China's Legislation Law and the Making of a More Orderly and Representative Legislative System*

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ABSTRACT This article examines the significance of the Legislation Law (*lifa fa)*, passed by the National People's Congress (NPC) in March 2000. The Legislation Law represents an attempt by the NPC to rationalize China's legal system, establish a uniform legislative hierarchy and consolidate its authority over other important lawmaking institutions. The politics behind the Law's development therefore offer insight into the balance of power in China's lawmaking arena, revealing how key institutions – the NPC, the State Council and local people's congresses – engaged in bureaucratic bargaining over fundamental questions of their existence and authority within an evolving system. While the promulgated Law reveals the mixed results of this complex process, it also makes possible a more open and consultative legislative process by sanctioning the emergence of public legislative hearings. Now gaining currency around China, hearings are a new development and could be an important step in institutionalizing more meaningful citizen participation in the legislative process.

More than two decades of rapid economic growth has fuelled China's transition from a centrally-planned to a market-oriented economy, necessitating the development of a legal system capable of fostering and protecting economic headway. Since China's reform and opening in 1978, its legal system has undergone an unprecedented expansion with the promulgation of myriad commercial and civil laws at national and local levels. While the emphasis on lawmaking contributed to the growing authority and capacity of the National People's Congress (NPC) during this period, numerous contradictions, tensions and ambiguities materialized within the lawmaking system as a whole. Largely because of a shifting distribution of authority among the NPC, the State Council and sub-national (primarily provincial) people's congresses, the legislative arena is populated by self-interested actors with uneasy power relationships who engage in institutional turf wars at virtually every stage of the lawmaking process. Faced with the possibility of legislative disorder derailing modernization, in the early 1990s, China's leadership began to

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consider a law on lawmaking to set out a clearly defined uniform legal hierarchy.[1]

The Legislation Law (*lifa fa)* represents a significant attempt to produce a more orderly and open legislative system in China.[2] Virtually unique in the world as a law on lawmaking, it deals with issues of a constitutional nature.[3] Moreover, it represents an attempt by the NPC to solidify its position vis-à-vis other lawmaking and regulation-making institutions, namely the State Council and provincial governments. While legal experts have criticized the promulgated Law for its many shortcomings, analysing the politics behind it offers insight into the current balance of power among China's major lawmaking institutions. Relying primarily on documentary and press analysis, as well as the author's participation in conferences of experts and lawmakers from across China, this article attempts to shed light on some of the intense positions taken by institutions engaged in protracted bureaucratic bargaining over fundamental questions of their purpose and authority within an evolving legislative system.

Furthermore, as the Legislation Law addresses substantive and procedural issues in the legislative process, its content stands to affect the quality of lawmaking in China in the future. Overall, the Law endorses a more open and consultative legislative process. Importantly, it sanctions, though does not require, the use of public legislative hearings (*lifa tingzheng*) as a new mechanism for incorporating greater citizen participation in the legislative process. The emergence and spread of public legislative hearings in China represents a ground-breaking governance reform, primarily taking root in urban areas at the local level. While the Law does not yet mandate their use, local people's congresses and administrative bodies have started experimenting with hearings, signalling the potential development of a new governance norm in which public participation plays a more valued and institutionalized role in the legislative process.

1. As used here, "uniform legal hierarchy" refers to the ordering of the effect of laws in China's unitary system, beginning with the Constitution, down to national laws (promulgated by the NPC and NPCSC); administrative regulations (promulgated by the State Council); and finally local regulations. See chapter 5, articles 78–80 of the Legislation Law. While the need to develop a law governing uniformity and procedures of lawmaking was reportedly first discussed by NPC members during the Seventh National People's Congress, plans for the Legislation Law first formally appeared in the Legislative Plan of the Eighth National People's Congress (1993–98), available in *Jingji ribao* (*Economic Daily*), 14 March 1994.

2. Legislation Law of the People's Republic of China (*Zhonghua renmin gongheguo lifa fa),* passed by the Third Plenary Session of the Ninth National People's Congress on 15 March 2000.

3. The 1982 Constitution establishes the framework and sets jurisdictional limits for dividing responsibility and authority among legislative institutions. For more on the rarity of laws like the Legislation Law, see Jianfu Chen, "Unanswered questions and unresolved issues," Jan Michiel Otto *et al.* (eds.), *Law-making in the People's Republic of China* (The Hague: Kluwer Law International, 2000) p. 236.

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Drafting the Legislation Law

It took seven years, from 1993 to 2000, to move from drafting to passage of the Legislation Law, attesting to the number, interest and power of the various actors engaged in the process. Drafting of the Law began following the Eighth National People's Congress in 1993.[4] Qiao Xiaoyang, vice-chairman of the Legislative Affairs Committee (LAC) and of the NPC Law Committee, proposed the Legislation Law on the LAC's behalf, as consistent with the LAC's role as lead sponsor of the NPC's most progressive, controversial and high profile lawmaking initiatives.[5] Beginning in 1993, two versions of the Law were drafted and circulated simultaneously, one under the leadership of the LAC and the other under the guidance of Li Buyun at the Chinese Academy of Social Sciences (CASS).[6]

The LAC delegated the task of writing to the State and Administrative Law Office in consultation with the legal bureau of the State Council and an advisory organ to the LAC, the Administrative Law Research Group under the direction of Li Yuan. Between the first draft issued for internal circulation and the final version of the Law, the LAC draft circulated among the upper echelons of the NPC and State Council for comments more than eight times.[7] Li Buyun's group produced its "experts' draft" on 20 October 1996 after a considerably more transparent process.[8] While

4. *Bajie quanguo renda changweihui lifa zhidu* (*Legislative Plan of the Eighth National People's Congress, 1993–1998*) available in *Jingji ribao*, 14 March 1994.

5. Qiao Xiaoyang, "Kaizhan lifa fa yanjiu – zai lifa fa qicao gongzuo yantaohui shang de jianghua" ("Launch research for the Legislation Law: speech at the symposium on the draft law on lawmaking") *Xingzheng fa yanjiu (Adminstrative Law Review*), No. 3 (1994); Qiao Xiaoyang, "Zhiding lifa la cujin yi fa zhi gu – zai 'Lifa fa' qicao gongzuo yantaohui shang de jianghua" ("To enact a law on law-making and to promote ruling the country by law: speech at the symposium on the draft law on law-making") *Xingzheng fa yanjiu* (*Administrative Law Review*), No. 3 (1997). For more on the role of the LAC in law drafting, see Michael Dowdle, "The constitutional development and operations of the National People's Congress," *Columbia Journal of Asian Law,* Vol. 11, No. 1 (Spring 1997) p. 64.

6. Qiao Xiaoyang, "To enact a law on law-making."

7. According to scholar Li Yahong in "The law-making law: a solution to the problems of the Chinese legislative system?" *Hong Kong Law Journal* (2000) p. 140. The first draft was released on 17 December 1994.

8. Delegating the task of developing an early draft of the Legislation Law to CASS is further evidence of a trend within Chinese lawmaking to involve experts in law drafting to improve the overall quality of the legislation. According to Li Buyun, his research group included 36 members from government, research institutions, professors and doctoral candidates from the Law Institute of CASS. They undertook extensive research, travelling around China and organizing two international conferences on general theories of lawmaking. They developed four drafts of the Law and solicited opinions on the second draft during two symposia on lawmaking in Nanjing and Fuzhou. Apparently, the discussions at these symposia incorporated the second draft of the LAC's Legislation Law as well as the Standing Committee's Provisions on Procedures of Examination of a Legislative Proposal, drafted by the Research Department of the General Office of the Standing Committee. The portion submitted by the General Office probably comprises the basis of the procedural section of the NPCSC in chapter 3 of the Legislation Law. See Li Buyun, "Guanyu qicao 'Zhonghua renmin gongheguo lifa fa' (Zhuanjia jianyi gao) de ruogan wenti" ("Several issues on the draft Legislation Law proposed by experts") *Zhongguo faxue* (*China Law Study*), No. 1 (9 February 1997), pp. 11–19. Also Li Buyun, "Explanations on the proposed law on law-making of the People's Republic of China," in Otto *et al*., *Law-making in the People's Republic of China*, pp. 157–173.

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much of the substance of this draft got whittled away in the protracted bargaining phase that followed, as shown below, the Legislation Law's drafting process paints a picture of lost opportunity and inevitable compromise. The two drafts merged in the "Draft for Consolidating Opinions" in the first half of 1997, around the time that the Law again went before the NPCSC for discussion.[9]

The submission of this draft coincided with a dynamic period for the development of "rule of law" in China.[10] Despite the momentum behind legal system reform, the Legislation Law did not meet its December deadline for official submission to the NPCSC for passage by the full session of the NPC in March 1998.[11] In fact, no drafts of the Law were released between 5 June 1997 and 6 August 1999, leading to speculation that it either stalled on a backburner or spent two years mired in disagreements between the major lawmaking bodies. In October 1999 the Law once again received increased attention from officials, marked by the quick-fire succession of discussion of it in the press concurrent with its submission to the NPCSC, in preparation for its introduction to the full session of the NPC in March 2000. The Legislation Law finally passed the NPC with a vote of 2,560 in favour and 89 against, with 129 abstentions.[12] As explored in the following section, complex policy debates contributed to the Legislation Law's lengthy drafting process.

Heated Debates, Bureaucratic Bargaining and the Balance of Power

China's leaders frequently referred to the Legislation Law as a cure-all for the myriad ailments plaguing the legal system. As a prominent advocate of the Law, Jiang Chunyun, a member of the CCP Central Committee (CCPCC) Political Bureau and vice-chairman of the National People's Congress, stated: "The Legislation Law will set norms for the legislative power limits and the legislative procedures, and play an important role in standardizing and legalizing the legislative work."[13] NPC leaders pushing for the Law clearly hoped to assert the role of the NPC in regulating legislative activities, standardizing and codifying the legal system after 20 years of haphazard development, and maintaining

9. The Legislation Law, "Draft for consolidating opinions," 5 June 1997. This draft came before the NPC for discussion on 18 March 1997 and again on 5 June 1997.

10. There is an extensive body of literature on the development of "rule of law" in China. See, for instance, Randall Peerenboom, *The Long March Towards the Rule of Law* (Cambridge: Cambridge University Press, 2002); Stanley Lubman, *Bird in a Cage* (Stanford: Stanford University Press, 1999); and Perry Keller, "Sources of Order in Chinese Law," *American Journal of Comparative Law*, Vol. 42 (1994).

11. The Legislation Law also missed its first submission date to the NPCSC in late 1995 for passage in early 1996, according to Qiao Xiaoyang and Chen Cixi, cited in J. Chen, *Chinese Law: Towards an Understanding of Chinese Law, its Nature and Development* (The Hague: Kluwer International, 1999) p. 120.

12. Meng Yan, "Ninth NPC ends fruitful session," *China Daily Internet Edition* (online), 16 March 2000.

13. Zhu Dongju and Shen Lutao, "NPC Standing Committee meeting examines Legislation Law," Xinhua, 23 December 1999, in FBIS-CHI-2000–0102.

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the unity of the entire legal system by curbing rampant local laws and State Council regulations.

To achieve these goals, the Legislation Law had to address a variety of challenging and sensitive issues, including the vertical division of central and local legislative powers, the horizontal distribution of legislative powers between the National People's Congress and State Council hierarchies, the relationship between laws and regulations issued by competing authorities, supervisory authority over laws, administrative regulations and rules, legal interpretation, and legislative processes and procedures.[14] As these are the issues at the very heart of power and authority in the lawmaking system, the Law's drafting process inspired heated arguments from influential institutional actors.

The National People's Congress versus the provincial people's congresses. The Legislation Law tackled head-on the division of authority between the NPC and sub-national people's congresses, which were determined to secure the rights of their locales. These debates mirror the larger issues relating to the emergence of a quasi-federalist system in China, characterized by an emerging division of legislative power between central and local governments. Scholars have documented the effect of the devolution of substantial fiscal and decision-making authority to lower level governments in creating a vertical tension within China's unitary system.[15] Byproducts of this high degree of discretionary power at the local level have been the phenomenon of rampant local protectionism and attendant abuses of the legal system, corruption and uneven application of laws. Examples of such developments abound in the Chinese media and were frequently raised by Chinese legislators and academics who believed a more centralized legislative system would allow the NPC in Beijing to keep closer tabs on the legislative work done by local levels.[16] It is possible that NPC leaders also thought greater centralization and a strong NPC would bolster the positions of the provincial people's congresses vis-à-vis powerful Party and state organs operating at the same level.[17] While the Legislation Law angered many sub-national people's congress representatives, its final content reveals that, despite a number of compromises, the NPC largely succeeded in solidifying its position over the localities.[18]

14. Gu Angran, "Guanyu Zhonghua renmin gongheguo lifa fa (cao'an) de shuoming" ("Explanation on the draft Legislation Law of the People's Republic of China"), NPC Standing Committee Gazette, No. 2 (2000). Also see J. Chen, "Unanswered questions and unresolved issues," in Otto *et al.*, *Law-Making in the People's Republic of China,* p. 236.

15. See, for instance, Dali Yang, *Beyond Beijing: Liberalization and the Regions in China* (London: Routledge, 1997).

16. "NPC Standing Committee studies draft Legislation Law" Xinhua, 29 October 1999, in FBIS-CHI-1999–1029.

17. For analysis of local people's congress representatives' attitudes towards greater centralization see Kevin O'Brien and Laura Luerhmann, "Institutionalizing Chinese legislatures: trade-offs between autonomy and capacity," *Legislative Studies Quarterly*, Vol. 27 (February 1998) p. 92.

18. For an example of the opinions of provincial people's congress representatives, see Xu Yang, "Draft law on legislation raising heated debates," *China Daily*, 30 October 1999. The

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The content of Article 8 produced a central debate in the Law's drafting process, since this article, for the first time in PRC legislative history, spells out ten broad areas in which the central government has exclusive legislative authority.[19] Several NPC representatives opposed this provision, claiming that it represented an attempt by the national legislature to curb the authority of local legislatures and intrude on social and economic issues better left to the localities to legislate.[20] For instance, while the NPC included taxation on the list of its ten areas in drafts of the law from 1997, the localities fought successfully to remove the phrase pertaining to "fees of tax nature" (*shuishou xing shoufei*). The levying of such fees, or extra-budgetary funds collected by local governments ostensibly to pay for local government provision of goods and services, has been a long-standing source of contention between central and local governments.[21] While the central government wanted to rein in the excessive levying of fees by localities, which were contributing to corruption, peasant protest and rural instability, it appears that drafters decided not to pursue this dispute in the context of the Legislation Law. The final version of the Law thus reflects a compromise in which it distinguishes between taxation and fees, with the central government legislating taxation and the localities imposing fees.

Despite resistance from provincial governments, the final version of the Legislation Law succeeded in delimiting the arena of NPC authority over local governments. While provincial people's congress representatives argued that it should also define the specific legislative powers of localities, the Law merely reaffirms the status quo in this regard.[22]

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footnote continued

dissatisfaction of local people's congress representatives with this division of responsibility, which appeared widely in the media and official accounts, is in accordance with the author's observations while attending a seminar on the Legislation Law in Beijing in May 2000 in which provincial representatives from around China reiterated their frustration over the central government's efforts to control areas they felt were better left to local legislation (author's personal file).

19. These areas include: (1) matters concerning national sovereignty; (2) election, organization and powers of people's congresses, governments, courts and procuratorates at various levels; (3) systems of autonomous regions, SARs and system of autonomy of the masses at grass-roots level; (4) crimes and criminal penalties; (5) deprivation of political rights of citizens, coercive measures and penalties restricting personal freedom; (6) expropriation of non-state-owned enterprises; (7) basic civil systems; (8) basic economic systems and basic systems regarding affairs of finance, taxation, customs, banking and foreign trade; (9) litigation and arbitration systems; (10) other matters that must be legislated by the NPC and NPCSC.

20. See, for instance, Qiao Xiaoyang, "To enact a law on law-making"; Li Buyun, "Several issues on the draft Legislation Law" and "Explanations on the proposed law on law-making"; and Office of the State and Administrative Law (ed.), "Opinions regarding the law-making law draft by various local and central governments and law schools," Legislative Affairs Committee (9 September 1997). These disputes and their significance are also discussed extensively in Li Yahong, "The law-making law: a solution to the problems in the Chinese legislative system?" *Hong Kong Journal* (2000) pp. 121–22.

21. On the relationship between the central government, local governments and society on taxation and fees, see Thomas Bernstein and Xiaobo Lu, *Taxation without Representation in Rural China* (Cambridge: Cambridge University Press, 2003).

22. See Li Buyun, "Several issues on the draft Legislation Law," pp. 11–19.

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Moreover, while earlier drafts stated that all localities could legislate in the NPC's exclusive areas with proper NPC or NPCSC authorization, the final draft gave only the State Council and special economic zones this opportunity. This perturbed many provincial representatives since the Legislation Law thus gives the NPCSC the final say in voiding any local legislation deemed inconsistent, even legislation that falls outside the central government's exclusive areas. Importantly, however, the localities did secure a formalization of the long-standing practice of drafting "advance legislation" (*xianxing lifa*), ensuring their ability to pass legislation in areas not yet legislated by the centre under the condition that it can be voided later once the national government has legislated.[23] Both the NPC and local governments seemed to be in favour of this arrangement since it facilitates local experimentation, which often serves as test points for national legislation. All in all, while provincial people's congress representatives fought strenuously to preserve their legislative jurisdiction and limit the scope of the NPC's exclusive legislative powers, the central government largely succeeded in asserting its authority over them by defining the basis for a clear division between central and local legislative power.[24]

The National People's Congress versus the State Council. While the National People's Congress is constitutionally the highest legislative body in China, the State Council has retained significant lawmaking power since the Party launched its legal modernization programme in 1979 and turned to it to implement the necessary legal measures to support Deng Xiaoping's economic reforms.[25] China's constitution describes the State Council as the highest organ of administrative power. The administrative rules and regulations (*xingzheng fagui*) it issues fall immediately below those enacted by the NPCSC (which fall beneath the constitution) in China's overall legislative hierarchy. Furthermore, the State Council commissions and ministries issue instructions, orders and rules (*guizhang*) to elucidate the administrative rules and regulations that affect the implementation of laws passed by the NPC and NPCSC. Consequently, by the year 2000, about 250 laws had been promulgated in China while the State Council issued over 800 administrative regulations.[26] As J. Chen writes, "the extensive legislative powers granted to the State Council have thus made the Council the *de facto* most powerful

23. Article 64 of the Legislation Law.

24. Just prior to the passage of the Law, the NPC came out with an endorsement for the work of local legislative bodies, possibly to quell ongoing disputes in preparation for the final vote, "China's NPC endorses local legislative bodies' role," Xinhua, 10 March 2000, in FBIS-CHI-2000–0310.

25. For more on the division of authority between the NPC and State Council, and NPC delegation of law-making responsibility to the State Council since the beginning of the reform period, see Murray Scot Tanner, *The Politics of Lawmaking in China* (Oxford: Clarendon Press, 1999). Indeed, the decision to consider State Council departmental regulations (*buwei guizhang*) in the Legislation Law was an important step towards bringing State Council regulations under the scope of "law."

26. Li Shishi, "The State Council and lawmaking," in Otto *et al.*, *Law-making in the People's Republic of China*, p. 102.

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law-making institution in China."[27] As such, Perry Keller argues that the Legislation Law represents "an attempt to rationalize a situation born out of an excess of pragmatic rulemaking, insufficiently constrained by constitutional principles."[28] Thus it brought out several controversial issues on which neither the State Council nor the National People's Congress were willing to make significant concessions.[29] These included the contradictions between laws and regulations, the confusion caused by too many overlapping powers between State Council departments, and the problems associated with the State Council's issuance of implementing legislation that diverges from the nature of legislation passed by the NPC.[30]

The debates surrounding the Legislation Law reveal that the State Council and National People's Congress have butted heads on an ongoing basis over the conduct of legislative work. NPC frustration with the State Council appeared frequently in the Chinese mass media during the 1990s. For instance, Zhang Chunsheng explained the Legislation Law as a solution to "the rush of administrative regulations issued by governments at various levels [that] has brought some problems to the enforcement work."[31] Similarly, NPC delegates expressed hope that the Legislation Law would end a "history of disputes" with the State Council over regulations that contravened the principles of NPC-passed legislation and led to departmental protectionism.[32]

Many State Council ministries opposed the Legislation Law as an excessive curtailment of their legislative powers.[33] For instance, one complaint by NPC officials that arose during the debate phase concerned the lack of a mechanism to terminate the endless cycles of bureaucratic bargaining and democratic consultation.[34] NPC officials sought to eliminate the frequent occasions on which State Council ministries, forced to compromise on draft legislation, have re-opened the debate when it comes before the NPC, inevitably prolonging disagreement on legislation through the unlimited opportunities for opponents to block progress. The

27. Chen, *Chinese Law,* p. 103.

28. From Perry Keller, "The National People's Congress," in Otto *et al.*, *Law-making in the People's Republic of China*, pp. 77–90.

29. Chen Sixi, " 'Lifa fa' qicao gongzuo yantaohui zongshu" ("Summary of the discussion over the working draft of the Legislation Law") *Zhongguo faxue* (*China Law Study*), Vol. 3 (1997).

30. For instance, officials of the Ministry of Foreign Trade and Economic Co-operation (MOFTEC) have openly admitted to passing administrative regulations that differ greatly from the content of NPC law. See Peter Corne, "Legal system reforms promise substantive – but limited – improvement," *China Law and Practice* (June 1997) pp. 33–34. For examples of irregularities arising from local and departmental protectionism, see Stanley Lubman, "Law of the jungle," *China Economic Review* (September 2004); and James Feinerman, "The give and take of center-local relations," *China Business Review* (January/February 1998).

31. "NPC commission to formulate legislation law," Xinhua, 25 October 1999, in FBIS-CHI-1999–1025.

32. Vivien Pik-Kwan Chan, "Law aims to end conflict at top level," *South China Morning Post Online* (online), 19 January 2000 and Jeremy Page, "China legislation seen boosting parliament power," Reuters (online), 15 March 2000.

33. Chen Sixi, "Summary of the discussion," p. 124.

34. *Ibid*.

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final version of the Legislation Law lacks any provisions to correct this problem in the sections related to the procedures of the NPC, demonstrating that the ministries succeeded in securing their ability to perpetuate this harmful practice. Nevertheless, the Legislation Law emphasized the primacy of the NPC over legislative work by reasserting its right to annul any administrative or local regulations deemed to contravene the constitution and laws. In another interesting development, just prior to the Law's passage, the NPC inserted the words, "coercive measures which restrict personal freedom," into its list of exclusive legislative powers, removing the State Council's jurisdiction to legislate over these areas critical to the protection of human rights.

Overall, the NPC used the Legislation Law to hammer out its frustrations with the State Council, especially with its departments at the local level, for the numerous confusions and ambiguities that have arisen in the legal system. It remains to be seen if the newly defined provisions related to central legislative authority means, as claimed by the director of the Legislative Affairs Committee, Gu Angran, that "the NPC and its Standing Committee will continue to authorize the State Council with the right to enact laws and regulations, but its scope of legislations will gradually be narrowed along with the formation of a fairly well-functioning legal system."[35] Nevertheless, while the exact terms of the compromise between the State Council and the NPC remain unknown, the final version of the Legislation Law largely codifies the status quo. While the State Council advocated the thorough implementation of the Legislation Law, its efforts raise the spectre of enforcement problems at the local level.[36]

Issues in implementing the Legislation Law. The final version of the Legislation Law promulgated by the full session of the NPC in March 2000 differed dramatically from the 1997 "Draft for Consolidating Opinions," which brought together the versions prepared by the Legislative Affairs Committee and Li Buyun's research group. Importantly, the June 1997 draft contained several progressive provisions to address some of the greatest challenges facing China's legal system. Legal experts took the lead in formulating these substantive and innovative provisions, most of which did not get incorporated in the final version of the Law.

For instance, a promising provision incorporated from the 1997 draft proposed the creation of law supervision committees within both the NPC and State Council hierarchies to take on the responsibility of supervising the implementation of law. Under the current system, by order of the constitution, the NPC and NPCSC have the authority to supervise the implementation and enforcement of both the constitution and all national legislation. In fact, however, they do not have the means to undertake such an enormous and essential task consistently and

35. "PRC to enact draft Legislation Law to standardize lawmaking," Xinhua, 9 March 2000, in FBIS-CHI-2000–0309.

36. For more on the State Council's official efforts to implement the Legislation Law, see "PRC State Council circular on enacting legislation law" Xinhua, 15 June 2000, in FBIS-CHI-2000–0615.

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effectively. Below the national level, people's congresses supervise their respective people's congress standing committees as well as the judiciary, using a variety of mechanisms including annual work reports, special reports, inquiries into governmental organs, and field visits and investigations. Yet the people's congresses have difficulty doing meaningful supervisory work, partly as a result of the popular perception of their weakness relative to the Party and government organs, and partly because they do not have resources adequate to the scope of the task.

Consequently, in proposing the law supervision committees, the drafters acknowledged the extent of the confusion that arises in implementation and called for measures that would reinforce and rationalize many of the people's congresses' existing supervisory responsibilities. The committees were to be instituted within the NPC and State Council at the provincial and municipal levels, as well as within the autonomous regions. Interestingly, the inclusion of the State Council in this provision might indicate a compromise over ongoing discussions within legal circles that such committees be established solely within the people's congress system, an idea that the State Council and its allies in the Party consistently fought against. Overall, while still an imperfect solution, the provision for law supervision committees in the 1997 draft would have been a step in the right direction by creating new organs to ensure consistency among legislation, resolve conflicts between conflicting hierarchical laws, enforce constitutionality and review legislative interpretations.[37] However, while specialists recognized that inconsistency and unconstitutionality ruined the legal system and proposed this solution, they did not have the authority to bring their idea to fruition in the final product. Instead, outlining supervisory authority is likely to have been folded into the purview of the long-awaited Supervision Law. Until steps are taken to improve supervision work, however, there will be no assurance of the consistent application of laws, indicating that the final version of the Legislation Law essentially disabled itself by removing a provision critical to its meaningful implementation. The lack of a strong enforcement mechanism for the Legislation Law ironically reflects the very deficiencies of the legal system it sought to correct and the difficulties of initiating a thorough reform when a myriad number of powerful and self-interested political entities have interests at stake.

The Changing Nature of Legislative Drafting: The Legislation Law and the Emergence of Public Hearings

While the Legislation Law confronted head-on the uneasy divisions of authority among major lawmaking institutions, officials from all branches

37. The provision appeared as Article 118 in the June 1997 draft Legislation Law. The provision is imperfect because the law supervision committees were not established independently of the existing legislative institutions but would essentially be in charge of monitoring the standing committees, their overseers. It further did not require a guarantee that the committees would have to treat complaints of inconsistency and unconstitutionality seriously and conduct an investigation. See Corne, "Legal system reforms," p. 30.

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and levels of government have started to recognize the need to improve the overall quality of legislation. Moreover, lawmakers have come to realize that taking public opinion into consideration in the drafting stages of legislation can enhance the legitimacy and enforceability of the final product. The Legislation Law contains several clauses designed to make the lawmaking process more procedurally open and transparent. For instance, it requires that laws and regulations issued by lawmaking bodies at all levels must be published in gazettes and appropriate newspapers.[38] For purposes of regularity and eliminating conflict between legislation and hidden regulations that favour protectionism, it requires that all regulations be filed within 30 days of their promulgation.[39] Finally, it provides for more opportunities for discussion by calling on the NPCSC to undertake three deliberations, instead of the traditional two, before voting on a piece of legislation.[40]

The Law also attempts to ensure more forums for public participation in the lawmaking process, making public participation one of the basic principles in lawmaking for the first time.[41] It goes on to codify a number of mechanisms to introduce more openness and transparency in the drafting process. In particular, Articles 34 and 58 require the NPC, NPCSC and State Council to "listen to opinions of various sectors in such ways as to hold meetings, seminars and hearings (*lifa tingzheng*)." This reference to hearings is now interpreted by legal experts and lawmakers as approval for a new type of public legislative hearing, modelled after the first hearing of its kind in China, pioneered in Guangdong on 9 September 1999.[42] Importantly, the Legislation Law does not require that officials use public legislative hearings in the legislative drafting process, but instead approves hearings as one option available to them. As such, the spread of hearings around China should be viewed as the dispersion of a new norm of governance, primarily taking root in urban areas at the sub-national level, in which the incorporation of citizen participation in the legislative process takes higher precedence than in the past. Tracing the origins and gradual spread of hearings provides insight into the changing role and nature of public participation in China's legislative process.

The development of hearings in China. Since the late 1970s, the pluralization of Chinese society and the demand for increasingly specialized and technical legislation has fostered a growing awareness among Chinese leaders of the need to solicit opinions from experts and relevant

38. Articles 52, 62 and 77.
39. Article 89.
40. Article 27.
41. Article 5.
42. For evidence of the groundbreaking nature of Guangdong's hearing, see for example Frank Ching, "Seeds of change," *Far Eastern Economic Review*, 30 September 1999, p. 22. For more insight into Guangdong's pivotal role in pioneering hearings, see Tang Xinglin *et al*., "Guangdong shi renda 1999, 2000 nian lifa tingzheng de bijiao fenxi" ("A comparative analysis of public legislative hearings: Guangdong People's Congress 1999–2000"), in Yang Xuedong *et al.* (eds.), *Lifa tingzheng yu difang zhili gaige* (*Legislative Hearings and Local Governance Reform*) (Central Compilation and Translation Press, 2004), pp. 13–35.

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segments of society during the legislative drafting process. Ideally, a more accessible legislative drafting process produces laws better attuned to reality, thereby increasing compliance and facilitating enforcement. Since the founding of the PRC, China's leadership has consistently marketed its decision-making process as democratic and consultative. Yet real opportunities to incorporate expert and public opinion in draft legislation have been limited, in terms of both variety and extensiveness.[43] Informal meetings (*zuotanhui*) and formal meetings (*lunzhenghui*), in which lawmakers invite experts and representatives from relevant government departments and agencies to review and comment on draft legislation, rank among the most regularly used mechanisms to invite relevant external commentary. In a small number of prominent cases, lawmakers at the national level have sought input even more widely; between 1982 and 1998 the NPC made nine draft laws available for broad public discussion.[44] Yet, the opportunities to participate in lawmaking at the local level, where the most direct and regular interaction between state and society takes place, have mostly lagged behind these budding trends towards more transparent and participatory lawmaking.

Hearings, as a tool for making the legislative process more open and consultative, have emerged only recently and debuted primarily in the area of administrative law. The 1996 Administrative Punishment Law (APL) first introduced the term "hearing" (*tingzheng*) into Chinese legislation in granting those facing administrative sanctions the right to a hearing with the government agency in question.[45] However it was not until the 1997 Pricing Law that the concept of hearings emerged as a mechanism for soliciting public opinion in the course of decision-making.[46] The Pricing Law permitted administrative departments, if they so desired, to hold hearings in which consumers or businesses could offer their opinions in determining the government pricing of essential goods. Most recently, hearings featured prominently in the Law on Administrative Licensing.[47] The emergence of public hearings in the legislative branch follows from these earlier examples of government and the public engaging each other in areas of sensitive and potentially controversial decision-making.[48]

43. For more history on this issue, see Zhu Jingwen, "Public participation in law-making in the PRC," in Otto *et al.*, *Lawmaking in the People's Republic of China*, pp. 141–156; and Peerenboom, *Long March*, pp. 242–47.

44. Peerenboom, *Long March,* p. 271.

45. See chapter 5, section 3 of the Administrative Punishment Law (*xingzheng chufa fa)* (1996). I am grateful to Phyllis Chang of China Law and Development, Ltd for this history of the term "hearing" in Chinese legislation.

46. See section 23 of the Pricing Law (*jiage fa*) (1997). See also "China's public hearings system needs improvements" *People's Daily* (online English version) 4 October 2003.

47. See chapter 4, section 4 of the Law on Administrative Licensing (*xingzheng xuke fa)* (2003).

48. While this article focuses on the emergence of hearings in the legislative branch, similar hearings are being used in the administrative branch. For instance, the Shanghai municipal government's Legal Affairs Department has actively explored using similar hearings in regulation-making. See NDI, "The role and practice of legislative hearings in democracies: examples from Germany and the United States," *Presentations in Shanghai and Beijing China, November 28–December 6, 2000* (2001).

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Public legislative hearings and the Legislation Law. Public legislative hearings are a common feature of democratic governance.[49] While procedures for hearings vary by type of political system, country and level of government, they commonly provide an opportunity for legislators to take into account the opinions of concerned citizens, experts and special interest groups on draft legislation or policy. In democratic systems, therefore, hearings provide a link between representatives and constituents, where legislators feel induced to consider public opinion because responsiveness and accountability to voters are important factors in re-election. In introducing public hearings into the Chinese legislative process, officials hoped to import and adapt a foreign democratic practice into a political system in which lawmakers are not elected and civil society plays, at best, a heavily proscribed role in advocacy and interest group representation. While a greater reliance on hearings could represent the institutionalization of a mechanism connecting lawmaking officials and the public over legislative issues, it remains to be seen what role hearings can play in a system that lacks the formal and informal institutions that guarantee their effectiveness in a democracy.[50] Whether or not the spread of hearings will create pressure for further governance reforms will only become apparent in time.

The Guangdong hearing in 1999 served as a successful test point, which facilitated the inclusion of hearings in the Legislation Law and provided an important model which other provinces and municipalities could emulate. As one of China's original special economic zones, Guangdong has consistently engaged in economic and, to some degree, political experimentation. For instance, between 1979 and the time of the first hearing, the Standing Committee of the People's Congress of Guangdong enacted 291 local regulations and laws, 279 of which are still effective; nearly half of the laws are experimental and have no precedent.[51] In 1997, in the interest of increasing transparency, Guangdong adopted the rarely utilized national practice of publishing and broadcasting draft versions of legislation to solicit public opinion. While it is unclear how Guangdong first decided to experiment with public hearings, there is some evidence that it drew on the experience of the United States

49. The role of hearings in democracies is widely acknowledged in both academic and practitioner literature. For practitioner perspectives, see *ibid*. For more on the relationship between citizen participation and hearings, see, generally, Christine DeGregorio, "Leadership approaches in congressional committee hearings," *The Western Political Quarterly*, No. 45, pp. 971–983; and B. Checkoway and J. Van Til, "What do we know about citizen participation? A selective review of research," in Stuart Langton (ed.), *Citizen Participation in America* (Lexington: Lexington Books, 1978). For an argument on the relevance of hearings to China, see Zhu Jingwen, "Public participation in law-making in the PRC," in Otto *et al.*, *Lawmaking in the People's Republic of China*, pp. 155–56.

50. For an example of how Chinese lawmakers are looking to foreign experience with hearings, see "A report on the NDI-China Center for Comparative Politics and Economics seminar on local legislative hearings" (Washington, DC: NDI, April 2004).

51. Yue Wen, "Guangdong hearing step towards democracy," *Beijing Review Internet Version, No. 49* (6 December 1999) in FBIS-CHI.

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and other foreign democratic countries, where public hearings are a regular part of the legislative process.[52]

Despite the fundamental differences between China's government and foreign democratic governments, Guangdong's provincial Party secretary, Li Changchun, executive vice-governor, Wang Qishan, and head of the provincial people's congress, Zhu Senlin, promoted legislative hearings as a mechanism through which the public could vent frustration over corruption and have input into legislation of local importance without threatening the authority of the state. In particular, the Guangdong hearing focused on draft legislation on procedures for inviting and awarding construction contracts in a move to temper a history of rampant corruption and public frustration. Reportedly, while much of the debate was timid, the Guangdong hearing did permit foreign observers and media coverage, widely seen by domestic and foreign attendees as a new development in local legislative processes.[53]

At the time of Guangdong's hearing, the draft Legislation Law stipulated that drafting bodies were required to solicit opinions widely, but did not elaborate on specific mechanisms such as hearings.[54] Apparently, positive public feedback bolstered the provincial leadership's decision to continue the experiment, attracting the attention of legal experts and Legislation Law drafters who then lobbied for a more specific provision on approved mechanisms for soliciting public opinion to appear in the Law.[55] While the Legislation Law finally passed with the expanded reference to "meetings, seminars and hearings," scholars and practitioners were initially uncertain whether *lifa tingzheng* referred to the new, Guangdong-style legislative hearings, or to more traditional and established methods of soliciting feedback.

A series of training sessions for the Legislation Law in May 2000 provided officials and scholars with an opportunity to flesh out the specific meaning of hearings as codified by the Law.[56] These sessions did not, however, contain sufficient technical training on when and how to hold hearings, and uncertainty over substantive and procedural issues persisted at both national and local levels. Similar to other local governance reforms, such as village level elections, the spread of legislative hearings in China has been a slow and incremental process that relies on the diffusion of knowledge and experience through networks of officials and lawmakers.[57] While relying on such networks may hinder the

52. An article in *Jiancha ribao* stated that America is the leading practitioner of legislative hearings and has further urged their spread to Japan and Latin America. The article goes on to emphasize that China already has public legislative hearings, and cites the example of Guangdong as proof. "Minzhu zhong le, zhiru fa turang" ("The seeds of democracy, planted in legislative soil"), *Jiancha ribao* (*Investigation Daily*), 25 June 2000.

53. Yue Wen, "Hearing step towards democracy"; and Yue Wen, "PRC's first legislative hearing held in Guangzhou," *Beijing Xinhua* (online English version), 9 September 1999.

54. Yue Wen, "Hearing step towards democracy."

55. Interview with senior NPC legal researcher, December 2001.

56. Hu Jian, "Beijing experts on enforcement of Legislation Law," *Renmin ribao*, 9 August 1999, in FBIS-CHI-2000–0809.

57. See NDI, "The scientification and democratization of legislative processes," report from a conference convened 19–21 May 2000 in Beijing.

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thorough and consistent application of legislative hearings throughout China, best practices are in the process of spreading.

By December 2002, all provincial people's congresses (except the Xinjiang Autonomous Region), 19 municipalities and the four special economic zones had written hearings into their legislative procedural rules.[58] While awareness of hearings is spreading, there is still a lack of standard and widespread implementation. Moreover, there are no established nation-wide rules for legislative and administrative hearings and only eight provinces and municipalities have created rules on hearings that have been used throughout an entire jurisdiction.[59] Nevertheless, according to one informal estimate, more than 25 hearings have been held thus far in provinces and cities around China.[60] For the most part, these are at local levels of governance and have not yet been used in national legislation. Public legislative hearings thus represent an attempt by legislators at sub-national level to allow the public to express opinions and vent frustration on legislation with an immediate impact on their daily lives, without challenging the overall stability of the political system.

A comparison of hearings to date reveals a number of similarities.[61] They tend to be held in urban centres and avoid overtly political subjects, focusing on practical pieces of legislation, most often related to socioeconomic development or public welfare. As Professor Ying Songnian, a member of the NPC Internal and Judicial Affairs Committee and director of the Law Department of the State Administrative College, stated succinctly: "Hearings should be held whenever a law or regulation related to the rights and obligations of citizens is to be formulated."[62] They have been held on topics such as regulating city real estate, protecting historic buildings, and regulating the destruction of buildings and removal of residents. Procedures for these hearings also share common features. For instance, they are often preceded by an advance notice, by publication of the draft legislation in the media for comment, and by registration of witnesses and observers. While openly advertised, many hearings are not yet truly open to the public as both attendance and participation often require advance approval. Members of the media may be invited to attend

58. The author is grateful to Phyllis Chang of China Law and Development Consultants, Ltd for this information.

59. "The development of legislative hearings in China" p. 3. For examples of rules developed by localities to govern hearings, see Yang Xuedong *et al.*, *Legislative Hearings and Local Governance Reform*, pp. 265–306.

60. Hearings have been held in places such as Anhui, Jiangsu, Zhejiang, Fujian, Hainan, Sichuan and Urumchi at the provincial level and Shanghai, Shenzhen and Shijiazhuang at the municipal level. The author is indebted to Phyllis Chang of China Law and Development Consultants, Ltd for this information.

61. A national seminar in Beijing co-organized by NDI and the China Centre for Comparative Politics and Economics brought together hearing organizers from different municipalities to compare their experiences. See resulting publications: NDI, "The development of legislative hearings in China," *Report on NDI's Seminar on Local Legislative Hearings and Local Governance*, 2003; and Tang Xinglin *et al*., "A comparative analysis of public legislative hearings."

62. Hu Jian, "Beijing experts on enforcement of Legislation Law," *Renmin ribao* (*People's Daily*), 9 August 1999, in FBIS-CHI.

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the hearing and report on the proceedings. Afterwards, the revised version of the legislation is often made available to the public for comparison with the earlier draft. Indeed, some locations, such as Shanghai have held more than one hearing and have undertaken efforts to improve the openness of their hearings.[63]

The example of Hebei. While still in the nascent stages of national implementation, public legislative hearings deserve to be observed closely to assess their potential to strengthen the channels of communication between officials and the public and improve the quality of legislation. The legislative hearing held in Shijiazhuang municipality in Hebei province in July 2000 exemplifies some of the recent experiments.[64] The hearing, organized by the Shijiazhuang LAC, debated which municipal government departments would be responsible for management of the Minxin river.

In June 2000 the Shijiazhuang LAC published a draft of the bill in local papers and simultaneously announced that a public hearing would be held in July. Invitations were then sent to members of the public and relevant departments to register to testify or observe. In two weeks, 90 people registered to attend the hearing and 40 more recommendations on the draft bill were offered via phone. On the date of the hearing in July, 27 people testified and 67 took part as observers. Those who testified were selected according to the order in which they registered as well as on the basis of geographic and socio-economic diversity. Interestingly, the director of the municipal government's City and County Construction Committee served as vice-chair and the director of the LAC as chair, participating primarily as organizers and observers. Equally important, as in Guangdong, members of the press attended and later reported on the hearing in local and national media. Shijiazhuang's first public legislative hearing produced 29 amendments to the draft bill, most of which addressed the distribution of powers and responsibilities between the relevant government departments. Several testifiers opposed the idea of government regulating this matter in the first place, which indicates

63. Shanghai was encouraged to make its hearings more "open" by hearing organizers from other provinces following its first hearing, held on 18 May 2001. While at this hearing students, parents, school principals, legal experts, social workers, insurance professional and government officials were invited to comment on draft legislation on allocating responsibility in the event of injuries to students while at school, cautious Shanghai organizers did not publish draft recommendations in advance, open the witness or participant list to the public or invite the media. For Shanghai's second hearing, held on 18 April 2002 on the subject of preserving historic buildings, the hearing was preceded by advance publication of the draft legislation in the *Liberation Daily* and the *Shanghai Rule of Law Daily*. The Standing Committee of the Shanghai people's congress also issued advance notice of the hearing, including the time and place, and how members of the public could register to participate. A total of 33 witnesses and 30 observers were ultimately selected. The day following the hearing, the *Liberation Daily* printed segments of transcript from the proceedings. I am indebted to Phyllis Chang of China Law and Development Consultants, Ltd for this information.

64. The information on this hearing was presented by Wang Zhiyou, vice-director of the Shijiazhuang municipal people's congress LAC during a conference in Beijing in December 2000 (author's personal file).

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a level of comfort in expressing independent viewpoints in such a forum.

Public participation and implications for the legislative process. Now that several lawmakers have organized at least one hearing in their localities, new questions and concerns are emerging which reveal challenges to the ongoing spread of hearings around China. While lawmakers acknowledge the value of incorporating public opinion in draft legislation, frustration over procedural issues persists. For instance, hearing organizers have grappled with how to establish a balance between witnesses and audience members, to ascertain when to hold a hearing and on what subject, to reach results after official debate, and to generate interest in the face of public apathy.[65] Given that officials decide to hold hearings on a voluntary basis, lawmakers also express concern over how to compensate for the high costs of organizing them, in both financial and capacity terms.[66] While acknowledging the benefit of hearings, many lawmakers remain unconvinced of their practicality as a regular feature of lawmaking.

In addition, Chinese officials struggle with how to make hearings an "effective" part of the legislative process in the absence of other democratic norms and institutions.[67] For instance, in an environment where no interest groups exist to represent or speak for members of the public, officials question how to select witnesses who can argue their positions effectively and who can speak to the concerns of other members of the public. Similarly, hearing organizers have deliberated over how to determine which and how many recommendations to accept on draft legislation, probing into why Chinese legislators should feel obliged to take any recommendations into account given the lack of electoral incentives.[68] As long as lawmakers in China continue to focus on the practicality of hearings as opposed to their role and function in a democratic system – and the intrinsic relationship between hearings, accountability and representation – it remains to be seen whether hearings will be adapted successfully for use in the Chinese legislative process.

Conclusion: The Significance of the Legislation Law to Legislative System Reform in China

Analysing the politics behind the passage of the Legislation Law offers a unique opportunity to glimpse the institutional power struggles among

65. See NDI, "The development of legislative hearings in China," p. 5.

66. For instance, a hearing organizer from Guiyang municipality noted that hearings cost more than traditional consultation sessions with experts. According to this organizer, Guiyang spent between 20,000 and 30,000 RMB per hour (US$2,400–3,600 per hour) for television coverage of its hearings, 50 RMB per participant (US$6) for transportation subsidies; and thousands of additional Renminbi for meeting and planning costs. See "A report on the NDI-China Center," pp. 6–7.

67. See *ibid.* pp. 5–6.

68. For examples of these questions raised by China's hearings organizers, see NDI, "The role and practice of legislative hearings."

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major lawmaking institutions as they engaged in arguments and reached compromises over fundamental issues of their authority, purpose and responsibilities within an evolving legislative system. The Legislation Law should be recognized as an attempt by the NPC to strengthen its authority against the State Council and local governments by addressing the myriad conflicts that jeopardized the coherence of China's entire legal system and challenged the NPC's ability to play a unifying role in that system. As this brief examination of the protracted policy debates reveal, the NPC succeeded to some extent in reining in the discretion of the localities but it made little progress in establishing mechanisms to control the departmental protectionism rampant within the State Council. While many debates that emerged during the Legislation Law's drafting revealed a genuine recognition of the problems and resulted in some innovative proposals, especially on supervision, the extreme sensitivity and volatility of the issues at hand meant the carving away of the draft Law's most substantive portions. Thus, while the Legislation Law puts on to paper the ideal of a uniform legal hierarchy, it is likely to become a victim of the system it was intended to reshape without more thorough structural reform.

The Legislation Law has some potential, however, if China's leadership views it as a necessary stepping-stone on the path to the creation of a better legal system, increasingly necessary for China's international economic integration and even the Party's legitimacy. To some degree, NPC officials who have invoked the Law in the name of more procedurally transparent and publicly consultative legislation have already demonstrated its use in such a manner. As the exploration of public legislative hearings demonstrates, the Legislation Law codified mechanisms for public participation in the decision-making process and has supported the nascent political experimentation fostered as a result. Looking behind the Legislation Law shows not only the shifting balance of power amongst political institutions but also that citizens may be gaining influence in the long process of legislative reform.

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