Reining in Rogue Legislation

An Overview of China's Invigoration of the 'Recording and Review' Process

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China's national legislature uses a process known as 'recording and review' (R&R) to ensure that major categories of legislation enacted by other governmental bodies conform to national law and policy. Long criticised for being ineffective and opaque, recently R&R has grown more robust, transparent, and accessible to the public, and has become the legislature's main vehicle for cautiously pushing ahead with constitutional review. This essay provides an overview of the recent developments surrounding R&R.

During the 1980s and 1990s, the Chinese Government created two forms of administrative detention to combat perceived social ills. The first, 'custody and repatriation' (C&R, 收容遣送), was used 'as a coercive measure to manage the flow of migrant workers and undesirables into China's urban centers' (Hand 2006: 120). The other, known as 'custody and education' (C&E, 收容教育), targeted sex workers and their clients (He 2015: 440). Corruption and abuse pervaded both systems (Hand 2006: 121; He 2015: 453–54; Zheng 2019: 89), and they were separately challenged by legal activists for violating China's Constitution and national laws through a process called 'recording and review' (R&R, 备案审查).

Rooted in the Chinese Constitution, R&R was fully operationalised for the first time in 2000, with the enactment of the landmark Legislation Law (立法法). In short, R&R is an oversight tool employed by China's top legislature, the Standing Committee of the National People's Congress (NPCSC), to ensure that sub-statutory legislation—ranked below national statutes as to legal force, such as local legislation—conforms to national statutes and policy. R&R is also China's sole mechanism for bringing constitutional challenges to enacted legislation; courts are not empowered to perform constitutional review. In practice, the NPCSC Legislative Affairs Commission (LAC, 法制工作委员会), a 200-strong professional support body under the NPCSC, conducts review and enforces its decisions on the legislature's behalf.

While both challenges to the two detention systems, brought 15 years apart, ultimately succeeded, the NPCSC handled them in drastically different ways. Using them as the starting point, I will provide an account of China's recent invigoration of the R&R process.

A Tale of Two Challenges

The demise of C&R was precipitated by a series of tragic events in 2003, when 27-year-old Sun Zhigang moved to Guangzhou for a new job¹. One night in mid-March, Sun was detained by police after he failed to produce a temporary resident permit—something for which he had not yet had time to apply. The police suspected he was an illegal migrant, so held him in a C&R centre. Three days later, Sun died; an autopsy revealed he had been tortured in custody. His death exposed the abuses within the C&R system and soon sparked a national outcry. Amid intense public outrage, in May 2003, three legal scholars requested that the NPCSC activate its R&R process and review the constitutionality and legality of the State Council regulations that created C&R.

¹The following account of what came to be known as the 'Sun Zhigang Incident' is drawn from Hand (2006; see also Froissart 2022).

Widely reported to be the first citizen request to invoke the R&R process, the scholars' efforts fell short of creating a precedent for NPCSC review, however. The NPCSC did acknowledge receipt of the request, but never responded further. A month later, the State Council repealed its C&R regulations, seemingly of its own volition. Commentators speculate that the repeal was the result of behind-the-scenes consultations between the two institutions. Such secrecy and emphasis on consultation were common at the time, due to an entrenched political norm of governmental bodies not publicly rebuking one another (Hand 2013: 202, 215). The NPCSC, moreover, lacked the political capacity to decide on major political or legal issues, so had to resort to encouraging consensus-building and self-correction (Hand 2013: 215–16). It thus could not directly and publicly annul the State Council's regulations.

Fifteen years after the NPCSC's unceremonious handling of the scholars' request for review during the Sun Zhigang incident, a similar request was made. Zhu Zhengfu, a lawyer and member of China's top political advisory body, put forward almost identical arguments against the constitutionality and legality of C&E. This time, however, the LAC publicly recommended abolishing the detention system, which occurred a year later (Wei 2018c). What had changed?

A Brief Overview of R&R

Before answering that question, it might be helpful to provide a sketch of the R&R system today. At its inception, R&R was envisioned as no more than a mechanism to maintain the uniformity of China's legislative system (Gu 2000: 134). As China's legislative hierarchy became more complex, conflicts inevitably arose between different categories of legislation—conflicts which R&R was designed to resolve. The R&R system's mandate today, however, reaches beyond that original purpose. As memorialised in the new 'Working Measures for the Recording and Review of Regulations and Judicial Interpretations' ('Working Measures', 法规、司法解释备案审查工作办法), adopted in

2019, the system now is above all a tool to ‘ensure that the Communist Party Central Committee’s orders and prohibitions are strictly enforced’ (Art. 3). It also serves to guarantee the implementation of the Constitution and national laws and to protect private entities’ lawful rights and interests (‘Working Measures’ 2019: Art. 3).

Broadly speaking, the NPCSC’s R&R process covers four categories of sub-statutory legislation: the State Council’s administrative regulations, the judicial interpretations of the Supreme People’s Court and the Supreme People’s Procuratorate, the State Supervision Commission’s supervisory regulations, and legislation enacted by local people’s congresses and their standing committees (‘Working Measures’ 2019: Art. 2). These types of legislation must be recorded with the NPCSC to allow for any subsequent review. Other categories of legislation, such as rules issued by central ministries, do not fall within the NPCSC’s purview, but are filed with and reviewable by other governmental organs (‘Working Measures’ 2019: Art. 26).

NPCSC review can be triggered in four ways (‘Working Measures’ 2019: Arts. 18–22, 24–25). The body may, and does, actively review new pieces of legislation as they are filed. It may also initiate review when requested by a third party—most often a citizen. The remaining two modes of review are variations of the first two. ‘Targeted review’ (专项审查) functions like active review, but rather than examine newly recorded legislation, the NPCSC reviews all legislation already filed in a certain area to effectuate the Party’s and its own priorities. Finally, the review process may be activated when a wrongly addressed request for review is forwarded to the NPCSC by another governmental body.

To survive NPCSC review, a piece of sub-statutory legislation must pass muster on four grounds (‘Working Measures’ 2019: Arts. 36–39): it must not contravene the Constitution or national statutes; it must not be inconsistent with the Party leadership’s ‘major decisions and deployments’ or ‘the direction of the country’s major reforms’; and it must not otherwise be ‘clearly inappropriate’ (明显不适当), such as when it no longer suits a significantly changed reality. After deciding that a legal document has failed review, the NPCSC has at its

disposal a series of progressively more coercive methods to demand compliance with its decision (‘Working Measures’ 2019: Arts. 41–44).

R&R as a Governance Tool

Since its Third Plenum in late 2013, the Communist Party has repeatedly outlined reforms of the once-obscure R&R system in high-profile policy documents, including the recent ‘Plan on Building the Rule of Law in China (2020–2025)’ (Wei 2021a). It has thereby markedly elevated the political status of R&R, in the hope of increasing its authority in the eyes of citizens and state organs alike. Recent developments on the ground suggest that the Party views R&R as a useful governance tool in two ways.

First and foremost, the Party uses R&R to monitor and achieve compliance with its decisions—whether embodied in policy documents or enacted statutes—particularly by local governments. To that end, authorities have instituted three key changes to R&R. First, the NPCSC has expanded the recording requirement. Now all acts of local legislatures—whether styled as formal legislation or not—must be filed if they affect private rights and obligations or the duties of governmental organs (Shen 2019). Second, the NPCSC has begun carrying out ‘targeted reviews’—often in conjunction with legislative ‘clean-up’ campaigns. In 2018–19, for instance, the NPCSC directed all provinces to comprehensively review their environmental legislation to support the Party’s war on pollution. That year-long campaign resulted in the updating or repealing of more than 1,000 local regulations that conflicted with national environmental laws (Shen 2019). Finally, and most crucially, the NPCSC now reviews sub-statutory legislation for inconsistency with the Party’s major policies—even before these policies are enacted into law. Last year, it asked a province to stop requiring taxi drivers to have a local *hukou*, considering a central policy document calling for the elimination of ‘identity-based discrimination in employment’ (Shen 2021).

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Second, the Party has also recognised the value of increasing the public use of R&R. Not only do citizen requests for review ‘provide a channel for identifying legislative conflicts that are generating public anger’—that is, act as a kind of ‘pressure release valve’ (Hand 2013: 215)—but they can also be leveraged to serve the Party’s own goal of ensuring the implementation of national law and policy. The NPCSC’s routine, abstract review of new legislation is unlikely to be thorough or to identify issues that would arise only in enforcement. Citizen requests therefore serve as a crucial ‘information channel’ for central authorities (Hand 2013: 214).

The NPCSC has implemented several measures to facilitate public use of the process. Most visibly, in late 2019, it launched an online platform where citizens could request review of specific sub-statutory legislation and then track the progress of each request (Wei 2019b). And, in stark contrast with its earlier practice, the NPCSC has been steadily increasing its rate of feedback to citizens who have

requested review. In 2020, it provided individual responses to all 3,378 properly submitted requests (Shen 2020).

A More Assertive LAC

The Party’s endorsement of a more authoritative and inclusive R&R process has consequently changed the institutional dynamics seen in the Sun Zhigang case. What has emerged is an LAC that appears much less constrained by the political taboo of publicly calling out other governmental bodies’ problematic legislation and more emboldened to make the hard calls in contentious cases.

The R&R process, to be sure, still relies heavily on consultation and self-correction to resolve identified legislative conflicts. After deciding that a piece of legislation has failed review, the LAC will first notify the enacting body informally, for example, in a phone call. The goal is to motivate

the latter to fix the conflicting legislation on its own and to promote efficiency (R&R Office 2020a: 118). Only after the enacting body refuses to self-correct after the informal communication will the LAC then formally issue a written opinion and demand corrections ('Working Measures' 2019: Art. 41). If the enacting body remains recalcitrant, the LAC has other tools at its disposal, including recommending that the NPCSC annul the legislation in question.

The NPCSC still has not yet used that drastic measure, but the review and rectification process has quietly grown more rigorous in recent years. Since 2017, the LAC has been publicly disclosing instances of legislation failing review. While the enacting bodies are not always named, the LAC's reports often provide enough clues for curious readers to identify them. This 'public shaming' and potential scrutiny from the public put pressure on the enacting bodies to follow the LAC's decisions. In addition, the LAC now routinely performs follow-up reviews, urging the relevant enacting bodies to change or repeal the legislation that has failed review. To amplify their impact, it also notes these 'second looks' and their outcomes in public reports. Last, as the Party has made the maxim 'every mistake must be corrected' (有错必纠) a core principle of R&R ('Working Measures' 2019: Art. 4), NPCSC annulment may no longer be the empty threat it once was.

In contrast to its continued reliance on consultation and self-correction, the LAC appears to have deemphasised consensus-building and become more assertive in deciding controversial cases. Consider, for instance, four labour law scholars' 2017 challenge to seven provinces' regulations that required private employers to fire any employee who exceeded the birth quota (Xing 2017). They argued that the regulations conflicted with both national labour law and the Party's gradual relaxation of national birth-control policy (R&R Office 2020c: 47). Among the provinces that disagreed with the scholars' arguments, Guangdong mounted the most aggressive defence. It warned the LAC that if the longstanding penalty was declared unlawful, those who had been fired for flouting birth restrictions would seek to reopen their cases, thereby 'affecting social stability' (R&R Office

2020c: 48). Central government agencies were also divided and unable to reach a consensus view on the legal question (Xing 2017).

In the end, both sides had plausible legal arguments; the LAC acknowledged as much (R&R Office 2020c: 49–50). Rather than resolve the dispute over the legality of the provinces' mandatory-firing penalties, it chose to adopt the scholars' policy-based argument, explaining that the penalties, though once proper, were no longer compatible with the Party's embrace of 'balanced population development' as a 'national strategy' (R&R Office 2020c: 50). It thus directed all seven provinces to amend their regulations accordingly. Here, the LAC took advantage of the fact that the Party's major policies have become bases for review and plausibly interpreted that broad policy statement as a bar to the continued validity of the penalties at issue. By resolving this contentious case on a firm political basis, the LAC managed to shield its decision from further criticism while also preserving its own authority in the R&R process.

Increased Engagement with Constitutional Issues

As part of its general efforts to elevate the importance of R&R, the Party has placed particular emphasis on developing one component of the process: constitutional review. Since 2017, it has repeatedly vowed to 'advance constitutional review' in policy documents (Xi 2017). And one recent official LAC article characterises R&R as the 'basis of a constitutional enforcement system with Chinese characteristics' (R&R Office 2021). Likely because of these developments, the LAC has grown increasingly willing to engage with the constitutional issues that arise in R&R—something the scholars were hoping to achieve in the Sun Zhigang case.

The LAC was initially cautious and timid in its approach to constitutional questions. Zhu Zhengfu's 2018 challenge to C&E was the first request disclosed in a public report that raised a consti-

tutional issue. But the LAC neither identified the specific basis of Zhu's constitutional objection nor rested its decision to recommend abolishing C&E on the Constitution (Shen 2018). It only commented vaguely that the system no longer suited China's changed social circumstances. Similarly in 2019, the LAC only obliquely referenced the Constitution in a case involving local legislation that authorised traffic police to examine the phone records of drivers involved in accidents (Wei 2019a). The LAC concluded that the legislation violated citizens' 'freedom and privacy of correspondence', without noting that it was a constitutional right (Shen 2019).

The real breakthrough occurred in 2020, when the LAC publicly identified several constitutional issues arising from R&R and addressed them head-on. In a new request for review, Zhu Zhengfu challenged the Ministry of Finance's 'levy' (征收) of a ticket surcharge on air travellers, arguing that it amounted to an unconstitutional 'expropriation' (征收) of private property (Liang 2021: 175). The LAC concluded, however, that despite the identical language, a 'levy' of the surcharge did not fall within the scope of the Constitution's 'expropriation' provision (Liang 2021: 175–76). An LAC official has cited this case as a 'ground-breaking' constitutional review 'in a substantive sense' (Liang 2021: 176).

In another instance, the LAC reviewed two local regulations adopted, respectively, by Inner Mongolia and the Yanbian Korean Autonomous Prefecture in northeastern Jilin Province, which regulated the medium of instruction in 'ethnic schools'—schools that primarily serve ethnic minority students (Shen 2021). The regulations required those schools to use the relevant ethnic language as the sole medium of instruction, except in Mandarin classes (Wei 2021b). But according to the LAC, those requirements violated China's constitutional policy of 'promoting the nationwide use of Putonghua' (Shen 2021). It seems to have read that constitutional provision as requiring ethnic schools to not only teach Mandarin itself, but to also teach some classes *in Mandarin* (Wei 2021b). It did so likely to support the Party's push in the autumn of 2020 to relegate ethnic languages to, at most, a topic of instruction at ethnic schools

in Inner Mongolia and northeastern China (Atwood 2020; Gao 2020). Troublingly, the LAC has not publicly provided any reasoning behind that aggressive reading.

A More Transparent Process

With strong policy endorsement from the Party, the LAC has gained greater political capacity to exercise its authority to conduct review and to demand corrections. Accordingly, it now has the political capital to make the R&R process more transparent.

As alluded to earlier, the NPCSC has been hearing the LAC's annual reports on its R&R work since 2017. These reports disclose, among other information, the number of each type of sub-statutory legislation filed, the number of citizen requests received (including the number of each type of legislation challenged), summaries of selected R&R cases, and the LAC's priorities relating to R&R in the coming year. As a supplement to these annual reports, the LAC has also been disclosing additional information on its decisions in extensive press interviews, academic journal articles, as well as a compilation of selected R&R cases it published itself in 2020 (Liang 2019, 2020, 2021; R&R Office 2020c).

To individual citizens who request review, the NPCSC no longer operates entirely in a black box. In 2020, it for the first time published its complete internal R&R rules, the 'Working Measures' adopted in 2019. These rules explain the types of legislation subject to NPCSC review, the various grounds and sub-grounds on which the LAC conducts review, as well as its procedures for processing citizen requests, conducting review, and ordering rectifications. The rules also reiterate the requirement first introduced by the 2015 amendment to the Legislation Law that the LAC provide feedback on each citizen request.

There is, of course, room and a need for further improvement. Based on statistics in the LAC's R&R reports, it has disclosed only a small percentage of the decisions it makes each year. Even for those it does disclose, it often provides little reasoning.

Similarly, the LAC typically provides little to no reasoning in its responses to individual citizen requests (R&R Office 2020b: 176–77). This is especially lamentable when other state organs like courts are giving fuller reasoning for their decisions to help educate the public and persuade the parties involved (Finder 2020). In addition, the bulk of the LAC’s review process still takes place in complete secrecy. It does not hold public hearings, even though it is often asked to address complex and far-reaching legal and policy issues. But the recent improvement in the transparency of R&R is a laudable step in the right direction.

Increased Public Use

As a result of the substantive and procedural reforms of R&R discussed so far, there has been a sea change in public use of the process, not just by legal scholars, but also by the general Chinese public.

The LAC’s continued disclosure and extensive media coverage of R&R cases have likely raised the Chinese public’s awareness of the process and its functions. During the decade after the Sun Zhigang incident, the NPCSC received just over 1,000 citizen requests in total (Hand 2013: 180). In 2017, the year the LAC began disclosing R&R cases, that number surged to 1,084 in a single year (Shen 2017). And then in 2020, the first full year after the NPCSC launched its online platform for requesting review, the volume of citizen requests skyrocketed to 5,146, with 3,229 (63 per cent) of them submitted online (Shen 2020; Liang 2021: 173).

The online platform likely has also helped reduce the number of procedurally defective citizen requests. It requires users to select specific legislation that is reviewable by the NPCSC (Wei 2019b), thereby ensuring that the citizen requests submitted online are properly addressed to the NPCSC. In 2020, the percentage of properly submitted requests was 65.6 per cent—a considerable improvement from the 36.2 per cent in 2019 and only 9 per cent in 2018 (Shen 2018, 2019, 2020).

Legal professionals continue to use R&R to push for general rule-of-law reforms in China. But, likely due to the greater accessibility of R&R, there have been more and more reported cases of lay citizens using the process to seek redress for personal grievances. During 2016–17, for instance, divorcees flooded the NPCSC with close to 1,000 requests challenging the legality of a Supreme People’s Court interpretation on community debt (Shen 2017). That rule presumed that the debt incurred by one spouse alone is a community debt for which both spouses are liable. Many divorcees, after they had failed to rebut that presumption in court, were thus ordered to pay the (usually massive) debts their ex-spouses had incurred during the marriage without their knowledge. Under pressure from the public and the LAC, in early 2018, the Court issued a new interpretation that more reasonably defined the scope of community debt and allocated the parties’ burden of proof (R&R Office 2020c: 95–96). There have also been cases where criminal defence lawyers used R&R to challenge rules issued by China’s top criminal justice authorities, with varying degrees of success (Wei 2018a, 2018b).

A Long but Promising Path Forward

The ongoing reforms of the R&R system are complex, and here I outline only some broad trends. Functionally, the reforms have focused on developing R&R’s key role in policing rogue local legislation and in ensuring the uniformity of China’s legislative system. But one must not overlook the crucial—even if incidental—progressive changes to Chinese law that legal professionals and lay citizens have been able to achieve through a more robust R&R process. That said, R&R remains incomplete and flawed. The disclosure of the LAC’s decisions and underlying reasoning, for instance, remains inadequate. The much hyped—and most anticipated—part of R&R, constitutional review, is yet to get off the ground; authorities are still studying such basic issues as the standards for

deciding constitutional claims. And, as some of the examples discussed above show, ultimately, all decision-making in the R&R process must succumb to politics. Further developments of the R&R system would require the right combination of political will, institutional capacity, and doctrinal advancements. But from what I am reading in official discourse and my interactions with Chinese scholars, the authorities appear determined to turn R&R into an effective mechanism for reining in rogue legislation. Hopefully, we need not wait another 15 years for the next breakthrough. ■

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