

# The Legislative Decentralization in China in the Reform Era

*Progress and Limitations*



Yang Feng



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ISBN: 9789462405264

Wolf Legal Publishers (WLP)  
P.O. Box 313  
5060 AH Oisterwijk  
The Netherlands  
E-Mail: [info@wolfpublishers.nl](mailto:info@wolfpublishers.nl)  
[www.wolfpublishers.com](http://www.wolfpublishers.com)

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## Acknowledgments

This book is based on my doctoral dissertation written at Erasmus University, Rotterdam from September 2012 to June 2016. I would like to express my deep appreciation and thanks to my two supervisors: Professor Yuwen Li and Professor Roel de Lange, for accepting me to carry out the PhD program at EUR and giving me continued support during my four-year PhD study. Without their constant encouragement and inspiring supervision, I could not have explored this research field and written this book with so much freedom and independence. Special thanks go to Prof. Yuwen Li. As the director of Erasmus China Law Center (ECLC), she has not only guided me academically but also taken care of me and other Chinese PhD students.

My sincere thanks go to the members of the Department of Constitutional Law and Administrative Law at Erasmus School of Law (ESL) for creating an enjoyable working environment and giving me constant help. They are Prof. Lodewijk Rogier, Dr. Joke de Wit, Dr. Nick Efthymiou, Eline Linthorst, Yun Ma and Stefan Philipsen. There are many people and friends at ESL whom I owe my gratitude. Special thanks go to Prof. Sanne Taekema, Prof. Ellen Hey and Prof. Elaine Mak and other faculty members, for organizing PhD courses in the probationary year and giving me valuable comments at the onset of this research. I also would like to thank Bruno de Lange, who translated a short summary of this book into dutch. I am indebted to ECLC's colleagues who have attended the ECLC's trimonthly meeting and given me valuable comments for my presentations. I am also deeply grateful to my friends both in Europe and in China who kindly provided their assistance to my research and generously shared their experiences and opinions with me. They are Yang Qian, Erlis Themeli, Jing High, Renate Buijze, Piotr Wilinski, Zhai Han, Zhang Jian, Wen Guanbin, Dai Liping and Marta Koalcz. Finally, with appropriate permissions from Thomson Reuters, significant part of a journal article was adopted into Chapter 7. This article is "Examining the legislation I China's Special Economic Zones: framework, practice and prospects", *Hong Kong Law Journal*, 47(2017), pp. 585-614.

This book is supported by the Rule of Law Center of China Law Society (Public Law Research Center of Zhejiang University) (中国法学会法治研究基地浙江大学公法研究中心)



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## List of Abbreviations

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

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## **Selected Legislation**

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

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

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

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

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

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

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

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

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

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

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

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

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



# Chapter 1. Introduction

## 1. Research Topic

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

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

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

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

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

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

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

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

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

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

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

The Chinese government decided to maintain the original governmental apparatus and in the meantime decentralize legislative powers to multiple state organs.<sup>13</sup> Legislative decentralization reforms started in 1979 with the passage of the Organic Law on the Local

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

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

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

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

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

<sup>13</sup> Perhaps the only major institutional change is setting up local PCSCs at and above the county level. In the early stage of the drafting of the 1982 Constitution, Hu Qiaomu - the head of the drafting group at that time, proposed reforming the NPC into a bicameral legislature. However, this proposal was later rejected and Chinese leaders chose to grant most legislative powers to the NPCSC to overcome the legislative difficulties of the NPC, which are attributed to its cumbersome structure. For the bicameral proposal, see Xu Chongde, *中华人民共和国宪法史 (Constitutional History of the PRC)* (Fuzhou: Fujian Renmin Chubanshe, 2003), pp. 563-570 and 585-592.

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

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

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

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

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

Wu's statement, on the one hand, was intended to make a conclusion with respect to the legislative achievement in the last 3 decades, and on the other hand, it was intended to set a basic tone for the legislative work after Wu's retirement in 2013. However, its wisdom is questionable. Some doubts can be cast on it. Does the prospect in the second statement really suit the actual legislative need of China in the future? Does the trajectory of the legislative development in practice after 2013 follow this instruction? Drawing on the NPC and the NPCSC's legislative work in the last three years (2013-2016), which is under the new leadership of Zhang Dejiang, it seems that Wu's instruction is not being strictly followed (if not intentionally ignored). The national legislatures' legislation has not been slowed down. On the contrary, their legislation is still active. The NPC passed the Charity Law in March

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

<sup>15</sup> Wu Bangguo, 全国人民代表大会常务委员会工作报告 (The Working Report of the Standing Committee of the National People's Congress) in 中国人大网 (*The Website of the NPC*), 10 March 2004, available at [http://www.npc.gov.cn/wxzl/wxzl/2004-04/15/content\\_332237.htm](http://www.npc.gov.cn/wxzl/wxzl/2004-04/15/content_332237.htm), last visited December 2018.



2016. This is the first time for the NPC to pass new laws in the last ten years, suggesting the tendency of the revival of its lawmaking. During the same period, the NPCSC passed as many as 8 national laws, implying that law creation is still one of the focuses, if not the only one, of the legislative work of the NPCSC. The inconsistency between Wu's statement and the legislative practice after 2013 reflects a fundamental question: is China's legal system at an well developed stage, as Wu Bangguo stated, so that the large scale law creation and the further development of legislative system is no longer the focus of the Chinese government?; or is it still at a developing stage, in which a large amount of law creation work and continuous development of the legislative system is still necessary as Zhang Dejiang is actually doing now?

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

## 2. Research Questions

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

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

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

Before examining the current legislative system, it is necessary to have a theoretical understanding of the legislative decentralization by putting it in the broader political, economic context. The economic theory of decentralization and its recent development 'market-preserving federalism' is helpful to achieve this goal. It helps us to understand why a highly centralized political, economic and legislative system did not work in China in the pre-reform era (1954-1978), and how does China's legislative decentralization contribute to the development of the system of the market economy?

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

The reform era experienced continuous decentralization of the legislative powers to multiple organs, including the NPCSC, the State Council, provincial governments, and city-level governments. Thus the legislative system is composed of several sub-systems. This sub-

question is addressed by assessing the following issues in each sub-legislative system, including the legal status of the major types of law, the demarcation of legislative powers, developments of the legislative procedures, and major developments and limitations of the legislative practice.

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

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

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

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

### 3. Theoretical Framework and Research Methods

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

The main methodology applied in this research is classic legal analysis. According to Hans Kelsen, law is a unique type of norm that guides human behavior (which is different from other norms such as morals) – it is composed of norms that are created by certain organs, and they are directed to coercive orders that inflict sanctions on individuals who violate its rules.<sup>16</sup> The major objects of legal analysis are: concepts, facts, events, relations and

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

principles in the legal system.<sup>17</sup> Accordingly, in order to discover the legislative system and its development in the formal system, legal analysis is employed to articulate concepts and facts, to elaborate legal relationships, to deduce principles from legal rules and to compare the effect of different legal rules in the legal system. To serve this purpose, various legal documents, including: national laws, administrative regulations, local regulations, and department/local rules are reviewed. It should be noted that the analysis of legal documents is under the political, economic and policy context. For this reason, the CCP's official documents, the State Council's normative documents, and the NPCSC's decisions, reports and other official documents, and judicial cases and opinions, in particular, the opinions and guidance of the Supreme People's Court, are discussed.

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

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

The subjects of this research do not incorporate the system of making administrative normative documents (normative documents) (行政规范性文件). Until now, the titles of this type of document are not standardized. Most of them are entitled as 'Measures' (办法), 'provisions' (规定), and 'implementing measures' (实施办法).<sup>19</sup> The issuing organs of this type of documents are very comprehensive, including governments at various levels and their internal working organs. In practice, these organs, particularly local people's governments at county and township levels rely on normative documents to carry out their specific

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

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

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

administrative acts. Normative documents are an important source of regulatory documents with general binding force, not only in the domain of administrative management, but also in domains that concern citizens' rights and interests.<sup>20</sup> The structure of these documents has no substantial difference compared to legal documents.<sup>21</sup> The rampancy of normative documents has become a concern of Chinese legislative officials, given the increasing tension between normative documents and legal documents. In 2001, Wang Kaifeng, the Director of the Bureau of Finance in the People's Government of Changle County (长乐县) (Fujian province) at that time, was prosecuted and sentenced to a fixed-term imprisonment of 5.5 years for committing the crime of state organ functionaries' abuse of powers. However, the defense lawyer argued that Wang's behavior of loaning money to 27 local enterprises as revolving funds with the township finance offices as sureties was strictly in accordance with the normative documents issued by the provincial and municipal governments in Fujian Province.<sup>22</sup>

The main reason for not incorporating the formulation of normative documents in this research is that its legal nature has not yet been recognized. Currently Chinese law and authoritative statements of the NPC and the NPCSC do not recognize normative documents as law. Moreover, the normative documents cannot be used as criteria by the court to adjudicate cases.<sup>23</sup> Another reason is that the formulation of this type of documents is by land large not regularized by law. There are no national laws and regulations that demarcate the scope of the document-making power or impose limitations for the exercise of the power.<sup>24</sup> There are also no unified procedural rules on document-making. For the abovementioned reasons, it is too early to regard document-making as one type of law resulting from legislative decentralization, and therefore it is not appropriate to incorporate it in this research. Nevertheless, document-making is an important area for future study on China's legislation. There is no fundamental difference between normative documents and department/local rules, which are issued by higher-level administrative organs (namely, provincial and city-level people's governments). Some Chinese legal scholars call for the recognition of the legal

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

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

<sup>22</sup> Chen Jieren and Liu Guohang, 政策和法律打架该听谁的? (In Case of Conflicts between A Policy and A Law, which One should be observed?), in 中国青年报 (*China Youth Daily*), 8 December 2001, available at <http://www.china.com.cn/chinese/difang/91546.htm>, last visited December 2018.

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

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

effect of normative documents.<sup>25</sup> Given that this type of legal document has been increasing since 1978, it is likely that the legal status of normative documents will be defined in the future.

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

## 5. Structure of the Thesis

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

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

Chapter 4 discusses the legislative system of the State Council. It first analyzes the legal status of the administrative regulation (行政法规) issued by the State Council (China's cabinet) and the department rule (部门规章) issued by the State Council departments (ministries and committees). It then reviews the scope of the regulation-making and

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

rulemaking powers of the State Council, showing that the legislative powers of the State Council are under continuous expansion in the first two decades of the reform era. Following the review of the legislative powers, this chapter evaluates the legal framework of the regulation-making and rulemaking procedure and provides an opinion on the shortcomings and prospects. Finally, the regulation-making and rulemaking practice is reviewed to explore the main development, shortcomings and prospects. An important argument is that the State Council's delegated legislation based on a 1985 NPCSC's delegation decision tends to fall into disuse and the decision will be abolished ultimately in the future.

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

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

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

# The Legislative Decentralization in China in the Reform Era

## *Progress and Limitations*

Yang Feng

This book provides in-depth analysis on the spectacular expansion of the legal system in China, which results from the consistent decentralization reform in 1978. This book is composed of 8 chapters. Following the introductory chapter, Chapter 2 spells out that in China the decentralized legislative powers have become not only one of the most important source of authority of local governments but also an important means to exercise other decentralized powers, which serves to ensure a common market. Chapters 3 to 5 examine the legislative systems of the National People's Congress, its standing committee, the State Council and local governments (provincial and city-level PC, PCSC and people's governments). The 2015 revised Law on Legislation, on the one hand, grants legislative power to all city-level governments, representing the continuous trend of legislative decentralization; on the other hand, it largely reduces city-level legislative powers, reflecting an attempt to tighten the control of the exercise of the local legislative power. Chapters 6 and 7 evaluate two unique local legislative systems in autonomous areas and Special Economic Zones (SEZs) respectively. Contrary to the autonomous areas, where legislative power is underused, SEZs consistently expand their legislative power. As a result, by using such power, SEZs played a key role for introducing the legal system on the market economy in China. It ultimately gathered the momentum for turning the tide of contestation in the ideological, economic and policy domains in favor of a market system, and created conditions favorable for the market-oriented legislation at national level. Lastly, this book discusses the limitations of the reform and provides recommendations for future legislative development.



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