher, intermediate, and basic level participated; heard their views, amended the draft article by article, then arrived a consultation draft.³⁰

Justice Hu Yunteng commented on consulting the lower courts in the process of drafting the 2012 comprehensive interpretation of the Criminal Procedure Law:

²⁸ Susan Finder, 'How the SPC Serves National Strategy and "Makes Law": The Pilot FTZs Opinion and Its Implications', in Julien Chaisse and Jiaxiang Hu (eds.), *International Economic Law and the Challenges of the Free Zones* (Alphen upon Rhine: Kluwer Law International, 2019), 277–298.

²⁹ The Legislation Law mentions the use of workshops. For further information, see Jamie Horsley, 'Public Participation in the People's Republic: Developing a More Participatory Governance Model in China', at 8, https://law.yale.edu/system/files/documents/pdf/Intellectual_Life/CL-PP-PP_in_the_PRC_FINAL_91609.pdf (last accessed 6 November 2020).

³⁰ Finder, 'How the SPC Serves National Strategy and "Makes Law"', 277.

After forming a more mature draft for comment, it was sent to the nation's courts for extensive consultation, and it was explicitly requested that the high courts carefully study and pay attention to the opinions of the lower courts, especially the front-line judges of the grass-roots courts. Many intermediate level courts held special symposiums for this purpose. An in-depth discussion of the draft for comments was conducted. Each of the high courts responded to the SPC with amendments that played an important role in modifying and improving the judicial interpretation.³¹

4.3.3.3 Commissioning Research by the CIAJ

Some judicial interpretations or criminal procedure reform projects are supported by research undertaken by the CIAJ, the SPC's in-house think tank.³² For example, the CIAJ has provided research on issues such as the confiscation of illegal income, domestic violence crimes and plea leniency.³³ It has also convened workshops on some of these issues, sometimes involving defence counsel as well as the criminal justice authorities.

4.3.3.4 Joint Research with a University

In some instances, the SPC will undertake a joint research project with a university or designate a university or research institute to generate additional research on a complex issue that is the subject of judicial reform or judicial interpretation. Since 2015, the SPC has annually sponsored large- and small-scale research on topics of institutional interest, many of which are related to judicial interpretation drafting.³⁴

³¹ Yunteng Hu (胡云腾), 'A Discussion of the Special Points and High Points of the Criminal Procedure Law Judicial Interpretation (谈谈刑事诉讼法司法解释的特点和亮点)', 9 April 2013, www.chinacourt.org/article/detail/2013/04/id/939241.shtml (last accessed 6 November 2020).

³² See more on the CIAJ at Susan Finder, 'Judicial Reform Post 19th Party Congress', *Supreme People's Court Monitor*, 22 December 2018, <https://supremepeoplescourtmonitor.com/2017/12/22/judicial-reform-post-19th-party-congress/> (last accessed 6 November 2020).

³³ See the research projects listed here: <http://yyfx.court.gov.cn/news/xq-372.html>; <http://yyfx.court.gov.cn/news/xq-368.html>; <http://yyfx.court.gov.cn/news/xq-366.html> (last accessed 6 November 2020); CIAJ Successfully Holds Plea Leniency System and the Amendment of the Criminal Procedure Law Workshop (法研所成功举办“认罪认罚从宽制度与刑事诉讼法修改”研讨会) of 19 June 2018, <http://yyfx.court.gov.cn/news/xq-688.html> (last accessed 6 November 2020).

³⁴ Tender Notice of the 2018 Annual Enforcement Research Project of the SPC (最高人民法院2018年度执行研究课题招标公告) of 10 July 2018, www.court.gov.cn/zixun-xiangqing-106441.html (last accessed 6 November 2020); 'SPC Holds an Acceptance Review Meeting to Evaluate the Research Products of the First Group of Scholars (最高法院召开首批法律研修学者研究项目成果评审验收会)', *People's Court Daily*, 18 January 2017, http://rmfbyb.chinacourt.org/paper/html/2017-01/18/content_120969.htm?div=-1 (last accessed 6 November 2020).

For example, Nanjing Normal University concluded a collaboration agreement with the SPC's No. 2 Circuit Tribunal to carry out research in this area.³⁵ In 2016, Nanjing Normal University won a bid for a major SPC-funded research project 'on the transformation of criminal collateral appeals cases to litigation procedure'.³⁶ A discussion of the results of the research project attracted prominent criminal law and procedure specialists from across academia and the judiciary.³⁷ This topic is related to the '2017 Opinion on Gradually Implementing Systems for Lawyers' Representation in Collateral Appeals', a joint document issued by the SPC and Ministry of Justice (MOJ). It is linked in turn to Item No. 36 on the SPC's 4th Court Reform Outline: to 'promote the establishment of a system for lawyer representation in complaint appeals [collateral appeals] cases'.³⁸ The details of this mechanism still have not been finalised, so this same issue appears in the 5th Court Reform Outline.³⁹

4.3.3.5 Pilot Projects

The SPC sometimes undertakes pilot projects such as for the 2021 Interpretation of the Criminal Procedure Law or designates local courts as pilot courts in major proposed reforms, which often require high-level Party approval. Judge Hu Shihao, former head of the SPC's Judicial Reform Office, noted at a press conference:

As to the plea leniency reform, after the last meeting of the Central Leading Group for Comprehensively Deepening Reforms, the NPCSC has passed this decision, authorising the piloting of plea leniency in some areas. This decision designates a total of eighteen places.⁴⁰

³⁵ SPC's #2 Circuit Court and China's rule by law modernization research institute have strategic cooperation (最高法院第二巡回法庭与中国法治现代化研究院战略合作), 15 April 2016, <http://jiangsu.sina.com.cn/edu/jyzx/2016-04-19/education-ixriqqv6273797.shtml> (last accessed 6 November 2020).

³⁶ SPC Releases the Results of the 2016 Major Judicial Research Projects Tendering (最高人民法院公布2016年度司法研究重大课题中标结果), 2 November 2016, www.court.gov.cn/zixun-xiangqing-29621.html (last accessed 6 November 2020).

³⁷ A Think-Tank Conference Is Held to Discuss the Litigationisation of Criminal Petitioning (刑事申诉诉讼化改造智库研讨会召开), 5 September 2017, www.jsthinktank.com/jiangsuzhiku/njsfdxgzgfdzdhyyj/yjdt/201709/t20170905_4608476.shtml (last accessed 6 November 2020).

³⁸ Opinions on Gradually Implementing Systems for Lawyers' Representation in Collateral Appeals (关于逐步实行律师代理申诉制度的意见), jointly issued by the SPC, SPP and MOJ on 1 April 2017.

³⁹ See above, note 5.

⁴⁰ www.chinacourt.org/chat/fulltext/listId/45451/template/courtfbh20160913.shtml (last accessed 6 November 2020).

Pilot projects are undertaken only for the most critical reforms, which in the SPC's view need piloting before being implemented nationwide. The best-known of these pilot projects are the plea leniency pilots, currently being piloted in eighteen cities, as analysed comprehensively in an article by Jeremy Daum.⁴¹ As Daum explains, the pilot system generally focuses on sentence reductions, and incorporates summary and expedited procedures set out in the Criminal Procedure Law.

Less well known is a pilot project to provide 'full coverage of lawyers in criminal cases'.⁴² One of the provinces designated to pilot the proposed reform was Guangdong. Therefore, the Guangdong Higher People's Court and Guangdong Judicial Department issued guidance to the lower courts on the project's implementation.⁴³ The SPC required the local courts, including the Guangdong Higher People's Court, to submit an interim report on the pilots,⁴⁴ which are further summarised in Daum's overview. He comments that the reform being piloted has left many legal professionals unhappy and dissatisfied. Lawyers brought into the duty lawyer system feel they are being burdened with a new responsibility that they lack the power to properly fulfil, a sentiment flagged in a recent meeting held by the SPC and MOJ.⁴⁵

4.3.3.6 Engaging with the Outside World

The SPC considers legislation, case law, and operating systems and practices in major foreign jurisdictions when drafting judicial interpretations or other interpretation-type judicial normative documents. This includes research into and consideration of foreign legal materials and international documents, particularly if binding on China. Occasionally

⁴¹ Jeremy Daum, Plea Leniency Pilot Overview, www.chinalawtranslate.com/plea-leniency-pilot-overview/ (last accessed 6 November 2020).

⁴² These pilot projects are summarised at *ibid.*

⁴³ Notice of the Guangdong Higher People's Court and Guangdong Judicial Department on 'Measures to Launch Full Coverage of Defence Lawyers in Criminal Cases' (广东省高级人民法院, 广东省司法厅印发《关于开展刑事案件律师辩护全覆盖工作的实施办法(试行)》的通知) of 23 March 2018.

⁴⁴ Answers to Questions About the Pilot Work of the SPC and MOJ concerning Complete Provision of Defense Counsel in Criminal Matters (最高法司法部就刑事案件律师辩护全覆盖试点工作答问), 12 October 2017, www.court.gov.cn/shenpan-xiangqing-63032.html (last accessed 6 November 2020).

⁴⁵ SPC and MOJ Announce the Expansion of Full Coverage of Lawyers in Criminal Cases and Pilot of Lawyers Participating in Mediation (最高人民法院、司法部部署扩大刑事案件律师辩护全覆盖和律师调解试点工作), 29 November 2018, www.court.gov.cn/zixun-xiangqing-133301.html (last accessed 6 November 2020).

the drafting process involves visits to foreign jurisdictions or exchanges with foreign specialists.

Engaging with foreign and international law can range from the review of foreign or international law materials (the most common), to study visits, or joint workshops. It is clear that the SPC has also reviewed materials on plea bargaining in the United States. Judge Hu Shihao stated the following in a 2015 press conference at which he made several references to US practice.

We are exploring the reform of the trial mode of plea leniency . . . This system has a very good effect on our accurately striking against crimes and the protection of human rights. Some people have misunderstood it recently, and confused plea leniency with a US or foreign plea bargaining system.⁴⁶

Study visits in the area of criminal procedure law and joint research or workshops in the area of criminal procedure law appear to be less common in recent years. One recent exception also involves the plea leniency mechanism and duty lawyer scheme. A workshop supported by the Great Britain China Centre in 2019, was sponsored by the CIAJ and SPC, brought together persons from the SPC, local courts, MPS, SPP and criminal defence lawyers, as well as an English high court judge and senior crown court advocate.⁴⁷

The 4th Plenum Decision set out the Chinese government's position regarding reference to foreign models: 'learn from beneficial experiences in rule of law abroad, but we can absolutely not indiscriminately copy foreign rule of law concepts and models'.⁴⁸ Hence, drafters take a cautious approach towards adopting the approaches in foreign or international legislation. A more recent version of the foregoing sentiment, found in statements by SPC judges, derives from the 2017 visit of

⁴⁶ See 'Opinion on Further Advancing Optimization of Judicial Resources by Distinguishing Complicated and Simple Cases', press conference, 13 September 2016, www.chinacourt.org/chat/fulltext/listId/45451/template/courtfbh20160913.shtml (last accessed 6 November 2020).

⁴⁷ Summary of Views Expressed at a Sino-English Workshop on the Plea Leniency System, (会议综述|中英认罪认罚从宽制度研讨会观点综述), 23 April 2019, https://mp.weixin.qq.com/s/hC_9Lyf_B94kHWOvZJuHA (last accessed 6 November 2020) and www.isonharrison.co.uk/our-people/mark-foley/ (last accessed 6 November 2020). This workshop would have required clearance by the SPC's International Cooperation Bureau.

⁴⁸ SPC Interpretation on the Application of the Criminal Procedure Law of 20 December 2012, English translation available at www.chinalawtranslate.com/en/The-Supreme-People's-Court-interpretation-on-the-application-of-the-Criminal-Procedure-Law/ (last accessed 6 November 2020).

President Xi Jinping to the China University of Political Science and Law: ‘China shall actively absorb and refer to successful legal practices worldwide, but they must be filtered, they must be selectively absorbed and transformed, they may not be swallowed whole and copied.’⁴⁹ In describing the drafting of a judicial interpretation on money laundering,⁵⁰ Judge Liu Weibo commented:

On the one hand, as to the provisions in the convention documents [earlier defined as several international conventions relating to money laundering to which China is a party], we cautiously combined a summary of the domestic situation, and did not blindly transplant.⁵¹

In explaining the scope of the Asset Recovery Interpretation, SPP official Wan Chun noted that in drafting the provisions relating to criminal income,⁵² the drafters had considered relevant international conventions, including the United Nations Convention against Corruption and International Convention for the Suppression of the Financing of Terrorism. He stated that both conventions clearly stipulate that any property that is indirectly produced or obtained from criminal activity shall be deemed to be ‘illegal income’.⁵³

4.3.3.7 Broad Consultation in the Gated Community

As previously noted, the SPC is required to ‘extensively solicit opinions’.⁵⁴ An important part of the drafting of judicial interpretations

⁴⁹ Xi Jinping Investigates at China University of Political Science and Law (习近平在中国政法大学考察时强调) 3 May 2017, http://news.xinhuanet.com/politics/2017-05/03/c_1120913310.htm (last accessed 6 November 2020). See e.g. the statement by Judge Hu Shihao, then head of the SPC’s Judicial Reform Office, Learning Thinking and Balance (学思平治), Shihao Hu (胡仕浩), The Duty of Judicial System Reform is Deepening the Judiciary (司法体制改革的任务是深化), 23 December 2018, https://m.thepaper.cn/newsDetail_forward_2766865 (last accessed 6 November 2020).

⁵⁰ Interpretation of the SPC on Several Issues concerning the Specific Application of Law in the Trial of Money Laundering and Other Criminal Cases of 4 November 2009, www.lawinfochina.com/display.aspx?lib=law&id=7811&CGid (last accessed 6 November 2020).

⁵¹ Weibo Liu (刘为波), ‘Understanding and Application of the “Interpretation of the Supreme People’s Court on Several Issues concerning the Specific Application of Law in the Trial of Money Laundering and Other Criminal Cases” (关于审理洗钱等刑事案件具体应用法律若干问题的解释的理解与适用)’ (2016) 104 *Reference to Criminal Trial* (刑事审判参考), 175, 180.

⁵² 犯罪所得.

⁵³ Press Conference Regarding the Judicial Interpretation of the Procedure for Confiscating Illegal Income (关于举办违法所得没收程序司法解释新闻发布会) of 5 January 2017, <https://perma.cc/U3DH-HVVM> (last accessed 8 April 2021).

⁵⁴ Art. 17 of the 2007 Regulations and Sections 3 and 5 of the 2015 Notice.

concerning criminal law and procedure is consulting with 'relevant departments', with central authorities and institutions that can be characterised as a 'gated community'. One former SPC judge described the general process as follows. When an internal SPC draft is finalised, it is sent to other institutions for comment, including but not limited to the SPP, MPS, CPLC, CCDI/NSC, relevant committees and commissions of the NPC, MOJ and State Council Legislative Affairs Office (now part of the MOJ). So these institutions may be considered to be members of the 'gated community'. Other authorities may join the gated community if they have interests closely related to the topic. For example, for topics related to foreign currency payments, the views of the People's Bank of China or the State Administration of Foreign Exchange may be useful. Senior political authorities (including the CPLC) may require regular updates on the draft's progress if it pertains to a major societal issue.⁵⁵

The 2015 Notice calls on drafters to give the departments whose views are being solicited at least thirty days to consider the draft judicial interpretation.⁵⁶ Among the core 'relevant departments' are the SPP, NPC Legislative Affairs Commission (LAC) and the CPLC. It is understood that this is initiated through formal correspondence through the General Office of the SPC.⁵⁷

The SPC and SPP regularly issue joint interpretations to harmonise their approaches to issues affecting both institutions, particularly in the areas of criminal and criminal procedure law.⁵⁸ The 2015 Notice calls for the SPC drafting departments to strengthen their communication with the SPP and for the Research Office to take on the role of planning and cooperation and create a communication platform with the SPP.⁵⁹ It also requires that all joint judicial interpretations issued by the SPC and SPP be based on legislation and the consensus of both parties.⁶⁰ A jointly issued 2007 conference summary on judicial interpretations and a 2010 CPLC document imply that there has been tension between

⁵⁵ Interview with the author.

⁵⁶ Section 3 of the 2015 Notice.

⁵⁷ Correspondence on file with the author.

⁵⁸ Art. 26 of the SPP Notice on Issuing the Provisions of the Supreme People's Procuratorate on the Judicial Interpretation Work (最高人民法院关于印发最高人民法院司法解释工作规定的通知) of 13 May 2019, www.spp.gov.cn/xwfbh/wsfbt/201905/t20190513_417914.shtml#2 (last accessed 6 November 2020).

⁵⁹ Section 8 of the 2015 Notice.

⁶⁰ Notice concerning the Strict Enforcement of Requirements in Judicial Interpretation Work and the Strengthening of Judicial Interpretation Work.

the two institutions in the past, although neither document is publicly available.⁶¹

The 2015 Notice gives consultation with the NPC LAC a special status.⁶² This liaison is critical because the Legislation Law lacks a clear distinction between judicial interpretation and legislative interpretation. To avoid the awkward situation of a judicial interpretation that has been approved by the SPC judicial committee being struck down in whole or part by the NPCSC, the SPC and NPC LAC communicate during the drafting process, through interbureaucracy liaison. Although it is not clearly stated, one aspect of the SPC liaising with the NPC LAC is to determine the 'original intention' of the legislation.⁶³ Under the 2007 Regulations, the SPC is required to submit the judicial interpretation draft under examination to the relevant committees of the NPC or relevant department of the NPCSC to solicit their views before the final draft is submitted to the SPC adjudication committee.⁶⁴ Section 3 of the 2015 Notice states: 'liaison with the NPC LAC must be timely, and after major revisions to the judicial interpretation draft after consulting with the NPC LAC, the view of the NPC LAC should be solicited again'.

In the following description, Justice Hu Yuteng sheds further light on the drafting of the Criminal Procedure Law judicial interpretation, particularly on how the SPC interacts with the LAC.

In particular, we have paid special attention to and repeatedly listened to the opinions of the NPC LAC on the interpretation of the Criminal Procedure Law. The LAC researched the draft clause by clause and made many amendments and suggestions. The SPC has carefully studied and considered these opinions and suggestions, and revised the interpretation strictly according to the opinions of the LAC to ensure that the interpretation is in compliance with the law. If there were no stipulations in the law but it must be resolved in practice or the lower courts have provided firm views and disputed issues, we tried to report their opinions and communicate this with the NPC LAC. If the LAC agrees, it will be

⁶¹ These documents are mentioned by Sun Qian, deputy chief procurator; see Qian Sun (孙谦), 'Research on Judicial Interpretations by the SPP (最高人民法院司法解释研究)' (2016) (6) *China Legal Science* (中国法学), 40–54.

⁶² On the role of the NPC LAC, see Scholarship Highlight: The NPCSC Legislative Affairs Commission and Its "Invisible Legislators", 25 June 2018, <https://npcobserver.com/2018/06/25/scholarship-highlight-the-npcsc-legislative-affairs-commission-and-its-invisible-legislators/> (last accessed 6 November 2020).

⁶³ Chenghe Chu (褚宸舸), 'Discussion of the Effectiveness of Responses to Legal Inquiries (论答复法律询问的效力)' (2014) (4) *Political Science and Law*, republished at www.calaw.cn/article/default.asp?id=9644 (last accessed 6 November 2020).

⁶⁴ Art. 18 of the 2007 Regulations.

stipulated. The interpretation of the Criminal Procedure Law correctly grasps and reflects the original intention of the legislation and reflects the legislative spirit.⁶⁵

The SPC may consult with other committees of the NPC as appropriate. In the area of criminal law and criminal procedure law, the SPC must harmonise its draft with the views of powerful institutions in the 'gated community'. The relevant institutions will depend on the specific judicial interpretation. The views of the CPLC may be solicited or the draft discussed, possibly from a macro level. However, sometimes specific provisions will be discussed, as the CPLC may have on its staff criminal law and procedure specialists who previously worked on such issues at the NPC LAC, SPC or in academia.⁶⁶

Justice Hu stated:

In the process of drafting the interpretation of the Criminal Procedure Law, we separately sought the opinions of the central political and legal organs, such as the SPP, the MPS, the Ministry of State Security, and the MOJ, and attached great importance to and accepted the opinions and suggestions put forward by these organs, to avoid the interpretation of the Criminal Procedure Law conflicting with judicial interpretations or normative documents issued by other agencies.

Take, for example, the 2017 Asset Recovery Interpretation, discussed in the previous section.⁶⁷ The SPC and SPP worked with the CCDI, CPLC, NPC LAC, Ministry of Foreign Affairs, MPS, MOJ and other authorities to create a practicable system that could be used when negotiating with foreign countries, meet the policy targets of the CPC and contain legal standards specific enough for the procuratorate and courts.⁶⁸

4.3.4 *Broad Consultation Outside the Gated Community*

The 2015 Notice asks drafters to consult with NPC and CPPCC delegates, relevant state organs, and various organisations and individuals in order to improve the right of the ordinary person to know and participate. Art.

⁶⁵ Yunteng Hu, 'A Discussion of the Special Points and High Points of the Criminal Procedure Law Judicial Interpretation'.

⁶⁶ Correspondence with the author. See e.g. the biography of Professor Taiyun Huang, Tianjin University, http://law.tju.edu.cn/szdw/zrjs/jy2z/201612/t20161219_289281.htm (last accessed 6 November 2020).

⁶⁷ www.chinacourt.org/chat/fulltext/listId/45451/template/courtfbh20160913.shtml (last accessed 6 November 2020).

⁶⁸ Ibid.

17 of the 2007 Regulations permits soliciting the views of the general public if the matter at hand is considered an ‘issue affecting the vital interests of the people’ or is a major or difficult matter and has obtained approval from senior SPC leaders. What that involves is the vice president in charge of that area of law to provide an initial approval and report to the executive vice president or SPC president for final approval.⁶⁹ Much like their counterparts in other party-state organs, the vice presidents of the SPC are in charge of certain divisions and approve major initiatives.

The drafting procedure generally includes consultation with scholars and other experts, sometimes through ‘argumentation meetings’.⁷⁰ Such meetings are often organised to solicit the views of experts on specialised or technical subject matter.⁷¹ Drafters then assess the views given by those experts and consider whether they should be adopted, as described by the principal drafters of the Concealing and Disguising of Assets Interpretation:

On this basis, we solicited the views of some criminal law experts, and on 15 December 2011 held an argumentation meeting at the SPC. [We r]equested views from experts and scholars, [including] the former deputy director of the NPCSC LAC Criminal Law Office, Huang Taiyong,⁷² Professor Zhao Bingzhi of Beijing Normal University [and a] doctoral advisor, Professor Chen Xingliang, [a] Peking University doctoral advisor, Chen Zexian, head of the China Academy of Social Sciences Institute of Law, Professor Huang Jingping, [a] Renmin University doctoral advisor, and others. On this basis, we sought the views of the NPCSC LAC Criminal Law Office and created a draft for submission for approval.⁷³

The experts invited for such consultation tend to be senior academics, either from the country’s major universities or the Chinese Academy of Social Sciences. Reports on the drafting of judicial interpretations rarely mention consultations with defence counsel, which an experienced SPC

⁶⁹ Ibid.

⁷⁰ 论证会.

⁷¹ The SPC Issues the Interpretation on the Application of the Criminal Procedure Law of the PRC (最高法发布最高人民法院关于适用中华人民共和国刑事诉讼法的解释), 4 February 2021, www.court.gov.cn/zixun-xiangqing-286501.html (last accessed 8 April 2021).

⁷² He subsequently worked at the CPLC; see the biography of Professor Taiyun Huang, Tianjin University.

⁷³ www.chinacourt.org/chat/fulltext/listId/45451/template/courtfbh20160913.shtml (last accessed 6 November 2020).

judge suggested was because of concerns that links could be formed between lawyers and judges.⁷⁴

However, one criminal defence lawyer interviewed for this research suggested that some criminal defence lawyers do comment on draft judicial interpretations. The usual procedure is for the MOJ to contact the All China Lawyers Association (ACLA). The lawyer said that ACLA also sometimes proposes judicial interpretations and that the SPC sometimes contacts certain defence counsellors directly. Those contacted, he noted, are generally defence lawyers who are known to be cooperative with government authorities or who hold leadership positions in ACLA, thus ensuring that their comments will not be overly critical. In Justice Hu's comments on the drafting of the 2013 comprehensive interpretation of the Criminal Procedure Law, he mentions that the drafters had adopted some lawyers' suggestions.⁷⁵

A review of SPC judicial interpretation public consultations reveals that few, if any, have been in the area of criminal law or criminal procedure law. One experienced SPC judge explained why:

It's the SPC's bureaucratic nature! It thinks that the power to draft interpretations is with it and it is completely within its ability to draft good judicial interpretations. So therefore no democratic procedure has been formed to broadly consult different parts of society during the drafting process. The practice always has been internal consultation, generally consulting *gongjianfasi* [public security, procuratorate, courts, and administration of justice], and experts, the various divisions and offices of the SPC, and then it is submitted and approved. If timing is rushed, one or two experts will be consulted.⁷⁶

4.3.5 *Language of Judicial Interpretations*

In consultation with the LAC, the SPC and SPP make ample use of the broad language of relevant legislation when drafting judicial interpretations. As Justice Hu mentioned in section 4.3.3.7, sometimes the SPC addresses issues that the NPC or NPCSC has failed to address but on which the lower courts are strongly of the view that a relevant provision is needed. The Asset Recovery Interpretation, for example, expands the scope of the crimes to which asset recovery applies while remaining

⁷⁴ Correspondence with the author.

⁷⁵ Yunteng Hu, 'A Discussion of the Special Points and High Points of the Criminal Procedure Law Judicial Interpretation'.

⁷⁶ Correspondence with the author.

within the wording of the Criminal Procedure Law. Judicial interpretations may not contradict or exceed the scope of existing law, but it is common practice for them to fill in some of the blank spaces in legislation. However, that practice has been criticised by academics for at least the past ten years,⁷⁷ with scholars also highlighting the inconsistencies between the judicial interpretations issued by the SPC and SPP.

The language of the law permits the SPC and SPP to act as they have because of its considerable flexibility. Art. 280 of the Criminal Procedure Law, for example, authorises the people's procuratorates to apply to the courts for confiscation of illegal gains and property related to serious crimes⁷⁸ such as corruption, bribery or terrorist activities if the criminal suspects or defendants in question have not been located within one year of a public arrest warrant being issued or have died. Therefore, Art. 1 of the related interpretation expands the 'such as'⁷⁹ by specifying that confiscation applies to the following crimes, amongst others.

- (1) Corruption; embezzlement of public funds; possessing huge amounts of property from unknown sources; concealing overseas savings; privately dividing state-owned assets; privately dividing assets that had been confiscated;
- (2) Bribe-taking; exploiting influence to take bribes; bribery by an individual or entity; giving bribes to persons with influence; introducing bribery;
- (3) Organising, leading or participating in terrorist organisations; helping terrorist organisations, preparing to carry out terrorist activities; advocating terrorism or extremism, and incitement to carry out terrorist activities; using extremism to sabotage the enforcement of laws; forcing others to wear clothing and signs that advocate terrorism or extremism; illegally possessing articles that advocate terrorism or extremism;
- (4) Endangering state security; smuggling; money laundering, financial fraud; mafia-type organisations, and drugs; and
- (5) Telecommunications and Internet fraud.

⁷⁷ Amongst the more recent articles are: Minhua Su (苏敏华) and Yongshu Wang (王永杰), 'Discussing the Reallocation of the Power to Interpret Law: From the Necessary Perspective of Building Rule of Law in China' (论我国司法解释权的重新配置: 法治中国建设不可或缺的视角) (2016) (12) *Exploration and Debate* (探索与争鸣), 81–85; Minyuan Wang (王敏远), 'Judicial Interpretation Research after the Amendment of the 2012 Criminal Procedure Law (2012 年刑事诉讼法修改后的司法解释研究)' (2015) (1) *Journal of National Prosecutors College* (国家检察官学院学报), 130–160, at 131, 135.

⁷⁸ 重大犯罪案件.

⁷⁹ 等.

Such expansion of statutory language is normal practice in judicial interpretations to respond to the evolving requirements of the CPC and government, requirements that may not have been realised when the legislation was promulgated. It is also sometimes the case that a specific area of law was not sufficiently developed in China at the time of promulgation for the NPC or NPCSC to legislate with any specificity. However, those institutions may then reach consensus on the matter once a judicial interpretation has been drafted. Many Chinese academics have criticised the SPC's expansion of statutory language, particularly in the area of criminal law, for violating the principle of no crime without a law.⁸⁰ However, as described in Section 4.3.3.7 by Justice Hu, and confirmed by others affiliated with the SPC, such expansion takes place with the full cooperation of the NPC LAC.

4.3.6 Submission to the Research Office and Adjudication Committee

The penultimate – non-transparent – step in the drafting of a judicial interpretation is for the draft to be submitted to the SPC's Research Office for review. The division or office of the SPC that has drafted the interpretation has to send it to the Research Office for review together with a package of related documents, including the draft interpretation and accompanying draft report summarising related investigations, summary of related opinions, related legislation and judicial interpretations, list of the principal issues in dispute and view of the responsible SPC vice president on whether the draft should be submitted to the adjudication committee for review.⁸¹

The Research Office has a one-month deadline for reviewing the draft and accompanying materials to determine whether it is ready for the adjudication committee's consideration.⁸² From the language of the 2015 Notice, however, it is apparent that drafting groups sometimes fail to meet that deadline.⁸³ The criteria by which the Research Office reviews draft interpretations include whether the submission package is complete. If it is not, then the Research Office sends the draft back to the office or division that submitted

⁸⁰ Minhua Su and Yongshu Wang, 'Discussing the Reallocation of the Power to Interpret Law'.

⁸¹ Art. 19 of the 2007 Regulations.

⁸² Art. 20 of the 2007 Regulations.

⁸³ Section 4 of the 2015 Notice.

it. If it is, then the Research Office determines whether the draft interpretation complies with the Constitution and the legislation in question; exceeds the limits of the SPC's authority to issue judicial interpretations (which will be apparent from the summary of the views of the LAC and other NPC and NPCSC committees and offices involved); is consistent with prior judicial interpretations (or suitably updates or replaces them); has been drafted following stipulated procedures; incorporates principal viewpoints (within the SPC and related institutions); and incorporates solutions to the major issues related to the interpretation.⁸⁴

The Research Office has two options after reviewing a draft interpretation.⁸⁵ If it considers the draft mature, it can forward it to senior court leaders for the required review and approval before submitting it to the adjudication committee. The other option, and the more likely one, is for the Research Office to consider the draft to require more work. In that case, it works with the office or division that drafted it to further amend it and solicit further comments from within the SPC and/or from other institutions or experts. Once the draft is considered ready, it is submitted to the SPC vice president responsible for the area of law in question and the SPC executive vice president. Once those two vice presidents have approved the draft, it is submitted to the adjudication committee for discussion and final approval.

The proceedings of adjudication committees, including that of the SPC, are not publicly accessible, and it is thus difficult to ascertain what occurs at SPC adjudication committee meetings. What is clear from reports and discrete inquiries is that a significant number of judicial interpretations are 'approved in principle', that is, discussed by the adjudication committee and sent back to the drafters for further revisions consistent with the adjudication committee decision. For example, in 2017, the SPC adjudication committee approved in principle a joint judicial interpretation with the SPP.⁸⁶ Sometimes amendments are made at the adjudication committee level as well.⁸⁷

The Legislation Law and the 2007 Regulations require that interpretations of law be reported to the NPCSC within thirty days of

⁸⁴ Art. 20 of the 2007 Regulations.

⁸⁵ Arts. 21 and 22 of the 2007 Regulations.

⁸⁶ The SPC passed a judicial interpretation concerning 'Regulations causing disruption to radio communications' (最高法院原则通过扰乱无线电秩序若干问题的解释) of 17 April 2017.

⁸⁷ Author's observations.

issuance.⁸⁸ Judicial interpretations must also be published in the *People's Court Daily* and the *SPC Gazette*, and the 2015 Notice calls for them to be published on the SPC's website as well.⁸⁹

4.4 Conclusion

This chapter has shown that in drafting criminal procedure judicial interpretations, the SPC is 'building the cart' of legal rules within a 'gated community'. The process appears to be poorly understood by many in the Chinese academic world, not to mention by those beyond it. The resulting legal rules are 'red and expert', integrated with party policy and values, and draw on institutional expertise within the SPC and lower courts and in other institutions. They incorporate compromises amongst party and state institutions and technical solutions to practical issues, particularly those faced by the lower courts, with the views and interests of the general public and non-state institutions accorded relatively little weight. The process creates legal rules that are politically acceptable, legally sound and practicable in the Chinese legal environment. The drafting reflects the quasi-administrative way in which the SPC operates: professional yet politically attuned. Although discrete efforts are being made to strengthen human rights protections and procedural protections (e.g. increasing 'trial-centred procedures') in the course of criminal procedure reforms, those efforts will be restricted to the confines of what is permitted by the political authorities.

⁸⁸ Art. 104 of the Legislation Law.

⁸⁹ Art. 25 of the 2007 Regulations.