



# InterPARES 2 Project

International Research on Permanent Authentic Records in Electronic Systems

## Policy Cross-domain

### Supplements to the Study of Archival Legislation in China (Report I)

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#### Brief Introduction to China's Legislative Process and Structure

According to the *Legislation Law of the People's Republic of China*, the National People's Congress and its Standing Committee exercise legislative power of the State to enact laws; the State Council formulates administrative regulations according to the Constitution and laws; the departments of, and agencies with administrative functions directly under, the State Council formulate rules according to the laws and administrative regulations of the State Council.<sup>2</sup> So the basic hierarchy of the legislative structure can be summarized as:

- Laws (regulatory documents formulated by the National People's Congress and its Standing Committee)
- Administrative regulations (regulatory documents formulated by the State Council, the highest organ of state administration, and only inferior to the Constitution and laws in authority or power.)
- Rules (administrative regulatory documents that may be classified according to the legislative organs, into categories as: (1) rules of departments, i.e., regulatory documents formulated by departments of, and agencies with administrative functions directly under, the State Council within their respective authorities in accordance with laws and administrative regulations of the State Council, and (2) rules on regulating matters concerning the implementation of laws or administrative regulations, decisions or orders of the State Council.). Rules are implemented within their respective scopes of authority. The law, when referring to regulations made under it, is called higher-position law, and, consequently, these regulations are called lower-position law. In some cases, the law explicitly designates some regulation-making unit to make a particular regulation, sometimes not. However, in the

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<sup>1</sup> The author acknowledges the assistance of Ma Xueqiang in collecting and compiling material for this report.

<sup>2</sup> See Appendix China's Government Structure (simplified).

opening chapter (which is always called General Provisions) of the regulation, the higher-position law(s) are always explicitly referenced.

When applied to the archival legislation, the Archival Law is an overall guiding law and was established by the top legislature, the Standing Committee of the National People's Congress of China, with latitude for archival administrations, national committees and other units at the Ministerial level to make regulations regarding archival work in their fields. According to the legislative practice in China, when enacting a law, there is always great attention paid to the formulation of rules for the implementation of the law and other relevant regulations with more detailed and concrete provisions. That is why there are the “measures” and other regulations addressing particular fields such as the “organs’ work” and “scientific-technological archives.” “Measures” are in fact also regulations according to Article 4 in the *Regulation on Procedures of Formulating Administrative Regulations* promulgated by the State Council in November 2001, which proscribes that administrative regulations shall be named “regulations,” “provisions” or “measures,” etc. In practice, more than ten different names for various regulations are commonly used. The term “regulation” somehow becomes an umbrella term that is also used to name “rules” as defined above. Therefore, the importance of these “regulations” and “measures” depends on solely the regulation-making units and cannot be inferred by the titles themselves. As illustrated above, the relationships between laws (NPC and its Standing Committee), administrative regulations (made by the State Council), and regulations made by ministries under the State Council and local regulations made by governments at different administrative level are detailed in the Legislation Law of PRC. However, as is typically the case in Chinese laws, which rarely include a section of definitions, there is no interpretation section defining these different types of regulations in this law either. Thus, these relationships can only be extracted from individual provisions or other relevant laws.

Sometimes, regulations can be jointly made by several units, which then enlarge the applicable scope of such regulations. For instance, the *Regulation on Scientific-Technological Archival Work* was jointly issued by three committees relating to the scientific and technological fields and the State Archives Administration.

The “making-units” for the law or regulations are indicated in the list of examined legislation to make them understandable in terms of their applicable scope and precedence.

### **Legislation Respecting Records as Evidence**

On August 28, 2004, the *Electronic Signatures Law of the People's Republic of China* was adopted by the Standing Committee of the National People's Congress and became effective on April 1, 2005. This is the first national law specifically addressing the standardization of electronic signatures and their legal effectiveness.

### Definition of Electronic Signature

Electronic signature means “the electronic data contained in or attached to a data electronic document for the purpose of identifying the signer and indicating his or her knowing of the content.” (article 2)

### Definition of Data Electronic Records

Data electronic document means “the information generated, sent, received or stored by electronic, optical, magnetic or other similar means.” Its general provision, article 3, also states, “Parties in civil activities may agree upon the using or not-using of contracts, certification or other documents in the form of electronic signature and data electronic record.” And “for the documents under agreement of using electronic signatures and data electronic records, parties in civil activities cannot deny their legal effectiveness because of the use of electronic signatures and data electronic records.” (article 2)

### Provisions regarding Evidence

Article 4, “A data electronic document that is capable of presenting the carried content in a visible form and of being retrieved and consulted at any moment shall be regarded as qualified written form in compliance with legal and regulatory requirements.”

Article 5, “A data electronic document qualifying the following conditions shall be regarded as an original form satisfying legal and regulatory requirements:

1. capable of presenting the carried content effectively and of being retrieved and consulted at any moment;
2. capable of unfailingly ensuring the integrity and unalteration of the content from the moment of its completion. However, annotations made to a data electronic document and the changes of presentation occurring in the process of data exchanging, storing and displaying are not considered to affect its integrity.”

Article 6, “A data electronic document qualifying the following conditions shall be regarded as satisfying the legal and regulatory requirements on document preservation:

1. capable of presenting the carried content effectively and of being retrieved and consulted at any moment;
2. the format of the data electronic document is the same format at its creation, transmission or reception, or if the format is different, the content can be re-presented accurately against the original at its creation, transmission or reception;

3. the sender, recipient and the time of sending and receiving can be identified.”

Article 7, “The data electronic document shall not be denied as evidence only because its formation, sending, receiving or storing are based on electronic, optic, magnetic or other similar means.”

Article 8, “When examine the authenticity of the data electronic document as evidence, the following factors should be taken into account:

1. the reliability of the means used to form, store and transmit the data electronic record;
2. the reliability of the means used to keep the integrity of the content;
3. the reliability of the means utilized to identify the sender, and
4. other relevant factors.”<sup>3</sup>

Article 13, “The electronic signature satisfying all of the following conditions shall be regarded as reliable electronic signatures:

1. the electronic signature creating data for electronic signature signing belongs to the electronic signature signer exclusively;
2. the electronic signature creating data is controlled solely by the electronic signature signer when signing;
3. any changes to the electronic signature after the signing can be detected; and
4. any changes to the content and the format of the data electronic document after signing can be detected.

Parties in the civil activities may choose to use reliable electronic signature upon agreement.”

Article 14, “The reliable electronic signature has equal legal effectiveness to hand-written signature or stamps.”

Article 16, “The provider of electronic signature verification services established lawfully may provide verification services when the electronic signature is in the necessity of verification from a third party.”

In the *Criminal Procedural Law of the PRC* revised in 1996, article 42 states, “every fact that is capable of attesting the true situation of the law case is evidence.” There are two types of evidence relating to records: (1) material evidence, document evidence and (2) audio-video materials.

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<sup>3</sup> There is no definition about “reliability” found.

In the *Civil Procedural Law of the PRC* (which came into force in 1991), article 63 similarly includes (1) documents and (3) audio-video materials as evidence, and states that evidence “must be verified in order to be the proof attesting to the facts.”

Article 68, “For document evidence, originals shall be submitted,” and where it is not reasonably practical to submit originals, “copies, photographs, duplicates and excerption can be admitted.”

Article 69, “For audio-video materials, the people’s courts shall distinguish trueness from counterfeit, verify and ascertain their admissibility by considering other evidence of the case.”

In the *Stipulation on Civil Procedural Evidence by the Supreme People's Court* (2001), provisions 20 regulates, “the document evidence collected by investigators may be originals, or verified duplicates or copies, the source of and verification information about which shall be explained in the investigation notes.”

Article 22 addresses electronic documents specifically, “when collecting computer data or audio-video materials, investigators shall request their original media from the party under investigation. Where it is not reasonably practical to provide original media, copies may be provided, the source and the copying process of which shall be explained in the investigation notes.”

Article 69 states certain evidence shall not be admitted as evidence by themselves only, including 3) audio-video materials with doubtful points and 4) copies cannot be verified with originals.

Article 77 states the principles for weighting several pieces of evidence to the same fact,

1. the official documents created by the state organs and social associations within their competence shall generally be assigned more weight than other documents;
2. material evidence, archival documents, appraisal conclusions, investigation notes or notarized or registered documents shall generally be assigned more weight than other document, audio-video materials and testimonies of witness;
3. original evidence shall generally be assigned more weight than hearsay evidence; and
4. direct evidence shall generally be assigned more weight than indirect evidence.

### **Appraisal and Deconstruction of Archives**

The provisions in the archival law and relevant regulations do not present appraisal criteria; instead, they proscribe procedures of appraisal and archives deconstruction.

In the *Archives Law of China*, article 15 states that “the principles of appraising values of archives for preservation, the criteria for scheduling retention periods and the procedures and methods of destroying archives shall be regulated by the state archival administrations. Unauthorized destroying of archives shall be prohibited.” Under this provision, regulations in view of different fields or aspects set up corresponding provisions as follows:

The *Regulations on Organ’s Work* (The Office of the Central Committee of CPC, The Office of the State Council, 1983), clause 16 states, “archival units in organs shall compile “The Archives Retention Schedules” for the organs or the specified fields in accordance with the relevant state stipulations. The retention schedules shall be implemented after the approval from the head of the organ, and they shall be submitted to the archival administration at the same administrative level to be filed.”

Provision 17, “Organs shall regularly appraise archives exceeding the retention schedules. Being supported by the head of the administrative office of the organ, the appraisal must be carried out by an appraisal task force constituted by the archival unit and the relevant operation department. An appraisal report shall be compiled upon the completion of the appraisal with the registered archives appraised as no preserving values, which then can be destroyed with the approval from the head of the organ.”

Provision 18, “In preventing the loss and secret divulgence of archives, two persons shall be appointed to supervise the deconstruction of the archives. The supervisors shall sign the deconstruction sheet.

The *Criteria for Archival Professional Development in Organs* (The State Archives Administration, 1987), provision 8, the Appraisal and Transfer of Archives stipulates,

- 8.1 In compliance with the relevant state rules on archival retention schedule, every organ shall compile its retention schedules and regularly appraise its archives to accurately decide the preservation or deconstruction of archives.
- 8.2 The appraisal of archives shall be administrated by the head in charge of archival work in the organ and carried out by an appraisal task force constituted of the archival unit and the relevant operation department according to the established standards.
- 8.3 The deconstruction of archives without preservation values shall be based on the recommendations of the appraisal task force; archives as such shall be registered and approved by the head in charge of archival work in the organ, and then destroyed in the designated location supervised by two persons, who shall sign the deconstruction

sheet. The deconstruction of specified archives with unusual circumstances covered by other deconstruction rules shall follow the relevant rules.”

*The Regulation on Scientific-Technological Archival Work* (The State Economy Committee, the State Basic Construction Committee, the State Scientific-Technological Committee and the State Archival Administration, 1980), provision 17 states, “every unit shall regularly conduct the appraisal of the preservation values of the scientific-technological archives. The method for appraisal is to evaluate the content of the archives directly. The appraisal shall be led by the chief engineer or the director of the research project and jointly conducted by the administrator in charge of the scientific and technological work, scientific and technological personnel familiar with the particular field and archival personnel responsible for the scientific and technological archives.”

*The General Provisions for Archival Institutions’ Work* (The State Archives Administration, 1983), provision 14 states, “the archives in archival institutions considered of no need to be continually preserved must go through the process of appraisal. The deconstruction of archives can only be conducted after the consultation with relevant departments<sup>4</sup> and the approval from the superior organs.<sup>5</sup> No archives can be destroyed without appraisal and approval.”

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<sup>4</sup> Relevant departments refer to the archives forming units and other departments responsible for cultural relics, secret keeping, etc.

<sup>5</sup> “Superior organ” refers to the administrative offices of the government and the Party.