



The Law-making Law: A Solution to the Problems in the Chinese Legislative System?

Li Yahong*

The PRC Law-making Law was promulgated to solve problems plaguing the Chinese legislative system, such as conflicts between laws, violation of legislative powers and procedures, and poor legislative quality. However, its role may be more symbolic than practical. Among the achievements of this new legislation, the division of legislative powers is most impressive. It signifies the institutionalization of China's legislative system and incorporation of federalist elements into the Chinese state system. On the other hand, the law itself contains serious problems, eg insufficient guarantees for local legislative powers, lack of an independent legislative supervision system, and omission of any powers for the courts to interpret laws. These problems render the prospects for using the law to solve legislative problems rather slim. It may, nevertheless, lay the foundation for future legislative reform in China.

Introduction

The Law-making Law of the People's Republic of China (or Legislative Law, hereinafter, 'Law-making Law'), a law aimed at regulating China's disorderly legislative system, was promulgated by the third plenary meeting of the Ninth National People's Congress ('NPC') on 15 March 2000.¹ The legislative process for this new law was lengthy and laborious. It began in 1993 and produced a total of seven or eight drafts during the succeeding seven years.² It was hailed by some as an important legislative event that could possibly cure disorder in the Chinese legislative system.³ To many others, however, the promulgation of such a law was not only inconceivable, since no

* Research Fellow, Faculty of Law, the University of Hong Kong.

¹ The author has been following and researching the drafts of the Law-making Law since early 1999, and has recorded major changes in most of the drafts submitted for discussion. An earlier draft paper was presented at the conference, 'Contemporary Chinese Legal Development' at Harvard Law School on 26-28 March 1999 and at a staff seminar of the Faculty of Law, the University of Hong Kong, on 6 October 1999. Final revisions to this paper were made after the promulgation of the law. The author especially wishes to thank Professors Li Buyun, Albert Chen and Yash Gai, Messrs Chen Sixi and Cai Dingjian, Dr Fu Hualing, and the anonymous reviewer for their insights and valuable comments.

² The drafts include, inter alia: An 'expert draft' submitted on 20 October 1996 by legal experts. Another six were drafted by the Legislative Affairs Commission ('LAC') of the NPC Standing Committee ('NPCSC'). The first one was issued for internal examination on 17 December 1994. The second was released on 18 March 1997. The third was released on 5 June 1997. The fourth was completed on 6 August 1999. The fifth was proposed to the NPCSC for discussion on 18 October 1999. The seventh was issued on 9 November 1999.

³ Cui Shixin, 'Law-making Law (draft) was Proposed to the NPCSC for Examination: A Sign that Illegal Legislative Activities Will Be Regulated By Law,' *People's Daily*, 10 November 1999, s 9.

other country in the world had a 'law-making law,'⁴ but also unnecessary because China had in the past already enacted comprehensive organizational and procedural rules governing legislative activities.⁵ In addition, it was also considered very doubtful that the law could accomplish its ambitious objective of solving the problems plaguing the Chinese legislative system.⁶

Perhaps the most significant achievement of the Law-making Law is that for the first time in PRC legislative history, the legislative powers of the central and local governments are divided, with the centre's exclusive legislative powers being specifically listed. This article argues that this move demonstrates that China has begun institutionalizing its legislative system and, consciously or unconsciously, incorporating some elements of federalism in restructuring its state powers. On the other hand, the Law-making Law contains many problems, among which insufficient guarantees for the exercise of local legislative powers, the lack of legislative supervision mechanisms and unclear delegation of the powers to interpret laws are most significant. This article argues that these problems, together with inherent defects in the Chinese political system, will (contrary to the Drafters' intention) undermine the ability of the new legislation to solve the above-mentioned legislative problems.

The significance of the law

Chaotic though it seemed to be, the Chinese legislative system, up to now, was not entirely unregulated. In fact, the laws and regulations governing organization, procedures and other legislative matters at various levels of the legislative organs are very comprehensive.⁷ The question, therefore, is why China needed to enact such a law as the Law-making Law. A possible answer is to achieve legislative uniformity. There are two aspects to this. Firstly, Chinese legislators have a tendency to consolidate relevant but scattered laws into one uniform code, eg the Contract Law and the Civil Code.⁸ Secondly, legislators are attempting to achieve the ambitious goal of establishing a complete legal

⁴ Most countries have separate rules governing separate legislative organs and their activities, but do not have a uniform 'law-making law'.

⁵ Articles 62, 64, 67, 89, 91, 100 and 116 of the PRC Constitution (1982) confer legislative powers on the NPC, the NPCSC, the State Council, the ministries and commissions of the State Council, local people's congresses and their Standing Committees and the people's congresses of autonomous regions. In addition, there are many separate laws and regulations on legislative organization and activities. These include, inter alia, the Organic Law of the NPC, the Procedural Rules of the NPC and the Procedural Rules of the NPCSC (1989), the Provisional Regulations on the Procedure for the Enactment of Administrative Regulations (1987) and the Organic Law of Local People's Congresses and Local People's Governments (1979).

⁶ Doubtful views were expressed by several scholars at a conference held in Beijing shortly prior to the promulgation of the law. See the Summary of Conference on 'Law-making Law', PKU Law Weekly, Part 2, No 3, Total No 23, <http://www.egroups.com/group/chinalawinfo/info.html>.

⁷ See note 5 above.

⁸ Replying to a question posed by a reporter to officials of the LAC in a press conference for the 3rd Plenary Meeting of the Ninth NPC, Hu Kangsheng said that the Civil Code is expected to be drafted within the term of the Ninth NPC. See People's Daily, 12 March 2000, s 7.

system by the year 2010; consolidating separate laws into a large code is said to be one way of reaching that goal.⁹ The need for uniformity stems also from serious problems arising out of a disorderly legislative system, eg conflicts between laws, legislating without authority or in violation of procedures, and the low quality of legislation.¹⁰ Thus, the major goals of the Law-making Law are said to regulate legislative activities and to maintain the unity and dignity of the whole legal system.¹¹

It is worth noting that some political ideologies, for example, the Four Basic Principles and Deng Xiaoping theory, have appeared in the Law-making Law.¹² The Four Basic Principles had not been written into any of the previous drafts of the Law-making Law; they were only inserted shortly before the Law was formally promulgated. No information on who proposed the addition and whether it had been debated are available. It is doubtful whether it is necessary for an ordinary law like the Law-making Law to incorporate those political ideologies. Besides showing the unquestionable authority of the central leadership, the addition is not only practically meaningless but will also cause more confusion over which 'road' and '-ism' China should choose.

The insertion of the Four Basic Principles, nevertheless, indicates that the Law-making Law is somewhat different from other laws. According to Chinese legal scholars and legislators, the Law-making Law is neither a constitutional amendment nor a constitutional document, but rather 'an important basic law that has a very close relationship with the Constitution.'¹³ Can this be interpreted to mean that the status of the Law-making Law is lower than the Constitution but higher than other 'basic laws'?¹⁴ If so, the question then becomes whether a non-constitutional statute can regulate constitutional issues such as decentralization or division of legislative powers because, according to one American constitutional law scholar, 'decentralisation is constitutional, not merely statutory.'¹⁵ On the other hand, as Samuel H Beer realised, the constitutional schemes of decentralisation in a unitary country and in a federal state are very different:

⁹ Ibid.

¹⁰ Zhang Chunsheng (Deputy Director of the LAC), 'Explanation on "PRC Law-making Law (draft)"', People's Daily Online, <http://www.peopledaily.com.cn/item/lifafa/bj13.html>.

¹¹ Law-making Law, arts 1 and 3.

¹² The Four Basic Principles are, 'insisting on the socialist road, on people's democratic dictatorship, on the leadership of the Communist Party, and on Marxism, Leninism, Mao Zedong thoughts.' Art 3 of the Law-making Law provides: 'Legislation shall follow the principles of the Constitution, taking economic construction as a core, insisting on the socialist road, insisting on people's democratic dictatorship, insisting on the leadership of the Communist Party, insist on Marxism, Leninism, Mao Zedong thoughts and Deng Xiaoping theory and insisting on reform and openness.'

¹³ Qiao Xiaoyang, 'Legislative Work Urgently Needs the Law-making Law,' in Li Buyun (ed), *Legislative Law Studies* (Hunan: Hunan People's Press, 1998), p 56; Chen Sixi, 'On Division of China's Legislative Powers' (1995) 1 Chinese Legal Science, 12, 12.

¹⁴ Basic laws, according to the Constitution, are those governing criminal offences, civil affairs, the state organs and other matters. See the PRC Constitution (1982), art 62 (3).

¹⁵ Samuel H Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, London: The Belknap Press of Harvard University Press, 1993), p 23.

In a unitary system the bodies governing these subdivisions will receive their authority from the ordinary statutory law of the central government. The distinctive thing about a federal system is that the authority of these bodies is assured by a law which is superior to the statutory law of the centre and which indeed is also the source of authority of that law.¹⁶

This analysis cannot, however, answer all the questions concerning the constitutionality¹⁷ of the Law-making Law in regulating the decentralisation or division of legislative power, because China at present is, in the author's opinion, neither a typical unitary system nor a federal system. The next section of this article discusses this matter in greater detail. For present purposes, it is sufficient to remark that the status of the Law-making Law should be made more definite. It should be clearly stated how 'important' this law is, what kind of 'close relationship' it has with the Constitution and what are the applicable procedures for its amendment. In other words, the Law-making Law should enjoy some sort of constitutional status because the issues it deals with are more constitutional than ordinary. Failing this, the powers conferred or allocated by it will carry insufficient legal guarantees. This in turn may cause uncertainty and instability in the whole political system.

In addition to uniformity, another role of the Law-making Law is to regulate or institutionalize the Chinese legislative system. 'Institutionalization is a key indicator of legislative change.'¹⁸ Furthermore, when an organization becomes more complex, it must develop the capacity, structure, practice, procedures, and so forth to confront those internal demands. At the same time, the changes in a country's ideology, party systems, economic systems, external events, and changes in the character of membership and their career patterns, may all trigger the institutionalization.¹⁹ Over the years the Chinese legislative system, especially at the central level, has grown into such a complicated bureaucracy that it can hardly deal efficiently with internal issues such as overlapping of powers, confusion of procedures, inconsistency between laws, etc. There have been reports of cases where a law falling within the NPC's jurisdiction has been passed by the NPCSC, or the legislative powers of the NPC and the NPCSC

¹⁶ Ibid. Beer also wrote: 'As in the United States, the division of authority between the two levels of government is set out in a legal document which can be amended only by a process of consent wider than and different from the process required for the ordinary statutory law of the central government.' Ibid.

¹⁷ Cases of violation of the Constitution have often been cited in recent years. One example is the National Security Law, which grants legislative power to the Central Military Committee to make laws, despite the fact that no such power is conferred by the Constitution. Another example is the Criminal Law, which changed the crime of 'anti-revolution' to the crime of 'endangering national security' two years before the PRC Constitution (1982) did so.

¹⁸ Kevin O'Brien & Laura M Luehrmann, 'Institutionalizing Chinese Legislatures: Trade-offs Between Autonomy and Capacity' (Feb 1998) XXIII Legislative Studies Quarterly, 91, 102.

¹⁹ Gary W Copeland & Samuel C Patterson, 'Changing an Institutionalized System,' in Gary W Copeland & Samuel C Patterson (eds), *Parliaments in the Modern World: Changing Institutions* (Ann Arbor: The University of Michigan Press, 1994), p 152.

have been usurped by the State Council or local legislatures without authorization.²⁰ In addition, since the economic reforms that promoted free markets and the rule of law, 'Beijing's leaders have lost the leverage over subordinate levels that ideological commitment formerly gave them.'²¹ Decentralization in China has become a norm instead of an exception. Although the decentralization of legislative powers has greatly increased local autonomy and stimulated the development of local economies, it has, in the meantime, also worsened the problems of local protectionism and irregularities and inconsistencies in the law-making system. There have been many reports of cases like the 'Battle of Cars' (*qiche daxian*)²² in which provinces and cities passed local regulations discriminating against imports.

From the above discussion we can conclude that the driving forces behind the enactment of the Law-making Law are internal demands for legislative changes and external pressures from a rapidly developing Chinese society. The resulting institutionalization represents a step taken by Chinese legislators to prevent further deterioration and disintegration of the problematic legislative system.²³ Whether this result can be achieved, however, still remains to be seen.

Division of legislative powers

As a pyramid system in which the central government grants, delegates or authorises powers from the top to each tier of the state administration, China has never treated the division of powers between the centre and the localities and between the legislative branches and the executive branch as seriously as federalist states. In fact, only three of the 135 articles in the Chinese Constitution

²⁰ Zhou Xiaohong, 'Summary of Studies on Legislative Powers,' (1992) 1 Chinese Legal Science 115, 115.

²¹ Kenneth Lieberthal, *Governing China: From Revolution Through Reform* (New York, London: W W Norton & Co, Inc, 1995), p 320.

²² According to a news report, the government of Shanghai issued a local regulation in June 1999 imposing in Hong Kong a license plate fee of 80,000 yuan per car on anyone who bought a car other than a Shang Ta Na, which is manufactured by a Shanghainese/German joint venture. About 10,000 quotas were granted every year to those who bought Shang Ta Nas. Car purchasers should, however, only have paid about 20,000 yuan for a license plate. To get even, the government of Hubei province issued a similar regulation in October 1999 imposing a fee called 'relief fund for most difficult enterprises' (*tekun qiye jiekun zijing*) of 70,000 yuan per car on those who bought Shang Ta Nas within the territory of Hubei province. See Zha Qingjiu, 'Market Economy Refuses "Dukes Separatism"', *Legal Daily*, 13 December 1999. The author has discussed in detail cases of irregularities and inconsistencies of legislation and local protectionism in her paper entitled 'The Legislative Autonomy of the Localities and its Impact on the Relations between the Centre and the Periphery', presented at Centre-Periphery Relations in China: Integration, Disintegration or Reshaping of an Empire?, a conference held on 24-25 March 2000 organized, inter alia, by the French Centre for Research on Contemporary China.

²³ See Zhang (note 10 above) and Cui (note 3 above).

are relevant to this issue.²⁴ The inadequate allocation of legislative powers by the Constitution has caused considerable irregularities in China's legislative practice. Thus the core issue that the Law-making Law needs to solve, as many commentators have agreed, is how to divide legislative powers between different legislative organs.²⁵

Division of legislative powers between central and local governments

According to conventional political theory, legislative powers are usually divided between the centre and the states in a federal system, but are uniformly exercised by the centre in a unitary system. Certain legislative powers in a federal state are surrendered by states to the federal government, while in a unitary system they are granted by the centre to the localities.²⁶ Hence, in a federal state, the federal legislature and state legislatures comprise two separate systems. The latter is not subordinated to the former and enjoys inalienable power once that power is explicitly granted in the constitution. On the other hand, China's legislative system is unified, with local legislatures subordinate to the supreme leadership of the NPC and the NPCSC.

It could, however, be argued that China is no longer a typical unitary state. Its central authorities still control state power to a large extent, but this control has been both willingly and unwillingly loosened, originally by the past two decades of decentralization in China and now by the division of central-local legislative powers in the Law-making Law. According to an interesting observation by a senior Chinese legislative official, China now has two types of legislative systems. Within the Mainland, the legislative system could be called 'one and one-half systems' because there are some divisions of power between the centre and the localities, although the two levels are not independent from each other.²⁷ Between the centre and the Special Administrative Regions (the 'SARs'), on the other hand, there are two legislative systems which are largely independent from each other.²⁸

²⁴ PRC Constitution (1982), arts 58, 100 and 116. In contrast, the definitions and division of legislative powers are normally spelt out in great length and detail in the constitutions of federalist countries. Over half of the original documents of the United States Constitution, at least 43 articles in the German Basic Law and more than 40 clauses in the Australian Constitution deal with allocation of legislative powers between the central and local governments.

²⁵ Chen Shirong & Li Lin, 'Summary of the International Conference on Legislative Theories,' in Li (note 13 above), p 277.

²⁶ Harry N Scheiber, 'Federalism and the Constitution: The Original Understanding' in Lawrence M Friedman & Harry N Scheiber (eds), *American Law and the Constitutional Order, Historical Perspectives* (Boston, Mass: Harvard University Press, 1988), p 91.

²⁷ Qiao Xiaoyang, 'China's Legislative System', People's Daily Online, <http://www.peopledaily.com.cn/item/lifafa/bj16.html>.

²⁸ Ibid.

Possibly under the influence of other countries' constitutions,²⁹ the Law-making Law, for the first time in PRC legislative history, specifically lists the exclusive legislative powers of the central government.³⁰ The list covers the following areas:

- (1) matters concerning national sovereignty;³¹
- (2) election, organization and powers of the People's Congresses, People's Governments, People's Courts and People's Procuratorates at various levels;
- (3) the systems of autonomous regions, SARs and self-governance of citizens (*jiceng qunzhong zizhi*) at the basic level;
- (4) crime and punishment;
- (5) restraining and penalizing citizens' political rights and personal freedoms;
32
- (6) appropriation of non-state-owned property;³³
- (7) the basic civil system;³⁴
- (8) the basic economic system and the basic systems of finance, taxation, customs, banking and international trade;³⁵
- (9) the systems of litigation and arbitration³⁶ and
- (10) other matters that must be legislated by the NPC and its Standing Committee.³⁷

The listing of the centre's exclusive legislative power was not favored at first by some mainland scholars, who saw it as an attempt by the centre to further

²⁹ For example, the constitutions of India, Austria, Switzerland, Malaysia, Canada, Germany and the United States list at length the exclusive powers of their central governments, which cover external affairs, defence, currency, bankruptcy, customs, etc. The lists vary, however, as to which powers are included. For example, civil and criminal laws are deemed within the realm of the exclusive power of the centre in Malaysia and Canada, whereas they are within the sphere of concurrent powers in the German and US constitutions. See Chester James Antieau, *States' Rights Under Federal Constitutions* (London, Rome, NY: Oceana Publications, Inc, 1984), p 4. The US Federal Government exercises exclusive power over such matters as immigration and naturalization, postal services, bankruptcy and copyright, whereas the Australian Parliament shares legislative powers on these matters with the state parliaments. The Australian Parliament only exercises exclusive power in three areas: (1) seat of government and places acquired by the government; (2) the public service, and (3) customs duties and bounties. See the Australian Constitution, arts 52 and 90.

³⁰ The Law-making Law, art 8.

³¹ The Law-making Law draft (October 1999) listed the specific matters including national territories, defense, diplomacy, nationalities, entry and other matters of national sovereignty.

³² The earlier draft of October 1999 also included 'attachment, freeze, appropriation and enforcement of property'.

³³ This is a new item that was not in the previous drafts.

³⁴ The earlier draft of October 1999 specifically listed the following areas: property, credit, intellectual property, marriage, family and succession.

³⁵ 'The confirmation and transfer of the ownership of natural resources' was listed in the August 1999 draft but deleted from that of October 1999. 'Basic economic system' was added before the promulgation.

³⁶ The earlier draft of October 1999 also included 'law enforcement, lawyer, notary public'.

³⁷ The wording in the October 1999 draft was 'the matters designated by the Constitution and deemed by the NPC and its Standing Committee to be legislated by the State'.

limit local legislative power.³⁸ The exclusive powers of the centre, they pointed out, cover not only the basic systems of the state, but also various social and economic issues that should be regulated by local regulations.³⁹ During the drafting process, civil subjects (*mingshi zhuti*), civil servants, labour and social security were dropped from the list of central exclusive legislative powers under pressure from local legislators.⁴⁰ As to the taxation system, the debates were even more heated. Before the separation of tax systems between the centre and local governments, only the centre had power to legislate on tax matters.⁴¹ However, local governments invented various fees to compensate their disadvantages in competing with the centre for tax revenues. An earlier draft of the Law included the so-called 'fees of tax nature' (*shuishou xing shoufee*)⁴² in the list of the centre's exclusive powers. This was viewed as a move by the centre to control the imposition of fees and was opposed by both local governments and some State Council departments. The former argued that local governments should have legislative power over specific tax issues since they had their own separate systems of taxation.⁴³ The latter, ie the General Bureau of Taxation, pointed out that there should be a clear distinction between tax and fees and that the inclusion of the fees of tax nature would confuse such a distinction. The Bureau suggested that legislative powers over tax should belong to the centre whilst powers over fees should be conferred on the localities.⁴⁴ As a result, the fees-of-tax-nature power was deleted in the later drafts of the Law.⁴⁵ Another unclear issue arises from the deletion from the list of some matters — eg postal services, telecommunications, railway and aviation transport, maritime commerce, accounting and commercial instruments, currency, foreign currency, the space industry, nuclear energy, the calendar and weights and measurements — which have been vital to China's central control.⁴⁶ The question arising is whether local governments can legislate without obtaining authority from the centre in relation to these matters, even to the extent of issuing local currency.

³⁸ For example, attachment of property, freezing of assets, appropriation and enforcement. See Chen & Li (note 25 above) p 277.

³⁹ They argued that this power should not exclusively belong to the centre since local governments enjoyed broad powers over such matters under the Administrative Penalty Law and had already imposed countless administrative penalties restraining citizens' political rights and personal freedoms. See 'The Opinions regarding the Law-making Law draft by various local and central governments and law schools', edited by the Office of the State and Administrative Law, LAC, 9 Sept 1997, p 2.

⁴⁰ The main concern of local governments in this regard was that the centre was too slow in enacting relevant laws to meet the rapid development of local economies. For example, some new subjects, such as 'ownership of water conservancy', had emerged recently and local governments should be able to regulate it. As to social security, many local governments had already passed regulations, so that powers over this area should not exclusively belong to the centre.

⁴¹ For discussion of how China has changed from a central tax system to a dual-tax system, see Kenneth Lieberthal (note 21 above), pp 249-250.

⁴² This is a special kind of fee collected in the name of a tax but which is in fact a fee imposed by local governments. See the Law-making Law draft (March 1997), art 7(6).

⁴³ See note 39 above, p 4.

⁴⁴ Ibid, p 2.

⁴⁵ The Law-making Law draft (October 1999).

⁴⁶ Ibid. These items were listed in earlier drafts of the Law, eg that of March 1997, art 7(5), (6), (7) and (8).

The Law-making Law does not list specific legislative powers exercisable by localities. It provides only generally that local legislatures can legislate on (1) implementing laws and administrative regulations; (2) matters that need to be regulated according to the special circumstances of the localities; and (3) matters pertaining to local affairs.⁴⁷

The Law-making Law also formally recognized a long-standing practice of the so-called 'advanced legislation' (*xianxing lifa*).⁴⁸ It provides, 'except in the areas of exclusive powers reserved to the Centre, local governments may legislate in advance in the areas which the Centre has not legislated; the local regulations, however, shall be void to the extent of inconsistency once the Centre has legislated.'⁴⁹ The legal recognition of the practice of advanced legislation, in the author's opinion, may cause several legal and practical problems. Firstly it violates the Constitution, which only permits local regulations to be passed to implement an existing national law.⁵⁰ Secondly, it may worsen existing conflicts between national laws and local regulations because, when enacted, every new national law has the potential to contradict existing local regulations. Conversely, every piece of local advanced legislation faces the problem of validity once a national law on the same subject has been enacted.⁵¹ Thirdly, it may encourage local protectionism, since every locality now has the legitimate power to pass local regulations irrespective of the interests of the centre and other localities.⁵²

On the other hand, the recognition of the advanced legislation practice helps to meet the practical needs of local development, since national laws may be untimely, unresponsive or unsuitable to local particularities. It has also been praised for serving as a test of the legislation so that subsequent national legislation may avoid unnecessary mistakes.⁵³ Some local legislatures have passed advanced legislation on the ground that the existing national laws

⁴⁷ Law-making Law, art 64.

⁴⁸ For example, Shenzhen's Company Regulation, Hainan's Regulation on Social Security and the Supervision Regulations of some local governments were all passed before relevant national laws were enacted.

⁴⁹ Law-making Law, art 64, para 2.

⁵⁰ PRC Constitution (1982), arts 99 and 100.

⁵¹ For example, some of the clauses in the 1985 Foreign-related Economic Contract Law and Technology Import Contract Regulation contradicted Shenzhen's relevant regulations that had been previously enacted. See J A Cohen, 'An American Lawyer's Observations on Chinese Legislation,' (March-April 1988) *China Business Review*, 6, 7.

⁵² For examples of local protectionism, see note 22 above.

⁵³ Liang Yunan, 'The Function, Problems and Strategies of Improvement of Local Legislation,' in Li (note 13 above), p 169.

covering the same subject matter are not consistent with international standards.⁵⁴

Arguably the clause on advanced legislation resembles the 'concurrent legislative powers' clause in some federalist states, such as Germany.⁵⁵ The difference is that the concurrent powers in the German Basic Law are clearly listed, which means both the centre and the localities share legislative powers in the areas listed and the centre can invalidate inconsistent local legislation only within the list. By contrast, China's Law-making Law does not define the scope of the concurrent powers, so that any inconsistent local legislation may be voided by the centre.

A change made to the final version of the Law-making Law may be significant. Previous drafts sought to provide that all local legislatures could legislate in areas reserved exclusively to the centre, with NPC or NPCSC authorization.⁵⁶ This clause was, however, deleted when the new law was finally passed. Now, only the State Council⁵⁷ and the Special Economic Zones (the 'SEZs')⁵⁸ may be authorized to legislate in areas reserved exclusively to the centre. This is a strong indication that the centre wishes to exercise tighter control over its exclusive legislative powers.

In general, the Law-making Law as enacted seems to be more restrictive as to the exercise of local legislative powers than the previous drafts. For example, under the Law-making Law, regulations of larger cities⁵⁹ must be reported and approved by the Standing Committees of People's Congresses (the 'SCPC') of provinces and autonomous regions;⁶⁰ such a requirement was not imposed in previous drafts. Furthermore, the legislative procedures for regulations of local people's governments (*difang guizhang*) are to be decided by the State Council,⁶¹ rather than by the SCPC as provided in a previous draft.⁶²

⁵⁴ In order to promote an open and reformed image, Fujian province passed a regulation allowing lawyers to represent criminal suspects immediately after the latter had been subjected to compulsory measures, whereas the national criminal procedure law, prior to its amendment, only allowed legal representation during trial. The regulation also required court judgments to include reference to the major opinions of counsel, which was not required under the previous national law. The Fujian legislators justified their action by asserting that their regulation was in line with the Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, September 1990, to which China is a signatory, and the general rule is that international law has higher authority over domestic laws. See Shen Guancheng, 'Rethinking Local Legislative Powers,' in Li (note 13 above), p 94.

⁵⁵ For example, art 72(1) of the Basic Law of Germany contains a list of concurrent powers which include laws 'relating to economic matters', the civil and criminal law, organization of the courts, public welfare, the care of refugees, immigration, labour law, traffic regulation and all forms of transport. 'In matters within concurrent legislative powers the *Laender* shall have power to legislate as long as the Federation does not exercise its right to legislate.' But, the article goes on to say 'once the central government exercises a power on the concurrent list, the states are unable to legislate in that area, at least in ways inconsistent with the federation's exercise of power.'

⁵⁶ Law-making Law, draft (October 1999), art 11.

⁵⁷ Law-making Law, arts 9, 10, 11 and 56, para 2.

⁵⁸ *Ibid*, art 65.

⁵⁹ Cities in which capitals of provinces and autonomous regions are located, cities in which SEZs are located and the cities established by the State Council.

⁶⁰ Law-making Law, art 63, paras 2, 3 and 4.

⁶¹ *Ibid*, art 74.

⁶² Law-making Law, draft (October 1999), art 72.

Although the Law-making Law does not have a clause clearly leaving residuary legislative powers to either the centre or the localities, it could be implied for a number of reasons that such powers belong to the centre. First of all, the clause on the advanced legislation indicates that the centre has final authority on all matters on which even localities may legislate before the centre does. This is different from the residuary clauses of federalist states in that, in those countries residuary powers cannot be annulled once they have been granted.⁶³ Secondly, the Law-making Law provides that one of the exclusive legislative powers of the NPC and the NPCSC is to legislate on any matter that must be legislated by them.⁶⁴ This leaves unlimited discretion to the centre because the Law does not define the matters that 'must be legislated' by them. This provision also resembles the 'necessary and proper' clause in the US Constitution, which provides that 'Congress may make all laws which shall be necessary and proper for carrying into Execution.'⁶⁵ The problem here is that in the United States the US Supreme Court is responsible for interpreting the 'necessary and proper' clause. In China, by contrast, there is no independent judiciary to resolve any potential conflict between the centre and the localities. The residuary power may, therefore, be broadly interpreted and applied with little possibility of challenge.

Division of legislative powers between the NPC and the NPCSC

Under the Constitution, the NPC has powers to amend the Constitution and to enact and amend basic laws governing criminal offences, civil affairs, the state organs and other matters.⁶⁶ The NPCSC has powers to enact and amend other laws and partially to supplement and amend laws enacted by the NPC when the latter is not in session.⁶⁷

The definition and scope of the wording 'basic laws' and 'other laws' are, however, rather general. This ambiguity has caused much confusion in legislative practice. For example, many laws that are deemed basic laws that should be passed by the NPC, such as the Laws on Demonstration, were actually passed by the NPCSC.⁶⁸ Laws of the same nature and status, such as the Organic Law of the Villagers' Committee and the Organic Law of the Residents' Committee, are nonetheless passed by two different legislative organs. The former was proposed to the NPC for passage and then passed by the NPCSC with the

⁶³ Countries leaving residuary legislative powers to states include Australia, the United States, Germany, Switzerland, Argentina, Brazil, Venezuela, Malaysia, Mexico and Pakistan. Countries leaving residuary legislative powers to the centre include Canada, Austria, Nigeria, India and Malaysia. See Antieau (note 29 above), pp 2-3.

⁶⁴ Law-making Law, art 8 (10).

⁶⁵ Art I, § 8 of the US Constitution. Also see *McCulloch v Maryland*, 17 US 316 (1819). Justice Marshall concluded that particular powers could be implied from the explicit grant of other powers.

⁶⁶ PRC Constitution (1982), art 62 (1), (3).

⁶⁷ Ibid, art 67 (2), (3).

⁶⁸ Zhou Xiaohong, 'Summary of Studies on Legislative Powers' (1992) 1 Chinese Legal Science, 115, 115.

NPC's authorization, whereas the latter was passed directly by the NPCSC without first being proposed to the NPC.⁶⁹

The Law-making Law has basically adopted the principle in the Constitution of dividing the legislative powers of the NPC and the NPCSC.⁷⁰ The old problem of ambiguities may, therefore, still remain. In practice, any law that is a principal law in one specific area will be treated as a basic law to be enacted by the NPC. Examples include laws on defence, education, and labour unions.⁷¹

Division of legislative powers between the NPC/NPCSC and the State Council

In recent years, administrative regulations have become a major component of China's legislation. They represent more than twice the number of laws made by the NPC and the NPCSC, while the legislative proposals by the State Council comprise more than seventy per cent of total proposals.⁷² The expansion of the legislative power of the administrative branches has been a driving force behind China's rapid economic growth but, in the meantime, has also caused inconsistencies and conflicts between laws and regulations, and the overlapping of powers among numerous departments of the State Council.

Under the Constitution, the State Council can only make administrative regulations to implement the existing national laws, which shall not contravene the Constitution and laws, and which must be reported to the NPCSC for recording.⁷³ This mechanism is confirmed by article 56 of the Law-making Law.

In addition, the Law-making Law allows the NPC and the NPCSC to authorize the State Council to pass administrative regulations on the matters exclusively belonging to the jurisdictions of the NPC and the NPCSC.⁷⁴ However, the authorization cannot be extended to the areas concerning crimes and punishments, restriction and appropriation of citizens' political rights and personal freedoms, and the judicial system.⁷⁵ The authorization has to be specific as to the purpose and scope, and is not transferable.⁷⁶ The authorized power expires upon the enactment of relevant national law on the same matter.⁷⁷

The law-making powers of the ministries, commissions, and departments of the State Council are more complicated. Under the Constitution, the ministries and commissions of the State Council may issue orders, directives and regulations

⁶⁹ Ibid.

⁷⁰ The Law-making Law, art 7, paras 2-3.

⁷¹ Qiao Xiaoyang, 'On the Further Division of Legislative Powers,' People's Daily Online, <http://www.peopledaily.com.cn/item/lifafa/bj04.html>.

⁷² Li Lin, 'Theory and Practice on Division of Legislative Powers' (1998) 5 Legal Studies, 70.

⁷³ PRC Constitution (1982), arts 5, 58, & 100.

⁷⁴ The Law-making Law, arts 9 & 56, para 2.

⁷⁵ Ibid, art 9.

⁷⁶ Ibid, art 10.

⁷⁷ Ibid, art 11.

within their jurisdictions.⁷⁸ However, the Constitution is silent on the rule-making power of the departments (*bu*) of the State Council. This aroused heated debates on whether the Law-making Law should include the departments of the State Council. Generally, the NPC and the NPCSC were against the inclusion because, they argued, otherwise the power of the administration would be broadly expanded.⁷⁹ On the other hand, those who supported the inclusion, mostly from the State Council, argued that stronger administrative legislative powers would enable the governments to manage social, economic and other aspects of a country more effectively.⁸⁰

The Law-making Law confirms that the departments of the State Council have the powers to make regulations (*guizhang*) within their respective jurisdictions, provided that the regulations should be passed to implement laws or administrative regulations, decisions and orders of the State Council.⁸¹

Division of legislative powers between the centre and the SARs

A separate but related issue is the legislative power and status of the SARs. The Law-making Law covers all legislative bodies in China and defines their respective powers with more or less clarity. Nevertheless, no reference has been made to the SARs' legislative status. According to some mainland scholars, the Law-making Law itself is a basic law, not a constitutional document. Under article 18 of the Basic Law of the Hong Kong Special Administrative Region (the 'HKSAR'), none of the national laws except those listed in Annex III to the Basic Law are applicable in the HKSAR. If the Law-making Law has a provision defining the SAR's legislative power, it then must be applicable in the HKSAR. This would, of course, contravene the Basic Law, unless the latter is amended to include the Law-making Law in Annex III to the Basic Law, a step that the NPC is very unlikely to take. The same applies to Macau. Assuming that the Law-making Law has obtained the status of a constitutional document, it is still questionable whether it is applicable in the SARs, since the applicability of the PRC Constitution itself in the SARs is not yet clear.⁸²

Nonetheless, in the author's view, the Law-making Law should at least have a general provision on the legislative status of the SARs, referring to the relevant provisions in the Constitution and the Basic Laws of the SARs. This does not affect the applicability of the Law-making Law, but in the meantime signifies that the SAR legislatures are a part of the national legislative system.

⁷⁸ Ibid, art 90.

⁷⁹ Li (note 72 above), p 74.

⁸⁰ Ibid, p 73.

⁸¹ The Law-making Law, art 71. This power is also extended to the China People's Bank, the Audit Administration and their agencies which have administrative functions.

⁸² Neither the PRC constitution nor the Basic Law has any provision on this issue. The strong flavor of the socialist ideologies indicates that the constitution cannot be applicable in the SAR if the 'one country two systems' is to be carried out.

The only mention of SARs in the Law-making Law is a provision granting the NPC and the NPCNC exclusive legislative power over 'special administrative region systems' (*tebie xingzhengqu zhidu*).⁸³ The clause was inserted after the 'right of abode' case was brought and decided.⁸⁴ There are obvious political implications here, and one can sense the centre's concern over the way that the SARs exercise their autonomy. It is not clear, though, whether the clause means that the NPC or the NPCSC has exclusive powers to legislate on matters reserved by the Basic Laws of the SARs, or to legislate on *any* matters concerning SARs' affairs. Conflicts and confusion are inevitable if this ambiguity is not clarified.

Looking at the Law-making Law as a whole, the Chinese legislators have made progress in dividing legislative powers between the central and local governments. They have done so, for instance, by incorporating some federalist elements, such as the enumeration of exclusive legislative powers and designation of concurrent legislative powers. However, the essence of federalism is not about these technicalities, but rather about how the powers of different levels are legally defined and secured.⁸⁵ In other words, the legislative powers of all levels — not only of the centre but also of localities — should be clearly defined and guaranteed. The Law-making Law has listed the exclusive legislative powers of the central government, but not those of local governments. Without a legally binding and a clearly divided territory between the various legislative authorities, the Law-making Law will be difficult to enforce, and the ambiguities will ultimately lead to conflicts between the central and local legislation.

Legislative supervision and review

Chinese legislators and legal scholars have reached a consensus that inconsistencies and conflict of laws are caused not only by unclear division of legislative powers, but also by the lack of a supervision and review system.⁸⁶ Therefore, it is important to establish a supervisory organ to decide the validity of a relevant law when a conflict between laws or regulations occurs.⁸⁷ Some proposed to use the existing Special Committees of the NPCSC, while others advocated the establishment of a Constitution Committee (*xianfa weiyuanhui*), independent from the NPCSC, and similar to the Constitutional Court in some western countries.⁸⁸ A draft issued in 1994 actually went so far as to

⁸³ The Law-making Law, art 8(3).

⁸⁴ *Ng Ka-ling and Ors v Director of Immigration* [1999] 1 HKLRD 315.

⁸⁵ 'As a system of law, it is a government in which the allocation of authority between levels is secured by some exceptional legal protection.' See Beer (note 15 above), p 23.

⁸⁶ See Chen & Li (note 25 above), p 295.

⁸⁷ General Office of the Legislative Affairs Commission of the NPCSC, 'Explanations on several issues in 'PRC Law on Legislation, draft (5 June 1997), 16 June 1997, p 9.

devote a whole chapter to legislative supervision. The establishment of the Constitution Committee was clearly proposed.⁸⁹ Some saw the introduction of the Constitution Committee as 'one of the most revolutionary and far-reaching reforms ever introduced into the PRC legal system.'⁹⁰ Under this reform, the power of legislative review would be transferred from complete control of the NPCSC to a quasi-Constitutional Court which, according to the earlier drafts, would be composed of some legal scholars whose status are more independent and neutral. Although the Committee would still be a part of the NPCSC, its formal composition and review procedures and relatively independent status resemble a form of judicial review system. Its experience in adjudicating the conflicts of law would lay a foundation for the establishment of a system of judicial review, and therefore pave the way for the introduction of the system of separation of powers into the Chinese political system.

For some reason, however, the drafts by the LAC after 1997 abandoned the whole idea of the Constitution Committee. Under the Law-making Law, the provisions on legislative supervision are scattered in different parts of the Law and the power of legislative supervision is granted to numerous organs, although 'relevant special committees' (*youguan zhuanmen weiyuanhui*) of the NPCSC are the main players and the NPCSC has final authority over the supervision decision.

First, the standing committees of provincial people's congresses can review the legality of regulations passed by larger cities.⁹¹ Second, the validity of conflicting regulations of local governments and the State Council departments is decided by the State Council. The State Council can invalidate a departmental

⁸⁸ China does not have any judicial review system. The court has power to review only 'concrete administrative acts' of the government, but not any legislation.

⁸⁹ See Law-making Law draft (17 December 1994), s 2 (Legislative Supervisory System), chapter 5. Several changes can be found in different drafts. The first draft (17 December 1994), prepared by the LAC of the NPCSC explicitly proposed to establish a Constitution Committee within the NPC. If such a committee is to be established, 9 committee members will be nominated by the NPC presidium amongst the NPC delegates who are legal experts and will be approved by the NPC annual meeting. The functions of the committee would be (1) to investigate conflicts between bills, laws, administrative and local regulations with Constitution and basic laws, and between each other, and (2) to recommend to the NPC a motion for invalidation of any inconsistent bills, laws and regulations. This proposal was confirmed by a later draft (1996) formed by a group of legal experts led by Professor Li Buyun. According to this so-called 'experts' proposed draft, the Constitution Committee shall be composed of a maximum of 18 members among whom one director and two deputy directors would be nominated by the presidium from the NPC vice Chairmen and the other 12 to 15 committee members from the NPC delegates. In addition to inviting a certain number of legal experts on the committee, the committee can also invite several legal advisors from outside. The draft has proposed to grant legislative supervisory power to the State Council and to set up the same committees at provincial people's congresses. The functions of the Constitution Committees are largely the same as those in the first draft, that is, to investigate and to recommend modification or invalidation of certain bills, laws and regulations that are suspected to be inconsistent with the Constitution and basic laws or with each other. The power to decide whether to modify or invalidate, nevertheless, is vested in the NPCSC, the State Council and the standing committees of provincial People's Congresses.

⁹⁰ Peter Corne, 'Right of Legislative Review Proposed: The Lawmaking Law Draft and Recent Legal System Reforms,' in Chris Hunter (ed), *A Guide to the Legal System of the PRC* (Hong Kong: Asia Law & Practice Publishing Ltd, 1997), p 42.

⁹¹ The Law-making Law, art 63.

regulation if it deems the application of local regulation as more appropriate, and will apply to the NPCSC for final decision if it decides otherwise.⁹² It is also for the State Council to decide whether there are inconsistencies between the departmental regulations, or between the departmental regulations and local government regulations.⁹³ This seemingly clear-cut scheme, however, may cast doubt on whether the State Council can make a fair and impartial decision because the State Council acting as the Central government, may favor the interests of its own departments over local governments when it acts as a referee. In addition, under the Administrative Litigation Law, local regulations have higher authority over departmental regulations because courts in adjudicating cases shall apply local regulations, whilst departmental regulations would only be used as 'reference' (*can zhao*).⁹⁴ The Law-making Law, however, does not define the priority between local regulations and department regulations, an omission that is likely to lead to further confusion and uncertainty.

Third, relevant special committees of the NPCSC mainly decide the constitutionality and legality of the following legislation: administrative regulations, local regulations, regulations of autonomous regions⁹⁵ and regulations passed under authorized power.⁹⁶ The Law-making Law provides a very detailed complaints procedure and allows more organizations and people to report violations. Generally, most of the state organs such as the State Council, the Supreme People's Court and other social organizations, enterprises and citizens may complain, in writing, and request the NPCSC's investigation.⁹⁷ Relevant special committees then may start investigating and reporting, in writing, to the NPCSC on their findings. The Law-making Law requires the original organs that drafted the law in question to decide within two months whether to withdraw or amend the offending legislation. Otherwise, the relevant special committees will submit a request asking the NPCSC to nullify the legislation.⁹⁸ In addition, articles 87 to 89 of the Law-making Law concern the matters of illegalities, authorities of nullification, and procedures for recording legislation.

Supervision and review by a variety of authorities at different levels are better than no review at all. However, it is questionable whether these supervisory organs may be able to efficiently exercise their power for the following reasons: they are a part of the NPCSC and not independent from the legislative system itself; they do not have final authority since such authority is vested in the NPCSC; they lack the necessary expertise and manpower

⁹² Ibid, art 86 (2).

⁹³ Ibid, art 86 (3).

⁹⁴ PRC Administrative Litigation Law, arts 52 and 53.

⁹⁵ The Law-making Law, arts 90 and 91.

⁹⁶ Ibid, art 86 (3).

⁹⁷ The Law-making Law, arts 90 and 91.

⁹⁸ Ibid.

because they are law-drafting rather than adjudicating organs; and finally, duplication and confusion over their respective responsibilities are certain to occur because the division of their supervisory powers is not clear.

Legislative procedures

Unable to establish a Constitution Committee, drafters of the Law-making Law had to focus on procedural and technical aspects of the legislation, hoping that inconsistencies could be eliminated by a well designed procedure and filing system. It follows that a substantial portion of the Law-making Law has been devoted to this area. The procedures are very detailed, including proposing, drafting, presenting, examination, and consultation, debating, withdrawing, passing, and publication.⁹⁹ It is believed that a detailed procedure will make the legislative process more democratic and scientific.¹⁰⁰

Most of the existing procedures provided in other procedural or organic laws have been confirmed by the Law-making Law. In other words, the existing legislative procedures will largely remain the same under the Law-making Law. However, the following important changes are noticeable. First, the procedures are more formal, eg a bill must be reviewed by the NPCSC three times before voting;¹⁰¹ and all the bills must be submitted to the Law Committee for final review after several rounds of discussions and modifications by other relevant Special Committees.¹⁰² In reality the Law Committee largely relies on its working commission, LAC, to handle all concrete matters of viewing a bill. Therefore, the LAC is very powerful in deciding what will or will not be written into a bill. This has caused complaints from the Special Committees, since their proposed modifications were often 'destroyed' by the LAC. However, the role of the LAC seems indispensable,¹⁰³ and is increased in the Law-making Law. For example, in addition to its power to draft proposals for law interpretation,¹⁰⁴ the LAC is also authorized to review and answer relevant concrete legal issues.¹⁰⁵ The newly added authority seems to imply that the LAC is not only responsible for drafting law interpretation proposals, but also enjoys the power to interpret laws.

Second, the procedures are more transparent. Previously, most bills were discussed among small groups (*xiaozu taolun*), which usually involve parties

⁹⁹ For example, the legislative procedures for the NPC and the NPCSC have taken almost 1/3 of the whole law: roughly 30 articles among 94 concern procedures. See the Law-making Law, arts 12-41.

¹⁰⁰ See Chen & Li (note 25 above), p 290.

¹⁰¹ The Law-making Law, art 27.

¹⁰² Ibid, arts 17, 18, 30, 31.

¹⁰³ 'It is necessary to have a legislative consolidating unit to uniformly review bills so that the consistency between the Constitution and laws and the unity of the legal system can be maintained.... [T]he LAC is the working commission of the NPCSC and the Law Committee. Together with the Law Committee it responsible for the uniformly review all bills.' Li Peng, The Speeches on the 3rd meeting of the 9th NPCSC, 26 June 1998.

¹⁰⁴ The Law-making Law, art 44.

¹⁰⁵ Ibid, art 55.

with similar interests. Under the Law-making Law, however, joint group meetings or even plenary meetings of the NPCSC should be held if there are important issues to be settled.¹⁰⁶ The law also requires public hearings and expert hearings to be held during the review of a bill.¹⁰⁷

Like most countries, China already has comprehensive legislative procedural rules governing different legislative bodies. Consolidating these rules into a uniform law seems unnecessary and problematic. Due to the complexity and diversity within the Chinese legislative system, each legislative body has its own unique system that requires special treatment. A single unified law may render law-making by different legislative organs more difficult and eventually lead to more conflicts and inconsistencies between the laws. For the Law to be more meaningful in solving the problems we mentioned earlier, the emphasis should be on the division of legislative powers, legislative supervision and law interpretation, rather than on legislative procedures.

Interpretation of laws

The power of interpreting law belongs to the NPCSC under article 42 of the Law-making Law. This is a constitutional right,¹⁰⁸ and was taken for granted until it was challenged recently by the Court of Final Appeal (CFA) of the HKSAR. Although the CFA, in its clarification, has confirmed the unquestionable power of the NPCSC in interpreting laws (including the Basic Law of the HKSAR), the doubts on the efficiency and fairness of this system still weigh on the minds of some legal scholars. They argue that the NPCSC, as a non-judicial organ, might not be able to interpret laws according to the needs of complicated and ever-changing realities, especially when it holds a meeting only once every two months.¹⁰⁹

According to the Law-making Law, the NPCSC has the power to interpret law in the following situations: (1) when the law is too general; and (2) when a new situation arises after the law has been passed.¹¹⁰ It is interesting to note that the power to interpret a law according to its original legislative intent was inserted into the August 1999 draft after the right of abode case occurred, but was dropped from the October 1999 draft. This seems to indicate that the legislators, worried about the recurrence of cases like the right of abode case in which the original legislative intent of the Basic Law for the HKSAR was ignored by the CFA, may have regained some confidence after the CFA's confirmation of the interpretation power of the NPCSC.

¹⁰⁶ Ibid, art 27, para 5.

¹⁰⁷ Ibid, arts 34 and 58.

¹⁰⁸ PRC Constitution (1982), art 67 (1), (4).

¹⁰⁹ Cai Dingjian, 'Conflict of Laws and Resolutions,' (1999) 3 Chinese Legal Science, p 58.

¹¹⁰ The Law-making Law, art 42.

As to interpretation procedures, there are four steps: (1) relevant organs request interpretation;¹¹¹ (2) the LAC drafts an interpretation proposal;¹¹² (3) the Law Committee reviews the draft and provides comments and suggests modifications;¹¹³ and (4) a majority of the members of the SCNPC pass (and publish) the interpretation.¹¹⁴ A new clause was inserted to the law prior to its promulgation stipulating that the interpretation of the NPCSC has the same legal effect as the law.¹¹⁵

In previous drafts, the Supreme People's Court (the 'SPC') had the power to interpret laws when the SPC had confronts issues regarding the application of laws during the litigation of a case. The drafts also stipulated that the Supreme People's Procuracy (the 'SPP') may apply to the NPCSC for interpretation if it disagrees with the interpretation of the SPC; and the interpretation of the NPCSC would prevail when it differs from that of the SPC.¹¹⁶ However, in the promulgated Law-making Law, the provision concerning the SPC was deleted. Since the interpretation powers of the SPC and SPP have been provided by an NPCSC decision in 1981,¹¹⁷ it is doubtful whether the change will affect their status. It seems that the legislators intended to separate matters concerning the judiciary from the legislature and, in fact, all provisions in previous drafts concerning the SPC and the SPP have been deleted from the promulgated law. If this is true, the authority for interpreting law for both the SPC and the SPP will not be affected.¹¹⁸

Unlike most western countries, China has parallel systems for interpreting law: legislative interpretation by the NPCSC and judicial interpretation by the court. The former is targeted at the validity of the law; while the latter solves problems that may have occurred during the application of the law, but does not include the ability to declare the unconstitutionality of the law. Since there is no concrete procedure and mechanism designed for interpretation by the NPCSC, and in reality since a majority of interpretations have been made by the SPC, the exercise of this power will be a great challenge for the NPCSC. It is unclear whether provisions on the LAC's power of interpretation imply that the LAC, a working commission of the NPCSC, has assumed powers of interpretation, in addition to its original legislative drafting and reviewing functions. Meanwhile, it may continue to delegate most of its interpretation power to the SPC, expressly or implicitly.

¹¹¹ Special Committees of the NPCSC, the SPC, the SPP, the State Council and the Standing Committees of People's Congresses can apply to the NPCSC for interpretation of laws. Ibid, art 43.

¹¹² Ibid, art 44.

¹¹³ Ibid, art 45.

¹¹⁴ Ibid, art 46.

¹¹⁵ Ibid, art 47.

¹¹⁶ The Law-making Law draft (October 1999), art 49, paras 2-3.

¹¹⁷ 'Decision on Strengthening the Work of Law Interpretation' passed by the 19th meeting of the 5th NPCSC, June 1981.

¹¹⁸ In fact, some people suspect that the change was made under the pressure of the SPP and the State Council so that their power of interpretation can be maintained under the NPCSC's 1981 decision.

Conclusion

The promulgation of the Law-making Law is a step forward to greater maturity and sophistication for China's legislative system. It shows the commitment of Chinese legislators to solve the problems that have long been troubling its legislative system in particular, and legal system as a whole. Improvements have been made to the area of the division of legislative powers. For the first time in PRC legislative history, legislative powers are divided between the centre and localities, in that local authorities may share some powers with the centre under certain conditions. The necessity of establishing a judicial review system such as a Constitution Committee was stressed and openly discussed. Although falling a step short of achieving that goal, under the recent promulgation some measures have been taken to improve the supervisory system within the current system. Legislative procedures have been carefully designed to ensure efficiency and transparency.

However, it would be naive and unrealistic to expect that the new law will achieve all the objectives that many people hoped it would. Without constitutional reform in China and without having the status of a Constitutional document, the Law-making Law will not be able to change any Constitutional arrangements, although some issues it tries to tackle are within the constitutional context. Therefore, it is understandable that the allocation of legislative powers between central and local governments has not been completely settled, eg the scope of the centre's exclusive powers is uncertain and the legislative power of localities, though liberally granted, are not specified and guaranteed. Furthermore, the legislative status of the SARs in the Chinese legislative system, an important and topical issue, has been intentionally bypassed. It may be that to define the status of the SARs in the new law would result in a clash with the Basic Laws of the SARs. However, totally ignoring the issue may cast doubt on the identity and certainty of the SARs' legislative power, and cause friction between the NPCSC and SARs' legislatures when the former tries to interfere or instruct the latter. Among all the problems discussed in this article, the most unfortunate result of the Law-making Law is that the drafters abandoned their earlier intention to establish an independent and impartial legislative supervision and review organ like the Constitution Committee. Without such an organ, the problem of conflict of laws remains unsolved no matter how well the power is divided and how perfectly the procedure is designed. Finally, judicial interpretation of law is also essential for the healthy development of China's legislative system. It is unfortunate that the law does not specifically grant the power of interpretation to the SPC, as some earlier drafts did. Even if the SPC can still interpret in practice, the system of parallel interpretation by both the NPCSC and the SPC is still problematic. On the one hand, the NPCSC rarely exercised its supreme power of interpretation

due to a lack of a concrete interpretation procedure and expertise; on the other hand, the SPC has assumed an active role in law interpretation, but without a legitimate basis provided by the Law-making Law. In addition the SPC is limited to the issues regarding the application of the law, but it is often not clear what are the issues of the law and what are the issues of the application of the law, and therefore in practice courts have already interpreted or invalidated some laws. Hence, the conditions for establishing a judicial review system in China do exist and the drafters of the Law-making Law should have taken this factor into account.

Thus it is not too ironic to say, given the wide range of unsolved problems, that this high profile legislation that has aroused much hope for fundamental change and improvement, may nevertheless achieve only relatively minor success, in the consolidating of existing lawmaking rules and in the institutionalizing of the legislative system. However, as Murray Scot Tanner has put it, a 'greater professionalism and specialization in the staffing of the NPC may provide the basis for a more independent legislature later in the decade.'¹¹⁹ It is to be hoped that the limited role that the Law-making Law is playing at present will serve as the basis for greater legislative reform in the future.

¹¹⁹ Murray Scot Tanner, 'CCP Central Document Number Eight (1991) and the Erosion of Central Party Control of Lawmaking,' (March 1994) *China Quarterly*, p 137.