

The Erosion of Party Control over Lawmaking

This chapter focuses on the structure and evolution of Communist Party control over lawmaking institutions and the lawmaking process in post-Mao China. In particular, it charts the erosion and decentralization of that control which has accompanied the rise of lawmaking since 1978. The unity of Party control over lawmaking has frayed and dissipated dramatically in these years, as more and more important policy issues are resolved outside the arena of the Party's Central decision-making organs (the Politburo, the Secretariat and so on). The decentralization of Party control, in turn, has been matched by a corresponding increase in the institutional power, autonomy and assertiveness of more permeable policy-making arenas, most notably the legislature, but also including the State Council lawmaking offices.

Efforts to institutionalize the decentralization of Party control over lawmaking reached a milestone in early 1991 with the promulgation of a major confidential Party document, Central Committee Document Number 8 [1991]. Central Document 8 represents the first time the Communist Party has ever attempted to define in writing the respective lawmaking roles of the Party Centre, the NPC and the State Council. Central Document 8, which was intriguingly and rather deceptively entitled 'Several Opinions of the Central Committee on Strengthening Leadership over Lawmaking Work', delimits Central Party lawmaking authority.¹ It also grants the leadership of the Chinese legislature greater operational autonomy than it has ever enjoyed before.

Despite a recent explosion in Western studies of both law and the policy-making process in China, Western scholars still know very little about the 'commanding heights' of the system, the Party's role in lawmaking and the nature of its leadership over the legislature. Many key questions about Party leadership over lawmaking remain unanswered. By what organizational means is Party leadership maintained? How unified and complete is this Party leadership? Does Party leadership mean centralized, highly detailed control over the content of lawmaking, or is it

time? All these process-related questions lead back to the key question of system transition: has the decentralization of Party leadership over lawmaking during the 1980s opened a window sufficiently large that China's legislature might some day begin to play as assertive a role in any prospective 'transitional China' as its Russian and Polish counterparts played during their societies' transitions?

The purpose of this chapter is to give at least partial answers to these important questions by examining the key Communist Party institutions involved in lawmaking, and their evolving structures and roles since 1978. The chapter begins by discussing the origins of decentralized Party control over lawmaking since 1978. Next, it examines in some detail the organization of Party control over lawmaking and the legislature, and discusses the erosion of that organizational control over the last nineteen years. This section ends with a discussion of the contents of Central Document Number 8 and an assessment of its significance. In conclusion, the chapter addresses the issue of how firmly established these changes have become, and briefly discusses the impact of lawmaking decentralization on China's prospects for a transition towards a more open, consultative system.

Forces for Decentralizing Party Control Over Lawmaking

There are several forces or processes which have contributed to the decentralization of Party control over lawmaking in China. Some reflect the Party leadership's desire for a new policy-making system after Mao's death. The institutions established to carry out this new system, in turn, developed a life of their own as a result of factional infighting and bureaucratic empire-building.

First, in the immediate post-Mao years, the Party's top leadership recognized that the Cultural Revolution had forced an unmanageably large number of policy decisions into its own hands.² Institutionalized Party and state decision-making authority at all levels of the system had been destroyed. Policy-making had degenerated into factional struggles for the blessing of a deified, aging and unpredictable Chairman, with purge or even death being the stakes of losing. In this tense and stalemated policy environment, leaders throughout the system, quite rationally, kicked any remotely controversial issue up to higher levels for decision, ultimately reaching the level of the Premier, the Politburo or the Chairman himself. This period correlates with the dissolution of the legislature and other state lawmaking organs, and an almost complete end to the use of law as a

2. Deng Xiaoping's clearest discussion of the evils of overcentralized decision-making power is 'On the Reform of the System of Party and State Leadership', in Deng Xiaoping (1984), 302-26.

policy-making vehicle. As Lieberthal has meticulously documented, the Party was instead forced to rely excessively upon its most authoritative policy documents, the Politburo-approved Central Documents (*zhongfa*), for even highly routine and specific decisions.³

Secondly, the scars left by this period renewed the desire among both Party leaders and society to create an institutionalized, stable, predictable system of rule by law (*fazhi*) and socialist democracy (*shehuizhuyi minzhu*); a goal first evinced in the post-revolutionary years of the mid-1950s. This desire initially focused on two areas: the build-up of the people's congress system and the predictable, codified administration of criminal law. While a certain cynicism must attend any post-Tiananmen discussion of CCP commitment to law, one nevertheless senses a genuine yearning for more legal stability, predictability and consultativeness in the early post-Mao speeches of veteran Chinese leaders such as Peng Zhen, himself a victim of Red Guard lawlessness. As late as 1986 Peng, the architect of China's new lawmaking system, still mentioned 'a personal understanding of the Cultural Revolution' prominently when listing those personal attributes which he felt best qualified senior Party leaders to serve in the National People's Congress and help build China's legal system.⁴

Thirdly, Deng Xiaoping and many of his fellow economic reformers probably valued an open legislature more instrumentally—as a vehicle to forge consensus behind economic reform—than intrinsically, as a proper way to make policy. The establishment of an increasingly open and consultative legislature with the power to criticize state bureaucrats who resisted reform or committed malfeasance would be a powerful institutional impetus for sustaining and accelerating economic reform. It seems clear that Deng, at least, did not especially desire that the legislature become a very wide-open, autonomous lawmaking institution. His speeches after 1978 invariably stressed that his goal in strengthening the legislature was not the creation of an American-style tripartite system of checks and balances.⁵ Nevertheless, Deng did enjoy periodically using the legislature to attack his factional opponents and light a fire under recalcitrant bureaucrats. This occurred in 1979 when the NPC became the focal point for the attack upon the leaders of the so-called 'Petroleum Faction'

3. Lieberthal (1976).

4. See Potter, (1986), 21–50; see also Peng Zhen, 'Jiaqiang Minzhu yu Fazhi Jianshe, Jiaqiang Renda Changweihui Gongzuo' ('Strengthen Construction of Democracy and the Legal System. Strengthen the Work of the NPC Standing Committee'), speech at an NPC Standing Committee delegates work meeting, 27 June 1986, in Peng Zhen (1989), 324–31. See also Deng Xiaoping's December 1978 Third Plenum address, 'Emancipate the Mind, Seek Truth from Facts, and Unite as One in Looking to the Future', in Deng Xiaoping (1984), especially 157–8.

5. 'In political reforms, we can affirm one thing: we have to insist on implementing the system of the National People's Congress and not the American system of the separation of three powers.' Deng's speech to the military commanders in Beijing, 9 June 1989. *Beijing Review* 10–16 July 1989, 18–21.

who dominated the state planning apparatus and resisted Deng's more market-oriented reforms.⁶

Fourthly, since Mao's death, the lawmaking system has benefited from a strong strain of thinking within the Chinese leadership which held that policy choices could be made more correctly and 'scientifically' (*kexue*) by making the system more open and consultative. In conceiving 'democracy', numerous CCP and other modern Chinese leaders have overlooked the existence of irreducible conflicts of interest in society. Instead, they take it on faith that an open, wide-ranging and well-intentioned debate of different policy proposals can overcome differences of interest, and universal consensus can eventually emerge upon a single 'correct' policy, which all people may be educated to embrace and support.⁷ In using such terms, the CCP leaders often seem to regard the goal of policy-making 'rationality' as far more serious and attainable than Western social scientists have for several decades. Lawmaking and the legislature are key parts of this process, by which the Party can stay in touch with the people and avoid policy mistakes.

Wan Li, who succeeded Peng Zhen as Chairman of the NPC Standing Committee (from 1988 to 1993), has probably been the Party's most persistent and outspoken advocate for strengthening the legislature in order to make Party-led policy-making more scientific. In a major speech on political structural reform in 1986, Wan called for much greater tolerance of divergent policy advice and an end to the persecution of well-intentioned policy specialists whose views were rejected in policy debates.⁸ In the wake of the 1989 Democracy Movement and the Tiananmen Massacre, Wan Li forcefully argued that the roots of the movement lay in the Party's increasing distance from the populace, and that such errors could only be avoided in the future if the Party would heed the voice of the NPC.⁹ Chinese legal sources confirm that in arguing this last point, Wan Li was engaged in a public debate with Party General Secretary Jiang Zemin over the proper relationship between the Party and the NPC, a point explored later in this chapter.

Inevitably, these various ideological arguments for decentralizing power within the lawmaking system have been reinforced and accelerated by leadership, factional and bureaucratic interests. Party leaders such as Peng Zhen, Wan Li, Chen Pixian, Peng Chong, Qiao Shi, Tian Jiyun and Wang Hanbin, all of whom have been tasked with serving in the legislature, have pushed hard to strengthen China's lawmaking organizations, even though they are men of hugely varied ideological views. Doubtless they

6. See, for example, Solinger, (1982), 1238-75; also Lieberthal and Oksenberg (1988), 252-4.

7. For an excellent discussion of this assumption that all interests can be made compatible through the democratic process, see Nathan (1985), especially 45-66.

8. See Wan Li, (1986), translated in Foreign Broadcast Information Service, *China: Daily Report* (hereafter FBIS-CHI), 19 August 1986, K-22.

9. Wan Li (1990).

did this, at least in part, to strengthen their own power bases. But the strengthening of these organizations is not all cynical power manipulation, and my own interviewing strongly suggests that the Party's legislative leaders have by and large come to value an increasingly open and consultative policy-making process for its own sake.¹⁰ Consequently, as a matter of course, they have greatly strengthened the NPC and other law-making units as bureaucracies, increasing their manpower, budgets, staff offices and other bureaucratic resources. The result since 1978 has been a dramatic shift in the location of day-to-day control and influence over lawmaking away from the Party's Central offices into the offices of the State Council and the NPC permanent bureaucracy. This organizational transformation constitutes, in my view, the most important force for institutionalizing the decentralization of lawmaking power in China, for it allows this decentralization to sink deep roots in the Chinese tradition of bureaucratic power and better guards it against any possible efforts to recentralize.

In reforming this policy-making process to make it more compatible with other reforms, Party leaders face several dilemmas. In a nutshell, the Party needs to strike a balance between maintaining the most important of Deng's Four Cardinal Principles—Communist Party leadership over society—and promoting a level of policy-making decentralization which is necessary to rationalize the process, undermine reform opponents and defuse some of the inevitable disagreements in the reform process. There has been tremendous disagreement among political, academic and legal-sector leaders over the proper balance between these goals. In addition, groups both inside and outside the legislative system, particularly those, such as the official trade unions and other mass organizations, who feel their interests have not received sufficient protection, have exerted pressure to expand access to the system.¹¹

*The (Dis-) Organization of Party Control Over Lawmaking:
Key CCP Organs in the Lawmaking Process*

The key CCP organizations involved in lawmaking are: the Politburo (and its Standing Committee), and the various 'leading groups' directly under the Politburo;¹² the Party's Central Secretariat, which is responsible for much policy planning work; and the various departments under the

10. This was especially stressed by interview 26-17-13-33/TWS, Beijing, 1992.

11. This was stressed by a high-ranking trade union legal scholar, and is discussed in depth in the two case studies in Chapters 7 and 8. Interview 27-22-13-33/TSE, Beijing, 1989 and 1992.

12. These leading groups (*lingdao xiaozu*), divided up by issue-area, are usually chaired by the Politburo member holding the appropriate policy portfolio, and bring together leading policy specialists in that issue area.

Secretariat (such as the Organization, Propaganda and United Front Work Departments). Nearly all Western studies on the Chinese lawmaking system have attributed great power to the Central Political-Legal Leading Group.¹³ But all the Chinese sources consulted for this project suggest that this group's power over lawmaking has been greatly exaggerated in the past, and has in any case declined markedly since 1978. Party leadership over lawmaking takes four dominant organizational forms: organizational penetration of the NPC leadership and control over key NPC appointments through the NPC Party Group system and the *nomenklatura* system; control over meeting agendas, as well as heavy influence (but not complete control) over the general tone of legislative debate; organizational oversight of legal drafting, some of which was previously performed by the Central Political-Legal Leading Group; and Politburo and Secretariat pre-approval of draft laws to be promulgated by the NPC.

This system of Party control, while indeed impressive in comparative perspective, is nevertheless not nearly so unified or organized as it once was, nor as Western scholars have often conceived it to be. Party control over NPC agendas and meetings has not prevented a secular increase in the acrimoniousness of NPC debate and the number of 'no' votes and abstentions. Control through the *nomenklatura* system is watered down through post-Mao unofficial norms of NPC delegate selection which allocate seats to representatives of virtually every notable bureaucratic, regional and sectoral interest. In legislative review, the Party Centre's influence is often vague and ill-defined, and has eroded significantly since 1978. Most importantly, on several key post-Mao legislative issues, the leadership voice from the Party Centre has not been sufficiently unified or potent to inoculate the legislature effectively against the contagious effects of intra-Party disagreement. As a result, the legislature and other state and government organs have more leeway to assert themselves in lawmaking, and play a more influential, though less well defined, role.

The Party's Nomenklatura System

Central Party control over NPC Standing Committee appointments is the basic system for preventing Standing Committee delegates from threatening the core values of the regime.¹⁴ The *nomenklatura* list of NPC appoint-

13. The organization's title has changed twice since 1978. Until 1979 it was called the Central Political-Legal Group (*Zhongyang Zhengfa Xiaozu*); that name was changed to the Central Political-Legal Commission (*Zhongyang Zhenfga Weiyuanhui*) in late 1979. In 1988, the name changed again to the Central Political-Legal Leading Group (*Zhongyang Zhengfa Lingdao Xiaozu*).

14. This section relies in particular on interviews 11-19-13-33/OKE, Beijing, 1989; 11-19-13-33/ADH, Beijing 1989 and 1992; and 26-17-13-33/TWS, Beijing, 1992.

ments which must be approved by the Party Centre includes all members of the NPC Standing Committee Party Group (*dangzu*), plus all the approximately 125 members of the NPC Standing Committee, as well as the top officials of all the special committees under the Standing Committee.¹⁵ The final list of candidates for the Standing Committee must be approved by the Politburo. In 1988 the Politburo, in an unprecedented effort to give NPC delegates a greater choice in voting, approved 144 possible candidates for the 135 posts on the Seventh NPC Standing Committee. It did not, however, approve multiple candidates for the twenty top Standing Committee posts, the members of the agenda-setting Committee Chairmen's Group, from whose Party members the Standing Committee Party Group is formed.¹⁶

Yet it remains an open question how much control the *nomenklatura* system provides the Party. In a much-publicized case in 1989, Standing Committee Member Hu Jiwei was expelled from the Standing Committee for his democracy movement activities, most notably circulating a petition among other Standing Committee members which called for an emergency NPC meeting which could have repealed Prime Minister Li Peng's martial law order. After 4 June, the Standing Committee forced Sichuan (Hu's home delegation) to recall Hu from the legislature. Although procedural proprieties were strictly observed, Hu Jiwei's expulsion dramatically underscores the Party leadership's willingness to use the *nomenklatura* system to suppress truly heterodox thinking by NPC delegates. Yet, at the same time, Hu's case is also a reminder that in times of rapid political change or crisis, not even the *nomenklatura* system is a foolproof way of preventing potential political radicals from entering the Standing Committee. Most importantly, the system certainly cannot prevent once-disciplined Party member delegates from becoming radicalized once they have already been elected to the Standing Committee.

Moreover, in non-crisis situations, Central approval of Standing Committee members by no means guarantees that NPC and Standing Committee delegates hold uniform opinions on substantive policy issues, or even that they will always comply with Central suggestions on how to vote on a given issue. On the contrary, during the 1980s, the Party Centre seems to have established an unofficial norm in delegate selection which favours choosing delegates representing a broad spectrum of factional, organizational, geographical and social interests. Certain groups and mass organizations—such as women, national minorities, trade unions, as well as

15. According to 1984 and 1990 Central Committee *nomenklatura* lists obtained by John P. Burns, the Central Committee's control extends no lower than the NPC Standing Committee and its chief staff officers. *Nomenklatura* control over the nearly 3,000 regular NPC delegates is unclear, but is probably worked out in consultation between the Centre and the provincial Party committees and the PLA, since the delegates are formally elected to the National Congress at the provincial/army level. See Burns (1989), 122, 123; also Burns (1994).

16. Beijing Xinhua English (BXE), 1 April 1988 in FBIS-CHI, 1 April 1988, 11.

virtually every ministry of the State Council and every provincial level unit—are *de facto* guaranteed at least one place on the Standing Committee. On the NPC Special Committees, which were established under the Sixth, Seventh, Eighth and Ninth NPC Standing Committees, the norm is to choose at least one committee member from each of the State Council ministries and mass organizations which regularly deal with that policy issue-area. In interviews, members of some of these constituencies, such as the trade unions, admit that they feel under-represented within the State Council and Party hierarchies. Consequently, these groups take their NPC Standing Committee and Special Committee positions very seriously, attempting to make the most of them politically to lobby for group interests.¹⁷ Their activism and assertiveness has the effect of further diluting any centralized Party control over the legislature.

The NPC Party Groups

The system of Party Groups (*dangzu*) within the NPC is the principal reporting conduit connecting the NPC leadership to the Party Centre. Laws and motions under consideration by the NPC Standing Committee which require Party approval are reported through the Committee Chairmen's Group to the Standing Committee Party Group (which, since at least 1988, has comprised essentially all the CCP members on the Committee Chairmen's Group) to the Party Secretariat. Although in theory these Party Groups are supposed to centralize the Party's organizational leadership within the NPC, in reality they have at times compounded organizational overlap within the legislative bureaucracy. One internal history of the CCP's organization work indicates that during the first decade after 1978, the Party Centre established at least three different Party Groups within the NPC Standing Committee bureaucracy.¹⁸ Interview sources report that these three Party Groups lacked any clear lines of subordination, and tended to exacerbate organizational divisions among the staffs of the NPC General Office, the Legislative Affairs Commission and the Special Committees.¹⁹ The three Party Groups were:

- (1) *The NPC Standing Committee Party Group*. This group has historically been chaired by the current Chairman of the NPC Standing Committee, usually with assistance from the NPC Secretary-General. Hence, from 1981 until (probably) July 1983 it was led by Ye Jianying. Ye was

17. Interview 27-22-13-33/TSE, Beijing, 1992.

18. This information is taken from CCP Central Organization Department Research Office (comp.), *Dang de Zuzhi Gongzuo Dashiji, 1978-1988 (A Chronology of Major Events in the Party's Organizational Work, 1978-1988)* (Beijing: Beijing Daxue Chubanshe, 1990).

19. Interviews 26-17-13-33/TWS, and 15-21-31-33/AEDH, Beijing, 1992.

succeeded by Peng Zhen, who chaired the Group until April 1988. Wan Li chaired the Group until March 1993, with Secretary-General Peng Chong as his deputy.

- (2) *The NPC Standing Committee Organs Party Group.* This group oversaw the permanent bureaucracy under the NPC General Office. It was led from August 1981 to July 1983 by Yang Shangkun, and from 1983 until its abolition in April 1988 by NPC Secretary-General Wang Hanbin.
- (3) *The NPC Standing Committee Legislative Affairs Work Committee Party Group.* (The Party history indicates the existence of this Party Group, but not its leadership).

In July 1987, after chairing a nine-month investigation of how to improve the NPC permanent bureaucracy, Standing Committee Vice-Chairman Peng Chong presented a major report which called for strong measures to end bureaucratic overlap and unify the work of the General Office, the Legislative Affairs Commission and the special committees.²⁰ As a result, during the April 1988 transition to the Seventh NPC, the new NPC leadership centralized and streamlined the NPC's Party Group structure. The Party Groups in the Legislative Affairs Work Committee and the Standing Committee Work Organs were abolished. They were replaced by a more powerful Standing Committee Party Group, chaired by Wan Li, whose membership included all the Standing Committee Vice-Chairmen who were Party members, plus NPC Deputy Secretary General Cao Zhi.²¹ The membership of the Eighth NPC Standing Committee Party Group was apparently not reported publicly. But if the past system is followed, the Group Chairman was almost certainly Standing Committee Chairman Qiao Shi, with Secretary General Tian Jiyun as Vice-Chairman, and including all the Party member Vice-Chairpersons and the Secretary General, plus perhaps one or more of the Deputy Secretaries General.²²

Preparatory Meetings of Party Member NPC Delegates

In addition to the Party Groups, which are permanent organizations, the CCP leadership convenes a meeting of all NPC delegates who are Party members before each annual NPC plenary session. Since at least 1983, the

20. Peng Chong, (1987).

21. CCP Organization Department, *Chronology of Party Organization work, 1978-1988*, 267. The Party Group members were Wan Li, Xi Zhongxun, Peng Chong, Ye Fei, Liao Hansheng, Ni Zhifu, Chen Muhua, Wang Hanbin and Cao Zhi.

22. Among the Chairman, Vice-Chairpersons and Secretary General of the Eighth NPC Standing Committee, the CCP members, who presumably comprised the Party Group, were: Chairman Qiao Shi, Vice-Chairpersons Tian Jiyun, Wang Hanbin, Ni Zhifu, Chen Muhua, Qin Jiwei, Li Ximing, Lu Jiayi, Bu He, Tomur Dawamat and Gan Ku, and Secretary General Cao Zhi.

quinquennial first session of a new National People's Congress has also been preceded by a full Central Committee Plenum which has approved the NPC agenda and personnel arrangements. Similar Party member meetings are held before at least some of the several Standing Committee meetings which are held each year. At these meetings, the Party General Secretary or other senior Party leaders are delegated to represent the Centre and discuss the NPC sessions's agenda, as well as the Centre's 'suggestions' and 'hopes' (*jianyi, xiwang*) for the forthcoming session. The leadership also suggests the tone the meeting should take: how open the debate should be, how much press coverage is planned and so on.²³ In March 1989, for example, Zhao Ziyang indicated to the NPC Party Members Group that the Centre wanted the Second Session of the Seventh NPC to adopt a more restrained tone than the wide-open March 1988 First Session.²⁴ Available sources indicate that Jiang Zemin made similar pleas for 'unity' and respect for Party leadership before the NPC meetings in 1990 and 1993.²⁵

But a close look at these preparatory meetings underscores the most significant change in Party control over lawmaking since the mid-1980s: the great erosion of Party discipline among NPC delegates. Although the Centre still expresses its preference concerning the passage of a law, if a given Party-member NPC delegate absolutely opposes a law, he or she is now far more likely to abstain or even vote against the law without any clear expectation of suffering punishment as a result.²⁶ As Chapter 5 shows, moderate levels of dissenting votes are now quite common, far more common than the once ubiquitous unanimous votes. And dissenting votes occasionally reach high, even decisive levels, notwithstanding the Party Centre's prior approval 'in principle' of the draft legislation. Official press sources have reported that in 1990 the Standing Committee voted down a draft amendment to the Law on Organizing Village Committees. The amendment was formally put to a vote, but gained support from only sixty-five delegates—less than a quorum—and thus failed to pass.²⁷ Legal specialists who advise the NPC have reported even more dramatic levels of

23. Interviews 11-19-13-33/ADH, and 11-19-13-33/OKE, Beijing, 1989.

24. 'Speak No Evil. The Party Puts a Lid on Criticism', *The Far Eastern Economic Review*, 30 March 1989, 11.

25. A summary of Jiang's speech to the 1993 NPC Party members meeting was published in *Wen Hui Bao* (Hong Kong), 15 March 1993, 2, in FBIS-CHI, 15 March 1993, 13-15. Jiang's speech to the March 1990 session was issued as 'Guanyu Jianchi he Wanshan Renmin Daibiao Dahui Zhidu'.

26. This change in norms was noted by several interviewees, but most stressed by interest 26-17-13-33/TWS, Beijing, 1992.

27. At the March 1989 Second Session of the Seventh NPC, for example, 274 delegates vote 'no' and 805 abstained on Zhao Ziyang's proposal to grant the Shenzhen Special Economic Zone (SEZ) special legislative autonomy from Guangdong province, defying a strong request by Party leaders that they pass the measure. The increased tendency for NPC delegates to cast 'no' votes is discussed in greater detail in Chapter 5. For an interesting discussion of the 1988 vote and other examples of the new opposition in the NPC, see Zhang Sutang and He Ping (1993).

dissent, including two instances when the Standing Committee has actually submitted draft laws to a vote and then voted them down (again, see Chapter 5).

Even assuming these two reported negative votes are correct, there are still obvious, major limits to the delegates' autonomy and assertiveness. The actual voting down of legislation is still very rare, and, in fact, reported dissenting vote totals have exceeded the critical 40% level on fewer than five occasions. On the other hand, these numerical measures of formal legislative votes may not fully reflect the amount of dissent and therefore the degree of erosion of Party discipline. Most unpopular draft laws never make it to a formal vote. Instead, several mid-rank NPC sources have indicated to me that the preferred practice whenever a draft law appears destined for defeat or an embarrassingly narrow passage is for the NPC leadership to withhold the draft from a vote and negotiate revisions with the organization which drafted it.²⁸ In addition, until the issuance of Central Document 8 [1991] on lawmaking, Party discipline did not permit the NPC to adopt any law which had not already been approved by the Centre. But these norms are still evolving away from tight Party control, and it is important to note that the post-Tiananmen persecution of Hu Jiwei and others has not stalled or set back this trend. Abstention and 'no' vote totals after 1989 quickly returned to and surpassed pre-Tiananmen levels, and the clear secular trend is that the willingness of Party-member NPC delegates to obey suggestions from the Party Centre has declined greatly since 1979.

Oversight of Lawmaking and the Party's Political-Legal (Zhengfa) System

In a striking contrast to Western notions of the separation of judicial, legislative and administrative functions, the Chinese Communist Party has a single 'political-legal system' (*zhengfa xitong*)²⁹ which subsumes not only lawmaking work but also the courts, prosecutors, police, intelligence-counterintelligence, prison/labour reform, civil affairs (such as fire-fighting, disaster relief) and many social affairs functions within one administrative system. At the top of this organizational system in Beijing is the Central Political-Legal Leading Group (*Zhongyang Zhengfa Lingdao*

28. Interviews 27-22-13-11-17/BNH; 27-13/15-16-32/BC; and 26-17-13-33/TWS. Beijing 1992.

29. English translations of the term *zhengfa* often reflect the problems Chinese and Westerners have in communicating the breadth of the concept. The official Chinese translation of 'political science and law' is an almost humorously benign translation for any organization which includes the secret police. 'Administration and Law' might be closer to the mark, but is still too vague. I will use the more standard translation 'Political-Legal'.

Xiao zu). Cadres who specialize in 'political-legal work' may, at various times in their career, shift back and forth between several or all of these tasks which may seem, to Westerners, widely disparate. Hence, in a deliciously ironic bureaucratic custom, many of the top leaders who have guided the development of the NPC, China's chief organ of socialist democracy, have spent the bulk of their careers in police and intelligence work.

In the past, many career political-legal cadres have been imbued with a conservative 'bureaucratic' view of law: a belief that while law should play a key role in ruling a modern Chinese state, it should principally be a tool of state control over citizens, not a weapon to protect individual political and economic liberties from arbitrary encroachment by the state.³⁰ While this represented a clear step forward from the legal nihilist view put forward during the Cultural Revolution, it is at odds with the legal relationship of state and society required for a transition to a market-oriented economy and a more liberal political system.³¹ During the post-Mao era, however, this bureaucratic view of law has gradually been eroding within the NPC system.

*The Central Political-Legal Leading Group:
Organizational History and Evolving Role*

In part because of this organizational connection between the legislature and the political-legal sector, Western analysts of Chinese lawmaking have long assumed that the Central Political-Legal Leading Group (CPLG), holds a unified leading role in lawmaking. This assumption remains a cornerstone of the traditional 'top-down' image of lawmaking in China, as has the notion that the CPLG and its leaders are the key sources of legislative proposals in the system. This controlling image of the CPLG is understandable. It has long been led by the CCP's 'tough guys' and 'enforcers'; the powerful, often brutal men who were responsible for protecting the Party from its enemies and imposing order in China's diverse society.³²

There is, in fact, some evidence that in the very earliest days of the reform era, the CPLG under the leadership of Deputy Director Zhao Cangbi did play a much more comprehensive role in formulating Party legal policy, including legislative work. The CPLG convened a major meeting on legal work in October 1978 at which Group member Tao Xijin, who had headed Zhou Enlai's Legislation Bureau during the CCP's legal heydays of the 1950s, gave a major speech on laws which needed to be drafted.³³ Lacking detailed, reliable studies of the CPLG's role since that

30. Baum (1986). 31. See Paltiel, (1989).

32. Among the public security 'enforcers' who have previously served on the CPLG are Luo Ruiqing, Li Kenong, Peng Zhen, Kang Sheng, Xie Fuzhi, Peng Chong, Liu Fuzhi, and, more recently, Qiao Shi, Wang Fang and Tao Siju.

33. The meeting was reported in *Renmin Ribao*, 29 October 1978, 1-2; see also BXDS, 29 October 1978 in FBIS-CHI, 1 November 1978, 2. See also Foster (1982) for an analysis.

time, however, the assertion that it was and still is the key organization in the lawmaking process has always rested largely on presumption.

Whatever the CPLG's role may have been in the late 1970s, a variety of Chinese government, legislative and academic sources all independently confirm that its role in lawmaking has declined steadily since 1979, and is now almost negligible outside its narrow bailiwick of criminal law.³⁴ For a time during the mid-1980s, one source reports that liaison between the CPLG and legislative organs was maintained through former Leading Group Deputy Secretary General Gu Linfang, once a personal bodyguard to former NPC Secretary General Peng Chong. But Gu Linfang's lack of formal legal training limited the influence he could exercise over the details of legislative drafting. The CPLG's role, according to these sources, is also limited by its relatively small staff (none of the major legal scholars interviewed for this project, for instance, could think of any former student of theirs who now worked for the CPLG), and its general orientation toward police and social control issues. The expanding roles of the NPC Standing Committee staff and the State Council Legislation Bureau have largely obviated the need for direct CPLG involvement in lawmaking. By the late 1980s, it primarily concerned itself with resolving bureaucratic and personnel disputes between the major ministries and committees within its system (the Ministries of Public Security, Justice, Civil Affairs and Supervision, plus the Supreme People's Court and Supreme People's Procuratorate). As of the late 1980s, the CPLG's system did include the NPC Legislative Affairs Committee, according to one source, but their relationship did not concern lawmaking work and the CPLG system did not include the other NPC units.³⁵

Former Party Chief and Premier Zhao Ziyang tried on at least two separate occasions to further diminish the role of the CPLG in the legal system, and weaken the influence of political conservatives on lawmaking. In 1984, Zhao established a Legislative Co-ordinating Group (*Lifa Xietiao Xiaozu*) directly under the Premier's office, and gave it the task of developing long-term legislative plans and resolving major bureaucratic disagreements between ministries. The Group was also dominated by proponents of relatively radical economic reform.³⁶

Zhao's second attack came in the wake of the October 1987 Thirteenth Party Congress, when he tried to abolish the CPLG (at that time called a 'Committee' (*weiyuanhui*) altogether.³⁷ Gu Linfang was relieved of his

34. Interviews 11-19-13-33/OHK; 11-19-13-33/ADH; and 15-35-19/QXX (all Beijing, 1989); and interviews 26-17-13-33/TWS; 27-22-13-11-13-17/BNH, Beijing, 1992.

35. Interview 15-35-19/QXX, Beijing, 1989.

36. The Working Group members were An Zhiwen, Zhang Yanning, Gu Ming, Ma Hong, and Li Hao. See FBIS-CHI, 23 May 1985, K11.

37. In addition to the interview sources used in this study, see the following Hong Kong press sources: *Guangjiao Jing*, 16 January 1988, 1; *Wen Hui Bao*, 11 March 1988, 1.

CPLG post and transferred to Vice-Minister of Public Security. For a brief period around December 1987, the CPLG 'basically did not exist', according to one well-informed PRC legal scholar.³⁸ But Zhao's efforts failed in the face of resistance from several Party elders, led by the late former Politburo member Wang Zhen and reportedly including two former CPLG Chiefs, Peng Zhen and Chen Pixian, who feared the Political-Legal Committee's abolition might weaken Party control over the courts.³⁹ In the end, the Committee was merely downgraded to a Leading Group with diminished staff and responsibilities.

A high-ranking legislative source interviewed for this project indicated that as of 1992 there was no longer any single centralized office overseeing lawmaking within the Party's Secretariat.⁴⁰ Individual laws are reported to the Secretariat office or commission charged with overseeing the appropriate issue-area. Economic legislation, for example, is reviewed by the Secretariat's economic offices and the Financial and Economic Leading Group. Legislation on issues of Party or government personnel or organizational structure tends to go to the Central Organization Department, and so on. The CPLG apparently plays no role as a central reviewer of legislation, if indeed it ever did, beyond reviewing legislation narrowly related to criminal law and social control. Perhaps most significantly, the CPLG is not even mentioned in CCP Central Document 8, which gives detailed instructions on the prior approval of legislation by the Party Centre.

Prior Approval of Legislation

In the actual process of drafting a law, the single most important method for maintaining Party leadership is the power of veto. Until the issuance of Central Document 8 in 1991 (and perhaps, in practice, still), all draft laws to be passed by the NPC or its Standing Committee had to receive prior approval 'in principle' by the Party Centre. In practice, this usually meant the draft had to be approved by the Central Secretariat, the Politburo and 'other relevant senior leaders'.⁴¹ But legislative officials and scholars report that until the issuance of Central Document 8, there were no documented procedures for this review, and such approval meetings, in any case, tended not to be very detailed, usually examining only the law's 'guiding princi-

38. This scholar and other sources believed Zhao enjoyed Deng Xiaoping's backing in trying to close down the Leading Group. Interview 15-35-19/QXX, Beijing, 1989.

39. Intriguingly, when asked, the source of this information indicated he had not heard of any evidence that Qiao Shi, at that time CPLG's Chairman, had opposed the abolition of the Group.

40. Interview 26-17-13-33/TWS, Beijing, 1992.

41. It is important not to put too fine an organizational edge on this picture of Party procedure, however. The relevant 'Party leadership' which must approve of a law can also include Party elders who, though not formally members of the Politburo, still have the personal power to involve themselves in policy-making on some issues.

ples', justification and most basic content. These sources indicate that these senior level officials tend to concern themselves only with whether or not the draft law's basic thrust fits in with the general direction (*fangzhen*) of current Party policy.⁴²

Moreover, as the case studies in this volume make clear, the top Party leadership in practice often abdicates much of its power to control the content of legislation. This abdication of Party leadership tends to occur either by allowing the NPC to delay or amend significantly a draft law after it has been approved in principle by the Party Centre, or by failing to signal to the legislature any clear and unified intention concerning the handling of the law. There are generally three major reasons for this lack of clear Party leadership intent: the leadership is too deeply split over the issue to reach a decision solely within Party decision-making offices; some or all top leaders are simultaneously preoccupied with other issues and cannot give a law their attention; or the leadership simply lacks the expertise to understand the true meaning of the draft legislation under consideration.⁴³

By the mid to late 1980s, the norms concerning the degree of insistence and level of detail the Party Centre exercised in reviewing draft legislation had already changed dramatically. Recent leadership suggestions to the NPC have often been much less specific, detailed or insistent than in past years. The Centre is apparently no longer able—or perhaps no longer feels the need—to prearrange a careful 'script' for all NPC sessions, with all the final wording of each piece of legislation worked out. Often the Centre cannot achieve consensus, and lacks a clear, strong preference concerning the content or passage of a draft law at the current session. If, later in the process, the Politburo is able to reach a consensus on the main features of a draft law, it will clearly express to the NPC Party members its 'hope' that the law will be finalized and passed at the current session.

An excellent example of this was the controversial 1986 Enterprise Bankruptcy Law, which is discussed in detail in Chapter 7. According to one Beijing legal scholar, before the Sixteenth and Seventeenth NPC Standing Committee sessions debated the draft, the leadership's instructions to NPC Party members, given by then-Premier Zhao Ziyang, were neither clear nor especially assertive, and tremendous debate and calls for extensive revision of the law ensued at the Standing Committee meeting. In October, prior to the Eighteenth Standing Committee meeting, NPC and State Council leaders extensively consulted local government, enterprise and labour union officials, and hammered out a compromise acceptable to almost all sides. Premier Zhao Ziyang reportedly gave a very strong speech to the preparatory session before the November Standing Committee meet-

42. Interviews 26-17-13-33/TWS, 27-13/34-19-28/XWQ and 27-22-13-11-13-17/BNH, all Beijing, 1992.

43. These three possibilities were discussed by Interviewee 11-19-13-33/ADH, Beijing, 1989 and 1992.

ing, indicating that the leadership expected final passage of the draft Bankruptcy Law at the current session. The session passed the law with just a handful of 'no' votes and abstentions.⁴⁴

Central Document Number 8 [1991]: Towards an Institutionalized Party Review System

In early 1991, advocates of a stronger legislature scored a major victory with the issuance of Central Document Number 8, 'Several Opinions of the Central Committee on Strengthening Leadership over Lawmaking Work'. Central Document 8 is the first such document in the history of the People's Republic to spell out the principles and procedures of Party leadership over lawmaking.

There is an intriguing contradiction between Document 8's title and its contents. The title clearly suggests the intention of *tightening* Party control over lawmaking. Yet its contents, both the preamble and key operative provisions, clearly indicate that Party leadership over the NPC should henceforth be rather general and should not involve micromanagement. Chinese sources interviewed for this project indicate the drafting and circulation of the document were tightly restricted at a very high level,⁴⁵ and unfortunately they were unable to provide much information on the politics of drafting the document. One source did confirm what seems obvious, given the title/content contradiction, that considerable leadership disagreement attended the drafting. The document as originally commissioned was reportedly intended to tighten Party control, or at least give that impression. Apparently, however, the responsibility for drafting was turned over to a drafting committee controlled or influenced by advocates of greater legislative independence and decentralized Party control.

Leadership speeches from the period of the document's drafting (1990 to early 1991) suggest high-level disagreement over Party control of lawmaking between CCP General Secretary Jiang Zemin and NPC Standing Committee Chairman and Politburo Member Wan Li, disagreement which, according to one legal source, influenced the drafting of Central Document 8. In March 1990 both men, speaking only three days apart at the annual meeting of the NPC, addressed the issue of Party-legislature relations.⁴⁶ Wan Li, as he had done before, repeatedly and strongly stressed that if the CCP as a ruling party was to avoid major errors and prevent future

44. Interview 11-19-13-33/OKE, Beijing, 1989.

45. The document carries the designation *jimi* (roughly equivalent to 'secret' in the U.S. system). But the document also indicates that circulation is restricted to officials with rank equal to a State Council minister or higher, a far more restrictive circulation than 'secret' or even most 'top secret' documents get in the U.S. system.

46. The two speeches are Wan Li (1990) and Jiang Zemin (1990a).

1989-style uprisings, it must allow genuine democracy within the legislature, and heed the voice of the legislators. But Jiang Zemin, speaking three days later, stressed the need for unified Communist Party leadership over lawmaking, repeatedly castigating what he characterized as a tendency toward 'separation of powers'. Jiang omitted any mention of what the Party stood to learn from the voice of the people as communicated through the legislature. It is important to note that both men remained well within the official line on Party-legislative relations. But the difference in their emphases is striking. And since both men, by virtue of their positions, would certainly have played a role in drafting Central Document 8, it does not seem unreasonable to speculate that their disagreement may be the source of the glaring contradiction between its title and content.⁴⁷

Turning to the document's content, the preamble suggests an effort to balance Party control with the evolving system of dispersed legislative power. The stated purposes for strengthening leadership over lawmaking strike a balance between four potentially contradictory goals: guaranteeing the legitimate authority of legislative organs (such as the NPC and State Council); better carrying out the Party line; speeding up lawmaking; and strengthening socialist modernization (economic development). The preamble notes that Party leadership over lawmaking is generally limited to 'leadership over the political line, direction, and policies', and may include 'reviewing and confirming' (*shending*) NPC-drafted legislative plans.

The document goes on to enumerate five basic dimensions or forms of the Party's leadership over lawmaking work, which may be summarized as follows:

- (1) Establishing the nation's political line, general direction and major policies, which form the guiding principles for lawmaking.
- (2) Examining and approving the NPC's annual and long-term legislative plans and guaranteeing that they are actually carried out.
- (3) 'Suggesting' that the NPC and State Council codify into law those Party policies which have been proven effective in practice.
- (4) Resolving and deciding any unclear or controversial points of Party policy which have been referred to the Party Centre by the NPC or its Standing Committee.
- (5) Strengthening the role of law in society and guaranteeing that the Party obeys the law; co-ordinating and resolving intersectoral legislative disputes.

These five dimensions describe a picture of Party leadership which is solidly on the less interventionist side of actual current practice. They also show a willingness to stand behind the NPC in its efforts to exercise its powers.

47. Interviewee 11-19-13-33/AEDH (Beijing, 1995) confirms that a strong disagreement over Party-NPC relations does exist between Jiang Zemin and Wan Li.

Document 8 commits the Party Centre to 'support and guarantee' the power of legislative organs to carry out legislative plans.⁴⁸ These five points also show no desire to micromanage the NPC's lawmaking work, a point which the document asserts much more explicitly in its later discussion of review procedures.

The key operative sections of Document 8 are devoted to a relatively detailed discussion of the procedures for prior Central approval of legislation. Fascinatingly, this section does not assert that all laws which are to be debated and adopted by the NPC or its Standing Committee must undergo Central Party review. Instead, Document 8 divides draft laws into several issue-based categories; these categories apparently imply ranking of laws in terms of their importance or sensitivity. The document prescribes different review procedures for each of these categories, and explicitly exempts some categories of laws from required Central review.

The major categories named in Document 8 are: important laws and constitutional revisions⁴⁹; political laws; important economic or administrative laws; and other laws outside the previous three categories. The term 'economic or administrative laws' is defined as 'laws which concern the development of the national people's economy or macroeconomic management, or draft administrative laws which concern the state management structure or which affect the rights and duties of citizens'. The vague-sounding category of 'political laws', however, is never defined, even implicitly. Party review procedures for the first three categories are discussed in separate sections of Document 8. The 'other laws' receive a brief but extremely important allusion at the end.

Constitutional revisions naturally receive the highest level of Party review. Document 8 requires that such revisions, whether they are submitted directly by the Politburo or through the Politburo by the NPC Standing Committee Party Group, must be discussed and approved by a Central Committee plenum. To the extent that the Central Committee plenum actually gets consulted on these revisions, this rule would represent a notable step towards intra-Party political democracy.

For political laws, the drafting ministry or unit must submit a report on the law's guiding thought and basic principles to the NPC Standing Com-

48. By comparison, the language 'support and guarantee' on its face seems to suggest an even stronger grant of NPC autonomy than the language used in 1988 to define the new, rather powerful position of state factory managers vis-à-vis enterprise Party committees, which were ordered to 'guarantee and supervise' the manager. See Chapter One, Article 8 of the State Owned Industrial Enterprises Law, which orders the Party committee to 'guarantee and supervise' (*baozhang jiandu*).

49. It is unclear what is intended by the term 'Important laws' (*Zhongyao Falu*), and the term is not revisited in the document. Perhaps this is a synonym for basic codes, such as the Criminal, Administrative and Civil Codes and their corresponding procedural codes; although, if that is the meaning, it is curious that the document did not use the well-established term *jiben falu*.

mittee or to its Party Group,⁵⁰ which would have the power to determine which questions in the law need to be referred to the Politburo for discussion and decision. After this point, Document 8 prescribes a procedure for both political laws and economic and administrative laws in which the wording is identical almost to a character. Before the draft laws are submitted to a plenary meeting of the NPC or its Standing Committee, they must be passed or agreed to by the Politburo or its Standing Committee. Among these, 'especially important' political, economic and administrative laws must also, like constitutional amendments, be submitted to a full Central Committee plenum. When the NPC Standing Committee or any other unit submits a draft law to the Politburo for approval, it must submit a brief report explaining the law, its purpose, major problems in it and how they have been dealt with, and a list of important issues regarding the law which the Party Centre must decide. Interestingly, the document does not specifically request that the unit submit the full current draft (*cao'an*) of the law. Only after the law has received Central approval may it be discussed and passed by the NPC.

Politburo review of these laws, according to Document 8, will be at a fairly general level, without micromanagement or individual review of legal clauses:

When the Party Centre discusses important laws, this will principally mean carrying out research on questions within the laws which touch upon important general directions and policies. There may be a few important legal clauses which require discussion. The majority of legal clauses need not be discussed.

Document 8 also grants the discretion to the NPC Standing Committee, not the Party Centre, to decide whether or not to ask the Party Centre to discuss or resolve other policy questions which affect lawmaking.

But in terms of the NPC's autonomy, the most remarkable clauses in Document 8 come at the end. The document closes with a reaffirmation of the lawmaking authority of the NPC and its Standing Committee, and pledges the Party Centre not to usurp the NPC's powers. Then it explicitly grants an unprecedented degree of autonomy to the NPC to carry on certain aspects of its lawmaking work without this formal Party review process:

Except for Constitutional revisions, political laws, and important economic and administrative laws, the NPC and its Standing Committee carry out the organization, drafting, and review of other laws, and normally do not report to the Party Centre. As for those few laws which need to be reported to the Party Centre for discussion, if the Party Centre has already expressed clear views or regulations, then these also need not be reported to the Party Centre again.

50. The inclusion of both the Standing Committee and its Party Group reflects standard protocol, which would require Party units to submit their reports directly to the NPC Party Group, and non-Party units to submit theirs to the NPC Standing Committee, which would in turn submit the reports to its Party Group.

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Among law-making specialists familiar with the contents of Central Document Number 8, reaction has been mixed, but generally quite favourable. One official who had read the document expressed anger at its title, which clearly suggests stronger Party control over the legislature. This official noted, however, that in his experience, none of the actual Party review procedures set out in the document represented any toughening of long-standing unofficial practice.⁵¹ Several scholars and NPC officials were pleased with the new grants of autonomy to the NPC and clearly hoped to expand them in the future. They also noted that the issuance of such a document represents an unprecedented level of Party respect for lawmaking work. Finally, one NPC official could scarcely contain his glee when noting that an official Party Central Document now required the Prime Minister and the State Council, long dismissive of the legislature, to submit key draft laws and plans through the NPC to the Party Centre.⁵²

It goes without saying that these written regulations by themselves do not automatically prove there has been a major change in the realities of the Party's control over lawmaking. The gap between the real lawmaking process and the one ordained by Central Document 8 may be considerable, and further research on this highly secretive process is necessary.

At the same time, however, interview data on lawmaking suggest that the real process often comes much closer to the bottom-up policy-making model suggested in some parts of Document 8 than it does to a top-down model of the process. NPC sources report that it is often the NPC rather than the Party Centre which initiates consultations between the two. According to the document, if the NPC Standing Committee, in the course of deliberating a law, feels that current Party policy is insufficiently clear on some key point (a common occurrence), the Standing Committee, acting through its Party Group, may request instructions and ask the Party Centre to clarify, explain, decide or reconfirm a policy decision. In a 1992 interview, a long-standing high-ranking NPC official stated that when the Party leadership's indecisiveness on a major issue is delaying NPC efforts to draft a law, the NPC often uses a 'Request for Instructions' as a polite device to pressure the Party Centre to make up its mind and clarify policy.⁵³

Institutionalizing Decentralization

Like many other authoritarian regimes, China has repeatedly been subject to cycles of policy decentralization and recentralization. Thus an important question when considering the impact of these changes on China's

51. Interview 27-22-13-11-13-17/BNH, Beijing, 1992.

52. Interview 27-13/34-19-28/XWQ, Beijing, 1992.

53. Interview 26-17-13-33/TWS, Beijing, August 1992.

prospects for a lasting transition to a more consultative system is: to what extent has the decentralization of Party control over lawmaking become institutionalized? The decentralized lawmaking arrangements established in the last nineteen years are now supported by changed attitudes and organizational forces which make it unlikely that power can be recentralized. Such attitudinal and organizational changes may also create pressure for further decentralization.

This topic will be discussed in detail in Chapter 10. But to anticipate that discussion somewhat, there is much evidence indicating that these decentralizing changes have survived even the post-1989 crackdown, and some have been pushed further. Changes in delegate selection norms and delegate behaviour, and the development of non-Party lawmaking organs continue to undermine centralized Party control. Moreover, the leadership during the post-Deng succession appears to lack the kind of internal unity necessary to take power back from these non-Party organs and return to the days when all major decisions could be taken exclusively within Party organs. Chapter 10 argues, however tentatively, that much of this decentralization has been institutionalized, and erosion of centralized Party control seems likely to continue in the future.

This chapter has stressed three important points. First, Party leadership over lawmaking is far less centralized and unified than has often been supposed by Western analysts. Secondly, that leadership has become even less centralized over the last nineteen years, notwithstanding any efforts to reassert general Party authority over society since 1989. Thirdly, this decentralization shows real signs of becoming institutionalized. Viewed from the 'commanding heights' of the legislative system, Party control over lawmaking and the legislature has devolved greatly to lower levels. How the legislature and the State Council have expanded their organizational powers to fill this emerging power gap is the subject of the next two chapters.