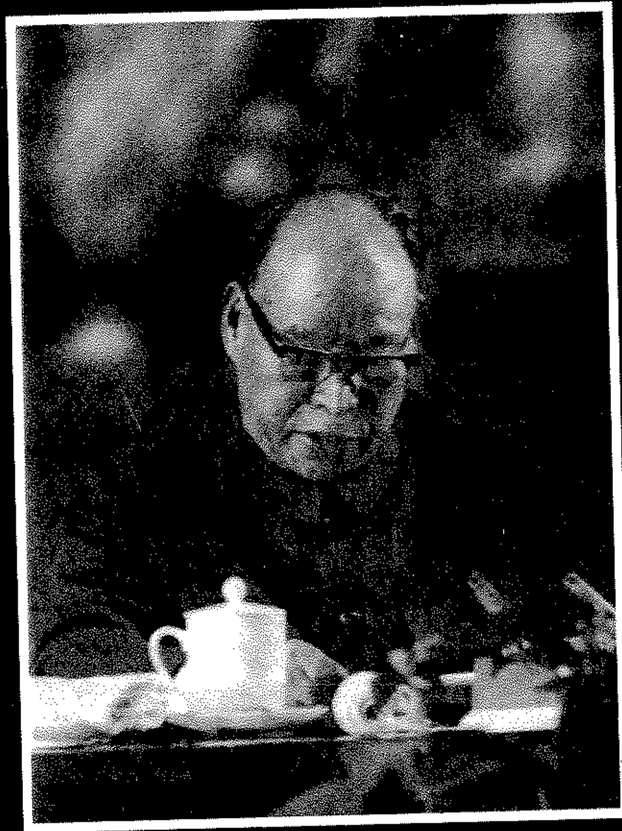
ON CONTEMPORARY CHINA

THE POLITICS OF LAWMAKING IN CHINA

Institutions, Processes, and Democratic Prospects



MURRAY SCOT TANNER

CLARENDON PRESS OXFORD

This book has been printed digitally and produced in a standard specification in order to ensure its continuing availability

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide in

Oxford New York

Auckland Bangkok Buenos Aires Cape Town Chennai Dar es Salaam Delhi Hong Kong Istanbul Karachi Kolkata Kuala Lumpur Madrid Melbourne Mexico City Mumbai Nairobi São Paulo Shanghai Singapore Taipei Tokyo Toronto

with an associated company in Berlin

Oxford is a registered trade mark of Oxford University Press in the UK and in certain other countries

Published in the United States by Oxford University Press Inc., New York

© Murray Scot Tanner 1999

The moral rights of the author have been asserted

Database right Oxford University Press (maker)

Reprinted 2002

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission in writing of Oxford University Press, or as expressly permitted by law, or under terms agreed with the appropriate reprographics rights organization. Enquiries concerning reproduction outside the scope of the above should be sent to the Rights Department, Oxford University Press, at the address above

You must not circulate this book in any other binding or cover and you must impose this same condition on any acquirer

ISBN 0-19-829339-9

1

Introduction: The New Importance of Lawmaking Politics in China

A Chinese Puzzle: The Surprising Difficulty of 'Rubber Stamping' a Law

In December 1978 Deng Xiaoping, in his pivotal address to the Communist Party Central Committee meeting that set the course for China's reform movement, called for the government to draft a law on factories that would help reform China's chronically money-losing state-owned enterprises. Armed with Deng's public endorsement, a senior Party economic planner in charge of enterprises set straight to work drafting the law and hammering out a consensus policy among the government ministries, unions, Party officials and legislators concerned with the project. Finally the bill that China's top leader called for was passed into law—*ten years later*.

In March 1989 Communist Party General Secretary Zhao Ziyang addressed a briefing session for key delegates to the annual meeting of China's legislature, the National People's Congress. Zhao told the attendees, all of whom were loyal Party members, that the top leadership wanted that year's meeting to show unity and obedience to Central directives. But when the piece of legislation most important to Zhao came up for discussion and vote (a bill designed to give the south-eastern Special Economic Zone of Shenzhen greater freedom to enact experimental laws promoting economic reform), there was terrific debate and resentment among the delegates. Led primarily by legislators and officials from Guangdong province (where Shenzhen is located), over 40% of the delegates present either voted 'no' or abstained on the resolution, which then limped embarrassingly to passage.

In autumn 1997 Jiang Zemin, Zhao's successor as Party General Secretary, anxious to secure his position after paramount leader Deng Xiaoping's death, skilfully manoeuvred to remove his chief rival Qiao Shi from the organizational positions that made him a threat. Over the past decade Qiao had occupied several of the cornerstone posts in China's Leninist power hierarchy, including head of Party organization and personnel, overseer of Party discipline, and chief of internal security and intelligence. But even the most cynical, tough-minded China watchers in the Hong Kong press corps acknowledged that in many ways, what made Qiao Shi

LIBRARY OF DAVIDSON COLLEGE

most threatening to Jiang Zemin's authority was that for five years Qiao had been 'the man who wields the "rubber stamp"'—Chairman of the Standing Committee of the National People's Congress.

As the popular saying goes, 'Something is *very wrong* with this picture.'

Until very recently, discussions of lawmaking and the legislature in China were regularly greeted by scholars, journalists and policy makers with tough questions such as 'why should we care how laws are made in China?' Few could be convinced that law, lawmaking politics and legislatures matter in single-party authoritarian systems such as China. And surely more than one reader who opened this book had to overcome some justifiable scepticism before doing so. Because even though the politics of the lawmaking process have been a staple of the study of American, British, or even Japanese politics for well over a quarter of a century, much of what we know (or *think* that we know) about China and other Marxist-Leninist or one-party systems suggests law, lawmaking, and legislatures are not important research topics. For years many leading textbooks on China only visited these topics briefly, as part of a scholarly 'duty dance' description of the government's formal constitutional authority structure. They would state that according to the Constitution the National People's Congress (NPC) was China's 'highest organ of state authority'. Almost invariably, however, these texts would then make a flat, dismissive concluding assertion that lawmaking institutions and processes are little more than a showpiece, and are irrelevant to the realities of Chinese power politics. Even today many news reports still refer to the NPC as 'China's rubber-stamp parliament' (indeed, scholars in the field have come to regard it as a minor victory when such reports refer to the Congress as 'China's *historically* rubber-stamp parliament').[1] As recently as ten years ago a book such as this one on Chinese lawmaking politics might have caught the eye of a scholar of Asian law, but for most political scientists it would have held scant interest, since their principal fascination is the study of power.

So where is the proof that something important in China has quietly changed, and lawmaking and the legislature now merit the attention of students of power? As the three examples cited above illustrate, nothing justifies a study of 'how a bill becomes a law' in Beijing quite so well as the fact that from the early 1980s, the Chinese lawmaking system simply began behaving in ways that were radically at odds with the earlier models, images and assumptions. Under pressure at home and abroad to develop a legal

1. Many of the dominant undergraduate textbooks on China still have relatively brief discussions of either the NPC or lawmaking: Townsend and Womack (1986), 100–1. Pye (1984) 178, 328–9 and Pye (1991), 180–1; Saich (1981) 120–2; Domes (1985) ch. 6; and Dreyer (1993) 111–13, and ch. 8. For some recent texts with relatively sophisticated discussions of the NPC and lawmaking, see Ogden (1992), 184, 236–7; Lieberthal (1995), 162, 223, 319–20; and Wang (1992), 111–16.

system, Chinese began drafting many policy documents on major issues that had historically been issued as administrative regulations of the State Council (China's cabinet) or as Communist Party 'Central Committee Documents' (called *zhongfa*), in the form of 'laws' which were also submitted to the scrutiny of the NPC. Now, quite routinely, when such laws come before the NPC or its Standing Committee, even though they already bear the endorsement 'in principle' of the highest Party ofices, they are subjected to extended, repeated subcommittee review and serious floor debate. Most surprisingly, it is now quite common for the NPC and its Standing Committee to seriously delay, amend, table or return bills to their drafters and insist upon major changes. In recent years the NPC has from time to time voted down proposed State Council amendments to their own draft laws, and some NPC sources even report two cases of the NPC Standing Committee voting down Party-approved draft laws, although these actions have not yet been publicized. Gone forever, it would seem, are the days before 1979 when the NPC would hear a brief summary of a bill, move to an immediate vote and then invariably pass it unanimously.

Yet, as fascinating, new and counterintuitive as some of this behaviour is, there is very little explanation for it within either the general literature on comparative politics or in the specific literature on Chinese policy-making. Mostly, this is because of some complementary shortcomings in these two literatures. The comparative politics literature on legislatures has tended to ignore the overall process of lawmaking, while the Chinese politics literature on policy-making processes has tended to overlook the growing importance of law as a form of policy and the emergence of the NPC as a policy-making institution.

The many fine studies of legislatures in developing countries, that for decades were steeped in the relativist theories of structural-functionalism, often looked past such questions of policy-process and power. With regard to the developing world, there really was not a process-oriented literature on 'comparative lawmaking politics,' but rather a structural-functional literature on 'comparative legislatures'. These legislative studies rarely examined the entire political process of how a law was drafted, inquiring what role the legislature played as one of several lawmaking institutions. And faced with the often grim reality of legislative irrelevance or repression, there was frequently good reason for this omission. Instead, these studies tended to focus on legislatures more or less in isolation as institutional structures that served a variety of other political functions. The overwhelming verdict of such scholarship was that lawmaking is a top-down process dominated by actors and institutions elsewhere in the system, such as the ruling Party or the executive branch.[2] Developing country legislatures play little or no significant role as policy makers, or even as

2. I will later refer to this view as the 'Command model' of lawmaking. See Chapter 2.

important adjunct arenas of political warfare.[3] Consequently the principal aim of much of the comparative legislatures literature was often to explicate the most significant *non*-policy-making functions of legislatures, such as political socialization, elite recruitment, or national integration.[4] By contrast, the new importance of China's lawmaking politics and the NPC's increasingly assertive role in the process provide an unusual opportunity to trace how a legislature in a one-party authoritarian system can emerge from irrelevance and gradually come to play a significant role in genuinely important policy-making activities.

Sinologists, on the other hand, have over the past two decades produced an enormous array of studies that are filling in the still-sketchy picture of Chinese policy-making processes. But to this point these studies have largely neglected one of the fastest growing bodies of 'policy' in the system: law. And with a few rare exceptions, most notably Kevin O'Brien's major study *Reform Without Liberalization*, China scholars have overlooked the growing influence of the National People's Congress. These are important omissions. Ever since the 1978 Third Plenum of the Eleventh Chinese Communist Party (CCP) Central Committee called for more rapid development of 'socialist democracy' and rule by law, lawmaking has become an increasingly large, important and contentious part of policy-making. Examples abound. When former Premier Zhao Ziyang and other radical economic reformers wanted to light a fire under non-performing state enterprises, one of the key vehicles was the 1986 Enterprise Bankruptcy

3. G. R. Boynton and Chong Lim Kim, in summarizing the results of a series of studies on legislatures in developing countries, divide potential legislative functions into three categories: 'goal-setting' (drafting, amending or changing laws); 'structuring political content'; and 'integrating political systems'. They find that legislatures play the greatest role in integrating systems. With respect to the lawmaking role of legislatures, they note succinctly, 'If one wants to find their [legislature's] significance in these political systems, one must look elsewhere'. Boynton and Kim (1975), 18. Another study of legislatures in developing countries notes they 'often appear to have only an insignificant role in the making of public policy'. See Kim, Barkan, Turan and Jewell (1984), 5–6. Similarly, Nelson and White's (1982, 1) important comparative study of legislatures in communist states notes that 'there . . . still are strong indications that legislatures in communist states do not "legislate" in the ordinary sense of that word. Where they come closest to doing so, in Yugoslavia and Poland, their activites appear to have an impact only at the periphery of "rule-making".'

4. The structural functional orientations of this literature are reflected in the institutional research designs of such studies, most of which focus solely on the roles or functions of the legislature as an institution, rather than examining the process of 'lawmaking' as an aspect of 'policy-making'. It is the present study's contention that one of the best methods for gaining a more precise and realistic understanding of any legislature's true role and influence in a political system is to examine the entire process of lawmaking, examining not only the role of the legislature, but also the roles of all the other institutions involved in that process. On the 'integrative' and other non-policy-making functions of legislatures in developing and one-party states, see the following: Boynton and Kim (1975); Loewenberg and Patterson (1979); Patterson (1978); Smith amd Musolf (1979). On communist systems in particular, see Nelson and White (1982); and on China, O'Brien (1987 and 1990). For a dissenting view that argues that the true importance of the legislature can only be assessed by looking at its lawmaking/policy-making roles, see Sisson and Snowiss (1979).

Law, and the most prominent point of opposition was the NPC. After the 1989 Tiananmen massacre, orthodox Leninists in the state bureaucracy, frightened by the Democracy Movement, responded in part by delaying passage of one law which they feared would loosen social control (the Press Law) and ramming through a more restrictive version of another which they hoped would tighten control (the Public Demonstrations Law).[5] In late 1992, when Beijing wanted to head off increasing pressure from the United States Congress to expand intellectual property protection for foreign businesses, the result was a major revision to the Patent Law.

Consequently, when the NPC Standing Committee in 1986 tabled, delayed, amended and ultimately gutted the State Council's highly touted Bankruptcy Law, that act should have caused Western analysts to reconsider many conceptions of the policy-making process and of the roles lawmaking bodies play in that process. Western scholars' new interest in Chinese law and lawmaking did spawn a few excellent case studies of individual laws; and O'Brien's pathbreaking work greatly expanded our knowledge of the NPC's numerous evolving institutional roles. But important issues remained unaddressed by each of these bodies of literature. Studies of Chinese policy-making have still tended to ignore lawmaking.[6] The available case studies of individual laws revealed much about debates over their content, but little about the relative power of the leaders and institutions in the drafting process.[7] And so, despite the acknowledged importance of the topic and the rich and expanding separate literatures on Chinese *law* and Chinese *policy-making* processes, there is still no comprehensive English-language study of the Chinese lawmaking system and process.[8] Multi-functional studies of the NPC, which did not analyse in detail its lawmaking interactions with the Party's Central offices and the State Council, necessarily tended to be more general on the crucial question of whether the NPC really had significant influence over policy content, or was still just ratifying decisions made elsewhere in the system.

This book takes a very different approach to these questions of lawmaking and the lawmaking institutions. It looks at the entire lawmaking process and assesses the power of the full array of actors and institutions involved in the various stages of that process, including the Party Centre,

5. Judy Polumbaum has provided excellent case studies of both of these laws. See Polumbaum (1991 and 1994).

6. Among the most influential such studies have been Lieberthal and Oksenberg (1988), Lampton (1987), Hamrin (1990), Lieberthal and Lampton (1992) and Fewsmith (1994). An early exception is Solinger (1982).

7. See, for example, Klein (1987) and Chang Ta-Kuang (1987).

8. Regarding China's post-Mao legal reforms in general, see Edwards (1984), Leng and Chiu (1985), Baum (1986), Feinerman (1989), Dicks (1989), Feinerman (1991), Alford (1993), Potter (1993), Keith (1994), Lubman (1995), Clarke (1995), Alford (1995) and Tanner (1995). For an excellent regularly updated bibliographic of recent English-language studies on Chinese law, see Johnson (1990 and subsequent editions available from the Library).

LIBRARY OF DAVIDSON COLLEGE

the NPC and the State Council and its ministries. This focus on the process and the various institutions involved in it not only reveals more about lawmaking in China, it also provides a unique base of evidence for understanding and evaluating how much real influence the NPC has relative to other institutions in making law. By studying the historical development and policy roles of the three key sets of institutions involved in lawmaking, and then examining specific case studies of how these institutions work (or fight) together to draft laws, this book attempts to sketch out the evolving power relations in the system. With respect to the NPC, this approach sacrifices an understanding of many of its non-policy-making functions, but in return reveals much more clearly and concretely the sources and limitations of its emerging influence over policy.

But of course the importance of the NPC's growing power in lawmaking goes far beyond what it can tell us about how policies are hammered out in Beijing. A study of lawmaking in China is not just another study of the policy-making process, because in a one-party authoritarian system, 'law' is not just any policy and the legislature is not just any policy-making institution. An understanding of lawmaking and the legislature is essential in order to assess the prospects that China, or any other state, can make a transition from Leninism to a political system that is more open, consultative, and ultimately, perhaps, democratic. This book begins and ends with some considerations about what impact the growth of China's lawmaking system, and especially the growing influence of the NPC, might have on China's prospects for initiating a genuine democratic transition.

When Leninist systems begin drafting more key policies in the form of laws to be considered by the legislature, something most of them began doing during their 'post-totalitarian' phases, these legal transitions often have important institutional consequences. The shift away from policy-making by Party edict to increasing 'rule by law' means the Party-state's rules for social behaviour are clearer and more predictable, and may even herald the beginnings of a contractual state–society relationship. At very least it marks the decline of relatively random unpredictable terror as the Party-state offers society an agreement that says that if citizens do not engage in certain clearly proscribed activities or challenge the Party-state's core values, they may expect that the Party-state will not attempt to punish or sanction them.[9] At early stages, this is merely an agreement to 'rule by law', rather than the liberal constitutionalist notion of 'rule of law', in which law defines a series of actions the state may not take, even though it might otherwise possess the raw power necessary to do so. The dramatic history of the last decade, however, suggests that the process is very difficult to freeze at this early stage. Very gradually, the Leninist Party-state may

9. The classics in this genre are Dallin and Breslauer (1970); Moore (1954); Lowenthal (1970); and Baum (1986).

recognize that in order to lure low-cost, voluntary mass compliance with its policies, it must increasingly submit to being voluntarily bound by its own legal rules, and must consult a broader array of social interests in making those rules. This process is most apparent in the economic sector, where foreign and domestic entrepreneurs can insist on an increasingly predictable, well-defined economic and legal environment or otherwise withdraw their investments. Leninist states are unlikely to succeed in erecting such an economic-legal infrastructure unless they consult these newly important economic actors and provide them with institutional avenues by which they can influence the drafting of laws.

Even though the top Party leadership's commitment to 'rule by law' in such systems is usually uneven at best, the growth of new lawmaking organs, especially the rise of the legislature, often has powerful unintended institutional implications. The Party leadership almost invariably tries to keep tightly unified control over lawmaking. But as Chapter 2 argues, this requires the Party leadership to prevent its own internal factional, personal, bureaucratic and policy-based disagreements from spilling over into the more open and accessible state lawmaking institutions such as the legislature. Legal and economic reforms in Leninist systems are inherently highly conflictual processes, and these conflicts cannot help finding their way into all the policy-making arenas in which these reforms are considered. Even though leadership posts in the legislature are initially restricted to 'reliable' Party-state officials, central control over lawmaking usually tends to fray and dissipate as various cleavages within the Party find new and more public institutional expression in the legislature.

History also demonstrates that this opening of the legislative process need not await the collapse of one-party rule and the establishment of a relatively fully developed civil society. Legislatures often become politically powerful long before either their societies or policy-making systems become more fully democratic.[10] The Soviet, Polish and Hungarian legislative reforms of 1988–90 dramatically demonstrate that a significant expansion in the power, assertiveness and corporate identity of the legislature can still take place even though the key officials in these institutions are still Party members nominally subject to increasingly abstract notions of 'Party discipline'.

Of course only a political Pollyanna would assume that the rise of lawmaking and the decentralization of policy-making power will inexorably lead to a transition towards a more consultative or democratic system. In bureaucratically-established authoritarian systems, temporary cycles of

10. For the U.S. and Europe, this point is made in Palmer (1959) and Shepsle (1988). On the former USSR and Eastern Europe, see especially the works of Hahn (1989, 1990 and 1996); also White (1992), Sabbat-Swidlicka (1990a, 1990b, 1991a, 1991b), de Weydenthal (1991), Rahr and Pomeranz, (1991) Gwertzman and Kaufman (1990), Steele (1994), and Lijphart and Waisman (1996).

LIBRARY OF DAVIDSON COLLEGE

policy-making decentralization which end in a reassertion and recentralization of regime power are quite common. For changes in policy process to translate into system transition, they must first become institutionalized, settled and resistant to change. Secondly, they must link up with other system-changing processes in the broader society, such as the emergence of politically active, influential civil society groups. The rise of law, lawmaking and the legislature are key parts of the picture, but they are only parts.

Key Research Questions and the Layout of the Book

This book focuses on two major sets of questions. The first, 'what are the politics of the lawmaking process in post-Mao China?' occupies the central chapters of the book, which examine China's national-level law-making institutions and processes. Chapter 2 critically analyses the assumptions, images and models which until now have guided Western sinologists' thinking about lawmaking and the NPC. The chapter compares and evaluates four competing models of the process drawn from Western political science literature. The 'Command model' and the 'Leadership Struggle model' have dominated discussions of lawmaking to this point. This study argues that the system now much more closely resembles the politics of an 'Organizational Politics model' and the unfortunately-named but perceptive 'Garbage Can model'. Chapters 3 to 6 focus on the historical development, policy-making roles and power sources of China's major lawmaking institutions—the Party Central apparatus, the National People's Congress (including its Standing Committee, permanent bureaucracy, and subcommittees), and the State Council (including its ministries). There are two key unifying themes in these chapters. The first concerns the erosion of centralized Communist Party control over lawmaking, and the corresponding rise of strong, competing legislative bureaucracies within the State Council, its ministries, and the NPC. The second theme is that as a result of this erosion and fragmentation of centralized control, each of these three systems should be seen as a separate lawmaking 'arena' characterized by a different constellation of powers and interests. Chapters 7 and 8 illustrate the changing politics of lawmaking using two quite highly detailed case studies of major recent Chinese laws—the 1986 Enterprise Bankruptcy Law and the 1988 State-Owned Industrial Enterprises Law.[11]

11. It is important to note that these case studies do not examine the true 'final' stage of the process: the politics of actually implementing the draft law. Instead, I have traced the laws' progress only through the stage of 'explicating' the law: that is, drafting a set of 'implementing regulations' or some similar interpretive document. Such explication, though important, represents only the beginning of the process of translating a law into a set of more precise bureaucratic instructions that can be implemented by lower levels. The reasons for not tracing the implementation of these laws are largely practical, since a proper study of how laws are implemented would involve extensive further interviewing, much of it at the local level, and

These case studies devote a great deal of attention to documenting and explaining, as reliably as possible, how the content of each law changed during the process, and the actual influence that various actors and processes had on the content. For the scholarly observer, such changes are the most reliable and verifiable indicators of real influence in the policy-making process. This requires a good deal of rather tedious comparison of multiple drafts of each law (which, fortuitously, are available for both cases). Whatever the stylistic shortcomings of such comparisons, they allow us to speak more precisely of the real political influence of such political actors as top Party leaders, State Council ministries and the NPC. Chapter 9 summarizes the lessons of the institutional chapters and case studies, and sketches out the different ways in which each of China's lawmaking institutions are influential in the various 'stages' of the lawmaking process.

The second major set of questions shifts the focus from policy process to the institutional politics of system transition. Chapters 2 and 10 ask what impact the rise of China's post-Mao lawmaking institutions, in particular the evolving Party–NPC relationship, is having upon China's prospects for a transition to a system that is more consultative, open and perhaps ultimately democratic. The theoretical transition between policy-making questions and system transition issues turns out to be a surprisingly difficult one because overwhelmingly the models of policy-making which have been employed to analyse China and other communist states have not been used to generate forecasts about a post-communist system transition. But the institutional evolution of the lawmaking system is creating pressure for significant further decentralization of power and is opening up windows for new public 'constituencies' to get involved in policy-making. Since there is no evidence that the Party leaders who designed this system intended it to create such pressures for transition, I argue that the emergence of the legislative system may be pushing China towards an 'inadvertent transition'. The nature and limitations of these pressures towards an 'inadvertent transition' are introduced in the latter half of Chapter 2 and discussed again in greater detail in Chapter 10.

would also make two already lengthy case studies unmanageably long. Still, this research design decision is an important flaw, since recent studies increasingly stress that the process of policy implementation frequently involves protracted battles that often change the content of a policy, or undermine it altogether (see Lampton, 1987). Hence, although there are perfectly defensible practical reasons for omitting this stage of the process, the reader should be aware that an important part of the story of these laws is being omitted.

LIBRARY OF DAVIDSON COLLEGE