

DATA ANALYSIS

LAWMAKING IN CHINA: DEVELOPMENT, ISSUES AND RETHINKING

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Since the Reform and Opening period commenced, lawmaking in China has made great achievements, constructed a lawmaking institution composed of constitution, laws, administrative and local rules and regulations as the source of law, and a legal system composed of constitutional and related law, administrative law, criminal law, civil and commercial law, economic law, social law, and procedure law. However, lawmaking in China faces new issues needing resolution. This paper focuses on the relation of lawmaking between the National People's Congress (NPC) and its Standing Committee (SC), between the NPC and the administrative and local organs. Because most laws are enacted by the SC with a small number of elites, but not the NPC with a large number of deputies, the challenge lies in how to represent the people and ensure the people's character of the laws. As the administrative and local organs enact the rules and regulations, how can their conformation to the Constitution and laws be ensured? Is it enough to only depend on an original deliberative mechanism? China needs to create and develop new mechanisms to resolve these issues.

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INTRODUCTION

Since Reform and Opening, China's lawmaking has made great progress. China had very few laws before, and some scholars said there were only two principal laws, namely, the 1954 Constitution and the 1950 Marriage Law; the first one was related to the state; the second one was related to the family. In other fields, the political policies of the Chinese Communist Party (CCP) and the national economic plans played major roles in regulating social and economic relations. The achievement of lawmaking since the reform and opening period began focuses on two fields. In the first field, through more than 30 years' effort, China has built a socialist legal system with Chinese characteristics, which is composed of seven legal branches, according to the Standing Committee (SC) of the National People's Congress (NPCSC), namely, constitution and related laws, civil and commercial law, economic law, administrative law, social law, criminal law and procedure law. In the second field, China has already formed a legislative system, which is mainly composed of the constitution, the laws enacted by the National People's Congress (NPC), the administrative rules and regulations enacted by the State Council (SC), the local rules and regulations enacted by the local people's congress at provincial level, as well as the departmental regulations enacted by the ministries and committees under the SC, and the local governmental regulations enacted by the local government at the provincial level.

On the other hand, lawmaking in China did face some new issues.

The first is that the NPC enacts the basic laws and the NPCSC enacts other laws except the basic laws. As a matter of fact, most laws are enacted and amended by the NPCSC, but not the NPC. The ratio of laws enacted by the NPC dropped from 33.7% in the 1980s to 4.2% in the 2000s, and further dropped to 3.1% between 2010 and 2013. That is to say, the NPCSC actually exercises the function of lawmaking in the NPC. More seriously, almost no local rules and regulations were enacted by the local people's congress for many years. For example the Beijing Municipal People's Congress has never enacted a local rule or regulation in the past 13 years.

It seems reasonable that the mission of lawmaking was actually undertaken by the NPCSC for the sessional term of the NPC and the SC and quantity of the Deputies to the NPC and the SC's members. However, this is only an expedient position. It should be noticed that the people's congress system as a fundamental political system in China posits that all the powers in the People's Republic of China (PRC) belong to the people.

Although the NPCSC is the permanent body of the NPC and plays the role of the NPC when the NPC is not in session, the permanent body is not equal to the NPC at all. If almost all laws were enacted by the SC, but not the NPC itself, the aspect related to the people in lawmaking would become a problem.

The second consideration is that the administration and local organs play a more and more important role in lawmaking in China than in many other countries, although the NPC and its SC enact the laws, but the SC and local people's congresses enact the administrative and local rules and regulations. In terms of lawmaking quantity, the number of rules and regulations enacted by the SC and local governments are much higher than enacted by the NPC and its SC. Up to 2011, the NPC and its SC enacted 240 laws in total. However the SC enacted 714 administrative rules and regulations and local authorities with lawmaking powers enacted 8,921 local rules and regulations (including autonomous regulations and specific regulations).¹ In short, the increase of the quantity of administrative and local lawmaking is an indisputable fact, and also conforms to the objective needs of development of lawmaking. The current issue is not to prevent or limit the development of administrative and local lawmaking, but to insure their conformability to the Constitution and laws, and enhance their supervision. Originally, when the rules and regulations did not conform to the Constitution and laws, the typical method was that the officers in charge of lawmaking in the SC called up, or informally communicated with, the officers in charge of legal affairs in SC or the local people's congress in order to correct inappropriate decisions. Otherwise, suppose the formal procedure or a mechanism to alter or annul was launched? It would mean public opposition between the central and local, the people's congress and government, which would be inconsistent with the leadership and organic principle of the Party. So not to say that China never has any case in which administrative and local rules and regulations did not conform to the Constitution and laws, but China used the informal method or deliberate mechanism to resolve such issues, via voting and antagonism, and even launching judicial procedure in the West. Right now, under the market economy and the interest multiplication, when there are different interests between the central and local governments, the people's congress and the government, it is possible to only depend on the deliberate mechanism that relies on the leader's personal authority and customs, the old boys system among the different officers with various ranks, without law or disregard of law. What kind of law-supervision can keep away and correct the above defect of the deliberate mechanism? The resolution of these issues is what this paper explores.

¹ 中国法治建设年度报告 (2011) (*Annual Report of the Rule of Law Construction in China (2011)*), available at <http://www.chinalaw.org.cn/cnfzndbg/>.

I. THE TRACK OF LAWMAKING IN CHINA

A. Quantity of Lawmaking

Lawmaking in China undergoes a tortuous process. On the quantity of lawmaking, legislative work was stressed in the 1950s. In the early years of the founding of the PRC, a series of major laws were enacted, including the 1954 Constitution, the 1950 Marriage Law, the land laws, and the organic laws of different kind of state organs, such as the people's congresses, the people's governments, the people's courts and the people's procuratorates, etc. From the late 1950s, legislative work was seriously disrupted, especially during the Cultural Revolution when the quantity of lawmaking slowed to almost zero. Since Reform and Opening, legislative work has moved to the fast lane. Actually, most laws in force have been enacted during the previous 30 years.

Fig. 1 illustrates the numbers of the laws and decisions related to the laws enacted and amended by the NPC (the Chinese People's Political Consultative Conference and the Central People's Government before the first NPC was held in 1954). It shows that the numbers of lawmaking between 1949 and 2013 were a couple of waves. Certainly we cannot evaluate the lawmaking in a country only in quantitative terms. However, to a certain extent, the number of laws made is an indicator measuring the legal development in China in a certain period. The figure of lawmaking in over 60 years in China was clearly composed of two connected waves. The first wave appeared between 1949 and 1977, in which an upward trend occurred between 1949 and 1958, and its peak was 24 laws enacted in 1957. In 1959, lawmaking reached a low; notably, the number of lawmaking was almost zero during the Cultural Revolution between 1966 and 1976. It shows that the Cultural Revolution had destructively

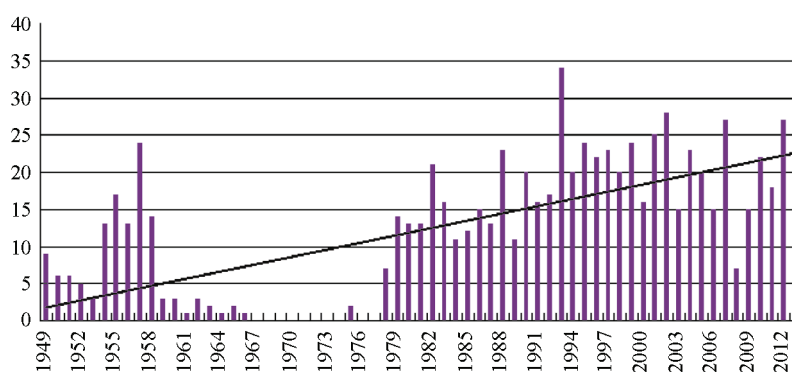


Fig. 1 Quantity of Laws and Decisions Related to Laws Enacted by the NPC and Its SC (1949–2013)

Sources: Calculation based on 全国人大常委会法工委立法规划室 (Office on Law-Making Project of Standing Committee of the NPC) eds., *中华人民共和国立法统计* (Statistics of Law-Making in the PRC), China's Democracy and Legality Press (Beijing), (2008); ZHU Jingwen eds. *中国法律发展报告 2010: 中国立法 60 年* (2011 Report on China's Legal Development: 60 Years Lawmaking in China), Renmin University of China Press (Beijing), (2011).

impacted on lawmaking. The second wave appeared between 1977 and 2013, in which a rising stage appeared between 1978 and 1999, and there were 10 years that the annual quantity of lawmaking exceeded 20 for this period, and its peak was 34 laws and decisions in 1993. Since then, the number of lawmaking maintained a rapid rate of increase, *e.g.* the average annual quantity of lawmaking exceeded 20.

Generally speaking, lawmaking includes the enactment and amendment of laws. Researching the lawmaking in China since reform and opening up, we can see that lawmaking in the early reform period focused mostly on the enacting, in which the policymakers wanted to resolve the lawless issues that existed after the Cultural Revolution and speed up the lawmaking. The number of laws enacted accounted for almost 90% of the total number of the lawmaking in the 5th, 6th, and 7th NPC (between 1978–1993; see Table 1). Along with deeper social and economic reform, the laws enacted just several years ago surfaced. The focus of lawmaking began to shift from enacting laws to amending them. The NPCSC stressed the quality of lawmaking and not only the quantity of lawmaking. The number of law amendments was 17 and accounted for over one-third in all lawmaking in the 8th Congress (1994–1998). Since then the proportion of law amendments grew to 50% in the 9th and 10th Congress (1999–2007), and reached 68.3% in the 11th NPC (2008–2013), over two thirds.

Table 1 The Number and the Ratio of Law-Enacting and Law-Amending Between the 5th and 11th NPC

NPC	Number of law-enacting	Number of law-amending	Total	Percentage of law-amending total (%)
5th NPC	34	4	38	10.5
6th NPC	37	5	42	11.9
7th NPC	44	6	50	12.0
8th NPC	62	17	79	34.7
9th NPC	35	41	76	53.9
10th NPC	31	42	73	57.5
11th NPC	19	41	60	68.3
Total	264	159	423	37.6

Source: ZHU Jingwen eds., 2010 年中国法律发展报告 (2010 Report on China's Legal Development), Renmin University of China Press (Beijing), (2009), available at <http://www.gov.cn/jfjg/index.htm>.

B. Contents of Lawmaking

On the contents of lawmaking, lawmaking before and after the reform and opening up may be compared in term of three aspects, namely, the guiding ideology of lawmaking, the laws themselves and the role of law in society.

On the guiding ideology, the lawmaking before the reform and opening up reflected the CCP's leading theory, line, and policy at that time, especially the class struggle as a line and the centered plan economy. Accordingly, criminal law was thought of as only a tool of class struggle, economic law was thought of as a tool to realize the

centrally-planned economy and the administrative law was thought of as an instrument of public administration to govern the people, lacking restriction and supervision of government's class struggle as a line. On the other hand, underdevelopment of the civil and commercial law was related to the understanding of socialism, the so-called "eliminating private ownership.ⁱ The guiding ideology of lawmaking after the reform and opening up has had a great change, that is, transformation from the "class struggle as outline" to economic construction as a center, to the construction of harmonious society, to the socialism with Chinese characteristics.

Regarding the laws themselves, they were very simple before reform and opening period, as apart from the Constitutional law, the organic law of state organs, the election law and the marriage law, major laws that generally comprise a country's legal system, such as criminal law, civil law, procedural law, had not yet been enacted. The administrative law mainly focused on the field of specific public administration, such as public security, the control of domicile and the military administration. The general administrative law, such as administrative permission law, administrative punishment law, administrative procedure law, and administrative review law were not enacted yet. The social law mainly focused on labor insurance of state-owned enterprises' members, but did not cover the social and labor insurance in the collective enterprises and farmers in people's communes. The greatest achievement of lawmaking after reform and opening up has been a formation of a socialist legal system with Chinese characteristics, which is composed of seven legal branches, according to the NPCSC, namely, the constitutional law and the laws related to the constitutional law, the administrative law, the criminal law, the civil and commercial law, the economic law, the social law, and the procedure law.

On the role of law in society, the laws did not get due respect before reform and opening up. As former Chinese leader Deng Xiaoping remarked, "change with the change in leaders; change with the change in the leaders' attention" (以领导人的改变而改变, 以领导人注意力的改变而改变), namely, the rule of man, but not the rule of law, was a portrayal of the role of law in that era. The role of law in society has been greatly enhanced since reform and opening up, and the rule by law has already become a major strategy of running a state. It should be noticed that the increasing role of law in society does not only lie in how many laws are enacted, but also, or more importantly, lies in to what extent the people depend on the laws in realty, or if the law enacted can actually be implemented. As a matter of fact, since the reform and opening up, the number of cases tried and enforced by the people's courts at various levels has increased from less than 500,000 in 1978 to over 10,000,000 in 2012², increasing more than 20 times. The number of judges has increased from more than 60,000 in 1981 to almost 200,000. The number of lawyers has increased from more than 8,000 in 1981 to more than 220,000, and the

² WANG Shengjun, 最高人民法院工作报 (*The Supreme People's Court's Working Report*), Dec. 21, 2013, available at http://www.gov.cn/2013lh/content_2359159.htm.

number of law schools has increased from 8 in the late 1970s to more than 600 right now. The number of students graduating from law schools has increased from less than 1,000 to over 100,000.³ All of these changes show that the role of law in society is really enhanced. The law has already become a very important aspect in current Chinese political and social life.

Certainly, the legalization does not mean that all social relations need to be regulated by law, and also it does not mean that the more the better in lawmaking and litigation. Although China has made great advances in the field of lawmaking for more than 30 years, it must be remembered that legal regulation owns both advantages and limitations. It is no doubt that lawlessness in major fields of social relations is not allowed; however, it is not a good idea to make laws in regulating any social relations, or resolving whatever disputes only depends on law. On this issue, China has its historical tradition, and Western countries also have their experience and lessons in legal development. It is still a serious challenge for China to keep positive attributes while removing negative attributes among both Chinese and the Western legal cultures in improving the legal system with Chinese characteristics.

II. CLASSIFICATION OF THE CURRENT LEGAL SYSTEM IN CHINA

The legal system in the PRC before reform and opening up was very simple and limited, mainly comprising of the 1954 Constitution, the organic laws of state organs, electoral law, labor law, and marriage law. Most of the laws in the legal system with Chinese characteristics were enacted after 1978. Up to now the legal system in the PRC has consisted of more than 244 laws enacted by the NPC and its SC, more than 700 administrative rules and regulations enacted by the SC and several thousand local rules and regulations enacted by the local people's congress at the provincial level, in terms of contents of laws. According to the NPCSC, the legal system in the PRC is composed of seven legal branches, namely, the constitutional law and related laws, the administrative law, criminal law, civil and commercial law, the economic law, the social law and the procedural law⁴ (see Fig. 2).

³ ZHU Jingwen, 2012 中国法律发展报告：中国法律工作者的职业化 (2012 Report of China's Legal Development: Professionalization of Legal Workers), Renmin University of China Press (Beijing), (2013).

⁴ As a matter of fact, how to classify the different legal branches in a legal system is an academic issue. There are different points of view about how many legal branches in the legal system of China in the academic circle. Some scholars think that the concept of the laws related to the Constitution is not clear because any laws should be related to the Constitution. Some scholars think that the environmental law should become an independent legal branch, but not a sub-branch under the economic law or the administrative law. Some scholars think that military law should be an independent legal branch but not a sub-branch under the administrative law. Another controversy is if it is suitable to put one or another law in this or that legal branch, for example, the administrative procedure law is a branch under the administrative law or under the procedure law? See ZHU Jingwen, *Overview, Framework of the Socialist Legal System with Chinese Characteristics*, in ZHU Jingwen & HAN Dayuan (ed.), *Research Report on the Socialist Legal System with Chinese Characteristics*, Enrich Professional Publishing (Beijing), at 37–42 (2013).

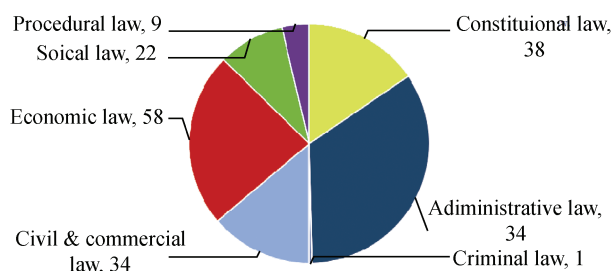


Fig. 2 Composition of Socialist Legal System with Chinese Characteristics (2013)

Source: The NPCSC.

A. Constitutional Law and the Related Laws

The constitutional law and the related laws branch has 38 laws composed of two sub-branches, namely, the constitutional law and the laws related to the constitutional law.

The PRC has promulgated four constitutional laws, namely, 1954, 1975, 1978 and the 1982 Constitution. The 1982 Constitution has had four amendments, the 1988, 1993, 1998 and 2004 Amendments.

Except for the constitutional law, the NPC has also enacted some laws related to constitutional law, principally including four types:

(1) Organic laws of state's organs, including the organic law of the people's congress at various levels, the people's government at various levels, the people's court, the people's procuratorate, the law of deputies to the people's congress, the judge law, the prosecutor law, etc.;

(2) Self-management laws, including the law of the national area autonomy; the law of self-management at grass-roots, such as the villagers' self-management and the urban residents' self-management; the Special Administrative Region's (SAR) basic law, such as the Basic Law of the Hong Kong SAR and the Macau SAR, etc.;

(3) Laws concerning political rights, including the demonstrative law, the electoral law, the trade union law, etc.;

(4) Laws concerning the state sovereignty, the national security, the national flag, emblem and anthem, etc.

B. Administrative Law

Administrative law in China is a branch consisting of 84 laws, the largest number of laws among the different legal branches, which can be divided into two types, namely, general administrative law and special administrative law.

General administrative law relates to the general principles, organic forms, operating mechanism, and remedy of administrative actions, including

(1) Organic law of administrative organs, such as organic law about the SC, the

people's governments at various levels, the ministries and commissions under the SC, etc.;

(2) Administrative operation law, such as the law of the administrative licensing, administrative penalty, administrative sanction, administrative supervision etc.;

(3) Administrative remedy law, such as the administrative compensation, the administrative review, the administrative procedural law, and etc.

Special administrative law is related to different areas of administrative management, such as laws about public security, national defense, civil administration, state security, post, customs, environment pollution, personnel, civil service, lawyer, police, military, education, science and technology, culture, health, food safety, sports, etc.

C. Criminal Law

The NPC enacted the Criminal Law in 1979, which is the first criminal law in the PRC. In 1997 the NPC greatly amended the 1979 Criminal Law. Since then, the NPCSC has already had eight amendments to 1997 Criminal Law.

Except the Criminal Law, the SC also enacted some laws on preventing crime, such as the laws on security administrative punishment, the laws on preventing teenagers from crime and the criminal executive law, such as prison laws, regulations on community correction.

D. Civil and Commercial Law

The civil and commercial law is composed of three sub-branches, namely, the civil law, the commercial law and the intellectual property law, altogether 34 laws.

In the field of civil law, China has already enacted the General Principles of the Civil Law (1986), Marriage Law (1950, 1981, 2001), Adoption Law (1992), Inheritance Law (1985), Property Law (2007), Contract Law (1999), Torts Law (2009), Law of the Application of Law for Foreign-Related Civil Relations (2010). Up to now, the codification of the civil law has not yet been finished.

In the field of commercial law, the SC has already enacted Company Law (1994), different kinds of enterprise law, including industrial enterprise owned by people, partnership enterprise, individual proprietorship enterprise, negotiable instrument law, bankruptcy law, insurance law, auction law, security law, guaranty law, consumer protection law, etc.

In the field of the intellectual property law, China has promulgated Trademark Law (1982, 1993, 2001), Patent Law (1984, 1992, 2000, 2008), Copyright Law (1990, 2001, 2010), etc.

E. Economic Law

The economic law in China has 58 laws that can be divided into two sub-branches,

that is, the macro-control law and the industrial management law.

The macro-control law relates to the control of macro-economy, including laws about the budget, the audit, the statistics, the price, antitrust, the banking, the anti-money laundering, the tax, the metrology, the standardization, the accounting, the product quality, etc.

The industrial management law relates to different industries' management, including different natural sources, land, sand, forestry, grasslands, water, river, ocean, fresh air, stock farming, fisheries, agriculture, industry, transportation, trade, external trade, environmental protection, etc., in which the environmental pollution protection law is composed of laws about atmospheric pollution prevention, water pollution prevention, marine environment protection, environmental noise pollution prevention, solid wastes pollution prevention, etc.

F. Social Law

The social law in China includes 22 laws and can be divided into three types, namely, the labor protection law, the social security law and the public welfare and charity law.

The labor protection law including the labor law, the labor union law, the labor contract law, the law of mediation and arbitration of labor disputes, the law on production safety, the law of occupational disease prevention, etc.

The social security law comprises the social insurance law, the employment promotion law, the social assistance law, the laws on the special groups protection, such as the laws on protection of minors, women's rights, senior citizens' rights, disabled people's rights, etc.

The public welfare and charity law, for example, includes public welfare donations law.

G. Procedure Law

The procedure law with nine laws in China is composed of the civil procedure law, the criminal procedure law, the administrative procedure law and the non-litigation procedure law.

The Civil Procedure Law (For Trial Implementation) was enacted by the NPCSC in 1981, and the NPC formally promulgated the Civil Procedure Law in 1991, and amended the Civil Procedure Law in 2007 and 2012.

The Criminal Procedure Law was enacted by the NPC in 1979, amended in 1996 and 2012.

The Administrative Procedure Law was enacted by the NPC in 1989.

The non-litigation procedure law in China includes the arbitration law, the people's mediation law, the law of mediation and arbitration of labor disputes, etc.

III. ISSUES AND RETHINKING OF INSTITUTION OF LAWMAKING

A. Current Institutions of Lawmaking

According to the Constitution and the law of legislation, the institutions of lawmaking in China include:

(1) The NPC and its SC enacts or amends laws, among which the NPC enacts and amends the basic laws governing criminal offense, civil affairs, state organs and other matters; and the NPCSC enacts and amends other laws except the basic laws; however, it has a power to partially supplement and amend the laws enacted by the NPC provided that the basic principles are not contravened when the NPC is not in session, e.g. Amendment 1–8 to the Criminal Law was promulgated by the SC, although the criminal law was enacted by the NPC;

(2) The SC enacts or amends the administrative rules and regulations; the ministries and committees under the SC enact and amend the departmental regulations;

(3) The local people's congresses and their standing committees at the provincial level enact and amend the local rules and regulations and the local people's governments enact and amend the local governmental regulations;

(4) The people's congresses and their standing committees in the relatively large cities, including the city in which the provincial capital is located, the city in which the special economic zone is located, and the relatively large cities approved by the SC enact and amend the local rules and regulations, and their people's governments enact and amend the local government regulations;

(5) The NPC and its SC enact and amend the basic law of the Hong Kong and the Macao SAR, and the SAR's legislative council and government enact and amend the local rules and regulations.

B. Relation between Laws Enacted by the NPC and Its Standing Committee

As above mentioned, the NPC enacts the basic laws and the NPCSC enacts other laws except the basic laws. As a matter of fact, most laws are enacted and amended by the NPCSC, but not the NPC. The laws enacted and amended by the NPC numbered only six, but the laws enacted and amended by its SC totalled 134 between 2000 and 2009. The ratio of laws by the NPC dropped from 33.7% in the 1980s to 4.2% in the 2000s (see Tables 3–8). The laws enacted and amended by the NPC consisted of only two, that is, the electoral law and the criminal procedural law amended by the NPC, account for 3.1% between 2010 and 2013 (see Table 2). That is to say, the NPCSC actually exercises the function of lawmaking in the NPC. More seriously, almost no one of local rules and regulations were enacted by the local people's congress for many years. For example, the Beijing Municipal People's Congress did not enact local rules and regulations, that is to

say, all of local rules and regulations were enacted by its SC for the recent 13 years.⁵

Table 2 Number of Laws Enacted by the NPC and the NPCSC (1979–2009)

	Laws enacted by the NPC	Laws enacted by the NPCSC	Percentage of laws enacted by the NPC in all laws
1979–1989	31	61	33.7%
1990–1999	18	120	13.0%
2000–2009	6	134	4.2%
2010–2013	2	63	3.1%

Source: 全国人大常委会法工委立法规划室 (Commission of Law-Making Affairs of NPCSC) eds., 中华人民共和国立法统计 (The PRC's Lawmaking Statistics), China Democratic and Legality Press (Beijing), (2008). Available at <http://www.gov.cn/flfg/index.htm>

It seems reasonable that the mission of lawmaking actually was undertaken by the NPCSC. The first reason is the sessional term, that is, the NPC holds one conference per year, but the NPCSC holds a meeting every two months. It is unimaginable to pass a bill in the NPC's conference that usually needs three or more readings, that is, waiting for three or more years. The second reason is the lawmakers, that is, the NPC has nearly 3,000 deputies, but the NPCSC just has 161 members, so that it is easier for the lawmakers in the NPCSC to reach a consensus than the 3000 lawmakers in the NPC (see Table 3). Generally speaking, the NPCSC members received higher education than the deputies to the NPC, so that they have better ability to participate in administration and discuss state affairs.

Table 3 Number of Lawmakers in the NPC and Its SC (The 1st–12th NPC)

NPC	All deputies to the NPC	All members of the NPCSC	Percentage of SC members in deputies
1 st NPC	1,226	65	5.3%
2 nd NPC	1,226	61	5.0%
3 rd NPC	3,040	95	3.1%
4 th NPC	2,885	144	5.0%
5 th NPC	3,497	173	4.9%
6 th NPC	2,978	132	4.4%
7 th NPC	2,970	135	4.5%
8 th NPC	2,978	134	4.5%
9 th NPC	2,979	134	4.5%
10 th NPC	2,984	175	5.9%
11 th NPC	2,979	174	5.8%
12 th NPC	2,987	161	5.4%

Source: 历届全国人大常委会委员长、副委员长、秘书长、委员 (The Chairman, the Vice-Chairmen, the Secretary-General and the Members of All Sessions of the NPCSC), available at http://www.gov.cn/test/2006-02/05/content_178434_7.htm

⁵ 北京市人大 13 年首次行使立法权通过 3 部法规 (Beijing Municipal People's Congress Firstly Exercised the Power of Lawmaking After 13 Years and Passed 3 Local Rules and Regulations), Beijing Morning Post, Jan. 23, 2014, available at http://news.xinhuanet.com/local/2014-01/13/c_118935814_2.htm.

However, this is only an expedient position. It should be noticed that the people's congress system, as a fundamental political system in China, indicates that all powers in the PRC belong to the people. The NPC and the local people's congresses at various levels are the organs through which the people exercise state power.⁶ The NPC and the local people's congresses at various levels are constituted through democratic election. Although the NPCSC is the permanent body of the NPC and plays the role of the NPC when the NPC is not in session, it is not equal to the NPC. If almost all laws were enacted by the NPCSC but not the NPC itself, the people's character of laws would become a problem.

According to the Constitution in China, the NPC enacts the basic laws governing criminal offense, civil affairs, state organs and other matters. The problem is that, on the civil basic laws, the General Principle of the Civil Law, the Marriage Law, the Property Law were enacted by the NPC, however, the Tort Liability Law, the Law Applicable to Laws of the Foreign-Related Civil Relations as the basic civil laws were enacted by the NPCSC. On the criminal basic laws, the Criminal Law and the Criminal Procedural Law were enacted by the NPC; however, their amendments were very different. According to the Constitution, the NPCSC has the power to partially supplement and amend the laws enacted by the NPC provided that the basic principles are not contravened when the NPC is not in session. However, the legislative practice for recent years showed that how to exercise this power, how to not overstep its authority when it exercise this power, how to prevent infringing on the NPC's power to enact basic laws, has already become a problem in practice and theories, which need to be seriously considered. Concerning the amendment of the basic laws, for example, the 1997 Criminal Law and the 2012 Criminal Procedural law were amended by the NPC; however, other basic laws amended by the NPCSC, because 1997 Criminal Laws and 2012 Criminal Procedural Law were overall amend but not partially, and other laws were only partially amended but not overall. But the 8th Amendment to the Criminal Law, which amended 50 articles, including general provisions and specific provisions, and abolished 13 death penalties related to no violent economic crimes, was only discussed and passed by the NPCSC. So what of principal parts of the amendment, if it was too rushed to be amended by the NPCSC?

As a matter of fact, it is related to two issues in lawmaking: Firstly, what is the basic law? Certainly it is not true that all the laws related to the civil affairs are the basic civil laws; however, which are those laws in the civil affairs the basic civil laws and which are not? On the other hand, it is also not true that all of the laws related to the criminal offense are the criminal basic laws, for example, many decisions related to the criminal law enacted by the NPCSC clearly do not belong to the criminal basic laws. In terms of lawmaking practice in laws about criminal offence, it seems that only the Criminal Law

⁶ 中华人民共和国宪法 (1982 年) (1982 Constitution of the People's Republic of China), Article 13.

and the Criminal Procedure Law belong to the criminal basic laws. According to this standard, how about the civil basic law in which the civil law in China is not yet codified, how is it determined which civil laws belong to the basic one and which do not?

Secondly, according to the Constitution the NPCSC has the authority to partially amend the basic law enacted by the NPC. Here, the “partially amend” certainly is not the “totally or overall amend.” But to what extent is the so-called “partially amend,” if a rather major part of a law is amended is this still the “partially amend?” Both issues above mentioned should be refined in improving the institution of lawmaking in the NPC and its SC.

More important is not at the operational level but at the guiding thought level. Improvement of the NPC’s lawmaking is not that the NPC’s power of lawmaking becomes an empty shell, but should form a reality. In recent years the NPCSC already realized the importance of the issue, and stipulated that some deputies to the NPC may be invited to participate in the lawmaking of the NPCSC. Although this measure can partially decrease the elitist or aristocratic tendency in the SC’s lawmaking, but cannot resolve the fundamental issue, because the deputies to the NPC only participate in the conference of the NPCSC, but they have no power to vote. In order to resolve the fundamental issue, it is a key to reconstruct the institution of the NPC, so as to assure the power of lawmaking owned by the deputies to the NPC, but not that the deputies elect the members of the NPCSC once again to exercise the legislative power.

In the long view, reconstruction of the current institution of the NPC’s lawmaking will be necessarily involved in a series of issues, such as the way to produce the deputies to the NPC and NPCSC members, their quota allocation, representativeness, the time fixed for a conference held by the NPC and its SC, relation between the NPC and its SC, the reasonability of establishment of the NPCSC, and etc., which are just one of the core issues in the current political reform in China in which there is a need to find a correct direction and initiate a solution step by step. It should be noticed that the current institution of lawmaking in the NPC is, to a certain extent, a result of compromise. The institution of the people’s congress reflects the representative democracy; on the other hand, for a large number of deputies and short fixed time of the conference the NPC has to establish the NPCSC with small numbers but highly trained, and involving more conferences than the NPC. However, the NPCSC’s lawmaking is not the deputies to the NPC’s direct lawmaking. And also concerning the issue about the producing procedure of the NPCSC’s members, in practice it is easier to control the lawmaking by a small number of elites so that the article “all powers of the PRC belong to the people” will become hollow words. How to balance the two sides, how to draw on advantages and avoid disadvantages are the core issues of reconstruction of the peoples’ congress’ lawmaking?

C. Relation between the NPC's Lawmaking and Administrative and Local Organs' Lawmaking

To improve lawmaking in China, one should not only focus on the lawmaking in the NPC and its SC, but also on lawmaking in the administrative and local organs. It should be especially noticed that, in the world-wide view, along with expansion of administrative authority and decentralization of the central government's powers, compared to the parliament's lawmaking, the administrative and local lawmaking have played an increasingly more important role in lawmaking in Western countries, although this trend does not mean the parliament's lawmaking does not play an important role at all, but only means that the parliament has already constructed the legal framework in the major fields of social life, the administrative issues and local issues in the daily routine need the administrative and local authorities to establish rules and accordingly handle the issues concerning the administrative and local characters. Generally speaking, the shift of lawmaking's focus was realized in two periods in Western countries. In the first period from the 17th to the 19th century, parliamentary lawmaking was the focus and in the second period from the 20th century onwards, administrative and local lawmaking formed a focus. However, the development of lawmaking in China in recent years is different from that of Western countries, and has some special features. The lawmaking in China always focus on the laws enacted by the NPC and its SC, so that the all laws that play a major role in this or that legal branch in the socialist legal system with Chinese characteristics are enacted by the NPC and its SC. On the other hand, to a certain extent, it should be noticed that the development of lawmaking in China also conforms to a trend of lawmaking in the world. On the quantity of lawmaking, the number of laws enacted by the SC and local governments are much more than enacted by the NPC and its SC. Up to 2011, the NPC and its SC enacted 240 laws in total. However, the SC enacted 714 administrative rules and regulations, the local authorities with lawmaking power enacted 8,921 local rules and regulations, including autonomous regulations and specific regulations.⁷ Table 4 shows that the numbers of lawmaking of the laws enacted by the NPC and its SC, the administrative rules and regulations enacted by the SC, the departmental regulations enacted by the ministries and committees under the SC, the local rules and regulations enacted by the people's congresses at the provincial level, and the local governmental regulations enacted by the local people's congresses between 2003 and 2012. The numbers of administrative and local lawmaking outdistance that of the NPC and its SC's lawmaking for the recent ten years (see Table 4). The NPC and its SC only enacted 111 laws, but the SC enacted 253 administrative rules and regulations, the

⁷ 中国法治建设年度报告 (2011) (*2011 Annual Report of the Rule of Law Construction in China*), available at <http://www.chinalaw.org.cn/cnfzndbg/>.

ministries and commissions enacted 2,061 departmental regulations, the local people's congresses at the provincial level enacted 7,093 local rules and regulations and the local people's governments enacted 6,202 local governmental regulations for recent 10 years. Certainly, the character of the NPC's laws is different from that of administrative and local rules and regulations, the former are usually related to the issues that importantly impact on the economic, the political and the social life of a state, but the administrative and local rules and regulations are enacted (or authorized) according to the Constitution and laws. Even so, most of the laws enacted by the NPC and its SC were actually drafted by the SC. It is estimated that about 80% of laws enacted by the NPC and its SC are drafted by the SC.

Furthermore, the delegated legislation has formed a noteworthy trend since the reform and opening up. The so-called delegated legislation is different from the original administrative rules and regulations, and the area that the delegated legislation involve in originally belongs to the NPC and its SC, only because the conditions of the NPC's lawmaking are not ripe so the SC firstly enacts the delegated legislation under the authorization of the NPC and its SC, and then the NPC or its SC enacts the laws when the conditions are favorable. In China, as in many countries in the world, because the SC works in the frontier of administrative management and is more familiar with the day-to-day administrative work, it would be best qualified to speak on how to handle the major issues in society. It is very natural for the SC to be responsible for drafting the laws or being authorized to enact the temporary regulations when the drafts concerned are not suitable or developed.

Table 4 The Numbers of Law Makings as Different Kinds of Sources of Law in China (2003–2012)

	Laws	Administrative rules & regulations	Departmental regulations	Local rules and regulations	Local government regulations
2003	10	28	208	621	560
2004	18	32	306	1397	842
2005	12	22	286	749	648
2006	13	26	254	725	569
2007	20	30	205	662	659
2008	7	34	153	438	602
2009	12	21	162	621	537
2010	10	19	190	672	600
2011	4	26	139	590	620
2012	5	15	138	618	565
Total	111	253	2061	7093	6202

Source: 《中国法律年鉴》(2004–2013 年各卷)(2004–2013 Law Yearbook of China), Press of Law Yearbook of China (Beijing), (2004–2013).

On the other hand, it is not enough to only depend on the central government, including the NPC and the SC without the local governments' lawmaking because China

is a multinational state with huge population and big regional difference. So it is necessary to enhance the local governments' lawmaking.⁸

In short, the increase of number of administrative and local lawmaking is an indisputable fact, and also conforms to the objective needs of the development of lawmaking. So it is clearly against reality to insist that the power of lawmaking may only be owned by the NPC, but not authorized to the administrative organs, and only owned by the central government but not be decentralized to the local governments. The current issue is not to prevent or limit the development of administrative and local lawmaking but to insure their conformability to the Constitution and laws, and enhance their supervision. The supervision of administrative and local rules and regulations is a worldwide issue. Different countries have different methods, such as the constitutional court or committee in the civil law system, the general courts in the common law system, a special committee or group under the parliament. Although all these methods may have some advantages and also disadvantages, the key is whether they are conformable for the historical tradition and the current situation in a country.

In China, the power to supervise the administrative and local rules and regulations was exercised by the NPCSC as a core of all supervision system. According to the Constitution, the NPC has the power to supervise the laws enacted by the NPCSC; the NPCSC has a power to supervise the administrative rules and regulations enacted by the SC and local rules and regulations enacted by the local people's congresses; the SC has a power to supervise the departmental regulations enacted by the ministries and committees under the SC, and the local people's congress has the authority to supervise the local government regulations enacted by the local government. All the state organs mentioned above have the power to alter and annul inappropriate decisions, including laws, administrative rules and regulations, local rules and regulations, departmental regulations and local governmental regulations enacted by the supervised state organs mentioned above. This is the so-called mechanism to "alter and annul" in the legal supervision in China. Except that, the Constitution and the laws also stipulate the institution for record that is, the SC should report the administrative rules and regulations to the NPCSC for record, the local people's congress should report the local rules and regulations to the NPCSC and SC for record, the people's congress in the national autonomous area should report the autonomous regulations and specific regulations to the NPCSC and the SC for

⁸ The local rules and regulations in China can be divided into two types. The first one is the implementative lawmaking (实施性立法), namely, to implement the laws enacted by the NPC or the administrative rules and regulations enacted by the SC, concerning the local specialty, the local authorities enact the local rules and regulation, which are based on the laws and administrative rules and regulations. The second one is the creative lawmaking (创制性立法), namely, to manage the local affairs, the local authority enact local rules and regulations, which the central government has not yet enacted the related laws and administrative rules and regulations.

record and then come into force; the SARs should report the NPC for record.

The issue of legal supervision in China does not lie in legal provisions regarding supervision but in their operation. It is worth noting that it is very difficult to find any cases for the NPCSC and the SC to launch the mechanism to “alter and annul” inappropriate decisions, including the laws, administrative and local rules and regulations, that is to say, the mechanism was almost idled. It does not mean that the lawmakers in the administrative and local organs are skilled enough to stress the conformity of their rules and regulations to the Constitution and laws. As a matter of fact, some scholars and lawmakers found out that some of the rules and regulations enacted by the administrative and local organs were contradicted by the Constitution and laws. On the operational level, when the rules and regulations did not conform to the Constitution and laws, the typical method is that the officer in charge of lawmaking in the SC calls up or informally communicate with the officer in charge of law affairs in the SC or local people’s congress in order to correct inappropriate decisions. Otherwise, suppose the formal procedure or a mechanism to alter or annul was launched; it would mean the public opposition between the central and local, the people’s congress and government, which would be inconsistent with leadership and organic principle of the Party. So not to say that China never has any case that administrative and local rules and regulations do not conform to the Constitution and laws, but China used the informal method or deliberate mechanism to resolve the issue, which was resolved by voting and antagonism, and even launching judicial procedure in the West.

On the other hand, it should be noticed that the abuse of deliberate democracy, especially under the market economy and the interest multiplication, with different interests between the central and local governments, the people’s congress and government emerge, it would be very dangerous to only depend on the deliberate mechanism that relies on the leader’s personal authority and customs, the old boys’ system among the different officers with various ranks, without law or disregard of law. Indeed it would be vague responsibility for it, mutually making excuses, and even be vulnerable to be used by careerists. Although insisting on the CCP’s leadership and political dynamic, China should learn the operation mechanism in the modern democracy. Without an accountability system, modern democracy will have no leg to stand on, and without the strict legal supervision, accountability will be not able to operate. In short, the key to reconstructing legal supervision in China is how to integrate jointly the mechanism to alter and annul and the deliberative mechanism.

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