

# **Several Issues Related to the Drafting of *The Legislative Law of the People's Republic of China* (*Drafted by Experts*)**

*Li Buyun*

The main focus of the legislative theory research group over the past two years has been the drafting of *The Legislative Law of the People's Republic of China (Drafted by Experts)* (henceforth, the *Draft*). Members of the group include those involved with legal work from legislative and research institutes, and researchers, professors and doctoral students from universities and the Institute of Law under the Chinese Academy of Social Sciences. On the basis of their investigations in a dozen provinces, autonomous regions and municipalities directly under the central government members proposed four drafts. Two international symposiums on legislative theory were held by the research group during the course of drafting the law.

The underlying principles for the *Draft* were: 1. The content should be comprehensive and specific, so that concerned departments could have more room for choice; 2. The articles should be as specific and operable as possible, but in a few cases they should be made abstract to avoid immature provisions for want of conditions and/or experience; 3. The law should be based on the constitution and be in agreement with other current laws, but progress should be made in making China's legislation more democratic and scientific; and, 4. China's actual conditions and needs and our own experience should be major considerations while the strong points from foreign countries should also be introduced.

I would now like to present my own views on some issues related to the *Draft*.

## **I. General Rules**

There is disagreement over the scope of application (the objects) of the legislative law.

1. There are two sharply diverging views on the connotation of "law." On the one hand, people do not consider regulations made by departments of the State Council or by local governments under the

provincial level as law, since they are not organs of state power or the legislature. On the other hand, however, these regulations are thought to be laws in a broader sense, or in the sense of delegated legislation, according to a popular international conception. I agree with the second view. A minority of people believe that State Council and local government regulations should be included within the sphere of application of the legislative law, because they reveal an obvious bias towards “departmental interests,” and are thus often in conflict. However, this proposal was rejected by the majority, who believe that it will not help to solve the major problems if the legislative law is too widely applicable. As a result, State Council and local government regulations are considered as legislation in a broad sense in the *Draft*, although they are not restricted by the legislative law. They are to be formulated independently by the State Council and local governments respectively (see Article II). Ambiguity and confusion related to the authority and procedure of State Council and local government regulations will be eliminated once legislative supervision mechanisms have been improved.

2. Some experts believe that the legislative law should not apply to military regulations because the authority of the Central Military Commission to formulate military regulations is not granted by the constitution, and also because this is not in agreement with international theory and practice. The *Draft* defines military regulations as legislation, and accepts the authority of the Central Military Commission to make laws and legislation, but on the other hand, it states that the Central Military Commission should formulate military laws and regulations independently and without restriction from the legislative law (Article II).

3. The proposal that the legislative law should only apply to central government laws and regulations and not to the legislative activities of local governments at the provincial (and autonomous region) level is unacceptable. Provincial government legislation, which plays an important role in Chinese jurisprudence, is still in a state of confusion. I think it justifiable for the *Draft* to include within the legislative law the formulation, ratification, abolition, interpretation and supervision of laws and administrative regulations, provincial regulations, autonomous laws and special regulations (see Article II).

## II. Legislative Authority

The division of legislative authority involves two basic relations, namely, that between the central and local governments and that between organs of authority and those of administration. I think the division of legislative authority should not be so strict because it is no

simple matter, and because structural reform is proceeding rapidly; the existing distribution of authority is on the whole reasonable. The decentralization of authority which has been implemented several times over the last decade or so has proved effective, but further decentralization is unwise; re-centralization of legislative authority should be avoided at all costs. It is better to keep the existing basic structure. Legislative authority could be centralized a little in favor of the authoritative bodies, although the functions and roles of administrative organs at all levels should be allowed full play. The *Draft* has focused its discussion on legislative authority in the following areas:

1. The exclusive legislative authority of the National People's Congress (NPC) and the Standing Committee of the NPC. Some very important matters can only be decided by the NPC and its Standing Committee through their exclusive legislative authority. In this way, the uniformity of state statutes can be maintained and legislation in excess of authority can be avoided. Eleven items have been included in Article V of the *Draft* that are under the exclusive legislative authority of the state. However, some people (mostly those from regional governments) prefer the elimination of this article because it is very difficult to clearly define "the exclusive legislative authority of the state." I believe that there are both advantages and disadvantages to making the "exclusive legislative authority of the NPC and its Standing Committee" very specific, and provisions for the Standing Committee in this respect should be made with caution. Perhaps not making specific provisions in this regard for the time being will be more helpful for activating the initiative of both central and local governments.

2. Local laws and regulations formulated prior to those of the central government. Local governments can formulate some laws and regulations prior to those of the central government. This has been demonstrated by experience to be correct. Laws and regulations made by local governments prior to those of the central government may satisfy the needs of reform and accelerate the pace of legislation. They may also pave the way for those formulated by the central government. This underlying principle will remain helpful even in the future, and it is therefore stipulated in Article XI.

3. The legislative authority of the NPC and its Standing Committee. The constitution provides for differences in the legislative authority of the NPC and its Standing Committee, yet some "displacement of legislation" has taken place in practice due to the confusing concept of the "basic law." For example, *The Labor Law* which was formulated by the Standing Committee should have been formulated by the NPC, while a few special laws formulated by the NPC would have been better formulated by the Standing Committee. It is in this regard that the *Draft* stipulates that "the NPC is responsible for revising the constitution, as well as making and revising the criminal law, the civil law, the laws of

state agencies and other basic laws.” By “other basic laws” is chiefly meant important national laws that directly concern the interests of all citizens and are meant to be universally obeyed by them (Article IV). For example, the *Education Law* and the *Environmental Protection Law* are basic laws, while the *Compulsory Education Law* and the *Law on the Prevention and Control of Water Pollution* are not.

4. The legislative authority of the Provincial People’s Congress (PPC) and its Standing Committee. It is stipulated in the constitution that the people’s congress of provinces, autonomous regions and municipalities directly under the central government, and the provincial standing committees during the closing period of the PPC, are entitled to make provincial laws and regulations, but no clear distinction has been made between the authority of the PPC and its standing committee. The legislative authority of the PPC in some provinces has never put to use since no local laws have been made since 1979. This is relatively abnormal. It is therefore suggested in the *Draft* that “all provincial laws that directly concern the interests of the residents in the province and are meant to be universally and directly obeyed by them, must be reviewed and ratified by the PPC”(Article VII).

### III. Preparation for Legislation

It is of great significance for guaranteeing the quality of legislation that research centered around the draft is conducted before legal motions and provincial regulations are sent to the NPC and the PPC for formal review, and before drafts of administrative regulations are sent to legislative agencies of the State Council and the executive meeting of the State Council for ratification. One chapter of the *Draft* is devoted to “Preparation for Legislation.” The main points are as follows:

1. Planning is very important for reducing costs, improving the quality and efficiency of legislation, and harmonizing and coordinating the legal system. A major aim of democratic legislation is to ensure that the right of all governmental agencies, social organizations and individual citizens to make legislative proposals and draft laws is guaranteed. Provisions have been made in the *Draft* in this regard in Articles XIV and XV.

2. Specific requirements have been made in the *Draft* with regard to various aspects of improving the quality of drafts of laws and regulations. These requirements encompass organization, investigation, demonstration and coordination in the drafting of laws, as well as the main content of the laws and their interpretation.

3. It is now common for different legislative departments to try their hardest to increase their own power or serve their own interests rather than sharing power and interests more equitably. Such problems are most

obvious in State Council and local government regulations, and in provincial laws and regulations. One solution to the problem may be the establishment of an avoidance system in drafting laws, and coordinated meetings held before the actual drafting. Article XVIII thus contains the provision that when drafting a law involves two or more departments, and no one department can be placed in overall charge of the drafting, a special committee consisting of members from authoritative organs, or legal agencies, or legal agencies of the State Council should be appointed to take charge of the drafting. According to Article XXI, when a law or regulation involves several departments in authority and their responsibilities, rights and obligations, and when it is not easy to make a clear-cut division or when there is serious disagreement between them, a coordination meeting should be held for the heads of the concerned departments by the agency in charge of drafting, a special committee from the body in authority, legal agencies or legal agencies of the State Council.

#### IV. Procedure for the Review of Laws

New material has been added to the *Draft* with regard to the procedure for reviewing laws by the NPC and its Standing Committee.

1. Preparation before a legislative bill is sent to the Standing Committee for review. It is stipulated that the sponsor should send the bill to the Secretary General twenty days before the session of the Standing Committee of the NPC, which should report to the chairman so that the legislative bill can be included in the agenda of the session. The Secretary General may suggest to the chairman that the motioned bill be sent to the related special committee which will provide a report before it is decided whether or not it should be included in the agenda (Article XXVII). If the sponsor asks to cancel his motion that has been included in the agenda, he must apply before the session and it must be agreed to by the chairman (Article XXIX). The motioned bill should be sent to the members of the Standing Committee within two days of being included in the agenda (Article XXX).

2. The form of review of motioned bills by the Standing Committee. Reviews by groups, large groups and plenary sessions are stipulated in detail in the *Draft* (Articles XXXI-XXXIII), and the work of special committees is divided. For example, the committee of law should be responsible for the content of bills as well as determining whether or not they conform to the constitution, whether or not they are in conflict with other laws and whether or not the law is scientific in its legislative technique. Other special committees should review related aspects of a bill in addition to its general content (Articles XXXIV-XXXVI).

3. Times of review by the Standing Committee. The major current

problem is that there is no maximum limit to the number of reviews. Some bills have been reviewed more than twice, and a few as many as five times. Neither the interval between a motion and a vote, nor the interval between two reviews have been decided, which has resulted in delays. Taking this into consideration, it is stipulated in the *Draft* that a bill may be reviewed twice. If the conditions for legislation are not yet ripe or a serious problem from the previous review has yet to be resolved, there can be an additional review. However, the maximum number of reviews is three. The interval between the application and the vote may not exceed two months. Special stipulations have also been made in regard to each review (Article XXXIX).

4. Amendments to reviewed bills. Amendments are an effective way of resolving serious disagreements when bills are reviewed. The *Draft* stipulates the procedures for proposing an amendment, and the review of amendments by special committees. It is stipulated that amendments must not be in conflict with the goals of the original bill (Articles XLIII-XLIV).

5. Review of bills that are specific to a certain field. Bills are becoming more and more specific, especially those related to the market economy, but committee members are often limited in their specific knowledge of the field. Specialized committees may now play a greater role, and the more effective services of legislative agencies, special groups composed of members of the Standing Committee who have related knowledge, and members of special committees may be organized. Such specialized groups, in collaboration with the proposer of the bill, may also consult experts in the field and related organizations. Relevant stipulations are included in Articles XL and XLI.

6. Review of bills by the NPC. The *Draft* conforms to the principles of the NPC in this respect. Some stipulations are similar to those of the NPC both in principle and in actual regulations, for example, in relation to the presentation of the drafts of bills in advance, the participation of experts, the consultation of social organizations and groups with regard to legislation, reviews by special committees, and the system of amendments. However, there are new elements: (1) The *Draft* provides that the right to explain the bill to the NPC should belong to the sponsor (Article XLVIII); this was not clearly expressed previously. (2) During the open session of the NPC, organizations and representatives have the right to apply to the NPC for a review of a related bill if the agenda has not yet been decided (Article LIV). Organizations and representatives also have the right to apply for a certain bill to be included in projected legislation or to urge the drafting of a certain legislation as soon as possible. This is actually a common practice which is given approval in the *Draft* (Article LV).

## V. The Procedure for the Review of Administrative Laws and Regulations

In April 1987 the State Council ratified and promulgated *Temporary Regulations on the Procedure for Drafting Administrative Laws*. These regulations are still in effect today, but they have been expanded, chiefly in the areas of planning and drafting, in the chapter on "Preparation for Legislation" in the *Draft*. No substantial revisions has been made with regard to the procedure for ratification and promulgation of the laws after the drafting has been completed. Article LX contains one revision which states that "the draft of an administrative law must be reviewed and ratified by the Standing Committee of the NPC. If the draft involves a wide range of fields, and/or has serious problems, and/or the related aspects are in conflict, it may be delivered to the plenary session of the NPC if the premier thinks it necessary." The *Temporary Regulations* state only that "the draft of an administrative law should be discussed by the Standing Committee of the NPC, or ratified by the premier." We believe that all administrative laws should be discussed and ratified by the Standing Committee, except when the country is in a state of emergency. This would ensure the quality of legislation and eliminate individual errors in decision making.

## VI. The Procedure for Reviewing Provincial Regulations

The standing committees of the PPC in most provinces, autonomous regions and municipalities directly under the central government already have regulations governing the procedure for formulating local regulations, although a few are still without such regulations. In some places procedures are well developed while in others they are over simplified and unsatisfactory in terms of current development. It is therefore absolutely essential to establish procedures for reviewing and ratifying local regulations that are applicable in all provinces, autonomous regions and municipalities directly under the central government, based on existing provincial procedures. The procedure for reviewing local regulations is, on the whole, similar to that for state laws both in principle and in terms of the actual system. The people's congresses in the provinces, autonomous regions and municipalities and their standing committees still, however, have the difficult job of ratifying local regulations for lower levels.

1. The *Draft* provides that special committees should play a role in

the course of ratifying local regulations (Articles LXII and LXIII).

2. According to Article LXIV, the draft of a motioned bill should be delivered thirty days in advance to the meeting of the chairman and vice chairmen and to the special committee, and seven days in advance to members of the PPC Standing Committee.

3. The practice in some provinces of reviewing a bill only at group meetings of the PPC but not at the plenary session is not compatible with democratic procedures. The *Draft* stipulates that local regulations should be reviewed at the plenary session after they have been reviewed at group meetings (Article LXVI).

4. Many comrades from the provinces believe that a draft should be reviewed twice by the Standing Committee, and this is stipulated in the *Draft*.

5. Two conflicting opinions and practices exist in relation to the ratification of motioned bills by the Standing Committee of the PPC: One belief is that the Standing Committee has the right to revise a motioned bill (including autonomous regulations and separate regulations). This is based on the reasoning that if the Standing Committee has the right to ratify a bill then it must also be authorized to revise such a bill. The other belief is that the Standing Committee does not have the right to revise the motioned bill, and can only decide whether or not to ratify it, since if the Standing Committee can revise a motioned bill at will, legislative authority actually resides with the PPC rather than with the people's council at lower levels. I prefer a compromise that both guarantees the quality of legislation and makes it efficient, that is, the PPC Standing Committee can make revisions to the motioned bill with the approval of the sponsor. If the sponsor agrees to make a revision, the bill will be put into effect, if not, it can be canceled. This is judicially more reasonable (Articles LXXIII and LXXIV).

## VII. Interpretation of the Laws

The stipulations on the interpretation of laws made in the *Draft* include the following aspects:

1. Types of interpretation. According to Article LXXXII, interpretation of the laws can be classified into interpretations by the legislature, by judicial offices and by administrative organs. It has been proposed that interpretation by the legislature be cancelled given the supposition that such interpretation is solely the responsibility of judicial offices. We disagree with this. Although in theory and in practice in some Western countries the interpretation of laws is solely the responsibility of judicial offices, this is not compatible with the system in China, our present conditions nor our practical needs. According to the Chinese constitution, the right of interpretation of the constitution and



state laws belongs to the NPC Standing Committee. The Chinese system is radically different from the "tripartite" political model. Judicial offices are not capable of assuming sole responsibility for interpretation of the laws. If this were the case, comprehensive interpretation would be hindered, which would not be a good thing for the construction of a legal system in China.

2. The subject and authority for legislative interpretation. Comprehensive rules are included in Article LXXXVII on the subject and authority for the interpretation of legislation: The NPC supervising committee for legislation, the legislative agencies of the State Council and the supervising committee of the PPC are authorized to interpret state laws, administrative regulations and local regulations respectively. Restrictive interpretation, amplified interpretation and explanatory additional regulations should be ratified by the NPC Standing Committee, the State Council and the PPC Standing Committee. In this way, both the fact that the NPC Standing Committee should be responsible for the interpretation of laws, according to the constitution, and that the Standing Committee cannot always be open have been taken into consideration. One example is provided by the interpretation of the application of the *Nationality Law* in Hong Kong by the PPC Standing Committee in 1996. The case of the State Council and that of the PPC are quite similar. It is practical that they take direct responsibility for interpretation of a small part of the serious problems that arise in relation to the laws.

3. Judicial interpretation. It is certainly possible and necessary to establish principles in relation to the authority for judicial interpretation through a legislative law, given that the interpretation of the law is a unified whole. The large number of judicial interpretations made by the Supreme People's Court and the Supreme People's Procuratorate have played an important role in the correct application of the law. However, there are still a few cases of *ultra vires*. The *Draft* provides that the judicial interpretation is limited in practice to a literal interpretation of the laws and regulations, and such interpretations must be reported to the NPC Standing Committee. However, it also provides that the Supreme People's Court and the Supreme People's Procuratorate may not only explain the application of a law in a certain case or a certain type of case, but may also explain the application of a law or a type of law. This ensures that the Supreme People's Court and the Supreme People's Procuratorate play their roles to the full in the interpretation of the laws, and reinforces the supervision of the organs of authority over judicial interpretation and maintains the unity of the state law.

## VIII. Supervision of Legislation

Stipulations in the *Draft* involving legislative supervision include the following:

1. The necessity and possibility of establishing a supervising committee for legislation. A system of supervision of the constitution and correspondent mechanisms and procedures have been established in most countries, and have proved indispensable for maintaining the authority of the constitution and the unity of state laws. China's constitution authorizes the NPC Standing Committee to explain the constitution and supervise its application, to invalidate administrative regulations, and State Council decisions and orders that conflict with the constitution and state laws, and to invalidate local regulations and decisions made by the organs of authority in the provinces, autonomous regions and municipalities that conflict with the constitution, state laws and state administrative regulations. However, for want of appropriate mechanisms, this regulation exists only on paper. The systems for ratifying and reporting are also not yet quite in place because the NPC special committees are busy making laws and reviewing other bills, and because responsibilities have not yet been clearly defined. There is also a lack of operative mechanisms in relation to the interpretation of the laws, and the handling of complaints from the State Council concerning conflicts between provincial regulations and state administrative regulations, and provincial regulations and regulations made by departments of the State Council. Drafting of the supervisory law has been restarted; the major purpose being to establish a constitutional committee. The legislative supervisory committee is actually the same as the constitutional committee which is required under the supervisory law, and so arrangements for their composition and authority can be made at the same time. According to the Chinese system, the legislative supervisory committee (or the constitutional committee) can be identical to other NPC special committees in nature. It reports to the NPC Standing Committee, and it is not difficult to determine its relationship to other special committees as long as guiding principles are defined. Following on from the above, the *Draft* contains specific stipulations concerning the composition and responsibilities of the legislative supervisory committee, the subject and procedures for supervision, and the participation of other special committees in such supervision.

2. Provincial legislative supervisory committees. The legislative supervisory committee of the NPC may only supervise legislation above the provincial level. There are still several levels of legislative below the provincial level, and it is no easy task to reinforce supervision in this regard. The establishment of provincial legislative supervisory

committees will be helpful in establishing a legislative supervision system, which will incorporate supervision of the NPC, the State Council and the PPC.

3. The system of ratifying and reporting. These are important for guaranteeing the harmony and coordination of the legal system, maintaining the unity of China's laws and improving the quality of legislation. The old regulations in this regard are rigid and inoperable. Detailed stipulations have been made in the *Draft* concerning ratification and reporting, including their timing, and methods of investigation and execution (Articles CXIX-CXXII). Some comrades from the provinces have demanded a clear explanation of the stipulation in the constitution that local regulation must not be in conflict with the constitution, state laws and administrative regulations. This is also included in the *Draft* (Article CXXVI).

The last point I want to make clear is that members of the legislative theory research group do not agree on a few points in relation to the *Draft*, and this paper represents only the views of the majority.

—*Translated by Huang Jue  
from Zhongguo faxue,  
1997, no. 1  
Revised by Su Xuetao*

## ABOUT THE AUTHORS

Du Liangxing (杜两省), b. 1958, Professor, North-Eastern Finance and Economics University. Address: Dalian 116025, China.

Fang Xingqi (方兴起), b. 1950, Professor, Institute of Economics, Hunan Normal University.

Feng Tianyu (冯天瑜), b. 1942, Professor, Department of History, Wuhan University.

He Shunguo (何顺果), b. 1944, Professor, Department of History, Beijing University. Address: Beijing 100871, China.

Li Bingxiang (李秉祥), b. 1958, Associate Professor, North-Eastern Finance and Economics University. Address: Dalian 116025, China.

Li Buyun (李步云), Institute of Law, CASS.

Li Lulu (李路路), b. 1954, Associate Professor, Department of Sociology, Renming University of China. Address: Beijing 100872, China.

Ren Suihu (任遂虎), b. 1952, Associate Professor, Department of Chinese Literature, North-Western Normal University.

Shu Yongping (舒咏平), b. 1953, Associate Professor, Institute of Social Sciences, Anhui Normal University.

Sun Xiaoling (孙晓玲), b. 1954, Deputy Editor-in-Chief of *Xibei Shifan Daxue xuebao*, North-Western Normal University.

Tang Can (唐灿), b. 1953, Associate Professor, Institute of Sociology, CASS. Address: #5 Jianguomennei Street, Beijing 100732, China.

Wei Houkai (魏后凯), b. 1963, Associate Research Fellow, Institute of Industry, CASS. Address: Beijing 100836, China.

Wu Yuanliang (吴元棵), Research Fellow, Institute of Philosophy, CASS. Address: #5 Jianguomennei Street, Beijing 100732, China.

Yang Dali (杨大利), b. 1964, Associate Professor, Department of Political Science, Chicago University, USA.

Yang Guorong (杨国荣), b. 1957, Professor, Department of Philosophy, Huadong Normal University.

Yang Zhijiu (杨志玖), b. 1915, Professor, Department of History, Nankai University.

Zhang Zhiming (张志铭), Associate Research Fellow, Institute of Law, CASS.

Zhou Shulian (周叔莲), Institute of Industry, CASS. Address: Beijing 100836, China.