

Legislative Decentralization in China in the Reform Era –  
Progress and Limitations

Decentralisatie van wetgeving in China in het  
hervormingstijdperk –  
Vooruitgang en beperkingen

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## **List of Abbreviations**

ALL	Administrative Litigation Law
CCP	Chinese Communist Party
CCPG	Committee of the Central People's Government
CPL	Criminal Procedural Law
CPPCC	Chinese People's Political Consultative Conference
FIL	Foreign Investment Law
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
CCPCC	Chinese Communist Party Central Committee
LAC	Legislative Affairs Commission (of the NPCSC)
LAO	Legislative Affairs Office (of the State Council)
LoL	Law on Legislation
NPC	National People's Congress
NPCSC	National People's Congress Standing Committee
PRC	People's Republic of China
PC	People's Congress
PCSC	People's Congress Standing Committee
RNA	Regional National Autonomy
SCRVB	System of Custody and Repatriation for Vagrants and Beggars in Cities
SEZ	Special Economic Zone
SRL	System of Re-education through Labor
UDHR	Universal Declaration of Human Rights

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## Selected Legislation

Administrative Litigation Law (行政诉讼法) (adopted by the NPC in 1989 and revised by the NPCSC in 2014).

Constitution (宪法) (adopted by the NPC in 1982 and revised by the NPC in 1988, 1993, 1999 and 2004 respectively).

Law on Legislation (立法法) (adopted by the NPC in 2000 and revised by the NPC in 2015).

Organic Law on the Local People's Congresses and Local People's Governments at Various Levels (地方各级人民代表大会和地方各级人民政府组织法) (adopted by the NPC in 1979 and revised in 1982 by the NPC, 1986, 1995, 2004 and 2015 by the NPCSC respectively).

Provisions of Administrative Procedure in Hunan Province (湖南省行政程序规定) (issued by the Hunan People's Government in 2008).

Regional National Autonomy Law (民族区域自治法) (adopted by the NPC in 1984 and revised by the NPCSC in 2001).

Regulation on the Rulemaking Procedure (规章制定程序条例) (issued by the State Council in 2001).

Regulation on Regulation-making Procedure in Suzhou (苏州市制定地方性法规条例) (adopted by Suzhou Municipal PCSC in 2001).

Regulation on Regulation-making Procedure in Shanghai (上海市制定地方性法规条例) (adopted by Shanghai Municipal PCSC in 2001 and revised in 2005).

Regulation on Special Economic Zones in Guangdong Province (广东省经济特区条例) (adopted by the NPCSC in 1980).

Rules of Procedure for the NPC (全国人民代表大会议事规则) (adopted by the NPC in 1989).

Rules of Procedure for the NPCSC (全国人民代表大会常务委员会会议事规则) (adopted by the NPCSC in 1987 and revised by the NPCSC in 2009).

Tourism Law (旅游法) (adopted by the NPCSC in 2013).

## Chapter 1. Introduction

### 1. Research Topic

This thesis examines the development of the legislative system of the People's Republic of China (PRC) shaped by decentralization reforms since 1979. The legal construction is an important aspect of modernization that the PRC has pursued since its founding in 1949. It is always associated with the political and economic upheavals. In approximately 70 years, China experienced two dramatic political, social and economic changes. In 1949, the Chinese Communist Party (CCP) took over mainland China and founded the PRC as a socialist country. Following Marxist-Leninist doctrines and the Soviet model, China adopted the one-party system and a planned economic system in the mid-1950s.<sup>1</sup> Legally, by adopting the Soviet model, China established a highly centralized legislative system in 1954 with the passage of its first constitution (1954 Constitution).<sup>2</sup> The promulgation of the 1954 Constitution ended the *de facto* decentralized legislative system, which appeared after 1949.<sup>3</sup> Under the 1954 Constitution, the National People's Congress (NPC), which was the national parliament, was the only state organ that could exercise legislative power. Other state organs both at the national and local levels, including the NPC Standing Committee (NPCSC) were not granted legislative authority.<sup>4</sup>

The following two decades did not see any substantial development of this Soviet-style highly centralized legislative system.<sup>5</sup> It did not lead to any systematic or coherent legal system either.<sup>6</sup> After producing a few national laws from 1954 to 1957, this legislative system was paralyzed by the 1957 Anti-rightist Movement and was totally abandoned during the Cultural Revolution (1966-1976).<sup>7</sup> In line with the paralysis of the legislative system, law never played a significant role in the first three decades of the PRC. During this period, law either served as an instrument to exercise terror for certain sections of the population (for

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<sup>1</sup> For the socialist economic transition in China in the early 1950s, see Lin Justin Yifu, 'Collectivization and China's Agricultural Crisis in 1959-1961', 98(1990) *Journal of Political Economy*, pp. 1230-1236; John McMillan, John Whalley, and Zhu Lijing, 'The Impact of China's Economic Reforms on Agricultural Productivity Growth', *The Journal of Political Economy* 97(1989), pp. 783-784; Qian Yingyi, 'The Process of China's Market Transition (1978-1998): The Evolutionary, Historical, and Comparative Perspectives', 156(2000) *Journal of Institutional and Theoretical Economics*, p. 164.

<sup>2</sup> The functions and powers of the NPC in 1954 paralleled those of the Supreme Soviet in the 1936 Soviet Constitution. For the soviet influence on China's legislative construction, see Kevin J. O'Brien, *Reform without Liberalization: China's National People's Congress and the Politics of Institutional Change* (Cambridge: Cambridge University Press, 2008), pp. 22-25; also see Albert H. Y. Chen, *Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law*, in Jan Michiel Otto (ed.) *Lawmaking in the People's Republic of China* (The Hague: Kluwer Law International, 2000), pp. 57-58.

<sup>3</sup> Wu Daying, *中国社会主义立法问题 (The Issue of the Socialist Legislation in China)* (Beijing: Qunzhong Chubanshe, 1984), pp. 36-37.

<sup>4</sup> The NPCSC serves as the permanent manifestation of the NPC; it assumes most of the NPC's functions when the latter is not in session; its members are selected from the NPC.

<sup>5</sup> Zhou Wangsheng, *中国立法五十年 (上) - 1949-1999 年中国立法检视 (Fifty-year Legislation in China, I - Appraisal of the Legislation in China from 1949-1999)*, 6(2000) *法制与社会发展 (Law and Social Development)*, pp. 6-10.

<sup>6</sup> For the legal development from 1949 to 1957, see Jerome A Cohen, *The Criminal Process in the People's Republic of China 1949-1963* (Cambridge: Harvard University Press, 1968), p. 11.

<sup>7</sup> Walter Gellhorn, 'China's Quest for Legal Modernity', 1(1987) *J. Chinese L.*, pp. 16-17.

example, counter-revolutionary elements and landlords) or was directed to particular transitional situations or problems (for example, the Land Reform from 1950 to 1953).<sup>8</sup>

The second dramatic change came in 1978 when the Chinese government decided to start the economic reform and ‘opening up’ policy (改革开放).<sup>9</sup> As a consequence, considerable administrative managerial functions and powers (especially those over the economy) were decentralized to provincial and city-level governments. The following three decades saw spectacular economic growth and the accompanying market-oriented transformation of the economic system. In the legal field, realizing the disasters caused by the state of lawlessness and the important role of law for the creation of the market economy, the Chinese government was determined to improve the importance of law as a means of regulating various social activities.<sup>10</sup> As a consequence, the reform era has witnessed the continuous development of the rule of law, which is reflected in many aspects, such as the development of an effective legislative system, the expansion of law in number, the enhancement of public legal consciousness, the retreat of the Party in the legal realm, the development of judiciary and legal professions and so on.<sup>11</sup> Among them, the development of the legislative system plays a key role for the evolution of the rule of law in China. In a narrow sense, an able legislative system is needed in order to create enough legal norms to guide behavior, which serves as a formal and substantively minimal basis for the rule of law.<sup>12</sup> In a broad sense, the legislative system determines the quality and consistency of the legal system, which affects the development of other elements of the rule of law. Thus the legislative system is not only one of the major elements of the rule of law, but also serves as the pre-requisite of the development of rule of law as a whole.

The Chinese government decided to maintain the original governmental apparatus and in the meantime decentralize legislative powers to multiple state organs.<sup>13</sup> Legislative

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<sup>8</sup> For criminal justice between 1949 and 1966, see Jerome Alan Cohen, ‘The Criminal Process in the People’s Republic of China: An Introduction’, 79 (1966) *Harvard Law Review*, pp. 469-533. For the program of the land reform and collectivization under the 1950 Land Reform Law, see Chungkun Yang, *A Chinese village in Early Communist Transition* (Cambridge: Harvard University Press, 1959).

<sup>9</sup> The turning point that signaled the departure from the Maoist era came in 1978 when Deng Xiaoping formally launched the policies of ‘Reform and Opening Up’ in the Third Plenum of the Eleventh Party Congress. For the background and process of the plenum see Ezra F. Vogel, *Deng Xiaoping and the Transformation of China* (Cambridge: Belknap Press of Harvard University Press, 2011), pp. 192-205.

<sup>10</sup> For the leadership’s intention of using the law to avoid the resurgence of the cultural revolution, see CCPCC Party Literature Research Office, 三中全会以来重要文献选编 (*Selected Party Documents since the Third Plenum of the Party Congress*) (Beijing: Renmin Chubanshe, 1982), pp. 817-819; Deng Xiaoping, 邓小平选集第二卷 (*Selected Works of Deng Xiaoping, Volume II*) (Beijing: Renmin Chubanshe, 1994), p. 146.

<sup>11</sup> See Randall Peerenboom, *China’s Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002); Stanley Lubman, ‘Bird in a Cage: Chinese Law Reform after Twenty Years’, 20(1999) *Nw. J. Int’l L. & Bus.*, pp. 383-424; Bin Liang, *The Changing Chinese Legal System, 1978-Present* (New York: Routledge, 2008); Yuwen Li, *The Judicial System and Reform in Post-Mao China: Stumbling towards Justice* (Farnham: Ashgate, 2014).

<sup>12</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality, Second Edition* (Oxford: Oxford University Press on Demand, 2009), pp. 210-233.

<sup>13</sup> Perhaps the only major institutional change is setting up local PCSCs at and above the county level. In the early stage of the drafting of the 1982 Constitution, Hu Qiaomu - the head of the drafting group at that time, proposed reforming the NPC into a bicameral legislature. However, this proposal was later rejected and Chinese leaders chose to grant most legislative powers to the NPCSC to overcome the legislative difficulties of the NPC, which are attributed to its cumbersome structure. For the bicameral proposal, see Xu Chongde, 中华人民共和国

decentralization reforms started in 1979 with the passage of the Organic Law on the Local People's Congress and Local People's Governments. This law, for the first time in the history of the PRC, granted the legislative power to provincial people's congresses and their standing committees.<sup>14</sup> The current Constitution, which was passed in 1982, laid out a basic framework of a decentralized legislative system. It granted legislative power to multiple organs both at the national and local levels, including the NPCSC, the State Council and provincial governments. The 1980s and 1990s experienced rapid developments of legislative systems of major state organs. These developments are reflected in many aspects, such as the granting of the legislative power to city-level governments, delegating more flexible legislative powers to Special Economic Zones (SEZs) (经济特区), specifying the legal nature of regulations and rules made by administrative organs, demarcating legislative powers, improving legislative procedures and so on. An important move towards the regularization of the decentralized legislative system came in 2000 with the passage of the Law on Legislation (LoL) (立法法). This law provides for relatively comprehensive rules concerning the legislative systems of major State organs.

Two recent moves concerning the construction of China's legislative system are observable. One move came in 2011 with the delivery of the working report of the NPCSC in the Fourth Plenary Session of 11<sup>th</sup> NPC in March 2011 by Wu Bangguo, the Chairman of the NPCSC at that time. In this report, Wu declared the establishment of the 'Socialist Legal System with Chinese Characteristics' (中国特色社会主义法律体系). He stated:

'A socialist multi-level legal system with Chinese characteristics, which was composed of the Constitution (as the head), national laws (as the backbone), administrative regulations and local regulations, has taken in shape. There is law to bind various circles including economy, politics, culture, society and ecology. The objective of establishing the socialist legal system with Chinese characteristics, which was put forward in the 15<sup>th</sup> National Congress of the CCP (held in 1997), has been achieved on schedule.'

With respect to the prospect of legislation in the future, he stated:

'We should recognize that although our legal system has come in shape, it is not perfect. Some laws need to be revised; some supplementary regulations need to be issued; a few laws have not been enacted due largely to immature legislative conditions... In the next period to come, we should place more energy in law revision and the formulation of regulations for supplementing laws; in the meantime, some new laws should be enacted for promoting the development of China's socialist legal system so that it can keep in pace with the times'.<sup>15</sup>

Wu's statement, on the one hand, was intended to make a conclusion with respect to the legislative achievement in the last 3 decades, and on the other hand, it was intended to set a basic tone for the legislative work after Wu's retirement in 2013. However, its wisdom is questionable. Some doubts can be cast on it. Does the prospect in the second statement really suit the actual legislative need of China in the future? Does the trajectory of the legislative

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国宪法史 (*Constitutional History of the PRC*) (Fuzhou: Fujian Renmin Chubanshe, 2003), pp. 563-570 and 585-592.

<sup>14</sup> Provincial units include provinces, regional autonomous regions (民族自治区) and cities directly under the control of the central government (直辖市).

<sup>15</sup> Wu Bangguo, 全国人民代表大会常务委员会工作报告 (The Working Report of the Standing Committee of the National People's Congress) in 中国人大网 (*The Website of the NPC*), 10 March 2004, available at [http://www.npc.gov.cn/wxzl/wxzl/2004-04/15/content\\_332237.htm](http://www.npc.gov.cn/wxzl/wxzl/2004-04/15/content_332237.htm), last visited May 2016.

development in practice after 2013 follow this instruction? Drawing on the NPC and the NPCSC's legislative work in the last three years (2013-2016), which is under the new leadership of Zhang Dejiang, it seems that Wu's instruction is not being strictly followed (if not intentionally ignored). The national legislatures' legislation has not been slowed down. On the contrary, their legislation is still active. The NPC passed the Charity Law in March 2016. This is the first time for the NPC to pass new laws in the last ten years, suggesting the tendency of the revival of its lawmaking. During the same period, the NPCSC passed as many as 8 national laws, implying that law creation is still one of the focuses, if not the only one, of the legislative work of the NPCSC. The inconsistency between Wu's statement and the legislative practice after 2013 reflects a fundamental question: is China's legal system at an well developed stage, as Wu Bangguo stated, so that the large scale law creation and the further development of legislative system is no longer the focus of the Chinese government?; or is it still at a developing stage, in which a large amount of law creation work and continuous development of the legislative system is still necessary as Zhang Dejiang is actually doing now?

The second far-reaching move occurred in 2015 with the passage of the amendment of the LoL. As a result, the 2000 LoL was substantially revised. The revision concerns virtually all the major aspects of the legislative system, such as detailing the exclusive legislative powers of the NPC and the NPCSC, granting the legislative powers to city-level governments, tightening the control of legislative delegation, allowing NPC deputies to be more involved in the NPCSC legislation, adding mandatory rules for legislative hearings and so on. These developments represent an attempt to further demarcate the powers of the major legislative organs, rationalize the legislative process and create a more uniform legal system. One of the most significant reforms in the amendment is the granting of legislative power to all the cities that are divided into districts (city with district) (设区的市). Consequently, the number of local legislative units dramatically increased, which undoubtedly has a far-reaching effect for the evolution of the legislative system. In this sense, with the passage of the revised LoL, China's legislative system is at the eve of another wave of dramatic change.

## **2. Research Questions**

The central question of this research is: how has China's legislative system in the reform era been constructed through decentralization reforms, and what are its progress and limitations? The ultimate goal of this research is to gain a better understanding of the development of the legislative system in the broad context of reform and opening up.

There are three sub-questions that are addressed in different chapters. They are:

(1) How can the economic theory of decentralization explain the political, economic and legislative decentralization in China in both the pre-reform era and the reform era?

Before examining the current legislative system, it is necessary to have a theoretical understanding of the legislative decentralization by putting it in the broader political, economic context. The economic theory of decentralization and its recent development 'market-preserving federalism' is helpful to achieve this goal. It helps us to understand why a highly centralized political, economic and legislative system did not work in China in the pre-

reform era (1954-1978), and how does China's legislative decentralization contribute to the development of the system of the market economy?

(2) How have the sub-legislative systems of major state organs been constructed through the decentralization reform, and what are the major progress and limitations?

The reform era experienced continuous decentralization of the legislative powers to multiple organs, including the NPCSC, the State Council, provincial governments, and city-level governments. Thus the legislative system is composed of several sub-systems. This sub-question is addressed by assessing the following issues in each sub-legislative system, including the legal status of the major types of law, the demarcation of legislative powers, developments of the legislative procedures, and major developments and limitations of the legislative practice.

(3) What are the developments and limitations of legislative systems in Regional Autonomous Areas (autonomous areas) (民族自治地方)?

In addition to the symmetrical legislative decentralization to provinces and major cities, the Chinese central government also allows two types of special localities to exercise more flexible legislative powers – one is the autonomous areas, which can enact autonomous/separate regulations in the light of the political, economic and cultural characteristics of local ethnic groups; the other one is SEZs, which can enact regulation over economic affairs. The common distinctive feature of these two types of regulation-making powers is that they can alter higher-level laws and regulations. With respect to the autonomous legislation, special attention is placed on the following question: what are the main reasons that contribute to the inactivity of autonomous legislation, in particular, to the situation that none of the five autonomous regions adopts their autonomous regulations?

(4) How SEZs successfully obtained the legislative power, and what are the roles of SEZ legislation for shaping China's legal system?

SEZ legislation is one of the most inspiring phenomena in the reform era. It has not only facilitated the rapid development of SEZs, but also influenced the development of the legal system at the national level. Special attention is placed on the following question: what are the characteristics of the SEZ legislation and what is its impact on the introduction of the market-oriented economic system in China and relevant national economic legislation?

### **3. Theoretical Framework and Research Methods**

The economic theory of decentralization is used as the theoretical framework of this research. First, the traditional decentralization theory is used as the basic theoretical framework. This theory is particularly useful to analyze China's central-local relationship in political economic as well as legislative domains in the pre-reform era. It helps us to understand the reason why a highly centralized economic and legislative system did not function well and why the Chinese government launched two waves of administrative decentralization reforms in the 1950s and 1960s, which represents a significant departure from the Soviet model. Then, the theory of market-preserving federalism is used. This theory is developed by scholars in

new institutional economics, to assess the political and economic as well as legislative decentralization. It is helpful for us to understand how the legislative decentralization, which is an inseparable part of the political and economic decentralization, impacts upon the emergence of a market-oriented economy in China.

The main methodology applied in this research is classic legal analysis. According to Hans Kelsen, law is a unique type of norm that guides human behavior (which is different from other norms such as morals) – it is composed of norms that are created by certain organs, and they are directed to coercive orders that inflict sanctions on individuals who violate its rules.<sup>16</sup> The major objects of legal analysis are: concepts, facts, events, relations and principles in the legal system.<sup>17</sup> Accordingly, in order to discover the legislative system and its development in the formal system, legal analysis is employed to articulate concepts and facts, to elaborate legal relationships, to deduce principles from legal rules and to compare the effect of different legal rules in the legal system. To serve this purpose, various legal documents, including: national laws, administrative regulations, local regulations, and department/local rules are reviewed. It should be noted that the analysis of legal documents is under the political, economic and policy context. For this reason, the CCP's official documents, the State Council's normative documents, and the NPCSC's decisions, reports and other official documents, and judicial cases and opinions, in particular, the opinions and guidance of the Supreme People's Court, are discussed.

Historical analysis is conducted in this research. The legislative system, which this research is meant to explore, has a history. Historical analysis aims to discover and describe the phenomena or realities concerning the changes of the legislative system in the historical past; apart from that, it also seeks an understanding of how and why these changes happened and what are their impacts.<sup>18</sup> More specifically, some parts of the analysis are traced back to the pre-reform era (1949-1978). The reason is that although China's legislative decentralization and the development of the legislative system started in 1979, the influence of the pre-reform era should not be underestimated. For example, the state organs that exercise legislative power after 1979 were established in the pre-reform era, and more importantly, the ideology behind the changes derives from the pre-reform era. For this reason, the historical analysis can give us a full picture of the research subject and facilitate a better understanding of the logic of the changes. The historical analysis is also reflected on analyzing a series of legislative changes that took place in the reform era. The current legislative system is the result of continuous developments. The historical analysis is useful to evaluate these developments and the scholarly debates over relevant issues materialized during this period.

#### **4. Limitations and Areas for Future Study**

The subjects of this research do not incorporate the system of making administrative normative documents (normative documents) (行政规范性文件). Until now, the titles of this

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<sup>16</sup> Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1978), pp. 30-35.

<sup>17</sup> Arthur L. Corbin, 'Legal Analysis and Terminology', 29(1919) *The Yale Law Journal*, pp. 163-173.

<sup>18</sup> The usage of historical analysis for legislative changes is modeled from Joan W. Scott's outstanding historical analysis on gender, see Joan W. Scott, 'Gender: A Useful Category of Historical Analysis', 91(1986) *The American Historical Review*, p. 1056.

type of document are not standardized. Most of them are entitled as ‘Measures’ (办法), ‘provisions’ (规定), and ‘implementing measures’ (实施办法).<sup>19</sup> The issuing organs of this type of documents are very comprehensive, including governments at various levels and their internal working organs. In practice, these organs, particularly local people’s governments at county and township levels rely on normative documents to carry out their specific administrative acts. Normative documents are an important source of regulatory documents with general binding force, not only in the domain of administrative management, but also in domains that concern citizens’ rights and interests.<sup>20</sup> The structure of these documents has no substantial difference compared to legal documents.<sup>21</sup> The rampancy of normative documents has become a concern of Chinese legislative officials, given the increasing tension between normative documents and legal documents. In 2001, Wang Kaifeng, the Director of the Bureau of Finance in the People’s Government of Changle County (长乐县) (Fujian province) at that time, was prosecuted and sentenced to a fixed-term imprisonment of 5.5 years for committing the crime of state organ functionaries’ abuse of powers. However, the defense lawyer argued that Wang’s behavior of loaning money to 27 local enterprises as revolving funds with the township finance offices as sureties was strictly in accordance with the normative documents issued by the provincial and municipal governments in Fujian Province.<sup>22</sup>

The main reason for not incorporating the formulation of normative documents in this research is that its legal nature has not yet been recognized. Currently Chinese law and authoritative statements of the NPC and the NPCSC do not recognize normative documents as law. Moreover, the normative documents cannot be used as criteria by the court to adjudicate cases.<sup>23</sup> Another reason is that the formulation of this type of documents is by land

<sup>19</sup> In April 2009, the State Council issued an administrative regulation ‘the Measures for Dealing with Official Documents of the Administrative Agencies’, which categorizes 13 types of administrative documents, including the order (命令), the decision (决定), the announcement (公告), the notice (通告), the notice (通知), the reply (批复), the opinion (意见), and the meeting minute (会议纪要), etc. In practice it is common that for the same subject matters, administrative agencies in different localities or at different levels in the same locality may issue administrative provisions with different titles. Since early 2000, some localities have made some efforts to standardize the title of normative documents. For example, Article 3 of the Measures for the formulation of Regulatory Documents of Lishui Municipal Government, which was issued in March 2001, decrees that the administrative provisions should be titled as ‘measures’ (办法或者措施), ‘provisions’ (规定), ‘implementing measures’ (实施办法), or ‘implementing rules’ (实施细则).

<sup>20</sup> Peter Howard Corne, ‘Creation and Application of Law in the PRC’, 50 (2002) *The American Journal of Comparative Law*, pp. 416-417.

<sup>21</sup> For example, in 2010, the People’s Governments in Fusong County (抚松县) (in Jilin Province) and Changning county (长宁县) (in Sichuan province) issued a series of normative documents on administrative decision-making procedures, including basic procedures, expert consulting, hearing, examination of the legality, collective decision-making procedures, evaluation of the implementation of decisions, and accountability investigation. The manifestation of these documents resembles the Provisions of Hunan Administrative procedures, which is a local rule issued by Hunan provincial government in April 2008.

<sup>22</sup> Chen Jieren and Liu Guohang, 政策和法律打架该听谁的? (In Case of Conflicts between A Policy and A Law, which One should be observed?), in 中国青年报 (*China Youth Daily*), 8 December 2001, available at <http://www.china.com.cn/chinese/difang/91546.htm>, last visited May 2016.

<sup>23</sup> A 2004 meeting minutes of the Supreme People’s Court on the application of legal norms for adjudicating administrative cases stated that normative documents are not a formal source of law and do not have binding force for the court, and the court can remark on the legitimacy, effectiveness and reasonableness of normative documents in judgments. In August 2009, the Supreme People’s Court issued a judicial interpretation (司法解释) concerning the citation of regulatory legal documents. It states that the normative documents, if confirmed to be legitimate and effective, may be used by the court as a basis for its argument in a judgment.

large not regularized by law. There are no national laws and regulations that demarcate the scope of the document-making power or impose limitations for the exercise of the power.<sup>24</sup> There are also no unified procedural rules on document-making. For the abovementioned reasons, it is too early to regard document-making as one type of law resulting from legislative decentralization, and therefore it is not appropriate to incorporate it in this research. Nevertheless, document-making is an important area for future study on China's legislation. There is no fundamental difference between normative documents and department/local rules, which are issued by higher-level administrative organs (namely, provincial and city-level people's governments). Some Chinese legal scholars call for the recognition of the legal effect of normative documents.<sup>25</sup> Given that this type of legal document has been increasing since 1978, it is likely that the legal status of normative documents will be defined in the future.

Another important area for future study is the resolution of the conflict of law, which is the key to maintain the coherence of the legal system. This research has touched upon some aspects of this area, such as the demarcation of legislative powers, the NPCSC's supervision for lower-level regulations, and the court's limited review of governmental rules. However, given that it is not the focus of this research, it does not give a complete picture. In-depth study on the formal system as well as field study are needed for clarify the following issues: (1) the legislative cleaning work (法律清理); (2) the prospects of judicial review on higher-level legal documents; (3) the effect of public participation and citizens' proposals to the NPCSC for resolving conflicts of law.

## 5. Structure of the Thesis

This thesis is composed of 8 chapters. Chapter 1 introduces the research topic, presents the research questions, theoretical framework and research methods, and discusses the limitations and areas for future study. Chapter 2 describes the economic theory of decentralization and the case of China. The discussion of decentralization theory has two dimensions. The first is the discussion of the traditional decentralization theory, the focus of which is the gains and limitations deriving from a decentralized structure of government. The second is the discussion of the recently developed theory of market-preserving federalism, which is intended to show the possible functions of a decentralized government for the creation of a market economy. By using the decentralization theory, this chapter explains why a highly centralized Soviet-style economic system was not sustainable in the early era of the PRC and why the Chinese government launched two waves of decentralization in the late 1950s and the early 1970s respectively. More importantly, this chapter explains the relationship between ongoing political, economic and legislative decentralization and the emergence of a market economy in the reform era.

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<sup>24</sup> Some localities have issued local rules, attempting to restrict the exercise of document-making powers. The Hunan Provisions on the Administrative Procedure, issued by the Hunan Provincial People's government in April 2008, provided for two restrictions: (1) the administrative provisions should not institute administrative permissions, administrative punishment, administrative enforcement measures or administrative charge; (2) without the prescription of existing laws, regulations or rules as basis, administrative provisions cannot restrict citizens' legitimate rights or add to their obligations (Article 47).

<sup>25</sup> Zhang Shuyi, 变革与重构—改革背景下的中国行政法理念 (*Transformation and Restructuring: the Concept of Chinese Administrative Law in the Background of Reform*) (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2002), pp. 181-185.

Chapter 3 discusses the legislative system of the NPC and the NPCSC. It first reviews the legal status of the national laws enacted by these two national organs, showing that although the NPC's lawmaking enjoys higher constitutional status compared to that of the NPCSC, the status of NPC law and that of the NPCSC law are regarded as being at the same level in practice. Second, it evaluates the scope of their law-making powers, focusing on exclusive legislative powers. The listing of exclusive matters in Article 8 of the LoL suggests that China has incorporated some federal elements in the division of legislative powers and it represents an attempt to strengthen the NPC and the NPCSC's legislative authority over decentralized legislative organs. Third, it evaluates the law-making procedure with the focus on two major developments – the incorporation of ‘three rounds’ deliberation of the NPCSC and the public participation. Finally, a review of the law-making practice is presented.

Chapter 4 discusses the legislative system of the State Council. It first analyzes the legal status of the administrative regulation (行政法规) issued by the State Council (China's cabinet) and the department rule (部门规章) issued by the State Council departments (ministries and committees). It then reviews the scope of the regulation-making and rulemaking powers of the State Council, showing that the legislative powers of the State Council are under continuous expansion in the first two decades of the reform era. Following the review of the legislative powers, this chapter evaluates the legal framework of the regulation-making and rulemaking procedure and provides an opinion on the shortcomings and prospects. Finally, the regulation-making and rulemaking practice is reviewed to explore the main development, shortcomings and prospects. An important argument is that the State Council's delegated legislation based on a 1985 NPCSC's delegation decision tends to fall into disuse and the decision will be abolished ultimately in the future.

Chapter 5 discusses the legislative system of provincial and city-level units. Following the examination of the legal status of local regulations and local rules, it explores how the local regulation-making and rulemaking powers are demarcated. It then examines the legal framework of the local regulation-making and rulemaking procedures with the focus on the requirement of public participation. Finally, the local regulation-making and rulemaking practice is provided.

Chapters 6 and 7 discuss the legislative systems of two types of special local units – the autonomous areas and SEZs. Chapter 6 begins with the evaluation of the legal framework of the legislative system in autonomous areas as one part of the system of Regional National Autonomy. Autonomous areas are allowed to exercise a more flexible legislative power and the key is the power to modify higher-level laws and regulations. Then it explores whether the designation of the legislative power in autonomous areas are in accordance with international standards. Finally, this chapter reviews the legislative practice, which focuses on two dimensions. The first is exploring the reasons why none of the autonomous regions have passed their regional-level autonomous regulations. The second is reviewing the legislative practice at sub-regional levels. In chapter 7, following a general overview of the SEZ system, a historical examination over the NPCSC's delegation of legislative powers to SEZs is presented. Then it examines the legal framework of the SEZ legislative system. Finally, it evaluates the SEZ legislative practice, focusing on the case of Shenzhen SEZ. The impact of SEZ legislation is far-reaching – it successfully introduced a legal system for the market economy and has been copied by later national legislation. The significance of SEZ

legislative power is that, equipped with a reformist identity/spirit, SEZs have the potential to introduce non-economic reforms in the legal domain, which are critical to China's long-term stability and development.

Chapter 8 is the concluding chapter. It first generalizes four major areas of progress in China's legislative system, namely, the creation of a decentralized multi-tier legislative system, clearer demarcation of legislative powers, the development of legislative democracy and the development of the pragmatic legislative approach. Then this chapter provides four major limitations that have materialized in the reform era. They are: inactive mechanisms for supervising legislation and addressing legislative conflicts, insufficient guarantee of local legislative authority, inactive legislative hearing and imbalanced legislation with the focus on economic affairs. Accordingly, relevant pragmatic recommendations for the future development of the legislative system are provided.

## Chapter 2. Decentralization Theory and the Chinese Case

### 1. Introduction

One of the most remarkable developments within the People's Republic of China over the last 37 years has been the spectacular expansion of the legal system. This achievement could not have been made without the decentralization of considerable legislative powers to multi-type state organs. In this chapter, the legislative decentralization is not seen as a single phenomenon; instead, it is put into a broad context, as one component of the broad political and economic decentralization program initiated in 1978. The decentralization is not modeled from systems of any foreign countries; instead, it is the result of 'learning by doing' practice, which can be traced back to the pre-reform era (1949-1978). Thus, in order to obtain a better understanding of the decentralization reform in the reform era, this chapter not only looks into the reform era, but also expands the study scope to cover the pre-reform era.

China's decentralization reform has its own characteristics but it also fits the decentralization theory. The decentralization theory was first developed by economists. Under this theory, decentralization has its gains in terms of pursuing welfare optimum. The 'new institutional economics' have expanded this theory into the political domain. They argue that a decentralized government structure may play a decisive role in creating a thriving market. In this chapter, it is argued that because the legislative decentralization is part of China's broad decentralization reform, it is also in line with the decentralization theory, serving as an important means of legitimating the market economy and facilitating its development. In fact, as revealed in the following chapters, the overwhelming majority of the existing legislation both at central and local levels is related to the development of a market economy.

This chapter is composed of 5 parts. Following the introduction, section 2 revisits the traditional decentralization theory and the theory of market-preserving federalism; section 3 looks back into the pre-reform era, exploring the establishment of a centralized political, economic and legal structure, and subsequent experiments of administrative decentralization; section 4 explores the broad decentralization program after 1978 and discusses its relationship with the legislative decentralization. Section 5 is the conclusion.

### 2. Revisiting the Decentralization Theory

#### 2.1 The Traditional Decentralization Theory

The decentralization theory was originally developed by economists. Under this theory, decentralization is generally defined as a shift of authority towards local governments and away from the central government.<sup>1</sup> Studies on decentralization have focused mainly on the shift of fiscal and to a lesser extent political and policy authority. With respect to this, two points should be clarified. First, the economic use of the term 'federalism' is different from that used in political science and legal study, where it refers to a particular political system with a constitution that guarantees, to varying degrees, the sovereign powers of both the

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<sup>1</sup> Jonathan Rodden, 'Comparative Federalism and Decentralization: On Meaning and Measurement', 4(2004) *Comparative Politics*, p. 482.

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national and the constituent units of government. In contrast, economists are more concerned with the *de facto* decision-making powers of the decentralized units (irrespective of the formal constitutional arrangement). In this sense, for economists a decentralized governmental structure is more or less federal, and therefore, for them, the terms ‘decentralization’ and ‘federalism’ are inter-changeable.<sup>2</sup> This section follows the economic use of the term ‘federalism’. Second, the theory describes a decentralized governmental structure for the vertical distribution of authority, focusing on economic efficiency. The subject of fiscal decentralization should be understood in a broad sense. It does not merely address those concerns relating to budgetary matters, but encompasses the whole range of issues relating to the vertical structure of the government.<sup>3</sup>

One of the major concern in the decentralization study is the gains of a decentralized government compared to a more centralized one. First and foremost, a decentralized provision of goods and services can contribute to maximizing overall social welfare.<sup>4</sup> One simple assumption is that the need for the output of public goods is likely to vary among local jurisdictions, resulting from the different preferences and cost differentials. As pointed out by Wallace Oates, by providing a range of outputs of public goods that corresponds more closely to the differing preferences of local people, a decentralized governmental system can increase economic welfare compared to the uniform provision of the central government.<sup>5</sup> In short, the welfare optimum of a country requires variation in the local output of public goods.

An assumption is that the asymmetrical provision of public goods according to the difference in local tastes can also be fulfilled by a benevolent central government. However, this is an idealist view and cannot happen in practice for two reasons. The first reason is that the central government is unlikely to generate an optimal pattern of local provision of public goods due to informational and political constraints. More specifically, in order to achieve optimal local provision, the central government must possess sufficient local information. With respect to information acquisition, the local governments are far more appropriate subjects compared to central government. Local governments are geographically closer to the local people; they possess information concerning local preferences and cost conditions that the central government is unlikely to have. The second reason is that even if a benevolent central government is able to collect sufficient information for achieving optimal local outputs, the central government is unlikely to provide local outputs asymmetrically because there are always certain political or legal constraints that forbid it to do so and require certain symmetrical treatment for local governments.<sup>6</sup>

The second gain from fiscal decentralization as developed by Charles Tiebout is that it enables the local people, as the consumers of local outputs, to choose localities that best satisfy their sets of preference; the greater the number of localities and the greater the variance among them, the closer the consumers will come to fully realize their preference

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<sup>2</sup> For the political definition of federalism see Ronald Watts, *Comparing Federal Systems* (Montreal: McGill-Queen’s University Press, 2008), pp. 8-9; for its economic definition, see Wallace Oates, *Fiscal Federalism* (New York: Harcourt Brace Jovanovich, 1972), pp. 17-20.

<sup>3</sup> Wallace Oates, ‘An Essay on Fiscal Federalism’, 37(1999) *Journal of Economic Literature*, p. 1121.

<sup>4</sup> Friedrich Hayek, ‘The Use of Knowledge in Society’, 35(1945) *American Economic Review*, pp. 519-530.

<sup>5</sup> Wallace Oates, *supra* note 2, p. 35.

<sup>6</sup> *Ibid.*, p. 123.

positions.<sup>7</sup> This ‘voting on foot’ mechanism can be regarded as a sort of market solution to the problem of enhancing the efficiency of the provision of public goods. Although the Tiebout model receives some criticism focusing on the stringent assumptions required by this model, such as full mobility and full knowledge of the differences between localities, it reveals considerable truth on the welfare gains from the decentralized provision of public goods.

The third gain, which is also related to the second one, is that fiscal decentralization tends to cause competition among local jurisdictions for revenue maximization. This competition serves to curb the expansionary tendencies of the public sector and to improve the provision of local public goods, and therefore is conducive to welfare enhancement.<sup>8</sup> It should be noted that the application of this model is not unconditional. Some scholars argue that one detrimental effect of inter-jurisdictional competition is that it may cause distortion in public choices, resulting in a ‘race to the bottom’ in terms of the provision of public services.<sup>9</sup> For instance, the incentives to compete for the attraction of business investment will decrease the tax rates more than the levels needed to maintain efficient public sectors.<sup>10</sup>

The fourth gain is that a decentralized form of government may lead to greater efficiency of public output through experimentation, which is known as laboratory federalism. Its main point is that a decentralized governmental structure may offer opportunities for encouraging local experimentation on initiating innovative policies, and therefore improving the overall effectiveness of the country in policy innovation. The laboratory nature of the decentralized system was first described by James Bryce in his study on the U.S. system of government.<sup>11</sup> A concurring point was made later by Justice Louis Brandeis in 1932. In *New State Ice Co. v. Liebmann*, he wrote: ‘it is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country’.<sup>12</sup>

The gains from laboratory federalism are multi-fold. First, it enables the central government to make use of decentralized units as a testing ground to find what kind of program is workable. It is also right to say that it serves to ascertain which level of government is best suited for governing certain matters. This was proved by the large-scale welfare reforms of the states of the U.S. in the 1990s.<sup>13</sup> Second, it may lead to the vertical diffusion of successful policies. More specifically, the successful programs developed at a decentralized level can provide models for subsequent national programs. Thirdly, it may also lead to the horizontal diffusion of successful policies. These two patterns of diffusion of

<sup>7</sup> Charles Tiebout, ‘A Pure Theory of Local Expenditures’, 64(1956) *The Journal of Political Economy*, pp. 418-419.

<sup>8</sup> Geoffrey Brennan and James Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Cambridge: Cambridge University Press, 1980), p. 184.

<sup>9</sup> George Break, *Intergovernmental Fiscal Relations in the United States* (Washington: Brookings Institution Press, 1967), pp. 23-24; John Cumberland, *Interregional Pollution Spillovers and Consistency of Environmental Policy* (New York: NYU Press, 1979), pp. 255-281; Alice Rivlin, *Reviving the American Dream: The Economy, the States & the Federal Government* (Washington: Brookings Institution Press, 1992), p. 142.

<sup>10</sup> Wallace Oates, *supra* note 2, pp. 142-143.

<sup>11</sup> Bryce V.J. Bryce and Bradley. R, ‘The American Commonwealth’, 1(1889) *Macmillan and Company*, p. 353.

<sup>12</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

<sup>13</sup> Craig Volden, ‘Entrusting the States with Welfare Reform’ in John Ferejohn and Barry R. Weingast (ed.), *The New Federalism: Can the States be Trusted?* (Stanford: Hoover Institution Press, 1997), pp. 65-96.

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experimental policies have been examined by a number of political scientists.<sup>14</sup> David Huff, Lutz James, and Srivastava Rajendra have examined the geographical and other determinants of the pattern of adoption by states of the US.<sup>15</sup> Some studies have examined the extent to which federal measures draw on the experience of the states.<sup>16</sup> In his study on the relationship between fiscal decentralization and the increase of policy innovation, Koleman Strumpf found that there exists a basic ‘information externality’ in the sense that local experimentation generates valuable information for other localities.<sup>17</sup>

Apart from economic gains, the gains from decentralization may also encompass political gains. From the standpoint of political science, a decentralized political system tends to enhance public participation in the political decision-making. This political gain was proved to be true by the study of Inman and Rubinfeld concerning ‘anti-trust state action doctrine’. In their study, Inman and Rubinfeld found that the vertical decentralization of responsibilities leads to an increase of political participation but it is at the expense of economic efficiency, thus exhibiting a trade-off between political participation and economic efficiency.<sup>18</sup>

In summary, a decentralized form of government reveals several economic advantages. It can enhance overall welfare by tailoring the provision of public goods in accordance with varying local preference; on the condition of free consumer mobility, it enables local consumers to migrate to the community that which best satisfies their tastes in terms of output of public goods; Through inter-jurisdictional competition, decentralization tends to enhance the local provision of public goods; it can generate an atmosphere of experimentation that is conducive to finding more efficient policies; lastly decentralization also possesses additional political attributes, such as increasing political participation. We should bear in mind that the above advantages of decentralized government are discussed in comparison to a more centralized government. These two forms of government stand at opposite ends of the spectrum. At one end of the spectrum is a unitary form of government, which, in the absence of local-level governments, assumes full functions of the public sector. The other end of the spectrum is a total decentralized form of government, which represents a state of anarchy. One objective of this research is to evaluate, from the perspective of legislation, the process of China’s efforts in seeking the optimal allocation of powers between the central government and decentralized units.

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<sup>14</sup> See Keith Boeckelman, ‘The Influence of States on Federal Policy Adoptions’, 20(1992) *Policy Studies Journal*, pp. 365-375. Michael Sparer and Brown Lawrence, ‘States and the Health Care Crisis: Limits and Lessons of Laboratory Federalism’, in Robert Rich and William White (ed.), *Health Policy, Federalism, and the American States* (Washington D.C.: the Urban Institute Press, 1996), pp. 181-202.

<sup>15</sup> David Huff, Lutz James and Srivastava Rajendra, ‘A Geographical Analysis of the Innovativeness of States’, 64(1988) *Economic Geography*, pp. 137-146; also see David Nice, *Policy Innovation in State Government* (Ames: Iowa State University Press, 1994).

<sup>16</sup> See Thomas Anton, *American Federalism and Public Policy: How the System Works* (Philadelphia: Temple University Press, 1989); Keith Boeckelman, ‘The Influence of States on federal Policy Adoptions’, 20(1992) *Policy Studies Journal*, pp. 365-375.

<sup>17</sup> Koleman Strumpf, ‘Does Government Decentralization Increase Policy Innovation?’, 4(2002) *Journal of Public Economic Theory*, pp. 207-241.

<sup>18</sup> Robert Inman and Rubinfeld Daniel, ‘Making Sense of the Antitrust State-action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism’, 75(1996) *Tex. L. Rev.*, pp. 1229-1230.

## 2.2 The Limitations for the Application of the Decentralization Theory

There are two main limitations for the application of the decentralization model. First, compared to a decentralized government, a centralized government is likely to be more capable in carrying out certain functions and powers. The purpose is to avoid the so-called 'race to the bottom' phenomenon. If, for example, local governments possess the power to create money, they have the incentive to finance their respective expenditures by expanding money supply, which would inevitably result in rampant price inflation. Thus, some form of centralized control over monetary policy is imperative for macro-economic stabilization.<sup>19</sup> Another example is income re-distribution. An ambitious local program for income re-distribution tends to induce the inflow of the poor and outflow of those with higher incomes who would bear the increased tax burden. For this reason, local governments have incentives to provide inadequate assistance to the poor, which has the consequence of the fall of overall poverty alleviation in the country.<sup>20</sup> Therefore a re-distributive program is more likely to be successful if it is carried out to the whole country by the central government. A centralized form of government is also more favorable for providing public good that benefits the whole population of the country. Given that it is the responsibility of the public sector as a whole and everyone in the country is a beneficiary, a highly centralized government is likely to be more effective in providing such public services. One public service with such a characteristic is national defense. Another intensively studied area with regard to 'race to the bottom' is tax competition.<sup>21</sup>

Second, whether the aforementioned gains from decentralization can be achieved is conditional. The above mentioned Tiebout model requires two crucial assumptions for achieving the gains from decentralization – full population mobility and full knowledge of difference between local jurisdictions. However, in many societies, the opportunity for domestic migration and the information exchange between local jurisdictions are highly restricted, which tends to affect the effectiveness of decentralization. The effect of inter-jurisdictional competition resulting from decentralization is also context-dependent. In their study on economic competition among jurisdictions, Wallace Oates and Robert Schwab suggests that in localities where jurisdictions are homogeneous, the competition generates a socially optimal outcome, and *vice versa*.<sup>22</sup> It is also noteworthy that whether the objectives of decentralization can be achieved are affected by political and social changes as shown in the pre-reform era, which will be discussed later.

The preceding discussion suggests that in terms of public good provision, both a highly centralized form of government and an extremely decentralized one have advantages and shortcomings. Thus an optimal form of government would be the one that combines the strengths of both the two extreme forms and avoids the shortcomings of either.<sup>23</sup> One of the major subjects of the decentralization study is to explore which authorities are best reserved

<sup>19</sup> Wallace Oates, *supra* note 2, p.4.

<sup>20</sup> David E. Wildasin, 'Income Re-distribution in a Common Labor Market', 81(1991) *The American Economic Review*: pp. 757-774; George Stigler, 'The Tenable Range of Functions of Local Government', 88(1998) *International Library of Critical Writings in Economics*, pp. 3-9.

<sup>21</sup> John D. Wilson, 'Theories of Tax Competition', 52(1999) *National Tax Journal*, pp. 269-304.

<sup>22</sup> Wallace Oates and Schwab Robert, 'Economic Competition among Jurisdictions: Efficiency Enhancing or Distortion Inducing?', 35(1988) *Journal of Public Economics*, pp. 333-354.

<sup>23</sup> Richard Musgrave, *The Theory of Public Finance* (New York: Mcgraw-Hill, 1959), pp. 181-182.

for the national government and which are best decentralized to local governments. It should be pointed out that there is no single right answer about the distribution of authority in a decentralized government. The right answer always varies from country to country depending on their particular history and character.<sup>24</sup> As mentioned earlier, the decentralization study focuses on the *de facto* vertical allocation of authority. In this sense, despite the difference in the constitutional guarantee of local authority, both a unitary country and a federation need, based on their conditions, to explore its optimal decentralized form of the distribution of authority.

### 2.3 The View of Institutional Economics: Market-preserving Federalism

The aforementioned traditional federalism theory can be regarded as the first generation theory, which is largely normative analysis and emphasizes vertical arrangement of public output for maximizing social welfare. The 1990s saw the emergence of a second fiscal federalism theory. The focus of this theory is not about maximizing social welfare, but about exploring the fiscal incentives for preserving other developments, such as local economic prosperity and market economy.<sup>25</sup> One important dimension of the second generation theory, which was developed by the ‘new institutional economics’, sees decentralization from the perspective of the capacity of political institutions to cultivate and sustain a thriving market. Some economists, especially Barry Weingast and Qian Yinyi have explored the critical role of political decentralization in providing a favorable political framework for a market system, which was termed ‘market-preserving federalism’.<sup>26</sup> Weingast’s viewpoint starts with a basic assumption that a thriving market economy requires a form of limited government that can credibly commit the state to honor economic and political rights.<sup>27</sup> The central element of this commitment is that in order to sustain the market, the limits imposed on the government must be self-enforcing, which means political institutions must have incentives to observe the self-imposed limitation.<sup>28</sup>

Weingast argues that a decentralized form of government may serve to sustain a market system. There are mainly two reasons. First, the decentralization can achieve credible commitment to preserving the market as mentioned above in the sense that it limits the information and authority of the central government, which tends to limit the predation of the central government and harden the local budget constraint.<sup>29</sup> Second, the competition among local governments over factor mobility may also provide such credible commitment - it helps to limit the bailout of enterprises by governments and to harden local budget constraints.<sup>30</sup>

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<sup>24</sup> Wallace E. Oates ‘On the Theory and Practice of Fiscal Decentralization’, *Working Paper No. 2006-05*, Institute for Federalism & Intergovernmental Relations, pp. 30-31.

<sup>25</sup> For the distinction between first generation and second generation of fiscal federalism, see Barry R. Weingast, ‘Second Generation Fiscal Federalism: the Implications of Fiscal Incentives’, 65(2009) *Journal of Urban Economics*, pp. 279- 293.

<sup>26</sup> Barry R. Weingast, ‘The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development’, 11(1995) *Journal of Law, Economics, & Organization*, pp. 1-31;

<sup>27</sup> *Ibid.*, p. 1.

<sup>28</sup> *Ibid.*, p. 2.

<sup>29</sup> Yingyi Qian and Barry R. Weingast, ‘Federalism as a Commitment to Preserving Market Incentives’, 11(1997) *The Journal of Economic Perspectives*, pp. 85-88.

<sup>30</sup> *Ibid.*, pp. 88-89; also see Yingyi Qian and Gerard Roland, ‘Federalism and the Soft Budget Constraint’, 88 (1998) *American Economic Review*, pp. 1-39.

According to Weingast, market-preserving federalism has three characteristics: (1) decentralized governments have primary regulatory responsibilities over the economy; (2) decentralized governments face a hard budget constraint, meaning they do not have the power to print money or have access to unlimited credit; (3) decentralized governments ensure a common market in which trade barriers erected by local authorities are not allowed.<sup>31</sup>

The most significant effect of market-preserving federalism is that it provides the political foundation for a market system. Apart from this effect, market-preserving federalism is in line with traditional decentralization theory in terms of the economic effect – it tends to (1) induce competition among jurisdictions and factors of production; (2) allow the diversity of policy choices and experiments.<sup>32</sup>

Weingast contends that this drove the impressive economic rise of England in the 18<sup>th</sup> century and the United States in the 19<sup>th</sup> Century,<sup>33</sup> In terms of the English case, 19<sup>th</sup> century England was a *de facto* federation in which the central government's regulatory ability over the domestic economy was limited, which induced competition among local jurisdictions over economy. A well-known case is that industrialization in England did not proceed from the established commercial centers, but started instead in the north where the unfavorable local regulatory constraints to the new industrial activities were much weaker. Weingast concludes that this *de facto* federal system provided a decisive political foundation for England's industrial revolution.<sup>34</sup> This Market-preserving federalism system in England proved sustainable because following the Glorious Revolution of 1688, the protection of local power against national interference emerged as an explicit constitutional consensus at the end of the 17<sup>th</sup> century, which in turn led to the establishment of an equilibrium, in which citizens could react to the violations of the limits on governmental action.<sup>35</sup>

In terms of the American case, the American Constitution, and in particular, the 'commerce clause', prevents states from erecting trade barriers; and it also limits the regulatory intervention of the federal government to the common market. This constitutional constraint on state and federal governments laid out the critical political foundation for the emergence of a common market and enormous expansion of the economy of the United States in the 19<sup>th</sup> century.<sup>36</sup> The market-preserving federal system in the United States has been proved sustainable due to explicit socio-economic differences between the north and the south (in the early era) and the two party system (in the later era), under which both sides agree to limits on national authority as a means of limiting the ability of the other to dominate.<sup>37</sup>

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<sup>31</sup> Barry R. Weingast, *supra*, note 26, p. 4.

<sup>32</sup> Gabriella Montinola, Yingyi Qian, and Barry R. Weingast. 'Federalism, Chinese style: the Political Basis for Economic Success in China', 48(1995) *World Politics*, pp. 57-59.

<sup>33</sup> This section will only discuss the English case and American case in general and the Chinese case will be discussed in great detail later.

<sup>34</sup> Barry R. Weingast, *supra*, note 26, pp. 6-8.

<sup>35</sup> *Ibid.*, pp. 17-18.

<sup>36</sup> *Ibid.*, pp. 8-9.

<sup>37</sup> *Ibid.*, pp. 18-21.

### 3. The Centralization of Power in the Pre-reform Era (1949-1978)

#### 3.1 A Centralized Political and Economic System and Two Waves of Decentralization Reforms

In the mid-1950s, by adopting the Soviet model, the PRC established a highly centralized political and economic system, which revealed a totalitarian nature.<sup>38</sup> In the political domain, the NPC was the *de jure* highest State organ, possessing unlimited power; and the State Council was the highest administrative organ. Following the vertical superiority-subordination principle, administrative agencies were set up nationwide, from ministries under the State Council to People's Communes (人民公社) in local communities, thus enabling the bureaucracy to exert its influence to every level of the society and every Chinese individual. The centralized governmental structure was reinforced by the one party system. In real life, the State power was monopolized by the Chinese Communist Party (CCP), a Marxist-Leninist party guided by the principle of centralism. A simple interpretation of the term 'centralism' as the party coordination mechanism is: instructions passed down from the top party committee must be carried out by the subordinates.<sup>39</sup> By interweaving with governmental apparatus, the party ensured its dominance in the governmental activities.<sup>40</sup>

In the economic domain, by 1956 the socialist transition for the means of productivity had been accomplished. In rural areas, the previously independent family farms were transformed into Production Teams (生产队), in which some 20 to 30 neighboring households performed agricultural productivity work and owned all the land, farm machinery and other means of productivity collectively.<sup>41</sup> In urban areas, the previous various types of non-public economic ownerships were transformed into either state-owned or collective-owned economic ownership. After the transition, the economic entities both in rural areas and urban areas were either state-owned or collective-owned, which were subject to the socialist planned economy. The emerging socialist planned economy in China was centralized in nature and under the ultimate control of the national bureaucracy. Its centralized nature is revealed in many spheres. In terms of the allocation of materials, the number of material items allocated by the central government dramatically increased from 55 in 1952 to 532 in

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<sup>38</sup> For the characteristics of the totalitarian regime, see Carl Friedrich and Zbigniew Brzezinski, *Totalitarian Dictatorship and Autocracy* (Massachusetts: Harvard University Press, 1965) p. 15; also see János Kornai. *The Socialist System: The Political Economy of Communism* (Oxford: Oxford University Press, 1992), pp. 46-48; For the totalitarian feature of Maoist China, see Peter Baehr, 'China the Anomaly Hannah Arendt, Totalitarianism, and the Maoist Regime', 9(2010) *European Journal of Political Theory*, pp. 274-279.

<sup>39</sup> János Kornai. *The Socialist System: The Political Economy of Communism* (Oxford: Oxford University Press, 1992), pp. 34-36.

<sup>40</sup> *Ibid.*, pp. 37-40.

<sup>41</sup> In 1958 people's communes were formed to strengthen the agricultural collectivization. Each people's commune consisted of about 20-40 production teams, which were the basic accounting and production organizing units; each team consisted of about 20-30 neighboring households. The productivity of the production team was guided by communes' plans, which was based on the national production plan set by the Central government. The state monopoly purchase and marketing system for crops was adopted during the pre-reform era. For the process of the rural collectivization see Lin, Justin Yifu. 'Collectivization and China's Agricultural Crisis in 1959-1961', 98(1990) *Journal of Political Economy*, pp. 1230-1236; For a detailed description on the operation of the production team, see John McMillan, John Whalley and Zhu Lijing, 'The Impact of China's Economic Reforms on Agricultural Productivity Growth', 97(1989) *The Journal of Political Economy*, pp. 783-784.

1957.<sup>42</sup> In terms of the allocation of budget, during the period of the first five-year plan (1953-1957), the central government's budget accounted for 75 per cent and local government's budget accounted for 25 per cent.<sup>43</sup> The fiscal system during this era was also highly centralized. The government adopted a Sharing Total Revenue System (总额分成制). Under this system, the central government was responsible for the collection of all revenues and for preparing a consolidated budget for itself as well as for local governments at all levels.<sup>44</sup>

Shortly after the establishment of the highly centralized system, Chinese leaders came to realize that this system severely hindered local economic development. Aiming to resolve this problem, Mao Zedong delivered his speech 'On Ten Important Relationships' in 1956. In this speech, he called for giving full play to two initiatives (national and local initiatives) and therefore, the central government should give more authority to local government.<sup>45</sup> Following Mao's speech, the Chinese central government launched its first wave of decentralization reform in 1958. As a consequence, the country was divided into 7 'Cooperative Regions' (协作区), each of which was required to form a complete industrial system; some important economic managerial powers, which was previous exercised by the central government, were decentralized to provincial governments. The managerial authority over most of the light industry enterprises and medium-sized and small heavy industry enterprises, for example, was decentralized to provincial governments. As a result, the number of enterprises subordinated to the central government was largely reduced from 9300 in 1957 to 1200 in 1958; the industrial output of the enterprises subordinated to the central government reduced from 39.7 per cent in 1957 to 13.8 per cent in 1958.<sup>46</sup> Decentralization reforms could also be seen in the areas of planning and fiscal management.<sup>47</sup>

The 1958 decentralization reform soon proved to be a failure and had disastrous consequences. The radical decentralization greatly weakened the central government's ability to control and adjust the national economy and it led to economic segmentation among regions and provinces. In order to make a complete industrial system and achieve economic development objectives, in particular, the 'great leap' in heavy industry, provincial governments chose to largely increase the investment in heavy industry at the expense of light industry and agriculture. The imbalanced investment not only led to repeated construction in heavy industry, but also led to significant shrinking in light industry and

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<sup>42</sup> Yingyi Qian. 'The Process of China's Market Transition (1978-1998): The Evolutionary, Historical, and Comparative Perspectives', 156(2000) *Journal of Institutional and Theoretical Economics*, p. 164.

<sup>43</sup> *Ibid.*, p. 164.

<sup>44</sup> For a detailed discussion on fiscal reform in the pre-reform era, see Nicholas Lardy, 'Centralization and Decentralization in China's Fiscal management', 61 (1975) *The China Quarterly*, pp. 25-60; Michel Oksenberg and James Tong. 'The Evolution of Central-Provincial Fiscal Relations in China, 1971-1984 the Formal System', 125(1991) *The China Quarterly*, pp. 1-32.

<sup>45</sup> Mao Zedong, 毛泽东选集第五卷 (*Selected Works of Mao Zedong, Vol. V*) (Beijing: Renmin Chubanshe, 1977), pp. 275-277.

<sup>46</sup> See Hu Shudong, 经济发展中的中央与地方关系: 中国财政制度变迁研究 (*The Central-local Relation in the Economic Development: On the Evolution of China's Fiscal System*) (Shanghai: Shanghai Sanlian Shudian, 2001), pp. 64-67.

<sup>47</sup> See *ibid.*, pp. 64-67.

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agriculture during the period from 1958 to 1962.<sup>48</sup> The shrinking caused a nationwide famine, leading to more than 20 million deaths during this era.<sup>49</sup> The economic difficulties following the 1958 decentralization forced the Chinese central government to re-consider its decentralization policy. In September 1961, the Chinese central government adopted a new policy: 're-adjustment, consolidation, filling out gaps and raising standards', the thrust of which was to re-centralize most of the powers, which had been decentralized to localities in 1958. Many enterprises, for example, were again put back under the control of the central government.

However, the highly centralized system rehabilitated in the early 1960s could not resolve the problems of information delivery and supervision. The Chinese central government started its second wave of decentralization reform in 1970. The extent of the 1970 decentralization reform was even larger than that in 1958. In 1976 the number of enterprises under the central government was around 1600, accounting for merely 6 per cent of the total industrial output, compared to 10533 and 42.2 per cent in 1965.<sup>50</sup> During this period, local governments were granted greater authority over planning and fiscal management. Apart from the above decentralization measures, the central government strengthened tighter supervision over the exercise of the decentralized powers.<sup>51</sup> Some key measures of the national supervision include: (1) all the local investment projects on basic construction were incorporated into the national plan; (2) the national plan and budget should be carried out strictly; and investment projects outside of the national plan were forbidden; (3) the balance between revenue and expenditure should be maintained, the surplus of budget could be left to the localities but the local budgets should be fixed annually.<sup>52</sup> It should be pointed out that the second wave of decentralization reform avoid the re-emergence of the disastrous economic consequence as caused by the first wave of decentralization reform, but it also did not lead to significant economic growth due largely to the disruption of the political turmoil at that time.<sup>53</sup>

The two waves of decentralization reforms were in line with the decentralization theory. The centralized economic and administrative system severely hindered the information delivery and supervision of economic activities, and therefore affected overall economic output. This provides a counterexample of the decentralization theory that, compared to a centralized government, a decentralized government can better collect sufficient information and conduct supervision, and therefore is able to achieve better economic outputs. The two waves of decentralization reforms represent the central government's attempts to correct the shortcomings brought by centralization, but the first wave had disastrous economic consequence due to the fact that the central government lost the ability to control and adjust the national economy and could not prevent the rampant but imbalanced investment in

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<sup>48</sup> Compared to 1958, the value of agricultural output in 1962 declined by 21.8% and the value of light industry output declined by 21%, see National Bureau of Statistics, 中国统计年鉴 1983 (*China Statistical Yearbook 1983*) (Beijing: Zhongguo Tongji Chubanshe, 1983), p. 249.

<sup>49</sup> Basil Ashton, Kenneth Hill, Alan Piazza, and Robin Zeitz, 'Famine in China, 1958-61', 10(1984) *Population and Development Review*, pp. 613-645.

<sup>50</sup> Hu Shudong, *supra* note 46, p. 78.

<sup>51</sup> *Ibid.*, pp. 81-82.

<sup>52</sup> *Ibid.*

<sup>53</sup> Ezra F. Vogel, *Deng Xiaoping and the Transformation of China* (Cambridge: Belknap Press of Harvard University Press, 2011), pp. 94-95 and 103-114.

various provinces. This demonstrates the limitations of decentralization - some functions and powers (for example, the power of macro-economic management) should not be decentralized for the purpose of maximizing overall economic output. Accordingly, the theory is also able to explain why the central government strengthened the supervision for the exercise of decentralized powers in the second wave of reform.

### 3.2 Moving to a Highly Centralized Legislative System and its Paralysis

Before examining the legislative development of the PRC in the pre-reform era, it is necessary to first discuss the abolition of the legal system of the Guomindang (国民党) government, known as the Six Codes (六法全书).<sup>54</sup> With the take-over of the mainland China in sight, the CCP issued an array of documents, repudiating the Guomindang's Six Codes and claiming that they should be abolished.<sup>55</sup> The reason for the abolition is largely ideological: in the eyes of the CCP these Guomindang laws were reactionary rules of the bourgeois class, and were used as weapons to suppress and coerce the vast masses of the people, therefore they were not applicable in liberated areas.<sup>56</sup> The Common Program of the Chinese People's Political Consultative Conference (CPPCC) (中国人民政治协商会议), which was deemed as a provisional constitution before 1954 when the first PRC constitution was adopted, confirmed that the Guomindang's legal system combined with its judicial system should be abolished.<sup>57</sup> Thus, after the establishment of the PRC on 1 October 1949, the Guomindang's legal system as a whole was abolished.<sup>58</sup> The development of the legal system in the PRC was started largely with a blank sheet.<sup>59</sup>

<sup>54</sup> With its roots in the legal modernization in the late Qing Dynasty, the Guomindang legal system was mainly constructed from 1929 to 1935, with the mixture of Anglo-American and Civil Law forms and procedure. For the development of the legal system under the Guomindang Regime, see Alice Erh-Soon Tay, 'Law in Communist China-Part 1', 6 (1968) *Sydney L. Rev.* pp. 162-165.

<sup>55</sup> See the CCP Central Committee, 中央关于废除国民党〈六法全书〉和确定解放区司法原则的指示 (The Directives concerning Abolishing the Guomindang's Six Codes and Laying out the Judicial Principles in Liberated Areas), issued in February 1949. The text is available in the State Archives Administration, 中共中央文件选集 (第十八册) (*Selected Documents of the CCP Central Committee*) (volume XVIII) (Beijing: Zhonggong Zhongyang Dangxiao Chubanshe, 1992), pp. 150-154.

<sup>56</sup> Jianfu Chen. 'Coming Full Circle: Law-making in the PRC from a Historical Perspective', in Michiel Otto (ed.), *Law-making in the People's Republic of China* (The Hague: Kluwer Law International, 2000), pp. 28-29; also see Yu Xingzhong, 'Legal Pragmatism in the People's Republic of China', 3 (1989) *J. Chinese. L.*, pp. 32-36.

<sup>57</sup> Article 17 of the Common Program of the CPPCC. The 1949 CPPCC served as a constitutional convention, which passed the Common Program, national flag, name, and elected the first government of the PRC. It becomes a political advisory body afterwards.

<sup>58</sup> For the influence of the abolition, see He Qinghua, 论新中国法和法学的起步—以‘废除国民党六法全书’与‘司法改革运动’为线索 (On the Startup of the Law and Legal Study in New China, Focusing on the Abolition of Guomindang's Six Codes and the Judicial Reform Movement), 4 (2009) *中国法学 (China Legal Science)*, pp. 131-145.

<sup>59</sup> Some scholars discussed the continuity of the legal development between the pre-1949 period in communist liberated areas and the post-1949 period when the CCP took over the mainland China. See Shao Chuanleng, *Justice in Communist China: a Survey of the Judicial System of the Chinese People's Republic* (New York: Oceana Publications, 1967), p. 26; It should be pointed out that given a serious shortage of competent legal cadres and trained personnel, and the tough war environment, the pre-1949 communist legal experience is better to be understood as providing some inadequate guidance for the later legal development rather than providing a fully-fledged legal system comparable to Guomindang's Six Codes.

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After abolishing the Guomindang's legal system, the CCP moved quickly to build its legislative system, hoping its subsequent legislation would fill up the legal vacuum caused by the abolition of the Guomindang's legal system. In the first five years after the establishment of the PRC in October 1949, a *de facto* fragmented legislative setting emerged. At the central level, the bodies with legislative powers were the Committee of the Central People's Government (CCPG) (中央人民政府委员会) and the Committee of Administrative Affairs (政务院).<sup>60</sup> At the local level, the local governments at all levels - from regional level down to county level - were empowered to enact interim acts and regulations, and separate regulations.<sup>61</sup>

From early 1950 to the September of 1954, Chinese governments at various levels had promulgated a large number of regulatory documents. For instance, from early 1950 to the end of 1953, the central government promulgated 435 laws, regulations and other regulatory documents.<sup>62</sup> Among them, the most important included the Marriage Law, the Land Reform Law, the Trade Union Law in 1950, and the Regulation for Punishing Counter-revolutionaries in 1951 and Regulations for Punishing Corruption in 1952. The Ministry of Justice and a codification committee set up by the Committee of Administrative Affairs deliberated on the proposed drafts for the Principles of Criminal Law, the General Principles of Judicial Procedure and Company law, but none of these had been adopted during this period.<sup>63</sup> Local governments at that time were also active in making regulatory documents. Some examples are these: various levels of local governments in Zhejiang province promulgated 653 regulations and other regulatory documents; from September 1949 to September 1954 and the Shanghai People's Government promulgated 799 regulations and other regulatory documents.<sup>64</sup> The legislation during this period mainly concerned three key tasks, namely, establishing state apparatus, implementing social reforms launched by the CCP and recovering and developing the economy.<sup>65</sup>

Consistent with its socialist transformation in the mid-1950s, the PRC passed its first constitution in September 1954. Under the 1954 Constitution, the previous *de facto* decentralized legislative system was radically changed to a highly centralized legislative system. According to the 1954 Constitution, the National People's Congress (NPC) was the only organ authorized to exercise the legislative powers of the State (Article 22); its Standing Committee (NPCSC) was not granted legislative powers but it may enact acts (法令). The

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<sup>60</sup> According to the Common Program and the Organic Law of the Central People's Government passed by the First Plenary Session of the CPPCC in September 1949, before the first NPC was convened, the CCPG was the organ to exercise State power, and it was also responsible for organizing the Committee of Administrative Affairs, which was the highest organ for carrying out the administrative affairs of the State.

<sup>61</sup> These local legislative powers were confirmed by relevant acts of the Committee of Administrative Affairs concerning the organization of local people's government, which were issued in December 1949 and January 1950 respectively, see Guo Daohui, *中国立法制度 (The Legislative System in China)* (Beijing: Renmin Chubanshe, 1988), pp. 12-13.

<sup>62</sup> Li Lin, *关于立法权划分的理论与实践 (On the Theory and Practice of the Division of Legislative Power)*, 5(1998) *法学研究 (Chinese Journal of Law)*, p. 59. It should be noted that the concept of law was not clearly specified in the initial stage of the PRC, and therefore the number of legislation at that time may vary in different sources.

<sup>63</sup> Alice Erh-Soon Tay, 'Law in Communist China-Part 2', 6 (1968) *Sydney L. Rev.*, p. 351

<sup>64</sup> Wu Daying, *中国社会主义立法问题 (The Issue on the Socialist Legislation in China)* (Beijing: Qunzhong Chubanshe, 1984), pp. 36-37.

<sup>65</sup> *Ibid.*, pp. 34-42.

new legislative setting did not grant legislative powers to any local authorities apart from those in autonomous areas. This was in sharp contrast to the previous *de facto* decentralized legislative setting.

The highly centralized legislative setting in the 1954 Constitution was modeled on the soviet legislative system in the USSR Constitution of 1936 in terms of both structural arrangement and legislative power allocation.<sup>66</sup> The 1954 Constitution concentrated legislative powers on the NPC, which paralleled the Supreme Soviet under the USSR Constitution of 1936. Modeling on the Soviet legislative system was not an isolated phenomenon. In fact, in the initial era of the PRC, the Soviet Union was taken as a model for political, economic and social construction and the law-related matters were not an exception.<sup>67</sup>

Soon after the establishment of the highly centralized legislative system, Chinese leaders realized that given its large size and short meeting duration, the NPC's legislative speed was too slow to satisfy practical needs. In order to accelerate legislative work, in July 1955 the NPC passed a resolution, empowering its standing committee to enact separate regulations.<sup>68</sup> In April 1959, the NPC further allowed its standing committee to revise provisions of existing national laws.<sup>69</sup>

After the promulgation of the 1954 Constitution, the Chinese legal system underwent a modest development. From September 1954 to the end of 1957, the NPC and its Standing Committee promulgated only a few dozen laws and regulations. These laws and regulations mainly concerned the organization of state apparatus. The laws promulgated by the NPC included the Organic Law of the National People's Congress, the Organic Law of the State Council, the Organic Laws of the People's Court and People's Procuratorate, the Organic Law of the Local People's Congresses and People's Committee at various levels, and the Military Service Law. The NPCSC promulgated the Regulation on Arrest and Detention, the Organic Regulation on Urban Sub-district Offices, the Organic Regulation on Urban Neighborhood Committee, and the Organic Regulation on Public Security Station.

If the legislative developments from 1949 to 1954 and from 1954 to 1957 are taken together for consideration, it can be observed that during the eight years the legislative system did not experience any substantial development and the accompanying legislation did not generate any systematic, coherent legal system as they were too loosely and poorly drafted. One significant characteristic of the legislation during this period was that it was used to push forward the ongoing social reforms and political movements. For instance, in the early 1950s, the central government and various local governments promulgated an array of

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<sup>66</sup> Albert H.Y. Chen, *Socialist Law, Civil Law, Common Law, and the Classification of Contemporary Chinese Law*, in Michiel Otto (ed.), *Law-making in the People's Republic of China* (The Hague: Kluwer Law International, 2000), p. 57.

<sup>67</sup> Jianfu Chen, *supra* note 55, p. 30.

<sup>68</sup> The title of this resolution is 关于授予常务委员会制定单行法规的决议 (The Resolution on Authorizing the Standing Committee to Enact Separate Regulations), for its main content, see Li Shishi, 关于全国人大常委会的立法工作 (On the Legislative Work of the NPCSC), available at [http://www.npc.gov.cn/npc/xinwen/2013-06/25/content\\_1798343.htm](http://www.npc.gov.cn/npc/xinwen/2013-06/25/content_1798343.htm), last visited May 2016.

<sup>69</sup> The title of this resolution is: 关于全国人民代表大会常务委员会工作报告的决议 (The Resolution on the Working Report of the NPCSC), for its main contents concerning the legislative authorization, see *ibid.*

laws, regulations and other regulatory documents to facilitate the land reform. Among them, most noticeable is the Land Reform Law passed by the CCPG in June 1950. In February 1951, the CCPG promulgated the Regulation on Punishing Counter-revolutionaries to deepen the ongoing campaign to suppress counter-revolutionaries launched by the CCP in October 1950, which led to the execution of more than 0.7 million people.<sup>70</sup> In order to facilitate the Three-anti Campaign (launched in December 1951) and the Five-anti Campaign (launched in January 1952), the Committee of the Administrative Affairs promulgated the Regulation on Punishing Corruption.<sup>71</sup>

Drawing on the above discussion, it can be seen that the legislation in the early pre-reform era had two main functions. First, it served to legitimize the new communist government by formalizing its structure and procedures. Second, in line with orthodox Marxism, the legislation provided coercive measures to maintain communist domination and suppress class enemies. For Chinese communist leaders, law along with other extra-legal measures (most noticeably the party documents), were used as weapons to inflict terror in the class struggle rather than for fundamental rules of a stable society; it was connected with mass mobilization rather than the settlement of individual disputes.

As pointed out by Alice Erh-Soon Tay, there was an unsolved fundamental ‘contradiction’ in China’s communist legislation – a marked tension between the politicization and popularization of law on the one hand, and a concern with formal legality and rule of law, which can be traced back to the Yanan period (1935-1945).<sup>72</sup> After 1949, this tension intensified and finally broke in late 1957 when the CCP decided to launch the Anti-rightist Movement. The nascent legislative system was severely paralyzed by this movement and finally abandoned during the Cultural Revolution (1966-1976). The NPC and the NPCSC as the only legislative bodies in the country were largely paralyzed during this period. They could not hold regular meetings as required by the 1954 Constitution. The NPC only passed two laws - the Platform for the Development of the National Agriculture (1956-1967) in 1960 and a new Constitution in 1975. The 1975 Constitution was composed of merely 30 provisions, a sharp reduction from the total 106 provisions of the 1954 Constitution. The NPCSC’s legislative work also largely paralyzed, passing only ten regulations.<sup>73</sup>

## 4. Decentralization Reforms and the Creation of a Market System in the Reform Era (1978-Present)

### 4.1 The Broad Decentralization Reforms

The Chinese government began to launch a new wave of decentralization in 1978. The decentralization after 1978 is distinguished from the previous decentralization in two aspects.

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<sup>70</sup> See Julia C. Strauss, ‘Paternalist Terror: The Campaign to Suppress Counter-revolutionaries and Regime Consolidation in the People’s Republic of China, 1950-1953’, 44(2002) *Comparative Studies in Society and History*, pp. 80-105; Yang Kuisong, ‘Reconsidering the Campaign to Suppress Counter-revolutionaries’, 193 (2008) *The China Quarterly*, pp. 102-121.

<sup>71</sup> The ‘three antis’ refers to corruption, waste and bureaucracy. The ‘five antis’ refers to bribery, theft of state property, tax evasion, cheating on government contract, stealing state economic information.

<sup>72</sup> Alice Erh-Soon Tay, ‘Law in Communist China-Part I’ 6 (1968) *Sydney L. Rev.*, p. 170.

<sup>73</sup> For the titles of the ten regulations, see Zhou Wangsheng, 中国立法五十年 (上) – 1949-1999 年中国立法检视 (Fifty-year Legislation in China, I – Appraisal of the Legislation in China from 1949-1999), 6(2000) *法制与社会发展 (Law and Social Development)*, p. 8.

First, the pre-reform decentralization focused on transferring administrative powers of the central government to lower-level governments, especially the controlling power over state-owned enterprises; the new decentralization however confers effective managerial power to micro-economic units (namely, rural households and enterprises), which marked the separation of government administration and micro-economic operation. Second, the new decentralization went beyond the simple measure of delegating administrative powers; it covers comprehensive areas including legislative affairs. Third, the new decentralization is far-reaching in economic domain as it facilitates the development of the market economy in China. The details are provided below.

#### 4.1.1 Conferring Effective Controlling Power on Rural Households and Enterprises

One important dimension of the decentralization reform is conferring effective controlling power on micro-level economic units - rural households and enterprises. In 1978, the Production Team System in rural areas, which was established in the mid-1950s, started to be replaced by the Household Responsibility System (家庭联产承包责任制) as the basic unit for agricultural productivity.<sup>74</sup> As noted earlier, after the socialist transformation in the mid-1950s, China established production teams nationally as the basic institutional form of agricultural collectivization. However, this collective farming system had proved to be inefficient. The collective management and the egalitarian income distribution under this system had led to low incentives to work and stagnant agricultural productivity. At the end of 1978, a few production teams in Anhui province and Sichuan province began to try out contracting land, other resources and output quotas to individual households, which was explicitly forbidden at that time due to its violation of the socialist principle of productivity. Seeing the remarkable success of these local experiments in improving the agricultural output and its rapid proliferation in many other localities, the central government finally gave its official recognition to the new system in September 1980.<sup>75</sup> Merely two years after the official recognition, the household responsibility system had been established over the whole country to replace the old production team system. The key change after the transformation is that most of the managerial powers over agricultural productivity, from production to distribution, which was previously administered at the level of production team, had been decentralized to individual households, with only the land ownership belonging to the collective; and the households were allowed to retain any production above the delivery quota. One related institutional change is the re-establishment of township government to replace the people's commune as the basic unit of government administration. This change in effect ended the commune's control on the local agricultural productivity, and therefore marked the separation of government administration and the microeconomic operations in rural areas.

In urban areas, the decentralization of the decision-making authority to micro-level economic units was reflected by the conferring of effective decision-making authority to

<sup>74</sup> Lin Justin Yifu, 'The Household Responsibility System in China's Agricultural Reform: A Theoretical and Empirical Study', 36 (1988) *Economic Development and Cultural Change*, p. 200.

<sup>75</sup> In September 1980, the CCP Central Committee issued the 'Document 75', which for the first time in the reform era explicitly recognized the household responsibility system as part of official policy. For the policy evolution on the household responsibility system, see Robert Ash, 'The Evolution of Agricultural Policy', 116 (1988) *The China Quarterly*, pp. 529-555.

state-owned enterprises. After 1978, the Chinese government began to reform the state-owned enterprises, the thrust of which was to decentralize decision-making power and income to enterprises. The most important reformist measure in the early era (from the mid-1980s to the early 1990s) was the adoption of the ‘Contract Responsibility System’ (承包责任制). Under this system, the enterprises were required to pay taxes instead of handing over profits to the government; and the after-tax profits were at the disposal of the enterprises. The adoption of this system represented the attempt to achieve the separation of State ownership (in effect exercised by the government administration) from the control of the enterprise’s operation.<sup>76</sup> An important reformist measure concerning the State-owned enterprise reform came in the late 1994 with the adoption of the policy ‘grasping the large and letting go the small’ (抓大放小).<sup>77</sup> As a consequence, the number of enterprises under the control of Chinese governments was also largely reduced from 238000 in 1998 to 155000 in 2014, which accounted at that time for only 1 per cent of the total number of enterprises in the country.<sup>78</sup> Accordingly, many small and weak state-owned enterprises were privatized through auctions and corporate transformation; therefore the complete and ultimate control of these enterprises was transferred to private individuals or legal persons.<sup>79</sup>

Conferring decision-making authority on rural households and enterprises was soon proved to be successful. The adoption of the household responsibility system unleashed vast momentum for the growth of overall agricultural output. The overall growth in agricultural output from 1978 to 1984 was 7.7 per cent, which was nearly three times higher than the long-term average (2.9 per cent) in the pre-reform era.<sup>80</sup> An array of studies, employing varying approaches, have identified that the nationwide adoption of the household system was the main factor for the dramatic output growth during this period.<sup>81</sup> The moderate growth rate (4.5 per cent) in the following three decades suggests that this system is sustainable.<sup>82</sup> The efforts of decentralizing authority to State-owned enterprises and the following relevant reforms have contributed to the impressive growth of the State-owned economy.<sup>83</sup> Despite the significant decrease in number and shirking in the proportion of the overall economy, the gross trading income and profit of Chinese state-owned enterprises during 1993 to 2014

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<sup>76</sup> For a detailed chronological discussion on the evolution of the State-owned enterprise reform after 1978, see Wang Haibo, 中国国有企业改革的实践进程 (1979-2003) (The Evolution of the Reform of the State-owned Enterprises in China, 1979-2003), 3(2005) 中国经济史研究 (*Researches in Chinese Economic History*), pp. 103-112.

<sup>77</sup> This policy was proposed in the ‘Plan Concerning Selecting a Batch of Large and Medium-sized State-owned Enterprises to Carry out the Pilot Modern Enterprise System (draft version)’, which was approved in principle by the State Council in November 1994.

<sup>78</sup> Zhang Zhuoyuan, 中国国企改革三十年：重大进展、基本经验和攻坚展望 (Thirty-year Reform of the State-owned Enterprises in China: the Significant Progress, Basic Experience and Prospects), 10(2008) 经济与管理研究 (*Research on Economics and Management*), p. 7.

<sup>79</sup> For the details on the privatization of small state-owned enterprises in the mid-1990s, see Cao Yuanzheng, Yingyi Qian and Barry R. Weingast, ‘From Federalism, Chinese Style, to Privatization, Chinese Style’, 7(1997) *Discussion Paper of Centre for Economic Policy Research*, pp. 5-10.

<sup>80</sup> National Bureau of the Statistics of the PRC, 统计年鉴 (Statistic Yearbook), available at <http://www.stats.gov.cn/tjsj/ndsj/>, last visited May 2016.

<sup>81</sup> See Lin Justin Yifu, ‘Rural Reforms and Agricultural Growth in China’, 82(1992) *The American Economic Review*, pp. 34-51; John McMillan, John Whalley and Lijing Zhu, ‘The Impact of China’s Economic Reforms on Agricultural Productivity Growth’, 97(1989) *The Journal of Political Economy*, pp. 781-807.

<sup>82</sup> National Bureau of the Statistics of the PRC, *supra* note 80.

<sup>83</sup> See Qian Sun and Wilson HS Tong, ‘China Share Issue Privatization: the Extent of Its Success’, 70(2003) *Journal of Financial Economics*, pp. 183-222.

increased 11 times and 21.7 times respectively.<sup>84</sup> Most importantly, as pointed out by Qian Yingyi, the reforms of the State-owned enterprises have facilitated the fast entry of non-state enterprises, which have become the driving force for the spectacular economic growth in China.<sup>85</sup>

#### 4.1.2 The Decentralization of Authority to Local Governments

The other important dimension of the decentralization reform is the decentralization of comprehensive administrative authority to local governments. The administrative decentralization in the reform era is similar to that in the re-reform era by nature, but its scale is much greater. Since the early 1980s, the Chinese central government has delegated most of its State-owned enterprises to local governments at provincial, municipal and county levels. By the end of 2014, the central government only controlled 110 large State-owned enterprises and the remaining 150,000 State-owned enterprises were under the control of local governments; and the operational income of the latter in the year of 2014 accounted for 39.9 per cent of the total income of the state-owned enterprises.<sup>86</sup> However, consistent with the rise of the private sector, the share of the state-owned economy in the national economy has been shrinking over the reform era.

A distinctive feature of the decentralization in the reform era *vis-à-vis* that in the pre-reform era, is that it goes far beyond merely decentralizing control power of state-owned enterprises to local governments. Considerable powers, especially those concerning economic development (such as price determination, new firm set-up and investment arrangements with self-raised funds), has been decentralized to local governments at various levels. In the meanwhile, consistent with the growth of fiscal capacity, local governments have also assumed considerable responsibility for education, health, housing and local infrastructure and so on.

One important aspect of the administrative decentralization is the fiscal decentralization. In the early 1980s, China began to adopt various forms of the Fiscal Contracting System (财政包干制) to replace the old Sharing Total Revenue System (总额分成制), which was adopted in the pre-reform era.<sup>87</sup> The adoption of the new system represented a marked move to a more decentralized fiscal system. Under the new system, the revenue share between the center and each province was fixed for several years<sup>88</sup>; the budgetary authority to arrange

<sup>84</sup> Ministry of Finance of the PRC, 2014 年 1-12 月全国国有企业经济运行情况 (The Situation of the Economic Operation of the State-owned Enterprises from January to December 2014), available at <http://www.sasac.gov.cn/n86302/n326735/index.html>, last visited May 2016.

<sup>85</sup> Yingyi Qian, 'Enterprise Reform in China: Agency Problems and Political Control', 4(1996) *Economics of Transition*, pp. 431-432.

<sup>86</sup> National Bureau of the Statistics of the PRC, *supra* note 80.

<sup>87</sup> For a detailed discussion on the evolution of the policies on the central-provincial fiscal relations from the early 1980s to the early 1990s, see Christine Wong, Heady Christopher and Woo Wing Thye, *Fiscal Management and Economic Reform in the People's Republic of China* (Hong Kong: Asian Development Bank, 1995).

<sup>88</sup> Various forms of the fiscal contracting system existed in the early 1980s. For instance, some provinces followed the Jiangsu model, which set a ratio for the overall revenue; some 15 provinces follow the Sichuan model, which divided the revenues into four types and the local fixed incomes, a fixed proportion of the share income and a fixed proportion of the shared adjustable income were assigned to the provinces. And there are also Guangdong and Fujian models, see Michel Oksenberg and James Tong, 'The Evolution of Central-Provincial Fiscal Relations in China, 1971-1984 the Formal System', 125(1991) *The China Quarterly*, pp. 1-32.

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local spending was decentralized to provinces and the central government no longer set mandatory fiscal targets for them.<sup>89</sup> The various forms of the Dividing Revenue System from 1980 to the early 1990s were replaced by the Separating Tax System (分税制) in 1994. Under this system, the national and local taxes have been clearly defined and a national tax bureau and local tax bureaus were established.

While decentralizing the comprehensive authority to local governments symmetrically, the Chinese central government began to explore even bolder economic reforms in some localities by decentralizing greater authority to them. In the early 1980s, the central government decided to open up Guangdong and Fujian provinces to be ‘one step ahead’ of the rest of the country to the outside world. In 1980, the Central government designated four Special Economic Zones (SEZs) (经济特区): Shenzhen, Zhuhai, Shantou and Xiamen, where local municipal governments were granted greater autonomy and more flexible policies for local economic development, in particular, the attraction of foreign investment and foreign trade. As a result, the market economy began to thrive thereafter and replaced the planned economy as the dominating economic form in these special economic zones while the rest of the country was still under the shadow of the planned economy. Drawing on the successful experience in SEZs, the central government soon decided to spread SEZ policies to other areas. In 1984, the central government further designated 14 coastal cities as ‘coastal open cities’ (沿海开放城市), which enjoyed most of the SEZs policies. In 1985, the whole eastern coastal area, stretching from Liaoning Peninsula in the north to Guangxi in the south, was opened to foreign investment and trade and was granted to local authorities paralleling those of the SEZs. As a consequence, various types of special zones, such as High-tech Industrial Development Zones (高新技术开放区), Export-processing Zones and Free Trade Zones (自由贸易区) have been established in China.<sup>90</sup> By taking this progressive approach, the market system, which was first tried out in SEZs, has been spread to the whole country, which is discussed in detail in the next section.

### 4.1.3 The Relevance of Chinese Reforms to the Decentralization Theory

In general, China’s decentralization reform in the reform era fits the decentralization theory. The decentralization reforms in rural and urban areas ‘liberalize’ peasants and enterprises from the control of administration. Their initiatives of productivity are mobilized. Decentralizing administrative and fiscal powers to lower-level governments allows them to manage the local economic construction more efficiently. All these factors contribute to the rapid overall economic growth in the reform era. By the end of 2014, China’s GDP increased 283 times compared to that in 1978.<sup>91</sup>

Specifically, China’s decentralization reforms satisfy all the aforementioned three characteristics of the theory of market-preserving federalism – (1) consistent with decentralization reforms, Chinese local governments have acquired considerable primary

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<sup>89</sup> For a detailed discussion on the evolution of the policies on the central-provincial fiscal relations in the early 1980s, see *ibid.*

<sup>90</sup> Zeng Douglas Zihua (ed.), *Building Engines for Growth and Competitiveness in China: Experience with Special Economic Zones and Industrial Clusters* (Washington: World Bank Publications, 2010), pp. 4-6.

<sup>91</sup> National Bureau of Statistics, 国家数据 (National Data), available at <http://data.stats.gov.cn/easyquery.htm?cn=C01>, last visited May 2016.

responsibility over economy; (2) the fiscal decentralization and accompanying monetary and banking reforms have hardened the fiscal budget constraints of local government;<sup>92</sup> (3) national policies have been adopted to ensure a common market. These reforms successfully led to China's transition to a market system. The details are provided below.

In the early 1980s, after obtaining economic authority, local government in southern China began to introduce market mechanisms to pursue local economic development. The local governments' adoption of various types of market mechanisms has two effects. First, it induces competition among local jurisdictions.<sup>93</sup> Second, it creates a favorable environment for policy experimentation. In terms of policy innovation, the most active local governments were those in SEZs, which have been granted more decision-making power than in other localities and it is SEZs that have experienced the most significant economic growth. The SEZ market-oriented policies soon expanded to other localities and finally their market-oriented policies were learned by the central government.

The fiscal decentralization and accompanying monetary and banking reforms have hardened the fiscal budget constraints of local government. These reforms create incentives for local governments to sustain a thriving market economy because the local revenue depends on the health of the local economy.

A common market began to emerge in the late 1970s. The marketization in agriculture started in 1979 when the government allowed peasants to sell their surplus grain to the market at higher prices compared to the State procurement prices. In the early 1980s, the central government began to loosen its control on agricultural productivity. The key measures included increasing the state procurement prices for most major farm products; loosening the restriction on agricultural trade between regions and allowing local areas to specialize in planting agricultural products with comparative advantages.<sup>94</sup> A key reformist measure was the joint issuance of a document by the CCP Central Committee and the State Council in 1985.<sup>95</sup> This document stated that the State would no longer make mandatory plans for agricultural production and since the beginning of 1985 the obligatory procurement quotas system was to be replaced by purchasing contracts between the State and peasants.<sup>96</sup> Thus, the adoption of the household responsibility system and the measures for increasing the market freedom contribute to the growth of a thriving agricultural market in China.

Compared to the agricultural market for peasants, the market for enterprises emerged late but had a bigger impact on the economic growth in China. The reform of conferring effective managerial authority on the State-owned enterprises and the accompanying rapid expansion of the non-state sector contributed to the rapid market expansion in the early 1980s.

<sup>92</sup> Cao Yuanzheng, Yingyi Qian and Barry R. Weingast, *supra* note 79, pp. 15-19; Jin Hehui, Yingyi Qian, and Barry Weingast, 'Regional Decentralization and Fiscal Incentives: Federalism, Chinese Style', 89(2005) *Journal of Public Economics*, pp. 1719-1742.

<sup>93</sup> Gabriella Montinola, Yingyi Qian, and Barry R. Weingast, 'Federalism, Chinese Style: the Political Basis for Economic Success in China', 48(1995) *World Politics*, pp. 73-77.

<sup>94</sup> Lin Justin Yifu, *supra* note 81, p. 39.

<sup>95</sup> The full title of this document is 关于进一步活跃农村经济的十项政策 (10 Policies for Further Activating Rural Economy). The text is available in 中国网 (*China News*), at [http://www.china.com.cn/aboutchina/data/zgncgk30n/2008-04/09/content\\_14685741.htm](http://www.china.com.cn/aboutchina/data/zgncgk30n/2008-04/09/content_14685741.htm), last visited May 2016.

<sup>96</sup> Ash Robert F, *supra* note 75, pp. 454-547.

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By 1985, the government adopted the system of ‘dual-track price’ in an effort to recognize the growing participation of the state-owned enterprises in the emerging market (making transactions in the market with the market determined price and planned transactions at the planned prices). The non-state enterprises only need to face one price in the transaction, the market price. In the early 1980s, the market underwent rapid expansion. By the mid-1980s, the transactions at market prices constituted a majority of transactions in the economy.<sup>97</sup> In November 1989, the central government initiated price reform, aiming to unify the two prices in two tracks into one track, that is, one price decided by the market.<sup>98</sup> By 1997, the price liberalization reform was largely accomplished.<sup>99</sup>

Seeing the growing role of the market, the Chinese government began to legitimize the market economy. The legitimization started in September 1982 when the 12<sup>th</sup> National Congress of the CCP, for the first time, put forward the policy ‘planned economy supplemented by the market adjustment’ (计划经济为主、市场调节为辅).<sup>100</sup> The Third Plenary Session of the 12<sup>th</sup> CCP Central Committee, which was held in October 1984, further enhanced the importance of the market in the economy, stating that the national economic policy is ‘ensuing planned commodity economy’ (有计划地商品经济).<sup>101</sup> The landmark change came in 1992 when 14<sup>th</sup> National Congress of the CCP put forward the establishment of the ‘socialist market economy’ as its reform goal.<sup>102</sup> Since then, China’s market-oriented economic reform at the national level has largely accelerated. It is right to say that the focus of China’s reform and opening up is economic reform, the thrust of which was the market-oriented economic reforms. Nevertheless, given the comprehensiveness of the reform, China has to take many years to establish a full market economic system and its development is still in progress.

It is also noticeable that decentralization reforms in China have provided devices that make the market system sustainable. First, the decentralization has significantly limited the central government’s information and authority as a way of credibly committing it not to interfere with the local market-oriented economy. This has been proved to be true by the rise of township and village enterprises. By controlling the assets of these enterprises, the local governments have access to information that is not available to the central government, and therefore local governments can credibly resist central government’s predatory measures.<sup>103</sup>

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<sup>97</sup> Yingyi Qian and Barry Weingast, ‘China’s Transition to Markets: Market-preserving Federalism, Chinese Style’, 1(1996) *The Journal of Policy Reform*, p. 19.

<sup>98</sup> This reform was proposed in the Decision of the CCP Central Committee on Further Improving, Rectifying and Deepening Reforms, which was issued on 9 November 1989.

<sup>99</sup> Chen Shouzhe, 市场经济视野下的‘价格双轨’与‘双轨合一’ (The Dual-track Price and its Unification under the Perspective of Market Economy), 27 (2009) 海南大学学报 (*Journal of Hainan University*), pp. 407-412.

<sup>100</sup> Hu Yaobang, 中国共产党第十二次全国代表大会上的报告 (The Report of the National Congress of the CCP) in 人民网 (*People’s News*), available at <http://cpc.people.com.cn/GB/64162/64168/64565/65448/4526430.html>, last visited May 2016.

<sup>101</sup> CCP Central Committee, 第十二届中央委员会第三次全体会议公报 (The Communiqué of the Third Plenary Session of the 12<sup>th</sup> CCP Central Committee) in 人民网 (*People’s News*), available at <http://cpc.people.com.cn/GB/64162/64168/64565/65378/4429527.html>, last visited May 2016.

<sup>102</sup> Jiang Zemin, 中国共产党第十二次全国代表大会上的报告 (The Report of the National Congress of the CCP) in 人民网 (*People’s News*), available at <http://cpc.people.com.cn/GB/64162/64168/64567/65446/4526308.html>, last visited May 2016.

<sup>103</sup> Yingyi Qian and Barry R. Weingast, *supra* note 29, pp. 86-87.

This in turn has provided incentives for local governments to develop the township and village enterprises, which has played a crucial role in China's economic growth during the reform era. Second, under factor mobility, the fiscal competition among local governments limits the government's options to bail out inefficient enterprises, and thus serves as a credible commitment for sustaining the market system.

## 4.2 The Legislative Decentralization

In the end of the 1970s, China began to decentralize considerable legislative authority to many other State organs. The legislative decentralization was not a single phenomenon. In fact, it appears as an inseparable part of the broad decentralization program during the reformist era. First, as far as the ideological basis is concerned, the initiation of legislative decentralization in the early era is influenced by 'giving full play to both national and local initiatives' (two initiatives) (发挥中央与地方两个积极性) as put forward by Mao Zedong in 1957. The Organic Law on Local People's Congresses and Local People's Governments, which was passed by the NPC in June 1979, was the first national law in the history of the PRC that granted legislative power to provincial governments. In his interpretation on the draft of this law delivered to the Second Plenary Session of the Fifth NPC, Peng Zhen, the Director of the Legislative Affairs Commission of the NPCSC at that time, stated that the legislative delegation in this law was due to 'the thought of the CCP Central Committee and Comrade Mao Zedong that local power should be expanded and both the initiatives of the center and localities should be mobilized'.<sup>104</sup> In this sense, the legislative decentralization share the same ideological basis as the broad economic and administrative decentralization. It should be pointed out that the principle of 'two initiatives' only had its influence in the early reform era. Chinese legislative leaders did not use it as the ideological basis for later legislative decentralization. One main reason is that the reforms after 1980s are more driven by the actual needs of economic opening up and the creation of market system, rather than the curbing the drawbacks of planned economy, which is the background of the principle of 'two initiatives'.

Second, the legislative decentralization generally follows the trajectory of the broad decentralization. Consistent with the decentralization of considerable economic, administrative and fiscal powers to provincial governments in the early 1980s, the central government empowered the provincial governments to enact local regulations. Given that the legislative scope was not specified and national legislation was scarce in the early reform era, the *de facto* legislative authority of provincial governments at that time was very extensive. While designating SEZs and delegating them extensive authority in economic development, the central government also gave SEZ governments the authority to enact local regulations which may alter national legislation. A significant effect of the legislative decentralization is that it is conducive for local governments to practice their decentralized powers. The reform era has witnessed the growing role of law in regulating social lives. In this respect, the legislative decentralization goes hand in hand with the broad economic and administrative reforms, and it plays an important role for China's economic transformation.

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<sup>104</sup> Peng Zhen, 彭真文选 (*Selected Works of Peng Zhen*) (Beijing: Renmin Chubanshe, 1991), p. 371.

Third, the legislative decentralization is intended to create and sustain the market system. The legislative decentralization enabled local governments to initiate market-oriented legislation in the early 1980s. This type of local legislation was soon copied and imitated by other local governments, forming a tremendous momentum for market-oriented legislative reform. Since the mid-1990s, the central government had regarded the market-oriented legislation as the focus of its legislative work. The legislative decentralization results in the promulgation of a myriad of local economic regulations and rules, and they serve as an important component of China's legislation on the market economy. In this sense, the legislative decentralization greatly facilitates the building of the legal system of the market economy in China.

### 5. Conclusion

The decentralization reforms in China in both the pre-reform era and the reform era fit the decentralization theory. The highly centralized economic and administrative system established in the mid-1950s severely hindered the information delivery and supervision, and therefore affected overall economic growth. This proves that compared to a centralized government, a decentralized one possesses some gains for overall economic output. The radical administrative decentralization in the late 1950s had disastrous economic consequence due to the rampant and imbalanced investment at provincial level. This fits the decentralization theory that certain functions and powers (for example, the macroeconomic management) should not be decentralized for avoiding the phenomenon of 'race to the bottom'. The spectacular economic growth after 1978 cannot be achieved without the decentralization of considerable economic and administrative powers to micro-level economic units and local governments. This is in line with the theoretical discussion concerning the gains that a decentralization government may possess.

A fundamental difference between the decentralization reforms in the pre-reform era and those in the reform era is that the former was limited to the decentralization of economic management powers while the latter is far more comprehensive, not only decentralizing administrative powers to local governments, but also conferring effective controlling power to micro-level economic units. Apart from contributing to the spectacular economic development, the decentralization after 1978 provides for a favorable institutional environment for the development of a market system. The decentralization of effective controlling power to rural households and enterprises liberates these units from the control of government administration so t

hat they can become independent micro subjects in the market. The considerable administrative decentralization enables bold local governments to initiate market-oriented mechanisms – a reformist move that central government was hesitant to take on in the early reformist era. Once they proved successful, the market-oriented mechanisms were expanded and imitated and finally became national policy.

Legislative decentralization can be regarded as one part of the broad economic and administrative decentralization program in the reform era. Their initiation in the early era was based on the same ideology, namely, 'giving full play to two initiatives'. The legislative decentralization generally follows the trajectory of the broad administrative and economic decentralization reforms. More importantly, the decentralization legislation plays an

important role for the creation of the market system in China. It serves as one of the three conditions for the creation of a market system according to the model of market-reserving federalism, that is, the decentralized governments have primary regulatory responsibilities over the economy. In fact, legislative powers have become not only one of most important primary authority of local governments but also an important means to exercise other decentralized powers. Moreover, since early 1990s, the national legislation is being accelerated and serves as one of the most important means for ensuring a common market.



## **Chapter 3. The Law-making System of the National People's Congress and Its Standing Committee**

### **1. Introduction**

In Chinese, the term 'Law' (法律) has two meanings. In a broad sense, it refers to all the legal norms that constitute the legal system; in a narrow sense, it merely refers to the statutes that are adopted by the National People's Congress (NPC) and its Standing Committee (NPCSC). These two meanings of law are both used in the Constitution, which appear 82 times in total. For illustration, in this thesis, I use the term 'national law' to refer to the narrow meaning and use the term 'law' to refer to the broad meaning. The making of national laws in China has experienced marked development in the reform era. In the initial stage, the national laws were scarce, and by March 2016, China has adopted 268 national laws, 248 of which are still valid. National laws are the most important law in the legal system and cover virtually every major aspect of social lives.

One significant feature of the lawmaking in China is that there are two national organs - the NPC and NPCSC - that can enact national laws. Although in practice the statutes enacted by them are indistinguishably called national laws, the lawmaking of the NPC and the NPCSC is considerably different in terms of status of national law they enact, law-making authority and procedure. These differences have in turn led to a significant imbalance in the legislative development of the NPC and the NPCSC. For this reason, this chapter will discuss the lawmaking of these two organs separately and make some comparisons. Following the introduction, Section 2 discusses the status of the national law in the legal system. Section 3 examines the scope of exclusive legislative powers of the NPC and the NPCSC, followed by the evaluation of the law-making procedure. Section 5 discusses the law-making practice in the reform era, and section 6 is the conclusion.

### **2. The Status of the National Law and the Basic Law**

#### **2.1 The National Law**

The source of law for the status of national laws is the Constitution and the Law on Legislation (LoL). These two laws stress the significance of the law-making powers of the NPC and the NPCSC. Under them, the NPC and the NPCSC are the organs to 'exercise the legislative power of the State'; however, these two laws do not state that in regards to the State Council, local people's congress (PC) or local people's government. Under the 1982 Constitution, both the NPC and the NPCSC can enact national laws. The 1982 Constitution distinguishes basic laws (基本法律) from other national laws. It decrees that only the NPC can enact basic laws that govern criminal offences, civil affairs and state organs. The other national laws can be enacted by either the NPC or the NPCSC. The status of the basic law will be discussed in the next section. This section aims to discuss the status of the national law as a whole.

Under the 2015 revised LoL, the status of the national law is lower than the Constitution but higher than other types of law, including the administrative regulation, the local regulation and rule (Article 88 and 89). The higher status of the national law means that in

case of conflict between the provisions of a national law and those of an administrative/local regulation or a rule, the former will prevail over the latter.

National laws are considered the most important component of China's legal system. Starting in the Second Plenary Session of the 10<sup>th</sup> NPC in 2004, the national lawmakers stressed the necessity of enacting national laws that functioned as 'pillars' (支柱/支架) for the legal system. In his working report to the NPC delivered in March 2004, Wu Bangguo, the Chairman of the NPCSC at that time, stated: 'it is urgent to enact the important national laws that have the function of pillars for the emergence of the socialist legal system with Chinese characteristics'.<sup>1</sup> The authoritative source indicates that during Wu Bangguo's era (2003-2012), the NPCSC regarded the enactment of the national laws with pillar functions as its focus of law-making work.<sup>2</sup>

## 2.2 The Basic Law

The 1982 Constitution and the LoL decree that the matters concerning criminal offences, civil affairs and state organs can only be governed by basic laws and the power to enact basic laws is granted to the NPC. The NPCSC can enact non-basic laws (ordinary laws) that govern matters apart from the abovementioned three matters. The 1982 Constitution and the LoL specify the status of the national law *vis-à-vis* other types of law, but they do not specify that of the basic law. This non-specification may lead to one problem: in case of conflicts between a basic law and an ordinary law, there is no specific rule to determine which type of law will prevail over the other. This problem is not only a theoretical problem but also has materialized in practice. Two salient cases are provided below.

### *The Administrative Punishment Law vs. the Law on Road Traffic Safety*

The Administrative Punishment Law is adopted by the NPC in March 1996. Article 33 decrees that the amount of the fine imposed on a citizen by applying the summary procedure should be no higher than 50 RMB.<sup>3</sup> Article 3 states that other national laws, regulations and rules concerning the procedure of administrative punishment should be in accordance with this law. However, Article 33 of this law is at odds with Article 107 of the Law on Road Traffic Safety (which was adopted by the NPCSC in October 2003), stating that the amount of the fine for the same offence can be up to 200 RMB. The different provisions between the

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<sup>1</sup> Wu Bangguo, 全国人民代表大会常务委员会工作报告 (The Working Report of the Standing Committee of the National People's Congress) in 中国人大网 (*The Website of the NPC*), 10 March 2004, available at [http://www.npc.gov.cn/wxzl/wxzl/2004-04/15/content\\_332237.htm](http://www.npc.gov.cn/wxzl/wxzl/2004-04/15/content_332237.htm), last visited May 2016.

<sup>2</sup> China News Service, 企业国资法通过, 吴邦国称其为起支架作用的法律 (The Law on State-owned Assets of Enterprises has passed, Wu Bangguo Calls it A National Law with Pillar Function), in 中国新闻网 (*China News*), 28 October 2008, available at <http://www.chinanews.com/gn/news/2008/10-28/1428842.shtml>, last visited May 2016; Zhou Zhaojun, 多部支架性法律出台, 中国法律体系日益健全 (Several National Laws with Pillar Functions have been Adopted, China's Legal System is under Perfection), in 新华网 (*Xinhua News*), 27 December 2010, available at [http://news.xinhuanet.com/legal/2010-12/27/c\\_12921641.htm](http://news.xinhuanet.com/legal/2010-12/27/c_12921641.htm), last visited May 2016.

<sup>3</sup> According to Article 33 of the Administrative Punishment Law, the imposition of fine by applying summary procedure has two conditions: (1) the facts concerning a violation of law are well-attested, and there is legal basis for the imposition of the fine; (2) the imposition of the fine should be decided on the spot.

two national laws has drawn the attention of the court. One example is the case of Liu Jiahai.<sup>4</sup> In May 2005, after being fined 100 RMB on the road by a local policeman, Liu Jiahai brought a lawsuit to the Qinxu District People's Court in Nanning City, requesting the court to rule that the imposition of this fine was void. Liu argued that the amount of the fine imposed on him had exceeded the limit set by Article 33 of the Administrative Punishment Law and therefore this penalty decision is void.<sup>5</sup> However, the defendant of this case, namely, the local traffic police department, argued that its penalty decision was lawful because it was within the limits in the Article 107 of the Law on Road Traffic Safety and the accompanying department rule issued by the Ministry of Public Security.<sup>6</sup>

*The Criminal Procedural Law vs. the Lawyer's Law*

The Criminal Procedural Law (CPL) was adopted by the NPC in July 1979. Prior to 2007, this law had been revised once in March 1996 by the NPC. The 1996 CPL provides for defense lawyers' rights to perform their practice during criminal investigation and litigation. The Lawyer's Law is adopted by the NPCSC in May 1996. It was revised significantly by the NPCSC in October 2007. The revised Lawyer's Law substantially expands defense lawyers' rights, thereby inducing inconsistency between this law and the 1996 Criminal Procedural Law. Some main inconsistencies are as follows. (1) Under the 1996 CPL, a defense lawyer can meet the criminal suspect only after he/she has been interrogated by an investigating organ for the first time; under the 2007 Lawyer's Law, however, a defense lawyer can meet the criminal suspect earlier – a defense lawyer can meet the criminal suspects when he/she is under interrogation for the first time. (2) Under the 1996 CPL, from the date on which the procuratorate starts to examine the case for prosecution, a defense lawyer is entitled to access, extract and duplicate judicial documents and technical verification material of the current case; the 2007 Lawyer's Law largely expands the scope of material that is accessible to lawyers - it allows a defense lawyer to access, extract and duplicate the abovementioned two types of material relating to the current case. Moreover, this law states that all the material relating to the current case is accessible to the defense lawyer from the date on which the case is received by the court. (3) Under the 1996 CPL, there are some restrictions concerning a defense lawyer's collection of evidence. The collection requires either the consents of witnesses/victims or the permission of the procuratorate or the court; the 2007 Lawyer's Law removes these restrictions.

As a number of press articles reported, the conflicts between the 1996 CPL and the 2007 Lawyer's Law had caused problems for implementing the provisions of the 2007 Lawyer's Law concerning the defense lawyer's rights. For some time after the adoption of the 2007 Lawyer's Law, investigating organs in many localities resisted the implementation of the

<sup>4</sup> There are other similar cases, such as 朱素明诉昆明市公安局交通警察支队一大队公安交通行政处罚案 (Zhu Suming vs. Kunming Traffic Police department) in 新华网 (Xinhua News), 8 September 2005, available at <http://www.yn.xinhuanet.com/topic/2007/2006jpal/>, last visited May 2016.

<sup>5</sup> For the details concerning this case, see Liang Sanli, 全国人大和全国人大常委会制定法冲突的问题与出路 (The Conflict between NPC Laws and NPCSC Laws and its Resolution), 5(2008) 法治论丛 (*The Rule of Law Forum*), pp. 68-69.

<sup>6</sup> The title of this department rule is the Provisions on the Procedure of Dealing with Traffic Safety Violation (道路交通安全违法行为处理程序规定), which was issued in 2004.

relevant provisions concerning defense lawyer's rights by asserting that the status of the 1996 CPL was higher than the 2007 Lawyer's law.<sup>7</sup>

The key of the disputes in the above two cases is: what is the status of the basic law *vis-à-vis* that of the ordinary law? With respect to this issue, there are two conflicting opinions among Chinese legal scholars. Some legal scholars, especially those in constitutional and administrative law, assert that basic laws constitute one separate hierarchical level in the legal system, which is only one level lower than the Constitution but higher than ordinary laws, and thus their status is higher than that of ordinary law.<sup>8</sup> Their main argument is that the NPC and the NPCSC are different law-making organs in terms of constitutional status, composition, functions and powers, and law-making procedure. In terms of constitutional status, for instance, the NPC has a higher constitutional status compared to the NPCSC.<sup>9</sup> Other legal scholars, especially those in criminal procedural law, argue that basic laws and ordinary laws are at the same hierarchical level of the legal system and in case of conflicts, the new law should be applied. Their main argument is that the NPC and the NPCSC should be regarded as the same organ, and therefore the status of basic law and the ordinary laws is at the same level.<sup>10</sup>

From my perspective, the two conflicting opinions are problematic. The NPC and the NPCSC are indeed two different organs. In this sense, the argument of the second opinion is invalid. However, the institutional difference does not necessarily infer that the NPC law has higher effect than the NPCSC law. The reason is that the NPC and the NPCSC have final say in their respective domains. For example, the NPCSC is empowered to interpret laws and adjudicate the conflicts between laws. These powers are not granted to the NPC, indicating that the NPCSC has the final say in these areas. Accordingly, both NPC laws and NPCSC laws are the highest source of law in respective realms. In this sense, the above first opinion is not valid. A cautious conclusion is that the status of the NPC laws *vis-à-vis* the NPCSC laws has not been specified.

Despite the non-specification in the 1982 Constitution and the scholarly controversy on the status of the basic law *vis-à-vis* the ordinary law, in practice these two types of national laws are regarded at the same level in terms of status. The law enforcement agency does not acknowledge the higher status of the basic law. In the Liu Jiahai case, for instance, the local traffic police department asserted that the penalty decision was based on the 2003 Law on the Road Traffic Safety rather than the 1996 APL, and the application of law was in accordance with the principle of 'new law prevails over old law and specific provisions prevail over general provisions' (新法优于旧法, 特别规定优于普通规定) (Article 92 of the revised LoL).

<sup>7</sup> Liang Sanli, 新《律师法》与《刑事诉讼法》的立法性冲突及化解路径 – 兼论我国法律适用规则的完善 (the Conflicts between the New Lawyer's Law and Criminal Law: Its Resolution and the Improvement of Rules on Law Application in China), 4(2009) 南京师大学报 (*Journal of Nanjing Normal University*), pp. 29-30.

<sup>8</sup> See Xu Xianghua and Lin Yan, 我国《立法法》的成功和不足 (The Achievement and Shortage of the Law on Legislation), 6(2000) 法学 (*Legal Science*), pp.9-10; Han Dayuan, 全国人大常委会新法能否优于全国人大旧法 (Can a New NPCSC Law Prevails over an Old NPC Law?), 10(2008) 法学 (*Legal Science*), pp. 10-12.

<sup>9</sup> Han Dayuan, *ibid.*, pp. 4-9.

<sup>10</sup> Jiang Anjie and Jia Zhijun, 新律师法如何与刑事诉讼法衔接 (How the New Lawyer's Law Connects with the Criminal Procedural Law), in 法制日报 (*Legal Daily*), 25 February 2008, available at <http://china.findlaw.cn/bianhu/xingfalunwen/xingshisusongfalunwen/20110704/77187.html>, last visited May 2016.

The assertion of the local traffic police department implies that the APL and the Law on Road Traffic Safety were at the same level in terms of effect. In the Liu Jiahai case and other similar cases, the court ruling was in line with the law enforcement agencies. The court argued that the basis for fining the plaintiff is not the 1996 APL, but the 2003 Law on the Road Traffic Safety, which can be regarded as the specific law governing the order of road traffic.

In terms of the resolution of the conflicts between a basic law and an ordinary law, the NPCSC also stands in line with the law enforcement organs and the court, concluding that the provisions of the ordinary laws should be applied, but compared to the court, the NPCSC justifies its stance differently. In August 2008, in response to a proposal requesting a unification of the conflicting content in the CPL and the Lawyer's Law, the NPCSC Legislative Affairs Commission (LAC) stated that since the NPCSC has the power to amend basic laws and indeed does so frequently in practice, the adoption of the ordinary laws can be treated as the way to revise the provisions of basic laws.<sup>11</sup> The LAC's statement implies that the NPCSC takes a pragmatic approach to justify that the ordinary law has the same status as the basic law. Nevertheless, its justification is problematic. The NPCSC cannot revise basic laws as it wants. Under the 1982 Constitution, there are some limits placed upon the NPCSC in exercising this revising power – only partial revision is permitted and the principles in the law cannot be revised. Moreover, although the NPCSC is empowered to revise basic laws, it does not mean that it can invalidate provisions of basic laws by the means of enacting or revising ordinary laws.

In short, as long as both the NPC and the NPCSC are empowered to enact national laws, the conflicts between the NPC laws and NPCSC laws will continue to exist. A feasible solution is that while enacting ordinary laws, the NPCSC should also revise relevant conflicting provisions of the basic law in a timely manner in order to achieve consistency in content between the two laws. This approach has been applied in practice. In March 2012, the NPC revised the CPL again. After revision, the provisions concerning the defense lawyer's rights in this law became in line with those in the 2007 Lawyer's Law.

### **3. The Scope of Exclusive Law-making Powers of the NPC and the NPCSC**

In theory and practice, there is no limitation on the law-making authority of the national legislature. The NPC, and to a lesser extent, the NPCSC can legislate on any matter they want. The reason is that China is a unitary country and the NPC is an omnipotent national organ. Article 57 of the Constitution decrees that the NPC is the highest organ of State power and the NPCSC is its permanent body, and Article 62.15 decrees that the NPC can exercise other functions and powers as it wants.

Apart from its unlimited law-making power, the NPC and the NPCSC also enjoy exclusive legislative powers, which is not shared with other state organs. The details are provided below.

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<sup>11</sup> The LAC, 对政协十一届全国委员会第一次会议第 1524 号 (政治法律类 137 号) 提案的答复 (The Response to the No. 1524 Proposal of the First Plenary Meeting of 11<sup>th</sup> Chinese People's Political Consultative Conference), August 2008, available at <http://www.mslvshi.com/ShowArticle.shtml?ID=20088189304140422.htm>, last visited May 2016.

### 3.1 Constitutional Provisions

Under the Constitution, there are two types of exclusive legislative powers. The first is the NPC's exclusive legislative powers. Article 62 states that only the NPC can exercise the following powers: revising the Constitution and enacting and revising basic laws concerning criminal offenses (刑事), civil affairs (民事) and the State organs (国家机构). The NPCSC however, can only enact and revise non-basic laws, and it can only 'partially supplement and revise basic laws when the NPC is not in session, provided that the basic principles of these laws are not contravened'.<sup>12</sup> Article 62 is intended to strengthen the legislative authority of the NPC and 'sufficiently guarantee the status of the NPC as the highest organ of the State'.<sup>13</sup>

It can be observed that the matters under the exclusive legislative power of the NPC is rather limited in scope – apart from revising the Constitution, they only include three matters as mentioned above. The limits of the NPC's exclusive legislative power also reflect on the ill-defined terms 'basic law' and the above mentioned three matters. Until recently there was no national law to further specify which matters the NPC, as opposed to the NPCSC, should regulate. As Murray Scot Tanner observed, under Article 62 of the 1982 Constitution, only six major codes could indisputably be considered basic laws: the Criminal Code, the Civil Code, the Administrative Code and the accompanying procedural codes for each.<sup>14</sup> In practice, because of this non-specification, many national laws that might to be regarded as basic laws were adopted by the NPCSC instead of the NPC. One implication of the NPC's limited exclusive legislative powers is that the legislative powers, which are shared by the NPC and the NPCSC, are very extensive.

The second type of exclusive legislative powers is that the Constitution lists matters that can only be governed by national laws (either basic laws or ordinary laws). Article 95, for example, decrees: 'the organization of people's congresses and people's government at various local levels should be prescribed by law'. It should be pointed out that the term 'law' (法律) appears 82 times in the Constitution. The meaning of these terms is not specified in the Constitution. Depending on the context, they either refer to various types of legal documents as a whole (法律), or only national laws (国家法律). In their study on the meaning of law in the 1982 Constitution, Han Dayuan and Wang Guisong state that there are 20 provisions that incorporate the requirements of the formation of national laws. These provisions can be categorized into three areas as provided below.<sup>15</sup>

- (1) Basic rights and obligations, which include expropriation or requisition of private property (Article 13), deprivation or restriction of citizens' freedom (Article 37), freedom and privacy of correspondence (Article 40), the right to receive state compensation for the losses resulting from the infringement of state organs or

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<sup>12</sup> Article 67.2 and 67.3 of the Constitution.

<sup>13</sup> Peng Zhen, 关于中华人民共和国宪法修改草案的报告 (The Report concerning the draft of the revised Constitution of the PRC) in 彭真文选 (*Selected Works of Peng Zhen*) (Beijing: Renmin chubanshe, 1991), pp. 455-456.

<sup>14</sup> Murray Scot Tanner, Organizations and Politics in China's Post-Mao Law-making System, in Pitman B. Potter (ed.), *Domestic Law Reforms in Post-Mao China* (New York: M.E. Sharpe, 1994), p. 59.

<sup>15</sup> See Han Dayuan and Wang Guisong, 中国宪法文本中法律的涵义 (The Meaning of Law in Chinese Constitution), 2(2005) 法学 (*Legal Science*), pp. 50-52.

functionaries (Article 41), retirement system (Article 44), performing military services and joining militia (Article 55) and paying taxes (Article 56).

- (2) Organization of State organs and their functions and powers, which include the NPC and the NPCSC (Article 78), the State Council (Article 86), the system of administrative officials (Article 89), the congresses and governments at various levels below central level (Article 95), courts (Article 124) and procuratorates (Article 130).
- (3) Systems in certain domains, which include the system of self-governance (Article 31, 95, 111 and 115), the system of election for deputies of the people's congresses (Article 34, 59 and 97), conditions for not hearing cases in public by courts (Article 125), confirmation of collective land and the State-owned land in rural and suburban areas (Article 9 and 10), the system of civil servants (Article 89.17) and the civil system and criminal system (Article 62.3).

Up to March 2016, an array of national laws has been adopted to govern most of the aforementioned matters. Some examples are as follows. With respect to the State compensation, the NPCSC passed the State Compensation Law in May 1994. With respect to the freedom and privacy of correspondence, the NPCSC passed the Postal Law in December 1986. With respect to the organization of the State Council, the NPC passed the Organic Law of the State Council in December 1982. However currently, the retirement system in Article 44 and the confirmation of collective land and the State-owned land in rural and suburban areas in Article 9 and 10 have not been regulated by national laws.

Prior to 2000, the abovementioned constitutional provisions were the only source of the NPC and the NPCSC's exclusive legislative powers. It lays the constitutional foundation for the further demarcation of legislative powers. Its shortcoming is that the exclusive matters are not provided in a systematic and rational way. Relevant provisions are scattered in different sections of the 1982 Constitution. In fact, the prime intention of constitutional drafters is not about outlining the exclusive legislative powers of the NPC and the NPCSC, but about emphasizing the significance of these matters. This fragmented prescription is not conducive to guarantee exclusive legislative authority of the NPC and the NPCSC against the infringement of other state organs.

### **3.2 Article 8 of the LoL: towards a Systematic Demarcation**

The LoL, which was passed by the NPC in March 2000, for the first time, demarcated the exclusive legislative power of the NPC and the NPCSC in a systematic manner. Article 8 of this law enumerated ten general matters that can only be governed by national laws. In March 2015, the NPC revised the LoL. Compared to the previous version, the revised law adds one clause to further detail the matter of 'taxation'. The eleven matters are as follows:

- (1) Matters concerning State sovereignty;
- (2) Formation, organization, and the functions and powers of the people's congresses, the people's governments, the people's courts and the people's procuratorates at all levels;
- (3) The system of regional national autonomy, the system of special administrative regions, the system of self-government among people at the grassroots level;

- (4) Criminal offenses and their punishment;
- (5) Mandatory measures and penalties involving deprivation of citizens' political rights or restriction of their freedom;
- (6) Basic taxation systems including the institution of taxable items, the determination of tax rates, and tax collection and administration.
- (7) Expropriation and Requisition of non-State-owned property;
- (8) Basic civil system;
- (9) Basic economic system and basic systems of finance, customs, banking and foreign trade;
- (10) Systems of litigation and arbitration;
- (11) Other matters that must be governed by laws of the NPCC and the NPCSC.

According to Article 9, the NPC and the NPCSC may authorize the State Council to regulate on matters in Article 8 with the exception of matters in (4), (5) and (9).

The listing suggests that the LoL incorporates some federal elements in distributing legislative powers between the central government and local governments. Consciously or unconsciously, China adopts the common practice in federal countries, namely, providing for a list of matters that are exclusively under the legislative jurisdiction of the central government. Some comparative observations can be seen. First, although the adoption of the LoL is relatively recent (adopted in 2000), its listing of exclusive legislative powers of the national government is rather general with ten matters. This resembles the practice in those mature federations, which adopted their constitutions more than one century ago. The American Constitution, which came in force in 1789, for example, lists 18 matters.<sup>16</sup> On the contrary, the constitutions in the emerging federations tends to provide for an exhaustive and detailed list. The Indian Constitution, for example, which was adopted in 1949, provides for a remarkably exhaustive list of exclusive federal legislative powers, including 97 matters.<sup>17</sup> The second comparing observation is that in terms of the contents of the exclusive legislative powers of the national government, China is generally in line with the common practice in federal countries. Some of the matters in the list, such as state sovereignty and functioning of the economic union (Article 8.8) are also commonly incorporated into the scope of exclusive legislative jurisdiction of federal governments.<sup>18</sup> Other matters in the list of Article 8, such as governmental organization and administration, criminal and civil systems, litigation and arbitration are either under the exclusive jurisdiction of federal governments or under concurrent jurisdiction between federal governments and their component units.<sup>19</sup>

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<sup>16</sup> See Article 8 of the Constitution of the United States of America.

<sup>17</sup> The Seventh Schedule of the Constitution of India, available at <http://indiacode.nic.in/coiweb/welcome.html>, last visited May 2016. For a detailed discussion on the exclusive legislative powers of Indian federal government see, George Mathew, Republic of India, in Majeed, Akhtar, Ronald L. Watts, and Douglas Brown (ed.), *Distribution of Powers and Responsibilities in Federal Countries*, Vol. 2 (Montréal: McGill-Queen's Press-MQUP, 2005), pp. 163-165.

<sup>18</sup> Ronald L. Watts, *Comparing Federal Systems* (Montreal: McGill-Queen's University Press, 2008), pp. 90-91.

<sup>19</sup> *Ibid.*

There are several key issues concerning the listing of matters in Article 8, which are provided below.

*The List in the Final Version of the Law is Shorter than that in the Earlier Draft Version*

The list in the earlier drafts of the LOL was not as short as it appeared in the passed version of this law. During the drafting process, some matters, which were listed in the earlier drafts of this law, were dropped out later. These matters include civil subjects (民事主体), civil servants, labor and social security, fees with a tax nature (税收性收费), postal services, telecommunication, railway and aviation transport, maritime commerce, accounting and commercial instruments, currency, foreign currency, space industry, nuclear energy, calendar and weights and measurements.<sup>20</sup> In China, most of these matters have been vital to the control of the central government and are supposed to be under its jurisdiction. The deletion of these matters from the list does not mean that they are undoubtedly under the central control and it is unnecessary to enumerate them in the LoL. In fact, some localities do have interest in legislating on these matters. For example, Shenzhen, where the Special Economic Zone was located, once attempted to persuade the central government to allow the issuance of local currency in Shenzhen SEZ.<sup>21</sup>

*The Significance of the Fifth Matter*

The incorporation of the fifth matter ‘mandatory measures and penalties involving restriction of citizens’ freedom’ has led to the abolition of two systems, namely, the System of Custody and Repatriation for Vagrants and Beggars in Cities (SCRVB) (收容遣送) and the System of Re-education through Labor (SRL) (劳动教养). The two systems were based on regulations rather than national laws and they concerned the imposition of mandatory measures and penalties involving restriction of citizens’ rights.<sup>22</sup> Under the first system, the relief recipients must be put in custody and repatriated to places where their residences are registered<sup>23</sup>; under the second system, eligible offenders for re-education through labor should be incarcerated for one to three years with a possible one-year extension.<sup>24</sup> In his study on the history of SRL, Fu Hualing pointed out that this punishment and criminal punishment was significantly similar.<sup>25</sup>

<sup>20</sup> Yahong Li, ‘Law-Making Law: A Solution to the Problems in the Chinese Legislative System?’, 30 (2000) *Hong Kong LJ*, pp. 125-127.

<sup>21</sup> Wang Shuo, 风雷激荡: 深圳经济特区的建立 (The Roar of Wind and Thunder: the Establishment of the Shenzhen SEZ), in the Party History Research Centre of the CCPCC (ed.), 邓小平和改革开放的起步 (*Deng Xiaoping and the Start of Reform and Opening Up*) (Beijing: Zhonggong Dangshi Chubanshe, 2005), p. 498.

<sup>22</sup> For the system of custody and repatriation, the State Council issued the Measures concerning Custody and Repatriation for Destitute Vagrants and Beggars in December 1982; for the system of re-education through labour, the State Council issued three administrative regulations, namely, State Council’s Decisions on the Re-education through Labour in August 1957, the State Council’s Supplementary Provisions concerning the Re-education through Labour in November 1979 and the Interim Measures for the Re-education through Labour in January 1982. Following these administrative regulations, many localities also issued accompanying implementing regulations. However, no national laws concerning these two systems have been enacted by the NPC or the NPCSC.

<sup>23</sup> See the Measures concerning Custody and Repatriation for Destitute Vagrants and Beggars.

<sup>24</sup> See State Council’s Supplementary Provisions on the Re-education through Labor.

<sup>25</sup> See Fu Hualing, ‘Re-education Through Labor in a Historical Perspective’, 184(2005) *The China Quarterly*, p. 814.

After the adoption of the LoL in 2000, the two regulation-based systems as mentioned above lost their legality because they contravened Article 8.5. In the following years after 2000, Chinese social media began to question the legality and rationality of these two systems by exposing a number of miserable cases resulting from the arbitrary implementation of these two systems by local administrations. The most high-profile cases include the Sun Zhigang Case (孙志刚案), the Ren Jianyu Case (任建宇案) and the Tang Hui Case (唐慧案).<sup>26</sup> The exposure of these cases stirred nationwide public outcry. Chinese scholars also called for the abolition of relevant regulations concerning the two systems. The most noticeable scholarly petition took place in May 2003 (scarcely two months after Sun Zhigang's death) when three law researchers in Beijing submitted a written suggestion to the NPCSC, calling for the latter to review the State Council's administrative regulations concerning SCRVB.<sup>27</sup> Largely due to this bottom-up populist protest, the State Council abolished its relevant administrative regulations in June 2003 and those concerning the SRL in December 2013 respectively.<sup>28</sup>

The incorporation of the fifth matter is applauded. It strengthens the legislative authority of the NPC and the NPCSC over other decentralized legislative organs and it is conducive to better protect citizen's freedom from arbitrary legislation of the State Council and local governments. However, the incorporation also has its defects. As Zhang Qianhan, a constitutional professor at Peking University, pointed out, it may hinder the effort of the local governments to resolve their local issues by legislation.<sup>29</sup> Some press articles reported that after the abolition of the system of custody and repatriation in 2003, local governments lack effective means to deal with the beggary, and it tends to increase human slavery and cause a deterioration of public security.<sup>30</sup>

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<sup>26</sup> For Sun Zhigang case, See Chen Feng and Wang Lei, 被收容者孙志刚之死 (The Death of Sun Zhigang), in 南方周末 (Southern Metropolis Daily), 25 April 2003, available at <http://ndnews.oeeee.com/html/201302/28/26725.html>, last visited May 2016. For Ren Jianyu case, see Zhou Zhimei, 因言获罪任建宇 (Ren Jianyu: Convicted for Speech), in 南都周刊 (Southern Metropolis Weekly), 19 October 2012, available at <http://money.163.com/12/1018/14/8E3TP1NI00253B0H.html>, last visited May 2016. For Tang Hui case, see anonymous author, 永州劳教委：不劳教唐慧就是失职 (Yongzhou Committee of Reeducation through Labor: It is a Dereliction of Duty if Tang Hui is not Re-educated though Labor), in 南方周末 (Southern Metropolis Daily), 13 July 2013, available at <http://www.infzm.com/content/92041>, last visited May 2016.

<sup>27</sup> For the details, see Cui Li, 三位中国公民依法上书全国人大常委会建议对《收容审查办法》进行违宪审查 (Three Chinese Citizens Submitted a Written Suggestion to the NPCSC, calling for the latter to review the Measures concerning Custody and Repatriation) in 中国青年报 (China Youth Daily), 16 May 2003, available at [http://zqb.cyol.com/content/2003-05/16/content\\_663628.htm](http://zqb.cyol.com/content/2003-05/16/content_663628.htm), last visited May 2016. After 2003, a number of Chinese scholars called for abolishing the regulations concerning the system of re-education through labor, see Shen Liang, 法学界提请对劳教制度启动违宪审查 (The Legal Scholars Suggested the NPCSC to Initiate Constitutional Review on the System of Re-education through Labor), in 南方周末 (Southern Weekly) 4 April 2008, available at <http://www.infzm.com/content/6316>, last visited May 2016.

<sup>28</sup> For other factors leading to the abolishment, see Keith J. Hand, 'Using Law for a Righteous Purpose: the Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China', 45 (2006) *Colum. J. Transnat'l L.*, pp. 127-145.

<sup>29</sup> Zhang Qianfan, 国家主权与地方自治 – 中央与地方关系法治化 (*State Sovereign and Local Autonomy – Juritification of Central-local Relation*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2012), p. 112.

<sup>30</sup> Apparently professional beggar does not want relief from local administrations, and those who were forced to beg are victims of criminal offences. See Wei Xuejun, 起底东莞丐帮 (Exploring Beggar Gangs in Dongguan), in 沈阳网 (Shenyang News), 18 March 2014, available at

The abolition of the regulations concerning the above-mentioned two systems suggests that the impact of the listing of the NPC and the NPCSC's exclusive legislative authority under the LoL is significant. The abolition sends a clear message to the State Council and local governments that their existing regulations, which govern matters involving those in Article 8 of the LoL, should be altered or annulled. As shown in legislative practice, after the passage of the LoL, the State Council and localities become more cautious on selecting matters to legislate on, the purpose of which is to ensure that the matters selected do not involve those in Article 8 of the LoL.<sup>31</sup>

#### *Detailing the Term 'Taxation'*

The LoL, for the first time, incorporated 'taxation' as one of the matters under the NPC and the NPCSC's exclusive legislative authority. Along with other economic matters, 'taxation' was incorporated into Article 8.8 in a general manner. This clause stated: '(the following matters can only be governed by the laws of the NPC and the NPCSC) basic economic system and basic systems of finance, taxation, customs, banking and foreign trade. The NPC revised the LoL in March 2015. The revised Law further details the term 'taxation'. The revised law uses one clause (Article 8.6) to prescribe 'taxation' separately and the prescription is more detailed compared to the 2000 LoL. Article 8.6 of the revised Law states: 'basic taxation systems, such as the institution of tax items, the determination of tax rates, and tax collection and administration'.

Detailing the term 'taxation' represents an attempt to strengthen the NPC and the NPCSC's authority on taxation legislation. In 1984, the NPCSC authorized comprehensive legislative powers over economic affairs to the State Council. The State Council has issued a number of taxation regulations thereafter. As a consequence, the State Council has, by and large, monopolized the taxation legislation since the mid-1980s. Until recently, 15 out of 18 taxation items were still regulated by State Council's administrative regulations.<sup>32</sup> For years, NPC deputies, legal scholars and public media had been calling for abolishing the 1984 authorization decision and withdrawing the legislative power on taxation to the NPCSC.<sup>33</sup> Finally, a consensus for reforming the legal system on taxation was reached in November 2013 when the Third Plenary Session of the 18<sup>th</sup> CCP Central Committee (CCPCC) decided

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[http://news.163.com/14/0318/11/9NK78O4300011229\\_3.html](http://news.163.com/14/0318/11/9NK78O4300011229_3.html), last visited May 2016; also see Zhang Qianfan, 流浪乞讨与管制 – 从贫困救助看中央与地方权限的界定 (Begging, Loitering and Control – the Demarcation of Central-local Jurisdiction from the Perspective of Poverty Relief), 3(2004) 法学研究 (*Chinese Journal of Law*), p. 40.

<sup>31</sup> Interviews with officials in the Legislative Affairs Office of the State Council, September 2013.

<sup>32</sup> See Wang Tao, 18 个税种仅三人大立法 (For 18 Tax Items, only 3 are Governed by national laws of the NPC), in 新华网 (*Xinhua News*), 4 March 2014, available at [http://news.xinhuanet.com/politics/2014-03/04/c\\_119604248.htm](http://news.xinhuanet.com/politics/2014-03/04/c_119604248.htm), last visited May 2016.

<sup>33</sup> See anonymous author, 全国人大代表赵冬苓提出关于终止授权国务院制定税收暂行规定的议案 (The NPC Deputy Zhao Dongling Proposed to Terminate the Authorization on Enacting Taxa Interim Provisions), in 证券时报 (*Securities Daily*), 23 August 2013, available at <http://www.dcetax.com/ntax/apps/home/index.php/Index/news/id/13732>, last visited May 2016; Liu Jianwen, 废止税收立法授权条件成熟 (The Conditions for Terminating the Tax Legislative Authorization are Ripe), in 财新网 (*Caixin News*), 15 March 2013, available at <http://special.caixin.com/2013-03-15/100501738.html>, last visited May 2016.

to achieve 'taxation by national laws' in the coming years.<sup>34</sup> In this sense, detailing 'taxation' under the revised LoL reflects the consensus, and thus it is predictable that the current regulation-based taxation legal system will be replaced by a law-based one.

One of the main issues during the drafting of the amendment is whether the matter 'determination of tax rates' should be listed in Article 8.6. In the earlier draft, this matter was listed; however, it was dropped out when the draft was submitted to the Third Plenary Session of the 12<sup>th</sup> NPC for the final deliberation and voting on 8 March 2015. Wu Zeng, the director of the State Law Office of the LAC, explained that the deletion was due to the opposition of some NPCSC members who believed that national laws are unlikely to regulate tax rates given the sheer number of taxable items and the changing taxation circumstance.<sup>35</sup> Surprisingly, the matter 'determination of tax rates' was re-incorporated into the draft law in the last deliberation stage of the NPC and it was finally passed by the NPC. The re-incorporation was largely attributed to the joint efforts of NPC members, the members of the Chinese People's Political Consultative Conference, and legal scholars. Through various types of lobbying activities, such as giving speeches in the NPC panel meetings, sending letters to relevant committees of the NPC and the NPCSC, convening seminars and releasing press articles, they successfully persuaded the law drafters to re-incorporate 'the determination of tax rates' into the amendment draft in the last deliberation stage of the NPC.<sup>36</sup>

In summary, the LoL provides for the exclusive legislative powers of the NPC and the NPCSC in a relatively systematic and comprehensive manner. The listing of 11 matters in Article 8 suggests that China incorporates some federal elements in distributing legislative powers between the central government and local governments. An important effect of the listing is that it strengthens the NPC and the NPCSC's legislative authority over other decentralized legislative organs. The incorporation of the 5<sup>th</sup> matter, for example, is intended to protect citizen's freedom from arbitrary legislation of the State Council and local governments. It has led to the abolishment of the State Council's regulations concerning the SCRVB and the SRL. Detailing the term 'taxation' in the revised LoL reflects the attempt to supersede the existing regulation-based taxation legal system with a law-based one.

## 4. The Law-making Procedure

### 4.1 An Overview

Prior to 2000, there were no specific national laws that governed the NPC and the NPCSC's law-making procedure. Nevertheless, during this period, some provisions of four national laws concerned this matter. These national laws were the 1982 Constitution, the Organic Law of the NPC (which was passed in December 1982), the Rules of Procedure for the NPCSC (which was passed in November 1987), and the Rules of Procedure for the NPC (which was

<sup>34</sup> See CCPCC, 中共中央关于全面深化改革若干重大问题的决定 (The Decision on Major Issues Concerning Comprehensively Deepening Reforms), in 新华网 (*Xinhua News*), available at [http://news.xinhuanet.com/politics/2013-11/15/c\\_118164235.htm](http://news.xinhuanet.com/politics/2013-11/15/c_118164235.htm), last visited May 2016.

<sup>35</sup> Wu Zeng, 2015 《立法法》修改背景和主要内容解读 (The Background of the Revision of the Law on Legislation in 2015 and the Interpretation on the Main Content), 1(2015) 中国法律评论 (*China Law Review*), p. 213.

<sup>36</sup> *Ibid.*

passed in April 1989). The common feature of these provisions is that they were rather general and failed to provide for law-making procedural rules in a systematic manner. The 1982 Constitution merely prescribes a super-majority (2/3) rule for passing the drafts of constitutional amendment and a simple majority (1/2) rule for passing the law drafts (Article 64). The other abovementioned three national laws provided for a basic framework on the meeting procedures of the NPC and the NPCSC but they largely failed to provide rules on law-making procedure. Both the NPC and the NPCSC's Rules of Procedure provided for rules concerning submission of and deliberation on proposals (in chapter two and chapter three respectively), but they only had one provision that specifically concerned the law-making procedure (which mainly dealt with the unified deliberation on law drafts by the NPC Law Committee). Hence, prior to 2000, there were no national laws to provide for the NPC and the NPCSC's law-making procedure in a detailed and systematic manner.

The LoL, for the first time, provides for the NPC and the NPCSC's law-making procedures in a relatively detailed and systematic manner, and the revised version of this law in 2015 further improves relevant procedures. Under the revised LoL, the NPC and the NPCSC's law-making procedures are prescribed in chapter 2(2) and (3) respectively. These two sections possess 31 provisions, which make up 29.5 per cent of the total content of this law, indicating that the procedural rules for the NPC and the NPCSC's lawmaking is one of the main subject matters under this Law. The contents of these provisions mainly covers seven aspects: (1) submission of law-making bills; (2) deliberation of draft laws by the NPC and the NPCSC's plenary session; (3) deliberation of draft laws by special committees; (4) the Law Committee's unified deliberation; (5) public participation (only for the NPCSC's lawmaking); (6) the conditions for withdrawing the law-making bill and tabling the deliberation; (7) voting and promulgation. Several key procedural matters are evaluated below.

#### *The NPCSC's 'Three Rounds' Deliberation*

Under the revised LoL, a law draft normally needs to be deliberated by three different NPCSC plenary sessions before it is put to vote (Article 29).<sup>37</sup> The reform era has witnessed a marked improvement on the NPCSC's deliberative procedure from 'one round' to 'two rounds' and finally 'three rounds'. In the early reform era, the NPCSC adopted 'one round' deliberative procedure, namely, the NPCSC members needed to deliberate and vote law drafts at the same plenary meeting.<sup>38</sup> This 'one round' deliberation was by and large perfunctory because the NPCSC members did not have the opportunity to write their revising opinions into the law drafts. Under this 'one round' deliberative rule, the contents of national laws were virtually determined by law drafters - in most cases, they were the State Council's subordinate ministries.

<sup>37</sup> The NPCSC plenary session convenes in every two months for about one week, see Article 3 of the Rules of Procedure for the NPCSC, and also see For the session duration of the NPCSC in the reform era, see the chronology of NPCSC Plenary Meeting, in 中国人大网 (*The Website of the NPC*), available at [http://www.npc.gov.cn/npc/cwhhy/node\\_2433.htm](http://www.npc.gov.cn/npc/cwhhy/node_2433.htm), last visited May 2016.

<sup>38</sup> Liu Songshan, 国家立法三十年的回顾与展望 (The Retrospect and Prospect for the Thirty-year Legislation of the State), 1(2009) 中国法学 (*China Legal Science*), pp. 48-49.

Starting in 1983, the NPCSC adopted a 'two rounds' deliberative procedure, namely, a law draft should normally be deliberated by two different NPCSC plenary sessions before it was sent for vote. More importantly, the NPCSC Chairman Council (委员长会议) at that time stressed that the major contradictions in the draft and differing opinions emerging during the deliberative process should be clarified and resolved before vote.<sup>39</sup> In April 1998, the NPCSC decided to adopt the procedure of a 'three rounds' deliberation. This change was formalized in March 2000 with the passage of the LoL. In practice, for some significant laws, enactment underwent more than three rounds of deliberation in the NPCSC. For example, the draft of Property Law was deliberated as many as 7 times in the NPCSC before it was submitted to the 5<sup>th</sup> Plenary Session of the 10<sup>th</sup> NPC for further deliberation and voting.<sup>40</sup> The significance of the incorporation of the 'three rounds' deliberation is that it enables the NPCSC to conduct more meaningful deliberative work, which is conducive to create a more democratic legislative process and improve the quality of national laws. In contrast to the NPCSC, the NPC still practices 'one round' deliberation for its lawmaking. This is partly because of its cumbersome size and short meeting duration, and partly because the law draft has undergone the whole legislative process of the NPCSC before it is sent to the NPC.

#### *The Law Committee's Unified Deliberation*

While the NPCSC began to adopt the two round deliberation procedure in 1982, national lawmakers also began to adopt the procedure of unified deliberation for the legislation of both the NPC and the NPCSC. Unified deliberation means that the Law Committee (法律委员会), one of the NPC's special committees, would conduct deliberation and revise law drafts by drawing on the opinions that emerged from the previous deliberative process. The significance of the adoption of the unified deliberation is that it provides a formal mechanism to incorporate the revising opinions of the NPC or the NPCSC members into law drafts. Thus it is conducive to improve the quality of law drafts. As noted earlier, the drafting of law drafts is usually undertaken by administrative organs. The revision of the law drafts through unified deliberation reflects the rising role of the NPC and the NPCSC for shaping the law drafts.

#### *Public Participation in the NPCSC's Legislative Process*

In the reform era, Chinese national lawmakers have come to realize that taking public opinions into account in the law-making process can enhance the legitimacy of law and reduce the possibility of resistance during law enforcement. If the abovementioned three round deliberations and the unified deliberation can be regarded as the 'interior' manifestation of the development of law-making democracy, the public participation then can be regarded as its 'exterior' manifestation. The LoL, for the first time, regarded public participation as one of the legislative principles and it also provided for a series of relevant rules. Under the LoL, four types of public participation, which had been practiced before,

<sup>39</sup> The Chairman Council is an internal organ in the NPCSC, which is in charge of daily organizational work of the NPCSC. It is composed of the Chairman, vice-chairmen and the secretary-general.

<sup>40</sup> Author unknown, 2007年物权法通过, 5年8审创纪录 (The Property Law was Passed in 2007, 8 Times Deliberation within 5 years Sets a New Record), in 新华网 (Xinhua News), 22 September 2009, available at <http://news.sina.com.cn/c/sd/2009-09-22/170618703640.shtml>, last visited May 2016.

were formalized. They are (1) holding symposiums (座谈会) and demonstration meetings (论证会), and soliciting written opinions of concerned State organs and social organizations; (2) publishing law drafts to solicit public opinions; (3) inviting legal experts to participate drafting work or even entrust them to formulate law drafts; (4) holding public hearings (听证会).

The 2015 revised LoL, for the first time, provides for mandatory rules for holding demonstration meetings and public hearings. Under Article 36.2, a demonstration meeting should be convened if a legislative bill contains highly technical issues, which necessitate feasibility evaluation; Under Article 36.3, a public hearing should be convened if there are considerable differences of opinions concerning relevant issues in the legislative bill or relevant issues in the legislative bill concern significant interest adjustment. Unlike the NPCSC, until recently the NPC law-making procedure had not incorporated any forms of public participation.

## 4.2 Shortcomings and Prospects

Despite its remarkable development, the evolution of the law-making procedure is still in its early stages. It reveals several shortcomings and also provides for several prospects, which will be discussed below.

### 4.2.1 Imbalanced Development on Law-making Procedure between NPC and the NPCSC

In the reform era, the NPCSC's law-making procedure has undergone marked development. In contrast, the development of the NPC's law-making procedure has largely stagnated. Two procedural matters critical to the improvement of law-making quality and democracy - 'three rounds' deliberation and public participation – only apply to the NPCSC's law-making and they are not incorporated into the NPC's law-making process. The 2015 revised LoL made attempts to further rationalize the law-making procedure of the NPCSC, such as detailing rules on public participation, incorporating legislative evaluation, allowing separate voting for significant clauses in a law drafts. However, these new developments do not apply for the NPC's law-making procedure. The imbalance on legislative procedural development between the NPC and the NPCSC can also be seen from the number of provisions. Under the revised LoL, there are 19 provisions that regulate the NPCSC's law-making procedure compared to only 12 provisions for the NPC's law-making procedure.

The imbalanced development can be understood from two aspects. First, the development of the NPC's law-making procedure is hindered by its short meeting duration (it convenes once a year for about two weeks), the sheer meeting size (about 3000 NPC deputies) and the lack of permanent internal working organs. Given these structural problems, the space left for developing the NPC's law-making procedure is extremely limited. Unlike the NPC, the NPCSC convenes more frequently (convenes in every two months for about one week); its size is much smaller (it only has about 150 members) and it possesses a number of special committees and internal working organs that can constantly work on legislative affairs. These factors lay the foundation for the development of the NPCSC's lawmaking. Second,

the underdevelopment of the NPC's law-making procedure is also due to the fact that in practice, before a law draft is submitted to the NPC, it has gone through the whole law-making procedure of the NPCSC. In this sense, these types of laws undergo law-making procedures of both the NPCSC and the NPC. This also tends to undermine the incentive of the national lawmakers to develop the NPC's law-making procedure.

Under the 1982 Constitution, both the NPC and the NPCSC are 'the organs to exercise the legislative power of the State'. In this sense, the underdevelopment of the NPC's law-making procedure is not in line with the NPC's constitutional status as the highest law-making organ. Nevertheless, the revision of the LoL in 2015 reveals that national lawmakers have no intention to transform the NPC into an able law-making organ.

#### 4.2.2 Uncertainties concerning the New Developments

The new developments under the 2015 revised LoL are applaudive, but it is too soon to observe their effects. One uncertainty concerns legislative planning (立法规划). Legislative planning plays an important role for the NPC and the NPCSC's lawmaking.<sup>41</sup> In practice, the NPC and the NPCSC normally enact national laws in accordance with their legislative plans.<sup>42</sup> The 2015 revised LoL, for the first time, provides for rules concerning legislative planning, including soliciting public opinions and conducting scientific investigation for the drafting of legislative plans; the rule for passing the legislative plans, and the supervision of legislative plans (Article 52). The formalization of the legislative planning into the revised LoL reflects an attempt to strengthen the NPC and the NPCSC's organization and coordination on law-making work. Whether this formalization can improve the law-making work (as Article 52 stated, the promptness, pertinence and systematicness) deserves further observation.

The second uncertainty concerns legislative hearings. Although legislative hearings have been incorporated into the 2000 LoL, the law-making practice thereafter indicated that relevant provisions largely remain on paper - the first NPCSC legislative hearing was held in September 2005, nearly 6 years after the passage of the Law.<sup>43</sup> After that the NPCSC has not yet held any further legislative hearing. As noted above, the 2015 revised LoL future details the rules concerning legislative hearing, providing for conditions under which a legislative hearing 'must be' held (Article 36.3). Whether this new development can activate the legislative hearing in practice remains to be seen in the future.

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<sup>41</sup> Since the late 1980s, enacting legislative plans to guide the legislative work of the NPC and the NPCSC have been emphasized by NPCSC leaders; see Liu Songshan, 立法规划之淡化与反思 (De-emphasizing and Rethinking Legislative Planning), 12(2014) 政治与法律 (*Political Science and Law*), pp. 91-92.

<sup>42</sup> The laws passed by the 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> NPC and its NPCSC was in line with the five legislative plans and annual legislative plans during this period, see Liang Cuning, 论规划立法模式的成功与不足 (On the Achievement and Defects of Legislation based on Planning), 2(2013) 人大研究 (*People's Congress Research*), pp. 29-31.

<sup>43</sup> Hu Jian, 个税法修改首开全国人大立法听证先河 (The First Legislative Hearing of the NPCSC was Held for the Revision of the Law on Individual Income Tax), 12(2005) 人民论坛 (*People's Forum*), p. 5.

### 4.2.3 Administrative-dominated Law Drafting

In the reform era, the bulk of national laws are drafted by the State Council's subordinate departments.<sup>44</sup> After completing the drafting, a law draft will be submitted to the NPCSC for deliberation and voting. The Five Year Legislative Plan for the 11<sup>th</sup> NPC (March 2008 – March 2013), for example, listed 64 national laws that needed to be enacted during this period; 48 of these national laws should be drafted by State Council's ministries and committees.<sup>45</sup> Drafting national laws by administrative organs has its advantages. First, State Council's ministries and committees are familiar with the legislative subjects, and thus they are able to provide pertinent legislative solutions. Second, compared to drafters in the representative bodies (the NPC and the NPCSC), the ministries and committees are powerful administrative organs, possessing able law-making staff and other sources, and therefore, assigning the law drafting tasks to them can facilitate law-making work. Third, these ministries and committees are not only law enforcement organs, but also organs to execute social and economic reforms. Allowing them to draft laws is conducive to make legislation in line with ongoing reforms.

Nevertheless, one major shortcoming of this administrative-dominated drafting is the 'departmentalism' in lawmaking - drafters tend to use the law to inappropriately expand their powers and avoid their duties. Its most obvious manifestation is that some national laws, whose goals are to protect citizen's rights and restrict the arbitrary exercise of administrative powers, were drafted by relevant ministries or committees. One example is that the drafter for the Law on Assemblies, Processions and Demonstrations was the Ministry of Public Security. As stated in Article 1, the purpose of enacting this law is to 'safeguard citizens' rights to exercise assemblies, processions and demonstrations. However, this law contains many prohibitive provisions that hinder the exercise of the rights to hold assemblies, processions and demonstrations, which contravenes the objective of this law. The reason is understandable – as the drafting organ, the Ministry of Public Security lacks incentives to sufficiently guarantee the rights on the freedom of speech at the expense of its own functions and powers. The consequence is that in practice, no approval has been given for the application of holding assemblies, processions and demonstrations since the passage of this law in 1989.

The dominance of administrative organs in law drafting, on the one hand, is due to the marked expansion of the administrative power, on the other hand is due to the fact that the scope of state organs, which is allowed to submit legislative bills to the NPC or the NPCSC, is rather limited. Under the LoL, the drafters are mainly national State organs, including the State Council, NPC's special committees, the Central Military Committee, the Supreme People's court and the Supreme People's Prosecutorate.<sup>46</sup> Apart from the State Council and the NPC's special committees, the functions and powers of other three national State organs

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<sup>44</sup> State Council's subordinate departments include dozens of ministries, committees and the People's Bank of China (which is China's central bank).

<sup>45</sup> Liang Cunming, *supra* note 43, p. 31.

<sup>46</sup> According to the revised LoL, the NPC's Presidium and NPC Delegations (代表团) can submit law drafts to the NPC, and the NPCSC's Chairmen's Meeting can submit law drafts to the NPCSC; however, these three organs are temporary organs, which cease to exist after the session.

are limited in certain specific domains, and thus they do not have too many opportunities to conduct drafting work and submit law-making bills.

Apart from the national State organs, the LoL also allows a group of certain NPC and NPCSC members to jointly submit law-making bills to the NPC and the NPCSC during the session for deliberation and voting.<sup>47</sup> However, although the NPC and the NPCSC members are remarkably active in proposing law-making bills, until recently the NPC and the NPCSC have never incorporated any jointly submitted law-making bill into their session agendas.<sup>48</sup> One reason for inactive submission is that nearly all the jointed submitted law-making bills do not contain detailed law drafts, and therefore they cannot be deliberated on and can only be regarded as law-making suggestions.<sup>49</sup> Another reason is that the NPC and the NPCSC are already over-congested with law-making work and other work (such as deliberation of the governmental working report, and appointment of key national officials) and leave no time for the deliberation of law-making bills jointly submitted. For example, the sessions of the NPCSC during the 9<sup>th</sup> NPC (March 1998 – March 2003) convened for 5.5 days for each session on average; and during each session, the NPCSC members needed to deliberate on as many as 10 law drafts on average.<sup>50</sup> During the period of the 9<sup>th</sup> NPC, the NPCSC held meetings for 167 days and deliberated on and passed 102 national laws, legal interpretations and decisions.<sup>51</sup>

## 5. Law-making Practice

### 5.1 An Overview

In the Second Plenary Session of the 11<sup>th</sup> NPC held in March 2010, Wu Bangguo, the Chairman of the NPCSC at that time, declared that ‘the Socialist Legal System with Chinese Characteristics (中国特色社会主义法律体系)’ has been established.<sup>52</sup> According to Wu, the national laws are the most important components in the Chinese legal system, serving as the

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<sup>47</sup> Under the revised LoL, a group of 30 or above deputies may jointly submit a legislative bill to the plenary session of the NPC, and the Presidium will decide whether or not to put it on the agenda of this session (Article 15); a group of 10 or above NPCSC members may submit a legislative bill to the plenary session of the NPCSC and the Chairmen's Counsel will decide whether or not to put it on the agenda of the session (Article 27).

<sup>48</sup> For example, during the first plenary session of the 12<sup>th</sup> NPC, which was held in March 2013, deputies submitted 401 bills in total, 295 of which concerned legislation. However, none of these bills were incorporated into the agenda of that session, see Hui Meng, 十二届全国人大一次会议期间代表提出议案 401 件 (Deputies proposed 401 Bills during the First Plenary Session of the 12<sup>th</sup> NPC), in 新华网 (*Xinhua News*), 13 March 2013, available at [http://news.xinhuanet.com/2013lh/2013-03/13/c\\_115015553.htm](http://news.xinhuanet.com/2013lh/2013-03/13/c_115015553.htm), last visited May 2016.

<sup>49</sup> In the book ‘the Speeches on the Law on Legislation’, Qiao Xiaoyang, a ranking NPCSC official, states that most legislative bills submitted by deputies during the sessions of the NPC only put forward the existing problems that materialized in practice and the titles of laws that are suggested to enact, and do not include the content and provisions of these laws, see Qiao Xiaoyang, 立法法讲话 (*The Speeches on the Law on Legislation*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2000), pp. 114-115.

<sup>50</sup> Sun Chao and Xu Xianghua, 论我国立法程序的完善 (On the Development of the Legislative Procedure in China), 5(2003) 中国法学 (*China Legal Science*), p. 62.

<sup>51</sup> *Ibid.*

<sup>52</sup> Wu Bangguo, 全国人民代表大会常务委员会工作报告 - 2011 年 3 月 10 日第十一届全国人民代表大会第四次会议 (The Working Report of the NPCSC in the Fourth Plenary Session of the 11<sup>th</sup> NPC held on March 10, 2011), in 中国政府网 (*The Website of the Central People's Government of the PRC*), 18 March 2011, available at [http://www.gov.cn/2011lh/content\\_1827143.htm](http://www.gov.cn/2011lh/content_1827143.htm), last visited May 2016.

backbone (主干).<sup>53</sup> By the end of March 2016, the NPC and the NPCSC have adopted 268 national laws, among which, 43 were passed by the NPC and the remaining 225 were passed by the NPCSC. There are 247 valid national laws; among them, 40 were passed by the NPC and the other 207 were passed by the NPCSC. By comparing these two types of law-making data, we can see that national laws remain by and large stable - despite the upheaval of the socio-economic environment in the reform era, only 20 national laws are annulled during this era, accounting for 7.6 per cent of the total national laws.

The areas regulated by the existing national laws are considerably comprehensive. This is in sharp contrast to the situation in the pre-reform era, when few areas were regulated by national laws. According to Chinese authoritative sources, national laws cover 7 realms, namely: constitutional laws, administrative laws, civil and commercial laws, economic laws, social laws, criminal laws and procedural laws.<sup>54</sup> The exact number of the valid laws in these 7 realms is provided below.

**Table 1: Number of valid national laws in 7 realms (July 1979 – March 2016)<sup>55</sup>**

Areas	Constitutional laws	Administrative laws	Civil and commercial laws	Economic management laws	Social laws	Criminal laws	Procedural laws
Number	39	82	33	60	22	1	10
Total	247						

Drawing on table 1, it can be observed that more than 2/3 of the existing laws (70.2 per cent) are clustered in the areas of administrative laws and economy-related laws (namely, civil and commercial laws and economic management laws). As Liu Songshan, the law professor at East China University of Political Science and Law, points out, more than half of

<sup>53</sup> According to Qiao Xiaoyang, one of the key features for the establishment of China's legal system is 'the basic and important national laws in various domains should have been enacted', see Qiao Xiaoyang, 关于中国特色社会主义法律体系的构成、特征和内容 (On the Composition, Characteristics and Contents of the Socialist Legal System with Chinese Characteristics), in the Training Center of the NPC (ed.), 全国人大干部培训讲义 (*The Teaching Materials for NPC Cadres*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2004), pp. 154-174.

<sup>54</sup> In the Symposium on the Socialist Legal System with Chinese Characteristics held in August 2010, Li Jianguo, the vice Chairman of the NPCSC at that time stated that the Chinese legal system was composed of seven 'legal departments' (法律部门), see Li Jianguo, 李建国在中国特色社会主义法律体系座谈会上的讲话 (The Speech of Li Jianguo in the Symposium on the Socialist Legal System with Chinese Characteristics) in 法制日报 (*Legal Daily*), 30 August 2010, available at [http://www.legaldaily.com.cn/bm/content/2010-08/30/content\\_2264309.htm?node=20735](http://www.legaldaily.com.cn/bm/content/2010-08/30/content_2264309.htm?node=20735), last visited May 2016. For the definition and contents of these legal areas, see Wang Weicheng, 关于有中国特色社会主义法律体系的几个问题 (Several Questions on the Socialist Legal System with Chinese Characteristics) in 中国人大网 (*The Website of the NPC*), available at [http://www.npc.gov.cn/npc/xinwen/1999-04/23/content\\_1459908.htm](http://www.npc.gov.cn/npc/xinwen/1999-04/23/content_1459908.htm), last visited May 2016.

<sup>55</sup> For the list of national laws adopted from July 1979 to October 2012, see the NPCSC Legislative Affairs Commission, 中华人民共和国立法统计 (*Legislative Statistics of the PRC*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2013), pp. 92-100; for the national laws adopted from the October 2012 to March 2013, see the NPCSC, 全国人大常委会公报 (Communiqué of the NPCSC) in 中国人大网 (*The Website of the NPC*), available at [http://search.npc.gov.cn:7000/was40/search?channelid=13334&templet=outline\\_cms\\_cwhgb.jsp](http://search.npc.gov.cn:7000/was40/search?channelid=13334&templet=outline_cms_cwhgb.jsp), last visited May 2016.

the existing national laws (41) in the realm of administrative management also directly serve to regulate the market economy.<sup>56</sup> In this sense, a rough calculation is that the number of existing national laws relating to economy reaches 134, making up 54.2 per cent of the total valid national laws.

In terms of the lawmaking in each NPC session, it is observable that the law-making speed of NPC and the NPCSC has followed an inverted V-form trajectory. The data is provided below.

**Table 2: Number of national laws passed since the First Plenary Session of the 5<sup>th</sup> NPC (1979)<sup>57</sup>**

Session	5 <sup>th</sup> Session (1979-1982)	6 <sup>th</sup> Session (1983-1987)	7 <sup>th</sup> Session (1988-1992)	8 <sup>th</sup> Session (1993-1997)	9 <sup>th</sup> Session (1998-2002)	10 <sup>th</sup> Session (2003-2007)	11 <sup>th</sup> Session (2008-2012)	12 <sup>th</sup> Session (2013-March 2016)
Number	31	35	42	64	33	31	23	9
Total	268							

As shown in table 2, in the first two decades of the reform era (from the 5<sup>th</sup> NPC to the 8<sup>th</sup> NPC (1978-1998)), the number of national laws enacted by each NPC session steadily increased and it reached an all-record high during the 8<sup>th</sup> NPC (1993-1998) at 64, thereafter the number of national laws enacted in each session decreased rapidly. During the 11<sup>th</sup> NPC (2008-2012), the NPC and the NPCSC adopted 19 national laws, which made up less than 1/3 of the number of national laws enacted by the 8<sup>th</sup> NPC. In the first three sessions of the 12<sup>th</sup> NPC (2013-2015), the NPC and the NPCSC only passed 4 national laws.

The decline of law creation after 1997 is associated with the rise of law revision work. The following table 3 shows the number of national laws revised since 1978.

<sup>56</sup> Liu Songshan, *supra* note 38, pp. 39-40.

<sup>57</sup> For the list of national laws adopted from July 1979 to October 2012, see the NPC Legislative Affairs Commission, 中华人民共和国立法统计 (*Legislative Statistics of the PRC*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2013), pp. 3-90; for the national laws adopted from the October 2012 to March 2013, see the NPCSC, 全国人大常委会公报 (Communiqué of the NPCSC) in 中国人大网 (*The Website of the NPC*), available at [http://search.npc.gov.cn:7000/was40/search?channelid=13334&templet=outline\\_cms\\_cwhgb.jsp](http://search.npc.gov.cn:7000/was40/search?channelid=13334&templet=outline_cms_cwhgb.jsp), last visited May 2016.

**Table 3: Number of national laws revised since the First Plenary Session of the 5<sup>th</sup> NPC (1979)<sup>58</sup>**

Session	5 <sup>th</sup> Session (1978-1982)	6 <sup>th</sup> Session (1983-1987)	7 <sup>th</sup> Session (1988-1992)	8 <sup>th</sup> Session (1993-1997)	9 <sup>th</sup> Session (1998-2002)	10 <sup>th</sup> Session (2003-2007)	11 <sup>th</sup> Session (2008-2012)	12 <sup>th</sup> Session (2013-March 2016)
Number	2	6	6	16	41	42	96	57
Total	266							

Table 3 illustrates that the number of laws revised considerably increased in the 9<sup>th</sup> NPC (1998-2003), which exceeds the number of laws revised in the previous 4 sessions combined. It is also noticeable that during the 9<sup>th</sup> NPC, the number of law revision has, for the first time, exceeded the number of laws created, thereafter, the gap has been increasing. In the first four years of the 12<sup>th</sup> NPC, 57 pre-existing national laws were enacted compared to 9 newly passed national laws. Overall, 147 existing national laws have been revised, making up 60.5 per cent of the total number of existing national laws.<sup>59</sup>

The increase of law revision and the decrease of law creation since the 9<sup>th</sup> NPC reflect that consistent with the expansion of the legal system, the law creation is not the only focus of the legislative work of the NPC and the NPCSC. Chinese authoritative sources suggest that after twenty years' intensive law creation work, national lawmakers began to regard law revision as an important means to advance the legal system. In his working report to the Fifth Plenary session of the 9<sup>th</sup> NPC delivered in March 2002, Li Peng, the Chairman of the NPCSC at that time, stated that law revision work was equally important as law creation work.<sup>60</sup> Wu Bangguo, Li's successor, further lifted the importance of law revision work. In his working report to the Second Plenary Session of the 11<sup>th</sup> NPC delivered in March 2010, Wu Bangguo regarded the law revision work as the principal legislative work of the NPC and the NPCSC in the forthcoming era.<sup>61</sup>

## 5.2 Some Observations

### 5.2.1 Lawmaking is Considered as a Planned Project

One characteristic of China's lawmaking is that the emergence of the considerable body of national laws is the result of intended efforts, which are guided by relatively clear objectives.

<sup>58</sup> *Ibid.*

<sup>59</sup> Data was collected from 全国人大常委会公报 (Communiqué of the NPCSC), in 中国人大网 (*The Website of the NPC*), available at [http://search.npc.gov.cn:7000/was40/search?channelid=13334&templet=outline\\_cms\\_cwhgb.jsp](http://search.npc.gov.cn:7000/was40/search?channelid=13334&templet=outline_cms_cwhgb.jsp), last visited May 2016.

<sup>60</sup> Li Peng, 全国人民代表大会常务委员会工作报告 (The Working Report of the NPCSC delivered on 9 March 2002), in CCPCC Party Literature Research Office, 十五大以来重要文献选编, 下册 (*Selected Documents since the 15<sup>th</sup> National Congress of the CCP, Volume II*) (Beijing: Zhongyang Wenxian Chubanshe, 2011), p. 489.

<sup>61</sup> Wu Bangguo, *supra* note 53.

This stands in sharp contrast to the situation of legislative development in many western countries where their legal systems naturally grow out of the society with the slow expansion of laws in number.<sup>62</sup> National leaders in the reform era regard the building of a legal system as a long-term goal. They believe that a full-fledged legal system can be established in a relatively short period of time by careful planning and intensive legislative work, and the key for achieving this goal is the enactment of national laws.<sup>63</sup>

Chinese national lawmakers have put forward at least two long-term legislative objectives. The first is 'strengthening the socialist legality' (加强社会主义法制) put forward in 1978.<sup>64</sup> Guided by this goal, the NPC and the NPCSC formulated and adopted a number of organic laws. The purpose was to rehabilitate the political apparatus, which was paralyzed during the Cultural Revolution.<sup>65</sup> A more far-reaching legislative objective was put forward in 1993. The Third Plenary Session of the 14<sup>th</sup> CCPC, which was held in November 1993, proposed to 'establish the 'Socialist Market Economic System' (社会主义市场经济).<sup>66</sup> Since then, legislating for a market economy became the focus of the NPC and the NPCSC's work. Qiao Shi, the Chairman of the NPCSC from 1993 to 1998, for example, iterated that the emphasis of the NPCSC's work is market-oriented economic legislation for the purpose of 'establish a basic framework of the socialist market-oriented economic legal system by 1998'.<sup>67</sup>

The planned nature of law-making work is also reflected on the extensive use of legislative planning (立法计划). In order to facilitate the law-making work, the NPCSC began to formulate five-year legislative plans and annual legislative plans since the early 1990s. Thereafter, formulating these two types of plans has become common place in People's Congress Standing Committees, both at the national and local levels. A legislative plan usually provides a long list of national laws that need to be enacted; these national laws are divided into several groups in terms of the degree of importance. Legislative practice reveals that the NPC and the NPCSC's law-making work normally follow the legislative plans, indicating that legislative planning plays a key role for guiding the NPC and the NPCSC's legislative work.<sup>68</sup> An important step for the regularization of legislative planning

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<sup>62</sup> A salient example of the natural development on legislation is the United Kingdom; see Venn Albert Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1960), pp. 1-6.

<sup>63</sup> See the Resolution of the 11<sup>th</sup> CCP Central Committee in 1978, and the resolutions of the 15<sup>th</sup> CCP National Congress in 1997, of 16<sup>th</sup> CCP National Congress in 2002 and of the 17<sup>th</sup> CCP National Congress in 2007.

<sup>64</sup> The objective of 'strengthening socialist legality' was first put forward at the Third Plenary Session of the 11<sup>th</sup> CCP Central Committee held in December 1978, see Party Literature Research Office of the CC, 十一届三中全会以来党的历次代表大会中央全会重要文件选编(上) (*Selected Documents of the Plenary Sessions of the CCP Central Committee since the Third Plenary Session of the 11<sup>th</sup> CCP Central Committee*) (Beijing: Zhongyang Wenxian Chubanshe, 1998), p. 27.

<sup>65</sup> In 1979, for example, the NPC passed the Election Law, the Organic Law of the Local People's Congresses and Local People's Governments, the Organic Law of the People's Court and the Organic Law of People's Procuratorate.

<sup>66</sup> The CCP Central Committee, 中共中央关于建立社会主义市场经济体制若干问题的决定 (The Decision of the CCP Central Committee on Several Issues concerning the Establishment of Socialist Market Economic System), passed by the Third Plenary Session of the 14<sup>th</sup> CCP Central Committee in November 1993, 人民日报 (*People's Daily*), 13 November 1993, available at <http://cpc.people.com.cn/GB/64162/134902/8092314.html>, last visited May 2016.

<sup>67</sup> Qiao Shi, 乔石谈民主法制(下) (*Qiao Shi's Talk on Democracy and Legality, Volume II*) (Beijing: Renmin Chubanshe, 2012), pp. 336-344 and 345-347.

<sup>68</sup> Liu Songshan, *supra* note 41, pp. 90-93.

came in 2015 with the revision of the LoL. The 2015 revised Law, for the first time, provides for some general guidelines for the formulation of legislative plans. Under Article 52, the drafting organ is required to widely solicit opinions for drafting a legislative plan; the NPCSC Chairman Council is the organ to approve it, and it should be released to the public after approval.

The significance of the planning is that it accelerates NPC and the NPCSC's law-making work. Moreover, the marked expansion of national laws in number also has the effect to stimulate the legislative work of other decentralized organs because the latter has to formulate relevant implementing rules. For this reason, the planned law-making work has accelerated the building of China's legal system as a whole. From this perspective, the planned building of China's legal system can be understood as a feasible way to accomplish China's complex legislative project in such a short period of time. It is noticeable that while announcing the completion of construction of the legal system in 2011, the Chinese government did not put forward a new legislative objective, instead, the NPCSC stated that the future legislative work should focus on law revision and enacting relevant supplementary regulations rather than enacting new laws.<sup>69</sup> This change in effect signifies the end of the intensive legislation for a market economy, which was initiated in 1993.

### 5.2.2 The Improvement of Law-making Quality

One striking trend of the NPC and the NPCSC's lawmaking in the reform era is the improvement of law-making quality. This trend can be observed from the following three aspects. First, in terms of content, the recently adopted national laws are more detailed and comprehensive compared to those adopted in the early reform era. Some examples are as follows. The Statistics Law, which was passed in December 1983, was rather general with only 28 provisions.<sup>70</sup> It failed to specify some key matters, such as the methods of statistical investigation; and its chapter 5, which was entitled 'legal responsibility' only had 2 provisions. Consistent with the development of their legislative capacity, the NPC and the NPCSC tends to enact laws in a relatively detailed and comprehensive manner. For example, the Administrative Enforcement Law, which was passed by the NPCSC in June 2011, is considerably more detailed and comprehensive.<sup>71</sup> It contains 7 chapters with 71 provisions. The Criminal Law, which was adopted by the NPC in June 1979, possessed 192 provisions. In March 1997, the NPC passed a new Criminal Code to replace the 1979 version; compared to the old version, the new version is remarkably longer, possessing 452 provisions.

A recent example is the Tourism Law. Despite the fact that nearly all the localities had their tourism regulations in place, the NPCSC passed its Tourism Law in May 2013.<sup>72</sup> The

<sup>69</sup> Wu Bangguo, *supra* note 52.

<sup>70</sup> This law was largely revised in May 1996 and June 2009 respectively, and after revision, the number of its provisions increases to 49. The revised Statistics Law specifies the methods of statistical investigation in Article 16 and the number of provisions in chapter 6 'legal responsibility' increased to 6.

<sup>71</sup> For a brief introduction to this law, see the Interpretation on the Draft of the Administrative Enforcement Law, available at [http://www.npc.gov.cn/wxzl/gongbao/2011-09/15/content\\_1671742.htm](http://www.npc.gov.cn/wxzl/gongbao/2011-09/15/content_1671742.htm), last visited May 2016.

<sup>72</sup> Prior to 2010, all the 31 provinces and most relatively large cities have passed their regulations on tourism.

purpose is to 'create a uniform legal framework on tourism'.<sup>73</sup> This law possesses 10 chapters with 112 provisions, which is relatively comprehensive compared to the existing local tourism regulations, whose provisions range from 30 to 90.<sup>74</sup> Compared to pre-existing local tourism regulations, the Tourism Law is specified and detailed. For example, Article 18 provides a list of 9 areas that should be incorporated into the local tourism development plans. Although all 31 local tourism regulations incorporate provisions concerning tourism development plans, few provide such detailed requirements. Another example is the requirement of establishing tourism information platforms. Some local tourism regulations generally require the local administrative organs to do so.<sup>75</sup> The Tourism Law went one step further, decreeing that the information provided by these platforms should include five types of information - scenic spots, routes, transportation, meteorological information and accommodation. The comprehensiveness and specification of the Tourism Law are also demonstrated by the fact that unlike the previous common legislative practice that national laws always need accompanying implementing regulations, after the passage of the Tourism Law, no locality formulates accompanying implementation regulations.

Second, the improvement of the quality of national laws is also reflected on the trend of the unification of separate national laws. As noted before, in the law-making process, national lawmakers adopted a piecemeal approach. But enacting separate laws to govern one matter is merely the first step. In the late 1990s, the NPC and the NPCSC tended to unify these pre-existing laws into one piece of law. Some examples are provided below: in October 1999, the NPC passed the Contract Law to replace the pre-existing three laws on contracts.<sup>76</sup> In January 2015, the Ministry of Commerce released the draft of the Foreign Investment Law (FIL), which was intended to replace the existing three laws on foreign investment.<sup>77</sup> In the area of civil affairs, the NPC and the NPCSC have passed a range of national laws, such as the Heritage Law (passed by the NPC in April 1985), the General Principles of Civil Law (passed by the NPC in April 1986), the Adoption Law (passed by the NPCSC in December 1991) and the Guaranty Law (passed by the NPCSC in June 1995). As iterated by NPCSC leaders, the ultimate goal is to enact a unified civil code in the future.<sup>78</sup>

This process of unification of laws does not simply unify the provisions of separate laws into one piece of law. It is a process leading to the development of the law-making quality in the sense that the provisions in the unified laws are usually more comprehensive and detailed compared to relevant pre-existing separate laws. One example is the Contract Law, which contains 428 provisions; however, the aforementioned three laws concerning contracts only have 155 provisions in total. Another example is the draft of the FIL, which contains 170

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<sup>73</sup> NPC Financial and Economic Affairs Committee, 关于《中华人民共和国旅游法（草案）》的说明 (The Interpretation on the Tourism Law of the PRC), in 中国人大网 (*The Website of the NPC*), 24 December 2005, available at [http://www.npc.gov.cn/huiyi/lfzt/lyflfzt/2013-07/18/content\\_1872437.htm](http://www.npc.gov.cn/huiyi/lfzt/lyflfzt/2013-07/18/content_1872437.htm), last visited May 2016.

<sup>74</sup> Generally speaking, the number of provision of these local regulations varies significantly from 33 (Hubei Tourism Regulation) to 90 (Tibet Tourism Regulation) with the majority ranging from 50 to 90.

<sup>75</sup> Such as the Tourism Regulations in Shanghai and Sichuan.

<sup>76</sup> These three laws are the Economic Contract Law (passed by the NPC in December 1981), the Foreign-related Economic Contract Law (passed by the NPCSC in 3 March 1985) and the Technology Contract law (passed by the NPCSC in June 1987).

<sup>77</sup> These three laws are the Law on Sino-foreign Equity Joint Venture Enterprise (passed in July 1979), Law on Sino-foreign Joint Venture Enterprise (passed in April 1988) and the Wholly Foreign-owned Enterprise Law (passed in April 1986).

<sup>78</sup> Peng Zhen, 彭真文选 (*Selected Works of Peng Zhen*) (Beijing: Renmin Chubanshe, 1991), p. 424.

provisions – it largely exceeds the number of provisions in the three foreign-related national laws combined (67 in total). Unlike these three national laws, which mainly provide for the forms of foreign-related enterprises, the draft of FIL covers all basic systems on foreign investment, such as market entry management, national security review, information reporting, investment promotion, coordination and complaints resolution, and supervision and inspection.

Third, the improvement of the law-making quality is also reflected by frequent law revision. As noted earlier, law revision has become an important legislative task of the NPC and the NPCSC since the 9<sup>th</sup> NPC. It is regarded by national lawmakers as an important means to improve existing national laws. The law-making practice indicates that the law revision largely supplements and detail existing national laws. The Trademark Law, for example, only had 43 provisions when it was passed by the NPCSC in August 1982. This law was revised in February 1993 and October 2001 respectively. As a result, the number of its provisions largely increased to 73. In terms of content, compared to the previous version, the revised law prescribes more detailed rules covering virtually all the major matters in the area of trademarks, such as criteria for applying a trademark, the determination of well-known trademarks, application by foreign subjects, rules on filling out application documents and so on. Another example is the revision of the Compulsory Educational Law. When it was passed by the NPCSC in April 1986, this national law was rather general and sketchy with merely 18 provisions, which were not divided into chapters. In order to implement this law, the State Council issued the Implementing Rules on the Compulsory Educational Law, which contained 46 provisions. This national law was extensively revised in June 2006. As a result, the number of its provisions increased to 63, dividing into 8 chapters. Because the revised version of this law is already comprehensive and detailed, the State Council's implementing rules was no longer needed - it was abolished in January 2008.

In summary, the development of more comprehensive content in national laws indicates that Chinese national lawmakers have, to some extent, abandoned the traditional principle that national laws should be drafted in a quick and general manner.<sup>79</sup> The adoption of this principle in the early reform era is understandable given the immature conditions at that time, such as the lack of experience, the imperfection of the law-making procedure and the shortage of law-making manpower. Consistent with the developments of these conditions in the reform era, national lawmakers have become more cautious on lawmaking and are willing to improve the law-making quality at the expense of the law-making efficiency. For some significant laws, drafting was arduous. For example, the drafting of the Administrative Enforcement Law lasted 12 years, during which time the NPCSC held its deliberation over five rounds.<sup>80</sup>

<sup>79</sup> With respect to lawmaking, Deng Xiaoping stated: 'it is better to have some laws than none and better to have them sooner than later', see Deng Xiaoping, 邓小平文选 (*Selected Works of Deng Xiaoping*) (Beijing: Renmin Chubanshe, 1994), p. 147; Peng Zhen also made similar statement, see Peng Zhen, 彭真文选 (*Selected Works of Peng Zhen*) (Beijing: Renmin Chubanshe, 1991), p. 505.

<sup>80</sup> Guo Jinchao and Zhao Weiran, 全国人大常委会 5 次审议通过行政强制法, 历时 12 年 (The Administrative Enforcement Law was Passed after Five-round's Deliberation by the NPCSC, Taking 12 Years), in 新华网 (*Xinhua News*), 30 June 2011, available at <http://ent.163.com/11/0630/16/77QF36PR00032DGD.html>, last visited May 2016.

### 5.2.3 The Decline of the NPC in Lawmaking

One significant institutional change in the reform era is the decline of the NPC and the rise of the NPCSC in lawmaking.<sup>81</sup> This change is mainly reflected on three aspects. First, the NPCSC has become the principal national law-making organ. In general, the NPC laws only account for a small proportion (16 per cent) of the national laws adopted, and the others (84 per cent) are adopted by the NPCSC. Moreover, the NPC's lawmaking is tending to fall into disuse - from March 2007 to March 2016, over a span of 9 years, the NPC only passed one law - the Charity Law (which was passed in March 2016). During the same period, the NPCSC passed 36 national laws. In terms of content, NPCSC laws covers a wide range of areas. In the area of administrative management, for example, the NPC only passed 7 national laws.<sup>82</sup> In contrast, the NPCSC passed 79 national laws in the area of administrative management, governing a wide range of matters; to name a few - urban management, population control, security, health, road traffic safety and environmental protection.

Second, the changing role of the NPC and the NPCSC in lawmaking is also reflected on law revision. The NPCSC has become the principal organ for law revision. The NPC only passed 13 amendments for 8 laws.<sup>83</sup> More specifically, the NPC passed four constitutional amendments in 1988, 1993, 1998 and 2004 respectively. Three national laws were revised twice by the NPC. They are the 1979 Electoral Law of the NPC and the Local People's Congresses (revised in 1982 and 2010 respectively), the 1979 Criminal Procedural Law (revised in 1996 and 2012 respectively), and the 1979 Sino-foreign Equity Joint Venture Law (revised in 1990 and 2001 respectively). Three national laws were revised once by the NPC. They are the 1979 Criminal Code (revised in 1997), the 1979 Organic Law on the Local People's Congresses and Local People's Government (revised in 1992), and the 2000 LoL (revised in 2015). The NPCSC has passed 253 national laws. Compared with the NPC, the NPCSC is far more active in law revision. It has passed 253 amendments.<sup>84</sup>

Third, the NPCSC tends to encroach upon the NPC's legislative authority. According to Article 67.2 of the 1982 Constitution, the power to enact basic laws is reserved for the NPC, and the NPCSC can only enact ordinary laws. However, the NPCSC passed some national laws, such as the Labor Law and the Law on Assemblies, Processions and Demonstrations. Whether these laws are basic laws or ordinary laws is disputable. The authoritative source recognizes that both the Property Law and the Tort Law are important components of the

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<sup>81</sup> In fact, the decline of the NPC and the rising of the NPCSC is not only revealed in legislation, but also in other areas, such as making significant decisions, electing national leaders, and the exercise of supervision powers, see Han Dayuan, 论全国人民代表大会之宪法地位 (The Constitutional Status of the NPC), 6(2013) 法学评论 (*Law Review*), pp. 8-12.

<sup>82</sup> They are the Compulsory Educational Law, the Military Service Law, the Administrative Litigation Law, the Budget Law, the Educational Law, the Administrative Punishment Law and the National Defence Law.

<sup>83</sup> For the list of national laws adopted from July 1979 to October 2012, see the NPC Legislative Affairs Commission, 中华人民共和国立法统计 (*Legislative Statistics of the PRC*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2013), pp. 3-90.

<sup>84</sup> *Ibid.*, for law revision from the October 2012 to March 2013, see the NPCSC, 全国人大常委会公报 (Communiqué of the NPCSC), in 中国人大网 (*The Website of the NPC*), available at [http://search.npc.gov.cn:7000/was40/search?channelid=13334&templet=outline\\_cms\\_cwhgb.jsp](http://search.npc.gov.cn:7000/was40/search?channelid=13334&templet=outline_cms_cwhgb.jsp), last visited May 2016.

legal system in regards to civil affairs.<sup>85</sup> The former was passed by the NPC but the latter was passed by the NPCSC. In the area of administrative law, the Administrative Punishment Law was passed by the NPC, but other laws that constitute the basic administrative legal system, such as the State Compensation Law, the Administrative Reconsideration Law, Administrative Licensing Law and the Administrative Enforcement Law, were passed by the NPCSC.

The NPCSC's encroachment on NPC's legislative authority is also reflected on the revision of basic laws. Under the 1982 Constitution, the NPC is the principal organ for revising the basic laws (62.3); the NPCSC only plays a supplemental role – (1) it can only make partial alteration when the NPC is not in session; (2) the alteration should not contravene the basic principles of basic laws (Article 67.3). However, the NPCSC's legislative practice indicates that its law revision work has exceeded these limits. The NPCSC has become the *de facto* principal organ for the revision of basic laws – 21 out of 43 NPC laws have been revised at least once by the NPCSC.<sup>86</sup> Moreover, many basic laws were extensively revised by the NPCSC to the extent that these revisions can hardly be regarded as partial revision.<sup>87</sup> In 1998, the NPCSC revised the Organic Law of Villagers' Committee. The altered provisions account for over 90 per cent of the provisions in the original version of this law. More surprising is the revision of the Marriage Law by the NPCSC in April 2001. The revised law supplemented and revised 39 provisions, which even exceeded the number of provisions (37 in total) in the original version of this law.<sup>88</sup> Another observation is that the NPCSC's law revision work also touches upon the change of principles in basic laws. In his study on the NPCSC's exercise of the power to revise basic laws, Yi Youlu concluded that most of the NPCSC legislative revision work (89.7 per cent) concerns the revision of basic principles or basic systems in national laws.<sup>89</sup> The revision of the Law on Regional National Autonomy, for example, lifts the status of the system of the national regional autonomy from 'an important political system' to 'a basic political system'.

Two major reasons for the decline of the NPC and the rise of the NPCSC in lawmaking can be identified. First, two key terms under the 1982 Constitution are ill-defined. The first term is 'basic law'. Apart from three major codes – the Criminal Code, the Civil Code, the Administrative Code and their accompanying procedural codes, whether other laws can be regarded as basic laws is under dispute. The second term is 'partial'. The 1982 Constitution

<sup>85</sup> NPCSC Legislative Affairs Commission, 涉外民事法律关系适用法（草案）全文及主要问题汇报 (The Full Text of the Law Draft on Application of Laws to Foreign-related Civil Relations), in 中国人大网 (*The Website of the NPC*), available at [http://www.npc.gov.cn/npc/flcazqyj/2010-08/28/content\\_1592751.htm](http://www.npc.gov.cn/npc/flcazqyj/2010-08/28/content_1592751.htm), last visited May 2016.

<sup>86</sup> They are the Compulsory Educational Law, the Military Service Law, the Administrative Litigation Law, the Budget Law, the Educational Law, the Administrative Punishment Law and the National Defense Law.

<sup>86</sup> For the list of national laws adopted from July 1979 to October 2012, see *supra* note 83, pp. 3-90.

<sup>87</sup> Even the NPCSC's moderate revision of basic laws usually concerns the alteration of a substantial proportion of original laws. For example, in 1986, the NPCSC revised the Electoral Law of the NPC and the Local People's Congresses and the Organic Law on the Local People's Congresses and Local People's Government. As a result, the altered provisions in the two revised laws accounts for 36% and 44% of the provisions in the original laws respectively.

<sup>88</sup> In the revision of the Individual Income Law in 1993 and the revision of the Compulsory Educational Law in 2006, the provisions supplemented or altered exceeded the number of provisions of these laws before revision.

<sup>89</sup> Yi Youlu, 全国人大常委会基本法律修改权行使的实证分析 (Empirical Analysis on the NPCSC's Exercise of the Power to Revise Basic Laws), 5(2014) 清华法学 (*Tsinghua University Law Journal*), p. 121.

and the LoL fail to specify to what extent the revision on a basic law can be regarded as a partial alteration. These ill-defined terms blurred the boundary of the legislative authority between the NPC and the NPCSC, and thereby providing possibility for the NPCSC's encroachment on the NPC's legislative authority. Second, the changing role of the NPC and the NPCSC in lawmaking is also due to their respective institutional underdevelopment/development. The NPC's legislative capacity remains underdeveloped in virtually every aspect. Given the huge size (nearly 3000 members), short meeting duration (about ten days), lack of permanent internal working organs and the perfunctory law-making procedure, it is extremely difficult for the NPC to conduct any meaningful legislative work.<sup>90</sup> Standing in contrast to the NPC, the NPCSC has risen to be an able law-making organ by reforming itself into a much smaller body with a dozen of subordinate committees and internal working organs that can convene more often. As noted earlier, the law-making procedure of the NPCSC is also relatively developed compared to that of the NPC.

## 6. Conclusion

The law-making system in China has undergone marked development in the reform era. Its most distinctive feature is that there are two national organs that can exercise the law-making power – the NPC and the NPCSC. The law-making systems of the NPC and the NPCSC reveal certain differences both in the formal system and in practice. Under the 1982 Constitution, the power to enact basic laws is reserved for the NPC and the NPCSC can enact ordinary laws. This represents an attempt to guarantee the NPC's law-making authority (Article 62.3). Based on this constitutional provision, some Chinese constitutional scholars assert that NPC laws have higher status over the NPCSC laws. However, the administrative and judicial practice reveals that the administrative organs and courts regard the status of NPC law and the NPCSC law at the same level.

The NPC and the NPCSC's law-making powers are more demarcated than ever before. The 1982 Constitution provides for general guidelines on the NPC and the NPCSC's law-making power. It states that the NPC, and to a lesser extent, the NPCSC is the highest legislative organ with unlimited legislative powers. Moreover, it also contains 20 provisions that require the formulation of national laws. The 2015 revised LoL provides for the exclusive legislative power of the NPC and the NPCSC in a relatively systematic and comprehensive manner. Article 8 of this law lists 11 matters that can only be governed by national laws. The listing is intended to strengthen the NPC and the NPCSC's legislative authority over other decentralized legislative organs. Its most significant effect came in 2003 and 2013 with the abolishment of the State Council's regulations concerning the system of SCRVB and SRL. Detailing the term 'taxation' in the 2015 revised Law reflects the attempt to supersede the existing regulation-based taxation legal system with a law-based one.

The two most important new developments with regard to the NPCSC's law-making procedure are the incorporation of the 'three rounds' deliberation and public participation, which are critical to the improvement of the law-making quality and democracy. Standing in contrast to the development of NPCSC's law-making procedure, the NPC's law-making procedure receives little development – the abovementioned two new developments are not applicable to the NPC. The principal law drafting organs are the State Council's departments.

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<sup>90</sup> The NPC lacks permanent internal organs. Even its heading organ – the presidium – is temporary.

The administrative-dominated drafting has its merits, such as providing better legislative solutions and accelerating law-making work, but its downsides are also obvious - it tends to expand the powers of relevant departments at the expense of citizens' rights and interests. One way to curb the 'departmentalism' in lawmaking is to formulate rules that allow NPC and NPCSC members to jointly submit law drafts to the plenary session of the NPC and the NPCSC. In order to achieve this, the professionalism of NPC and the NPCSC members should be improved so that they are able to conduct drafting work.<sup>91</sup> With respect to this, the 2015 revised LoL made some efforts. Compared to the 2000 original version, the 2015 revised LoL allows NPC members to be more involved in the NPCSC's law drafting (Article 16, 28 and 36). Article 16, for example, requires the NPCSC to solicit, by various means, the opinions of the NPC members on law drafts, and it should send feedback to them; while conducting legislative investigations, the NPCSC special committees and working organs may invite NPC members to participate. These new developments in the 2015 revised LoL may lay the foundation for the further development of the professionalism of the NPC and the NPCSC.

The reform era saw the remarkable expansion of national laws in number. With respect to this, the NPCSC is the principal contributor, passing 225 national laws. The remaining 43 national laws were passed by the NPC. In terms of content, economic-related affairs have become the major law-making subject - it is the subject of more than half of national laws. From a historical perspective, the creation of laws shows an M-form trajectory, reaching an all-record high in the 8<sup>th</sup> NPC (1993-1998) with the promulgation of 64 national laws. The legislative focus of the NPCSC has been gradually shifted to law revision since 9<sup>th</sup> NPC (1998-2003), suggesting that after twenty years' intensive law creation work, national lawmakers began to regard law revision as an important means to advance the legal system

One characteristic of China's lawmaking is that the emergence of the considerable body of national laws is the result of intended efforts of national lawmakers, and it is guided by relatively clear objectives. The most far-reaching objective is 'establishing a socialist market-oriented legal system' put forward in 1993, which largely shaped the law-making work thereafter. After declaring the establishment of the socialist legal system with Chinese characteristics in 2010, Chinese leaders have not formulated any long-term legislative goal. This signifies that the planned legislation has come to an end and the future development of legal system in China relies more on their spontaneous response to the changing Chinese society. It is observable that the law-making quality has undergone improvement, which is reflected on the fact that recent laws are relatively detailed and comprehensive than those adopted earlier, and that separate laws tend to be unified into one law.

Drawing on the above discussion, it can be observed that the key to understand the law-making system in China is the imbalanced legislative development between the NPC and the NPCSC. One important question is how to resolve the tension between the NPC's *de jure* role as the highest law-making organ and the rise of the NPCSC in law-making activities. From my perspective, the rise of the NPCSC in lawmaking should not be regarded as *ultra vires*. Instead, it is better to be understood as a feasible way to activate the NPC law-making system.

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<sup>91</sup> Being a NPC deputy or NPCSC member is a part-time job, and he/she do not have assistants or funding for preparing bills, therefore it is difficult for them to undertake the law drafting work, see Cai Dingjian, 中国人民代表大会制度 (*The System of People's Congress in China*) (Beijing: Falv Chubanshe, 1998), p. 302.

Reforming the NPC is extremely difficult given the cumbersome size, short duration and underdevelopment legislative procedure, and lack of institutional support. For this reason, the future reform should continue focusing on the NPCSC. The NPC may serve more as a consultative organ rather than a legislative organ.

## Chapter 4. The Legislative System of the State Council

### 1. Introduction

The first three constitutions of the PRC (namely, the 1954, 1975 and 1978 Constitutions) did not grant legislative power to the State Council (国务院) (China's cabinet). The current Chinese constitution (adopted in 1982), for the first time, granted this power to the State Council and its subordinate department (Article 89.1 and 90.2). Under the Constitution, the State Council can issue the Administrative Regulations (行政法规). The issuing is determined by the State Council's Executive Meeting (常务会议), which is composed of the Prime Minister, vice Prime Ministers, State Councilors, and the Secretary General.<sup>1</sup> The drafting of administrative regulations is either performed by relevant departments or the Legislative Affairs Office (LAO) (法制办公室) – an organ directly under the State Council, which is in charge of regulation drafting and inter-ministerial legislative co-ordination.<sup>2</sup> The State Council's subordinate departments can issue department rules (部门规章) – a type of regulatory document. The State Council subordinate departments mean ministries, committees, the People's Bank of China (Chinese central bank), National Audit Office and bureaus directly under control the State Council (国务院直属事业单位). Currently there are 39 such departments.<sup>3</sup> The issuing of department rules is determined by the ministerial general meetings (部务会议), which are composed of minister, vice ministers, the heads of subordinate bureaus (司或局).<sup>4</sup> The *de facto* rule drafter within each department is its law bureau (法规司).

The significance of State Council's legislation lies in the fact that administrative regulations and rules constitute the bulk of the legal documents promulgated at the national level. Moreover, the majority of the national laws passed by the NPC and its Standing Committee are originally drafted by State Council's departments. This chapter will focus on the State Council's regulation-making and rulemaking systems. It is divided into 6 sections. Following the introduction, section 2 examines the status of the administrative regulation and the department rule. Section 3 and 4 evaluate the scope and formulating procedures of these two types of legal norms. Section 5 discusses the legislative practice, followed by the conclusion.

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<sup>1</sup> For the current members of the State Council, see 国务院领导 (The Leadership of the State Council) in 中国政府网 (*The Website of Central People's Government of the PRC*), available at <http://www.gov.cn/guowuyuan/>, last visited May 2016.

<sup>2</sup> The Legislative Affairs Office is defined as a ministerial-level Functional Office (办事机构) directly under the State Council. It possesses no independent functions and powers of administrative management. Its predecessor was the Legislation Bureau (法制局), which was established in 1954. In 1998, the Legislation Bureau was re-named as the Legislative Affairs Office. For the historical evolution of the Legislation Bureau see Murray Scot Tanner, *Organizations and Politics in China's Post-Mao Law-making System*, in Pitman B. Potter (ed.), *Domestic Law Reforms in Post-Mao China* (New York: M.E. Sharpe, 1994), pp. 65-71.

<sup>3</sup> See 国务院组织机构 (The Institutional Organization of the State Council), in 中国政府网 (*The Website of Central People's Government of the PRC*), available at <http://www.gov.cn/guowuyuan/zuzhi.htm>, last visited May 2016.

<sup>4</sup> For committees and bureaus directly under the control of the State Council, it means the general meeting of the committees or bureaus.

## 2. Status of the Administrative Regulation and Department Rule

### 2.1 The Administrative Regulation

Although the State Council obtained the regulation-making power in 1982, the legal nature of administrative regulations had not been explicitly recognized until 2000 with the passage of the Law on Legislation (LoL). Article 2 of this law states that the enactment, revision and nullification of administrative regulations should apply this law, indicating that the administrative regulation is one type of law in China. A more explicit authoritative statement came in 2010 with the release of the NPCSC Working Report. In this report, Wu Bangguo, the Chairman of the NPCSC at that time, stated that administrative regulations were one of the three major types of legal documents that constitute China's legal system.<sup>5</sup> The other two are national laws and local regulations. The LoL specifies the status of the administrative regulation *vis-à-vis* other types of law: its status in the legal system is lower than the Constitution and the national law, but higher than local regulation and the rule.

Administrative regulations have general binding force not only for administrative institutions and individuals but also judiciary. For administrative litigation, Article 63 of the Administrative Litigation Law specifies that administrative regulation is one of the three types of criteria for the court to adjudicate administrative cases; the other two are national laws and local regulations. For civil litigation, a 2009 Supreme People's Court's judicial interpretation (司法解释) spells out that although the principal criteria for adjudicating civil cases is national laws, relevant administrative regulations may also be taken as the criteria.<sup>6</sup> The reason for this is that many civil affairs are regulated by administrative regulations. In his study on the tort liability regulated by administrative regulations, Zhang Xinbao found that by 2007 there were 72 administrative regulations concerning the compensation for tort behaviors.<sup>7</sup>

Administrative regulations are also one source of criteria for adjudicating criminal cases. The reason is that under many provisions of the Criminal Law, the violation of the relevant 'Provisions of the State' (国家规定) is the condition for constituting a criminal offense. In many cases, the Criminal Law does not specify what the provisions of the State are, instead, it only gives a general guidance. Under Article 96 of the Criminal Law, the 'provisions of the

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<sup>5</sup> Wu Bangguo, 全国人民代表大会常务委员会工作报告 - 2011年3月10日第十一届全国人民代表大会第四次会议 (The Working Report of the NPCSC in the Fourth Plenary Session of the 11<sup>th</sup> NPC held on 10 March 2011), in 中国政府网 (*The Website of the Central People's Government of the PRC*), 18 March 2011, available at [http://www.gov.cn/2011lh/content\\_1827143.htm](http://www.gov.cn/2011lh/content_1827143.htm), last visited May 2016.

<sup>6</sup> Judicial Interpretation is one type of documents issued by the Supreme People's Court, which aim to either comprehensively interpret provisions of national laws or answer specific questions deriving from the judicial practice of local courts. It is regarded as a source of law for the court to adjudicate cases. For a detailed analysis of the status and effect of judicial interpretation, see Eric C. Ip, 'Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China', 24 (2010) *The Colum. J. Asian L.*, pp. 239-405. The 2009 Judicial Interpretation refers to 最高人民法院关于裁判文书引用法律、法规等规范性文件的规定 (The Provisions of the People's Supreme Court on the Citation of Regulatory Documents such as Laws and Regulations in Judgment Documents) issued by the Supreme People's Court in October 2009.

<sup>7</sup> Zhang Xinbao, 行政法规不宜规定具体侵权责任 (Administrative Regulation should not Regulate Substantive Tort Liability), 5 (2007) *法学家 (The Jurist)*, p. 135.

State' mentioned refers to the national laws, decisions of the NPC and NPCSC and the administrative regulations and decisions of the State Council. In practice, the specification of many criminal offenses hinges on the provisions of relevant administrative regulations. For this reason, administrative regulations serve as an important supplement for the Criminal Law. For example, Article 180 of the Criminal Law criminalizes the behavior of illegally obtaining inside information concerning futures trading. This provision also decrees that the scope of inside information should be specified by laws and administrative regulations. Until recently, the only law governing this matter was an administrative regulation - the Regulation on the Management of Futures Trading, which was issued by the State Council in March 2007.<sup>8</sup> Thus, only by taking both the both the Criminal Code and the 2007 Regulation into consideration, can a criminal case concerning obtaining inside information be adjudicated.<sup>9</sup>

## 2.2 The Department Rule

Under the 1982 Constitution, the State Council departments are empowered to formulate and issue rules, but it does not specify whether the rule is a type of law.<sup>10</sup> For a long time after the adoption of the Constitution, this issue was under dispute among Chinese legal scholars.<sup>11</sup> Consistent with the passage of a few national laws after the late 1980s, the legal nature of the rule tends to be recognized. Article 13 of the 1989 Administrative Litigation Law states that administrative regulations and the rules are not part of administrative actions that can be sued by citizens in a court, implying that rules are one type of legal documents like administrative regulations.<sup>12</sup>

With respect to the types of government documents that are exempt from the judicial examination in an administrative litigation, the 1989 Administrative Litigation Law categorizes the administrative regulation and rule together, which distinguishes them from administrative decisions and orders (Article 12). This indicates that the nature of the rule is more sided with administrative regulations (which is one type of law) than administrative decisions and orders. Under the 1996 Administrative Punishment Law, the rule is one of the four types of governmental norms that can institute administrative punishments. The other

<sup>8</sup> Prior to the issuance of this administrative regulation, future trading was governed by the Interim Regulation on the Management of Futures Trading, which was issued by the State Council in June 1999.

<sup>9</sup> For other cases concerning taking administrative regulations as criteria to adjudicate criminal cases, see Lin Xuefei, 行政法规作为独立刑法法源的现状和问题 (The Current Situation and Problems concerning the Administrative Regulation as Independent Source of Law), 2(2011) 中共浙江省委党校学报 (*Journal of Zhejiang Province Party School*), pp. 84-87.

<sup>10</sup> It is noticeable that the department rule is one of the two types of the rule. The other type is local rule. For this reason, while talking about the status of the rule, it is also talking about the common status of the department rule and the local rule as a whole.

<sup>11</sup> Some scholars assert that the department rule is one type of law, see Yang Haikun, 论我国行政立法 (On the Administrative Legislation), 1(1992) 北京社会科学 (*Beijing Social Sciences*), pp. 138-139, and Luo Wenyan, 有关行政规章若干问题的法理分析 (A Theoretical Analysis on Several Questions concerning Rules) 3(1996) 行政法研究 (*Administrative Law Review*), pp. 74-75; some scholars however deny the legal nature of the department rule, see Cui Zhuolan, 论行政规章及其制定程序 (On the Rule and Its Formulation Procedure), 4(1992) 社会科学战线 (*Social Science Front*), pp. 140-141; Guan Baoying, 行政法与行政诉讼法 (*The Administrative Law and the Administrative Procedural Law*) (Beijing: Zhongguo Zhengfa Daxue Chubanshe, 2007), p. 240.

<sup>12</sup> The 1989 Administrative Litigation was revised by the NPCSC in November 2014.

three types are national laws, administrative regulations and local regulations, all of which are law. An important step for recognizing the legal nature of the rule came in 2000 with the passage of the LoL. This law spells out that the rulemaking of State Council's departments and local governments should be in accordance with relevant provisions of this law (Article 2.1).<sup>13</sup>

Under the LoL, the status of the department rule is lower than that of the Constitution, the national law and the administrative regulation; its status is at the same level as the local rule. The LoL also provides for rules for determining which type of documents will prevail in case of conflicts between a departmental rule and a local rule or a local regulation. More specifically, for the conflicts between two department rules or between a department rule and a local rule, the State Council has the power to decide which one will prevail (Article 95.3); for the conflicts between a department rule and a local regulation, if the State Council considers that the local regulation should prevail, then the local regulation should be applied in the localities concerned; if the State Council considers that the department rule should prevail, this case should be submitted to the NPCSC for a ruling (Article 95.2).

According to the aforementioned 2009 Supreme People's Court's judicial interpretation, the rules of State Council's departments can be used as the criteria by the court to adjudicate administrative cases.<sup>14</sup> Unlike other types of legal documents, which must be applied by the court as a criterion for adjudicating cases, the judicial application of rules is conditional. Given that the most of the cases concerning the judicial application of rules materialize at the local level, this issue will be discussed in chapter 5 'the Local Legislative system'.

### 3. The Scope

#### 3.1 The Scope of Regulation-making Powers

Prior to 2000, the only legal provision concerning the State Council's regulation-making power was Article 89.1 of the Constitution, which decrees that '(the State Council) can, in accordance with the Constitution and national laws, adopt administrative measures, formulate administrative regulations and issue decisions and orders.' This provision is very general. Legal scholars and legislative officials offered two types of interpretations for this provision. One is that the State Council may formulate administrative regulations to cover its functions and powers except otherwise provided by the Constitution and national laws.<sup>15</sup> The advocates of this view assert that the formulation of administrative regulations was one means of exercise of State Council's functions and powers.<sup>16</sup> The other interpretation is that the State Council can exercise its regulation-making power only with the authorization of the Constitution and national laws. Proponents for this view contend that Article 89.1 explicitly

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<sup>13</sup> It should be noted that rulemaking is not the focus of the LoL. Article 2.1 decrees that the whole process of lawmaking and regulation making (enactment, revision and nullification) should apply this law.

<sup>14</sup> *Supra* note 6.

<sup>15</sup> Article 89 of the Constitution provides for a list of 18 broad functions and powers of the State Council.

<sup>16</sup> Zhu Weijiu, 论中央行政立法的权限——对宪法第 89 条规定的理性思考 (The Scope of National Administrative Legislation-Reflection on Article 89 of the Constitution), 3(1995) 行政法学研究 (*Administrative Law Review*), pp. 35-37.

states that the formulation of the administrative regulation should be in accordance with ‘the Constitution *and* national laws’ rather than with ‘the Constitution *or* national laws’, indicating that the formulation requires not only the general authorization of the Constitution but also specific authorization of national laws.<sup>17</sup> Some legal scholars endorse the second interpretation from the perspective of restricting administrative powers and safeguarding citizen’s rights and interests. They state that given its extensive functions and powers, allowing State Council to formulate administrative regulations based on its constitutional mandate is not conducive for protecting citizen’s rights against capricious administrative powers.<sup>18</sup>

The intentions of constitutional drafters were in line with the second interpretation. They held the idea that administrative organs do not possess primary legislative powers and they can only exercise this power with the authority of legislatures. Holding this idea was understandable in the initial reform era when the Constitution was drafted, these constitutional drafters did not expect the dramatic expansion of the administrative powers of the central government in the reform era. The second view is more the response of the *de facto* legislative power of the State Council.

The key of the two different interpretations on Article 89.1 is whether the functions and powers granted by the Constitution can be the basis for the State Council to exercise its regulation-making power. State Council’s regulation-making practice indicates that the State Council, to a large extent, sides with the first interpretation. In many cases, the issuance of administrative regulations did not have the authorization of national laws.<sup>19</sup> The expansion of the State Council’s *de facto* legislative powers was formalized by the LoL in 2000. Nevertheless, the second interpretation also exerted certain influence. In September 1984, the NPCSC passed a decision, authorizing the State Council to formulate regulations on industrial and commercial taxes; and one year later, it further passed a decision, authorizing the State Council to regulate matters concerning the reform of the economic system and the broad reform and opening up. The NPCSC’s authorization suggests that the State Council’s regulation making is limited and cannot cover all its administrative mandate.

The LoL further demarcates State Council’s regulation-making power. Under this law, the State Council can formulate administrative regulations to govern three types of matters. The first is administrative regulations for implementing matters in national laws (hereafter abbreviated as implementing regulations). Due to some reasons such as the geographic diversity in the country, complexity of the matters regulated and the lack of legislative experience, national laws, especially those adopted in the early reform era, tend to use

<sup>17</sup> Ma Lin, 孙志刚案的启示: 违宪审查还是违法审查 (the Implication of the Case of Sun Zhigang: Constitutional Review or Law Review), 1 (2005) 国家行政学院学报 (*Journal of Chinese Academy of Governance*), p. 81; Zhang Youyu, 张友渔文选下卷 (*The Selected Works of Zhang Youyu, Volume II*) (Beijing: Falv Chubanshe, 1997), pp. 260-261.

<sup>18</sup> Wang Lei, 对行政立法权的宪法学思考 (Constitutional Reflection on the Administrative Legislative Power), 5(1998) 中外法学 (*Peking University Law Journal*), pp. 61-63.

<sup>19</sup> Yuan Shuhong and Li Honglei, 中国行政立法的新发展 (The New Development of Administrative Legislation in China), in Zhou Wangsheng (ed.) 立法研究, 第二卷 (*Legislation Review of China, Volume II*) (Beijing: Falv Chubanshe, 2001), pp. 451-453.

general language.<sup>20</sup> For this reason, administrative regulations play an important role for implementing national laws. The 1988 Law on the Industrial Enterprises owned by the All People (全民所有制工业企业法), for example, grants 13 types of rights to the enterprises owned by the whole population. Under this law, the exercise of 8 types of these rights should be 'in accordance with relevant provisions (规定) of the State Council'.

The implementing regulation can be further divided into two types. The first type is regulations that aim at detailing relevant national laws as a whole. This type of implementing regulation is entitled as implementing rules/regulations/measures (实施细则) for xxx laws. It is intended to interpret terms, and specify matters such as the scope of punishment and rewards, functions and powers of enforcement institutions, enforcement procedures, and the types of enforcement measures. Formulating implementing regulations is a requirement in many national laws. Article 52 of the Mineral Resource Law passed in August 2009, for example, decrees: 'the implementing rules for this law should be formulated by the State Council'. In practice, the State Council has issued a wide range of this type of regulation although relevant national laws do not have such requirement. The second type is regulations for detailing certain provisions of relevant national laws. Article 104 of the Drug Management Law, for example, decrees that the circulation of preventive biological products should be under the special management of the State, and relevant rules on this matter should be formulated by the State Council.

The second type is administrative regulations that cover State Council's administrative functions and powers as provided in Article 89 of the Constitution. Under Article 89, State Council's functions and powers are very extensive, which are divided into 18 areas. According to Xu Anbiao, a NPCSC official, these functions and powers can be generalized into three aspects, namely: leading the nationwide administrative work, approving the plan of administrative institutional changes and appointing and dismissing administrative personnel, and administrative supervision.<sup>21</sup> It should be pointed out that the State Council's regulations cannot govern matters which have been exclusively reserved for the NPC and the NPCSC, even if these matters are within its administrative functions and powers. For example, under Article 89.16 of the Constitution, the State Council may decide on declaring a state of emergency in parts of provinces, but since this matter concerns the restriction of citizens' freedom, which is under the exclusive legislative power of the NPC and the NPCSC (Article 8.5 of the LoL), the State Council cannot issue an administrative regulation on this matter if no relevant national law has been adopted.

The third type is the matters that are delegated by the NPC and NPCSC. Article 8 of the LoL enumerates 11 matters which can only be legislated on by the NPC and the NPCSC. For this reason, the State Council normally cannot formulate regulations on these matters. However, Article 9 states that the NPC and the NPCSC may authorize the State Council to regulate these matters except those in Article 8.4, 8.5 and 8.10 (namely, matters concerning

<sup>20</sup> Tanner Scot Murray, *The Politics of Lawmaking in Post-Mao China: Institutions, Processes, and Democratic Prospects* (Oxford: Clarendon Press, 1999), p. 129.

<sup>21</sup> Xu Anbiao, 论行政法规的权限范围 (The Scope of the Administrative Regulations), 2(2001) 行政法学研究 (*Administrative Law Review*), pp. 34-35.

criminal offense and criminal punishment, deprivation of citizen's political rights and the restriction of citizen's freedom, and judicial system). The NPC has passed a few delegation decisions. In September 1984, the NPCSC passed a decision, authorizing the State Council to draft and issue tax regulations, and in April 1985, the NPCSC further authorized the State Council to draft and issue interim provisions or regulations on the reforms of economic system and the opening policies. Thus, through these two NPCSC delegation decisions, the State Council acquired the regulation-making power over nearly all the aspects of the economy. Compared to the abovementioned two legislative delegations in the mid-1980s, the scope of recent legislative delegations to the State Council is much narrower. The NPCSC passed two decisions in 2012 and 2013, authorizing the State Council to 'temporarily adjust relevant provisions of some national laws concerning administrative examination and approval' in Shanghai Free Trade Zone and Guangdong province.

### 3.2 The Scope of Rulemaking Powers

Under the Constitution, the State Council's departments only refers to ministries and committees (Article 90). In practice, State Council's departments also include the People's Bank of China (China's central bank), the State Audit Administration and 17 Bureaus directly under the State Council (国务院直属机构).<sup>22</sup> In practice, these 17 departments have issued a wide range of regulatory documents with the same effect as department rules.<sup>23</sup> However, prior to 2000, whether these departments possessed rulemaking power was disputable among legal scholars.<sup>24</sup> This dispute was resolved in 2000 with the passage of the LoL. Article 80 of this Law recognizes the rulemaking power of these departments.

The scope of the rulemaking power of the State Council departments is mainly provided in Article 80 and 81 of the LoL, which can be assessed from three aspects. First, department rules can only govern matters under administrative functions and powers of relevant departments (Article 80.1). If a matter is within the functions and powers of more than two departments, this matter should be regulated by an administrative regulation or a department rule that are jointly issued by the departments concerned (Article 81). In this sense, there is a restriction to the exercise of rulemaking power: a State Council's department cannot regulate matters that exceed its administrative mandate. It is noticeable that up to now, there is no law

<sup>22</sup> The Bureaus directly under the State Council exercise certain specific functions and powers in the area of administrative management. These bureaus include the General Administration of Customs of the PRC, the State Administration for Industry and Commerce of the PRC, and so forth. For the institutional development of Chinese national government since the establishment of the PRC in 1949, see Zhu Jingwen, 中国法律发展报告 2010 – 中国立法六十年 – 体制、机构、立法者、立法数量 (上册) (*Report on China Law Development – System, Institution, Lawmakers and the Number of Legislation, Volume I*) (Beijing: Zhongguo Renmin Daxue Chubanshe, 2010), pp. 219-234.

<sup>23</sup> Yuan Shuhong and Li Honglei, 中国行政立法的新发展 (The New Development of Administrative Legislation in China), in Zhou Wangsheng (ed.) 立法研究, 第二卷 (*Legislation Review of China, Volume II*) (Beijing: Falv Chubanshe, 2001), p. 454.

<sup>24</sup> Sun Xiaoxia, 法律对行政的控制 (*The Legal Control for the Administration*) (Jinan, Shangdong Renmin Chubanshe, 1999), p. 102; Wang Shaoquan, 部委规章不能任意扩大为部门规章 (The Rules of Ministries and Committees Cannot Arbitrarily be Expanded to Department Rules) 3(1991) 中国法学 (*China Legal Science*), p. 126; Zhang Jiansheng, 行政诉讼法基本理论 (*The Basic Theory of Administrative Litigation Law*) (Beijing: Zhongguo Renshi Chubanshe, 1998), p. 125.

to define the functions and powers of State Council's departments, which tends to undermine the significance of this restriction.<sup>25</sup>

Second, the State Council departments can only formulate rules to implement national laws, administrative regulations and decisions and orders of the State Council (Article 80.2). Compared to rulemaking power of local governments, the rulemaking power of State Council department is under tighter control. Under the LoL, local governments cannot only formulate implementing rules, but also formulate rules to cover matters of administrative management that have not been governed by higher-level laws and regulations (Article 82). More specifically, for the reason of lack of local regulation-making experience, Article 82.5 allows local governments to first formulate rules, covering matters that should be governed by local regulations; the duration for their implementation is two years.

Third, the LoL forbids the department rule to encroach upon citizens' rights. Under Article 80.2, without national laws, administrative regulation, decisions and orders, a department rule should not reduce citizens' rights or increase their obligations; it should also not expand the powers or reduce the legal duties of the departments concerned.

#### **4. The Legislative Procedure**

##### **4.1 The Regulation-making Procedure**

###### **4.1.1 The Legal Framework**

The first law that regulated the State Council's regulation-making procedure is the Interim Regulation for the Formulation Procedure of Administrative Regulations, which was issued by the State Council in April 1987 (1987 Regulation).<sup>26</sup> This regulation mainly provided for five procedural matters, namely: general principles, planning, drafting, deliberation and determination, and issuance. Although the issuance of the 1987 Regulation was a breakthrough for the regularization of the State Council's regulation-making procedure, it had two shortcomings. First, this regulation was remarkably short with only 21 provisions. These provisions were rather general and vague. Second, the 1987 Regulation failed to provide for public participation in the regulation-making process. Article 9 of this regulation required drafting organs to solicit the opinions of other relevant State Council's departments, but it did not require them to solicit public opinions at any drafting stage. Under the 1987 Regulation, the regulation-making procedure was regarded as a purely internal administrative working procedure, which totally excluded public participation.

The current legal framework on the State Council regulation-making procedure is governed by the LoL and the Regulation on the Formulation Procedure of Administrative Regulations (2001 Regulation), which was issued by the State Council in November 2001 to supersede the 1987 Regulation.<sup>27</sup> Under the LoL and the 2001 Regulation, regulation making

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<sup>25</sup> Yang Liming, 我国立法法关于权限规定的缺陷分析 (Analysis on the Defects of the Law on Legislation concerning the Limits of Functions and Powers), 6(2000) 法学 (*Legal Science*), p. 17.

<sup>26</sup> This regulation is entitled '行政法规制定程序暂行条例'.

<sup>27</sup> The 2001 Regulation is entitled '行政法规制定程序条例'.

mainly undergoes the following 6 procedures: (1) regulation-making proposal; (2) drafting of administrative regulations; (3) solicitation of opinions from relevant institutions, organizations and citizens; (4) examination of the State Council Legislative Affairs Office; (5) determination and issuance; (6) submission to the NPCSC for the record and examination.

The provisions in the LoL and the 2001 Regulation are relatively comprehensive and specific compared to those in the 1987 Regulation. In the LoL, it is mainly governed by chapter 3 and 5. The 2001 Regulation has 37 provisions with 7 chapters, which significantly outnumbers the 1987 Regulation. The 2001 Regulation reveals significant development compared to the 1987 regulation, which is reflected in the following three aspects. First, the 2001 Regulation adds two requirements for the drafting of administrative regulations. The first requirement is that administrative provisions should safeguard the interest of citizens and organizations, and while providing for their obligations, rules should also provide for their accompanying rights and the means by which these rights can be realized. The second requirement is that while granting necessary functions and powers to administrative organs, administrative regulations should also provide for the conditions and procedures whereby they can perform these functions and powers and the responsibility they should undertake. The incorporation of these two requirements in the 2001 Regulation reflects an attempt to curb the long-standing rampancy of ‘departmentalism’ in the regulation drafting process, and strengthen the protection of citizen’s rights and interests.<sup>28</sup>

Second, the 2001 Regulation incorporates public participation. Public participation exists in three stages of the regulation-making process. The first is the drafting stage. Article 12 of the 2001 Regulation decrees that while drafting administrative regulations, the drafting organs should extensively solicit opinions of relevant institutions, organizations and citizens by holding symposiums, appraisal meetings and hearings. The second is the stage of examining the draft regulations by the State Council’s LAO. Article 19 of the 2001 Regulation decrees that the LAO should circulate major issues concerning the draft regulation to relevant departments of the State Council, local governments, relevant organizations and experts to solicit opinions. The third is the stage of examining the administrative regulations that are submitted to the NPCSC for the record. Article 90 of the LoL decrees that when citizens and organizations consider that an administrative regulation contravenes the Constitution or national laws, they may submit written suggestions to the NPCSC to examine this administrative regulation.

The significance of incorporating provisions concerning public participation in the LoL and the 2001 Regulation is that it, for the first time, provides a mechanism for making the public voice heard in the regulation-making process and it can also help to curb the arbitrary exercise of regulation-making powers. Thus, the regulation-making procedure is no longer a

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<sup>28</sup> Put it simple, departmentalism (部门主义) refers to borrowing the law to expand the power of State Council departments that are the principal drafting organ of administrative regulations, see Tanner Scot Murray, *the Politics of Lawmaking in Post-Mao China: Institutions, Processes, and Democratic Prospects* (Oxford: Clarendon Press, 1999), pp. 120-123.

pure internal administrative working procedure, which indicates a significant departure from the 1987 Regulation.<sup>29</sup>

The third development in the 2001 Regulation is that it imposes some restrictions on drafting organs. For example, Article 17 and 18 of the 2001 Regulation specify a few conditions, under which the LAO may table the examination on draft regulations or return them back to their drafting organs, namely, relevant State Council's departments. The 2001 Regulation requires drafting organs and the LAO, which are assigned to examine draft regulations, to take a cautious approach to deal with conflicting opinions that are solicited from State Council's relevant departments. Article 13 of the 2001 Regulation decrees that during the stage of soliciting opinions on a draft regulation, if different departments cannot reach a consensus, the drafting organ should spell out the difference and reasons for such difference when they submit the draft regulation to the LAO for examination. Article 23 of the 2001 Regulation decrees that if a consensus cannot be reached among different departments during the stage of soliciting opinions by the LAO, the latter should spell out different opinions and its own opinion to the State Council for making the final decision. These restrictions on the drafter reflects an attempt to make a more transparent and consultative regulation-making process.

#### 4.1.2 Shortcomings and Prospects

Aforementioned discussion suggests that the current legal framework on the State Council's regulation-making procedure is more complete than ever before. It represents an attempt to rationalize the regulation-making process by sanctioning the emergence of public participation and imposing some restriction on drafters in the regulation-making process. Nevertheless, it currently reveals three major shortcomings.

First, the scope of the subjects to propose and conduct regulation drafting is rather narrow. Under the current legal framework, only State Council's departments can propose and conduct the drafting of regulations; other governmental organs, organizations and citizens are not granted this power. As Zhang Jiansheng, a law professor at Zhejiang University, points out, the reason is that regulation making has long been regarded as an internal administrative working process, which excludes the participation of other governmental organs, organizations and citizens.<sup>30</sup> The department's monopoly on drafting administrative regulations is not conducive to collecting regulation-making initiatives outside of the administrative circle. Moreover, it tends to reflect the legislative preference of the departments, and fails to respond to the legislative need of other governmental organs, organizations and citizens.<sup>31</sup> Future development may consider expanding public participation in the regulation-making process by sanctioning citizens' rights to propose and

<sup>29</sup> Zhu Mang, 行政立法程序调整对象重考 – 关于外部效果规范与程序性装置关系的考察 (Re-exploring the Subject Matters of the Procedure of Administrative Legislation – An Analysis on the Relation between the Norm with Legal Effect and Procedural Settings), 6(2008) 中国法学 (*China Legal Science*), p. 51.

<sup>30</sup> Zhang Jiansheng, 论行政立法程序 (On the Procedure of Administrative Legislation), 1(2002) 安徽大学法律评论 (*Law Review of Anhui University*), p. 146.

<sup>31</sup> Shi Xuzhai, 行政立法民主保障之问题与对策 (On Strengthening Democratic Guarantee of Administrative Legislation), 4(2006) 政法论坛 (*Tribune of Political Science and Law*), p. 85.

conduct regulation drafting. As some Chinese legal scholars point out, the rights of citizens to participate in the regulation-making process is incomplete if they are not allowed to propose and draft administrative regulations.<sup>32</sup> It should be pointed out that the rules of citizens to propose the drafting of administrative regulations should be carefully designed. We should bear in mind that the energy and sources of the State Council for legislation is limited and the key of the future development is to find the balance between sufficient public participation and effective exercise of regulation-making powers, which can better contribute to the improvement of the quality of regulation making.

Second, public participation in the regulation-making process is still at its initial stage of development. Under the current legal framework, public participation is limited to the soliciting of public opinions during the drafting stage. However, as one Chinese legal scholar states, the right of the public to participate in the regulation-making process has four forms and giving recommendations is just one of them; the other three include (1) the right to give opinions to the drafting organs; (2) the right to receive a response to the opinions; (3) the right have opinions accepted by the drafting organs.<sup>33</sup>

Like the common practice for regularizing certain matters for the first time in China, the legal provisions on public participation in State Council's regulation-making process use general language. For example, these provisions fail to specify the conditions under which symposiums, appraisal meetings or hearings can be held.<sup>34</sup> For this reason, whether a draft regulation meets these conditions and thereby requiring public participation in its drafting process is largely at the discretion of the drafting organ.<sup>35</sup> The provisions on the organization of symposiums, appraisal meetings and hearings are also rather general. Some key procedural matters remain unspecified, such as who should preside over these three types of meetings and what the procedure is to select participants, and what the effect of the result of these meetings is. Thus, whether a meeting for public comments should be held and how it is held is at the discretion of drafting organs. Nevertheless, the incorporation of these basic rules on public participation in the State Council's regulation-making process has far-reaching impact. As a new development, it could be an important step for creating a more transparent and consultative legislative process of the State Council in the future.

The third shortcoming is that although the 2001 Regulation provides for drafter's obligations in a relatively comprehensive manner, it does not stipulate accompanying responsibilities that it should bear in case it fails to fulfill their obligations. In their study on

<sup>32</sup> See Yang Jianshun, 行政立法过程的民主参与和利益表达 (The Democratic Participation and Interest Expression in the Process of Administrative Legislation), 3(2004) 法商研究 (*Studies in Law and Business*), p. 9; Shi Xuzhai, 行政立法民主保障之问题与对策 (On Strengthening Democratic Guarantee of Administrative Legislation), 4(2006) 政法论坛 (*Tribune of Political Science and Law*), p. 88; Zhang Jiansheng, 论行政立法程序 (On the Procedure of Administrative Legislation), 1(2002) 安徽大学法律评论 (*Law Review of Anhui University*), p. 146.

<sup>33</sup> Fang Shirong, 论行政立法参与权的权能 (On the Content of the Right to participate in the Administrative Legislation), 3(2014) 中国法学 (*China Legal Science*), pp. 116-121.

<sup>34</sup> The 2001 Regulation states that a symposium, appraisal meeting or hearing can be held if the draft regulation 'concerning significant or complicated issues' or 'involving immediate public interests'. These terms are rather general and cause ambiguity in practice.

<sup>35</sup> Zhu Mang, *supra* note 29, p. 52.

the State Council's legislative responsibility, Wu Mingzhi and Wang Lili find that the 2001 Regulation imposes 23 obligations on various legislative organs such as the drafting organ and examining organ, but this regulation does not prescribe what accompanying obligations these organs should bear.<sup>36</sup> For example, Article 21 decrees that for a draft regulation concerning significant and complicated issues, the LAO should convene symposiums, appraisal meetings, which comprises personnel in relevant departments and experts, to solicit opinions and conduct research and appraisals; however, this Regulation does not say what responsibility the LAO should bear in case it does not convene the symposiums or appraisal meetings, nor what will happen to an significant or complicated administrative regulation if its drafting did not convene these two types of meetings.

## 4.2 The Rulemaking Procedure

Prior to 2000, there was no national law or administrative regulation that provided for State Council departments' rulemaking procedure. Nevertheless, during this period, various departments had issued respective rules on the rulemaking procedure. For example, the Ministry of Public Security and the Ministry of Land and Resources issued their rules on rulemaking procedures in June 1988 and March 1999 respectively. These two department rules possessed 24 and 23 provisions respectively. One main shortcoming of these rules is that public participation was not incorporated into the rulemaking process.

The current legal framework on the rulemaking procedures of State Council's departments is composed of three types of law. The first is the LoL. With respect to the rulemaking procedure, this law spells out the rules on approval, promulgation, publishing and the submission to the higher authority for the record.<sup>37</sup> For other drafting procedures, this law merely provides a guidance that requires the State Council to formulate the details by taking its regulation-making procedure as reference (which is regulated in Chapter 3 of this law). The second type of law is the Regulation on the Rulemaking Procedure (规章制度程序条例) issued by the State Council in November 2001. This regulation lays out a relatively comprehensive legal framework on the rulemaking procedure. It possesses 39 provisions divided into 7 chapters, namely (1) general principles; (2) rulemaking planning; (3) drafting of rules; (4) examining rule drafts; (5) approval for passage and issuance; (6) interpretation and submission to higher-level organs for filing; (7) supplementary rules. The third type of law is respective departmental rules over rulemaking procedure. After the passage of the LoL and the Regulation on the Rulemaking Procedure, State Council's departments either revised or re-drafted their respective rules on the rulemaking procedure. Compared to the old rules, the main development in the revised or redrafted versions is that they added the rules on public participation in the rulemaking procedure.

The current legal framework on the rulemaking procedures, for the first time, incorporates the requirement of public participation. Chinese governments both at national

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<sup>36</sup> Wu Mingzhi and Wang Lili, 论国务院立法程序的法律责任 (On the Legal Responsibility in the Legislative Process of the State Council), 6(2007) 广西民族大学学报 (*Journal of Guangxi University for Nationalities*), pp. 167-169.

<sup>37</sup> See Article 84.1, 85.1, 86.1 and 98.4 of the LoL.

and local levels have performed various forms of public participation in the rulemaking process. From April 2004 to December 2005, for example, the State Council departments and provincial governments held 74 rulemaking hearings and 827 meetings for soliciting experts' opinions and released 496 draft rules for soliciting public opinions.<sup>38</sup> There is evidence suggesting that the new public participation is influencing government rulemaking. For example, due to the AIDS activists' input during the two rounds of the solicitation of public opinions, the final version of the General Standards of Physical Examination for Recruitment of Civil Servants, which was jointly issued by the ministries of Personnel and Public Health in January 2005, allows (in an implicit manner) HIV-positive people who do not have full-blown AIDS to apply the governmental jobs.<sup>39</sup>

The major shortcoming of the current rulemaking procedure is that public participation in the rulemaking procedure is not sufficiently guaranteed, which could lead to serious consequences. Take the suspension of a department rule on traffic in 2012 as an example. In December 2012, the Ministry of Public Security issued a department rule, which is entitled 'the Provisions on the Application and Use of the Drive License for Motor Vehicle'. One of its provisions decrees that violating the rule of the yellow traffic light will have 6 points recorded.<sup>40</sup> This provision sparked heated controversy in public and many people stated that the '6 points' penalty for violating the rule of the yellow traffic light was severe and had the potential to create more accidents in crossroads than help in reducing accidents.<sup>41</sup> The public criticism forced the drafter to re-consider the rationality of this provision. Consequently, on 6 January 2015, scarcely one week after this department rule went into effect, the Ministry of Public Security issued an announcement, declaring that the enforcement of this provision in this department rule was temporarily suspended and it promised to reconsider this provision after soliciting public opinion. This announcement stated:

'Recently some people, in a relatively intensive manner, provided opinions and suggestions concerning the punishment on going through the yellow light. The Ministry of Public Security pays high attention to these opinions and suggestions, and appreciates the public concern and support for the management work on traffic road. Today, the Bureau on Traffic Management of the Ministry of Public Security specifically issued an announcement, requiring local traffic management administrations to give education and oral warnings instead of imposing punishment on the violation of the rule of yellow traffic light. The Ministry of Public Security will further specify the types of violation of traffic signal lights and punishment by comprehensively soliciting

<sup>38</sup> The Central People's Government of the PRC, 国务院 2005 年法制工作综述: 加快建设法治政府 (The 2005 Summary of State Council's Legal Work: Accelerating the Rule of Law Government), December 29, 2005, in 中国政府网 (*The Website of Central People's Government of the PRC*), 29 December 2005, available at [http://www.gov.cn/zfjs/2005-12/29/content\\_141063.htm](http://www.gov.cn/zfjs/2005-12/29/content_141063.htm), last visited May 2016.

<sup>39</sup> Jamie P. Horsley, 'The Rule of Law in China: Incremental Progress', in C. Fred Bergsten (ed.), *The China Balance Sheet in 2007 and Beyond* (Phase II Papers) (2007), p. 5.

<sup>40</sup> China applies the system of accumulated recording of points for the violation of law on traffic road safety. If a driver receives 12 points in total for violating law on traffic road safety within 12 months, his/her driving license will be suspended and he/she has to pass the examination on traffic road safety again to get the license back.

<sup>41</sup> Lu Guoqiang and Liu Jingyang, 中国史上最严交规遭遇黄灯争议 (The Most Severe Traffic Law is under Dispute concerning the Punishment on Going through Yellow Light), in 新华网 (*Xinhua News*), 5 January 2013, available at [http://news.xinhuanet.com/legal/2013-01/05/c\\_114253287.htm](http://news.xinhuanet.com/legal/2013-01/05/c_114253287.htm), last visited May 2016.

opinions from various sectors, conducting scientific demonstration work, and taking the reality of the traffic road management into consideration.<sup>42</sup>

Undoubtedly, the above-mentioned incident has the effect of undermining the authority of the State Council departments' rulemaking power. Only after facing severe public criticism, did the Ministry of Public Security decide to suspend the enforcement of the relevant provision of its department rule. If it solicited public opinion in a sufficient and genuine manner during the rule drafting process, it may have avoided the incorporation of the above-mentioned provision on penalizing the violation of the yellow traffic light in the department rule.

From the legal perspective, the poor guarantee of public participation in the rulemaking process reflects on that although the law requires drafting organs to solicit the opinions of various circles, this requirement is very general and 'soft' - it by and large does not specify what, when and how to conduct this solicitation of opinions. Public hearing is one of the forms for soliciting public opinions. Article 15 of the Regulation on the Rulemaking Procedure provided for relatively detailed requirements for holding a hearing for the rulemaking, however, the key matters, such as the organization of the hearing, selection of the matters discussed, the selection of participants and the effect of the result of the hearing are still not specified. This tends to undermine the significance of public participation in the rulemaking process.

## 5. The Legislative Practice

### 5.1 Regulation-making Practice

#### 5.1.1 An Overview

By the end of March 2016, there were 664 valid administrative regulations.<sup>43</sup> Apart from 15 administrative regulations, which were issued before the pre-reform era (before 1978), the vast majority of them (649) were issued after 1979, averaging 17.5 per year. More details are provided in the table below.

**Table 4: Number of administrative regulations issued since 1949**

Issuance Year	Number	Issuance Year	Number
1949-1978	15	1998	15
1980	3	1999	22
1981	5	2000	24
1982	8	2001	35

<sup>42</sup> Zou Wei and Shi Jingnan, 公安部交管局下发通知要求违反黄灯信号以教育为主暂不处罚, in 新华网 (*Xinhua News*), available at [http://news.xinhuanet.com/legal/2013-01/06/c\\_114270939.htm](http://news.xinhuanet.com/legal/2013-01/06/c_114270939.htm), last visited May 2016.

<sup>43</sup> For the valid administrative regulation issued from 1949 to the end of March 2013, see the NPC Legislative Affairs Commission, 中华人民共和国立法统计 (*Legislative Statistics of the PRC*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2013), pp. 370-432; for those issued from the end of March 2013 to the end of March 2016, see 现行有效行政法规 (*The Valid Administrative Regulations*), in 国务院法制办公室 (*The Website of the State Council's Legislative Affairs Office*), available at <http://www.chinalaw.gov.cn/article/fgkd/xfg/xzfg/index.shtml>, last visited May 2016.

1983	9	2002	25
1984	3	2003	26
1985	11	2004	30
1986	23	2005	18
1987	20	2006	23
1988	27	2007	22
1989	18	2008	17
1990	26	2009	19
1991	12	2010	10
1992	16	2011	16
1993	29	2012	12
1994	21	2013	10
1995	22	2014	9
1996	21	2015	7
1997	28	2016 (by March)	2
In total	664		

The large number of administrative regulations indicate that it is impossible to generalize its content. Nevertheless, some general observation can be made. According to the 2008 version of the Legislative Statistics of the PRC, which was published by the NPCSC Legislative Affairs Commission, the valid administrative regulations at that time (by October 2007) numbered 667, covering six domains – constitutional law, administrative law, civil and commercial law, law on economic management, social law and law on litigation and non-litigation procedure.<sup>44</sup> The majority (73.5 per cent) of these administrative regulations was clustered in the domains of administrative law (27.5 per cent) and economic law (including civil and commercial law and law on economic management) (46 per cent).<sup>45</sup> These regulations covered a wide range of areas. For example, the administrative regulations in the domain of economic law covered 23 areas, such as contract, intellectual property, inheritance, commercial activity, finance, supervision and management of State-owned property, pricing, transportation, posts and telecommunications, energy industry, agriculture, and price control, etc.<sup>46</sup>

One noticeable phenomenon is that from the early 1990s until March 2016 the number of valid administrative regulations fluctuated from 500 to 700, despite that the State Council issued more than 20 administrative regulations annually during this period. Some data is provided below. By the end of 1991, there were 688 administrative regulations compared to 619 at the end of 1994.<sup>47</sup> By the end of 2001, the number further decreased to 560 while it increased to 669 by the end of 2007.<sup>48</sup> The stagnation of the increase of administrative

<sup>44</sup> The NPCSC Legislative Affairs Commission, 中华人民共和国立法统计 (*Legislative Statistics of the PRC*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2008), pp. 490-570.

<sup>45</sup> *Ibid.*, pp. 497-564.

<sup>46</sup> *Ibid.*, pp. 491-497 and 527-564.

<sup>47</sup> The Legislative Affairs Office of the State Council, 中华人民共和国法规目录 (1949年10月至1991年12月) (*The Catalogue of Regulations of the PRC (1949.10-1991.12)*) (Beijing: Renmin Chubanshe, 1992), p. 2.

<sup>48</sup> Data collected from the Legislative Affairs Office of the State Council, 中国法规 (*Chinese Regulations*) (Beijing: Zhongguo Fazhi Chubanshe, 2002), The Legislative Affairs Office of the State Council, 中华人民共和国现行法律行政法规目录 (1949-1994) (*The Catalogue of the Currently Valid Laws and Administrative Regulations of the PRC (1949-1994)*) (Beijing, Zhongguo Fazhi Chubanshe, 1992), p. 1; The Legislative

regulations is due to the fact that the State Council periodically revises and abolishes administrative regulations, which offsets the number of new regulations issued. An important measure for achieving this is the work of ‘Regulation Cleaning’ (法规清理), which was intended to revise and abolish administrative regulations in an intensive and periodical manner. Since 1983, the State Council has conducted 12 regulation cleanings, five of which targeted the whole body of administrative regulations (comprehensive cleaning) (全面清理), and the remaining 7 targeted those in specific areas (special cleaning) (专项清理). More specifically, the 5 comprehensive cleanings were conducted in 1983, 1990, 2000 and 2007 respectively.<sup>49</sup> The 7 special cleanings were conducted in 1988, 1996, 2000, 2003, 2004, 2006 and 2016 respectively.<sup>50</sup> As a consequence, a large number of administrative regulations were abolished or revised. For example, consistent with the issuance of the 2007 decision for comprehensive cleaning, 92 administrative regulations were abolished, accounting for 14 per cent of the total 655 administrative regulations at that time.<sup>51</sup> The effect of regulation cleaning is that it is conducive for preserving the consistency of administrative regulations issued and it serves as an important supplement to the system of filing and checking for resolving the conflicts of law.<sup>52</sup>

Some administrative regulations are issued based on the NPCSC’s delegation decision (it will be discussed in the next section). The other administrative regulations are either those governing matters that none of the national laws have governed or those for implementing pre-existing national laws. The significance of administrative regulations lies on the fact that they serve as an important supplement to national laws and are conducive to the improvement of relevant national laws. For example, the Compulsory Education Law, which was adopted in 1986, was remarkably sketchy with only 18 provisions. In March 1992, the State Council

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Planning Office of the Legislative Affairs Commission of the NPCSC, 中华人民共和国立法统计 (2008年版) (*The Legislative Statistics of the PRC: the 2008 Version*) (Beijing: Zhongguo Fazhi Chubanshe, 2005).

<sup>49</sup> See Zhu Jingwen, 中国法律发展报告 2010 – 中国立法六十年 – 体制、机构、立法者、立法数量 (上册) (*Report on China Law Development – System, Institution, Lawmakers and the Number of Legislation, Volume I*) (Beijing: Zhongguo Renmin Daxue Chubanshe, 2010), pp. 253-255.

<sup>50</sup> The 1988 special cleaning work targeted at foreign-related administrative regulations; the 1990 work targeted at administrative regulations concerning administrative punishment (because the Law on Administrative Punishment was passed in March 1996); The 1996 work targeted at administrative regulations concerning administrative licensing (because the Law on Administrative Licensing was passed in August 2003); The 2000 work targeted at the administrative regulations that were not in line with the WTO requirement (for preparing China’s accession to the WTO in November 2001); The 2004 work targeted at the administrative regulations concerning local protectionism in the market economy; The 2006 work targeted at the administrative regulations that imposed restrictions on non-public economic sectors. The 2016 work targeted at the administrative regulations concerning administrative licensing. For the first five work, see *ibid.*; for the 2016 work, see 国务院关于修改部分行政法规的决定 (The Decision of the State Council on Revising Some Administrative Regulations), in 国务院法制办公室 (*The Website of the State Council’s Legislative Affairs Office*), available at <http://www.chinalaw.gov.cn/article/fgkd/xfg/xzfg/201603/20160300480314.shtml>, last visited May 2016.

<sup>51</sup> Legislative Affairs Office of the State Council, 国务院关于废止部分行政法规的决定 (The Decision of the State Council on annulling Some Administrative Regulations), in 国务院法制办公室 (*The Website of the State Council’s Legislative Affairs Office*), available at <http://www.chinalaw.gov.cn/article/fgkd/xfg/xzfg/200803/20080300053890.shtml>, last visited May 2016.

<sup>52</sup> Keith J. Hand, ‘Understanding China’s System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony’, 26(2013) *Columbia Journal of Asian Law*, pp. 196-199.

issued an implementing regulation, which possessed 44 provisions.<sup>53</sup> Prior to 2006, this regulation played an important role for implementing as well as supplementing the 1986 Compulsory Education Law. In June 2006, after 20 years' implementation, the Compulsory Education Law was revised and the number of its provisions increased to 63. As a consequence, the 1992 implementing regulation was abolished and no further implementing regulation was issued. The reason for this is that the provisions of the Compulsory Education Law had been enriched drawing on the 1992 implementing regulation, and therefore the latter was no longer needed.

Despite remarkable development, State Council's regulation-making practice reveals some shortcomings. First, some national laws require the State Council to formulate relevant implementing regulations, but the latter fails to do that in a timely manner. For example, the State Council's regulation for the implementation of the Law on the Protection of Cultural Relics was not issued until May 2003 although this law was adopted 20 years earlier. Article 22 of the 1985 Forest Law, for example, requires the State Council to formulate an implementing regulation but this regulation has not been formulated even after the revision of this law in December 2002.<sup>54</sup> Another example is the Copyright Law, which was adopted in September 1990. Until now, the State Council has not formulated the implementing regulation for this law even though Article 6 of this law requires the State Council to do so.<sup>55</sup>

Second, many administrative regulations unnecessarily repeat provisions of relevant national laws. For example, the State Council issued the Implementing Regulation on Trademark Law in August 2002 and revised it in April 2014. Many provisions of this regulation is directly copied from the Trademark Law. Moreover, with respect to some matters, this regulation even refers back to the Trademark Law. One example is that for the identification of a well-known trademark, Article 3 of the Regulation simply refers to Article 13 and 14 of the Trademark Law.

Third, some administrative regulations are suspected of contravening provisions of the Constitution or national laws. The LoL forbids the State Council to issue administrative regulations on matters concerning the restriction of citizen's freedom.<sup>56</sup> For this reason, after the passage of this law in 2000, the pre-existing administrative regulations on two systems - the System of Custody and Repatriation for Vagrants and Beggars in Cities (收容遣送) and the System of Re-education through Labor (劳动教养), became *ultra vires*. As a consequence,

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<sup>53</sup> This regulation was entitled as the Implementing Rules for the Compulsory Education Law.

<sup>54</sup> The implementing regulation for the Forest Law is unlikely to be formulated because compared to the original law, the revised version is more specified and comprehensive, and it removes the requirement for the formulation of State Council's implementing regulation.

<sup>55</sup> In September 2014, the National Copyright Administration issued an announcement for soliciting opinions on the draft regulation concerning the protection of copyrights on the works of folk literature and arts, but when the State Council will approve this drafting regulation is uncertain.

<sup>56</sup> The principal administrative regulation for the first system is the Measures concerning Custody and Repatriation for Destitute Vagrants and Beggars in Cities, which was issued in December 1982; for the second system, the principal administrative regulations include the State Council's Decisions on the Reeducation through Labor, which was issued in August 1957, the State Council's Supplementary Provisions concerning the reeducation through labor, which was issued in November 1979 and the Interim Measures for the Reeducation through Labor which was issued in January 1982.

the State Council abolished these administrative regulations in June 2003 and December 2013 respectively.<sup>57</sup> In recent years, lawyers and legal scholars called for the evaluation of the legality of some controversial administrative regulations. For example, in March 2006, two Chinese lawyers sent a letter to the NPCSC, proposing a review of the constitutionality of the Regulation for the Management of Entertainment Places, which was issued by the State Council in January 2006. They asserted that the provisions in this regulation that forbid four types of persons to operate entertainment places contravene the constitutional principle of equal protection.<sup>58</sup> In his study on the prescription of tort liability in administrative regulations, Zhang Xinbao argues that the State Council is not empowered to regulate matters relating to the compensation for tort acts; however, he found that by 2007, there were 72 administrative regulations that covered this matter.<sup>59</sup>

Fourth, despite the large scale work of regulation cleaning, some administrative regulations have been outdated. In January 2007, a 9-year-old girl was killed in a railway accident in Qingdao. Her parents only received 600 Yuan as compensation from the local railway agency. The reason for such little compensation is that the administrative regulation for calculating the amount of compensation, which was applied in this case, was issued in 1979 when the commodity price was much lower.<sup>60</sup> The aforementioned sad story is not an isolated case. Due to the rapid socio-economic development in China, many administrative regulations have become outdated. Most noticeable are those entitled as ‘Interim Regulations or Measures (暂行条例或规定)’, which are issued based the NPCSC’s 1985 Delegation Decisions. These regulations account for a substantial proportion of the total administrative regulations. Although they were intended for interim implementation, many of them have remained valid for an exceedingly long period of time and fail to catch up with the changing socio-economic development in China. Some examples are provided below. The Interim Regulation for Railway Transportation on Military Purpose was issued in August 1950 and this regulation was not abolished until 2008. The Interim Regulation concerning the Administrative Punishment for Illicit Speculation, which was issued in September 1987, was not abolished until 2008. The Interim Regulation on Comforting and Compensating the Injury and Death of Personnel who Take Part in Revolutionary Work and the Interim Organic Regulation on Public Security Committee were issued in the early 1950s and until now these two regulations have not been abolished.<sup>61</sup>

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<sup>57</sup> The Measures concerning Custody and Repatriation for Destitute Vagrants and Beggars in Cities was superseded by the Measures for the Management of Relief for Destitute Vagrants and Beggars in Cities in June 2003; the administrative regulations concerning reeducation through labor was abolished by a decision made by the NPCSC in December 2013.

<sup>58</sup> Author unknown, 律师称新条例侵犯了公民就业权 (Lawyers Assert the New Regulation Violate Citizens’ Employment Right), in 新晚报 (*New Evening Post*), 20 March 2006, available at <http://news.sina.com.cn/c/2006-03-20/00218477546s.shtml>, last visited May 2016.

<sup>59</sup> Zhang Xinbao, 行政法规不宜规定具体侵权责任 (Administrative Regulations should not prescribe specific Tort Liability), 5(2007) 法学家 (*The Jurist*), pp. 133-139.

<sup>60</sup> The title of this regulation is the Interim Measures for Dealing with the Crashes between Trains and other Vehicles and Injuries and Death of Personnel outside of Trains.

<sup>61</sup> These two regulations are outdated. For example, under article 2 of the Interim Regulation concerning comforting and Compensating the Injury and Death of Personnel who Take Part in Revolutionary Work, for the death of personnel with an administrative ranking equal to the head of county-level government, his/her

### 5.1.2 Delegated Legislation

A substantial proportion of the administrative regulations issued in the reform era are based on NPCSC's two delegation decisions. The first delegation decision was made in September 1984 (the 1984 Delegation Decision). Under this decision, the State Council obtained the power to formulate and issue tax regulations.<sup>62</sup> Broader legislative powers were delegated to the State Council in April 1985 when the NPCSC passed a decision authorizing the State Council to formulate interim provisions or regulations concerning 'the reform of the economic system and the opening policies' (经济体制改革和对外开放) (1985 Delegation Decision). The 1984 Delegation Decision was in effect superseded by the 1985 Decision because the scope of the delegated legislative powers in the former is covered by that of the latter. In July 2009, the 1984 Delegation Decision was formally abolished by the NPCSC.<sup>63</sup> Currently the 1985 Delegation Decision is still valid.

Two features of the two delegation decisions are observable. First, the scope of the legislative powers delegated to the State Council is very extensive. The 1984 Delegation Decision granted considerable legislative powers over taxation to the State Council. The scope of the legislative powers granted in the 1985 Delegation Decision is ever broader, covering the whole area of the reform of the economic system and the opening up policies. Some Chinese scholars argue that under the 1985 Delegation Decision, the State Council in effect acquires legislative powers over the economy as a whole.<sup>64</sup> Second, both the two delegation decisions recognized that legislative delegations are interim measures. They state that after these interim regulations are tested and relevant conditions are ripe, the NPC and the NPCSC should enact relevant national laws to supersede them. According to Article 4 of the Regulation on the Procedure of the Formulation of Administrative Regulations, the administrative regulations issued based on these two delegation decisions should be entitled as 'interim regulations' (暂行条例) or 'interim provisions' (暂行规定).

The passage of the two delegation decisions has its rationale. In the early reform era, the NPC and the NPCSC were already over-congested with legislative work. Authorizing the State Council to formulate economic regulations can reduce the NPC and the NPCSC's

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relatives can receive 1000 Jin (斤) of grain as pension (Jin is a unit of weight; one Jin is equal to 0.5 kg); although the Interim Organic Regulation on Public Security Committee remain valid until recently, the public security committee as 'local security organization organized by the mass' has ceased to exist in the reform era.

<sup>62</sup> A more detailed description for the 1984 Delegation Decision is that the Decision allowed the State Council to draft tax regulations and issue them in the draft form for trial implementation (以草案的形式发布试行) during the period when the State Council undertook the reform of introducing the practice that the State-owned enterprises pay tax instead of turning over their profit to the State and the reform of the system of industrial and commercial taxes.

<sup>63</sup> According to Li Shishi, the Director of the NPCSC Legislative Affairs Commission, the reason for the abolition was that the scope of the delegation in the 1984 Delegation Decision was covered by that in the 1985 Delegation Decision, See Li Shishi, 关于《全国人民代表大会常务委员会关于废止部分法律的决定(草案)》和《全国人民代表大会常务委员会关于修改部分法律的决定(草案)》的说明 (The Interpretation on 'the Decision of the NPCSC to Annul Some Laws (Draft)' and 'the Decision of the NPCSC to Revise Some Laws (Draft)', delivered to the Ninth NPCSC of the 11<sup>th</sup> NPC in June 2009, in 中国人大网 (*The Website of the NPC*), available at [http://www.npc.gov.cn/wxzl/gongbao/2009-10/28/content\\_1543806.htm](http://www.npc.gov.cn/wxzl/gongbao/2009-10/28/content_1543806.htm), last visited May 2016.

<sup>64</sup> Fan Zhongxin, Fan Jingfang, 论对授权立法中授权行为的监控 (On the Supervision on the Delegated Acts during Legislative Delegation), 1(2000) 法律科学 (*Science of Law*), pp. 8-9.

legislative pressure. Moreover, in the 1980s and 1990s, the economic reforms and opening up policies were under rapid change, which necessitated a legislative organ that can adjust relevant legislation frequently. Compared to the NPC and the NPCSC's lawmaking, the State Council's regulation making can better accomplish this task.

The State Council's delegated legislation largely accelerates the economic legislative work at the national level. In the first five years after the passage of the 1985 Delegation Decision, the State Council had issued 221 economic regulations and dozens of them were interim regulations based on the 1985 Delegation Decision; however, during this period, the NPC and the NPCSC only passed 20 economic laws.<sup>65</sup> By the end of 2011 the State Council had issued more than 100 interim regulations.<sup>66</sup> The significance of the State Council's delegated legislation is vividly reflected in the regime of tax legislation. Until now the principal source of law on tax in China is the State Council's interim regulations. More specifically, in China there are 18 tax items, 15 of which including those governing main tax items such as the tariff, consumption tax, and value-added tax, are regulated by the form of interim regulations.<sup>67</sup> The other three tax items, which are regulated by laws, are individual income tax, enterprise income tax, and motor vehicle and vessel tax.

Despite its significance in regulating China's economy, the 1985 Delegation Decision reveals some shortcomings. Most noticeable is that the provisions in the decision are rather vague and relevant key matters are either un-specified or missed. The details are as follows. Under the 1985 Delegation Decision, the purpose and scope of legislative delegation are extremely ill-defined, and the decision fails to specify the principles that the State Council should observe for exercising delegated legislative powers. Most importantly, although the 1985 Delegation Decision states that the legislative delegation is an interim measure, it fails to specify the time limits and it also did not specify for how long an interim regulation can remain effective. In practice, the 1985 Delegation Decision still remain valid, and many interim regulations have been implemented in an 'interim' way for over 2 decades. In many cases, the State Council revises or even re-drafts pre-existing interim regulations rather than submits legislative drafts to the NPCSC for passage, which is required by the 1985 Delegation Decision. For example, the Interim Regulation for Value-added Tax was issued in December 1993 and revised in November 2008 by the State Council. Currently this interim regulation is still the only source of law governing value-added tax.

The un-specification of scope and purpose of legislative legation in the 1985 Delegation Decision did not meet the requirement of the 2000 LoL. The tension has been more obvious consistent with the revision of the LoL in 2015, which states that the legislative delegation

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<sup>65</sup> Li Ping, 论国家权力机关应切实加强经济立法工作-兼析授权立法之利弊得失 (The Institution with State Power should actually strengthen the Work of Economic Legislation – An Exploration on the Merits and Drawbacks of Delegated Legislation), 6(1992) 中国法学 (*China Legal Science*), p. 37.

<sup>66</sup> Wan Qigang, 当代中国的授权立法 (the Delegated Legislation in Contemporary China), in 中国人大网 (*The Website of the NPC*), available at [http://www.npc.gov.cn/npc/xinwen/rdl/fzjs/2011-05/13/content\\_1655612.htm](http://www.npc.gov.cn/npc/xinwen/rdl/fzjs/2011-05/13/content_1655612.htm), last visited May 2016.

<sup>67</sup> For the fifteen tax items regulated by interim regulations, see Wang Tao, 18个税种仅三个人大立法 (For 18 Tax Items, only 3 are Governed by national laws of the NPC), in 新华网 (*Xinhua News*), 4 March 2014, available at [http://news.xinhuanet.com/politics/2014-03/04/c\\_119604248.htm](http://news.xinhuanet.com/politics/2014-03/04/c_119604248.htm), last visited May 2016.

should specify the scope and purpose (Article 10.1). The 1985 Delegation Decision has remained valid for over 30 years, which contravenes the requirement of the 2015 revised LoL that the delegation decision should specify the time limit and it normally should not exceed 5 years, and if continued delegation is needed, the State Council should submit a proposal to NPC and the NPCSC for acquiring a new legislative authorization (Article 10.2).

The State Council's delegated legislation shows two prospects. First, consistent with the development of the NPC and the NPCSC's lawmaking, the NPCSC is unlikely to delegate general legislative powers to the State Council as it did in the 1984 and 1985 delegation decisions. This has been exemplified by NPCSC's two delegation decisions in 2012 and 2013, which authorize the State Council to 'temporarily adjust relevant provisions of some national laws concerning administrative examination and approval' in the Shanghai Free Trade Zone and Guangdong province.<sup>68</sup> In these two delegation decisions, the scope, purpose and time limits of the legislative delegation is specified, which is in line with the requirement of the LoL.<sup>69</sup>

Second, there tends to be increasing control of the NPCSC over State Council's delegated legislation. As a consequence, the pre-existing delegated legislation based on the 1985 Delegation Decision tends to shrink and this decision will be abolished ultimately. This trend is already observable. Many delegated regulations have been superseded by relevant national laws. The Interim Regulation on the Management of Banks in the PRC, which was issued in July 1986, was superseded by the Law on the People's Bank of China passed in December 2003. The authoritative source indicated that the NPCSC has recognized the importance of tax legislation.<sup>70</sup> The Interim Regulation on the Motor Vehicle and Vessel Tax, which was issued by the State Council in December 2006, was superseded by the Law on Motor Vehicle and Vessel Tax passed by the NPCSC in February 2011. An important step reflecting this trend came in 2015 with the revision of the LoL, which details the matter 'taxation' in the list of the matters that are under the exclusive legislative powers of the NPC and the NPCSC (Article 8.6).<sup>71</sup> Although the detailing does not immediately invalidate the

<sup>68</sup> See 全国人民代表大会常务委员会关于授权国务院在广东省暂时调整部分法律规定的行政审批的决定 (The NPCSC Decision concerning Authorizing the State Council to Temporarily Adjust Parts of Legal Provisions on Administrative Examination and Approval in Guangdong Province) in 中国人大网 (*The Website of the NPC*), available at [http://www.npc.gov.cn/npc/xinwen/2015-12/28/content\\_1957443.htm](http://www.npc.gov.cn/npc/xinwen/2015-12/28/content_1957443.htm), last visited May 2016.

<sup>69</sup> For example, in terms of time limit, both of these two decisions state that the adjustment will be implemented on a trial basis for three years; after three years' implementation, relevant national laws should be revised if these adjustments proved to be feasible in practice; while the original provisions of laws should be restored if the adjustments are proved to be unsuitable in practice, see *ibid*.

<sup>70</sup> In the reply to a NPC deputy's proposal on withdrawing the legislative power over tax to the NPC and NPCSC during the First Plenary Session of the 12<sup>th</sup> NPC in March 2013, the NPCSC Budget Committee stated: 'the tax legislation has become the principal content of State Council's delegated legislation; the current legislation on finance and tax has become a shortcoming of Chinese legal system, and therefore it should be strengthened', see author unknown, 全国人大回复税收立法权回归议案: 对精神表示肯定 (The NPC Replies the Proposal of Withdrawing Legislative Powers on Taxation: its Spirit was Affirmed) in 京华时报 (*Jinghua Daily*), 4 July 2013, available at [http://news.xinhuanet.com/politics/2013-07/04/c\\_116395251.htm](http://news.xinhuanet.com/politics/2013-07/04/c_116395251.htm), last visited May 2016.

<sup>71</sup> The revised law uses one clause (Article 8.6) to prescribe 'taxation' separately, stating: (the following matters should be governed by national laws) 'basic taxation systems, such as the institution of tax items, the determination of tax rates, and tax collection and administration'. For the details for this, see Chapter 3.3.

1985 Delegation Decision because the law does not forbid the NPCSC's legislative delegation over tax to the State Council (Article 9), it represents an attempt to supersede the current regulation-based legal framework on taxation by a law-based one. As a consequence, enacting the Law on Value-added Tax and other laws on other tax items were put into the legislative plan of the 11<sup>th</sup> and 12<sup>th</sup> NPCSC.<sup>72</sup> It can be predicted that the 1985 Delegation Decision will be either abolished or fall into disuse when the main body of interim regulations is superseded by relevant national laws.

## 5.2 Rulemaking Practice

The reform era witnessed the issuance of a large number of department rules. There is no authoritative source that give the exact number of department rules issued. According to the Beida Fabao Online Legal Database (北大法宝), State Council's departments have issued 11705 rules, 7290 of which are still valid.<sup>73</sup> The real number is likely to be larger because the department rules collected in this database may not be complete. Active rulemaking is still ongoing. According to the website of the State Council LAO, various departments issued 26 rules in the first three months of 2016 and they issued 105 rules in the whole year of 2015.<sup>74</sup> The activeness is also reflected on rule revision and annulment. For example, in September 2015, the Ministry of Housing and Urban-rural Development revised its 12 pre-existing rules, which were issued between 1993 and 2013<sup>75</sup>; in March 2016, the National Health and Family Planning Committee, annulled its 25 pre-existing rules, which were issued between 1989 and 2010.<sup>76</sup>

## 6. Conclusion

The State Council's legislative system has two levels, namely regulation making and rulemaking. Although both of them are legislation made by administrative organs, they are significantly different in terms of status, scope and procedure. Their legal nature was not recognized in the beginning of the reform era. The recognition is a process with the passage

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<sup>72</sup> Cai Yanhong, 增值税等单行税法列入人大立法规划: 全国人大收回税收立法权释放明确信号 (Enacting the Law on Value-added Tax and Other Laws on Other Separate Tax Items were Written into the NPC's Legislative Plan: Releasing Explicit Signal on Withdrawing Tax Legislative Power to the NPC) in 法制日报 (*The Legal Daily*) 6 November 2013, available at [http://www.legaldaily.com.cn/index\\_article/content/2013-11/05/content\\_4995147.htm?node=5955](http://www.legaldaily.com.cn/index_article/content/2013-11/05/content_4995147.htm?node=5955), last visited May 2016.

<sup>73</sup> 北大法宝 (Beida Fabao Online Legal Database), available at <http://vip.chinalawinfo.com/>, last visited May 2016.

<sup>74</sup> 国务院部门规章 (State Council Department Rules) in 国务院法制办公室 (*The Website of the Legislative Affairs Office of the State Council*), available at <http://www.chinalaw.gov.cn/article/fgkd/xfq/gwybmgz/>, last visited May 2016.

<sup>75</sup> 住房和城乡建设部关于修改《房地产开发企业资质管理规定》等部门规章的决定 (The Decision of the Ministry of Housing and Urban-rural Development on Revising Department Rules, for example, the Provisions on the Qualification Control of Enterprises on the Development of Real Estate), in 国务院法制办公室 (*The Website of the Legislative Affairs Office of the State Council*), available at <http://www.chinalaw.gov.cn/article/fgkd/xfq/gwybmgz/201509/20150900478948.shtml>, last visited May 2016.

<sup>76</sup> 国家卫生计生委决定废止的部门规章目录 (The List of Department Rules that are annulled by the National Health and Family Planning Committee), in 国务院法制办公室 (*The Website of the Legislative Affairs Office of the State Council*), available at <http://www.chinalaw.gov.cn/article/fgkd/xfq/gwybmgz/201603/20160300480405.shtml>, last visited May 2016.

of several key national laws, in particular, the LoL in 2000. Under the current legal framework, administrative regulations are a major source of law at the national level. Its legal status is lower than the Constitution and national laws but higher than local regulations and rules. They are an importance source of law for the court to adjudicate administrative cases, and they also serve as a supplemental source of law for adjudicating criminal cases. The department rule is not as significant as the administrative regulation. It plays a subordinate role, aiming to implement higher-level laws and administrative regulations.

The early reform era saw the expansion of the State Council's regulation-making power and rulemaking power. Under the 1982 Constitution, whether the State Council had the power to formulate administrative regulations that are based on its constitutional mandate was uncertain. The exercise of this primary legislative power was formalized in 2000 with the passage of the LoL, reflecting the significant expansion of the State Council's regulation-making power. The expansion is also reflected on the NPCSC's legislative delegations to the State Council. Most noticeable is the 1985 Delegation Decision of the NPCSC, which granted comprehensive legislative powers over economy to the State Council. The expansion of the rulemaking power is reflected by the increase of rulemaking organs. Under the Constitution, only State Council's ministries and committees are empowered to formulate department rules. The LoL largely expands the rulemaking organs to include the People's Bank of China, the State Audit Administration and bureaus directly under the State Council.

The legal framework on the regulation-making and rulemaking procedures has undergone significant development. The principal laws governing these two procedures are the Regulation on the Rulemaking Procedure and the Regulation on the Formulation Procedure of Administrative Regulations, both of which are issued by the State Council. The major new development in these two procedural regulations is that they incorporate public participation in the regulation-making and rulemaking processes. However, it should be pointed out that the procedural development of public participation is still at its initial stage. The only form of public participation is the soliciting of public opinions during the drafting stage. The public is not empowered to propose regulation/rule drafting. Moreover, the application of the procedure of public participation is largely at the discretion of the drafting organ. This tends to undermine the significance of public participation in State Council's legislation. Nevertheless, the incorporation of public participation lays the foundation for creating a more transparent and consultative legislative process of the State Council in the future.

State Council's administrative regulations and department rules constitute the bulk of the legislation at the national level. The number of administrative regulations and department rules is nearly three times and 40 times larger than that of national laws respectively. It can be concluded that for seeking the legal resolution on most of the matters at the national level, administrative regulations and department rules are the source that one must look to. A substantial proportion of the administrative regulations are delegated regulations based on the 1985 Delegation Decision. Consistent with the adoption and revision of the LoL in 2000 and 2015, the NPCSC's control over the State Council's delegated legislation has been tightened. It is predictable that the State Council's delegated legislation based on the 1985 Delegation

Chapter 5. The Local Legislative System

Decision will tend to shrink and the Decision will be abolished ultimately although we do not know the specific date for that.

## Chapter 5. The Local Legislative System

### 1. Introduction

One of the major drivers of the momentum for the construction of legal system in China in the reform era is the spectacular development of the local legislation. This development cannot be achieved without significant decentralization of legislative powers to many local governments.<sup>1</sup> This legislative decentralization is better to be understood as a process rather than a one-shot reform. It was initiated in 1979 with the passage of the Organic Law on the Local People's Congresses and Local People's Governments at Various Levels (the Organic Law). This law, for the first time, granted the provincial people's congresses and their standing committees the power to enact local regulations (地方性法规). According to Peng Zhen, the Director of the NPC Legislative Affairs Commission at that time, the legislative decentralization was in accordance with the principle of 'giving full play to two initiatives' (national and local initiatives).<sup>2</sup> This legislative decentralization was confirmed by the 1982 Constitution.

The 1982 revised Organic Law empowered the provincial people's governments to formulate and issue rules, which are called local governmental rules (地方政府规章) (local rule). This type of rule governs not only purely administrative affairs (for example, the internal operation of governmental institutions) but also general matters concerning administrative supervision and management of various social activities, which has binding force for citizens. Consistent with the revisions of the Organic Law in 1982 and in 1986, provincial capital cities and relatively large cities (较大的市) acquired the regulation-making and rulemaking power. The 2000 Law on Legislation (LoL), formalized the legislative power of cities where Special Economic Zones (SEZs) are located. Thus, SEZs possess dual legislative powers, namely, ordinary local legislative power as other relatively large cities possess, and delegated SEZ legislative powers. Prior to 2015, China has 80 local legislative units, including 31 provincial units (22 provinces, 5 Autonomous Regions, and 4 Cities directly under the Control of the Central Government), 49 relatively large cities (27 provincial capital cities and 22 relatively large cities designated as such by the State Council).<sup>3</sup> An important step in legislative decentralization came in 2015 with the revision of the LoL. The revised LoL grants legislative powers to all the 288 cities that are divided into districts (设区的市) (cities with districts).<sup>4</sup> Thus, in total there are 319 local legislative units (including 31 provincial units and 288 cities with districts).

Consistent with the expansion in number of local legislative units, the local legislative system has undergone significant development, which is the subject of this chapter. This

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<sup>1</sup> Local governments in this chapter refer to people's governments, people's congresses (PC) and their standing committees (PCSC) at provincial and city levels.

<sup>2</sup> Peng Zhen, 彭真文选 (*Selected Works of Peng Zhen*) (Beijing: Renmin Chubanshe, 1991), p. 387.

<sup>3</sup> Xu Anbiao, 较大的市的三种含义 (Three Meanings of the Relative Large Cities), 11(2000) 中国人大 (*The People's Congress of China*), p. 7.

<sup>4</sup> For the number of cities with districts, see the National Bureau of Statistics, 国家数据 (National Data), available at <http://data.stats.gov.cn/easyquery.htm?cn=C01>, last visited May 2016.

chapter is composed of 6 sections. Following the introduction, section 2 discusses the status of the two types of local legal documents - local regulation and the local rule. Section 3 examines the scope of local legislative powers, followed by evaluation of the local legislative procedure. Section 5 assesses the local legislative practice. Section 6 is the conclusion.

## **2. The Statuses of the Local Regulation and the Local Rule**

### **2.1 The Status of the Local Regulation**

The local regulation is one of the major types of law in China. Under the LoL, its legal status is lower than the Constitution, the national law, the administrative regulation, but higher than the local rule (Article 87, 88 and 89). The LoL does not explicitly specify the status of the local regulation *vis-à-vis* the department rule, nevertheless, this law lays out the rule for resolving the conflicts between a local regulation and a department rule. According to Article 95.2, in case of this type of conflict, the local regulation should prevail over the department rule if the State Council thinks so; the case should be submitted to the NPCSC for making the final ruling, if the State Council thinks that the department rule should prevail.

The local regulation has binding force for judiciary. According to a 2009 Supreme People's Court judicial interpretation, local regulations should be applied for adjudicating civil cases and administrative cases<sup>5</sup>; and the court has no power to review their legality.<sup>6</sup> In cases where there are conflicts between a local regulation and a higher laws or regulation during a trial, the court should report to the authority that possesses decision-making powers to decide which legal document should prevail.<sup>7</sup> It should be mentioned that this mechanism is very rarely used in practice. The reason is that in a litigation, the court always has to decide which law should be applied when facing two conflicting legal norms and it tends to deal with it quietly (does not record the conflicts of two legal norms in the judgment) in order to avoid tension and direct conflict with legislative organs. Unlike local regulations, the judicial application of local rules is rather limited. It can only be applied for when adjudicating administrative cases and the court has the power to examine the legality of rules concerned. The details concerning the judicial application of local rules will be discussed in the next section.

### **2.2 The Status of the Local Rule**

The current legal system tends to recognize the legal nature of the local rule. Article 2 of the revised LoL states that relevant provisions of this law is applicable for the administrative ruling. Under the revised LoL, the legal status of the local rule is lower than the Constitution, the national law, and the local regulation (Article 87, 88 and 89). This law spells out that the

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<sup>5</sup> Under Article 8 of the LoL, local regulation cannot be taken as criteria by the court to adjudicate criminal cases because criminal punishment can only be governed by the national law.

<sup>6</sup> The full title of this judicial interpretation is: 最高人民法院关于裁判文书引用法律、法规等规范性文件的规定 (The Provisions of the Supreme People's Court concerning the Citation of Regulatory Legal Documents such as Laws and Regulations in Judgment Documents), issued by the Supreme People's Court in October 2009.

<sup>7</sup> *Ibid.*

department rule and the local rule are not in a superior-subordinate relation, but should be implemented in their respective administrative spheres (Article 91). In terms of conflict between a department rule and a local rule, the State Council has the power to give a ruling (Article 95.3).

The local rule is one of the two types of rules. The other type is the rule issued by State Council's departments. The status of the local rule in the legal system is equal to the department rule as discussed in Chapter 4.2. For this reason, the discussion on the status of department rule also applies to the local rule. In general, the current legal system does not explicitly recognize the legal nature of the rule although the provisions of a few national laws imply that it is law. Interestingly, some local regulations on rulemaking procedures attempt to justify the legal nature of the rules. Article 2 of the Interim Provisions on the Local Regulation Drafting and Rule Drafting in Hainan, which was adopted in March 1990, decrees that both the local regulation and the local rule are regulatory documents with legal binding force.

Rules are one of the major sources of law for adjudicating administrative cases.<sup>8</sup> As discussed in preceding chapters, the court must apply national laws, administrative regulation and the local regulation for adjudicating cases. However, unlike the judicial application of these higher-level laws, the judicial application of rules is not unconditional, which is reflected in the 1989 Administrative Litigation Law (ALL).<sup>9</sup> Article 63.3 decrees: 'for adjudicating administrative cases, the people's court should use rules as the reference'. The key for understanding this provision is the meaning of term 'reference'. In his interpretation report on the draft of the ALL delivered to the NPC in 1989, Wang Hanbin, the Head of the NPCSC Legislative Affairs Commission at that time, attempted to further clarify the term 'reference'. He said:<sup>10</sup>

'At present there are different opinions on whether the rule can be taken by the court as one of the criteria to adjudicate administrative cases. Some people think it should be taken as a criterion. However, the others think it cannot, and only the national law, the administrative regulation and the local regulation can be taken as criteria. .... However, the status and effect of the rule is not totally the same as the law and regulation, and some rules are problematic. Therefore, the draft of this law, which decrees that the court may take the rule as reference for adjudicating administrative cases is the result of considering the above two different opinions.'

The above authoritative statement implies that using rules as the 'reference' was a result of compromise between two conflicting opinions concerning whether they can be used as judicial criteria. It also implies that rules are regarded as one type of law although they have minor differences compared with higher-level laws and regulations. The statement suggests that the court should examine the legality of a rule before using it to adjudicate administrative

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<sup>8</sup> From a legal perspective, there is no difference between the department rules and local rules in terms of judicial application. For this reason, the judicial application of the local rule as discussed in the next section can serve as the reference to the judicial application of the department rule.

<sup>9</sup> This law was revised in December 2014.

<sup>10</sup> Wang Hanbin, 关于中华人民共和国行政诉讼法草案的说明 (The Interpretation on the Draft of the Administrative Litigation Law of the People's Republic of China) in 中国人大网 (*The Website of the NPC*) available at [http://www.npc.gov.cn/wxzl/gongbao/2000-12/27/content\\_5002264.htm](http://www.npc.gov.cn/wxzl/gongbao/2000-12/27/content_5002264.htm), last visited May 2016.

cases. More specifically, the court should examine whether it is in accordance with higher-level laws and regulations. If it is, the rule should be applied; if it is not, the court has the right to not apply it.

One question is: who has the right to propose this limited judicial review of a local rule, which is involved in an administrative litigation? According to Article 52, 53 and 64 of the ALL, only the court itself can initiate such a review and either side of the parties is not granted the right to make a request to the court. With respect to this, an important development came in 2014 with the revision of the ALL. The 2014 revised ALL allows a plaintiff to request the review of relevant administrative normative documents – a lower-level administrative regulatory documents with general binding force, on which the concrete administrative act is based (Article 53). This may lay the foundation for the further development of judicial review in the future.

Up until this time, there are no laws to specify the criteria for the judicial review of rules. Chinese legal scholars and judges have developed three main criteria for examining a rule. First, a rule is applicable only if it is issued by a legitimate administrative organ.<sup>11</sup> As noted earlier, there are three types of rulemaking organs – State Council departments, provincial governments and city-level governments. Administrative regulatory documents that are issued by the subordinate bureaus of these organs or other lower governments (county and township governments) cannot be regarded by the court as reference. Second, a rule is applicable only if its drafting is in accordance with the rulemaking procedure.<sup>12</sup> The principal legal document that regulates the rulemaking procedure is the Regulation on the Rulemaking Procedure, which was issued by the State Council in November 2001. Article 2 of this regulation states that rules whose drafting violates this regulation, are null and void, and therefore cannot be applied in an administrative litigation. Third, a rule should not contravene higher laws and regulations.<sup>13</sup> Under the LoL, a rule should be altered or annulled if it contravenes higher laws or regulations (Article 88, 89 and 96).

### 3. The Scope of the Local Legislative Powers

#### 3.1 The Scope of Local Regulation-making Powers

Under the current legal framework, both local people's congresses and its standing committees at provincial and city levels are empowered to enact local regulations. The revised LoL distributes the legislative responsibility between these two types of organs in a general manner. Article 76 decrees that the power to enact a local regulation, which governs

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<sup>11</sup> Administrative Tribunal of the Chengdu Intermediate People's Court, 行政审判中参照规章的几个问题 (Several Issues concerning Using Rules as Reference in Administrative Trial), 1(1991) 人民司法 (*People's Judiciary*), pp. 29-31.

<sup>12</sup> Jiang Bixin, 试论人民法院审理行政案件如何参照行政规章 (How do People's Courts Use Rules as Reference for Adjudicating Administrative Cases), 6(1989) 中国法学 (*China Legal Science*), p. 82.

<sup>13</sup> Zhang Jiansheng, 行政诉讼中规章的‘不予适用’——基于最高人民法院第5号指导案例所作的分析 (The Non-application of the Rule in Administrative Litigation, Based on the Analysis of the 5th Guiding Precedent of the Supreme People's Court), 2(2013) 浙江社会科学 (*Zhejiang Social Sciences*), pp. 73-75.

particularly significant matters in the local area concerned, is reserved for the local people's congress.

The scope of the local regulation-making power can be assessed from three aspects. First, from the legal perspective, the scope is very extensive. Article 73.3 of the revised LoL decrees: 'apart from the matters provided for in Article 8 of this law, the local governments may, in light of the specific local conditions and actual needs, enact local regulations on all other matters for which the State has not yet enacted any national laws or administrative regulations'.<sup>14</sup> This provision indicates that local regulation-making power is demarcated in a general manner; it is not enumerated, which stands in contrast to the listing of exclusive legislative authority of the NPC and the NPCSC. This tends to give greater flexibility for local regulation making. Moreover, given the short listing of the exclusive legislative powers in Article 8, the local regulation-making powers are very extensive.

The local regulation-making power under the LoL, corresponds to the concepts of 'residual power' and 'concurrent' in the studies on federalism. It overlaps the scope of concurrent legislative powers, which can be exercised by both the central government and local governments.<sup>15</sup> The main merit of the broadness of the concurrent legislative power is that it provides high flexibility in exercising legislative power; and it encourages local governments to take legislative initiative, which is in conformity with local circumstances. Its weaknesses are also obvious - it causes considerable uncertainty in the distribution of legislative power in reality; it increases the likelihood of the overlap between national laws and local regulations, which in turn increases the likelihood of conflicts between them; and it poses a considerable burden on the arbiter for resolving the conflicts.

The second aspect of the scope of local regulation-making powers is that the local governments can enact implementing regulations for higher-level laws and regulations. Article 73.1 of the revised LoL decrees: 'local regulations may govern matters, in light of the actual conditions of a given administrative area, for implementing the provisions of national laws and regulations'. As observed by many legal scholars, the language used in many national laws, in particularly, those enacted in the early reform era, is general, which necessitates local implementing regulations.<sup>16</sup>

The third aspect is that the local governments can enact local regulation, governing matters with a local character (local matters) (地方性事务). Article 73.2 of the revised LoL decrees: 'local regulations may govern matters with a local character that require the enactment of local regulations'. Even now, there is no law to specify the term 'local matters'. During the drafting of the 2000 LoL, one opinion was to clearly define this term and even

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<sup>14</sup> For the discussion on the enumeration of the matters under the exclusive legislative power of the central government, see Section 3.3, chapter 3.

<sup>15</sup> Ronald L. Watts, *Comparing Federal Systems, 3rd edition* (Montreal & Kingston: McGill-Queen's University Press, 2008), p. 88.

<sup>16</sup> Liu Dasheng, 中国当前立法语言失范化之评析 (The Assessment on the Anomie of the Use of the Legislative Language in China), 1(2001) 法学 (*Legal Science*), pp. 11-15; Li Kangning, 民事法律立法语言失范问题检讨 (Reflection on the Language Anomie in Civil Laws), 5(2010) 法律科学 (*Science of Law*), pp. 131-132.

enumerate local matters. However, this opinion was not accepted by the drafter at that time.<sup>17</sup> In 2001, the NPCSC Legislative Affairs Commission, which are the principal drafters of the LoL, published the book ‘Interpretation on the Law on Legislation’. This book interprets the term ‘local affairs’ as provided below:<sup>18</sup>

‘The term ‘local matters’ is used in correspondence to the term ‘national matters’ (国家事务). It refers to matters with local features, which do not need, at least in foreseeable period of time, uniform legislation of the central government. For example, the protection of scenic and historic areas in their respective administrative areas belongs to the local affairs, which, generally speaking, do not need the regulation of the State. Take another example, the prohibition of setting off fireworks is deemed necessary in some cities, and therefore, they enacted relevant local regulations; however, other cities consider that setting off fireworks should not be restricted. Therefore, obviously, this kind of matter does not need the uniform legislation of the State.’

Compared to this semi-authoritative interpretation, China’s legal scholars stress the exclusive nature of local matters. Sun Bo put forward that the local matters refer to matters in certain local areas and they can only be dealt by localities or at least it is more efficient to let them be dealt by localities.<sup>19</sup> Similar opinion was given by Guo Daohui: local matters are exclusively within the legislative jurisdiction of the local governments, and it is not necessary as well as undesirable to let those matters to be governed by national legislation.<sup>20</sup>

The abovementioned rules on the scope of local legislative powers apply to regulation making both at the provincial and city levels; however, the exercise of legislative powers at the city level is imposed with more restrictions. Under the revised LoL, the scope of the city-level regulation-making power is limited to three types of matters, including urban and rural construction and management, environmental protection, and the protection of history and culture; city-level regulations may also govern other matters only upon the authorization of the national law (Article 72.2). However, the provincial regulation making does not have these restrictions.

According to Wu Zeng, an official in the NPC Legislative Affairs Commission, during the drafting of the amendment to the LoL, there are different opinions concerning the scope of city-level legislative powers. Some drafters agreed to restrict the city-level regulation-making power, while the others thought the scope of powers prescribed in the draft was too narrow and should be expanded.<sup>21</sup> The reason of limiting the city-level regulation-making

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<sup>17</sup> Zhang Chunsheng, 中华人民共和国立法法释义 (*The Interpretation of the Law on Legislation of the PRC*) (Beijing: Falv Chubanshe, 2001), p. 193.

<sup>18</sup> *Ibid.*, p. 195.

<sup>19</sup> Sun Bo, 论地方性事务 – 我国中央与地方关系法治化的新进展 (*On the Local Matters – the New Development of Legal Relationship between Central and Local Governments*), 5(2008) 法制与社会发展 (*Law and Social Development*), p. 52.

<sup>20</sup> Guo Daohui, Zhou Wangsheng and Wang Chenguang (ed.), 立法原则、制度、技术 (*Legislative Principal, System and Technique*) (Beijing: Beijing Daxue Chubanshe, 1994), p. 162.

<sup>21</sup> More specifically, four different opinions on the scope of city-level regulation-making powers emerged during the drafting of the amendment. The first opinion was to grant the city with districts the same legislative powers as those of the province and the previous relatively large city. The second opinion agreed to enumerate the city-level regulation-making powers, but it asserted that the three kinds of matters as mentioned above was too narrow and should be expanded to cover other matters, such as public service, social management, livelihood security, education, health and social security. The third opinion endorsed the tight restriction on the

power to three matters is spelt out in the Deliberation Report of the Draft of the Amendment to the LoL delivered by the NPC Legislative Affairs Commission in 2015. It states:<sup>22</sup>

‘The scope of legislative powers of the city divided into districts, namely, ‘the urban and rural construction and management, environmental protection, historical and cultural protection’ is relatively broad. For example, urban and rural construction includes urban and rural planning, infrastructure construction, and municipal administration. According to the Environmental Protection Law, the scope of environmental protection includes: atmosphere, water, ocean, land, mineral resources, forest, grassland, wetland, wildlife, and natural and human remains. The scope prescribed in the draft amendment can basically cover the scope of the pre-existing local regulations enacted by the 49 relatively large cities.’

Drawing on the above discussion, two conclusions can be made. First, under the revised LoL, the concept of ‘relatively large cities’, which refers to one type of local legislative body, were superseded by that of ‘cities with districts’. As a consequence, the number of city-level legislative units increases from 80 to 288. Second, despite the increase in number of local legislative bodies, their legislative autonomy is remarkably restricted compared to that of the previous relatively large cities.<sup>23</sup> In this sense, the revision of the LoL reveals both the trend of legislative decentralization and centralization. On the one hand, granting regulation-making power to cities with districts represent a significant move towards legislative decentralization. On the other hand, abolishing the relatively large cities as one type of local legislative body and reducing the city-level legislative powers reflects the national lawmakers’ attempt to centralize the legislative power.

### 3.2 The Scope of Local Rulemaking Powers

According to Article 82 of the revised LoL, the local rule can govern three types of matters. First, it can govern matters for implementing higher laws and regulations. Many local regulations require local people’s governments to issue relevant local implementing rules. For example, Article 24 of the Guangdong Regulation on the Protection of Wetland, which was passed in September 2006, decrees: ‘the Provincial People’s Government should formulate concrete measures for the management of wetland parks, the system of the compensation system for the ecological benefits of wetland, and the system for the examination of the significant wetland’. In practice, local governments have issued a wide range of implementing rules even without the authorization in respective local regulations.

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city-level regulation-making powers for the purpose of preventing a ‘legislative great leap forward’. The fourth opinion was to distinguish the regulation-making powers of the previous relatively large cities and that of the city with districts. With respect to the scope of the relatively large cities, this opinion tended to remain the *status quo*, and imposed harsher restriction for the latter, see Wu Zeng, 2015 《立法法》修改背景和主要内容解读 (The Background of the Revision of the Law on Legislation in 2015 and the Interpretation on the Main Content), 1(2015) 中国法律评论 (*China Law Review*), pp. 211-212.

<sup>22</sup> The NPC Legislative Affairs Commission, 全国人大法律委员会《关于立法法修正案（草案）审议结果的报告》(The Deliberation Report of the Draft of the Amendment to the Law on Legislation), cited from Wu Zeng, *ibid*.

<sup>23</sup> Article 72.6 of the revised LoL states that the existing local regulations enacted by relative large cities, which exceed the scope as provided in Article 72.2 of the LoL, will remain valid.

Second, local rules can govern matters concerning the performance of administrative functions and powers. Chinese law does not specify these matters. Given that the local government possesses broad administrative functions and powers, these matters are very comprehensive. In his book concerning the interpretation of the 2000 LoL, which was published in 2008, Qiao Xiaoyang, a vice director of the NPC Legislative Affairs Commission at that time, categorizes these matters into three groups: (1) matters concerning internal administrative working procedure; (2) matters concerning the operation of administrative institutions; (3) specific administrative affairs concerning social public order and public affairs, which do not relate to citizens' rights and obligations.<sup>24</sup>

Third, local rules can first govern matters that should be governed by local regulations. There are some limits for the exercise of this rulemaking power: (1) there are urgent regulatory needs in the area of administrative management; (2) the conditions for local regulation making are not ripe; (3) this type of local rule can only be carried out for two years; after two years, the local government should request the local people's congress or its standing committee to enact relevant local regulations.

There are two restrictions on the exercise of rulemaking powers at the local level. First, the scope of rulemaking power of city-level government is largely narrow when compared to that of the provincial government. Under Article 82.3 of the revised LoL, the first and second types of rules issued by city-level governments can only cover three areas – urban and rural construction and management, environmental protection, and historical and cultural protection. The second restriction is that the revised LoL forbids local rules to reduce citizens' rights or adding their obligations if there are no higher-level laws or regulations authorizing them to do that (Article 82.6).

#### **4. The Local Legislative Procedure**

##### **4.1 The Local Regulation-making Procedure**

Under the current legal framework, the local regulation-making procedure normally covers the following matters: (1) making legislative plans; (2) drafting local regulations; (3) proposing regulation drafts to local PCs or PCSCs; (4) conducting deliberation of regulation drafts by local PCs or PCSCs; (5) voting, submitting to the higher-level authority for filing and checking, and publishing. The legal sources for the regulation-making procedure is mainly composed of two types of laws. The first is the LoL. Apart from laying out procedural rules on some technical issues, such as publishing the final version of regulations and submitting them to the higher-level authority for filing and checking, this law only provides for a general guidance for the major part of the regulation-making procedure. According to Article 77.1 of the revised LoL, the drafting of local regulations and deliberation and voting of regulation drafts should be regulated by local people's congresses with reference to the provisions concerning law-making procedures of the NPC and the NPCSC in Section 2, 3 and 5 of Chapter 2 of this law.

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<sup>24</sup> Qiao Xiaoyang, 立法法讲话 (*Speeches on the Law on Legislation*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2008), pp. 282-284.

The second and main source of law for local regulation making is respective local regulations. Soon after the passage of the LoL in 2000, as required by this law, every locality with legislative power adopted procedural rules on their regulation making in the form of a local regulation. For example, the Shanghai PC adopted the Regulation on Regulation-making Procedure in Shanghai (Shanghai Procedural Regulation) in February 2001 and revised in February 2005. This regulation has 58 provisions divided into 6 chapters. Its structure is as follows (1) general principles; (2) procedure for the Municipal People's Congress to enact local regulations; (3) procedure for the Standing Committee of the Municipal People's Congress to enact local regulations; (4) interpretation of local regulations; (5) other provisions; (6) supplementary provisions.

The structure of the Regulation on Regulation-making Procedure in Suzhou, Jiangsu Province (Suzhou Procedural Regulation), which was adopted in April 2001, is significantly different from that of Shanghai. This regulation has 37 provisions divided into 7 chapters, which are (1) general provisions; (2) the formulation of legislative plans; (3) the drafting of local regulations; (4) proposing drafting regulations to the Suzhou PC and PCSC; (5) the deliberation and voting of regulation drafts; (6) submitting to the higher-level authority for filing and checking, publishing and interpretation; (7) supplementary provisions. It can be seen that the major difference between Suzhou and Shanghai procedural regulations is that the former is structured in terms of the ordering of the enactment of the local regulation, but the latter distinguishes the legislative procedure of PC and PCSC. In general, the local regulations on the regulation-making procedure in the rest of the country is structured in a similar manner as either the Suzhou model or Shanghai model.

The important rules in the Suzhou and Shanghai procedural regulations are provided below. In terms of regulation drafting, the local PC's special committees and the local people's governments are the principal drafting organs. Article 17 of the Shanghai Procedural Regulation, for example, empowers the Shanghai People's Government and Shanghai PC's special committees to formulate regulation drafts and to propose them to the Shanghai PC and PCSC. The drafting organs under the Suzhou Procedural Regulation are relatively broad – apart from the municipal People's Government and PC's special committees, the Intermediate People's Court and the Intermediate People's Procuratorates can also conduct drafting work (Article 7).

The focus of the two procedural regulations is placed on the PCSC's deliberation of regulation drafts. An important procedure is 'two round' deliberation, namely, a regulation draft should normally be deliberated by two local PCSC plenary sessions before it is sent for vote.<sup>25</sup> Suzhou Procedural Regulation also lays out three criteria for deliberation: whether the regulation draft contravenes higher-level laws and regulation, whether it fits local situations and actual needs, whether its structure, provisions and language are accurate (Article 20). The incorporation of 'two round' deliberation is helpful to create a more efficient and meaningful deliberation work. Another important and relevant procedure is 'unified deliberation', which is conducted by the Legislative Affairs Committee (法制委员会) – one of the special

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<sup>25</sup> Normally the plenary session of a local PCSC is held in every 2 months for 3-5 days.

committees of local PCSC. According to Article 24 of the Shanghai Procedural Regulation, the Legislative Affairs Committee should, based on the comments of PCSC members, members of special committees and various circles, revise regulation drafts and submit them to the next PCSC plenary session. The significance of the unified deliberation is that it provides a formal mechanism to put revision comments of the PCSC members into legislative drafts.

Public participation has become a general requirement during the deliberation process. Article 22 of the Shanghai Procedural Regulation states that the PCSC working organs and special committees should extensively solicit comments from various circles and they may release the regulation draft for soliciting public opinions. Legislative hearing is a major experiment of public participation in practice. Localities such as Shenzhen, Shandong, Ningxia, Harbin and Tianjin have passed their respective local regulations on the legislative hearing. Some local legislative hearings drew extensive public attention and successfully affect the drafting work. In July 2003, the PCSC of Guangdong province held a hearing on two provisions of the draft of the Guangdong Regulation on Patriotic Health Work, namely Article 6, which total prohibits citizens to take pets into public places, and Article 7, which totally bans the consumption of wild animals. These two provisions were intended to avoid the spread of diseases from animals to humans and the recurrence of the outbreak of SARS (Severe Acute Respiratory Syndrome) from late 2002 until early 2003, which was traced to civet cats and caused several hundred deaths in Guangdong. During the hearing, legislative officials of Guangdong PCSC were surprised to find that the majority of the attendees opposed the absolute bans in Article 6 and 7.<sup>26</sup> As a consequence, in the final version of the Regulation, the bans were loosened: Article 6 decrees: ‘no one can take pets into public transportation, indoor public places or unauthorized outdoor public places’; Article 7 decrees: ‘citizens should not consume three types of wild animals: (1) wild animals under protection (2) wild animals that easily spread disease; (3) wild animals that have not undergone quarantine.

Despite remarkable development of the local regulation-making procedure, it reveals some shortcomings. First, although multiple organs are empowered to propose and conduct the drafting of local regulations, in practice the principal proposer and drafter are local administrative organs, namely, local people’s governments and their subordinate departments.<sup>27</sup> From 1994 to 2000, for example, the Hainan provincial PC planned to draft

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<sup>26</sup> Liao Yingyi, 广东爱卫条例立法听证会, 多数人为动物求情 (The Hearing for the Draft of Guangdong Regulation on Patriotic Health Work, Most Attendees Begged Pardon for Animals) in 信息时报 (*Information Daily*), 9 July 2003, available at <http://news.sina.com.cn/c/2003-07-09/03451304340.shtml>, last visited May 2016.

<sup>27</sup> Generally speaking, under the existing local regulations on the regulation-making procedure, the scope of the organs, who may propose a bill of local regulation is broad. For example, according to the Measures of Guangzhou Municipality on the Establishment of the Projects of Enacting Local Regulations passed in July 2012, there are 13 types of organs or personnel who can propose legislative suggestions. The Regulation of Jiangsu Province on Enacting and Approving Local Regulation makes even a bolder stride, decreeing that all State organs, political parties, social organizations and citizens, may put forward, in a written form, the suggestions on enacting local regulations. The scope of organs with the power to draft local regulations is smaller, which usually include the Director Meeting of the local PCSC, Special Committees of the local PCSC, local People’s Government, local People’s Court, local People’s Procuratorate, ten or more deputies of the PC

157 local regulations, 133 of which were proposed by the provincial people's government and its departments.<sup>28</sup> The rationale for this administration-dominated drafting process is that local administrative organs possess relevant expertise for the drafting work. It also contributes to the enforcement of the local regulations because the drafters are also the enforcers who are familiar with the reality. However, there has been criticism for this administrative-dominated drafting process. Liu Jianwei, a legislative official at the Hebei provincial PC, points out that the local regulations, which are drafted by administrative agencies, are more concerned with the convenience of the exercise of the administrative powers than the protection of the citizens' rights and interests.<sup>29</sup> More specifically, Liu states that under the local regulations drafted by administrative organs, the provisions directed to citizens' obligations, and those concerning liability of enforcement objects are relatively complete and detailed; however, the provisions concerning their rights are sparse and general.<sup>30</sup>

Second, although many local regulations on the regulation-making procedure incorporate the rules of legislative hearing, the relevant provisions are still very vague.<sup>31</sup> Many key issues are either not specified or lacking, such as the conditions to hold a legislative hearing, the organization, selection of participants, and effect of the hearing result. As a result, whether a hearing should be held is largely at the discretion of the legislative affairs committee of local PCSC. In practice, not many hearings are held. According to a survey conducted by Chongqing PCSC in 2003, from the passage of the LoL in March 2000 to the end of 2003, 31 provincial PCs and their respective PCSCs in China had enacted 1069 local regulations, and only 20 of them went through hearings during their drafting.<sup>32</sup>

## 4.2 The Local Rulemaking Procedure

As noted in Chapter 4, which concerns the State Council's legislation, the LoL provides for a general guidance on the rulemaking procedure, stating that the rulemaking procedure should be regulated by the State Council with reference to the administrative regulation-making procedure of the State Council as governed by Chapter 3 of this law. As a consequence, the detailed rules are provided in the Regulation on the Rulemaking Procedure, which was issued

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and five or more members of the NPCSC. The abovementioned organs or personnel may also entrust relevant administrative departments, social organizations, or experts to conduct drafting work.

<sup>28</sup> Shen Qunshan, 我省地方立法规划工作中若干问题的思考 (Reflection on the Several Questions of the Local Legislative Plan of Hunan Province), in Hunan People's Congress Regulatory Working Committee, 湖南省地方立法二十年 1980-1999 (*Twenty-year of the Local Legislation of Hunan Province*) (Changsha: Hunan Renmin Chubanshe, 2000), p. 91.

<sup>29</sup> Liu Jianwei, 省级国家权力机关立法程序探讨 (On the Legislative Procedure of the Provincial State Organs), in Zhou Wangsheng (ed.), 立法研究 (第二卷) (*Legislative Review of China, Vol. II*) (Beijing: Falv Chubanshe, 2001), pp. 569-570.

<sup>30</sup> *Ibid.*

<sup>31</sup> The LoL does not provide for the rules of the regulation-making hearing. This law only mentioned hearing in the legislative procedure of the NPCSC. Article 36 of this law provides that the NPCSC's special commissions and other working organs should solicit opinions from various circles, and the solicitation of opinion may be conducted in the form of symposia, demonstration meeting and hearing. In this sense, local regulations on regulation-making procedure serve as a forerunner to incorporate hearing into the local legislative process.

<sup>32</sup> Zhang Yuan, 立法听证在行进中成长 (The Legislative Hearing Is Developing during its Exercise), 1(2007 人大建设 (*Construction of the People's Congress*), p. 19.

by the State Council in November 2001. This regulation has 39 provisions divided into 7 chapters, which are (1) general principles; (2) rulemaking planning; (3) drafting of rules; (4) examining rule drafts; (5) approval for passage and issuance; (6) interpretation and submission to higher-level organs for filing; (7) supplementary rules.

The legal sources that specifically govern the local rulemaking procedure are respective local regulations. They largely imitate the structure and content of the State Council's Regulation on the Rulemaking Procedure. Nevertheless, some of their provisions reveal certain innovations, reflecting an attempt to improve the rulemaking quality. For example, Article 19 of the Regulation on the Rulemaking Procedure lays out three situations, under which the legislative Affairs office of the local government (the organ responsible for conducting unified examination on the draft of a local rule) may table the examination of a draft rule or return it back to its original drafting organ.<sup>33</sup> Article 19 of this regulation is significantly specified in the Provisions on the Formulation of the Regulation Draft and Rules of Fujian People's Government. This Fujian local rule lists 8 situations (Article 24).<sup>34</sup> Another example is that the Regulation on the Rulemaking Procedure allows the governments' internal departments and lower-level governments to propose the drafting of a local rule, but it is silent on whether the public can do that (Article 9). With respect to this, some local rules do allow citizens to put forward rulemaking suggestions.<sup>35</sup>

The public participation in rulemaking is a general legal requirement. According to the Regulation on the Rulemaking Procedure, public opinions should be extensively solicited during the drafting and examining stages (Article 14, 15 and 23). This regulation lists three forms of public participation – symposiums, seminars with invited experts, and public hearing. There is evidence suggesting that public participation is influencing the local government's rulemaking. For example, in his study on the rule of law in China, Jamie Horsley observes that after facing the criticism from the public comments, the Beijing Municipal People's Government withdrew a proposed regulation on outside contractors.<sup>36</sup> Similar to the shortcoming of State Council department's rulemaking procedures, the main shortcoming of the local rulemaking procedure is that although the LoL and the Regulation

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<sup>33</sup> The 3 situations are (1) the basic conditions for the formulation of rules are not yet mature; (2) There are relatively significant disagreements among relevant departments on the main matters in the draft rule, and the drafting organ has not consulted with these departments; (3) The draft is not in accordance with the requirement, which is provided in Article 17 of this regulations, concerns the submission of the draft, its interpretation and other relevant materials.

<sup>34</sup> This Fujian rules were issued in May 2014. The 8 situations are (1) Contravening national laws and regulations; (2) The main content is greatly divorced from reality; (3) Inappropriately reinforcing departmental power and stressing the departmental interests; (4) the legislative technology has serious defects; (5) There are matters, which incur relatively significant disagreements, and the drafting organ has not solicited opinions from departments, experts, or citizens as required by Article 17 and 18 of this rule; (6) A hearing should have been held according to law, but it was not; (7) The conditions for the formulation of rules undertakes significant changes; (8) Other situations that should undertake redrafting or revising work.

<sup>35</sup> For example, Article 8.2 of the Provisions on the Procedure on the Formulation of the Rule of Jilin (吉林) People's Government, which was issued in July 2013, decrees: 'citizens, legal persons and other organizations may, in the form of letters, fax and other written forms, put forward rulemaking suggestions to the Legislative Affairs Department of the City'.

<sup>36</sup> Jamie P. Horsley, 'The Rule of Law in China: Incremental Progress', in C. Fred Bergsten (ed.), *The China Balance Sheet in 2007 and Beyond* (Phase II Papers) (2007), p. 5.

on the Rulemaking Procedure incorporate rules of public participation in the rulemaking process, it is still poorly guaranteed. Under the Regulation on the Rulemaking Procedure, a hearing for the drafting of a local rule may be held under two conditions (1) the rule concerns immediate interests of the public; (2) there are substantive disagreements on the draft rule among the public. Because many draft rules do not meet these two conditions, a hearing cannot be held during their drafting. Moreover, although a draft rule meets these two conditions, whether a hearing can be held is at the discretion of the drafter. For this reason, in practice the drafting of the most local rules does not go through a hearing. From April 2004 to December 2005, the provincial governments and State Council departments only held a total of 74 rulemaking hearings.<sup>37</sup> Beijing Municipal People's Government, for example, held its first hearing for the drafting of a local rule in April 2006, which was already 4 years after the adoption of the Regulation on the Rulemaking Procedure.<sup>38</sup>

The poor guarantee of public participation is also reflected in the fact that the effect of result of public participation is not specified, which tends to undermine its significance. For example, in a hearing for the draft of the Beijing Provisions on the Work Safety of the Catering Units held in April 2006, nearly all the participants expressed dissenting opinions for Article 25 of the draft, which decrees that the oil and gas exhaust pipes in the food preparation room should be cleaned at least once in every 60 days. These participants asserted that this requirement was very difficult to meet because of the complexity and high cost of the cleaning work.<sup>39</sup> However, despite the dissenting opinions in the hearing, the requirement for cleaning the oil and gas exhaust pipes in Article 25 was not changed in the draft and this draft was issued six months later.

## 5. Local Legislative Practice

### 5.1 Local Regulation-Making Practice

#### 5.1.1 An Overview: The Number, Contents and Shortcomings

From 1 January 1980 to 10 April 2015, the existing 80 legislative localities have adopted 8381 local regulations in total, averaging 102 for each.<sup>40</sup> Among these local regulations, 5278

<sup>37</sup> The Central People's Government of the PRC, 国务院 2005 年法制工作综述: 加快建设法治政府 (The 2005 Summary of State Council's Legal Work: Accelerating the Rule of Law Government), December 29, 2005, in 中国政府网 (*The Website of Central People's Government of the PRC*), 29 December 2005, available at [http://www.gov.cn/zfjs/2005-12/29/content\\_141063.htm](http://www.gov.cn/zfjs/2005-12/29/content_141063.htm), last visited May 2016.

<sup>38</sup> Huang Qingchang, 北京首次对政府规章听证 (Beijing Began to Hold Hearing for the formulation of Governmental Rules) in 人民日报 (*People's Daily*), 19 April 2006, available at <http://news.sohu.com/20060420/n242896255.shtml>, last visited May 2016.

<sup>39</sup> *Ibid.*

<sup>40</sup> The number of local regulations mentioned in this section is collected from Beida Fabao online Legal Database (<http://www.pkulaw.cn/>). The criteria for collection are provided below:

(1) The documents passed by the local PC and PCSC, which are named as xxx 条例 (regulation), xxx 办法 (measures) and xxx (规定) are counted as local regulations. The reason is that according to the authoritative explanation of the Legislative Affairs Commission of the NPCSC, the local regulations are named either as xxx regulation (条例) or xxx measures (办法), see 全国人大法工委关于‘国家有上位法的情况下, 制定地方性法规如何确定名称’的答复 (The Reply of the Legislative Affairs Commission of the NPCSC to the Anhui Provincial PCSC on the issue of ‘how to specify the name of the local regulation on the condition that the State

are still valid, accounting for 63 per cent of the total number of local regulations adopted. It can be seen that over a span of 35 years; more than one third of the local regulations had been annulled. Normally, the validity duration of local regulations is less than 10 years. Some examples are provided below. The Regulation on Conserving Energy in Guangdong Province went into effect in October 2003 and was invalidated in July 2010. The Regulation on Work Safety in Henan Province went into effect in August 2004 and was invalidated in October 2010. The Regulation of City Planning in Wuxi City went into effect in April 2005 and was annulled in January 2011.

China's local regulations are under frequent revision. In a study on the local legislation in Shanghai, Shi Jiansan and Wu Tianhan find that prior to February 2008, 62 local regulations in Shanghai had been revised. The revised regulations accounted for 43.7 per cent of the total valid 142 local regulations in Shanghai at that time. Among these 62 revised local regulations, 29 had been revised more than once.<sup>41</sup> Most of the revisions of these local regulations (77.5 per cent of the total 102 times of revision) were conducted within 2 to 6 years after their passage or previous revision.<sup>42</sup> The short validity period of local regulations and their frequent revision is attributed mainly to the rapid socio-economic changes, which generates momentum for the rapid change of local legal system.<sup>43</sup>

In terms of content, the existing local regulations govern a wide range of areas, including political organization, economy, ethnicity, social affairs, natural resources, environment, education, science and technology, health, and urban management. The emphasis of local legislation is placed on economy.<sup>44</sup> Based on different categorizations in scholarly discussion in China, the proportion of local economic regulations range from about 30 per cent to nearly 50 per cent of the total local regulations.<sup>45</sup> Notwithstanding the variation

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has higher laws') in 中国人大网 (*The Website of the NPC*), 30 December 2002, available at [http://www.npc.gov.cn/npc/xinwen/lfgz/xwdf/2003-08/05/content\\_318387.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/xwdf/2003-08/05/content_318387.htm), last visited May 2016. The reason to regard documents entitled as 'xxx provisions' as local regulations is that in the early era of post-Mao era, localities also named some local regulations as xxx provisions (规定).

(2) A local regulation, which has been revised several times and has several revised versions, is counted as one local regulation. Other documents passed by the local PC or PCSC, such as the decisions to revising or repealing pre-existing local regulations, decisions about appointment and dismissal of cadres, various kinds of notices, are not counted into the number of local legislation.

<sup>41</sup> Shi Jiansan and Wu Tianhao, 地方立法质量: 现状, 问题与对策——以上海人大地方立法为例 (*The Quality of Local Legislation: Present Situation, Problems, and Resolution – the Case of Shanghai Local Legislation of the People's Congress*), 6(2009) 法学 (*Legal Science*), p. 98.

<sup>42</sup> *Ibid.*

<sup>43</sup> Based on the evaluation of enforcement departments on local regulations in Shanghai, Shi Jiansan and Wu Tianhao found that the proportion of local regulations with low applicability and implementation effect enacted in 1980s and 1990s is significantly higher than that enacted after 2000. This indicates the shortcomings of local legislation in the early reform era, see *ibid.*

<sup>44</sup> Lu Qunxing and Liang Shangshang, 先行法治化和地方立法 (*The Rule by Law in Advance and Local Legislation*), in Sun Xiaoxia (ed.) 法治浙江, 三十年回顾与未来展望 (*Rule by Law in Zhejiang, Thirty-year Retrospect and Future Prospect*) (Hangzhou: Zhejiang Daxue Chubanshe, 2009), p. 8.

<sup>45</sup> Sun Xiaodong and Zhu Liyu found that by the end of 2008, the proportion of economic regulations and rules in Beijing and Shanghai accounted for 34.70% and 29.47% of their total local regulations respectively. See Sun Xiaodong and Zhuliyu, 北京市与上海市地方立法的比较分析 (*The Comparative Analysis of the Local Legislation in Beijing and Shanghai*), 1(2013) 北京社会科学 (*Beijing Social Science*), p. 37. Jiang Caixun found that by the end of 2004, the local economic regulations made up 48.36% of the total local regulation. See

of the proportion, there is no doubt that economic legislation is the main concern of local legislators.

If we compare the numbers of legislation between two tiers of local legislative subjects (namely, provincial regulations and city-level regulations), two observations can be made. First, in terms of regulation making, the provincial units are generally much more active than city-level units. Until recently, the PC and PCSC of Shanghai Municipality and Zhejiang Province, for example, have enacted 198 and 207 local regulations respectively, and among them, 139 and 146 respectively are still valid. However, for the PCs and PCSCs of two cities - Qiqihar Municipality in Heilongjiang Province and Suzhou Municipality in Jiangsu Province, these number only 45 and 66, and 34 and 42 respectively. The gap is due to two reasons. The first reason is that provincial governments were granted legislative power in the late 1970s, but those relatively large cities were granted this power from 1984 to 1993, therefore the former can adopt more local regulations than the latter.<sup>46</sup> The second reason is that as sub-national units, provincial governments have more policies that need to be carried out compared to city-level government. They, for example, need to enact local regulations to implement national laws and regulations, however, a city-level unit does not need to enact a local regulation for implementing a certain national law if its provincial government has already adopted one.

The second observation is that the geographical location is not an important factor for the activeness of local legislation. In terms of the number of local regulations, there is no significant gap between eastern coastal provinces, which are economically more developed, and inland provinces, which are economically less developed.<sup>47</sup> For example, Sichuan Province and Gansu Province – the two western interior provinces, have enacted 229 and 196 local regulations respectively, and among them 189 and 145 are still valid. The number of local regulations enacted by these two provinces is roughly equal to that of Shanghai Municipality and Zhejiang Province, which are in the eastern China. The main reason for the rough equal number of local legislation among provinces is that the subject matters governed by local regulation in different provinces are alike.<sup>48</sup> Although there is no significant difference in number, the content of local legislation indeed reveals certain geographical differences. Some legal scholars point out that in 1980s and 1990s, the eastern coastal provinces served as forerunners for initiating economic legislation in advance of the central

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Jiang Caixun, 地方立法数量及项目研析 (On the Subject Matters and Number of the Local Legislation), 11(2005) 人大研究 (*People's Congress Study*), p. 30.

<sup>46</sup> The first city-level local regulation was the Regulation on the Management of River Channel and Dike in Urban Area of Wuhan, enacted by Wuhan PCSC on 11 December 1984.

<sup>47</sup> Nevertheless, the gap between the quality of legal professionals and the functioning of the legislation between these two regions is large, see Benjamin L. Liebman, 'Assessing China's Legal Reforms', 23 (2009) *Colum. J. Asian L.*, p. 27.

<sup>48</sup> There are two reasons for the similarity of the subject matters governed by local regulations in Chinese provinces. The first reason is that Chinese provinces will enact their own local regulations for implementing the same national laws and regulations. The second reason is that if a province enacts a local regulation governing certain matter, the other provinces will move fast to legislate on the same matter by modeling the provisions of the pre-existing local regulation. See Jiang Caixun, 地方立法数量及项目研析 (On the Subject Matters and Number of the Local Legislation), 11(2005) 人大研究 (*People's Congress Study*), pp. 30-31.

government and interior provinces; the interior provinces were more concerned with enacting local regulations for implementing higher laws and regulations.<sup>49</sup>

One main shortcoming of China's local legislation is that many local regulations unnecessarily repeat national laws and local regulations enacted elsewhere. In his book on China's legislation, Li Lin estimates that the content of local legislation, which repeats national legislation, makes up 70 per cent to 90 per cent of the total local legislation.<sup>50</sup> In his article on local legislative work published in 2005, Yang Jingyu, the director of the NPC Legal Commission at that time, pointed out that some localities not only repeat national legislation but also copy local legislation made elsewhere.<sup>51</sup> He stated that the local regulations in some localities basically copy the local regulations enacted elsewhere except for several provisions, which are enacted in light of actual local conditions.<sup>52</sup> A more precise study on the unnecessary repetition of local legislation was conducted by Tang Shanpeng and Yan Hailiang. In their study on identifying and resolving unnecessary repetition, Tang Shanpeng and Yan Hailiang find that the proportion of unnecessarily repeating national law in 7 local regulations on the prevention and control of environmental pollution by solid waste ranges from 14.6 per cent to 26.6 per cent.<sup>53</sup> It should be recognized that repetition in local legislation is inevitable to some extent, but the exceedingly high repetition also reveals that the local legislative units do not give full play to their local legislative powers.

In recent years, the lawmakers at both national and local levels have noticed the repetition problem. On various occasions, local lawmakers spelt out the idea that a local regulation which has a similar structure as its respective national law should be abandoned; and that local legislation should aim to resolve concrete problems.<sup>54</sup> An important step for curbing the repetition in local legislation came in 2015 with revision of the LoL. Article 73 of the revised LoL that local regulations normally should not repeat the provisions in higher laws and regulations which are already specific.

### 5.1.2 Two Types of Local Regulations and Their Functions

Based on whether there are relevant higher laws or regulations to be complied with, existing local regulations can be categorized into two types. The first is the implementing regulations for higher-level laws and regulations. The implementing regulations make up a substantial proportion of the local legislation. In their study on Shanghai's local legislation, two legal scholars from Shanghai Academy of Social Science identified that from 1999 to 2008, the

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<sup>49</sup> Tang Wei and Bi Kezhi, 地方立法的民主化与科学化设想 (*The Democratization and Prospects of Local Legislation*) (Beijing: Beijing Daxue Chubanshe, 2006), pp. 21-22.

<sup>50</sup> Li Lin, 走向宪政的立法 (*Chinese Legislation: One the Way to Constitutionalism*) (Beijing: Falv Chubanshe, 2003), pp. 221-222.

<sup>51</sup> Yang Jingyu, 加强地方立法工作, 提高地方立法质量 (Strengthening Local Legislative Work, Improving Local Legislative Quality), 14(2005) 求是 (*Seeking True*), p. 7.

<sup>52</sup> *Ibid.*

<sup>53</sup> Tang Shanpeng and Yan Hailiang, 地方立法不必要重复的认定与应对 (The Identification and Resolution of the Unnecessary Repetition of higher-level Laws and Regulations in Local Legislation), 4(2014) 法制与社会发展 (*Law and Social Development*), p. 162.

<sup>54</sup> *Ibid.*

implementing regulations accounted for 47 per cent of the total regulations enacted in Shanghai from 1999 to 2008.<sup>55</sup>

The local implementing regulations can be further divided into two sub-types. The first details higher laws as a whole. It is normally named as ‘Measures for Implementing the Law of xxx’ (实施<xxx 法>办法), and in some cases, as ‘Provisions on xxx’ (条例).<sup>56</sup> Some national laws explicitly authorize localities to enact implementing regulations. For example, Article 44 of the Law on Promoting Small and Medium-sized Enterprises stipulates: ‘provinces, autonomous regions and cities directly under the control of the central government may, in light of the conditions of local small and medium-sized enterprises, enact implementing measures’. As a result, as of this time, a total of 38 provinces have enacted their own implementing measures for this law.<sup>57</sup> The second sub-type of implementing regulations details certain specific matters in higher laws and regulations. It is named as the Regulation of xxx (条例). For example, Article 8 of the Food Hygiene Law states: ‘the provincial PCSC should formulate specific provisions on the hygienic requirements during food production or marketing undertaken by vendors in urban and rural markets’.<sup>58</sup> Accordingly, 25 provinces have adopted relevant local regulations governing this matter.<sup>59</sup> Since the mid-1990s, the first type of implementing regulation has become less common. The reason is that the provisions of national laws and regulations in general have become more specific thereafter, and compared to the earlier national laws and regulations, the recent ones do not need comprehensive implementing regulations for the implementation of the laws as a whole.<sup>60</sup> The recent implementing regulations are more concerned with detailing specific matters in the higher laws and regulations.<sup>61</sup>

The second type of existing local regulations are those that govern matters that have not been governed by higher laws and regulations. These types of local regulations can also be divided into two sub-types. The first one is local regulations that govern matters with a local character. As noted earlier, the matters with a local character refers to matters with a purely local feature and matters that do not need uniform national legislation. The examples for this type of local legislation include the Regulation on the Protection of Yixing (宜兴) Clay in

<sup>55</sup> Shi Jiansan and Wu Tianhao, *supra* note 41, p. 104.

<sup>56</sup> 全国人大常委会关于‘国家有上位法的情况下，制定地方性法规如何确定名称’的答复 (The Reply of the Legislative Affairs Commission of the NPCSC to the Anhui Provincial PCSC on the issue of ‘how to specify the name of the local regulation on the condition that the State has higher laws’) in 中国人大网 (*The Website of the NPC*), 30 December 2002, available at [http://www.npc.gov.cn/npc/xinwen/lfgz/xwdf/2003-08/05/content\\_318387.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/xwdf/2003-08/05/content_318387.htm), last visited May 2016.

<sup>57</sup> Data collected from 北大法宝 (Beida Fabao Online Legal Database), available at <http://vip.chinalawinfo.com/>, last visited May 2016.

<sup>58</sup> It is noticeable that the legislative practice also indicates that localities may also enact implementing regulations even without the authorization of higher laws and regulations.

<sup>59</sup> *Supra* note 57.

<sup>60</sup> Liu Mianyi, 地方性法规贯彻实施法律的思考 (The Thinking on the Local Regulations’ Implementation of Laws), 2(2001), 法学杂志 (*Law Science Magazine*), p. 48; Shi Jiansan and Wu Tianhao, 地方立法质量: 现状, 问题与对策——以上海人大地方立法为例 (The Quality of Local Legislation: Present Situation, Problems, and Resolution – the Case of Shanghai Local Legislation of the People’s Congress) 6(2009) 法学 (*Legal Science*), p. 102.

<sup>61</sup> *Ibid.*, p. 48.

Wuxi and the Regulation for the Protection and Management of Classical Gardens in Suzhou, and various local regulations governing dog raising and the restriction on setting fireworks. In Shanghai from 1999 to 2008, the local regulations governing local matters made up 33.3 per cent of the local regulations at that time.<sup>62</sup>

The second sub-type are those enacted to govern matters, which should be, but have not yet been, governed by higher laws or regulations. Chinese authoritative sources and scholarly discussions call this type of legislation ‘the local legislation in advance (地方立法先行)’. Chinese national leaders iterated the importance of local legislation in advance. In his speech delivered in a working conference of the CCP Central Committee in 1981, Deng Xiaoping stated: ‘some regulations can be made by localities, and then after summarization and improvement, national laws can be enacted’.<sup>63</sup> This legislative experimentation has become an important component of the rapid development of the legal system.<sup>64</sup> According to a study on Shanghai local legislation, In Shanghai, the local regulations in advance accounted for about 20 per cent of the total Shanghai regulations enacted from 1979 to 2008.<sup>65</sup> Local legislation in advance is a nationwide phenomenon rather than being limited in certain localities. With regard to this, the legislation on tourism serves as a salient example. In January 2002, Hainan PCSC passed the Regulation on Tourism in Hainan Province, which was the first local regulation for the management of tourism in China at that time. The following 11 years saw the adoption of local tourism regulations in all the 31 provinces, and finally in April 2013, the NPCSC adopted the Tourism Law.

Drawing on the above discussion, the functions of local legislation can be summarized as follows. First, it helps to implement higher-level laws and regulations by providing for detail in rules. Due to some reasons, such as the huge socio-economic diversity, imperfection of the legislative technique and immaturity of legislative conditions and experience, the provisions of national legislation are relatively general, thus, local legislation is needed to detail them for their effective implementation in localities. Second, it enables localities to resolve local matters by the means of legislation. Third, local legislation serves as experiments for later national legislation. It helps to generate legislative conditions and experience for future national legislation.

## 5.2 Local Rulemaking Practice

In the reform era, China’s local governments have issued a myriad of local rules. The exact number varies according to different sources. According to Beida Fabao Online Legal Database, from January 1978 to March 2016, China’s local governments issued 20082 local rules. In 1999, the NPCSC Legislative Affairs Commission conducted an investigation concerning local rulemaking. It inquired to a total of 80 localities with rulemaking powers to

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<sup>62</sup> Shi Jiansan and Wu Tianhao, *supra* note 41, p. 104.

<sup>63</sup> See Deng Xiaoping, 邓小平文选 (*Selected Works of Deng Xiaoping*) (Beijing: Renmin Chubanshe, 1994), p. 147. In a working report deliberated to the NPC in 2001, Li Peng, the then NPCSC chairman, stated that the local legislation in advance is ‘a good experience and practice created and generated in the past twenty years, which generated experience for national legislation’.

<sup>64</sup> Benjamin L. Liebman, ‘Assessing China’s Legal Reforms’, 23 (2009) *Colum. J. Asian L.*, pp. 21-22.

<sup>65</sup> Shi Jiansan and Wu Tianhao, *supra* note 41, p. 104.

provide information of the local rules they issued. As a result, 24 provincial governments and 38 relatively large cities replied. The details are as follows: By the early May 1999, these 62 localities had issued more than 15000 local rules. More specifically, the 24 provincial governments had issued 7300 rules, averaging 304 each. Among these rules, 53 per cent were implementing rules for higher laws and regulations; and the remaining 47 per cent were rules without higher laws and regulations as their basis.<sup>66</sup> The 38 relatively large cities had issued 7600 rules, averaging 200 each. Among these rules, 72.4 per cent of them were implement rules and remaining 27.6 per cent were issued without higher laws and regulations as a basis.<sup>67</sup>

By comparing the local regulations and local rules, it can be seen that the latter largely outnumbers the former. For example, by the end of 1998, Qindao (a prefectural-level city in Shandong province) had issued 308 local rules compared to 61 local regulations enacted.<sup>68</sup> In their study on the comparison of local legislation between Beijing and Shanghai, Sun Xiaodong and Zhu Liyu find that the local rule constituted the main part of local legislation in both Beijing and Shanghai, making up 75 per cent and 81 per cent of the total local legislation respectively.<sup>69</sup> The higher proportion of the number of local rules reflects that, in practice, many matters are regularized by local rules instead of local regulations. A recent example is the legislation on the expropriation and compensation on real estate in state-owned land. In January 2011, the State Council issued the Regulation on Expropriation and Compensation on Housing on State-owned Land. Following the issuing of this regulation, 49 localities have issued their own relevant implementing rules, but there are only 5 localities that chose to regularize it by the form of local regulation and the other 45 chose to regularize it by the form of local rule.<sup>70</sup>

The significance of the local rule is also reflected on the fact that it serves as a testing ground for local legislative initiatives. The legislative practice shows that the legislation on many matters is first initiated in the form of the local rule. Several examples are provided below. Prior to the issuing of the Regulation on the Disclosure of the Government Information by the State Council in May 2007, 19 localities had issued relevant local rules governing this matter. In April 2008, Hunan provincial government issued the Provisions of the Administrative Procedure. This local rule is intended to comprehensively regularize the administrative decision-making procedure. After its issuance, 24 other localities issued respective local rules governing the administrative procedure, and now, an administrative

<sup>66</sup> Zhang Chunsheng, *supra* note 17, p. 356.

<sup>67</sup> *Ibid.*

<sup>68</sup> The Legislative Affairs Office of the Qiaodao Municipal PCSC and the Legislative Bureau of Qingdao Municipal People's Government, 青岛市现行地方性法规规章汇编 (1949 -1998) (*The Currently Valid Local Regulations and Rules in Qingdao*) (Qingdao: Qingdao Chubanshe, 1999).

<sup>69</sup> Sun Xiaodong and Zhu Liyu found that by the end of 2008, the proportion of economic regulations and rules in Beijing and Shanghai accounted for 34.70% and 29.47% of their total local regulations respectively. See Sun Xiaodong and Zhuliyu, *supra* note 45, p. 34.

<sup>70</sup> 北大法宝 (Beida Fabao Online Legal Database), available at <http://vip.chinalawinfo.com/>, last visited May 2016.

regulation that provides for a unified rule on this matter has been written into State Council's legislative plan.<sup>71</sup>

One major shortcoming of the local rules is that some of them, especially those issued in the early reform era, tend to restrict citizen's rights and interests without higher laws and regulations as a basis. Its main manifestation includes instituting new types of administrative punishment, adding extra requirements (such as charging extra fees or requiring extra procedures) for license applications and creating new types of administrative enforcement measures. For example, in March 1997, the NPCSC adopted the Law on Animal Epidemic Prevention.<sup>72</sup> In terms of not obtaining a quarantine certificate for running an animal production business, Article 49 of this law institutes two types of administrative punishment – suspension of business and confiscation of illegal gains. However, the implementing rule for this law in Fujian, which was issued in January 2002, instituted three types of punishment. Apart from the abovementioned two types, this rule also set a fine as the third type (Article 41). Setting a fine was *ultra vires* because it imposed more restriction on citizens, which was not authorized by the Law on Animal Epidemic Prevention.

## 6. Conclusion

The local legislative system has undergone marked development in the reform era. The development can be divided into three stages. The first stage, which lasted from 1979 to 2000, experienced abrupt decentralization of comprehensive legislative powers and the significant increase of local legislative units. During this period, the development of the local legislative system was at its nascent stage: the local regulation-making and rulemaking powers were vaguely demarcated and there were no unified rules for the regulation-making and rulemaking procedures, and public participation was not a compulsory procedural requirement in the local legislative process. The second stage started in 2000 and ended in 2015. The landmark of the development is the passage of the 2000 LoL. This law provided for the exclusive legislative powers of the central government and further demarcated the local legislative powers, which showed a trend for the centralization of the legislative power. During this stage, a relative comprehensive legal framework for the local regulation making and rulemaking had been established. Most noticeable is that public participation had become a general requirement for local legislation. Various localities had tried legislative hearing during this period. Nevertheless, largely due to the poor guarantee in the legal system, local legislative hearing was by and large inactive.

The third stage, which is still ongoing, started in 2015 with the revision of the LoL. The revised LoL granted legislative powers to all the cities with districts. As a consequence, the number of city-level legislative units largely increased from 80 to 271. Another significant move in the revised LoL is that the city-level legislative power is largely reduced to cover only three matters, namely, the urban and rural construction and management, environmental protection and the protection of history and culture. Thus we can observe an interesting phenomenon: on the one hand, the continuous increase of the city-level legislative unit

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<sup>71</sup> Interview to officials in the Legislative Affairs Office of the State Council.

<sup>72</sup> This law was revised in 2007, 2013 and 2015 respectively. Here it refers to the original version of this law.

represents a trend of legislative decentralization, on the other hand, the reduction of its legislative powers represents a trend of legislative centralization. In addition to the reduction, the revised LoL also tightened the control on the exercise of local rulemaking power – in addition to issuing implementing rules, city-level governments are only permitted to issue primary local rules for a two-year trial implementation (Article 82).

The current legal framework on local legislation shows some prospects for its future development. Allowing the court to examine local rules during administrative litigation is conducive to protect citizens' rights against arbitrary administrative actions, and it may lay the foundation for the development of a judicial review system in China in the future. It is too early to examine the effect of the latest legislative decentralization reform as formalized in the revised LoL. Considering that the number of local legislative units are now four times larger than before, the effect of this bold reformist measure is far-reaching – it will not only re-shape the future local legislation, but also have a significant impact to the development of China's legal system as a whole in the future.



## Chapter 6. The Legislative System in National Autonomous Areas

### 1. Introduction

In order to resolve its ethnic issues, the PRC adopted the system of Regional National Autonomy (RNA) (少数民族区域自治) in the mid-1950s. Under this system, ethnic minorities in the national autonomous areas (autonomous areas) (民族自治地方) can exercise autonomous legislative powers, namely, enacting autonomous regulations (自治条例) and separate regulations (单行条例). Prior to 1982, autonomous areas were the only type of locality that could exercise legislative powers in China. However, during this era, the autonomous legislative system did not experience any development and autonomous areas only enacted 48 separate regulations in total.<sup>1</sup>

Under the 1982 Constitution, the PRC rehabilitated the RNA system and the autonomous legislative system. Under this system, the exercise of autonomous legislative power is not only one of the main conduits to achieve ethnic minorities' autonomy, but also one of the two principal rights that are assigned to minorities in autonomous areas (the other is the preservation of key posts in the self-government organs to titular minorities). Given its significance in the RNA system, autonomous legislation provides an important tool to examine whether, or to what extent, the autonomy under the RNA system is achieved. During the reform era, the autonomous legislation has undergone unprecedented development in many aspects, and it also shows limitations. This chapter aims to provide detailed analysis on the developments both in the legal framework and the legislative practice. This chapter is composed of 7 sections. Following the introduction, section 2 provides an overview of the system of the RNA, followed by a historical review of the autonomous legislation in the pre-reform era. Section 4 analyzes the legal framework of the autonomous legislative powers in the reform era. Section 5 and 6 explores the autonomous legislative practice followed by the conclusion.

### 2. An Overview of the RNA System

As Fei Xiaotong, a prominent Chinese sociologist, summarized, the Chinese nation (中华民族) is a pluralistic, unified entity with a multi-level ethnic identity.<sup>2</sup> Until now, China has recognized fifty-six ethnic groups.<sup>3</sup> The fifty-five ethnic minorities are significantly

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<sup>1</sup> Wu Zongjing and Ao Junde, 中国民族立法理论与实践 (*The Theory and Practice of Autonomous Legislation in China*) (Beijing: Zhongguo Minzu Fazhi Chubanshe: 1998), pp. 384-385.

<sup>2</sup> Fei Xiaotong, 简述我的民族研究经历和思考 (A Brief Introduction on the Experience and Thinking of My Ethnic Research), 2(1997) 北京大学学报 (*Journal of Peking University*), p. 10; Fei Xiaotong, 中华民族的多元一体格局 (The Unity of Pluralistic Society of the Chinese Nation), 4(1989) 北京大学学报 (*Journal of Peking University*), p. 19.

<sup>3</sup> Chinese government initiated the Nationality Identification Project in 1953. This work was officially completed in 1979 when the Jino group was identified as the 56<sup>th</sup> ethnic group in China. For the details on China's nationality identification, see Qing Heping, '56个民族的来历'并非源于民族识别——关于族别调查的认识与思考 (The Origin of the Fifty-six Nationalities, Does not Derive from the Nationality

diversified in many aspects, such as language, culture, religion and the socio-economic development.<sup>4</sup> Despite the dominance of the Soviet model in China's political and legal life in the early pre-reform era, the Chinese leadership chose to apply the RNA system under a unitary political and legal framework rather than adopting the Soviet ethno-federalism. The reasons, as stated by Barry Sautman, lay in the different demographic conditions between China and Soviet Union, and the fear of disintegration of the country.<sup>5</sup> Under the RNA Law, which was passed by the NPC in 1984 and revised by the NPCSC in 2001, the unified leadership of the State allows ethnic minorities to set up self-government organs that exercise the power of regional autonomy in the compact communities in which they live.<sup>6</sup> The RNA is claimed to be the 'basic policy' of the CCP and a 'basic political system' of the State to resolve this national issue in the PRC. It embodies 'the State's full respect for the guarantee of the rights of ethnic minorities to administer their internal affairs and its adherence to the principle of equality, unity and common prosperity for all the nationalities'.<sup>7</sup> Despite its uniqueness in name and formal provisions, the RNA system reflects the common integrationist and accommodationist practice around the world.<sup>8</sup>

The concept of the RNA is composed of two elements: territory and ethnicity. In terms of territory, China has established 155 autonomous areas where minorities live in compact communities and can exercise the power of autonomy.<sup>9</sup> Every autonomous area has at least one titular ethnic minority.<sup>10</sup> The autonomous areas, which cover 64 per cent

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Classification Project – Understandings and Reflections on the Nationality Classification Project), 5 (2013) 民族学刊 (*Journal of Ethnology*), p. 38. According to the Six National Census in 2010, only 640000 persons were not recognized, accounting for 0.046% of the whole population. Data of the Sixth National Census (2010), available at <http://www.stats.gov.cn/tjsj/pcsj/rkpc/6rp/indexch.htm>, last visited May 2016; For the non-identified ethnic groups, see Fei Xiaotong, 关于民族识别问题 (Issues Concerning the Identification of the Nationalities in China), 1(1980) 中国社会科学 (*Social Science in China*), pp. 156-162, and Wang Xien, 中国民族识别依据 (The Criteria of the Nationality Identification in China), 5(2010) 民族研究 (*Ethology Study*), pp.1-15.

<sup>4</sup> Xiaohui Wu, 'From Assimilation to Autonomy: Realizing Ethnic Minority Rights in China's National Autonomous Regions', 6 (2014) *Chinese Journal of International Law*, p. 4; Arthur Rosett, 'Legal Structures for Special Treatment of Minorities in the People's Republic of China', 66 (1990) *Notre Dame L.Rev.*, p. 1507; Thomas Heberer, *China and its national minorities: Autonomy or assimilation?* (New York: ME Sharpe, 1989), p. 7; Maria Lundberg and Yong Zhou, 'Hunting-Prohibition in the Hunters' Autonomous Area: Legal Rights of Oroqen People and the Implementation of Regional National Autonomy Law', 16 (2007) *International Journal on Minority and Group Rights*, pp. 351-352.

<sup>5</sup> Barry Sautman, 'Scaling Back Minority Rights: the Debate about China's Ethnic Policies', 46(2010) *Stan.J.Int'l L.*, pp. 88-89.

<sup>6</sup> Preface of the RNA Law.

<sup>7</sup> *Ibid.*

<sup>8</sup> Ge Zheng, 'Economic Development and Cultural Autonomy in Tension, the Tibet Issue in China's Constitutional Framework', 42 (2012) *Hong Kong LJ*, p. 199.

<sup>9</sup> For the designation and delineation of the autonomous areas, see Maria Lundberg and Yong Zhou, 'Regional National Autonomy under Challenges: Law, Practice and Recommendations', 16 (2009) *Int'l J.on Minority & Group Rts.*, pp. 294-299.

<sup>10</sup> To date, 43 out of the existing 155 autonomous areas (accounting for 29 per cent of the total number of the ethnic minorities) have two or three titular ethnic minorities. There is only one autonomous area, which have four or more titular ethnic minorities. It is Shuangjiang Lahu, Wa, Blang and Dai Autonomous County (双江拉祜族佤族布朗族傣族自治县).

of the PRC's territory, are mainly located in the northeast, northwest and southwest parts of the country. They are divided into three administrative levels, namely, 5 Autonomous Regions (analogous to provinces), 30 Autonomous Prefectures and 120 Autonomous Counties. In terms of ethnicity, 44 out of 55 ethnic minorities have their own autonomous area(s), and 71 per cent of the minority population inhabits in autonomous areas where they are titular.<sup>11</sup> Some smaller (lower-level) autonomous areas are incorporated into larger (higher-level) autonomous areas and have different titular ethnic minorities. For example, the Qapqal Xibe Autonomous County (察布查尔锡伯自治县) is within the Yili Kazakh Autonomous Prefecture (伊犁哈萨克自治州) and the latter is within Xinjiang Uyghur Autonomous Region.<sup>12</sup>

In terms of the form of government, there is no difference between the autonomous areas and the rest of the country. Under the 1982 Constitution, the self-government organs in autonomous areas are the people's congress and the people's government (Article 112). From the historical perspective, this represents an attempt to tighten the reign on the right to choose the form of government because the 1954 Constitution – the first constitution in the PRC, allowed the ethnic minorities to determine the forms of self-government (Article 67).

According to the RNA Law, self-government organs enjoy a wide range of autonomy, among which the most salient elements include: more flexible legislative powers, modification of decisions of higher-level State organs, preservation of key posts in self-government organs to titular ethnic minority/minorities, freedom to develop their own languages, religions and cultures, prioritization for the recruitment of ethnic minority cadres and specialized personnel, greater autonomy on local economic development and the management of local finance. The RNA Law also requires the State to formulate preferential policies for autonomous areas for 'assisting ethnic minorities to accelerate economic and cultural development'. These preferential policies are mainly focused on providing financial, material, educational and technical assistance.<sup>13</sup>

Among these preferential policies, the power to make autonomous legislation is deemed the most important and distinctive.<sup>14</sup> It is regarded as one of the two principal

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<sup>11</sup> Information office of the State Council of the PRC, 中国的民族政策和各民族共同繁荣发展白皮书 (The White Paper: China's Ethnic Policy and Common Prosperity and Development of All Ethnic Groups), in 新华网 (Xinhua News), 27 September 2009, available at [http://news.xinhuanet.com/politics/2009-09/27/content\\_12117333.htm](http://news.xinhuanet.com/politics/2009-09/27/content_12117333.htm), last visited May 2016.

<sup>12</sup> Maria Lundberg and Yong Zhou, *supra* note 9, pp. 297-298.

<sup>13</sup> For detailed discussion on preferential policies, see Barry Sautman, 1998, 'Preferential Policies for Ethnic Minorities in China: the Case of Xinjiang', 4 (1998) *Nationalism and Ethnic Politics*, pp. 86-118; Wang Tiezhi, 'Preferential Policies for Ethnic Minority Students in China's College/University Admission' 8(2007) *Asian Ethnicity*, pp. 149-163; Minglang Zhou and Ann Maxwell Hill (ed.), *Affirmative action in China and the US: A Dialogue on Inequality and Minority Education*, (New York: Palgrave Macmillan, 2009), Part One.

<sup>14</sup> Cai Dingjian, 宪法精解 (*Chinese Constitution: An Intensive Reading*) (Beijing: Falv Chubanshe: 2006), p. 21.

methods for the exercise of regional national autonomy (the other is the preservation of key posts in the self-government organs to titular minorities).<sup>15</sup> Under the 1982 Constitution, the RNA Law and the Law on Legislation (LoL) (passed in 2000 and revised in 2015), the autonomous people's congresses are empowered to enact regulations, and the regulations they enact can modify provisions of higher-level laws and regulations. The purpose of this 'modification' power is to suit 'the political, economic and cultural characteristics' of the titular minority.<sup>16</sup>

### 3. The Legal Framework in the Reform Era (1978 – present)

In the reform era, the autonomous legislative power was incorporated into the 1982 Constitution. Generally speaking, Chinese national laws have laid out a range of rules regulating the exercise of autonomous legislative powers. With regard to this, the most important national laws include the 1982 Constitution, the RNA Law and the LoL.<sup>17</sup> Among these national laws, the LoL is the most comprehensive and specific on regulating autonomous legislation. This section will first assess the modification power, which is the key for the autonomous legislation. Then it will in turn discuss the scope, form and procedure of autonomous legislation, after which the legal framework will be assessed under international law.

#### 3.1 The Modification Power

In line with the 1954 Constitution, Article 116 of the 1982 constitution specifically grants one type of legislative power to autonomous areas: the power to enact autonomous regulations (自治条例) and separate regulations (单行条例) in light of the political, economic and cultural characteristics of the local ethnic minority/minorities in autonomous areas. Article 19 of the RNA Law and Article 63 of the LoL repeat the same language as prescribed in the 1982 Constitution. Apart from autonomous legislative powers, the 1982 Constitution and the LoL also recognize the power of autonomous governments to enact ordinary local regulations as ordinary local governments do.<sup>18</sup>

The most distinctive feature of autonomous legislation *vis-à-vis* ordinary local legislation is that it can modify higher-level national laws and regulations.<sup>19</sup> Article 81 of the LoL also specifies that the provisions of autonomous regulations and separate regulations, which modify national laws and administrative regulations, prevail over the

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<sup>15</sup> Yash Ghai and Sophia Woodman, 'Unused powers: Contestation over Autonomy Legislation in the PRC', 82 (2009) *Pacific Affairs*, p. 29.

<sup>16</sup> See Article 116 of the 1982 Constitution and Article 19 of the RNA Law.

<sup>17</sup> The RNA Law was revised in 2001, but the change on autonomous powers was minor. For the revision of RNA Law in 2001, see Guimei Bai, 'International Covenant on Civil and Political Rights and the Chinese Law on the Protection of the Rights of Minority Nationalities', 3 (2004) *The Chinese J. Int'l L.*, pp. 453-454.

<sup>18</sup> Article 100 of the 1982 Constitution and Article 63 of the LoL.

<sup>19</sup> Article 66.2 of the LoL.

latter in concerned autonomous areas. Ordinary local legislation, however, cannot make such modifications.

The exercise of modification powers is under central supervision. As decreed in Articles 4, 5 and 6 of the RNA Law, the self-government organs should ‘exercise autonomous power within the limits as prescribed by the Constitution and national laws, and implement the State’s national laws and policies in light of local conditions’; should ‘uphold the unity of the country and guarantee the observance and implementation of the Constitution and national laws’; and may ‘adopt special policies and flexible measures in light of local conditions to speed up the economic and cultural development of autonomous areas, provided that the principles of the Constitution and national laws are not contravened’. The central supervision as mentioned above has the potential to cause tension between the exercise of autonomy by ethnic minorities and the central control.

### 3.2 The Scope

Under the current legal framework, which matters can be regulated by autonomous legislation is largely unspecified. The national laws merely provide a general rule, which asserts that the legislation should be based on the political, economic and cultural characteristics of the local minority.<sup>20</sup> In this sense, the scope of the legislative autonomy is limited to political, economic and cultural affairs. This rule is too vague to delineate the scope of autonomous legislative powers in practice. It closely resembles the provisions on legislative powers in ordinary localities, which also emphasizes legislating based on the actual local environment. The resemblance in terms of scope between autonomous legislative powers and ordinary local legislative powers makes it difficult to distinguish one from the other. In response to the question on how an autonomous/separate regulation differs from a local regulation; in May 1986, the NPC Legislative Affairs Commission, which was the principal drafting organ in the NPC, stated that while they were clearly different in form, the question of whether the autonomous/separate regulation was a type of local regulation required ‘further research’.<sup>21</sup>

The modification power is the most distinctive feature of autonomous legislation. In the early reform era, the NPCSC tended to regard modification power as a delegated power. In its interpretation on the enactment of modifications and supplement provisions for the Electoral Law delivered in November 1983, the NPCSC Legislative Affairs Commission stated that if a national law does not contain a provision allowing for modification, enactment of modification provisions in autonomous areas is not permitted.<sup>22</sup> Prior to 2000, less than a dozen national laws had authorized the

<sup>20</sup> Article 116 of the 1982 Constitution, Article 19 of the RNA Law and Article 66.1 of the LoL.

<sup>21</sup> Zhou Wei, 民族区域自治法案例实证问题研究 (Case Study on the Interpretation of the Law on Regional National Autonomy), 23 (2002) 西南民族学院学报 (*Journal of Southwest University for Nationalities*), p. 152.

<sup>22</sup> *Ibid.*, p. 153.

modification power on various matters to autonomous areas. Article 35 of the Succession Law passed in 1985, for example, provides: ‘an autonomous people's congress may, in accordance with the principles of this Law and the actual practice of the local ethnic minority/minorities with regard to property inheritance, enact modification provisions or supplementary provisions’.

In fact, during this period, the autonomous legislation was not strictly in line with the NPCSC’s interpretation. Prior to 2000, a number of autonomous areas had passed regulations that modify higher-level national laws without relevant authorization. Some Chinese scholars contended that modification is allowed except when it has been expressly prohibited.<sup>23</sup> This view was accepted by the NPC in 2000 with the passage of the LoL. With four limitations, this law allows autonomous areas to modify higher-level laws without prior authorization. According to Article 66 of the LoL, these limitations are as follows:

1. Provisions of the 1982 Constitution and the RNA Law should not be modified.
2. Where other laws and administrative regulations already make particular provisions for national autonomous areas, no further modification is allowed.
3. Modification should not contravene the basic principles of national laws and administrative regulations.
4. No modification is allowed for the matters under the exclusive legislative powers of the central government.

In summary, both the autonomous legislative power and the scope of modification power are vaguely defined. The current legal framework does not provide a specific list of legislative powers that can be exercised by autonomous areas. The four limitations mentioned above suggest that the exercise of modification power is not guaranteed. Its actual scope hinges on the will of the central government.

### **3.3 Form and Procedure**

#### **3.3.1 The Form**

There are three types of autonomous legislation, namely, the autonomous regulation, the separate regulation, modifying rules and supplementing rules. At this point of time, Chinese authoritative sources have not defined any of them. Nevertheless, Chinese legal scholars have generated some discussions on this issue which can help us better understand these three types of autonomous legislation.

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<sup>23</sup> Yang Xu, 民族自治地方立法选题及变通问题初探 (A Preliminary Analysis on the Subject Matters of Legislation in Autonomous Areas and the Issue of Modification), 3(2002) 满族研究 (*Journal of Manchu*), p. 6.

The term ‘the autonomous regulation’ (自治条例) has not been defined by law or other authoritative sources. Chinese legal scholars usually use the terms ‘comprehensive’ or ‘basic’ to define the autonomous regulation. Kang Yaokun defines it as a comprehensive regulation that adjusts the relationships between nationalities in autonomous areas.<sup>24</sup> According to Cai Dingjian, it is a regulation governing the basic system concerning national regional autonomy in autonomous areas.<sup>25</sup> Chinese law do not specify the status or effect of the autonomous regulation. Scholarly discussion considers it as ‘a kind of regulation having special status in the national legal system’.<sup>26</sup> According to Song Caifa, it serves as the local constitution for the autonomous area.<sup>27</sup> Some scholars asserted that it has higher legal effect than the separate regulation and the latter must be in accordance with it.<sup>28</sup> Given the comprehensive content and special status of an autonomous regulation, an autonomous area can only have one at a time.

The subject of an autonomous regulation, according to Kang Yaokun, is the relationship between nationalities in autonomous area.<sup>29</sup> Wu Zongjin and Ao Junde asserted that it also governs the relationship between the organs of an autonomous area and higher-level organs.<sup>30</sup> In general, the matters governed by an autonomous regulation are comprehensive and cover various aspects of political affairs, economy, and cultural and social lives. Kang Yaokun lists six domains that may be governed by an autonomous regulation. These include principles on exercising autonomy, autonomous organs, autonomous powers, relationships between autonomous organs, nationalities and between lower autonomous organs and higher-level autonomous organs.<sup>31</sup>

Scholarly discussion defines the separate regulation (单行条例) as a regulation governing one particular matter in the autonomous area.<sup>32</sup> This stands in contrast to the autonomous regulation that governs comprehensive matters. There is a superior-subordinate relationship between the autonomous regulation and the separate regulation. The latter should be in accordance with the former. According to Kang Yaokun, the separate regulation aims to materialize provisions of the autonomous regulation, and

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<sup>24</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, 中国民族自治地方立法研究 (*On the Legislation of National Autonomous Area in China*) (Beijing: Minzu Chubanshe: 2007), p. 162.

<sup>25</sup> Cai Dingjian, *supra* note 14, p. 125.

<sup>26</sup> Wu Zongjing and Ao Junde, *supra* note 1, p. 398.

<sup>27</sup> Song Caifa, 民族区域自治法通论 (*The General Theory on the Law on National Regional Autonomy*) (Beijing: Minzu Chubanshe: 2003), p. 140.

<sup>28</sup> Zhang Wenshan, 自治权理论与自治条例研究 (*On the Theory of Autonomous Power and Autonomous Regulation*) (Beijing: Falv Chubanshe: 2005), p. 125; Wu Zongjing and Ao Junde, *supra* note 1, p. 399.

<sup>29</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, *supra* note 24, p.162.

<sup>30</sup> Wu Zongjing and Ao Junde, *supra* note 1, pp. 394-395.

<sup>31</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, *supra* note 24, pp. 167-171. For a case study on the content of the Autonomous Regulation on Yanbian Korean Autonomous Prefecture, see Wu Zongjing and Ao Junde, *supra* note 1, pp. 395-398.

<sup>32</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, *supra* note 24, p. 215.

depending on the actual needs, an autonomous area may enact more than one separate regulation.<sup>33</sup>

In general, the scope of separate regulations is quite extensive. According to Wu Zongjin and Ao Junde, the separate regulations may deal with the following 13 matters: culture, education, population control, drug prohibition, protection of forest and grassland, economic management, environmental protection, administration of electric power facilities, land and city planning, rural development and agriculture, and others.<sup>34</sup> According to Kang Yaokun, apart from the abovementioned 13 matters, separate regulations may also deal with the following 7 matters, protection of private economy, tourist management, mineral resources administration, minority protection, archive management, Muslim food administration, water resource protection, promoting science and technology, and legislative procedure.<sup>35</sup>

The 1982 Constitution, the RNA Law and the LoL do not mention the modifying rules (变通规定) and supplementing rules (补充规定). The autonomous areas may enact these two forms of autonomous legislation based on the authorization of national laws. The modifying rule aims to modify provisions of the national law. Scholarly discussion interprets two forms of modification: partly or entirely modifying national laws for execution, and partly or entirely stopping the implementation of national laws.<sup>36</sup> The supplementing rule aims to supplement provisions of national laws. The purpose of these two forms of autonomous legislation is to guarantee the ‘correct implementation of national laws in autonomous areas’.<sup>37</sup> To date, 14 national laws have made such authorization.<sup>38</sup> The difference between these modifying/supplementing rules and autonomous/separate regulations is that the former needs explicit authorization of national laws; enacting autonomous regulations and separate regulations, however, do not need such delegation.<sup>39</sup>

### 3.3.2 The Procedure

In general, a regulation/rule passed by an autonomous people’s congress needs to be approved by its higher-level PCSC before it goes into effect. There is also an un-codified rule that the regulation/rule drafting is led by the local committees of the Chinese Communist Party (CCP). After completing the drafting, a draft should be approved by

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<sup>33</sup> *Ibid.*, p. 216; also see Wu Zongjing and Ao Junde, *supra* note 1, p. 393.

<sup>34</sup> Wu Zongjing and Ao Junde, *supra* note 1, pp. 399-400.

<sup>35</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, *supra* note 24, pp. 222-225.

<sup>36</sup> Wu Zongjing and Ao Junde, *supra* note 1, pp. 401-402.

<sup>37</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, *supra* note 24, pp. 241-242.

<sup>38</sup> These 12 national laws include the Criminal Law, Election Law, Marriage Law, Heritage Law, Forest Law, General Principles of Civil Law, Civil Procedural Law, Adoption Law, Law on the Protection of Women’s Rights and Interests, Land Administration Law, National Flag Law, Law on the Industrial Enterprise owned by the Whole People, Law on Prevention and Treatment of Infectious Diseases.

<sup>39</sup> Deng Jianmin, 论变通或补充规定与单行条例的区别 (The Difference between Modifying/Supplementing Rules and Separate Regulations), 23(2002) 西安民族学院学报 (*Journal of Xian College for Nationalities*), pp. 111-112.

its higher-level CCP committee before it enters the formal approval procedure of the higher-level people's congress. This section will first examine the procedure of making autonomous and separate regulations. It will then examines the procedure of making modifying rules and supplementing rules followed by the examination of the role of the CCP in the autonomous legislative procedure as a whole.

Under the 1982 Constitution and the RNA Law, only the autonomous people's congress can enact autonomous regulations and separate regulations. Its standing committee is not granted this power. This stands in contrast to the enactment of ordinary local regulations which can be exercised by both the local people's congress and its standing committee.<sup>40</sup> Only allowing the autonomous people's congress to enact autonomous regulation and separate regulation reflects the significance of these two forms of legislation. As Article 17 of the LoL decrees, the legislation governing particularly important matters in an administrative area should be passed by the people's congress of this area.

An autonomous regulation or a separate regulation would not come into effect until the standing committee of the higher-level people's congress approves it. In the case of regional-level autonomous regulations and separate regulations, the approving organ is the NPCSC and for sub-regional/provincial autonomous regulations and separate regulations, it is the standing committee of the provincial/regional people's congress.<sup>41</sup> The regional/provincial autonomous regulations and separate regulations are also required to, within 30 days after the date of promulgation, be submitted to the NPCSC and the State Council for the record.<sup>42</sup> Ordinary local regulations, however, do not require such higher-level approval. The local legislative organ, namely, the people's congress and its standing committee will determine when they go into effect, though they also need to be submitted to the NPCSC for the record.<sup>43</sup>

Compared to the autonomous and separate regulations, the procedure to make modifying rules and supplementing rules is more complicated. Under some national laws, the enacting organ is the autonomous people's congresses. The Marriage Law, for example, only assigns the modification power to autonomous people's congresses (Article 50). Some other laws (for example, the Adoption Law), however, grant this power to both the local people's congress and its standing committee. Some Chinese scholars contend that the enacting organ should be standardized in order to avoid conflicts and reduce legislative costs.<sup>44</sup>

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<sup>40</sup> Article 63 of the LoL.

<sup>41</sup> Article 66 of the LoL.

<sup>42</sup> The approving organs are responsible to submit for record. Regional autonomous regulations and separate regulations do not need to be submitted to the NPCSC for record, because the approving organ is the NPCSC. See Article 89.3 of the LoL.

<sup>43</sup> Article 63 of the LoL.

<sup>44</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, *supra* note 24, pp. 256-257.

Unlike autonomous/separate regulations, the procedures of approval and record for modifying rules and supplementing rules are not unified. It varies in accordance with national laws that make the delegation. For regional-level modifying rules and supplementing rules, some national laws state that they should be submitted to the NPCSC for the record.<sup>45</sup> Under some other national laws, these rules are required to be submitted to the NPCSC for approval.<sup>46</sup> Several other laws do not specify the rule for approval and record (备案).<sup>47</sup> For the rules under regional levels (namely, prefectural and county levels), they are required to be submitted to the standing committee of regional people's congress for approval, and they are also required to be submitted later to the NPCSC for the record.

Some Chinese scholars argue that because of the higher-level approval required, autonomous areas only have 'half' legislative power, meaning that the exercise of autonomous legislative power ultimately resides with the central government.<sup>48</sup> Compared to autonomous areas, ordinary localities have complete legislative power since they do not need to submit local regulations to the central government for approval.<sup>49</sup> The regional-level autonomous legislation has binding force on the central government because the latter approves the autonomous legislation. Some scholars assert that because of the high-approval procedure, autonomous legislation has the binding force not only for autonomous areas concerned but also for the central government; this stands in contrast to ordinary local regulations that only have binding force in the localities.<sup>50</sup>

In practice, higher-level approval for autonomous legislation not only exists in the formal congress's system but also exists in the CCP system. Take the drafting of prefectural autonomous regulation as an example; after a draft is completed by a drafting group composed of chief officials from the prefectural Party committee, the standing committee of the prefectural people's congress and people's government, the prefectural Party committee will submit it to the regional Party committee for approval.<sup>51</sup> After

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<sup>45</sup> These national laws include the Law on the Protection of Women's Rights and Interests (Article 53), the Heritage Law (Article 35) and the Adoption Law (Article 31).

<sup>46</sup> These national laws include the Criminal Law (Article 90), the Civil Procedural Law (Article 17), and the Marriage Law (Article 50).

<sup>47</sup> These national laws include the General Principle for Civil Law (Article 115) and the Law on the Protection of Elder's Rights and Interests (Article 49).

<sup>48</sup> Li Chao, 对民族自治地方自治机关立法权的思考 (Analysis on the Legislative Power of the Self-government Organ in the National Autonomous Areas), 23(2005) 西南民族学院学报 (*Journal of Southwest College for Nationalities*), pp. 138-139; Chen Shaofan, 我国民族自治地方立法若干问题新探 (New Exploration on Several Issues concerning Legislation of National Autonomous Areas in China) 1 (2005), 民族研究 (*Journal of Ethology*), p. 11.

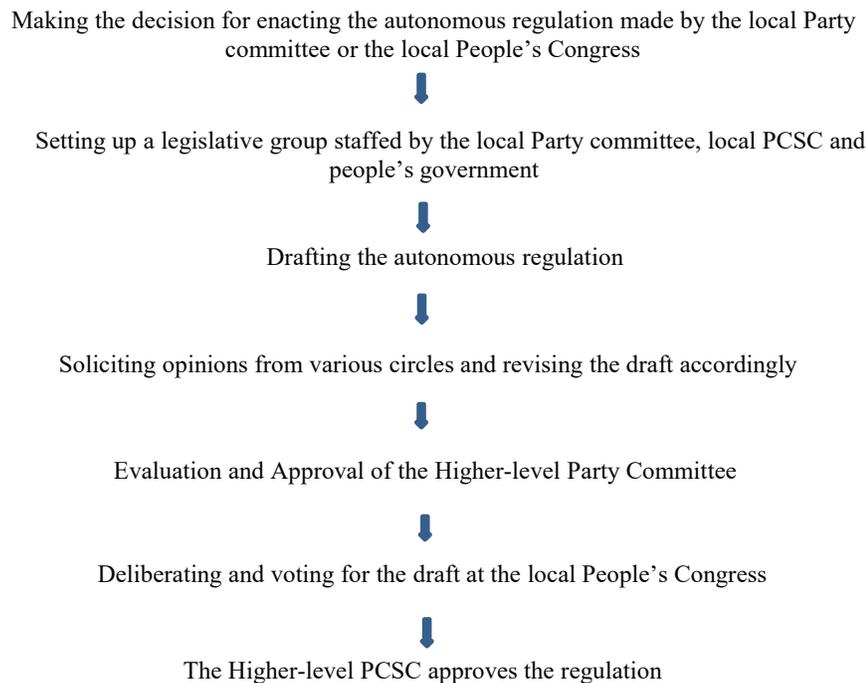
<sup>49</sup> Wu Zongjing and Ao Junde, *supra* note 1, p. 390.

<sup>50</sup> *Ibid.*; Qin Naichang, 论制定自治条例的困难及推进民族立法的新思路——以广西壮族自治区为例 (On the Difficulties in Enacting Autonomous Regulations and New Thoughts on Promoting Minority Legislation – the Case of Guangxi Zhuang Autonomous Region), 3(1995) 广西师范大学学报 (*Journal of Guangxi University for Nationality*), pp. 2-10.

<sup>51</sup> If the draft regulation is drafted for county-level autonomous area, it needs to be submitted to not only the prefectural Party committee but also the regional level Party committee for approval.

receiving the approval, the prefectural party committee will submit the draft to the prefectural people's congress for passage. After passage, it will be submitted to the standing committee of the regional people's congress for approval. It should be noticed that the drafting is an iterative process. The higher-level Party committee and people's congress would usually give their revising opinions, and the local drafting organs would revise the draft accordingly and re-submit the revised draft for approval again. The following chart illustrates the *de facto* process of the enactment of an autonomous regulation, which combines the Party system as well as the congress system.<sup>52</sup>

**Figure 1: *De facto* process of the enactment of an autonomous regulation**



In summary, the autonomous legislation requires higher-level approval in both the formal congress system and the CCP system. As stated by some Chinese scholars, the approval of higher-level organs for autonomous legislation has advantages such as guarantee the unity of the legal system, improving legislative quality and contributing to better implementation.<sup>53</sup> However, its disadvantages are also obvious. First, the criteria for approval are not clear, with some legislation getting stricter treatment than others. According to an interpretation by the NPCSC Legislative Affairs Commission, the

<sup>52</sup> Wu Zongjing and Ao Junde, *supra* note 1, pp. 244-246.

<sup>53</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, *supra* note 24, p. 173-174; Xisheng Zhang, 'Written Language Reform and Regional Autonomy of Dai Nationality in Xishuangbanna', 16(2009) *Int'l J. on Minority & Group Rts*, pp. 423-432.

approving criterion is whether the autonomous legislation is ‘appropriate’ (适当).<sup>54</sup> This criterion is too vague to be applicable. As mentioned above, the autonomous legislation only comes into effect once it has been approved, but the national laws are silent on what should happen if approval is not granted.<sup>55</sup> The adverse effect of higher-level approval rule is that it undermines the local legislative autonomy, which will be discussed at length in the following section.

#### 4. Autonomous Legislative Powers under International law

##### 4.1 Minority Rights Protection under International Law

An array of international covenants and declarations are relevant to the minority rights protection, which include the UN Charter in 1945, the Universal Declaration of Human Rights (UDHR) adopted by the United Nations Conference on International Organization in 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the General Assembly of the United Nations in 1966, and the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minorities Declaration) adopted by the General Assembly of the United Nations in 1992. Among these international authoritative documents, the Minorities Declaration is the most comprehensive on the protection of ethnic minorities’ rights. Although it is not a legally binding instrument, the Minorities Declaration is increasingly recognized as an important point of reference to define and guide the broad international efforts to promote minority rights.<sup>56</sup> The Chinese government has reiterated its commitment to abide by the key international human rights treaties relating to the respect and protection of human rights.<sup>57</sup> China has signed both the ICESCR and the ICCPR in 1997 and 1998 respectively. The former has been ratified by the NPCSC in 2001 and the latter yet to be ratified.

Generally speaking, the rights of ethnic minorities guaranteed by the above international covenants and declarations can be divided into three major categories. The first category is the right of equal protection as provided in Article 27 of the ICCPR and Article 2.1 of the Minorities Declaration.<sup>58</sup> This is the most frequently cited claim in the international law, which includes protection from discrimination as well as rights that are

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<sup>54</sup> See 地方性法规、自治条例和单行条例、规章 (Local Regulation, Autonomous Regulation, Separate Regulation and [Administrative] Rules, 中国人大网 (*The Website of the NPC*), available at [http://www.npc.gov.cn/npc/flsywd/xianfa/2001-08/01/content\\_140409.htm](http://www.npc.gov.cn/npc/flsywd/xianfa/2001-08/01/content_140409.htm), last visited May 2016.

<sup>55</sup> In practice, the approving organs have never refused to approve the autonomous legislation reported to them. The reason lays in the fact that these drafts have been approved in advance by higher-level Party committees.

<sup>56</sup> Xiaohui Wu, *supra* note 4, p. 22.

<sup>57</sup> Edward Wu, Human Rights: China’s Historical Perspectives in Context, 4(2002), *J. of the History of Int’l L.* pp. 351-353.

<sup>58</sup> For similar expression in other international legal source, see Article 15 of the International Covenant on Economic, Social and Cultural Rights, and Article 27.1 of Universal Declaration of Human Rights.

aimed at the preservation of their culture and ethnic identity.<sup>59</sup> As provided by Article 55(c) of the UN Charter, equal protection of human rights serves as a fundamental purpose of the United Nations, and all member States are obliged to promote universal respect for human rights without distinction on the basis of race, sex, language or religion.<sup>60</sup> The second category is the rights of participation and/or self-governance as provided in Article 2.2 of the Minority Declaration and Article 25 of the ICCPR.<sup>61</sup> The third category is that the State is obliged to take affirmative measures for the achievement of the above two categories of rights entitled to ethnic minorities. This is clearly reflected in Article 4 of the Minorities Declaration, which obligates the State to provide five types of affirmative measures.

It should be noted that the current international legal instruments only provide general standards and guidelines for the minority rights protection at the state level. It remains unclear how the acceptable level of autonomy/treatment granted to minority groups regarding the above three categories of rights are defined.<sup>62</sup> A considerable level of discretion is left to the states in deciding what rights and treatments should be granted, which groups should be entitled to these rights and treatments and when these steps should be taken. In addition, a sovereign state is subject to these international legal instruments only to the extent that it has so consented. Another limitation concerning the use of international legal instruments to enforce minority rights protection is the lack of mechanisms for their enforcement. The international community has yet to develop a coherent political and legal approach to deal with ethnic conflicts and claims of ethnic groups.<sup>63</sup> As a consequence, enforcement of human rights obligations entrenched in the international laws have been achieved primarily through various domestic processes by which states have incorporated international laws into their domestic legal orders.<sup>64</sup>

#### **4.2 A Comparison between the International Law and China's Domestic Law in the Legislative Requirement for Minority Rights Protection**

Generally speaking, under the international law, legislative measures are regarded as one of the principal conduits for the achievement of the minority rights protection. Article 2.2 of the ICCPR provides:

<sup>59</sup> Xiaohui Wu, *supra* note 4, pp. 22-23.

<sup>60</sup> The principle of equal right protection can also be found in other international legal sources, such as Article 2 of the Universal Declaration of Human Rights in 1948, Article 2.1 of the ICCPR, Article 2.2 of the International Covenant on Economic, Social and Cultural Rights in 1966, and Article 3.1 and 4.1 of the 1992 Declaration.

<sup>61</sup> Other international authoritative sources referring to the right of participation of minorities include: Article 15 of the ICESCR, Articles 7 and 14 of the UDHR, Article 8 and 14 of the Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979 by the UN General Assembly.

<sup>62</sup> Reuter Tina Kempin. 'Dealing with Claims of Ethnic Minorities in International Law', 24 (2008) *Conn. J. Int'l L.*, p. 236.

<sup>63</sup> *Ibid.*

<sup>64</sup> Koh Harold Hongju. 'How is International Human Rights Law Enforced', 74 (1998) *Indiana L. J.* p. 1397.

‘Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant ‘.

The ICESCR particularly stresses the legislative measure as the most important means for the realization of the rights guaranteed by the Covenant. Article 2.2 provides:

‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

In line with the above two declarations, the Minorities Declaration also emphasizes the importance of the legislative measure for the protection of minority rights protection. Article 1.2 decrees: ‘States shall adopt appropriate legislative and other measures to achieve those ends’. Most noticeable is Article 2.3 which recognizes the right of minorities, who live in compact communities, to take measures which may alter national legislation:

‘Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation’.

By comparing the international law with China’s domestic law with regard to the legislative requirement on minority rights protection, it can be concluded that the latter is generally in line with the former although there many specific points relating to the minority rights’ protection are not clear.<sup>65</sup> The three categories of minority rights under the international law as mentioned in the previous section are generally covered by Chinese laws.<sup>66</sup> The details are provided below. The first category – the right of equal protection, is reflected in Article 4 of the 1982 Constitution, which states that all nationalities in China are equal. The second category – the right of participation and/or self-government, is reflected in Chapter 3.6 of the 1982 Constitution and Chapter 2 to 5 of the RNA Law, which promise self-government and lays out a wide range of autonomy, including the preservation of key posts in self-government organs. The third category – the State’s obligation to take affirmative measures, is reflected in Article 122 of the 1982 Constitution and Chapter 6 of the RNA Law, which require the State to formulate preferential policies in finance, material provision, education and technology for autonomous areas to ‘assisting ethnic minorities to accelerate economic and cultural development’.

Chinese laws on the autonomous legislative powers in general meet the legislative requirement under the international law. First, as mentioned above, under Chinese laws,

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<sup>65</sup> Randall Peerenboom, ‘Assessing Human Rights in China: why the Double Standard?’, 38 (2005) *Cornell International Law Journal*, pp. 134-135.

<sup>66</sup> Bai Guimei, *supra* note 17, pp. 441 and 468.

the autonomous legislative powers enjoy significant status – it is deemed as one of the two principal rights (the other is the preservation of key posts in self-government organs).<sup>67</sup> Second, the scope of legislative powers is extensive, covering a wide range of matters. This enables autonomous areas to use legislation as a conduit for the exercise of minority rights and autonomy. Third, the LoL grants modification powers and this is in line with the requirement in Article 2.3 of the Minorities Declaration. This conclusion echoes Zheng Ge’s general argument in his study on the cultural protection of Tibet, which states that despite its uniqueness in name and formal provisions, the system of Regional National Autonomy reflect the common integrationist and accommodationist practice around the world.<sup>68</sup>

In summary, China’s legal framework on the minority rights protection, and in particular, those concerning legislative requirements on minority rights protection, is generally in line with standards under international law. It should be pointed out that the above discussion only evaluates the normative aspect of the legislative autonomy in autonomous areas. Whether ethnic minorities in China can enjoy genuine legislative autonomy depends on the autonomous legislation in practice, which will be discussed in depth in the following sections.

## **5. No Regional-level Autonomous Regulation has been passed**

### **5.1 The Drafting Effort of Four Autonomous Regions**

As discussed earlier, the autonomous regulation functions as a ‘sub-constitution’ or ‘basic law’ for an autonomous area. The regional-level autonomous regulation is particularly important because it lays out basic framework for the exercise of autonomy in the whole region. In theory, as long as an autonomous area exists, it should have an autonomous regulation. Surprisingly, although the overwhelming majority of autonomous areas under the regional level (namely, autonomous prefectures and autonomous counties) have enacted their autonomous regulations, none of the five regional autonomous areas have passed them.<sup>69</sup>

The absence of regional autonomous regulations does not mean that these autonomous regions do not want to have them. In contrast, except for the Xinjiang Uygur Autonomous Region, the other four regions were remarkably active in attempting to enact their autonomous regulations. Among the four autonomous regions, the Guangxi Zhuang Autonomous Region was the first and most active one to engage in the drafting work. In March 1958, the Guangxi People’s Congress passed its first draft of the Autonomous Regulation. It also made a resolution, requiring that after conducting investigation and revision by soliciting opinions from various circles, the Guangxi

<sup>67</sup> Yash Ghai and Sophia Woodman, *supra* note 15, p. 29.

<sup>68</sup> Ge Zheng, *supra* note 8, pp. 199-200.

<sup>69</sup> To date, 135 out of 150 autonomous areas under regional/provincial level have passed their autonomous regulations.

People's Committee, which was the Guangxi government at that time, should submit the draft to the later session of the people's congress for passage and then to the NPCSC for approval.<sup>70</sup> However, due to the interruption of political campaigns since 1957, in particular, the Anti-rightist Movement (1957-1959) and the Cultural Revolution (1966-1976), the drafting was suspended until the early 1980s.<sup>71</sup> Guangxi re-started the drafting in 1980. After three years' arduous drafting, the Standing Committee of the Guangxi Provincial People's Congress formulated the 13<sup>th</sup> draft in 1987, and in the same year the Guangxi Party Committee submitted the draft to the Party Central Committee for approval. The Party Central Committee circulated it to the NPC Ethnic Affairs Committee and 'the relevant departments of the State Council' for soliciting opinions.<sup>72</sup> However, the latter's disapproving opinions blocked the drafting from going any further. After this failure, Guangxi organized people to conduct drafting again. Under the guidance of the NPC Minority Affairs Committee, Guangxi completed 18<sup>th</sup> draft in 1991 and this was submitted to the center for approval. This draft had the same fate as its 1987 counterpart and was rejected during the stage of soliciting opinions of the State Council's departments.<sup>73</sup> In 1993, Guangxi formulated the 19<sup>th</sup> draft but did not submit to the central government. After this, the drafting work was by and large suspended.

It is noticeable that among the four autonomous regions that conducted the drafting of the autonomous regulation, only Guangxi submitted the draft to the central government for approval. The Inner Mongolia Autonomous Region initiated the drafting in 1980. When the 17<sup>th</sup> draft was completed in 1987, the drafting group sent people to 'report' it to the Ethnic Affairs Committee and the Legislative Affairs Committee of the NPC, and relevant departments of the State Council. After completing the 20<sup>th</sup> draft in 1993, the drafting work was suspended.<sup>74</sup> In the Ningxia Hui Autonomous Region, drafting was initiated in 1980. In 1994, the 15<sup>th</sup> draft was completed and submitted to the Ningxia regional Party committee. Consistent with the revision of the RNA Law in 2001, Ningxia formulated the 16<sup>th</sup> draft and again submitted to the Ningxia regional Party Committee. In 2004 and 2008, drafting the regional autonomous regulation was introduced into the five-year legislative plan of the Ninth and Tenth sessions of the regional people's congress respectively. To date, Ningxia has not submitted its draft to

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<sup>70</sup> Ethnic Affairs Commission of Guangxi Zhuang Autonomous Region Ethnic Affairs Commission of Guangxi Zhuang Autonomous Region, 广西民族区域自治文件资料汇编 (*Selected Documents and other Materials on Regional National Autonomy in Guangxi*) (Nanning: Guangxi Zhuangzu Zizhiq Minzushiwu Weiyuanhui, 1988), p. 254.

<sup>71</sup> Zhang Wenshan, 通往自治的桥梁—自治条例与单行条例研究 (*The Bridge for Autonomy, Study on Autonomous Regulation and Separate Regulation*) (Beijing: Zhongyang Minzu Daxue Chubanshe, 2009), pp. 91-92.

<sup>72</sup> Qin Naichang, *supra* note 50, p. 3.

<sup>73</sup> Zhang Wenshan, *supra* note 71, pp. 92-96.

<sup>74</sup> Bai Yongli, 自治区自治条例制定研究—以内蒙古自治区为例 (*Study on the Enactment of Regional Autonomous Regulation, the Case of Inner Mongolia Autonomous Region*), 6 (2010) 内蒙古师范大学学报 (*Journal for Inner Mongolia Normal University*), p. 52.

the central government for approval.<sup>75</sup> By 2001, the Tibet Autonomous Region had completed its 16<sup>th</sup> draft, and since then the drafting work was suspended.<sup>76</sup> Unlike the above mentioned four autonomous regions, Xinjiang Uygur Autonomous Region has not yet initiated the drafting.

The State Council perceives the absence of regional autonomous regulations as an abnormal phenomenon and asserts to support their enactment. The Undertakings of Ethnic Nationality of the 11<sup>th</sup> Five-year Plan (2007-2012), which were approved by the State Council, asserted to push forward the enactment of regional autonomous regulations.<sup>77</sup> The State Council, in the 12<sup>th</sup> Five-year Plan (2012-2017), also asserts to enact departmental directives and other normative documents to implement the RNA Law.<sup>78</sup> However, these assertions seem to only remain on paper. To date, the drafting work in the above mentioned four autonomous regions has not been re-started since the mid-1990s and the central government's directives and other normative documents aiming to facilitate or promote the drafting is scarce.

## 5.2 The Disapproving Opinions of the State Council's Departments for Guangxi's Draft

It can be observed that although autonomous regions showed their considerable willingness to enact autonomous regulations, the drafting has stagnated. Guangxi went one step further, submitting its drafts of the Autonomous Regulations to the CCP Central Committee for approval twice, but its submissions were rejected.<sup>79</sup> As reflected in the Guangxi case, the principal obstacle for blocking the legislative process is the disapproval by the central government. Thus, the evaluation of these disapproving opinions can provide insight into the difficulties of enacting regional-level autonomous regulation.

As mentioned before, after receiving the 17<sup>th</sup> Guangxi draft in 1987, the CCP Central Committee circulated the draft to the NPC Ethnic Affairs Committee and relevant ministries and commissions of the State Council for 'soliciting opinions'. The

<sup>75</sup> Pan Hongxiang, 自治区自治条例出台难的原因分析及对策 (The Analysis on the Reason for the Difficulty of Enacting Regional Autonomous Regulation), 3 (2009) 北方民族大学学报 (*Journal of Northern University for Nationalities*), pp. 55-56.

<sup>76</sup> *Ibid.*

<sup>77</sup> See the State Council General Office, 少数民族事业 '十一五规划' (The Undertakings of the Ethnic Minorities of the 11<sup>th</sup> Five-year Plan) in 中国政府网 (*The Website of the Central People's Government of the PRC*), 8 March 2007, available at [http://www.gov.cn/zwgk/2007-03/08/content\\_545955.htm](http://www.gov.cn/zwgk/2007-03/08/content_545955.htm), last visited May 2016.

<sup>78</sup> See the State Council General Office, 少数民族事业 '十二五规划' (The Undertakings of the Ethnic Minorities of the 12<sup>th</sup> Five-year Plan) in 中国政府网 (*The Website of the Central People's Government of the PRC*), available at [http://www.gov.cn/zwgk/2012-07/20/content\\_2187830.htm](http://www.gov.cn/zwgk/2012-07/20/content_2187830.htm), last visited May 2016.

<sup>79</sup> As mentioned in preceding pages, if the CCP central committee approves the draft, the draft will be sent back to the regional people's congress to go through the formal legislative process. More specifically, after approved by the CCP Central Committee, it will be deliberated and passed by the regional people's congress and finally will go into effect after being approved by the NPCSC.

latter put forward two disapproving opinions: first, the provisions of the draft was 'relatively general and did not deeply reflect the characteristics of Guangxi'; Second, there was a relatively large difference in the opinions of the State Council's ministries and the requirements of Guangxi which reflected the differing perceptions of the spirit of the RNA Law.<sup>80</sup> According to Qin Naichang, a scholar in ethnology from Guangxi, the key lay on the divergence towards 'the affair of decentralizing powers and ceding interests'.<sup>81</sup>

For the 18<sup>th</sup> draft submitted in 1991, State Council departments provided more detailed opinions. A few ministries and committees 'had no opinion', 'no opinion in general' or 'basically agree'. Each of the other ministries and committees put forward objections to 6 and up to 13 provisions of the draft. The objections were mainly concerned with the decentralization of economic powers and interests. Some completely rejected the stipulations of the draft that allowed the Guangxi to carry out special policies, stressing that policies must be in accordance with unified national regulations. Some rejected the provisions that required the central government to make preferential arrangement for Guangxi, stating that it was difficult to formulate preferential policies to a particular autonomous region. Others asserted that the provisions of the draft contravened their departmental policies, implying that their departmental rules prevail over autonomous regulations.<sup>82</sup> One even stated: 'the price Guangxi charges is too high'.<sup>83</sup>

It is noticeable that the procedure of soliciting the opinions of the State Council's departments is not codified. The solicitation is understandable given the fact that the various levels of daily coordinative administrative work between the center and autonomous regions are managed by these departments. It is foreseeable that these drafts were not applicable in practice if relevant departments did not agree with the contents in advance. Some Chinese scholars have asserted that because of this procedure, the *de facto* approving power rests on some State Council's departments, in particularly, those in charge of economic management.<sup>84</sup>

### 5.3 The Reasons for the Absence of Regional Autonomous Regulation

#### *The Higher-level Approval Procedure*

As already mentioned above, the first and foremost reason for the absence of regional autonomous regulations is that the central government did not approve the Guangxi drafts and the key is the disapproving opinions of the State Council's departments. From

<sup>80</sup> Qin Naichang, *supra* note 50, p. 7.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, p. 3.

<sup>83</sup> Wei Yimin, 对民族自治权与上级国家机关领导帮助的关系的再认识 (Reevaluating the relationship between the national autonomy and the assistance of higher State organs), 4 (1996) 广西政法管理干部学院学报 (*Journal of Guangxi Administrative Cadre Institute of Politics and Law*), p. 3.

<sup>84</sup> Zhang Wenshan, *supra* note 71, p. 110.

the perspective of the autonomous regions, the State Council's departments hold an indifferent attitude towards the exercise of regional autonomy and are reluctant to concede their powers and interests to them<sup>85</sup>; however, from the perspective of these State Council's departments, the price that the autonomous regions charges is too high (要价太高). Take the 19<sup>th</sup> draft as an example. Article 59 required the central government to provide 5 per cent of the 'mobilization fund' and 5 per cent of the 'reserve fund' based on the budget of the Guangxi Autonomous Region. Article 60 required the central government to provide specific subsidies for sudden changes in the national financial system, the adjustment of the State policies and cases of major natural disasters. Article 66 required the central government to return the profits of the enterprises directly under the central government to the Regional Government for appropriate use.<sup>86</sup> The central government was reluctant to accept these financial arrangements proposed by Guangxi because these policies could affect national unified management and increase additional financial burden of the central government. The higher-level approval procedure echoes the argument of Pitman Potter, which states that the legal system reveals the continuing commitment of the Chinese government to the primacy of state power at the expense of regional autonomy.<sup>87</sup>

By analyzing the content of the draft, we can go one step further to see that the fundamental reason lies on the difficulty of re-adjusting the powers and interests between the central government and autonomous regions. Compared to the arduous process of enacting regional autonomous regulations, the enacting of sub-regional autonomous regulations proved to be much smoother. The reason, as explained by Song Caifa, a scholar in ethnology from Beijing, lies in the fact that it is easier to adjust the interests between two levels of local autonomous governments.<sup>88</sup>

### *The Economic System in Transition*

Autonomous areas are one of the least developed areas in China. One of the main goals of the regional autonomous regulation is to delineate economic autonomy and guarantee preferential treatment from the central government. However, since China's reform and opening up in the late 1970s, the Chinese economic system has been under rapid transition. The change has been accelerated since the early 1990s when China began to turn to a market economy. Thereafter, the central government has formulated a wide range of reform measures concerning various aspects of the economic system, including finance, foreign trade, banking and investment. The changing economic system affects

<sup>85</sup> Qin Naichang, *supra* note 50, p. 7.

<sup>86</sup> Other provisions that prescribed the central government's responsibility to the autonomous region include Article 48, 49, 50, 68, 71, 75, 76, 77 and 78; For the text of the 19th Guangxi draft, see Zhang Wenshan, *supra* 71, pp. 223-241.

<sup>87</sup> Pitman B. Potter, 'the Chinese Legal System: Continuing Commitment to the Primacy of State Power', 159(1999) *The China Quarterly*, pp. 673-683.

<sup>88</sup> Song Caifa, 自治区自治条例研究 (Study on Regional Autonomous Regulations), 1(2007) 黑龙江民族丛刊 (*Heilongjiang National Series*), p. 63.

the enactment of regional legislation mainly from two aspects – it, on the one hand, has led to a difficulty in delineating the economic autonomy and preferential policies for autonomous regions, on the other hand, it stands in contrast to the stability requirement of law.<sup>89</sup> Qin Naichang proposed a similar view from the perspective of the transformation of the economic system. He asserted that, consistent with the establishment of the market economy, the previous special treatment under the planned economy given to the autonomous areas has been either diminished or was offset by preferential policies given to the eastern coastal areas; and to date the new policies that can replace old special treatment and accords with the principles of market economy have yet to be found.<sup>90</sup>

#### *The Lack of State Council's Implementing Regulations and Rules*

The language used in the RNA Law is too general to be implemented.<sup>91</sup> Thus, the State Council and its departments are expected to formulate regulations, directives and other normative documents in order to crystallize autonomous powers enshrined in the RNA Law. The RNA Law, for example, states that while exploiting natural resources, the State should give consideration to the interests of autonomous areas. From a legal perspective, it implies that while formulating relevant nationwide rules on resources exploitation, the State Council should strike out rules specific to autonomous areas, which differ from the nationally applied rules. It is predictable that the enactment of regional autonomous regulations would be easier if relevant State Council's implementing regulations and rules were in place. The authoritative source shows that the State Council is well aware of the importance of its implementing regulations and rules for the enactment of regional autonomous regulations. The 12<sup>th</sup> Five-year Plan (2012-2017) of the Undertaking of Ethnic Nationality requires that the State Council and its departments should enact administrative regulations, rules and other normative documents to implement the RNA Law, and to support the autonomous areas to enact autonomous regulations.<sup>92</sup> However, these central government's rules are scarce, if not non-existent.

#### *The Revision of the Higher-level Law*

The revision of the RNA Law had an adverse impact for the drafting work of the regional-level autonomous regulations.<sup>93</sup> As mentioned earlier, the RNA Law serves as a basic law for ethnic affairs in China and the local autonomous legislation should be in accordance with the provisions of the RNA Law. Although several pieces of legislation had been drafted, autonomous regions suspended their drafting work after the initiation

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<sup>89</sup> *Ibid.*, p. 63.

<sup>90</sup> Qin Naichang, *supra* note 50, p.4.

<sup>91</sup> According to Qin, these general terms appear 20 times in the text of the RNA Law. For example, in terms of the State's assistance for autonomous areas, the RNA Law use very general terms such as 'striving to help', 'may offer assistance', 'may offer appropriate consideration', 'should properly set lower standards', see Qin Naichang, *supra* note 50, p.4.

<sup>92</sup> The General Office of the State Council, *supra* note 79.

<sup>93</sup> Bai Yongli, *supra* note 74, p. 63.

of the revising work of the RNA Law in 1993. They had hoped to re-start this process after the passage of the revised RNA Law, so that their new drafts could be in accordance with revised RNA Law. However, the RNA Law was not passed until 2001, seven years after the initiation of the revising work. During this period, the drafting of regional autonomous regulations was suspended. The drafting was also affected by the belated passage of the State Council's implementing regulation on the RNA Law.<sup>94</sup> The State Council began to draft this regulation just after the passage of the RNA Law in 1984. However, it did not pass the administrative regulation until 2005, 21 years after its drafting.

## 6. Legislative Practice

### 6.1 Sub-regional Autonomous Regulations

In contrast to the situation at the regional level, most sub-regional/provincial autonomous areas have enacted their autonomous regulations. More specifically, 25 out of 30 autonomous prefectures have enacted their autonomous regulations. All of these were passed within 6 years after the passage of the RNA Law in 1984. At county level, 110 out of 120 autonomous counties have enacted their autonomous regulations, all of which were adopted before 2001. After the revision of the RNA Law in 2001, most of the above 135 autonomous areas revised their pre-existing autonomous regulations accordingly.<sup>95</sup> At this point in time, there are still 5 autonomous prefectures and 10 autonomous counties that have not passed their autonomous regulations. The five autonomous prefectures that have not passed their autonomous regulations are all located in the Xinjiang Uyghur Autonomous Region.

In general, the contents of the existing autonomous regulations have two sources – the RNA Law and two autonomous regulations that were adopted earlier. Copying occurred in nearly all main subject matters including the autonomous organs, people's courts, people's prosecutors, economic construction, financial management, education and science, and culture. As Yash Ghai points out, these autonomous regulations are generally a collection of provisions from the RNA Law combined with relevant national policies.<sup>96</sup> Moreover, their structure and contents are alike because they are modelled on two earlier autonomous regulations - the Autonomous Regulation for the Yanbian Korean Autonomous Prefecture and the Xinhuang Dong Autonomous County, which were enacted in 1985 and 1986. According to a provincial legislative official, these regulations are rather general and do not reflect the characteristics of local ethnic

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<sup>94</sup> The title of this administrative regulation is the Implementing Rules on the RNA Law.

<sup>95</sup> Compared with the provisions of the 1984 RNA Law, the new RNA Law revised 31 provisions, deleted two provisions and added 9 provisions. The thrust of the amendment is to make the law accord with the market economy, which the Chinese government adopted in the early 1990s.

<sup>96</sup> Yash Ghai and Sophia Woodman, *supra* note 15, p. 42.

minorities and lack the necessary applicability for these communities.<sup>97</sup> For illustration, the structure of the Yanbian regulation is provided below:

Chapter One: General Provisions

Chapter Two: The Self-government Organs

Chapter Three: People's Court and People's Procuratorate

Chapter Four: Economic Construction and Financial Management

Chapter Five: The Undertakings of Education, Science and Technology, Culture, Public Health and Physical Culture

Chapter Six: The National Relationship

Chapter Seven: Supplementary Provisions

While modelled on the NRA Law and earlier autonomous regulations, some autonomous regulations, to certain degree, revealed the exercise of autonomy. In terms of representation of ethnic minorities in the local government, many autonomous areas not only repeated the provisions of the RNA Law, which required the chief executive to be a titular ethnic minority, but also reserve a greater number of governmental posts for titular nationalities and other ethnic minorities. The Autonomous Regulation for the Yanbian Korean Prefecture passed in 1985, for example, decrees that the Chairman of the Standing Committee of the Prefectural People's Congress 'should' be a Korean, and Koreans 'may' occupy more than half of the posts in the Committee and of the posts comprising the Prefectural People's Government (including vice mayors, the chief secretary, directors of bureaus).<sup>98</sup> The head or deputy heads of the Prefectural Intermediate People's Court (the highest court in the area) and the Prefectural Procuratorate 'should' be Koreans.<sup>99</sup> Another example is the Autonomous Regulation for Dorbod Mongol Autonomous County, which states that each of the nationalities that inhabit the county should be assigned with appropriate posts and Mongols may occupy more than 30 per cent of the posts in the People's Congress of the County and its Standing Committee.<sup>100</sup> This regulation also states that leading officials in the People's

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<sup>97</sup> Chen Hongbo and Wang Guangping, 民族立法工作中存在的主要问题、成因及对策 (The Main Problems, Reasons and Resolutions for the Current National Legislative Work), 2(2001) 民族研究 (*Ethology Study*), p. 4.

<sup>98</sup> The Yanbian Korean Prefecture, located in the east of Jilin province, has 798 000 Koreans, making up 36.5 per cent of the local population, see [www.yanbian.gov.cn/tpl/txt/2012031611081743.jsp?infoId=16840](http://www.yanbian.gov.cn/tpl/txt/2012031611081743.jsp?infoId=16840), last visited May 2016.

<sup>99</sup> See Article 12, 16 and 25 of the Autonomous Regulation for Yanbian Korean Prefecture

<sup>100</sup> Located in Heilongjiang Province, the Dorbod Mongol Autonomous County has 45500 Mongols, making up 18.2 per cent of local population, see the local government website, available at [www.drbt.gov.cn/qyqk/zrdl/index.html](http://www.drbt.gov.cn/qyqk/zrdl/index.html), last visited May 2016.

Government of the County and the head or deputy heads of the People's Court of the County and the Procuratorate at the same level 'should' include Mongols.<sup>101</sup>

Some autonomous regulations go further to detail the autonomous rights in the fields of language, education and culture, which were incorporated in higher-level laws. The Yanbian Autonomous Regulation, for example, accentuates the use of Korean language and the education for Korean people. This regulation requires that while performing governmental duties, the local autonomous organs should use both the Korean and Chinese languages and the former should be the principal language used. The local autonomous organs are responsible for setting up a working organ for studying and standardizing the Korean language, to promote the publications in Korean and to encourage the learning of the Korean language in local primary and middle Han schools.<sup>102</sup> As stated in the regulation, the education of Korean people has 'strategic status and should be prioritized'.<sup>103</sup>

Economic construction is the main content in the existing autonomous regulations. Take the Autonomous Regulation for Qianan Buyer and Miao Autonomous Prefecture as an example. A total of 22 provisions of this regulation were related to economic construction and this makes up one third of its total provisions. According to Zhang Wenshan, this reflects the strong desire of autonomous areas for economic development.<sup>104</sup> These economic provisions largely copy the provisions in the higher-level laws and barely reflect the local features. Nevertheless, the Autonomous Regulation for Evenk Autonomous Banner goes beyond this.<sup>105</sup> It accentuates the protection of local herdsmen's interests and rights on managing the grassland, which covers 68.9 per cent of the territory of the banner.<sup>106</sup> According to this regulation, the boundary between grassland and the forest can only be changed by the decision of the People's Congress of the Banner. The users of the grassland may, with the approval of the People's Government of the Banner, make plans to remove forests that grow naturally in the grassland and cultivate forests for conserving grassland; the ownership of forests that grow naturally in the grassland belong to the users of grassland.<sup>107</sup>

One common shortcoming in the existing autonomous regulations is the lack of rules on the selection of chief executives in autonomous areas where more than one ethnic minority is designated. With respect to this issue, relevant autonomous regulations only vaguely decree that both or all (in case there are three titular groups) groups are qualified. However, in practice it has been revealed that in most cases the post is taken by the titular group with the largest population within the community. In the Haixi Mongol

<sup>101</sup> Article 8, 9, 12 and 22 of the Autonomous Regulation for Dorbod Mongol Autonomous County.

<sup>102</sup> See Article 18, 19, 53 and 55 of the Autonomous Regulation for Yanbian Korean Prefecture

<sup>103</sup> See Article 53 of the Autonomous Regulation for Yanbian Korean Prefecture.

<sup>104</sup> Zhang Wenshan, *supra* note 71, p. 177.

<sup>105</sup> The Evenk Autonomous Banner (which is equal to an autonomous county) is located in the northeast of the Inner Mongolia Autonomous Region.

<sup>106</sup> The Evenk Autonomous Banner has a territory of 19111 km<sup>2</sup>. It is rich in grassland and forest.

<sup>107</sup> See Article 25 of the Autonomous Regulation for Evenk Autonomous Banner.

and Tibetan Autonomous Prefecture, its chief executive is always a Mongolian since its establishment in 1953; the chief executive in Ngawa Tibetan and Qiang Autonomous Prefecture is always a Tibetan, and the people from the other ethnic group – Qiang, never get this post. Some scholars assert that this practice contravenes the principle of national equality.<sup>108</sup>

Some tensions have materialized between the existing autonomous regulations and the RNA Law. For example, the Autonomous Regulation for Yanbian Korean Autonomous Prefecture decrees that the Chairmanship of the Standing Committee of the Prefectural People's Congress can only be taken by the titular ethnic nationality, namely Korean. A few autonomous areas followed the Yanbian model, incorporating the same provisions in their autonomous regulations. However, these provisions are not in line with Article 36.3 of the RNA Law, which states that the people from the titular minority should at least hold one position between the chairman and vice chairmen. In its reply to the local governments in June 1992, the NPCSC Legislative Affairs Commission stated that the Yanbian model is incompatible with the RNA Law and therefore local autonomous governments should not follow it.<sup>109</sup> After the issuing of this authoritative reply, no autonomous area follows the Yanbian model. Nevertheless, the Yanbian Autonomous Regulation retains relevant provisions for the chairmanship in the local people's congress even after its revision in 2001.

The tension between autonomous regulations and the RNA Law is also reflected on whether the organs of ordinary Han-dominated counties, which are within the territory of autonomous prefectures, should enjoy autonomy. Some autonomous areas tend to regard them as self-government organs, and therefore preserve key posts to people from titular ethnic minority. The Autonomous Regulation for Shien Tujia Yi Autonomous Prefecture, for example, states that the chief executive of counties (which includes a few ordinary counties) under the jurisdiction of the prefecture should be members of Tujia group or Miao group.<sup>110</sup> In contrast to these autonomous regulations, the NPCSC Legislative Affairs Commission stated that the organs of these counties are ordinary state organs rather than self-government organs, and therefore cannot exercise relevant autonomy.<sup>111</sup>

The key reason for the tension is that some autonomous areas endeavored to expand their autonomy using autonomous regulations. In the face of this tension, the NPCSC tends to disapprove these local legislative initiatives, labelling them as incompatible with the RNA Law.

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<sup>108</sup> Zhang Wenshan, *supra* note 71, pp. 418-420.

<sup>109</sup> Qiao Xiaoyang and Zhang Chunsheng, *选举法和地方组织法释义和解答 (Interpretation and Explanation on the Election Law and the Organic Law of Local People's Congress and Local People's Government)* (Beijing: Falv Chubanshe: 1997), p. 276.

<sup>110</sup> Similar provisions can be seen in Autonomous Regulation for Chuxiong Yi Autonomous Prefecture, Autonomous Regulation for Shien Tujia Yi Autonomous Prefecture, Autonomous Regulation for Qianan Buyi Miao Autonomous Prefecture, and Autonomous Regulation for Qianxinan Buyi Miao Autonomous Prefecture.

<sup>111</sup> Qiao Xiaoyang and Zhang Chunsheng, *supra* note 113, p. 273.

## 6.2 Separate Regulations

Up to now, none of the five autonomous regions have passed any separate regulations although efforts were made to formulate some drafts.<sup>112</sup> Autonomous prefectures are the most active in enacting separate regulations among the three levels of autonomous areas. Among the pre-existing 489 separate regulations, 233 were enacted by autonomous prefectures and this covered 28 out of the 30 prefectures.<sup>113</sup> On average, each autonomous prefecture has enacted 8.3 separate regulations. The number of separate regulations enacted by an autonomous prefecture vary significantly from 27 (the Yanbian Korean Autonomous Prefecture) to 1 (Changji Hui Autonomous Prefecture and Bortala Mongol Autonomous Prefecture). The remaining two autonomous prefectures that have not enacted any separate regulations are the Diqing Zang Autonomous Prefecture (in Yunnan Province) and the Kizilsu Kirgiz Autonomous Prefecture (in Xinjiang Autonomous Region). By 2008, the 120 autonomous counties had enacted 256 separate regulations, averaging 2.1 per county.<sup>114</sup> Changyang Tujia Autonomous County in Hubei province was the most active, enacting 11 separate regulations; however, there are 21 autonomous counties that had only enacted one.

The subject matters regulated by pre-existing separate regulations are fairly extensive. Zhang Wenshan categorizes the matters into ten areas with 39 subject matters.<sup>115</sup> According to Kang Yaohui, the contents can be categorized into 20 areas: culture, education, population control, the development of private economy, tourism, mineral resources, protection of the interests of special groups, archive, Muslim food, prohibition of opium, economic management, agriculture, protection of forest and grassland, ecological environment protection, water resources protection, water conservation and hydroelectric projects, land and city planning, promotion of science and technology, procedure for autonomous legislation, and others.<sup>116</sup>

By looking into the content of pre-existing separate regulations, it can be observed that it usually copies higher-level laws and regulations. Many, if not most, of these regulations have failed to exercise modification power, which makes it analogous to ordinary local regulations. Take the Regulation of Water Resource Management for Liangshan Yi Autonomous Prefecture as an example. This regulation, which was adopted in May 2008, mainly repeats the provisions of three higher-level laws and regulations, namely, the Water Law (promulgated by the NPCSC in 1988), the Law for the

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<sup>112</sup> For example, in October 2000, after nearly two-years drafting, the Ethnic Minority Commission of the PCSC in Guangxi province completed the Draft of Separate Regulation for Resettling Relocated People for Water Conservancy and Hydroelectric Projects in Guangxi Zhuang Autonomous Region. However, this draft did not enter the formal congress system for passage. As pointed out by Zhang Wenshan, the main drafter of this draft, the reason is basically the same as that of the absence of regional autonomous regulation, see Zhang Wenshan, *supra* note 71, p. 459.

<sup>113</sup> *Ibid.*, p. 508.

<sup>114</sup> *Ibid.*, p. 560.

<sup>115</sup> *Ibid.*, pp. 561-562.

<sup>116</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, *supra* note 24, pp. 222-225.

Prevention and Control of Water Pollution (promulgated by the NPCSC in 1984), and the Implementation measures of Sichuan Province for the Water Law (promulgated by Sichuan Provincial PCSC of Sichuan in 1992).<sup>117</sup> This separate regulation does not modify these three higher-level laws and regulations. The reason for the analogy between separate regulations and ordinary local legislations is that prior to 2015, sub-regional autonomous areas did not have the power to enact the latter, and therefore the enactment of separate regulations became the only legislative form available to them.

The making of separate regulations is inactive, and more importantly, none of the five autonomous regions have enacted any separate regulation. There are mainly two reasons for this inactivity. The first reason, as stated by Zhang Wenshan, is basically the same as that for the absence of regional autonomous regulation, namely the arduous, iterative drafting process resulting from the higher-level approval procedure. According to Zhang Wenshan, the enacting process would take at least three to five years. The autonomous areas are demotivated to start the drafting process of autonomous legislation because higher-level governments are reluctant to make more flexible arrangements. Zhou Wenju's interview of two officials of the PCSC in Jingxiu Yao Autonomous County reflects this. One official said: 'the current autonomous legislation in Jinxiu does not have significant effect, and in contrast it would restrain the local development; the subject matters, which were regulated by our autonomous legislation, had been regulated by national laws'. The other official said: 'we planned to enact the Regulation for the Management of Water Resource, but the higher-level government does not give us the power of modification; the drafting is meaningless if we do not have this power.'<sup>118</sup>

The second reason for the inactivity is that autonomous regions tend to use ordinary local legislation because the ordinary local legislation does not need higher-level approval. The standing committee of local people's congress has risen to be the principal organ for enacting ordinary local regulations; however, the local people's congresses, which are responsible for enacting separate regulations, have become inactive in legislation, thus, the autonomous regions regard ordinary local legislation as an alternative when the drafting of a separate regulation is blocked by the central government. In the early 1980s, the Inner Mongolia Autonomous Region drafted the Regulation for the Management of Grassland as a separate regulation. It was then submitted to the NPCSC for approval, but the latter did not approve it. Given that the Grassland Law had not been enacted at that time, indicating that this regulation did not

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<sup>117</sup> As a matter of fact, Article 2 of the Regulation of Water Resource Management for Liangshan Yi Autonomous Prefecture enumerates six higher-level laws and regulations that it is based on. Except the above three, the other three are the RNA Law, the Several Provisions of the State Council for the Implementation of the RNA Law (promulgated by the State Council in 2005), and the Several Provisions of Sichuan Province for the Implementation of the RNA Law (promulgated by Sichuan People's Government in 2006).

<sup>118</sup> He Wenju, Master Dissertation, 金秀瑶族自治县民族立法研究 (The Study on the Autonomous Legislation in Jinxiu Yao Autonomous County), 2008 广西民族学院 (*Guangxi University for Nationalities*), pp. 11-12.

need to modify higher laws, the Inner Mongolia Region passed this regulation in the form of ordinary local regulation in June 1984.<sup>119</sup>

### 6.3 Modifying Rules and Supplementing Rules

As noted above, the modifying rules and supplementing rules cannot be made without the authorization of national laws. To date, the number of national laws making such authorization is limited. Only 14 national laws make such authorization.<sup>120</sup> Concerning these 14 authorizations, four common features can be observed. First, these authorizations are comprehensive, directed at the general subject matter of the national law as a whole, and do not focus on certain specific provisions. Second, two restrictions are imposed: the principles of national laws cannot be contravened and these two forms of rules should be based upon characteristics of local ethnic groups. Third, while national laws authorize modification, they also authorize supplementation at the same time. Fourth, the authorizations use general language and lack specific rules. They usually contain only one provision and are located in the supplementary section of relevant national laws. These authorizations also omit some key issues, such as the authorizing subjects, the purpose, criteria and the possibility of re-authorization.<sup>121</sup> Article 48 of the Forest Law represents the standard authorization. It states: ‘if the provisions of this law cannot be fully applied in the autonomous areas, the autonomous organs may, in line with the principles of this law and based upon the characteristics of autonomous areas thereof, formulate modifying rules or supplementing rules’.

In practice, the rulemaking in autonomous areas is inactive. By the end of 2008, autonomous areas had adopted a total of 68 modifying rules and supplementing rules.<sup>122</sup> These rules only relate to 5 of the 15 laws that empower the authorization, which include the Marriage Law, the Heritage Law, the Election Law, the Land Law and the Forest Law. More than half of the existing rules are concerned with the modification and supplementation of the Marriage Law. The number of rules on Marriage Law ranges from one to eighteen provisions. Modifications in these rules mainly related to the lowering of the legal marriage age from 22 years old for male and 20 years old for female to 20 and 18. Some rules aim to loosen the restriction on the first-cousin marriage, which is forbidden under the Marriage Law. For example, Article 7 forbids the marriage between persons who are collateral relatives by blood within three generations of kinship. However, the Supplementing Rules for Implementing the Marriage Law in Inner Mongolia Autonomous Region, which was passed in 1988, provided that it energetically

<sup>119</sup> Bai Yongli, *supra* note 74, p. 55.

<sup>120</sup> These national laws include the Criminal Code, the Marriage Law, the Forest Law, the Heritage Law, the General Principles of the Civil Code, the Civil Procedural Law, the Adoption Law, the Election Law, the Grassland Law, the National Flag Law, the Law on the Industrial Enterprises owned by the Whole Population, the Law on the Protection of Women’s Rights, the Land Law and the Law on the Prevention and Treatment of Infectious Diseases.

<sup>121</sup> Kang Yaokun, Ma Hongyu and Liang Yamin, *supra* note 24, p. 198.

<sup>122</sup> The State Council Information Office, *supra* note 11.

advocates no marriage between persons who are so related. This implies that while this kind of marriage is legally recognized, it is not encouraged. The supplementing matters in these rules usually focus on matters such as reasserting and detailing the principles and important provisions of the Marriage Law.<sup>123</sup> For example, the Supplementing Rules for Implementing the Marriage Law in the Garzê Tibetan Autonomous Prefecture, which was passed in 1981, decrees that the practice of levirate marriage remaining in Tibet is in contravention with the principles of the freedom of marriage, and therefore should be forbidden.<sup>124</sup> Other supplementing matters in the Rules concern the forbidding of the interference of marriage in the name of religion.

The rulemaking practice reveals that the goals of these rules are mainly regarded as a means to transform the local 'backward' cultural convention. Take the lowering legal marriage age as an example. Early marriage is prevalent in many autonomous areas and people get married at ages between 13 and 18. It is practically difficult to enforce the minimum legal marriage age (as mentioned earlier, it is 22 for male and 20 for female) in the Marriage Law, which is a few years older than the practical marriage age in these autonomous areas. Thus, the modifying rules lowered the legal marriage age by 2 years (namely male 20 and female 18), which has two goals: making the Marriage Law more enforceable and improve the people's awareness of the negative effects of early marriage.<sup>125</sup>

It should be pointed out that local lawmakers deem the modifying rules as a transitional arrangement and the ultimate goal is to abolish the rules and implement the Marriage Law. In 1982, the Nanjian Yi Autonomous County (in Yunnan province) adopted its modifying rules on the Marriage Law, which lowered the legal marriage age by two years for local rural citizens.<sup>126</sup> As stated by the interpretation report of the Standing Committee of the People's Congress of the County, the reason for lowering the legal marriage age is because of the backward socio-economic conditions.<sup>127</sup> After 8 years of implementation, the Standing Committee passed a decision to abolish the rules. According to this decision, these rules 'played a certain function on safeguarding the

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<sup>123</sup> Such as the principle of monogamy, equality of men and women, the exercise of population control, encouraging late marriage and postponed child-bearing, forbidding the interference of marriage freedom, forbidding the demand of property in the name of marriage, forbidding bigamous marriage, forbidding the marriage between lineal relatives, and compulsory marriage registration.

<sup>124</sup> It can be seen that these rules are entitled as supplementing rules but they contain modifying provisions. It reflects the fact that in terms of content, the distinction between modifying rules and supplementing rules blurs. It is always the case that the existing supplementing rules contain modifying provisions and *vice versa*.

<sup>125</sup> Wu Zongjing and Ao Junde, *supra* note 1, p. 403.

<sup>126</sup> After passage by the local people's congress, the rules were approved by the Standing Committee of the Yunnan Provincial People's Congress in the same year.

<sup>127</sup> The report stated: 'our county is a Yi dominated mountainous county with other 21 ethnic groups including Hui, Bai, Miao, Lisu, Bulang and Han. The economy and culture are quite backward. Local ethnic groups all get used to get married at the age of 15 or 16. Although the tradition of early marriage has been under change after thirty years of liberalization, due to historical reasons, cadres and the masses are required to implement Article 5 of the Marriage Law, namely, 'the marriage age for man should not earlier than 22 and for woman should not earlier than 20', with modification'.

dignity of the Marriage Law and guiding people from all ethnic groups in our county to go on the track of rule by law', and the abolition is due to the fact that 'the condition for implementing the marriage age of the Marriage Law in the rural areas of our county is ripe'.<sup>128</sup>

## 7. Conclusion

Compared with the past, it is quite fair to say that the current autonomous legislation is enjoying its best time in the PRC's history. The autonomous legislative system has experienced marked development. The autonomous areas possess a more flexible legislative autonomy, and the key is the modification power. However, ordinary localities do not possess such power. The autonomous legislative powers are more delineated than ever before. Chinese national laws have not defined the scope of the autonomous legislative powers, but vaguely state that the autonomous legislation may cover political, economic and cultural affairs. The vague delineation implies that the *de facto* powers are comprehensive. This stands in contrast to the SEZ legislative power, which is limited to economic affairs. By comparing the international law and China's domestic law in the legislative requirement for minority rights protection, it can be concluded that China is in line with the international standard.

The autonomous legislation has made marked improvement since 1978, reflecting a higher degree of tolerance of the central government for political, social and cultural diversity. Nevertheless, compared to other types of legislative powers (namely, ordinary legislative power and the SEZ legislative power), the autonomous legislative power is still underused – the reform era does not see any significant expansion of autonomous legislation in number. Although there are 135 autonomous areas, covering more than 63 per cent of the territory and 13 per cent of the population, by 2008, there are only about 700 pieces of autonomous legislation, merely an average of 5.2 per autonomous area. Most importantly, although the autonomous regulation is deemed as the most important form of autonomous legislation, until now, none of the five autonomous regions have passed them. Given that the autonomous legislation is one of the two principal means to exercise autonomy in autonomous areas, its underuse indicates that the exercise of autonomy is substantially hindered.

The immediate reason for the inactivity in autonomous legislation is the higher-level approval procedure. Given the enthusiasm of local autonomous lawmakers, the autonomous legislation would be largely accelerated if the higher-level approval procedure was removed. However, this scenario is highly unlikely to come true because the provisions of autonomous regulations, in particular those at the regional level, always requires the higher-level government to provide assistance, especially financial assistance.

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<sup>128</sup> see 新华网 (*Xinhua News*), 11 October 2004, available at [http://www.yn.xinhuanet.com/gov/2004-10/11/content\\_3013076.htm](http://www.yn.xinhuanet.com/gov/2004-10/11/content_3013076.htm), last visited May 2016.

Without the approval of the higher-level government, the assistance in autonomous regulations cannot be settled.

Since the current legal framework provides a relatively significant legislative autonomy for autonomous areas, the key for the development of autonomous legislation is not creating a new mechanism for the exercise of legislative autonomy, but on how to improve the implementation of the present legal framework. Some Chinese scholars have put forward proposals for achieving genuine autonomy in autonomous areas. A recent proposal is put forward by Zheng Ge, Constitutional Professor at Shanghai Jiaotong University. In his study on the cultural autonomy in Tibet, by modeling the SEZs, he proposed to designate Special Cultural Zones in the area of Tibet, where special policy and law-making power over cultural affairs are decentralized.<sup>129</sup> Zheng's proposal may contribute to the expansion of cultural legislation. However, considering that it is such a comprehensive reform, it is unlikely to be accepted by the Chinese central government in the short term. Nevertheless, some cautious technical recommendations for the legislative development in autonomous areas can be provided below. First, with respect to the development of the regional autonomous legislation, both the central government and autonomous areas should adjust their attitude and expectations. On the one hand, the central government should take a more tolerant attitude to the legislative initiatives in autonomous areas; on the other hand, autonomous regions should take a more realist view in the regulation drafting. Second, the autonomous regions should try to acquire the support of national leadership. As illustrated in the chapter on the SEZ legislation, the endorsement of the national leadership, in particular, the key members in the Party Central Committee, the State Council and the NPCSC, played a critical role for the delegation of legislative powers to SEZs. Accordingly, with the support of national leadership, the likelihood of higher-level approval for autonomous legislation would be enhanced. Third, detailed rules on the approval procedure should be provided. The difficulty of higher-level approval is also due to the lack of detailed procedural rules. The future development for the autonomous legislation should pay attention to lay out relevant rules, such as the criteria and the time limit for the higher-level approval.

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<sup>129</sup> Ge Zheng, *supra* note 8, pp. 195-251.

## Chapter 7. The Legislative System in Special Economic Zones

### 1. Introduction

The spectacular development of five Special Economic Zones (SEZs) (经济特区) – Shenzhen, Zhuhai, Shantou, Xiamen and Hainan, is one of the most inspiring phenomena in China in the reform era. From the time of their designations until 2015, the SEZs' average GDP growth rate reached 16.5 per cent, which was remarkably higher than the national average (9.5 per cent) in the same period.<sup>1</sup> Among five SEZs, Shenzhen is the most successful. After 34 years' rapid development, Shenzhen has been transformed from a small fishing village with about 20000 people to one of the most important manufacturing and high-tech research and development bases in China with a population of 12 million. Per capita GDP in Shenzhen during this period increased 189 times, from 835 Yuan in 1980 to 157985 Yuan (US\$ 25730) in 2015, which was one of the highest among Chinese cities.<sup>2</sup> Now Shenzhen has the world's third-largest container port, has the fourth-largest airport in China and draws the fourth-largest number of tourists among Chinese cities.

Amidst a number of reasons for the economic takeoff in SEZs, the most important is the assignment of an array of preferential policies, which created a favorable environment for the inflow of foreign investment and the development of a market economy. Perhaps the most far-reaching SEZ policy is the delegation of the flexible legislative power over economic affairs. The SEZ legislation, on the one hand, serves as one important part of the SEZ policy package; on the other hand, it serves as one of the principal means for the implementation of SEZ policies. The significance of SEZ legislative power is that while most of the SEZ preferential policies have faded away after China's accession to the WTO and the improvement of the market system in the early 2000s, the SEZ legislation seems to be the only institutional legacy of the SEZ system. In fact, in the eyes of SEZ officials, the exercise of SEZ legislative power has become a unique identity of SEZs. In a 2012 conference celebrating the 20<sup>th</sup> anniversary of the legislative delegation to Shenzhen SEZ, Wang Rong, the Secretary of Shenzhen

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<sup>1</sup> From 1980 to 2015, the average GDP growth rate in five SEZs are as follows: 23 per cent in Shenzhen, 18 per cent in Zhuhai, 12 per cent in Shantou, 15 per cent in Xiamen, and 11.5 per cent in Hainan. For the data in Shenzhen, see Shenzhen Statistical Bureau, 统计数据 (Statistical Data), available at <http://www.szstj.gov.cn/xxgk/tjsj/tjnj/>; for the data in Zhuhai, see Zhuhai Statistical Bureau, 统计数据 (Statistical Data), available at <http://www.stats-zh.gov.cn/tjzl/tjgb/>; for the data in Shantou, Shantou Statistical Bureau, 统计数据 (Statistical Data), available at <http://stj.shantou.gov.cn/tjsj/tjyb/>; for the data in Xiamen, see Xiamen Statistical Bureau, 统计数据 (Statistical Data), available at <http://www.stats.hainan.gov.cn/tjsj/tjsu/jdsj/>, last visited May 2016. For the data at national level, see the National Bureau of Statistics, 国家数据 (National Data), available at <http://data.stats.gov.cn/easyquery.htm?cn=C01>, last visited May 2016.

<sup>2</sup> Yuan (元) is the official currency of the PRC. For the data mentioned above see, Shenzhen Statistical Bureau, 2015年深圳国民经济和社会发展统计公报 (Communiqué of Economic and Social Development in Shenzhen), released in April 2016, available at [http://www.szstj.gov.cn/xxgk/tjsj/tjgb/201604/t20160426\\_3606261.htm](http://www.szstj.gov.cn/xxgk/tjsj/tjgb/201604/t20160426_3606261.htm), last visited May 2016.

CCP Committee at that time, stated: ‘the specialness of the Shenzhen SEZ lies in SEZ legislative power, and it is still the most conspicuous institutional advantage in the Shenzhen SEZ’.<sup>3</sup>

This chapter aims at examining the legal framework of SEZ legislative power and its exercise in the reform era with the focus on Shenzhen SEZ legislation. It is composed of 6 sections. Following the introduction, section 2 provides an overview of the SEZ system. Section 3 views the delegation of SEZ legislative power from a historical view, followed by the evaluation of the current legal framework. Section 5 analyzes the SEZ legislative practice, focusing on the Shenzhen SEZ legislation. Section 6 is the conclusion.

## 2. An Overview on the SEZ System

The designation of SEZs was inspired by the existing export processing zones in other developing countries and regions at that time, such as Singapore, South Korea, Hong Kong and Taiwan.<sup>4</sup> In the early 1980s the central government decided to designate SEZs in the southeast of China. As a result, Shenzhen SEZ, Zhuhai SEZ and Shantou SEZ in Guangdong province and Xiamen SEZ in Fujian province were officially designated in 1980. In 1988, following the establishment of Hainan province, the whole Hainan Island was designated as the fifth as well as the last SEZ.<sup>5</sup> The five SEZs, in particular, the initial four SEZs established in the early 1980s, are in close proximity to Hong Kong, Macao and Taiwan, which lends them a geographical advantage for attracting foreign investment. It is also noticeable that prior to 2011, the four initial SEZs only constituted a small part of the cities where they are located. The reform era has witnessed the continuous expansion of SEZs’ territory.<sup>6</sup> In 2010 with a decision issued by the State Council, the territories of the four SEZs were expanded to cover the whole cities.<sup>7</sup>

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<sup>3</sup> Wang Rong, 立法权是深圳‘特’之所在 (The Specialness of Shenzhen Laid on Legislative Power) in 深圳新闻网 (*Shenzhen News*), 11 July 2012, available at [http://www.sznews.com/news/content/2012-07/11/content\\_6930264.htm](http://www.sznews.com/news/content/2012-07/11/content_6930264.htm), last visited May 2016.

<sup>4</sup> Li Junxiao, 先行一步—广东开放初期历史研究 (*Go One Step in Advance: Historical Analysis on the Initial Stage of Reform and Opening in Guangdong*), Doctoral Dissertation, Central Party School of the CCP, 2007, pp. 139 -140; According to Thomas J. Klitgaard and Mayre Rasmussen, prior to the designation of SEZs, the PRC had examined 52 export processing zones in 28 developing countries, see Thomas J. Klitgaard and Mayre Rasmussen. ‘Preferential Treatment for Foreign Investment in the People’s Republic of China: Special Economic Zones and Industrial Development Districts’, 7 (1983) *Hastings Int’l & Comp. L. Rev.*, p. 383.

<sup>5</sup> Hainan province comprises some 200 islands and its main island is Hainan Island, which accounts for 97 per cent of its land mass.

<sup>6</sup> For the expansion of the SEZs’ territories, see Research Association of Shenzhen SEZ, 深圳经济特区 30 年 (1980-2010) (*Thirty Years of Shenzhen SEZ: 1980-2010*) (Shenzhen: Haitian Chubanshe, 2011), p. 1; for the politics on the expansion of SEZs, see George T. Crane, *The Political Economy of China’s Special Economic Zones* (Armonk: NY: ME Sharpe, 1990), pp. 91-99.

<sup>7</sup> Anonymous author, 盘点：四大经济特区范围扩大到全市 (Summary: the Territories of the Four Special Economic Zones have been Expanded to the Whole Cities) in 新华网 (*Xinhua News*), 6 April 2011, available at: [http://news.xinhuanet.com/local/2011-04/06/c\\_121270857.htm](http://news.xinhuanet.com/local/2011-04/06/c_121270857.htm), last visited May 2016.

According to Wu Nansheng, the Secretary of Guangdong Provincial Party Committee at that time who first proposed the idea of SEZs, the initial motivation for the designation of SEZs was to promote local economies and alleviate poverty by using preferential policies as a means to attract foreign investment.<sup>8</sup> Consistent with the rapid development of SEZs, China's reformers re-set the objectives of SEZs, which are reflected in three aspects. First, the objective of the designation of SEZs is not merely the creation of employment opportunities and the gain of foreign currency like export processing zones in some countries and regions, but is far more comprehensive, covering the development of agriculture, science and technology, commerce, tourism, real estate, and culture.<sup>9</sup> Second, SEZs are regarded as a testing lab for the application of innovative policies and regulations.<sup>10</sup> The logic is that after proving successful, policies and legislation applied in SEZs would be applied in the other parts of the country where the conditions are deemed ripe, and finally popularized to the whole country. Third, the designation of SEZs was also associated with the recovery of China's sovereignty over Hong Kong, Macao and Taiwan. In the eyes of Chinese reformist leaders, the designation was conducive to assure residents in the above-mentioned three regions.<sup>11</sup> They intended to release the signal that a capitalist economic system would be tolerable in certain parts of the PRC.

Consistent with the designation of the SEZs in the early 1980s, Chinese government adjusted the structure of local administration for better pursuing SEZs objectives. Three main measures are outlined below. First, the administration of Shenzhen and Zhuhai were upgraded from county level to prefectural level. Since then these two cities' administrations are directly under the provincial government rather than under the previous dual authority of provincial government and prefectural governments, and therefore they enjoy greater flexibility and autonomy in administering local affairs. Second, Guangdong and Fujian established the Provincial Committees for the SEZs Administration (广东省和福建省经济特区管理委员会). While decentralizing most of the administrative and managerial powers to SEZs, the Committees had the power to approve significant construction projects and resolve important problems on behalf of

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<sup>8</sup> Lu Di and Chen Feng, 经济特区是怎样‘杀出一条血路来的’—吴南生访谈录 (How SEZs Fought Out A Way - the Record of Interview on Wu Nansheng), 3 (2008) 广东党史 (*History of the Communist Party of China in Guangdong*), pp. 5-6.

<sup>9</sup> *Ibid.*, p. 8.

<sup>10</sup> While inspecting Shenzhen SEZ and Zhuhai SEZ, Deng Xiaoping iterated the experimental nature of SEZs, see Deng Xiaoping, 邓小平文选 (第三卷) (*Selected Works of Deng Xiaoping, Third Volume*) (Beijing: Renmin Chubanshe, 1983), pp. 130 and 133.

<sup>11</sup> Deng Xiaoping pointed out: ‘putting aside its effect on Taiwan first, doing a good work in SEZs, is at least conducive to resolve Hong Kong problem, to assure Hong Kong residents’, see Wang Shuo, 风雷激荡: 深圳经济特区的建立 (the Roar of Wind and Thunder: the Establishment of Shenzhen SEZ), in the CCPC Party History Research Center (ed.), 邓小平和改革开放的起步 (*Deng Xiaoping and the Start of Reform and Opening*) (Beijing: Zhonggong Dangshi Chubanshe, 2005), p. 485.

their respective provincial governments.<sup>12</sup> Third, in 1988 Shenzhen and Xiamen were designated as Cities Separately Listed on the State Plan (计划单列市), which enjoy economic management authority equal to a province.<sup>13</sup> The designations have largely expanded the two cities' economic management autonomy.

For a long time during the reform era, the most distinctive feature of SEZs is that they enjoyed a wide range of preferential policies which were not available in the rest of the country. These policies covered a wide range of matters including: taxation, customs duties, labor and wages, entry and exit management, and land use and so on. Among these preferential policies, the most noticeable is the lower tax rate for foreign-rated enterprises. The corporate income tax rate for foreign enterprises in SEZs is 15 per cent, a marked reduction from 33 per cent set against enterprises in other part of the country. This tax rate was even lower than that in Hong Kong at that time, which was 17 per cent.<sup>14</sup> In SEZs, tax holidays were also available, depending upon the duration and types of the enterprises.<sup>15</sup>

Amidst various preferential policies granted to SEZs, one is the flexible legislative power over economic affairs. Compared to other preferential policies, SEZ legislative power is unique in the sense that while most of the SEZ preferential policies have faded away after China's accession to the WTO and the development of national legislation on the market system in the early 2000s, SEZ legislative power is still in use. The preferential tax policy for SEZs, for example, was repealed in 2007 when the Law on Enterprise Income Tax was passed by the NPC. Standing in contrast to the disuse of preferential policies, the legislative delegation to SEZs remains valid and accompanying legislative work remains fairly active. The legislative power seems to be the only institutional legacy of the SEZ system. Until recently, local SEZ officials still emphasized the importance of the legislative power for SEZs development.

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<sup>12</sup> For the discussion on the functions and power of the Guangdong Provincial Committee for the Administration of SEZs, see Joseph E. Pattison, 'Special Economic Zones in the People's Republic of China: the Provincial Experiment', 1(1980) *China L. Rep.*, pp. 147-149.

<sup>13</sup> For the information concerning the City Separately Listed on the State Plan and its impact for the improvement of local economic efficiency, see Shi Yupeng and Zhou Lian, 地区放权与经济效率: 以计划单列为例 (Regional Decentralization and Economic Efficiency: Evidence from Cities Separately Listed on the State Plan), 1(2007) *经济研究 (Economic Research Journal)*, pp. 17-28.

<sup>14</sup> Fenwick Ann, 'Evaluating China's Special Economic Zones', 2(1984) *Int'l Tax & Bus. Law*, p. 383.

<sup>15</sup> For the SEZs' tax incentives for attracting foreign investors, see Thomas J. Klitgaard, and Rasmussen Mayre, 'Preferential Treatment for Foreign Investment in the People's Republic of China: Special Economic Zones and Industrial Development Districts', 7(1983) *Hastings Int'l & Comp. L. Rev.*, p. 383; Kwan Yiu Wong and David K.Y. Chu, 'The Investment Environment' in Kwan Yiu Wong and David K.Y. Chu (ed.), *Modernization in China: the Case of the Shenzhen Special Economic Zone* (Oxford: Oxford University Press, 1985), pp. 194-196.

### 3. Delegating Legislative Powers to SEZs: A Historical Review

#### 3.1 Two Stages of Legislative Delegation

The legislative delegation to SEZs was not completed in one stroke; instead, it is a process which can be divided into two stages. The first stage lasted from the early 1980s to the early 1990s, during which the power to legislate on SEZ affairs was delegated to provincial people's congresses (PC) and their standing committees (PSCS) in Guangdong and Fujian, where SEZs are located. The official delegation came in November 1981 with the issuance of a NPCSC's decision that authorizes the provincial PCs and their standing committees in Guangdong and Fujian to enact separate economic regulations (单行经济法规) for SEZs.<sup>16</sup> According to this decision, the enactment of these regulations should be in accordance with 'the principles prescribed in relevant laws, acts, and policies', and be in light of the specific conditions and the actual needs of SEZs in these two provinces'. In April 1988, the same legislative power was also delegated to the PC and its standing committee of the newly created Hainan province to regulate the Hainan SEZ.<sup>17</sup> During this period, the SEZ regulations were normally drafted by SEZs and then submitted to their respective provincial people's governments, and the latter would submit it to accompanying provincial PCs for deliberation and passage.<sup>18</sup>

The second stage of legislative delegation is from the early 1990s to the present, during which time the legislative power was further decentralized to PCs and PCSCs of SEZs' cities. Shenzhen was the first city to obtain this kind of power. In July 1992, the NPCSC made a decision, authorizing the Shen Zhen PC and PCSC to enact regulations. According to this decision, the enactment of regulations for Shenzhen SEZ should be 'in light of special conditions and actual needs, and pursuant to the prescription of the Constitution as well as the basic principles of laws and administrative regulations'. These regulations should be submitted to the NPCSC, the State Council and the Provincial PC Standing Committee of Guangdong for the record. Apart from the enactment of regulations, the decision also empowered the Shenzhen Municipal People's Government to enact local rules.<sup>19</sup> Following the legislative delegation to Shenzhen, Xiamen, Zhuhai

<sup>16</sup> This Decision was entitled as 全国人民代表大会常务委员会关于授权广东省、福建省人民代表大会及其常务委员会所属经济特区的各项单行经济法规的决议 (Resolution of the NPCSC authorizing the People's Congresses of Guangdong and Fujian Provinces and Their Standing Committees to Formulate Separate Economic Regulations for Their Respective SEZs). The full text of the Decision is available in 中国人大网 (*The Website of the NPC*), at [http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content\\_5004406.htm](http://www.npc.gov.cn/wxzl/gongbao/2000-12/06/content_5004406.htm), last visited May 2016.

<sup>17</sup> See the Resolution for the Establishment of Hainan SEZ, passed by the First Plenary Session of the 7<sup>th</sup> NPC in April 1988. The full text is available at Liu Yunliang, *ibid.*, p. 231.

<sup>18</sup> The *de facto* drafter for Shenzhen SEZ regulations was the Legislative Working Group, which was established within the SEZ government. It was later renamed as the Bureau of Legislative Affairs in Shenzhen. Shenzhen established its first people's congress in 1992 followed by the delegation of legislative power from the NPCSC. Prior to that, Shenzhen did not have its regulation-making organ.

<sup>19</sup> The title of this decision is 全国人民代表大会常务委员会关于授权深圳市人民代表大会及其常务委员会和深圳市人民政府分别制定法规和规章在深圳经济特区实施的决定 (The NPCSC's Decision on

and Shantou were also delegated this kind of power in March 1994 (for Xiamen) and March 1996 (for Zhuhai and Shantou).<sup>20</sup>

With the passage of the LoL in 2000, the SEZ cities were regarded as relatively large cities (较大的市) and were empowered to enact ordinary local regulations, which would be implemented in the area of the whole cities. Since then the PCs and PCSCs of these SEZ cities possess dual legislative power, namely the delegated legislative power for SEZs and the ordinary local legislative power for the whole cities. For years, this situation of ‘one city, two kinds of laws’ in SEZ cities had caused dilemmas in some aspects, which will be discussed later.

Drawing on the above discussion, some implications can be observed. First, the legislative delegation to SEZs can be regarded as a proactive reaction to the SEZs development. Granting legislative power was not included in the initial policy package to SEZs. However, rapid development of SEZs in the following years necessitated a better regulatory environment, which led to the legislative delegation to SEZ cities. Second, legislative delegation took a bottom-up approach. It was initiated by SEZs themselves and later approved by the central government. As demonstrated by the discussion in the next section, officials in SEZ cities were committed to pursue the legislative power and were very active in lobbying the central government during the latter’s decision-making process for the delegation.

### 3.2 The Reasons for the Legislative Delegation to SEZs

#### *The Supportive Macro Environment Created by the Central Government*

The macro environment has three dimensions. First, the legislative delegation to SEZs is in line with China’s reform and opening up policy launched in 1978. Thus, the delegation is better to be understood as one further step along with the development in China after 1978.

Second, in the early reform era, Chinese leaders, both at national level and local levels, realized the importance of relevant economic legislation for attracting foreign investment and technology. For them, relevant economic legislation in place is conducive to strengthen foreign investors’ security and confidence, and therefore expand the inflow of foreign direct investment.<sup>21</sup> Moreover, drawing on the practice in the initial era,

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Authorizing the Shenzhen municipal PC, PCSC and People’s Government to enact regulations and rules for the Implementation within Shenzhen SEZ). Its text is available in 中国人大网 (*The Website of the NPC*) at [http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content\\_5004568.htm](http://www.npc.gov.cn/wxzl/gongbao/2000-12/05/content_5004568.htm), last visited May 2016.

<sup>20</sup> The full texts of the decisions for the legislative delegation to these three cities are available in Xu Peihua, *经济特区立法研究 (The Legislation in Special Economic Zones)* (Beijing: Falv Chubanshe, 2014), pp. 219-220.

<sup>21</sup> In the proposal for delegating flexible legislative power to Guangdong and Fujian, Jiang Zemin stated that the lack of relevant regulations on enterprise registration, labor and wages, land lease and use, and entry and exit management had led to the situation that quite a few foreign investors held a sideline attitude

Chinese leaders also learnt that legislation was necessary for guaranteeing the operation of economic activities and providing rules for the resolution of economic disputes.<sup>22</sup>

Third, in general, national leaders at that time endorsed the proposal of delegating legislative power to SEZs. In the reform era, especially in the early reform era, many significant reforms were controversial when they were proposed. The SEZ policy is not an exception. In the late 1987, despite the opposition from some conservative officials, the CCP Central Committee approved the proposal for delegating legislative power to Shenzhen. The Party's approval served as a pre-condition for the passage of the NPCSC's decision for delegating legislative power to the Shenzhen SEZ in 1991. The semi-authoritative source shows that the main supporters in the Party for the delegation were Deng Xiaoping, Gu Mu and Tian Jiyun (vice premiers at that time).<sup>23</sup> The endorsement of national leaders also reflects on the fact that during the Second Plenary Session of the 7<sup>th</sup> NPC held in March 1989, Peng Chong, the vice chairman of the NPCSC in charge of the session at that time, proposed to change the place of deliberation of the SEZ legislative delegation from the NPC to the NPCSC. Peng's purpose was to avoid the potential of considerable opposition to the delegation from the NPC deputies from Guangdong and Shanghai.<sup>24</sup> The proposal for the delegation was approved by the NPCSC in July 1992.

### *The Strong Commitment of SEZ Officials to Pursue Legislative Power*

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in SEZs, see Jiang Zemin, 尽快制定和颁布经济特区的各项单行经济法规 (Enacting and Promulgating Various Separate Economic Regulations of SEZs as Soon as Possible), proposed to the 21th Meeting of the NPCSC of the 5<sup>th</sup> NPC on 23 November 1981, available at [www.hprc.org.cn/pdf/DANG201005009.pdf](http://www.hprc.org.cn/pdf/DANG201005009.pdf); last visited May 2016. According to an investigation conducted by judges in the Shenzhen Intermediate People's Court in 1985, the main concern of foreign investors is the lack of legal protection of their investment, see Ye Weicheng, '关于深圳经济特区立法与司法情况调查' (Investigation concerning the Legislation and Judiciary in Shenzhen SEZ), 2(1986) 法学杂志 (*Law Science Magazine*), pp. 30-31.

<sup>22</sup> Jiang Zemin stated 'due to the lack of concrete regulations and measures for implementation, staff in SEZs did not have rules to follow in dealing with various foreign-related affairs; The 'hands and feet' are not unfettered and the criteria is not the same, putting us in a passive position', See Jiang Zemin, *ibid*. Because of the lack of relevant legal rules, SEZ governments were difficult to deal with, and with the increasing smuggling and unfair contract with the involvement of Hong Kong businessmen; for the same reason, Shenzhen government and court had to solve the dispute by consultation between the two parties, see Thomas Chan, E.K.Y. Chen and Steve Chin, China's Special Economic Zones: Ideology, Policy and Practice, in Jao Y.C., Leung C. K. and Chai. C.H. (ed.) *China's Special Economic Zones: Policies, Problems, and Prospects* (Oxford: Oxford University Press, 1986), pp. 94-98; and Ye Weicheng, '关于深圳经济特区立法与司法情况调查' (Investigation concerning the Legislation and Judiciary in Shenzhen SEZ), 2(1986) 法学杂志 (*Law Science Magazine*), p. 31.

<sup>23</sup> Wang Shuo, *supra* note 11, p. 8

<sup>24</sup> During the deliberation, deputies from Shanghai voiced their dissenting opinion, which focused on two aspects. First, Guangdong had already been granted quite a few preferential policies, and giving SEZs the legislative power would further widen the policy gap between SEZs and other localities. Second, Shenzhen had not established its people's congress. In this situation, it was not appropriate to grant legislative power to Shenzhen. Deputies from Guangdong provincial government also opposed the proposition from the perspective of safeguarding the principle of the unification of the law, see Fan Hongyun and Jin Ling, '深圳法治建设大事' (*Significant Events of the Construction of Rule by Law in Shenzhen*) (Shenzhen: Haitian Chubanshe, 2008), p. 7-10.

With respect to this, Shenzhen SEZ officials served as a salient example. The idea of delegating legislative power to SEZs was first put forward by Shenzhen officials in a conference on SEZ legislation held in 1986.<sup>25</sup> In the ensuing five years, Shenzhen officials were remarkably active in persuading the central government to delegate legislative power. Amidst an array of measures they took, two significant measures stand out.

The first measure was that while facing the opposition of Guangdong provincial government, Shenzhen officials directly brought their proposal for delegating legislative power to the central government in 1987.<sup>26</sup> Their attempt began to bear fruit the next year - when Tian Jiyun, the vice premier at that time, visited Shenzhen in autumn 1988. Shenzhen officials proposed the delegation to him and they won the support of this well-known reformist leader.<sup>27</sup> In the following month, Shenzhen officials and the Economic Restructuring Office of the State Council (国务院经济体制改革办公室) jointly formulated a proposal for legislative delegation to the Shenzhen SEZ.<sup>28</sup> In 1989, this proposal was submitted to the NPC in the name of the State Council. In early 1992 scarcely before the deliberation on the proposal in the NPCSC, Li Youwei, the Chairman of the Shenzhen municipal PCSC at that time, went to Beijing to rally the support of the national leaders for the last time.<sup>29</sup>

The second and more inspiring measure was the lobbying activities for NPCSC members conducted by Shenzhen officials. As noted above, although some national leaders expressed their support for the Shenzhen proposition, this proposal met severe opposition in the 2<sup>nd</sup> Plenary Session of the 7<sup>th</sup> NPC held in March 1989, therefore, the national legislative leaders changed the deliberation place from the NPC to the NPCSC in order to avoid potential direct confrontation. Facing this situation, during 1991, one year before the deliberation of Shenzhen's proposal in the NPCSC, Shenzhen officials invited more than one hundred senior Beijing cadres, including members of the NPCSC, to take inspection tours in Shenzhen. This measure was intended to persuade these officials to

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<sup>25</sup> This conference was a high-level conference. Its attendees included chief officials from the Bureau of Legislative Affairs in the State Council, the NPC Legislative Affairs Commission, Guangdong Government and SEZs government, and scholars from universities and research institutions in Guangdong province. See Xu Tian, 揭秘深圳获立法权细节, 曾有学者批评属于‘违宪’ (Uncover the Details on that Shenzhen Obtained Legislative Power, Criticized by Scholars as Unconstitutional), 凤凰网 (*News of Ifeng*), June 9, 2013, available at [http://news.ifeng.com/shendu/zgxwzk/detail\\_2013\\_06/09/26279987\\_0.shtml](http://news.ifeng.com/shendu/zgxwzk/detail_2013_06/09/26279987_0.shtml), last visited May 2016.

<sup>26</sup> In the Conference on SEZ legislation held in 1987, some attendees, especially those from Guangdong provincial government severely opposed the proposition of legislative delegation to Shenzhen SEZ, see *ibid.*

<sup>27</sup> Fan Hongyun and Jin Ling, *supra* note 24, p. 8.

<sup>28</sup> The proposal is entitled as 在原国务院授权广东、福建有立法权的基础上, 授权深圳立法权的议案 (the Proposal of Authorizing Legislative Power to Shenzhen on the Basis of Authorizing Guangdong Province and Fujian Province the Legislative Power), see Fan Hongyun and Jin Ling, *ibid.*, p. 8.

<sup>29</sup> Ding Honghua, 张庆余, 难忘特区立法岁月 (Zhang Qingyu, the Unforgettable Time of Legislation in Shenzhen Special Zone) in 中国共产党新闻网 (*CCP News*), 30 December 2010, available at <http://dangjian.people.com.cn/GB/13623378.html>, last visited May 2016.

support the proposal of legislative delegation. It proved to have a positive effect: many cadres voiced their understanding and support for the Shenzhen proposal though some still remained suspicious.<sup>30</sup>

Like Shenzhen officials, the officials from the other three SEZ cities were also active in appealing to the national government for delegating legislative power at that time. Deputies from the Fujian delegation, for example, made a proposal to the NPC concerning legislative delegation to Xiamen SEZ in March 1989 and March 1993 respectively. This proposal was approved by the Second Plenary Session of the 8<sup>th</sup> NPC held in March 1994.<sup>31</sup>

*Higher-level governments were ill-prepared for SEZ legislation*

One important reason for legislative delegation to SEZs is that both the national government and provincial governments were not prepared to sufficiently undertake legislative work for SEZs. The legislative delegation to SEZs in the first stage was due to the central government's lack of experience. In the proposal for delegating legislative power to Guangdong and Fujian provincial governments, Jiang Zemin stated: 'due to the lack of experience, at present there are quite a few difficulties in enacting nation-wide unified separate economic regulations for SEZs, and therefore it is suitable to authorize Guangdong province and Fujian province to enact them'.<sup>32</sup>

The reason for the legislative delegation to SEZs in the second stage was that the provincial governments' SEZ legislation was too slow to meet the actual needs in SEZs. From 1981 to 1991, the Guangdong Provincial PC and PCSC passed a mere 19 SEZ regulations, averaging 1.7 per year; and from 1981 to 1993, the Fujian Provincial PC and PCSC merely passed 8 SEZ regulations.<sup>33</sup> Standing in sharp contrast to the legislative inactiveness at provincial level, there was considerable demand for SEZ legislation during this period. From 1981 to 1991, Shenzhen submitted nearly 200 regulation drafts to the Guangdong provincial government.<sup>34</sup> In 1987, after conducting their investigative tour in Hong Kong, Europe and the United States, Shenzhen officials formulated a five-year legislative plan, which listed 135 economic regulations.<sup>35</sup> According to one Shenzhen legislative official, these economic regulations were crucial in 'establishing a basic legal framework to govern various economic works in Shenzhen SEZ', and only with these regulations in place could 'Shenzhen SEZ could open up one step further and accelerate the inflow of foreign capital'.<sup>36</sup> However, the ambitious 1987 legislative plan

<sup>30</sup> Fan Hongyun and Jin Ling, *supra* note 24, p. 10.

<sup>31</sup> Zheng Qinxun, 厦门特区立法 10 年回眸 (Glancing the 10 years of Legislation in Xiamen Special Zone), 4(2004) 人民政坛 (*The People's Political Forum*), p. 46.

<sup>32</sup> Jiang Zemin, *ibid.*, 21.

<sup>33</sup> Zheng Qinxun, *supra* note 31, p. 46.

<sup>34</sup> Fan Gang, 中国经济特区研究: 昨天和明天的理论与实践 (*China's Special Economic Zone: the Theory and Practice of Today and Tomorrow*) (Beijing: Zhongguo Jingji Chubanshe, 2008), p.68.

<sup>35</sup> Xu Tian, *supra* note 25.

<sup>36</sup> Fan Hongyun and Jin Ling, *supra* note 24, p. 7.

was unlikely to achieve this because of the slow legislative work of the Guangdong and Fujian provincial governments.

Facing the scarcity of SEZ regulations, SEZs had to rely on administrative normative documents to fill in the legislative gap. In 1980s, the Shenzhen municipal government issued 430 such documents. However, compared to SEZ regulations, the shortcomings of these documents were obvious – the status was low, they were unsystematic and were changed too often.<sup>37</sup>

There are two reasons for the slow SEZ legislation of the Guangdong and Fujian provincial legislatures. First, at that time they were already congested with other legislative work and could not pay adequate attention to SEZ legislation. More specifically, the two provincial PCs had to, on the one hand, clear up the backlog of legislative work that had accumulated since the mid-1950s, on the other hand, conduct legislation for the national policy of the opening of the Yangtze River Delta and Pearl River Delta. Second, they held a negative attitude towards the reformist initiatives in the regulation drafts submitted by SEZs. The Guangdong provincial government removed a substantial proportion of legislative proposals in the legislative plans submitted by Shenzhen SEZ.<sup>38</sup> Moreover, provincial PCSCs were reluctant to approve some bold reformist measures in SEZ regulation drafts. In 1986, the Guangdong Provincial PSCSC passed ‘the Regulation on the Management of Mortgage Loans in Shenzhen SEZ’. Compared to the draft, the final version of the Regulation reduced the types of subject matters that may apply to mortgage loans, which was not conducive for the development of financing of local enterprises.<sup>39</sup>

## 4. The Legal Framework

### 4.1 The Nature: Delegated Power

Unlike the ordinary local legislative power or the autonomous legislative power, which are derived from the Constitution and the LoL, SEZ legislative power is delegated by the NPCSC. As discussed earlier, SEZ legislative power was first delegated to Guangdong and Fujian provincial governments in the early 1980s. In the early 1990s, the legislative power was delegated to four SEZ cities.<sup>40</sup> The NPCSC’s decisions for delegating legislative powers to SEZs are remarkably short and some key contents are not clearly defined, such as the delegation purpose, the duration, and the scope.<sup>41</sup> Take the delegation decision for Shenzhen SEZ as an illustration:

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<sup>37</sup> Fan Gang, *supra* note 34, p.68.

<sup>38</sup> Fan Hongyun and Jin Ling, *supra* note 24, p. 7.

<sup>39</sup> According to the draft, both the foreign-related enterprises and domestic enterprises may apply mortgage loans. However, the passed regulation only entitled this right to foreign-related enterprises, see Fan Hongyun and Jin Ling, *ibid*.

<sup>40</sup> In fact, prior to the legislative delegation to the four SEZ cities, namely Shenzhen, Shantou, Zhuhai and Xiamen, Hainan island was delegated the legislative power in 1988 when it was designated as a province.

<sup>41</sup> The delegation scope will be discussed in detail in the following section.

‘(The NPCSC) decided to authorize Shenzhen PC and its PCSC to enact regulations, in light of the specific conditions and actual needs and pursuant to the provisions of the Constitution and the basic principles of laws and administrative regulations; these regulations will be implemented in the Shenzhen SEZ; authorize the Shenzhen Municipal Government to enact rules and to implement them in the Shenzhen SEZ.’<sup>42</sup>

According to some Chinese legal scholars, the unspecified nature of legislative delegation to SEZs is attributed to the comprehensiveness of the reform undertaken in SEZs.<sup>43</sup> However, this is not in line with Article 10 and 11 of the 2000 Law on Legislation (LoL), which states that legislative delegation should have a specific purpose and scope, and should be withdrawn when the conditions for national legislation are ripe, which implies that the delegation should have a time limit. The time limit for legislative delegation is further specified to no longer than 5 years in the revised LoL in 2015.

Despite their inconsistency with the LoL, the decisions for delegating legislative power to SEZs remain valid even after the passage and revision of the LoL in 2000 and 2015 respectively. It is noticeable that the decisions for legislative delegations made after 2000 strictly followed the rules in the LoL. For example, the NPCSC made a decision in August 2013, authorizing the State Council to suspend the implementation of provisions of three laws on administrative examination and approval in the Shanghai Free Trade Zone. This delegation clearly laid out the purpose, spatial scope, duration and subject matters.<sup>44</sup>

The legal status of SEZ regulations is not specified in the NPCSC’s delegation decisions. Scholarly discussion varies upon this issue. Some Chinese legal scholars assert that SEZ legislative power should be regarded as a component of the central government’s legislative authority, and therefore SEZ regulations have higher legal status

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<sup>42</sup> The full title of this resolution is 全国人民代表大会常务委员会关于授权深圳市人民代表大会及其常务委员会和深圳市人民政府分别制定法规和规章在深圳经济特区实施的决定 (The Decision of the NPCSC on Authorizing the Shenzhen Municipal PC and its PCSC to Enact Regulations and Rules Respectively for Implementation in the Shenzhen SEZ), passed on 1 July 1992.

<sup>43</sup> Zhou Chengxin and Zhong Xiaoyu, 深圳经济特区立法权与立法规划研究 (*The Legislative Planning and Legislative Power of Shenzhen Special Economic Zone*) (Beijing: Zhongguo Fazhi Chubanshe, 2001), p. 33.

<sup>44</sup> According to the 2013 delegation Decision, the purpose of this delegation is ‘speeding up the transformation of government functions, adopting innovative models of opening-up, and further exploring and deepening the experience of reform and opening-up’. The delegation is associated with the Shanghai Free Trade Zone and three national laws. In terms of duration, ‘the suspension of relevant laws should be applied on a trial basis for three years, after which relevant laws shall be revised and improved for those adjustments proved to be feasible in practice, while the original legal provisions shall be restored for items for which the adjustments are proved to be unsuitable in practice.’ For the full text, see 全国人民代表大会常务委员会关于授权国务院在中国(上海)自由贸易试验区暂时调整有关法律规定的行政审批的决定 (Decision of the NPCSC on the Administrative Examination and Approval on Authorizing the State Council to Temporally Adjust Relevant Legal Provisions in the China (Shanghai) Free Trade Zone, passed by the NPCSC in August 30, 2013. The text is available in 中国人大网 (*The Website of the NPC*) at [http://www.npc.gov.cn/npc/xinwen/2013-08/31/content\\_1805118.htm](http://www.npc.gov.cn/npc/xinwen/2013-08/31/content_1805118.htm), last visited May 2016.

than ordinary local legislation.<sup>45</sup> Other legal scholars and officials contend that the unspecific legal status of SEZ regulations is intentionally made so due to the lack of experience at that time and the experimentalist nature of the SEZ legislation. In a symposium on SEZ legislation held on 28 August 2003, Chan Ke, the vice director of the Research Office of the NPCSC at that time, stated:

‘It is not worthy to spend too much energy and time on the theoretical research (on delegated legislation); the NPC does not specify its status and probably will not do so in the future. (The NPC) gives you this power, then just use it. It is not necessary to conduct too much debate’<sup>46</sup>

A similar pragmatic view was voiced by Li Lin, a legislative scholar in the Law Institute of Chinese Academy of Social Science. He asserts that matters conducive to the development of SEZ legislation should be prescribed in a specific manner, and those that have potential adverse effects should be dealt with in a fuzzy manner in order to facilitate SEZ delegated legislation.<sup>47</sup>

## 4.2 The Scope

### 4.2.1 The Subject Matters under the SEZ legislation

The matters under SEZ legislative power are generally demarcated and limited to economic affairs. This can be seen from the full name of SEZ. During the preparation period for the designation of SEZs, national leaders stressed that SEZs were special economic zones not special ‘political’ zones.<sup>48</sup> The delegation decision in the first stage, which authorized Guangdong province and Fujian province to make SEZ legislation, also stressed that the form of delegated legislation was ‘separate economic regulations’, although the delegation decisions in the second stage, which empowered SEZ cities to make regulations, did not say so. In the late 1980s, consistent with the rapid development of SEZs, local SEZ officials attempted to initiate reforms in other domains, in particularly those concerning local administration. For example, in the late 1980s following the Hong Kong model, Shenzhen local officials planned to establish a legislative committee for law-making affairs, instead of establishing local PC and local Political Consultative Conference (a local political advisory body) as the rest of the

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<sup>45</sup> Zhang Gengda, *立法学总论 (Introduction to Legislative Science)* (Beijing: Falv Chubanshe, 1991), p. 217; Zhou Wangsheng, *立法论 (On Legislation)* (Beijing: Beijing Daxue Chubanshe, 1994), p. 395; Lu Zhaoxia and Li Huiyan, *经济特区授权立法若干问题探讨 (Exploration of Several Problems on SEZ Delegated Legislation)*, 2 (1997) *郑州大学学报 (Journal of Zhengzhou University)*, p. 107.

<sup>46</sup> Yang Jingyu, *全国人大有关部门领导和专家谈经济特区授权立法 (Chief Officials of Relevant Department of the NPC and Scholars Discuss the SEZ Delegated Legislation)*, 12(2003) *海南人大 (The People's Congress of Hainan)*, p. 21.

<sup>47</sup> Li Lin, *关于经济特区授权立法的几个问题 (A Few Questions concerning SEZ Delegated Legislation)*, 2(2004) *海南人大 (The People's Congress of Hainan)*, pp. 23-24.

<sup>48</sup> Huang Weiping and Zheng Chao, *深圳经济特区建立和发展的政治意义 (The Political Significance of the Establishment and Development of Shenzhen Special Economic Zone)*, 5(2010) *理论视野 (Theoretical Horizon)*, p. 33.

country does.<sup>49</sup> Another example is the proposal of creating a Hong-Kong style governor in Shenzhen SEZ.<sup>50</sup> However, these two proposals were aborted largely due to the lack of central government's support.<sup>51</sup>

One noticeable issue is: under what conditions SEZ cities can exercise SEZ legislative power? Scholarly discussion in China distinguishes two kinds of conditions. One is the matters that national laws and regulations have not prescribed, SEZ cities may enact SEZ regulations. The other condition is where national laws and regulations have already prescribed, SEZs may enact SEZ regulations to modify provisions of relevant national laws and regulations.<sup>52</sup>

#### 4.2.2 The Scope of Modification Power

The most distinctive feature of a SEZ regulation is that it can modify higher national laws and regulations. The SEZ regulation may prevail over higher laws and regulations in case of conflicts between them.<sup>53</sup> This stands in contrast to ordinary local regulations, which must be in compliance with higher national laws and regulations. The other kind of localities possessing such kind of modification power is the autonomous area. In fact, the modification power of these two kinds of localities are prescribed in the same article (Article 81) of the LoL, indicating that they are the same kind of power in nature.

With respect to the exercise of modification power in the SEZs, two limitations are imposed. First, as noted above, the delegation decisions stated that SEZ regulation cannot modify provisions of the Constitution and the basic principles of national laws and administrative regulations. Second, the exercise of the modification power is further restricted by the 2015 revised LoL. Article 8 of this law enumerates 11 matters, which are under the exclusive legislative authority of the central government. In this sense, these 11 matters, such as 'the basic economic system', should be outside of the scope of the modification power.

By comparing the SEZs' modification power in legislation and that of autonomous areas, it can be seen that there are less limits imposed on the former compared to those in autonomous areas. Apart from the above limitations imposed on the SEZs' exercise of modification power, autonomous regulation also cannot modify the Regional National Autonomy Law, and provisions of other national laws and regulations, which already make particular provisions for national autonomous areas,<sup>54</sup> However there are no such

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<sup>49</sup> Xu Tian, *supra* note 25.

<sup>50</sup> Wang Shuo, *supra* note 11, p. 493.

<sup>51</sup> The first proposal of establishing a legislative committee in Shenzhen was rejected by the then national leadership, see the proposal of creating a governor in Shenzhen was aborted consistent with the economic crisis in SEZs in 1985, which led to the reduction of economic power and functions of SEZs, see Wang Shuo, *ibid*.

<sup>52</sup> Zhou Chengxin and Zhong Xiaoyu, *supra* note 43, p. 18-19.

<sup>53</sup> Article 81.2 of the LoL.

<sup>54</sup> Article 66.2 of the LoL.

limits on the SEZ legislation. This has caused some doubt that it may lead to the arbitrary use of the modification power in the SEZ legislation.<sup>55</sup>

#### 4.2.3 The Spatial Scope

According to the NPCSC's decisions for delegating legislative powers to SEZs, the SEZ legislation can only be implemented in the area of SEZs. As mentioned in the introductory section, prior to 2010, the initial four SEZs (Shenzhen SEZ, Zhuhai SEZ, Shantou SEZ and Xiamen SEZ) constituted only one part of the cities where they were located, and therefore the SEZ legislation was only effective in parts of these cities. It is noticeable that prior to the adoption of the LoL in 2000, the SEZ cities only possessed SEZ legislative power. One issue that has arisen from it is: before 2000 did the SEZ legislation have legal effect to the non-SEZ parts of the SEZ cities? The authoritative source partly recognized the effect of the SEZ legislation to the non-SEZ part of the SEZ cities. In its response to the Shenzhen PC in 27 December 1995, the NPCSC General Office stated:

'(The General Office) approves that the SEZ regulations enacted by the Shenzhen Municipal PC and its standing Committee may be applied in the other administrative area of this city (including Baoan District and Longgang District), but the provisions in the regulations concerning the special policies granted by the State cannot be applied within non-SEZ area. If the SEZ regulations applied in the non-SEZ area contravene local regulations enacted by Guangdong Provincial PC or its standing committee, the latter should be applied.'<sup>56</sup>

Drawing on the above statement, two observations can be made. First, for matters which have not been regulated by higher-level laws and regulations but regulated by SEZ regulations, the latter may be applied in non-SEZ areas of SEZ cities, but the provisions in the regulations concerning the special policies granted by the State cannot be applied. Second, if both the higher-level laws/regulations and SEZ regulations have regulated the same matters, but relevant provisions in these two types of law contravene each other, the higher laws/regulations would prevail over SEZ regulations. The practice showed that prior to 2000, Shenzhen enacted nearly 200 SEZ regulations and most of them were primary regulations, which were not only applied in its SEZ, but also in non-SEZ areas of the city.<sup>57</sup>

One important step concerning the spatial scope came in 2000 with the passage of LoL. This law empowers SEZ cities to pass ordinary local regulations, which would be

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<sup>55</sup> Song Fangqing, 论中国经济特区立法的新格局—兼评《立法法》有关经济特区立法的规定 (On the New Legislative Pattern of China's Special Economic Zones – with Concurrent Comments on the Provisions of the Law on Legislation Concerning the Legislation for the Special Economic Zones), 22 (2000) 现代法学 (*Modern Law Science*), p. 128.

<sup>56</sup> See 全国人民代表大会常务委员会办公厅关于深圳市人大及其常委会制定法规适用于该市行政区域内问题的复函 (The Response of the General Office of the NPCSC Concerning the Application of the Regulations Enacted by the Shenzhen Municipal People's Congress and Its Standing Committee, in the Administrative Area of this City), issued on 27 December 1995, available at [http://www.110.com/fagui/law\\_22128.html](http://www.110.com/fagui/law_22128.html), last visited May 2016.

<sup>57</sup> Fan Hongyun and Jin Ling, *supra* note 24, p. 12.

implemented in the whole area of respective cities (Article 63). Thus from 2000 to 2010, SEZ cities possessed dual legislative powers. On the one hand, they may enact SEZ regulations, which will be implemented within SEZs, and on the other hand, they may enact ordinary local regulations, which will be implemented for the whole area of cities. Due to the situation of ‘one city two types of law’, during this period SEZ cities faced the dilemma that the same matters may have two different legal resolutions because of the difference between ordinary local regulations and the SEZ regulations.<sup>58</sup> This, according to some Chinese scholars, may hinder the process of integration between SEZs and the non-SEZ areas in SEZ cities.<sup>59</sup> The situation of ‘one city two types of law’ was resolved in 2010 when SEZs in the initial four SEZ cities were expanded to the whole cities.<sup>60</sup> Since then, the SEZ regulations have binding force over the whole SEZ city.

### 4.3 The Form and the Procedure

The above discussion mainly concerns the SEZ regulations enacted by the SEZ cities’ PC and their standing committees. It should be pointed out that the national government also authorized the people’s government of SEZ cities to enact local rules (规章) as the other form of SEZ legislation. Compared to SEZ regulations, the scope of rules is largely restricted. They aim to implement higher laws, regulations and SEZ regulations, rather than make primary legislation.<sup>61</sup>

<sup>58</sup> Qian Feiying and Zhang Huiping, 深圳：破解‘一市两法’ (Shenzhen, Resolving ‘One City Two Kinds of Laws’) in 深圳商报 (Shenzhen Commercial Daily), 2 July 2010, available at [http://szsb.sznews.com/html/2010-07/02/content\\_1137084.htm](http://szsb.sznews.com/html/2010-07/02/content_1137084.htm), last visited May 2016.

<sup>59</sup> For the dilemma caused by ‘one city two kinds of laws’, see Fan Hongyun and Jin Ling, *supra* note 24, p. 13-14.

<sup>60</sup> Take the expansion of the Zhuhai SEZ as an example. On August 26, 2010, the State Council issued the Response of the State Council concerning the Expansion of the Area of Zhuhai SEZ. Article 1 of the Response states: ‘in order to further improve the ability of Zhuhai SEZ on reform and innovation and on the development in a scientific way, to resolve the disparity on the development between the SEZ and the other part of the city, the spatial restriction of the development of SEZ, and the problem of ‘one city two kinds of legislation, the State Council approves to expand the area of Zhuhai SEZ to the whole city. See 国务院关于扩大珠海经济特区范围的批复 (The Response of the State Council Concerning the Expansion of the Area of Zhuhai SEZ) issued by State Council Legislative Affairs Office, 14 December 2010, available in the State Council Legislative Affairs Office, at <http://www.chinalaw.gov.cn/article/fgkd/xfq/fgxwj/201012/20101200330690.shtml>, last visited May 2016.

<sup>61</sup> On August 16, 1997, the Shenzhen People’s Government issued 深圳市人民政府制定深圳经济特区规章和拟定深圳经济特区法规草案规定 (The Rule Concerning the Procedure of the Enactment of Rules and the Drafting of SEZ Regulations by Shenzhen People’s Government), Article 6 of which stated the scope of the rules: (1) the matters that need to be further specified for the implementation of national laws, administrative regulations and SEZ regulations; (2) matters concerning the reforms of economic, social and administrative system under the powers and functions of the municipal people’s government or under the authorization of the State Council, its relevant departments and the provincial people’s government, and the conditions for legislating these matters in the form of SEZ regulations are not ripe; (3) the organization and functions of various departments of the municipal government and other organs for exercising the powers of administrative management; (4) for the needs of improving administrative management, setting up, revising or removing approval systems, charging systems, licensing systems, administrative enforcements, administrative punishments; (5) any other matters deemed as necessary to be regulated by the rules of the municipal government. This Rule was repealed by Shenzhen People’s Government on 29 April 2010.

In terms of legislative procedure, the SEZ legislation enjoys greater autonomy than other types of local legislation. According to Article 89.5 of the LoL, after being passed by the local PC or its standing committee, a SEZ regulation only needs to be submitted to the NPCSC for filing. When a SEZ regulation goes into effect is determined by the local PC or its standing committee; the procedure of submitting for filing is purely a matter of notification and does not affect its legal effect. However, the procedural restriction on other kinds of local legislation is tighter. Take the ordinary local regulations enacted by a relatively large city as an example. After being passed by the municipal PC, the ordinary local regulations should be submitted to the provincial PCSC for approval. Only after receiving this approval, can the ordinary local regulations go into effect.<sup>62</sup> The autonomous legislation enacted by autonomous areas also has a higher-level approval procedure. After being drafted and passed by the PC of autonomous areas, an autonomous regulation needs to be approved and recorded by a higher-level authority.<sup>63</sup>

## 5. Legislating for a Market Economy – the Case of Shenzhen

### 5.1 An Overview of SEZ Legislation

The last two decades witnessed a significant expansion in the number of SEZ regulations. At present, the number of SEZ regulations enacted by China's five SEZs varies significantly. The number of SEZ regulations and ordinary regulations adopted by the end of 2015 is shown in Table 5 below.<sup>64</sup>

**Table 5: Number of SEZ regulations and ordinary local regulations enacted by March 2016.**<sup>65</sup>

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<sup>62</sup> The criteria for the higher-level approval for ordinary local regulations enacted by relatively large cities is their legitimacy, namely whether they contravene higher laws and regulations. If no contravention exists, the higher PCSC should approve them within four months, see Article 63.2 of LoL.

<sup>63</sup> For the drafting process of autonomous legislation before it enters into the formal legislative process of the people's congresses, see Davis, M.C., 'Establishing a Workable Autonomy in Tibet', 30 (2008) *Human Rights Quarterly*, p. 233; Wu Zongjing and Ao Junde, *中国民族立法理论与实践 (The Theory and Practice of Autonomous Legislation in China)* (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 1998), pp. 244-246.

<sup>64</sup> The SEZ regulation refers to those enacted based on the NPCSC's Legislative Delegation Decisions; the ordinary regulation is not enacted based on these decisions but based on the fact that SEZ cities are relatively large cities, which can exercise the local legislative power under the 2000 Law on Legislation. These two types of regulations are distinguishable from their titles. A SEZ regulation is always entitled with 'SEZ', however an ordinary regulation is not.

<sup>65</sup> For the legislative data in Shenzhen passed from October 1992 to March 2016, see the website of Shenzhen PCSC, available at <http://www.szrd.gov.cn/queryszfg.jsp#>; for the legislative data in Zhuhai, see the official website of Zhuhai Municipal PCSC, available at <http://www.zhrd.gov.cn/zhfg/>; for legislative data in Shantou, see the official website of Shenzhen Municipal PCSC, available at <http://www.strd.gov.cn/Article.asp?ClassID=9&CType=1>; for the legislative data in Xiamen, see the official website of Xiamen Municipal PCSC, available at <http://www.xmrd.gov.cn/qwfb/fgk/index.htm>; For the legislative data in Hainan, see the official website of Hainan Provincial PCSC, available at <http://www.hainanpc.net/eap/100.news.list>, last visited May 2016.

SEZs	SEZ regulations currently valid/passed	Ordinary local regulations currently valid/passed
Shenzhen	129/166	44/46
Zhuhai	21/34	38/44
Shantou	37/62	28/34
Xiamen	58/62	47/81
Hainan	42/51	169/206

Some analysis based on Table 1 is provided below. First, among five SEZs, Shenzhen is the most active in making SEZ legislation. By March 2016, it had adopted 166 SEZ regulations, averaging 7 per year. The number of Shenzhen SEZ regulations is larger than the other four SEZs combined. During this period, Shenzhen only adopted 40 ordinary local regulations, indicating that the SEZ regulations are the main form of legislation in Shenzhen. This stands in contrast to the legislative practice in Hainan SEZs where the main form of legislation is ordinary local regulations. The remarkable larger number of ordinary local regulations in Hainan province is attributed to the fact that just like the provincial legislatures elsewhere, Hainan PC and its PCSC need to enact local regulations for the implementation of national laws, regulations in the area of Hainan province.

According to scholarly discussion, the existing Shenzhen SEZ legislation can be roughly categorized into three types - about one third are innovative regulations, regulating matters that had not been regulated by national laws and administrative regulations; another third are regulations enacted to modify, supplement and crystalize national laws and administrative regulations; and the remaining third is enacted for the needs of local economic, social, cultural and ecological development. The situation in the other four SEZs are by and large alike.<sup>66</sup>

The most significant feature of SEZ legislation is that it introduced a set of foundational rules for a market economy in China. The following section will discuss the SEZ legislation in Shenzhen as a case study.

## 5.2 SEZ Legislation in Shenzhen

### 5.2.1 Stage One (1980-1992): Making the Breakthrough in the Economic System

During the first stage of Shenzhen SEZ legislation, lasting from 1980 to 1992, the national political atmosphere in general was not friendly to the market-oriented legislation in the Shenzhen SEZ. The Constitution adopted in 1982 declares that the mainstay of the economy was the socialist publicly owned economy; it was supplemented by the non-public owned economy (Article 11). The authoritative source

<sup>66</sup> Zhou Chengxin and Zhong Xiaoyu, *supra* note 43, pp. 1-2.

issued during this period regarded the planned economy as the leading economic mode and the market mechanisms were *ad hoc* and provisional.<sup>67</sup>

Notwithstanding the unfavorable political atmosphere, the Shenzhen SEZ was the first locality in China to embrace the market as a key component of the economy. While market-oriented legislation was sparse both at the national level and elsewhere in local levels during this period, Shenzhen had adopted a large number of market-oriented legislations. The first and perhaps most significant regulation concerning the Shenzhen SEZ is the SEZ Regulation in Guangdong Province (广东省经济特区条例) passed by the Guangdong Provincial PC and approved by the NPCSC in 1980. This regulation with 26 provisions provides for a basic organizational framework and an array of policies for SEZs in Guangdong. As noted before, during this stage, the organ responsible for SEZ legislation in Shenzhen was the Guangdong PC and its standing committee. During this period, 19 SEZs regulations were adopted for the Shenzhen SEZ. Moreover, the Shenzhen municipal government also issued approximately 430 administrative documents to fill the gap due to the slow SEZ legislation of the Guangdong PC and its standing committee.<sup>68</sup> The thrust of the legislation in the Shenzhen SEZ was to break through the traditional planned economy by introducing market mechanisms in some key sectors, such as construction, labor and wages, land use, enterprises, and stock market as discussed below.

From a legal perspective the breakthrough in the marketization of the economy in the Shenzhen SEZ was first made in the domain of labor and wage systems. The Guangdong SEZ Regulation, for the first time, allowed enterprises in the Shenzhen SEZ to recruit their labor force on their own by the means of contract, and in particular, to dismiss their Chinese staff members and workers (Article 20).<sup>69</sup> The adoption of this regulation marked a significant departure from the traditional labor system under which labor forces were assigned by local labor administration and labor mobility was very difficult.<sup>70</sup> The first five years of this period saw the adoption of two SEZ regulations and one administrative document, which significantly widened the scope of enterprises and institutions that were subject to the new labor contract system, covering staff members

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<sup>67</sup> For example, the Report of the Twelfth National Congress of the CPC held in 1982 asserted: 'correctly adopting the principle of Placing Planned Economy as the Mainstay with the supplement of Market Adjustment is a fundamental question in the reform of economic system', see Party Documents Research Office of the CCPCC Archives, 十一届三中全会以来党的历次全国代表大会中央全会重要文件选编(上) (*The Important Documentation of Various National Congress of the CPC since the Third Meeting of the 11th National Congress of the CPC, Volume I*) (Beijing: Zhongyang Wenxian Chubanshe, 1997), p. 244.

<sup>68</sup> During this phase, Shenzhen municipal government can only issue administrative documents; it did not possess the power to issue local rules until the NPCSC's delegation of SEZ legislative power to Shenzhen in July 1992. Nevertheless, despite the difference in title, these two types of documents had no fundamental difference in terms of content.

<sup>69</sup> The SEZ enterprises in the Guangdong SEZ Regulations referred to foreign-related enterprises, namely those invested by foreign investors, or jointly invested by Chinese and foreign investors.

<sup>70</sup> Shenzhen Labor Bureau, 深圳特区劳动制度十年改革历程 (*The History of the Reform on the Labor System in Shenzhen Special Economic Zone*) (Shenzhen: Haitian Chubanshe, 1991), pp. 20-22.

and workers in foreign-invested enterprises, state-owned enterprises, collective enterprises, State organs, social organizations and public institutions.<sup>71</sup>

Consistent with the marketization of labor, Shenzhen SEZ lawmakers started to liberalize its wage system. In December 1981, Shenzhen municipal government issued the Interim Measures for Applying the Labor Contract System in Shenzhen, and in August 1988, Guangdong PCSC adopted the Labor Regulation in Guangdong SEZs. Under these two documents, SEZ enterprises were allowed to determine the form of wages, rewards and bonus for their staff members and workers. These two documents intended to connect labor's wages with enterprises' economic benefit. This market-oriented wage system stood in contrast to the previous rigid egalitarian wage system, which was called 'everyone eats from the same big pot' (吃大锅饭). The reform in labor and wage systems resulted in the emergence of the local labor market and contributed to the significant increase in working efficiency and workers' incomes in Shenzhen SEZ. The labor productivity in the industry of the Shenzhen SEZ in 1989 increased 9.4 times compared to that in 1979.<sup>72</sup> The workers' monthly wage increased to 325 Yuan in 1989 compared to 69 Yuan ten years before.<sup>73</sup>

In Shenzhen SEZ, the market mechanism was introduced to the field of construction in the early 1980s. In September 1982, the Shenzhen Municipal People's Government issued the Interim Measures on Bidding Invitation and Bidding on Construction Projects in Shenzhen (1982 Document). Under this document, the determination of construction design should be subject to a selection procedure, the determination of construction projects required public bidding, and the constructors winning the bidding may subcontract projects. The issuing of this document drew on the successful practice of the bidding for the construction of the Shenzhen International Commercial Mansion (国贸大厦) in Luohu District from 1981 to 1982.<sup>74</sup> The issuing of the 1982 Document marked the recognition of the newly emerged construction market in the Shenzhen SEZ. This document sent the signal that the assignment of construction projects should be more subject to market forces and less subject to local bureaucratic priorities. The following

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<sup>71</sup> These three documents concerning the adoption of new labor contract system in Shenzhen SEZ were: The Interim Measures of the Management of Labor and Wage of Enterprises in Guangdong SEZs adopted in December 1981 by Guangdong PCSC, the Interim Measures for Applying the Labor Contract System in Shenzhen adopted in August 1983 by Shenzhen municipal government, and the Labor Regulation in Guangdong SEZs adopted in August 1988 by Guangdong PCSC.

<sup>72</sup> The Shenzhen Labor Bureau, *supra* note 70, p. 8.

<sup>73</sup> *Ibid.*, p. 129.

<sup>74</sup> The construction of the Shenzhen International Commercial Mansion was the first construction project in Shenzhen that underwent public bidding. The quoted price through the bidding was 398 Yuan per M<sup>2</sup> and the quoted period of construction was 18 months, both of which were a marked reduction compared to the original administrative-assigned constructor who quoted 580 Yuan per M<sup>2</sup> over 36 months. The result was even more applause, this construction was completed within 16 months and the construction cost was 9.46 million Yuan less than the quoted price, see author unknown, 敢闯第一例 (The First Breakthrough Case) in 深圳热线 (*Shenzhen Online*), 23 September 2004, available at <http://szhome.oeeee.com/Channel/content/2004/200409/20040923/144595.html>, last visited May 2016.

years during the 1980s saw the expansion of bidding in the field of construction. By 1985, 90 per cent of the construction projects in Shenzhen were assigned by public bidding.<sup>75</sup> The 1982 Document was superseded by a more detailed and comprehensive Shenzhen SEZ regulation - the Regulation of Bidding Invitation and Bidding on Construction Projects in Shenzhen SEZ, enacted by the Standing Committee of Shenzhen PC in October 1993.

From a legal perspective, an important step for the marketization of Shenzhen SEZ's economy came in December 1987 when the Guangdong PCSC adopted the Regulation on the Land Management in the Shenzhen SEZ. This regulation sanctioned the granting of long-term land leases in state-owned land in the Shenzhen SEZ. Under this regulation, the means of the transfer of land-use rights included negotiation, bidding and auction. The land-use rights can be granted for up to 50 years. The marketization of the land in the Shenzhen SEZ allowed local governments to reap significant revenues, which greatly accelerated the development of local infrastructure.<sup>76</sup> It should be pointed out that when it was adopted, this regulation contravened the Constitution (Article 10) and the Land Management Law (Article 2), which explicitly forbade land leasing.

The 1980s saw the rapid increase of enterprises and the diversification of the form of enterprises in Shenzhen.<sup>77</sup> Consistent with this, an array of SEZ regulations were adopted to formalize the activities of enterprises in the Shenzhen SEZ. The following table lists these regulations in chronological order.

**Table 6: Shenzhen SEZ regulations concerning enterprises enacted in the 1980s**

Title	Date of Passage
Guangdong SEZ Regulation (广东省经济特区条例)	April 1980
Interim Provisions on the Management of Enterprises' Registration (广东省经济特区企业管理暂行规定)	November 1981
Provisions on Foreign-related Economic Contract in Shenzhen SEZ (深圳经济特区涉外经济合同规定)	February 1984
Interim Provisions on Introducing Technology in Guangdong SEZs (深圳经济特区技术引进暂行规定)	February 1984

<sup>75</sup> *Ibid.*

<sup>76</sup> Shen Jie, 深圳观念变革大事 (the Significant Issues for the Conception Transformation) (Shenzhen: Haitian Chubanshe, 2008), pp. 41-42.

<sup>77</sup> In 1979, Shenzhen only had less than 300 small-sized enterprises. The first decade of post-Mao era witnessed a rapid increase of both domestic enterprises and foreign-related enterprises. By the end 1988, Shenzhen had 1962 foreign-related enterprises compared to the total 18540 enterprises. In 1988, although they only constitute 10.6 per cent, the foreign-related enterprises made up 63.26 per cent of the total industrial output in Shenzhen; see Yang Guanghui, 深圳 10 年的理论探索—社会主义初级阶段理论与经济特区 (*Ten years of Theoretical Exploration of Shenzhen – the Theory of Primary Stage of Socialism and Special Economic Zone*) (Shenzhen: Haitian Chubanshe, 1990), pp. 24-25.

Provisions on Trade Union in Enterprises in Guangdong SEZs (广东省经济特区企业工会规定)	June 1985
Provisions on the Accounting Management of Foreign-related Enterprises in Guangdong SEZs (广东省经济特区涉外企业会计管理规定)	December 1985
Regulation on Foreign-related Companies in Guangdong SEZs (广东省经济特区涉外公司条例)	December 1986
Regulation on the Bankruptcy of Foreign-related Companies in Shenzhen SEZ (深圳经济特区涉外公司破产条例)	November 1986
Provisions on the Mortgage Loans in Guangdong SEZs (广东省经济特区抵押贷款管理规定)	February 1990

The regulations in Table 6 accounts for nearly half of the 19 SEZ regulations adopted by the Guangdong PC and its standing committee during this period, indicating that legislating on enterprises was the SEZ lawmakers' main concern at that time. The significance of the above 9 regulations is that they provided a basic legal framework for the operation of enterprises, in particular, foreign-related enterprises in the Shenzhen SEZ.<sup>78</sup>

In 1986 the Shenzhen SEZ initiated the reform on state-owned enterprises, the thrust of which was to demutualize state-owned enterprises and introduce the jointed stock system. From 1986 to 1988, the Shenzhen Municipal Government issued several administrative documents to facilitate the reform as provided in Table 7 below.

**Table 7: Administrative documents on demutualization of state-owned enterprises and the jointed stock system issued by Shenzhen municipal government in 1980s.**

Title	Date of Issuance
Interim Provisions of Shenzhen SEZ on the Pilot of Demutualization of State-owned Enterprises (深圳经济特区国营企业股份化试点暂行规定)	October 1986
Interim Provisions of Shenzhen People's Government on Encouraging Technological Personnel to Opening Technological Enterprises (深圳市人民政府关于鼓励科技人员兴办民间科技企业的暂行规定)	February 1987
Interim Measures of Shenzhen SEZ on the Registration of the Pilot of Demutualization of State-owned Enterprises (深圳经济特区国营企业股份化试点登记注册暂行办法)	March 1987

<sup>78</sup> Foreign-related enterprises referred to three kinds of enterprises invested by foreign investors, namely, the Sino-foreign entity joint venture, the Sino-foreign cooperative joint venture, and the whole foreign-owned enterprise.

Interim Provisions on the Work of the Board of Directors Controlled by the Municipality of Shenzhen (深圳市公司董事会工作暂行规定)	April 1988
Interim Provisions on the Work of the Managers in State-owned Enterprises Controlled by the Municipality of Shenzhen (深圳市市属国营企业经理厂长工作暂行规定)	April 1988

The documents in Table 7 represent an attempt to explore the possible solution for the reform of China's state-owned enterprises; and they provided a basic legal framework for the operation of jointed stock enterprises in the Shenzhen SEZ. The significance of these documents also lies in the fact that they generated experience for Shenzhen' comprehensive SEZ legislation on enterprises in 1990s.

Apart from the legislation on the key sectors of the economy, the Shenzhen SEZ also issued a number of administrative documents to provide basic rules in some other domains critical to the development of the local market economy. These domains include: the pricing system, financing, insurance, housing, real estate, foreign and stock exchange. Taking the legislation on stock exchange as an example; one month after the establishment of the Shenzhen Stock Exchange in April 1991, the Shenzhen Municipal People's Government issued the Interim Provisions on the Issuance and Transfer of Shares in Shenzhen.

### 5.2.2 Stage Two (1992-2000): Creating a Basic Legal System for Market Economy

The spectacular development in SEZs and other coastal opening cities (沿海开放城市) during the first stage of economic reform gathered momentum for further embracing a market economy in China. The turning of the political atmosphere in favor of the market economy came in October 1992 when the 14th CCP National Congress spelt out that the goal of economic reform was to establish 'the socialist market economic system' under which 'the market plays a fundamental role in the allocation of resources'.<sup>79</sup> The authoritative source stressed the importance of the legal system for the establishment of a market economy. The third session of the 14th CCP National Congress held in 1993 emphasized the necessity of a complete legal system for establishing and perfecting the market economy. This session also called for accelerating economic legislation and establishing a basic legal system by the end of 20<sup>th</sup> century.

Consistent with the turning of the political atmosphere, starting in 1992, the SEZ legislation in Shenzhen had been significantly accelerated. In the second stage, lasting from 1992 until 2000, Shenzhen adopted 134 SEZ regulations compared to 19 in the first

<sup>79</sup> Party Documents Research Office of the CCPCC Archives, 十一届三中全会以来党的历次全国代表大会中央全会重要文件选编(下) (*The Important Documents of Various National Congress of the CPC since the Third Meeting of the 11<sup>th</sup> National Congress of the CPC, Volume II*) (Beijing: Zhongyang Wenxian Chubanshe, 1997), p. 170.

stage (1980-1991).<sup>80</sup> During this period, the number of SEZ rules issued by Shenzhen Municipal People's Government was about 160 - a significant reduction compared to 400 administrative documents issued in the first stage.<sup>81</sup> This indicates that Shenzhen SEZ tended to use the SEZ regulation as the main means to regulate its local economic reforms rather than rules.

To some extent, the acceleration of Shenzhen SEZ economic legislation reflects the takeoff of the market economy. It should be pointed out that the legislative acceleration could not have been achieved without the NPCSC's delegation of SEZ legislative power to Shenzhen SEZ in July 1992. After that point, Shenzhen gave full play exercising legislative power. For example, the Shenzhen PCSC convened 8 times per year compared to the average of 6 elsewhere.<sup>82</sup> In the first two years after 1992, Shenzhen passed as many as 39 SEZ regulations.

Perhaps the most significant Shenzhen SEZ legislation during this period was that concerning company systems. In April 1993, Shenzhen adopted the Regulation on the Joint Stock Company (股份有限公司) and the Regulation on the Limited Liability Company (有限责任公司).<sup>83</sup> These two company regulations in Shenzhen SEZ formalized two types of companies as their titles indicated. They were more liberal when compared with China's first Company Law adopted by the NPCSC in December 1993. Some examples are provided below. (1) under the Company Law, approval by the local administration is required for founding a joint stock company (Article 77), but under the Regulation on Jointed Stock Company, administrative approval was not required (Article 4); (2) under the Company Law, the registered capital should be subscribed to prior to the founding of a company (Article 23 and 83), but the Regulation on Jointed Stock Company allowed payment by installment for the subscription of registered capital of the jointed stock company (Article 19); (3) the two company regulations forbade a company to become a shareholder of other economic organizations with unlimited liability, aiming at protecting company shareholders; but the Company Law did not have such a prohibitive prescription.

Following the two SEZ company regulations, the Regulation on the Cooperative Stock Company (股份合作公司) was adopted in April 1994. This regulation created a

<sup>80</sup> Zhou Chengxin and Zhong Xiaoyu, *supra* note 43, pp. 238-246.

<sup>81</sup> Shenzhen municipal government did not possess the power to issue local rules until July 1992 when the NPCSC authorized it to do so. Nevertheless, despite the difference in title, the administrative document and local rules did not have fundamental differences in terms of content. Zhou Chengxin and Zhong Xiaoyu, *ibid.*, pp. 246-252.

<sup>82</sup> Ding Honghua, *supra* note 29.

<sup>83</sup> During this period, the Shenzhen Municipal Government also issued a range of accompanying local rules for the implementation of the two SEZ company regulations. Some important rules include: the Implementing Measures for the Regulation on Limited Liability Company (September 1993), Rules on the Condition and Procedure for the Establishment of the Enterprise Limited by Shares in the Shenzhen SEZ (November 1994), the Interim Provisions on the Work of the board of Directors in Shenzhen (November 1994), the Interim Provisions on the Work of Company Managers in Shenzhen and the Interim Provisions on the Enterprise Work of Board of Supervisors (January 1996).

new type of company – the cooperative stock company. This type of company in essence was a joint stock company, but the registered capital for founding it was much lower; 2 million Yuan, compared to 10 million Yuan for founding a joint stock company. This regulation allowed collective organizations to found a cooperative stock company by converting collective-owned assets into stock shares. It provided organizational vehicles for collective organizations that wished to restructure into companies with investors holding equity shares and who wished to receive investment.<sup>84</sup>

Apart from the above three SEZ company regulations, the Shenzhen SEZ also adopted an array of SEZ regulations to formalize other types of business organizations. These SEZ regulations include the Partnership Regulation (adopted in April 1994), the Regulation on the Management of State-owned Assets (adopted in July 1995), the Regulation on wholly State-owned Companies (adopted in May 1999), and the Regulation on Commercial Business (adopted in June 1999). The adoption of these SEZ regulations represents an attempt to encourage entrepreneurship and small business and expand the market economy in the Shenzhen SEZ.

In the Shenzhen SEZ, an important step forward in the law of enterprises was the passage of the Enterprise Bankruptcy Regulation in November 1993. Compared to the Enterprise Bankruptcy Law adopted by the NPCSC in 1986, this regulation provided for more detailed rules, making it more applicable.<sup>85</sup> This regulation largely reduced the government involvement and incorporated rules in line with the market mechanism. For example, standing in contrast to the Bankruptcy Law, this regulation stated that bankruptcy did not require governmental approval.<sup>86</sup> Following the Enterprise Bankruptcy Regulation, Shenzhen adopted the Regulation on Enterprise Liquidation in July 1995. This regulation provided a basic legal framework for the enterprise liquidation.

A substantial proportion of Shenzhen SEZ regulations adopted during this period concerns the regularization of factors markets (生产要素市场). These regulations intended to expand the scale of economic marketization. These regulations covered a number of fields, including construction, labor, real estate, transportation, technology, culture, communication and information, and medicine. Take the regularization on real

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<sup>84</sup> Zhong Mingxia, 深圳特区公司立法的回顾与展望 (The Retrospect and Prospect of Legislation on Company in Shenzhen Special Economic Zone), 5(2000) 广东社会科学 (*Guangdong Social Science*), pp. 89-90.

<sup>85</sup> The implementation of the 1986 Bankruptcy Law was problematic. As Donald Clarke commented, despite its name, ‘this law is less a law about bankruptcy than a statement of policy about closing down state-owned enterprises in certain circumstances’; ‘the actual bankruptcies at that time were governed far more by state policy than the legal rules’, see Donald C. Clarke, ‘Legislating for a Market Economy in China’, 191 (2007) *The China Quarterly*, pp. 570 and 582.

<sup>86</sup> The excessive government involvement required in the Bankruptcy Law had been observed by legal scholars. Donald Clark, for example, concluded that this law ‘is essentially a procedure to be applied by the Government, not invoked at the option of debtors or creditors’, see Donald C. Clarke, ‘Regulation and its Discontents: Understanding Economic Law in China’, 28 (1991) *Stan. J. Int’l L.*, pp. 283 and 299-300.

estate market as an example. The following table shows the SEZ regulations on real estate adopted during this period.

**Table 8: Shenzhen SEZ regulations on real estate in the 1990s**

Title	Date of Passage
Regulation of Shenzhen SEZ on the Administration of House Lease (深圳经济特区房屋租赁管理条例)	December 1992
Regulation of Shenzhen SEZ on the Registration of Real Estate (深圳经济特区房地产登记条例)	January 1993
Regulation of Shenzhen SEZ on the Transfer of Real Estate (深圳经济特区房地产转让条例)	July 1993
Regulation of Shenzhen SEZ on the Management of Real Estate Industry (深圳经济特区房地产行业管理条例)	December 1997
Regulation of Shenzhen SEZ on the land-use Right Assignment (深圳经济特区土地使用权出让条例)	February 1998

During this period, Shenzhen started to legislate on intermediary organizations in the market. In April 1997, for example, Shenzhen passed the Lawyer Regulation, aiming at privatizing the legal profession. This regulation defined a lawyer as a civil subject that provided legal services to society (Article 2 and 17); the lawyers/law firms are under the guidance and supervision of the Shenzhen Justice Bureau (Article 6). These stand in contrast to the State Council's 1980 Interim Regulation on Lawyers, which defined lawyers as one branch of the judicial administration that undertook the mission of law enforcement (Article 1). The Shenzhen Lawyer Regulation formalized three types of law firms: the corporate law firm, partnership law firm and the one-person partnership law firm (Article 16). Apart from the Lawyer Regulation, Shenzhen also adopted some SEZ regulations aimed at privatizing other intermediary organizations. These regulations include: the Regulation on Auction of Property (adopted in June 1993), the Regulation on the Management of the Certified Public Accountants (adopted in March 1995) and the Regulation on the Management of the Brokers (adopted in July 1996).

Shenzhen adopted a wide range of SEZ regulations aimed at providing basic rules for maintaining the market and removing barriers that inhibit competition. These regulations are provided below:

**Table 9: Shenzhen SEZ regulations concerning the maintenance of the market**

Title	Date of Passage
Regulation of Shenzhen SEZ on Severely Cracking down on the Acts of Manufacturing and Selling Counterfeit or substandard Commodities	July 1993

(深圳经济特区严厉打击生产、销售假冒、伪劣商品违法行为条例)	
Provisions of Shenzhen SEZ for Implementing the PRC Law against Unfair Competition (深圳实施《中华人民共和国反不正当竞争法》规定)	September 1993
Metrology Regulation of Shenzhen SEZ (深圳经济特区计量条例)	May 1994
Regulation of Shenzhen SEZ on the Market of Agricultural and Sideline Products (深圳经济特区农副产品集贸市场条例)	May 1994
Regulation of Shenzhen SEZ on the Management of Alcohol Drinks (深圳经济特区酒类管理条例)	April 1995
Regulation of Shenzhen SEZ on the Pricing Management (深圳经济特区价格管理条例)	November 1995
Provisions of Shenzhen SEZ on Inhibiting Making Exorbitant Profits (深圳经济特区制止牟取暴利规定)	January 1996
Regulation of Shenzhen SEZ on the Format Contract (深圳经济特区格式合同条例)	July 1998
Regulation of Shenzhen SEZ on the Commodity Market (深圳经济特区商品市场条例)	January 1999

### 5.2.3 Stage Three (2000-2015): Legislating for Hi-tech Industry, Modern Service industry and Non-Economic Areas

Stage three, lasting from 2000 to the end of 2015, saw the adoption of regulations in the Shenzhen SEZ, averaging 4.3 per year. Compared to the legislation in stage two, which averaged 16.8 per year, the rate of SEZ legislation in stage three significantly slowed down. There are two reasons for this change. First, during this period, many matters in Shenzhen were regulated by ordinary local regulations rather than by SEZ regulations. In 2000, Shenzhen was empowered to enact ordinary regulations; since then, Shenzhen has adopted 36 ordinary local regulations. Compared to SEZ regulations, the merit of ordinary local regulations is that they can be implemented for the whole of Shenzhen City. The SEZ regulation however can only be implemented within the SEZ area.

Second, the slowing legislation is also due to the changing national political and legal environment. China's accession to the WTO in 2001 and the development of the legal system on market economy has created a commitment for the Chinese Government to ensure uniform application of policies and laws. This had led to the gradual

elimination of preferential policies and treatments in SEZs.<sup>87</sup> Accordingly the SEZ legislation aiming at formalizing these policies cannot be made thereafter and many SEZ legislation were abolished. With respect to this, the most salient example is the abolition of the preferential tax policies in SEZ regulations in March 2007 with the passage of the new Enterprise Income Tax Law. As a consequence, the corporate income tax rate in SEZs was raised from previous the 15 per cent to a standardized 25 per cent at the national level. The SEZ legislation is also affected by the adoption of the LoL. This law provides for a list of ten matters that are under the exclusive legislative authority of the central government (Article 8). The 8th matter covers basic systems of finance, taxation, customs, banking and foreign trade. The listing tends to diminish the legislative autonomy of SEZs and therefore affects the SEZ legislation.

Despite the reduction in number, the SEZ legislation in Shenzhen during this period reveals some new developments. Perhaps the most inspiring development is the legislation on hi-tech industry. Prior to 2000, the Shenzhen Municipal People's Government had issued a wide range of administrative documents and rules aimed at promoting the development of hi-tech industry. An important step came in June 1993 with the issuing of the Provisions for the Management of Private Scientific and Technical Enterprises. This local rule was intended to attract scientific and technical personnel and to facilitate the establishment of private hi-tech enterprises in the Shenzhen SEZ by offering an array of favorable policies concerning taxation, residence registration, professional titles, and exit and entry. Starting in 2000, Shenzhen adopted an array of SEZ regulations to further formalize the previous Shenzhen policies and rules on promoting high-tech industry. This represented an attempt to create a more complete and stable regulatory environment that is favorable for the development of high-tech industry. Some important SEZ regulations are provided below.

**Table 10: Shenzhen SEZ regulations on hi-tech industry**

Title	Date of Passage
Regulation of Shenzhen SEZ for High and New Technology Industry Areas (深圳经济特区高新技术产业园区条例)	March 2001
Regulation of Shenzhen SEZ for Venture Capital Investment (深圳经济特区创业投资条例)	February 2003
Regulation of Shenzhen SEZ for Promoting Circular Economy (深圳经济特区循环经济促进条例)	March 2006
Regulation of Shenzhen SEZ for Promoting Scientific and Technological Innovation (深圳经济特区科技创新促进条例)	July 2008

<sup>87</sup> The WTO rules on national treatment (or more precisely, equal treatment) forbid certain localities of a country to provide more preferential treatment to foreign enterprises than domestic enterprises, see Qin Julia Ya, 'Trade, Investment and Beyond: the Impact of WTO Accession on China's Legal System', 191 (2007) *The China Quarterly*, pp. 731-732 and 736-737.

Regulation of Shenzhen SEZ for the Transfer of Technology (深圳经济特区技术转移条例)	February 2013
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The SEZ legislation plays an important role for the dramatic development of high-tech industry in the Shenzhen SEZ. Shenzhen has become China's most important high-tech research and development base.<sup>88</sup> In 1991, the hi-tech industrial output value in Shenzhen was 2.29 billion Yuan, accounting for 8.1 per cent of the total industrial output value; in 2000, it increased to 106 billion Yuan and 41 per cent and in 2013, it reached 1293.2 billion Yuan and 58 per cent.<sup>89</sup>

Another ongoing development is the SEZ legislation on modern service industry in Qianhai (前海), Shenzhen.<sup>90</sup> In August 2010, the State Council designated the Qianhai Shenzhen-Hong Kong Modern Industries Cooperation Zone (Qianhai Zone) (前海深港现代服务业和合作区). Accordingly, Shenzhen passed the Regulation on the Qianhai Zone. The designation and the regulation aimed at 'promoting the production-oriented service industries, and developing the services of finance, modern logistics, information, technology and other professional service industries.'<sup>91</sup> The Regulation on the Qianhai Zone lays out a basic legal framework for the development of the Qianhai Zone. It is predicted that the following years will see the adoption of more SEZ legislations for the Qianhai Zone. In a 2010 reply to the Guangdong Provincial Government concerning the development plan of the Qianhai Zone, the State Council required Shenzhen to 'sufficiently make use of SEZ legislative powers to create a good legal environment for the development of modern service industry in Qianhai'.<sup>92</sup> As Zhang Bei, the Director of Qianhai Administration Bureau, stated in 2014, Shenzhen will gradually establish a legal framework for the Qianhai Zone, which is in line with the development of modern service industry.<sup>93</sup>

In recent years, SEZ legislation in Shenzhen has appeared to govern non-economic matters. Relevant important regulations include the Regulation on the Promotion of Social Construction (passed in January 2012), the Regulation on the Promotion of

<sup>88</sup> Zhang Junbiao, Shu Guoxiong and Li Zhenhe, 深圳四大支柱产业的崛起: 高新技术 (*The Rise of Four Pillar Industries in Shenzhen: the High and New Technology*) (Beijing: Zhongguo Wenshi Chubanshe, 2010), pp. 12-20.

<sup>89</sup> Statistics Bureau of Shenzhen, 深圳统计年鉴 2013 (Shenzhen Statistic Yearbook 2013), available at [www.szstj.gov.cn/nj2013/indexce.htm](http://www.szstj.gov.cn/nj2013/indexce.htm), last visited May 2016.

<sup>90</sup> Qianhai Zone is located in the western Nanshan Peninsula, bordering Lingding Ocean and Pearl River Estuary to the east, with a territory of approximately 15 km<sup>2</sup>.

<sup>91</sup> Article 3 of the Regulation on Qianhai Zone.

<sup>92</sup> The title of this document is 国务院关于前海深港现代服务业合作区总体发展规划的批复 (The State Council's Reply on the Overall Development of Modern Service Industry in Qianhai), see 凤凰网 (*Ifeng News*) available at [www.szqh.gov.cn/sygnan/xxgk/xxgkml/zcfg/gjflfg/201112/t20111216\\_29049.shtml](http://www.szqh.gov.cn/sygnan/xxgk/xxgkml/zcfg/gjflfg/201112/t20111216_29049.shtml), last visit May 2016.

<sup>93</sup> Zhang Wei, 前海法律专业咨询委成立 (The Qianhai Legal Advisory Committee was Established) in 南方日报 (*Southern Daily*), 29 May 2014, available at [news.163.com/14/0529/07/9TD5E10800014AED.html](http://news.163.com/14/0529/07/9TD5E10800014AED.html), last visited May 2016.

Gender Equality (passed in June 2012), the Regulation on the Promotion of Civilized Behavior (passed in December 2012), the Regulation on Promotion of Body Building of Citizens (passed in August 2014), the Regulation on Blood Donation (passed in October 2014), the Regulation on the Residence Permission (passed in October 2015).

Some SEZ legislation in Shenzhen has caused controversy. The most noticeable example is the Regulation on the Punishment of the Illegal Acts against the Road Traffic Safety adopted in January 2010. This regulation intended to curb the rampant violation of traffic safety rules and enhance the public awareness of traffic safety by imposing remarkably higher fine (compared to national law) for the acts that violate traffic safety rules.<sup>94</sup> Under the Regulation, the minimum fine imposed for the violation of traffic rules is 300 Yuan (Article 11-14) compared to 20 Yuan under the Law on the Road Traffic Safety (Article 90).<sup>95</sup> With respect to the fining on red light violation, the Regulation applies an accumulative mechanism. If a driver runs the red light for three times or more within one year, he/she should be imposed a fine of 1000 Yuan each time after the third violation (for the first two violations, the fine is 500 Yuan). The national law, however, does not apply this mechanism. Moreover, the Regulation also imposes a remarkably higher fine for the overloading of freight motor vehicles and the use of the forged plates compared to the national law.<sup>96</sup>

The effect of this traffic regulation in Shenzhen is significant. One local press article reported that in the first four months after the Regulation went into effect, the acts of running red lights decreased by 70 per cent compared to the last four months before it went into effect.<sup>97</sup> Nevertheless, during the drafting process, this regulation stirred up considerable controversy among lawmakers, legal scholars and the public. In a meeting for soliciting opinions on the draft of regulation held in October 2009, many attendees stated that the fine in the draft was too high.<sup>98</sup> Some critics also questioned the legality of the regulation, asserting that the traffic penalty rules in the national law should not be contravened.<sup>99</sup> Facing the criticism, Liu Shuguang, the vice director of the Legislative

<sup>94</sup> Author Unknown, 深圳拟重罚交通违法行为, 律师上书全国人大质疑 (Shenzhen Plans to Severely Punish Illegal Traffic Acts, Lawyers Sent Proposal to the NPCSC to Question It) in 北京晨报 (*Beijing Morning Daily*), 19 October 2009, available at <http://news.163.com/09/1019/02/5LV1DUFS0001124J.html>, last visited May 2016.

<sup>95</sup> The Law on Road Traffic Safety was adopted by the NPCSC in October 2003.

<sup>96</sup> For the overloading of freight motor vehicles, the Regulation not only fines the driver, but also the owner of vehicles and their users. However, under the Law on the Road Traffic Safety, only the driver will be fined (Article 92). Under the Regulation, the fine for using forged plates is 30000 Yuan (Article 32) compared to 1000 to 3000 Yuan under the Law on the Road Traffic Safety (Article 96).

<sup>97</sup> Fu Lunbo, 深圳经济特区立法创新的回顾与思考 (Reviewing and Rethinking of the Legislative Innovation in Shenzhen Special Economic Zone) in 深圳特区报 (*Shenzhen SEZ Daily*), 21 December 2010, available at [http://sztqb.sznews.com/html/2010-12/21/content\\_1370485.htm](http://sztqb.sznews.com/html/2010-12/21/content_1370485.htm), last visited May 2016.

<sup>98</sup> Zhou Chunyuan, 重罚交通违章违法该不该? (Whether it is Necessary to Severely Punish Illegal Acts against Traffic Safety?) in 深圳特区报 (*Shenzhen SEZ Daily*), 24 October 2009, available at [http://sztqb.sznews.com/html/2009-10/24/content\\_821937.htm](http://sztqb.sznews.com/html/2009-10/24/content_821937.htm), last visited May 2016.

<sup>99</sup> Li Kejie, 史上最严厉交规是否涉嫌越权立法 (Whether the Most Severe Traffic Regulation was enacted without Authority) in 检察日报 (*Procuratorate Daily*), 4 August 2010, available at

Affairs Commission of Shenzhen PCSC at that time, justified that the higher fining in the Regulation was the result of exercising SEZ legislative power.<sup>100</sup> As one paper published in the Procuratorial Daily stated, a foundational question is whether the SEZ legislative autonomy includes the modification of national laws in the field of administrative penalty.<sup>101</sup>

### 5.3 Effects of SEZ Legislation

The effect of SEZ legislation is twofold. First, it provides a basic regulatory framework for a market economy in SEZs. SEZs were pioneers in introducing regulatory rules on a market economy while the rest of the country was still under the shadow of the planned economy. The change of policies and legislation towards a market system greatly facilitates local economic development. For example, starting in 1993, SEZs adopted regulations that abolished the pre-approval procedure for the establishment of foreign enterprises. The adoption of these regulations resulted in the dramatic expansion of enterprises in number and the accompanying inflow of massive foreign investment.<sup>102</sup>

The second and far-reaching effect of SEZ legislation is that it serves as a testing ground for later market-oriented national legislation. From the view of national lawmakers, the SEZ legislation has two functions. The first function is that it contributes to the creation of a favorable political, economic and policy environment for market-oriented legislation at national level. The designation of SEZs and the adoption of SEZ legislation were controversial in the early reform era and these legislative initiatives were unlikely to be transplanted by the central government given the constraints in ideology, planned economic management and policy at that time. SEZ legislation is more concerned with initiating primary rules rather than modifying national laws and regulations. Seeing the economic success in SEZs, many other localities, to varying degrees, imitated the SEZ legislation. This gathered the momentum for turning the tide of contestation in the domains of ideology, economy and policy in favor of a market system, and created conditions favorable for the market-oriented legislation at national level.

The second function of SEZ legislation is that it serves as a model for the market-oriented national legislation. In a conference on the SEZ legislation held in December

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[http://newspaper.jcrb.com/html/2010-08/04/content\\_50698.htm](http://newspaper.jcrb.com/html/2010-08/04/content_50698.htm), last visited May 2016; also see Zhu Yingping and Xu Bofang, 公然违法立法, 迄今未见纠正-《深圳经济特区道路交通安全管理条例》违法性评析 (Analysis on the Unlawfulness of the Regulation on the Punishment of the Illegal Acts against the Road Traffic Safety in Shenzhen SEZ), 5(1999) 法学 (*Legal Science*), pp. 6-7.

<sup>100</sup> Wang Miaomiao, 闯红灯最低罚千元, 深圳'重典'惹争议 (Minimum 1000 Yuan Fine for Running the Red Light, Shenzhen's Heavy Penalty Stirred up Controversy) in 新华网 (*Xinhua News*), 20 October 2009, available at, [http://news.xinhuanet.com/focus/2009-10/20/content\\_12272233.htm](http://news.xinhuanet.com/focus/2009-10/20/content_12272233.htm), last visited May 2016.

<sup>101</sup> Shu Shengxiang, 重罚交通违法深圳是否违法 (Whether It is Illegal to Severely Punish Traffic Offense) in 新京报 (*The Beijing News*), 4 August 2010, available at, <http://www.bjnews.com.cn/opinion/2010/08/04/57420.html>, last visited May 2016.

<sup>102</sup> Liu Yunliang, 中国经济特区立法研究 (*The Legislation of China's Special Economic Zones*) (Haikou: Nanhai Chubanshe, 1996), pp. 81-83.

2013, Zhou Chengkui, the NPCSC vice secretary general at that time, concluded that the SEZ legislation's main task was to generate legislative experience for the establishment of a legal system of market economy in China.<sup>103</sup> Some examples are provided below. As noted earlier, Shenzhen SEZ formalized the bidding system in the form of a SEZ regulation in the early 1980s. The following years saw its expansion into many other localities in the country. Drawing on the local legislative practice, the Ministry of Housing and Urban-rural Construction issued an array of local rules on the bidding system in the early 1990s. Finally, this system was formalized by the 1997 Construction Law and the 1999 Law on Bidding Invitation and Bidding.<sup>104</sup> Shenzhen SEZ's legislation for the liberalization of labor and wages in the early 1980s soon spread to other localities. One important legislative move came in 1986 with the issuing of four administrative regulations by the State Council. These regulations recognized the Shenzhen model in labor and wage reform and applied it to the whole country. Finally, it was formalized in the 1994 Labor Law, 1999 Contract Law and the 2007 Labor Contract Law.<sup>105</sup>

Perhaps the most significant SEZ legislation in term of its impact on national legislation are those that sanctioned the granting of land leases. When Shenzhen adopted the Regulation on the Granting of Land Leases in 1987, Article 10 of the Constitution and Article 2 of the Land Management Law that forbade land lease were still effective. The inconsistency between SEZ legislation and the Constitution sparked heated debate among constitutional scholars, and was called 'benign unconstitutionality' (良性违宪).<sup>106</sup> This inconsistency was resolved by the 1988 amendment of the Constitution to remove the prohibitive provision, followed by the revision of the Land Management Law in the

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<sup>103</sup> Zhou Chengkui, 经济特区立法要为完善社会主义市场经济法律体系作出贡献 (The SEZ Legislation Should Make a Contribution for Perfecting the Legal System of Socialist Market Economy), 1(2004) 海南人大 (*Hainan People's Congress*) pp. 9-10.

<sup>104</sup> These rules include the Rules on the Qualification of the Enterprise for Construction Project (issued in August 1983), the Rules on the Management of Construction Market (jointly issued with the State Administration for Industry and Commerce in November 1991), the Measures for the Management of Bidding Invitation for Construction Projects (issued in December 1992), and the Measures for the Management of Construction Contract (issued in January 1993).

<sup>105</sup> These four administrative regulations were Interim Provisions on Applying Labor Contract System in State-run Enterprises, the Interim Provisions on Recruiting Workers by State-run Enterprises, the Interim Provisions on Dismissal of Staff Members and Workers Who Violate Disciplines, and the Interim Provisions on Employment Insurance for Staff Members and Workers in State-run Enterprises. From 1978 to 1992, apart from these four administrative regulations, the State Council also enacted a broader range of labor-related regulations, see Xia Jizhi, 中国劳动立法问题 (*The Legislation on Labor in China*) (Beijing: Zhongguo Laodong Chubanshe, 1989), pp. 9-11 and 19-27.

<sup>106</sup> See Hao Tiejuan, 论良性违宪 (On the Benign Unconstitutionality), 4(1996) 法学研究 (*Chinese Journal of Law*), p. 89-91; Tong Zhiwei, 良性违宪不宜肯定 (the Benign Unconstitutionality should not be Recognized), 6(1996) 法学研究 (*Chinese Journal of Law*), pp. 19-22; Zhang Qianfan, 宪法变通与地方试验 (*Constitutional Uniformity and Local Experiments*), 1(2007) 法学研究 (*Chinese Journal of Law*), pp. 63-73.

end of 1988. In 1990 the State Council issued two administrative regulations aimed at detailing rules on the granting of land leases.<sup>107</sup>

## 6. Conclusion

The SEZ legislation, on the one hand, is part of the SEZ policy package, on the other hand, it is one of the principal means for the implementation of SEZ policies. It should be pointed out that the delegation of SEZ legislative power was not included in the original SEZ policy package. The SEZ Regulation in Guangdong and Fujian, which serve as the basic laws for the SEZs, do not grant SEZs the legislative power. Thus, the delegation of SEZ legislative power can be better understood as a proactive reaction to the SEZs' actual need of a favorable regulatory environment to the development of the local market economy. The delegation is partly due to the endorsement of the reformist national leaders and partly due to the strong commitment of SEZ officials to pursue legislative power.

SEZ legislative power is, by nature, a delegated power from the central government. The Constitution does not mention SEZ legislative power at all. The LoL confirms that the exercise of this power is based on the NPC's authorization (Article 74), implying that the NPC may withdraw its authorization whenever it deems necessary.<sup>108</sup> For this reason, the SEZ legislation is not as stable as other types of legislation that are formalized by the Constitution and the LoL. From the perspective of delegated power, the legality of SEZ legislative power is questionable. Under the LoL, the period of legislative delegation normally should not exceed 5 years (Article 10). Apparently, the NPCSC's delegation decisions, which were made in the early 1990s, have largely exceeded this time limit, and therefore there are legal deficiencies for the exercise of SEZ legislative power. If the central government wants to retain SEZ legislative power, the feasible solution is that the NPCSC can either issue a decision to extend the period of delegation, or revise Article 74 of the LoL to remove NPC's delegation requirement.

SEZs serve as a testing ground for national legislation on the market economy. SEZs work like a petri dish where market-oriented reforms and legislation were introduced and practiced, and later spread to elsewhere in the country. It ultimately gathered the momentum for turning the tide of contestation in the domains of ideology, economy and policy in favor of a market system, and created conditions favorable for the market-oriented legislation at national level. Perhaps a more significant impact of SEZ legislation is that it serves as one of the main sources of reference for national legislation on the market economy. As noted earlier, drawing on the legislative experience of SEZs for national legislation is not an individual phenomenon; it is a practice that was

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<sup>107</sup> These two regulations are the Interim Regulation on the Granting and Transfer of Use-right of State-owned Land in Urban Areas, and the Interim Administrative Measures on Foreign Investment for Developing Plots of Land.

<sup>108</sup> Under Article 74 of the LoL, the term 'NPC' refers to not only the NPC but also the NPCSC.

intentionally and systematically organized. The SEZ legislation provides a series of rules on the market economy that are later written into national laws and regulations.

The SEZ legislation is a unique phenomenon in China's legislative decentralization in the reform era. Despite its significance in introducing the legal system on the market economy, its side effect cannot be ignored: it has the tendency to create some disorder in China's legal system. Because of this uniformity problem, the Chinese central government refused to create more SEZs and did not delegate similar legislative power to the new 'economic zones', such as Shanghai Pudong New Area (浦东新区) in 1992, Tianjin Binhai New Area (滨海新区) in 2006 and Shanghai Pilot Free Zone (上海自由贸易试验区) in 2013. One related issue is that consistent with the development of the market-oriented national legislation, many SEZ regulations have either been abolished or superseded by national laws. For the above two reasons, future SEZ legislation is likely to lose its significance and features.

Given SEZ legislation's side effect and declining trend, one may question the rational and necessity to continue the delegation of SEZ legislative power. However, from my perspective, the SEZ legislation is still necessary in the future and still has the potential to introduce significant reforms in the legal domain. The main reason is that after more than two decades' legislation in SEZs, SEZ officials have created a reformist identity/spirit that does not exist elsewhere. This reformist identity/spirit is crucial for introducing legal reforms in other domains critical to China's long-term stability and development, such as political modernization, administrative management, rights protection and so on. This trend is observable. As noted earlier, the Shenzhen SEZ adopted the regulation on the traffic road safety. Shenzhen SEZ also passed the Regulation on Residency Permits in November 2014, aimed at removing barriers for the inflow of migrants to the Shenzhen SEZ.



## Chapter 8. Conclusions: Progress, Limitations and Recommendations

### 1. Introduction

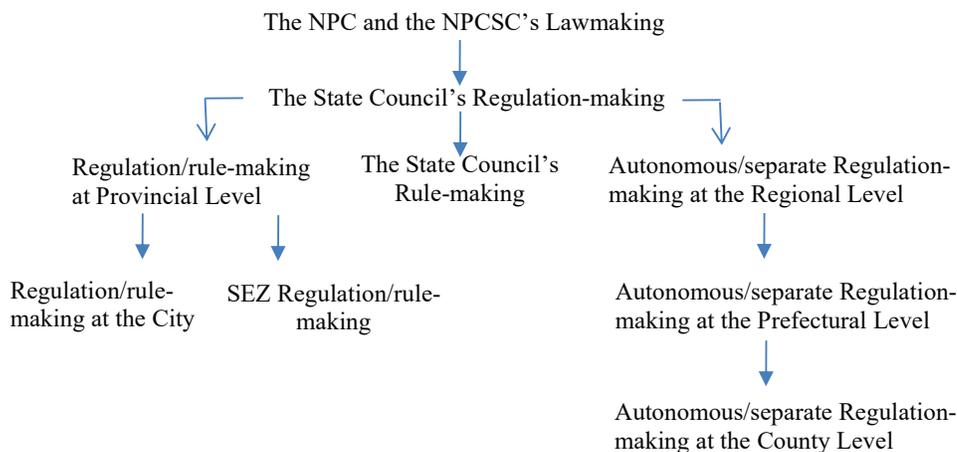
Chapters 3 to 7 of this thesis examine all the 5 sub-systems within China's legislative system respectively. Each sub-legislative system has undergone remarkable development and revealed shortcomings. Accordingly, the reform era has witnessed an unprecedented expansion of the legal system with the adoption of a myriad of national laws, administrative regulations, local regulations and department/local rules. Based on the discussion in the preceding chapters, this chapter looks at the legislative system as a whole, examining its progress and limitations and give recommendations. This chapter is composed of 4 sections. Following the introduction, section 2 summarizes the progress concerning the legislative system as a whole. Section 3 presents the limitations that materialized in the reform era. Section 4 provides for relevant feasible recommendations regarding how the Chinese government could improve the legislative system.

### 2. Progress

#### 2.1 The Emergence of a Decentralized Legislative System and Its Gains

After 37 years' continuous development, a decentralized legislative system has taken shape in China. The legislative system contains 5 types of sub-legislative systems, which include (1) the law-making system of the NPC and the NPCSC; (2) the State Council's legislative system; (3) the local legislative system; (4) the legislative system in autonomous areas; (5) the SEZ legislative system. In general, there are four levels of legislative organs – the NPC and the NPCSC, the State Council, provincial government, city-level government. Apart from these, autonomous counties (自治县) are also allowed to enact autonomous/separate regulations. They constitute the 5<sup>th</sup> level of legislative organs. In short, the decentralized legislative system has a hierarchical structure with 4 levels (for autonomous areas it is 5 levels), as shown below:

**Figure 2: The hierarchical structure of the legislative System in China**



The allocation of legislative powers in China is asymmetrical. The central government, on the one hand, decentralized considerable legislative powers to localities symmetrically, on the other hand, it allows two types of special localities – autonomous areas and SEZs, to exercise more flexible legislative powers. As a consequence, these two types of localities enjoy two types of legislative power.

As discussed in Chapter 2, the broad economic and administrative decentralization created an institutional foundation for the spectacular economic growth and the creation of a market system in China in the reform era. In general, as one part of the decentralization program, the legislative decentralization plays an important role for this economic transformation. Decentralized legislative powers have become a main primary power that can be exercised by local governments; in addition, it also serves as an important means to exercise other decentralized authority.

More specifically, abundant studies in law and economics suggest that law is one of the most important determinants for economic growth and the accompanying increase of the overall welfare of a country.<sup>1</sup> Given that China was a lawless country prior to the reform era, the economic significance of the legal construction resulting from the legislative decentralization is obvious. In the reform era, the economic legislation is the focus of Chinese legislative organs both at the national and local levels. Consequently, a large amount of legislation has been made in a wide range of areas, such as property, contract, and business organization, and commercial and civil dispute resolution and so on. In this sense, the legislative decentralization has become one of the most important institutional bases for the spectacular economic growth and accompanying creation of a market system.

One may argue that the legal system in China is flawed and inconsistent due to the local rampant legislation, and therefore is unable to support sustainable economic growth and a market system. This argument is problematic for three reasons. First, a ‘bad’ legal system is better than none. Second, Chinese experience proves that even a ‘bad’ legal system may enhance economic growth and preserve a market system because despite its various drawbacks, the flawed and inconsistent legal system also leads to lower factor prices, and subsidized investment and production, which tends to accelerate growth at least in the short run.<sup>2</sup> Third, as discussed in previous chapters, the reform era saw remarkable improvement of the legislative quality – legal provisions are more specific than before and legislative coherence is enhanced by the means of unifying separate laws into one and conducting legislative cleaning work.

One criteria to assess the legislative system in China is whether it can produce sufficient and effective legislation that supports the objective of the reformist government - economic growth and the creation of a market system. Compared to the previous centralized one, the decentralized legislative system has proved to be more capable of achieving this objective. Its gains are in line with those of the decentralization theory. First, it contributes to the expansion of the legal system at a much greater speed. In the pre-reform era, there was only one legislative organ – the NPC. On the eve of the reform era, China was virtually in a

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<sup>1</sup> For the summary of the study on the important of legal rule on macro-economic growth, see Guangdong Xu, *Does law Matter for Economic Growth?* Doctoral Thesis at Erasmus University, Rotterdam, 2015, pp. 6-10.

<sup>2</sup> *Ibid.*, pp. 154-167.

lawless state. With the passage of the revised LoL in 2015, the number of legislative organs has increased to 319. In fact, the current legal system, which contain numerous national laws, administrative regulations, local regulations and rules, cannot be built without legislative decentralization because the overwhelming majority of laws are made by decentralized organs rather than by the NPC.

Second, it enables localities to make legislation that corresponds more closely to the specific conditions than the uniform legislation of the central government, and therefore it can better deal with local problems and better serve the goal of local economic development.

Third, the decentralized legislative system has led to legislative competition among localities and it also allows enterprises to choose localities whose legal environment best satisfies their preference. The lower rate of corporate income tax set by its tax regulations was deemed as the principle advantage of SEZs for attracting foreign investment in the early reform era. As a consequence, because of this preferential tax legislation, most of the foreign investment in China at that time flew into SEZs. In the 1980s and early 1990s, many local governments issued their local regulations and rules, which laid out various types of favorable policies for attracting investment. Another example is that many hi-tech enterprises cluster in Shenzhen because of its relatively complete local legislation on Hi-tech Industry.

Fourth, it also provides space for legislative experimentation. Local governments, especially those in SEZs, first introduced market-oriented economic legislation to regulate various emerging economic activities. These legislative measures were soon copied and imitated, and finally became part of national legislation. In this sense, localities serve as a testing ground for building a legal system of the market economy.

In summary, it can be concluded that the traditional decentralization theory can be borrowed to explain the gains of a decentralized legislative system. The difference is the objective. The traditional decentralization theory aims at maximizing social welfare. The direct objective of legislative decentralization is creating (as fast as possible) a sufficient and effective legal system. However, one should be cautious when applying it to explain the future legislative development in China. The reason is that the basic nationwide legal framework on market system has been established and it can be predicted that the focus of future legislation, in particular, the future local legislation, will be transferred to other domains (for example, political reform), therefore the legislative decentralization will no longer serve to preserve a market. This change does not mean that a decentralized form of legislation is no longer needed. On the contrary, consistent with the growing importance of law in China, legislative decentralization may play a key role in initiating other significant reforms in the political and social domains.

## **2.2 Clearer Demarcation of Legislative Powers of Different Organs**

At this point of time, the scope of the legislative powers of different legislative organs is more demarcated than ever before. This development is reflected by the following 4 aspects. The first is that the exclusive legislative powers of the NPC and the NPCSC have been enumerated. The 1982 Constitution recognizes that the NPC and the NPCSC possess unlimited legislative powers but it does not say what kind of legislative powers can only be exercised by these two bodies vis-à-vis other legislative bodies. This situation lasted for

nearly 20 years. The 2000 LoL, for the first time, incorporates a list of 10 matters that can only be governed by NPC and the NPCSC's laws (Article 8). The listing suggests that after 20 years' abrupt decentralization of legislative powers, the Chinese central government attempted to consolidate its legislative authority over other legislative bodies.<sup>3</sup> The 2015 revised LoL further details the term 'taxation'. As a consequence, the number of matters in the list increased to 11. The detailing of the term 'taxation' reflects the intention to withdraw the taxation legislative powers, which were delegated to the State Council in 1984, back to the NPC and the NPCSC. It also shows the prospect that national laws will be enacted to supersede the pre-existing State Council's tax regulations.

The second aspect of development is the expansion and demarcation of the State Council's regulation-making powers. Under the 1982 Constitution, the State Council can issue administrative regulations only with the authorization of the Constitution and national laws (Article 89.1). Semi-authoritative sources suggest that constitutional drafters at that time had no intention to confer primary legislative powers to the State Council.<sup>4</sup> The State Council's regulation-making practice in the following 2 decades showed that this constitutional restriction had been exceeded – a large number of administrative regulations issued during this period were not based on the provisions of the Constitution or national laws. The State Council's *de facto* extensive regulation-making powers were formalized in 2000 with the passage of the LoL. Under this law, the State Council can issue administrative regulations to govern three types of matters – (1) matters for implementing provisions of national laws; (2) matters within its administrative functions and powers; (3) matters under the exclusive legislative powers of the NPC and the NPCSC, which are delegated to the State Council.

The third aspect of development is the demarcation of local regulation-making powers. Prior to 2000, the *de facto* local legislative powers were very extensive. Under the Constitution, they can enact local regulations as long as they do not contravene higher-level laws and regulations. Like the State Council's regulation-making powers, the local regulation-making powers were delineated by the LoL. Under this law, the local regulations can govern three types of matters: (1) matters for implementing provisions of higher-level laws and regulations; (2) local affairs; (3) matters that have not been governed by higher-level laws and regulations, except those under the exclusive legislative powers of the NPC and the NPCSC. It can be seen that while the local units that possess legislative powers significantly increased in number, the exercise of local legislative powers is under tighter restriction. The 2015 revised LoL further tightened the restriction on the exercise of city-level local legislative powers. The revised law states that local regulations at city level can only govern three matters – urban and rural construction and management, environmental protection, and the protection of history and culture. Under the original law, however, city-level governments possess the same legislative powers as provincial governments do.

The fourth aspect is the demarcation of rulemaking powers. The LoL, for the first time, provides for the scope of the State Council's department and local rulemaking. Under this

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<sup>3</sup> Paler Laura, 'China's Legislation Law and the Making of a More Orderly and Representative Legislative System', 182 (2005) *The China Quarterly*, pp. 301-318.

<sup>4</sup> Zhang Youyu, 张有渔文选 (下卷) (*Selected Works of Zhang Youyu, Volume II*) (Beijing: Falv Chubanshe, 1997), pp. 260-261.

law, the department rules can only serve to implement national laws, administrative regulations and State Council's decisions and orders. The scope of local rules is broader. Apart from implementing higher laws and regulations, they can also govern matters within the administrative functions and powers of local governments. The revised LoL imposes restrictions on the exercise of rulemaking powers. Article 80 states that a State Council's department should not use department rules to expand its powers or reduce its legal duties; if there are no relevant national laws and administrative regulations as the basis, the department rules and local rules should not reduce citizens' rights or increase their obligations.

Drawing on the above discussion, it can be seen that the demarcation of legislative powers of different bodies has undertaken rapid development. Three phases of development are distinguishable. The first phase, which lasted from 1982 until 2000, was the initial stage. During this stage, as the only source of law for distributing legislative powers, the Constitution granted comprehensive legislative powers to the NPCSC, the State Council and provincial governments but relevant constitutional provisions do not provide detailed rules for demarcating the legislative powers of different organs. As a consequence, the scope of their legislative powers largely overlaps. The exclusive concurrent legislative powers are conducive to mobilize the legislative initiatives of different organs and therefore can serve to accelerate legislative work, but they also tend to create conflicts between different legal documents and have the potential to cause disorder in the legal system. Stage 2 and stage 3, which respectively lasted from 2000 until 2015 and 2015 to the present, see a clearer demarcation of the legislative powers of different bodies. This development was achieved with the passage and revision of the LoL in 2000 and 2015.

Three implications are observable. First, the demarcation of legislative powers is regarded as an important measure to build a more uniform legislative system and eliminate the legislative disorder that was caused by *ultra vires* legislation at various levels in the early reform era.<sup>5</sup> Second, the delineation of legislative powers is mainly governed by the LoL rather than by the Constitution. Using a national law to govern this matter instead of the Constitution has its advantage. It allows the Chinese government to adjust the distribution of legislative powers more easily. Third, consistent with the enactment and revision of the LoL in 2000 and 2015, we can observe the trend of re-centralization of legislative powers. Following the abrupt legislative decentralization in the 1980s and 1990s, the enactment of the LoL saw the consolidation of NPC and the NPCSC's legislative authority and the reduction of local legislative powers. The extent of legislative re-centralization after 2000 is not as significant as the legislative decentralization in the 1980s and 1990s. Thus, the legislative re-centralization should be understood as a measure of adjustment to correct the problems which materialized in the first 2 decades of the reform era, rather than an attempt to reverse the previous decentralization measures.

### 2.3 The Advancement of Legislative Democracy

The reform era witnesses remarkable advancement of legislative democracy in China, which is illustrated in 4 aspects. First, the People's Congress Standing Committees (PCSC) both at the national level and the local level have strengthened the deliberation on legislative drafts.

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<sup>5</sup> Li Yahong, 'Law-Making Law: A Solution to the Problems in the Chinese Legislative System', 30(2000) *The Hong Kong LJ*, pp. 120-140.

Prior to 1983, the legislative drafts sent to the NPCSC and local PCSCs were deliberated on and put to vote in the same session.<sup>6</sup> Under this ‘one round’ deliberation, the time for deliberation was too limited to conduct any meaningful deliberation work. More importantly, due to time limits, it was very difficult to incorporate the comments of PCSCs’ members into legislative drafts. This tended to make the PCSCs deliberation work perfunctory and the content of legislative drafts was virtually determined by their drafters - in most cases they were administrative institutions.

The PCSC’s deliberative work was strengthened in 1983. Drawing on the suggestion put forward by some NPCSC members during the deliberation on the draft of the Maritime Traffic Safety Law in March 1983, the NPCSC Chairmen Council (委员长会议) decided to abolish the previous ‘one round’ deliberative procedure and began to adopt a ‘two round’ deliberative procedure, namely, a law draft should normally be deliberated by two different NPCSC plenary sessions before it was sent for vote. More importantly, the Chairman Council at that time stressed that the major contradictions and different opinions that emerged during the deliberative process should be resolved before a vote. This ‘two rounds’ deliberation procedure was formalized in November 1987 with the adoption of the Rules of Procedure for the NPCSC. This change enabled the NPCSC to conduct a sufficient and more meaningful deliberation, and accordingly reduced the influence of the administrative organs in the drafting process, which represents the advancement of legislative democracy. The ‘two round’ deliberation procedure was written into all the local legislative procedural rules within several years of the passage of the LoL.

The NPCSC’s deliberation on law drafts was further strengthened in 1998 by adopting the procedure of ‘three rounds’ deliberation. For the third round, the NPCSC should deliberate the revised law drafts based on the report of the second round deliberation conducted by the Law Committee (法律委员会), one of the NPCSC special committees. This change was formalized by the LoL in 2000. The significance of the adoption of the three rounds deliberation is that compared to the previous one round deliberation and two round deliberations, it increases the NPCSC’s weight in shaping the final contents of law drafts.

The second aspect of the development of legislative democracy is the adoption of the unified deliberation procedure. Consistent with the adoption of the two round deliberation procedure in 1983, the NPCSC began to adopt the procedure of unified deliberation. Its Law Committee (法律委员会) would collect the comments of NPCSC members, which are made during the deliberation, and revise law drafts based on the comments. At the local level, the organ assuming this responsibility is the Legislative Affairs Committee (法制委员会) of the local People’s Congress (PC). The significance of the unified deliberation is that it provides a formal mechanism to put revising comments of the PCSC members into legislative drafts. Some studies suggest that this procedure enables PCs to alter a substantial proportion of the content of original law drafts. According to Xu Xianghua’s study on the unified deliberation of 19 drafts of local regulations, the altering proportion resulting from the unified deliberation

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<sup>6</sup> One NPCSC session usually lasts about one week. For the session duration of the NPCSC in the reform era, see the chronology of NPCSC in 中国人大网 (*The Website of the NPC*), available at [http://www.npc.gov.cn/npc/cwhhy/node\\_2433.htm](http://www.npc.gov.cn/npc/cwhhy/node_2433.htm), last visited May 2016.

ranges from 19.2 per cent to 74.1 per cent.<sup>7</sup> Xu's research also showed that one of the main functions of the unified deliberation is to clarify controversial issues in legislative drafts.<sup>8</sup>

The third aspect of the advancement of legislative democracy concerns public participation in legislative processes. Public participation became a general requirement for legislation in 2000 with the passage of the LoL. This law decrees that, while drafting laws and administrative regulations, drafting organs should widely hear citizens' opinions. This law lists a variety of participatory mechanisms that could be used to achieve this purpose, including holding seminars with invited experts, releasing drafts for seeking public input, symposiums for seeking input from relevant organizations, and public hearings. Among these mechanisms, a public hearing was the focus of experiment - it had not been tried in practice by the time it was formalized by the LoL. The law does not provide detailed procedural rules for using these participatory mechanisms. Under this law, their use is discretionary and the ultimate decision is left up to drafting organs. A new development of legislative hearing came in 2015 with the revision of the LoL. The revised law, for the first time, provides for mandatory rules for holding a legislative hearing. It decrees that a public hearing for drafting a national law must be held under one of the following two conditions: (1) there are major divergence of opinions on the drafts; (2) the law draft concerns major adjustments of interests (Article 36.3).

Compared to the central government, local governments in China are more enthusiastic in embracing the idea of public participation in legislation. Following the passage of the LoL, many localities have issued their implementing regulation and rules on how to conduct the above-mentioned participatory mechanisms during regulation-making and rulemaking processes. As a consequence, various applicable rules on public participation in the legislative process are established at the local level. Some of them reveal certain innovation. For example, the Hunan Provisions on Administrative Procedure decrees that a hearing must be held during rulemaking processes if it meets one of following four conditions: (1) concerning major public interests; (2) there are major divergences of opinions on the draft; (3) may affect social stability; (4) national laws, regulations or rules require it so. Another example is the Guangzhou Public Participation Measures, which require that at least one symposium should be held for every rule being made in Guangzhou. The establishment of local rules reveals that China is progressing towards a more institutionalized public participation in legislation.

In summary, the adoption of three round deliberations makes PCSCs members more involved in the drafting process. It is conducive to make deliberation work more meaningful. The unified deliberation by the Law Committee plays a key role in incorporating the comments of NPCSC's members into the legislative drafts. If the above-mentioned three round deliberations and the unified deliberation can be regarded as the 'interior' manifestation of the development of legislative democracy, public participation then can be regarded as an 'exterior' manifestation. Since 2000, public participation has been incrementally introduced in legislation both at the national level and local level. In a country where genuine executive and parliamentary elections are not permitted, the development of

<sup>7</sup> Xu Xianghua, 地方立法统一审议制度的法定功能 (The Functions of the System of Unified Deliberation of Local Legislation), 11(2007) 法学 (*Legal Science*), p. 62.

<sup>8</sup> *Ibid.*, pp. 58-59.

legislative democracy in the above-mentioned three aspects can help to ameliorate the democratic deficit and it can be viewed as a preparation for future democratization in China.

## 2.4 The Pragmatism as the Main Approach for Legislative Work

Chinese lawmakers in the reform era have taken a pragmatic approach to conduct their legislative work. This is first reflected in the ideological domain. The authoritative sources reveal that the previous Marxist legislative doctrine was largely ignored by top Chinese legislative leaders<sup>9</sup>, and they have a pragmatic ideology for legislative work, which is manifested in three aspects. First, the pragmatic approach for legislation is emphasized by Chinese leaders. In the initial reform era, Peng Zhen, the top legislative leader at that time, called for giving full play to two initiatives, namely, national initiatives and local initiatives.<sup>10</sup> Giving full play to local legislative initiatives implies that localities should take the special local conditions into consideration for their legislative work.<sup>11</sup> Chinese legislative leaders iterate the importance of the actual reality for legislative work. In their eyes, the basis for legislative work is China's reality. For example, in the 2010 NPCSC working report, which announced the establishment of 'the socialist legal system with Chinese characteristics', Wu Bangguo the NPCSC Chairman at that time, concluded that to 'proceed from reality' was one of the five most important legislative experiences.<sup>12</sup> It should be pointed out that stressing the importance of local conditions does not mean the rejection of foreign legislative experience. On the contrary, foreign laws are regarded as an important source of reference for law drafting in China. Chinese legislative leaders stressed that learning foreign legislative experience should take China's reality into consideration.<sup>13</sup>

In the reform era, Chinese legislative leaders have come to realize that reforms should not be initiated in the form of legislation, instead it is better to start them in the form of lower-level administrative documents and relevant legislation should come one step later. Its manifestation is the primacy of policy and treating legislation as a tool of administration.<sup>14</sup> This pragmatic approach is based on the legislative experience in the early reform era. In the 1980s, Chinese central government made some reformist legislation, aiming to initiate and lead reforms in relevant areas. However, this reformist national legislation had serious implementation problems. For example, largely because of the lack of legislative experience, the 1979 Law on Sino-foreign Equity Ventures was rather short with 15 provisions. It is better to be viewed as a policy statement for the guidance of foreign investors rather than a

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<sup>9</sup> Yu Xingzhong, 'Legal Pragmatism in the People's Republic of China', 3(1989) *J. Chinese. L.*, pp. 37-40.

<sup>10</sup> Peng Zhen, 彭真文选 (*Selected Works of Peng Zhen*) (Beijing: Renmin Chubanshe, 1991), p. 371.

<sup>11</sup> Peng Zhen, 论新时期的社会主义民主与法制建设 (*On the Construction of the Socialist Democracy and Legal System in New Era*) (Beijing: Zhongyang Wenxian Chubanshe, 1998), p. 246.

<sup>12</sup> The other four most important experiences include: adherence to the Party's leadership; adherence to the guidance of Socialist Theory with Chinese characteristics; adherence to the principle of legislating for the people; adherence to the unification of the legal system, see Wu Bangguo, 全国人民代表大会常务委员会工作报告 - 2011年3月10日第十一届全国人民代表大会第四次会议 (The Working Report of the NPCSC in the Fourth Plenary Session of the 11<sup>th</sup> NPC held on March 10, 2011), in 中国政府网 (*The Website of the Central People's Government*), 18 March 2011, available at [http://www.gov.cn/2011lh/content\\_1827143.htm](http://www.gov.cn/2011lh/content_1827143.htm), last visited May 2016.

<sup>13</sup> *Ibid.*, p. 302.

<sup>14</sup> Stanley Lubman, 'Studying Contemporary Chinese Law: Limits, Possibilities and Strategy', 39(1991) *The American Journal of Comparative Law*, pp. 317-319.

part of the legal system that contains mandatory rules for foreign investment.<sup>15</sup> Facing legislative failures, China's legislative leaders came to realize that it is better to initiate reforms by formulating lower-level administrative documents, and legislation should come later, serving as an instrument to formalize and safeguard the fruits of reforms. This kind of practice is conducive to strengthen the stability of the legal system and it also contributes to guarantee the enforceability of laws.

The second manifestation of the pragmatic legislative approach is that the Chinese central government allows localities to first legislate on matters that it has not yet legislated on. The major reason for this is to make up for the lack of legislative experience and the immaturity of relevant conditions. In this sense, local legislation is regarded as experiments for later national legislation. The local experimental legislation was formalized in 2000 with the passage of the LoL (Article 73.3). The legislative practice reveals that local experimental legislation is a nationwide phenomenon and it covers a wide range of matters. In many cases, prior to the passage of a national law or an administrative regulation, most local governments have adopted relevant local regulations or local rules. A recent case is the legislation on tourism. Prior to the passage of the Tourism Law in 2013, all the 31 provincial governments and most of the relatively large cities had adopted their own local regulations for tourism. The SEZs are most active in conducting legislative experiments. Although SEZ legislation can alter provisions of higher-level laws and regulations, the legislative practice reveals that the focus of SEZ legislation is not about making alterations, but about introducing rules towards a market economy. The SEZ legislation serves as models for the national market-oriented legislation. The merits of local experimental legislation are that it serves to generate experience for later national legislation and eventually accelerates national legislative work; it contributes to the creation of favorable conditions for national legislation and it can largely reduce the risks of legislative failure.

The third manifestation of the pragmatic legislative approach is the wide use of the piecemeal approach for national legislation. When facing the difficulty of enacting a comprehensive law/code on certain complex matter (mainly because of lack of legislative experience and immature conditions), the Chinese national government usually chooses to enact relevant short laws to first govern certain parts of the matter and constantly revise these laws. Deng Xiaoping was a well-known advocate for adopting this approach. He made a statement concerning the use of the piecemeal approach in the Preparatory Conference for the Third Plenary Session of the 11<sup>th</sup> CCP Central Committee in 1978. With respect to legislative revision, he stated: 'individual legal provisions can be revised or supplemented one at a time as necessary, and there is no need to wait for a comprehensive revision of an entire body of law'. With respect to lawmaking, he stated: 'it is better to have some laws than none and better to have them sooner than later'.<sup>16</sup> Deng's view represents the common review of the Chinese reformist leadership towards how to construct the legal system, which lays out the foundation for the legislative development.<sup>17</sup>

<sup>15</sup> Donald Clarke, 'Legislating for a Market Economy in China', 191 (2007) *The China Quarterly*, p. 569.

<sup>16</sup> Deng Xiaoping, 邓小平选集, 第二卷 (*Selected Works of Deng Xiaoping, Volume II*) (Beijing: Renmin Chubanshe, 1994), p. 147.

<sup>17</sup> Carlos W. H. Lo, 'Deng Xiaoping's Ideas on Law: China on the Threshold of a Legal Order', 32(1992) *Asian Survey*, pp. 664-665.

From the perspective of legislative practice, the piecemeal approach is reflected in many areas, such as civil law, contract law and foreign investment law. In the area of civil law, up to now China does not have a unified civil code, but it has adopted an array of laws on civil affairs, such as marriage, succession, tort and property, etc. In the area of contract law, by the late 1980s, the NPC and the NPCSC had adopted three national laws on contracts, namely, the 1981 Economic Contract Law, the 1985 Foreign-related Economic Contract Law and the 1987 Technology Contract Law. In the area of foreign investment, the most significant national laws are the 1979 Law on Sino-foreign Equity Joint Ventures, the 1986 Foreign-owned Enterprise Law and the 1988 Law on Sino-foreign Contractual Joint Ventures. Apart from these three laws, which lay out a basic foundation for the organizational forms of foreign investment, the Chinese government also adopted a wide range of laws and regulations which provide a series of arrangements for foreign-related investment, covering registration, trade unions, foreign currency, and taxation, etc.

It should be pointed out that enacting separate national laws is the first step. The ultimate goal is to enact unified laws that comprehensively govern relevant matters. The Contract Law, which was adopted in 1999, superseded the above-mentioned three laws in the area of contract. This Law possesses 428 provisions, which largely exceeds the length of the previous three separate contract laws combined (145 provisions in total). At this point of time, the Foreign Investment Law is in the drafting process. This Law is deemed to be a basic law for ‘providing unified rules on the management and promotion of foreign investment’, and it is intended for ‘unifying laws and regulations concerning foreign and domestic investment’.<sup>18</sup> The trend of legislative unification also reflects the usage of the pragmatic approach.

### 3. Limitations

#### 3.1 Inactive Mechanisms for Supervising Legislation and Addressing Legislative Conflicts

The current mechanisms for supervising legislation and addressing legislative conflicts are by and large unused. Under the current legal framework, the principal mechanism is the NPCSC’s review of the State Council’s administrative regulations and local regulations. This system is composed of filing and checking (备案和审查). Filing was regularized in 1979 with the passage of the Law on the Local PCSCs and the Local People’s Government. This law requires local people’s congresses to submit their local regulations to the NPCSC for filing (Article 6 and 27). Starting in the same year, the State Council also submitted its administrative regulations to the NPCSC for filing although this practice was not formalized until the passage of the LoL in March 2000.<sup>19</sup>

Although it was performed periodically in the 1980s and 1990s, the system of checking of administrative and local regulations was not written into law until March 2000 with the

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<sup>18</sup> The Legislative Bureau of the Ministry of Commerce of the PRC, 商务部就《中华人民共和国外国投资法(草案征求意见稿)公开征求意见》(The Ministry of Commerce Publicly Solicit Opinions on the Draft of the Foreign Investment Law of the PRC), in 商务部官网 (*The Website of the Ministry of Commerce*), 19 January 2015, available at <http://tfs.mofcom.gov.cn/article/as/201501/20150100871010.shtml>, last visited May 2016.

<sup>19</sup> For the supervision efforts in the early era, see Keith J. Hand, ‘Understanding China’s System for Addressing Legislative Conflicts: Capacity Challenges and the Search for Legislative Harmony’, 26(2013) *Columbia Journal of Asian Law*, pp. 160-163.

passage of the LoL.<sup>20</sup> This law provides basic rules on the system of filing and checking at the national level.<sup>21</sup> The focus of checking is the constitutionality and legality of lower-level regulations. Under Article 90 and 91 of the law, the subjects that can be proposed for the NPCSC to check are very broad and can be divided into two types. The first type is some key State organs, including the NPCSC special committees, State Council, the Central Military Commission, the Supreme People's Court, the Supreme People's Procuratorate and provincial PCSCs. After receiving a proposal from these State organs, relevant NPCSC special committees must conduct an examination and put forward their opinions to the NPCSC. The second type is other State organs, social organizations and citizens. Unlike the mandatory checks initiated by the key State organs, the NPCSC has the right to decide whether a check, which is based on the proposal of the second type of subjects, can be initiated.

Following the passage of the LoL, the NPCSC Chairmen Council adopted a directive in October 2000, which is entitled: 'Working Procedures on Filing and Checking of Administrative Regulations, Local Regulations, Autonomous Regulations, Separate Regulations and SEZ Regulations'. This document provides detailed procedural rules on filing and checking. In October 2003, this document was revised. Its revised version permits the NPCSC to initiate checking procedures by itself. In the next year, under its Legislative Affairs Commission, the NPCSC established an internal working organ - the Office of Checking and Filing of Regulations (法规审查备案室), to deal with filing and checking.

There are limitations in the system of filing and checking both in law and practice. First, there is no mechanism to review the constitutionality of national laws. Under the LoL, the system of filing and checking targets administrative and local regulations rather than national laws. At this point of time, the NPC and the NPCSC have promulgated 268 national laws, 247 of which are still valid. Conflicts between the provisions of these national laws and constitutional provisions are likely to exist. Given that there are 208 national laws promulgated by the NPCSC, it is more likely to see conflicts between provisions of NPCSC laws and constitutional provisions. Accordingly, there is less likely to be conflict between NPC laws and constitutional provisions. One reason is that there are only 39 valid NPC laws. The other reason is that the NPC has the power to revise the Constitution, and therefore, the conflicts between NPC laws and the Constitution can be regarded as the conflicts of legal documents promulgated by the same organ. In this sense, the nature of reviewing NPC's law is not a constitutional review but NPC's legislative action, namely, lawmaking and constitutional revision.

One possible mechanism to review the constitutionality of NPCSC's laws is through the exercise of NPC's general supervisory powers. Article 62.11 of the Constitution empowers the NPC to alter or annul NPCSC's decisions that it deems inappropriate. However, there are

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<sup>20</sup> This law also requires State Council departments and local governments to submit their rules to the State Council for the filing (Article 89).

<sup>21</sup> The reform era also saw the rapid expansion of the systems on the supervision of normative documents issued by local governments. At the national level, the principal law about it is the 2006 Law on Supervision by the PCSC at Various Local Levels, chapter 5 of which lays out some general rules for the supervision work. At local levels, many local governments established filing and checking systems for normative documents, see Keith J. Hand, *supra* note 25, pp. 181-191.

no laws or authoritative documents to confirm that the NPC can do so for the NPCSC's legislation and it has never happened in practice.

Second, the review of administrative and local regulations is, by and large, not institutionalized. The national parliament – the NPCSC – assumes the power to review administrative and local regulations. It can annul regulations it deems unconstitutional or illegal. Its special committees are the organs to conduct the examination on the constitutionality/legality of regulations concerned. However, the NPCSC and its special committees do not regard the review work as their priority because they are already congested with legislative work and other parliamentary work and have little time and energy to conduct review work. The Office of Checking and Filing of Regulations established in 2004 is an internal working organ under the NPCSC Legislative Affairs Commission. Its work is about receiving regulations submitted and conducting preliminary checking, and it has no power to annul regulations submitted. In summary, under the NPCSC there is no organ that is especially in charge of the legislative review work.

Third, the current checking system is ineffective. Although the NPCSC can initiate examination over administrative and local regulations submitted, due to the shortage of labor, examining all regulations submitted seems an impossible mission. During the 8<sup>th</sup> NPC (March 1993–March 1998), the NPCSC special committees examined about 3100 regulations, accounting for less than half of the total regulations submitted (6300 in total).<sup>22</sup> Established in 2004, the Office of Checking and Filing of Regulations is equipped with less than 30 working staff and it has to examine more than 10000 regulations annually. Given the huge workload, the Office cannot examine every regulation.<sup>23</sup> More importantly, the result of the review is not satisfying. Although the LoL empowers the NPCSC, after examination, to annul unconstitutional/unlawful regulations, the NPCSC has never done so. Instead, while having ascertained the problematic provisions in regulations, the NPCSC usually chooses to inform local people's congresses by sending letters. The purpose of this is to minimize the shock and tension brought by directly annulling relevant regulations. This indicates that despite the clear legal authorities for annulling illegal and unconstitutional lower-level regulations, the Chinese national government relies on consultative processes to resolve legislative conflicts.<sup>24</sup> However, the practice reveals that only a few local people's congresses rectified their local regulations based on the opinions in NPCSC letters, many others insisted on the original versions of their local regulations for various reasons.<sup>25</sup>

Fourth, it is difficult to initiate the check procedure. As noted above, some key State organs are permitted to propose the review of regulations to the NPCSC, and the NPCSC must give a response. However, until now no such proposal has been made. Although this mandatory check remains unused, the discretionary check – citizens' proposal, has been used

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<sup>22</sup> Wen Ye and Zhang Yixuan, 全国人大法规审查备案室新张, 违宪审查还在远处 (The Establishment of the Office of Checking and Filing in the NPCSC but the System of Constitutional Review is still Far away), 23(2004) 中国新闻周刊 (*China News Weekly*), available at <http://www.china.com.cn/chinese/law/597287.htm>, last visited May 2016.

<sup>23</sup> *Ibid.*

<sup>24</sup> Keith Hand, 'Resolving Constitutional Disputes in Contemporary China', 7(2012) *E. Asia L. Rev.*, pp. 106-114.

<sup>25</sup> Cai Dingjian, 中国人民代表大会制度 (*The System of People's Congress in China*), 4<sup>th</sup> Ed. (Beijing: Falv Chubanshe, 2003), p. 301.

occasionally after the Sun Zhigang incident in 2003. The miserable death of Sun Zhigang, a 27-year-old college graduate, in the Guangzhou Custody and Repatriation Center in March 2003, directed a nationwide outcry to the age-old system of Custody and Repatriation for Vagrants and Beggars (收容遣送).<sup>26</sup> Under this system, the relief recipients (mainly rural migrants without a residence permit) must be put in custody and repatriated to places where their residences are registered. The main legal source for this system is the Measures concerning Custody and Repatriation for Destitute Vagrants and Beggars in Cities, issued by the State Council in May 1982.

Soon after the Sun Zhigang incident, three young legal scholars made a proposal to the NPCSC, requesting the later initiate the checking procedure on these regulations.<sup>27</sup> Under the Proposal, they asserted that under the LoL, compulsory measures that restrict citizens' freedom can only be governed by national laws, and therefore the legality of the regulation on custody and repatriation is questionable. Although the NPCSC remained silent after receiving this review proposal, the view proposal prompted the State Council to abolish the above-mentioned regulation on custody and repatriation in October 2003. Undoubtedly, the abolition could not have been achieved without the submission of the legal scholars' proposal and accompanying nationwide outcry. The three legal scholars' review proposal triggered a series of similar citizens' actions that attempted to draw the NPCSC's attention to some controversial regulations in areas such as house-hold residence, re-education through labor system, and land-taking and city renovation.<sup>28</sup> Despite its growing significance, the citizen's review proposal for initiating the NPCSC's checking procedure has not been institutionalized. The NPCSC has never responded to these review proposals. Unlike the three legal scholars' review proposal in 2003, the subsequent proposals for the NPCSC did not bear any immediate fruit- they failed to initiate the NPCSC's check procedure or force the State Council to abolish relevant regulations.<sup>29</sup>

Drawing on the above discussion, it seems that from a legal perspective there is judicial review of legislation in China - the court can only review abstract administrative documents rather than legal documents, which enjoy higher status. Nevertheless, from the perspective of judicial practice, a certain degree of judicial review exists. This is reflected in two aspects. First, when two conflicting legal norms appear in a case, the court always has to decide which

<sup>26</sup> Keith J. Hand, 'Using Law for a Righteous Purpose: the Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China', 45(2006) *Colum. J. Transnat'l L.*, pp. 119-122.

<sup>27</sup> In March 17, 2003, Sun Zhigang was detained by police when he came back from an internet cafe without bringing his temporary residence permit as an identification document; then he was brought to the Guangzhou Custody and Repatriation Center where he was severely battered by fellow inmates and died a few days later, see Chen Fei and Wang Lei, 被收容者孙志刚之死 (The Death of Sun Zhigang who was under Custody), 南方周末 (*Southern Weekly*), 25 April 2003. Available at <http://ndnews.oeeee.com/html/201302/28/26725.html>, last visited May 2016. The three young legal scholars are Yu Jiang, Teng Biao and Xu Zhiyong, who were lecturers at the law schools of Central China University of Science and Technology, China University of Political Science and Law, and Beijing University of Post and Telecommunications respectively.

<sup>28</sup> In 2003, the NPCSC received 10 citizens' proposals for reviewing relevant regulations, see Song Rui, 关于全国人大常委会法规备案审查工作的几个问题 (Several Questions on the Filing and Check of the NPCSC), 2(2004) 全国人大 (*The National People's Congress*), pp. 30-33.

<sup>29</sup> Zhang Qianfan, 'A Constitution without Constitutionalism? The Paths of Constitutional Development in China', 8 (2010) *International Journal of Constitutional Law*, pp. 968-971; also see Keith J. Hand, *supra* note 25, pp. 162-182.

legal norm should be applied.<sup>30</sup> As discussed in chapter 5, under the 1989 Administrative Litigation Law, the court has the right to examine the legality of rules and the judicial application of rules is discretionary. A similar rule has been made by the Supreme People's Court. In 1991, local courts in Fujian province and Liaoning province asked the Supreme People's Court for instructions about the resolution of conflicts between a national law and local regulations, and between an administrative regulation and a local rule. The Supreme People's Court responded that national laws and administrative regulations should be applied by the court.<sup>31</sup> This response implies that in the realm of judicial practice, in case of contravening higher-level laws and regulations, local regulations and local rules will lose their effect although they are not formally annulled.

Apart from the review of the national legislature, the other mechanism that can provide a partial remedy for legislative conflicts is the judicial review of legal documents. The 1989 Administrative Litigation Law (ALL), for the first time, permits a citizen to bring lawsuits in the court to challenge administrative actions. This law empowers the court to review the legality of 'concrete' administrative actions (具体行政行为) and annul those it deems illegal (Article 5 and 11).<sup>32</sup> An important move came in November 2011 with the revision of the ALL, the thrust of which is to empower the court to review the legality of one type of 'abstract' administrative action (抽象行政行为) - administrative normative documents (行政规范性文件). Under Article 53, citizens are permitted to file a request to the court for reviewing administrative normative documents. If the court deems a normative document as illegal, it should not use it as criteria for adjudicating relevant cases and should suggest to the drafting organ to alter the document concerned (Article 64). Nevertheless, the ALL makes it clear that the normative documents under judicial review do not include rules.

Second, starting in the late 1990s, a few bold judges went one step further. They explicitly announced, in relevant judgments, that relevant local regulations were illegal. In December 1998, the judge in the Intermediate People's Court in Jiuquan City ruled that the

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<sup>30</sup> The exercise of the *de facto* power to review local regulations and rules started in 1980s with the endorsement of the Supreme People's Court, see Eric C. Ip 'Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China', 24(2010) *The Colum. J. Asian L.*, pp. 419-424.

<sup>31</sup> Both of the cases in Fujian and Liaoning provinces concern the different stipulation of administrative punishment between national laws/administrative regulations and local regulations/ rules. In the Fujian case, the conflict is between the 1986 Fisheries Law and its Implementing Regulation in Fujian. Under Article 30 of the Law, the local fisheries' administrative department may confiscate fishing gear if relevant illegal fishing actions are serious. However, under the Fujian Implementing Regulation, the punishment for the same illegal fishing actions are harsher, in which there is the confiscation of fishing vessels. In the Liaoning case, the conflict is between the 1987 State Council's Regulation on the Administration of Highway Transport and its implementing rule in Liaoning. The latter provides for some compulsory measures (for example, the detainment of drivers' licenses and vehicles), which were not provided for by the former. For the two cases, see Yuan Mingsheng, 当代中国法院立法审查之现状与未来走向 (The Current Situation and Prospects of the Court's review on legislation), 11(2012) 政治与法律 (*Political Science and Law*), pp. 107. For the Replies of the Supreme People's Court, see 最高人民法院关于人民法院审理行政案件对地方性法规的规定与法律和行政法规不一致的, 应当执行法律和行政法规的规定的复函 (The Replies of the Supreme People's Court on How to Resolve the Inconsistencies between Local Regulations, Administrative Regulations and Laws in Adjudicating Administrative Cases) in China Legal Publishing House, 行政诉讼案件 (*The Cases of Administrative Litigation*) (Beijing: Zhongguo Fazhi Chubanshe, 2005), p. 87.

<sup>32</sup> For a detailed analysis of the ALL and the scope of administrative matters that can be reviewed by the court, see Song Bing, 'Assessing China's System of Judicial Review of Administrative Actions', 8(1994) *China L. Rep.*, pp. 2-8.

provisions of Regulation of Supervision and Management of Product Quality in Guangsu Province violated Article 11.2 of the Administrative Penalty Law, and therefore the former could not be used as the source for making penalty decisions; for this reason, the court annulled the relevant penalty decisions whose issuance was based on this regulation.<sup>33</sup> Another salient case came in October 2003. The judge in the Intermediate People's Court in Luoyang ruled that provisions concerning seed pricing in the Implementing Regulation for the Seed Law in Henan province violated relevant provisions of the Seed Law, and therefore these provisions in the Regulation lost their effect.<sup>34</sup>

The limitations of the current court's review are obvious. In general, from the legal perspective, the Chinese court does not possess the power to review various types of legal documents - the only exception is the rule. More importantly, it has no power to annul any types of legal documents. In this sense, a genuine judicial review system has not been established even minimally. The above-mentioned bold actions made by Chinese local judges created tensions between local courts and local legislatures. After hearing that their local regulations were publicly sentenced to 'death' by local courts, the Gansu provincial PCSC and Henan provincial PCSC were upset. They fought back quickly - they asked the High People's Courts in respective provinces to punish relevant judges. The Supreme People's Court did not endorse this local courts' initiative either. In 2009, it issued a judicial interpretation on how to cite legal documents in judgments.<sup>35</sup> Article 7 states that in the case of conflicts between legal documents that the court has to cite, it cannot argue and decide their effects in judgments, and it must request higher-level authority to give a ruling.

### 3.2 Insufficient Guarantee of Local Legislative Authority

The insufficient guarantee of local legislative authority is reflected in the following 3 aspects. First, the local legislative powers are not governed by the Constitution but by a national law - the LoL. Compared to the revision of a national law, an amendment of the Constitution carries stricter procedural requirements. For example, the passage of a constitutional amendment requires a 2/3 supermajority vote of all NPC deputies; however, the passage of a national law requires a simple majority vote. Thus revising a national law is easier than revising the Constitution. For this reason, the local legislative powers are relatively easily altered by the central government. Second, the central government can alter the local legislative powers unilaterally. Under the LoL, the distribution of legislative powers is entirely up to the central government. In other words, the alteration of local legislative powers does not require the approval of local governments. This law also does not provide for any mechanism under which the voice of local governments can be heard by the central government when it decides to enhance or reduce local legislative powers. Third, although the LoL lists the exclusive legislative powers of the central government, it fails to list those of local governments. This put the local legislative authority in a vulnerable state - in theory,

<sup>33</sup> Author unknown, 甘肃: 法院废了人大法规 (Gansu: the Court Annulled a Local Regulation?) in 中国经济时报 (*China Economic Times*), 5 September 2000, available at [www.people.com.cn/zgrdxw/news/200009/05/90507.html](http://www.people.com.cn/zgrdxw/news/200009/05/90507.html), last visited May 2016.

<sup>34</sup> Guo Guosong, 法官判地方法规无效: 违法还是护法? (A Local Regulation was ruled ineffective by the Court: it violates the law or safeguards the law?) in 南方周末 (*Southern Weekly*), 11 November 2003, available at <http://old.chinacourt.org/public/detail.php?id=92887>, last visited May 2016.

<sup>35</sup> The title of this judicial interpretation is 'the Provisions of the Supreme People's Court on the Citation of Legal Documents such as Law and Regulations in Judgments'.

the central government can legislate on any matters it wants; moreover, consistent with the increasing volume of national legislation, the *de facto* local legislative autonomy tends to be reduced accordingly.

Because of the insufficient guarantee of local legislative powers, the central government has the tendency to encroach upon the local legislative authority. China's legislative practice indicates that the expansion of national legislation is at the expense of local legislative authority. It is common that after the promulgation of national laws or regulations, the pre-existing local regulations, which govern the same matters, will lose their effectiveness and be annulled later. A recent example is the legislation on Tourism. In April 2013, the NPCSC passed the Tourism Law. Prior to its passage, all the 31 provinces had adopted their own tourism regulations. The LoL is composed of 112 provisions divided into 10 chapters, which is relatively comprehensive compared to the existing local tourism regulations, whose provisions range from 30 to 90.<sup>36</sup> As noted in Chapter 3, compared to pre-existing local tourism regulations, the Tourism Law is specified and detailed. For this reason, none of local governments has enacted implementing regulations for this law, implying that this Law is already specified enough for implementation and concrete local implementing rules are not needed. In this sense, after the adoption of the Law, the power to legislate on tourism has been re-centralized to the central government.

The LoL strengthens the central government's legislative power by listing its exclusive legislative powers. From the perspective of local governments, this measure tightens the control on the exercise of local legislative powers. The 2015 revised LoL empowers city-level governments to enact local regulations on three matters -urban and rural construction and management, environmental protection, and the protection of history and culture. This suggests the significant reduction of the previous legislative powers of relatively large cities. Article 72.6 stipulates that the existing local regulations adopted by relatively large cities, which governs other matters, remain valid. For the reduction of city-level legislative powers, one NPCSC official explained that the matters under existing local regulations passed by the previous 49 relatively large cities basically can be categorized into these three matters. However, drawing on his study on the legislation of Suzhou, a relatively large city, Shang Guang Piliang, a legal scholar from Suzhou University, put forward a different opinion. He argues that 27 out of a total of 50 local regulations in Suzhou govern matters that cannot be categorized into the aforementioned three matters.<sup>37</sup> The reduction under the revised LoL tends to hinder the city-level governments' effort to initiate reformist legislation. Moreover, this reduction also applies to the previous relatively large cities although they have generated ample legislative experience in the last three decades.

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<sup>36</sup> Generally speaking, the number of provisions of these local regulations varies significantly from 33 (Hubei Tourism Regulation) to 90 (Tibet Tourism Regulation) with the majority ranging from 50 to 90.

<sup>37</sup> Shang Guang Piliang, 立法法修改后地方立法权的检讨与完善建议—以江苏省苏州市为例 (Examination and Recommendation of the Local Legislative Powers after the Revision of the Law on Legislation – the Case of Suzhou City, Jiangsu Province) in 第一届地方立法发展论坛·地方立法制度理论与实践'学术研讨会论文集 (The Collection of Papers for the Theory and Practice of Local Legislative System in the First Forum of Local Legislative Development), October 2015, pp. 20-21.

### 3.3 Inactive Legislative Hearing

Public participation has become a legislative principle both at the national level and the local level since 2000 with the passage of the LoL. The public hearing is the main focus of experimentation in public participation. However, the legislative practice of holding a legislative hearing is inactive. At the national level, the NPCSC held its first legislative hearing in September 2005, on the issue of raising the monthly tax exemption threshold from 800 Yuan to 1500 Yuan in the draft of the revised Individual Income Tax Law. Mainly based on place of origin (Eastern, middle and western region of the country) and professions (high, middle and low income), the NPCSC Legislative Affairs Commission selected 40 out of 4982 applicants to attend the hearing, and 20 of the attendees were allowed to make an 8-minute speech during the meeting.<sup>38</sup> Most of the attendees thought the exemption threshold for the monthly income tax in the law draft could be higher. The report of the hearing result was later circulated among NPCSC members whose opinion was in line with that of attendees. As a consequence, the final version of the Law raised the exemption threshold to 1600 Yuan.

Since then, the NPCSC has not yet held a second legislative hearing. The State Council to date has not held any hearings for the formulation of administrative regulations. At the local level, public hearings on legislation are held more frequently. From March 2000 until January 2006, 31 provincial PCSCs had held 45 legislative hearings for 46 draft regulations concerning relevant major issues of public concern.<sup>39</sup> Some local hearings drew extensive public attention. As mentioned in Chapter 5, the hearing for two provisions of the draft of the Guangdong Regulation on Patriotic Health Work successfully made the Guangdong PCSC loosen the restrictions on taking pets into public places and the consumption of wild animals.<sup>40</sup> Nevertheless, local hearings are still very limited in number. These regulations, which underwent the hearing process, only accounted for less than 1 per cent of the total local regulations adopted during this period.<sup>41</sup>

There are two possible reasons for the inactivity of legislative hearings. First, the legal rules for holding a legislative hearing have not been standardized at the national level. Articles 36 and 37 of the LoL provide for general rules on legislative hearings of the NPCSC and the State Council, but this law fails to provide for the rules of local legislative hearings. The shortcomings of the lack of standardized national rules are that it leads to a significant variation of local rules on holding legislative hearings, many of which are problematic.<sup>42</sup>

<sup>38</sup> Yu Chen, 难忘全国人大常委会首次立法听证会 (The First Legislative Hearing of the NPCSC) in 法制日报 (*Legal Daily*), 12 November 2008, available at [http://www.npc.gov.cn/npc/xinwen/lfgz/2008-11/13/content\\_1458327.htm](http://www.npc.gov.cn/npc/xinwen/lfgz/2008-11/13/content_1458327.htm), last visited May 2016.

<sup>39</sup> Zhang Yuan, 开门立法成大势所趋, 立法听证在行进中成长 (Open Legislation has Become a General Trend and Legislative Hearings are Developing), 人民网 (*People's News*), available at <http://npc.people.com.cn/GB/14957/53050/4940208.html>, last visited May 2016.

<sup>40</sup> Liao Yingyi, 广东爱卫条例立法听证会, 多数人为动物求情 (The Hearing for the Draft of Guangdong Regulation on Patriotic Health Work, Most Attendees Begged Pardon for Animals), 信息时报 (*Information Daily*), 9 July 2003, available at <http://news.sina.com.cn/c/2003-07-09/03451304340.shtml>, last visited May 2016.

<sup>41</sup> *Supra* note 36.

<sup>42</sup> Chen Jiagang, 程序民主的实践 — 中国地方立法听证规则的比较研究 (The Practice of Procedural Democracy - the Comparison of Rules of Local Legislative Hearings in China), 3(2004) 南京社会科学 (*Social Sciences in Nanjing*), pp. 32-38.

Moreover, because of the lack of higher-level rules, localities are hesitant to try out bold and reformist rules.

Second, the scope of subjects for hearings is not specified. The 2015 revised LoL adds two conditions under which a public hearing must be held during the drafting. They are (1) major differences on relevant issues in law drafts; (2) significant impacts to interests of certain groups of society covered by law drafts. The incorporation of these two conditions represents an attempt to make public hearings more mandatory. However, the provisions on the two conditions are general and leave much space for legislative organs to decide whether a public hearing should be held. The situation at the local level is even worse. Although similar subjects are normally incorporated into local procedural rules, many of them fail to provide mandatory rules for holding a legislative hearing, suggesting that whether a hearing should be held is at the discretion of relevant local legislative organs.

Third, the effect of the legislative hearing has not been regularized. Many local procedural rules require the formulation of hearing reports, but they fail to stipulate their effects on relevant law/regulation drafting. The lack of these rules tends to hinder the efforts to make a meaningful legislative hearing, and it also tends to undermine the willingness of citizens to participate in legislative hearings. Apart from the above-mentioned problems, in the local procedural rules, provisions on relevant key matters are usually missing or non-specific, such as the rights and obligations of participants, the selection of participants, and disclosure of legislative information.<sup>43</sup>

### 3.4 Imbalanced Legislation with the Focus on Economic Affairs

In terms of areas being legislated on, the legislation in the reform era is undertaken in a selective way, which consequently results in the imbalance of the legislation. The imbalance is reflected in the following two aspects. First, Chinese lawmakers both at national and local levels focus on economic legislation and administrative management relating to the economy and fail to pay adequate attention to the legislation in other areas. In line with the policies of economic reform and opening up since 1978 and the transformation towards a market-oriented economic system since the early 1990s, Chinese lawmakers regard economic legislation as their principal legislative task. At the national level, economic laws constitute a substantial part of existing national laws.<sup>44</sup> They include 93 national laws (namely, 33 civil and commercial laws and 60 economic management laws), making up 38.4 per cent of the total national laws. As Liu Songshan, the law professor at East China University of Political Science and Law points out, more than half of the existing 79 national laws in the realm of administrative management also directly serve to regulate the market economy.<sup>45</sup> In this sense, a rough calculation is that the number of existing national laws relating to the economy reaches 132, making up 54.5 per cent of the total valid laws.

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<sup>43</sup> Zhu Liyu and Sun Xiaodong, 立法听证效果研究 (Evaluation of the Effect of Legislative Hearing), 5(2007) 法学杂志 (*Law Science Magazine*), p. 27.

<sup>44</sup> The term 'economic law' is defined in a broad manner, referring to civil and commercial laws and economic management laws.

<sup>45</sup> Liu Songshan, 国家立法三十年的回顾与展望 (The Retrospect and Prospect for the Thirty-Year Legislation of the State), 1(2009) 中国法学 (*China Legal Science*), pp. 39-40.

After 30 years' intensive legislation, the task of economic legislation has almost been completed. Although a comprehensive civil code has yet to be drafted, the NPC and the NPCSC have passed a large array of separate civil laws concerning various aspects of civil matters. In the realm of commercial affairs - contracts, insurance, noticeable instruments and maritime affairs, to name a few, have been regulated by national laws. In terms of legislation on economic management, the NPC and the NPCSC have adopted a number of laws governing various aspects of economic management, such as the subjects of the market, tax, investment promotion, pricing, product quality, and various types of industries and so on. In line with the legislation of the NPC and the NPCSC, the legislation of the State Council and the local legislation also focus on the economic legislation.

In contrast to the remarkably active legislation on economic affairs, the legislation in many other domains is under-developed. Take the legislation on the protection of special groups' rights and social security as an example. There are only 20 laws concerning these two areas, accounting for 8.3 per cent of the total valid national laws, which is significantly smaller than the proportion of economic legislation.<sup>46</sup> These laws mainly cover labor protection, labor-related dispute resolutions, protection of persons with disabilities, minors, women, elders, and charities.<sup>47</sup>

From a legislative perspective, the reform era saw very limited progress in the domain of electoral democracy. The Organic Law of the Villagers Committees, which was adopted for trial implementation in 1988 and revised in 1998 and 2010, is intended to achieve self-government in rural villages by introducing direct election of a villagers' committee, however, it is far from certain whether the implementation of the Law has been successful. One important uncertainty is that consistent with the improvement of electoral procedural rules, the election of a villagers' committee faces less open resistance, but feigned compliance and manipulation will certainly be a serious problem.<sup>48</sup> Moreover, even though the election is free and fair, given the CCP's interference in village decision-making, real village democracy still does not occur. According to this Law, the villagers' committee is the body to implement the decisions of the villagers' assembly (村民会议) and deal with all issues related to the village (Article 2 and 10).<sup>49</sup> However, in practice the decision-making is not always made by villagers' committees – in many cases, the village CCP branch headed by the village Party secretary, keeps tight control of powers.<sup>50</sup> Direct election at township level was tried out in a few places after 1998. These experiments ended in 2000 mainly because leadership at that time still felt that holding direct elections above village level is premature. Up until now,

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<sup>46</sup> The NPC Legislative Affairs Commission, 中华人民共和国立法统计 (*Legislative Statistics of the PRC*) (Beijing: Zhongguo Minzhu Fazhi Chubanshe, 2013).

<sup>47</sup> For example, in the area of the protection of women's and children's rights and interests, China has adopted the Law on the Protection of Minors (1991), the Law on the Protection of Women's rights and Interests (1992). For a detailed discussion on this area, see Ronald C. Keith, 'Legislating Women's and Children's Rights and Interests in the PRC', 149(1997) *The China Quarterly*, pp. 29-55.

<sup>48</sup> Kevin J. O'Brien, and Lianjiang Li, 'Accommodating 'Democracy' in a One-party State: Introducing Village Elections in China', 162 (2000) *The China Quarterly*, pp. 465-489.

<sup>49</sup> According to the Organic Law of the Villagers Committees, the villagers' assembly is composed of all villagers at or above 18 years old in the village (Article 21); it is the highest decision-making body in the village and the villagers' committee is elected by it (Article 11).

<sup>50</sup> Jean C. Qi and Scott Rozelle, 'Elections and Power: The Locus of Decision-making in Chinese Villages', 162 (2000) *The China Quarterly*, pp. 513-539.

from both legislative and practical perspectives, the Chinese government does not have plans to re-initiate and popularize direct township elections, let alone those at higher levels.

Another example is the Law on Assemblies, Processions and Demonstrations. As stated in Article 1, the purpose of enacting this law is to ‘safeguard citizens’ rights to exercise assemblies, processions and demonstrations. However, the incorporation of the pre-approval system of local police departments substantially hinders the realization of this right. Moreover, many provisions in this law concern the restriction for holding assemblies, processions and demonstrations, which in essence further reduces the possibility of receiving approval from the local government. Article 15, for example, forbids a citizen to organize or participate in an assembly, procession or demonstration outside of the city where he resides. For the violation of this provision, the police are empowered to detain and send him/her back to his/her place of residence (Article 33). Apparently, the restrictions in this Law are not conducive to achieve the proclamation in Article 1. As a consequence, no approval was given for the application of holding assemblies, processions and demonstrations since the passage of this Law in 1989.

The imbalance of China’s legislation is also reflected on the fact that Chinese lawmakers value local reformist legislation, governing matters which have not been governed by higher-level laws and regulations; however, they choose to ignore the legislation in autonomous areas, which is intended to protect rights and interests of minority groups. Making local legislation in advance of national legislation is a nationwide phenomenon. This type of local legislation in general makes up one third of local legislation, focusing on economic affairs.<sup>51</sup> The reformist local legislation is particularly active in SEZs. About one third of SEZ legislation concerns the modification of provisions of higher-level laws and regulations, and another one third is reformist local regulations; the remaining one third is implementing regulations for higher-level laws and regulations.<sup>52</sup> The Chinese national government not only endorses local reformist legislation, but also encourages it. In fact, the widespread local reformist legislation is the result of the national endorsement and local enthusiastic exploration. It serves as a legislative testing ground for later national legislation and it is also conducive for the generation of legislative conditions for later national legislation.

Standing in sharp contrast to the active local reformist legislation, the power to enact autonomous/separate regulations in autonomous areas is underused, and this is reflected in the following two aspects. First, as the sub-constitution or the organic law for autonomous areas, the autonomous regulation is supposed to be enacted by every autonomous area, but until recently, all the 5 autonomous regions, 5 out of 30 autonomous prefectures and 10 out of 120 autonomous counties still have not enacted their own autonomous regulations. Second, compared to legislation in ordinary localities, the number of the other two types of autonomous legislation, namely, separate regulations and modifying rules and supplementing rules, is rather limited. Up until now, these two types of local legislation average at 4 in each

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<sup>51</sup> Shi Jiansan and Wu Tianhao, 地方立法质量: 现状, 问题与对策——以上海人大地方立法为例 (The Quality of Local Legislation: Present Situation, Problems, and Resolution – The Case of Local Legislation of the People’s Congress in Shanghai) 6(2009) 法学 (*Legal Science*), p. 104.

<sup>52</sup> Zhou Chengxin and Zhong Xiaoyu, 深圳经济特区立法权与立法规划研究 (*The Legislative Planning and Legislative Power of Shenzhen Special Economic Zone*) (Beijing: Zhongguo Fazhi Chubanshe, 2001), pp. 1-2.

autonomous area. Given the limited number, the impact of autonomous legislation for the local governance is very limited.

The underuse of the autonomous legislation is in contrast with its significant status in the legal system. The autonomous legislation is regarded as one of the main manifestations of the system of Regional National Autonomy, which is claimed the ‘basic policy’ of the CCP and a ‘basic political system’ of the State to resolve national questions in the PRC.<sup>53</sup> The local reformist legislation, however, does not have such weight in the legal system. In this sense, the inactivity in the creation of autonomous legislation reveals a gap between the system of RNA and its implementation in practice.

As illustrated by the failure of the drafting of regional-level autonomous regulations, the underuse of autonomous legislation is not due to the unwillingness of the autonomous areas to exercise autonomous legislative power. The active drafting of the regional autonomous regulations by autonomous regions (in particularly the Guangxi Zhuang Autonomous Region) reflects the aspiration of autonomous areas in activating autonomous legislation. The real reason is the central government’s disapproval of the favorable economic arrangements in the drafts of regional autonomous regulations. More specifically, the failure is due to the unwillingness of the State Council’s departments to accept special economic arrangements in the drafts. They feared that favorable economic arrangements in the drafts of regional autonomous regulations will hinder the State’s unified planning.

In summary, the development of China’s legislative system is, to some degree, imbalanced. Chinese lawmakers at the national level prioritize economic legislation and do not pay adequate attention to non-economic legislation. The legislation in many other domains is under-developed. At the local level, the legislation in autonomous areas is still underused, which stands in sharp contrast to the rapid expansion of legislation in ordinary localities, especially SEZs.

#### **4. Recommendations**

While recognizing the remarkable progress made in the reform era, we should bear in mind that the development of China’s decentralized legislative system is by no means complete. On the contrary, there is much space for further development in virtually every major aspect. With respect to this, four major recommendations are provided below.

##### **4.1 Make the System of Filing and Checking More Institutionalized**

This recommendation is composed of two major measures. The first is establishing a Constitutional Committee (宪法委员会) under the NPCSC. The status of this committee would be a NPCSC’s special committee. It would serve as the principal organ within the NPCSC to interpret the Constitution and to review constitutionality and legality of NPCSC laws, administrative regulations and local regulations. The Committee would submit the review results to the NPCSC, and the latter will make the final decision. Under the system of filing and checking, the above-mentioned Office of Checking and Filing of Regulation can play a supplemental role. Important functions it can perform include: receive regulations

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<sup>53</sup> Preface of the Regional National Autonomy Law.

submitted, conduct a preliminary review for these regulations and receive proposals that request the review of laws and regulations. The second measure is setting and specifying conditions and procedures for the submission of citizens' proposals that request the review of laws and regulations. Most important is setting compulsory rules that qualified citizens' proposals will lead to the initiation of the review procedure of the Constitutional Committee.

The purpose of the two above-mentioned measures is to activate the existing parliamentary review system in China, namely, the system of filing and checking. Some Chinese legal scholars propose to establish a judicial review system, namely, either allowing ordinary courts to review the constitutionality and legality of legislative actions, or creating a constitutional court to assume the reviewing authority. However, given the current political and legal circumstances, this proposal is unlikely to be accepted by the Chinese government. Up until now, the courts are not empowered to annul administrative documents or any legal documents as was mentioned in each chapter of this research. As noted earlier, under the revised Administrative Litigation Law, the court obtains the discretion of the use of normative documents and rules for adjudicating cases. However, this is still far from being the emergence of a judicial review system. For this reason, the proposal of empowering ordinary courts to conduct review work for legislative actions would be an unrealistic leap, which is too big to be accepted. Establishing a constitutional court to review legislative actions is also not feasible given that it is difficult to adjust its relationship with the CCP, the NPC/NPCSC, and the Supreme Court.<sup>54</sup>

Establishing a Constitutional Committee under the NPCSC is a feasible proposal. Unlike the proposal of establishing a judicial review system, this proposal does not concern the creation of a new review system to replace the current one, but serves as a measure to make the current system work. The merit of this proposal is that it serves to minimize the tension and shock brought about by the creation of a new institution, and meanwhile contributes to activate the existing parliamentary review system.

## **4.2 Interpret the Scope of City-level Legislative Powers in a Broad Way**

This recommendation concerns how to specify the city-level legislative powers. As noted earlier, the 2015 revised LoL demarcated the city-level legislative powers into three general matters (Article 72). Chinese lawmakers need to explore the exact boundary of the exercise of legislative powers at the city level. It is proposed that city-level PCs and PCSCs should take a liberal attitude to exercise their legislative powers and the central government should take a tolerant attitude towards the city-level legislative initiatives. At present, it is too soon to summarize the scope of city-level legislative powers in practice because none of the cities with districts have promulgated any local regulations. Nevertheless, administrative organs have generated experience which can be taken as a reference. Taking the first matter - urban and rural construction and management as an example; according to the Ministry of Housing and Urban and Rural Construction, the urban and rural construction covers urban and rural planning, market supervision, urban development, county and rural development, and

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<sup>54</sup> The Speech of Jiang Ping at the Second Session of Constitutional Forum, Peking University, 23 May 2012, available at <https://www.youtube.com/watch?v=uvTcpcwDaOXI>, last visited May 2016.

supervision of product quality, etc.<sup>55</sup> According to local administrative practice, the urban and rural management is even broader, covering transformation, social security, environmental protection, education, water management, tourism, public security, sanitation, agriculture, radio and television, and administration for industry and commerce.<sup>56</sup>

The broad interpretation of city-level legislative powers is intended to give full play to city-level governments to exercise legislative powers. Its merits are obvious – it can better serve to fulfill the local legislative need, maximize local legislative competition, and can better perform local legislative experiments. Given that at this point of time the development of city-level legislation is at its initial stage, it is more important to give full play to city-level governments rather than imposing severe restraints for the exercise of their legislative powers. One may fear that the broad interpretation could lead to the rampancy of *ultra vires* legislation at the city level, which would tend to threaten the uniformity of the legislative system and this fear is not entirely groundless. In the 1980s and 1990s, following the abrupt legislative decentralization, numerous tensions, inconsistencies and conflicts materialized in China's legal system. Nevertheless, potential city-level *ultra vires* legislation is a minor problem. One reason is that compared to local legislative powers in the first two decades of the reform era, the city-level legislative powers under the revised LoL are rather limited. The other reason is that China remains a unitary country with the final say belonging to the central government, and therefore, in case of the appearance of disorder and chaos in the legal system brought by broad interpretation of city-level legislative powers, the central government would be able to react quickly.

### 4.3 Strengthen the Legislative Hearing System

The purpose of this recommendation is to ensure that legislative hearings are held more often and become an effective part of the legislative process. It is composed of three concrete measures. First, the central government (either the NPCSC or the State Council) should formulate and adopt a series of rules to standardize, specify and rationalize the legislative hearing system. This legislative suggestion is feasible. The legislative hearing has been formally introduced to China since 2000 with the passage of the LoL. Although it remains inactive in general, the past 16 years have seen the formulation of procedural rules and hearing practices in many localities, which have generated relevant experience. This lays a foundation for the formulation of nationwide rules.

Second, the scope of subjects should be further specified. Specifying the scope of subjects is the key to the cause of inactivity in the legislative hearing system. As noted earlier, the LoL and local procedural rules has provided for general guidance, such as ‘major differences of opinion’, ‘significant influence for local development’, and ‘adjustment of significant interests’. This can be considered as the first step for the specification of the scope of subjects, and the second step that the Chinese government may consider taking is to enumerate some key matters. Drawing on the practice, the following matters may be

<sup>55</sup> See 住房和城乡建设部 (*The Website of the Ministry of Housing and Urban and Rural Construction*), available at <http://www.mohurd.gov.cn/>, last visited May 2016.

<sup>56</sup> Zheng Yi, 对我国《立法法》修改后若干疑难问题的诠释与回应 (The Interpretation and Response to Several Difficult Issues after the Revision of the Law on Legislation), 1(2016) 政治与法律 (*Political Science and Law*), p. 55.

enumerated in the list: (1) legislation on tax and price; (2) administrative licensing and punishment; (3) restriction of citizen's rights and freedoms. Apart from the enumeration of matters, another important measure is to provide mandatory rules, other than discretionary ones, for initiating a legislative hearing. Putting it simply, - if a law/regulation draft governs the above enumerated matters, the legislative organ 'must' (rather than 'may') hold a legislative hearing.

Third, the effect of the result of hearings should be specified. Three points should be noted. (1) The formulation of a report of the hearing should be regularized. Most importantly, a report should clarify the key issues and the focus of debate during the hearing; (2) the report should be sent to local PCSCs, their relevant special committees and working committees; (3) for the opinions resulting from a hearing that are not incorporated into the law/regulation draft, the drafting organ should give an explanation to the local PCSC. Apart from the abovementioned three measures, Chinese lawmakers should also explore how to regularize the following issues: application of the hearing, selection of participants, and disclosure of legislative information.

#### **4.4 Pay More Attention to the legislation on Non-economic Fields**

While continuing legislating for a market-economy, the Chinese government should pay more attention to legislate on the broader areas of public and private law that are critical to the creation of a comprehensive legal system. The work of legislating for a market economy is almost complete, although there is still much work to be done, such as clarification of rights over urban and rural land and over collectively owned enterprises, reduction of State interference in the business activities in the form of administrative examination and approval, and State-owned enterprise reforms.<sup>57</sup> In the future, Chinese legislators should pay more attention to legislate on non-economic domains which are critical to China's long-term stability and development. The major domains include social affairs, protection of special groups, treatment of ethnic minorities, and political reforms. This trend is already observable. In December, 2015, the NPCSC adopted the Anti-Domestic Violence Law. This law lays out a body of rules which are intended to prevent and curb domestic violence. Among these rules, the most noticeable is the written reprimands and personal safety protection writs that aim at warning and punishing offenders, and protecting victims of domestic violence. In March 2016, the NPC adopted the Charity Law, aiming at regularizing and promoting charitable activities.

Although the legislation on non-economic affairs has been accelerated, there are still vast amounts of legislative work to do. The local legislation should continue to serve as a forerunner. With respect to this, the autonomous legislation and SEZ legislation may play a special role. For the protection of ethnic groups and maintaining national stability, autonomous areas should sufficiently exercise their autonomous legislative powers. More importantly, the five autonomous regions should enact their autonomous regulation as required by the RNA Law. SEZs should take a bold attitude to try out reformist legislation. If China attempts to initiate important reforms, SEZs are the most likely places to first try them out. The SEZs advantages are obvious – they are located in the southern coastal region,

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<sup>57</sup> Donald C. Clarke, 'Legislating for a Market Economy in China', 191(2007) *The China Quarterly*, pp. 567-585.

which is far away from the traditional political and economic centers (Beijing and Shanghai) where reformist initiatives have more restraints; they are the most economically and socially developed areas in the country with an emerging civil society. Most importantly, the active legislative practice in SEZs in the last three decades has generated local identity as the legislative forerunner. This identity is helpful to make legislative breakthroughs on controversial subjects.



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## Appendixes

### 1. Appendix I: Contents of the Law on Legislation (2015)

<b>Chapter</b>	<b>Contents</b>	<b>Total No. of Articles</b>
Chapter 1	Purposes, Scope of Application and Basic principles (Articles 1-6)	6
Chapter 2	National Laws (Articles 7-64)	58
Section 1	Scope of Law-making Power (Articles 7-13)	
Section 2	Law-making Procedure of the National People's Congress (Articles 14-25)	
Section 3	Law-making Procedure of the National People's Congress Standing Committee (Articles 26-44)	
Section 4	Interpretation of National Laws (Articles 45-50)	
Section 5	Other Provisions (Articles 51-64)	
Chapter 3	Administrative Regulations (Articles 65-71)	7
Chapter 4	Local Regulations, Autonomous Regulations and Separate Regulations, and Rules (Articles 72-86)	15
Section 1	Local Regulations, and Autonomous Regulations and Separate Regulations (Articles 72-77)	
Section 2	Rules (Articles 80-86)	
Chapter 5	Application, Filing and Checking (Articles 87-102)	16
Chapter 6	Supplementary Provisions (Article 103-105)	3
Total No. of Articles		105

## 2. Appendix II: Contents of the Regulation on the Rulemaking Procedure (2001)

<b>Chapter</b>	<b>Contents</b>	<b>Total No. of Articles</b>
Chapter 1	Purposes, Scope of Application and Basic principles (Articles 1-8)	8
Chapter 2	Setting up Regulation-making Project (Articles 9-12)	4
Chapter 3	Drafting (Articles 13-17)	5
Chapter 4	Examination by Legislative Affairs Departments (Articles 18-26)	9
Chapter 5	Approval and Issuance (Articles 27-32)	6
Chapter 6	Interpretation and Submission for the Record (Articles 33-35)	3
Chapter 7	Supplementary Provisions (Articles 36-39)	4
Total No. of Articles		39

## Summary

The spectacular expansion of the legal system is one of the most significant phenomenon in the People's Republic of China since it launched the reform and opening up in 1978. By the end of March 2016, the legal system is composed of 247 national laws (promulgated by the National People's Congress and its standing committee), 664 administrative regulations (issued by the State Council), 5278 local regulations (promulgated by local people's congresses and their standing committees) and more than 30000 rules (issued by the State Council departments and local people's governments). This achievement cannot be made without the continuous decentralization of legislative power to multiple state organs. The subject of this research is the evolution of the legislative system, which is shaped by decentralization reforms.

This thesis is composed of 8 chapters. Following the introductory chapter, chapter 2 provides a theoretical understanding of China's legislative decentralization in the reform era by examining it in a broad political and economic context and extending the time span to cover both the pre-reform era and the reform era. The traditional decentralization theory spells out the merits and limitations of a decentralized government. As a new dimension of the traditional theory, the theory of market-preserving federalism explains the effect of decentralization for creating a market system. The shortcomings of the highly centralized political and economic system established in the mid-1950s in China and the disaster brought by the radical decentralization reform in the late 1950s provide a striking counterexample of the decentralization theory. The considerable political and economic decentralization contributes to the spectacular economic growth and the emergence of the market system in the reform era, which fits the theory of market-preserving federalism. Legislative decentralization serves as one part of the broad political and economic decentralization. The decentralized legislative powers have become not only one of the most important source of authority of local governments but also an important means to exercise other decentralized powers, which serves to ensure a common market.

Chapters 3 to 5 examine the legislative systems of the NPC and the NPCSC, the State Council and local governments (provincial and city-level PC, PCSC and people's governments). These three chapters have similar structure, which contains the following subjects: (1) the status of different types of law enacted by the abovementioned organs; (2) the demarcation of legislative powers; (3) the legislative procedure; (4) legislative practice. With respect to the legislative power demarcation, for example, the main conclusions are these: the listing of exclusive matters in Article 8 of the Law on Legislation (LoL) suggests that China has incorporated some federal elements in the division of legislative powers between the central government and local governments, and it represents an attempt to strengthen the NPC and the NPCSC's legislative authority over decentralized legislative organs. The legislative powers of the state Council were under continuous expansion in the first two decades of the reform era; nevertheless, its delegated legislation based on a 1985 NPCSC's delegation decision tended to decrease and the decision will be abolished ultimately in the future. The 2015 revised LoL, on the one hand, grants legislative power to all city-level governments, representing the continuous trend of legislative decentralization; on the

other hand, it largely reduces city-level legislative powers, reflecting an attempt to tighten the control of the exercise of the local legislative power.

Chapters 6 and 7 evaluate two unique local legislative systems in autonomous areas and Special Economic Zones (SEZs) respectively. In addition to the uniform decentralization of legislative power to major local state organs, the Chinese government also decentralizes more flexible legislative powers to these two types of localities, showing that China incorporates asymmetry in the decentralization of legislative power. The autonomous legislation has made substantial improvement since 1978, reflecting a higher degree of tolerance of the central government for political, social and cultural diversity. Nevertheless, compared to other types of legislative powers (namely, ordinary legislative power and SEZ legislative power), the autonomous legislative power is still underused – the reform era does not see any significant expansion of autonomous legislation in number. Until now, due to the disapproval of the central government, none of the five autonomous regions have passed their regional-level autonomous regulations.

SEZs played a key role for introducing the legal system on the market economy in China. SEZs served like a petri dish where market-oriented policies and legislation were introduced and practiced, and later spread to elsewhere in the country. It ultimately gathered the momentum for turning the tide of contestation in the ideological, economic and policy domains in favor of a market system, and created conditions favorable for the market-oriented legislation at national level. Perhaps a more significant impact of SEZ legislation is that it served as one of the main sources of reference for national legislation on the market economy. Drawing on the legislative experience of SEZs for national legislation is not an individual phenomenon; instead, it is a practice that was intentionally and systematically organized. The SEZ legislation provided a series of rules on the market economy that were later written into national laws and regulations.

Chapter 8 is the concluding chapter. It summarizes the progress, limitations of the development of China's legislative system and proposes relevant recommendations for the future development. The reform era saw the emergence of a decentralized legislative system. The legislative powers of various major state organs are more demarcated than ever before, and considerable efforts are made to create a more transparent and consultative legislative process. A pragmatic attitude is adopted as the main approach for legislation. The major limitations are these: the current mechanisms for supervising legislation and addressing legislative conflicts are by and large unused; the local legislative authority is insufficiently guaranteed; legislative hearing is still inactive; the legislation is imbalanced with the focus on economic legislation. The recommendations for the development of the legislative system are these: institutionalizing the system of filing and checking, taking a liberal attitude for the exercise of city-level legislative power; strengthening the legislative hearing system; paying more attention to legislate on the broad areas of non-economic law that are critical to the creation of a comprehensive legal system.

## Samenvatting

De opzienbarende uitbreiding van het rechtssysteem is een van de belangrijkste fenomenen binnen de Volksrepubliek China sinds de economische hervormingen en de toenemende openheid van het land vanaf 1978. Naar de stand van eind maart 2016 bestond het rechtssysteem uit 247 nationale wetten (uitgevaardigd door het Nationaal Volkscongres en diens Permanente Comité), 664 administratieve reglementen (uitgevaardigd door de Staatsraad (de regering)), 5.278 plaatselijke reglementen (uitgevaardigd door plaatselijke congressen en overheden), en meer dan 30.000 beleidsregels (uitgevaardigd door departementen van de Staatsraad en plaatselijke overheden). Deze prestatie had niet geleverd kunnen worden zonder de voortdurende decentralisatie van wetgevende macht naar meerdere staatsorganen. Het onderwerp van dit onderzoek is de evolutie van het wetgevingssysteem, dat gevormd is door de decentraliserende hervormingen.

Deze dissertatie bestaat uit 8 hoofdstukken. Na de introductie in hoofdstuk 1 biedt hoofdstuk 2 een theoretische verklaring van China's decentralisatie van de wetgeving in het tijdperk van de hervormingen, door haar te onderzoeken in een brede politieke en economische context, en te kijken naar de tijdperken vóór de hervormingen en na het begin van de hervormingen. De traditionele theorie omtrent decentralisatie zet zowel de verdiensten als de beperkingen van een gedecentraliseerde overheid neer. Als toevoeging aan de traditionele theorie kan men kijken naar de theorie over markt-behoudend federalisme, dat uitlegt dat decentralisatie helpt bij het creëren van een marktsysteem. De tekortkomingen van het sterk gecentraliseerde politieke en economische systeem dat in China midden jaren '50 tot stand kwam en de radicale en rampzalige decentraliserende hervormingen in de late jaren '50 vormen een opvallend tegenvoorbeeld op de decentralisatietheorie. De aanzienlijke politieke en economische decentralisatie draagt bij aan de opzienbare economische groei en het ontstaan van een marktsysteem in het tijdperk van hervorming, wat past bij de theorie over markt-behoudend federalisme. Decentralisatie van de wetgeving is een onderdeel van de brede politieke en economische decentralisatie. De gedecentraliseerde wetgevende bevoegdheden zijn niet alleen een van de belangrijkste bronnen van gezag van de plaatselijke overheden, ze zijn ook een belangrijk middel om andere gedecentraliseerde bevoegdheden uit te kunnen oefenen, wat een gemeenschappelijke markt helpt verzekeren.

Hoofdstukken 3 tot en met 5 kijken naar de wetgevingssystemen van het Volkscongres, het Permanente Comité, de 'Staatsraad en plaatselijke overheden (provinciale en stedelijke volkscongressen, provinciale en stedelijke besturen). Deze drie hoofdstukken hebben een soortgelijke opbouw, bestaande uit de volgende onderwerpen:

- 1: De status van verschillende wetstypen uitgevaardigd door bovengenoemde overheidsorganen
- 2: De grenstelling/afbakening tussen de wetgevende bevoegdheden
- 3: De wetgevingsprocedure
- 4: De wetgeving in de praktijk.

De belangrijkste conclusies omtrent de afbakening tussen de wetgevende bevoegdheden luiden als volgt: de vermelding van exclusieve aangelegenheden in Artikel 8 van de Wetgevingswet suggereert dat China federale elementen heeft gebruikt in de verdeling van wetgevingsbevoegdheden tussen de centrale en plaatselijke overheden, en laat een poging zien tot het versterken van het wetgevende gezag van het Volkscongres en het Permanente Comité over de gedecentraliseerde wetgevingsorganen.

De wetgevende bevoegdheden van de Staatsraad hebben zich in de eerste twee decennia van het hervormingstijdperk doorlopend uitgebreid; toch is de omvang van de gedelegeerde regelgeving op basis van een delegatievoorschrift van het Permanent Comité van het Volkscongres, daterend uit 1985, voortdurend geringer geworden, en de verwachting bestaat dat dit voorschrift in de toekomst zal komen te vervallen.

De in 2015 herziene Wetgevingswet geeft aan de ene kant wetgevende macht aan alle stedelijke overheden (wat de doorlopende trend naar wetgevende decentralisatie tot uitdrukking brengt), en aan de andere kant vermindert zij de wetgevende bevoegdheden op stadsniveau (hetgeen aangeeft dat gepoogd wordt om meer controle te krijgen over de uitoefening van plaatselijke wetgevende bevoegdheden).

Hoofdstukken 6 en 7 evalueren twee unieke plaatselijke wetgevingssystemen in autonome gebieden en Speciale Economische Zones (SEZ). In aanvulling op de eenvormige decentralisatie van wetgevende bevoegdheid naar belangrijke plaatselijke staatsorganen, decentraliseert de Chinese overheid ook flexibelere wetgevende bevoegdheden aan deze twee soorten plaatsen, wat laat zien dat China asymmetrie gebruikt in de decentralisatie van wetgevende macht. De autonome wetgeving heeft substantiële verbeteringen gekend sinds 1978. Dit vormt een illustratie van een hogere mate van tolerantie van de kant van de centrale overheid op het gebied van politieke, sociale en culturele diversiteit. Toch, vergeleken met andere typen van wetgevende bevoegdheid (de gangbare en die van Speciale Economische Zones) is de autonome wetgevende macht onderbenut gebleven – het hervormingstijdperk heeft geen betekenisvolle uitbreiding te zien gegeven van het aantal autonome vormen van regelgeving.

Tot op heden heeft (als gevolg van de afkeuring door de centrale overheid) géén van de vijf autonome regio's hun regionale autonome regelgeving aangenomen.

Speciale Economische Zones hebben een sleutelrol gehad in het introduceren van het rechtssysteem op de markteconomie in China. Speciale Economische Zones dienden als petrischaal waar markt-georiënteerd beleid en wetgeving geïntroduceerd en uitgevoerd werd, wat zich later verspreidde naar elders in het land. Uiteindelijk is hierdoor een dynamiek ontstaan die ertoe heeft geleid dat controverses op ideologisch, economisch en politiek terrein zich ten gunste van een markteconomie hebben ontwikkeld, waardoor de voorwaarden zijn geschapen voor markt-georiënteerde regelgeving op nationaal niveau.

Wellicht is een grotere invloed van SEZ-regelgeving uitgegaan door het feit dat zij als een van de hoofdbronnen diende in nationale beleidsvorming op economisch gebied. Dit putten uit de ervaringen van de SEZ's staat niet op zichzelf; integendeel, het is bewust en systematisch

georganiseerd. De SEZ-regelgeving bevatte een aantal regels die later in nationale wetgeving werden opgenomen.

Hoofdstuk 8 dient als afsluiting. Het geeft een samenvatting van de vooruitgang en de beperkingen van China's wetgevende systeem en biedt relevante aanbevelingen voor toekomstige ontwikkelingen. Het hervormingstijdperk zag de opkomst van een gedecentraliseerd wetgevingssysteem. De wetgevende bevoegdheden van verscheidene belangrijke staatsorganen zijn duidelijker afgebakend dan ooit, en een aanzienlijke inspanning is geleverd om een transparanter en meer op raadpleging gericht wetgevend proces te bewerkstelligen. Men heeft gekozen voor een pragmatische benadering van de wetgeving. De belangrijkste beperkingen zijn de volgende: de huidige mechanismen die horen te dienen om toezicht te houden op wetgeving en om om te gaan met wetgevingsconflicten worden grotendeels niet benut; het plaatselijke wetgevend gezag is onvoldoende gewaarborgd; hoorzittingen als onderdeel van het wetgevingsproces vinden nog niet plaats; en de wetgeving is niet in balans, met de focus op economische wetgeving. De aanbevelingen voor de ontwikkeling van het wetgevingssysteem luiden als volgt: het institutionaliseren van het systeem van indienen en controleren, een liberale houding ten aanzien van de uitoefening van wetgevende macht op stadsniveau; het versterken van het element van de hoorzittingen als onderdeel van het wetgevingsproces; en meer aandacht besteden aan het wetgeven op een breed non-economisch vlak, die essentieel zijn in het creëren van een veelomvattend rechtssysteem.

## Curriculum vitae

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Short bio	
<p>Yang Feng is a PhD candidate at the Department of Constitutional Law and Administrative law of School of Law, Erasmus University, Rotterdam. He obtained his bachelor degree in law and master degree in constitutional law and administrative law from the School of Law of China University of Political Science and Law (CUPL). From 2010 to 2012, he participated in several research programmes concerning the reform of China's administrative decision-making procedure and the structural reform of Chinese central government, funded by the Chinese government. He started his PhD programme at the Erasmus School of Law in September 2012. His academic interest include allocation of legislative powers between the central government and local governments, local self-government and judicial review in China. His PhD thesis concerns the decentralization of legislative powers in the reform era in China.</p>	
Education	
Bachelor of Laws, School of Law of China University of Political Science and Law.	2006-2010
Master of Laws, School of Law of China University of Political Science and Law.	2010-2012
PhD in Constitutional Law and Administrative Law, School of Law, Erasmus University, Rotterdam.	2012-2016
Work experience	
Member of Law Clinic for Protection of Elderly's Rights at CUPL.	2010-2012
Intern in the Department of Policy and Law, Ministry of Civil Affairs of the PRC.	2009
Member of Legal Clinic for Providing Legal Aid at CUPL.	2008
Volunteer in 29 <sup>th</sup> Olympic Games and Disabled Olympic Games.	2008
Prizes and awards	
Obtained Diploma with <i>Cum Laude</i> at 26 <sup>th</sup> Summer University on Federalism, Decentralization and Conflicts Resolution, Fribourg University, Switzerland.	2014
Received 7 times Scholarship for excellence study and research during Bachelor and Master Programmes.	2006-2012.
Graduated with <i>cum laude</i> from CUPL.	2010
One of the 7th 'Ten Research Stars' at CUPL.	2009
First Prize of the 5 <sup>th</sup> Beijing 'Challenge Cup' of Research Contest.	2009

Third Prize of the 11 <sup>th</sup> National (China) 'Challenge Cup' of Research Contest.	2009
Publications	
Chaoyang Jiang and Yang Feng, 'the Administrative Litigation System in Macao, in Yuwen Li (ed.), <i>Administrative Litigation Systems in Greater China and Europe</i> (Farnham, England; Burlington, USA: Ashgate Publishing, 2014), pp.71-91.	2014
Yang Feng, 对全国人大常委会立法权变迁的历史解读与反思 (Reflection on the Changing Legislative Power of the National People's Congress Standing Committee, 2011 内蒙古农业大学学报 (社科版) ( <i>Journal of Inner Mongolia Agricultural University, Social Science Version</i> ), pp. 18-26.	2011
Yang Feng, 西汉地方长官地域回避制度—以郡守 (国相)、县令 (长) 为中心 (Geographic Challenge System in Western Han Dynasty: focusing on Prefect (Kingdoms' Primer) and County Magistrate), 2011 研究生法学 ( <i>Graduate Law Review of CUPL</i> ), pp. 44-53.	2011
Yang Feng, 论公民选举权与被选举权的平等保护—以 2010 年选举法修改为视角 (The Equal Protection of the Right to Vote and the Right to be Elected: the amendment of Chinese Election Law in 2010), 2011 山西警官高等专科学校学报 ( <i>Journal of Shanxi Police Academy</i> ), pp. 22-27.	2011
Others	

## PhD Portfolio

Name PhD student: Yang Feng

PhD-period : Sep. 2012- Sep. 2016

Promoters : Prof. Mr. Roel de Lange and Prof. dr. Yuwen Li.

Co-promoter:

## PhD training

### EGSL courses

year

Reflection on Social Science

2013

How to Make Presentation

2013

Writing Clinic

2013

Research Lab

2012

Introduction of Legal Research Method

2012

Academic Writing

2012

### Specific courses

year

Summer School Courses on Federalism, Decentralization and Conflicts Resolution

2014

Comparative Constitutional Law

2012

### Seminars and workshops

year(s)

ESL Brown Bag Lunches Lectures

2012-2016

ECLC Brown Bag Lunch Lectures

2012-2016

ESL Poster Presentations	2012-2016
Seminar by Visiting Scholar Prof. Zhu Suli in Groningen University on 'Access to Law in Rural China: why Western Style Solutions will not Work'.	Jun. 2015
ECLC Seminar by Guest Lecturer Prof. Qing Tianbao on 'New developments of Environmental Law in China'.	Jan. 2015
Seminars organized by EGSL Discussing Group on 'Reflection of Social Norms and Legal Norms'.	2014
ECLC Seminar by Guest Lecturer Dr. Zhao Yun on 'New Developments of Dispute Resolution in China'.	May 2013
ECLC Seminar by Guest Lecturer Mr. Mao Yushi on 'Puzzles of the Reform of Economic System in China'.	June 2013
ECLC Seminar by Guest Lecturer Prof. Zhan Zhongle on 'Reform on China's Administrative Litigation System'.	June 2013
Workshop of Legal PhD Candidates in the Netherlands	Oct. 2013
<b>Presentations</b>	<b>year</b>
ECLC Brown Bag Lectures (in every three months): presenting the latest work.	2012-2016
Peer View Workshop in the School of Law of Tilburg University: The New Developments of Lawmaking of the National People's Congress and its Standing Committee'.	Jan. 2016
ESL Brown Bag Lunch: 'Legislative Decentralization In Post-Mao China'.	May 2014
The World Congress of Constitutional Law 2014: China's Experimental Legislation.	2014
Summer School at Fribourg University, Switzerland: 'Moving Towards a Federation? The Exclusive Legislative Power of the Central Government in China'.	2014
<b>Attendance (international) conferences</b>	<b>year</b>
2016 Annual Conference of the International Society of Public Law, held in Berlin, Germany.	2016
The World Congress of Constitutional Law 2014, organized by the International Association of Constitutional Law, held in Oslo, Norway	2014

26 <sup>th</sup> Summer University on Federalism, Decentralization and Conflicts Resolution, in Fribourg, Switzerland	2014
Teaching	year
....	
Others	year
....	