

1-1-2019

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Citation Details

Wei Cui & Jiang Wan, "Decentralizing Legislation in China's Law on Legislation Amendment" (2019) 49:2 Hong Kong LJ, forthcoming in 2019.

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Decentralizing Legislation in China's Law on Legislation Amendment

Wei Cui* and Jiang Wan†

Abstract: *We present a novel account of China's recent move to decentralize legislation through amending the Law on Legislation (LL). Conventional wisdom pervading both Chinese political discourse and social scientific scholarship on China portrays law as incompatible with experimentation and as only suitable for codifying policies adopted after experimentation. Moreover, the value of legislatures is viewed as lying in their independence from the executive branch. We highlight rationales offered by the Chinese Communist Party for the LL amendment that repudiate these assumptions: the Party proclaimed the intention to promote lawmaking as a central instrument of policy experimentation; moreover, the Party's intervention in legislative processes may rescue legislatures from their irrelevance. We trace this new position regarding the role of lawmaking through the amended LL's legislative history and initial implementation. We further show how this new official ideology clashed with the views of legislative officials, for whom "constraining government" has become a central preoccupation—both as a consequence of, and reinforcing, legislation's political irrelevance. We argue that, to understand the political calculus underlying Xi's approach to law, one does well to acknowledge the coherence and appeal of initiatives such as the LL amendment.*

Introduction

In March 2015, China's National People's Congress (NPC) amended a foundational statute governing the country's legal system, the Law on Legislation (LL), and dramatically expanded the sphere of sub-national lawmaking.¹ Previously, only 49 cities at the sub-provincial, prefectural level possessed legislative power. After the amendment, the number increased more than five-fold to 322. As the ability to make law at prefectural-level cities consequently becomes the rule rather than the exception, the volume of law in China, by one measure of legal rules, could easily triple.²

A change of this magnitude would be considered radical in any legal system. Yet the LL Amendment is important not only to Chinese law, but may also substantially impact how the Chinese political regime works—which is a matter of broader, indeed global, policy significance. The significance derives from the fact that the 2015 legislative amendment was apparently the result of an explicit and deliberate effort by the top leadership of the Chinese Communist Party (CCP) to institutionalize

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¹ *Zhonghua Renmin Gongheguo Lifa Fa [Legislation Law of the People's Republic of China]*, promulgated by the National People's Congress, 15 March 2000, effective 1 July 2000, and as amended on 15 March 2015, hereinafter the "Amended LL". Where provisions of the pre-amendment LL are relevant, references will be made to the "2000 LL". This Article does not discuss differences between the 2000 LL and the Amended LL other than those described in Part IV. See note 44 below regarding the official view of LL amendment as "incremental" aside from legislative decentralization.

² See note 18 and accompanying text below.

governance. It was a central strategy for implementing a vow made by President Xi Jinping in 2014—that the CCP would invest more in the rule of law, and make China’s legal institutions simultaneously more responsive to the CCP’s will and function more like a genuine legal system.³

Nonetheless, the 2015 LL amendment has received relatively little attention from scholars and observers of Chinese law and politics.⁴ In this Article, we present a novel account of China’s move to decentralize legislation through the LL amendment. Our starting point is to take the CCP’s own rationalization of legislative decentralization seriously. In particular, under Xi’s leadership, the CCP appears now to promote lawmaking as an instrument of policy experimentation, notwithstanding the conventional wisdom—based on past experience—that law is incompatible with experimentation in China and therefore can only codify policies adopted after experimentation. Moreover, the CCP aims to exercise more control over legislative processes, not because legislative institutions have become too independent, but because they suffer disuse and are too often irrelevant. We believe that these recent stances of the CCP not only are internally coherent, but also reflect cogent assessments of the ills in China’s existing legislative system. Whatever political motivations underlie these stances, they offer *prima facie* compelling justifications for the LL amendment.

Starting with this basic premise, we offer a nuanced narrative about the adoption and initial implementation of the Amended LL, and show how different ideologies about the value of legislative institutions clashed during this process. We present the key legal aspects of the LL amendment and resolve an immediate doctrinal paradox associated with it. While the Amended LL radically expanded the range of cities permitted to make law, it also introduced restrictions on the scope of city-level lawmaking. Why this combination of liberalization and tightening? Our answer is that the new restrictions are compromises made to those who resisted legislative decentralization, ie primarily, national and provincial-level bureaucrats who had previously benefitted from the monopoly of legislative power. This implies that, politically, the most significant aspect of the LL amendment is decentralization: it likely captures the core thinking of the CCP leadership.

We go further and identify a deeper paradox in the Amended LL’s implementation: the CCP’s attempt to institutionalize governance through formal lawmaking has encountered resistance from groups of individuals normally responsible for sustaining the rule of law discourse in China. From the CCP top leadership’s perspective, legislation should actively respond to the needs of new policy initiatives, and subnational political leaders should actively participate in the legislative process. This perspective, if one could put aside the fact that the CCP is the ruling party in an authoritarian regime, is no different from common views of the relationship between politics and legislation in democracies. By contrast, many actors invested in the rule of law discourse in China—including bureaucrats who, under China’s current institutional arrangements, manage the legislative process—are accustomed to being politically marginalized. As a consequence, “constraining government” has become their intellectual and

³ Xi’s record of promoting the rule of law since 2014 is deeply controversial and may give little or no comfort to those who wish to see political liberalization and stronger protection of human rights in China. Our portrayal of legislative decentralization as motivated by the Party’s desire to promote the rule of law may thus seem quite peculiar. Our argument, however, is that this is precisely what is remarkable about the LL amendment: it moves China’s legislative system, in a way that is not easily reversed, towards a direction that should generate greater rule of law; it thereby gives content to a piece of Party rhetoric from 2014 that one might otherwise want to dismiss as mere propaganda.

⁴ In contrast, a concurrent development in China’s legal system—the CCP’s push to reform the judiciary—has attracted much more attention and debate. See, e.g. Benjamin L. Liebman, “Authoritarian Justice in China: Is There a ‘Chinese Model’?” in *The Beijing Consensus? How China Has Changed The Western Ideas of Law and Economic Development and Global Legal Practices* (Weitseng Chen ed., 2017); Ling Li, “Chinese Characteristics of the ‘Socialist Rule of Law’: Will the Fourth Plenum Cure the Problems of the Chinese Judicial System?” *20 Asia Policy* 17 (2015).

professional preoccupation. The ideology of a politically independent parliamentary branch is thus invoked despite its incongruence with China’s basic institutional design.

Drawing on unique field interviews, we show that congressional officials and staff members of legal offices in the executive branch conceptualize their primary goal as minimizing opportunities for executive branch abuse, while remaining relatively unperturbed by the irrelevance of law to governance. Unlike lawyers who operate on the assumption that law is relevant, these groups behave as what one might call “rule of law professionals” operating on the assumption that the law will be disregarded. We believe that our interviews reasonably captured some representative arguments of decentralization’s opponents. However, an important limitation of our research is that we did not interview officials from cities that newly gained legislative power, nor did we interview political leaders (as distinct from bureaucrats in legislative offices). There may thus well be constituencies within the Chinese government who are enthusiastic about legislative decentralization, but who are less accessible than traditional legislative offices.

Overall, we highlight the surprising strengths of the CCP’s case for legislative decentralization, as well as the weaknesses and tensions characterizing the views of decentralization’s opponents. Whether the implementation of the LL amendment will truly enhance the rule of law and/or social welfare in China is an important question, but lies beyond the scope of this article. Our main aim is to demonstrate that those interested in understanding the political calculus underlying Xi’s approach to law would do well to recognize the conceptual coherence of initiatives such as the LL amendment. By the same token, liberal advocates for greater rule of law in China would do well to abandon some of the more implausible views (that have nonetheless become entrenched) about the role of legislative institutions.

I. Subnational Lawmaking in China: Background and Statistics

China’s legal system endows government-promulgated rules with binding legal effect only when they take the forms of statutes and regulations recognized by the LL. At the national level, the NPC enacts statutes (*falü*); the State Council enacts “administrative statutes” (*xingzheng fagui*); and national ministries enact ministerial regulations (*bumen guizhang*). At the subnational levels, provincial and some city-level People’s Congresses adopt “local statutes” (*difangxing fagui*), whereas provincial and some city-level People’s Governments adopt local government regulations (*difang zhengfu guizhang*, abbreviated as LGRs below).

The People’s Government (PG) of any given jurisdiction in China represents the central executive office for that jurisdiction. It is distinct from specialized agencies (eg tax, public security, etc) at the same level, much as the national ministries are distinct entities from the State Council. Unlike national ministries, no specialized subnational government agency can enact formal regulations. Formal lawmaking at the city level therefore comprises the adoption of statutes by city congresses and of regulations by city PGs.⁵

The content of the 2015 LL amendment we focus on mainly regulates the activities just described—who can engage in city-level lawmaking, and what kind of law can be made. But to understand the context of the LL amendment, one must grasp two further features of China’s legislative system: the unity of the executive and parliamentary branches in lawmaking; and parliamentary irrelevance.

⁵ In the rest of this article, references to lawmaking should be understood to include the adoption of both statutes and regulations.

Because China is an authoritarian country ruled by the CCP, many Western scholars have looked to China's People's Congresses (PCs) at national as well as subnational levels as the most promising loci for gradual democratization.⁶ Democratization would limit the CCP's political power; and if PCs can serve the purpose of democratization, they must monitor and restrain the functioning of China's single-party state. This seemingly intuitive reasoning, however, can lead to erroneous assumptions about how Chinese legislative institutions either are intended to, or actually do, operate.

We begin by noting that China's nominally democratic political institutions are designed to resemble parliamentary systems, as opposed to presidential polities.⁷ That is, PCs are either directly elected or elected by delegates from lower-level PCs, and once these parliamentary bodies are formed, they elect the heads of the PGs (ie the executive branch) in their respective jurisdictions.⁸ The nominal power of the parliament to appoint or remove the heads of the executive branch underlies the concept of "parliamentary supremacy."⁹ The concept of "parliamentary supremacy" is also formally reflected in the legislative system, in that statutes have superior legal force over executive orders and can never be overridden by the latter. However, we know from mature democracies that parliamentary supremacy does not imply that the parliament necessarily competes with and constrains the executive. Instead, the head of the executive branch in a parliamentary democracy is most likely to be the leader of the winning political party (or coalition of parties), whose political power far exceeds the parliamentary members of his or her party.¹⁰ Therefore it is the cabinet, not parliament, which dominates lawmaking. In many parliamentary systems, the cabinet proposes most bills, and parliament's ability to independently propose or amend legislation tends to be weak.¹¹

⁶ See generally, Melanie Manion, *Information for Autocrats: Representation In Chinese Local Congresses, Introduction* (Cambridge: Cambridge University Press, 2015); Oscar Almén, "Only the Party Manages Cadres: Limits of Local People's Congress Supervision and Reform in China," (2013) 22 *Journal of Contemporary China* 237; Young Nam Cho, *Local People's Congresses in China: Development and Transition* (Cambridge: Cambridge University Press, 2009). Truex suggests that the focus on democratization has led scholars studying China's People's Congresses to "assume away the policy-making process itself", ie to neglect actual legislative activities. Rory Truex, "Authoritarian Gridlock? Understanding Delay in China's Legislative System," (2018) *Comparative Political Studies*.

⁷ The distinction between these systems is highly important for studying legislative processes. See generally, John D. Huber and Charles R. Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (Cambridge: Cambridge University Press, 2002), Chs 4 and 7; Terry M. Moe and Michael Caldwell, "The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems," (1994) 150 *Journal of Institutional and Theoretical Economics* 1, 171; Christian B. Jensen and Robert J. McGrath, "Making Rules about Rulemaking A Comparison of Presidential and Parliamentary Systems," (2011) 64 *Political Research Quarterly* 3, 656.. This comparative politics literature generally refers to presidential systems also as "separation of powers" systems. To avoid confusion with other meanings of "separation of powers" in the legal literature, we will refrain from using this latter term and refer to the presidential v. parliamentary systems dichotomy.

⁸ Ch III, *Constitution of the People's Republic of China* (as last amended in 2004).

⁹ *Ibid.*, Art 2 and 57.

¹⁰ Huber and Shipan (n 7 above).

¹¹ *Ibid.*; for weak legislative capacity in Canadian federal and provincial legislatures, see David C. Docherty, *Legislatures* (Vancouver: UBC Press, 2005); David C. Docherty, *Mr. Smith Goes to Ottawa: Life in the House of Commons* (Vancouver: UBC Press, 1997). By contrast, in presidential systems where the head of the executive branch is elected independently from congressional elections, the "legislative branch" is politically independent from the executive, tends to possess greater legislative capacity, and is in a position to seriously constrain the executive in legislation. See Huber and Shipan (n 7 above) generally.

Because China's nominal democratic institutions are designed to resemble parliamentary (as opposed to presidential) systems, one would expect a high degree of unity between the executive and parliamentary in lawmaking. And that is indeed what one observes in China. All scholars studying Chinese legislation agree that legislative proposals overwhelmingly originate from the executive branch, and that parliamentarians rarely block proposals advanced by the executive branch.¹² What is less commonly recognized, however, is that this pattern cannot be attributed exclusively to the CCP's monopoly of political power: the same phenomenon is also observed in majority-controlled parliamentary democracies. The function of CCP control can be analogized with a party in a parliamentary democracy with very secure majority control, combined with very strong party discipline.¹³

A further fundamental institutional fact important for our analysis is that, in real life, Chinese political leaders do not need to legislate to implement most policies. Not only can they adopt formal regulations that also have binding legal effect (but do not need parliamentary cooperation in adoption), they can, and overwhelmingly do, rely simply on informal policy directives (*guifanxing wenjian*) or IPDs. Under the Chinese legal system, IPDs are not binding on courts.¹⁴ But in China as elsewhere, the state apparatus nonetheless routinely enforces them before they are successfully challenged in courts. The appeal of IPDs to politicians is easy to understand. They are much less costly to produce in terms of both time and political resources, making them perfect instruments for short-term policy objectives. They are also flexible, and can be easily revised to incorporate new information and to correct mistakes. Moreover, they can be used to express the preferences of a few political actors without garnering consensus from a broad array of stakeholders. In other words, politicians' private benefits from lawmaking are likely to be very small relative to the lawmaking's social benefit.¹⁵

The implication of this reality for Chinese legislative institutions is stark. If the executive branch's default choice for implementing policy is to use IPDs, there is, for the most part, no occasion even for parliamentary bodies to monitor policymaking. Not only is parliamentary independence in legislation an elusive ideal in light of China's *de jure* constitutional design and *de facto* political regime, but of equal or arguably greater importance is the irrelevance, as far as policymaking concerned, of parliamentary bodies, and of the legal system in general.

These core institutional features of the Chinese legal system are reflected in the empirical patterns in lawmaking. Since this Article focuses on city-level lawmaking, we offer some simple data on legislative activities at the city level. Before the LL amendment, 49 cities that were designated "relatively

¹² Michael W. Dowdle, "The Constitutional Development and Operations of the National People's Congress," (1997) 1 *Columbia Journal of Asian Law*, p 3; Murray Scot Tanner, *The Politics of Lawmaking in Post-Mao China: Institutions, Processes and Democratic Prospects* (Oxford: Oxford University Press, 2002); Pitman B. Potter, *From Leninist Discipline to Socialist Legalism: Peng Zhen On Law and Political Authority in The PRC* (Stanford: Stanford University Press, 2003).

¹³ Docherty (n 11 above).

¹⁴ See Nicolas C. Howson, "Enforcement without Foundation? Insider Trading and China's Administrative Law Crisis," (2012) 60 *American Journal of Comparative Law* 4, 955.

¹⁵ A question might be raised: might the social benefit of legislation, especially at the city level, simply be smaller in China than elsewhere? For example, if policies need to change especially frequently in Chinese cities, little benefit may be derived from more permanent rules, and legislation would simply become outdated quickly. In reply, note first that there is neither evidence nor *a priori* reason to believe that policy change occurs more frequently in China than in other countries, or at the city level more frequently than at higher levels. Legislation everywhere needs to respond to changing circumstances. Moreover, in a separate empirical study, we do not find that Chinese legislative bodies have difficulty abolishing outdated statutes. Indeed, cancelling outdated statutes represents one of the top legislative activities of China's relatively inactive legislatures, and occurs at roughly equal frequency at the provincial and city levels.

large cities” (RLCs) had been allowed to make law. Table 1 below sets out summary statistics on city-level lawmaking during the 2000-2014 period (from the LL’s initial enactment to the year before its amendment), and compares the volume of city-level lawmaking with that of provinces.

On average during this period, each of China’s 49 RLCs adopted 6.34 local statutes and 6.91 LGRs. In comparison, at the provincial level during the same period, on average each province adopted 16.48 local statutes and 11.17 LGRs annually. While city-level lawmaking occurs on a smaller absolute scale, cities display a higher activity level relative to population size and GDP: for a given population or GDP size, RLCs on average generated between three and four times the law produced by provinces.¹⁶

Table 1. Summary Statistics on Lawmaking per Year in Relatively Large Cities (2000-2014)

Type of Policy Instrument	Mean	Median	Q1	Q3	Max	Min	Std. Dev.	Obs.
Provincial statutes	16.80	13	9	18	122	3	13.04	465
Provincial PG regulations	12.17	10	7	14	182	0	12.33	465
City statutes	6.32	5	3	7	77	0	6.49	735
City PG regulations	6.91	6	3	9	38	0	5.57	735
City PG IPDs	91.31	73	19	127	432	0	84.16	734

One can also compare the pursuit of formal lawmaking in RLCs with the issuance of IPDs. On average, RLC governments issued 91.31 IPDs a year. This total does not include policy documents issued by any city’s specialized agencies, but only actions of the mayors’ offices—the same executive branch bodies that adopt formal regulations and propose statutes to city congresses. Clearly, Chinese city politicians much prefer using IPDs to adopting law in the implementation of policy. Also worthy of the note is that fact that although adopting statutes may seem more costly than adopting LGRs—the former requires going to parliament—city governments do not make significantly fewer statutes than regulations.¹⁷ This is consistent with the idea of parliamentary-executive unity: if politicians want to make formal law, they might as well go all the way through the legislative process.

Figure 1 plots the trends in national aggregates in provincial and city lawmaking during the same 15-year period. The overall quantities of different forms of subnational lawmaking have not increased, and indeed even demonstrate slight decline, in recent years. Rapid economic growth and the greater variety of social problems and demands such growth brings thus seem not to have been reflected in legislative activities. This again reflects the widespread disuse of lawmaking in policy implementation.

Finally, the data in Table 1, when combined with data on national lawmaking, enable another simple calculation. Between 2000 and 2014, China’s 31 provincial jurisdictions generated on average an aggregate of 511 statutes and 346 LGRs a year, while the 49 RLCs generated an aggregate of 322 statutes and 331 LGRs a year. During the same period, the NPC, State Council, and China’s national ministries collectively generated on average 244 statutes, administrative statutes, and ministerial regulations a year.¹⁸ If we assume that the 273 prefectural jurisdictions newly permitted to engage in lawmaking after 2015 reach the same level of production as the RLCs before 2015, over 3,600 additional city-level statutes and LGRs would be adopted each year. If there is no change to the level of lawmaking in provinces or at

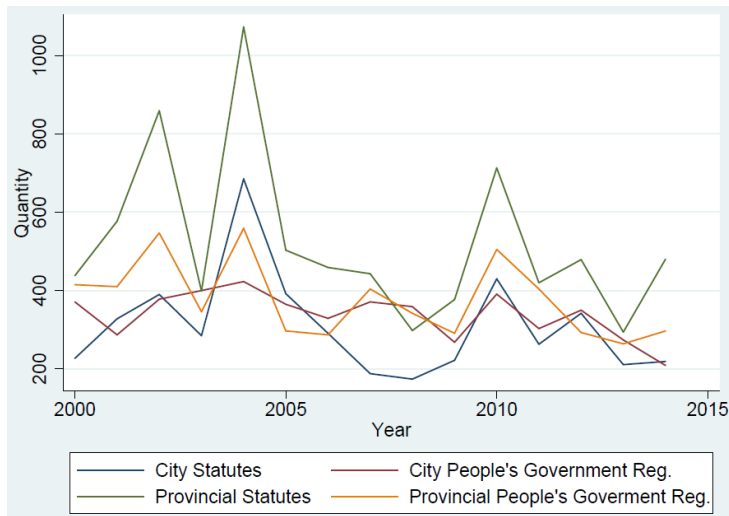
¹⁶ The average population of a Chinese province is 8.16 times of that of an RLC, and the average provincial GDPs are 7.9 times the average RLC GDP. Summary statistics on city level population and GDP are omitted here but are available upon request.

¹⁷ Indeed, provincial governments make more statutes than regulations on average.

¹⁸ National data on file with the authors and available upon request.

the national level, city-level lawmaking after 2015 would increase the total number of statutes and regulations in the country by more than 2.15 times.

Figure 1: National Trends in Provincial- and City-Level Lawmaking, 2000-2014



II. The CCP’s Push to Institutionalize Governance

The amendment of the LL in 2015 was not an accident. It represented a major push by the CCP, under Xi Jinping’s leadership, to institutionalize governance. This “institutional turn” to legislation can be seen as comprising two components.¹⁹ The first is the rejection of the notion that new policy initiatives (“reforms”) must be carried out in violation of existing law codifying previous policies. Instead, the CCP’s new view is that lawmaking should play an active role in the process of policy exploration. Second, the CCP leadership envisions that the Party itself would devote greater energy to lawmaking, ensuring that lawmaking is responsive to current political needs. Both aspects of the new CCP position conflict with traditional views regarding the relationship between law and policy in China, and regarding the political configurations behind the legislative process.

1. Coordinating legislation and reform

Commentators on Chinese law commonly assume that in China, economic and other institutional reforms are inherently incompatible with the rule of law, and that the CCP’s preference is to disregard the niceties of law and embrace “flexibility” in the reform process.²⁰ It was widely accepted until recently that the implementation of new policies need not have statutory or other legal basis, and that lawmaking should mainly be expected take place *after* policy development has “matured”.²¹ And for scholars, a

¹⁹ See Manion (n 6 above) for a discussion situating the study of Chinese subnational legislatures in the study of authoritarian electoral and legislative institutions.

²⁰ Chinese scholars began to debate whether there might be “benign violations” of the law and the Constitution in the 1990s. See, eg “Hao Tiechuan, “*Shehui Biange Yu Chengwenfa De Juxianxing* [Social Change and the Limitation of Statutory Law],” (1996) 6 *Faxue Yanjiu* [Chinese Journal of Law] 23.

²¹ Jiang Zemin, “*Shixing He Jianchi Yifazhiguo, Baozhang Guojia De Changzhijuan* [Practice and Adhere to Rule of Law, Safeguard the Prolonged Stability and Peace of the Country],” *Renmin Ribao* [People’s Daily], 9 February 1996, p 1.

prominent example of the conflict between law and policy is taken to be subnational policy experimentation. It has been argued that a key feature of the Chinese reform experience is that the CCP experiments with new policies through subnational reform pilots,²² with only successful experiments being ultimately adopted as national policy in the form of law.

Such arguments implicitly equate law with national policy, and imply that conflicts between subnational reforms and the rule of law are inevitable. This view, however, was explicitly rejected in the CCP's widely discussed "Decision on Major Issues Pertaining to Comprehensively Promoting the Rule of Law" (the "4th Plenum Decision") in October 2014.²³ The 4th Plenum Decision emphasized that

"Law is a crucial tool of statecraft in governing a country. Good law is a precondition to good governance. To build a socialist rule of law system with Chinese characteristics, we must adhere to the principle of 'legislation first', and allow legislation to play a pioneering and initiating function."²⁴

Consistently with this aspect of the 4th Plenum Decision, there has been a spate of prominent national statutory amendments to provide specific legal authority for subnational policy experiments—amendments that, while not unprecedented, were previously rare.²⁵

While national statutory amendments to permit experimentation are important, an even more important implication of taking subnational experimentation seriously is to give sub-national governments greater lawmaking power. Only then can reform be conducted *through* the instrument of lawmaking. A chief architect of the LL amendment, the vice chairman of the NPC's Standing Committee Li Jianguo, explained the significance of decentralizing legislation in the following way:

"It is important to resolve the tensions between the need to pursue policy reforms and governing according to the rule of law, and between the stability of law and the changes necessitated by reform. There is a greater need to coordinate legislative and policy decisions and ensure that they are mutually consistent, so that important reforms have legal basis, and law-making actively accommodate the needs of reform and social and economic development."²⁶

In other words, it is in the context of the major 4th Plenum Decision to run more policymaking through the legislative process that the CCP championed decentralizing legislation. Li explains the connection between the 4th Plenum Decision and the LL Amendment as follows:

"Promptly amending the [LL], allowing legislation to perform a pioneering and initiating function by improving the legislative system and procedures, so that reforms can be

²² Sebastian Heilmann, "Policy Experimentation in China's Economic Rise," (2008) 43 *Studies in Comparative International Development* 1.

²³ The Decision was the main outcome of the 4th Plenary Session of the CCP's 18th Congress.

²⁴ *Ibid.*, Section 2.

²⁵ For an overview with many examples, see *Quanguo Renda Changweihui Shouquan Youguan Fangmian Zhanshi Tiaozheng Youguan Falü Guiding, Kaizhan Youguan Shidian Gongzuo De Jueding De Qingkuang* [Regarding the Decision of the Standing Committee of the National People's Congress on Authorizing Relevant Authorities to Temporarily Adjust Relevant Statutes and Initiate Relevant Trial Work]. Available at http://www.npc.gov.cn/npc/lfzt/rlyw/2015-09/28/content_1947313.htm.

²⁶ Li Jianguo, "Quanmian Guanche Shishi Xiugaihou De Lifa Fa, Wei Shixian Liangfashanzhi Tigong Zhidu Baozhang [Fully Implement the Amended Law on Legislation to Provide Institutional Safeguard for Achieving Good Governance under Good Law]," (2015) 8 *Qiushi [Seeking Truth]*, 12.

conducted under the rule of law, the rule of law can be strengthened through reform, and reform and rule of law can progress side by side: all of this is in adaptation to the actual needs of comprehensively deepening reforms. To build socialist rule of law system with Chinese characteristics [...] we must adhere to the principle of ‘legislation first’.”²⁷

Overwhelmingly, Chinese policy experiments preceding legislation are pursued through the issuance of IPDs. Thus the “flexibility” of Chinese policy experiments noted (and often commended) by many commentators simply marks the same phenomenon as what we called *parliamentary irrelevance* earlier. Instead of seeing this as a by-product of individual politicians’ incentives—for example, reflecting the fact that many politicians’ tenures in particular offices are too short for them to care about policy stability achievable only through legislation—commentators have been more inclined to attribute a deliberate attitude to the CCP’s collective psyche. The 4th Plenum Decision seems to offer a clear rebuttal of this attribution.

Of course, legislation and policy decisions can be synchronized only if the main actors in policymaking—leaders of the CCP—put themselves to the task of legislation. Interestingly, the 4th Plenum Decision also urged more investment by the political leadership in lawmaking.

2. Strengthening political leadership in legislative activities

It is commonly observed that national and subnational legislatures traditionally merely “rubberstamped” legislative proposals made by the executive branch.²⁸ It is also claimed that at least the NPC has somewhat departed from this tradition since the early 1990s: as many senior political leaders assumed roles in legislatures during their transitions to retirement, legislatures are said to have gained greater political clout, and are more likely to display opposition to executive proposals.²⁹ Within this narrative, the significance of the legislative process is measured by the legislature’s independence from the executive, and such independence can have reality in China today only because (and to the extent that) important politicians strive to continue their political lives after careers in the executive branch.³⁰

This narrative, however, overlooks the fact that China’s legislative institutions are designed to resemble parliamentary systems. In parliamentary democracies, legislatures are often expected to “rubberstamp” legislative proposals by the executive branch.³¹ This is because once a ruling party is in power (or once a governing coalition is formed), the head of the executive branch (eg the Prime Minister) is also the leader of the ruling party/coalition in parliament. Political contests are thus observed mainly in elections and the formation and maintenance of governing coalitions, and rarely during the passage of legislation.³² In assessing the effectiveness of the legislation in most parliamentary democracies, therefore, few would view parliamentary opposition to the executive as a relevant criterion. To insist on the norm of parliamentary independence from the executive thus adopts the wrong frame of reference, by implicitly comparing Chinese legislatures to legislatures in presidential systems.

²⁷ *Ibid.*, p 12.

²⁸ Tanner (n 12 above), p 76; Potter (n 12 above), p 128; Dowdle (n 12 above), p 3.

²⁹ Tanner (n 12 above), p 106; Dowdle (n 12 above), pp 8-11.

³⁰ Ming Xia, “China’s National People’s Congress: Institutional Transformation in the Process of Regime Transition (1978-98)” (1998) 4 *The Journal of Legislative Studies* 4, 104-105; Dowdle (n 12 above), p 12 (“The most commonly articulated explanation for the NPC’s institutional emergence is that the NPC has been riding on the coattails of the personal power of the current Chairman of its Standing Committee.”)

³¹ See n 11 above.

³² Huber and Shipan, (n 7 above), pp 97-103, 183-190.

In contrast to this view that People's Congresses are strengthened only when they are independent, the CCP envisions empowering legislatures by its own greater involvement in the legislative process. According to this new position, leaders of PCs are to actively assist the leaders of the CCP to see important policy initiatives into legislation. This new position was reportedly elaborated in a secret document issued by the CCP Central Committee in February 2016, titled "Opinions regarding Enhancing the Party's Leadership of Legislative Work"³³ and circulated among senior members of the CCP. While the secret document is not publicly available, reports on it indicate that three ideas are emphasized: (1) the CCP leadership in a law-making jurisdiction (eg a prefectural city) should treat lawmaking as an important component of its agenda; (2) leaders of local congresses should report more frequently to the local CCP leadership on legislative matters; and (3) the congressional leaders should themselves devote more time to legislation rather than delegate to subordinates.³⁴ This, ironically, is not dissimilar to the standard view of the legislative processes in parliamentary democracies. Although one could view greater CCP control of legislation as an authoritarian power grab, an alternative view is that it would rescue legislative institutions from irrelevance.

In summary, the new CCP view on the role of legislation represents a strong rejection of the conception of lawmaking in China as passively codifying past policy decisions, as being constantly threatened by the implementation of new policies, and as being the provenance of not top or rising political leaders but those ones facing retirement but wishing to retain policy influence. Of course, how seriously the declarations of the 4th Plenum Decision and the more recent Opinion on Party Leadership in Legislation should be taken is an open question. For our purposes, the more relevant point is that the position is quite new, and is still just beginning to be absorbed by participants in lawmaking in China.

In this context, we focus on the most prominent consequence of CCP's new position on legislation, namely the amendment of the LL.

III. Legislative History and Main Provisions of the 2015 LL Amendment

1. Pre-2015 status quo

Before the LL amendment, only 49 RLCs had been allowed to make law. What RLCs could do with local statutes or LGRs, however, was subject to relatively few restrictions. Generally, city statutes and LGRs cannot contravene higher sources of law. Moreover, like their provincial counterparts, city statutes were expected to either (1) implement the provisions of national laws by developing "specific provisions according to the actual circumstances of the local jurisdiction", or (2) "address local affairs".³⁵ There was also a specific requirement on city LGRs: they must have some legislative basis in national or provincial statutes; they could not be merely based on provincial-level LGRs or city statutes. These general restrictions are retained in the Amended LL.

³³ *Guanyu Jiaqiang Dang Lingdao Lifa Gongzuo de Yijian* [Opinions regarding Enhancing the Party's Leadership of Legislative Work] (issued as a secret document by the CCP Central Committee in February 2016). This secret document had nonetheless received wide discussion. For a scholarly analysis, see Liu Songshan, "Dang Lingdao Lifa Gongzuo Xuyao Yanjiu Jiejue De Jige Zhongyao Wenti [Several Major Issues Regarding Party's Leadership of Legislative Work to Be Researched and Resolved]," (2017) 5 *Faxue* [Law Science] 3.

³⁴ Li Jianguo, "Nuli Jiang Difang Lifa Gongzuo Tigaodao Yige Xin Shuiping [Strive to Bring the Work on Local Legislation to A New Level]," (2016) 18 *Zhongguo Renda Zazhi* [China People's Congress Magazine] 8, p 9-10.

³⁵ *Ibid.*, Art 64, para 1(1) and (2). Similarly, both provincial and city LGRs were broadly permitted to either (1) implement the provisions of national laws and subnational statutes, or (2) address matters "pertaining to specific administrative and management matters of the administrative region." *Ibid.*, Art 72, para 2(1) and (2).

Notably, under the 2000 LL, local statutes enacted by provinces and RLCs could be employed to regulate matters (1) for which there was no national legal rule and (2) for which the right to legislate had not been reserved to the national government. Subnational LGRs cannot play this gap-filling role: parliamentary supremacy requires that all government regulations have legislative basis.³⁶ As discussed below, this gap-filling role was eliminated for city statutes by the 2015 LL Amendment.

Finally, local statutes enacted by RLCs must, before they can come into force, be filed with and approved by the Standing Committee of the People's Congress in the province in which the RLCs are located. However, this supervisory authority of the provincial congress is limited to the review of the legality of the proposed RLC statute to ensure that it does not contravene higher law.³⁷ There was no similar filing requirement for LGRs adopted in RLCs.

2. Legislative history

a. CCP directive and opposition by NPC officials

The 2015 amendment was the first since the LL's initial enactment in 2000. The proposal to amend the LL was first briefly mentioned in the political declaration issued at the end of the 3rd Plenary Meeting of the CCP's 18th Congress in November 2013.³⁸ As a measure for "advancing the building of a China under the rule of law", the 3rd Plenum Decision stated that "the number of RLCs with legislative power should be gradually increased."³⁹

However, by August 2014, when a draft of the proposed amendment of the LL was submitted to the NPC, the range of cities expected to gain legislative authority became all "cities with districts".⁴⁰ Because all but five prefectural cities in China had districts, this was tantamount to authorizing almost all prefectural cities. And in October 2014, the 4th Plenum Decision confirmed that statutory basis would be provided to grant all "cities with districts" the authority to make law.⁴¹ Thus sometime between November 2013 and August 2014, the initial caution in expanding the sphere of city-level lawmaking was cast aside in favor of broad decentralization.

³⁶ See n 26 above, p 14 ("The principle of 'non-contravention' applies to the relationship between local statutes and their superordinate laws; regulations on the other hand should have basis in superordinate laws").

³⁷ With respect to any proposed city statutes that does contravene higher law, the provincial PC standing committee is authorized to "make a decision for disposition." 2000 LL, n 1 above, Art 72, para 3.

³⁸ *Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti De Jueding [The Decision by CCP Central Committee on Several Major Issues Pertaining to Deepening Reforms]*, adopted 12 November 2013 3 at the 3rd Plenum of the CCP Central Committee's 18th Congress ("3rd Plenum Decision").

³⁹ *Ibid.* Section 9, Art 30.

⁴⁰ *Zhonghua Renmin Gongheguo Lifa Fa Xiuzheng An (Cao'an)* [Amendment of the Legislation Law of People's Republic of China (Draft)]. Drafted in Aug 2014, reviewed at the 10th Session of the Standing Committee of the 12th National People's Congress in Aug 2015. Available at http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2014-08/31/content_1876205.htm.

⁴¹ Note 23 above. The government will "clarify the scope and extent of local legislation and grant, in accordance with the law, local legislative authority to cities with districts."

Decentralizing legislation was generally taken to be the main breakthrough of the LL amendment,⁴² and indeed the *raison d'etre* of the amendment. One key NPC leader characterized the political nature of the amendment process as follows:

“The CCP Central Committee attached great importance to the amendment of the LL... The entire amendment process was led by the CCP Central Committee. The Party Group⁴³ of the NPC Standing Committee twice asked instructions from and reported findings to the CCP Central Committee regarding the main issues of the draft amendment, and consequently revised and improved the draft in accordance with the spirit of the important directives from the Central Committee. [With respect to] the implementation of the important measures of the 3rd and 4th Plenum Decisions, any measure that involved the LL amendment was, without exception, implemented through amending the LL.”⁴⁴

Yet the proposal to decentralize legislation drew a heated debate during a meeting of the NPC Standing Committee in August 2014.⁴⁵ Indeed, by one official news report, among NPC Standing Committee members and NPC delegates, opinions opposing or expressing reservations about the amendment far outnumbered opinions in support of it.

Among supporters, one delegate argued that “significant variance across different regions in terms of their state of reform and social development” implies that “current laws cannot extend to cover the various aspects of social administration. Thus, we need to let each region devise regulations according to its specific circumstances to effectively address problems.” Moreover, “granting legislative authority to local jurisdictions can effectively address the problem of continuity of local policies, counteracting the changes in local governance due to changes in local leadership.”⁴⁶

But opponents made a wide range of counter arguments. One delegate contended that existing provincial legislation largely replicated and reiterated national legislation, and that further legislative decentralization would simply increase such duplication.⁴⁷ He also claimed that lawmaking in China is substantially synonymous with regulatory intervention, and expanding the sphere of subnational legislation carries the risk of encouraging over-regulation. Overall, he asserted that

“[G]ranting legislative authority to cities with districts is not of great necessity. The current legal system has already taken sufficient shape. Legislation is also becoming more elaborate and specific, leaving little room for local legislation. As for the special

⁴² Jiao Hongchang and Ma Xiao, “*Difang Lifaquan Kuorong Yu Guojia Zhili Xiandaihua* [The Expansion of Local Legislative Authority and the Modernisation of State Governance],” (2014) 5 *Zhonggong Zhongyang Dangxiao Xuebao* [Journal of the Party School of the Central Committee of the CPC], 41.

⁴³ Author note: the Party Group (*dangzu*) of a Chinese government institution is a small, core group of Community Party leaders in that institution.

⁴⁴ See n 26 above, p 13. Interestingly, the same congressional leader explained that “this LL amendment is only a partial and not a full-scale amendment: [the idea is] to avoid amending those provisions that need not be changed for the time being”) This incrementalism shows that the LL amendment’s chief purpose was to implement the new CCP policy discussed above in Part II.2.

⁴⁵ Cui Qingxin, Shi Yuchen, Li Zhihui, and Difang Lifaquan “*Shoufang Zhijian* [Amid ‘Waxing and Waning’ of Local Legislative Authority],” *Zhongguo Renda Wang* [China People’s Congress Web], 29 August 2014.

⁴⁶ *Ibid.* (quoting Ms. Gao Mingqin).

⁴⁷ *Ibid.* (quoting Mr. Liu Zhengkui).

needs of a few regions, their respective provincial congressional Standing Committees may legislate on a case-by-case basis.”⁴⁸

The opposition of one NPC Standing Committee member who is also a senior Chinese legal academic was also typical. She claimed that there were legislation “experts” who feared that decentralization would lead to the abuse of power.⁴⁹ She asked: “Can democratic scope and procedure be guaranteed? Will legislative authority become a tool serving the will of officials? Can it meet the requirement of uniformity of the country’s legal system?” According to her, “if the will of officials can be enacted in local legislation, then it may exert some negative influence on the sustainable development of the regions.”⁵⁰

Yet another senior NPC official raised multiple questions, including “If each city follows and enforces its local statutes, then what functions do provincial statutes have left?”⁵¹ Other opposing or cautionary views were reported as coming from NPC Standing Committee members.⁵² Given that in China’s political culture, explicit opposition to CCP directives is normally highly suppressed among Party members and government employees, the actual degree of discomfort felt by opponents of decentralization was likely even greater than conveyed by news reports.⁵³

b. Debate about the scope of city-level lawmaking

The LL Amendment proposed in August 2014 provided that the lawmaking power of cities with districts should be limited to urban construction, urban public space and public hygiene, environment protection and other items of urban management.⁵⁴ Compared to the pre-2015 regime, under which there were no specific subject matter restriction on RLC lawmaking (and especially no subject matter restriction that provincial lawmaking was not also subject to), this newly delineated scope pointed to a major change, and potentially a major curtailment of the lawmaking capacity of the 49 existing RLCs. According to our interviews with senior legislative officials in one province, this restriction reflected the intention of the NPC that the grant of legislative authority would occur within an *ex ante* agreed scheme for the division of legislative labor.⁵⁵

In response, some RLCs and other cities with districts pointed out that the proposed restrictions “are not entirely consistent with the actual practice of local legislation by the RLCs currently. The scope newly delineated is somewhat overly narrow.”⁵⁶ While the NPC’s Law Committee initially seemed to

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* (quoting Ms. Xin Chunying).

⁵⁰ *Ibid.*

⁵¹ *Ibid.* (quoting Mr. Qiao Xiaoyang).

⁵² *Ibid.*

⁵³ This understanding was confirmed by our interview with senior legislative officials in Province X, who admitted that the expansion of city lawmaking was “not the idea of the NPC, but that of the CCP.” Interview with provincial congressional staff members in Province X, and congressional staffers as well as the legislative staff of the mayor’s legislative affairs office in a RLC in the same province (June 2016). For further details about the field interviews, *see* n 82 below.

⁵⁴ Note 40 above.

⁵⁵ Note 53 above.

⁵⁶ *Quanguo Renmin Daibiao Dahui Falü Weiyuanhui Guanyu “Zhonghua Renmin Gongheguo Lifa Fa Xiuzheng’an (Cao’an)” Xiugai Qingkuang De Huibao [The National People’s Congress Law Committee’s Report on the Revision Status of “Amendment of the Legislation Law of the People’s Republic of China (draft)”]*, promulgated by the National People’s Congress Law Committee, 30 December 2014). Available at http://www.npc.gov.cn/npc/lfzt/2014/2014-12/30/content_1892194.htm.

dismiss this concern, the phrasing of the newly restricted scope of city lawmaking underwent further mutations, culminating with the final formulation in March 2015, “matters including the development and management of cities and towns, environmental protection, and the conservation of history and culture”.

c. Limited scholarly commentary

Interestingly, public commentary, including by legal scholars, on the proposed LL amendment prior to March 2015 was very scant. One scholar quoted in an October 2014 news report claimed that one should “absolutely not expect” that all cities with districts would soon be empowered to legislate.⁵⁷ Other scholars were also quoted as expressing either opposing or cautionary views about the benefits of decentralization, similar to those reported as coming from establishment figures in the NPC.⁵⁸ Almost no legal scholar expressed outright support for decentralization. We found only one academic article, published in October 2014, that offered some support for the proposed LL amendment.⁵⁹

The authors first observed that the then-existing restriction of legislative power to RLCs was arbitrary, and reflected the political clout of some Chinese cities under a planned economy. They then raised the question of why legislative power should not be further decentralized, given that the demand for self-governance is “spontaneous”, and not a correlate of administrative classification. Assuming that even lower levels of governments such as counties may have the need to legislate, they argue that granting cities legislative power but not counties unreasonably privileges cities over counties—implying that this could be an unintended political consequence of the CCP’s decision. While these arguments cannot easily be construed as embracing the CCP’s decision to decentralize legislation—the authors do not even invoke the rule of law rhetoric in the 4th Plenum Decision—they are nonetheless consistent with the advocacy for decentralization.

IV. Main provisions of the Amended LL and Initial Implementation

1. Main provisions

The Amended LL provided that all cities with districts have the authority to adopt local statutes and LGRs.⁶⁰ As of 2015, 239 cities with districts did not have the status of RLCs and stood to gain legislative power pursuant to this provision. In addition, the NPC’s Decision to amend the LL also conferred law-making authority on 30 ethnic autonomous prefectures and four cities that did not have districts,⁶¹ leaving out a mere 12 prefectural-level jurisdictions (mostly located in sparsely populated areas of China’s ethnic autonomous regions) from the set of newly empowered jurisdictions.

However, city-level lawmaking became more restricted in scope. Previously, city statutes were permitted for all subject matters on which there was an absence of national legal rules.⁶² Under the Amended LL, such gap-filling city statutes are no longer permitted. Cities’ lawmaking power is

⁵⁷ Peng Bo and Zhang Xiaoyue, “*Difang Lifa: Jiyu Haishi Tiaozhan* [Local Legislation: Opportunity or Challenge],” *Renmin Ribao* [People’s Daily], 22 October 2014, p 17 (quoting Professor Zhu Yuxi from Renmin University).

⁵⁸ *Ibid.* (quoting Professor Jiang Shigong from Peking University). See also Li Wenceng and Chen Lei, “*Zhang Chunsheng Yanzhong De Lifa Fa Xiugai* [Zhang Chunsheng’s View of the Amendment of the Legislation Law],” *Fazhi Ribao-Fazhi Zhoumo* [Legal Weekly/Legal Daily], 10 December 2014.

⁵⁹ Jiao and Ma (n 42 above), p 41.

⁶⁰ Note 1 above, Art 72, para 2.

⁶¹ LL amendment decision, para 46.

⁶² See above text accompanying n 35-36.

authorized only regarding matters specifically designated in Amended LL Art 72(2), namely matters “including city and township development and administration, environmental protection, and historical culture protection”⁶³ and matters on which national legislation explicitly delegates authority. Existing RLC statutes enacted prior to 2015 are grandfathered and may remain effective even if they lie outside the newly delineated scope in Art 72(2).⁶⁴

Art 82 of the Amended LL provides that the PG of cities, like their provincial counterparts, can adopt regulations, each on the basis of national as well as provincial statutes. City governments can enact LGRs only in respect of the same limited range of matters authorized for city statutes in Art 72(2).⁶⁵ Moreover, it is not possible for national statutes to delegate authority to cities to make LGRs. Existing LGRs previously adopted in the 49 RLCs that might fall outside the new restricted scope are also grandfathered.⁶⁶

The newly amended LL also states two general rules for LGRs (provincial and city). First, where a local statute should but has not been enacted, the local PG may first develop regulations “to meet the urgent need for administrative management.” In such cases, if the regulations have been implemented for two years and continued implementation is necessary, the executive branch should request the local congress to adopt local statutes.⁶⁷ This option of enacting interim regulations may seem to give city PGs the capacity to adopt rules even without explicit basis in statutes.⁶⁸ However, the general scope restrictions for city-level lawmaking still remain in force.⁶⁹ Just as importantly, a second new general rule cuts in the other direction: without any basis in national or subnational statutes, no LGR “may set out any requirements that impair the rights or increase the obligations of citizens, legal persons, and other organizations.” Given the rarity of legal rules that do not circumscribe the actions of regulated subjects in any manner, this seems to be a major restriction.

Local statutes enacted by cities and other newly authorized prefectural jurisdictions are subject to the same filing and approval requirements as local statutes previously enacted by RLCs,⁷⁰ and their approval by the relevant provincial PCs was subject to the same legality standard of review.⁷¹ Because most cities did not possess legislative authority before 2015, the amended LL contemplates an initial process through which provincial congresses would gradually approve cities for assuming legislative power. For cities newly authorized to adopt local statutes, their “specific procedures and time for beginning to enact local statutes” were to be determined by the Standing Committee of the provincial congress “after comprehensively considering the population, territorial area, level of economic and social

⁶³ For the interpretation of these ambiguous phrases, *see* below Part V.2.

⁶⁴ Note 1 above, Art 72, para 6.

⁶⁵ *Ibid.*, Art 82, para 3.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* Art 82, para 5; Li (n 26 above), p 14 claims that “if two year expiry date transpires during the review stage, the executive measures may continue to ensure the continuity of executive management.”

⁶⁸ For provincial-level PGs, this provision also seems to allow provincial governments to adopt interim rules to fill gaps in national rules, in contrast to the status quo prior to the LL amendment.

⁶⁹ Note 1 above, Art 72, para 6.

⁷⁰ *Ibid.* Art 72, para 2. The provincial review of the legality of city legislation after 2015 is further discussed below Part V.1.

⁷¹ *Ibid.*, Art 72, para 2-3.

development, legislative demand, legislative capacity, and other factors of the cities with districts.”⁷² Any cities granted the authority to adopt local statutes would also be granted the authority to enact LGRs.⁷³

2. Initial Implementation

By the end of July 2016, among 273 cities and prefectural jurisdictions potentially eligible to make law by the Amended LL, 263 already received actual grant of such power from their provinces.⁷⁴ In other words, few provinces chose to impose a gradual transition to decentralization, despite urgings by legal scholars and establishment figures in the NPC⁷⁵ and what was understood as an aspect of the NPC’s legislative intention.⁷⁶ At least 123 cities and autonomous prefectures had enacted a total of 147 local statutes by July 2016, although 115 among these were procedural statutes governing the making of local statutes.

The issue of legislative capacity attracted a good deal of discussion during and after the LL amendment. Many opponents of decentralization argued both before and after 2015 that cities should not be granted legislative power because they lacked the capacity. If legislative capacity means possessing competent legislative staff, this argument seems perverse: why would a city prohibited from making law invest in lawmaking capacity? Not surprisingly, cities other than RLCs generally had no legislative staff, which, in RLCs, is taken to comprise (1) a Law Committee that is a sub-committee of the congressional Standing Committee, consisting of congressional delegates who can review and vote on legislation, and (2) a Legislative Affairs Commission consisting of bureaucrats managing drafting and the legislative agenda.⁷⁷ After 2015, cities proceeded to assemble such committees and commissions based on existing models.⁷⁸

In the first two years of its implementation, the part of the Amended LL that drew the most discussion was the restrictions on the scope of city lawmaking. The Amended LL’s delineation of the scope of city-level lawmaking was regarded from the outset as very vague. Senior NPC officials have given varying interpretations. For example, the retired head of the NPC Legislative Affairs Commission Li Shishi reports that:

“The scope of [the Art 72(2) language] is relatively broad. Take the ‘development and management of cities and towns’: it includes planning for the city and towns, infrastructure development, municipal management and so on. For ‘environmental protection’, according to the provisions of Environmental Protection Law, the scope includes air, water, seas, land, minerals, forests, grasslands, wetland, wildlife, natural and cultural relics, etc. Judging from the topics covered by the local laws already enacted by the 49 RLCs, they are by and large included in the scope mandated by the draft amendment. Thus, overall, [the Art 72(2) language] can encompass the actual needs of cities with districts.”

⁷² *Ibid.*, Art 72, para 4. These provincial authorizations of city statutory power are in turn to be filed with the NPC Standing Committee and the State Council.

⁷³ *Ibid.*, Art 82, para 4 (The new authority to enact LGRs for cities that did not previously possess such authority must be approved by provincial congresses, which is to be “synchronized” with the approval of the authority to enact local statutes.) As noted above, city local government regulations cannot be based on city local statutes.

⁷⁴ Note 34 above, p 8 (“Cities with districts not yet confirmed are also actively moving forward with the relevant work.”).

⁷⁵ See Peng and Zhang, n 57 above.

⁷⁶ Note 53 above.

⁷⁷ Note 34 above, p 12.

⁷⁸ *Ibid.*, pp 11-12.

The same official made additional statements that seem to encourage a liberal reading of the Art 72(2) language.⁷⁹ Nonetheless, he urged that cities should begin their legislative activities at the core of the permitted scope of lawmaking.⁸⁰ Moreover, he claimed that the Art 72(2) language should be read exclusively—the phrase “including” (*deng*) should not be read as making the list open-ended. Instead of stretching the meaning of the Art 72(2) language by themselves, the official recommends cities to seek out the opinions of provincial and national congressional officials.⁸¹

In the end, the interpretation of the Art 72 language on scope restrictions is likely to depend on politics and institutional logic, just as the application of the principle of gradual transition pronounced in Art 72(6) has turned out to be. Our review of the legislative history points to two preliminary conclusions. First, although on its face, the Amended LL simultaneously expands and limits city-level lawmaking, these two aspects by no means have equal weight: expanding sub-provincial legislation is by far the politically more important decision. The scope restriction on city legislation can be thought of either as a cautionary measure to mitigate any unanticipated consequences, or as the way in which the NPC, having accepted the CCP’s decision to devolve lawmaking power, attempted to demarcate a future division of labor among legislatures at different levels. The political reality, however, is that the CCP national leadership and all provinces seem to favor a quick as opposed to gradual transition.

Second, neither in devising legal measures to counterbalance decentralization, nor in arguments made to oppose or urge caution against it, did members of China’s legislative status quo address the basic rationale for decentralization, namely the CCP’s aspiration to synchronize lawmaking and policymaking to institutionalize the task of governance through the legal system. Few members of the legislative elite acknowledged potential benefits to decentralization, and emphasis was almost uniformly given to its potential harms. This is paradoxical: the legislation professionals seemed more content with the status quo where political leaders simply ignore the use of legislative tools and regard law as irrelevant. It is as though the abuse of law is held to be the primary evil to be avoided, whereas the disuse and neglect of law are simply to be accepted. Preserving the sanctity of law is given much more weight than making law more relevant. Is this a tenable approach to promoting the rule of law?

V. Abuse v. Disuse: The Preference of “Rule of Law Professionals”

A good way to understand the institutions and politics behind the implementation of the Amended LL is through the words of subnational legislators themselves. In June 2016, one of us conducted field interviews in a large Chinese inland province (Province X), meeting with legislative staff teams from the provincial legislature as well as legislative affairs offices in the executive branch at both the provincial and city levels.⁸² Through these interviews, we obtained insights into not only key aspects of the

⁷⁹ See n 75 above, Section 3(2), he stated that “in our opinion, ‘development of cities and towns’ includes not only the development of municipal infrastructure such as local road transportation and municipal networks for water, electricity, gas and heat, but also the development of public facilities such as hospitals, schools and recreational and sports facilities. The management of cities and towns includes not only the management of a municipality’s image and municipal administration, but also the management of and services to local personnel and organizations as well as regulations of administrative management matters.”

⁸⁰ *Ibid.*

⁸¹ See n 34 above.

⁸² The interviews were carried out over a two-day period and organized by the interviewee institutions as formal meetings and thus understood to be formal interviews.

Amended LL's implementation, but also, more importantly, a popular view regarding the role of legislatures in enhancing and protecting the rule of law in contemporary China.

1. Provincial review of proposed city legislation

As city-level legislation must be reviewed by provincial congresses before taking effect,⁸³ the expansion of city lawmaking implies a heavier docket of review work for provincial legislatures.⁸⁴ Such review work is generally handled by the legislative affairs commissions (LAC) of provincial congresses.⁸⁵ Consistently with reports from elsewhere,⁸⁶ the provincial LAC team we interviewed confirmed that previously only four to six city statutes per year needed to be reviewed in their province, whereas the quantity expected after 2015 was significantly greater. While they also confirmed that the provincial congress LAC's budget and staff has been adjusted upwards accordingly,⁸⁷ they argued that provincial review after the LL amendment presented important challenges.

This first seemed to be because, notwithstanding the fact that the provincial standard of review is only legality, provincial LAC staff members regarded the review of city legislation as quite involved. They argued that because of the principle that whoever approves a piece of legislation bears (partial) responsibility for the legislation, provincial legislatures can be held accountable for the city legislation they review. In addition, they claimed that the provincial congress is responsible not only for the legality of city statutes submitted for review, but also for the statutes' "quality".⁸⁸ They observed that once a city statute is adopted by a city's congress and submitted for provincial review, it would be hard to make major revisions. Therefore, the provincial LAC must intervene earlier to provide guidance on statutory drafting.⁸⁹ Consequently, the *ex ante* guidance by the provincial legislative staff to city legislatures would touch not just on the legality, but also (and even primarily) on the substance, of proposed city statutes.⁹⁰

However, this form of provincial intervention in city legislation seems controversial. After all, legislative staff in city congresses are city-level employees, and are presumably agents for city-level principals, eg city congressional leaders, and more importantly, the city's CCP leadership. By contrast, when provincial staff intervenes in city legislative drafting, provincial political principals (eg the governor and Party leadership) are not involved. Such intervention comes from bureaucratically superior, but non-political, technocrats. There is thus weak institutional basis for expecting the preferences of the latter to be respected. At most, the provincial congress can provide a relatively independent check on the legality of city lawmaking. Any more robust form of *ex ante* guidance could be perceived as the intrusion of an unwanted principal.

⁸³ See n 37 and n 73 above, and accompanying texts. Note that city-level regulations are not subject to such review requirements. See below Part V.2, however, which suggests that the rule of law bureaucratic ideology may characterize the view of lawyers in executive branch offices as well.

⁸⁴ See n 45 above (Cui, Shi & Li quoting senior NPC official Qiao Xiaoyang as objecting to legislative decentralization along these lines).

⁸⁵ Guo Jiafa, "Difang Lifa Zhe Liangnian: Shequ de Shi Xingshi Difang Lifaquan Quanmian Tuijin [Local Legislation During Last Two Years: Full Speed Ahead For Cities With Districts To Exercise Local Legislative Authority]," *Zhongguo Renda Wang [China People's Congress Web]*, 5 January 2017, pp 35-38.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* This also is consistent with reports in Guo.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

However, national and provincial congressional officials do evidently regard themselves as important principals for city legislatures. For example, regarding the Art 72 scope restriction on city-level lawmaking, NPC officials repeatedly suggested that city congresses should seek the opinion of provincial congresses in cases of ambiguity.⁹¹ This must have seemed quite natural under the prior *status quo*. Previously, most city congresses did little because of the lack of legislative power.⁹² The fact that they act at the behest of city-level political leaders had little significance. Indeed, city congresses had incentives to highlight their relationship to superior congresses—which did possess legislative power—to maintain their symbolic status under China’s Constitution. Once empowered to legislate, however, city congresses may have less need for such symbolism, and may benefit directly from assisting the work of their local principals. As agents of city-level principals, they would presumably want to interpret the Art 72 scope restriction as favorably for the latter as possible, and would have little incentive to seek superior congressional input if that is against their principals’ interests.⁹³

Provincial review of the legality of city legislation, therefore, pits cities against vested interests that decentralization threatens.⁹⁴ We do not suggest that this is the only reason why provincial congressional officials may view the review of city legislation as a burden. A second challenge identified by these officials is that city congresses may not only lack legislative experience—which is not surprising and for which city congresses themselves can hardly be blamed, having previously been denied the possibility of such experience—but city congressional employees may also lack legal education and “legal consciousness”.⁹⁵ Some argued that for the legislative staff to perform their task properly, it is not enough to have a sufficiently large team, but the staff members must also be of “high caliber.” They must possess “good conscience,” as “only just persons can adopt just law”.⁹⁶

These arguments express a conception of what legislators ought to do that is even more controversial than the view that provincial congresses should exercise robust supervision over city congresses. We turn to this conception now.

2. Lawmaking as checking executive discretion?

Many individuals we interviewed expressed the view that one of their key aims in preparing and reviewing proposed legislation is to check executive discretion. Interestingly, this view is not exclusive to congressional staff but also held by lawyers from executive branch offices. From this perspective, a basic challenge for city legislation is whether city legislatures can live up to an ideal of providing an *independent check on executive authority*.

When asked what constitutes good law—a question provoked by skeptical comments on whether cities can make “good-quality” law in the short term—some congressional staffers interviewed answered that “the most important trait of good law is that it protects the rights of citizens, constrains the power of

⁹¹ See n 81 above and accompanying text.

⁹² Manion (n 19 above)..

⁹³ Some Chinese scholars argue that because provincial review of the legality of city legislation always occurs before the city legislation takes effect, it is unlikely to curb all *ultra vires* city legislation, since many instances of illegality may not be obvious and may be detectable only during the implementation of legislation. See Jiao and Ma (n 42 above), p 42. However, at least in theory, superior congresses in China have the capacity to conduct *ex post* review of the legality of legislation by lower congresses, at the petition of individual citizens or the urging of courts.

⁹⁴ The erosion of vested interests held by provincial congresses also manifests in other ways, eg the proliferation of city legislation may be felt to undermine the importance of provincial legislation.

⁹⁵ Interview, provincial LAC staff members in Province X.

⁹⁶ *Ibid*.

the government, and displays the right understanding of the proper scope of rights and powers.”⁹⁷ They claimed that much proposed legislation was “very problematic” in light of this criterion: the proposed rules tended to excessively favor “the interest of government agencies,” to display “local protectionism”, to involve the abuse of coercive powers such as the imposition of penalties and seizures, and “were filled with the wills of Party committees and the government.”⁹⁸ Overall, legislative proposals tended to emphasize “the interest of the state instead of the interest of citizens”, lack “independence” and “the spirit of laws”, and zealously “impose on citizens”.⁹⁹ Consequently, legislative staff must spend “most of the time correcting” these bad features of proposals, leading to a strong fear that “local law can only be the tools of local officials”.¹⁰⁰ All these candid assessments support a conservative approach to city lawmaking: it was better not to enact law than to enact bad law.¹⁰¹

Some of these critical assessments are also shared by staffers from a mayor’s legislative affairs office that we interviewed (from a city that was one of the 49 RLCs). They confirm that the mayor’s legislative agenda is composed mainly of requests from specialized city agencies. While some agencies request legislation out of genuine needs, others display interest mainly “in capturing privileges”, and not necessarily in matters falling within their regulatory scopes. Generally, observing the rule of law was “difficult in every step,” and thus promoting the rule of law in the enforcement of law was the key concern of their office.¹⁰² In general, these lawyers tended to take a conservative view of their work: they mainly carried out the detailed implementation of superior legislation, rather than filling gaps left by such legislation.¹⁰³ A senior staffer even demurred at our suggestion that his role was to act as the lawyer of the government!¹⁰⁴

This remarkable “less law is better” view, coming from bureaucrats charged with running the city and provincial lawmaking processes, seem to express these professionals’ deep alienation from their work. The implied narrative is that, privately, many of them may subscribe to an “ideal of the rule of law”, yet the reality of Chinese government operations and legislation forces them to surrender such ideals.¹⁰⁵ In such circumstances, it seems natural that some would prefer marginalization to compromise: it is better for there to be no law than for official abuse to be carried out in the name of law.

But it is also difficult to assess how well-justified, and how well-articulated, such feelings of alienation are. Even some of the congressional staffers we interviewed admitted that it is “only normal” for proposed legislation to show evidence of interest group influence: otherwise there would be no need for congressional review and deliberation.¹⁰⁶ One interviewee observed “a perfect, conflict-free legislative system is only imaginary; that some legislation displays poor quality is normal and inevitable, the key is to make timely corrections.”¹⁰⁷ At least for provincial legislatures, the sense of alienation may also come

⁹⁷ Interview with staff from a mayor’s legislative affairs office in a RLC of Province X (Jun 2016).

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* One congressional interviewee even suggested that it was too easy for congressional staff to take a “holier-than-thou attitude” towards the executive branch: “People who really act on their beliefs are few; for most, ‘ideals’ must yield to interests, and the prevailing attitude is: ‘When not pertaining to oneself, let others hang out to dry.’”

¹⁰⁶ Note 97 above.

¹⁰⁷ *Ibid.* The interviewee also reasonably observed that “it should be surprising that many cities not previously authorized to make law are unable to show a high level of preparedness at the beginning—the technical expertise will come sooner or later. In truth, provincial legislatures do not display the same level of quality and expertise as

from entirely different sources. For one, provincial congressional delegates, being far more removed from their constituencies than city and county level congressional delegates,¹⁰⁸ may provide little input into the legislative process.¹⁰⁹ For another, because provincial legislation is generally implemented by lower levels of government, it is natural for provincial legislative staff to “not to know what happens after...the transient bustle and ceremony of legislation.”¹¹⁰

Most importantly, however, the fear of the abuse of law ought to be weighed against the disuse of law. As discussed earlier, the level of RLC legislation prior to 2015 was low, especially compared to the informal policy directives issued by the same government entities.¹¹¹ One senior member of the city legislative affairs office we interviewed pointed out that “leaders need to seize opportunities for legislation, they must be forward looking.”¹¹² But the reality is that the quantity of legislation is not a metric by which any politician’s performance is measured, and the turnover of city political leaders is high.¹¹³ Thus for political leaders to pay any attention to legislation was “as much as one could ask for.”¹¹⁴ However, few of the legislative personnel we interviewed dwelt on such disuse of the lawmaking process, even though the lawlessness resulting from the disuse of law (and the extent of personal discretion thus condoned) seems just as antithetical to the rule of law as the abuse of the coercive apparatus of the state.

In summary, the implicit conception of the legislative process among the civil servants we interviewed was one in which the wanton wills of the executive branch are—or ought to be—tamed into the good order of law. Such good order should display a high degree of consistency, “unity”,¹¹⁵ and respect for citizens’ rights. This ideal legal order defines the goal of legislation, and lies at the core of the identity of the legislature (and of formal lawmaking in general). The legislature should not simply follow the executive branch’s or even the CCP’s instructions, the way parliamentary members follow their party leaders in parliamentary democracies. Legislatures are not political principals, either, both because they cannot plausibly claim greater affinity to the CCP than the mayor’s or governor’s offices, and because they do not derive legitimacy from truly democratic elections. Instead, the legislature (and executive branch entities in charge of formal rulemaking) should be independent and *stand above the political process*, and represent the principle of the rule of law and thereby the rights of the people. In this regard, parliaments are perhaps similar to courts or other purportedly independent and neutral tribunals. Whether the legislative process is used at all, by contrast, has no bearing on the assessment of whether legislatures promote the rule of law. In this sense, legislative specialists are rule of law professionals: unlike lawyers accountable to their (political) clients, legislative specialists are accountable to an ideal.

This conception of the lawmaking as taming executive discretion is consistent with the concerns fueling the opposition to the LL amendment. It is significantly disjointed, however, from the justifications

the NPC, due to differences in the political nature, human resources of and technical support received by different legislative bodies.”

¹⁰⁸ Manion (n 19 above), pp 96-96, 121-122

¹⁰⁹ Note 97 above.

¹¹⁰ *Ibid.*

¹¹¹ *See* above, Part 3.c.

¹¹² Note 97 above.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Throughout the debate about decentralizing legislation that has taken place in China since 2013, there was a persistent trope in public and scholarly discussion, that the “unity of law” would be disrupted if there are too many bodies that can make law for the country. *See* Cui, Shi and Li citing Qiao Xiaoyang, (n 45 above); Li (n 26 above). This trope was also often repeated in the interviews we engaged in. It nonetheless remains rather abstract, however, especially since the laws made by a particular city are most likely not relevant to individuals elsewhere.

for decentralizing legislation that the CCP has advanced since 2013. Indeed, to anyone holding the moralistic conception of legislation (as representing the moral superiority of a legal order), the CCP's suggestion that the Party should take control of the legislative process may even seem alarming.¹¹⁶

We can think of two possible explanations for this striking disjunction. One is that those whom we interviewed, while being quite candid about the government's tendency to abuse executive power, were still reticent about an even more sensitive matter: namely, they may reasonably lack confidence that the CCP would make greater commitments to the rule of law by making law more relevant. With or without reflection, they may simply not expect local political leaders to take greater interest in legislative agendas, or to commit to the principle of no policy change without legislation (or formal rulemaking). Their prediction may be that, as in the past, political leaders would resort to legislation only when the mobilization of the coercive apparatus of the state is desired. If such expectations are correct, their role, as always, would be to check such impulses to legislate.

A second possibility is that we have simply spoken to a group of interviewees who are poorly situated to assess the LL amendment's likely impact. For one, we did not interview officials from cities that newly gained legislative power. More importantly, we interviewed only the agents—the gatekeepers in the legislative affairs offices and commissions—and not the principals, eg city mayors, Party secretaries, congressional political leaders, or city regulators in substantive areas. These latter parties may be truly excited about the new grant of legislative power and may primarily perceive its benefits, but their views on legislation are simply less accessible than traditional legislative offices.

Conclusion: The Future of City Legislation and Implications for Understanding “Authoritarian Rule of Law”

In any case, China's legislative professionals are unlikely to determine the fate of legislative decentralization. This is already abundantly clear from the CCP's swift decision (in 2013-2014) to grant all “cities with districts” lawmaking power, and from the equally rapid authorization provinces across the country gave to cities in 2016. What is of paramount importance, instead, is whether Chinese city politicians and bureaucrats will seize opportunities arising from their newly-granted legislative power. The outcomes of legislative decentralization will be a function of the politicians and the political processes themselves.

How the Amended LL might systematically change political incentives and processes is not yet known. The signal sent by the CCP senior leadership through the LL amendment was clear but weak. It was clear, because it seemed precisely to identify the tension between the centralization of legislative power and the reality of decentralized governance, as well as the inconsistency between the disuse of formal lawmaking and the rule of law. But the signal was also weak. While amending the LL took a couple of years, in some ways it involved not much more than the stroke of a pen: the CCP handily ignored the opposition and incomprehension of NPC officials and legal scholars. What has been created is only the legal *possibility* of coordination of reform and legislation, not the reality of such coordination.

So far, we have little clue as to the probability that the positive potentials of legislative decentralization will be realized in the foreseeable future. Among the legislative officials we interviewed, a few are indeed optimistic. One interviewee argued that legislation is the most vital function of

¹¹⁶ Many legislative professionals and scholars on legislation in China thus prefer to read the declared intention of the CCP to control legislation as a promise to offer greater political backing for efforts to check executive discretion.

congressional bodies, and city congresses without legislative power were essentially “zombies”. The grant of legislative power thus provided the most meaningful incentive for these congresses.¹¹⁷ But the same interviewee also admitted that such optimism was not based on past experience, but instead was founded on a faith that the Amended LL has brought about a break from the past. In his view, the extents to which cities will make good use of their legislative power will be quite heterogeneous, and depend largely on the skills and preferences of individual politicians.¹¹⁸

Chinese scholars and professionals specializing on the legislative process have tended to make forecasts about city legislation based on experiences of provincial legislation. Studies of RLC legislation are fewer, and afford few predictions. And at least relative to some expectations, the level of lawmaking by RLCs has been anemic. However, there is at least one important way in which the performance of RLCs may under-predict the lawmaking performance of cities post-2015. RLCs were relatively unique in their legislative privilege: on average there were fewer than two RLCs in each Chinese province, and most provinces had only one. This means that the force of sub-provincial competition was mostly absent. There is now a good body of social scientific evidence that city governments within Chinese provinces do compete with one another on taxation, infrastructure investments, and other policy matters. There is thus some reason to expect that not only better knowledge of local demand, but also intra-provincial competition for mobile capital and for political promotion, may trigger greater levels of city-level lawmaking.

The credibility of the CCP for promoting the rule of law is low, and realism would in any case temper hopes for the best outcomes. However, there are also obvious, substantial reasons to be skeptical about the opposing vision, that constraining the executive ought to be the main function of legislative institutions under authoritarianism. As China’s own experience in the past decades shows, the codification of citizens’ rights in written law, and the avoidance of excessive grants of discretion to the executive branch through legislation, are themselves of limited utility in curbing the worst executive abuses. If the state is intent on oppression, it can simply ignore whatever legal and moral norms against it and disregard what written legal rules say. Conversely, if the state views arbitrary coercion and oppression as unacceptable, a few constitutional provisions and laws of criminal procedure and of property should be sufficient to spell out such norms; there should be no reason for legislators to view their *main task* in *all* legislation as propounding such norms.

Moreover, it is simply implausible to hold that the ideal legislative process is apolitical. In contemporary democratic polities (where civic and political rights are largely secured), the idea of apolitical legislative processes seems an oxymoron. It is a good question how, without democratic elections, legislative politics in authoritarian regimes can deliver socially desirable outcomes. But it is also far from clear that legal specialists, informed not by policy preferences but only a preference for unity and consistency among legal rules, can substantially improve the rationality of government policies. Indeed, aside from the protection of citizens’ rights, many of the legislative specialists’ ideals about a good (ie conflict-free) legal order arguably have no intrinsic moral appeal.

It is possible that the vision of China’s legislative officials that has fueled their resistance to legislative decentralization is mainly the product of past political marginalization—of the political irrelevance of legislation. Emphasizing the unity and consistency of law justifies the existence of legislative offices that are neglected by political principals and that lack their own policy agenda. And emphasizing the protection of citizen’s rights creates a façade of moral superiority for an institution that is

¹¹⁷ Note 97 above.

¹¹⁸ *Ibid.*

powerless in offering such protection.¹¹⁹ In other words, the rule of law discourse in an authoritarian regime may be shaped by the institutions that sustain such discourse. Proposals to change such institutions—eg making legislation politically relevant—may not be compatible with the discourse that the existing institutional configurations have created, eg one that sees the task of law as mainly constraining government, as opposed to facilitating governance.

¹¹⁹ Moreover, these two roots of the traditional rule of law discourse in China are distinct. Legislative processes and institutions may be politically irrelevant not because of the CCP's disregard for citizens' rights, but simply as a result of features in the design of legislative institutions (eg over-centralization) or the method of political competition.